

Sentenced to Sovereignty: Sentencing, Sovereignty, and Identity in the Nunavut Court of  
Justice

by

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B.A.H., Queen's University, 1998  
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## **Supervisory Committee**

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Prof. James C. Hopkins, Faculty of Law and Faculty of Business  
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## Abstract

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In Canada, sentencing has been the target of reforming the criminal justice system with a view to alleviating the over-representation of indigenous people in the criminal justice system and the historic injustice perpetuated against indigenous communities through colonialism. My thesis explores how sentencing decisions from the Nunavut Court of Justice construct and shape Inuit identity in Nunavut. My research analyzes the sentencing decisions of the Nunavut Court of Justice since its creation in 1999. Using selected sentencing decisions as case studies, I interrogate how the Court uses notions of “Inuit”, “Inuit culture”, and “Nunavut”, both implicitly and explicitly. I show how rather than a tool for alleviating the historic injustice perpetuated against indigenous people through colonialism and systemic racism, the sentencing process perpetuates historic injustice through constructing binary, essentialized notions of Inuit identity. The consequences affect both the criminal justice system and the realization of indigenous self-determination. I conclude that as a result the Nunavut Court of Justice exemplifies an intractable dilemma facing the criminal justice system for indigenous people that sentencing reforms cannot solve. I suggest new ways of imagining criminal justice and indigenous self-determination that provide hope for a way out of the intractable dilemma.

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## Acknowledgments

Although I refer to my experience working as a Crown attorney in Nunavut, none of the research I conducted for my thesis was as a Crown attorney. All the opinions I express herein are entirely my own and in no way represent the views of the Public Prosecution Service, Justice Canada, or the Attorney General of Canada and are not based on any confidential information communicated to me in my practice as a Crown attorney.

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Finally, thank you to my amazing family and friends without whose support I could not have completed this thesis.

## Dedication

For my parents, Vera and Phillip.

## Introduction

The date is April 1, 1999. Parliament ratifies the *Nunavut Act*. The new Nunavut Territory is awash in celebration: the Inuit's claim to their traditional land has a measure of recognition in the Canadian state. The justices of Nunavut's new court, the Nunavut Court of Justice, are sworn in at midnight on March 31, 1999, to insure a seamless transition between the jurisdiction of the Northwest Territories courts, which had jurisdiction over Nunavut prior to 1999, and the new Nunavut Court of Justice.<sup>1</sup> The new court is a unified court combining the jurisdiction of territorial and superior courts under the *Criminal Code*.<sup>2</sup> The new justices come to their posts with experience working in Inuit communities, though they are not Inuit. The new Nunavut Court of Justice brings with it the promise of a new court space, new processes, and greater participation by the Inuit community, such as elders sitting in court and interpreters providing Inuktitut interpretation during circuit court sittings throughout the Territory. The new Inuit territory brings with it the possibility of change, including the prospect of changing the criminal justice system to accommodate Inuit traditional knowledge and legal perspectives. The new justices thus face a formidable task: to develop a criminal justice system in Nunavut that integrates Inuit knowledge and perspectives without perpetuating the historical oppression and stereotyping that to date had characterized the Canadian criminal justice system for Inuit people.

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<sup>1</sup> Justice Canada, *The Nunavut Court of Justice Formative Evaluation: Final Report* (Ottawa: Evaluation Division Office of Strategic Planning and Performance Management, 2007) at 7 [*NCJ Evaluation*].

<sup>2</sup> *Criminal Code of Canada*, RSC 1985, c C-46, emphasis added [*Criminal Code*].

Ten years later, in May 2009, the Nunavut Court of Justice has a new court building in Iqaluit. The new building has a courtroom in which the divider between the public and the counsel is styled to resemble a *qamutiik*.<sup>3</sup> An Inuktitut interpreter is on call when court is in session. Inuktitut and English have equal placement on the sign outside the courthouse and the display cases feature Inuit art. Inuit, Inuktitut-speaking court staff are commonplace. On this day, Justice Kilpatrick, soon to be Chief Justice of the Nunavut Court of Justice, delivers a sentencing decision regarding whether J.P., a repeat sex offender, should be designated a dangerous offender. Justice Kilpatrick wears a traditional Inuit seal-skin vest designed to be part of his robes as a judge of the Nunavut Court of Justice. Counsel for the Crown and Defence eagerly await the decision. They have divergent opinions on the dangerousness of J.P. and have made that clear in their submissions. They disagree about what inference the court can draw from a psychiatrist's report about J.P., prepared by a Toronto psychiatrist. The lawyers in the case are not Inuit. Justice Kilpatrick is not Inuit. No elders sit to advise the court as to J.P.'s sentencing. J.P.'s fate now lies in the hands of Justice Kilpatrick: will he be sentenced to a life in a federal penitentiary outside Nunavut as required by the finding he is a dangerous offender under the *Criminal Code*?

Justice Kilpatrick finds J.P. is a dangerous offender under the *Criminal Code* of Canada. J.P. will spend the rest of his life in a federal penitentiary because he is a dangerous sex offender within the meaning of Canada's *Criminal Code*, but Justice Kilpatrick's judgment seems to lay blame with the territorial Government of Nunavut. He includes in his judgement a "post-mortem" critical of the lack of resources in Nunavut. At the time

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<sup>3</sup> Traditional Inuit sled.

of sentencing, J.P. is homeless and has cycled in and out of psychiatric institutions outside Nunavut. Criticizing how social welfare services in Nunavut have handled J.P.'s situation, Justice Kilpatrick states, "Mr. J.P. has now fallen from the wall. All the king's horses and all the king's men are not able to reassemble the pieces of a life shattered by a toxic combination of profound mental illness and enduring criminality. This fall of Mr. J.P. was to be expected." Unfortunately, the factual record reflecting J.P.'s circumstances does not support Justice Kilpatrick's "post-mortem." The factual record indicates that J.P. had the opportunity for treatment several times at federal penitentiaries and psychiatric institutions, but that he does not trust the medical profession, refuses to take medication to deal with his issues, and refuses to express remorse or face his criminal behaviour.<sup>4</sup> Curiously, it is not on the basis of J.P.'s circumstances or the complicated nature of schizophrenia and pedophilia as mental illnesses that Justice Kilpatrick distinguishes J.P.'s case from other sex offenders, but rather on the basis of Nunavut Territory's scarce government resources. Portraying an Inuit dangerous offender as a fallen man whose criminality is somehow the product of an ineffective *Nunavummiut* government rather than his repeat sexual crimes that harmed Inuit children resonates with the historical position of the Canadian justice system in Nunavut acting as the self-appointed protector of Inuit people—protecting them from unrefined and unfit local practices. An image of Inuit as poor, vulnerable, and in need of outside protection denies the educational and socio-economic trends that resulted in Inuit legislators, lawyers, and advocates championing the Inuit land claim and successful creation of the Nunavut Territory. Instead, it places Inuit in a position that perpetuates the Court's

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<sup>4</sup> *R v JP*, [2009] NUCJ 13 at paras 18-29.

supremacy and exercise of authority over Inuit as vulnerable people in need of protection; protection in the form of the Canadian criminal justice system.

The Court's position exposes a dilemma: in the self-same effort to precisely administer criminal justice in a manner sensitive to Inuit circumstances, the Court renders itself an agent of injustice because it perpetuates essentialized notions of Inuit identity. This thesis will explore that dilemma through the perspective of the sentencing process in the criminal justice system in Nunavut. To shed light on the role the Nunavut Court of Justice plays in constructing and shaping Inuit identity in the criminal justice system, I will focus on a particular moment in the criminal justice process at which the Court's role in mediating the relationship between Inuit identity and the criminal justice system is most pronounced: the sentencing of Inuit offenders in the Nunavut Court of Justice. Of course, the criminal justice system in Nunavut has met with significant criticism; critiques point out that the Court and the criminal justice system in general fails to integrate Inuit traditional knowledge or to respond to the particular needs of Inuit victims and offenders. What the critiques have not addressed, however, is the role that the Nunavut Court of Justice's jurisprudence plays in mediating the relationship between the criminal justice system and Inuit identity.

Sentencing is a site law and identity issues most squarely collide. Sentencing makes up part of the social institution of punishment, which has a place in the process of identity formation. Sentencing throws into sharp relief the questions of indigenous identity and Canadian sovereignty that surround the criminal justice system. To illuminate the relationship between sentencing decisions and Inuit identity, I first explore the nature of the relationship between law and identity and, in particular, law and indigenous identity

in Canada. Criminal law and legal institutions are sites where indigenous identity is constructed and negotiated. In Canada, criminal law and its legal institutions are implicated in creating and shaping notions around indigenous identity whether “aboriginal,” “First Nation,” or “Inuit.” The meaning the criminal law attaches to what is indigenous or “aboriginal” exemplifies how the constitution of indigenous identity is related to Canada’s colonial and political history.

It is also important to understand the particular relationship between the criminal justice system and Inuit identity in Nunavut. In chapter two, therefore, I address how Canada’s criminal justice system has taken part in the colonial project of creating our nation-state as well as in forming Inuit identity in Nunavut. The history of Canada’s assertion of territorial sovereignty over the Arctic involved dominating the Arctic’s residents, the Inuit, through Canada’s political and legal institutions. For Inuit, the process of self-determination and the movement to create the public government of the Nunavut Territory mobilized Inuit people around the idea of creating a territory reflecting Inuit identity and values yet still rooted in the Canadian state. Any discussion of the Nunavut Territory and its public government is a discussion of *Inuit Qaujimajatuqangit*<sup>5</sup> and Inuit identity; but, unlike indigenous communities where conversations about cultivating identity and culture can take place outside state institutions, in Nunavut conversations around reconciling *Inuit Qaujimajatuqangit* with colonial political and legal institutions like the Nunavut Court of Justice must engage the Canadian state. The Nunavut Territory has taken on dimensions of the Canadian state, yet the Nunavut Territory is inextricably linked to Inuit identity through the land claim movement.

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<sup>5</sup> Inuit traditional knowledge.

In chapter three, I apply the problems I identify in chapter one to the context I discuss in chapter two to demonstrate how the Nunavut Court of Justice is one of the sites where Inuit identity is constructed and negotiated in the Nunavut Territory. I argue that the sentencing decisions of the Nunavut Court of Justice exemplify how criminal law constructs and shapes Inuit identity in Nunavut. Although the Court's decisions are accessible to legal scholars through legal research databases like Quicklaw and CanLii, we know little of how Inuit identity is characterized in the Nunavut Court of Justice's criminal law decisions. Pursuing a line of inquiry into Nunavut's sentencing cases requires engaging the characterization of Inuit identity in sentencing, with its focus on the circumstances of the offence—and perhaps more importantly for this thesis—the circumstances of the offender. Sentencing Inuit offenders also requires the Nunavut Court of Justice to take into account “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders.*”<sup>6</sup> What is unclear, however, is what that means in the context of a legal institution that has taken part in oppressing and colonizing Inuit. The Nunavut Court of Justice's decisions demonstrate the tension inherent in the role of the criminal justice system as an instrument of Canadian sovereignty in a territory that is the product of Inuit self-determination. They also demonstrate the ways that sentencing decisions, in the effort to negotiate Inuit identity, elide the complexities of Inuit identity and perpetuate the appropriation of Inuit identity through the sentencing process. The result is a dilemma for the criminal justice system and for Inuit that remains unresolved.

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<sup>6</sup> *Criminal Code*, s 718.2(e) *supra* note 2.

Finally, in Chapter Four, I address whether any resolution of the dilemma the Nunavut Court of Justice's sentencing decisions illuminate is possible. I question whether any model of the Canadian criminal justice system can avoid appropriating and essentializing indigenous identity for the purpose of asserting Canadian sovereignty. There is an imbalance of power between indigenous and non-indigenous people in Canada that reforms to the criminal justice system alone cannot solve. The dilemma the Nunavut Court of Justice's sentencing decisions reveal may remain a dilemma. Nonetheless, I propose some ways we can re-imagine the criminal justice system and the relationship between indigenous and non-indigenous people that could alleviate the problems the dilemma creates for the court.

In undertaking this research, I understand that my own perspective and position as a *Qallunaat*<sup>7</sup> Crown attorney in the criminal justice system in Nunavut informs my work. The criminal justice system is not the first or only exposure I had to Inuit culture, but it has played an important part in my experience of Nunavut. I have interviewed hundreds of Inuit victims and witnesses. I have travelled to almost every Nunavut community with the court and have played a part in the criminal justice system I examine in this paper. The research I conduct is thus also a project of self-inquiry, and my perspective informs my thesis and in particular my conclusions in chapter four.<sup>8</sup>

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<sup>7</sup> Non-Inuit person.

<sup>8</sup> While I refer to my experience in Nunavut, I note again that the views I express in my thesis in no way represent the views of Justice Canada, the Public Prosecution Service of Canada, or the Attorney General of Canada and are not based on any confidential communication communicated to me as a Crown attorney.

## **Chapter One: Indigenous Identity in the Canadian Criminal Justice System**

### **Introduction**

The criminal justice system and the question of indigenous identity collide squarely in the process of sentencing indigenous offenders. Sentencing engages questions central to individual identity including individual's cultural characteristics, such as indigeneity. The sentencing process takes individual offenders' cultural characteristics and associates them with the idea of criminality or deviance; an offender's characteristics are related to the causes of criminality. The sentencing process is also a moment in which the state asserts sovereignty over its subjects. When asserting sovereignty over indigenous subjects in Canada, identity and sovereignty become inextricably linked. This chapter explores the relationship between the state's assertion of sovereignty and the characterization of indigenous identity in the sentencing process. I argue that the sentencing process continues to assert sovereignty and appropriate indigenous identity despite efforts to institute remedial measures that were intended to alleviate the very historic injustice the imposition of colonialism through the criminal justice system perpetuated against Canada's indigenous people. In Part I, I show how the criminal justice system is a site where the state asserts sovereignty over individuals as well as where individual identity is appropriated in characterizing criminals in the sentencing process. In Part II, I examine how the Canadian criminal justice system was a tool for dominating indigenous people in the colonization of Canada, particularly in the way the criminal justice system appropriated notions of indigenous identity in differentiating

between indigenous people and settlers. Finally, in Part III, I show how the sentencing process continues to shape indigenous identity in the criminal justice system in the way that indigenous offenders are differentiated in the sentencing process today through jurisprudence like *R. v. Gladue*<sup>9</sup> and the provisions for aboriginal offenders in section 718.2(e) of the *Criminal Code*.<sup>10</sup>

## **Part I: Character, Criminals, and Criminal Justice: The Relationship Between Sentencing, Sovereignty and Identity**

### **a. Understanding Identity**

This thesis is concerned with how sentencing constructs identity in the criminal justice system. Identity construction involves the way that individuals internalize a view of themselves as distinct or similar in relation to others, the way that society ascribes traits or characteristics to groups of individuals, and the relationship between the former and the latter. Identity is a fluid concept; its changeability and its elusive nature make it difficult to define. The problem of defining identity often lies at the heart of why it is easier to conceive of identity in a group context even though the individual is often the one on whom social institutions visit the constructions and notions of identity.<sup>11</sup> After all, identity formation does not take place in a vacuum.

The study of identity politics provides a fruitful starting point for thinking about how an individual is constituted as a subject and how culture makes up part of individual identity. Charles Taylor frames well the internal and external components of how individual human experience forms human identity when he distinguishes the “monological” from

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<sup>9</sup> [1999] 1 SCR 688 [*Gladue*].

<sup>10</sup> *Criminal Code*, *supra* note 2.

<sup>11</sup> See e.g. Avigail Eisenberg, *Reasons of Identity* (Oxford: Oxford University Press, 2009).

the “dialogical” in *Multiculturalism and the Politics of Recognition*.<sup>12</sup> He argues that human identity cannot be generated solely inwardly through some type of internal genesis; identity “is fundamentally dialogical in character.”<sup>13</sup> Taylor notes, “[t]hus my discovering my own identity doesn’t mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others.”<sup>14</sup> With respect to the others with whom an individual’s dialogue takes places, Taylor posits that this dialogue takes place on two planes or levels: the intimate and the social. The intimate involves our love relationships, such as with our spouses, and the social involves our relationships in the social or public sphere. The social sphere includes an individual’s cultural, ethnic, or indigenous identity, which necessarily arises through dialogical relationships with others.<sup>15</sup>

The process of identity formation is dynamic and can serve different ends. Human experience creates the social realities in which identity is negotiated and constructed. At the same time, the nature and quality of human experience changes over time and space, so identity is also fluid and changeable. To the extent identity is fluid or changeable, it is important to understand to what end the dialogical process Taylor discusses functions, particularly in the way social institutions can operate to construct or negotiate identity. The human experience of social reality and identity formation are open to manipulation by social institutions that can oppress or mobilize groups distinguished on the basis of

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<sup>12</sup> Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1994) online: <[http://elplandehiram.org/documentos/JoustingNYC/Politics\\_of\\_Recognition.pdf](http://elplandehiram.org/documentos/JoustingNYC/Politics_of_Recognition.pdf)>.

<sup>13</sup> *Ibid* at 30.

<sup>14</sup> *Ibid* at 34.

<sup>15</sup> Note that, much like Taylor, I recognize that feminist critique exposes the relationships between the intimate and the public spheres such that differentiation is somewhat artificial; however, it is the public or the social that primarily concerns my discussion of the criminal justice system in this paper.

identity. In *Black Skin, White Masks*, Frantz Fanon describes how the identity of the black man became the basis for oppression through colonial and post-colonial social institutions and relationships. Social relationships in France and the Caribbean demonstrate for Fanon that “a Black is not a man” but instead an ‘other’ defined in opposition to and often inferior to a white man.<sup>16</sup> As much as racial categories were the basis of oppression, however, they have also been the basis for group mobilization and resistance. For instance, although the census in the United States took an active role in creating and sustaining “black” as a racial category of oppression, black activists seek to sustain racial categorization through the census for the purpose of fostering black identity and mobilizing the black community.<sup>17</sup>

Social institutions adopt and understand the meanings of cultural or ethnic characteristics to construct and negotiate difference and in doing so appropriate identity. The capacity of the dialogical process of identity formation to serve different ends leads to a number of problems rooted in the way social that institutions may appropriate and/or essentialize identity. Sally Engle Merry, for instance, refers to “symbolic appropriation” to describe the way that state structures may borrow the cultural or political symbols of other normative orders to promote integration.<sup>18</sup> Appropriation extends beyond symbols, however; it extends to the way state institutions portray and take up cultural and political characteristics of other normative orders. Appropriation can result in essentializing identity. Essentialism happens when identity is distorted such that certain aspects of identity become discrete and preeminent to others or generalizations about identity

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<sup>16</sup> Frantz Fanon, *Black Skin, White Masks*, trans Richard Philcox (New York: Grove Press, 1952) at xii.

<sup>17</sup> See e.g. Melissa Nobles, *Shades of Citizenship* (Stanford: Stanford University Press, 2000).

<sup>18</sup> Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Soc Rev* 869 at 882.

become the basis for disciplining members of a group. Anne Phillips aptly describes the dangers of essentialism in public discourse about multiculturalism and how essentialism often works to allow cultural characteristics to obscure gender inequalities.<sup>19</sup> Emma Larocque notes that with respect to indigenous communities in Canada, women's interest often become subsumed in the overarching struggle indigenous communities face when seeking political recognition.<sup>20</sup> Since the dialogical process can serve different ends, it is important to examine the process of identity formation to see what social institutions and influences possess the most power over the dynamic of identity formation. While biological or spiritual elements of identity formation can also influence the construction of identity, social institutions make up the large part of human experience in the construction of modern identity and serve as sites at which to study the dialogical process of identity formation.<sup>21</sup>

#### **b. Appropriating Identity: Identity, the Law, and Sentencing**

Social or public institutions like legal institutions are part of the social sphere that negotiates and constructs identity. Studying one part of the social sphere can demonstrate the dynamic nature of the dialogical process of identity formation. Courtney Jung, for example, argues that identity is strictly constructed and that the state is the operative instrument in constructing identity.<sup>22</sup> Jung's approach emphasizes the nation-state's role

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<sup>19</sup> Anne Phillips, *Gender and Culture* (Cambridge: Polity Press, 2010) at 1-15 & 69-82.

<sup>20</sup> Emma Larocque "Re-examining Culturally Appropriate Methods in Criminal Justice Applications" in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch, ed (Vancouver: UBC Press, 1997).

<sup>21</sup> What constitutes a "social institution" may also change across societies. For example, "land" might be considered a social institution in and of itself to which humans have a relationship that shapes their identity. That relationship and the way humans identify with land may differ and cause conflict, such as the significance land as geopolitical space has taken in relation to indigenous identity. I will return to this idea in Chapter Four.

<sup>22</sup> Courtney Jung, *The Moral Force of Indigenous Politics* (New York: Cambridge University Press, 2008).

in the construction of identity, but she obscures how other social forces operate within the social sphere that shapes human experience. Social realities exist beyond state institutions; social realities encompass social networks, group dynamics, and intersecting gender, race, and ethnic cleavages.

Among the social institutions through which the dialogical process of identity formation takes place, sentencing provides an excellent example of how identity can be appropriated and/or essentialized to political ends. Sentencing is a social institution that implicates the greatest violence and is one of the most painful decisions our society makes: the decision to punish. We must approach sentencing with that understanding in mind yet also realize that punishment is one of the social institutions that arises from the social context in which people construct and negotiate individual identity. As a social institution enforcing punishment, the sentencing process reflects the social context in which punishment takes place. The social context in which we understand what constitutes a criminal or a crime determines how the criminal justice system responds to crime and criminals.<sup>23</sup> As David Garland states, punishment “tells us how we react to disorderly persons and threats to social order—but also, and more importantly, it can reveal some of the ways in which personal and social order come to be constructed in the first place.”<sup>24</sup> The influence also works in the other direction. The diverse individuals that interact with the criminal justice system as individual offenders have a relationship with the criminal justice system that makes up part of their experience in determining their identity. The sentencing process represents one of the means by which the criminal

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<sup>23</sup> David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: The University of Chicago Press, 1990).

<sup>24</sup> *Ibid* at 22.

justice system communicates the relationships, norms, expectations, and assumptions that interact to create individual human experience, including cultural interaction and perceptions of how culture is a component of an individual's or group's identity.

Sentencing understands identity through construction of the individual as a criminal and appropriates individual identity for the purpose of using individual offender's characteristics to ascribe criminal responsibility.<sup>25</sup> The individual is the subject on whom the sentence is imposed and the one whose characteristics become part of the reason for the severity of the punishment, including prison. Punishment is "individualized" to allow for rationalizing why there is a relationship between an individual's cultural characteristics and his or her criminality.<sup>26</sup> In Canada, for example, one of the ways the sentencing process criminalizes aspects of individual identity is in mandating consideration of the "circumstances of the offender", which become part of the reasons in a judge's justification of sentence.<sup>27</sup> An "indigenous offender" is not just a description of an offender's origins, but has come to represent a type of criminal behaviour linked to particular social, economic, and historical circumstances. Sentencing creates notions of "legal" and "illegal", "criminal" and "law-abiding", or "normal" and "deviant" that reinforce the legal and social understanding of those terms.<sup>28</sup> As Foucault states, appropriating individual identity for the purpose of reinforcing ideas of criminality insures that:

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<sup>25</sup> Note in this paper I use the terms "criminal", "offender", "accused" or "defendant" interchangeably for the purpose of referring to the individual subject in the criminal justice system.

<sup>26</sup> Michel Foucault, *Discipline and Punish* (London: Penguin Books, 1975) at 128-31, 191-94.

<sup>27</sup> *Criminal Code*, s 718, *supra* note 2.

<sup>28</sup> Garland, *supra* note 23 at 267-71.

Individuals who appear before courts are addressed, examined, and understood according to the law's conception of a normal person and normal attributes. No matter what the reality of that individual is, the law insists upon seeing him or her in a particular, predefined way, and dispensing judgment accordingly.<sup>29</sup>

The sentencing process inherently appropriates an individual subject's identity because individual characteristics are the basis for explaining why the individual is a criminal and rationalizing his or her punishment.

**c. Asserting Sovereignty in Sentencing**

In addition to characterizing the nature of criminal responsibility and explaining the individual identity of criminals, sentencing is the moment that the legal system exercises sovereignty over individuals by punishing them. Sentencing is part of how the state asserts sovereignty over individuals and reinforces its monopoly on permissible violence. The assertion of state sovereignty in sentencing is one that reveals itself in the inherent threat of violence contained in the act of sentencing and the way in which the criminal justice system understands sentencing as a rationalization, legitimation, and expression of the power of the sovereign.

Individual offenders sentenced in the criminal justice system receive their punishment under threat of state violence. Offenders acquiesce in the sentencing process. This acquiescence is rooted in their acknowledgement of state power that undergirds the sentencing process.<sup>30</sup> In "Violence and the Word," Robert Cover explains that "the experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated."<sup>31</sup> Cover

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<sup>29</sup> *Ibid* at 268.

<sup>30</sup> Robert Cover, "Violence and the Word" (1985-1986) 95 *Yale LJ* 1601 at 1609.

<sup>31</sup> *Ibid* at 1608.

explains that the function of sentencing is the function of rationalizing state violence in the sentencing process to those who benefit from and defend the legal order inflicting the punishment.<sup>32</sup> Lawyers or judges may become detached from the violence sentencing visits on offenders, but “judges deal in pain and death.”<sup>33</sup> As Cover notes, the sense of violence is appreciated best from the perspective of the sentenced offender. This violence is palpable, for example, to an offender sentenced to life in prison for murder, such as Tammy Marquardt. Marquardt was wrongfully convicted for killing her son and spent fourteen years in jail on the basis of false evidence presented by the now discredited child pathologist, Charles Smith. Marquardt understands her jail experience as one of violence, which becomes clear when she expresses her opinion of the sentence she thinks Charles Smith deserves: “[p]ersonally I’d like to see him to go jail, at least feel a little bit of what we felt: fear for your life on a daily basis.”<sup>34</sup> The fear Marquardt and her fellow prisoners felt is due to force inflicted on offenders by the Canadian criminal justice system and authorized by the state.

State authority makes criminal justice an exercise of sovereign power. The state, or the sovereign,<sup>35</sup> inflicts violence on its convicted subjects in the sentencing process. The sentencing process is a legitimization of that exercise of violence and an affirmation of the state or sovereign as the sole source of legitimate violence in the state. The justification of state punishment “must show not merely that punishment achieves some

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 1609.

<sup>34</sup> The Canadian Press, “Disgraced Pathologist Smith Reprimanded” *CBC News* 25 March 2011, online: CBC News <<http://www.cbc.ca/news/health/story/2011/03/25/charles-smith-reprimand.html>>.

<sup>35</sup> Although I use the concepts of state and sovereign somewhat interchangeably in my thesis, I recognize there are differences and subtleties those concepts involve that I do not engage.

good, but that it is a proper task of the state to pursue that good by these means.”<sup>36</sup> Foucault depicts how in the 17th and 18th centuries “the spectacle of the scaffold” represented the sovereign’s right to punish individuals who offended the sovereign’s rule. Not only was crime an offence against the victim or an affront to those who abides by the law, but also “the crime attacks the sovereign: it attacks him personally since the law is the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince.” To punish the offender is to restore and uphold the sovereign’s power.<sup>37</sup> Foucault’s depiction of the sovereign will in criminal sentencing is not just a historical phenomenon; it remains a constant in the criminal justice system. In Canada, our criminal cases are ones prosecuted in the name of our sovereign, “Her Majesty the Queen” or *Regina*. Even international criminal law maintains a conception of criminal justice grounded in the idea of state power. For instance, the jurisdiction of the International Criminal Court only arises under circumstances where a state is not in a position to prosecute offenders; it contains within it a normative ideology about the pre-eminence of the state.<sup>38</sup>

Sentencing, even as it functions to assert sovereignty, exists within a particular social and cultural context. Sentencing structures imposed on society shape social relationships, but social relationships also affect the structures of sentencing. David Garland argues that how we conceive of punishment and institutionalizing offenders is one way the criminal law expresses social and cultural interactions that demonstrate how society deals with

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<sup>36</sup> Antony Duff and David Garland, “Introduction” in *A Reader on Punishment*, Antony Duff and David Garland, eds (Oxford: Oxford University Press, 1994) 1 at 3.

<sup>37</sup> Foucault, *supra* note 26 at 47-48.

<sup>38</sup> See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, 37 ILM. 999, art 17 (entered into force July 1, 2002); see also Phillippe Kirsch and Valerie Oosterveld, “Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court” (2001) 46:4 McGill LJ 1141 at 1152.

conflicts and relationships.<sup>39</sup> How state sovereignty is conceived of in sentencing is one of the social and cultural expressions of our idea of punishment; for example, Garland notes that the way social authority is configured or represented in punishment shapes the specific meaning “authority” takes within the idea of punishment.<sup>40</sup> Thus, the idea of punishment as a result of the sovereign’s will, as Foucault has pointed out, is one that has changed since the classical age from the idea of the pure concept of subjugation to the sovereign’s will to rejecting the idea that there is any arbitrariness in the sovereign’s power. The sovereign, the state, can still exercise power to sentence and punish one who has offended the sovereign’s rule, but modern conceptions of punishment demand that the exercise of power must not be arbitrary.<sup>41</sup> Indeed, today it is a fundamental principle in Canada’s modern criminal law that the arbitrary exercise of criminal law powers are unconstitutional and arbitrary actions by the police, prosecution, or judges can result in the remedy of acquittal.<sup>42</sup>

Changing ideas of what constitutes just rule and legitimizes the sovereign’s authority reflect the social and cultural context in which the assertion of sovereignty in the criminal justice system takes place. The assertion of sovereignty in the sentencing process is part of understanding the conception of punishment as a social institution. Punishment is a necessary component of understanding how sentencing works and justifying why we continue to vest the sentencing process with the authority to mete out violence to offenders. The interesting question, and the one that ultimately concerns my research,

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<sup>39</sup> Garland, *supra* note 23.

<sup>40</sup> *Ibid* at 266-67.

<sup>41</sup> Foucault, *supra* note 23 at 126-31.

<sup>42</sup> In this instance, I refer to the remedies available in criminal law under the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

however, is how that sovereign power is exercised in the social and cultural context for indigenous people in Canada today.

## **Part II: The Origins of Indigenous Difference: Colonial Criminal Justice**

The criminal justice system occupies an important place in state domination and the identity appropriation of indigenous people in Canada. Settling Canada required that colonial officials dominate the indigenous people who occupied the land they wished to settle, and the criminal justice system provided one means for that domination. The history of the Canadian criminal justice system as applied to indigenous offenders reveals a relationship between the assertion of sovereignty and the appropriation of identity in the way that the criminal justice system differentiated between indigenous and non-indigenous individuals. Indigenous identity is one of the cultural differences that the colonial state emphasized in the criminal justice system. The emphasis on indigenous difference and appropriation of the nature of that difference into sentencing was one of the ways the Canadian state dominated indigenous people in Canada through the criminal justice system.

### **a. Maintaining and Negotiating Indigenous Difference through the Criminal Justice System**

Colonial expansion and the taking up of land for settlement imposed a legal order in Canada through which indigenous people were treated differently than settlers. In *White Man's Law*, Sidney Harring describes how British colonial officials believed that orderly settlement was their primary concern in settling Canada. Colonial officials wished to avoid colonial wars, so they implemented a “law-centred policy” that would “re-socialize” indigenous people so as to accommodate them to the new colonial order. Harring explains, “the essence of colonial native policy was an ethnocentric

paternalism.”<sup>43</sup> The criminal justice system facilitated colonial domination in regions of the country that were distant from Ottawa or other centres of colonial administration. Examples of this reach of the Crown include Royal Canadian Mounted Police presence in the areas of the numbered treaties and high-profile trials of indigenous people accused of killing settlers or traders.<sup>44</sup> Confederation in 1867 also facilitated the domination of indigenous people through the criminal justice system as Confederation created the impetus for a single, nationally codified criminal law.<sup>45</sup> As Martin Friedland notes, Sir John A. Macdonald’s comments in parliamentary debates prior to Confederation express well why Parliament came to a consensus about assigning authority over criminal law to the federal government:

The criminal law too—the determination of what is a crime and what is not and how crime shall be punished—is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces—that what is a crime in one part of British America, should be a crime in every part—that there should be the same protection of life and property in one as in another.<sup>46</sup>

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<sup>43</sup> Sidney L Haring, *White Man’s Law: Native People in Nineteenth Century Canadian Jurisprudence* Osgoode Society for Canadian Legal History (Toronto: University of Toronto Press, 1998) 16-18 [Haring, *White Man’s Law*]; see also Kenneth Coates and William Morrison, “To Make the Tribes Understand”: The Trial of Alikomiak and Tatamigana” (1998) 51:3 *Arctic* 220 [“To Make the Tribes Understand”].

<sup>44</sup> Graham Price, “The North” (1995) 23 *Man LJ* 356; Shelagh Grant, *Arctic Justice: On Trial for Murder in Pond Inlet, 1923* (Montreal: McGill-Queen’s University Press, 2002) [*Arctic Justice*]; Coates and Morrison, *ibid*; Amanda Nettelback and Russel Smandych, “Policing Indigenous Peoples on Two Colonial Frontiers: Australia’s Mounted Police and Canada’s North-West Mounted Police” (2010) 43:2 *Austl Crim NZJ of Criminology* 356.

<sup>45</sup> Martin Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell Legal Publications, 1984) at 47-49; Barry Wright, “Criminal Law Codification and Imperial Projects: the Self-Governing Jurisdiction Codes of the 1890s” (2008) 12 *Legal Hist* 19 at 20, 29-30, 31-37.

<sup>46</sup> Friedland, *ibid* at 48, citing MA Lapin and JS Patrick, eds, *Index to Parliamentary Debates on the Confederation of British North American Provinces: 3rd session, 8th Provincial Parliament of Canada, 1865* (Ottawa: King’s Printer, 1951).

The vision of Canadian sovereignty over territory included dominating the occupants of the territory through the criminal justice system, importantly among them, indigenous peoples.

Differential treatment through the criminal justice system was a tool the colonial legal system used to dominate indigenous people, and the jurisdiction of the colonial criminal justice system was imposed on indigenous people with the intention of displacing traditional indigenous law.<sup>47</sup> The colonial criminal justice system frequently refused to apply Canadian law to settler squatters who took up indigenous lands. Eventually, the *Indian Act* criminalized even the organization of resistance to assert indigenous land claims through the colonial legal system.<sup>48</sup> The consequence for indigenous communities was profound: “full access to the ‘privileges of British law’ more often meant the opposite of legal protection of their land rights: they went to prison.”<sup>49</sup> The uneven application of the colonial criminal justice system to indigenous and non-indigenous offenders is something Sherene Razack highlights in “Gendered Racial Violence and Spacialized Justice: the Murder of Pamela George.”<sup>50</sup> She argues that nineteenth century policing and prosecution demonstrated aboriginal people’s marginalization politically and geographically. Razack describes how Canada’s colonizing efforts were directed at confining indigenous people to particular spaces and often involved “brutal policing and

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<sup>47</sup> Harring, *White Man’s Law*, *supra* note 43 at 109-24; Sidney L. Harring, “Rich Men of the Country” (1989) 21 *Ottawa L Rev* 1 [Harring, *Rich Men*]; Bonita Lawrence, “Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada” in *Race, Space, and the Law: Unmapping a White Settler Society*, Sherene H. Razack, ed (Toronto: Between the Lines, 2002).

<sup>48</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, vol 1(Ottawa: Supply and Services Canada, 1991) [RCAP].

<sup>49</sup> Harring, *White Man’s Law*, *supra* note 43 at 109.

<sup>50</sup> in *Race, Space and the Law*, Sherene Razack, ed (Toronto: Between the Lines, 2002) 123 at 128-36.

settler violence.”<sup>51</sup> Her examples of the violence that resulted in the “spatial containment” of indigenous people include settlers in Regina pressing for vigorous policing of indigenous people and the Northwest Mounted Police’s coercive relations with indigenous women.<sup>52</sup> Control of how colonial space geographically and politically divided settlers and indigenous people meant that the differential treatment of indigenous people in law was a way to occupy land.

#### **b. Criminalizing Indigenous Identity**

The *Indian Act* not only created racialized spaces and legal systems, but also prohibited indigenous cultural and legal practices fundamental to maintaining indigenous identity and indigenous legal systems. The colonial criminal justice system criminalized indigenous efforts to retain land and traditional spaces in a way that the settlers’ taking up of land was not criminalized. The law criminalized both routine cultural and political activities as well as broader political actions by indigenous people. The *Indian Act* prohibited indigenous practices such as the sundance and the potlatch; the result was the criminalization of indigenous cultural and legal practice.<sup>53</sup> The federal *Indian Act* made the potlatch a criminal offence in 1884 and the sundance a criminal offence in 1885.<sup>54</sup> For indigenous people of the Pacific Northwest, the potlatch was a legal institution that affected the organization of land, property, and family. The dances were also religious

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<sup>51</sup> *Ibid* at 130.

<sup>52</sup> *Ibid* at 129-31, 133-35.

<sup>53</sup> Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 56-102; RC MacLeod and Heather Rollason, “‘Restrain the Lawless Savages’: Native Defendants in the Criminal Courts of the North West Territories, 1878–1885” (1997) 10:2 *J of Hist Soc* 157 at 158, 168; Royal Commission on Aboriginal People, *Bridging the Cultural Divide: A Report on Aboriginal People and the Criminal Justice System in Canada* (Ottawa: Ministry of Supply and Services Canada, 1996) at 4-5 [*Bridging the Cultural Divide*].

<sup>54</sup> *RCAP*, *supra* note 48; Backhouse, *ibid*, at 6.

expressions important to indigenous spiritual development.<sup>55</sup> Although the prohibition on dancing was enforced inconsistently, arrests and convictions pursuant to the *Indian Act* certainly took place, with one official estimating fifty arrests and twenty convictions.<sup>56</sup> To criminalize indigenous ceremonies like the potlatch was to criminalize the legal orders, social relationships, and religious expression that were fundamental to indigenous identity.

Indigenous people in Canada have a history of physical occupation of sites as a way of asserting delineating boundaries and asserting sovereignty over traditional territory.<sup>57</sup> When colonial legal institutions would not enforce indigenous rights against squatters or violations of indigenous law, some indigenous people took matters into their own hands to enforce their rights. The Tsilhqot'in in British Columbia had their Chiefs organize to attack settlers in what the Tsilhqot'in still view today as the defence of their lands.<sup>58</sup> To assert the civility of British colonial rule of law, several of the Tsilhqot'in Chiefs were arrested and tried under British Columbia's colonial criminal law.<sup>59</sup> During the conflict and the trial, the characterization of the Tsilhqot'in as 'war-like' affected the final decision to sentence the convicted chiefs to hang. Their acts of war became a criminal violation of colonial law—without the acquiescence of the Tsilhqot'in to that colonial

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<sup>55</sup> Backhouse, *ibid* at 64-65.

<sup>56</sup> *Ibid* at 69 & 100.

<sup>57</sup> For more information about the nature and history of indigenous peoples' physical occupation of land: see John Borrows, "Crown and Aboriginal Occupations of Land: A History & Comparison", Research Paper for the Ipperwash Inquiry (October 15, 2005) at 3-19 online: The Ipperwash Inquiry <[http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/History\\_of\\_Occupations\\_Borrows.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf)>.

<sup>58</sup> Note that war in some indigenous communities was in fact the basis for delineating boundaries over indigenous lands through later peace and friendship treaties: see e.g. Robert Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Routledge, 1999).

<sup>59</sup> Tina Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in *Essays in the History of Canadian Law: Crime and Criminal Justice*, vol 5 (Toronto: Osgoode Society for Canadian History, 1994) 112 at 129.

law. The profound ensuing sense of injustice the Tsilhqot'in feel as a result of the hanging of their chiefs and the characterization of their actions as murder rather than war has been documented in both the *Cariboo-Chilcotin Inquiry* and in the Royal Commission for Aboriginal People's Report on Criminal Justice.<sup>60</sup> The incident, ensuing trial, and modern inquiries demonstrate that the criminalization of indigenous people's relationship to land struck at the heart of indigenous culture and law. The colonial authorities' use of criminal justice to assert sovereignty over the Tsilhqot'in people appropriated a fundamental component of the Tsilhqot'in's indigenous identity: their authority over their land and their right to assert that authority through battle. That Tsilhqot'in identity was appropriated for the purpose of asserting Canadian sovereignty and for emphasizing Tsilhqot'in 'savagery' in the face of colonial civility.<sup>61</sup> Even when trying to use colonial justice systems, indigenous people faced hurdles settlers did not. In 1927, the *Indian Act* was amended to criminalize the raising of funds from indigenous communities for the purpose of bringing land claims—one of the most egregious examples of a discriminatory hurdle. Thus, colonial law that often expressly authorized taking up of land through treaties and land registries at the same time punished some indigenous communities for asserting sovereignty over their territory. At a broader level, colonial authorities refused to recognize the value of assertions of sovereignty by indigenous people. In this sense, indigenous identity itself was criminalized through the colonial criminal justice system.

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<sup>60</sup> *Bridging the Cultural Divide*, *supra* note 53 at 7-10; *Report of the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993).

<sup>61</sup> Loo, *supra* note 59.

One also finds in the colonial criminal justice system the genesis of alcoholism as a characteristic ascribed to indigenous criminality. Without minimizing the issue of alcoholism in indigenous communities,<sup>62</sup> it is important to consider that inherent in the policies of vigorous prosecution and prohibition alcohol amongst indigenous people in Canada was the assumption that ‘drunkenness’ was more problematic among indigenous people.<sup>63</sup> Colonial assumptions about indigenous drunkenness and the criminal problems of indigenous drunkenness were based on little more than anecdotal evidence.<sup>64</sup> Colonial liquor laws illustrate the complexities around who could be classified as “Indian” and the rights contained in such a classification.<sup>65</sup> In 19th century British Columbia, for instance, authorities passed “a litany” of laws to control the production, distribution, and consumption of liquor—many of which explicitly prohibited supplying “Indians.”<sup>66</sup> In addition to the prohibition itself, the way that liquor offences were prosecuted and treated in the criminal justice system revealed biases against indigenous offenders.<sup>67</sup> In

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<sup>62</sup> See e.g. Sherry Sagers and Dennis Gray, *Dealing with Alcohol: Indigenous Usage In Australia, New Zealand And Canada* (Cambridge: Cambridge University Press, 1998). See also the literature surrounding the problem of higher rates of Fetal Alcohol Spectrum Disorder among North America’s indigenous people: Larry Burd and Michael EK Moffatt, “Epidemiology of Fetal Alcohol Syndrome in American Indians, Alaskan Natives, and Canadian Aboriginal Peoples: a Review of the Literature” (1994) 109:5 *Public Health Reports* 688; National Alcohol Strategy Working Group, *Reducing Alcohol-Related Harm in Canada: Toward a Culture of Moderation: Recommendations for a National Alcohol Strategy 2007* at 10, online: Canadian Centre on Substance Abuse <<http://www.ccsa.ca/2007%20CCSA%20Documents/ccsa-023876-2007.pdf>>.

<sup>63</sup> Renisa Mawani, “In Between and Out of Place: Mixed-Race Identity, Liquor and the Law in British Columbia” in Sherene Razack, ed, *Race, Space and the Law* (Toronto: Between the Lines, 2002) 47 at 60; Harring, *White Man’s Law*, *supra* note 43 at 119-21.

<sup>64</sup> See e.g. Mary-Ellen Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia* (Vancouver: UBC Press, 1998) at 16-17. While indigenous people in today’s North America may have increased problems related to binge drinking and Fetal Alcohol Spectrum Disorder, a much greater proportion of the indigenous population abstains entirely from consuming alcohol compared to the general population: see e.g. Amy Bombay, Kim Matheson, and Hymie Anisman, “Intergenerational Trauma: Convergence of Multiple Processes among First Nations peoples in Canada” (2009) 5:3 *Journal of Aboriginal Health* 6.

<sup>65</sup> Harring, *White Man’s Law*, *supra* note 43 at 59-65; Backhouse, *supra* note 53 at 23-27

<sup>66</sup> Mawani, *supra* note 63 at 60-61.

<sup>67</sup> Backhouse, *supra* note 53; Harring, *White Man’s Law*, *supra* note 43 at 119-21.

Manitoba, one Indian agent supported banning all types of indigenous dancing because of “the potential for the abuse of liquor when large numbers of ‘Indians’ were drawn to prairie towns to perform for the ‘amusement of the public’.”<sup>68</sup> Liquor became another hallmark of indigenous difference and indigenous identity in the criminal justice system.<sup>69</sup>

It is important to emphasize that the nature of the criminal justice system’s imposition and encroachment on indigenous people was as incremental and diverse as the nature of colonialism and settler encroachment across Canada. As Haring points out, in the late 18th and early 19th century, the boundaries of colonial criminal jurisdiction over indigenous people remained ambiguous even to colonial administrators. For the most part, colonial criminal jurisdiction was exercised only in the particular areas of colonial settlement, and crimes between indigenous people on their own lands generally remained outside colonial criminal jurisdiction. Although Haring states it is difficult to pinpoint when or how a policy shift toward exercising criminal law jurisdiction over indigenous people came about in Ontario, it was clear that by the late 19th century, indigenous people were being prosecuted and jailed in disproportionate numbers.<sup>70</sup> Similarly, British Columbia also had disproportionate numbers of indigenous people incarcerated.<sup>71</sup> MacLeod and Rollason explain that from 1878-1885 the Canadian authorities in the Northwest Territories (which at that time would have included Alberta and

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<sup>68</sup> Backhouse, *ibid* at 71.

<sup>69</sup> The sources I draw on reveal interesting connections between the depictions of intoxication as a part of the depiction of indigenous criminality. This is an area in which more research would be helpful, especially given that there continues to be a difference in the way indigenous and non-indigenous communities regulate alcohol consumption.

<sup>70</sup> Haring, *White Man’s Law*, *supra* note 43 at 109-23.

<sup>71</sup> Razack, *supra* note 50 at 133.

Saskatchewan) cautiously exercised criminal jurisdiction over indigenous people. In addition, they argue that indigenous people “were not simply the passive recipients of a repressive and culturally destructive system; indeed, it appears that natives employed the Euro-Canadian legal system for their own uses, including the resolution of inter-band and familial conflicts.”<sup>72</sup> Nothing about indigenous agency or the incremental and diverse nature of Canada’s exercise of criminal justice power over indigenous people based on the extent of political control over the territory over which the government exercised jurisdiction diminishes the overall impact of the Canadian criminal justice system on indigenous people. The reach of the criminal justice system may have varied and the extent of its impact may have depended on the indigenous community targeted, but it remains a powerful reminder of Canada’s assertion of sovereignty over indigenous people.

### **Part III: The Dilemma of Delineating Difference: Perpetuating Appropriation and Asserting Sovereignty in Modern Sentencing**

Historically, the colonial criminal justice system was a site for asserting sovereignty and appropriating indigenous identity. The modern sentencing process exemplifies the way that changes to the criminal justice system, though well-intentioned, have not alleviated the historic injustice indigenous people suffered under colonial criminal justice. Today, despite efforts to mitigate the damage the criminal justice system caused indigenous people, the relationship between asserting sovereignty and appropriating identity continues. The overrepresentation of indigenous people in Canada’s criminal justice system means that indigenous communities live with powerful reminders of Canada’s

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<sup>72</sup> MacLeod and Rollason, *supra* note 53 at 159.

assertion of sovereignty over their people. Indigenous people make up 4 percent of the total Canadian adult population. In the criminal justice system, however, indigenous people are: 24 percent of offenders admitted to provincial and/or territorial sentenced custody; 18 percent of offenders serving federal custodial sentences; 19 percent of offenders in remand (i.e. detained pending trial); 21 percent of male offenders in custody; and 30 percent of female offenders in custody.<sup>73</sup> In the Western provinces, the statistics are even grimmer: in Manitoba, 71 percent of sentenced admissions; in Saskatchewan, 79 percent of all prisoners.<sup>74</sup>

In this section, I explore how the *Criminal Code*'s sentencing provisions serve as a basis for studying the relationship between the assertion of sovereignty and the appropriation of indigenous identity. First, I consider the modern critiques of the indigenous experience of the criminal justice system. Second, I demonstrate how the *Criminal Code*'s sentencing provisions assumed the role of a remedial measure for dealing with the failure of Canada's criminal justice system for indigenous people. Finally, I argue that the remedial measures in sentencing provisions do not respond to the critiques of the criminal justice system but rather are a form of maintaining sovereignty over indigenous people in Canada and continue to appropriate indigenous identity through the sentencing process.

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<sup>73</sup> Laura Landry and Maire Sinha, "Adult Correctional Services in Canada 2005/2006" (Ottawa: Minister of Industry for Statistics Canada, 2008) at 1, 6-7, 16, 22 online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008006-eng.pdf>>; note that the number of people self-identifying as aboriginal in the national census has also increased by 45 percent, though further research would be necessary to find what the correlation is between the increase in self-identification in the national census and the Juristat Statistics.

<sup>74</sup> *Ibid* at 7, 22.

**a. Impact of the Modern Sentencing Process on Indigenous People**

Various reports commissioned by parliamentary, legislative, or committee inquiries have documented the failure of the Canadian criminal justice system for indigenous people.<sup>75</sup>

The critiques of the criminal justice system tend to revolve around: 1) the overrepresentation of indigenous Canadians in the criminal justice system, particularly in jails;<sup>76</sup> 2) the failure of the criminal justice system to deal with the social and economic dislocation that is often related to crime;<sup>77</sup> 3) the lack of indigenous perspectives in the criminal justice system; and 4) the sense of illegitimacy and oppression most indigenous Canadians associate with the criminal justice system.<sup>78</sup>

I want to engage the latter two critiques in this section, as I believe they are not only the underlying source of most of the criticism of the criminal justice system, but also critiques fundamentally concerned with the assertion of Canadian sovereignty and

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<sup>75</sup> See e.g. AC Hamilton and CM Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) [*Manitoba Justice Inquiry*]; *Bridging the Cultural Divide*, *supra* note 53; Richard Gosse, Roger Carter, and James Youngblood Henderson, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994); Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force on the Criminal Justice System, 1991).

<sup>76</sup> See e.g. *Bridging the Cultural Divide*, *supra* note 53 at 28-33; Larry Chartrand and Celeste McKay, *A Review of Research on Criminal Victimization and First Nations, Metis, and Inuit Peoples* (Ottawa: Department of Justice, 2006) online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06\\_vic1/index.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_vic1/index.html)>; "Canadian Centre for Justice Statistics Profile Series: Aboriginal Peoples in Canada" (Ottawa: Ministry of Industry, 2001) at 6-11; Hamilton and Sinclair, *ibid*.

<sup>77</sup> See e.g. Rick Linden, "Crime Prevention in Aboriginal Communities", Consultation Paper for *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Murray Sinclair, "Aboriginal Peoples, Justice, and the Law" in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, Richard Gosse, James Youngblood Henderson, and Roger Carter, eds, (Saskatoon: Purich Publishing, 1994) 173 at 174-75; Dawn Y Andersen, *After Gladue: Are Judges Sentencing Aboriginal Offenders Differently?* (Ph D Dissertation: York University, 2003) at 2 & 5; Kent Roach and Jonathan Rudin, "Gladue: the Judicial and Political Reception of a Promising Decision" (July 2000) *Canadian J Crim* 355 at 358-59; Sanjeev Anand, "The sentencing of aboriginal offenders, continued confusion and persistent problems: A comment on the decision in *R. v. Gladue*" (July 2000) *Can J Crim* 412 at 416.

<sup>78</sup> See e.g. *Bridging the Cultural Divide*, *supra* note 53 at xi, 7; Sinclair, *ibid*; Patricia Monture, "Thinking About Aboriginal Justice: Myths and Revolution" in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) at 222; Roach and Rudin, *ibid* at 376.

appropriation of indigenous identity through the criminal justice system. The criminal justice system remains a system in which the power to decide about the consequences that flow from crime in indigenous communities remains in the hands of non-indigenous people, politically and legally. The problem of how the disempowerment of indigenous communities and the historical disadvantage that attaches to indigenous people in the legal system has attracted significant criticism. John Borrows notes: “[p]ut simply, the continent’s original inhabitants have never been convinced that the rule of law lies at the heart of their experiences with others in this land.”<sup>79</sup> Of the criminal justice system, the late Patricia Monture once commented, “[t]he legal system is at the heart of what we must reject as aboriginal nations and Aboriginal individuals.”<sup>80</sup> Monture advocated for indigenous people in Canada to be given “both the resources and the control to address the many problems that our communities now face.” She was fierce in advocating that indigenous people be allowed to apply those resources and that control in accordance with indigenous legal traditions.<sup>81</sup>

The numerous government inquiries and reports into the failure of the Canadian criminal justice system for indigenous people also direct criticism at the lack of political power and legal authority indigenous communities suffered through their experience of criminal justice. The reports of the Royal Commission on Aboriginal Peoples and the Manitoba Justice Inquiry, in particular, called on the federal government to respond to the charge that the criminal justice system fails indigenous people in Canada.<sup>82</sup> The Royal

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<sup>79</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 1 [Borrows, *Canada’s Indigenous Constitution*].

<sup>80</sup> Monture, *supra* note 78 at 223.

<sup>81</sup> *Ibid* at 224.

<sup>82</sup> Andersen, *supra* note 77 at 5-6; Roach and Rudin, *supra* note 77 at 358, 379.

Commission on Aboriginal People's report on criminal justice outlined how the criminal justice system accounted for part of the historic disadvantage and oppression indigenous people in Canada have suffered.<sup>83</sup> The Commission rejected "indigenization"<sup>84</sup> of the criminal justice system, which was already taking place with court workers and diversion, and any reform that targeted cultural awareness without changing the political framework of the criminal justice system.<sup>85</sup> The Manitoba Justice Inquiry recommended that the federal government support the establishment of indigenous systems of justice to empower indigenous communities and to insure that the criminal justice system to which indigenous people are subject applies indigenous law.<sup>86</sup>

While the call for change focused on the need for greater political control being given to aboriginal communities, Monture's "revolution" in the criminal justice system to provide for indigenous control and application of indigenous criminal law systems has not come about; instead, the focus of the criminal justice system is accommodation of indigenous difference. The accommodation maintains Canadian sovereignty over indigenous people and, in fact, specifically makes appropriating indigenous difference part of the sentencing process by sidestepping the question of whether indigenous communities should control the punishment of their members and translating the need for sovereignty and control into

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<sup>83</sup> David Stack, "The Impact of Gladue on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom" (1999) 62:2 Saskatchewan L Rev 471 at 477; *Bridging the Cultural Divide*, *supra* note 53 at 1-25.

<sup>84</sup> Indigenization refers to the practice of maintaining state and post-colonial structures but with indigenous staff and programmes. For example, Tammy Landau describes the indigenization of corrections practices: "where Aboriginal workers (for example, probation and parole officers) and programmes (for example, sweat lodges and healing circles) are integrated into existing correctional practices, either at the institutional or community level." See Tammy C Landau, "Plus Ça Change?: Correcting Inuit Inmates in Nunavut, Canada" (2006) 45:2 *The Howard Journal* 191

<sup>85</sup> *Bridging the Cultural Divide*, *supra* note 53 at 40-53.

<sup>86</sup> See the recommendations for aboriginal justice systems in Chapter 17 of the report of the Manitoba Justice Inquiry: *Manitoba Justice Inquiry*, *supra* note 75.

a question of cultural difference that requires specific accommodation and measures in the *Criminal Code*. The focus on the sentencing of indigenous offenders relates to the argument I lay out in Part I of this paper regarding the way that the sentencing process demonstrates a relationship between the assertion of sovereignty and the appropriation of identity in the sentencing process. Sentencing reforms recognize indigenous identity and difference in a way that maintains the Canadian assertion of sovereignty over indigenous offenders in the criminal justice system and the use of indigenous cultural distinctions in the characterization of criminality.

**b. Providing for Indigenous Difference in the Sentencing Process**

In 1996 with the passing of Bill-C-41, the federal government amended the sentencing provisions of the *Criminal Code*; it was a comprehensive amendment of sentencing that included an expression of principles and purposes to direct judges in sentencing, as well as new sentencing options and rules of evidence for sentencing hearings. The principles and purposes of sentencing reflected in sections 718, 718.1 and 718.2 of the Code were intended to codify existing judicial principles of sentencing and emphasize more the remedial aspects of the rationale for sentencing.<sup>87</sup> Bill C-41 signalled “Parliament’s interest in the restorative justice objectives of reparation for harm done to victims and the community and in promoting a sense of responsibility in offenders and the harm done to victims in the community.”<sup>88</sup> The overall approach of the guidelines was to balance a

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<sup>87</sup> Department of Justice, *Background on Sentencing Reform* (August 28, 1996) online: Department of Justice: <[http://web.archive.bibalex.org/web/19980116184537/canada.justice.gc.ca/News/Communiques/1996/chap22\\_bkg\\_en.html](http://web.archive.bibalex.org/web/19980116184537/canada.justice.gc.ca/News/Communiques/1996/chap22_bkg_en.html)>; Andrew Welsh and James Ogloff, “Progressive Reform or Maintaining the Status Quo?: An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions” (July 2008) *Can J of Crim* 491 at 493.

<sup>88</sup> David Daubney and Gordon Parry, “An Overview of Bill C-41 (The Sentencing Reform Act)” in *Making Sense of Sentencing*, Julian V Roberts and David P Cole, eds (Toronto: University of Toronto Press, 1999) 31 at 34.

number of factors in sentencing.<sup>89</sup> In addition, expressing sentencing principles that would promote rehabilitation, the Bill also created a new non-custodial sentencing option, conditional sentences, and set out when alternatives measures to *Criminal Code* sentencing could be used—though the nature of those alternative measures were left to the individual Attorneys General in the Provinces.<sup>90</sup> The remedial purpose of Bill C-41 reflected an approach that several parliamentary reports and Law Reform Commission of Canada reports had called for since the 1970s. In *A Report on Dispositions and Sentences in the Criminal Process—Guidelines—1976*, the Law Reform Commission of Canada lamented that the *Criminal Code* “lacked a coherent sentencing structure” and recommended the enactment of legislation that would impose imprisonment as a sentence of last resort.<sup>91</sup> Similar recommendations flowed from *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release, and Related Aspects of Corrections*, a report of the 1987 House of Commons Standing Committee on Justice chaired by David Daubney.<sup>92</sup>

Most important to the analysis of Bill C-41 for the purpose of this paper, however, is that the reforms added section 718.2(e) requiring “particular attention to the circumstances of aboriginal offenders” in the consideration of “all available sanctions other than imprisonment.” The particular attention Parliament directed at indigenous offenders in 718.2(e) reflected the concerns about the overrepresentation of indigenous offenders in

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<sup>89</sup> The amendments Bill C-41 contained are reproduced in Appendix A to this thesis.

<sup>90</sup> Daubney and Parry, *supra* note 88.

<sup>91</sup> Law Reform Commission of Canada, *A Report on Dispositions and Sentences in the Criminal Process—Guidelines, 1976* (Ottawa: Minister of Public Works and Services, 2006) at 65-66, 75.

<sup>92</sup> David Daubney, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release, and Related Aspects of Corrections* (Ottawa: Ministry of Supply and Service, 1988); Daubney and Parry, *supra* note 88 at 32.

the Canadian criminal justice system. At the first meeting of the Standing Committee hearings on Bill C-41, the then Justice Minister, the Hon. Alan Rock, told the Committee:

[t]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. [...] Nationally, aboriginal persons represent about 2 percent of Canada's population, but they represent 10.6 percent of persons in prison. Obviously, there's a problem here.

What we're trying to do, particularly having regard to the initiatives in the aboriginal justice communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with protection of the public—alternatives to jail [...].<sup>93</sup>

The reports on sentencing leading up to Bill C-41 supported creating alternatives to imprisonment for indigenous offenders. The Law Reform Commission specifically supported diversion measures and victim-offender reconciliation for indigenous offenders and codifying the recommendation for diversion in the Code. The basis for that recommendation was the premise that “rehabilitation and reconciliation are important for aboriginal communities.”<sup>94</sup> As Sanjeev Anand says, “it is indisputable that s. 718.2(e)’s purpose is to help ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges, where appropriate, to have recourse to a restorative approach to sentencing.”<sup>95</sup>

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<sup>93</sup> House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* in Official Report of Debates (Hansard), 35th Parl, 1st Sess, Vol 144, No I-62 (November 17, 1994) (Hon Alan Rock); It is worth noting that the First Nations communities appearing before the Standing Committee discussed how they viewed 718.2(e) as a tool to develop aboriginal justice systems: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* in Official Report of Debates (Hansard), 35th Parl, 1st Sess, Vol 144, No I-79 (February 14, 1995) (Blaine Favel); House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* in Official Report of Debates (Hansard), 35th Parl, 1st Sess, Vol 144, No I-88 (March 2 1995) (Ovide Mercredi).

<sup>94</sup> Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 70; Michael Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities” (1992) 26 UBC L Rev 141 at 170-87.

<sup>95</sup> Anand, *supra* note 77 at 416.

The *Criminal Code* gave no specific indication of what constituted “particular circumstances of aboriginal offenders”. That task has been left to the courts and the same sentencing process that has asserted sovereignty over indigenous people since the implementation of colonial criminal justice. The Supreme Court has defined the “particular circumstances of aboriginal offenders” in a way that relies on the notion of indigenous difference and considers indigenous identity a factor to be negotiated and accommodated in the sentencing process, as *R. v. Gladue*<sup>96</sup> demonstrates. In *Gladue*, the Supreme Court of Canada set out how the particular circumstances of an aboriginal offender should be taken into consideration in sentencing. Jamie Tanis Gladue, a Cree woman residing in an urban area off reserve, pled guilty to manslaughter after stabbing her husband and causing his death. She was intoxicated at the time. At the sentencing hearing, the trial judge considered several of the aggravating and mitigating factors and sentenced her to three years imprisonment. Gladue appealed to the Alberta Court of Appeal and then the Supreme Court of Canada on the basis that the trial judge erred in failing to apply section 718.2(e) because he did not consider Gladue’s status as Cree to be a special circumstance that he needed to take into consideration.<sup>97</sup> The Supreme Court found the trial judge erred in failing to consider section 718.2(e). Reflecting on the legislative history of section 718.2(e), the Court recognized the overincarceration of indigenous people in Canada and the power the sentencing process held over indigenous people:

The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the

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<sup>96</sup> *Gladue*, *supra* note 9.

<sup>97</sup> *Ibid* at paras 19 & 24.

Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

[...]

Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.<sup>98</sup>

The Court's reasoning reinforces the idea that the state has the power and responsibility to remedy indigenous people's overincarceration and the social problems that overincarceration reflect. Agency and authority are not given to indigenous people; there is a failure to recognize that dislocation in indigenous communities is related to the history of occupation by the Canadian state that the criminal justice system continues to represent. The Court does acknowledge that indigenous offenders suffer unique systemic and background factors in the criminal justice system "because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions."<sup>99</sup> The acknowledgement might have opened an argument into the role of the criminal justice system and sentencing in asserting sovereignty over indigenous people in Canada. The Court's way to restore the balance of power is not, however, to restore indigenous authority. Instead, it is to create a new area of authority for the criminal justice system

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<sup>98</sup> *Ibid* at paras 64-65.

<sup>99</sup> *Ibid* at paras 61-65 & 68.

that incorporates the Court's view of indigenous identity into the sentencing process. It suggests a methodology for sentencing indigenous offenders that includes considering the systemic and background factors affecting an offender and crafting the sentencing process and the sanctions imposed in accordance with an aboriginal perspective.<sup>100</sup> The Court's sense of indigenous identity is one of impoverished socio-economics and marginalization to be remedied through a return to tradition and historical ideas of indigeneity.

The Court's view of the way indigenous identity should be conceived of in the sentencing process is exemplified in this excerpt of *Gladue*:

When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.<sup>101</sup>

Once again, the Court acknowledges that the criminal justice system in Canada has asserted sovereignty over indigenous people through punishment. That assertion of sovereignty has used the colonial state's understanding of legitimacy to rationalize punishing indigenous people rather than allowing indigenous people to govern themselves in the criminal justice system. *Gladue* does not give indigenous people authority to reclaim the legal traditions that would involve punishing their own people. Instead, the Court sees them as healing traditions, taking a firm approach in

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<sup>100</sup> *Ibid* at para 67-74.

<sup>101</sup> *Ibid* at para 81.

characterizing traditional indigenous law as primarily “restorative”.<sup>102</sup> The decision describes restorative justice as:

an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender.<sup>103</sup>

Those “needs” are constructed in *Gladue* in a way that characterizes indigenous identity in sentencing as victimized by systemic and direct discrimination, suffering from dislocation, and substantially affected by poor social and economic conditions. The Court’s characterization of indigenous identity and indigenous offenders is one trial judges across Canada follow as precedent.<sup>104</sup> It is important to consider what the impact of both appropriating indigenous identity and essentializing that identity as victimized, dislocated, and poor has on indigenous communities and offenders agency over the sentencing process. The Supreme Court in *Gladue* portrays the rationale for adopting 718.2(e) as one of accommodation of indigenous people on the basis of this essentialized, paternalistic depiction of indigenous identity. The state becomes a kind of trustee for indigenous people, tasked with remedying the disadvantage *Gladue* describes. It has the effect of placing indigenous offenders in a similar position in the criminal law as an offender with diminished capacity for responsibility, such as the mentally ill or youth. It is a logic for which sentencing is particularly well-suited given its propensity to use

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<sup>102</sup> *Ibid* at para 79.

<sup>103</sup> *Ibid* at para 71.

<sup>104</sup> Although it is not possible to consider the legal and sociological literature and case law regarding the application of *Gladue* here, it is safe to say that sentencing judges differ in its application: see Andersen, *supra* note 77; Roach and Rudin, *supra* note 77; Margot Hurlbert and John Mackenzie, “The Criminal Justice System and Aboriginal People” in *Moving Toward Justice*, John D Whyte, ed (Saskatoon: Purich Press: 2008)

individual offender's character and identity to determine the extent of criminal responsibility as well as its role in upholding the state's authority. *Gladue* does not mean the state has any less authority to punish indigenous offenders, but it does mean that the rationale used to punish indigenous offenders must take on a new mantle, one that has the guise of indigenous authority in the form of restorative justice and healing as part of the rationale of punishment. Modern sentencing has reinterpreted indigenous practices and then adopted those practices to claim indigenous tradition in a way that legitimizes the current criminal justice system in Canada.

**c. Maintaining Sovereign Space in Sentencing**

Through section 718.2(e) and *Gladue*, indigenous identity continues to be appropriated in sentencing. The state gives the criminal justice system authority to characterize and apply indigenous legal traditions in expressing the rationale for punishment. In addition, indigenous people are characterized in a way that essentializes indigenous identity both in the socio-economic position of indigenous people and in the all-encompassing view of indigenous legal tradition that maps the modern concepts of restorative justice onto the indigenous legal traditions that the criminal justice system has usurped. The continued appropriation and essentialization calls into question how the *Criminal Code* could ever create space for indigenous identity in the criminal justice system. The twofold problem *Gladue* reveals in appropriating indigenous identity and also essentializing indigenous identity is not directly engaged by criticisms of the decision in the literature, though both *Gladue* and 718.2(e) have attracted criticism. The inclusion of the need to pay particular attention to the circumstance of aboriginal offenders was one that met with criticism, much of which involved concern that there would be disparate sentences for indigenous

offenders or that less punitive sentences would endanger the community.<sup>105</sup> The decision has also attracted criticism from feminists who argue that the decision's emphasis on restorative justice practice overlooks the gender dimensions of crime and victimization in aboriginal communities.<sup>106</sup> Finally, *Gladue* faces the critique that decisions made under its framework essentialize indigenous people and indigenous culture in a way that reinforces historical stereotypes.<sup>107</sup> By analyzing the criticisms of *Gladue* from the perspective of the relationship between asserting sovereignty and appropriating identity on the basis of indigenous difference, it is also possible to understand how *Gladue* is a way that Canada maintains sovereign space over indigenous people.

First, in the application of *Gladue* indigenous tradition is formulated and set up in contrast, and even in contradiction, to the unitary values of the Canadian criminal justice system; Canada's criminal justice system is depicted as "retributive" whereas indigenous models of justice are depicted as "restorative." Len Sawatsky, for instance, has characterized the Canadian criminal justice system in exactly such an oppositional way.<sup>108</sup> Rupert Ross's work depicting his understanding of indigenous difference also relies on the notion that indigenous people have an understanding of dealing with crime

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<sup>105</sup> Roach and Rudin, *ibid*; Andersen, *ibid*; See also the Pauktuutit Inuit Women Association's submission to the Standing Committee on Justice and Legal Affairs: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* in Official Report of Debates (Hansard), 35th Parl, 1st Sess, Vol 144, No I-85 (February 28, 1995) [Pauktuutit Submission].

<sup>106</sup> See e.g. Angela Cameron, "R. v. *Gladue*: Sentencing and the Gendered Impacts of Colonialism" in John D. Whyte, ed, *Moving Toward Justice* (Saskatoon: Purich Publishing Ltd., 2008); Emma Larocque "Re-examining Culturally Appropriate Methods in Criminal Justice Applications" in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch, ed. (Vancouver: UBC Press, 1997).

<sup>107</sup> Cameron, *ibid*.

<sup>108</sup> Len Sawatsky, "Self-Determination and the Criminal Justice System" in *Nation to Nation*, D Engelstad and John Bird, eds, (Toronto: Anasi, 1992).

that contradicts principles of the Canadian criminal justice system.<sup>109</sup> Michael Jackson lays out a framework for indigenous justice systems that parallels the idea indigenous legal systems are restorative or reconciliatory; his purpose to show that recognition of indigenous legal systems compliments the way the Canadian criminal justice system is moving—toward remedial measures and rehabilitation. He summarizes the series of reports and inquiries that recommended changes to Canada’s sentencing process and argues that the recommended changes compliment indigenous legal systems’ approach to crime.<sup>110</sup> I point this out not because I perceive a problem with remedial measures or restorative justice, but because characterizing indigenous traditions as oppositional to the Canadian criminal justice system is problematic for a number of reasons. First, equating indigenous culture and law with restorative justice incorrectly conflates indigenous legal systems with Western notions of restorative justice.<sup>111</sup> Restorative justice allows for ideas of “diversion” or “sentencing circles” to exist within the criminal justice system rather than mandating the creation of a different criminal justice system for indigenous people. Canadian criminal justice authorities, like police or crown prosecutors, decide who may be diverted or how the sentencing circle is constituted. By conflating indigenous legal systems with the idea of restorative justice that deals with indigenous through diversion in the *Criminal Code*’s process of sentencing, the criminal justice system remains the site in which to negotiate indigenous cultural difference. Indigenous communities must fit themselves into the spaces the criminal justice system creates in sentencing and acquiesce to the same sentencing process that historically appropriated

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<sup>109</sup> Rupert Ross, *Dancing with a Ghost* (Markham: Reed Books Canada, 1992).

<sup>110</sup> Jackson, *supra* note 94.

<sup>111</sup> See e.g. Monture, *supra* note 78; Larocque, *supra* note 106.

indigenous identity for the purpose of asserting sovereignty. The logic, procedures, and language of sentencing remain that of the colonial state, maintaining the sovereign authority of the Canadian criminal justice system over indigenous people.

Second, indigenous identity is essentialized in a way that can perpetuate problematic stereotypes that were the basis for asserting sovereignty over indigenous people and appropriating indigenous identity in the first place. To assume a conception and identification of indigenous tradition separate and apart from the experience of colonialism may not be possible. Emma Larocque argues that “typologizing Aboriginal cultures results in gross generalizations, draws on stereotypes, reduces Aboriginal culture to a pitiful handful of ‘traits’, and by oversimplifying, ends up infantilizing the very cultures Aboriginal people are trying to build up in the eyes of colonizers.”<sup>112</sup> Larocque’s argument about gender is a good example of the problematic stereotyping that essentializing indigenous identity creates. She argues that gender is often at the heart of what becomes typologized as indigenous tradition and that typologizing frequently creates new problems around gender and what is “authentically” indigenous. She asserts that that notion of justice and the role of women in indigenous societies in relation to criminal justice “is actually syncretized fragments of Native and Western tradition which have become highly politicized because they have been created from the context of colonization.”<sup>113</sup> Larocque’s concern was in fact one brought to the attention of the Standing Committee on Justice and Legal Affairs in its consideration of Bill C-41 by Pauktuutit Inuit Women’s Association of Canada.<sup>114</sup> The way gender engages questions

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<sup>112</sup> Larocque, *ibid* at 77.

<sup>113</sup> *Ibid* at 76.

<sup>114</sup> Pauktuutit Submission, *supra* note 105 at 6 & 19 (Martha Flaherty and Jeanne Sala).

of culture serves as an example of the problematic way the dichotomized notions of “traditional” and “Western” justice manifest themselves in public discourse about criminal law as it affects indigenous people.

Third, and finally, both the continued appropriation of indigenous identity and the discourse around the nature of “traditional” indigenous versus “Western” legal tradition completely shifts the argument from the issue of why the assertion of Canadian sovereignty and appropriation of indigenous identity in the sentencing process is problematic in the first place to what the best forum is for asserting sovereignty or appropriating identity might be. It is, in essence, accommodation rather than transformation.<sup>115</sup> Indigenous scholars, such as Monture, argue that reclaiming indigenous notions of justice is not a matter of accommodation; Monture herself said, “I do not want to be accommodated.”<sup>116</sup> Accommodation, however, has continued in the form of interpreting section 718.2(e) through *R. v. Gladue* and the application of *Gladue* to subsequent cases in the sentencing process. While the application of *Gladue* may be uneven, there is no move to create a legal system beyond accommodation through the sentencing process.<sup>117</sup> It becomes instead an argument about how to accommodate or recognize indigenous difference in the criminal justice system. Accommodation itself is less about accommodation than it is about insuring the claims of indigenous people to authority over the criminal justice system remain articulated in the language and procedures of the colonizer.

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<sup>115</sup> I use “transformation” in the sense Nancy Fraser does in “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age” (July/August 1995) 212 *New Left Review* 71 to indicate deeper shifts to political and economic power, though I do not adopt her argument in its entirety in that regard.

<sup>116</sup> Monture, *supra* note 78 at 228.

<sup>117</sup> Andersen, *supra* note 77; Roach and Rudin, *supra* note 77.

**Conclusion: Sentencing, Sovereignty, and Transformation**

Indigenous identity was historically a target for the criminal justice system because the criminal justice system was an important tool in the domination and colonization of indigenous communities in Canada. Indigenous people in Canada continue to be differentiated in the criminal justice system on the basis of their identity in the sentencing process, and indigenous identity continues to suffer distortion at the hands of the criminal justice system. In the sentencing process, the criminal justice system reveals the political position of indigenous people in the Canadian state. Through characterization of individual indigenous offenders' identities, modern sentencing interprets indigeneity and indigenous law in a way that reinforces the legitimacy of the Canadian state's authority over indigenous people. In understanding indigenous offenders in the sentencing process through the lens of Crown sovereignty, the criminal justice system thus appropriates indigenous identity for the purpose of asserting sovereignty over indigenous people. In the appropriation of indigenous identity, a problem of essentialism also arises because when appropriating indigenous identity, the criminal justice system often distorts that identity. While the current effort of the criminal justice system in differentiating offenders based on their indigenous identity is one based on alleviating the historic injustice of the colonial criminal justice system, the differentiation has not responded to indigenous concerns regarding how the criminal justice system maintains Crown sovereignty. Thus, in the very effort to make the criminal justice system inclusive for Canadian indigenous people and indigenous perspectives through sentencing, sentencing perpetuates historic injustice.

Given the integral role the Canadian criminal justice system played in imposing colonial frameworks on indigenous people, it is difficult to understand how essentializing

indigenous identity in sentencing has not resulted in agitation to diminish the emphasis of indigenous difference in the criminal justice system or richer notions of what constitutes indigenous identity—ones that imagine diversity in the indigenous experience. As critical as scholars remain of the proclivity of the criminal justice system to equate indigenous legal traditions with modern notions of restorative justice, indigenous communities continue to participate in the diversions and alternative measures that are subject to critique. It appears to be a contradiction, but if one considers the jeopardy indigenous offenders face from systemic discrimination or overincarceration, their communities' participation despite the critiques is understandable. Effectively, what other choice do indigenous people have? A failure to participate in sentencing means eschewing involvement in the criminal justice system altogether and leaving indigenous offenders to be incarcerated. Moreover, indigenous dissent or withdrawal from sentencing circles may be interpreted as a failure of indigenous law rather than the failure of the state to apply indigenous law. The depiction of indigenous “primitivism” was once used as the justification for colonial and assimilationist policies and institutions, such as bringing indigenous people into the framework of Canadian criminal law.<sup>118</sup> The dialogue about fragmented indigenous tradition and gender roles, for instance, could be used in a similar way to deploy state action in a way that continues to reinforce Crown sovereignty by using the need to protect indigenous women as the reason for state imposition of criminal justice on indigenous people. Another way to understand the dialogue around the distinction between “Western” and “traditional” difference lies in current Supreme Court of Canada jurisprudence. Canada's indigenous communities must

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<sup>118</sup> *Bridging the Cultural Divide*, *supra* note 53 at 12-16.

continuously justify aboriginal rights as aspects of indigenous culture, a result of the “integral to distinctive culture” test articulated in *R. v. Van der Peet*.<sup>119</sup> If they cannot, their aboriginal rights claims are denied. For Canadian indigenous communities pursuing their right to self-determination through the legal system as aboriginal rights, the consequence of a denied aboriginal rights claim can be devastating. The imagined result in the criminal justice system if the treatment of offenders could not be framed in cultural terms would be even more devastating given the number of indigenous Canadians already incarcerated in the criminal justice system.

If there is to be a shift away from a criminal justice system that appropriates indigenous identity for the purpose of asserting Canadian sovereignty, however, it must involve transformative change. The question that necessarily follows from the need for a transformative shift is: what constitutes transformative change? And is that possible given how the criminal justice system necessarily asserts sovereignty and appropriates identity? To venture into exploring the alternatives to the current constitution of the criminal justice system, some indigenous authors have given us the tools to create a framework for a new process. Patricia Monture is one such author, and she advocates a “revolution” and a return to traditional indigenous legal traditions. Although Monture does not give much insight into how traditional legal systems might function, Taiaiake Alfred, another Mohawk scholar, provides further insight into what such a “revolution” may involve. Alfred opposes engaging in Canada’s liberal democratic state structures, which he argues are the source of indigenous oppression and have “polluted” indigenous

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<sup>119</sup> *R v Van der Peet*, [1996] 2 SCR 50.

people to make them “cultural blanks”.<sup>120</sup> He believes, “there is a need for morally grounded defiance and non-violent agitation combined with the development of a collective capacity for self-defence, so as to generate within the Settler society as reason and incentive to negotiate constructively in the interest of achieving a respectful coexistence.”<sup>121</sup> Alfred argues for an anarcho-indigenous theory through which indigenous communities can resist the mechanisms of the colonial state and achieve political autonomy. John Borrows, on the other hand, argues for a reconciliatory approach. Borrows sees in Canada’s liberal democratic legal structures the potential for tolerance and respectful coexistence and an “openness and a freedom” where indigenous legal traditions can thrive alongside the Canadian common law legal tradition.<sup>122</sup> In my view, therefore, to endorse a particular approach is premature.

While there are a great many reports on the way the criminal justice system fails indigenous people and efforts at framing how to make transformative change, as Carol LaPrairie once said, “the results are long on recommendations, but short on data.”<sup>123</sup> My focus is not specific recommendations. There is a need for greater research about the particular sources of the failure before launching into solutions. It could be the criminal justice system is one where state sovereignty, appropriation of identity, and indigenous difference are inextricably linked. Even if one could untie the knot that binds these three aspects of the criminal justice system together in the sentencing process, colonialism and the modern realities indigenous communities face leave little room for indigenous legal

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<sup>120</sup> Taiaiake Alfred, *Wasá'se: indigenous pathways of action and freedom* (Toronto: Broadview Press, 2005) at 11.

<sup>121</sup> *Ibid* at 27.

<sup>122</sup> Borrows, *Canada's Indigenous Constitution*, *supra* note 79 at 125 & 238.

<sup>123</sup> Carol LaPrairie, “Sentencing Aboriginal Offenders: Some Critical Issues” in *Making Sense of Sentencing*, Julian Roberts and Judge David Cole, eds, (Toronto: University of Toronto Press, 1999) 173 at 175.

structures to impose punishment. More careful research and analysis is necessary to consider the nature of the criminal justice system and its role in asserting sovereignty and appropriating identity. To institute transformative change, we must first tease apart the fabric that bind indigenous and non-indigenous people together in the Canadian state, particularly in the criminal justice system. It may be we discover there are fundamental things about criminal justice that would require changing the criminal justice system overall before any transformative change can take place for indigenous people. The intent of this thesis is to be one step in that process.

In this chapter, I have explored the links between identity and sovereignty in the way criminal justice system understands indigenous difference. Nowhere is this more palpable than the newly created Nunavut Territory. Nunavut is one of the areas in which the criminal justice system with respect to indigenous people is the longest on recommendations and shortest on data. Research in the Arctic generally suffers from a number of challenges, as Kenneth Coates and William Morrison note when they characterize Canadian historiography “like small spots on an open landscape, instructive and often extremely professional, but without the numbers and reach necessary to create a wider impact.”<sup>124</sup> Research into the criminal justice system in Nunavut faces similar challenges. A few studies into the criminal justice system in Nunavut have taken place but there remain many unexplored areas and unanswered questions.<sup>125</sup> Created in 1999

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<sup>124</sup> Kenneth Coates and William Morrison, “The New North in Canadian History and Historiography” (2008) 6:2 *History Compass* 639 at 646 [“The New North”].

<sup>125</sup> See e.g. Mary Beth Levan, *Creating a Framework for the Wisdom of the Community: Review of Victim Services in Nunavut, Northwest and Yukon Territories* (Ottawa: Canada Department of Justice, 2004); IER Dennis G. Patterson, *Nunavut Legal Services Study: Final Report* (Ottawa: Canada Department of Justice, 2004); Pauktuutit Inuit Women Canada, *Inuit Healing in Contemporary Inuit Society* (Ottawa: Pauktuutit Women Canada, 2004); Pauktuutit Inuit Women Canada, *Research Report: Applying Inuit Cultural Approaches in the Prevention of Family Violence and Abuse* (Ottawa: Pauktuutit Inuit Women Canada, 2005); Allan J Patenaude, *Crime and Criminal Justice in Nunavut: An Exploration in Aboriginal Peoples*

as a result of Inuit political mobilization, the Nunavut Territory is particularly well-situated as a study of the interaction between the assertion of sovereignty and the appropriation of identity on the basis of indigenous difference in the criminal justice system. Balanced and careful research about the interaction into the criminal justice system in Nunavut becomes even more critical when one considers today's increasing concern with crime and violence in the Territory.<sup>126</sup> In the next chapter, I will explain why Nunavut serves as a good case study of the relationship between the appropriation of identity and the assertion of sovereignty in Canada's criminal justice system.

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*and Criminal Justice Policy* (PhD Thesis, Simon Fraser University, 1997); Don Avison, Alice MacKenzie, and Helen Tologanak, "The Changing Role of Native Courtworkers" in *Self-Sufficiency in Northern Justice*, Curt T Griffiths, ed, (Northern Justice Society, 1992) 195; Nora Sanders, "Trial Court Unification in Nunavut" in *Canada's Trial Courts*, Peter H Russell, ed, (Toronto: University of Toronto Press, 2007); Howard Finkler, "Community Participation in Socio-Legal Control" (July-October 1992-93) *Can J Crim* 503; Curt T Griffiths et al, *Crime, Law & Justice Among Inuit In The Baffin Region, NWT, Canada* (Burnaby: Criminology Research Centre, Simon Fraser University, 1995) [Griffiths, *Crime, Law & Justice*]; Landau, *supra* note 84; Mariano Aupilaarjuk et al, *Interviewing Inuit Elders: Perspectives on Traditional Law*, vol 2, Jarich Oosten, Frederic Laugrand & Wim Rasing, eds (Iqaluit: Nunavut Arctic College, 1999); Pauktuutit Inuit Women of Canada, *National Strategy to Prevent Abuse in Inuit Communities* (Ottawa: Pauktuutit Inuit Women of Canada, 2006) [Pauktuutit, *National Strategy*]; Qullit Nunavut Status of Women Council, *What Inuit Women Need in Order to Deal with Abuse and Violence* (Iqaluit: Qullit Nunavut Status of Women Council, 2004) [Qullit, *What Inuit Women Need*]; Scott Clark, "The Nunavut Court of Justice: Examples of Challenges and Alternatives for Communities and for the Administration of Justice" (July 2011) *Can J Crim & Crim J* 343

<sup>126</sup> Patick White, "The Trials of Nunavut: Lament for an Arctic Nation", *The Globe and Mail* (April 1, 2011) online: *Globe and Mail* <<http://www.theglobeandmail.com/news/national/nunavut/northern-crime/article1963420/>>.

## **Chapter Two: Appropriating Inuit Identity: Creating Canada, Creating Nunavut**

### **Introduction**

In this chapter I address why Nunavut serves as an excellent case study for the way that the Canadian criminal justice system asserts sovereignty over indigenous people and appropriates indigenous identity through the characterization of indigenous difference in the criminal justice system. The indigenous people of Nunavut are the Inuit and their Arctic homeland is a part of Canada not conducive to the agricultural settlement that characterized settlement of much of the rest of Canada. As a result, Canadian occupation of the Arctic came later in the history of the Canadian nation and differed in nature from the settlement of the rest of the country. As economic activity in the Arctic increased, so did Canada's regulation and control of Inuit. International pressure played a role in this economic interest, as competition from Denmark and the United States over Arctic territory brought to bear how important it was for Canada to maintain sovereignty over the Arctic and the Arctic's resources. The criminal justice system was an established mechanism of regulation and control, and when Canada's interest in asserting sovereignty over the Arctic grew more important, so too did the jurisdiction of the criminal justice system. Inuit resistance and collective Inuit identity creating the Nunavut Territory emerged in this particular political and social context. Canada's occupation of the Arctic not only asserted Canadian sovereignty, but also shaped Inuit understanding of a geopolitical space grounded in Inuit identity and politically connected to the Canadian state. Inuit collective identity in Nunavut is now unseverable from the geopolitical construct of the Nunavut Territory.

In Part I of this chapter, I show how Canada's assertion of sovereignty in the Arctic involved occupying the Arctic's inhabitants, the Inuit. In Part II, I address the role that the law played in occupying Inuit and negotiating Inuit identity, specifically the role of the criminal justice system. In Part III, I consider Inuit perspectives and reaction to Canada's occupation and how Inuit resistance mobilized leaders around the idea of creating Nunavut to reflect Inuit identity and values. Finally, I argue that the creation of the Nunavut Territory as a geopolitical space embodying Inuit identity and values means that the conversation about Inuit identity takes place within the framework of the state. Colonial political and legal institutions like the Nunavut Court of Justice thus necessarily remain a part of the conversation about Inuit identity.

### **Part I: Occupying the Inuit: Asserting Canadian Sovereignty**

Canada's exercise of sovereignty in the Arctic happened through the exercise of authority over Inuit people. The remote and isolated location of the Arctic meant that Canada's historical assertion of sovereignty depended on "effective occupation" that involved administrative, economic and legal occupation of the Inuit rather than the establishment of colonies or the cultivation of land through agriculture.<sup>127</sup> The physical assertion of Canadian sovereignty in the Arctic was ambiguous and Canada's role in the Arctic was uncertain until the 20th century. Inuit inhabitants of the Arctic lived primarily nomadic lifestyles in camps where traditional Inuit legal and cultural perspectives governed relationships between individuals and communities governed more than colonial

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<sup>127</sup> Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2010) at 20 [*Polar Imperative*]; see also James Cavell and Jeff Noakes, *Acts of Occupation* (Vancouver: UBC Press, 2010); Peter Kulchyski and Frank Tester, *Tammarnitt (mistakes): Inuit Relocation in the Eastern Arctic 1939-1963* (Vancouver: UBC Press, 1994) [*Tammarnitt*]; Peter Kulchyski and Frank Tester, *Kiumajut (talking back): game management and Inuit rights, 1900-70* (Vancouver: UBC Press, 2007) [*Kiumajut*].

officials.<sup>128</sup> Economic concerns and international pressure meant that Canada needed to maintain a presence in the Arctic, but bureaucracy and government officials were slow in instituting any policies bringing direct Canadian government administration to the Arctic. Even after the provinces of Alberta and Saskatchewan were created, the Arctic region remained part of the Northwest Territories under the direction of a Commissioner in Ottawa.<sup>129</sup> Capacity to administer Arctic territory was at issue, but as Canada's economic interest in the Arctic grew and its sense of nationhood developed, so did Canadian interest in asserting sovereignty over the Arctic. Canada developed a sense of being a "northern nation."<sup>130</sup> In the meantime, the question of whether the Canadian government should take a more active role in the welfare of Inuit through legislation and social welfare policy was hotly debated in the bureaucratic and parliamentary discourse of the time. The debate was framed, however, in terms of the Canadian government's role rather than whether Inuit sought a relationship with Canada. The debate divided public officials: "[i]nternally, the government was torn between those who continued to advocate minimalist or residual approaches to dealing with welfare concerns and others who actively sought to intervene in the growing social and economic problems faced by Inuit."<sup>131</sup> While the policy debate about Arctic occupation in the 20th century concerned Canadian economic interests and international law, the policies implemented involved

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<sup>128</sup> See generally: Aupilaarjuk, *supra* note 125; *Uqalaruit: An Oral History of Nunavut*, John Bennett and Susan Rowley, eds (Montreal: McGill-Queen's University Press, 2004) [*Uqalaruit*]; Saullu Nakasuk, Hervé Paniaq, Elisapee Ootoova and Pauloosie Angmaalik. *Interviewing Inuit Elders: Acknowledgments, Preface, and Introduction*, vol. 1, Jarich Oosten & Frederic Laugrand, eds (Iqaluit: Nunavut Arctic College, 1999) at 6-11, on the nature of Inuit values and Inuit knowledge; see also Dorothy Harley Eber, *Images of Justice: a legal history of the Northwest Territories and Nunavut as traced through the Yellowknife Courthouse collection of Inuit sculpture* (Montreal: McGill-Queen's University Press, 1997) at 15-16; Griffiths, *supra* note 125 at 12, 18-20 & 138-40

<sup>129</sup> See Kulchyski and Tester, *Tammarnitt*, *supra* note 127 at 14; Cavell and Noakes, *supra* note 127.

<sup>130</sup> Grant, *Polar Imperative*, *supra* note 127 at 195-200.

<sup>131</sup> Kulchyski and Tester, *Tammarnitt*, *supra* mpte 127at 19.

occupying the Inuit. In this part of chapter 2, I illustrate the way Canadian policy in the Arctic involved occupying Inuit by considering: first, the way that economics influenced occupation of the Inuit; second, how international pressure motivated Canada to assert sovereignty over Inuit; and finally, the policies implemented that exemplify how Canada's assertion of sovereignty in the Arctic required occupying Inuit.

Economic occupation was the initial mode of asserting sovereignty over Inuit people, both through whaling and through the fur trade. The British government had assumed sovereignty over the Canadian Arctic in its colonization of Canada. The earliest economic opportunists left their mark on the geography of the Arctic with the support of the British Crown, attaching names such as Frobisher, Hudson, and Bylot to Arctic spaces. In 1670 Britain granted economic rights over Arctic territory to the Hudson's Bay Company as part of Rupert's Land. As a result, the Hudson's Bay Company had a license to conduct trade with Inuit and that insured continual British presence in the Arctic with its ships and trading posts.<sup>132</sup> The Hudson's Bay Company sold its interest in Rupert's Land to Canada in 1870, and the British transferred their remaining interest in the Arctic to the Dominion of Canada in 1880.<sup>133</sup> The status of the Arctic's Inuit inhabitants was neither a matter raised in these transfers of Arctic territory, nor an issue considered at Canada's Confederation in 1867.<sup>134</sup> At the time, the region was under exploration, territorial boundaries were unclear, and much secret diplomacy governed the

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<sup>132</sup> Grant, *Polar Imperative*, *supra* note 127 at 78-92.

<sup>133</sup> *Ibid* at 95.

<sup>134</sup> Kulchyski and Tester, *supra* note 127 at 14-15; Ian Creery, "The Inuit (Eskimo) of Canada" in *Polar Peoples: self determination and development*, Minority Rights Group, ed (London: Minority Rights Publications, 1994) 105 at 110.

final transfer of land from Britain to Canada.<sup>135</sup> Moreover, Canada was by no means ready to govern the vastness of the Arctic territory. As Shelagh Grant points out, in 1880 Canada was “a large nation bounded by three oceans, but with scant population, no navy to protect adjacent waters and only a rudimentary infrastructure to govern the newly acquired lands.”<sup>136</sup> The Hudson’s Bay Company offered a practical means for exercising sovereignty. The Company took Inuit furs in exchange for weapons and other imported goods, and to some extent the barter system encouraged Inuit to become dependent on the fur trade and the trading posts.<sup>137</sup> In some parts of the Arctic, the Hudson’s Bay Company fostered Inuit dependency on the fur trade by carrying Inuit debts for Company goods on their books. When the Company became unwilling to carry the debts, the Canadian government instead provided relief payments to Inuit. Provision of government relief not only assisted Inuit, but also served the purpose of demonstrating Canadian federal government occupation of the region.<sup>138</sup> Although more research is necessary to determine the extent of Inuit participation in Canada’s economic decisions, existing sources suggest Inuit participation in the decisions to transfer of land, engage in trade, and provide government relief was at best indirect and perhaps nonexistent.<sup>139</sup>

International pressures interacted with economic interests to motivate Canada’s interest in asserting sovereignty over the Arctic. The United States, Britain, and Denmark were among the countries with economic interests in the Arctic that threatened Canada’s

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<sup>135</sup> Cavell and Noakes, *supra* note 127; Grant, *Polar Imperative*, *supra* note 127 at 155-92, describing the uncertainty of the boundaries of the Arctic Islands.

<sup>136</sup> Grant, *ibid* at 8; see also Cavell and Noakes, *ibid* at 136-39.

<sup>137</sup> Marybelle Mitchell, *From talking chiefs to native corporate élite: the birth of class and nationalism among Canadian Inuit* (Montreal: McGill-Queen’s University Press, 1996) at 67-72; Kulchyski and Tester, *Tammarnitt*, *supra* note 127 at 20-28, 30-32.

<sup>138</sup> Kulchyski and Tester, *Tammarnitt*, *ibid* at 20-28, 30-32; Cavell and Noakes, *supra* note 127.

<sup>139</sup> See e.g. Mitchell, *supra* note 137 at 56, 61, 84-86.

sovereignty.<sup>140</sup> The Alaska Boundary Dispute is one example of how Canadian and American interests conflicted in the Arctic, and that experience made Canada aware that it needed to “show the flag” in its Arctic territories to preserve sovereignty.<sup>141</sup> Kulchyski and Tester argue that the Canadian claim to Arctic sovereignty faced three challenges from the international community. First, Scottish whalers operated whaling bases in the Arctic, in particular a hub on Herschel Island.<sup>142</sup> Second, British, American, and Scandinavian explorers and scientists made “discoveries” in the Arctic that Canada feared they would claim on behalf of their own nations.<sup>143</sup> Finally, it came to the Canadian government’s attention in 1919 that Greenlandic Inuit travelled across Northwestern Greenland to Ellesmere Island in the high Arctic to hunt for musk-ox, raising the spectre that Denmark would lay claim to Ellesmere Island.<sup>144</sup> In 1903, the Canadian government responded to sovereignty concerns by establishing three police posts in the Arctic and sending the ship *Neptune* on a patrol around Baffin Island and Ellesmere Island to “show the flag.”<sup>145</sup> In addition, Canada faced an evolving definition of the meaning of “effective occupation” in international law. Effective occupation was a means to claim sovereignty through “the provision of basic services, administrative structures for governance and enforcement of a nation’s laws and regulations.”<sup>146</sup>

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<sup>140</sup> Creery, *supra* note 134 at 111; Cavell and Noakes, *supra* note 127.

<sup>141</sup> Grant, *Polar Imperative*, *supra* note 127 at 115-33; 194; William Morrison, *Showing the Flag: the Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: UBC Press, 1985) at 72, 78-79. Note: Herschel Island is off the shore of the border between the Yukon and the Northwest Territories.

<sup>142</sup> See also Mitchell, *supra* note 137 at 88.

<sup>143</sup> See also Grant, *Polar Imperative*, *supra* note 127 at 168-69, explaining how the international science of polar exploration often served nationalistic ends.

<sup>144</sup> Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 14-15.

<sup>145</sup> *Ibid* at 15; Grant, *Polar Imperative*, *supra* note 127 at 201-207.

<sup>146</sup> Grant, *ibid* at 12; see also Morrison, *supra* note 141 at 88.

Canada's policy choices needed to conform to international legal norms that justified Canada's assertion of sovereignty over Arctic territory through the occupation of Inuit people. What territorial claims the Inuit inhabitants of the Arctic possessed beyond the way that Inuit facilitated the nations' assertions of Arctic sovereignty was barely a consideration. International law recognized the acquisition of sovereignty over territory through the occupation of indigenous inhabitants, because international law of the day did not recognize indigenous social orders as states.<sup>147</sup> Inuit could nonetheless support Canada's assertion of sovereignty; as Marybelle Mitchell argues, the Canadian state viewed Inuit as "squatters" whose presence supported Canada's claim to sovereignty.<sup>148</sup> Canada's interest in Inuit welfare was related therefore to international pressure and the understanding that Canada had to assert effective occupation of Arctic territory through Inuit inhabitants of the Arctic; Canadian sovereignty was asserted by Inuit.

Contact between *Qallunaat* (non-Inuit) and Inuit took place when whalers, explorers, missionaries, and Hudson's Bay Company officials in the Arctic, but it was not until the early 20th century that the Canadian government developed a policy of occupying the Arctic that involved fundamental changes to the lifestyle of Inuit and a greater need to control the spaces Inuit occupied.<sup>149</sup> In the 1920s and the 1930s, the Inuit would face social and economic problems related to their contact with *Qallunaat*: the diseases traders, missionaries, and explorers carried, as well as economic strategies connected to

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<sup>147</sup> Grant, *Polar Imperative*, *supra* note 127 at 15-18, 23; Cavell and Noakes, *supra* note 127 at 66-68.

<sup>148</sup> Mitchell, *supra* note 137 at 82.

<sup>149</sup> For an account of the debate regarding Inuit welfare and Canadian involvement in the Arctic: see generally Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 16-28. For historiography and history of the Arctic: see generally, Coates and Morrison, "The New North" *supra* note 124; Price, "The North", *supra* note 44.

the *Qallunaat* world.<sup>150</sup> The Second World War brought a new reminder of international pressure in the form of the United States' military presence in the Arctic.<sup>151</sup> The policy Canada developed to assert sovereignty over the Arctic after the Second World War involved the greatest exercise of authority over Inuit in the history of Canada's relations with Inuit people. In the mid-twentieth century, the Canadian government, through relocation and settlement, encouraged Inuit to move to communities where they would eventually build houses and be expected to establish non-Inuit, "settler"-type lifestyles.<sup>152</sup> Government policies shifted to reflect the interaction of these economic and geopolitical interests in a way that involved more direct governance of Inuit. The Canadian government instituted an education program directed to inculcate Inuit women in the Canadian women's "kitchen culture" of the 1940s and 1950s, including a *Book of Wisdom* instructing Inuit women on how to care for their homes.<sup>153</sup> The family allowance (or relief) program became highly regulated and increasingly used as a means of coercing Inuit to live in settlements and send their children to federal schools.<sup>154</sup> Residential schools were established that instituted the now-infamous assimilationist policies that "divorced" Inuit children "from parents and from their parents' lives on the land;" some children were taken out of the Arctic and sent to live with *Qallunaat* families

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<sup>150</sup> Kulchyski and Tester, *ibid* at 20.

<sup>151</sup> Grant, *Polar Imperative*, *supra* note 127 at 247-83, 286-89 and at 13, noting that American military and civilians outnumbered the population of the Yukon and the Northwest Territories combined; Adam Rudolph Marcus, *Relocating Eden: The Image and Politics of Inuit Exile in the Canadian Arctic* (Hanover: University of New England Press, 1995) at 71-72.

<sup>152</sup> Mathieu Charron, Christopher Penney, and Sacha Sénécal, "Police-Reported Crime in Inuit Nunangat" *Statistics Canada Centre for Justice Statistics* (Ottawa: Minister of Industry, 2010) at 5 & 8. Cf David Damas, *Arctic Migrants/Arctic Villagers: Transformation of Inuit Settlement in the Central Arctic* (Montreal: McGill-Queen's University Press, 2002): Damas argues that not all settlement took place under Canadian authority and explores Inuit migration as one of the factors that influenced centralization and relocation to settlements in the central Arctic.

<sup>153</sup> Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 84-86.

<sup>154</sup> *Ibid* at 86-94.

in Canada's urban centres.<sup>155</sup> Inuit tuberculosis patients were sent to sanatoriums in the south often without understanding why and leaving their families behind to wonder about their fate.<sup>156</sup> Inuit even carried evidence of the assertion of Canadian sovereignty on their bodies in the form of dog tags, usually referred to as E-numbers, that the Canadian government assigned to each Inuit person as identification.<sup>157</sup> The policies the Canadian government implemented directly changed Inuit lifestyle and demonstrated Canadian sovereignty in the Arctic.

Perhaps the saddest and most blatant example of Canada's occupation of Inuit as a means of asserting sovereignty in the Arctic is the relocation to the high Arctic of numerous Inuit families in the 1950s.<sup>158</sup> In the mid-1950s, the Canadian government relocated several Inuit families residing in Inukjuak in Northern Quebec and Pond Inlet on Baffin Island to Grise Fjord and Resolute Bay on Cornwallis Island. The decision to relocate the Inuit families was taken entirely by the government and was the culmination of decades of urging Inuit settlement in areas connected to Canada's economic and military interests. The Inuit families relocated to the high Arctic had little choice in the matter. Members of the RCMP chose the individuals they believed should relocate, often separating family

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<sup>155</sup> John S Milloy, *"A National Crime": The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 254; See also Janet Mancini Billson and Kyra Mancini, *Inuit Women: Their Powerful Spirit in a Century of Change* (Lanham: Rowman and Littlefield, 2007) at 101-102. For a recent documentary account of the experience of Inuit sent to Canada's urban centres for education, see "The Experimental Eskimos" (White Pine Pictures, 2009).

<sup>156</sup> Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 48; Mitchell, *supra* note 137 at 119; Mancini Mancini, *ibid* at 106-10. The consequences of transporting Inuit to southern sanatoriums are documented poignantly in "Ce qu'il faut pour vivre (Necessities of Life)" (2008).

<sup>157</sup> Mancini and Mancini, *ibid* at 100; Ann Meekitjuk Hanson, "What's in a Name?" in *Nunavut '99* (Nunavut: Nortext Media and Nunavut Tunngavik Inc) online NTI:  
<<http://www.nunavut.com/nunavut99/english/name.html>>.

<sup>158</sup> For a detailed historical and sociological account of the Canadian government's policy toward Inuit, see Kulchyski and Tester, *Tammarniit*, *supra* note 127 and *Kiumajut*, *supra* note XXX; National Film Board "Broken Promises: The High Arctic Relocation" (1995) and "Place of the Boss: Utshimassits" (1996).

members and pressuring those reluctant to travel. Media correspondence of the day depicted the families as “volunteers”; however, Inuit accounts indicate that the RCMP officers persistently solicited those “volunteers”, and Inuit interpreted the RCMP officers’ requests as commands.<sup>159</sup> The Canadian government’s motivation for the relocation was primarily the perception that resettling Inuit in more remote areas would somehow promote traditional economies, but the idea that Inuit presence reinforced Canadian sovereignty in the northernmost regions of the Arctic was certainly a factor as well.<sup>160</sup> Kulchyski and Tester state:

What started out as a concern for the deteriorating welfare conditions of the Inuit in Arctic Quebec was to become entangled in the minds of some officials within the Department of Resources and Development and the RCMP with concerns about sovereignty and the enforcement of Canadian law in the Arctic Archipelago, both of which were fuelled by cold war fears, Soviet atomic capability, and American military paranoia.<sup>161</sup>

The devastating consequences of the relocation for the Inuit are well-documented. The high Arctic was colder, darker, and more barren than the communities in which the Inuit families had lived prior to the relocation. This vastly different landscape as well as the inadequate food and shelter the Inuit received from the government resulted in illness and starvation for many relocated families.<sup>162</sup> The rationale and consequences of the relocation demonstrate that despite the absence of reserves and settler pressure for land in the Arctic, the Canadian government treated Inuit people in a way that prioritized Canada’s interest in nation-building over the welfare or autonomy of Inuit people.

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<sup>159</sup> Marcus, *supra* note 151 at 79; Kulchyski and Tester, *supra* note 127 at 138-43, 185.

<sup>160</sup> Kulchyski and Tester, *Tammarniit, ibid* at 9, 113-35.

<sup>161</sup> *Ibid* at 119.

<sup>162</sup> See Kulchyski and Tester, *ibid* at 143-84; Marcus, *supra* note 151 at 93-99.

Canada had an interest in having Inuit communities in the high Arctic, so it put Inuit people there and expected Inuit to adapt and demonstrate Canada's assertion of sovereignty in the high Arctic.

Whether as an economic strategy, or a response to international interests, the Canadian government's assertion of sovereignty in the Arctic meant increasing governmental regulation and control of Inuit people. The increasing control and regulation was part of how Canada occupied and created its image as a "northern nation." The Arctic was not a place that settlers in Canada could occupy indigenous territory through agricultural development, so the Canadian government did not occupy the land the way it did south of the tree line. Settlers' hunger for agricultural land in 19th century North America meant that the Canadian state could occupy indigenous territory in Canada through settlement, parceling land to individuals. The Crown negotiated and signed treaties with indigenous people in the 19th century with the intention of gaining title to indigenous land. One million people came to Upper Canada from 1800-1851. In Six Nations' Grand River Lands, for example, settlers often arrived and took up land without applying for legal deeds such that "a large proportion of early nineteenth century Upper Canadian farmers started off as squatters."<sup>163</sup> In the Arctic, on the other hand, no influx of immigrants would mark Canada's claim to Arctic territory. Instead, the Canadian government occupied the people who already lived there, the Inuit who traditionally hunted and made the Arctic their home. Occupying the Inuit started out as an economic occupation, loosely organized, but became increasingly bureaucratic, involving governmental control and regulation. Occupying Inuit also involved imposing Canadian law on Inuit. Law's

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<sup>163</sup> Haring, *White Man's Law*, *supra* note 43 at 41.

role in asserting Canadian sovereignty and occupying Inuit is what I shall explore in Part II.

### **Part II: Occupying the Arctic, Occupying Inuit: Law's Role**

Canadian law, especially the criminal justice system, had a key role to play in the occupation of Inuit; it was the tool of governmental control and regulation and the means of appropriation of Inuit identity. When the Canadian government commenced actively regulating and controlling Inuit life, law was one of the primary tools it used. Canada's assertion of sovereignty through the law depended on a categorization of Inuit identity that differentiated Inuit both from "Indians" and from Canadian citizens, assigning Inuit rights and benefits based on their status as Inuit. Law appropriated Inuit identity by creating and rationalizing the ambiguous political relationship between Inuit and the Canadian government. The criminal justice system had a specific role to play in law's occupation of the Inuit in providing a means to impose state sovereignty on Inuit and to appropriate Inuit identity for the purpose of asserting Canadian sovereignty.

#### **a. Delineating Inuit Identity through the Law**

The Canadian government differentiated between Inuit and non-Inuit on the basis of identity in asserting sovereignty over Inuit people. In the 20th century, litigation defined Inuit as "Indians" for the purpose of federal power, but Inuit were not Indians under the *Indian Act*.<sup>164</sup> Inuit were not Canadian citizens, which was made clear by their exclusion from the benefits of Canadian citizenship and the government's treatment of Inuit in occupying Arctic territory. The debate about where Inuit fell in Canada's depiction of indigenous difference and appropriation of indigenous identity through the law is best

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<sup>164</sup> RS 1985, c I-5, as amended.

illustrated by the Supreme Court reference case *Re: Eskimos*.<sup>165</sup> Through *Re: Eskimos*, Inuit legal status was grounded in the conception of Inuit identity used in colonial legal texts. From this colonial, racially-constructed concept of Inuit identity came the determination of Inuit legal status by the Supreme Court: Inuit were not Indians under the *Indian Act*, but they were not Canadian citizens either. Nonetheless, the Supreme Court decided that the federal government had responsibility for Inuit people. The Canadian government would then use that responsibility to exercise sovereignty over the Arctic through occupying Inuit people.

*Re: Eskimos* remains a quintessential example of the Canadian legal system's assertion of sovereignty over Inuit and how Canadian law constructed and shaped Inuit identity. The case involved a question of territorial jurisdiction, essentially putting at issue how Canadian government could occupy and regulate Inuit people. Unlike the federal government's policy toward Canada's other indigenous people, in the early 20th century there was no established Canadian policy toward Inuit in Canada: no equivalent to the *Indian Act*,<sup>166</sup> no federal statutory definition of "Inuit", and—most importantly for the decision in *Re: Eskimos*—no mention of Inuit in the *British North America Act, 1867*,<sup>167</sup> which assigned areas of federal or provincial responsibility.<sup>168</sup> In *Re: Eskimos*, the question of Inuit legal status in Canada arose after a federal-provincial dispute over the scope of federal responsibility for Inuit under the *British North America Act*. At issue in the dispute was whether the Canadian federal government or the Quebec provincial

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<sup>165</sup> [1939] S.C.R. 104 [*Re: Eskimos*].

<sup>166</sup> Note that an amendment to the *Indian Act* to add responsibility for Inuit was proposed in 1924 but defeated after opposition in Parliament, Arthur Meighen, advocated against it: see Kulchyski and Tester, *Tammarnitt*, *supra* note 127 at 19 and Backhouse, *supra* note 53 at 27.

<sup>167</sup> 30 & 31 Victoria, c 3.

<sup>168</sup> Kulchyski and Tester, *supra* note 127 at 13.

government was responsible for relief payments to Inuit in Northern Quebec during the interwar period. The dispute formed part of the early 20th century debate about whether to provide Inuit with government relief payments.<sup>169</sup> In the 1920s, the Canadian government had given the relief supplies to Inuit and then billed the Quebec government for the cost. In the 1930s, affected by the Depression, the Quebec government protested paying the bills for the relief supplied to Inuit and claimed that Inuit welfare was a federal responsibility alone under s. 91(24) of the *British North America Act, 1867*, which gave responsibility for “Indians” to the federal government.<sup>170</sup> In 1935, the case was referred to the Supreme Court of Canada. The Supreme Court of Canada determined that the term “Indian” in s. 91(24) of the *British North America Act* included “Eskimos”, i.e. Inuit, making Inuit the responsibility of the federal government. The debate over Inuit identity in *Re: Eskimos* made Inuit the objects of a jurisdictional conflict between the Canadian federal government and the Quebec provincial government. Making Inuit part of a jurisdictional conflict assumed a Canadian government had the right to assert sovereignty over the Arctic and, by extension, to occupy Inuit people.

The Supreme Court’s decision in *Re: Eskimos* reflects the colonial, governmental approach to how the Canadian government and the Supreme Court characterized Inuit identity. For one, the use of the term “Eskimos” itself reflects the colonial, objectified manner with which the Court and the government treated Inuit. “Eskimos” or “Esquimaux” is the name Hudson’s Bay Company administrators had given Inuit. It is not an Inuktitut word, nor is it a word Inuit in Nunavut use today beyond historical or

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<sup>169</sup> *Ibid* at 28-37.

<sup>170</sup> Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 32-33.

academic references; for some its colonial origins give it a pejorative connotation.<sup>171</sup> The parties tendered anthropological evidence about race and the proceedings made use of racial terminology concerned with whether Inuit and Indians were different “races”.<sup>172</sup> The Court relied primarily on colonial documents, such as the 1856 and 1857 Hudson’s Bay Company censuses and the 1870 Order-in-Council transferring to Canada power over the Arctic territory.<sup>173</sup> Despite the fact that the outcome of the case would decide what level of Canadian government would take responsibility for the welfare of Inuit people, no Inuit person gave evidence or directly participated in the case.<sup>174</sup> The lack of Inuit participation in *Re: Eskimos* not only disenfranchised Inuit, but also reflected how Canadian authorities viewed indigenous difference as something to be subjected to Canadian sovereignty, a basis on which to occupy territory.

The lack of Inuit participation, the racialized nature of the debate about whether Inuit were Indians, and the question of federal control over Inuit territory constructed Inuit identity in such a way that it justified Canada’s assertion of sovereignty over Inuit people. Law played a special role in the assertion of sovereignty over indigenous people throughout Canada but operated in a unique way for Inuit. Canada did not engage in treaties with Inuit. Canada neither created legislation similar to the *Indian Act*, nor gave Inuit rights as Canadian citizens. Instead, Canada asserted sovereignty over Inuit territory by creating and asserting responsibility over Inuit people through the Canadian

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<sup>171</sup> The use of the word Eskimo is believed to have originated with the Montagnais, or Innu, people and was understood to mean either “eaters of raw meat” or to be a reference to snowshoes: see “Eskimos”, *Encyclopaedia Britannica*, online *Encyclopaedia Britannica*:

<<http://www.britannica.com.ezproxy.library.uvic.ca/EBchecked/topic/192518/Eskimo>>.

<sup>172</sup> Tester and Kulchyski, *Tammarniit*, *supra* note 127 at 35; Backhouse, *supra* note 53 at 18-55.

<sup>173</sup> *Re: Eskimos*, *supra* note 165.

<sup>174</sup> Kulchyski, *supra* note 170 at 2; Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 32; Backhouse, *supra* note 53 at 35, 54.

constitution. The question of territorial sovereignty in the high Arctic was constructed as a constitutional argument through which legal jurisdiction was to be exercised over people not just territory. The legal jurisdiction arising from the constitutional argument rationalized and justified the existing ways that Canada asserted sovereignty over Inuit people: in the case of *Re: Eskimos*, occupying Inuit through providing relief payments. The legal jurisdiction also justified the steps taken in the late 20th century to assert sovereignty over Inuit people, such as the high Arctic relocation, medical intervention, and residential schools, which I discussed in Part I of this chapter. At the same time, the constitutional argument obscured the lack of a treaty with Inuit or any statute that showed the Canadian state had authority to engage in the occupation of Inuit.

**b. Imposing Criminal Law on Inuit**

One of the most important ways that law played a role in occupying Inuit people and the focus of this work was through the criminal justice system. The criminal justice system played a significant role in Canada's assertion of sovereignty over Inuit. The criminal justice system's involvement in asserting Canadian sovereignty over Inuit territory continued and grew with the Canadian state's regulation and control of Inuit people. The extension of criminal law reflected Canada's incremental increase in its exercise of authority and assumption of jurisdiction over Inuit in the Arctic. To show how Canada incrementally exercised sovereignty over Inuit people through the criminal justice system in the late 19th and early 20th centuries, I will examine three aspects of Canada's exercise of authority: policing, early criminal trials, and criminal circuit court.

i. Policing

Historically, policing Inuit was one way the federal government demonstrated its sovereignty over Arctic territory. The federal government extended the authority of the Northwest Mounted Police (and then the Royal Canadian Mounted Police) to the Arctic to demonstrate that through its exercise of authority over Inuit, the Arctic's inhabitants, Canada had a valid claim to Arctic territory. The extension of Mounted Police authority mirrored the interaction of economic interests and international pressure Canada experienced in the late 19th and throughout the 20th century. William Morrison argues, "Using the police as its main instrument, the federal government slowly spread its metropolitan web of laws, regulations, economic and cultural policies, and finally a well-intentioned but suffocating welfare system over much of northern Canada."<sup>175</sup> In the late 19th century, police authority was greatest in the Yukon, where mediating between mining and indigenous interests as well as monitoring the Alaska boundary dispute was the primary concern of the Canadian government. In the early 20th century, Mounted Police presence increased in the Mackenzie Delta and then spread to the eastern Arctic through the Eastern Arctic Patrol.<sup>176</sup> Arctic patrols demonstrated Canadian sovereignty.<sup>177</sup> In the eastern Arctic, in particular, the patrol was important to assert Canada's sovereignty in the archipelago, as were the establishment of seven new Mounted Police detachments in the eastern Arctic in the 1920s.<sup>178</sup> Patrols and detachments were physical representations of the authority of the Mounted Police and symbols of Canadian sovereignty. The Mounted Police were responsible for

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<sup>175</sup> Morrison, *supra* note 141 at 180.

<sup>176</sup> See generally *ibid.*

<sup>177</sup> *Ibid* at 88.

<sup>178</sup> *Ibid*; Cavell and Noakes, *supra* note 127 at 6-7; 168-71.

administering the criminal justice system and demonstrated Canadian governmental authority in the exercise of Canadian sovereignty through the enforcement of law, here with regard to Inuit.

Mounted Police officers held a great deal of power in the Arctic in their administration of the criminal justice system. Officers investigated alleged offences and were responsible for charging the first Inuit offenders tried and convicted for murder.<sup>179</sup> Special patrols investigated murders with a view to establishing sovereignty through effective policing: “[i]f murderers could be successfully tracked down and arrested near Coronation Gulf, then Canada’s right to the area would seem clear and certain.”<sup>180</sup> Police authority did not stop at formal investigation. Although empowered as both peace officers and justices of the peace, the police often acted as mediators to resolve disputes outside the formal court process.<sup>181</sup> The Mounted Police were also advocates for appointing resident judges in the early circuit court system.<sup>182</sup> Policing changed Inuit communities and social orders forever.<sup>183</sup> At first, Mounted Police were dependent on Inuit for surviving in the harsh conditions of the Arctic. As Inuit dependency on governmental resources that the police administered increased and after two Inuit men killed a police officer, what seemed an amicable relationship between Inuit and police officers changed.<sup>184</sup> Moreover, inserting Canadian governmental authority into the way that Inuit resolved disputes changed the

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<sup>179</sup> Coates and Morrison, “To Make the Tribes Understand”, *supra* note 43 at 223; Harring, “Rich Men of the Country”, *supra* note 47.

<sup>180</sup> Morrison, *supra* note 141 at 136.

<sup>181</sup> Graham Price, *Remote Justice: the Stipendiary Magistrate’s Court of the Northwest Territories (1905-1955)* (LLM Thesis, University of Manitoba, 1986) at 56 [*Remote Justice*].

<sup>182</sup> See *ibid* at 98, explaining how the Mounted Police advocated for a resident Stipendiary Magistrate in the Mackenzie District in 1931.

<sup>183</sup> Harring, “Rich Men of the Country”, *supra* note 47; Kulchyski and Tester, *Kiumajut*, *supra* note 127; Nettelback and Smandych, *supra* note 128.

<sup>184</sup> Morrison, *supra* note 141 at 157-61.

power relationships within Inuit communities.<sup>185</sup> Inuit communities had traditional leaders and elders to resolve disputes, but as the Mounted Police increasingly conducted patrols, investigations, and mediations, they inserted a non-traditional authority into Inuit communities. When the consequences of their investigations resulted in trials, convictions, and even executions, the Mounted Police also became a symbol of the violence of Canada's assertion of sovereignty.

In addition, Mounted Police were responsible for the overall governance of Arctic communities and "performed many public functions unrelated to the investigation and enforcement of law and order" as the "overseers" of development.<sup>186</sup> Until 1917, the North-West Mounted Police's Lieutenant-Colonel Fred White was acting Commissioner of the Northwest Territories.<sup>187</sup> From 1905 to 1920, Inuit contact with Canadian governmental administration in the Arctic was often limited to contact with the Mounted Police.<sup>188</sup> The police carried mail from one part of the Arctic to another, acted as Customs officers, and reported to the Department of Indian Affairs about the conditions of indigenous people in the territory they policed.<sup>189</sup> Administrative or developmental functions of police officers also included the distribution of relief and the selection of families for the high Arctic relocation, as I described in Part I. Without a coherent policy regarding the administration of the Arctic for most of the 20th century, police officers

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<sup>185</sup> Price, *Remote Justice*, *supra* note 181 at 237-38.

<sup>186</sup> Price, *ibid* at 91; Morrison, *supra* note 141 at xviii. See also Kulchyski and Tester, *Kiumajut*, *supra* note 127 at 125-26.

<sup>187</sup> Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 14.

<sup>188</sup> *Ibid* at 16.

<sup>189</sup> Morrison, *supra* note 141 at 118-19, 137, 171.

“had *carte blanche* to do whatever they thought was best.”<sup>190</sup> Some of the power officers held resulted in heavy-handed administration. One officer prohibited Inuit from drum dancing (a symbolic celebration of community) in the settlement, going so far as to smash Inuit drums.<sup>191</sup> The Mounted Police also placed pressure on Inuit families to relocate to the high Arctic and to send their children to residential school.<sup>192</sup> Their power as administrators was buttressed by the criminal justice system. In imposing of Canadian governmental control, Mounted Police also imported the threat of violence from the Canadian state as administrators of the criminal justice system.

The increase in Mounted Police presence, the greater number of detachments in the Arctic, as well as administrative and investigative duties police officers exercised gave the Canadian government a regular, authoritative presence in the Arctic. The Mounted Police demonstrated Canadian government authority with their presence and patrols in the Arctic. They exercised governmental authority as administrators of the criminal justice system. As administrators, the spectre of the criminal justice system Mounted Police represented was part of asserting Canadian sovereignty over Inuit. Mounted Police brought to bear the threat of violence from the Canadian state. Their authority was an effective way for the Canadian government to occupy the Arctic and assert sovereignty over Inuit.

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<sup>190</sup> Morrison, *ibid* at 161; Price, “The North”, *supra* note 44 at 368, 372; Kulchyski and Tester, *Kiumajut supra* note 127 at 167-69, 257; *Qikitani Truth Commission, QTC Final Report: Achieving Saimaqatigiingniq* (Iqaluit: Qikitani Inuit Association, 2010).

<sup>191</sup> Kulchyski and Tester, *Kiumajut, ibid* at 167-69.

<sup>192</sup> See Part I of this chapter.

ii. Inuit on Trial: Criminal Courts in the North

Accounts of early court cases involving Inuit accused demonstrate how bringing the “white man’s law” to the North was one way the young nation of Canada justified its claims to sovereignty over contested and valuable territory in the Arctic.<sup>193</sup> Sidney Haring, recounting the Inuit experience of criminal law in the community of Coppermine,<sup>194</sup> points out that Inuit in general, and the Inuit of Coppermine in particular, came under the Canadian government’s authority with a “speed and totality” that was “unparalleled in North America.”<sup>195</sup> His language refers to how swiftly the 20th century brought changes to Inuit life as a result of the exercise of Canadian sovereignty compared to the previous centuries during which Inuit were left relatively alone. Just as policing of Inuit increased in the 20th century, so did the administration of the criminal justice system through trials. High profile criminal trials demonstrated the Canadian government’s authority over Inuit people to other Canadians and to foreign nations.

Three high profile criminal trials in the early 20th century demonstrate how the criminal justice system imposed Canadian authority on Inuit for the purpose of supporting Canada’s exercise of sovereignty over Arctic territory. The first public trials and convictions of Inuit were the trials of Sinnisiak and Uluksuk, two Inuit men of Coppermine, for the murder of two Catholic priests in 1917.<sup>196</sup> The priests had hired the Inuit men as guides. Historians still speculate as to the events leading up to the killing of

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<sup>193</sup> See e.g. R.G. Moyles, *British Law and Arctic Men* (Saskatoon: Western Producer Prairie Books, 1979) at 90, 33; McKay Jenkins, *Bloody Falls of the Coppermine: Madness, Murder, and the Collision of Cultures in the Arctic, 1913* (New York: Random House, 2005); Grant, *Arctic Justice*, *supra* note 44 at xvii-xviii; Haring, “Rich Men of the Country”, *supra* note 47 at 3-4, 58, & 62-64; Haring, *White Man’s Law*, *supra* note 43; Coates and Morrison, “To Make the Tribes Understand”, *supra* note 124.

<sup>194</sup> Coppermine describes the community and region now known as Kugluktuk.

<sup>195</sup> Haring, “Rich Men of the Country” *supra* note 47 at 3-4, 58.

<sup>196</sup> Moyles, *supra* note 193; Jenkins, *supra* note 193.

the priests, but whatever ensued before the priests' death, it resulted in Sinnisiak and Uluksuk being investigated and charged with murder.<sup>197</sup> After a trial in Edmonton and a retrial in Calgary, the Inuit men were found guilty and sentenced to death, but their death sentences were commuted to life in prison at Fort Resolution in the (then) Northwest Territories. In *British Law and Arctic Men*, R.G. Moyles affords some insight into both how the criminal trial process treated the Inuit accused and the colonial nature of the trial process. He states, "it is clear that those trials, the first for any Inuit elder under 'king's law', were a significant part of the process of neo-colonialism which Hugh Brody so lucidly describes."<sup>198</sup> It was the first trial demonstrating the power of the Canadian criminal justice system over Inuit. In 1923, Alikomiak and Tatamigana became the first Inuit in Canada tried, convicted, and executed for murder after killing a police officer. Coates and Morrison, in their account of the trials of Alikomiak and Tatamigana argue that trials were conducted to demonstrate Canadian authority for the benefit of non-Inuit Canadians and foreign governments: "it showed Canadians that it would brook no further violence from Inuit, and it demonstrated to foreigners that the government intended to be a strong force in the region."<sup>199</sup> Shelagh Grant in *Arctic Justice: Murder in Pond Inlet, 1923* reaches a similar conclusion about the trial of Nuqallaq, an Inuit man from Igloodik, for the murder of Robert Janes, a white trader from Newfoundland. Grant reveals that, while the exact circumstances that led to Janes's killing were unclear, Inuit generally accept that Nuqallaq was selected to kill Janes because Janes had threatened to kill the

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<sup>197</sup> *Ibid*; see also Haring, "Rich Men of the Country" *supra* note 47.

<sup>198</sup> See Moyles, *ibid* at 90 [referring to *The People's Land: Eskimos and Whites in the Eastern Arctic* (Harmondsworth: Penguin Books, 1975), Hugh Brody's anthropological study of colonization in the Arctic, cited at 88-89]; see also Price, *Remote Justice*, *supra* note 181 at 216-17.

<sup>199</sup> Coates and Morrison, "To Make The Tribes Understand" *supra* note 43 at 229.

Inuit's dogs and thus endanger the community. The community decided it was too dangerous to have Janes in the community and in keeping with Inuit legal tradition nominated Nuqallaq to kill Janes. Grant argues that the killing was one Nuqallaq undertook in keeping with Inuit tradition but was dealt with by Canadian courts as murder to further Canada's occupation and sovereignty in the Arctic.<sup>200</sup> Imposing the criminal justice system on Inuit people by conducting high profile murder trials was intended to demonstrate Canada's occupation of the Arctic.

The criminal justice system was a swift and effective way for Canada to show that Inuit were subjects of the Canadian state because it demonstrated that Inuit were punishable under Canadian law. The imposition of the violence of the Canadian state, in particular on Alikomiak and Tatamigana, was intended to express the power that Canada held over Inuit residents of the Arctic. Much like Foucault's depiction of the "spectacle of the scaffold" as the sovereign's right to punish individuals who offend his rule, the trial of Inuit for murder exemplified the Canadian state's right to punish Inuit for offending Canadian law. Since the criminal process is part of the social and cultural context in which the criminal justice system exists, the trials also served as a way to demonstrate the assumption of Canada's authority in deciding what constitutes punishment and the corresponding displacement of Inuit systems of authority. Regardless of whether Canada's imposition and usurpation succeeded in displacing entirely Inuit structures of authority, for non-Inuit Canadians or foreign governments, the powerful spectacle of the murder trial succeeded in demonstrating Canada's authority over Inuit and by extension over Arctic territory.

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<sup>200</sup> Grant, *Arctic Justice*, *supra* note 44.

### iii. Criminal Circuit Court

In addition to high profile murder trials and convictions, travelling criminal circuit courts became synonymous with Canadian authority in the Arctic. Circuit court was a way to maintain the presence of the Canadian criminal justice system in the vast Arctic archipelago that made up Canada's northernmost region. From 1905 until 1955, the Stipendiary Magistrate's Court administered criminal circuits in the Northwest Territories, including the Arctic. The Magistrate's Court was the first circuit court in the Arctic,<sup>201</sup> though in the early years of the magistrates' tenure travel was limited. As Graham Price explains, "[c]limate and geography initially determined the circuit court's perambulations," but advances in water and air travel facilitated the process of conveying criminal courts to Inuit communities and created connections between remote parts of the Arctic.<sup>202</sup> The Commissioner appointed magistrates and, in the early 20th century, the magistrates lived outside the Arctic and only travelled north for the purpose of administering court. In the 1930s, a Northwest Territorial court circuit with two part-time non-resident judges evolved into a court presided over by a resident, legally-trained magistrate appointed sitting in Yellowknife.<sup>203</sup> When the Northwest Territories Supreme Court was created in 1955, Justice Sissons, the first judge of the court, embraced the travel that the criminal circuit court involved. Justice Sissons believed the court had to travel to the communities—no matter how remote or uncomfortable the journey—to further the administration of criminal justice:

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<sup>201</sup> Although Justice Sissons considered his own circuits with the Northwest Territories Supreme Court to be the first circuit court in the Northwest Territories, Graham Price points out that the Stipendiary Magistrate's Court from 1905-1955 was "most emphatically" a criminal circuit court: Price, *Remote Justice*, *supra* note 181 at 214.

<sup>202</sup> *Ibid* at 226.

<sup>203</sup> Price, "The North" *supra* note 44 at 370.

Justice shall be taken to every man's door;

This court shall go on circuit to every part of its realm at least once or twice a year;

The proper place for a trial is the place where the offense was committed or the cause of action arose;

Every person accused of a serious offense is entitled to be tried by a jury drawn from the area in which the offense was committed;

No man shall be condemned except by the judgment of his peers and the law of the land.<sup>204</sup>

The “law of the land” Justice Sissons referred to was Canadian law and the authority of the Canadian criminal justice system. The “realm” of the criminal circuit was the Arctic territory, the “person[s] accused” were the Inuit inhabitants of the Arctic, and their “offenses” were committed against the Canadian authority occupying their home. By traveling to every Inuit person's door, the criminal circuit court demonstrated Canadian sovereignty over Inuit and their territory.

Judges of the criminal circuit courts had a complicated relationship to the authority they possessed in the Arctic. Graham Price argues that the stipendiary magistrates often had conflicting, “dual” political and legal allegiances: “To whom did a stipendiary magistrate owe first loyalty? Was he to promote governmental executive interests, or was he to see justice done between the parties, including often the government, who appeared before him?” The magistrates' close ties to Ottawa further confused the conflicts they faced as dual actors in the Arctic.<sup>205</sup> Much like the police, the magistrates had to take on tasks of political administration because no other government officer existed in the Territories to

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<sup>204</sup> John Howard Sissons, *Judge of the Far North: The Memoirs of Jack Sissons* (Toronto: McLelland and Stewart Ltd., 1968) at 76; Nunavut Court of Justice, *Annual Report* (2008) Nunavut Court of Justice online: [www.nucj.ca](http://www.nucj.ca) quoting Sissons, *ibid*.

<sup>205</sup> Price, *Remote Justice*, *supra* note 181 at 374.

perform such tasks.<sup>206</sup> Engaging with Inuit interests may have been inevitable in that dual role, but not a great deal of evidence exists from the era of the Stipendiary Magistrate's Court on that point. More interesting is the era of the Northwest Territories Supreme Court after 1955, when judges indicated some engagement with Inuit interests. Even when judges engaged the criminal justice system to advance Inuit interests, their position as authorities under Canadian law maintained Canadian sovereignty.

To illustrate how judicial engagement both advanced Inuit interests and maintained Canadian sovereignty, two case studies of decisions from Justice Sissons', the first Judge of the Northwest Territories Supreme Court, are helpful: *R. v. Kogogolak*<sup>207</sup> and *R. v. Kikkik*.<sup>208</sup> In 1959, Justice Sissons' 1959 decision in *R. v. Kogogolak* overturned a game ordinance that Canadian administrators relied on to control and regulate Inuit hunting practices. Kogogolak had been charged under the Game Ordinance of the Northwest Territories after killing musk-ox out of season. Justice Sissons dismissed the charge because he decided that without any treaties or legislation to govern Inuit the Canadian government did not have the authority to regulate Inuit hunting. Justice Sissons's decision directly conflicted with Canada's aims for legal administration of the Arctic and "directly challenged [Indian Affairs] departmental orthodoxy on Aboriginal rights."<sup>209</sup> It was not the only time Justice Sissons confronted Canadian government policy with the notion of advancing Inuit rights. He presided over other cases where he held that hunting and game laws did not apply to Inuit, troubling the Canadian government in its efforts to

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<sup>206</sup> Price, "The North", *supra* note 44 at 375.

<sup>207</sup> NWT Supreme Court, 20 April 1959.

<sup>208</sup> *R v Kikkik: Trial Transcripts* (Yellowknife, NWT: Supreme Court of the Northwest Territories, ca.1958) [*R v Kikkik: Trial Transcripts*]; note Kikkik is also the subject of Farley Mowat's *The Desperate People* (Toronto: Seal Books, 1980).

<sup>209</sup> Kulchyski and Tester, *Kiumajut*, *supra* note 127 at 192.

evade questions about whether the federal government possessed the authority to govern Inuit.<sup>210</sup> The conflict between the federal government and Justice Sissons over Inuit hunting rights eventually resulted in his resignation.<sup>211</sup>

Another case in which Justice Sissons acted as a kind of advocate for Inuit is *R. v. Kikkik*. Kikkik's family was relocated to a settlement in the 1950s. In 1958, Kikkik's husband was murdered, and Kikkik killed his murderer. Left alone in dire circumstances, Kikkik traveled with her five children to the closest settlement. She pulled her children with her on a piece of hide. She was discovered by plane almost a week later, but only three of her children were with her. She told the police her two other children had died. Later, the police found her two missing children in an *iglu* (snow-house) on the tundra, naked from the waist up; one was dead and the other alive. Investigation revealed that Kikkik had left the two children in the *iglu* when she realized she could not manage to get all five to the settlement. She was arrested and charged with murder of her husband's killer as well as abandonment and criminal negligence causing death with regard to her children left in the *iglu*. Kikkik's trial by jury took place before Justice Sissons. The Crown sought a verdict of manslaughter for the killing of her husband's murderer in recognition that she acted out of provocation, but the Crown took issue with defence counsel's argument that the killing was in self-defence.<sup>212</sup> When Justice Sissons charged the jury on the issues of provocation and self-defence, he stated:

In this case I feel it is my duty to make a little further comment and add something to what I have said about provocation and self-defence.

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<sup>210</sup> See generally: Sissons, *supra* note 204; Eber, *supra* note 128. See also: Kulchyski and Tester, *Kiumajut*, *supra* note 127.

<sup>211</sup> Sissons, *ibid* at 172-80.

<sup>212</sup> Eber, *supra* note 128 at 58-73.

[...]

The application of these principles is somewhat controlled by the evolution of society. Self-defence and provocation have been differently estimated in different ages. The ordinary man, the reasonable man, is different. The common law, and that is the basis of all our criminal law, has not changed, but in earlier times when our society was less secure and less settled, the courts took a more lenient view towards provocation and self-defence than generally taken today, when we are more secure, and a policeman is at every door, and social habits have changed. In this case we have a primitive society which has not changed very much, and is still insecure and unsettled.

[...]

the tests here have to be applied to an ordinary Eskimo[...]<sup>213</sup>

The jury acquitted Kikkik of all charges. Justice Sissons's charge informed the jury's reasonable doubt in acquitting Kikkik, and her dire situation certainly would have excited sympathy. While it is impossible to know unequivocally if Justice Sissons's charge to the jury influenced the verdict in Kikkik's case, it certainly reflected his own engagement with Inuit interests. He depicted Inuit as a primitive society to engage the sympathy of the jury. Justice Sissons acted as an advocate for Inuit though he was an agent of the criminal justice system imposing Canadian sovereignty on Inuit. Ironically, Justice Sissons's effort to mitigate the effect of the imposition of Canadian sovereignty through the criminal justice system affirmed the authority of the Canadian state. It established the criminal court process as a site for determining Inuit rights. Although one may portray Justice Sissons as an advocate for Inuit rights, his actions are not unambiguously favourable to Inuit. One Commissioner for the Northwest Territories described Justice Sissons as "paternalistic."<sup>214</sup> Moreover, despite decisions that advocated for Inuit rights, as the first judge of the Northwest Territories Supreme Court to preside over expanding

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<sup>213</sup> *R v Kikkik: Trial Transcripts*, *supra* note 208; see also Eber, *supra* note 128 at 70.

<sup>214</sup> Kulchyski and Tester, *Kiumajut*, *supra* note 127 at 149, 186, 192-93.

criminal circuit courts, Justice Sissons was an active participant in the assertion of Canadian sovereignty over Inuit. By making the criminal justice system a site in which to advocate for Inuit rights and to act out Inuit resistance, he bolstered the authority of the criminal justice system over Inuit people. Rather than remaining a site solely for demonstrating how Canada asserted sovereignty over Inuit, the criminal court also became a site for negotiating Inuit identity and exercising Inuit resistance. How and in what way the criminal court is a site for negotiating Inuit identity and exercising Inuit resistance is what I will detail in chapter three of my thesis. First, however, it is important to understand how Inuit interacted with and resisted Canadian authority and how that interaction culminated in the creation of the Nunavut Territory.

### **Part III: Nunavut Rising? Inuit Resistance, Self-Determination, and the Creation of the Nunavut Territory**

In this chapter, my argument has focused on the Canadian institutions and authorities exercising sovereignty over Inuit people. The question of how Inuit interacted with colonial and Canadian authorities has been secondary to my analysis because Inuit were often overlooked in Canada's decision-making processes.<sup>215</sup> It is nonetheless important and revealing to consider Inuit perspectives of colonization and how raising collective Inuit consciousness culminated in the creation of the Nunavut Territory. The dialogical process of identity formation means that Inuit authorities, structures, and understandings interacted with Canadian authorities, structures, and understandings to form what is the Nunavut Territory today. Canada's occupation through the criminal justice system shaped

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<sup>215</sup> See e.g. the lack of Inuit participation or evidence in *Re: Eskimos*, which I discuss in Part II(a) of this chapter.

Inuit identity, but Inuit experience of Canada's occupation was just as important a force in negotiating and constructing Inuit identity. It is the Inuit experience of identity formation and how that affected the creation of the Nunavut Territory that I will now discuss.

#### **a. Inuit Voices**

Inuit voices, in the form of oral history and Inuit perspectives, have largely been absent from this chapter, and that absence is an issue I want to address here. Up to this point, this chapter of my thesis has focused on Canada's assertion of sovereignty over Inuit—the way Canadian government asserted sovereignty over the Arctic through occupying Inuit, especially through the criminal justice system. As such, Canadian governmental institutions have been the primary focus of my analysis. In addition, until recently Inuit voices have largely been absent from Canadian history and political study of the Arctic. Often what counted as Inuit perspectives were understandings of Inuit as documented by non-Inuit.<sup>216</sup> Recently, however, Inuit have published their own oral histories,<sup>217</sup> and contemporary historians have made efforts to use and to integrate Inuit perspectives into their work.<sup>218</sup> Inuit oral histories reflect a complicated relationship between Inuit and early *Qallunaat* residents of the Arctic. Inuit life and culture changed as a result of not only actions Canada took to assert sovereignty, but also reactions to *Qallunaat* authorities. For instance, was one of the earliest relationships Inuit developed with *Qallunaat* was with missionaries and resulted in many Inuit converting to Christianity as

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<sup>216</sup> See e.g. Brody, *The People's Land*, *supra* note 198; Muller-Wille, Ludger, ed, *Franz Boas Among the Inuit of Baffin Island, 1883-1884* (Toronto: University of Toronto Press, 1998).

<sup>217</sup> See e.g. *Uqalaruit*, *supra* note 128; Wachowich, Nancy, et al, *Saqiyuq: Stories from the Lives of Three Inuit Women* (Montreal: McGill-Queen's University Press, 1999) [*Saqiyuq*].

<sup>218</sup> See e.g. Grant, *Arctic Justice*, *supra* note 44; Kulchyski and Tester, *Tammarniit*, *supra* note 127; Kulchyski and Tester, *Kiumajut*, *supra* note 127.

well as missionary efforts to advocate for Inuit rights.<sup>219</sup> With respect to the Mounted Police, Morrison describes how the initial relationship between Inuit and the police was amicable, supported by Inuit cultural values that required generosity and hospitality to guests. Over time, however, that relationship became less amicable after the murder of a police officer and as police officers perceived that Inuit were becoming dependent on Canadian governmental assistance.<sup>220</sup> The Inuit's own description of their relationship with the Mounted Police also conveys distrust and, at times, fear. The fear of the police felt by Inuit who were asked to take part in the high Arctic relocation is reflected in the way they understood the police requests as demands.<sup>221</sup> When a police officer prohibited Inuit from drum dancing in the settlement, as I noted in Part I, Inuit took their drums far enough away from the settlement to be able to continue to drum and celebrate their community without interference.<sup>222</sup> Inuit reacted to the forces of Canadian sovereignty around them and their reaction was an important part of the development of a collective Inuit identity.

The question of how Inuit reacted to Canada's assertion of sovereignty in their territory is tied to the development of collective Inuit identity. Marybelle Mitchell argues that contact with *Qallunaat* both undermined and confirmed Inuit identity. From the earliest interaction with whalers, Inuit "customary territorial divisions were eroded as Inuit congregated in camps around whaling harbours;" subsequently, "the breakdown of

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<sup>219</sup> See e.g. Aupilaarjuk, *supra* note 125; Wachowich, *supra* note 217 at 19-20, 26-27 & 31-32.

<sup>220</sup> Morrison, *supra* note 141 at 86, 153-61.

<sup>221</sup> Marcus, *supra* note 151 at 79; Kulchyski and Tester, *Tammarniit*, *supra* note 127 at 138-43, 185. See also Wachowich, *supra* note 217 at 24, Apphia Agalakti Awa describing how her father was afraid of the RCMP.

<sup>222</sup> Kulchyski and Tester, *Kiumajut*, *supra* note 127 at 167-69, note that one of the quotations is from David Serkoak who himself today is a well-known drum-maker.

territorial boundaries and intertribal hostilities paved the way to broader affiliation along ethnic lines.”<sup>223</sup> Although life in settlements and disparate access to the resources of *Qallunaat* lifestyle created disparities and hierarchies among Inuit, being treated as a distinct ethnic group created a sense of collective identity.<sup>224</sup> Mitchell argues, “Inuit who had previously referred to themselves only as ‘the people’ began to perceive themselves as a particular *kind* of people, distinct from Europeans.”<sup>225</sup> As Canadian governmental control and authority increased in the 20th century, it must have been patently clear to Inuit that their distinction from European-Canadians had become the basis for the differential treatment Inuit received at the hands of the Canadian government. Inuit could not exercise rights as Canadian citizens; for example, Inuit could not vote in federal elections until 1950, nor could Inuit of the eastern Arctic vote in territorial elections until Parliament amended the *Northwest Territories Act* in 1966.<sup>226</sup> The exclusion of Inuit from participation in elections and from most Canadian government posts on the basis of the Canadian government’s determination of Inuit status in Canada gave Inuit common ground around which to rally and became the foundation for a collective Inuit response. Raising the consciousness of what constituted Inuit identity for all Inuit in the Arctic and promoting the idea of Inuit identity was the basis for Inuit self-government in the Arctic. To do so, it was integral to develop a collective, regional Inuit identity. Developing Inuit identity focused on both collective action and on the geographic basis for Inuit identity.

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<sup>223</sup> Mitchell, *supra* note 137 at 84.

<sup>224</sup> Mitchell, *ibid* at 125-40

<sup>225</sup> *Ibid.*

<sup>226</sup> Ronald Quinn Duffy, *The Road to Nunavut: the Progress of the Eastern Arctic Inuit Since the Second World War* (Montreal: McGill-Queen’s University Press, 1988) at 226-27.

The Arctic's distinctive geography has always leant itself to symbolism.<sup>227</sup> The Inuit land claim relied on “the geographical location of specific cultural and historical indicators”, such as Inuit hunters' harvesting journeys, cairns, camp sites, burial grounds, and Inuktitut place-names.<sup>228</sup> André Légaré notes that symbols of Nunavut and Inuit identity were based on regional, cultural, and physical elements of distinctiveness in the Arctic, The Inukshuk is one such symbol. The name of the territory, *Nunavut*, which means “our land” in Inuktitut represents Inuit action to take back the geography of their territory. Since 1999, communities have also renamed themselves to reflect their Inuit character; “Frobisher Bay”, for example, is now called “Iqaluit”.<sup>229</sup> The language of geography fostered Inuit collective regional identity. The prominence of language in the creation of physical and geographical symbols of identity also reflected the role Inuktitut education played in Inuit resistance throughout contact with the Canadian government. The land claim movement sought to make a political and legal space for Inuktitut as much as for Inuit.<sup>230</sup> Inuit expression of geographic space made its way into collective action that fostered a collective, regional Inuit identity.

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<sup>227</sup> Literature, for example the work of Farley Mowat, and film, such as “Nanook of the North”, exemplify such symbolism. Canada's national anthem itself refers to “The True North strong and free.”

<sup>228</sup> André Légaré, “Nunavut: The Construction of a Regional Collective Identity in the Canadian Arctic” (Autumn 2002) 17 *Sovereignty and Governance* 65 at 73-74, 78.

<sup>229</sup> *Ibid* at 81; see also Nunavut Implementation Commission, *Footprints in New Snow: Report of the Nunavut Implementation Commission* (Iqaluit: Nunavut Implementation Commission, 1993) at A-2.2 at 90 [*Footprints*].

<sup>230</sup> CBC Archives, “An Inuit Education: Honouring a Past, Creating a Future” online: CBC Digital Archives <<http://archives.cbc.ca/society/education/topics/529-2666/>> ; *Footprints, ibid* at A-9.9; Nunavut Implementation Commission, *Footprints 2: A Second Comprehensive Report of the Nunavut Implementation Commission* (Iqaluit: Nunavut Implementation Commission, 1996) at 195-203 [*Footprints 2*].

How Inuit responded to regulation of hunting provides insight into the ways Inuit resisted Canada's assertion of sovereignty and developed a collective Inuit identity. As Kulchyski and Tester aptly state:

Attempts by the state by the state to change the relationship of Inuit to wildlife played a critical role and to some degree provided a foundation for many of the other changes. It was a relationship that was instrumental in defining what it meant to be Inuit. It is therefore not surprising that anything that challenged Inuit relationships with animals and the land on which they depended was likely to be met with original and passionate responses.<sup>231</sup>

Early, uncoordinated forms of Inuit resistance to hunting laws involved Inuit continuing to hunt in the face of hunting prohibitions and sometimes even feeding the illicit meat of their hunt to the Mounted Police officers charged with enforcing the law.<sup>232</sup> In the 1960s, as Canadian regulation of game and hunting increased, Inuit resistance took on more collective forms of action. Communities formed settlement councils and hunting associations to voice Inuit concerns to Canadian state institutions, such as the Northwest Territories Council, and to communicate with the Mounted Police.<sup>233</sup> Inuit communities petitioned the Canadian government as a way of expressing their collective dissatisfaction with Canadian government policies, such as the prohibition against Inuit registering mineral rights and mandatory attendance of Inuit children in residential schools.<sup>234</sup> Some Inuit leaders in the community councils later went on to become Inuit leaders in the land claim and then elected official in the Nunavut Legislature, including

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<sup>231</sup> Kulchyski and Tester, *Kiumajut*, *supra* note 127 at 162.

<sup>232</sup> *Ibid* at 123-25.

<sup>233</sup> *Ibid* at 137-50, 161, & 203-238.

<sup>234</sup> *Ibid* at 239-72.

Tagak Curley.<sup>235</sup> It was an era when Inuit collective resistance grew stronger around the idea of Inuit identity and gathered its forces, including leaders who identified powerfully with the challenges they faced as Inuit.

Inuit leaders understood the collective and geographic aspects of Inuit identity formation. Leading the Inuit in the Arctic was as much about understanding the Inuit relationship to territory—both their own and that of the rest of Canada—as it was about Inuit collective action; their education had demonstrated as much. Ironically, residential school had given Inuit the first members of their community capable of communicating in English and advocating on behalf of Inuit. *Experimental Eskimos*, a recent documentary about three Inuit leaders, Peter Ittinuar, Zebedee Nungak, and Eric Tagoona, provides a case study of how the experience of assimilationist education policies influenced future Inuit leaders. The Canadian government removed the three men from their families at the age of 12 and sent them to southern Canadian high schools as an experiment in educating Inuit outside the Arctic. In the film, Peter Ittinuar, the first Inuk Member of Parliament, reflects on how the experience shaped his perception of the political power Inuit held: “I only knew that Inuit were not the decision-makers in their own land, and that they ought to be.”<sup>236</sup> Zebedee Nungak, a signatory of the *James Bay and Northern Quebec Agreement* as well as a constitutional negotiator also links his activism to his educational experience, “I thought that my training, the education I had received, should be harnessed for the use of my people.”<sup>237</sup> In the mid-1960s, Inuit also collectively reclaimed their individual identities by rejecting the numbered dog tags the Canadian government issued

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<sup>235</sup> *Ibid* at 160-61, 253.

<sup>236</sup> Peter Ittinuar, “Experimental Eskimos”, *supra* note 155.

<sup>237</sup> Zebedee Nungak, *ibid*.

and demanding to be known by their own Inuit names. The origin of the protest was Simonie Michael's election to the Northwest Territories Legislature. Michael was an Inuit leader who refused to be known by his identification number. As a result, Abraham Okpik, another Inuit leader, campaigned successfully to eliminate the use of the numbered dog tags used to identify Inuit people through Project Surname, travelling throughout the Arctic to ask each Inuit family to pick a surname.<sup>238</sup> Individually, and collectively, in the 1960s Inuit resisted the way the Canadian state asserted sovereignty in their Arctic territory through governmental regulation and control that sought to appropriate their identity. Inuit leaders of the era became spokespersons for Inuit and helped foster a sense of collective Inuit identity. Their efforts would eventually direct Inuit resistance into the struggle for autonomy over land and the negotiation of the Nunavut land claim.

**b. "The Road to Nunavut"**<sup>239</sup>

With this collective and regional identity forged, the Inuit rights movement gained momentum by targeting ambiguities in Inuit legal status and arguing for Inuit control over Arctic territory and institutions of the Canadian state that governed Arctic territory. Inuit resistance targeted Canadian state institutions governing Inuit not with a view to eliminate them but instead to find a means for Inuit governance through state institutions. The ambiguity of Inuit legal status facilitated Inuit resistance: Inuit were neither Indians under the *Indian Act*, nor Canadian citizens. In addition, Inuit had no treaties with the Canadian government, so there was constant negotiation about what political and economic rights Inuit legal status gave Inuit in Canada. Inuit resistance to the

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<sup>238</sup> Mancini and Mancini, *supra* note 155 at 100; Hanson, *supra* note 157.

<sup>239</sup> Taken from the title of Ronald Quinn Duffy's book: Duffy, *supra* note 226.

construction of their identity and their legal status in the Canadian state culminated in advocacy for the Nunavut land claim, the effort to reclaim “our land.” The creation of the Nunavut Territory is the result of Inuit struggle to resolve their legal status, gain recognition as Canadian citizens, and take over responsibility for their land. Creating an idea of Inuit political and legal space based on the use and occupancy of Arctic territory meant that Inuit resistance built on the collective, regional identity Inuit fostered in the 1960s. The proposal for an Inuit territory came from the Inuit Tapirisat of Canada (ITC) in 1973 as a response to the federal government’s Aboriginal Comprehensive Land Claims Policy.<sup>240</sup> What eventually emerged from the ITC’s proposal and discussion among Inuit stakeholders was the agreement to create an Inuit territory administered by a public government in the Canadian state as part of a comprehensive land claim agreement. Over twenty years, negotiation and discussion among Inuit leaders resulted in the proposal to create Nunavut.<sup>241</sup> In 1993 the Parliament of Canada ratified the final Nunavut Land Claims Agreement and enacted the *Nunavut Act*, which would create the new Nunavut Territory on April 1, 1999.<sup>242</sup> The source of that collective regional identity, as I have explained, was both cultural and territorial. While Inuit resistance and advocacy was involved in creating other territorial spaces for Inuit (e.g. Nunavik, Inuvialuit), only Nunavut marshalled collective, regional identity across three time zones

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<sup>240</sup> The Inuit Tapirisat of Canada was the precursor to the Inuit Tapiriit Kanatami (ITK). ITK “is the national voice of 55,000 Inuit living in 53 communities across the Inuvialuit Settlement Region (Northwest Territories), Nunavut, Nunavik (Northern Quebec), and Nunatsiavut (Northern Labrador), land claims regions. Inuit call this vast region Inuit Nunangat. Founded in 1971 ITK represents and promotes the interests of Inuit on a wide variety of environmental, social, cultural, and political, issues and challenges facing Inuit on the national level. ITK does not deliver or fund programs, rather it is a national advocacy organization.”: see “About ITK” online: Inuit Tapirisat Kanatami <<http://www.itk.ca/about-itk>>; Légaré, *supra* note 228 at 73.

<sup>241</sup> *Footprints*, *supra* note 229 at A-2.2; Terry Fenge and Paul Quassa, “Negotiating and Implementing the Nunavut Land Claims Agreement” (July-August 2009) *Policy-Options* 80.

<sup>242</sup> *Nunavut Act*, RS, 1993 c 28 [*Nunavut Act*]; *Nunavut Land Claims Agreement Act*, RS, 1993, c 29 [*NLCA*].

and varying terrains to result in a territory with its own status and commitment to the federation of Canada. Nunavut is a committed geopolitical space for Inuit identity in Canada.

As much as the Nunavut land claim sought to create a political and legal space for an Inuit territory, it also secured Canadian sovereignty in the Arctic. As the preamble of the land claim agreement itself states, the territory was created “in recognition of the contributions of Inuit to Canada’s history, identity and sovereignty in the Arctic.”<sup>243</sup> To argue for Inuit governance of a territory already defined by Inuit identity within the structure of the Canadian state meant that Inuit struggle for political and legal recognition as participants in the Canadian state took place within the established framework of colonialism and Canadian governmental authority in the Arctic. Inuit negotiated with the federal government. Statutes of Canada created Nunavut.<sup>244</sup> Canadian law and Canadian legal institutions govern the *Nunavut Land Claim Agreement* and even the ongoing disputes about the agreements.<sup>245</sup> Federalism’s structures are those within which the new territory exists. While early visions of Inuit self-determination differed, forces of Inuit self-determination coalesced around creating a territory within Canada’s federal structure.<sup>246</sup> Inuit were already part of a territory, the Northwest Territories, but the idea was that an Inuit territory would result in *de facto* Inuit self-government by virtue of

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<sup>243</sup> *NLCA, ibid.*

<sup>244</sup> *Nunavut Act, supra note 242; NNLCA, ibid.*

<sup>245</sup> For example: “Laws of general application” in the land claim agreement “means all federal, territorial and local government laws of general application according to common law definition”; Art. 2.2.1 of the Nunavut Land Claim Agreement states: “The Agreement shall be a land claims agreement within the meaning of Section 35 of the *Constitution Act, 1982*.” Although there are Inuktitut, English, and French versions of the land claim agreement, the English and French versions are the only ones that are authoritative: art 2.8.1.

<sup>246</sup> Louis McComber, ed, *Changing the Face of Canada: The Life Story of John Amagoalik* (Montreal: Serpentine, 2007).

creating a geopolitical space in which Inuit would be the majority. At the same time, a new organization, Nunavut Tunngavik Incorporated, would hold Inuit lands and settlement monies on behalf of Inuit beneficiaries as a public trust company.

Inuit leaders had cooperated with the Canadian government and emphasized a vision of Inuit self-determination as part of the Canadian state to create Nunavut.<sup>247</sup> The support for the Canadian state meant Inuit supported Canada's sovereignty over the Arctic: "Inuit leaders characterized themselves as proud Canadians who support Canada's Arctic sovereignty, which contributed to this image. Indeed, the Inuit contribution to Canada's Arctic sovereignty is referred to in the preamble to the Nunavut Agreement."<sup>248</sup> Inuit leaders' vision of an Inuit homeland in Canada included making Nunavut part of the Canadian Constitution. The Implementation Commission supported amending the Canadian Constitution to account for Nunavut's place in the Canadian federation.<sup>249</sup> The Nunavut Implementation Commission described Nunavut's self-determination from a "circumpolar angle" as one "anchored in Canadian sovereignty."<sup>250</sup> Land claim negotiations also coincided with constitutional negotiations in which a number of collective groups representing Canada's indigenous people, including the Inuit, lobbied for additional constitutional protection for indigenous people. The result was the addition of section 35 to the Charter of Rights and Freedoms recognizing "existing aboriginal and treaty rights" and including Inuit in the definition of aboriginal people holding these rights.<sup>251</sup> While canvassing the extensive literature and debates around the advisability of

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<sup>247</sup> See Fenge and Quassa, *supra* note 241 at 82-84.

<sup>248</sup> *Ibid* at 83.

<sup>249</sup> *Footprints*, *supra* note 229 at 91.

<sup>250</sup> *Ibid* at 6.

<sup>251</sup> See Section 35 of the Charter of Rights and Freedoms, *supra* note 42.

entrenching aboriginal rights in the Constitution is beyond the scope of my thesis, it is significant that Inuit leaders lobbied for inclusion in the Canadian Constitution.<sup>252</sup> The Nunavut Implementation Commission expressed how Inuit leaders' vision of the land claim encompassed inclusion in section 35.<sup>253</sup> Section 35 and the Nunavut land claim connected Inuit and their Arctic homeland to Canada through formal Canadian law.

Creating the Nunavut Territory was meant to be one step in Inuit identity formation rather than the ultimate end. As the Nunavut Implementation Commission stated, "the meaning of 'Nunavut' is not and cannot be fixed. 'Nunavut' is a means, not an end in itself."<sup>254</sup>

Affirming Canadian sovereignty as part of the Inuit land claim was as much pragmatic as ideological: Inuit politicians had engaged in twenty years of negotiation with the Canadian government;<sup>255</sup> moreover, Inuit leaders saw the creation of the Nunavut Territory as a "necessary first step in allowing Inuit and other residents to take control of their own lives and future."<sup>256</sup> The first step ostensibly created territory and governance structure in which Inuit could ostensibly exercise *de facto* self-governance and become the primary agents in their own identity formation within the Canadian state. The Nunavut Territorial government is supposed to incorporate *Inuit Qaujimajatuqangit* (Inuit traditional knowledge) into its policies and legislation. For example, in contrast to

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<sup>252</sup> Literature illustrating the history and debate about section 35 of the *Charter of Rights and Freedoms* includes: Brian Slattery, "Hidden Constitution: Aboriginal Rights in Canada, the New Canadian Constitution" (1984) 32:2 Am J Comp L 361; Gordon Christie, "Aboriginal Citizenship: sections 35, 25 and 15 of Canada's *Constitution Act, 1982*" (2003) 7:4 Citizenship Studies 481; Leonard Rotman "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997-1998) 36 Alta L Rev 1; Canada, *Taking Section 35 rights seriously [electronic resource] : non-derogation clauses relating to Aboriginal and treaty rights: final report of the Standing Senate Committee on Legal and Constitutional Affairs* (Ottawa: Standing Committee on Legal and Constitutional Affairs, 2007).

<sup>253</sup> See *Footprints*, *supra* note 229 at 91.

<sup>254</sup> *Ibid* at 2.

<sup>255</sup> Donald Purich, *The Inuit and their Land: the Story of Nunavut* (Toronto: James Lorimer and Co, 1992) at 96-116 & 130-38; Duffy, *supra* note 226 at 231-66; Fenge and Quassa, *supra* note 241.

<sup>256</sup> *Footprints*, *supra* note 229 at 5.

the time when federal game ordinances controlled and regulated Inuit hunters in ways that opposed traditional Inuit hunting practices, the current Nunavut *Wildlife Act*<sup>257</sup> expressly implements “principles and concepts of *Inuit Qaujimajatuqangit*.”<sup>258</sup> Nonetheless, Nunavut’s place in the Canadian state and the frustrations it has experienced implementing the land claim<sup>259</sup> mean that Inuit identity formation can never entirely free itself from Canadian governance. The product of the formation of Inuit identity and Inuit resistance is now fused with the legal and political structure of the Canadian state, which complicates how Inuit identity develops in the Canadian legal system.

The Nunavut land claim originated in Inuit resistance and was fostered by Inuit identity, but the resolution of the land claim has bound Inuit even more closely to the Canadian state. The dialogical process of identity formation in Nunavut has created a territory that expresses both Canadian sovereignty and Inuit identity. Moreover, the Nunavut territory is intended to express Inuit self-determination as *de facto* self-government. In the way governance in Nunavut has unfolded, however, it is unclear whether Nunavut can express Inuit self-determination. Once the Nunavut Territory was created, as Jackie Price states, “[a]ll the hard work and enthusiasm used to secure the [Nunavut Land Claim Agreement] was directed to the [Government of Nunavut]” such that the Government of Nunavut is

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<sup>257</sup> S Nu 2003, c 26.

<sup>258</sup> *Wildlife Act*, s 1(2)(h).

<sup>259</sup> Inuit continue to litigate the implementation of agreements made under the land claim: see e.g. *NTI v Canada (Attorney General)*, 2007 NUCJ 27 (CanLII), *NTI v Canada (Attorney General)*, 2008 NUCJ 11 (CanLII), *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2009 NUCA 2 (CanLII); see also Thomas Berger, *Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period* (March 1, 2006) online: Aboriginal Affairs and Northern Development Canada <<http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/lca/nlc-eng.asp#chp1>>.

“the symbolic measure for Nunavut.”<sup>260</sup> She argues that although the Government of Nunavut is meant to represent Inuit experience and empower Inuit people, setting the space for Inuit perspectives within government means that state institutions are paramount, and Inuit perspectives must fit themselves into those state institutions.<sup>261</sup> Price’s argument questions the unconditional support Inuit are expected to give Nunavut and the way Nunavut has come to embody what it means to be Inuit. It questions whether the Nunavut Territory can both express Inuit identity and act as the means of exercising Canadian sovereignty. I have the same questions, but my concern is for how the criminal justice system continues to assert Canadian sovereignty and appropriate Inuit identity in the geopolitical Inuit space that is Nunavut. The Nunavut Territory seemingly embodies Inuit values but in fact supports Canadian sovereignty through the state mechanisms and legislation that created and continue to support Nunavut. If Canada is still the “overarching authority” in Nunavut, then the institutions that make up part of the Government of Nunavut must also be scrutinized to question the degree to which they can alleviate the historic injustice visited on Inuit by colonialism and the assertion of Canadian sovereignty. The criminal justice system is one of these institutions.

**c. Maintaining Sovereign Space in The Nunavut Court of Justice**

The Nunavut Territory is a space for the expression of Inuit identity—and its political and legal institutions are open to analysis as such. The Government of Nunavut has taken on the role of expressing Inuit identity through governmental and legal institutions, including a role in the justice system. The justice system was not the primary focus of

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<sup>260</sup> Jackie Price, *Tukisivallialiqtakka: The things I have now begun to understand: Inuit governance, Nunavut, and the Kitchen Consultation Model* (MA Thesis, University of Victoria Indigenous Governance, 2007) at 8.

<sup>261</sup> *Ibid* at 92-94.

the Nunavut Implementation Commission, though the Commission recommended creating a working group made up of the federal and territorial departments of justice and Pauktuutit Inuit Women's Association of Canada for the purpose of creating a timetable and conditions for transferring responsibility for the prosecution function in Nunavut from the federal to the territorial government. In 2011, however, the federal government still retains the authority to prosecute criminal offences in the Nunavut Territory—as it does in the Yukon and Northwest Territories.<sup>262</sup> Criminal circuit court continues and travels to more communities with greater frequency than it ever did before.<sup>263</sup> No transfer of responsibility to the Nunavut territorial government has occurred despite the creation of the new Nunavut Court of Justice. The Court is unique in constitution as a unified court, i.e. one where provincial/territorial and superior court jurisdiction are combined, but those differences do not change the source of the Court's authority, which is that of the Canadian sovereign.<sup>264</sup> One might point to the initiatives the Nunavut Court of Justice implemented after 1999 as ones designed to make the criminal court system more accessible to Inuit, but they have had mixed success and do not change the underlying authority and structure of the criminal justice system.<sup>265</sup> Thus, the 'new' court for Nunavut involves primarily improvements to court administration and legislation and maintains the criminal justice system Canada imposed in the 20th century.

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<sup>262</sup> *Footprints 2*, *supra* note 230 at 240-43; Sanders, *supra* note 125 at 146-47, explaining how the decision to create the Court was the result of intergovernmental consultation and a 1997.

<sup>263</sup> Today, circuits and court sittings are more frequent than those in 1955, though crime rates are also higher: see e.g. Eber, *supra* note 128 at 26-28; Griffiths et al., *supra* note 125 at 36-38.

<sup>264</sup> See generally: *Criminal Code*, s 2 & Part XIX.1, *supra* note 2, though amendments were not exclusive to these sections of the Code; see also Shauna Labman, "An experiment in innovation: Nunavut's single-level trial court" (Aug/Sep 2003) 28 *Law Now* 31; NCJ Evaluation, *supra* note 1 at 7.

<sup>265</sup> For a summary and assessment of the changes implemented by the Nunavut Court of Justice, see generally: Sanders, *supra* note 125; Labman, *ibid*; NCJ Evaluation, *ibid*.

The Nunavut Court of Justice is a good study of the problems the Government of Nunavut encounters in the effort to function as an expression of Inuit identity as well as a force of Canadian sovereignty. The Nunavut Court of Justice is a legal institution that takes its authority from the Canadian state. As an actor in the Canadian criminal justice system, the Court is implicated in the appropriation of identity and the assertion of sovereignty that has made up Canada's history of dealing with indigenous people. Canadian law governs the criminal justice system in Nunavut. At the same time, the Court is part of the institutional and state-mediated context in which the conversation about Inuit identity in Nunavut takes place. It is one of the structures in the dialogical process of identity formation; however, the way the dialogical process functions in Nunavut's political and legal climate does not necessarily give equal footing to both Inuit experience and Canadian law. In this context, it is difficult to imagine how the criminal justice system in Nunavut today alleviates the historical injustice perpetrated by Canada's occupation of Inuit.

### **Conclusion**

The Nunavut Territory has a unique place in Canada's colonial history. Its origin lies in Canada's assertion of sovereignty in the Arctic through its occupation of Inuit. This occupation through governmental control substantially increased in the 20th century and law facilitated Canada's actions. One important way the law facilitated Canada's occupation of Inuit was the criminal justice system. Inuit were not passive recipients of Canadian occupation, and Inuit perspectives have brought new insights into how Inuit resisted occupation. Inuit voices and resistance grew with the intensity of Canadian governmental control and regulation, and the Inuit rights movement culminated in the

creation of the Nunavut Territory. Nunavut represents the geopolitical space for Inuit identity in Canada, though that space is still dominated by Canadian authority and Canadian state institutions, including the Nunavut Court of Justice. If changing the criminal justice system's legacy in Nunavut requires shifting its role away from being an instrument of Canadian sovereignty, it is important to examine how the Court exercises its authority to characterize Inuit identity in its sentencing decisions since the creation of Nunavut. Sentencing, as I argued in chapter one, is a place where the criminal justice system and the question of indigenous identity collide squarely. My thesis will show that the Nunavut Court of Justice cannot eschew its historical and institutional place as an instrument of Canadian sovereignty, shaping and constructing Inuit identity in the criminal justice system. It continues to perpetuate the notions of Inuit identity that have enabled Canada to assert sovereignty over Inuit people. The Court's sentencing decisions serve as an example of how the criminal justice system in Nunavut negotiates and constructs Inuit identity in a way that maintains the relationship between the assertion of Canadian sovereignty and the appropriation of indigenous identity. A judge may don the sealskin sash, but further inquiry is required to determine if the new robe represents something other than symbolic appropriation.<sup>266</sup>

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<sup>266</sup> "Symbolic appropriation" in this context refers to Sally Engle Merry's description of how state law may borrow the symbols of other normative orders to promote integration of traditional symbolic trappings in new institutions: see Merry, *supra* note 18 at 882.

## **Chapter Three: All the King's Horses and All the King's Men: Maintaining Sovereign Space in Nunavut**

### **Introduction**

The sentencing decisions of the Nunavut Court of Justice provide a case study for how the criminal justice system perpetuates notions of indigenous identity that enable Canada's assertion of sovereignty over the Inuit. This chapter will demonstrate how the Court's sentencing decisions expose an imagination of the Inuit and Inuit identity that lends authority to the criminal justice system's construction of Inuit identity. Even when the Court makes an effort to implement the legislative and jurisprudential reforms designed to alleviate the historic injustice the criminal justice system visited on Inuit, the result appropriates Inuit identity and communicates an essentialized version of what Inuit identity is. In chapter one, I explained that sentencing is the moment where the Canadian state appropriates identity, specifically indigenous identity, for the purpose of asserting sovereignty. The criminal justice system uses indigenous identity in its domination of Canada's indigenous people. Despite legislation and jurisprudence intended to alleviate the historic injustice the criminal justice system perpetuated against indigenous people, the sentencing process continues to differentiate indigenous people on the basis of their identity as aboriginal offenders and to constitute their position in the Canadian state as subjects of Canadian authority. As chapter two demonstrates, Nunavut is a place where the relationship between identity and sovereignty in the criminal justice system is especially stark. The law used Inuit identity to rationalize the ambiguous political relationship between Inuit and the Canadian state. The criminal justice system was one of the primary tools of occupying Inuit people through policing, circuit courts, and high-

profile trials. Collective Inuit identity and political consciousness developed in a system dominated by Canadian law and legal concepts. Inuit involvement and advocacy for the land claim and the creation of the Nunavut territory relies on the idea that the Nunavut territorial government, the authority the land claim created, is grounded in Inuit identity. Inuit identity is tied to the existing Nunavut territory and Inuit activists' political fight that led to its creation. Nunavut's public government identifies as Inuit even though Canadian state institutions, like the criminal justice system, continue to govern Inuit in Nunavut.

The case studies I undertake in this chapter are relatively modest. I do not suggest that the cases offered as examples in this paper are a proportionate sample or statistically representative of the sentencing decisions in which the Nunavut Court of Justice refers to Inuit culture and law.<sup>267</sup> The size of the bench and the nature of the available decisions mean that Justice Kilpatrick's jurisprudence will be at the centre of my analysis but my analysis is not a critique of his approach; my critique is aimed at the structure of criminal justice in Nunavut. The selected cases studies nonetheless will shed light on how the Nunavut Court of Justice exemplifies the relationship between the assertion of sovereignty and the appropriation of identity in the sentencing process of the Canadian

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<sup>267</sup> A complete survey of sentencing decisions would require extensive resources and research into unreported as well as reported decisions. The circuit court schedule described in chapter 2 means that judges are pressed for time and issue few written decisions; unreported judgments only become available if a transcript is ordered or the decision is appealed. I selected sentencing decisions for my case study using electronic search tools to search the Court's reported decisions for terms that revealed a discussion of Inuit identity. I searched all cases available on CanLii, the primary site for finding reported decisions from the Nunavut Court of Justice. I also reviewed the archive of unreported decisions contained in the library of the Nunavut Court of Justice. The archive contains unreported judgments from 2000 to 2003, and I identified sentencing decisions in the archive through manual review. From the combined results of the archival search and electronic search, I selected decisions relevant to my case study by searching the decisions for relevant terms, including: "Inuit", "culture", "Inuk", "aboriginal" and "identity". While selecting primarily reported cases limits my sample size, it still serves to demonstrate how the Nunavut Court of Justice engages in the conversation about Inuit identity in Nunavut and why it is important to interrogate that aspect of judicial decision-making in Nunavut.

criminal justice system. Each case study analyzes how the Court appropriates and essentializes Inuit identity in its characterization of the Inuit and examines circumstances in which the Court preserves its authority over Inuit, and by extension the authority of the Canadian criminal justice system. I examine the Court's portrayal of Inuit identity in the way the sentencing decisions imagine Inuit (i) lifestyle, (ii) traditional law, (iii) justice, and (iv) self-government. My study of sentencing in Nunavut shows that all represent aspects of Inuit identity in the social sphere in which the Canadian criminal justice system's sentencing process functions. These aspects of Inuit identity are not necessarily distinct from each other, but they are dimensions of identity formation that can reveal how the law works to negotiate and to construct Inuit identity.

### **Part I: Imagining Inuit Lifestyle: "The Genuine Inuk"**

The Nunavut Court of Justice imagines authentic Inuit lifestyle as a lifestyle that differs sharply from the "modern" lifestyle of *Qallunaat*. Inuit lifestyle is one lived on the land, hunting and fishing in the Arctic archipelago. In 2004, defence counsel appearing in the Nunavut Court of Justice seeking an exemption from a weapons' prohibition for his client told the court his client is a "genuine Inuk" who "hunts and provides food for elders in his community" and "feeds dog teams."<sup>268</sup> The argument defence counsel advanced on behalf of his client is designed to appeal to the Court because it relies on the idyllic image of Inuit lifestyle as a hunting lifestyle. A genuine Inuk is a hunter. Such a stereotypical depiction of traditional Inuit life can often be found in film and television. *Nanook of the North*,<sup>269</sup> the famous 1922 documentary by Robert Flaherty, was intended to document this idyllic Inuit life on the land. The 1922 New York Times review of *Nanook of the*

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<sup>268</sup> *R v Silas Ulayuruluk*, Nunavut Court of Justice (22 January 2004) at 15.

<sup>269</sup> (1922).

*North* called its protagonist, Nanook, “a real Eskimo” in way he hunted and lived in an *iglu*.<sup>270</sup>

The persistent image of Inuit lifestyle as tied to the early pre-contact traditions of subsistence hunting and fishing both fosters and impairs the development of Inuit identity, a process that motivates Inuit self-determination. When the question of who is a “genuine Inuk” hangs over the Nunavut’s courtrooms and sentencing decisions, it affects not only the Court’s sentence, but also the legal and political dialogue about what authentically motivates Inuit self-determination. As Edmund Searles argues, on the one hand, the politics of Inuit cultural identity have promoted a connection between Inuit identity and outpost camps that assume real Inuit culture can only exist in those places.<sup>271</sup>

On the other hand, Searles points out the corollary assumption is that Inuit culture cannot exist in places or institutions dominated by *Qallunaat*,<sup>272</sup> like Iqaluit or other urban centres. Searles recognizes that the assumptions tying Inuit identity to land-based activities may create a unique space for Inuit identity, but the same assumptions frustrate the creation of an urban Inuit identity that engages modern political economy. He explains, “the phrase ‘caught between two worlds’ was commonly used to describe a cohort of urbanized Inuit who seemed unable to succeed in the world of traditional Inuit and unable to compete in the world of *Qallunaat* culture, symbolized by wage employment and the local educational system.”<sup>273</sup> I would add that in an era when indigenous people increasingly live in urban centres, including Iqaluit, tying Inuit identity

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<sup>270</sup> New York Times (12 June 1922) online: <<http://query.nytimes.com/mem/archive-free/pdf?res=9A00E2DB1E3EEE3ABC4A52DFB0668389639EDE>>.

<sup>271</sup> Edmund Searles, “Placing Identity: Town, Land, and Authenticity in Nunavut, Canada” (2010) 27:2 *Acta Borealia* 151.

<sup>272</sup> Non-Inuit person.

<sup>273</sup> Searles, *supra* note 271 at 163.

to places that have fewer Inuit inhabitants not only essentializes Inuit identity, but also compromises the ability of all Inuit to participate fully in Inuit culture and self-determination. Essentialism on the basis of colonial-era indigenous cultural practices is, however, a problem that afflicts many indigenous legal claims. As Eisenberg argues, the “integral to distinctive culture” test the Supreme Court of Canada in *Van der Peet* adopted for assessing indigenous rights claims under section 35 of the Charter often results in the “domesticating” or disempowering indigenous people’s cultural claims.<sup>274</sup> Similarly, Rotman argues that temporal considerations of indigenous rights and treaty claims limits the vitality of indigenous societies because “[i]nsofar as aboriginal and treaty rights are to be viewed in connection with the cultural and physical survival of Aboriginal peoples, judicial considerations of those rights ought to shift away from temporal considerations and towards the continued vitality of Aboriginal societies.”<sup>275</sup> Essentializing Inuit lifestyle in a way that overlooks how Inuit may participate in wage employment or modern education requires freezing Inuit identity in the colonial era and denying vitality to modern Inuit society. Whether a “real Eskimo” or a “genuine Inuk”, then, Inuit lifestyle is understood to be one of hunting and fishing. The Inuit lifestyle Flaherty portrayed predates the 1922 filming of *Nanook*<sup>276</sup> and certainly predates the creation of Nunavut. The portrait originates in the early era of colonialism. Despite its origins in the colonial era, the idyllic image of Inuit life in camps and on the land persists in the modern political and legal imagination of Nunavut. This image of Inuit identity

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<sup>274</sup> Eisenberg, *Reasons of Identity supra* note 9 at 119-27.

<sup>275</sup> Rotman, *supra* note 252 at 6; see also Anthony Connolly, “Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law” (2006) 7:1 *The Asia Pacific J of Anth* 27.

<sup>276</sup> That Inuit idyll did not exist even on the set of *Nanook*, where the director, Robert Flaherty, and the woman portrayed as Nanook’s wife, Nyla, had a romantic relationship. The child portrayed as that of the couple Nanook and Nyla was in fact Flaherty’s son: see Melanie McGrath, *The Long Exile: a tale of Inuit betrayal and survival in the high Arctic* (New York: Vintage Books, 2006).

helped motivate Inuit self-determination in the process of creating Nunavut, yet excluding some Inuit from identity formation means excluding those same Inuit from the process of self-determination. Moreover, having the Nunavut Court of Justice take part in the exclusion of some Inuit by deciding who can be a “genuine Inuk” adds another problematic dimension to Inuit identity formation. The Court is one of the institutions of the criminal justice system that occupied Inuit. Their decisions apply Canadian law and assert the authority of the Canadian state. To have them also decide who is authentically Inuit implicates the authority of the Canadian state in the process of Inuit identity formation and self-determination.

Two sentencing decisions, *R. v. Evaloardjuk* and *R. v. Nookiguak* demonstrate the Court’s imagination of Inuit lifestyle and how that imagination, as relied upon in the act of punishment, appropriates and essentializes Inuit identity while at the same time asserting as Canadian sovereignty. In *R. v. Evalaordjuk*,<sup>277</sup> the Court considered whether Suzanne Evaloardjuk, an Iqaluit woman who pled guilty to a single count of aggravated assault, should receive a conditional sentence or a jail sentence for her crime. She had argued with her husband about infidelity after drinking and then stabbed him, saying “[I]et’s see if God is going to protect you now.” She stabbed him in the abdomen with a knife and perforated his bowel. The Crown had argued that the nature of the offence, one of domestic violence that inflicted serious injury on the victim, warranted a jail sentence of 8-12 months. Defence counsel argued that a community-based sentence was appropriate based on the Supreme Court’s decision in *R. v. Gladue*.<sup>278</sup> Ms. Evaloardjuk, an Inuit woman with no prior criminal record, expresses a great deal of remorse for her

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<sup>277</sup> [1999] Nu. J. No. 11 [*Evaloardjuk*].

<sup>278</sup> *Ibid* at para 5.

actions. In imposing a nine-month conditional sentence, Justice Kilpatrick draws attention to the “the unique cultural perspectives of the Inuit community of which both Suzanne and her victim are a part.”<sup>279</sup> Justice Kilpatrick goes on to articulate what he means by the circumstances and lifestyle of Inuit in Nunavut that characterize these unique cultural perspectives. He notes the difference between the lifestyle of Inuit in Nunavut and “urban living as is apparent in the south.”<sup>280</sup> He differentiates between “urban living” and Inuit lifestyle on the basis that:

Many of Nunavut's citizens do not have adequate housing and, though this situation is slowly improving, overcrowding is not uncommon. Illiteracy is high and reading as a source of recreation is not available to many. A significant percentage of Nunavut's citizens are unilingual. They speak only Inuktitut. To the extent that most of the visual and printed media continue to be published in English or French, the recreational value of these mediums is limited.<sup>281</sup>

Justice Kilpatrick also links the overcrowding and illiteracy to the crime rate in Nunavut, expressing the view that “poverty, chronic unemployment, and inadequate housing combines with a lack of recreational outlets and substance abuse” draw Nunavut’s citizens into “a life of crime.” He argues that prison offers many of Nunavut’s citizens “material comforts” not available at home.<sup>282</sup> In particular, Justice Kilpatrick interprets Inuit life to mean life on the land. He states, “Many of Nunavut’s citizens have grown up on the land” and explains what life on the land means:

Most Inuit retain a close association with traditional on-the-land activities. Many remain dependent upon these activities as their primary source or recreation. Hunting and fishing, and the foods

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<sup>279</sup> *Ibid* at para 18.

<sup>280</sup> *Ibid* at para 24.

<sup>281</sup> *Ibid*.

<sup>282</sup> *Ibid* at para 24.

generated by these activities provide not only a major staple of Inuit diet, but the activity itself constitutes a way of life.<sup>283</sup>

Justice Kilpatrick also specifically refers to Suzanne Evaloardjuk in a way that reveals he considers her a “genuine Inuk.” He alludes to her “disadvantaged background” as a factor in sentencing, though he does not detail what disadvantages she suffered.<sup>284</sup> He states that she is “a social worker, a teacher, a broadcaster, and a mother” and “a person of tremendous ability.”<sup>285</sup> The decision does not really address whether there is a way to reconcile the portrait of Ms. Evaloardjuk as a person of tremendous ability with the depiction of Nunavut’s disadvantage that Justice Kilpatrick gives. The implication is that the source of the disadvantage is her status as an Inuit person and as a citizen of Nunavut and that she requires the protection of the Canadian state. The decision has the rhetorical effect of using the authority of the Canadian state to endorse the idea of what counts as authentically Inuit and to protect Inuit identity formation—as long as that Inuit identity keeps Inuit living an idyllic, subsistence life on the land.

Evaloardjuk proves her connection to Inuit hunting camps and life on the land and that link allows the Court to rationalize protecting her by imposing a conditional sentence rather than custody. The decision has already tied Inuit identity to life on the land and to the disadvantages of illiteracy, poverty, and unemployment. It is not only her disadvantage, but also her association with the idyllic Inuit lifestyle of hunting and fishing that matters for Evaloardjuk’s sentence. Justice Kilpatrick argues that a conditional sentence confines Evaloardjuk to her home and deprives her of on-the-land

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<sup>283</sup> *Ibid* at para 22.

<sup>284</sup> *Ibid* at para 27.

<sup>285</sup> *Ibid* at para 27.

activities, making it a greater punishment for her than for someone in a larger community in the south:

I am confident that many, if not most Inuit would perceive close confinement in a house as a significant hardship, particularly where this restricts access to the land. I am confident that such an order, in an appropriate case, will serve as a meaningful deterrent to others.<sup>286</sup>

Evaloardjuk's character as a "genuine" Inuit woman who discloses an association with traditional life on the land means the Court mitigates her punishment. Evaloardjuk is not simply a woman who stabbed her husband in a jealous rage; she is a citizen of Nunavut and a participant in Inuit life. That is what distinguishes her and makes house arrest a punishment for her. It does not matter that she lives in Iqaluit, the capital of Nunavut, or that she has worked in non-traditional jobs, or that she has never committed a crime before; nor does it matter that jail would also restrict participation in life on the land even more stringently than house arrest. Prisoners do not normally have access to preparing or eating country food, but someone on a conditional sentence under house arrest could participate in that aspect of hunting or fishing. Inuit lifestyle, essentialized only as the idyllic portrait of on-the-land living, is what matters. Justice Kilpatrick's decision appropriates Inuit identity because his reasons connect Evaloardjuk's lesser sentence to her Inuit identity and the Court's need to protect that identity. The Court takes on the role of the protector of Inuit lifestyle, a paternalistic role. The Court's paternalistic role is familiar, a position that not only reinforces the Court's colonial past, but also mirrors the interpretation of indigenous identity in the Canadian criminal justice system that

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<sup>286</sup> *Ibid* at paras 20 & 22.

affirms the criminal justice system's power over indigenous people and asserts the sovereignty of the Canadian state.

The Court's use of Inuit identity as a justification for the exercise of the Canadian state's authority is more pronounced in reasons for judgment that rationalize the imprisonment of Inuit offenders. The Nunavut Court of Justice's association of the punishment an offender receives with the extent of his or her involvement with traditional lifestyle may mean that house arrest punishes a "genuine Inuk;" however, the association also means that offenders who fall short of the ideal of an authentic Inuit lifestyle could receive greater punishment. The application of *Evaloardjuk* in *R. v. Nookiguak*<sup>287</sup> illustrates how the Court appropriates and essentializes Inuit identity to decide whether an Inuk is not authentically Inuit. Terry Nookiguak pled guilty to sexually assaulting his sixteen year-old niece while she was sleeping. He had no criminal record and a positive pre-sentence report. Although defence counsel relied on sections 718 and 718.2 of the *Criminal Code* to argue that as an aboriginal offender Mr. Nookiguak should be considered for a conditional sentence, Justice Kilpatrick sentenced him to eighteen months in jail. Justice Kilpatrick notes the seriousness of the sexual offence Terry Nookiguak committed and distinguishes Mr. Nookiguak's case from *Evaloardjuk*'s on the basis of his "urban" lifestyle. Nookiguak is "largely urbanized" because he "participates in the local wage economy of Iqaluit", "possesses good job skills", and "some computer skills."<sup>288</sup> Justice Kilpatrick concludes he is "largely urbanized in his focus and his lifestyle" because:

There is no evidence to suggest that this citizen's present food sources or recreation is contingent upon access to on the land activities. Mr. Nookiguak possesses a grade 11 education. He has

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<sup>287</sup>, [2005] NUCJ 16 (CanLII) [*Nookiguak*].

<sup>288</sup> *Ibid* at para 19.

a credit card. He is fluent in English. When not at work, or occasionally drinking or gambling, he spends his time alone at home. He seems to prefer this lifestyle, and is comfortable with it.<sup>289</sup>

Justice Kilpatrick makes it an important factor in sentencing Nookiguak that the Inuit man's life is not "tied to the land."<sup>290</sup> He implies that wage-based employment, credit, fluency in English (we are not told if Mr. Nookiguak speaks Inuktitut), and being a homebody means he does not live an Inuit lifestyle. The suggestion is that Mr. Nookiguak's Inuit identity is diminished because he neither lives on the land, nor relies on the land for recreation. It is not just that the offence of sexual assault is serious enough to result in a jail sentence. There is a component to rationalizing Nookiguak's sentence that involves the Court's imagination of Inuit lifestyle as traditional life on the land. The Court applies the authority of the Canadian state, the Canadian criminal justice system, to impose that imagination on Inuit offenders. An irony lies in that fact because, in defence of the Court's idealized imagination of Inuit identity, Inuit are treated even more harshly by the state. The violence applied at the moment of sentencing is even greater in *Nookiguak* than *Evaloardjuk* because it involves imprisonment, the ultimate exercise of the state's power over its citizens. As I argued in chapter one, imprisonment reveals the inherent violence implicated in the moment of sentencing.

The assumptions about Inuit identity being tied to traditional spaces that Edmund Searles criticizes for frustrating the development of Inuit identity in urban spaces manifest themselves in *Evaloardjuk* and *Nookiguak*. It does not matter that Terry Nookiguak lives in Iqaluit, just as Suzanne Evaloardjuk. In *Nookiguak*, Justice Kilpatrick finds Iqaluit is

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<sup>289</sup> *Ibid* at para 19.

<sup>290</sup> *Ibid* at paras 22-24.

less “Inuit” than it was when he sentenced Suzanne Evaloardjuk. Justice Kilpatrick states Iqaluit “has doubled in size since this Court released its decision in *R. v. Evaloardjuk*.”<sup>291</sup>

He argues:

Residents of a larger, more cosmopolitan population like Iqaluit will not likely feel the same impact. Deterrence is weakened by the greater anonymity associated with living in a larger urban center. Enforcement of such an order becomes more difficult. To the extent that the non-Inuit segment of the population does not share the Inuit’s cultural identity with the land and the strong social values underlying this, the significance of confinement and the hardship associated with this may not be understood in the same way. The deterrent effect of such a sentence will be reduced, because the lifestyle that is most affected by confinement is not shared by many of the urban residents of Iqaluit.<sup>292</sup>

Justice Kilpatrick’s explanation about Iqaluit’s “urban” lifestyle and wage economy, and his inference that its residents live an “urban” lifestyle is entirely intended to rationalize why a conditional sentence would not adequately punish an Iqaluit resident. “Urban” or “cosmopolitan” are not words most residents of Iqaluit would use to describe the city, the population of which, in 2011, remains below 10,000 people. Perhaps compared to Inuit communities that have neither direct flights to Ottawa, nor many opportunities for wage employment, Iqaluit is urban. Compared to Toronto or even Victoria, however, Iqaluit is decidedly not urban. Characterizing Iqaluit’s lifestyle as urban is just another way of expressing that Iqaluit’s lifestyle is not an Inuit lifestyle in the sense the Court imagines Inuit life. To live an Inuit lifestyle means living a traditional, land-based, subsistence lifestyle. Terry Nookiguak does not live that life, so he is not a “genuine Inuk.” Therein lies the irony in the result. The Court, an institution of colonialism and a means of asserting Canadian sovereignty over Inuit takes it upon itself to judge as inauthentically

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<sup>291</sup> *Ibid* at para 21.

<sup>292</sup> *Ibid* at para 24.

Inuit someone who fails to live a lifestyle that colonialism tried to erase. In doing so, it continues to perpetuate the assertion of Canadian sovereignty even as it makes the effort to be sensitive to the Inuit cultural context.

Reducing Inuit lifestyle to idealize subsistence life on the land essentializes what Inuit lifestyle is to a time and place that is colonial. Essentializing Inuit identity in *Evaloardjuk* and *Nookiguak* ignores the history of occupation, forced resettlement, and residential schooling that removed Inuit from their traditional camp life and resulted in Inuit adapting to colonization. Colonialism and the subsequent Inuit political activism involved in the land claim has changed Inuit lifestyle, but in the eyes of the Nunavut Court of Justice Inuit must remain on the land to be understood as “genuine Inuk.” Justice Kilpatrick’s imagination of Inuit identity allows the criminal justice system to appropriate and essentialize Inuit identity by constructing an idea of what type of Inuk possesses the “particular circumstances” of an aboriginal offender, a “genuine Inuk,” that allows for imposing a noncustodial sentence. The exercise of Canadian sovereignty is being used to determine the authenticity of Inuit identity.

The Court’s reasoning perpetuates the idea that authentic Inuit culture exists in settlements, which are in fact a product of colonialism, rather than Iqaluit, the capital of Nunavut. As a result, the Court distinguishes what is authentically Inuit in Nunavut in a way that supports the Canadian state’s authority in Nunavut. The “traditional” spaces are those determined by the state. Where Inuit remain in these “traditional” spaces, hunting and fishing, the Canadian criminal justice system will refrain from exercising the full power of the state. Where Inuit become politically and economically active in the same way as *Qallunaat*, however, the Canadian state will exercise its full power to punish

Inuit. Whatever intention the Nunavut Court of Justice may have in *Evaloardjuk* or *Nookiguak* to diminish the historic injustice the criminal justice system visited on Inuit, it fails. The depictions of Inuit lifestyle in *Evaloardjuk* and *Nookiguak* reveal the work sentencing does in making use of Inuit identity to assert the sovereignty of the Canadian state. The nature of sentencing and the criminal justice system uphold the authority of the Canadian state and that puts the Court in an untenable position with respect to Inuit identity. If even with the best intentions, sentencing in the Nunavut Court of Justice cannot escape the need for the criminal justice system to enforce Canadian sovereignty.

### **Part II: Imagining Inuit Law: “There Was No Rape in the Old Days”**

Despite the creation of Nunavut, the Canadian state formally remains the sovereign authority over Inuit in the criminal justice system. The position of Inuit law and Inuit authority in Nunavut is undetermined and arguably contentious given the formal authority the Canadian state retains. For institutions enforcing Canadian sovereignty in the Inuit geopolitical space that is Nunavut, the result is an uncomfortable tension. The Canadian *Criminal Code* may grant the Nunavut Court of Justice extensive authority to decide criminal cases, but the punishment it imposes exclusively punishes Inuit in an Inuit territory. The Court’s appearance includes Inuit symbols, but the criminal circuit courts from which the Court takes its legal inheritance were not designed to represent Inuit law, they were designed to represent and communicate Canadian law. In fact, they were designed specifically to communicate the authority of the Canadian state through the criminal justice system. Inuit law governed the camps and communities in which Inuit lived until Canada began asserting sovereignty through its occupation of Inuit people. The Canadian criminal justice system, as I outlined in chapter two, was one of

the primary tools of occupying Inuit people. Even when judicial engagement advocated for Inuit rights, like Justice Sissons's decision in *Kikkik*, Canadian law defined the applicable legal principles. The land claim developed collective Inuit voices and Inuit identity in Nunavut, but any formal application of Inuit law in Nunavut's criminal justice system is constrained by the legal apparatus of the Canadian state. The Nunavut Court of Justice is the institutional apparatus of the Canadian state. The source of the Court's authority in the criminal justice system remains the power of the Canadian state. At the same time, the Court exercises power throughout the political entity that represents Inuit and symbolizes Inuit identity, the Government of Nunavut. Inuit have questioned whether the Court's rationalization of its position as an authority over Inuit is legitimate and whether the territory should create Inuit institutions to apply Inuit law. Questioning whether the Canadian criminal law and Inuit law conflict has resulted at times in exposing how the Canadian criminal justice system can cause fissures in Inuit politics. On January 24, 2009, the former Minister of Justice of the Government of Nunavut, Louis Tapardjuk, sent an email to all his employees calling for a dialogue about incorporating *Inuit Qaujimajatuqangit* into the criminal justice system. Tapardjuk's concern was the way he believed the Canadian criminal justice system treated domestic violence. He said, "Often, the male is charged even though the conflict may have been initiated by the female partner."<sup>293</sup> In response to the public and political outcry to his email, he issued a formal apology and resigned from his position as Minister of Justice. In October 2010, Tapardjuk resigned from the Nunavut cabinet and in his parting speech mentioned his regret that he had not brought Inuit traditional knowledge and the criminal

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<sup>293</sup> Chris Windeyer, "Email costs Tapardjuk -justice portfolio", *Nunatsiaq News* (January 30, 2009) online: Nunatsiaq News <[http://www.nunatsiaqonline.ca/archives/2009/901/90130/news/nunavut/90130\\_1860.html](http://www.nunatsiaqonline.ca/archives/2009/901/90130/news/nunavut/90130_1860.html)>.

justice system closer together. He stated, “The court system and control system need to be addressed because it’s alien to the thinking of our elders [...] They’ve never had to deal with a court system before... you know, we have an enigmatic social malaise.”<sup>294</sup>

On the one hand, the type of conflict that led to Tapardjuk’s resignation is characteristic of the law in general and the criminal justice system in particular. Actors within the Canadian criminal justice system have different interpretations of the law and often openly disagree. What is interesting, however, is the way that the conflict in Nunavut involves a conflict between the normative orders of Inuit law and Canadian criminal law, the latter being a tool of colonialism and the former representing the Inuit identity of Nunavut’s majority. The conflict plays out in the Nunavut Court of Justice, especially in sentencing decisions. Sentencing implicates the full extent of the violence the Canadian state. When the Court exercises that violence over Inuit in Nunavut, it discloses a rationale for inflicting the violence of the state. If Inuit law is incorporated into a sentencing decision as recognition of an offender’s Inuit identity or to allow the Court to assume an Inuit identity, the Court appropriates Inuit law and identity for the purpose of rationalizing the violence of the Canadian state. The Canadian state still asserts sovereignty, but the assertion of sovereignty is cloaked in the mantle of Inuit identity.

*R. v. Sala*<sup>295</sup> shows how the Court’s attempt to resolve the uncertainty between Canadian law and Inuit law results in reinforcing the authority of the Canadian criminal justice system. The decision reflects the tenuous relationship the Court has with the source of its authority over the Inuit. The Court portrays traditional Inuit law in *Sala* in a way that

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<sup>294</sup> Chris Windeyer, “Louis Tapardjuk resigns from Nunavut cabinet”, *Nunatsiaq News* (28 October 2010) online: Nunatsiaq News <  
[http://www.nunatsiaqonline.ca/stories/article/98789\\_louis\\_tapardjuk\\_resigns\\_from\\_nunavut\\_cabinet/](http://www.nunatsiaqonline.ca/stories/article/98789_louis_tapardjuk_resigns_from_nunavut_cabinet/)>.

<sup>295</sup> Nunavut Court of Justice (October 14, 1999) [*Sala*].

allows the Canadian criminal justice system to take on the character and assume the power of Inuit authority. Alec Sala was convicted of assault on his spouse and a sexual assault on another young woman.<sup>296</sup> The sexual assault took place outside the community of Sanikiluaq after Mr. Sala forced the complainant to go for a ride with him on his skidoo.<sup>297</sup> The assault on his spouse involved poking and threatening her with a shotgun as well as punching her on the forehead and arm.<sup>298</sup> Mr. Sala had a criminal record and was intoxicated at the time of the offences.<sup>299</sup> In sentencing Mr. Sala to a penitentiary sentence of fifty-one months, Justice Kilpatrick relies not only on the sentencing provisions in section 718 of the *Criminal Code*, but also on Inuit law. He tells Mr. Sala that he “not only violated the criminal laws of Canada but, as I understand it, you have also violated a customary law of the Inuit as well.”<sup>300</sup> Justice Kilpatrick identifies the source of his understanding of Inuit law as elders, in particular elders’ stories of Inuit life prior to colonization:

I am told by Elders that long before the coming of the courts and the police there was a form of justice in the Inuit camps that did not take the form of written laws. Inuit customs, traditions and way of life was all part of Inuit law. Inuit law was something that was carried in the hearts and minds of every member of the Inuit family and community. It was an attitude. It was a state of mind. I’m told by the Elders that it was a way of relating to other people in the family. It was a way of relating to your neighbours. The Elders tell me that the most important part of that law was, I call it a law of respect.<sup>301</sup>

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<sup>296</sup> Mr. Sala was found guilty of sexual assault after a jury trial. He pled guilty to the assaults on his spouse. See *ibid* at 1.

<sup>297</sup> *Ibid* at 2.

<sup>298</sup> *Ibid* at 4.

<sup>299</sup> *Ibid* at 5-6.

<sup>300</sup> *Ibid* at 7.

<sup>301</sup> *Ibid* at 7.

The “law of respect” Justice Kilpatrick finds in elders’ stories is based on his idea of the “hard” life in the camps. He says, “Survival in a harsh environment in the camps required the cooperation of everyone in the camp. There had to be respect for others in order for that cooperation to continue. Without that cooperation, the whole group was threatened. Its very survival could be effected.”<sup>302</sup> He admonishes Sala because his offence against Canadian law violates the Inuit “law of respect.” According to Justice Kilpatrick, the Inuit law of respect is what makes sexual assault a crime in Inuit law: “The duty to respect others included the victim in the sexual assault. Without that respect the harmony and balance of the camp, the harmony and balance of the community so essential to survival, would be ruined.”<sup>303</sup> Justice Kilpatrick then goes on to contrast the punishment he imposes, the penitentiary sentence, with what he depicts as punishment under Inuit law:

In the past you would have been cautioned, I’m told. If somebody was disrupting the life of the camp they would be cautioned by the Elders or perhaps the camp leader. And the word of the Elder or the camp leader was law. It had to be respected for the sake of the group. And if you continued to violate that respect, eventually, I’m told, Inuit custom would allow very serious consequences upon someone who was threatening the harmony of the group. It could include death, I’m told. There are many stories of what happens to people who will not respect that law.<sup>304</sup>

Justice Kilpatrick uses the image of an elder or camp leader imposing the word of Inuit law on camp members to justify his sentence in the case. He says, “In this particular case you were cautioned on a number of occasions when you showed disrespect to others in the past through assaults. You were cautioned not, I suppose, by Elders but by a judge, a

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<sup>302</sup> *Ibid* at 7.

<sup>303</sup> *Ibid* at 8.

<sup>304</sup> *Ibid* at 9.

court.” He equates the Court’s penitentiary sentence with “banishment” under Inuit law and notes that banishment “could mean death.”<sup>305</sup> By implicitly likening the Court to traditional Inuit leaders, Justice Kilpatrick communicates that the authority of the Canadian state, which the Court represents, has taken the place of Inuit authorities like elders and camp leaders. In invoking and applying Inuit law, Justice Kilpatrick takes up the role of an elder, a traditional authority over Inuit. He legitimizes his decision-making role by taking on the *persona* of a traditional elder or camp leader and appropriating that identity as the authority for the “law of respect” that sexual assault violates. Moreover, by incorporating Inuit law into the criminal justice system, he legitimizes the Canadian state’s punishment of Sala. Cloaked in Inuit law, the *Criminal Code* visits the violence of the Canadian state on Inuit offenders. The Court’s assumption of Inuit authority elides the way the criminal justice system’s displacement of traditional authority in Nunavut, including elders, and lends unsubstantiated legitimacy to the authority of the Canadian state.

Cloaking Canadian authority in Inuit identity does not mean the Court possesses Inuit authority. It in fact discloses a weakness in the Canadian state’s authority over Inuit. It exposes the need for the Canadian criminal justice system to adopt an Inuit source of authority to justify the exercise of the state’s power over Inuit. To lend the Canadian criminal justice system and the Canadian state the authority of Inuit elders or camp leaders, Justice Kilpatrick must tie the principles of the Canadian criminal justice system to principles of Inuit law. He suggests that Inuit law would condemn Mr. Sala’s actions based on the cooperation and respect necessary to survive in camps. Serious

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<sup>305</sup> *Ibid* at 9.

consequences, including death, could result from someone who carried out such actions, which Justice Kilpatrick portrays as disruptive to the community. One might imagine a penitentiary sentence is light in comparison to what Inuit law requires. Sexual assault is a prevalent crime in Nunavut, and delving deeper into the understanding and conceptualization of sexual violence in Inuit law reveals a much more complicated picture than the one Justice Kilpatrick portrays.<sup>306</sup> If one looks into what traditional Inuit law was in camps, however, what Inuit oral history and elders' perspectives suggest is that traditional life did not understand sexual assault the way that Canadian criminal law does today. In *Interviewing Inuit Elders: Perspectives on Traditional Law*, Emile Imaruittuq, an elder questioned directly about sexual assault in traditional camps, responds "[t]here was no rape in the old days." Imaruittuq's statement demands further inquiry. It cannot be taken at face value that unwanted sex did not take place in traditional camps. It refers instead to how the concept of consent in the *Criminal Code* did not have the same significance to sexual relations in traditional camp life as it does in Inuit communities today. In *Saqiyuq*, Apphia Agalakti Awa openly recounts how Inuit arranged marriages in traditional camps and how her own marriage was arranged. When she was a young teenager, she did not want to leave her family and marry, but her husband eventually tied her to a *qamutiik* and took her to his family's camp. Awa is open about how she perceives her experience in comparison to what an Inuit woman's modern experience would be. She explains that sexual relations differed in the past, "When I started menstruating, that is when I found out about sex ... If it was today, with the RCMP and Social Services here, I would report that I was raped by my husband, and they would

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<sup>306</sup> Between 2006 and 2008, statistics of police-reported crime indicate that the rate of sexual assault in Nunavut was eight times that of the rest of Canada and almost three times as much as the other Territories: see Charron *supra* note 152 at 7.

take him away from me...”<sup>307</sup> Awa neither condemns, nor idealizes, women’s experience in traditional camps:

When we were living in it, when we were doing it, it was all right. Happiness was around us. There didn't seem to be all that many stressful situations ... But looking back, it was a very difficult lifestyle. It was a terrible thing we went through as women, as teenagers. The struggles we went through, we don't forget.<sup>308</sup>

Awa’s story depicts the nuances and complexities of comparing life in a traditional camp to life in modern communities, especially in relation to the role of women. Contrasting her view with Imaruittuq’s illustrates that elders may differ in the way they understand sexual violence and sexual relations in the past. In addition, modern Inuit life has changed understandings about sexual relations—just as sexual mores and how the criminal justice system makes sense of those mores has changed over time in Canadian law.

Certainly, it is impossible to capture the nuances and complexities of Awa’s and Imaruittuq’s understandings of sexual violence with the notion of the “law of respect.” The term “law of respect” and images of traditional camps in *Sala* result instead in an essentialized version of Inuit law that validates the Canadian criminal justice system’s authority, the Canadian state’s authority, rather than represents Inuit law. This version simplifies and idealizes Inuit law in a way that ignores conflicts that would reasonably exist across time, space, and—most importantly—different normative orders, both Inuit and Canadian. Traditional Inuit camp life is set as the standard for Inuit behaviour and relationships, despite the reality that traditional Inuit life has changed. The depiction of

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<sup>307</sup> Wachowich, *supra* note 217 at 41.

<sup>308</sup> *Ibid* at 41.

Inuit tradition as one closer to a pre-contact situation of subsistence living functions to oversimplify Inuit law and freezes it in the past. Instead of an elder from Sala's community punishing him, a *Qallunaat* judge of the Nunavut Court of Justice visits judgment on him using reasoning that dresses up Canadian law and the exercise of Canadian sovereignty as Inuit law. Using Inuit law and authority allows the Court to justify Sala's punishment in a way that resolves any uncertainty regarding the Court's authority over him. The Court's description of the principles of Inuit law as the same as the principles of Canadian law has the effect of eliminating any question about whether Inuit law should apply to Sala. The Court's reduction of Inuit law serves to legitimize the normative order of the Canadian criminal justice system. The suggestion is that the violence of the Canadian state *Sala's* punishment inflicts is not colonial because Inuit law is implicated in judging the accused. The rationale negates any debate about whether the Canadian criminal justice system adequately reflects Inuit law.

Canadian law dressed up as Inuit law is not a substitute for an Inuit justice system. Functioning in the context of Inuit culture and Nunavut's political position as a territory created through Inuit self-determination, the debate about creating an Inuit justice system remains constantly relevant. Any Inuit justice system will engage the question of what structures and institutions are best-placed to communicate Inuit authority. Although *Sala* never mentions what role the Government of Nunavut plays in the criminal justice system, it is one potential institution with the authority to develop Inuit law. Nunavut is the product of Inuit self-determination and in one sense its territorial government is the natural inheritor of a camp leader's authority. There may be other candidates for that position, but the history and situation of the Nunavut's courts as instruments of the

Canadian state's authority excludes the Nunavut Court of Justice from the category of candidates. The Court's decision in *Sala* demonstrates why. The decision does not consider who should inherit camp leaders' authority; instead, the Court itself takes on that authority to reinforce the authority of the Canadian state. Furthermore, the Court insists that Inuit authority must be traditional to be legitimate, once again tying Inuit identity to the Inuit hunting camp of the colonial era. Inuit law is left frozen in time and space, far from the Canadian criminal justice system and removed from anywhere it can openly challenge or upset the sovereignty and authority of the legal institutions of the Canadian state.

### **Part III: Imagining Inuit Justice as Restorative Justice**

*Sala* suggests that when the Court creates parallels between Inuit law and the Canadian criminal justice system, it does so with the effect of maintaining the authority of the Canadian state through the criminal justice system. Even when the Court recognizes differences between the Canadian criminal justice system and Inuit law, however, that difference is still constructed in a way that maintains Canadian sovereignty. At the heart of the charge that the criminal justice system fails indigenous people, as I explained in chapter one, is the way the criminal justice system upholds Canadian sovereignty over indigenous people. Indigenous self-determination movements in Canada have not resulted in more control over the criminal justice system for indigenous people. Instead, recommendations for indigenous control have resulted in legislation and specific measures that construct the question of sovereignty in the criminal justice system as one of cultural difference to be accommodated through the sentencing.

The criminal justice system has failed Inuit in Nunavut in the same way it has failed other indigenous Canadians. Nunavut's violent crime rate is the highest in Canada.<sup>309</sup> In a story entitled "The Trials of Nunavut" on April 2011, the *Globe and Mail* brought to national attention the realities of the criminal justice system in Nunavut that are already well-known to most people living in the territory.<sup>310</sup> Even as I sat down to write this chapter, a family of four was killed in Iqaluit in what is believed to be a murder-suicide and an armed stand-off took place in Pangnirtung.<sup>311</sup> Often, the root of the failure of the criminal justice system has been identified as the cultural difference between Inuit justice and the Canadian criminal justice system. There is a tendency to set up the Canadian criminal justice system in opposition to traditional Inuit justice to emphasize the restorative nature of the latter and the retributive nature of the former.<sup>312</sup> The remedial measures focused on addressing the criminal justice system in Nunavut revolve around the issue of the cultural difference between Inuit "restorative" justice and non-Inuit "retributive" justice. In its sentencing decisions, the Court frames the cultural difference in a way that conflates the concepts of Inuit justice and Inuit community with the concepts of restorative justice and community-based sanctions within the meaning of the *Criminal Code*. The effect is to contain the conversation about Inuit justice within the authority of the Canadian state and to pre-empt the need for Inuit to create an Inuit justice

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<sup>309</sup> Charron, *supra* note 152.

<sup>310</sup> White, *supra* note 125.

<sup>311</sup> See Sarah Rogers, "Death of Sylvain Degrasse and family a puzzle to friends, relatives", *Nunatsiaq News* (June 10, 2011) online: Nunatsiaq News <[www.nunatsiaqonline.ca](http://www.nunatsiaqonline.ca)>; Chris Windeyer, "Nunavut RCMP treating Iqaluit family deaths as homicides", *Nunatsiaq News* (9 June 2011) online: Nunatsiaq News <[www.nunatsiaqonline.ca](http://www.nunatsiaqonline.ca)>.

<sup>312</sup> See e.g. Aupilaarjuk et al, *supra* note 125 at 157, the editors stating "Canadian law views murder primarily as a crime that should be punished. Inuit used to view murder as a tragedy and tried to redress its consequences."

system based on how Inuit themselves want to frame concepts of justice and community in the Inuit geopolitical space that is Nunavut.

As I argued in chapter one in regard to the equation of indigenous culture and law with restorative justice in general, the association between concepts of Inuit community and Inuit justice and ideas of community-based sanctions and restorative justice initiatives in the criminal justice system is problematic. In “The Role of the Victim in the Criminal Justice System—Circle Sentencing in Inuit Communities,” Mary Crnkovich sets out the problems that arise when the criminal justice system conflates concepts of Inuit justice, Inuit community, and restorative justice models. She points out that the movement toward circle sentencing as an alternative and restorative Inuit model of justice relies on a number of assumptions: “(a) the assumption that this alternative is rooted in Inuit culture and tradition; (b) the assumption that if the community is involved this is a community-based alternative; (c) the assumptions about ‘the’ Inuit community; and (d) the assumption that this is truly an alternative to the existing justice system.”<sup>313</sup> She interrogates these assumptions. First, she argues that there is little similarity between Inuit traditional justice mechanisms and alternatives introduced through sentencing circles. She notes that locating Inuit traditional justice in the forum of a sentencing circle overlooks the fact that sentencing circles were not part of traditional Inuit justice, nor would traditional Inuit have lived in communities populated in the manner Nunavik’s communities are. Second she questions whether an initiative of a judge in which the judge has the final say, as was the case in sentencing circles in Nunavik, can legitimately constitute a “community-based” justice project. Third, she finds that participation in the

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<sup>313</sup> (1995) Prepared for the Canadian Institute for the Administration of Justice Conference in Banff, Alberta, October 11-14 online: CASAC <<http://www.casac.ca/content/role-victim-criminal-justice-system-circle-sentencing-inuit-communities-0>>.

sentencing circle may discriminate against some members of the community, particularly women who are victims of violence. She argues that the power imbalance is important to acknowledge because:

if “community” is understood to be the local geographic unit and the “collectivity” empowered by judges to participate in and, eventually, decide on the design and procedures of such sentencing alternatives, the end result will mean women may be further discriminated against and unable to speak out.<sup>314</sup>

Finally, Crnkovich concludes that sentencing circles are not really “alternatives” for Inuit communities but instead an often problematic tool of the existing criminal justice system. The circle usually does not address the lack of resources in the community that lead to violence. Also, since control remains with the *Qallunaat* mechanisms of the criminal justice system, the “alternative” involves little discussion of the questions of legitimacy and the imbalance of power that affect the justice system overall. Crnkovich offers criteria and measures for how to improve the problems she finds with sentencing circles in Nunavik, but she points out that an Inuit-based system must be one designed by Inuit in the context of self-government and constitutional negotiations.

Crnkovich’s concern is the Inuit communities in Nunavik, but the questions she raises about the assumptions involved in the circle sentencing process are relevant for Inuit in Nunavut as well. In Nunavut, community justice committees in particular have been touted as the means to reconnect Inuit with mechanisms of traditional justice. Community justice committees function as a “diversionary” or “alternative” sentencing process meant to institute restorative justice measures. In *Crime, Law, and Justice Among Inuit in the Baffin Region*,<sup>315</sup> Curt Griffiths analyzes several problems with the

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<sup>314</sup> *Ibid.*

<sup>315</sup> Griffiths et al, *supra* note 125 at 193-219.

community-based justice initiatives that exist on Baffin Island, namely that initiatives suffer from the same problems that Crnkovich highlights in her piece as well as a dependence on government resources to achieve what are meant to be community goals. Understanding Inuit justice as restorative justice has become part of the sentencing process and the understanding finds its way into the Nunavut Court of Justice's sentencing decisions. In sentencing Inuit offenders, the Court uses the concepts of restorative justice or "community" justice to reflect traditional Inuit justice and Inuit communities. The Court often incorporates these concepts in considering the "particular circumstances of aboriginal offenders" under section 718.2(e) of the *Criminal Code* or in applying *Gladue*. It is yet another way to appropriate Inuit identity—though in this instance to manage the question of sovereignty as cultural difference that requires a "special" or "alternative" model of justice rather than a new criminal justice system.

What constitutes Inuit views of justice, as I explained in chapter one, does not break down simply into the principles of restorative justice that seem to carry so much weight in the *Criminal Code* and the Canadian state as principles of aboriginal justice. In *Interviewing Inuit Elders: Perspectives on Traditional Law*, elders' stories demonstrate how complex considerations and the nuances of time, place, and circumstance all affected how Inuit dealt with offenders.<sup>316</sup> In 2002, the Inuit hamlet of Cambridge Bay asked the Court to banish a man convicted of sexual assault. The community expressed concern for public safety if the man was returned. Banishment is not an available sentence in the Canadian criminal justice system, but instead of merely noting that, the sentencing judge states, "it would be unusual to send someone away from their home community" and that

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<sup>316</sup> *Ibid* at 43-47, 53; Aupilaarjuk, *supra* note 125 at 22 [Mariano Aupilaarjuk discussing how murder was not condoned], 167 & 169 [Emile Imaruittuq saying victims' families would often kill as revenge and that he never heard of people being forgiven].

banishment is a “very difficult and very troubling concept in many ways.”<sup>317</sup> Banishment does not align with the restorative justice principles the Canadian criminal justice system construes as aboriginal justice, but Inuit in Cambridge Bay clearly believed it was a just punishment. Pauktuutit Inuit Women’s Association has argued that the relationship between traditional justice and restorative justice outcomes in the criminal justice system improperly construes cultural factors as relevant when sentencing Inuit offenders. In fact, Pauktuutit opposed the reform that added the “particular circumstances of aboriginal offenders” in section 718.2(e) of the *Criminal Code* to the principles of sentencing. They argued that experiences of alternative measures did not respond to the needs of Inuit women. They took issue with “the underlying assumption that the interests of the victim and society are one in the same.” They stated, “[w]hen we consider Inuit society and narrow this down to particular Inuit communities, often the interest of the victim may be in conflict with that of the community.”<sup>318</sup> Pauktuutit’s representatives told the Standing Committee on Bill C-41 that they perceived a disparity between sentences imposed on Inuit versus sentences imposed on non-Inuit for sexual assault:

When non-Inuit judges take into account mitigating factors that are based on cultural issues, such as the man being a good hunter and providing for his family, not knowing that what he did was unacceptable in the law since it is acceptable in Inuit culture, and failing to fully understand the extent of the harm and violence that sexual assault as a violent act—not just a matter of sex without affection—we believe this is a violation of our rights.

[...]

Reviewing some of the sentencing decisions of trial and lower-level appeal judges for violent crimes against women in one Inuit region illustrates the extent to which Inuit culture is often misunderstood and misapplied. It is not uncommon in these

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<sup>317</sup> *R v Nakashook*, NUCJ (November 20, 2002).

<sup>318</sup> Pauktuutit Submission, *supra* note 105 at 13 (Martha Flaherty and Jeanne Sala).

decisions to see judges reluctant to sentence an Inuk offender convicted of sexual assault to a federal penitentiary. The reasons are often expressed in terms of culture.<sup>319</sup>

Two case studies from the Nunavut Court of Justice, *Kootoo* and *Christensen*, indicate that Pauktuutit's concerns in 1995 were almost prescient. The cases show how the Court's sentencing decisions build on the idea that "restorative justice" as "Inuit justice" is somehow part of dealing with Inuit communities on Inuit terms. Non-custodial sentences pass for "community-based" sentences. The Court's reasoning is an appropriation of Inuit views of justice that ultimately maintains the sovereignty of the Canadian state by limiting the reach of what Inuit self-determination in Nunavut can involve. The Court's reasoning allows Canadian law to govern what Inuit justice means and to define what counts as Inuit community. Having the Canadian criminal justice system define Inuit justice and Inuit communities wields as heavy a hand as over Inuit as the Canadian state did through colonial occupation because it continues to displace Inuit authority in favour of the authority of the Canadian state. As I argued in chapter two, the Nunavut Implementation Commission's statement, "'Nunavut' is a means, not an end in itself,"<sup>320</sup> was made in recognition of the continuing development of Inuit identity and how that identity motivates and drives the geopolitical space for Inuit in Nunavut. The Commission recognized the need for a continuing, evolving conversation about Inuit identity and Inuit self-determination, as well as how that conversation might change Nunavut's position in Canada. What authorities negotiate and manage the conversation about the meaning of Nunavut is part of the process not only of creating Inuit identity in

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<sup>319</sup> *Ibid* at 6 & 19.

<sup>320</sup> *Footprints*, *supra* note 229 at 2.

Nunavut, but also of empowering Inuit self-determination. The effect of having the criminal justice system take the place of Inuit authority and Inuit communities is essentially to occupy Inuit through sentencing in the criminal justice system.

*R. v. Kootoo*<sup>321</sup> provides an example of how the Court roots restorative justice initiatives in the Canadian criminal justice system in Inuit tradition as a means of justifying imposing a “community-based” sentence. The issue Justice Kilpatrick addresses in *Kootoo* is whether a conditional sentence, a “community-based” sanction, rather than custody, is an appropriate sentence for Mickey Kootoo. Mr. Kootoo pleads guilty to unlawfully entering the home of a 59 year-old woman and sexually assaulting her. Justice Kilpatrick sentences Mr. Kootoo to 38 months in jail, relying heavily on Mr. Kootoo’s failure to involve himself in any rehabilitative activities in the Inuit community. Justice Kilpatrick expresses the opinion that “718.2(d) and (e), when viewed with S. 742.1, leave no doubt in the Court's mind that the amendments to the *Criminal Code* represent a fundamental shift in sentencing, a shift away from incarceration to both a wider range of punitive responses and a restorative model involving more community-based sentencing.”<sup>322</sup> He takes the view that *Gladue* expands the range of available sentences for indigenous offenders and that in focusing on individual indigenous offenders “[d]ifferences in sentencing based on this individualized sentencing focus are to be expected, particularly where restorative justice principles are applied across a broad spectrum of different offences and different communities.”<sup>323</sup> The “individualized focus” emphasizes the meaning restorative justice purportedly has for an Inuit offender. Justice

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<sup>321</sup> *R v Kootoo*, 2000 CanLII 4442 (NU CJ).

<sup>322</sup> *Ibid* at para 26.

<sup>323</sup> *Ibid* at para. 38.

Kilpatrick places importance on whether the accused has “tangible involvement” with the “restorative processes in the community of Iqaluit.”<sup>324</sup> The restorative justice processes he identifies are the “local Justice Committee” or “other community based organizations.”<sup>325</sup> He also makes it clear that engaging in the “healing process” would have gone some way toward showing an involvement in restorative justice:

A sentence plan based on restorative principles will usually demonstrate a significant degree of creativity to engagement of local resources and community involvement in the healing process itself. Mickey has had considerable opportunity to engage these restorative processes and to develop a personal healing plan prior to sentencing. The fact that he has not done so is telling.<sup>326</sup>

Similar to the Supreme Court’s description of indigenous law in *Gladue*, then, Justice Kilpatrick identifies the Inuit legal traditions underpinning his imagination of Inuit justice as healing traditions. He also limits the idea of what community can assist in delivering Inuit justice. He wants Kootoo to seek out not only conventional psychiatric resources, but also Inuit community resources such as elders or the local justice committee. His judgment uses almost interchangeably the concepts of “restorative justice”, “community” and “Inuit community”:

Thus, an offender who is heavily engaged in a restorative process with the support of his community may well bring himself within range of a community-based disposition in the form of a Conditional Sentence.[...] There are many recent examples of this special type of disposition, particularly in the smaller communities outside Iqaluit where conditional sentences have been imposed with the assistance and intervention of elders and sentencing panels.<sup>327</sup>

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<sup>324</sup> *Ibid* at para 39.

<sup>325</sup> *Ibid*.

<sup>326</sup> *Ibid* at paras 40-41.

<sup>327</sup> *Ibid* at para 37.

The “restorative justice” and “community” Justice Kilpatrick refers to are meant to reflect Inuit justice and Inuit community. That is why he refers to “smaller communities” and the “assistance and intervention of elders”. The assumption is Inuit community is the same as the geographical spaces defined by Nunavut’s settlements. In addition, within these communities, only certain members, specifically traditional elders, can act as an authority in the sentencing process. The Court determines how and when elders can participate in sentencing Inuit offenders in Nunavut’s settlements. Another assumption the Court communicates is that for Inuit, “community” justice is a restorative, healing process.

The Court’s assumptions reduce ideas of Inuit justice and Inuit community into ideas that the Canadian state can appropriate and dominate through sentencing. If Inuit want to participate in sentencing, they must acquiesce to the state’s assumptions about Inuit communities, Inuit authorities, and Inuit justice; after all, the assumptions carry the weight of state law and the threat of state violence being visited on those who fall outside those assumptions. Since the Court conflates both Inuit justice with what is understood as restorative justice under the *Criminal Code* and Inuit community with the idea of a community-based sanction under the *Criminal Code*, Inuit must engage in the sentencing process on the state’s terms. They must accede to the Canadian state’s authority as exercised pursuant to the *Criminal Code* to decide what Inuit justice is and on what basis it is different from non-Inuit justice. Community members must also accede to the state’s determination that traditional elders are Inuit authorities for sentencing. Instead of self-determination driving the creation of an Inuit justice on Inuit terms in the new territory, Inuit become participants in the state’s process, laws, and ideas of Inuit justice. Inuit

participation reinforces Canadian sovereignty by lending legitimacy to the exercise of the criminal justice system's punishment of Inuit offenders. The fact that the nature of that punishment through restorative justice is less harsh than jail does not diminish the problematic way sentencing exercises sovereignty. The very dilemma the imagination of Inuit justice creates in *Kootoo* lies in the way that regardless of the outcome of sentencing, the effect of sentencing in the criminal justice system is to assert Canadian sovereignty at the expense of Inuit identity.

*R. v. Christensen*<sup>328</sup> also reveals how the Court equates community-based sentences and restorative justice with concepts of Inuit justice and community, with the effect of reinforcing the authority of the Canadian criminal justice system over Inuit. In *Christensen*, Justice Browne considers whether a conditional sentence is available as a sentence for a young Inuit man from Grise Fjord with no criminal record who had sexually assaulted a woman while on a trip to Iqaluit. Her sentencing decision follows a line of reasoning that takes her from the *Criminal Code*'s provisions for community-based sentences to how community-based sentences promote principles of aboriginal justice as restorative justice. She reviews briefly the principles of sentencing in section 718 of the *Criminal Code*, including section 718.2(e)'s requirement to have "particular attention to the circumstances of Aboriginal offenders."<sup>329</sup> She relates the conditional sentence provisions in section 742 to alternative measures of sentencing that consider principles of restorative justice, then she expresses what role the Nunavut Court of Justice might have in applying the sentencing principles. She states, "[t]he communities in Nunavut, and the Government of Nunavut, as well as perhaps as the courts in Nunavut,

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<sup>328</sup> 2000 CanLII 14581 (NUCJ).

<sup>329</sup> *Ibid* at 5.

are also attempting to explore creative sentencing options to try to reduce the crimes that are prevalent in our communities here and in the south.”<sup>330</sup> She concludes:

I think that as a result of all of the changes to the *Criminal Code*, the cases that have talked about the principles of sentencing, that the weight given to each of the principles of sentencing is shifting somewhat and that more recognition is given to the issues often recognized in Aboriginal justice discussions of restorative justice, offenders taking responsibility, and those sorts of issues.<sup>331</sup>

Justice Browne’s line of reasoning ultimately connects Inuit community and Inuit justice to ideas of restorative justice and non-custodial, community-based sentencing in the *Criminal Code*. She understands the “shifting” principles of sentencing and the “recognition” of aboriginal justice as a shift toward restorative justice. She struggles to define community, perhaps recognizing the tenuous place the Court holds as a legitimate venue for defining Inuit community given its colonial history and its role in asserting Canadian sovereignty through the criminal justice system. She suggests that Inuit communities and the Inuit public government are the appropriate venues for discussing alternative measure of sentencing for Inuit offenders, but nonetheless finds that the Canadian state’s power can justify the Nunavut Court of Justice’s imagination of Inuit justice as restorative justice. Even with Justice Browne’s best intentions to recognize Inuit cultural difference and the authority of the government of Nunavut, the Canadian state’s authority dominates *Christensen*’s imagination of Inuit justice.

*Kootoo* and *Christensen* explicitly and implicitly understand the restorative justice process to be “aboriginal justice.” The source of the relationship the Court assumes between restorative justice and Inuit justice derives from Canadian law and authority—a

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<sup>330</sup> *Ibid* at 6.

<sup>331</sup> *Ibid* at 7.

source legitimate to the Canadian criminal justice system. If a Canadian authority determines the legitimate sources of Inuit justice, then where is the room for the Inuit to create or maintain their own assessment of what legitimate sources of Inuit justice are? The Court's decisions rationalize the punishment of Inuit offenders as ostensibly the delivery of Inuit justice, but the Canadian state determines the parameters and meaning of Inuit justice through the Canadian criminal justice system. The Court's rationalization of the punishment of Inuit offenders appropriates Inuit views of justice and equates them with the Canadian state's ideas of restorative justice. The equation reduces the views of Inuit justice to restorative justice and sets them up in opposition to the "retributive," alien colonial criminal justice system. It is a construction of the idea of traditional justice that allows the Court to rationalize a sliding scale of custody based on the degree of involvement an offender has with the traditional aspects of the community in Nunavut such as elders or family. In setting up Inuit views of justice as ones that correspond to restorative justice but are antithetical to the retributive principles of sentencing, the Court's decisions reduce and essentialize Inuit views of justice. Banishment, for example, is unacceptable even when an Inuit community acts expresses that banishment is an appropriate punishment. The appropriation and essentialism of Inuit views of justice insures the conversation about whether the Canadian state legitimately exercises authority over Inuit is one about accommodation not sovereignty. The message is that Inuit self-determination in Nunavut excludes the power to decide what constitutes Inuit justice. The state can accommodate Inuit identity but is ill-placed to empower Inuit authority. Moreover, how the Court accommodates Inuit offenders in the nature of their punishment is significant because punishing Inuit offenders ultimately implicates the

violence of the state and represents the exercise of sovereign authority over Inuit. The lack of involvement with restorative justice is interpreted as a failure to involve oneself with Inuit community and to possess Inuit views of justice, as justified by the Canadian state. The “spectacle” of the sovereign’s exercise of authority is no longer the scaffold or the high-profile criminal trial, but judgment about whether offenders can acquiesce to the Canadian state’s concept on Inuit justice. If not, it is then open for the Canadian criminal justice system to exercise authority over the Inuit offender. Either as authentic participants in “Inuit” justice, or as recipients of “Canadian” justice, then, Inuit offenders are subject to the authority of the Canadian state. Moreover, The Canadian state retains the power to decide what justice means to Inuit, regardless of the character it assigns to the nature of justice. Consequently, the goals of Inuit self-determination to create an Inuit justice system are frustrated.

#### **Part IV: Imagining Inuit Self-Government: The Trials of Nunavut**

“The Trials of Nunavut” the Globe and Mail set out to expose in its recent series on Nunavut did not just involve problems with the criminal justice system in Nunavut. The article heavily criticizes the Government of Nunavut, arguing that Inuit political culture “can become incapable of identifying its core problems.”<sup>332</sup> One of the politicians the article quotes, Tagak Curley, acted as an Inuit activist for the land claim. Curley’s response to the article was: “I get angry when I read the national newspaper that tries to portray Nunavut as hopeless, that there’s not hope, the leaders have their face under the snow and they’re not willing to admit it.”<sup>333</sup> Scholarly criticism of the territorial

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<sup>332</sup> White, *supra* note 125.

<sup>333</sup> Chris Windeyer, “Curley blasts Globe and Mail for Nunavut feature”, *Nunatsiaq News* (May 31, 2011) online: Nunatsiaq News

government's ability to represent Inuit matches journalistic criticism. Jackie Price argues that the Government of Nunavut fails to represent Inuit experience and empower Inuit.<sup>334</sup> Michael Mifflin suggests that the structure of governance is the problem because there is "a mismatch between responsibilities and capacity" in the territorial government and the Nunavut Tunngavik Incorporated, the trust created to manage the land and monies transferred to Inuit under the land claim.<sup>335</sup> Whatever the source of the critique, criticism inevitably falls on the territorial government. As I showed in chapter two, that territorial government is tied inextricably to the forces of Inuit self-determination. Although the structure of the territorial government is rooted in Canadian public government, that structure is the means by which Inuit chose to achieve some measure of control in governing themselves and their people. The Government of Nunavut is a political institution born of the land claim movement and driven by Inuit advocacy and movements for self-determination. Inuit achieved self-determination in the form of their own territory after almost a century of Canadian political and economic occupation. Whether the land claim's achievement, Nunavut's territorial government, functions competently to represent and provide services to Inuit becomes a test of how well Inuit-self-determination works for Inuit.

The criminal justice system in Nunavut is as much a site today for the debates about Inuit rights, governmental responsibility, capacity, and competence as it was during early criminal trials and circuit courts. Just as Justice Sissons's decisions at times demonstrates

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<[http://www.nunatsiaqonline.ca/stories/article/98789\\_curley\\_blasts\\_globe\\_and\\_mail\\_for\\_nunavut\\_feature](http://www.nunatsiaqonline.ca/stories/article/98789_curley_blasts_globe_and_mail_for_nunavut_feature)>

<sup>334</sup> Price, *supra* note 260 at 92-94.

<sup>335</sup> Michael Mifflin, "The Prince and the Pauper—Nunavut Tunngavik Incorporated and the Government of Nunavut" (July-August 2009) Policy Options 92 at 92.

how judicial engagement both advanced Inuit interests and maintained Canadian sovereignty,<sup>336</sup> so too do sentencing decisions in the Nunavut Court of Justice. Judicial engagement that results in judges advocating for Inuit rights can be admirable and can advance causes Inuit bring to court. For example, in *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*<sup>337</sup> the Court allowed the Qikiqtani Inuit Association's motion for an injunction on seismic testing in Lancaster Sound. Nonetheless, judges are federal appointees and symbols of Canadian sovereignty in the criminal justice system; criticism they level against the territorial government that is the product of Inuit advocacy brings the Canadian criminal justice system directly into conflict with Inuit self-determination. In the era in which the Nunavut Territory represents the culmination of Inuit political determination and symbolizes Inuit identity, having the Court negotiate Inuit identity and advocate for Inuit too often places the criminal justice system place between Inuit and their government—it is a place the Court already naturally occupies as an instrument of colonialism that dislocates Inuit authority. Of course, Nunavut is not the only place judicial activism has political consequences or raises questions about judges' role in the criminal justice system. In Nunavut, however, judicial engagement is not just a debate about the advisability or the political consequences of judicial activism. It is also a debate about Inuit self-determination. When judges of the Nunavut Court of Justice criticize the Government of Nunavut in sentencing decisions under the auspices of protecting or advocating for Inuit, they tacitly undermine the operation of *de facto* Inuit self-government. Advocating for Inuit rights is the role Inuit activists played in creating Nunavut as a space for Inuit self-government.

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<sup>336</sup> See the case studies of *R v Kikkik* and *R v Kogogolak* in part II(b)(iii) of chapter two.

<sup>337</sup> 2010 NUCJ 12 (CanLII).

Undermining the achievement of Inuit self-government perpetuates the historic role the criminal justice system had in asserting Canadian sovereignty over Inuit. The criminal justice system played a key role in occupying Inuit and asserting Canadian sovereignty in the Arctic. Judges' intention may be to advocate for Inuit, but the effect is to assert Canadian sovereignty over Inuit. Three cases, *R. v. K.G.S.*,<sup>338</sup> *R. v. J.P.*,<sup>339</sup> and *R. v. Haongak*,<sup>340</sup> illustrate how judges of the Nunavut Court of Justice engage in criticism of the Government of Nunavut with the effect of asserting Canadian sovereignty by questioning Inuit governance. Inuit self-determination is interrupted in favour of Canadian sovereignty.

In *R. v. K.G.S.*, the Court censures the Government of Nunavut with regard to Nunavut's child protection system and alternatives to youth custody services available in Nunavut. K.G.S., a sixteen year-old youth, pleads guilty to twenty offences, for the part most property offences that involved breaking into homes in Rankin Inlet. Intoxication is a factor in all of the offences. Although he has no criminal record, Justice Kilpatrick sentences the youth to an eight month open custody and supervision order under the *Youth Criminal Justice Act* (YCJA).<sup>341</sup> Justice Kilpatrick determines that K.G.S. is one of the "exceptional cases" provided for in section 39(1) of the Youth Criminal Justice Act when a court considers custody for a young person. In his decision, Justice Kilpatrick recognizes the importance of noncustodial options for young people, but he finds that there are few noncustodial measures for youth in Nunavut. He states, "[t]he YCJA again assumes that these "other measures" will be available where and when necessary to

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<sup>338</sup> [2009] NUCJ 9.

<sup>339</sup> [2009] NUCJ 13.

<sup>340</sup> Nunavut Court of Justice (5 June 2008), unreported.

<sup>341</sup> SC 2002, c 1.

address the needs of youth in this jurisdiction. Such an assumption may well be valid in the south. The provinces enjoy a wealth of resources that are simply not available in Canada's remote northern communities."<sup>342</sup> At one point, he compares Nunavut to Ontario and decides that "Ontario has the non-custodial alternatives that are necessary to implement the philosophy of the YCJA. Nunavut does not."<sup>343</sup> Justice Kilpatrick canvasses the noncustodial sentencing options available in Nunavut and finds that: "apart from a sentence of probation with some community service work, there are very few structured programs and services available to youth in the communities."<sup>344</sup> He notes the YCJA provides for alternatives that Nunavut has failed to implement, such as additional structure and supervision for troubled youth as contemplated by section 42(1)(m) of the YCJA or an intensive support and supervision program as contemplated by section 42(1)(l) of the YCJA. He complains that the Department of Health and Social Services fails to respond to the Court's request for assessments. At the heart of his critique is the vulnerability of Nunavut's youth:

Many of the youth in conflict with the law come from disadvantaged backgrounds. They struggle with crushing poverty and very limited means of social or economic advancement. Many of these youth come from chaotic, dysfunctional homes where there is no consistency, little discipline and few role models.<sup>345</sup>

The quotation communicates that poverty and vulnerability characterize Inuit youth in Nunavut—not unlike the image of Inuit the *Globe and Mail* depicts in the "Trials of Nunavut." Justice Kilpatrick implies that the Canadian criminal justice system could

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<sup>342</sup> *KGS*, *supra* note 338 at para 18.

<sup>343</sup> *Ibid* at para 31.

<sup>344</sup> *Ibid* at para 19.

<sup>345</sup> *Ibid* at para 22.

ameliorate K.G.S.'s lot but it struggles with the failures of the Nunavut government. His remarks imply that the lack of noncustodial sentencing options is a failure of Inuit self-government. He suggests that the "attendance programs" or an "intensive support and supervision program" would be alternatives available for K.G.S. in another non-Inuit jurisdiction. He also finds fault with the Department of Health and Social Services for their lack of involvement in the court process, though there is no indication he had ordered an assessment of the young person before him. Justice Kilpatrick's criticism of the Nunavut territorial government becomes more overt when he compares what the Government of Nunavut offers for Inuit to what was available under the Northwest Territorial government:

there were a number of privately run group homes, traditional camps and the Uttaqivik half-way house designated by regulation as open custody "homes" to assist youth in crisis (see SI-001-98, N.W.T. Gaz. 1998.II.2). Prior to division, there were nine such facilities scattered throughout what is now Nunavut.

Many of these resources are no longer available to youth in Nunavut.<sup>346</sup>

Justice Kilpatrick's criticism does not end with his assessment of the lack of alternatives to custody for K.G.S. Even the type of custody the Government of Nunavut offers is unsatisfactory because "there does not appear to be any open custody "group homes" available in Nunavut to provide the structured, stable living arrangements that these youth so desperately need to thrive and succeed."<sup>347</sup> The Court's critique of the success and virtue of Inuit self-determination, the Nunavut Territory, has the effect of using that

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<sup>346</sup> *Ibid* at paras 45-46.

<sup>347</sup> *Ibid* at para 47.

exercise of Canada's authority to criticize Inuit self-determination. Justice Kilpatrick's conclusion exemplifies such criticism:

It is the right of government to decide where and how to allocate its resources. In doing so however the government must respect the scheme mandated by the federal government under the YCJA. It must ensure that both levels of custody, and the facilities, programs and privileges necessary to support this distinction, remain available for those youth sentenced to custody in Nunavut.<sup>348</sup>

Justice Kilpatrick's reasoning here upholds the Canadian state's authority over the Nunavut government. K.G.S. requires a "structured living environment where there is a clear link behaviour and consequences" that would physically prevent him from accessing intoxicants.<sup>349</sup> Justice Kilpatrick suggests it is the Nunavut government's responsibility to provide that structured environment, as the Canadian state requires. The failures of the Nunavut territorial government, the lack of resources it provides, become the basis for creating the "exceptional circumstances" that allowed sentencing K.G.S. to custody. Due to the failure of Nunavut's government, the Court justifies the Canadian state's intervention and assertion of authority. The Court visits the violence of the Canadian state on K.G.S., but only because his own government, the Inuit government of Nunavut, fails him first. The Court fashions itself as K.G.S.'s advocate, imposing the violence of the state on him for his own good. The Court's activism does more than advocate for K.G.S.; it also paints a picture of the Inuit territorial government as incapable in contrast to the power of the Canadian state. The picture painted reinforces the idea that, for the good of Inuit themselves, Inuit self-determination is governed and constrained by the authority of the Canadian state. The Court guards the right of the

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<sup>348</sup> *Ibid* at paras 47-49.

<sup>349</sup> *Ibid* at para 38.

Canadian state to oversee Inuit self-determination rather than advancing Inuit self-determination, regardless of the Court's objective to act as an advocate for K.G.S.

Tying decisions about custody to the success of Inuit self-determination in Nunavut means implicating the exercise of Canada's authority to constrain Inuit self-determination. The implication for self-determination matters regardless of whether the policy choices targeted in the Court's decisions are the reasons for keeping an offender out of jail rather than sending him there. In *R. v. Haongak* Justice Johnson decides that due to the lack of resources available to Inuit, the Court should refrain from imposing jail sentences on Inuit offenders. Mr. Haongak was convicted of nine breaches of court orders. He was 28 years old and had a criminal record that spanned ten years and included sexual assault and impaired driving as well as many other breaches of court orders. The Crown argued that Mr. Haongak should serve four months jail for the offences. Defence counsel argued, on the basis of *Gladue*, that his client should not be sentenced to custody unless there was an indication he had failed to take advantage of counselling and treatment resources, of which there were few in Haongak's community of Cambridge Bay; however, there was a men's program in which the accused agreed to take part. In his sentencing decision, Justice Johnson is critical of both the municipality of Cambridge Bay and the territorial government. He refers to RCMP statistics about crimes in Cambridge Bay involving alcohol and states "[d]espite these disturbing figures, the community of Cambridge Bay has chosen not to establish an alcohol committee to the detriment of alcoholics like the accused."<sup>350</sup> An alcohol committee would monitor the requests for alcohol import permits from individual in a municipality to the Nunavut

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<sup>350</sup> *Haongak*, *supra* note 340 at 8.

Liquor Commission, but the mayor of Cambridge Bay publicly opposed imposing restrictions on alcohol.<sup>351</sup> Justice Johnson makes a point of noting the mayor's opposition in his sentencing decision; however, he reserves the majority of his criticism for how the Government of Nunavut allocates its resources.<sup>352</sup> Noting "[i]t costs a lot of money to put a person in jail" and the overcrowding in Nunavut's territorial prison, he criticizes the lack of resources the Government of Nunavut provides for alcohol addiction treatment and counselling. He says:

Eventually the Government of Nunavut will realize that it is in its own economic interest to invest in treatment and prevention rather than building jails. Until that happens, the courts will continue to apply the *Gladue* principles except where it is necessary to protect the public and will make the most of the situation.<sup>353</sup>

Justice Johnson's decision levels criticism against two different Inuit political entities: the Hamlet and the territorial government. He reproaches the policy choices both make. He emphasizes the lack of resources in Nunavut and the Nunavut territorial government's policy choices because he makes a "correlation between the treatment resources available and the level of crime."<sup>354</sup> Although very real logistical and financial challenges exist to providing services in a remote area like Cambridge Bay, he does not consider them and instead frames the lack of resources as a matter of economic choice. His critique of Nunavut's government seems to advocate for Inuit but is truly just a rationalization of how a failure of Inuit self-government is why he should punish Haongak without sentencing him to jail. Nunavut's policy choices are not only the target of Justice

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<sup>351</sup> Note that all alcohol purchases in the Nunavut Territory are highly regulated and require applications to the Nunavut Liquor Commission regardless of whether a community has an alcohol committee.

<sup>352</sup> *Haongak*, *supra* note 340 at 9-10.

<sup>353</sup> *Ibid* at 12.

<sup>354</sup> *Ibid* at 14.

Johnson's opprobrium, but also the reason for the punishment he chooses. Even if Justice Johnson's critique is accurate, bringing the criminal justice system to bear in the political problems of Nunavut's territorial government removes agency from both Haongak and the territorial government. The Court and the criminal justice system are placed in a paternalistic position with respect to Inuit offenders and Inuit self-determination. Justice Johnson is also caught in a cultural conundrum. To ignore the circumstances of Inuit identity in Nunavut is to ignore the geopolitical space in which the Nunavut Court of Justice functions; however, to take account of Inuit identity in Haongak's punishment is to use the Canadian state's authority to visit judgment on the product of Inuit self-determination. Whatever Justice Johnson's aim, the structure of the criminal justice system means any sentencing decision making use of Inuit idea privileges the role of the state over that of Inuit self-determination.

My final case study returns us to a case I discuss at the start of my thesis, *R. v. J.P.* J.P. was sentenced to a life in prison when Justice Kilpatrick designated him a dangerous offender under section 752 of the *Criminal Code* in May 2009. In his decision to sentence J.P. as a dangerous offender Justice Kilpatrick critiques what he perceives as the dearth of social welfare resources available for the mentally ill in Nunavut. He bemoans that "all the king's horses and all the king's men are not able to reassemble the pieces of a life shattered by a toxic combination of profound mental illness and enduring criminality."<sup>355</sup> In doing so, Justice Kilpatrick makes the failure of the territorial government an issue in J.P.'s fate as a dangerous offender as much as the facts of the case. J.P. was a repeat sex offender diagnosed with schizophrenia and pedophilia.

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<sup>355</sup> *JP*, *supra* note 339 at para 67.

Although he had the opportunity for treatment several times at federal penitentiaries and psychiatric institutions, he did not trust the medical profession, refused to take medication to deal with his issues, and would not discuss his criminal behaviour. Justice Kilpatrick includes a “post-mortem” in his sentencing decision suggesting that the Nunavut territorial government’s failure to provide J.P. with a “long-term plan” for his “special needs” was the source of J.P.’s criminal behaviour.<sup>356</sup> He criticizes the social services agencies of the territorial government because “both financial and physical” resources are not available to help J.P. He scathingly states, “[i]t takes more than government pronouncements of policy to effect real change in the lives of citizens devastated by mental illness.”<sup>357</sup> Justice Kilpatrick openly disapproves of the lack of “interdepartmental cooperation” in dealing with the mentally ill:

Justice and Corrections, Health and Social Services, the medical community, the Department of Education, all need to be involved in a cooperative effort to develop a treatment plan and coordinate resources in the search for a longterm solution. Cooperative case management and a holistic response are required. This is not presently provided by government in Nunavut.<sup>358</sup>

The moment of sentencing in *J.P.* reveals how the Nunavut Court of Justice continues to assert Canadian sovereignty over Inuit people. J.P. is a fallen man. His mental illness encounters the incompetence of the Inuit territorial government, and the result is that J.P. has “fallen from the wall.” “All the king’s horses and all the king’s men” in the Canadian criminal justice system cannot reassemble the pieces. Portraying an Inuit dangerous offender as a fallen man who sank into criminality as a result of an ineffective

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<sup>356</sup> *Ibid* at para 66.

<sup>357</sup> *Ibid* at para 68.

<sup>358</sup> *Ibid* at para 69.

Nunavummiut government rather than as a repeat, high-risk offender whose crimes mandate protection of the public perpetuates the Court self-image as the self-appointed protector of Inuit people—protecting them from the disorganization of Inuit self-government. Like K.G.S., J.P. is vulnerable and a victim of his own government as much as his own actions. The Court in Nunavut ostensibly advocates for Inuit but advocates in such a way that the beneficiary is the Court itself. The Court's authority and competence are set up in contrast to the Inuit territorial government's incompetence. The effect of the Court's characterization of Inuit self-government is to shatter the idea that Inuit government advocates for Inuit. Inuit self-government cannot successfully advocate for Inuit if it fails them in the way the government failed J.P. That is the message the Court conveys in *J.P.* The damage done to Inuit identity is that the Court displaces Nunavut as a place of Inuit self-government to reinforce its own authority and, by the same token, the authority of the Canadian state. If “all the king's horses and all the king's men” still assert authority over Inuit through the criminal justice system, where is the space for Inuit identity free from appropriation and essentialism?

What the three cases I analyze in this part demonstrate is the way that the structure of sentencing in Canada's criminal justice system has the effect of diminishing the power of Inuit self-government even when the Court acts as an advocate for Inuit. The failure of self-government implies a failure of Inuit self-determination. To mitigate that failure justifies the continued authority of the Canadian state through the criminal justice system. Inuit offenders, portrayed as impoverished and open to exploitation, are the excuse for maintaining the paternalistic authority of the Canadian state over Inuit. The Court's depiction of Inuit self-government as incompetent means Inuit need an advocate—and

the Nunavut Court of Justice takes on that role. To paint Inuit as exploited people allows the Court to maintain the paternalistic role the state, and the criminal justice system, has had with respect to Inuit even after the success of the Nunavut land claim. An image of Inuit as poor, vulnerable, and in need of outside protection denies the educational and socio-economic trends that resulted in Inuit legislators, lawyers, and advocates championing the Inuit land claim and successful creation of the Nunavut Territory.<sup>359</sup> Instead, it places Inuit in a position that continues to perpetuate Canada's exercise of authority over Inuit as vulnerable people in need of Canadian government protection at the expense of Inuit self-determination.

### **Conclusion**

Amendments to the *Criminal Code* reflect the efforts of the Canadian state to alleviate the historic injustice the criminal justice system has perpetrated against indigenous people. Section 718.2(e) and *Gladue* are intended to be remedial. In Nunavut, there is the opportunity to apply remedial measures in a jurisdiction that was created as a means to effect *de facto* Inuit self-government. The Nunavut Court of Justice applies section 718.2(e) and *Gladue* to an almost exclusively Inuit population in a territory where the government is a place that Inuit identity is meant to manifest itself and to guide public decision-making. The “particular circumstances of Aboriginal offenders” are more universal than particular in the Nunavut Territory. If the territorial government and Nunavut's majority could make space for *de facto* Inuit self-government, the criminal justice system in Nunavut should have a sentencing process in which there is the opportunity for Inuit law to flourish. Examining the Nunavut Court of Justice's

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<sup>359</sup> To name a few: Eva Aariak, Premier of Nunavut; Sandra Inuitiq, Akitsiraq graduate, lawyer, and activist; Jack Anawak, NTI Vice-President; John Amagoalik, politician, negotiator, and signatory of the Nunavut Land Claim Agreement; Leona Agglukaq, politician and federal Minister of Health.

application of *Gladue* and overall sentencing of Inuit offenders demonstrates something different, however. The Court's decisions have the effect of appropriating and essentializing Inuit identity in the way they use Inuit lifestyle, Inuit law, Inuit justice, and Inuit government to legitimize the authority of the Canadian state.

Nunavut is a place where Inuit identity gave rise to a land claim that focused on creating Inuit public government. Nonetheless, the state continues to wield authority over Inuit in Nunavut. The Court's intention may be to advocate for Inuit or to alleviate the historic injustice colonialism wrought on Inuit people, but in fact the Court perpetuates that very historic injustice. The ties that bind Inuit and non-Inuit together in Nunavut appear more knotted and complicated than they were before the land claim. Untying them seems impossible. Examining sentencing cases that represent how the Court portrays Inuit identity allows for understanding how indigenous identity is constructed and negotiated in sentencing. The uncomfortable space the Nunavut Court of Justice occupies in sentencing Inuit offenders also reflects how modern sentencing has assumed an uneasy place as mediator between the criminal justice system and indigenous self-determination—both of which require the exercise of authority over indigenous people to succeed. If a territory with a homogenous indigenous community and an indigenous public government cannot institute remedial measures by means of the criminal justice system, can the criminal justice system ever remedy the historic injustice perpetuated against indigenous people by colonialism and colonial criminal courts? The continuing dynamic of appropriation of identity and assertion of identity in the Nunavut Court of Justice leads me to believe that the Canadian criminal justice system in its current form cannot ever institute remedial efforts that alleviate the historic injustice colonial and the

criminal justice system. A criminal justice system absent the authority of the Canadian state and that does not assert Canadian sovereignty is almost unimaginable. The question of whether it is possible for the criminal justice system ever to serve as the means for remedying the injustices against indigenous people is the subject I will address in chapter four.

## Chapter Four: Reconciling the Irreconcilable? Indigenous Identity and the Criminal Justice System

### Introduction

My review of Nunavut's sentencing decisions prompts me to question whether sentencing in Canada is trying to reconcile the irreconcilable: can the criminal justice system ever be a device for alleviating the historical injustice that colonialism and the criminal justice system has visited on Canada's indigenous people? In this chapter, I want to explore this question and what it means for the future of Canada's criminal justice system and Canada's indigenous people. What I set out to accomplish in this chapter is not to develop a set of recommendations. My goal instead is to challenge modes of thinking and develop a different mindset than what currently characterizes sentencing for indigenous offenders. Despite recommendations in numerous reports completed that document how the criminal justice system has failed Inuit and other Canadian indigenous people, however, the problems that prompted the sentencing reforms of section 718 of the *Criminal Code* and the Supreme Court's decision in *Gladue* persist. The sentencing process remains in the hands of primarily non-indigenous people, and systemic discrimination remains a problem in the Canadian criminal justice system. If anything, as I have shown in the Nunavut context, the sentencing reforms introduced to alleviate historic injustice exacerbate the appropriation and essentialism of Inuit identity for the purpose of maintaining sovereignty over Inuit people. Indigenous people remain overrepresented in the Canada's criminal justice system, particularly in Nunavut. The historical injustice that colonialism and the criminal justice system perpetuated against indigenous people, taking indigenous land and seeking to assimilate indigenous cultures,

has not been resolved. Even in Nunavut, where Inuit political struggle and advocacy focused on creating a territory as a space in which Inuit express Inuit identity, sentencing maintains Canadian sovereignty. The dilemma of how to alleviate the historic injustice of colonialism and the criminal justice system remains a dilemma. Moreover, the dilemma calls into question not only the paradigm governing sentencing in the criminal justice system but also the way we approach indigenous claims for self-governance.

The sentencing decisions I analyze in chapter three reveal that the criminal justice system operating in a geopolitical space that is meant to represent the result of Inuit self-determination results in continued occupation of the Inuit by the state through the criminal justice system. Possibly, any changes attempted within the existing structure of the criminal justice system and the current political structures that constrain indigenous self-determination will be as unsuccessful as the Nunavut Court of Justice. There may be no way to reconcile the criminal justice system's role in asserting Canadian sovereignty with the goal of indigenous self-determination. I am not convinced there is a way for the Canadian criminal justice system to cease appropriating and essentializing indigenous identity for the purpose of asserting Canadian sovereignty. The function of the state and the operation of criminal justice system are so connected by the idea of sovereign authority that changing the implementation of criminal justice seems impossible. Nonetheless, I propose here a way to approach the dilemma that may uncover some solutions. First, I will show that although certain aspects of the dilemma are peculiar to the criminal justice system in Nunavut, the dilemma permeates the way the Canadian criminal justice system deals with indigenous difference. Second, I will consider how some type of reform to the Canadian criminal justice system could alleviate the

appropriation of identity and the assertion of sovereignty that characterizes the sentencing of Canada's indigenous offenders and results in the dilemma facing criminal courts like the Nunavut Court of Justice. Finally, I will argue that ultimately the dilemma exposes the imbalance of power between indigenous and non-indigenous people that merely accommodating indigenous people through existing state structures cannot solve.

### **Part I: Delineating the Dilemma**

Given the peculiarities of Nunavut's colonial history and the history of the Nunavut Land Claim Agreement, it is possible that one could construe the dilemma Inuit face in the sentencing process as one unique to Inuit and uncharacteristic of the criminal justice system overall. As I detailed in chapter two, Nunavut does face specific challenges related to its location, history, and the political relationship culminating in the Nunavut Land Claim. The criminal justice system's tendency to do the work of exercising sovereignty through the negotiation and constructions of indigenous identity is not unique to Nunavut. The dynamic between identity and sovereignty the sentencing process Nunavut reveals is typical of the way the sentencing process in Canada deals with the question of indigenous difference generally.

#### **a. The Dilemma in Nunavut**

It is tempting to imagine that the dilemma I present is confined to Nunavut. Nunavut's remoteness, its small population, the unique way Canada colonized the Arctic, and the land claim movement all make for convincing arguments that Nunavut is unusual among Canadian jurisdictions and that my conclusions could be confined to the criminal justice system in that territory. I would argue, however, that the dilemma is not unique to Nunavut; it is merely Nunavut's particular circumstances that allow for the starkest

example of how the dilemma plays out in the quotidian functions of the criminal justice system. Those particular circumstances include the way Canadian sovereignty is asserted over the Arctic, the environment in which the Nunavut Court of Justice functions, and the way the environment of the criminal justice system in Nunavut allows a small proportion of the legal profession to set the tone.

The criminal justice system played a very specific role in the assertion of sovereignty in Nunavut. Law was a tool of Canadian occupation, a way the Canadian government could exercise sovereignty over Arctic territory through Inuit. As I explained in chapter two, the criminal justice system was the means to impose state sovereignty on Inuit. Policing, criminal circuit courts, and the early high-profile trials of Inuit demonstrate how the criminal justice system in the Arctic appropriated and essentialized Inuit identity for the purpose of asserting Canadian sovereignty. Inuit resistance and Inuit rights advocacy culminated in the land claim movement and the creation of the Nunavut Territory. For Inuit, the Nunavut Land Claim was meant to result in *de facto* self-government, a geopolitical space tied to the expression of Inuit identity; however, many challenges hamper the implementation of true Inuit governance, as Jackie Price and Ailsa Henderson argue.<sup>360</sup> The Government of Nunavut strives to incorporate *Inuit Qaujimajatuqangit* into legislation and policies of Nunavut's public government but the structure of the Canadian state and questions around how to define *Inuit Qaujimajatuqangit* in modern Nunavut remain a challenge. The undercurrent in the debate Louis Tapardjuk sparked when he criticized the criminal justice system stems in part from the challenge the Government of Nunavut faces whenever *Inuit Qaujimajatuqangit* and the criminal justice

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<sup>360</sup> Jackie Price, *supra* note 260; Ailsa Henderson, "Self-Government in Nunavut" in *Aboriginal Self-Government in Canada*, 3rd ed, Yale D Belanger, ed (Saskatoon: Purich Publishing, 2008).

system conflict. Nunavut and its government are supposed to function in harmony with *Inuit Qaujimajatuqangit*, yet the new territory has little power over the criminal justice system. Constitutionally and structurally, there is little likelihood the new territory will ever exercise the kind of power over the criminal justice system that fulfills public expectation about bringing the principles of *Inuit Qaujimajatuqangit* and the criminal justice system closer together. The Nunavut Territory as geopolitical space is fused to the political structure of the Canadian state. Although the conversation about how to best make Nunavut a place for Inuit governance continues, the implementation of Inuit governance took a backseat to the constitutional and political imperative of making Nunavut part of Canada during the land claim negotiation. Whether or how Nunavut will ever provide a way to express Inuit identity free from the historical legacy of colonialism remains an open question. As a result, one could imagine the dilemma the Nunavut Court of Justice faces is a facet of the larger problem of Nunavut being a failure of *de facto* Inuit self-government.

Moreover, Nunavut's territorial status means the federal government has a greater role in the criminal justice system than it would in a province. Anywhere in Canada, it is the federal government who legislates criminal law under section 91(27) of the Constitution and the provincial government administers criminal justice under section 92(14).<sup>361</sup> In Canada's Territories, however, the federal government also holds the powers of the Attorney General under the *Criminal Code*. This means that the federal prosecution service exercises and sets policies about prosecutorial discretion under the *Criminal Code*. The police who serve Nunavut are the Royal Canadian Mounted Police, a national

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<sup>361</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict c 3, s 91 & 92, reprinted in RSC 1985, App II, No 5. In addition, the federal government retains the power to administer justice for certain federal legislation like the *Controlled Drugs and Substances Act*.

police force. Nunavut is the only Canadian territory that has no inferior Court, as the Nunavut Court of Justice is a unified Court allowing superior court judges to hear all cases on one circuit.<sup>362</sup> That means that all judges in Nunavut are federal appointees, unlike provinces or territories that appoint their own judges as well. Although the territorial government nominally has the power to prosecute territorial offences, territorial prosecution power has been delegated to the federal prosecution service under a memorandum of understanding. With the exception of the judges of the unified Nunavut Court of Justice, all federal entities existed prior to the creation of Nunavut. As a result, the Department of Justice in the Government of Nunavut has jurisdiction only over court services, which governs what funding and services criminal circuit courts receive. While the delegation of power means the federal government is a bigger player in Nunavut than in any other province or territory, the delegation is in many ways a question of efficiency and points to another of Nunavut's unique problems.

Nunavut spans an area of approximately 2 million sq. km. of Arctic archipelago with a population of approximately thirty-three thousand people. As a result, there are limited resources and capacity to fund and staff Inuit police and prosecution services even if the administration of justice devolved from the Attorney General of Canada to the Attorney General of Nunavut. In addition to the way the dilemma of sovereignty and identity plays out in Nunavut, then, the Nunavut Court of Justice exists in an environment unlike any other court. Nunavut's small population and limited resources means that actors in the criminal justice system may have more influence than in other jurisdictions

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<sup>362</sup> Nunavut does have a Justice of the Peace Court that functions to hear to decide select criminal cases and sentencing, but the Nunavut Court of Justice for the most part governs the Justice of the Peace Court's jurisdiction: see "JP Court/NCJ Transfers", Nunavut Court of Justice Practice Directive No. 11, online: The Nunavut Court of Justice <[http://www.nucj.ca/Directives/PD11\\_JPNCJCourt\\_Transfers.pdf](http://www.nucj.ca/Directives/PD11_JPNCJCourt_Transfers.pdf)>.

and their reported sentencing decisions may carry more weight. The Nunavut Court of Justice has four judges, and until 2008 had only three judges. All the judges of the Court have resided in the territories for most of their legal careers, though none of them are Inuit.<sup>363</sup> All judges are also judges of the Nunavut Court of Appeal.<sup>364</sup> By way of comparison: in Ontario, nineteen judges sit as judges of the Ontario Court of Justice and the Superior Court of Justice in the Northwest region, the province's smallest bench; in British Columbia's Northwest district, one of the smaller districts in that province, five judges sit on the Provincial Court alone. Having a small number of judges serve a small population seems reasonable from a resource allocation perspective, but it means that one judge can have a profound effect on the flavour of the criminal justice system. A majority of the cases I analyze in chapter three are Justice Kilpatrick's decisions. It may seem that Justice Kilpatrick's decisions dominate my analysis; however, he is not the only judge whose decisions appear in chapter three. I would also hesitate to discount his sentencing decisions as an anomaly or a curiosity. In 2009 he was appointed the Senior Judge of the Nunavut Court of Justice. Since his appointment, he has put in place 37 new practice directives and increased the number of criminal circuit courts in the Territory.<sup>365</sup> Moreover, given the limited number of reported sentencing decisions in Nunavut, available decisions sway the tone of litigation in the territory. Reported sentencing decisions are the only ones readily available to counsel who appear before the Court as well as judges from outside Nunavut who volunteer to sit on the Court. Even if another project analyzes the Court's unreported decisions applying the question in my thesis, it

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<sup>363</sup> See "Meet the Judges", Nunavut Court of Justice online: The Nunavut Court of Justice <<http://www.nucj.ca/judges.htm>>.

<sup>364</sup> *Ibid.*

<sup>365</sup> See "Rules of Court" online: The Nunavut Court of Justice <<http://www.nucj.ca/rules.htm>>.

will be the reported decisions that legal professionals turn to when they want to understand how to cast arguments in the Nunavut Court of Justice. Although penned by only a small number of judges, these decisions reflect the tone of criminal justice in Nunavut. They represent how the criminal justice system in Nunavut negotiates Inuit identity in sentencing.

It is possible to argue the significance the Court's sentencing decisions take on in constructing Inuit identity derives from Nunavut's unique history, geography, and political situation. As I argued in chapter two, the criminal justice system played an important role in occupying Inuit and securing Canada's sovereignty in the Arctic. The Court has had difficulty detaching itself from the expression of the Canadian state's power over Inuit that attaches to spectacle of the criminal trial and criminal circuit court in the Arctic. In addition, no other movement for indigenous self-determination has created a jurisdiction with territorial status in the Canadian state. Nunavut is unique as a geopolitical space for expressing the identity of a particular indigenous group, the Inuit, that also has the constitutional status of a unit of the Canadian state. To confine the questions my research raises to the sentencing process in Nunavut, however, ignores the role of the criminal justice system plays throughout Canada as an expression of Canadian sovereignty over indigenous people.

**b. Exposing the Broader Implications: Beyond Nunavut**

The criminal justice system may have been a primary tool in occupying Inuit and asserting sovereignty in the Arctic, but as I set out in chapter one, the criminal justice system was just as much an instrument of colonialism in the rest of Canada as it was in Nunavut. Indigenous people in Canada have in common the historic injustice visited on

them by the criminal justice system, even though their actual experiences of the system may vary. Differential treatment through the criminal justice system was a tool the colonial legal system used to dominate Canada's indigenous people. The criminal justice system displaced indigenous law and criminalized indigenous identity. Amendments to the *Criminal Code* designed to alleviate the historic injustice that the colonial criminal justice system visited on indigenous people continue to apply across Canada to all indigenous Canadians, whether in Nunavut, or North Bay. Power to legislate the criminal law remains a federal power across Canada. Reports and inquiries find the criminal justice system fails indigenous people, Inuit or otherwise, as a result of the lack of political power and legal authority indigenous communities have in the criminal justice system.<sup>366</sup> Even in Nunavut, a product of the land claim movement and indigenous activism for self-governance, Inuit have not received the political power and authority in the criminal justice system that would revolutionize the criminal justice system similar to what Patricia Monture advocated.<sup>367</sup> Canadian law and legal institutions dominate the criminal justice system. Even where indigenous communities have purportedly received some power over the sentencing process, as I argued in chapter one, that power is still constrained by the authority of the Canadian state. The criminal justice system uses the language of "alternative" or "restorative" justice to refer to all indigenous law or justice—not just Inuit law or justice. What the dilemma studying the sentencing process in Nunavut reveals, then, are problems not only in the way the criminal justice system treats indigenous difference, but also in the way Canada approaches the question of

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<sup>366</sup> See e.g. Andersen, *supra* note 77 at 5-6; Roach and Rudin, *supra* note 77 at 358, 379; Manitoba Justice Inquiry, *supra* note 75; RCAP, *Bridging the Cultural Divide*, *supra* note 53 at 1-25, 40-53.

<sup>367</sup> Monture, *supra* note 78 at 223-24.

indigenous self-governance. At best, the result is indigenization of current state structures and institutions rather than the creation of new structures and institutions. Both criminal justice and indigenous self-governance are dominated by the apparatus of the Canadian state.

The legal structures and legal institutions in Nunavut reflect how we cannot imagine a criminal justice system without the Canadian state. Nunavut poses one stark example of the intractability of reconciling indigenous self-governance with the structure and aims of the Canadian criminal justice system. As a territory, Nunavut does not possess powers over the administration of justice it would if it was a province, but that power imbalance is not unique to Nunavut. The *Indian Act* still dominates indigenous governance. Under the *Indian Act*, bands have limited governance powers over most aspects of band members' lives, let alone the power to administer criminal justice. A debate has been underway since the Trudeau government tabled the White Paper regarding how or whether to repeal the *Indian Act* and what structures might replace that legislation.<sup>368</sup> Recent political efforts have tried to redefine the relationship between indigenous and non-indigenous people in Canada. The British Columbia Treaty Commission is currently overseeing what may result in fifty modern treaties between the Government of Canada, the Government of British Columbia, and British Columbia's indigenous communities.<sup>369</sup> In 2007, the Inuit of Nunavik, Québec, the Province of Québec, and the federal government signed an agreement in principle to formally create a new regional

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<sup>368</sup> See e.g. Tom Flanagan, Christopher Alcantara, André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010).

<sup>369</sup> See B.C. Treaty Commission online: <<http://www.bctreaty.net/files/quickfacts.php>>.

government in Nunavik.<sup>370</sup> The number of new agreements means we need to question whether the existing agreement structures work to deliver the self-government they promise and how the criminal justice system will factor into self-government. The more agreements Canada negotiates with indigenous people without thinking through the problem of whether those agreements deliver self-determination, the greater and more complicated redefining the relationship with indigenous people becomes. Land claims negotiations in Canada are resulting in different political structures that purport to implement indigenous self-government. Different formats for self-government within the same institutional framework and constitutional structure will not solve the problem the criminal justice system raises for indigenous people. If anything, it may exacerbate the problems. For example, the Nisga'a Final Agreement gives the Nisga'a of British Columbia the power to provide police services and correctional services as well as to create Nisga'a courts and to prosecute offences.<sup>371</sup> It remains to be seen how these powers are exercised. If Nunavut's case serves as an example, many pitfalls await the new Nisga'a courts. Agreements and legislation lack carry little weight if indigenous governments lack the capacity and resources to act as authorities. Moreover, if Nunavut's experience is any indication, the criminal justice system cannot help but carry its history of occupying indigenous people and reinforcing Canada's authority into the forums in which it must also negotiate indigenous identity. The character of the criminal justice system as an agent of Canadian sovereignty will not disappear merely because the

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<sup>370</sup> See Makivik online: <<http://www.makivik.org/building-nunavik/nunavik-government/>>.

<sup>371</sup> Nisga'a Final Agreement, online: Aboriginal Affairs and Northern Development Canada <<http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp#chp13>>.

jurisdiction administering criminal justice attempts to take on the character of indigenous law or make reference to indigenous identity.

The dilemma confounding Nunavut's sentencing process is not only a dilemma about the criminal justice system, but also a dilemma about how the Canadian state deals with claims of indigenous self-determination. The criminal justice system enforces and reinforces the authority of the Canadian state; sentencing is the most profound expression of that authority. To turn sentencing into a venue for negotiating indigenous identity is not to renegotiate the power dynamics in sentencing but instead to lend greater authority to the state structures that appropriate and essentialize indigenous identity. Likewise, when indigenous claims to self-determination and self-governance become questions of accommodation in the existing structures of the Canadian state, including the Canadian criminal justice system, the result may actually frustrate the implementation of self-governance.<sup>372</sup> Nunavut provides a stark example of how the dilemma plays out daily in the sentencing process, but the problem is one that reaches beyond Nunavut and goes to the very heart of the constitution of Canada. If we want to alleviate the historic injustice the criminal justice system wrought on the indigenous people in Canada without perpetuating the very same injustice, the dilemma is twofold. First, we must address the way the administration of criminal justice in Canada, particularly sentencing, lends itself to using indigenous identity in its rationalization of the exercise of Canadian sovereignty. Second, we must redraw Canada's relationship with indigenous people such that indigenous self-governance claims take into account giving indigenous people

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<sup>372</sup> See e.g. James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 5, explaining how "basic laws and institutions of modern societies, and their authoritative traditions of interpretation, are unjust in so far as they thwart the forms of self-government appropriate to the recognition of cultural diversity."

meaningful powers and capacities over the criminal justice system. We must re-imagine our approaches to both criminal justice and indigenous self-governance. I will address each of these problems in turn in the next two parts of this chapter.

## **Part II: Re-Imagining the Criminal Justice System**

I want to consider how we might re-imagine our criminal justice system so that we address the dilemma on which my study of sentencing decisions in Nunavut sheds light. I want to imagine how we can alleviate the historic injustice visited on Canada's indigenous people in a way that would not result in perpetuating the very problems associated with the historic injustice itself. First, I want to examine how the problems with sentencing indigenous offenders reveal deeper problems with how the sentencing process elides its role in the assertion of Canadian sovereignty and instead engages questions of cultural accommodation. Second, I will consider what implications my research has for the behaviour of actors in the criminal justice system called on to deal with questions of indigenous identity and cultural claims in general. Ultimately, I propose that what we must re-imagine is how we assign authority in the criminal justice system and who has power over the sentencing process. Reforming existing structures will not engage the problems of state authority that lie at the heart of the dilemma.

### **a. Culture and Conflict: Re-imagining the Sentencing Process**

Sentencing in the Canadian criminal justice system is in an impossible position. The impossible position arises because it is asked both to assert Canadian sovereignty and somehow provide the means for accommodating indigenous difference. The accommodation of indigenous difference through the sentencing process sits within the

overall confusion surrounding the purposes and principles of punishment. As I explained in chapter one, the sentencing process involves punishment, punishment that enforces the authority of the state or the sovereign. Despite the function of sentencing as an exercise of state authority and punishment as a social institution involved in the dialogical process of identity formation, divergent ideologies cloud the purposes of punishment. As David Garland has argued, punishment has become detached from its history and its position as a social institution enforcing authority in the modern state. It has come to embody conflicting ideas about rehabilitation, deterrence, or treatment—to name a few purposes of modern sentencing.<sup>373</sup> The amendments to the *Criminal Code* requiring that courts consider the “particular circumstances of aboriginal offenders” throws yet another conflicting idea into the mix of purposes and principles meant to govern the sentencing process. The addition of 718.2(e) does not just import a new theory of punishment. It represents the manifestation of the political struggle between indigenous and non-indigenous people in the criminal justice system generally and in sentencing in particular. Sentencing is already a site where identity and sovereignty collide squarely. Like any other offender, an indigenous offender’s character and identity becomes part of the rationalization for punishment. Officially legislating sentencing as a site for negotiating indigenous difference is unresponsive to the political problems that characterize the relationship between indigenous and non-indigenous people. Instead, such legislation amounts to the state assigning courts the authority to delve openly into defining and characterizing indigenous identity; it sanctions appropriation and essentialization under the guise of empowering indigenous people. My study of sentencing in Nunavut

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<sup>373</sup> Garland, *Punishment and Modern Society*, *supra* note 23 at 4-7.

demonstrates how, regardless of courts' intentions, cultural accommodation in sentencing upholds state authority at the expense of Inuit identity. The idea the state limits Inuit self-determination finds its way into the Court's imagination of Inuit lifestyle, law, justice, and self-government. The result is that courts end up exacerbating the very problems they were trying to alleviate.

My analysis of the sentencing decisions of the Nunavut Court of Justice exposes the confusion that results from layering the question of indigenous accommodation on top of an already incoherent, state-centred process. Inuit life and law become essentialized in *Evaloardjak* and *Sala* in the effort for the Court to define its authority over Inuit in an environment that questions whether the Court legitimately exercises that authority. Even when judges' decisions advocate for Inuit they reinforce the Court's authority, such as the way the Court's decisions in *K.G.S.* or *Haongak* criticize the Government of Nunavut and maintain the authority of the criminal justice system. Sentencing is a social institution. As a social institution in Nunavut, sentencing reflects the political conflict in which it is situated: the historic legacy of the criminal justice system that asserted sovereignty over Inuit and the tension around continuing to give the Canadian criminal justice system, which has at its heart the assertion of Canadian sovereignty, authority over Inuit. The tension finds few outlets either in the criminal justice system, or in the political process in Nunavut. Dissatisfaction with the power the Nunavut Court of Justice retains finds its way into the sentencing process, both the Court's sentencing decisions and political criticism of the incarceration of Inuit. Essentially, with respect to indigenous identity and governance claims, sentencing in Nunavut has been asked to reconcile the conflict between the political forces of Canadian sovereignty and Inuit self-determination in the

Arctic. The conflict is a political conflict between the Canadian state and the Inuit. To place the Nunavut Court of Justice in a position where it is tasked with resolving this conflict is to place it in an impossible position. The Court is an institution whose authority and legacy lies with asserting Canadian sovereignty.

The situation the Court faces is not confined to Nunavut. As the target of legislative amendments and reforms to create diversionary measures that target indigenous difference, Canada's sentencing process remains a place of political strife for indigenous people. Sentencing has become a place for negotiating indigenous self-determination. Sentencing cannot be a space for reconciling the political differences of indigenous and non-indigenous people. The goal of sentencing is punishment. The philosophy of punishment may engage conflicting theories about what punishment means and how to communicate that theory at the moment of sentencing, but the moment of sentencing symbolizes the spectacle of punishment that reinforces the state's sovereignty. Given the way sentencing implicates the state's authority, it is easy to understand why legislative reform focuses on the moment of sentencing as a way to incorporate indigenous perspectives. The irony, of course, is that the state is trying to remedy a problem with state authority using the exercise of state authority, which leaves sentencing in an intractable position.

If negotiation and dialogue about indigenous communities' power to govern their own people takes place through a process designed to communicate and enforce state authority, it defeats every effort to resolve the imbalance of power. To retreat from the impossible position in which sentencing is now situated requires reevaluating whether the question of indigenous difference belongs in the hands of the criminal justice system at

all. Patricia Monture once called for a “revolution” to change the criminal justice system; she did not want to be accommodated.<sup>374</sup> Hadley Friedland argues that indigenous people experience the criminal justice system as one that has brought social disorder to their communities in the form historic criminalization of indigenous identity, overincarceration, high crime rates, and systemic discrimination.<sup>375</sup> She finds it “absurd” to expect indigenous people to recognize the existing criminal justice system as a legitimate way to bring social order to their communities when it is clearly the source of so much disorder. She believes that “the best route to order is committing to renewing the historical experience of a ‘mediated justice’ between communities, where justice is seen as an ongoing normative conversation between communities, rather than a comprehensive (and unilateral) theory.”<sup>376</sup> To imagine that the criminal justice system, which is understood as a site of historical oppression and social disorder, could ever be the appropriate venue for mediating political conflict seems almost ridiculous. The existing sentencing process cannot create mechanisms that legitimately make space for indigenous communities to have authority over themselves and exercise their own law, yet we keep returning to sentencing as the answer to the dilemma of why the criminal justice system fails indigenous people. We create more alternative programs and more diversionary measures without interrogating whether those measures meaningfully alter the way the criminal justice system works for indigenous people. To create mechanisms in the criminal justice system that are legitimate for indigenous people means we must reconsider whether it is truly legitimate to create indigenous-run programs as

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<sup>374</sup> See Monture, *supra* note 78 at 223-24.

<sup>375</sup> Hadley Friedland, “Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System” (2009) 72 Sask L Rev 105.

<sup>376</sup> *Ibid* at 106.

“alternatives” to or “diversions” that still work within the criminal justice system’s sentencing process. Even the terms “alternative” and “diversion” imply that the *Criminal Code*’s sentencing process is the most authoritative in the criminal justice system; yet it is the authority itself that indigenous people question. If we acknowledge that sentencing under the *Criminal Code* can amount to no more than a demonstration of the state’s authority—regardless of what good intentions we have to make it otherwise—we can redirect our efforts at institutional or structural reform to the underlying political and social issues that affect Canada’s relationship with indigenous people. We must stop imagining that criminal justice can do the impossible of remaking itself and instead recognize it can only function as an instrument of state authority.

The question that remains after we acknowledge the meaning of sentencing is punishment is whether it is indeed possible to use state authority to remedy the social and political problems caused by the exercise of state authority. Transforming sentencing means transforming how state authority defines the criminal justice system. Canada’s criminal justice system is wedded to the modern Canadian state—just as the modern Canadian state is wedded to the criminal justice system. One *Criminal Code* governs our country and was designed to do so as a way to insure that one normative order dominates Canadians’ relationship to the state and one authority has the power to punish. The criminal justice system as it currently functions constitutionally entrenches power in a way that prevents anyone but the Canadian state from exercising authority over communities in matters dealing with crime. To relinquish that power means at the very least constitutional change. Constitutional change may jeopardize the very existence of the Canadian state, however, because it will require reconsidering the make-up of our

country and how we have allocated state power. Faced with the prospect of destroying the very structure that helps unify our country and maintain the sovereignty of the Canadian state, the prospect of reforming the criminal justice system may be structurally impossible. Equally daunting are the significant resources we must allocate to insuring that indigenous communities have the capacity and vitality to play an equal part in constitutional change. In addition, we face trying political and economic times. If anything, the exercise of state authority through sentencing has only gained momentum through the creation of mandatory minimum sentences and the focus on incarcerating offenders. Political times change, however, and political appetite for constitutional change and allocating more resources to indigenous communities can change with it. As I argued in chapter one, the nature and quality of human experience changes over time and space, bringing with it changes to identity formation and social institutions as a result. How the Canadian state conceives of itself may change for reasons we cannot foresee. How indigenous and non-indigenous communities conceive of their relationship to the state may also change. In every change lies the hope for re-imagining the criminal justice system and sentencing. Even if structural change is beyond our reach, there is room to conceive of improving how the current criminal justice system functions, especially how we conceive of the role of individual actors in the criminal justice system.

**b. In Our Hands: Re-Imagining Ethics of Activism in Sentencing**

Conceiving of a renewed ethical role of actors in the criminal justice system who deal in questions of identity can mitigate the work sentencing does on behalf of the state. Judges and lawyers can influence sentencing and the way cultural claims negotiate and construct identity in sentencing. They act within existing structures but their actions can

mitigate the way the current structures result in the modern state dominating sentencing. Lawyers work with clients to provide evidence that the court uses in sentencing. Judges exercise wide discretion around how they administer the sentencing process and in creating the environment in their courtroom. Both judges and lawyers construct and adjudicate cultural claims in the sentencing process. There are, however, few standards by which to assess how the legal profession approaches and deals with cultural claims. The question I would like to explore is whether greater self-reflectiveness in how judges and lawyers act would ameliorate how sentencing appropriates and essentializes indigenous identity. Since I myself am a lawyer involved in the criminal justice system in Nunavut, my point of view necessarily implicates my personal experience.

The dilemma I identify in this thesis and detail in chapter three has surrounded me for three years. When I joined the Crown's office in Nunavut in 2007, I had little experience living in an indigenous community. I had some experience living in a remote community, and I had had childhood relationships with indigenous artists. My father is an art dealer in Canadian art and while other children had season's passes to Canada's Wonderland, we had family memberships to the Art Gallery of Ontario and the McMichael Canadian Collection. We spent more than one weekend going to powwows and attending openings for indigenous artists. Working in my father's gallery, I memorized the name of every Inuit community, and Kenojuak Ashevak and Kananginak Pootoogook became as famous to me as Van Gogh or Monet. Inuit art surrounded us at home, and my few individual experiences with Inuit artists were sitting down to dinner with them or watching them work. This was my experience of all things Inuit until I moved to Nunavut in 2007. I had some vague knowledge of the high crime rates that

characterize Nunavut's criminal justice system, but I quickly learned how violence complicates lives in many Inuit communities. I also learned that my life in Nunavut would bear little resemblance to the world of Inuit art and music I imagined. I understood that I would not have time to take Inuktitut classes or spend time on the weekend doing much more than laundry or noting up files. My first six months of work were a blur of circuits and parkas. The closest I got to Inuit culture was when I went on my first solo circuit, to Arviat, and saw the first dog sled team cross the finish line of the Hudson Bay Quest Dog Sled Race. When the town of Arviat lifted the sled and its rider over their heads so that he was silhouetted against the incredible sunset on the plains, I realized that I had just attended my first community event in Nunavut.

Having public institutions and legal actors approach identity claims with humility and self-reflection finds support in the literature on law and identity. In *Reasons of Identity*, Avigail Eisenberg emphasizes the need for humility in the public institutions tasked with assessing identity claims. She argues public institutions require fair background conditions and humility to commence their work. She uses the concept of "institutional humility" to describe fair institutions, which "refers to the capacity of public decision makers to detect the errors of their decisions and the biases of their procedures caused by employing criteria that favour the identities, including the histories and values, of (usually) dominant groups over all others."<sup>377</sup> I find her emphasis on fair background conditions and humility in the design of institutions to be persuasive, though I construe the practical implications differently than she does. The current structure of legal institutions and process require little from lawyers and courts in regard to the way they

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<sup>377</sup> Eisenberg, *Reasons of Identity*, *supra* note 9 at 25.

construe identity claims in the criminal justice system. I would argue that part of institutional design for the criminal justice system must have lawyers and judges bring fairness and humility to their role. Fairness is already a component of that role. Judicial codes of conduct and lawyers' ethical rules, where they exist, already require that judges and lawyers act fairly but fairness is quite broadly and abstractly construed.<sup>378</sup> Humility is not a concept that finds its way into codes of conduct, possibly because it is difficult to construe humility as an ethical obligation. Humility is something that arises from self-reflection. It is more akin to Frantz Fanon's musing in *Black Skin, White Masks* that cultural recognition requires approaching difference with the full awareness of the reactions and attitudes that each of us have internalized.<sup>379</sup> Fanon identifies recognition, self-perception, and how self-perception can be created through interrelation with others as an important part of why the racialized situation between white and black exists. Glen Coulthard makes a similar argument with respect to the relationship between indigenous and non-indigenous people in Canada.<sup>380</sup> Fanon's insight that identity is socially constructed, not only by our relationships with others, but also by how we internalize other's view of us, means that any approach to questions of identity requires as much internal reflection as it does external interaction. It requires self-reflection, and self-reflection in turn requires humility. To exercise humility and self-reflection as lawyers and judges, we need to know who we are and how that affects our perception of others. We need to understand the social and political history of the criminal justice system

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<sup>378</sup> See e.g., Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004), requiring judges to be "fair-minded" and to "conduct themselves and proceedings before them so as to assure equality according to law" at 13 & 23; Rule 4 of the Law Society of Upper Canada's *Rules of Professional Conduct* require that the lawyer as an advocate treat the tribunal with fairness: Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01(1).

<sup>379</sup> See Fanon, *supra* note 16.

<sup>380</sup> Glen Coulthard, "Subjects of Empire" (2007) 6:4 Contemporary Political Theory 437.

whose legacy we have inherited. Most importantly, we need to know what we do not know, which can often be difficult to admit to ourselves and others. Lawyers and judges survive on their expertise. Ignorance is not a position in which we feel comfortable; indeed, ignorance of the law amounts to professional incompetence. We strive to escape ignorance through study and the use of precedent. In the world of indigenous identity claims, however, ignorance is the position from which almost all non-indigenous legal professionals will work. No amount of participation in dog sled races or powwows will result in the structural change needed to alleviate the centuries of historic injustice indigenous people have suffered in the criminal justice system. Admitting ignorance and appreciating the historic injustice that we can perpetuate even as we try to change the legal system for indigenous people allows us to embrace humility in the way we approach identity claims. Ultimately, being self-reflective and cultivating humility means fostering mindfulness, and mindfulness is an attribute to which the legal profession should aspire, particularly when dealing with questions of indigenous identity or cultural difference. Mindfulness helps avoid the pitfalls of stereotyping and essentializing when dealing with cultural claims. It would lead lawyers to question the language they use to characterize their clients, such as portraying a client as a “genuine Inuk”. By questioning our situation in relation to others we characterize as culturally different, we complicate our understanding of cultural difference. Consequently, our understanding reflects more accurately nuances of social realities and impedes our capacity to appropriate so readily individuals’ cultural characteristics in the name of advocacy.

It is difficult to make humility and self-reflection professional obligations. They are qualities that differ from the kinds of ethical rules one can test or monitor, such as rules

about trust funds or wearing robes in the courtroom. They are qualities that in their very nature require sincerity, understatement, and quiet reflection. They are, however, qualities that can personally empower us. They are qualities we can encourage in law students and colleagues. As a profession, we have numerous educational requirements both before and after we become practicing lawyers into which we can infuse the understanding that humility and self-reflection are professional obligations.<sup>381</sup> Cross-cultural experience can develop humility, though we have to look closely at the meaning of cross-cultural experience. Not every cross-cultural experience is created equal. For instance, it is one thing to travel the world on a luxury cruise ship and another to be forced to work your way across the world with minimum-wage jobs. In my view, humility develops when people situate themselves outside their spheres of influence or understanding so that they rely on others for success or even survival. When such a cross-cultural experience shifts one's sense perspective on power or social realities, humility may develop. Sadly, however, humility and self-reflection in the legal profession will not present a complete answer to my dilemma. Although greater self-reflectiveness on the part of actors in the criminal justice system may lessen the acuteness of how the sentencing process functions as a site for negotiating indigenous identity, it cannot change the underlying structure of the criminal justice system. The sentencing process negotiates and constructs indigenous identity in a way that harms indigenous self-determination. We can lessen the impact of that process when we act mindfully and with humility, but we cannot alter it without structural change. I have already discussed the problems involved in making structural changes to the criminal justice system. Next I

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<sup>381</sup> I refer, of course, to law school classes, bar admissions courses, and continuing legal education for both lawyers and judges.

will discuss whether we can alter the way we approach claims of indigenous self-determination, particularly indigenous self-government.

### **Part III: Re-Imagining Indigenous Self-Governance**

#### **a. The Structure of Self-Governance**

The dilemma sentencing reveals with respect to the interaction of the appropriation of identity and the assertion of sovereignty in the criminal justice system implicates the modern state and calls on us to rethink whether indigenous self-determination can succeed in the modern state. It is in the modern state, as Foucault has argued, that punishment has organized itself as a mechanism for asserting the sovereign's or the state's power over its subjects.<sup>382</sup> There is a monopoly on the legitimate use of violence against subjects in the state and only the sovereign or central government exercises that the authority to use force. Indigenous claims to self-determination, in particular self-government, also seek to exercise authority over indigenous people. Exercising indigenous authority represents a restoration of power to indigenous communities, in some sense a freedom from the state that has dominated and oppressed their communities through colonialism. Even in the way claims to indigenous self-government are made out, however, state structures dominate. Indigenous communities seeking self-determination or self-government in Canada are expected to fit themselves into the structure of the Canadian state. In doing so, their claims themselves change and may reflect neither the community, nor the values, that generated the claim in the first place. The case study of the Nunavut Court of Justice provides an example of the dissonance that arises from

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<sup>382</sup> Foucault, *supra* note 26 at 47-48.

requiring claims of indigenous self-determination to mould themselves to the structure of the modern Canadian state. One of the ways the dissonance resulting from fusing Inuit identity and self-determination to the structure of the Canadian manifests itself is in the sentencing decisions of the Nunavut Court of Justice.

Creating the Nunavut Territory required Inuit advocacy and resistance, but it also required compromising Inuit self-determination to fit the structure of the Canadian state. Quassa and Fenge describe their experience negotiating the Nunavut Land Claim Agreement and explain that one of the reasons the negotiation was successful was “[t]he parties were willing to compromise on issues the Government of Canada considered to be matters of principle, such as the Crown retaining title to most of the subsurface, and the boundary separating the Inuit and Dene land claims settlement areas.”<sup>383</sup> They also point out “[a] forward-looking and practical approach was adopted that aimed to avoid embarrassing the Government of Canada for past mistakes, such as the involuntary [high Arctic] relocation.”<sup>384</sup> Implementation of the agreement was rarely discussed in its negotiation, a factor Quassa and Fenge argue has contributed to the challenge the territorial government faces providing services and recruiting Inuit staff. Above all, the negotiation was an exercise in compromise, a compromise that has met with criticism. Jackie Price argues that the conciliatory approach Inuit have taken overshadows lessons of defence and defiance that equally make up part of Inuit traditional governance.<sup>385</sup> Viewed as conciliatory people from the perspective of colonialism, Inuit have thus benefited from compromise through the land claim, though Price believes colonial

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<sup>383</sup> Fenge and Quassa, *supra* note 241 at 83.

<sup>384</sup> *Ibid.*

<sup>385</sup> Jackie Price, *supra* note 260 at 96.

systems no longer have anything to offer Inuit communities and that Inuit governance requires moving beyond colonial structures like the modern Canadian state.<sup>386</sup> Ailsa Henderson makes a similar argument when she assesses why the Nunavut Territory has not met public expectations. Expectations for the new territory emphasized cultural self-determination for Inuit. The opportunity for cultural self-determination was meant to exist in the *de facto* self-government that would develop from Inuit dominating the public territorial government put in place by the Nunavut land claim. Since Inuit are 85 percent of Nunavut's population, that factor itself was supposed to "provide an avenue for Inuit self-government."<sup>387</sup> Henderson points out that much of the disappointment with the land claim in Nunavut revolves around how it has failed to effect self-government for Inuit and to integrate *Inuit Qaujimagatuqangit* into the practice of government.<sup>388</sup> She questions the model of *de facto* self-government and in fact all the models of governance offered to indigenous people in Canada, which follow three possible models: municipal, provincial, and sovereign. She states:

[t]he existing literature suggests that self-government is really just government for Aboriginal peoples modelled on one of the three existing orders of public government in Canada. This suggests that it is unremarkable in its institutional structure, decision-making process, or leadership selection; that majority or plurality voting will determine decisions; and that the chief innovation will be the substance of policy, offering greater Aboriginal content for education, language rights, or community-based justice. Deviations are thus expected to be policy-based, rather than structural or procedural. This, really, is self-government through public institutions of government.<sup>389</sup>

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<sup>386</sup> *Ibid* at 96-98.

<sup>387</sup> Henderson, *supra* note 360 at 222-23, 232-33.

<sup>388</sup> *Ibid* at 234-36.

<sup>389</sup> *Ibid*.

The “means” that is Nunavut has not yet realized the goal of Inuit self-government, and the criminal justice system in Nunavut provides a profound example for how the new territory has fallen short of that goal. The criminal justice system continues to be an instrument of the Canadian state. Nothing has changed in the structure of the criminal justice system or the sentencing process in Nunavut. Symbolic changes, such as the redesign of the courtroom, the Nunavut crest, and the sealskin outfits of the judges, are accompanied by few, if any, policy changes. Institutional design means the Government of Nunavut has little influence over the sentencing process in the Nunavut Court of Justice. Inuit communities have even less. Unsurprisingly, the institutional design of legal and authoritative structures in the Canadian state revolves around preserving the power of the Canadian state. Tension exists nonetheless as a result of the imbalance of power that designing institutions around enforcing the power of the Canadian state causes. The tension finds its way into public debate, for example Louis Tapardjuk’s call to bring *Inuit Qaujimajatuqangit* and the criminal justice system closer together. The tension also finds its way into the Court’s sentencing decisions, with the Court imagining Inuit identity in a way that tries to reconcile the imbalance of power that exists between Inuit and the criminal justice system. As I have shown, by positing convergence of approach and values, the Court’s attempts at reconciliation fail to resolve the imbalance of power in Nunavut. The result, instead, is that trying to negotiate Inuit identity in a geopolitical space dominated by Canadian sovereignty emphasizes the imbalance of power.

What kind of structural and institutional change could address the imbalance of power in the Canadian state? At one level, the answer is constitutional. James Tully argues that a

contemporary constitution “should be seen as an activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies accord with the conventions of mutual recognition, consent and continuity.”<sup>390</sup> His aspectual approach to constitutionalism values the different ways in which indigenous groups voice their cultural claims and rejects the uniformity that would subordinate cultural difference to the overarching sovereignty of the state. Although the approach of intercultural dialogue makes space for the idea indigenous communities can govern themselves in a way they choose and value, Tully does not explain what contemporary constitutionalism would look like in practice. John Borrows has explained a little more what constitutional change would involve and made a case for institutional change that would reflect the position of indigenous people as partners in the constitution of Canada. He argues that indigenous law must take its place as one of Canada’s original legal traditions in the constitution and articulation of the Canadian legal system. He sees a role for government, courts, and legal institutions in creating a multi-juridical Canadian state in which indigenous law exists alongside the civil law and common law.<sup>391</sup> Neither Borrows, nor Tully, really articulate what the multijuridical, intercultural Canada would look like. Moreover, in both works, there is an acknowledgement that in the redrawing of political and legal structures, a certain amount of cultural exchange and internal dissent will take place. Tully even argues “[t]he possibility of crossing over from one culture to another is available and unavoidable.”<sup>392</sup> In the crossing over, I worry that indigenous communities will lose cultural ground. For indigenous communities whose cultural

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<sup>390</sup> Tully, *supra* note 372.

<sup>391</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 79.

<sup>392</sup> Tully, *supra* note 372 at 207.

traditions suffered centuries of onslaught from colonialism, cultural exchange and dissent can diminish indigenous tradition. In Oujé-Bougoumou, Québec, for example, cultural exchange recently resulted in the predominantly Christian Cree community dismantling a sweat lodge and banning native spirituality practices.<sup>393</sup> Borrows recognizes that there may be costs attached to cultural exchange but he chooses “openness and freedom” because the alternative freezes our current constitutional relationship in an unacceptable way.<sup>394</sup> I support the vision of Canada as a multijuridical, intercultural state, but I desire clearer versions of how constitutional and institutional change will come about.

To turn the motivation for indigenous self-determination into indigenous self-government, we must provide pragmatic tools and conceive of institutions that allow indigenous self-determination to function in a way that the state cannot subsume. There is little protection for indigenous self-government in the Canadian state. Parliament does not reflect the original relationship of indigenous and non-indigenous people as partners. Our first-past-the-post electoral system favours representation by regional population, meaning indigenous people have a diminished voice in political debate and political office. Nothing in the constitution or our courts’ interpretation of the constitution protects indigenous self-government. Indigenous people are treated as subjects of the Canadian state rather than partners in the political process. We must guard against the tendency of the state to assert sovereignty over indigenous people at the expense of indigenous identity and indigenous self-determination. Many of the legal constructions that describe Canada’s relationship with indigenous people perpetuate the idea that

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<sup>393</sup> Ingrid Peritz, “Dismantled sweat lodge exposes rift in Christian, traditional teaching”, *The Globe and Mail* (June 17, 2011) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/quebec/dismantled-sweat-lodge-exposes-rift-in-christian-traditional-teaching/article2066299/>>.

<sup>394</sup> Borrows, *Canada’s Indigenous Constitution*, *supra* note 79 at 283.

Canada maintains unitary authority over indigenous people. The *Indian Act* is a colonial piece of legislation that still governs life on indigenous reserves. The fiduciary duty Canada has to indigenous people continually places indigenous people in the position that the law places pieces of property or individuals with diminished competence to care for their property or themselves. True indigenous self-government means divesting our political structures and our legal system of the paternalistic legacies of colonialism and acknowledging indigenous authority as legitimate—at least as legitimate as the authority of the Canadian state.

Even assuming an alteration to the constitutional relationship between indigenous and non-indigenous people and institutional change to reflect a new relationship, it is difficult to imagine that the political and social changes necessary to restore the imbalance of power between indigenous and non-indigenous communities can be found in the structure of our state. Indigenous communities had a diversity and vitality prior to colonialism that ensured their survival and reflected their health; however, time and external pressures have eroded communities. Taiaiake Alfred argues a resurgence and restoration of indigenous communities' values must take place before indigenous communities can become politically autonomous. Alfred opposes engaging in Canada's liberal democratic state structures, which he argues are the source of indigenous oppression and have "polluted" indigenous people to make them "cultural blanks".<sup>395</sup> He believes, "there is a need for morally grounded defiance and non-violent agitation combined with the development of a collective capacity for self-defence, so as to generate within the Settler society as reason and incentive to negotiate constructively in the interest of achieving a

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<sup>395</sup> Alfred, *supra* note 120 at 11.

respectful coexistence.”<sup>396</sup> Alfred harshly criticizes the socio-economic position of indigenous communities, but his sharp criticism is mirrored in statistical realities. The impact of colonialism means that poverty, low graduation rates, and high unemployment plague indigenous communities. The statistics lend urgency to the question of how to improve the structural issues that underpin the socio-economic problems. We all feel compelled to make people’s lives better today, in our time, but the institutions we empower when we undertake that betterment may be just as harmful as the institutions we replaced. To protect indigenous self-determination and indigenous self-government, we must also protect the vitality of indigenous communities. To set out on the path of structural change requires social change, the kind that invigorates and celebrates indigenous identity as fluid and dynamic in a way that gives indigenous people control over that dynamic and fluidity. Reimagining self-governance requires tangible changes that reassign authority to indigenous communities, not just symbolic changes that maintain the existing structure of the state. Indigenous communities are active participants in the process and their vitality is important to that active participation.

**b. Revitalizing Indigenous Identity**

The starting point for social change that will support altering the structure of the relationship between indigenous and non-indigenous people in Canada is indigenous authority over indigenous identity formation. Indigenous identity has suffered generations of attack from colonialism. The criminal justice system was an important prong in that attack. Despite the onslaught, however, indigenous traditions, culture, and law have survived. Their survival has laid the groundwork for indigenous advocacy and

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<sup>396</sup> *Ibid* at 27.

resistance, primarily to preserve access to their traditional lands and economies. The vibrant practices and traditions that make up indigenous identity are like a well from which indigenous communities draw, ensuring their political and social survival. If the sources of those wells dry up, it will be disastrous for indigenous people. If there is a way to replenish or maintain the well—to insure a fluid, steady, source—then communities will flourish. Strong indigenous communities will be in a position, as Alfred argues, to negotiate on equal terms and they will be less vulnerable to the threats that appropriation and essentialism in sentencing poses. Preserving indigenous authority over traditional lands is an important part of keeping a steady source for indigenous identity, but authority over other aspects of indigenous identity is equally important. When land claim negotiations take up most of the resources and energy that motivates indigenous self-determination, little remains to realize other goals or to develop indigenous identity outside the political question of control over the land. As I noted in chapter two, Nunavut now suffers this problem because all the energy of Inuit activists that went to create the territory now go to the Government of Nunavut—despite the fact the Government of Nunavut is dominated by structures of the Canadian state. The struggle to create geographic space that recognizes the root of indigenous identity cannot overshadow the development of vital indigenous identity in indigenous communities if the political structures in those communities are to survive as indigenous structures.

Vitality should be an important part of how we imagine indigenous identity. Leonard Rotman links the continued vitality of indigenous communities with the ability to conceive of indigenous rights in a way connected to the physical and cultural survival of indigenous people and not just whether a practice is one indigenous people engaged in at

the time of colonization.<sup>397</sup> In *Wasáse*,<sup>398</sup> Taiaiake Alfred gives his vision of how to foster resurgence and restore vitality to indigenous communities. Alfred argues for an anarcho-indigenous theory through which indigenous communities can resist the mechanisms of the colonial state and achieve political autonomy. Although Alfred's argument that indigenous communities themselves must take the steps to revitalize their traditions is appealing, I worry that there is a component of his vision that discourages a broader imagination of vitality in indigenous communities. I understand the risk of cooptation and the non-indigenous influences in indigenous communities are great, but it is in many ways unrealistic to imagine indigenous identity cannot change over time and space in the same way that settler identity has changed. No one imagines that there is a cultural limitation on non-indigenous land use in the prairie merely because the first settlers planted wheat there. For indigenous people, however, it seems there are such limitations. Indigenous rights and title to land are linked to traditional, colonial practices in the minds of many non-indigenous people. If indigenous people also impose on themselves an idealized, historicized version of their own identity, they join in denying their communities the right to change over time and space. Indigenous identity exists in the present, and indigenous people have a right to that identity regardless of whether they hunt, practice law, or drive a truck. With the growing number of urban indigenous communities, it is doubly important that all indigenous people have a place in their communities. Otherwise, as Edmund Searles has argued and the decisions in *Evaloardjuk* and *Nookiguak* make abundantly clear, differentiation between who is

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<sup>397</sup> Rotman, *supra* note 252.

<sup>398</sup> Alfred, *supra* note 120.

“authentically” indigenous and who is not will only limit the vitality of indigenous communities.<sup>399</sup>

Although land and an authoritative relationship to land are fundamental to indigenous communities, to preserve the vitality of indigenous communities is not to embalm indigenous identity and confine it to particular conceptual spaces and places. A successful geopolitical space requires the political and civic society to sustain that space.<sup>400</sup> To insure vitality of indigenous identity requires putting resources into other resources that feed the well of indigenous culture and identity. Other resources include indigenous language, knowledge, and arts. Although I cannot speak for indigenous communities, I can imagine the resources it might take to foster the vitality of indigenous identity needed to sustain a geopolitical space based on my own experience as an Armenian. Armenian political and cultural institutions have sustained Armenian identity and civic society within and outside Armenia—both of which were important to creating the modern geopolitical space for Armenians that is the Republic of Armenia. Cultural institutions within and outside Armenia allowed Armenian language, politics, knowledge and arts to flourish. It was important for Armenians to maintain those spaces both inside and outside Armenian traditional territories because history, economics, and foreign occupation meant that Armenians in Armenia were not always free to express their identity. Those spaces meant the Armenian diaspora, otherwise a displaced people scattered across many jurisdictions, always had a means to support Armenian self-determination. While there are cultural and political differences between Armenians and

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<sup>399</sup> Searles, *supra* note 271.

<sup>400</sup> For instance, Jackie Price makes this argument with respect to Nunavut when in her thesis when she posits what Inuit need to foster true Inuit governance rather than placing Inuit within Canadian state institutions: see Jackie Price, *supra* note 260.

indigenous people, indigenous communities in Canada face similar tensions between the need to foster indigenous identity both inside and without their traditional lands. Indigenous people are leaving their traditional communities and increasingly populating Canada's urban spaces.<sup>401</sup> One challenge this fact poses is to maintain the vitality of indigenous identity in indigenous territories, which requires dedicated community resources that will not tether indigenous communities to the state's vision of indigenous politics and society.<sup>402</sup> The other challenge is how to maintain the connection to indigenous identity for those indigenous people who live outside their traditional territories. It is not hard for me to imagine how indigenous communities outside their traditional territories may access to their cultural spaces. I had such access to Armenian culture as a child growing up in Canada and continue to have access today. I carry Armenian language, music, dancing, and tradition with me wherever I go, and I have sources I can turn to when I want to replenish what I carry, not only in Armenia, but anywhere there is an Armenian community. Finally, and importantly, my identity as an Armenian is not confined to any time or space. No piece of Canadian legislation defines what it means to be Armenian. Likewise, no piece of Canadian legislation should define what it means to be an "Indian" or what the acceptable spaces are for indigenous people who are "Indians." The success of indigenous geopolitical spaces relies on supporting mechanisms that feed rather than deter the revitalization of indigenous identity.

The Canadian state has no place in defining indigenous identity, but the state can consider what resources indigenous communities require to develop their own identities,

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<sup>401</sup> For example, the 1991 Census indicated that over 40 percent of Registered Indians and Treaty Indians do not live on reserve: see "2001 Census Consultation Guide: Aboriginal Peoples Recent Trends" online: Statistics Canada < <http://www.statcan.gc.ca/pub/92-125-g/html/4151216-eng.htm>>. Over 60 percent of

<sup>402</sup> I refer here to the depiction of indigenous tradition that "freezes" indigenous communities in pre-contact practices, criticized in Rotman, *supra* note 252 and Connolly, *supra* note 275.

in essence their own civic societies. Resources allocated to developing language, art, political institutions, and knowledge in each indigenous community would reinforce the way indigenous identity defies colonial institutions or legislative definitions.<sup>403</sup> Language, for example, is an essential tool for revitalizing indigenous identity. It is already recognized as an important component of identity for most indigenous communities. In Nunavut, for instance, Inuit face the challenge of creating a trilingual territory, where services are provided in Inuktitut as well as English and French. The Nunavut Literacy Council links knowledge and use of Inuktitut to the success of the Nunavut Land Claim.<sup>404</sup> From my own perspective, I cannot overemphasize what the ability to speak, read, and write Armenian gives me in terms of maintaining and cultivating my Armenian identity. The ability to conceptualize and express ideas in Armenian is invaluable, as is the ability to communicate with other Armenians across territorial boundaries. No doubt the power the abilities of language harbour was in the minds of Canada's colonial institutions when they set out to eliminate indigenous language. Revitalizing indigenous language would go a long way to eradicating that historical legacy and to making conceptual space for indigenous communities that goes beyond reservations or territorial boundaries.

I want to avoid perpetuating the legacy of colonialism's imposition on indigenous people. To do so means insuring the Canadian state cease and refrain from using state authority to define indigenous identity and imagine a space where indigenous people have the

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<sup>403</sup> Institutions and projects already exist to which resources can be directed. For instance, Native Friendship Centres exist in many urban centres. Language reclamation and revitalization projects are currently underway, such as the First Voices project in British Columbia, online: First Voices <<http://www.firstvoices.com/en/home>>.

<sup>404</sup> Shelley Tulloch, *Building a Strong Foundation: Considerations to Support Bilingualism in Nunavut* (2009) Nunavut Literacy Council.

power to define their own identity. I know that it is also not for me to imagine what indigenous identity should be, nor to impose my sense of community on indigenous communities. This is a task for indigenous communities themselves. Although each indigenous community will identify what revitalization means for its people, the work involved in revitalization is work that non-indigenous Canadians can support politically, financially, and socially. Making space for indigenous communities in each of our communities means funding indigenous institutions of politics, art, education, and language. It means insuring sacred spaces remain sacred or reclaiming spaces taken from indigenous people. It means changing the way we talk about the land when we talk to our children to include indigenous history and making sure our children learn as much about the Tsilhqot'in war as they do about the battle at the Plains of Abraham. If we combine our efforts, we could effect the kind of social change that may result in transforming the constitutional and institutional structures that make up the Canadian state. We could at the very least create a space where intercultural dialogue can take place with less danger of appropriating and essentializing indigenous identity. The focus on criminal justice is ill-suited to provide for the vitality of indigenous communities. The criminal justice system is too closely bound to the Canadian state structures that took part in devastating indigenous communities through colonialism. Sentencing, in particular, carries with it all the symbolism and authority of the Canadian state and is a poor means for advancing indigenous self-determination. The new imagination of criminal justice and indigenous self-governance must imagine a space for indigenous people beyond the confines of current legal structures and institutions, or the dilemma I have illuminated will continue to confound us.

## **Conclusion**

It may feel like I have wandered far from sentencing and the criminal justice system in Nunavut to deal with the dilemma I uncovered. That was not my intention. This thesis was a very personal process for me. It was not long after starting work in Nunavut that I noticed the ways the Nunavut Court of Justice negotiated and constructed aspects of Inuit identity. I was not present in the courtroom when counsel called his client a “genuine Inuk”, but I am not surprised to see the term appear in submissions. The quotations I draw from the Court’s sentencing decisions in chapter three also do not surprise me, though none of the cases I analyze are cases in which I acted as counsel. In Nunavut, I am a relatively new lawyer, junior not only in years of call, but also in years of experience in the North. Others often remind me of that fact both explicitly and implicitly. As I sat listening to submissions and decisions over my three years there, I began to ask myself a lot of questions about my place in Nunavut, the position of the criminal justice system, and the relationship between *Qallunaat* and Inuit. I could not reconcile the Inuit I knew as a child and the Inuit I had come to know as an adult in Nunavut with the Court’s construction of Inuit identity. The reality seemed so much more complex to me. I know what I saw and heard was intended only to help, to administer criminal justice in a way that the Court imagined to be sensitive to differences in Inuit culture and identity; however, I became discouraged and sceptical of the benefit Inuit derived from the Court’s decisions. At the time, my scepticism was almost paralyzing. Now, however, I wonder if it was not meant to teach me self-reflection and understanding about how humility can improve the way public institutions deal with questions of identity.

Sentencing decisions perpetrate and perpetuate the historic injustice the criminal justice system visited on indigenous people even while attempting to alleviate that injustice. The dilemma is not one confined to Nunavut, nor is the solution one confined to Nunavut. The dilemma means that even the best intentions of actors in the criminal justice system result in reinforcing the authority of the Canadian state at the expense of indigenous identity. My research exposes deep systemic problems in the structure of the Canadian state, namely the institutions of the criminal justice and the way Canada has structured its relationship with indigenous people. The problems that my dilemma illuminates are twofold: problems with criminal justice and problems with indigenous self-determination claims. I recognize there is more than one way to characterize the problems of the criminal justice system or the problems involved with indigenous self-determination. I welcome other perspectives on the dilemma I present. My intention was to approach the dilemma I laid out realistically while still preserving a sense of idealism for the possibility of transformative change. I also maintain my scepticism about whether our country can muster the political will and resources to change the entrenched ways we conduct criminal justice and negotiate with indigenous people. It is a scepticism I hope I can channel into approaching my own work with humility and self-reflection.

## Conclusion

The dilemma that surfaces from my thesis lies in the fact that even with legislative changes or court reforms, the criminal justice system perpetuates the very historic injustice recent changes to sentencing and negotiations of land claims are meant to alleviate. When it comes to reconciling the criminal justice system with the motivation for indigenous self-determination, the dilemma seems intractable. In the face of an intractable dilemma, it is hard to know where to look for hope. No one knows better than indigenous people how challenging and yet also how necessary it is to find hope despite the effects of the devastating onslaught of colonialism to indigenous communities. In *Radical Hope: Ethics in the Face of Cultural Devastation*, Jonathan Lear describes North American indigenous people's experience of colonialism as "cultural catastrophe."<sup>405</sup> Lear derives "radical hope" from his ethical inquiry into the actions of Chief Plenty Coups, the last great chief of the Crow nation, who maintained hope for the future of his people in the face of their cultural devastation. Lear finds cultural devastation "is a vulnerability we all share simply in virtue of being human."<sup>406</sup> He imagines that courage gives humanity the strength to retain hope even when facing these immeasurable risks that life will alter irrevocably. Such is radical hope, "[i]t is basically the hope for *revival*: for coming back to life in a form not yet intelligible."<sup>407</sup> This is the hope needed to re-imagine what the dilemmas confronting the criminal justice system and indigenous self-determination mean to the constitution of the Canadian state. I retain a radical hope that

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<sup>405</sup> Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (Cambridge: Harvard University Press, 2006).

<sup>406</sup> *Ibid* at 8.

<sup>407</sup> *Ibid* at 95.

Canada's people, indigenous and non-indigenous alike, possess the courage and will to participate in changing the face of our country and our criminal justice system.

Radical hope means a radical approach to reconciling the intractable dilemma that has made the criminal justice system a site of oppression for indigenous people. Numerous reports and research studies have assessed why the criminal justice system cannot serve indigenous people in Canada. Nonetheless, as Carol LaPrairie once cautioned, those reports are long on recommendations and short on data. I would add that they are often also short on analyzing why the very nature of criminal justice is irreconcilable with indigenous self-determination. The criminal justice system in Canada enforced Canada's colonial regime on indigenous communities who occupied the land over which the Canadian state sought sovereignty. Colonialism criminalized indigenous identity. All the while, the Canadian state imposed criminal law on indigenous people to demonstrate Canada's sovereignty over indigenous territory that would come to be the Canadian state. Sentencing epitomizes how intractable the nature of the dilemma of alleviating the historic injustice that the criminal justice system perpetrated against indigenous people is. Sentencing reveals the work the criminal justice system does both in making an individual offender's identity a part of defining criminality and in demonstrating the state's assertion of sovereignty over those who violate its rule. It is no wonder that the law's efforts to turn again and again to sentencing as a way to mitigate the damage the Canadian state has inflicted on indigenous communities through the criminal justice system are so unsuccessful. No radical hope can lie in using the same tools of the state that Canada originally used in occupying indigenous people to re-imagine a different geopolitical space in which indigenous communities are partners not subjects.

Even in the Nunavut Territory, where the imagination of Inuit identity is tied so closely to the politics of government, the intractable dilemma posed by the interaction of identity and sovereignty in sentencing confounds the future of radical hope. Nunavut requires radical hope. Its high crime rates and the increased incarceration of Inuit make plain the failure of Canada's criminal justice system for Inuit people. Despite what the Nunavut Territory represents in terms of a dedicated geopolitical space for indigenous identity in the Canadian state, it still fails to meet the expectation that a public government representing an Inuit majority can govern Inuit on the principles of *Inuit Qaujimagatuqangit*. Nowhere is this more apparent than the criminal justice system where the territorial status and environment of Nunavut exacerbate the way the criminal justice system is a tool for asserting Canadian sovereignty. To realize Inuit self-determination, we need radical hope. It is the same hope Inuit activists harboured when they conceived of Nunavut as the means to *de facto* self-government. The challenge is to keep that radical hope alive.

A return to radical hope is the only way to redirect the good intentions that originally motivated bringing Inuit identity into the Nunavut Court of Justice's sentencing decisions. My thesis is not meant to quash those good intentions. My critique of the Court's sentencing decisions in chapter three was not aimed at their outcome or the reasoning of particular judges, but instead at the work sentencing decisions do in both constructing and negotiating indigenous identity and in maintaining Canadian sovereignty. It is important that the criminal justice system turn its attention to that work. The work sentencing does in constructing and negotiating indigenous identity and in

maintaining Canadian sovereignty can help us understand how necessary a fundamental reconception of the Canadian state is to the success of indigenous self-determination.

There is no simple way to sustain radical hope in the face of a dilemma so intractable that even good intentions fail to effect change. The path facing us is an unsteady one fraught with twists, turns, and forks in the road that may even take us back to where we started. Setting out on this unsteady path requires not only radical hope, but also perseverance and patience—from every aspect of the criminal justice system. We cannot pretend that the solution lies in another *Criminal Code* amendment, another justice committee, another elders' council, or another indigenous lawyer. These things might or might not prove essential to alleviate the way that the criminal justice system appropriates and essentializes indigenous identity for the purpose of asserting Canadian sovereignty. Much will depend on how we approach the solutions, our willingness to educate each other and adapt to new situations, as well as the resources allocated to the institutions of criminal justice and indigenous self-government. Much will also depend on our ability to act on our radical hopes.

## Bibliography

### Legislation

*British North America Act*, 1867 30 & 31 Victoria, c 3

*Constitution Act, 1867* (UK), 30 & 31 Vict c 3, s 91 & 92, reprinted in RSC 1985, App II, No 5

*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982* (UK), 1982, c 11

Canada, Bill C-41, *An Act to Amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl, 1994-95 (assented to July 13 1995), SC 1995, c 22

*Criminal Code*, RSC, 1985, c C-46, as amended

*Indian Act*, RS, 1985, c I-5, as amended

Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01(1)

*Nunavut Act*, RS, 1993 c 28

*Nunavut Land Claims Agreement Act*, R.S. 1993, c 29

*Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, 37 ILM 999, art 17 (entered into force July 1, 2002)

*Wildlife Act*, S Nu 2003, c 26

*Youth Criminal Justice Act* SC 2002, c 1

### Jurisprudence

*Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)* 2010 NUCJ 12 (CanLII)

*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2008 NUCJ 11 (CanLII)

*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, (2009) NU CA 2 (CanLII)

*Re: Eskimos*, [1939] SCR 104

*R. v. Christensen*, 2000 CanLII 14581 (NUCJ)

*R. v. Evaloardjuk*, [1999] Nu. J. No. 11

*R. v. Gladue*, [1999] 1 S.C.R. 688

*R. v. Haongak*, Nunavut Court of Justice (5 June 2008), unreported

*R. v. J.P.*, [2009] NUCJ 13

*R. v. K.G.S.*, [2009] NUCJ 9

*R. v. Kikkik: Trial Transcripts* (Yellowknife, N.W.T.: Supreme Court of the Northwest Territories, ca.1958)

*R. v. Kogogolak*, N.W.T. Supreme Court, 20 April 1959

*R. v. Kootoo*, 2000 CanLII 4442 (NU CJ)

*R. v. Nakashook*, NUCJ (November 20, 2002)

*R. v. Nookiguak*, [2005] NUCJ 16 (CanLII)

*R. v. Sala*, Nunavut Court of Justice (October 14, 1999)

*R. v. Silas Ulayuruluk*, Nunavut Court of Justice (22 January 2004)

*R. v. Van der Peet*, [1996] 2 S.C.R. 50

### **Secondary Sources and Other Materials**

Alfred, Taiiiake, *Wasa'se: indigenous pathways of action and freedom* (Toronto: Broadview Press, 2005)

Andersen, Dawn Y. *After Gladue: Are Judges Sentencing Aboriginal Offenders Differently?* (Ph.D. Dissertation: York University, 2003)

Anand, Sanjeev. "The sentencing of aboriginal offenders, continued confusion and persistent problems: A comment on the decision in *R. v. Gladue*" (July 2000) Can J Crim 412

- Aupilaarjuk, Mariano, et. al. *Interviewing Inuit Elders: Perspectives on Traditional Law*, vol. 2, Jarich Oosten, Frederic Laugrand & Wim Rasing, eds. (Iqaluit: Nunavut Arctic College, 1999)
- Avison, Don, Alice MacKenzie, and Helen Tologanak. "The Changing Role of Native Courtworkers" in *Self-Sufficiency in Northern Justice*, Curt T. Griffiths, ed., (Northern Justice Society, 1992) 195
- Backhouse, Constance. *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999)
- Bennett, John and Susan Rowley, eds. *Uqalurait: An Oral History of Nunavut* (Montreal: McGill-Queen's University Press, 2004)
- Bombay, Amy, Kim Matheson, and Hymie Anisman. "Intergenerational Trauma: Convergence of Multiple Processes among First Nations peoples in Canada" (2009) 5:3 *Journal of Aboriginal Health* 6
- Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010)
- Brody, Hugh. *The People's Land: Eskimos and Whites in the Eastern Arctic* (Harmondsworth: Penguin Books, 1975)
- Burd, Larry and Michael E.K. Moffatt. "Epidemiology of Fetal Alcohol Syndrome in American Indians, Alaskan Natives, and Canadian Aboriginal Peoples: a Review of the Literature" (1994) 109:5 *Public Health Reports* 688
- Cameron, Angela. "R. v. Gladue: Sentencing and the Gendered Impacts of Colonialism" in John D Whyte, ed., *Moving Toward Justice* (Saskatoon: Purich Publishing Ltd., 2008)
- Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004)
- Cariboo-Chilcotin Inquiry, *Report of the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993)
- Carter, Roger, James Youngblood Henderson, and Richard Gosse, eds. *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994)
- Cavell, James and Jeff Noakes. *Acts of Occupation* (Vancouver: UBC Press, 2010)

- Charron, Mathieu, Christopher Penney and Sacha Sénécal. "Police-Reported Crime in Inuit Nunangat", Statistics Canada Centre for Justice Statistics (Ottawa: Minister of Industry, 2010)
- Christie, Gordon. "Aboriginal Citizenship: sections 35, 25 and 15 of Canada's Constitution Act, 1982" (2003) 7:4 *Citizenship Studies* 481
- Clark, Scott, "The Nunavut Court of Justice: Examples of Challenges and Alternatives for Communities and for the Administration of Justice" (July 2011) *Can J Crim & Crim J* 343
- Coates, Kenneth and William Morrison. "The New North in Canadian History and Historiography" (2008) 6:2 *History Compass* 639
- \_\_\_\_\_, "To Make the Tribes Understand': The Trial of Alikomiak and Tatamigana" (September 1998) 51 *Arctic* 220
- Connolly, Anthony. "Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law" (2006) 7:1 *The Asia Pacific J of Anth* 27
- Coulthard, Glen. "Subjects of Empire" (2007) 6:4 *Contemporary Political Theory* 437
- Cover, Robert. "Violence and the Word" (1985-1986) 95 *Yale LJ* 1601
- Creery, Ian. "The Inuit (Eskimo) of Canada" in *Polar Peoples: self determination and development*, Minority Rights Group, ed. (London: Minority Rights Publications, 1994) 105
- Damas, David. *Arctic Migrants/Arctic Villagers: Transformation of Inuit Settlement in the Central Arctic* (Montreal: McGill-Queen's University Press, 2002)
- Daubney, David. *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release, and Related Aspects of Corrections* (Ottawa: Ministry of Supply and Service, 1988)
- \_\_\_\_\_, and Gordon Parry. "An Overview of Bill C-41 (The Sentencing Reform Act)" in *Making Sense of Sentencing*, Julian V Roberts and David P Cole, eds. (Toronto: University of Toronto Press, 1999) 31
- Duff, Antony and David Garland. "Introduction" in *A Reader on Punishment*, Antony Duff and David Garland, eds. (Oxford: Oxford University Press, 1994) 1

- Duffy, Ronald Quinn. *The Road to Nunavut: the Progress of the Eastern Arctic Inuit Since the Second World War* (Montreal: McGill-Queen's University Press, 1988) at 226-27
- Eber, Dorothy Harley. *Images of Justice: a legal history of the Northwest Territories and Nunavut as traced through the Yellowknife Courthouse collection of Inuit sculpture* (Montreal: McGill-Queen's University Press, 1997)
- Eisenberg, Avigail. *Reasons of Identity* (New York, Oxford University Press, 2009)
- Fanon, Frantz. *Black Skin, White Masks*, trans. Richard Philcox (New York: Grove Press, 1952)
- Fenge, Terry and Paul Quassa. "Negotiating and Implementing the Nunavut Land Claims Agreement" (July-August 2009) *Policy-Options* 80
- Finkler, Howard. "Community Participation in Socio-Legal Control" (July-October 1992-93) *Can J Crim* 503
- Flanagan, Tom, Christopher Alcantara, André Le Dressay. *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010)
- Foucault, Michel. *Discipline and Punish* (London: Penguin Books, 1975)
- Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (July/August 1995) 212 *New Left Review* 71
- Friedland, Hadley. "Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System" (2009) 72 *Sask L Rev* 105
- Friedland, Martin. *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell Legal Publications, 1984)
- Garland, David. *Punishment and Modern Society: A Study in Social Theory* (Chicago: The University of Chicago Press, 1990)
- Grant, Shelagh. *Arctic Justice: On Trial for Murder in Pond Inlet, 1923* (Montreal: McGill-Queen's University Press, 2002)
- \_\_\_\_\_. *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2010)
- Griffiths, Curt T. Et. al. *Crime, Law & Justice Among Inuit In The Baffin Region, N.W.T., Canada* (Burnaby: Criminology Research Centre, Simon Fraser University, 1995)

- Hamilton, A.C. and C.M. Sinclair. *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991)
- Henderson, Ailsa. "Self-Government in Nunavut" in *Aboriginal Self-Government in Canada*, 3rd ed, Yale D Belanger, ed. (Saskatoon: Purich Publishing, 2008)
- Harring, Sidney L. *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998)
- \_\_\_\_\_, "Rich Men of the Country" (1989) 21 Ottawa L Rev 1
- House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs in Official Report of Debates (Hansard)*, 35th Parl, 1st Sess, Vol 144, No I-62 (November 17, 1994)
- \_\_\_\_\_, No I-79 (February 14, 1995)
- \_\_\_\_\_, No I-85 (February 28, 1995)
- \_\_\_\_\_, No I-88 (March 2, 1995)
- Hurlbert, Margot and John Mackenzie. "The Criminal Justice System and Aboriginal People" in *Moving Toward Justice*, John D Whyte, ed. (Saskatoon: Purich Press: 2008)
- Jackson, Michael. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) 26 UBC L Rev 141
- Jenkins, McKay. *Bloody Falls of the Coppermine: Madness, Murder, and the Collision of Cultures in the Arctic, 1913* (New York: Random House, 2005)
- Jung, Courtney. *The Moral Force of Indigenous Politics* (New York: Cambridge University Press, 2008)
- Justice Canada. *The Nunavut Court of Justice Formative Evaluation: Final Report* (Ottawa: Evaluation Division Office of Strategic Planning and Performance Management, 2007)
- Kelm, Mary-Ellen. *Colonizing Bodies: Aboriginal Health and Healing in British Columbia* (Vancouver: UBC Press, 1998)
- Kirsch, Phillippe and Valerie Oosterveld. "Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court" (2001) 46:4 McGill LJ 1141

Kulchyski, Peter. *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994)

Kulchyski, Peter and Frank Tester. *Tamarniit (mistakes): Inuit Relocation in the Eastern Arctic 1939-1963* (Vancouver: UBC Press, 1994)

\_\_\_\_\_, *Kiumajut (talking back): game management and Inuit rights, 1900-70* (Vancouver: UBC Press, 2007)

Labman, Shauna. "An experiment in innovation: Nunavut's single-level trial court" (Aug/Sep 2003) 28 *Law Now* 31

Landau, Tammy C. "Plus Ca Change? 'Correcting' Inuit Inmates in Nunavut, Canada" (2006) 45 *The Howard Journal* 191

Lapin, M.A. and J.S. Patrick, eds., *Index to Parliamentary Debates on the Confederation of British North American Provinces: 3rd session, 8th Provincial Parliament of Canada, 1865* (Ottawa: King's Printer, 1951)

LaPrairie, Carol. "Sentencing Aboriginal Offenders: Some Critical Issues" in *Making Sense of Sentencing*, Julian Roberts and Judge David Cole, eds., (Toronto: University of Toronto Press, 1999) 173

Larocque, Emma. "Re-examining Culturally Appropriate Methods in Criminal Justice Applications" in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch, ed. (Vancouver: UBC Press, 1997)

Law Reform Commission of Canada. *A Report on Dispositions and Sentences in the Criminal Process—Guidelines, 1976* (Ottawa: Minister of Public Works and Services, 2006)

\_\_\_\_\_. *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991)

Lawrence, Bonita. "Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada" in *Race, Space, and the Law: Unmapping a White Settler Society*, Sherene H. Razack, ed. (Toronto: Between the Lines, 2002)

Lear, Jonathan. *Radical Hope: Ethics in the Face of Cultural Devastation* (Cambridge: Harvard University Press, 2006)

Légaré, André. "Nunavut: The Construction of a Regional Collective Identity in the Canadian Arctic" (Autumn 2002) 17 *Sovereignty and Governance* 65

- Levan, Mary Beth. *Creating a Framework for the Wisdom of the Community: Review of Victim Services in Nunavut, Northwest and Yukon Territories* (Ottawa: Canada Department of Justice, 2004)
- Linden, Rick. "Crime Prevention in Aboriginal Communities", Consultation Paper for *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991)
- Loo, Tina. "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in *Essays in the History of Canadian Law: Crime and Criminal Justice*, vol. 5 (Toronto: Osgoode Society for Canadian History, 1994) 112
- Ludger, Muller-Wille, ed. *Franz Boas Among the Inuit of Baffin Island, 1883-1884* (Toronto: University of Toronto Press, 1998)
- MacLeod, R.C. and Heather Rollason. "'Restrain the Lawless Savages': Native Defendants in the Criminal Courts of the North West Territories, 1878-1885" (June 1997) 10:2 *J of Hist Soc* 157
- Mancini Billson, Janet and Kyra Mancini. *Inuit Women: Their Powerful Spirit in a Century of Change* (Lanham: Rowman and Littlefield, 2007)
- Marcus, Rudolph. *Relocating Eden: The Image and Politics of Inuit Exile in the Canadian Arctic* (Hanover: University of New England Press, 1995)
- Mawani, Renisa. "In Between and Out of Place: Mixed-Race Identity, Liquor and the Law in British Columbia" in Sherene Razack, ed., *Race, Space and the Law* (Toronto: Between the Lines, 2002)
- McComber, Louis, ed. *Changing the Face of Canada: The Life Story of John Amagoalik* (Montreal: Serpentine, 2007)
- McGrath, Melanie. *The Long Exile: a tale of Inuit betrayal and survival in the high Arctic* (New York: Vintage Books, 2006).
- Merry, Sally Engle. "Legal Pluralism" (1988) 22:5 *Law and Society Review* 869
- Mifflin, Michael. "The Prince and the Pauper—Nunavut Tunngavik Incorporated and the Government of Nunavut" (July-August 2009) *Policy Options* 92
- Milloy, John S. *"A National Crime": The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999)
- Mitchell, Marybelle. *From talking chiefs to native corporate elite: the birth of class and nationalism among Canadian Inuit* (Montreal: McGill-Queen's University Press, 1996)

- Monture, Patricia. "Thinking About Aboriginal Justice: Myths and Revolution" in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, Richard Gosse, James Youngblood Henderson, and Roger Carter, eds. (Saskatoon: Purich Publishing, 1994) 222
- Morrison, William. *Showing the Flag: the Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: UBC Press, 1985)
- Mowat, Farley. *The Desperate People* (Toronto: Seal Books, 1980)
- Moyles, R.G. *British Law and Arctic Men* (Saskatoon: Western Producer Prairie Books, 1979)
- Nakasuk, Saullu Hervé Paniaq, Elisapee Ootoova, and Pauloosie Angmaalik. *Interviewing Inuit Elders: Acknowledgments, Preface, and Introduction*, vol 1, Jarich Oosten & Frederic Laugrand, eds. (Iqaluit: Nunavut Arctic College, 1999)
- Nettelback, Amanda and Russel Smandych. "Policing Indigenous Peoples on Two Colonial Frontiers: Australia's Mounted Police and Canada's North-West Mounted Police" (2010) 43:2 *The Austl Crim & NZJ* 356
- Nobles, Melissa. *Shades of Citizenship* (Stanford: Stanford University Press, 2000)
- Nunavut Implementation Commission. *Footprints in New Snow: Report of the Nunavut Implementation Commission* (Iqaluit: Nunavut Implementation Commission, 1993)
- Nunavut Implementation Commission. *Footprints 2: A Second Comprehensive Report of the Nunavut Implementation Commission* (Iqaluit: Nunavut Implementation Commission, 1996)
- Patenaude, Allan J. *Crime and Criminal Justice in Nunavut: An Exploration in Aboriginal Peoples and Criminal Justice Policy* (Ph.D. Dissertation, Simon Fraser University, 1997)
- Patterson, IER Dennis G. *Nunavut Legal Services Study: Final Report* (Ottawa: Canada Department of Justice, 2004)
- Pauktuutit Inuit Women Canada. *Inuit Healing in Contemporary Inuit Society* (Ottawa: Pauktuutit Women Canada, 2004)
- 
- \_\_\_\_\_. *Research Report: Applying Inuit Cultural Approaches in the Prevention of Family Violence and Abuse* (Ottawa: Pauktuutit Inuit Women Canada, 2005)

---

\_\_\_\_\_. *National Strategy to Prevent Abuse in Inuit Communities* (Ottawa: Pauktuutit Inuit Women of Canada, 2006)

Phillips, Anne. *Gender and Culture* (Cambridge: Polity Press, 2010)

Price, Graham, "The North" (1995) 23 Man. LJ 356

Price, Graham. *Remote justice: the Stipendiary Magistrate's court of the Northwest Territories (1905-1955)* (LLM Thesis, University of Manitoba, 1986)

Price, Jackie. Tukisivallialiqtakka: *The things I have now begun to understand: Inuit governance, Nunavut, and the Kitchen Consultation Model* (MA Thesis, University of Victoria Indigenous Governance, 2007)

Purich, Donald. *The Inuit and their Land: the Story of Nunavut* (Toronto: James Lorimer and Co, 1992)

Qikitani Truth Commission. *QTC Final Report: Achieving Saimaqatigiingniq* (Iqaluit: Qikitani Inuit Association, 2010)

Qullit Nunavut Status of Women Council. *What Inuit Women Need in Order to Deal with Abuse and Violence* (Iqaluit: Qullit Nunavut Status of Women Council, 2004)

Razack, Sherene H. "The Murder of Pamela George" in *Race, Space, and the Law: Unmapping a White Settler Society*, Sherene H. Razack, ed. (Toronto: Between the Lines, 2002)

Roach, Kent and Jonathan Rudin, "Gladue: the Judicial and Political Reception of a Promising Decision" (July 2000) Can J of Crim 355

Ross, Rupert. *Dancing with a Ghost* (Markham: Reed Books Canada, 1992)

Rotman, Leonard. "Creating a Still-Life out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36:1 Alta L Rev 1

Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and the Criminal Justice System in Canada* (Ottawa: Ministry of Supply and Services Canada, 1996)

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1991)

- Sagers, Sherry and Dennis Gray. *Dealing with Alcohol: Indigenous Usage in Australia, New Zealand And Canada* (Cambridge: Cambridge University Press, 1998)
- Sanders, Nora, "Trial Court Unification in Nunavut" in *Canada's Trial Courts*, Peter H Russell, ed (Toronto: University of Toronto Press, 2007)
- Sawatsky, Len, "Self-Determination and the Criminal Justice System" in *Nation to Nation*, D Engelstad and John Bird, eds., (Toronto: Anasi, 1992)
- Searles, Edmund, "Placing Identity: Town, Land, and Authenticity in Nunavut, Canada" (2010) 27:2 Acta Borealia 151
- Sinclair, Murray, "Aboriginal Peoples, Justice, and the Law" in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, Richard Gosse, James Youngblood Henderson, and Roger Carter, eds., (Saskatoon: Purich Publishing, 1994) 173
- Sissons, John Howard. *Judge of the Far North: The Memoirs of Jack Sissons* (Toronto: McLelland and Stewart Ltd, 1968)
- Slattery, Brian, "Hidden Constitution: Aboriginal Rights in Canada, the New Canadian Constitution" (1984) 32:2 Am J Comp L 361
- Stack, David, "The Impact of Gladue on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom" (1999) 62:2 Sask L Rev 471
- Statistics Canada. "Canadian Centre for Justice Statistics Profile Series: Aboriginal Peoples in Canada" (Ottawa: Ministry of Industry, 2001)
- Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force on the Criminal Justice System, 1991)
- Tulloch, Shelley. *Building a Strong Foundation: Considerations to Support Bilingualism in Nunavut* (2009) Nunavut Literacy Council
- Tully, James. *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995)
- Wachowich, Nancy et al. *Saqiyuq: Stories from the Lives of Three Inuit Women* (Montreal: McGill-Queen's University Press, 1999)

Welsh, Andrew and James Ogloff, "Progressive Reform or Maintaining the Status Quo?: An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (July 2008) *Can J of Crim* 491

Williams, Robert. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Routledge, 1999)

Wright, Barry, "Criminal Law Codification and Imperial Projects: the Self-Governing Jurisdiction Codes of the 1890s" (2008) *12 Legal Hist* 19

### **Electronic Sources**

Berger, Thomas. *Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period* (March 1, 2006) online: Aboriginal Affairs and Northern Development Canada <<http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/lca/nlc-eng.asp#chp1>>.

Borrows, John, "Crown and Aboriginal Occupations of Land: A History & Comparison", Research Paper for the Ipperwash Inquiry (October 15, 2005) online: The Ipperwash Inquiry <[http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/History\\_of\\_Occupations\\_Borrows.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf)>

B.C. Treaty Commission online: <<http://www.bctreaty.net/files/quickfacts.php>>.

Canada, *Taking Section 35 rights seriously [electronic resource] : non-derogation clauses relating to Aboriginal and treaty rights: final report of the Standing Senate Committee on Legal and Constitutional Affairs* (Ottawa: Standing Committee on Legal and Constitutional Affairs, 2007)

The Canadian Press, "Disgraced Pathologist Smith Reprimanded" *CBC News* 25 March 2011, online: *CBC News* <<http://www.cbc.ca/news/health/story/2011/03/25/charles-smith-reprimand.html>>

CBC Archives, "An Inuit Education: Honouring a Past, Creating a Future" online: *CBC Digital Archives* <<http://archives.cbc.ca/society/education/topics/529-2666/>>

"Ce qu'il faut pour vivre (Necessities of Life)" (2008)

Chartrand, Larry and Celeste McKay. *A Review of Research on Criminal Victimization and First Nations, Metis, and Inuit Peoples* (Ottawa: Department of Justice, 2006) online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06\\_vic1/index.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_vic1/index.html)>

Crnkovich, Mary, "The Role of the Victim in the Criminal Justice System -- Circle Sentencing in Inuit Communities" (1995) Prepared for the Canadian Institute for the

Administration of Justice Conference in Banff, Alberta, October 11-14 online CASAC:  
<<http://www.casac.ca/content/role-victim-criminal-justice-system-circle-sentencing-inuit-communities-0>>

Department of Justice Canada, *Backgrounder on Sentencing Reform* (August 28, 1996)  
online: Department of Justice  
<[http://web.archive.bibalex.org/web/19980116184537/canada.justice.gc.ca/News/Communique/1996/chap22\\_bkg\\_en.html](http://web.archive.bibalex.org/web/19980116184537/canada.justice.gc.ca/News/Communique/1996/chap22_bkg_en.html)>

“Eskimos”, Encyclopaedia Britannica, online Encyclopaedia Britannica:  
<<http://www.britannica.com.ezproxy.library.uvic.ca/EBchecked/topic/192518/Eskimo>>

“The Experimental Eskimos” (White Pine Pictures, 2009)

First Voices <<http://www.firstvoices.com/en/home>>

Hanson, Ann Meekitjuk. “What’s in a Name?” in Nunavut ’99 (Nunavut: Nortext Media and Nunavut Tunngavik Inc) online NTI:  
<<http://www.nunavut.com/nunavut99/english/name.html>>

Inuit Tapirisat Kanatami, “About ITK” online: Inuit Tapirisat Kanatami  
<<http://www.itk.ca/about-itk>>

Landry, Laura and Maire Sinha. “Adult Correctional Services in Canada 2005/2006” (Ottawa: Minister of Industry for Statistics Canada, 2008) online: Statistics Canada  
<<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008006-eng.pdf>>

Makivik Corporation online: Makivik <<http://www.makivik.org/building-nunavik/nunavik-government/>>

“Nanook of the North” (1922)

National Alcohol Strategy Working Group. *Reducing Alcohol-Related Harm in Canada: Toward a Culture of Moderation: Recommendations for a National Alcohol Strategy* (2007) online: Canadian Centre on Substance Abuse  
<<http://www.ccsa.ca/2007%20CCSA%20Documents/ccsa-023876-2007.pdf>>

National Film Board “Broken Promises: The High Arctic Relocation” (1995)

National Film Board, “Place of the Boss: Utshimassits” (1996)

New York Times “Review”, 12 June 1922 online: New York Times  
<<http://query.nytimes.com/mem/archive-free/pdf?res=9A00E2DB1E3EEE3ABC4A52DFB0668389639EDE>>

Nisga’a Final Agreement, online: Aboriginal Affairs and Northern Development Corporation <<http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp#chp13>>

Nunavut Court of Justice. *Annual Report (2008)* online: The Nunavut Court of Justice <[www.nucj.ca](http://www.nucj.ca)>

\_\_\_\_\_. “JP Court/NCJ Transfers”, Nunavut Court of Justice Practice Directive No. 11, online: The Nunavut Court of Justice <[http://www.nucj.ca/Directives/PD11\\_JPNCJCourt\\_Transfers.pdf](http://www.nucj.ca/Directives/PD11_JPNCJCourt_Transfers.pdf)>

\_\_\_\_\_, “Meet the Judges” online: The Nunavut Court of Justice <<http://www.nucj.ca/judges.htm>>

\_\_\_\_\_, “Rules of Court” online: The Nunavut Court of Justice <<http://www.nucj.ca/rules.htm>>.

Nunavut Tunngavik Incorporated online: <<http://www.tunngavik.com/>>

Peritz, Ingrid. “Dismantled sweat lodge exposes rift in Christian, traditional teaching”, *The Globe and Mail* (June 17, 2011) online: Globe and Mail <<http://www.theglobeandmail.com/news/national/quebec/dismantled-sweat-lodge-exposes-rift-in-christian-traditional-teaching/article2066299/>>

Rogers, Sarah, “Death of Sylvain Degrasse and family a puzzle to friends, relatives”, *Nunatsiaq News* (June 10, 2011) online: Nunatsiaq News <[www.nunatsiaqonline.ca](http://www.nunatsiaqonline.ca)>

Taylor, Charles. *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1994);online: <[http://elplandehiram.org/documentos/JoustingNYC/Politics\\_of\\_Recognition.pdf](http://elplandehiram.org/documentos/JoustingNYC/Politics_of_Recognition.pdf)>

White, Patrick. “The Trials of Nunavut: Lament for an Arctic Nation”, *The Globe and Mail* (April 1, 2011) online: Globe and Mail <<http://www.theglobeandmail.com/news/national/nunavut/northern-crime/article1963420/>>

Windeyer, Chris. Email costs Tapardjuk -justice portfolio”, *Nunatsiaq News* (January 30, 2009) online: Nunatsiaq News <[http://www.nunatsiaqonline.ca/archives/2009/901/90130/news/nunavut/90130\\_1860.html](http://www.nunatsiaqonline.ca/archives/2009/901/90130/news/nunavut/90130_1860.html)>

\_\_\_\_\_, “Louis Tapardjuk resigns from Nunavut cabinet”, *Nunatsiaq News* (28 October 2010) online: Nunatsiaq News <[http://www.nunatsiaqonline.ca/stories/article/98789\\_louis\\_tapardjuk\\_resigns\\_from\\_nunavut\\_cabinet/](http://www.nunatsiaqonline.ca/stories/article/98789_louis_tapardjuk_resigns_from_nunavut_cabinet/)>

\_\_\_\_\_, “Nunavut RCMP treating Iqaluit family deaths as homicides”, *Nunatsiaq News* (9 June 2011) online: Nunatsiaq News <[www.nunatsiaqonline.ca](http://www.nunatsiaqonline.ca)>

\_\_\_\_\_, “Curley blasts Globe and Mail for Nunavut feature”, *Nunatsiaq News* (May 31, 2011) online: Nunatsiaq News  
<[http://www.nunatsiaqonline.ca/stories/article/98789\\_curley\\_blasts\\_globe\\_and\\_mail\\_for\\_nunavut\\_feature](http://www.nunatsiaqonline.ca/stories/article/98789_curley_blasts_globe_and_mail_for_nunavut_feature)>

## Appendix A

Amendments to the *Criminal Code*, R.S.C., 1985, c. C-46, added by Bill C-41:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
  - (ii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.<sup>408</sup>

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<sup>408</sup> Canada, Bill C-41, *An Act to Amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl, 1994 1995 (assented to July 13 1995), SC 1995, c 22.