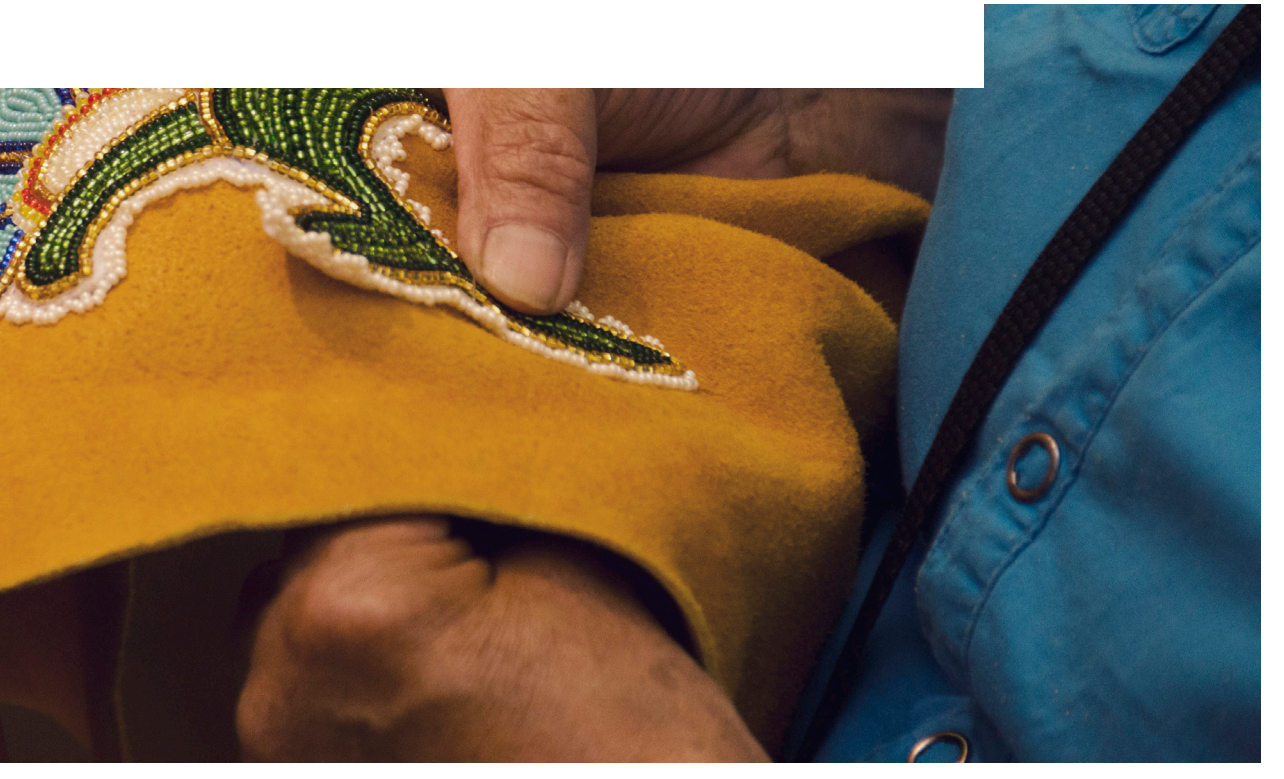
Nän K'ałädàtth'ät:

Changing Times, Continuing Ways:

A Re-evaluation of Court Options for Shadhäla, Äshèyi yè kwädän

Champagne and Aishihik First Nations

Samantha Dawson, Jessica Black, Melaina Sheldon,
Jordan Peterson, Meagan Grabowski



THE GORDON FOUNDATION

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Project Supervisor and Director
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Submitted to
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representatives of Shadhäla, Äshèyi yè kwädän
(Champagne and Aishihik First Nations)

THE GORDON FOUNDATION

The Gordon Foundation undertakes research, leadership development and public dialogue so that public policies in Canada reflect a commitment to collaborative stewardship of our freshwater resources and to a people-driven, equitable and evolving North. Our mission is to promote innovative public policies for the North and in fresh water management based on our values of independent thought, protecting the environment, and full participation of indigenous people in the decisions that affect their well-being. Over the past quarter century The Gordon Foundation has invested over $37 million in a wide variety of northern community initiatives and freshwater protection initiatives.

JANE GLASSCO NORTHERN FELLOWSHIP

The Jane Glassco Northern Fellowship is a policy and leadership development program that recognizes leadership potential among young northern Canadians who want to address the emerging policy challenges facing the North. The two year long program is built around four regional gatherings and offers skills training, mentorship and networking opportunities. Through self-directed learning, group work and the collective sharing of knowledge, Fellows will foster a deeper understanding of important contemporary northern issues, and develop the skills and confidence to better articulate and share their ideas and policy research publicly. The Fellowship is intended for young northerners between 25 and 35 years of age, who want to build a strong North that benefits all northerners. Through the Fellowship, we hope to foster a bond among the Fellows that will endure throughout their professional lives and support a pan-northern network.

Samantha Dawson

Samantha Dawson is a citizen of the Selkirk First Nation, Yukon and is a graduate of Allard Law, UBC with a dual specialization in Aboriginal law and social justice. She currently practices criminal defence law as an articling student in Vancouver, continuing her research of justice issues and how they pertain to Indigenous peoples, particularly high incarceration rates. Samantha has also volunteered with a number of organizations including: the Assembly of First Nations, The Native Women's Association of Canada, the Yukon Aboriginal Women's Council, the UBC Indigenous Law Student's Association and the Canadian Association of Journalists. Samamtha is grateful to the Champagne and Aishihik First Nations for sharing their history with our group in preparation for this work.

Jessica Black

Jessica Black is a Nunavummiut from Iqaluit. Jessica has spent her career so far imbued within the field of justice. She is currently residing in Victoria, B.C., while she completes a juris doctor at the University of Victoria, but her home and heart remain in the North. Her dream is to practise environmental and indigenous law in a way that advocates and contributes to the arctic and its peoples. She is passionate about circumpolar affairs, complex policy issues, art, and loves surfing and cycling.

Melaina Sheldon

Melaina Sheldon is of Polish/Ukrainian, Southern Tutchone and Inland Tlingit descent of the Deisheetaan (Beaver) Clan from Teslin, Yukon Territory. As an alumna of the Jane Glassco Northern Fellowship 2015 cohort Melaina completed her fellowship with a focus on crime prevention and relationship-building between First Nations people and law enforcement officers, combining her passion for justice with a deep-seated belief in the power of theatre to effect social change. She currently sits as a member of the Yukon Police Council and as a clan representative on the Teslin Tlingit Justice Council.

Jordan Peterson

Jordan Peterson was raised in Aklavik, is of Gwich'in, Inuvialuit, Scottish and Swedish ancestry and currently resides in Inuvik. He has dedicated his life to his communities and working with Gwich'in youth, as he did in his former role as the Community Development Officer for the Gwich'in Tribal Council. Jordan has held a number of board positions in Inuvik and is currently appointed as a Board Member for Gwich'in Council International. He has lived and worked all over Western Canada in a number of industrie, but found his true calling when given the chance to work for and with his people. Jordan was elected Deputy Grand Chief/Vice President of the Gwich'in Tribal Council in 2016.

Meagan Grabowski

Meagan Grabowski was born in Dawson City, raised in Whitehorse and continues to live in the Yukon Territory. She completed a B.Sc. in Natural Resource Conservation and an M.Sc. in Zoology at the University of British Columbia. With the Jane Glassco Northern Fellowship, Meagan provided policy recommendations to Yukon Government on modernizing the Yukon Scientists and Explorers Act to better co-manage the granting of research licenses with Yukon First Nations. She is interested in the role of science policy in self-determination for Yukon communities, particularly as it relates to climate change adaptation and equitable economic development.

“We don’t want a brown version of the YTG system.”[1]

1 Champagne and Aishihik First Nations, CAFN *Justice General Assembly Report* (2004): 19.

The Jane Glassco Northern Fellowship is a program hosted by The Gordon Foundation, which selects emerging leaders in northern public policy from across the Canadian North. We are five northerners, age 25 to 35, from diverse backgrounds, communities and skill sets, who are passionate about the well-being of the North and its people. The Fellowship fosters understanding and enhances experience in policy and leadership in the North through connection and work. This report represents a part of the group project component of the Fellowship as a "mock consultation learning exercise" in northern policy development; however, our intention is to assist the Shadhäla, Äshèyi yè kwädän (Champagne and Aishihik First Nations, herein referred to as CAFN) in evaluating the next steps for CAFN Justice.

Based on the diversity of our individual experiences, we see the urgency and importance of reducing the disproportionate representation of Indigenous peoples in the Canadian justice system. Some of us are training to be lawyers, and are dealing with how to practise law given the many unjust precedents set by the colonial system. Some of us have been targeted by the justice system based on racial identity and deal with the multiple impacts of racial profiling. Some of us have family who are in enforcement and know the level of institutional dysfunction within. As we conducted this group project, we passionately discussed and shared our experiences, and recognize the need for healing, accountability and true justice. We also firmly recognize the unique position of Champagne and Aishihik First Nations and hope this work assists in shedding light and furthering justice discussions.

This document explores options available to the CAFN to implement justice under the *Yukon Umbrella Final Agreement* and CAFN law.[2] We provide recommendations to address some ongoing problems persisting since the imposition of a colonial legal structure in the Yukon, and enhance the ability of Indigenous communities to administer justice for their citizens and lands. In this report, we begin with the presentation of our problem definition. Next, the background section includes a colonial historical context example and a brief summary of CAFN's justice work and current programming. In the second section, the report presents five options, each accompanied by a risk analysis. In the final section, we present further considerations with a summary of our recommendations.

The Jane Glassco Northern Fellows were given privileged access to and entrusted with CAFN reports and documentation. Through this document, our group will present court model options available for implementing CAFN Justice. Our recommendations will be based on this completed work, as well as drawn from the research and experiences of academics and other Indigenous governments.

In a broad context, these questions are timely; CAFN and the federal government signed the *Administration of Justice Agreement* framework on February 21, 2011, to resume negotiations.[3] The release of reports such as the *Truth and Reconciliation Commission of Canada Findings* in June 2015, and the newly formed commission charged with investigating Canada's missing and murdered Indigenous women, illustrate the increasing pressure to examine the state of Indigenous peoples and their inherent rights.[4]

2 *Yukon Umbrella Final Agreement*, ss. 24.2.1.13.
3 Champagne and Aishihik First Nations. CAFN *Annual Report 2015-16*. 2015, 7. Accessed at: http://cafn.ca/wp-content/uploads/2015/04/2015-16-CAFN-Annual-Report-for-web-1.pdf.
4 Truth and Reconciliation Commission Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. (Winnipeg: Truth and Reconciliation Commission of Canada, 2015.)

How can CAFN successfully implement the justice provisions of the Yukon Umbrella Final Agreement and its own Self-Government Agreement to create an Indigenous court system?

Da Kų Cultural Centre in Dakwäkäda (Haines Junction).

Imposed and Overlapping Methods of Yukon Justice

The gold rush of 1898 spurred the creation of a new Yukon Territory, accompanied by the Canadian colonial justice system. Yukon Courts served as a response to the growing population of Dawson City. The first murder trial to be tried held in the Yukon Court was the "judicial homicide" of the Nantuk brothers.[5]

Figure 1

Four Nantuck brothers in iron leg with Corporal Rudd (North West Mounted Police) at Tagish Post, Yukon, 1898.[6]

The four Yukon Tagish First Nation "brothers"[7] were tried in Dawson City, required to plead guilty to the murder of William Meehan and attempted murder of Christian Fox, and sentenced to be hanged. Two of the brothers, Frank and Joe, died in prison from scurvy and tuberculosis. From a historical perspective, the execution of the brothers was

> "intended to send a strong message, to first nations: don't you step out of line, you'll face the full weight of the law, and that includes execution. For the Americans: Don't take things into your own hands — the government of Canada will take all measure necessary and impose justice of the highest order."[8]

The language and law set by the provisional court system and experienced by the brothers, fundamentally lacked an understanding of Tagish Tlingit language and laws. Poor translation capacity by the court in Dawson City failed to accommodate the Nantuk brothers from Tagish, who would have spoken Tagish, Southern Tutchone and Tlingit.[9] The Nantuk brothers' trial exemplifies the profound cultural and linguistic barriers the courts accommodate based on incarceration trends and despite some efforts by Gladue reports and Aboriginal Court Workers.

5 Alan Grove. "Where is the Justice, MR Mills?': A Case Study of R. v. Nantuk." in H. Foster & J. McLaren (Eds.), *Essays in the History of Canadian Law: British Columbia and the Yukon* (87–127). (Canada: The Osgoode Society for Canadian Legal History, 1995.)
6 Canadian Museum of History. Klondike photographic collection, J6186.
7 They were "brothers" in their clan (Ganaxtedi, raven symbol and part of the Crow moiety), which was interpreted by settlers and police as literal brothers. Their first and last names were potentially also given at some point during their arrest. (Susan Moorhead Mooney, pers. comm.)
8 John Thomson, "Bones discovered in Yukon tell tale of Klondike justice." *The Globe and Mail*, November 12, 2010, accessed January 20, 2016. http://www.theglobeandmail.com/news/national/bones-discovered-in-yukon-tell-tale-of-klondike-justice/article1314028/.
9 Julie Cruikshank, "Oral Traditions and Written Accounts: An Incident from the Klondike Gold Rush." *Culture* 9 (2) (1989): 25–34.

Many historians, archaeologists, anthropologists and biographers have since reflected on what was already known by many First Nations: the Nantuk brothers were administering the Tagish Nation's justice. As summarized by Justice McGuire in his report to Ottawa after the trial, when the Nantuks were asked for justification, they said, "the whites were 'good friends' but (that) some white man a year or two years ago had killed two Indians."[10] However, this was merely a side note in the trial documents. For the Nantuk brothers, the Yukon legal system had run contrary to their understanding of justice. They had adhered to Tagish Tlingit laws in responding to the death of fellow clans people, and their deaths as a consequence would only create an imbalance in the numbers. [11]

"...Natives are still, as they were a century ago, invariably compelled to defend their practices in a manner consistent with Western logic." [12]

Many stories give further insight into the harm that the brothers were avenging. Mrs. Kitty Smith and Mrs. Angela Sidney shared with Julie Cruikshank that a boy brought a can of white powder left behind by settlers at a camp to his aunt, who used it in bannock.[13] The aunt first fed the bannock to a dog as a test, but because the effects of the poison were delayed, two Crow members consumed the bannock and died. According to their traditional Tlingit laws, the Nantuk brothers as clan members of the deceased were required to administer the reciprocal deaths of two settlers.[14] In this regard, Meehan and Fox were considered social equivalents of the deceased, whose deaths would fairly restore community equilibrium.

"We, the Indians of the Yukon, object to... being treated like squatters in our own country. We accepted the white man in this country, fed him, looked after him when he was sick, showed him the way of the North, helped him to find the gold, helped him build, and respected him in his own rights. For this we have received little in return. We feel the people of the North owe us a great deal and would like the Government of Canada to see that we get a fair settlement for use of the land. There was no treaty signed in this Country, and they tell me the land still belongs to the Indians. There were no battles fought between the whites and the Indians for this land." [15]

10 *Ibid.*
11 Susan Moorehead-Mooney (pers. comm.).
12 Julie Cruikshank's, 'The Social Life of Stories: Narrative and Knowledge in the Yukon Territory', 1998. p. 97
13 *Ibid*, *supra* note 10.
14 *Justice* by Leonard Linklater. Gwaandak Theatre, Whitehorse, Yukon. 2012. Performance.
15 Tämbey (Elijah Smith) Käjèt (Crow clan)

Overriding Indigenous justice with colonial justice has led to the untimely deaths of many, including the Nantuk brothers. Indigenous justice systems were disregarded and deemed inferior despite their presence in the Yukon Territory.[16] The colonial court remains the primary and default judicial system, but has only been predominant since 1898. Indigenous laws have always and continue to play a central role in governing the land and the lives of Indigenous peoples and Yukoners alike. The *Yukon Umbrella Final Agreement* (UFA) formally recognizes the self-governing authority of Yukon First Nations in colonial law. The UFA sets out the lawmaking authority of the self-governing Yukon First Nations, who have the power to negotiate administration of justice agreements. The UFA and agreements that flow from it are powerful self-determination tools entrenched in section 35 of the *Constitution*[17] and a number of self-governing Yukon First Nations have begun using these tools, including CAFN. Indigenous legal orders also operate independently of colonial systems of law and recognition.

Previous Work by CAFN on Justice

As part of our research for this project, we were given access to a number of justice filing boxes. Given the limited time to address these files, we can discern that a large body of research has been completed by CAFN on justice. Due to limitations in our timelines and capacity, we must preface the following summaries on previous work and present programs by acknowledging that these are not comprehensive assessments.

From approximately 2001 to 2009, CAFN had a Justice Manager whose work, along with CAFN negotiators and lawyers, led to an *Administration of Justice Agreement Framework* (AJA), signed in 2016.[18] The Justice Manager also led the community-based nature of a justice program and conducted research through community workshops and Elder interviews to define CAFN justice values for its citizens. The key results from these consultations can be seen in CAFN *Justice Visioning Principles* (*Appendix B*) and Elder interview transcript documents. There were several documents about mediation and adjudication options. For example, a CAFN *Justice General Assembly Report* (2004) presents several models for a CAFN-specific or integrated Indigenous court system. The following information summarizes, as far as our research indicated, what the Justice Manager achieved in planning a CAFN court system.

The Administrative Appeals Tribunal (AAT) was a judicial body set up within CAFN in 2001 under the *Government Administration Act*, to "investigate, hear, and decide complaints brought forth by persons who are aggrieved by actions, decisions, recommendations or procedures of CAFN public officers."[19] As the role and mandate of the AAT became unclear, a review was conducted in 2008, and the tribunal was no longer run as of 2009. As with the

16 *Ibid.*
17 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
18 Champagne and Aishihik First Nations. CAFN *Annual Report 2015–16*. 2015, 7. Accessed at: http://cafn.ca/wp-content/uploads/2015/04/2015-16-CAFN-Annual-Report-for-web-1.pdf.
19 Champagne and Aishihik First Nations. Department of Secretariat. *Administrative Appeals Tribunal Review. Governance Administration Act. Working Group Finding and Recommendations*. December 2008, 5.

Teslin Tlingit Council's ("TTC") Peacemaker Court, a CAFN court could deal with formal complaints by CAFN citizens to the CAFN government.[20]

In 2009, John Bailey wrote *Options for Improving Champagne and Aishihik First Nations' Appeal Processes*, which suggests to "repeal all provisions relating to the Administrative Tribunal and replace them in the *Government Administration Act* with provisions establishing a CAFN Ombudsman with a similar mandate to the Yukon Ombudsman."[21]

Existing CAFN Justice Programs

The Haines Junction Community Justice Program and the Restorative Community Conference Coordinator are initiatives that provide alternatives and diversion away from mainstream courts for CAFN citizens.[22] Given the upcoming AJA framework implementation negotiations,[23] these restorative justice programs could provide guidance on efficacy.

The Haines Junction Community Justice Program started in 1994 as part of the *Aboriginal Justice Strategy*[24] and is funded by the Aboriginal Justice Directorate (Justice Canada) and the Yukon Government Department of Justice, and administered through CAFN. The program consists of a Coordinator and a Committee. The Committee has six appointed individuals: three appointed by CAFN Chief and Council, and three appointed by the Village of Haines Junction Council. The Committee determines whether alternative justice is an appropriate option for a client. The client base of the Haines Junction Community Justice Program is both CAFN citizens (within geographical access) and residents of Haines Junction, making it one of the few "bridging agencies" in the community.

The *Aboriginal Justice Strategy*, and therefore the program, advocates for clients to be kept out of the mainstream court system and diverted into alternatives (such as: healing circles, counselling, suspended sentences), with the goal to administer justice in a manner better aligning with a community's traditions and well-being. Alternatives can be provided at various stages of the justice process, including pre-charge or post-charge, through healing or sentencing circles, or other diversions from correctional facilities.[25]

The Haines Junction Community Justice Program facilitates healing/restorative justice circles and other opportunities for restorative justice. Circles consist of fewer than 12 people, and on average will have in attendance the following:

20 The Teslin Tlingit Peacemaker Court is independent from the General Council and Executive Council of the Teslin Tlingit Council. The Peacemaker Court has the jurisdiction to resolve any dispute between citizens, any dispute that may arise under the Teslin Tlingit Constitution, resolve or adjudicate a dispute between, among or within clans (if the clan leaders involved so request). There is a Discipline Panel to address complaints made against a Peacemaker, but currently there is no official process to address complaints made by a citizen against the government.

21 John Bailey. *Options for Improving Champagne and Aishihik First Nations' Appeal Processes.* March 31, 2009, 17.

22 Information on these programs was collected via the current Coordinator of the HJ Community Justice Program (with the understanding that this information is for a report for CAFN), and from attending a presentation by the Restorative Community Conference Coordinator.

23 Champagne and Aishihik First Nations. CAFN *Annual Report 2015–16*. 2015, 7. Accessed at: http://cafn.ca/wp-content/uploads/2015/04/2015-16-CAFN-Annual-Report-for-web-1.pdf.

24 Government of Canada. *Aboriginal Justice Strategy*. (Ottawa: 2017.) Accessed at: http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html.

25 Our research indicated that pre-charge diversion rarely occurs.

- The victim (optional, can send a proxy);
- The offender;
- A facilitator (Haines Junction Community Justice Coordinator);
- Support people for the victim, offender, and community members and;
- Potentially the Haines Junction Community Justice Committee members (often community elders).

The offender must accept responsibility for their actions. One person speaks at a time, following the order of the circle, for as long as they require. Everybody who will attend is interviewed beforehand to ensure the process is one of healing and any additional conflicts are minimized. The result or decision is decided by consensus of the circle (minus the facilitator). There were many concurrent circles in the mid-nineties, but referrals have become scarce (a rate of approximately one circle/year) due to changes in court and RCMP practices. The program has shifted from its main function of providing support for persons facing charges, incarcerated or on conditions, towards active supports such as organizing camps, crisis lines and support groups.

The Restorative Community Conference Coordinator administers the Community Conference, which is a Yukon Territorial Government program. The Coordinator is responsible for providing restorative justice opportunities for youth victims and offenders under the age of 18 in all Yukon communities. The Coordinator was hired in 2006 and is responsible for providing restorative justice opportunities for youth victims/offenders under the age of 18. Occasionally adults are included if co-accused with a young person. The Coordinator meets with the offender and assesses willingness to meet with the victim and hear their story, then meets with the victim and hears their story (what happened, what impact the incident had on them, how the harm could be mediated). After each gives consent, the client, victim and whoever else needs to be there (as determined by the victim and client) are then brought together to resolve the dispute and the victim identifies the punishment. Both parties are monitored in carrying out the punishment, depending on the referral.

These programs avoid Western adversarial approaches to justice by providing an opportunity for transparency, support and accountability. Diversion programs like these seek to address the harm and shame often accompanying criminal activity, decrease the likelihood of re-victimization and recidivism and enable life to continue in small communities by facilitating healing relationships. Some challenges experienced in providing these programs are: logistics; accessibility/ awareness; willingness; human chemistry and sometimes resistance by the offender and/or victim (regarding concern about accountability or retaliation).

Status Quo

The Canadian justice system's formal structure and regalia reflect British and French colonial history, culture and traditions. By nature, it is a binary and adversarial system that assigns innocence or guilt and punishment, which does not focus on respect, teaching and reconciliation, as Indigenous justice systems do. For example, CAFN documentation indicates that traditional justice systems were holistic, focusing on the effects of conflict on community as opposed to individuals.[26] Healing and teachings were used to resolve conflict and crime in a clan-based system of justice decision-making.[27]

The Canadian justice system disproportionately charges, convicts and imprisons Indigenous people. Indigenous people make up approximately 4.3% of the general population, but 24.6% of the prison population in Canada.[28] An Indigenous male is more likely to be incarcerated than to graduate from high school.[29] The Indigenous female offender population grew by 90% between 1999 and 2009.[30] Correctional Service Canada has commitments and obligations to provide "Aboriginal specific programs," yet further increases in Aboriginal incarceration are projected well into the future.[31] Many communities believe that police enforcement systematically mistreats and discriminates against visible minorities, particularly Indigenous people. Statistical trends in police-reported crime rates and self-reported victimization studies routinely demonstrate crime levels in the Territories are the highest in Canada.[32]

A defining feature of the Canadian criminal justice system seems to be how culturally inappropriate and ineffective it is for Indigenous communities.[33] One of the major critiques of the system is that it decontextualizes crimes by focusing on punishment rather than healing or rehabilitation.[34] This focus serves to exacerbate the dysfunction in communities by not addressing underlying causes. It also silences the voices of the victim, accused and community by placing them in a highly adversarial environment. It favours procedural fairness over justice, so those who are already vulnerable or disenfranchised find themselves at a disadvantage.

The Canadian justice system was and is completely foreign to Indigenous peoples. The courtroom setup, with a judge presiding over the parties from the bench and legal counsel in their black robes, is not reflective of Indigenous values or Indigenous legal principles.

Similar critical reception and frustration with the current system has spurred the

26 Author unknown, Champagne and Aishihik First Nations document, "AJS/YTG D of J." April 20, 2004.
27 *Ibid*.
28 Government of Canada, Office of the Correctional Investigator of Canada. *Annual Report of the Office of the Correctional investigator 2014–2015.* (Ottawa: Office of the Correctional Investigator of Canada, 2015.)
29 Emile Therein. 2012. "The national shame of aboriginal incarceration." *The Globe and Mail*, July 20, 2011, Accessed at: http://www.theglobeandmail.com/opinion/the-national-shame-of-aboriginal-incarceration/article587566/.
30 Government of Canada, Office of the Correctional Investigator. *Annual Report of the Office of the Correctional Investigator 2009–2010*. (Ottawa, 2009). Accessed at: http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20092010-eng.aspx#2.4.
31 Michelle Mann. *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*. (Ottawa: Office of the Correctional Investigator of Canada, 2013.) Accessed at: http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf.
32 Government of Canada. Statistics Canada. *Police-reported crime in Canada's Provincial North and Territories, 2013*. Juristat, 85-002-x. (Ottawa, 2015).
33 Office of the Correctional Investigator. *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act.* (Ottawa: Office of the Correctional Investigator of Canada, 2012.)
34 John Kleefeld et al., "Charter 1: Conflict Analysis" in *Dispute Resolution: Reading and Case Studies*, (Toronto: Emod Montogomery Publications, 2003).

academic field of Alternative Dispute Resolution (ADR), which credits many Indigenous communities' approach to resolve and prevent crime through peacekeeping and circles. ADR prioritizes healing trauma and restorative justice as highly interrelated in preserving public order and protection.[35] ADR is also a priority within CAFN *Justice Visioning Principles* (see: *Appendix B, principle 14*).

GLADUE REPORTS WITHIN THE STATUS QUO

The Supreme Court of Canada in *R. v. Gladue* (1999) is a landmark decision in response to the Indigenous peoples' overrepresentation within Canadian mainstream court systems. The judgment recognizes the unique systemic circumstances and historical traumas affecting Indigenous peoples with the intention to lower over-reliance on incarceration by making viable alternatives and realities within communities. In that case, the Supreme Court interpreted s. 718.2 (e) of the Criminal Code of Canada for the very first time. This section requires that:

> "...all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[36]

The section is a sentencing principle *requiring every* Canadian criminal court to carefully consider an Indigenous person's background in making sentencing decisions and to consider alternatives to incarceration. A focus on more restorative community-based justice methods means that jail is to be used only as the last resort and least preferable option.[37] Gladue reports are composed to help fulfil the legal requirement under s.718.2(e). In these reports, personal histories are prepared for trial judges to outline mitigating factors to consider when sentencing an Indigenous person. This is framed as a Gladue right, which entitles an Indigenous person in conflict with the law to such considerations.[38]

Twelve years later, the Supreme Court of Canada revisited *Gladue* in *R v. Ipeelee* (2012) and found that it had made little difference — Indigenous peoples were still being overincarcerated at disproportionate rates. In investigating why *Gladue* had not made a difference, the court found that in most cases it just was not being applied because it was viewed as inapplicable or a race-based justification for different sentences. The court found these interpretations to be incorrect. *Gladue* is not "reverse discrimination," but a tool to unveil the inequality perpetuated by the status quo of the mainstream courts. The courts note how things such as employment status, level of education and family situation, normally taken into consideration when sentencing a person, may appear to be neutral but they are socioeconomic factors

35 Howard Zehr. "Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding." *Peace Prints: South Asian Journal of Peacebuilding* (2008): 1:1.
36 Criminal Code, R.S.C. 1985, c.46, s. 718.2 (e)
37 http://www.duhaime.org/LegalDictionary/G/GladueRights.aspx.
38 http://www.thecanadianencyclopedia.ca/en/article/r-v-gladue/.

that "conceal an extremely strong bias in the sentencing process." In other words, better understanding the current systemic barriers and background faced by a person leads to a better understanding of their case, and should result in better justice outcomes.

Eighteen years after *Gladue* and five years since *Ipeelee*, these decisions remain underutilized and lack of designated financial support for the order of this statutory obligation.[39] The duty to ensure reports are conducted fall on the court; all Yukon First Nations have a substantive legal right to have *Gladue* factors considered until they expressly waive it. Yukon Legal Services (Legal Aid) only recently began working on setting up pilot projects for consistent Gladue Report writing with a working group established with representatives from the Council of Yukon First Nations (CYFN), Skookum Jim's Friendship Centre and Legal Aid. Up until now, Gladue Reports have been written on a case-by-case basis without funding for the individuals compiling them. The Council of Yukon First Nations Justice Manager and a handful of others in the territory compose reports, but because of the time necessary to gather the information (–six to eight weeks), employees may require the permission of an employer. On occasion, legal aid defence may pay for the service of Gladue Report writing, but finding the providers of such services proves difficult because as of yet there is not an established program in the territory. This leaves counsel to outsource the work or to ascertain information for themselves, for which they have not been provided any form of training.

There is an immediate need to establish Gladue Report methodology with minimum standard guidelines that do not force further systemic barriers. Current problems include untrained writers (lack of standard format to follow) who are unfamiliar with the individual or the community, prolonging report completion and making the timeframe acting as a further barrier to access. Those currently working with Gladue Reports in the Yukon Territory suggest that Gladue Report writers should be First Nations people from the communities who can pair their lived Canadian First Nation experience with tested report-writing processes and training for Gladue Reports to be truly effective.

Gladue Reports came to exist out of a recognition that Indigenous peoples face racism and systemic discrimination in and out of the criminal justice system. Gladue requires that a court hears and considers the historical and current life experiences that can lead a Canadian Indigenous person to come into conflict with the colonial law. Hearing these factors and considering alternatives is a sample of restorative justice in the mainstream, yet, if the reports are not being integrated and utilized as standardized practice for each case involving an Indigenous person, is the intention of *Gladue* null and void?

Some movement is being made. The Yukon Law Society is implementing a pilot project Gladue Report–writing system, which will become refined through trial and error. To prepare for a high case-load and avoid the potential for vicarious trauma considering the subject matter of the reports, the recommendation is to ensure more than one report writer in the territory exists.[40] Yukon First Nation Governments could help meet this effort by coordinating

39 Yukon Legal Aid Service Provider, Melissa Atkinson. (April 2017.)
40 Council of Yukon First Nations Justice Manager, Laura Hoversland. (April 2017.)

a small roster of Gladue Report writers from their respective communities. This may be especially useful in the process of Yukon First Nations administering criminal justice. A specialization in the research and writing of Gladue Reports could affect sentencing times of citizens within the court system. The reports facilitate a restorative justice–based approach and could provide value in a First Nation court. The practice of Gladue Report writing should be developed with First Nations input and taught to First Nations individuals, giving the opportunity to help determine the path of their fellow citizens and make a greater difference in the Yukon Territory than they already do.

Below, and in each subsequent option section of this paper, a table will present some of the anticipated opportunities and obstacles involved in implementing a particular option. Balancing these considerations is a necessary step in selecting the most appropriate trajectory for CAFN justice.[41] The current legal system presents some opportunities and obstacles, which are presented in Table 1.

Table 1

STATUS QUO (CURRENT LEGAL SYSTEM)	
OPPORTUNTIES	**OBSTACLES**
Societal norm.	Limited access to justice through courts and persistence of systemic discrimination.
Costs are incurred by the territorial government and not by First Nation governments.	Long-term societal costs felt primarily by communities.
Assumes that all accused persons are innocent until proven guilty.[42]	Does not account for Indigenous culture, traditions and language, which creates an alienating environment.
The system is evolving. For example, the Charter of Rights and Freedoms limits the Canadian Parliament from creating laws that discriminate against race or nationality.	Most communities have little control over law enforcement (e.g. RCMP in the Yukon).
Options are available for restorative justice, diversion and programs such as circle sentencing, Community Wellness Court and the Haines Junction Community Justice Program.	Indigenous people cannot equitably access diversion options from mainstream courts to their citizens, even where available, without first pleading guilty to the offence.
	Not enough referrals are made to existing diversion programs.

41 The group acknowledges that the distinction between an “opportunity” and “obstacle” is a sliding scale with much contextual nuisance involved not captured by the dichotomist nature of these tables.
42 However, data supports the idea that the application of the presumption of innocence is skewed.

“A defining feature of the Canadian criminal justice system seems to be how culturally inappropriate and ineffective it is for Indigenous communities.”

Hybrid Court

A hybrid court option combines mainstream court structures and proceedings with customized First Nations justice measures, such as including Elders and having a designated docket, which means all CAFN citizens could be tried over one customized session.[43] A hybrid court would cost less than creating a new First Nations court or could serve as an interim measure.

Having an Elder permitted to speak in court allows space for a familiar, community voice in the courtroom. Currently, only the lawyers, judge and whomever is called to testify are able to speak. Adding this voice could increase the ability of an Indigenous person to feel less culturally alienated in the mainstream court system, criminal law and corrections system. Allowing for other voices in the courtroom is used in Aboriginal Community Court in Australia, where the magistrate is assisted by Aboriginal elders in their decision-making.[44]

A designated docket where all CAFN citizens are tried in one session potentially increases access to existing diversions from mainstream courts, however there must be diversion programs in place and an awareness of the possibility for diversion. A designated docket would also allow space for those in the mainstream court, such as lawyers, judges and court workers to acknowledge the particular needs of CAFN citizens.

A risk of the hybrid court option is continued reliance on court staff potentially unfamiliar with CAFN values, principles and traditions. This unfamiliarity leads to misunderstandings that further discriminate against those in the system. Another issue may be cost. Either the First Nation or the courts would need to cover costs of having an Elder present. Additionally, deciding which Elder presides could be a difficult point to negotiate to ensure equity and balanced representation from the community and/or First Nation clans, Raven or Wolf. These decisions should remain with the First Nation. Financial support from the federal government for measures such as these could be negotiated as part of the *Administration of Justice Agreement*.

Table 2

HYBRID COURT	
OPPORTUNTIES	**OBSTACLES**
Accommodates a certain degree of Indigenous legal knowledge and applicable principles within the mainstream court system.	The framework of mainstream court is still the adversarial, binary system.
More community presence via Elders permitted to speak in court may help offenders feel less alienated.	This approach limits the use of existing CAFN laws and customs. Western-style judges still make the court decisions.
	May not change the overall structure or fundamentally alter systemic discrimination, and may not result in improved outcomes for community members.

43 Victoria Fred, presentation to the Trudeau Foundation in Whitehorse, Yukon, May 2016.
44 Government of Western Australia, Department of the Attorney General, Aboriginal Community Court. 2015. Accessed at: http://www.courts.dotag.wa.gov.au/A/aboriginal_community_court.aspx?uid=4279-5018-6799-1500.

Teslin Tlingit Peacemaker Court Model

The Teslin Tlingit Peacemaker's Court emerged from the Teslin Tlingit Council (TTC) *Administration of Justice Agreement* signed on February 21, 2011, by representatives of the Government of Canada, Government of Yukon and the Teslin Tlingit Council, and came into effect on June 30, 2011. TTC's jurisdiction and authority over the administration of justice is recognized within the *Teslin Tlingit Final Agreement and Self-Government Agreement (1993)*.

The AJA allows the establishment of a Teslin Tlingit justice system that provides for courts, corrections and enforcement services over Teslin Tlingit matters.[45] The administration of justice in Teslin Tlingit Council settlement land is to be based on inherent Teslin Tlingit *Hà Kus Teyea* ("The Tlingit Way") values and guidelines for resolving disputes and preserving traditional territory. The agreement affords the nation the power to create its own laws that do not impose penalties for violations of TTC laws, appoint individuals to enforce and prosecute violations of these laws, and establish a Peacemaker Court to adjudicate violations and reconsider decisions made by TTC government officials and/or administrative bodies.

The implementation of the AJA was entered into with the understanding that the first implementation phase (Phase I) would occur in two stages. The first stage would be the establishment of a TTC Justice Department, TTC Justice Council (composed of one representative from each of the five Teslin Tlingit Clans), Peacemaker Court, Disciplinary Panel and Peacemakers. On November 24, 2011, stage one began with the enactment of the *Peacemaker Court and Justice Council Act*. The AJA estimated it would take four years to implement stage one.

The Teslin Tlingit Council Justice Department and Council have implemented stage one, which provides mediation services to adjudicate violations of enacted TTC law and judicially reviews TTC governmental decisions. The court is composed of a Chief Peacemaker, Alternate Chief Peacemaker and Associate Peacemakers. Five clan leaders act as an advisory panel. The TTC Peacemaker court model includes jurisdiction over the following:

- Adoption
- Inheritance
- Wills
- Solemnization of marriage
- Management, control and protection of Settlement Land
- Rights and interests on Settlement Land
- Natural resources, gathering, hunting, trapping or fishing, protection of fish, wildlife and habitat
- Prevention of overcrowding of residences or other buildings, and planning, zoning and land development

45 Victoria Fred, *Teslin Tlingit Justice Council Orientation*. December 2016.

Teslin Tlingit Council and the Peacemaker Court are not currently exercising criminal law or procedures but the ability to do so can be negotiated. Transfers and appeals of TTC Peacemaker Court Decisions are sent to Yukon's Supreme Court.

The Peacemaker Court established by Teslin Tlingit legislation will have the jurisdiction and authority to:

1. **Resolve and adjudicate disputes under Teslin Tlingit Laws;**
2. **Resolve and adjudicate violations under Teslin Tlingit Laws;**
3. **Hear appeals from Teslin Tlingit administrative bodies;**
4. **Assist in dispute resolution where parties are prepared to be bound by the Peacemakers decision; and**
5. **Adjudicate federal or territorial laws, upon prior written agreement with the respective government.**

The Peacemaker Court has the authority to hear all matters arising under Teslin Tlingit law and can impose penalties of a fine up to a maximum of $5000 or imprisonment for a term not to exceed six months. However, in the case of environmental offences, Teslin Tlingit law may provide for a fine of up to $300,000. Peacemaker Court orders will be enforced in accordance with Teslin Tlingit enforcement and corrections laws, should the Teslin Tlingit Council choose to enact such laws. Until such time as the Peacemaker Court is able to adjudicate its own laws and have its own enforcement capacity established, section 14.2.2 of the AJA provides that the Yukon Courts will adjudicate TTC Laws.

Stage two will focus on enforcement of TTC laws and correctional services within TTC traditional territory. These negotiations will focus on the provisions within the AJA that address law enforcement, policing, enforcement of Peacemaker Court orders, corrections and community services. The TTC envisions negotiations for phase two of criminal justice.

In practice, the estimate for the timelines for full implementation should be increased to take into consideration the realistic amount of time required for negotiations and development of capacity in Peace Maker court practices.

There are both opportunities and obstacles which exist within the Teslin Tlingit Peacemaker Court Model. The opportunities afford Teslin Tlingit Justice Council the right to establish jurisdictional laws and attain recognized court status, but the obstacle is the reality of limited financial and human capacity and the time necessary for training of both Teslin Tlingit citizens and territorial and federal courts and legal practitioners.

Table 3

TESLIN TLINGIT PEACEMAKER COURT MODEL	
OPPORTUNTIES	**OBSTACLES**
The TTC Administrative Justice Agreement affords the Teslin Tlingit Council authority to create its own laws reflecting Teslin Tlingit cultural values that can be exercised within Teslin Tlingit traditional territories.	Necessity to establish and record TTC laws (customary, civil, regulatory and quasi-criminal laws) that are inclusive and encompassing of Teslin Tlingit traditional laws. This makes for a lengthy process as oral, inherent, spiritual values of Hà Kus Teyea ("the Tlingit Way") have yet to be made available in written form.
Vital jurisdictions and authorities of importance to the Teslin Tlingit are the authority over legal child adoptions and the authority to exercise enforceable protection of their Settlement Land.	Necessity to build capacity to recruit and train TTC Peacemakers and Enforcement Officers within a limited-capacity environment. It is yet to be determined whether or not the enforcement officers would come from within the community or from outside of the community.
The Yukon Territorial Court and associates of the court must recognize and will be expected to be knowledgeable about TTC laws and must give consideration to Hà Kus Teyea and Teslin Tlingit values when hearing one of our laws in the Territorial Court or hearing an appeal at the Supreme Court.	Ultimately, the village of Teslin is comprised of TTC citizens and non- TTC citizens, as well as First Nation and non-First Nation residents. There exists the need to enter into jurisdictional agreements with the federal RCMP when stage two and enforcement is actualized.
Nowhere within the TTC Self Government Agreement has the TTC ceded its option to be responsible for the administration of criminal justice.	Implementing all facets of the AJA will be costly and TTC will need to generate or negotiate the necessary funds.
Creates a vision of a culturally appropriate "system" moving into a second stage and beyond, creating a tool for its own long-term intentions.	TTC Peacemaker Court does not yet have the authority to exercise criminal law or procedures. The timeline for negotiation extends the wait for Teslin Tlingit First Nation individuals within the mainstream correctional system who are in need.
The fact that appeals may be heard at the Supreme Court may mollify non-Indigenous opponents of Indigenous courts.	The Supreme Court would hear appeals of the judgments of Indigenous courts, which may reduce the authority of the First Nation.
When authority to exercise criminal law is negotiated and implemented, the judgment of an offender could be considered as a composition of the individual's entire life experience as opposed to a single act of crime as the mainstream judicial system does. Cohesively, the "correction" of this individual's offence would also take into consideration the individual's entire life experience and to focus on healing and "correcting" the entire individual in a communal environment as opposed to punishment by imprisonment.	

“Many communities believe that police enforcement systematically mistreats and discriminates against visible minorities, particularly Indigenous people.”

CAFN Indigenous Court

Indigenous courts are difficult to define because of different approaches to providing justice and answering jurisdictional questions by both Indigenous communities and colonial law-making authorities. For this report, we took a broad approach to defining Indigenous courts in order to provide a greater breadth of understanding of these approaches by First Nations. We decided that an Indigenous court would be a mechanism to adjudicate both Canadian law and CAFN law. There were five models suggested for a CAFN Indigenous court/justice system in the 2004 CAFN Justice General Assembly Report.[46]

In researching this area, our group reviewed 14 existing and four planned Indigenous court models currently operating in Canada, as well as two Indigenous court models operating in the United States (see Appendix A for a list of the models reviewed). Some Indigenous communities partner with provincial governments as an arm of the provincial courts but have specialized adjudication processes with First Nation culture and values. Additionally, these specialized provincial courts often have a First Nations judge presiding. An example of this is the Tsuu T'ina Peacemakers Court Circle sentencing courts in Calgary.

Other First Nations have created Indigenous courts through negotiated self-government agreements, but all have done so in slightly different ways depending on cultural, judicial, jurisdictional and financial needs. For example, the Teslin Tlingit have extensively enacted legislation to create the Peacemaker Court, and the Kahnawá:ke First Nations have elected a Justice of the Peace through the *Indian Act*.

46 Champagne and Aishihik First Nations, CAFN *Justice General Assembly Report.* 2004, General Assembly Report, 10–14.

Table 4

CAFN INDIGENOUS COURT	
OPPORTUNTIES	**OBSTACLES**
Exercises CAFN's inherent sovereignty and diverts from colonial perspectives of law.	Requires ongoing negotiation and support with the territorial and federal governments, who may be reluctant to negotiate alternative court options or relinquish authority.
Asserts self-determination, promoting greater CAFN autonomy in justice administration through increased independence from territorial and federal powers.	Requires adherence to the Canadian Criminal Code and the Charter of Rights and Freedoms, placing limits on CAFN's autonomy and authority.
Is an opportunity to revitalize and incorporate CAFN customary law and language into the justice system.	Potentially may be perceived as detracting from CAFN independence and legitimacy.
Provides long-term solutions by creating space for innovative approaches to crime and healing, potentially reducing recidivism.	Expensive and time-consuming in planning and ongoing operation. It would require consideration of: funding sources (identification, certainty and consistency), territorial and federal appeal mechanisms, training regimes, data collection, community education and consultation, and other related programming and services.
Diverts citizens away from institutions that can further harm and disenfranchise.	High capacity demands for resources and personnel.
Facilitates the creation of a CAFN working body of law, a CAFN common law system which can evolve and drawn upon.	Challenges of translating customary law to the extent that it could be enforced in a Court.
Presents an opportunity for reconciliation and new partnerships between CAFN and the territorial and federal governments, which accords with the Truth and Reconciliation Commission's Calls to Action.	Poses some risk in replicating adversarial colonial institutional/systemic features that harm communities.
Provides a positive model of First Nation self-determination for other Nations to adopt or build on.	Creates complexity in jurisdiction and potential overlap.

Integrated/Shared Indigenous Court System

An Integrated Indigenous Court option, or an interconnected system of more than one Yukon First Nations court, might be a potential long-term vision for CAFN. The *2004 CAFN Justice General Assembly Report* suggests a "Southern Tutchone Tribal Justice" model.

This option would entail Yukon First Nations self-government justice departments developing legislation for their respective courts, and then multiple First Nations sharing resources, capacity, or authority to benefit all parties involved. The scale of this sharing model could be based on different commonalities, such as culturally or linguistically similar First Nations, or could involve any self-governing First Nation. In the long term, this option addresses any perceived conflicts of interest by rotating or sharing court adjudicators and workers.

To some extent the development of this option depends on the stage of AJA implementation reached by each self-governing First Nation. For example, if two Southern Tutchone First Nations are at a similar stage of AJA implementation, they could form an agreement to share "judges," principles of customary or Indigenous law, and consensus-based decisions about how legal problems can be dealt with. This would effectively build a Southern Tutchone body of cases or legal precedents.[47]

47 This discussion of an integrated system takes place against the backdrop of Western legal terminology. The group notes that these frameworks are not a necessary starting point, but a practical approach that outlines one way in which to envision an integrated Indigenous court system.

Table 5

INTEGRATED/SHARED INDIGENOUS COURT SYSTEM	
OPPORTUNITIES	**OBSTACLES**
Opportunities to develop a long-term vision that would benefit each participating First Nation.	Concept of Integrated Indigenous court system may be perceived as threatening Yukon territorial court jurisdiction.
Creates a system where First Nations values, laws and principles are adequately reflected.	Would require extensive cooperation and time to negotiate an agreement between First Nations, territorial and federal governments.
Shared resources and responsibilities make available several judges who could act as deputy judges in each other's courts.	Yukon First Nation governments are still building and capacity is taken up by day-to-day tasks.
Communities can define their adjudication process on their own terms outside of territorial and federal authority to the extent of being outside of Criminal Code offences.	This system would have to be unified in some way in order for the tribal courts to co-exist with each other, and might not accommodate individual participating First Nations to the full extent their own court would. For example, Tlingit courts would have to work with Southern Tutchone courts to establish judicial character, values, share intrinsic similarities, etc.
Disagreements within shared court could be decided in territorial court.	
Serves as an entrenchment of First Nation values and vision for the future. Integrated or shared courts are helpful in establishing collective values as a body of First Nations common law.	
Assist in the evolution of First Nations courts.	
As with individual Indigenous courts, an integrated system would have powers to preside over hearing offences that occurred on settlement land.	
Could enable a single First Nations' court registry.	

COSTING ESTIMATES

Although determining cost projections for each of the options provided are outside of this report's scope or expertise, expense is an important consideration. Below are some extremely preliminary costing estimates for each of the options. The second column in the table below ("Immediate Cost") reflects more upfront costing requirements, mostly related to implementation. In assessing the initial costs of these options, it is also important to consider the long-term implications of each choice with its interplay on the expense of other systems, which includes both social and economic. The third column in the table below ("Long-term Cost") attempts to account for some of these concerns. For example, while maintaining the status quo is an inexpensive option, the negative effects on Indigenous communities is well-established, whereas an Integrated Indigenous Court System may initially be the most exorbitant, but cost savings are had in sharing services with other Indigenous and non-Indigenous governments. Additionally, where and how finances are integrated and prioritized impact systems outside of justice. National inquiries have demonstrated that the reasons why disproportionately high numbers of Indigenous children are in the child welfare system is the same as the reason why they are over-represented in the criminal justice system.[48] Each option's impact on CAFN self-government and self-determination is also a vital invaluable and immeasurable consideration.

HYBRID COURT	IMMEDIATE COST	LONG-TERM COST
Status Quo	Low	High
Hybrid Court	Low-Moderate	Moderate
Teslin Tlingit Council Peacemaker Model	High	Low
CAFN Indigenous Court	High	Low
Integrated Indigenous Court System	Moderate (shared)	Low

48 "Child welfare" in AC Hamilton and CM Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry in Manitoba*, Vol. 1 (1991).

For this report, our primary focus was on presenting court-model options as a method to develop and implement CAFN justice. In this sense, our group recognizes the limited scope of this report and its relative silence in analyzing the most efficient ways to realize CAFN justice within the community from a more interrelated and holistic perspective.

Courts are not necessarily the starting point in justice development. The desired outcome in implementing a CAFN justice system should be the guide in the analysis and ultimate selection of a particular approach. This evaluation is of considerable importance given the centrality of justice systems within society, combined with the tension created by scarce resources and capacity. Appropriately addressing this issue goes to the heart of this quote from the CAFN Justice General Assembly report (2004), "We do not want a brown version of the YTG system."[49]

While CAFN citizens would likely benefit from the establishment of a more culturally appropriate court model, all Canadian courts must abide by the *Charter of Rights and Freedoms* and the exclusive jurisdiction of the *Criminal Code of Canada*, and as such, reconciling Indigenous laws and customs within this colonial framework is limiting. However, there are still innovative options available which facilitate and assert a significant level of community self-determination through justice. As indicated in the analysis section, the TTC model provides the opportunity for self-design, but it is important to recognize challenges and limitations.

If the ultimate reason for establishing a CAFN court is to reduce crime, successfully deal with disputes and provide increased opportunity for healing, then solutions may lie in focusing support on existing programs or in expanding them. Less formal mechanisms to prevent and address crime at a community-based level may be more cost-effective and fruitful in achieving the desired outcome.

We feel that there are some outstanding and interrelated issues related to the successful implementation of CAFN justice options, including:

49 Champagne and Aishihik First Nations, CAFN *Justice General Assembly Report.* 2004, 19.

YOUTH

There is a sequence of events through which an individual may find themselves in the justice system, and by more fully understanding this sequence we could avoid courts altogether. Community diversions could take effect long before the justice system intervenes, through continuing to support ways in which youth can find pride and purpose in their lives.

LAW ENFORCEMENT

There are limitations in the ability, training and resources of Royal Canadian Mounted Police (RCMP) to do their job in the best interest of community well-being. Due to the background of law enforcement agents and their transiency, we predict limitations will persist. Thus, First Nations must consider the role of community policing in providing better access to diversions and alternatives, and/or consider training options for local RCMP. This could include community partnership in training on normalization, movement policy, diversion awareness, sensitivity training and de-escalation.[50]

CAPITAL AND HUMAN RESOURCES

The timeline for negotiating our suggested Option 5 (a shared Indigenous court) could be 10–20 years, in addition to the process of data repatriation, tracking and transparency. It would require already a budget and mandate to take on that commitment. As a group, we recognize these challenges.

AWARENESS OF DIVERSION OPTIONS

There are challenges faced by existing programs because not everyone is aware of or has access to the diversions available. Given the status quo analysis, access to current diversion programs could be strengthened by better communications, an awareness strategy or agreement with RCMP, and better communication between citizens in the system and coordinators.

JURISDICTION

In the path forward there are questions remaining about jurisdiction. To whom would a First Nations court apply? To whom does First Nation law apply? Over what land would these laws/courts apply (i.e: settlement vs. traditional territory)? These jurisdictional questions would need to be answered and addressed to move forward in cooperation with the territorial and federal levels of government and all Yukoners.

50 This relates to CAFN *Visionary Principle* 11 (See: *Appendix B*).

In consideration of the preceding analysis, we offer the following recommendations:

1. **Allocate funding for and hire a CAFN Justice Manager to work towards establishing and implementing a dedicated CAFN Justice Department, including continuation of previous justice work.**
2. **Create better connections between the CAFN citizen registry and diversion programs to ensure access to diversion programs from mainstream courts.**
3. **Hire a qualified professional to examine the costs and availability of federal subsidies for each option, including community-based diversion programs.**
4. **Create official policy which systematizes diversion away from courts to CAFN programming within the community (i.e. before disputes reach court).**
5. **Ensure that cases diverted to CAFN are tracked in a centrally located database. This will be useful to track the progress and success of programs as well as garnering support in application for future grants.**
6. **Based on our analysis of court-specific justice options, we see value in making a recommendation towards pursing the Indigenous court option. However, we believe further consideration is warranted before this can be established as a firm recommendation. In relation to this, we would recommend that CAFN explore collaborating with other Yukon First Nations in establishing a shared or integrated Indigenous court in the Yukon.**

Kusawa Lake, CAFN Traditional Territory.

Da Kų Nän Ts'étthèt (Our House is Waking up the Land) festival at Da Kų Cultural Centre.

COLONIAL

A system put into place during the building of Canada, meaning it did not exist in the Yukon before contact with non-Indigenous people, but remains today.

HYBRID COURTS

Mainstream courts that operate in the current legal system but have additional measures, such as the inclusion of Indigenous perspectives or methods of healing.

INDIGENOUS COURTS

Courts that would be run by the First Nation or other Indigenous group.

INTEGRATED/SHARED INDIGENOUS COURT

Courts involving multiple First nations, potentially sharing resources such as adjudicators.

MAINSTREAM COURTS

The current colonial legal system not including diversion programs or alternatives.

Existing courts

FIRST NATION COURTS IN B.C.

Location: Duncan
Nation: All, but provides particular support to local Cowichan.
Initiation: May 2013
Jurisdiction: a specialized provincial court
Operation and Procedure: Presided over by judge and a rotation of 10 different elders. Healing orders are given in place of probation orders, and may use ceremony and witnessing.
Comment: The Cowichan Justice Committee works closely with the court to provide alternative sentencing. The Justice Committee recommends policies and programs to council and oversees implementation, funded by the band's own revenue.

Location: New Westminster
Nation: All, but primarily Squamish, Tsleil Waututh and Musqueam.
Initiation: November 2006
Jurisdiction: As a specialized provincial court, it will only hear matters that have no prospect of jail time. Focuses on guilty pleas and restorative justice sentencing.
Operation and Procedure: Operates based on the medicine wheel principle. How clients meet restorative justice goals depends their social and cultural location.
Comment: Presiding Judge Marion Bennett (Mistawasis First Nation). The court also has a relatively sophisticated community education and outreach initiative.

Location: Kamloops — Cknúcwentn First Nations Court
Nation: All, but primarily Secwépemc
Initiation: March 2013
Jurisdiction: As a specialized provincial court, will only hear guilty pleas from those who have taken responsibility for their actions.
Operation and Procedure: Takes a problem-solving approach with holistic focus.
Comment: Led by Métis and non-Indigenous judges.

Location: North Vancouver
Initiated: February 2012
Nation: All, but primarily Squamish and Tsleil Waututh.
Jurisdiction: Specialized provincial court hearing all criminal sentencing proceedings (including indictable) from guilty pleas and self-identified Aboriginals.
Operation and Procedure: Presided over by Joanne Challenger (non-Aboriginal).

GLADUE COURTS IN ONTARIO

Location(s): courts currently operating in Brantford, Sarnia, London and Toronto.
Nation: All (those who self-identified as Aboriginal
Initiation: Since 2001 (Old City Hall location) — 2014 (Brantford)
Jurisdiction: A type of specialized provincial court; the purpose is to operate on the basis of *R. v. Gladue* and 718.2(e) of the *Criminal Code*.
Operation and Procedure: *Gladue* provides criminal bail applications and sentencing matters of those plead or are guilty, which may be available to self-identified Aboriginals who choose to be heard in

these courts. Judges and court workers are specially trained in *Gladue*.
Comment: Accesses funding for their Aboriginal Criminal Court Worker Program through the Ministry of the Attorney General.

THE CREE COURT IN SASKATCHEWAN

Location: Circuit: primarily Loon Lake and other small Saskatchewan communities.
Nation: Primarily Cree
Initiated: October 2000 (first of its kind in Canada)
Jurisdiction: As a specialized provincial court, it handles criminal matters and child-protection hearings.
Operation and Procedure: The Cree Court operates in a manner similar to other provincial court circuits. The judge may emphasize traditional Cree values.
Comment: Essential emphasis on use of Cree language. Presided over by Judge Gerald Morin, Cree and member of the Cumberland House First Nation.

THE TSUU T'INA PEACEMAKERS COURT

Location: Calgary (formally on reserve but moved due to infrastructure and resource issues)
Nation: Tsuu T'ina Dene
Initiated: October 2000
Jurisdiction: Integrated with the provincial court by working with community traditions. Has criminal and youth justice jurisdiction (except indictable offences). Plans to expand into family, child welfare, and civil matters, which would be available to all First Nations, and to non-First Nation individuals as a provincial court. Proceeds as a provincial court if a "not guilty" plea is entered.
Operation and Procedure: Both parties must consent to the Tsuu T'ina First Nation peacemaking system, or else the Western justice system is used.
Comment: Presided over by Judge Leonard S. Mandami (Anishnawbe, Wikwemikong).

THE COURT OF KAHNAWÁ:KE

Location: Kahnawake, Quebec
Nation: Mohawk
Initiated: January 2000 (as a mediation and arbitration program)
Jurisdiction: Self-government and election of Justice of the Peace through the *Indian Act* (s.81 and 107. JPs used instead of Judges). The court is divided into criminal and traffic courts. criminal court hears summary convictions and traffic court hears ticket offenses. No indictable offenses are heard (at the community's request).
Operation and Procedure: Offers peacemaking and restorative justice forums conducted by trained community members. It also provinces the services of a native court worker for court appearances and inquiries.
Comment: Has an in-depth community decision- and law-making process resulting in a broad spectrum of legislation. Implemented *Kahnawà:ke Justice System Act,* funded by a cost-sharing agreement between the province of Québec and Canada, but since 2005, both governments have only agreed to yearly funding. In 2004, JP appointments under the *Indian Act* were halted.

THE SAINT REGIS MOHAWK TRIBAL COURT

Location: Akwesasne Reservation, Quebec (crosses U.S./Canada border)
Nation: Mohawk
Initiated: December 2000 (beginning with a traffic court)
Jurisdiction: Self-government and the

election of Justice of the Peace through the *Indian Act*. The court consists of a traffic court and a civil court.
Operation and Procedure: collaborates with neighbouring courts to provide a judicially supervised program that uses cultural traditions in a wellness/drug court.
Comment: In the process of establishing a family court system designed to hear all family cases that are currently being heard off-reserve.

MASHTEUIATSH TRIBAL COURT

Location: Saguenay–Lac-Saint-Jean/Pointe-Bleue, Québec.
Note: Difficult to research, but Mashteuiatsh appears to be very similar to Akwessne and Kahnawake.

TESLIN TLINGIT COUNCIL PEACEMAKER COURT

Location: Teslin, Yukon
Nation: Tlingit
Initiated: 2012 The TTC Justice Department was formed in 2012 and the *Administration of Justice Agreement* (AJA)
Jurisdiction: The *Teslin Tlingit Final Agreement and Self-Government Agreement (1993)* laid the legislative foundation (s.13.3.17, 13.6.1, 13.6.2, 13.6.3) for the TTC to pass the AJA and the *Peacemaker Court Act* in 2011.
Operation and Procedure: Adjudicates violations of enacted TTC law and judicially reviews TTC decisions. Decisions can be appealed to the Yukon Supreme Court, subject to AJA terms and TTC laws. A Chief Peacemaker, Alternate Chief Peacemaker and Associate Peacemakers compose the court. Five clan leaders act as an advisory panel.
Comment: TTC Government trains their own peacemakers.
Planned Courts

Location: Thunder Bay
Status: In development as of February 2016. Likely similar to Gladue Courts.
Location: Tsilhqot'in territory, likely Williams Lake
Status: No set date, but in official initial stage as more than a sentencing court.
Location: Lheidli T'enneh Territory/Prince George
Status: Suggests that court would be up and running in 2016.
Location: Sto:lo nation territory, Chilliwack, B.C.
Status: Official but initial stage. Seem to be leaning towards a more provincial-type model.

Examples of U.S. Tribal Courts

HOPI TRIBAL COURT

Location: Keams Canyon, Arizona, U.S.
Nation: Hopi
Initiated: 1972
Jurisdiction: Created by the tribal council exercising their inherent sovereignty. The courts have trial and appellate levels. Trial court has civil jurisdiction over all actions of members and criminal jurisdiction over any violation of Hopi ordinances on reservation
Operation and Procedure: Hopi Rules of Civil Procedure and Federal Rules of Criminal Procedure and Rules of Evidence govern the procedure in all court proceedings. Hopi

courts interpret and apply laws stemming from Hopi Constitution, by-laws, legislation, customs, traditions and culture, and federal and state laws.
Comment: Produced a comprehensive Code. Hopi Tribe common and positivistic law requires the Hopi Court to apply customs, traditions and culture of the Hopi Tribes in a court's decision of what law to apply before a court reaches the use of any foreign law.

JUDICIAL BRANCH OF THE NAVAJO NATION

Location: Numerous district locations throughout Navajo territory, Arizona, U.S.
Nation: Navajo
Initiated: 1960s–1985
Jurisdiction: Complete civil and criminal jurisdiction (criminal jurisdiction limited to crimes codified in the Navajo Nation Code along with its terms of punishment) over tribal members acting on the reservation, with a focus on peacemaking.
Operation and Procedure: Operates on a two-level court system: trial and Navajo Nation Supreme Court (an appellate court). The Navajo have transcribed their principles into a document, *The Fundamental Laws of the Dine*, outlining rules for judicial process.
Comment: The Navajo Nation use a linguistic model as a framework for their justice model.

Canoers on Mät' àtäna M' n (Kathleen Lake) in the CAFN Traditional Territory.

APPENDIX B: CAFN JUSTICE VISIONING PRINCIPLES

Drafted at the CAFN Justice Visioning Workshop on January 2004

Any CAFN justice processes must be based upon the following principles. These principles are foundational to any negotiations and laws of CAFN:

1. **The CAFN justice processes and laws shall be based upon the traditional and holistic values of respect, honesty, sharing, caring, spirituality and the communal nature of CAFN society;**
2. **The traditional clan and family processes must be the basis of the formation of any CAFN justice process or system;**
3. **CAFN citizens, Elders, youth, families, communities and clans must assume their traditional roles to ensure that time-honoured traditional values of CAFN cultures are retained and relearned and taught to the succeeding generations;**
4. **The CAFN justice systems or processes must use the traditional languages of CAFN to ensure that the languages are retained and enriched;**
5. **CAFN justice must be community-based and flexible;**
6. **The offender and his/her clan must take responsibility for the actions of the offender and make appropriate repayment as mediated or imposed by the CAFN court to the victim and the victim's family or clan;**
7. **Justice must be transparent, fair, and immediate and at all times built on the holistic values of CAFN society;**
8. **ealing to instill pride, self-esteem and self reliance of offenders as opposed to punitive sanctions is central to CAFN justice;**
9. **The sanctions must be traditional and contemporary and should include concepts such as repayment, banishment, if deemed to be culturally appropriate, rehabilitation and, as a last resort, incarceration;**
10. **Other First Nation sharing of ideas or institutions must be explored to ensure that costs and other matters are shared;**
11. **Enforcement and policing must be addressed and included in any justice agreement and these matters must be premised upon CAFN values;**
12. **Corrections must include diverse and pragmatic options such as probation, holistic healing centres with satellite healing camps, and Elder, citizens and youth circles;**
13. **During the phasing in of any CAFN justice processes there should be interim justice agreements respecting diversion, young offenders and other aspects relating to the criminal law;**
14. **Mediation and other forms of Alternative Dispute Resolution (ADR) be used to resolve disputes within the CAFN community before there is resort to the CAFN justice process or other justice processes;**

15 **A culturally appropriate meeting or conference be held to record the customary laws of CAFN, including Aduli, and that these teachings be shared and taught in a manner as direction by the clan Elders; and**

16 **Support programs or other sources of support as directed by the Chief and Council, youth, citizens, Elders for those in need of care be adopted and utilized as part of the CAFN justice programs.**

Finally, there is a need to draft these principles into a document that will be presented to the Governments of Yukon and Canada as directed from time to time by the Chief and Council, the Elders, youth and citizens of CAFN.

The 2015 CAFN General Assembly at Kusawa Lake.

Nän K'ałädàtth'ät (Changing times, continuing ways): A Re-evaluation of Court Options for Shadhäla, Äshèyi yè kwädän (Champagne and Aishihik First Nations)

The group project team would like to express their utmost thanks to Champagne and Aishihik First Nations, particularly Diane Strand and Ian Robinson, for allowing us to conduct this policy research, for hosting us at their government offices, providing access to internal files and for dedicating valuable time to provide feedback throughout the project.

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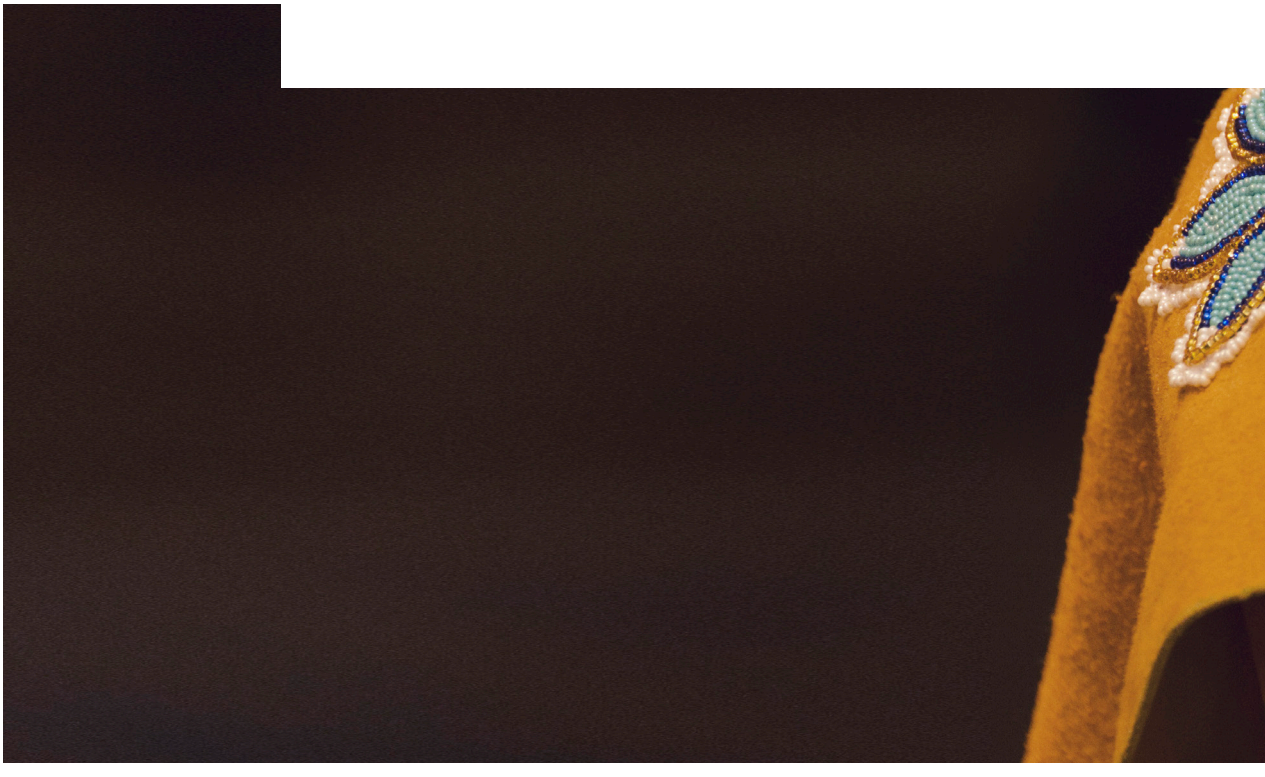

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