Judicial Reasoning Across Legal Orders: Lessons from Nunavut

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In this article, the author explores the criminal justice relationship between Canadian courts and Indigenous laws. More specifically, by examining two recent criminal law judgments from Nunavut that rely on Inuit customary law in their reasons, R v Ituriligaq *and* R v Ippak*, the author queries and seeks to answer whether Canadian courts ought to engage with Indigenous laws, and if so, what appropriate engagement might look like. Through identifying both the promising and cautionary elements of these judgments, the author argues that Canadian courts should actively engage with Indigenous laws to achieve more responsive legal outcomes, but that great care and caution must accompany these efforts. The author proposes guidelines for engagement that involve establishing ethical space with Indigenous legal orders at the outset of judicial analysis to determine commensurability, followed by concurrent application where principles are mutually reinforcing or deference to Indigenous laws where principles conflict. The author concedes that judicial use of Indigenous laws is no panacea; rather, its use represents an important way in which the Canadian legal system can coexist alongside revitalized Indigenous legal systems and their institutions.*

The article is divided into four parts. In Part I, the author introduces the Nunavut court system and analyzes Ituriligaq *and its application of* Inuit Qaujimajatuqangit *in light of the pluralist promise of* R v Ipeelee*, concluding that its reasoning instills both optimism and caution. Part II explores the philosophical and normative questions of whether Canadian and Indigenous laws are commensurate and whether non-Indigenous judges ought to engage with Indigenous laws in their judgments. In Part III, the author argues that* Ippak *best exemplifies judicial reasoning across legal orders that appropriately upholds both Indigenous and Canadian legal systems while respecting their incommensurabilities. Drawing on the lessons learned from* Ituriligaq *and* Ippak*, the author then develops his proposal for responsible engagement. Lastly, in Part IV, the author offers suggestions for institutional and legislative reform that must accompany judicial engagement with Indigenous laws. As the author indicates, the success of Indigenous-Canadian pluralism requires rebalancing sentencing objectives away from the rigid Canadian application of deterrence and denunciation and towards a system more focused on rehabilitation.*

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Introduction

Much scholarship calls on Canadian courts to recognize Indigenous laws in their decisions, but examples of courts doing so regularly and effectively remain elusive.[1] In criminal law, Indigenous perspectives entered the general judicial imagination twenty years ago, with *R v Gladue* obliging judges to consider an offender's unique systemic or background factors and "aboriginal heritage"[2] when sentencing an Indigenous offender under section 718.2(e) of the *Criminal Code*.[3] And yet, commentators have long noted the failure of

1. See e.g. John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629 [Borrows, "With or Without You"]. Professor Borrows' seminal article argues for further and more explicit use of First Nations law by lawyers and courts (*ibid* at 629). See also Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 17; Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16/17:1 Indigenous LJ 21. See generally 61:4 (2016) McGill LJ (a special collection on Indigenous laws and legal pluralism).

2. [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385. *R v Gladue* obliges judges to consider, first, "[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" and, second, "[t]he types of sentencing procedures which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection" (*ibid*).

3. See *Criminal Code,* RSC 1985, c C-46, s 718.2(e) ("[a] court that imposes a sentence shall also take into consideration the following principles: . . . (e) 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").

Gladue to mitigate the mass incarceration of Indigenous peoples.[4] In 2012, *R v Ipeelee* not only clarified that sentencing judges *must* take into account Canada's history of colonialism and residential schools, but it also pushed further by emphasizing the need for judges to explore alternatives to incarceration due to the failure of the criminal justice system to respond to the needs of Indigenous peoples.[5] This latter feature of *Ipeelee* forms the foundation of this article. Justice LeBel went on to encourage judges to consider alternatives in light of the "fundamentally different world views" of Indigenous peoples, arguably establishing a role for Indigenous legal orders at the second stage of *Gladue*.[6] But judicial reluctance persists. In a 2018 article, Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre reviewed 635 *Gladue* decisions and found that incarceration was imposed in 87.7% of those sentencing decisions.[7] Only thirty decisions applied restorative justice principles,[8] despite their explicit endorsement in *Gladue*.[9] Referencing Indigenous laws also remains exceedingly rare. In part, this reluctance stems from a lack of guidance on whether and how judges ought to approach such a delicate task. Despite sparse precedent, examples have recently emerged, most notably and consistently in Nunavut. These cases offer useful lessons for courts. By evaluating two judgments invoking Inuit *maligait* (customary law), this article seeks to add clarity to Indigenous-

4. The literature extensively covers the failure of *R v Gladue* to ameliorate the over-incarceration of Indigenous peoples and the abject failure of criminal justice to devise culturally appropriate systems. For the most recent take on this, and for the suggestion that Indigenous laws have a role to play in the sentencing of Indigenous offenders, see Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal & Kingston: McGill-Queen's University Press, 2019). See also Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Publishing, 2019); David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84; Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470; Justice Harry S Laforme, "The Justice System in Canada: Does it Work for Aboriginal People?" (2005) 4 Indigenous LJ 1; Renée Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Prisons" (2001) 39:2/3 Osgoode Hall LJ 469.

5. 2012 SCC 13 at paras 60, 74.

6. *Ibid* at para 74. For the argument that *Ipeelee* judicially recognizes a role for Indigenous laws in the second step of *Gladue*, see Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548. The authors characterize section 718.2(e) as creating a "contact zone within which the legal systems can intersect with a view to achieving greater internormativity", in particular internormativity between Indigenous laws and Canadian law (*ibid* at 554–55).

7. See Denis-Boileau & Sylvestre, *supra* note 6 at 578.

8. See *ibid* at 580.

9. See *supra* note 2 at para 69.

Canadian pluralism in criminal law. Although *Ipeelee* addresses sentencing specifically, when courts show deference to Indigenous laws, as this article will show, Canadian law and procedure must respond holistically.

Due to its increasing references to *Inuit Qaujimajatuqangit* (IQ), or Inuit world view, much can be gleaned from the Nunavut Court of Justice, both promising and cautionary, about judicial pluralism. The first case I review is *R v Itturiligaq*, in which Bychok J relies on IQ principles to find unconstitutional a four-year mandatory minimum sentence.[10] *Itturiligaq* shows that drawing on Indigenous laws in sentencing may bring judicial outcomes closer in line with community perspectives, but only to a point. In this case, the principles of judicial discretion and restraint allowed greater emphasis on reintegration and the effects of community separation, consistent with Inuit societal values. Yet, deterrence and denunciation could not be ignored, suggesting that Canadian sentencing law, in its current form, precludes the full realization of IQ principles. Several cautionary lessons about interpreting Indigenous laws also emerge from Bychok J's approach. The second case I examine, *R v Ippak*, offers a more compelling picture of judicial pluralism.[11] An appellate decision of the Nunavut Court of Appeal, *Ippak* saw Berger JA engage with Inuit *maligait* in concurring reasons to exclude evidence, quash a conviction, and acquit the accused. Unpacking Berger JA's approach in *Ippak* provides substantive guidance to judges for identifying and dealing with incommensurabilities between Canadian and Indigenous laws. Justice Berger adopts an ethic more deferential to Inuit *maligait* in criminal procedure. Both decisions indicate that integrating Indigenous laws, particularly in *Canadian Charter of Rights and Freedoms* analysis,[12] improves judicial outcomes from an inter-societal perspective, but that its limits must be acknowledged in doing so.

In light of these lessons, this paper offers several suggestions for greater plurality. First, judges, I argue, ought to establish "ethical space" with Indigenous laws—a concept developed by Cree scholar Willie Ermine[13]—by exploring apparent overlaps and conflicts with Canadian law. Second, a process of harmonization then flows: where laws coexist in mutual non-interference, concurrent application reinforces both legal systems. Where laws prove incommensurable, deference to Indigenous processes should

10. 2018 NUCJ 31. At the time of writing, an appeal of Bychok J's decision in *Itturiligaq* had been heard by the Nunavut Court of Appeal and its judgment was still under reserve.

11. 2018 NUCA 3.

12. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

13. Willie Ermine, "The Ethical Space of Engagement" (2007) 6:1 Indigenous LJ 193 (developing a philosophy for dialogue between Indigenous and western communities, including their respective legal systems).

direct. Forging new diversion pathways toward local customs, as the Federal Court has done in recent times to resolve governance disputes according to Indigenous practices, can facilitate this process of deference. To reduce the risk of distorting Indigenous laws, laws deliberately rendered cognizable to non-Indigenous audiences could be put to judges through counsels' submissions and other research materials. This would increase judicial ability to appreciate latent nuances and minimize interpretive missteps. External to this analogical reasoning process, institutional and legislative developments can increase sites of internormativity.[14] For example, community justice committees re-centre Indigenous justice by entrenching local diversion pathways.[15] Legislative reforms to the sentencing objectives that apply to section 718.2(e), namely introducing a focus on restorative justice and judicial restraint in place of deterrence and denunciation, can reduce normative conflicts like we see in *Ituriligaq*.[16] Such reforms would reduce opportunities for western subjugation of Indigenous legal norms by increasing spaces for dialogue and deference in which both epistemologies meaningfully coexist.

My claim expands on the work of Denis-Boileau and Sylvestre, who argue that the second step of the *Gladue-Ipeelee* framework "represents an open door to legal pluralism and to the possibility of rethinking sentencing".[17] I develop this idea further by conceptualizing judicial pluralism between Indigenous and Canadian criminal law more broadly. Since adherence to

14. See Denis-Boileau & Sylvestre, *supra* note 6 at 554–55. "Internormativity" denotes normative exchanges between legal systems.

15. For an insightful critique of the Nunavut criminal justice system drawing on principles of Inuit *piusiit* (moral values and social customs) and charting pathways toward greater Inuit self-governance and autonomy in criminal law, see Jessica Black, *Tupiq Nappaqtauliqtuq: Meeting Over-Incarceration and Trauma with Re-Centering Inuit Piusiit* (Toronto: The Gordon Foundation, 2017). Black observes the recognized but underutilized value of Community Justice Committees in Nunavut (*ibid* at 36–37).

16. For examples of legislative reforms to this effect, see generally Canada, Department of Justice, *Reform of the Purposes and Principles of Sentencing: A Think Piece*, by Benjamin L Berger, Catalogue No J22-33/2017E-PDF (October 2016) at 6–15, online (pdf): <www.justice.gc.ca/eng/rp-pr/jr/rpps-ropp/RSD_RR2016-eng.pdf> [Berger, "A Think Piece"]; Canada, Department of Justice, *"Moving Towards a Minimalist and Transformative Criminal Justice System": Essays on the Reform of the Objectives and Principles of Sentencing,* by Marie-Ève Sylvestre, Catalogue No J22-29/2017E-PDF (5 August 2016), online (pdf): <www.justice.gc.ca/eng/rp-pr/jr/pps-opdp/pps-opdp.pdf>. But see Canada, Department of Justice, *An Opinion on Reform Changes with Respect to the Principles and Purposes of Sentencing*, by Leslie Dunning, Catalogue No J22-30/2017E-PDF (October 2016), online (pdf): <www.justice.gc.ca/eng/rp-pr/jr/orc-orp/orc-orp.pdf>.

17. Denis-Boileau & Sylvestre, *supra* note 6 at 577.

Indigenous legal principles will often transcend discrete legal tests in Canadian law, my analysis implicates sentencing but inevitably captures other areas of criminal law as well. To justify this proposal, I first attempt to address the live normative debates in this area, including the threshold issue of whether courts *ought* to engage with Indigenous laws and under what circumstances. Part I introduces the Nunavut context and analyzes *Itturiligaq* in light of *Ipeelee*, concluding that its reasoning instills both optimism and caution. Part II investigates, with reference to *Itturiligaq*, questions of whether Indigenous legal orders are commensurate with Canadian law and whether judges ought to engage with them. Part III discusses the limits of such analogical reasoning and uses *Ippak* to illustrate an ethical framework for internormative dialogue in which Indigenous laws receive greater deference. Part IV synthesizes the lessons drawn from these inquiries and considers institutional and legislative reforms that ideally should accompany greater internormative judicial reasoning.

I. Nunavut Courts and Judicial Consideration of *Inuit Qaujimajatuqangit*

I begin with a few necessary clarifications. First, this article does not provide an independent definition of IQ. Joe Karetak, Frank Tester, and Shirley Tagalik describe IQ as a holistic set of values and practices used within Inuit society that refers to how to be in the world.[18] According to Karetak, Tester, and Tagalik, Inuit communities traditionally employed a range of legal rules, processes, and consequences to regulate behaviour deemed undesirable.[19] Beyond these parameters, as a non-Inuit and non-Indigenous person I cannot fully know or explain IQ. I instead rely on texts authored by Inuit knowledge-holders communicating IQ to western

18. See Joe Karetak, Frank Tester & Shirley Tagalik, eds, *Inuit Qaujimajatuqangit: What Inuit Have Always Known To Be True* (Halifax: Fernwood Publishing, 2017) at 1. This seminal work was the result of a $240,000 Arctic Inspiration Prize in 2012 to research, record, and communicate IQ in substantial detail. See "Inuit Qaujimajatuqangit: What Inuit Have Always Known To Be True", online: *National Collaborating Centre for Indigenous Health* <www.nccih.ca/474/Inuit_Qaujimajatuqangit__What_Inuit_have_always_known_to_be_true.nccah>.

19. See *ibid* at 5, 10–12, 194. For a discussion of Inuit *piusiit* (moral values and social customs) by Akisu Joamie, an Inuit elder, see Mariano Aupilaarjuk et al, *Perspectives on Traditional Law: Interviewing Inuit Elders*, ed by Jarich Oosten, Frédéric Laugrand & Wim Rasing, vol 2 (Iqaluit: Language and Culture Program of Nunavut Arctic College, 1999) at 46 [Aupilaarjuk, *Perspectives on Traditional Law*].

audiences.[20] With a growing canon,[21] Inuit legal concepts form a robust legal system with workable principles, including principles comparable to those found in criminal law. Moreover, IQ is neither monolithic nor static. Since Inuit are properly positioned to contest and determine its contours, including the extent to which traditional laws remain relevant, providing an independent definition would interfere with this process of debate and clarification. I reference IQ in the spirit of my argument, cautiously, as one seeking to uphold its philosophical and epistemological assumptions without fully grasping them.

Second, I review Nunavut courts[22] and their relationship to IQ quite deliberately. Distinguishing Indigenous peoples' courts, or specialized Indigenous-led courts applying Indigenous legal principles,[23] I instead discuss Canadian courts applying Canadian law to Indigenous peoples. Though beyond the scope of this paper, my argument desires the eventual transition to Indigenous jurisdiction over criminal matters, with Canadian courts relating to Indigenous peoples' courts as parallel justice systems. Presently, the Nunavut Court of Justice awkwardly balances institutional design intended to better represent IQ with the clear imposition of colonial law foreign to Inuit.[24] The harmful effects of colonization and western justice on Inuit are well-

20. See e.g. Karetak, Tester & Tagalik, *supra* note 18.

21. See *ibid*. See also Paul Groarke, "Legal Volumes from the Arctic College's Interviewing Inuit Elders Series" (2009) 47:4 Osgoode Hall LJ 787; Aupilaarjuk, *Perspectives on Traditional Law*, *supra* note 19; Mariano Aupilaarjuk et al, *Inuit Qaujimajatuqangit: Shamanism and Reintegrating Wrongdoers into the Community*, ed by Jarich Oosten & Frédéric Laugrand, vol 4 (Iqaluit: Language and Culture Program of Nunavut Arctic College, 2002) [Aupilaarjuk, *Shamanism and Reintegrating*].

22. My institutional critique of Nunavut criminal justice focuses on the Nunavut Court of Justice, Nunavut's single unified court. However, my analysis also implicates the Nunavut Court of Appeal, especially as it relates to *Ippak*, which comprises judges of the courts of Alberta, the Northwest Territories, and the Yukon, and judges of the Nunavut Court of Justice itself.

23. See e.g. Angelique EagleWoman (Wambdi A Was'teWinyan), "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2019) 56:3 Alta L Rev 669. Comparing American Tribal Courts to the Canadian context, EagleWoman cites the Court of Kahnawá:ke and the Akwesasne Court as Canadian examples (*ibid* at 672).

24. For critiques of the structure and operations of the Nunavut Court of Justice in relation to Inuit communities, see e.g. Scott Clark, "The Nunavut Court of Justice: An Example of Challenges and Alternatives for Communities and for the Administration of Justice" (2011) 53:3 Can J Corr 343; Canada, Indian and Northern Affairs, *Inuit and the Administration of Criminal Justice in the Northwest Territories: The Case of Frobisher Bay*, by Harold W Finkler, Catalogue No R52-11/1976 (Ottawa: Supply and Services Canada, 1976); Jessi Casebeer, "'Justice from Another Planet': The Impact of Imported Justice on Inuit Self-Governance" (January 2016) [unpublished, on file with author].

documented.[25] Amongst *Gladue* courts, Nunavut illuminates because, unlike other *Gladue* courts which may hear matters implicating several Indigenous legal traditions,[26] Nunavut judges encounter only one—Inuit *maligait*—and develop experience with IQ more broadly over time.[27] Nunavut also offers several innovative judgments testing the boundaries of legal pluralism, examined here, thus providing a fertile area for analysis. My experiences growing up in the Northwest Territories during Nunavut's division[28] and recent privilege to listen to Indigenous leaders across the north[29] also convince me of the northern institutional paradox: at once spaces of ongoing colonial imposition yet also the source of several leading socio-legal and political innovations. We have much to learn from the successes and failures of these ambitious experiments.

25. See especially Jeanette Gevikoglu, *Sentenced to Sovereignty: Sentencing, Sovereignty, and Identity in the Nunavut Court of Justice* (LLM Thesis, University of Victoria, 2011) [unpublished] [Gevikoglu, *Sentenced to Sovereignty*]. See also Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (Toronto: University of Toronto Press, 2007); Black, *supra* note 15.

26. See Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451 at 453. For example, dedicated *Gladue* courts in Toronto rely on a team of court workers hired or trained by Aboriginal Legal Services of Toronto, which writes specialized reports placing each offender in context (*ibid* at 452).

27. "[T]he courts in Nunavut and the Northwest Territories consider themselves to be, to a certain extent, specialized courts interacting with a largely, if not exclusively, Indigenous population and to possess more general knowledge of the communities in question". See Denis-Boileau & Sylvestre, *supra* note 6 at 588.

28. Due to their previous unification, the criminal justice systems in both territories share a parallel legal history and evolution until Nunavut's division in 1999 charted a new path. See e.g. Dorothy Harley Eber, *Images of Justice: A Legal History of the Northwest Territories as Traced Through the Yellowknife Courthouse Collection of Inuit Sculpture* (Montreal & Kingston: McGill-Queen's University Press, 1997).

29. In 2019, I completed the Jane Glassco Northern Fellowship, a two-year research fellowship for northern individuals interested in addressing the complex policy and legal challenges facing the north and its communities. The fellowship involved travelling to all three territories and learning from elders, community leaders, politicians, and other policy thinkers, and culminated in an independent research project. My research examined opportunities for dialogue between Dene and Canadian law to advance ongoing self-government negotiations. See Don Couturier, *Negotiating the Dehcho: Protecting Dene Ahthít'e in Modern Treaty-Making* (Toronto: The Gordon Foundation, 2020) [forthcoming, on file with author].

A. R v Itturiligaq*: The Nunavut Court of Justice Applies IQ in Sentencing*

Designed to serve Nunavummiut through Canadian law, the Nunavut Court of Justice, Canada's only unified court system, pursues culturally appropriate court processes, sentencing alternatives, and community engagement through elder and youth panels in sentencing.[30] Clouding this idealized picture, scholarship generally rebukes the Nunavut Court of Justice's attempts to involve Inuit identity,[31] and its remote fly-in circuit court system receives criticism as well.[32] Although far from perfect, the presence of sentencing panels and community justice committees provides levers that *could* better harmonize Inuit-led justice with Canadian law. Situated tenuously where western justice meets Inuit culture, the Nunavut Court of Justice occasionally cites IQ in judgments—with interesting results.

In *Itturiligaq*, the accused pleaded guilty to a firearm-related offence.[33] The offence came with a mandatory four-year minimum sentence. The accused challenged the constitutionality of this mandatory minimum, arguing it amounted to cruel and unusual punishment under section 12 of the *Charter*. At issue was whether *Charter* and *Gladue* principles could be reconciled with the mandatory minimum.[34] Justice Bychok began with the following: "The Nunavut Court of Justice is a *Gladue* Court. Our Court *must* account for the unique circumstances of Inuit, their culture and society. If a sentence is to be considered just, it must be rooted in the realities of the offender and our society."[35] Justice Bychok then emphasized the need for individualization in just sentencing.[36] He observed that while Nunavummiut do not experience the same gang-related gun violence as Torontonians, firearm offences are too common in

30. See Clark, *supra* note 24 at 345–46. "Nunavut's single-level criminal court differs from courts in the provinces and the other territories primarily in that the normally distinct functions of the superior court and the provincial or territorial court are combined in a single superior court" (*ibid* at 345).

31. See Gevikoglu, *Sentenced to Sovereignty*, *supra* note 25 at 50; Black, *supra* note 15.

32. See e.g. David Matyas, "Short Circuit: A Failing Technology for Administering Justice in Nunavut" (2018) 35 Windsor YB Access Just 379 at 380 (critiquing the use of circuit courts, wherein parties of judges, lawyers, translators, and clerks travel across the territory to administer justice in school gymnasiums and hotel rooms).

33. See *supra* note 10 at para 1.

34. See *ibid* at para 3.

35. *Ibid* at para 19 [emphasis in original].

36. See *ibid* at para 28.

Nunavut.[37] Then, after emphasizing the collective trauma experienced by Inuit as a result of colonialism and forced relocation,[38] he wrote:

> Like *Mikijuk*, the present case highlights the challenges in applying pan-Canadian legal principles in Nunavut. As I said earlier this year in *R v Anugaa*:
>
> > We recognize that Inuit social governance continues in parallel to the application of pan-Canadian criminal law. Therefore, we strive to incorporate the precepts of Inuit Qaujimajatuqangit into our judgments and all our practices.[39]

Firearm-related offences, he reasoned, contravene both Canadian law and Inuit societal values.[40] On the basis that referencing IQ meaningfully applies *Gladue*,[41] Bychok J then assessed whether the mandatory minimum offended Inuit societal values, and, if so, whether this infringed the accused's *Charter* rights.[42] In his preliminary analysis, Bychok J affirmed his "duty" to denounce and deter the offence,[43] reasoning that imprisonment aligns with traditional Inuit justice, and citing banishment as an example of that alignment.[44] "Forgiveness, reconciliation, reintegration and restitution" were offered as goals common to

37. See *ibid* at para 58.

38. See *ibid* at para 60, citing *R v Mikijuk*, 2017 NUCJ 2 at paras 22–24.

39. *R v Itturiligaq*, *supra* note 10 at para 61, citing *R v Anugaa*, 2018 NUCJ 2 at para 42.

40. See *R v Itturiligaq*, *supra* note 10 at para 62.

41. See *ibid* at para 63, citing *R v Gladue*, *supra* note 2 at para 33.

42. See *R v Itturiligaq*, *supra* note 10. This assessment took place using the framework established in *R v Nur*. See 2015 SCC 15 at para 46. In *Nur* the Court set out a three-part test:

> First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

See *ibid*.

43. *R v Itturiligaq*, *supra* note 10 at para 85.

44. See *ibid* at para 86.

both Inuit justice and the Nunavut Court of Justice.[45] No reasonable alternatives to imprisonment were identified.[46] In light of these perceived commonalities, Bychok J asserted that "one cannot sentence Nunavummiut without considering the precepts of Inuit Qaujimajatuqangit".[47] The totality of this analysis led Bychok J to conclude that, in these areas, "there is some common ground between Inuit and Qallunaaq legal norms".[48] A just sentence was determined to be two years less a day, far below the mandatory minimum.[49]

The mandatory minimum was then deemed grossly disproportionate because it would force the accused to spend four years in jail in a federal penitentiary, whereas the lighter sentence would allow the accused to remain in Nunavut, a consideration of great importance to Inuit justice.[50] Justice Bychok's rationale was put this way:

> For justice to be seen to be done by Nunavummiut, this *Nur* analysis must account for *Gladue*. This *Nur* analysis must account for Inuit Qaujimajatuqangit. The mandatory minimum regime is, in reality, a perpetuation in Nunavut of last century's systemic colonialism and discrimination.
>
> . . .
>
> This analysis speaks directly to the issue of gross disproportionality. It speaks directly to our society's conception of what constitutes justice. Commentators have noted recently the perception that many courts have given mere lip service to *Gladue* principles. Not so in the Nunavut Court of Justice. As I stated earlier, judges of this court have a moral as well as a constitutional duty to apply *Gladue* principles *meaningfully* when sentencing Inuit offenders.
>
> . . .
>
> If I were to impose the MMP in a southern penitentiary in the present circumstances, it would be considered intolerable to fair minded Nunavummiut. To send Mr. Itturiligaq to a

45. *Ibid*.

46. See *ibid* at para 88.

47. *Ibid* at para 106.

48. *Ibid* at para 109. *Qallunaaq* means "non-Inuit" in Inuktitut.

49. See *ibid* at para 112.

50. See *ibid* at para 116.

> southern penitentiary in these circumstances would indeed outrage Nunavummiut's collective and traditional sense of decency and justice.[51]

The foregoing invites optimism yet caution. On a positive note, Bychok J's reasoning arranges the sentencing objectives under section 718 of the *Criminal Code*—specifically denunciation, deterrence, separation from society, and rehabilitation—to roughly accommodate Inuit societal values, suggesting a degree of symmetry between legal orders.[52] This aligns with Supreme Court of Canada precedent: "[T]he sentencing judge must determine which objective or objectives merit the greatest weight, given the particulars of the case".[53] Despite this, Canadian sentencing law arguably remains fundamentally committed to deterrence and retribution as overriding objectives.[54] Given that the offender still received a significant custodial sentence and that Bychok J could not fully dismiss denunciation and deterrence, rearranging sentencing objectives to achieve reduced sentences likely does not go far enough to substantively establish equal respect for Canadian law and Indigenous laws. Statutory and other reforms, discussed in Part IV, would ideally complement this type of reasoning by expanding spaces for internormativity.

Moreover, although Bychok J does well to invoke IQ precepts, we might question his portrayal of some aspects of Inuit *maligait*. For example, he cites banishment as consistent with imprisonment. Yet literature suggests that while elders see the modern institution of imprisonment as similar to banishment, banishment was one of the harshest sanctions possible under Inuit law, and was only applied as a last resort.[55] Canadian law, in contrast, applies incarceration to a broad range of offences. Justice Bychok's possible conflation of the two speaks to the potential dangers of misinterpretation when non-Indigenous judges

51. *Ibid* at paras 118–124 [emphasis in original].

52. See *Criminal Code*, *supra* note 3, s 718.

53. Clayton C Ruby et al, *Sentencing,* 9th ed (Toronto: LexisNexis Canada, 2017) at 5. Contextual balancing of objectives was confirmed as the dominant approach by the Supreme Court of Canada in *R v Nasogaluak*. See 2010 SCC 6 at para 43. See also *R v Lacasse*, 2015 SCC 64 (providing great detail and clarification on fundamental sentencing principles in Canadian law).

54. See Denis-Boileau & Sylvestre, *supra* note 6 at 565, 578–80. See also Andrew Welsh & James RP Ogloff, "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50:4 Can J Corr 491 (analyzing 691 sentencing decisions and concluding that Aboriginal status did not significantly predict the likelihood of receiving a custodial or non-custodial disposition in relation to the sentencing objectives referenced by judges).

55. See Groarke, *supra* note 21 at 795.

invoke Indigenous legal concepts, including inadvertent co-optation. I deal with strategies for minimizing these missteps and measuring community thinking on desirable sentencing alternatives also in Part IV.

Beyond these cautionary points, *Itturiligaq* richly integrates Indigenous law perspectives in *Charter* analysis to reduce the impact of community separation. These principles permeate the *Gladue* and section 12 analysis to foreground Inuit societal values. Justice Bychok thus demonstrates a commendable ability to perceive the harm incarceration would impose on the offender and to mitigate it by exercising his judicial restraint. In *Itturiligaq*, a just and fit sentence, and therefore a proportionate one, took into account the community's sense of justice, suggesting that Indigenous legal orders enhance our understanding of proportionality, individualization, and reintegration in the Indigenous offender context. But is Bychok J's approach too unmoored from sentencing law to withstand scrutiny?

B. Justice Bychok Tests Ipeelee*'s Limits on Legal Pluralism*

Justice Bychok's finding that being sentenced to a federal penitentiary would offend principles of Inuit justice warrants revisiting *Ipeelee*'s recognition of Indigenous laws in sentencing. *Ipeelee* asks sentencing judges to perceive Indigenous offenders in cultural, social, and historical contexts. Section 718.2(e) was interpreted in *Gladue*, *R v Wells*,[56] and finally *Ipeelee*, the sum of which stands for the directive that judges must account for the "holistic and individualized circumstances of Indigenous people" to reach "a proportionate sentence emphasizing restorative justice".[57] Proportionality involves proper consideration of the unique and systemic factors in *Gladue*'s first step,[58] but proportionality yields to individualization.[59] No principle overrides the

56. 2000 SCC 10.

57. Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 151. Hebert's article provides an excellent summary of case law and context surrounding these developments (*ibid* at 151–56). See also Thalia Anthony, Lorana Bartels & Anthony Hopkins, "Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice" (2015) 39:1 Melbourne UL Rev 47 at 49 (noting that *Ipeelee* balances the concepts that judges can account for Indigenous systemic disadvantage while also promoting individualized justice).

58. See *R v Ipeelee*, *supra* note 5 (noting that proportionality is the "*sine qua non* of a just sanction" at para 37). For more analysis on the relationship between denunciation and proportionality under the *Gladue-Ipeelee* framework, see Berger, "A Think Piece", *supra* note 16 at 5–6.

59. See *R v Ipeelee*, *supra* note 5 (LeBel J noting that "despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process" at para 38).

sentencing judge's *duty* to appreciate the offender before them: how their story and experience, cultural and otherwise, shapes life's trajectory. Judges must always undertake a process of intercultural judgment and apply the individualized *Gladue-Ipeelee* analysis.[60]

While recent scholarship suggests that *Gladue*'s second step receives Indigenous laws,[61] potential for internormativity also exists at the first step. Proportionality is a "highly individualized process",[62] and individualization is "the fundamental duty of the sentencing judge".[63] Given the cultural perception required in this exercise, individualization ought to encompass not *just* facts describing the individual in cultural and historical contexts, I suggest, but also the offender's circumstances *in relation to* their community. This includes, at this first step, engaging with an offender's community experience, including their community's relationship to criminal justice, whether that community would view a sentence of incarceration as legitimate, and, if not, *how* it would preferentially respond. Individualization in this context encompasses the collective, which includes community preservation values.[64]

Justice Bychok arguably ties his duty to individualize to collective morals by canvassing Inuit societal values. Inevitably, the problem of authentically

60. See *ibid* at paras 84–85.

61. See generally Denis-Boileau & Sylvestre, *supra* note 6. The authors conclude that *Ipeelee* represents a "shift of paradigm" that "invites the Canadian state and justice system to recognize the existence of Indigenous legal orders" (*ibid* at 604, 606). *Contra* Jeanette Gevikoglu, "*Ipeelee/Ladue* and the Conundrum of Indigenous Identity in Sentencing" (2013) 63 SCLR (2d) 205 at 206 (casting doubt on the implications of *Ipeelee* and arguing that it remains confined to solutions within criminal law rather than a broader consideration of Indigenous peoples' relationship with colonial institutions). While the reasoning of the Court in *Ipeelee* may be narrowly interpreted, prima facie, as only instructing the use of proportionality and individualization in sentencing, and therefore mandating solutions grounded strictly in Canadian criminal law, I read LeBel J's reasons as an open invitation to trial judges to explore these deeper questions of legal philosophy. For more discussion on the limits of proportionality in Indigenous sentencing, see Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 334 (asserting that theories of retribution and proportionality are insufficient to reinvent the criminal justice system in a way that works for Indigenous peoples).

62. *R v Ipeelee*, *supra* note 5 at para 38.

63. *Ibid* at para 75. Benjamin Berger advocates for recognition of the fundamental principles of individualization, restraint, and proportionality. See Berger, "A Think Piece", *supra* note 16 at 12. See also Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 SCLR (2d) 337 [Berger, "Salience of Pain and Hope"] (arguing that it is the character and quality of punishment, rather than quantum of time spent in prison, that should dominate the sentencing analysis).

64. See Finkler, *supra* note 24 at 12; Groarke, *supra* note 21 at 795.

reflecting community values arises, which are not static, uniform, or necessarily democratic. Indeed, defensible approaches to legal pluralism must account for the ongoing and deeply contested nature of normative disagreement within legal traditions.[65] This is, in part, a question of institutional design, and whether the Nunavut Court of Justice can leverage Inuit-led fora informing the Court of such matters, and whether Inuit desire such integration. For the purposes of remaining consistent with Supreme Court of Canada precedent, however, Bychok J appears to follow LeBel J's remarks that "given these fundamentally different worldviews, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community".[66] Put differently, the Supreme Court of Canada left the door open for Indigenous laws in sentencing, and Bychok J walks through that door. But this raises fundamental ethical and normative concerns, which I address now.

II. Theoretical and Normative Debates on Judicial Reasoning Across Legal Orders

Ipeelee's nod to legal pluralism lures courts into stormy waters. Little guidance exists on how, or even *if*, courts should engage with Indigenous laws.[67] Two separate inquiries follow. First, are Canadian and Indigenous laws cognizable to one another (commensurability)? Second, if they are, *ought* judges—particularly non-Indigenous judges—engage with Indigenous laws in their judgments (normatively)? While many areas of Canadian law currently express incommensurability with Indigenous laws,[68] some notable symmetries

65. See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167. Webber has argued that "[i]nteraction across legal orders involves the encounter of two or more traditions of normative decision making, each of which contains its own methods, protocols, modes of argument, and processes of judgment. Understanding another legal tradition requires . . . that one understand how that order marshals and resolves arguments" (*ibid* at 170).

66. *R v Ipeelee*, *supra* note 5 at para 74.

67. Courts are reluctant to engage with and apply Indigenous legal orders in part because there is minimal precedent on how to do it. There is also the ever-present concern of having a decision overturned for failing to follow established precedent. Some commentators would disagree that state institutions should be engaging with Indigenous legal orders at all, further disincentivizing the bench from undertaking this task. This partially wades into the debate of recognition politics, a debate I note here but do not directly respond to. See e.g. Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

68. Common law doctrines incommensurate with Indigenous legal orders may evolve to become commensurate, and vice versa. My analysis extends only to situations where applying

exist.[69] Where symmetries arise, I argue Indigenous laws can and should apply concurrently. Where no symmetry exists, deference to Indigenous practices is more appropriate, and only statutory or doctrinal reform will enable equitable conditions for concurrent application.[70] Again, *Itturiligaq* shows how commensurability and interpretive issues can both augment judicial outcomes and obscure Indigenous legal concepts.

A. Commensurability: Are Canadian and Indigenous Laws Cognizable to One Another?

Where common law assumptions challenge those of Indigenous law, a contest of legitimacy ensues.[71] In such instances, colliding doctrines are incommensurate insofar as applying one denies the other. Several examples exist in Canadian law, most notably within the doctrines of Aboriginal rights and

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one in its current form necessitates the denial of the other. Much scholarship is dedicated to advancing Canadian law to better reflect the principles and perspectives of Indigenous peoples. See e.g. Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws—Special Report* (Waterloo, Ont: Centre for International Governance Innovation, 2017) 63; Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77; Christine Zuni Cruz, "Law of the Land—Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, UK: Hart Publishing, 2009) 315.

69. "Legal symmetry", in my view, means areas of law where concurrent application of Canadian and Indigenous laws preserves their respective objectives. I discuss several examples below, which include custom election codes, aspects of family law, and, as I argue, aspects of criminal law. My purpose here is simply to point out that many doctrines, at present, actively work against living assumptions guiding Indigenous laws. But some do not, and they are capable in their current form of generating mutually reinforcing relationships.

70. The risks of misinterpretation are great, and since incommensurate doctrines fundamentally oppose one another, judicial interpretation and application of Indigenous laws in these situations might inadvertently erode their content in an effort to uphold common law precedent. In these situations, external assertions of Indigenous laws may be more appropriate than judicial recognition, unless the judge incrementally shifts common law doctrine toward legal symmetry.

71. See Henry S Mather, "Law-Making and Incommensurability" (2002) 47:2 McGill LJ 345. Mather does not use the language of "contest of legitimacy" as I have done, but he similarly views incommensurability as the situation where two values are so conflicting or diverse as to render it too difficult to compare them and to conclude that one is superior to the other (*ibid*

title.[72] Aboriginal title invariably preserves the legitimacy of Crown sovereignty.[73] Aboriginal title is but a burden of collective ownership on the underlying radical title of the Crown.[74] In stark and obvious contrast, many Indigenous nations assert ultimate sovereignty over their territory, either through arguments that such territory was never ceded to the Crown,[75] or, where a land surrender treaty was signed, through claims that the written text does not reflect the oral agreement between the parties.[76] This clash derives from the distinctive ontological, epistemological, and cosmological features of Indigenous and western constitutional orders, referred to as "lifeworlds" by Aaron Mills.[77] In these contests of legitimacy, either Canadian law moves toward symbiosis with

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at 347). For language that reflects the legitimacy contest between First Nations and European law, see Borrows, "With or Without You", *supra* note 1 at 629.

72. See John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; Kent McNeil, "Indigenous Law and Aboriginal Title" (2017) Osgoode Legal Studies Research Paper Series Working Paper No 2/2017 at 23–24. Alan Hanna refers to this as the tension over "territorial jurisdiction", meaning conflicting authority over traditional lands and/or territories. See Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2017) 51:1 UBC L Rev 105 at 139. The classic example of conflicting values in Aboriginal law doctrine is the *Van der Peet* Aboriginal rights test. See *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289. The test has been extensively critiqued in the literature as a "frozen rights" approach. See especially Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

73. The closest Canadian courts have come lifting the lid on this intractable problem was in *Haida Nation v British Columbia (Minister of Forests)*. See 2004 SCC 73. Chief Justice McLachlin observed that the Crown held "*de facto*" control over Aboriginal title lands (*ibid* at para 32). Much of Aboriginal law doctrine has attempted to reconcile the Crown's assertion of sovereignty and the reality that we are "all here to stay" with the fact that Indigenous nations were here before the arrival of Europeans and were never conquered. See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193.

74. See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 75.

75. See e.g. Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).

76. See Michael Coyle, "As Long as the Sun Shines: Recognizing that Treaties Were Intended to Last" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39.

77. Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 850, n 6, 854. Mills is concerned with the subjugation of one legal community to another through failure to recognize the distinctive lifeworlds beneath constitutional orders. In referencing Mills' work, my point is that liberal constitutionalism understands treaty relationships differently than Indigenous constitutional orders; this pits a

Indigenous legal orders, or Canada's liberal constitutional order subjugates and oppresses Indigenous concepts of law.[78]

On this point, Alan Hanna explores how the Canadian legal system is positioned with respect to Indigenous legal traditions.[79] He finds there is little room within the present Canadian legal landscape for full, respectful engagement with Indigenous legal orders.[80] Instead, he argues Canadian governments "must reform the legal system to make room for Indigenous legal orders to take their rightful place in the substance of Canadian law."[81] Hanna does, however, observe some opportunity "for inherent jurisdiction to flow".[82] The example offered is subsection 2(1) of the *Indian Act*, which allows for the "custom" election of a band council.[83] Custom election codes allow First Nations to develop bespoke election rules and procedures on their own terms.[84] Custom election codes, and also *aspects* of sentencing, as we see in *Itturiligaq*, represent examples of symmetry between traditions. These areas of overlap are important sites for asserting Indigenous legal sovereignty in contemporary circumstances.[85]

Custom election codes were judicially considered to give expression to Indigenous perspectives in *Joe Pastion v Dene Tha' First Nation*.[86] Justice Grammond observed that custom "must be understood in a broad sense and refers to what is more properly Indigenous law".[87] Canadian courts, he observed, recognize the existence of Indigenous legal traditions and give effect to situations

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textual understanding of a treaty relationship against a relational and oral account of mutual aid and obligation.

78. See *ibid* at 851–53.

79. See generally Hanna, *supra* note 72.

80. See *ibid* at 108.

81. *Ibid*.

82. *Ibid* at 132. Hanna uses the term "inherent jurisdiction" to connote places within the Canadian legal system in which Indigenous laws govern unencumbered by Canadian legal constraints (*ibid*).

83. RSC 1985, c I-5, s 2(1) (defining "council of the band" as "(d) . . . the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band").

84. See *Joe Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 13 [*Pastion*]. A First Nation may develop its governance structure according to its own internal laws, should it choose to do so (*ibid* at para 14).

85. See Naiomi Metallic, "*Indian Act* By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211 at 232.

86. See *supra* note 84.

87. *Ibid* at para 7.

created by Indigenous laws.[88] He further noted that the Federal Court has developed expertise in adjudicating First Nations governance disputes and offers mediation services that allow Indigenous laws and principles to permeate dispute resolution.[89] The Federal Court defers to Indigenous decision-making processes as they "are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions".[90] Notably, while the Federal Court has not developed its own method of interpreting Indigenous laws, it adapts the judicial process itself to integrate Indigenous laws in conflict resolution.[91] As *Pastion* shows, courts can develop procedures that go a long way toward preserving Indigenous legal contexts.

Deference in the face of incommensurability nonetheless encounters limitations. With respect to sentencing, opportunities to utilize alternative procedures may have come and gone at this final stage of the criminal process, or they may be unavailable or insufficiently operational. In these moments where deference is impossible, successful harmonization will only come through institutional or statutory reform. Turning toward Indigenous laws assists in this regard—Indigenous and Canadian societies may at times address wrongful behaviour in complementary ways.[92] But as *Itturiligaq* highlights, although rehabilitation and separation from society may guide, deterrence and denunciation could not be eschewed. True commensurability requires rebalancing sentencing objectives away from rigid applications of deterrence and denunciation. For judges to fully grapple with and defer to substantive principles and processes of Indigenous laws, they must be free to depart from the punitive ethos binding them under the *Criminal Code*.[93]

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88. See *ibid* at para 8. Though Grammond J does not use the term "legal symmetry", he identifies another area of overlap in this passage, observing that family law benefits greatly from Indigenous legal principles (*ibid*).

89. See *ibid* at para 15. For discussion of the ways in which the Federal Court has developed this expertise, see *Kenenth Henry Jr, Gary Roberts v Roseau River Anishinabe First Nation*, 2017 FC 1038 at paras 18–37 [*Henry*].

90. *Pastion*, *supra* note 84 at para 22.

91. See *Henry*, *supra* note 89 at para 15.

92. See Hadley Louise Friedland, *The* Wetiko *Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018). Friedland's groundbreaking book examines Cree and Anishinabek stories surrounding *wetikos* (windigos)—cannibals, or, more broadly, human beings who do monstrous things—to illustrate complex legal responses to violence and victimization within these societies. Friedland argues we can learn from these stories today and apply their lessons to contemporary contexts (*ibid* at xvii).

93. See e.g. Debra Parkes, "Punishment and Its Limits" (2019) 88 SCLR (2d) 351. Parkes identifies an increasingly punitive turn in criminal law reform during the Harper era (*ibid* at 351). But she also acknowledges that Canadian criminal law has "long been rooted in

B. Normatively: Should Courts Work with Indigenous Legal Traditions at All?

Whether courts ought to engage with Indigenous legal principles at all remains sensitive and controversial. As John Borrows writes:

> In practice, there are enormous risks for misunderstanding and misinterpretation when Indigenous laws are judged by those unfamiliar with the cultures from which they arise. The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality.[94]

As Finch CJ of the Court of Appeal for British Columbia (as he then was) also warns, avoiding Eurocentric interpretations of Indigenous laws is exceedingly difficult.[95] Judges must foreground the limitations of Canadian legal perspectives to foster humility, respect, and receptivity to Indigenous legal orders.[96] First and foremost, non-Indigenous interpreters must resist the tendency to essentialize "Indigenous law" as monolithic, and instead actively engage with the specific legal order in question.[97] Indigenous legal systems must remain contextualized, in form and substance.[98] In general, "it is dangerously easy to carry our unconscious matrices of interpretation to our approach to another culture's values and laws".[99] In my attempt to follow this advice, although I discuss commensurability in the abstract, my specific analysis in this paper centres on interactions between Canadian law and Inuit *maligait*.

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punishment" (*ibid* at 352). She argues that we "overuse criminal law to address social problems, at great human and fiscal cost" (*ibid* at 353).

94. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 140 [footnotes omitted].

95. See The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the Indigenous Legal Orders and the Common Law 2012 Course, The Continuing Legal Education Society of British Columbia, 15 November 2012), online (pdf): *The Continuing Legal Education Society of British Columbia* <online.cle.bc.ca/CoursesOnDemand/ContentByCourse/Webinars?courseId=4280>.

96. See *ibid* at 2.1.2.

97. See Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford, UK: Oxford University Press, 2014) 225 at 239–41 [Napoleon & Friedland, "Roots to Renaissance"] (instead of thinking about Indigenous laws as a pan-Indigenous legal order in abstract terms, the particularities of specific legal orders must ground the conversation).

98. See Finch, *supra* note 95 at 2.1.4.

99. *Ibid* at 2.1.8.

Academic narratives divide on this issue: there is a right way and there is no right way for non-Indigenous scholars, lawyers, and judges to work with Indigenous legal traditions. For Hanna, the Canadian judiciary is an inappropriate venue to adjudicate Indigenous laws because it lacks the competence to do so and adopts a hierarchical nature in its work, contrary to the ethos of many Indigenous legal orders.[100] He writes, "[w]hether Indigenous laws should be subjected to the scrutiny and adjudication of Canadian courts is a matter to be determined by First Nations with their lawyers, considering the circumstances."[101] Salteau and Gitskan scholar Val Napoleon and scholar Hadley Friedland take a different view, noting that narratives of incommensurability and fragility across legal orders "can inhibit critical and rigorous scholarship engaging with Indigenous laws, further obscuring their presence and inadvertently perpetuating the colonial myth of an absence of Indigenous legal thought".[102] Napoleon and Friedland state that while philosophical questions on who should be working with Indigenous laws are deeply important, we should not "let these critical questions paralyze us into inaction".[103] This is even more relevant, according to them, in criminal law. They argue that we should beware the "artificial dichotomy between Indigenous and state responses to harm and violence", which "inhibits any productive discussion examining cultural differences *and* similarities between legal principles that grapple with the same universal human issues".[104]

Bridging the positions of Hanna and of Napoleon and Friedland, perhaps courts ought to begin by tentatively engaging with Indigenous laws to assess commensurability. Where symmetry exists, concurrent application flows because applying Canadian law preserves the assumptions guiding Indigenous legal orders. Where conflicts arise, courts might devise ways of deferring to Indigenous justice processes best positioned to apply and interpret the relevant principles. Justice Bychok does not achieve this balance. He

100. See Hanna, *supra* note 72 at 144.

101. *Ibid* at 149. See also Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19:1 CJWL 1 (arguing *against* the use of judicially convened sentencing circles on the grounds that it may overlook women's experiences of violence).

102. Napoleon & Friedland, "Roots to Renaissance", *supra* note 97 at 239. See also Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Richardson, Imai & McNeil, *supra* note 68, 195 at 213.

103. Val Napolean & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 at 754.

104. Napoleon & Friedland, "Roots to Renaissance", *supra* note 97 at 239 [emphasis in original]. HLA Hart recognized that one of the most fundamental characteristics of any legal system is the prohibition or prevention of human violence, particularly killing. See HLA Hart, *The Concept of Law*, 2nd ed (Oxford, UK: Oxford University Press, 1994) at 194.

provides no explanation for his understanding of IQ principles, with several references simply citing his own judgments.[105] This presents a difficulty given the interpretive misstep related to banishment discussed previously, potentially supporting Hanna's position. But Bychok J also draws parallels between Inuit justice and the Court's goals of forgiveness, reconciliation, reintegration, and restitution,[106] resulting in a sentence that better reflects community values, and echoing Napoleon and Friedland's point that exploring productive similarities is ultimately beneficial.

Judicial interaction with Indigenous laws—and in my view Bychok J both succeeds and stumbles in this regard—should strive to create ethical space between Indigenous and Canadian legal systems.[107] The concept of ethical space involves bracketing assumptions of western universality in order to create a dialogue between cultures, traditions, knowledge systems, and social, economic, and political realities.[108] With respect to adjudication, this involves a reasoning process in which judges test the contours of the relevant Indigenous law in conversation with Canadian law. Chief Justice Lamer's comments in *R v Van der Peet* support this proposition: "[T]he only fair and just reconciliation is . . . one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each."[109] Others suggest that "courts must be open to the presentation of examples and narratives that convey textured, particularized versions of First Nations' perspectives."[110]

Although exercised judicially, building capacity for internormative reasoning takes coordination among courts, legislatures, and communities. For example,

105. See *R v Ituriligaq*, *supra* note 10 at paras 62, 86 (with Bychok J providing no citation at paragraph 62, and citing his own prior judgment at paragraph 86).

106. See *ibid* at para 86.

107. See Ermine, *supra* note 13 (providing a review of ethical space).

108. See *ibid* at 202.

109. *Supra* note 72 at para 50. The Court here cites Mark Walters. See Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17:2 Queen's LJ 350 ("[a] morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives" at 413).

110. Timothy Dickson, "Section 25 and Intercultural Judgment" (2003) 61:2 UT Fac L Rev 141 at 167–68. See also David Leo Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) (suggesting that there is an inherent tension between protecting individual liberty through *Charter* rights and maintaining space for Indigenous legal traditions, which calls for "constitutional balancing" of the rights of individuals with the collective rights of Aboriginal peoples at 72); Julia Tousaw, "Meeting Halfway: Reassessing 'Cognizable to the Canadian Legal and Constitutional Structure'" (2018) 16/17:1 Indigenous LJ 85 at 86.

the Federal Court consulted with the Indigenous Bar Association - Aboriginal Law Bar Liaison Committee and elders to explore opportunities for resolving custom governance disputes according to Indigenous practices.[111] The Federal Court Practice Guidelines for Aboriginal Law Proceedings now incorporate a tailored dispute resolution process.[112] Similarly, counsel and supporting agencies can advance *Gladue* principles by introducing local practices in criminal procedure.[113] Defence counsel could submit codified Indigenous laws to courts for consideration (where available), eventually informing sentencing submissions.[114] Even Crown counsel, with their expansive prosecutorial discretion and public justice role, ought to take seriously and incorporate Indigenous perspectives in their submissions. Yet, as David Milward and Debra Parkes note, inadequate resources and institutional resistance impede counsel's ability to propose convincing submissions for non-custodial sentences.[115] Governments play a role here, and Nunavut is no exception. Despite its attempts to make the criminal justice more accessible to Nunavummiut, commentators say these efforts fail to change oppressive structures of authority in the justice system.[116]

Where Indigenous legal systems are deliberately textualized with a view to asserting their principles in Canadian legal contexts,[117] outside audiences more readily and precisely appreciate their nuances. The likelihood of accurate judicial application increases as well. This places an additional burden on Indigenous peoples to decide whether and how to render their laws accessible to non-Indigenous audiences, but it minimizes the problem of essentializing Indigenous

111. See *Henry*, *supra* note 89 at para 15.

112. See *ibid* at para 16.

113. See Judge ME Turpel-Lafond, "Sentencing Within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (1999) 43:1 Crim LQ 34 at 37 (noting that counsel and supporting agencies in the criminal justice system have a role to play in providing a full picture of the circumstances of the defendant and the offence).

114. Establishing a court registry containing the names of consenting Indigenous nations would facilitate this, as well as a database holding codified laws accessible to judges, counsel, clerks, and other officers of the court.

115. See Milward & Parkes, *supra* note 4 at 90, 92–94 (writing in the context of Manitoba).

116. See Gevikoglu, *Sentenced to Sovereignty*, *supra* note 25 at 92–93.

117. For example, see the work of the University of Victoria's Indigenous Law Research Unit (ILRU) and West Coast Environmental Law's RELAW program, which continues to work with many nations to codify their legal orders with a view to asserting and applying them in ways cognizable to the Canadian legal landscape. See "Indigenous Law Research Unit (ILRU)" (last visited 11 February 2020), online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>; "RELAW: Revitalizing Indigenous Law for Land, Air and Water" (last visited 11 February 2020), online: *West Coast Environmental Law* <www.wcel.org/program/relaw>.

laws as merely or simply restorative justice, a problem noted by Jeanette Gevikoglu,[118] because principles and guidelines are generated internally and courts are advised of their specificities. This process improves courts' abilities to engage with Indigenous laws and furthers the project of equitable, balanced, and precise pluralist reasoning. Even in a strictly western legal context, judges rely on counsel to advise them on the relevant law and sort through the practical implications of their decisions. Advancing Indigenous legal principles requires the same dialectic, and counsel and courts can only do this effectively with the necessary resources available to them. Had Bychok J referenced an Inuit-authored guide to IQ, his sourcing and possible interpretive issues may have been avoided.

III. Dealing with Incommensurability: *Ippak* Adopts a Distinctions-Based Approach

Individualized sentencing and judicial restraint bring Bychok J closer to the community preservation goals driving Inuit *maligait*, but, ultimately, he acquiesces to western law by giving short shrift to incarceration alternatives[119] and imposing a two-year custodial sentence, followed by a two-year probationary period.[120] Justice Bychok fails to acknowledge the tensions, perhaps incommensurabilities, present in this result. Judges must carefully contemplate whether judicial consequences nullify Indigenous processes intended to flow from the principles they recognize. Given IQ's holistic and relational epistemology,[121] *Gladue* and *Charter* analyses may provide entry points for Indigenous laws to inform judicial reasoning, but Indigenous laws will not—and should not be made to—fit neatly within legal tests.

For example, how one fulfills IQ's obligations matters as much as what those obligations direct.[122] Although counselling primarily resolved crime in Inuit society,[123] as Karetak, Tester, and Tagalik explain, if someone broke a *piqujarjuat* (a guiding principle),[124] action was sometimes taken through a sentencing

118. See Gevikoglu, *Sentenced to Sovereignty*, *supra* note 25 at 40–42.

119. See *R v Itturiligaq*, *supra* note 10 at para 89 (with Bychok J curtly stating that no valid alternatives exist).

120. See *ibid* at para 112.

121. See Karetak, Tester & Tagalik, *supra* note 18.

122. See Aupilaarjuk, *Shamanism and Reintegrating*, *supra* note 21. IQ "is not only a matter of content, but also of form. It implies an attitude to life, a way of speaking and interacting with other people" (*ibid* at 4).

123. See Black, *supra* note 15 at 14.

124. See Karetak, Tester & Tagalik, *supra* note 18 at 4.

process called *ajiiqatigiigniq*.[125] What actions trigger *ajiiqatigiigniq*—and the relationship between counselling, *ajiiqatigiigniq*, and more serious consequences—remain unknowable to all but knowledge-holders of traditional Inuit criminal justice. No judge without this expertise can accurately and precisely assess the thresholds distinguishing these standards and the respective responses their breaches necessitate. But perhaps ethical space simply calls for criminal justice proceedings to recognize these limits and defer to sentencing panels or community justice committees. Equally unknowable is how community justice committees would approach Inuit legal nuances today. We should resist viewing traditional laws as frozen; rather, their legal matrices are continually contested and clarified internally.[126] Communities should decide how to adapt their laws to present realities on the basis of their own internal normative clarification processes.[127]

Courts should also avoid using Indigenous laws to *justify* incarceration, a practice largely exclusive to western criminal justice systems. Where analogical reasoning requires conflating concepts foreign to an Indigenous legal order to achieve an outcome, this signals the need for measured interaction, dialogue, and deference. *Ippak*, this time at the Nunavut Court of Appeal, usefully demonstrates how judges might reason analogically across legal orders without reductively conflating principles. As the inverse to *Itturiligaq*, *Ippak* sought to harmonize Inuit *maligait* and Canadian law, but was ultimately grounded in acknowledgement of their substantive and procedural differences, and therefore the ways in which court processes should have deferred to Indigenous justice in the lead up to trial. Thus, *Ippak* exemplifies judicial reasoning across legal orders in a manner that upholds both traditions while respecting the incommensurability of certain concepts and giving them determinative weight in the result.

Ippak dealt with an appeal from a conviction of possession of marijuana for the purposes of trafficking. At trial, the judge admitted the seized evidence

125. See *ibid*.

126. John Borrows cautions against viewing Indigenous traditions as "closed, static, and frozen". See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 19. Rather, they are "contested, cross-cutting, and ever-changing" (*ibid* at 20). He argues intellectual and physical mobility represents a core struggle for Indigenous peoples in securing freedom (*ibid*).

127. For a foundational discussion of the problems that result when the criminal justice system fails to understand Indigenous cultural responses to the punitive ethos of the adversarial system, see generally Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont: Octopus Publishing Group, 1992); Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Group, 2006).

after conducting a section 24(2) *Charter* analysis.[128] The issue on appeal was whether the trial judge erred in finding this evidence admissible.[129] In concurring reasons, Berger JA[130] found that this legal question engaged the accused's section 25 *Charter* rights,[131] which guarantee that no other *Charter* rights and freedoms shall "abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada".[132] Since the accused's section 8, 9, and 10(b) rights were in play, Berger JA took the unusual step of asserting the following:

> A tension arises, however, between Inuit law and the traditions and the protections of Individual liberty through *Charter* remedies. In order to reconcile the two, I have concluded that Inuit law's restorative justice approach, providing as it does an *alternative form of justice*, furnishes a just solution in the case at bar that is *not inconsistent with Canadian legal principles.*
>
> . . .
>
> It seems to me that aboriginal legal principles and perspectives on criminal law and on the application of the *Charter* must be taken into account in pursuit of the objective of mutually enriching and harmonizing Canadian and Indigenous legal orders.[133]

128. See *R v Grant*, 2009 SCC 32 (providing the section 24(2) *Charter* test for evidence exclusion). *Grant* holds that once an individual's *Charter* rights have been violated, the evidence obtained through the violation must be excluded if its inclusion would bring the administration of justice into disrepute. This involves considering: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact on the *Charter*-protected interests of the accused; and (3) society's interests in an adjudication on its merits (*ibid* at para 71).

129. See *R v Ippak*, *supra* note 11 at para 59.

130. Justice Berger was at the time a judge on the Court of Appeal of Alberta. Judges of this Court also sit on the Nunavut Court of Appeal and the Court of Appeal for the Northwest Territories.

131. See *R v Ippak*, *supra* note 11 at para 56.

132. *Supra* note 12, s 25.

133. *R v Ippak*, *supra* note 11 at paras 70, 84 [emphasis added]. This decision stands in contrast to the reasoning of Bychok J in another decision, *R v Anugaa*. See *supra* note 39 (in which the *Jordan* framework was deemed incompatible with IQ, which was grounds to limit, rather than expand, the accused's *Charter* rights). For the *Jordan* framework, see *R v Jordan*, 2016 SCC 27 at paras 46–48.

At first glance, this passage suggests that Berger JA may invoke Inuit law only to the extent that it upholds Canadian law. However, his subsequent analysis displays a more nuanced approach to appreciating and dealing with incommensurability. He began by reciting several principles of Inuit law, including its primary intent to "preserve the community and avoid negative consequences for the individual and the group as a whole"[134] and to encourage wrongdoers to confess, which generally triggers a process for reconciliation and reintegration into the community.[135] Notably, unlike *Itturiligaq*, these recitations cited established texts authored by Inuit elders. Further, Berger JA acknowledged the deep aversion to imprisonment in Inuit culture, which has a negative impact on both the individual and the community as a whole.[136]

Then, in a crucial move in the analysis, Berger JA stated, "[a]pplication of an Inuit law approach from the time of the appellant's detention might well have resulted in the appellant's diversion from the traditional criminal justice system entirely".[137] He recognized that under Inuit law, only the most serious offences warrant incarceration.[138] On these facts, another community-based option was available: "Inuit law would likely address the importation of marihuana through elder counselling and the Justice Committee Program".[139] At this point, Berger JA justified his deference to Indigenous justice by dealing with incommensurability directly and giving preferential weight to Indigenous laws:

> As discussed above, the general focus of aboriginal justice is on restoration and healing, as opposed to the adversarial system's focus on deterrence and punishment. When there is a conflict between aboriginal law and Canadian law, scholars have called for the incorporation of Aboriginal values and "accommodations" in the adversarial system (Dale Dewhurst, Parallel Justice Systems, Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 215.[140]

134. *R v Ippak*, *supra* note 11 at para 87, citing Aupilaarjuk, *Perspectives on Traditional Law*, *supra* note 19.

135. See *R v Ippak*, *supra* note 11 at para 88, citing Aupilaarjuk, *Shamanism and Reintegrating*, *supra* note 21 at 180.

136. See *R v Ippak*, *supra* note 11 at para 89, citing Aupilaarjuk, *Shamanism and Reintegrating*, *supra* note 21 at 18.

137. *R v Ippak*, *supra* note 11 at para 92.

138. See *ibid*.

139. *Ibid*.

140. *Ibid* at para 93.

The concept invoked by Berger JA at this point in the judgment—that scholars call for the incorporation of Indigenous legal values in the adversarial system—raises the spectre of co-optation under the guise of legal systems' recognition.[141] But a closer look at the book chapter cited by Berger JA reveals that Dale Dewhurst in fact calls for equally authoritative parallel justice systems.[142] Judicial reasoning, then, must tread carefully between referencing Indigenous laws to emphasize mutual goals and controlling, and thereby perverting, the meaning of those principles. Justice Berger, in my view, walks this line finely but ultimately successfully. Rather than subsuming Inuit law within Canadian law, Berger JA noted the tensions between each system and gave determinative weight to Inuit protocols. His analysis relied on the conclusion that state actions are not entitled to the same level of deference as Inuit justice processes.[143]

Justice Berger's distinctions-based approach grounds his *Charter* analysis, which, in a move displaying symmetry across legal systems, integrates Inuit values into the section 24(2) analysis.[144] Justice Berger acknowledges the incommensurabilities between Canadian and Inuit law, which better equips him to then weave together their principles in mutually reinforcing ways that avoids co-opting the substance of Inuit law. This differentiates *Ippak* from *Itturiligaq*. Justice Berger considers the *Grant* test in light of Inuit *maligait*, which drives the conclusion that less deference is owed to the Canadian state in its enforcement of the criminal law given how repugnant the *Charter* breaches were under Inuit law.[145] Since the wrongdoer would almost certainly have been reintegrated into the community under Inuit *maligait*, the third *Grant* factor—society's interest in adjudicating the matter on its merits—militates against conviction and sentencing.[146] The *Grant* test formed the analytical framework through which Canadian and Inuit approaches to resolving the conflict could be compared, thus allowing Berger JA to determine the extent to which deference

141. This arguably represents the legal equivalent of the political concern expressed by Glen Coulthard. See Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437 at 453 (in which Coulthard argues that Indigenous peoples should "turn away" from dominant society and focus instead on self-recognition at 456).

142. See Dale Dewhurst, "Parallel Justice Systems, or a Tale of Two Spiders" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 213.

143. See *R v Ippak*, *supra* note 11 at para 95.

144. See *ibid* at paras 94–95.

145. See *ibid*.

146. See *ibid* at paras 100–04.

to state action would unduly subjugate Inuit laws. In the result, the evidence was excluded, the conviction quashed, and the accused acquitted.[147]

IV. Ethical Space and Harmonization as a Relational Analytical Framework

From the foregoing philosophical debates and practical examples surrounding judicial use of Indigenous laws, an ethic for responsible judicial engagement emerges. Predictably so, missteps will occur. But if we accept Napoleon and Friedland's view that narratives of fragility inhibit greater recognition of Indigenous legal philosophies, then Indigenous legal traditions possess the resiliency to withstand judicial efforts to harmonize them with criminal law. Preserving Indigenous peoples' power to determine substance and form must ground the inquiry. Exploring overlaps across legal orders, as academics increasingly do,[148] within the jurisprudence moves this exercise to an arena impacting the lives and liberty of Indigenous peoples. Given the growing momentum of Indigenous scholars and practitioners in assisting nations to strengthen, codify, and assert their legal orders, this approach will increasingly encounter cognizable sources of Indigenous laws from which to draw. My suggestion is that dialogue between these projects—that is, the rigorous cross-pollination of legal orders within the Canadian criminal justice system and the resurgence of Indigenous laws—would engender greater acceptance of Indigenous legal systems within the judiciary writ large, and move Indigenous and Canadian societies closer to parallel and relational, rather than dominating and subservient, justice systems.

The lessons from *Itturiligaq* and *Ippak* reveal a pattern of analytical groundwork that must occur at the outset of judicial analysis. The first step, establishing ethical space, dictates whether the next step, harmonization, results in principled synthesis or deference. *Itturiligaq* saw Bychok J invoke IQ without attribution and with a dubious conflation between incarceration and banishment. Conversely, *Ippak* saw Berger JA identify these tensions to justify his deference to Indigenous protocols. In Jeremy Webber's article theorizing the relationship between societies and their legal orders, he states: "Identifying elements of connection and of difference across indigenous and non-indigenous legal orders equips us more adequately to understand how those orders might

147. See *ibid* at para 106. Recall that Berger JA wrote concurring reasons. The majority reached the same result, though they did not undertake the same method of applying Inuit law alongside Canadian law.

148. See e.g. Friedland, *supra* note 92.

productively relate to one another."[149] On this advice, judges must first interrogate the symmetries and incommensurabilities across legal orders.

Until representation of Indigenous judges trained in their respective legal traditions improves, judges must account for their interpretive limitations. As Webber notes, "[t]he process of reasoning across legal languages is not easily accomplished. . . . Our very capacity to evaluate strengths and weaknesses is inevitably constrained by our vastly greater comfort with and mastery of the scheme in which we have come to form our own opinions."[150] Reasoning across legal orders thus occurs most capably when Indigenous laws have been willingly codified by Indigenous knowledge holders. Where judges reach interpretive limitations or note conflicts, judges must, at the harmonization stage, defer to Indigenous laws and processes rather than contort them to fit Canadian legal principles.[151] In *Ippak*, this involved assigning determinative weight to alternative justice procedures and integrating Inuit justice values into the *Grant* analysis. *Itturiligaq* presents a more difficult scenario. Inuit *maligait* and sentencing law may coexist insofar as individualization and judicial restraint prevail, but denunciation, deterrence, and imprisonment strike against the apparent restorative goals of Inuit justice.

This presents a problem: either courts apply Canadian law and disregard Indigenous laws, or they cannot apply Canadian law, something *stare decisis* typically cautions against. Here we reach the limits of the criminal justice system's capacity to balance and apply both legal orders concurrently. Irreconcilable incommensurabilities, particularly in sentencing, require deference at the harmonization stage of the analysis, but where no alternatives exist, they ultimately require institutional and legislative reform. Advances made by the Federal Court show that institutional reform may emanate within courts, but legislative reform obviously exceeds the judicial role. According to Webber, where power asymmetries exist, which would include the power to incarcerate, "[d]ifferences of legal culture . . . suggest an ethic that should temper

149. Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 at 593 [Webber, "Grammar of Customary Law"].

150. *Ibid* at 625.

151. Often Indigenous laws appear in stories or legends incorporating sacred or mythic elements, making it even more difficult to compare their principles to Canadian law from an analytical perspective. See e.g. Neil Christopher, Noel McDermott & Louise Flaherty, eds, *Unikkaaqtuat: An Introduction to Traditional Inuit Myths and Legends* (Toronto: Inhabit Media, 2011); Webber, "Grammar of Customary Law", *supra* note 149 (observing this quality, but also noting that constitutional law in western legal orders adopts its own mythical narratives, including the "two founding peoples" narrative, i.e., the French and English at 612). Friedland, through her work with Napoleon, has developed a useful methodology for identifying legal principles within Indigenous stories. This involves: (1) identifying historical rationality in the

interactions across the normative divide."[152] Jessica Black, a Nunavummiut who conducted extensive research on criminal justice reform in Nunavut, suggests more emphasis and reliance on community justice committees, which offer "tremendous opportunity to center Inuit values within the heart of criminal justice".[153] Unfortunately, Black also finds inadequate interest, investment, and dedication to making these levers work to their full potential.[154]

In summary, pluralism between Indigenous laws and Canadian law deserves our attention because, if done right, it facilitates parallel rather than oppressive justice systems. Even when imperfect, judicial reasoning across legal orders can result in more satisfactory inter-societal outcomes. Greater plurality requires clarifying the judicial role. Rather than avoid opportunities for internormativity, courts should seek them out. If the relevant legal order offers textualized principles, judges ought to engage with them by, first, identifying their similarities and differences with Canadian law to establish ethical space, and, second, harmonizing the two through concurrent application where they coexist or deferring to Indigenous norms where they conflict. Interpretive and cross-cultural difficulties will occur, but this should not deter good faith and rigorous efforts to engage in pluralist reasoning. External efforts to increase access to Indigenous laws lessens these difficulties, which necessarily involves deliberation within communities to determine whether and how laws should be asserted in this format. Where Indigenous and Canadian laws conflict, or indeed wherever preferable alternatives exist, institutional innovations can divert processes to support deferential reasoning. Where no alternative routes exist, legislative reform beyond the purview of the judiciary is needed.

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actions of a community applying their traditional laws; (2) analyzing contemporary application of present-tense legal principles; (3) focusing on social responses to universal human problems; and (4) bracketing supernatural concepts. See Friedland, *supra* note 92 at 41. For a more detailed discussion of their methodology, see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16.

152. Webber, "Grammar of Customary Law", *supra* note 149 at 626.

153. Black, *supra* note 15 at 37.

154. See *ibid*. Black finds that the community justice committees are highly regarded, but generally underfunded, underutilized, and not well recognized outside of the communities (*ibid*). Admittedly, improving the effectiveness of justice alternatives is likely very difficult for a range of complex and interrelated reasons. As Mary-Ellen Turpel-Lafond J writes, extrajudicially, "[t]he mechanics of how to innovate within a justice system . . . are not well known. Further, there is no clear consensus on how effective justice [system] reform happens, except that 'communities' are to be engaged at various levels in the political and legal order." See The Honourable ME Turpel-Lafond, "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68:2 Sask L Rev 293 at 294. She does, however, conclude on a positive note: "[I]nstitutions that want to change can" (*ibid* at 299).

Conclusion

This paper has argued that judges can reason across legal orders to achieve outcomes better reflecting Indigenous responses to crime. In doing so, opportunities arise for judges to apply Canadian and Indigenous laws concurrently in mutually reinforcing ways. This no doubt strikes some as unduly optimistic. Most judges hesitate to introduce pluralist approaches to an area characterized by technocratic and punitive criminal justice administration.[155] Few take this risk, and when they do, they stray from the well-worn judicial path. Sparse guidance underpins this reluctance, in part. The analytical framework I have described here attempts to assist by unpacking the complex dynamics driving Indigenous laws' erasure and building a clear framework for courts to consider. It finds optimism not in looking around the courtroom today, but in focusing on several positive trends currently afoot and imagining possibilities for relational justice. Human psychology also impedes. Very serious and violent crimes seem to inescapably instill concerns over perceived "lighter" sentences.[156] Benjamin Berger insightfully offers that while "[t]he lives and experiences of offenders will always remain foreign to the law that is tasked with punishing them", sentencing should focus on the quality of punishment to account for pain, loss, estrangement, and alienation experienced by those convicted.[157] These experiences also drive—thanks to colonialism, residential schools, and intergenerational trauma—violence within Indigenous communities as well. Criminal law should also take into account how pain, trauma, and cultural alienation drive violence in the first place. Only by appreciating these dynamics will the psychological tendency to equate incarceration with effective denunciation and deterrence in Indigenous communities subside. Central to developing relational justice is an understanding of how the criminal law itself compounds these experiences.

I also responded to concerns throughout this paper relating to fundamental tensions between sentencing and Indigenous responses to wrongful behaviour, the competence of judges in navigating cross-cultural intellectual inquiries, and

155. Referring to sentencing and judicial application of *Ipeelee*, Denis-Boileau and Sylvestre observe: "From an empirical point of view, however, the majority of trial and appellate judges are especially reluctant, if not resistant, to exploit its innovative potential". See Denis-Boileau & Sylvestre, *supra* note 6 at 562.

156. Still referring to sentencing, Denis-Boileau and Sylvestre's empirical analysis finds that "the concept of the gravity of the offence is by far what prevents judges from giving full effect to the prescriptions of the Supreme Court". See *ibid* at 596.

157. Berger, "Salience of Pain and Hope", *supra* note 63 at 361. See also Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2019) 69:1 UTLJ 85.

the difficulties in realizing the institutional and legislative reforms I propose. These concerns all temper optimism for immediate realities. But Indigenous laws' revitalization continues to gain momentum, and a new cadre of lawyers specifically trained in Indigenous legal traditions will soon graduate from the University of Victoria.[158] These lawyers will incorporate Indigenous legal principles into court submissions more effectively in ways courts can understand, and these lawyers will also be well-positioned to increase and strengthen Indigenous peoples' courts. My argument seeks not to obviate the need for Indigenous peoples' courts, but only to conceptualize how Canadian courts might relate to Indigenous institutions as they increase their capacity and jurisdiction in the manner envisioned by Angelique EagleWoman in her article advocating for greater capacity in Indigenous peoples' courts.[159] From their innovations and errors, several justices of the Nunavut Court of Justice and the Nunavut Court of Appeal have provided useful examples courts can learn from. These judgments tell us that *Gladue* and *Charter* analysis can effectively balance inter-societal approaches to criminal law. They also pinpoint the limitations of this exercise, which in turn reveals several key sites for deference and diversion to Indigenous justice.

158. See "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" (last visited 11 February 2020), online: *University of Victoria Law* <www.uvic.ca/law/about/indigenous/jid/index.php>.

159. See EagleWoman, *supra* note 23.