



THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

On Matters of Indigenous Justice in British Columbia

Submitted to: **Attorney General of BC, Ministry of
Indigenous Relations & Reconciliation, and
Ministry of Children & Family Development**

Submitted by: **Canadian Bar Association, BC Branch**

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CBABC

CBABC represents over 7000 lawyers, students, and judges in BC as a branch of the Canadian Bar Association (“CBA”), the largest national, legal professional association. Members of CBABC are dedicated to protecting the rule of law, the independence of the judiciary and the Bar, and improving laws, justice and legal systems and access to justice. We believe in equality, diversity and inclusiveness in the profession and in justice and legal systems, and are committed to the process of reconciliation with Indigenous peoples.

Through a Board of Directors, 70 Sections, 20 committees and working groups, and member service programs, CBABC:

- improves and promotes the knowledge, skills, ethical standards and well-being of members of the legal profession;
- provides opportunities for members to connect and contribute to the legal community;
- advocates on behalf of the profession based on members’ professional, front-line experience.

This submission was prepared by members of the CBABC Indigenous Justice Advocacy Committee (“Committee”), which was established to monitor, develop, and make recommendations with respect to Indigenous justice issues including the following:

- implementation of UNDRIP into provincial law;
- BC First Nations Justice Strategy;
- restorative justice initiatives;
- Indigenous Courts;
- expansion of legal aid services;
- child protection reform;
- lack of technology and lawyers in rural communities;
- enhanced cultural competence among all justice system participants; and
- Indigenous-specific victim services.

This Committee reached its recommendations based on discussions with its members and with other members working in this field. CBABC members and the members of this Committee include Indigenous and non-Indigenous lawyers. It includes lawyers working in the field of Aboriginal law, criminal justice, child protection, and constitutional and human rights law, among many others. CBABC consults with the First Nations Justice Council, Métis Nation BC, and other Indigenous organizations. CBABC is not resourced to consult broadly with Indigenous communities, and relies on reports of members and external organizations who have experience and knowledge from broader consultations.

Members of the Committee include:

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Acknowledgment

The recent recovery of the remains of 215 children at the former Kamloops Indian Residential School is a devastating reminder of what we each must undertake to know the truth of Indigenous peoples in Canada and work towards reconciliation. The Canadian Bar Association, BC Branch mourns the lives of these children, and honours each child, their families, their communities, and all who are affected by the trauma inflicted by the residential schools in Canada.

CBABC acknowledges with sorrow and regret the significant harm done to Indigenous peoples, families, and communities as a result of the role the legal profession played in the implementation and enforcement of assimilationist government laws and policies.

CBABC is committed to responding meaningfully to the Calls to Action of the Truth and Reconciliation Commission and the Calls for Justice of the Murdered and Missing Indigenous Women and Girls Inquiry. The over-representation of Indigenous children in the child protection system and Indigenous peoples in the criminal justice system is ongoing and must be addressed. We offer educational programs, advocate for policy and law reform to implement DRIPA and the First Nations Justice Strategy, and have made recommendations for changes to the *Child, Family & Community Service Act* and the *Police Act*.

We recognize this is only the start of working to regain the trust of Indigenous peoples. We share space with Indigenous leaders and listen to their recommendations for moving forward with meaningful reconciliation. As we all engage in conversations about this recent recovery and the actions that are required to support Indigenous peoples in speaking their truths, we are mindful that dialogue about Indian Residential Schools can be re-traumatizing.

For those seeking a way to assist survivors and to support education about the residential schools, please consider a donation to the [Indian Residential School Survivors Society \(IRSSS\)](#).

Executive Summary

CBABC requests that the Province of British Columbia (the “Province”) commit to meaningful change to address systemic inequality. The Province committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) and ensuring B.C. laws are made consistent with UNDRIP. More than a year after the passage of the *Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”), the legislation that solidifies this commitment, there has been little from the Province. Therefore, it is imperative that the Province move forward with the process of implementing UNDRIP, provide a roadmap to Indigenous groups as to the steps to be taken in the process, and provide meaningful and ongoing opportunities for consultation and cooperation with Indigenous peoples.

The Province worked with the First Nations Justice Council to produce the First Nations Justice Strategy (the “Strategy”), which is a comprehensive plan to transform the criminal justice system, as well as the relationship between Indigenous peoples and that system. The Province must provide adequate funding to ensure that the objectives of the Strategy are met, and must be clear and transparent regarding the sources of that funding. CBABC fully supports the recommendations found in the Strategy, and requests that the Province implement them to benefit all Indigenous peoples in the province.

The overrepresentation of Indigenous peoples in our justice system is a problem of great concern to the CBABC. The scope of this problem is made clear thanks to many studies and statistics that have addressed the issue. As a result, there is a growing awareness of the need for restorative justice that is better suited for Indigenous peoples than those mechanisms found in the traditional justice system. The Province must work with Indigenous groups and other stakeholders in the criminal justice system to build upon the existing restorative justice framework to build new and better programs that will meet the needs of Indigenous peoples, and are easily accessible for Indigenous communities across the province.

Three major obstacles for accessing the justice system for Indigenous communities in rural areas of the province are a lack of access to high-speed internet, a lack of access to a computer, and a lack of access to a lawyer. One crucial reason for the lack of lawyers in rural areas is that many law school graduates

have incurred massive student loan debt, which drives these lawyers to seek higher salaries found mainly in firms in urban areas. As a matter of access to justice, CBABC calls on the Province to provide high-speed internet and computers to rural communities in the Province, as well as to encourage lawyers to practice in rural communities by implementing a student loan forgiveness program.

As Indigenous peoples are overrepresented in the justice system and are more likely to have their family split up due to government intervention, they are more likely than non-Indigenous peoples to rely on legal aid services. However, a lack of legal aid funding has resulted in a lack of availability both in terms of staff and services provided. CBABC calls on the Province to increase funding to legal aid to ensure that Indigenous peoples in BC have access to the services they need.

Indigenous children are overrepresented in the child welfare system. In 2018, changes were made to the *Children, Families and Community Services Act* (the “CFCSA”), the legislation dealing with child protection matters. However, these changes have been insufficient in addressing this problem. CBABC recommends the Province completely overhaul the child protection system and the CFCSA, and make dealing with the overrepresentation of Indigenous children a top priority. These changes should be made after extensive consultation with Indigenous peoples.

There have been calls for all lawyers in BC to receive cultural competency training, and while there have been optional courses available for those working in the justice system, the Law Society of British Columbia announced that all lawyers in B.C. will undergo mandatory training starting in 2021. However, the cultural competency training is inconsistent among the other professions within the justice system, and there is a lack of readily available public information regarding the mandatory training that has been implemented for these professions. CBABC calls on the Province to ensure all actors in the justice system receive mandatory cultural competency training, and that the details of such training be readily available to the public to ensure greater transparency.

CBABC believes that much work is needed to ensure the justice system is working for Indigenous peoples in B.C. This submission outlines our recommendation for what is needed to help achieve that objective. Now is the time for these important changes to be made.

1. Moving Forward with DRIPA

Introduction

UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the UN General Assembly in September 2007.¹ Canada, along with three other states, voted against its adoption. In 2010, Canada reversed its position, but officially objected to UNDRIP until May 2016, when the newly elected Liberal government officially removed Canada's objector status.

The inherent human rights of Indigenous peoples expressed in UNDRIP affirm Indigenous humanity, self-determination, and traditions, and provide for such recognition by colonizing nations. The substantive Articles of UNDRIP set out fundamental human rights of Indigenous peoples, both collective and individual. They also amplify existing treaty rights and agreements, while laying the framework for new relations with states.²

Priority UNDRIP Articles

To strengthen Indigenous legal institutions and the recognition of Indigenous laws and legal systems, certain Articles are especially relevant with respect to how the adoption of UNDRIP should impact legislation (and legal culture) in British Columbia:

¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007

² James (Sa'ke'j) Youngblood Henderson, "The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous (Special Report)*, Centre for International Governance Innovation, 2017, Online at: <https://www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws>

- “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” (Article 3)
- “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” (Article 4)
- “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” (Article 5)
- “States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.” (Article 27)
- “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights.” (Article 40)

Provincial UNDRIP Legislation

In November 2019, the Province passed the *Declaration on the Rights of Indigenous Peoples Act*,³ which is essentially a legislated roadmap toward implementing UNDRIP. In their online announcement of DRIPA, the Province stated that the aim of DRIPA is to “create a path forward that respects the human rights of Indigenous peoples while introducing better transparency and predictability in the work we do together”.⁴

³ *Declaration on the Rights of Indigenous Peoples*, SBC 2019, c 44.

⁴ Province of British Columbia, “B.C. Declaration of the Rights of Indigenous Peoples Act”, Online at: <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

Through the adoption of DRIPA, UNDRIP has now entered the legal landscape in BC. Its somewhat complex status under international law should give way to its role as a matter of domestic law.

DRIPA is a starting point rather than an end. The stated purposes of DRIPA are found in section 2, and are:

- (a) to affirm the application of UNDRIP to the laws of BC;
- (b) to contribute to the implementation of UNDRIP; and
- (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.⁵

Under section 3 of DRIPA, the Province must take all measures necessary to ensure B.C.'s laws are consistent with UNDRIP⁶. Section 4 states that the Province must prepare and implement an action plan to achieve the objectives of UNDRIP.⁷

The BC First Nations Justice Strategy, which is an agreement between the Province and the BC First Nations Justice Council (“BCFNJC”), disclosed to the public in March of 2020, included Strategy 8, “to undertake a joint review of legislation to align laws with [UNDRIP] as required by DRIPA, and ensure space for the recognition and operation of First Nations justice systems and institutions”.⁸

In June 2021, the Province released a draft five-year Action Plan for the implementation of DRIPA (the “Action Plan”) as part of their consultation.⁹ The Action Plan establishes a number of actions that the Province plans to undertake between 2021 and 2026, and is organized into the following four themes:

- Self-determination and inherent right of self-government,
- Title and rights of Indigenous peoples,

⁵ *Declaration on the Rights of Indigenous Peoples Act*, *supra*, s 2.

⁶ *Supra*, s 3.

⁷ *Supra*, s. 4.

⁸ BC First Nations Justice Council, “BC First Nations Justice Strategy”, February 2020, p. 35, Online at: https://news.gov.bc.ca/files/First_Nations_Justice_Strategy_Feb_2020.pdf.

⁹ Province of British Columbia, Ministry of Indigenous Relations and Reconciliation, “Declaration on the Rights of Indigenous Peoples Act: Draft Action Plan” (“Action Plan”), Online at < https://engage.gov.bc.ca/app/uploads/sites/667/2021/06/Declaration_Act_-_Draft_Action_Plan_for_consultation.pdf>.

- Ending Indigenous-specific racism and discrimination, and
- Social, cultural and economic well-being.

Each section is introduced by “statements of [g]oals that will be achieved through implementation of [UNDRIP] and [o]utcomes that will demonstrate that the objectives of [UNDRIP] are being successfully met throughout B.C.”¹⁰ Each action also mentions the ministry or ministries responsible for leading the work, and there will be an annual report in consultation and cooperation with Indigenous peoples that will be released publicly and will report on the progress of the Action Plan.

However, the Action Plan does not specify how the Province will ensure the laws of BC are consistent with UNDRIP, as required under section 3 of DRIPA.

In the *Declaration on the Rights of Indigenous Peoples Act: 2020/2021 Annual Report* (“2020/2021 Annual Report”), the Province detailed the consultation it has done with Indigenous groups to finalize the Action Plan, and the steps it has taken to implement UNDRIP. However, it contains very few details regarding the steps the Province will take to ensure the laws of BC are consistent with UNDRIP.

Federal UNDRIP Legislation

On December 3, 2020, Department of Justice Canada (the “DOJ”) announced the introduction of Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, which “proposes to affirm [UNDRIP] as a universal international human rights instrument with application in Canadian law”.¹¹ It would “require the Government of Canada, in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure that the laws of Canada are consistent with the rights of Indigenous peoples set out in [UNDRIP], as well as to develop an action plan to achieve its objectives”.¹² According to the DOJ, the bill has the objective of “protecting and promoting the rights of Indigenous peoples including the rights to equality and non-discrimination, self-government and the inherent right

¹⁰ *Ibid*, at p. 5.

¹¹ Department of Justice Canada, New release, Online at: <https://www.canada.ca/en/department-justice/news/2020/12/government-of-canada-introduces-legislation-respecting-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>

¹² *Ibid*.

to self-determination”.¹³ The bill received Royal Assent on June 21, 2021, and has now become law in Canada.

Issues

In 2017’s *An Agenda for Justice*, CBABC called on the provincial government to “[c]ommit to the recognition and implementation of Aboriginal justice systems in a manner consistent with treaty and constitutional obligations, as well as [UNDRIP]”.¹⁴ Therefore, CBABC applauded the introduction and passing of DRIPA. However, as CBABC points out in the 2021 *Agenda for Justice*, DRIPA must be more than a simple acknowledgement, and “must be implemented with clear opportunities for consultation and involvement”.¹⁵

While the Action Plan is a good starting point, the timeline is insufficiently detailed to give Indigenous groups in B.C. a clear understanding of when the Province is looking to implement the specific actions in their Action Plan. Nor does the Action Plan specify the Province’s priorities in terms of reform within the areas it has identified. This specificity is essential for Indigenous groups who want to assist or contribute to this process, and the involvement of Indigenous groups in this process is essential for DRIPA to achieve its stated goals and objectives. Furthermore, a timeframe for the specific actions will help determine whether the Province is meeting its targets in the Action Plan, and will allow it make adjustments early on in the process if it is not meeting its targets. A broad timeline without specific dates for each action to be completed does not allow for these early adjustments. The 2020/2021 Annual Report details some of the initial steps taken to implement the actions of the Action Plan, but it also does not specify a timeline when the rest of the steps mentioned in the Action Plan will be completed.

¹³ *Ibid.*

¹⁴ Canadian Bar Association, British Columbia Branch, “An Agenda for Justice: Platform considerations presented by the Canadian Bar Association”, February, 2017, Online at: https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/A4J/An-Agenda-For-Justice-2017.pdf.

¹⁵ Canadian Bar Association, British Columbia Branch, “An Agenda for Justice 2021”, at p. 10, Online at: <https://www.cbabc.org/Our-Work/Agenda-for-Justice>

Importantly, there are no measures to further section 3 of DRIPA in the Action Plan, which is a major component of the DRIPA legislation that aims to ensure the laws of B.C. are consistent with UNDRIP. The Action Plan simply states that the section 3 measures are separate from the initiatives of the Action Plan. The 2020/2021 Annual Report mention the Province's intention to create a dedicated secretariat to coordinate the government's work on reconciliation, which will include providing oversight and guidance on the alignment of laws with UNDRIP. It also mentioned the work being done to modernize the *Emergency Program Act*. However, those are the only two mentions of the plans to further section 3. It is imperative that legislation that impacts Indigenous peoples be reviewed to ensure it is line with UNDRIP.

Implementing UNDRIP requires structural legislative change. One major component of DRIPA was to do an extensive review of current legislation to make sure that meaningful legal reform occurs. After more than a year since DRIPA was introduced, it is unclear what is being done to bring provincial laws into harmony with UNDRIP.

While the Action Plan states dispute-resolution outside of the existing court system as one of its desired outcomes of the Action Plan¹⁶, there is little in the way of specifics in terms of what that dispute-resolution mechanism would look like, or even the steps needed to create such a mechanism. The 2020/2021 Annual Report does not even mention this topic. A dispute-resolution mechanism is crucial to implement Articles 25 and 40 of UNDRIP into the laws of B.C., which is why it is necessary for the Province to work with Indigenous groups to implement a dispute-resolution system that is supported by Indigenous peoples.

Recommendations

CBABC recommends that the Province immediately move forward with the implementation of section 3 of DRIPA, and take all necessary measures to ensure the laws of B.C. are consistent with UNDRIP, in consultation and cooperation with Indigenous peoples in BC.

¹⁶ Province of British Columbia, p. 7.

CBABC recommends that the Province provide specific dates as to when each of the items in the Action Plan must be completed, and that these dates must be set based on consultation with Indigenous peoples in B.C.

CBABC recommends that the Province detail specific steps to be taken to implement a dispute-resolution procedure for any potential conflicts or disputes between Indigenous peoples and the Province, as well as any potential infringement of Indigenous rights by the Province. This procedure must be in accordance with Article 40 of UNDRIP, and any steps taken towards implementing such a procedure must be done in consultation and cooperation with Indigenous peoples in B.C.

Given the myriad issues raised by the implementation of UNDRIP, it is beyond the scope of this paper to address all the potential areas of law reform. However, consistent with the Strategy, CBABC recognizes the transformational importance of the implementation of Articles 5, 27, and 40 of UNDRIP, and recommends that these Articles be prioritized.

CBABC will continue to monitor and provide recommendations on the implementation of other areas of UNDRIP in the future.

2. BC First Nations Justice Strategy

Introduction

The BC First Nations Justice Strategy is a comprehensive plan to “transform the criminal justice system and the relationship between Indigenous peoples and the criminal justice system”.¹⁷ It is also a plan to restore First Nation legal traditions and structures. It is a historic agreement that will require significant infrastructure for its implementation.

¹⁷ BC First Nations Justice Council, *ibid*, p. 7.

The Strategy is based upon the expectation of “an integrative, holistic, and comprehensive approach that addresses all forms of interaction between First Nations and the justice system”.¹⁸ The goal of the Strategy is to “achieve a 180-degree shift from the current reality of First Nations people being overrepresented in all stages of interaction with the justice system, while at the same time being underrepresented as actors with roles and responsibilities within the system”. It details how the justice system is not properly serving Indigenous peoples in the province, and it includes 42 actions needed to achieve the following objectives:

- reducing the number of First Nations people who become involved with the criminal justice system,
- improving the experience of those who do,
- increasing the number of First Nations people working within the justice system, and
- supporting First Nations to restore their justice systems and structures.

Recommendations

Given the urgent need for change and reconciliation, CBABC recommends that the Province provide sufficient funding and resources to fully implement the Strategy, including transparently reporting on the magnitude and sources of funding to engender trust in the Province in their commitment to changing the lives of Indigenous peoples in a meaningful manner.

CBABC also acknowledges that there is work to be done with Métis Nation BC and other Indigenous groups to address the experience of Indigenous peoples, other than First Nations, within the criminal justice system, and we wish to see those efforts move forward as well.

¹⁸ *Ibid*, p. 3.

3. Restorative Justice

Introduction

Indigenous peoples are significantly over-represented in Canada's criminal justice system, both as criminals convicted of crimes, and as people harmed by crime. On January 21, 2020, the Correctional Investigator of Canada, Dr. Ivan Zinger, issued a news release and supporting information regarding the ongoing Indigenization of Canadian prisons.¹⁹ Dr. Zinger showed that Indigenous inmates now make up over 30% of the federal prison population. His statement suggests that surpassing the 30% mark indicates a deepening Indigenization of Canada's correctional system. Dr. Zinger referred to these trends as "disturbing and entrenched imbalances," noting that the numbers are even more troubling for Indigenous women, who now account for 42% of the women inmate population in Canada. According to the Province, although First Nations, Inuit and Métis people are only 5.9% of the adult population of British Columbia, they are 29.7% of the adult population in correctional centres and 25.8% of people under community supervision.²⁰

One measure currently used to alleviate this problem is restorative justice. While the value of restorative justice systems has been well documented, they remain a fringe part of the criminal justice system. Restorative justice is an approach that provides an expanded set of tools that complement, and can work within, the traditional justice system. With a primary focus on those harmed, as well as community needs, it recognizes that, while crime impacts society as a whole, it is primarily an offence against people. Therefore, restorative justice involves the person harmed, the offender, and their communities, and strives for the outcome that best meets the needs of those that have been harmed, and stresses addressing the underlying causes of the act. Remedial options under restorative justice may include restitution, counselling, apology letters, and/or community services, but can also include other creative solutions determined by key stakeholders.

¹⁹ Office of the Correctional Investigator, "Indigenous peoples in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge", Online at: <https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx>

²⁰ Province of British Columbia, "Corrections and Aboriginal Justice", Online at: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/corrections/reducing-reoffending/aboriginal-justice>

In BC, there are 30 Indigenous justice programs that are jointly funded by the federal Department of Justice and BC Corrections. However, there has been little to no increase to the funding allotment to these programs in 20 years, so there have no additional programs added since the inception of these programs.

In several jurisdictions, including in B.C., there has been an effort to develop specialized courts designed to respond to the needs of Indigenous peoples and communities. In BC, those specialized courts include Indigenous Courts, as well as Aboriginal Family Healing Court Conferences.

In BC, the Indigenous Courts are administered by the Provincial Court.

The Provincial Court describes the Indigenous Courts as follows:

“They are sentencing courts that provide support and healing to assist in rehabilitation, and to reduce recidivism while also acknowledging and repairing the harm done to victims and the community. Their focus is collaborative and holistic, recognizing the unique circumstances of Indigenous offenders within the framework of existing laws.”²¹

Indigenous Courts are held in the seven communities within BC:

- New Westminster First Nations Court (opened November 2006),
- North Vancouver Chet wa nexwníw ta S7ekw’í7tel Indigenous Court (opened February 2012, serves Whistler, Squamish and the North Shore),
- Kamloops Cknucwentn First Nations Sentencing Court (opened March 2013),
- Duncan First Nations Court (opened May 2013),
- Nicola Valley Indigenous Court (opened in Merritt, October 2017),
- Prince George Indigenous Court (opened April 2018),

²¹ Provincial Court of British Columbia, “Specialized Courts”, Online at: <https://www.provincialcourt.bc.ca/about-the-court/specialized-courts>

- Williams Lake Indigenous Court (opened December 2020), and Hazelton Indigenous Court (opened June 2021)²²

There have also recently been applications to open Indigenous Courts in Port Hardy and Lilloet.

Saskatchewan was the first province to adopt restorative justice measures in 1992, its primary focus being the use of sentencing circles in provincial courts throughout the province; Manitoba quickly followed suit. Indigenous Courts have also been established in other jurisdictions within Canada, including in Alberta and Ontario. The Indigenous Court in Calgary opened in September 2019. The physical space is modelled after a teepee.

In BC, the Indigenous Courts are tailored to the needs of the community, and hearings are often held with offenders sitting in a circle with the judge, prosecutor, defence counsel, Elders and support people. Often an element of the sentence imposed includes the creation and implementation of a healing plan for the offender.

One measure used to try to reduce the overrepresentation of Indigenous peoples in the criminal justice system are Gladue reports. Counsel for Indigenous offenders have a duty to bring individualized information about a client's life circumstances, history of trauma, and experiences of systemic racism before the court in the form of a Gladue report. Both Crown and defense can order a report, and they are used to help judges make informed decisions regarding the individual. One of the aims of Gladue report is to create a less adversarial process, so that the reports are not viewed as a tool for the defence, but rather are to be utilized by all judicial actors. Gladue reports are used in the following types of hearings:

- bail hearings,
- sentencing hearings,
- reviews in Indigenous Courts,
- dangerous offender hearings,

²² *Ibid.*

- long term offender hearings, and
- not criminally responsible hearings.

On September 6, 2020, it was announced that Indigenous justice centres had been recently opened in Merritt, Prince George and Prince Rupert.²³ The opening of these centres is a result of the Strategy. While each centre offers unique support tailored to the local Indigenous community, individuals are able to access:

- legal advice and representation for criminal and child protection matters;
- advocacy and support in dealing with agencies such as the police and Ministry of Children and Family Development;
- referrals to relevant agencies and services such as counselling or employment support;
- information towards better transitions from jail and integration into the community; and
- restorative justice options to better support and address the needs of those impacted by a crime.

Starting in 2020, there was a plan to open three new Indigenous justice centres every five years, with each centre having a lawyer and someone to oversee Gladue reports, but the status of that goal has been unclear because of the Covid-19 pandemic. The BCFNJC and the Law Foundation of BC signed an agreement to open a community legal clinic in the Prince George Indigenous justice centre to provide legal services to all low-income people, both Indigenous and non-Indigenous, and began hiring staff in June 2021.

On October 5, 2021, the opening of a new Virtual Indigenous Justice Centre (“VIJC”) was announced. The service offered by the VIJC include:

- providing legal advice and representation to Indigenous clients in rural and remote communities for family and criminal court cases who would not otherwise have access to support, or for

²³ Province of British Columbia, New Release, “New centres improving access to justice for Indigenous Peoples”, Online at: <https://news.gov.bc.ca/releases/2020AG0056-001672> .

clients in other legal proceedings that could reasonably lead to imprisonment or a child becoming in need of protection;

- working with the court, where appropriate, to divert legal matters from the formal court system to less intrusive measures, such as alternative dispute resolution processes, mediation, and restorative justice processes; and
- helping Indigenous peoples access the legal, social, housing, transportation, and health and wellness supports.

The Native Courtworker and Counselling Association of British Columbia is a joint provincial and federal organization to help Indigenous individuals accused of crimes access fair and culturally sensitive treatment by the justice system. Native Courtworkers aim to intervene with the Indigenous accused at the earliest possible stage of the criminal process and provide information and support. The courtworker can assist with communicating with justice system personnel, obtaining counsel, and can even speak directly to the court about the culture and socioeconomic conditions of the accused's community.

The Strategy itself is part of the Province's effort to deal with the overrepresentation of Indigenous peoples in the criminal justice system, and is a result of the Province's increased engagement with Indigenous organizations and communities.

It is useful to look at other pilot projects from other provinces to see if such program could work in BC. One such program is a program started by the Winnipeg Police Service in late 2018.²⁴ This program deals solely with intimate partner violence cases. The offenders are directed to the program, which is run by Manitoba Justice's restorative justice program, by Winnipeg police before charges are laid. The offender must first accept responsibility, and the victim must agree to the program. To qualify for the program, offenders must not have any domestic violence charges in the past five years, and no charges involving the same victim. Those charged with aggravated assault, firearm or sexual offences are not eligible. The goal of such a program is rehabilitation through reconciliation with victims. Police do not pursue charges

²⁴ Barghout, Caroline, and Joanne Levasseur, "They just want the violence to end': Restorative justice programs aim to stop intimate partner abuse", *CBC*, March 6, 2020, Online at: <<https://www.cbc.ca/news/canada/manitoba/winnipeg-police-restorative-justice-partner-violence-1.5478990>>.

to those who successfully complete the program. With this program, Winnipeg became the first police agency in Canada to direct offenders to a restorative justice program before charges are laid. The program was started to limit the approximately 16,000 calls involving intimate partner violence that Winnipeg Police Service receives every year that result in approximately 2,000 yearly arrests.

While this program is not specifically tailored to Indigenous peoples, any program designed to limit intimate partner violence is especially relevant for Indigenous women, as they are especially susceptible to intimate partner violence. Canadian statistics show that Indigenous women 15 years and older are 3.5 times more likely to experience violence than non-Indigenous women, and rates of spousal assault against Indigenous women are more than three times higher than those against non-Indigenous women.²⁵

While a lot of the focus of restorative justice initiatives deals with Indigenous offenders and their experience, it is also worth looking at the experiences of Indigenous victims of crime. A recent report completed by Just Outcomes Canada for Justice Canada takes a Canada-wide look at the experiences of victims of crime, including Indigenous victims, with restorative justice.²⁶ The report was a result of a series of listening sessions conducted with Indigenous and non-Indigenous crime victims across Canada. The authors of the report found that Indigenous crime victims involved in the sessions stated that successful restorative justice measures included involvement in community and community-based ceremonial practices in addressing wrongdoing.²⁷ Other Indigenous participants discussed the importance of having maximum choice for traditional ceremonies or rituals, such as a sweat lodge or a smudge.²⁸ There was also concern that restorative justice services were not available in every Indigenous community, especially for those who prefer having maximum choice.²⁹

²⁵ Native Women's Association of Canada, "Fact Sheet: Violence Against Aboriginal Women", Online at: <https://www.nwac.ca/wp-content/uploads/2015/05/Fact_Sheet_Violence_Against_Aboriginal_Women.pdf>.

²⁶ Just Outcomes, "Crime Victims' of Restorative Justice: A Listening Project", May 2019, Online at: <https://www.justice.gc.ca/eng/rp-pr/jr/cverj-vvpci/cverj-vvpci.pdf>.

²⁷ *Ibid*, p. 19.

²⁸ *Ibid*, p. 29.

²⁹ *Ibid*, p. 36.

Issues

Indigenous Courts are viewed as a way of reconciling the existing system of laws with restorative justice, and Indigenous cultural practices and understandings of justice. However, as they are currently configured, Indigenous Courts do not go so far as to expressly acknowledge or apply Indigenous laws. Nor, as a specialized branch of the B.C. Provincial Court, do they strengthen Indigenous justice institutions and the self-governance of Indigenous peoples.

Indigenous courts are also limited to criminal justice sentencing matters, and Indigenous individuals dealing with other aspects of the court system, such as when dealing with issues around family law, do not have access to a court process tailored to Indigenous peoples

The decision of whether to refer a particular offender to the Indigenous Courts for sentencing is viewed as a matter of Crown discretion, dependent on the nature and severity of the crime and the circumstances of the offender. Acknowledgement of guilt is a prerequisite for participation.

There has been concern from lawyers representing Indigenous clients that Indigenous Court is only an option if their client pleads guilty or is found guilty. As Jamie Maclaren, QC points out, some lawyers believe that stipulation means that Indigenous Courts actually “serve to perpetuate colonial injustices.”³⁰ Maclaren notes that he was made aware of examples where Indigenous clients would plead guilty solely to access the option of Indigenous Court.³¹ Therefore, it is imperative that options be made available to Indigenous peoples that are not premised on state involvement or corrections.

Recommendations

CBABC calls on the Province to increase access to restorative justice programs for Indigenous peoples (particularly for youth and first-time offenders), through:

³⁰ Jamie Maclaren, QC, “Roads to Revival: An External Review of Legal Aid Service Delivery in British Columbia”, Online at: https://news.gov.bc.ca/files/Roads_to_Revival-Maclaren_Legal_Aid_Review-25FEB19.pdf, January 2019, p. 41.

³¹ *Ibid*, at p. 42.

- development of a restorative justice strategy and action plan in consultation with the Restorative Justice Association of BC, First Nations Justice Council, Métis Nation BC Justice Council, BC Corrections, police, Crown Counsel, as well as other legal stakeholders and restorative justice providers;
- increased funding to Indigenous justice programs, as well as to organizations such as the Indigenous Justice Association that can facilitate the promotion of these programs throughout BC;
- increased funding to restorative justice associations and societies to enable services in all parts of BC;
- continued funding for police, Crown Counsel, criminal defence counsel, and BC Corrections teams to increase the benefits of, and access to, restorative justice programs.

CBABC recommends the Province work towards a more robust and comprehensive restorative justice program, which can be accessed at the discretion of both police forces and Crown Counsel, and has the potential for cost savings to both the judicial and corrections systems. Building this type of system would require:

- a funding model for community-based restorative justice organizations that allows them to accept all referrals from both police forces and Crown Counsel, provide high-quality training to staff members, retain staff, provide a viable career path for those who wish to thrive as restorative justice practitioners, and constantly improve upon programming;
- the development of common standards and training regimens across the province that will enhance the reputation of restorative justice organizations, while also allowing them to maintain their close community ties and reflect the nature and needs of their local communities;
- amended government policies guiding Crown Counsel to allow expanded referrals to restorative justice programs; and
- a plan to educate those in the justice delivery and response system on the benefits of restorative justice programs.

CBABC urges the Province to begin doing work to achieve the goals set out by the Strategy, which include:

- establishing a presumption of using programs outside of the court system for Indigenous peoples, wherever possible;
- establishing roles for Elders and Knowledge Keepers within the justice system; and
- increasing the number of community justice programs in each Indigenous community.

These goals can be met through a comprehensive restorative justice strategy that should be written within 1 year and implemented province-wide within 3 years.

Indigenous Courts should also be more holistic, and should handle all the same matters as non-Indigenous courts do, but tailored to meet the specific needs of Indigenous peoples. The jurisdiction of Indigenous courts should be the same as the jurisdictions listed in self-government agreements. Specifically, Indigenous Courts should deal with matters related to property rights and child welfare, in addition to criminal justice matters.

Until the previous recommendation is implemented, Indigenous Courts should officially change their name to reflect their function more accurately. Any name change should be based on consultation with Elders, as well as other actors involved with Indigenous Courts. A potential new name could be “Indigenous Sentencing Courts”, which would indicate the fact that “Indigenous Courts” are not analogous to regular courts because they only deal with sentencing. This change would also make clear that there needs to be more alternatives for Indigenous peoples in the court process prior to sentencing. Alternatively, Indigenous Courts could be called “Indigenous Healing Courts” to better reflect that their focus on healing the offender and their relationship with their community is broader than simple sentencing.

CBABC recommends that the Province increased funding for Indigenous Courts, and make further changes that would include:

- court process or awareness training for Elders with ongoing training on an annual or bi-annual basis on subjects such as preventing vicarious trauma;
- regularly scheduled meetings for Elders that participate in Indigenous Courts, so they would have the opportunity to speak with one another;

- an increase in the compensation for Indigenous Elders participating, as their time is limited, and it is a challenge for them to attend; and
- an increase in Indigenous Court sittings scheduled, as there is currently a lack of sittings scheduled, especially in more populous areas such as New Westminster.

Sentencing judges must consider the Indigenous laws of the offender's community when making sentencing decisions. While Gladue reports are vital in helping the judge understand the history of the offenders before them, there is a crucial piece of information that is still missing. It is now being increasingly understood that restorative justice approaches are necessary for Indigenous peoples and communities because they look at justice in a way that is not compatible with the standard, colonial justice system. However, there needs to be a growing awareness by judges that different Indigenous communities have different laws, as that awareness of the specific Indigenous laws of the offender's community is crucial when determining an appropriate sentence.

CBABC calls on the Province to increase funding to support the development of the articulation of Indigenous laws through community-based work, such as what is being done by the Indigenous Laws Research Unit. This funding would be an important step towards supporting the revitalization of Indigenous legal orders.

While Indigenous Courts are vital tools when it comes to the sentencing of Indigenous offenders, there needs to be restorative justice alternatives that do not rely on Indigenous accused pleading guilty or being found guilty.

4. Rural Access to Lawyers and Technology

Introduction

There are three primary issues facing rural British Columbians with respect to accessing online legal information, legal and support services, and the increasingly digital/virtual services of the courts and out-of-court resolution services:

- a) lack of high-speed internet access;
- b) lack of access to computers, training and support; and
- c) shortage of lawyers in reasonably close proximity.

Access to Technology

It is well-established that rural communities, particularly Indigenous communities in remote areas, do not have the necessary internet bandwidth to access online legal information and resources. In addition, there are few publicly accessible computers with required software at community locations such as libraries and community centres to access courts and other justice services virtually. Although Indigenous justice centres and other community-based advocacy organizations may have the necessary hardware and internet capabilities, they may not be available to the public for private use to attend a court hearing or access a lawyer for legal advice.

The International Centre for Criminal Law Reform and Criminal Justice Policy in its comprehensive report, “Enhancing Access to Justice for Women Living in Rural and Remote Areas of British Columbia: Reviewing Practices from Canada and Abroad to Improve Our Response” outlines the need for and barriers to technology-based forms of access. As the report says on page 83:

Technology solutions assume access to the internet, computers, reasonable proficiency at using computers and software programmes, literacy, fluency in English, sufficient phone or cable and electricity availability and capacity to afford the costs, which is not always the case in rural and remote areas. Technology can bridge spatial divides quickly

and efficiently and has thus been increasingly used to enhance rural access to justice. It can increase the geographic reach of existing justice services by connecting justice providers with justice users, lawyers with clients, and witnesses to courts, over greater distances that do not require face-to-face interactions. At its simplest, technology might be constituted by a telephone link, however, Skype and other video call conferencing technologies have gained some traction in providing legal services in hard-to-reach places. Videoconferencing can be done using ISDN 'dial-up' or Internet based, which is less expensive but there may be more security issues which is particularly important for maintaining the integrity of evidence if used in remote witness testimonies. Promoting the use of technology can mean lawyers are able to conduct phone or video consultations with clients, courts would have the ability to receive documents electronically; using fax, internet and case management software. It also improves the reach of public legal education material as well as the availability of a range of legal self-help measures, such as completing and submitting forms online.

Pathways to Technology is an initiative to bring affordable high-speed internet to all 203 First Nations in B.C. According to their 2020/2021 project outlook report, which was released on August 17, 2020, their goal was to connect all 203 primary First Nations communities by the end of March of 2021³², and there has not been an update on their progress since the release of the report.

While the report was confident that they will reach their goal, it also states that 102 of those communities only meet the 2008 regulatory standard of connectivity, not the current one, which was implemented in 2016.³³ Therefore, half of all the 203 primary First Nations communities will require significant upgrades, as the target that will be met is based on outdated standards. "Primary" First Nations communities refers to communities where each First Nation's main office is located. 307 secondary communities were not included in the original mandate and are still yet to be connected in any capacity, and a lack of funding was stated as the reason for this exclusion of secondary communities in the current mandate.

³² Pathways to Technology, "2020/2021 Outlook: Connecting 203 First Nations Across BC", Online at:<<http://www.pathwaystotechnology.ca/downloads/2020-2021.pdf>>.

³³ *Ibid*, p. 10.

Another issue concerns Internet Service Providers (“ISP”). In communities that lie within the service areas of large ISP, they have access to the internet, but affordability can be an issue.³⁴ For those that do not lie in these areas, First Nations manage their own networks, but pay small carriers for “transport” to the community. While this allows for affordable internet, the insufficient cash flow results in connection standards not being met.

Furthermore, many First Nations communities that do have high-speed internet only have it in central community locations, and many homes lack internet access. A lack of home access to high-speed internet is especially detrimental to students and patients needing to see a doctor by videoconference.

Another similar issue is a lack of cellular service in some rural areas and Indigenous communities in the province. A lack of cellular service not only makes communication difficult, but also puts people in danger if they cannot get help in emergency situations. One area where this is a major issue is Highway 16 between Prince Rupert and Prince George, known as the Highway of Tears because of the number of missing and murdered Indigenous women and girls in the area since 1970.

The Province’s Fall 2020 StrongerBC Economic Recovery Plan included joint funding from the Connecting British Columbia program and the Government of Canada’s Universal Broadband Fund to provide \$4.5 million to improve cellular service on the Highway of Tears “to make the highway safer and help prevent violence to Indigenous women and girls”.³⁵

Shortage of Rural Lawyers

While the above is vitally important, it should not be considered as a legitimate substitution for having legal representation that is informed by first-hand knowledge of the community it seeks to serve. There is currently an ever-increasing shortage of lawyers in most rural BC communities. The following areas, all

³⁴ *Ibid*, p. 11.

³⁵ Province of British Columbia, Press Release, “Budget 2021 Backgrounder: Funding supports work with First Nations to advance reconciliation”, April 20, 2021, Online at: https://www.bcbudget.gov.bc.ca/2021/pdf/2021_Backgrounder_6_Reconciliation.pdf.

of which overlap with locations of Indigenous communities, have been identified as “high needs” as there are no lawyers present or a ration of lawyers to British Columbians of greater than 1 lawyer to 1000 people:

- Houston/Burns Lake/Vanderhoof
- Fort Nelson/Fort St. John
- Quesnel
- Haida Gwaii
- Powell River
- Golden/Invermere/Sparwood/Elkford
- Nakusp/Kaslo
- Grand Forks/Castlegar
- Penticton/Osoyoos/Oliver (Okanagan Similkameen Regional District)
- Port Alberni/Ucluelet/Tofino
- Port Hardy and points north of Campbell River

In late 2020, a survey was sent by the Law Society of BC to all current B.C. articulated students and lawyers who had articulated in the past three years.³⁶ The survey was completed anonymously, and dealt with numerous topics, including the location where articulated students and new lawyers articulated. The results of the survey found that 62.1% of respondents articulated in Vancouver, 19.2% articulated in the Lower Mainland outside Vancouver, and 8% articulated in Victoria, which means just over 10% articulated outside of these areas in B.C.³⁷ These results, especially the fact that almost two-thirds of recent articulated students articulated in Vancouver, demonstrate that there continues to be a shortage of articling students in rural areas of the province.

It is important to recognize that a lack of available legal services does more than just prevent residents from accessing legal advice. Such a deprivation also results in more limited overall community

³⁶ Law Society of British Columbia, “Agenda: Benchers”, January 29, 2021, Online at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/agendas/2021-01-29_agenda.pdf>.

³⁷ *Ibid*, p. 54.

infrastructure for families and businesses, contributes to the stagnation of local economies by preventing the creation of more jobs, and hinders overall access to justice.

One significant obstacle that has prevented recent law graduates from seeking articling and junior lawyer positions in rural or remote communities is the substantial student loan debt that they had to incur to obtain a legal education. Tuition alone can exceed \$30,000 per year at some institutions and it is of no surprise that the vast majority of law school graduates leave law school with substantial debt owing to student loans, private institutions, and family members.

Paying this debt as quickly as possible is a significant priority for most young lawyers, and accordingly, many seek positions that can offer a higher salary. Those salaries are earned at large regional, national, or international firms which are concentrated in urban areas such as Vancouver. Smaller communities, where the financial compensation to lawyers is less, have difficulty attracting law graduates.

A simple solution is to have the Province implement a student loan debt forgiveness program. By reducing some of the debt load in exchange for establishing a practice in a rural community, new law graduates would have the incentive to serve rural and Indigenous communities. Such a program would also give Indigenous law graduates more of an opportunity to serve their home communities. Such a program would supplement the efforts of the CBABC through its REAL program which places law students in rural communities to expose them to the kind of law and practice they will experience there. There is currently a student loan forgiveness program in B.C. for people who work in certain professions and either serve in a publicly funded facility in an underserved community, or work with children. Unfortunately, the legal profession is not one of the eligible occupations.³⁸

Issue

These gaps contribute to the general inequity between rural and urban communities and the access to justice challenge for those in rural communities, including Indigenous communities.

³⁸ StudentAid BC, "B.C. loan forgiveness program", Online at: < <https://studentaidbc.ca/repay/repayment-help/bc-loan-forgiveness-program>>.

Closing this access to justice gap in all its forms would achieve greater fairness and equity for British Columbians living outside urban areas. It would reduce ineffective self-help measures and the general frustration and lack of confidence in justice systems which seem beyond the practical reach of many in the community.

Recommendation

CBABC recommends that the Province provide Indigenous peoples, especially in rural communities, with high-speed internet access and the necessary computer equipment and computer literacy training so that they can access, navigate, and participate in court and justice services. All of these elements must be included together to ensure effectiveness.

CBABC recommends that the Province encourage new lawyers, through a student loan forgiveness program, to establish legal services in rural communities to increase the geographic proximity to people in rural communities, including Indigenous communities, and that such a program be implemented to give Indigenous lawyers a greater opportunity to serve their home communities

CBABC recommends the Province work with and help fund Pathways to Technology to ensure all First Nations communities in B.C. have access to affordable high-speed internet that meets Canadian standards and is available in every home in the community.

CBABC asks the Province to provide full transparency regarding the funding for cellular service for the Highway of Tears, which would include providing progress reports for the implementation of this plan and its effectiveness. These reports should include data regarding the improvement in the lives and well-being of Indigenous peoples in the area, especially women, girls, and 2SLGBTQQIA people.

5. Legal Aid and Indigenous Peoples

Introduction

Indigenous peoples are over-represented in the criminal justice system and are more likely to have families split through government intervention. Indigenous women are also more likely to be subjected to physical violence than non-Indigenous Canadians. As a result of residential schools and other systemic impacts of colonialism, Indigenous peoples are more likely to interact with the justice system, yet often lack the financial resources to obtain full representation from legal counsel to understand or enforce their legal rights. Most often, they rely on legal aid for assistance in navigating the legal justice system. Therefore, the issues currently plaguing legal aid in BC especially affect Indigenous peoples.

Legal Aid BC

Legal Aid BC offers free legal advice for those who do not qualify for legal aid, duty counsel, advice counsel, parent legal centres and other resources. In order to provide greater access to justice, various services are offered throughout the province that are tailored specifically for Indigenous communities, including:

- Indigenous community legal worker services,
- parents' legal centres,
- family advice clinic services,
- First Nations Court services, and
- community partners Indigenous services.

Legal Aid BC remains committed to addressing the needs of Indigenous peoples with its Reconciliation Action Plan (the "RAP"), designed to advance reconciliation through ongoing education, and by empowering Indigenous peoples. Staff receive cultural competency training, which will be elaborated upon later in this paper, and strategic policies will include the principles behind the RAP.

At the centre of the issue with legal aid has been the lack of funding over the last twenty years. Effectively, legal aid tariffs have been cut by one-third in terms of real dollars since the 1990s. As the

legal aid tariffs were not increased in keeping with the rising business costs of lawyers and inflation, many lawyers doing legal aid have simply withdrawn their services, leaving many people without any legal representation. Although the government had implied that sales tax on legal services would be used to increase access to justice and legal aid, that allocation has not been forthcoming. For decades, the CBABC has strongly advocated for improvements around legal aid funding.

In May 2019, Legal Aid BC launched a new program aimed at people who normally would not qualify for legal aid to address criminal law issues. The criminal early resolution system has relaxed rules for eligibility and allows for lawyers to help a wider range of people resolve issues early in the process, thus eliminating the need for additional court appearances.

The provincial government and Legal Aid BC jointly announced a one-time grant of \$7.9 million to support the development of a new framework for legal aid funding. The grant is in addition to the \$26 million over three years in increased funding to Legal Aid BC already announced by the government.

On November 4, 2019, the provincial government announced that eight new legal clinics will open across BC after a cash injection of \$2 million. Clinics each received a grant of up to \$250,000 to hire lawyers and support staff. These clinics will offer free legal advice on issues which include housing, poverty, immigration, disability, and child protection. These are issues which often impact the Indigenous community who are unable to afford legal representation. Therefore, funding will offer additional support in various parts of the province, including:

- Vancouver,
- Prince George,
- Kamloops,
- Kelowna, and
- Surrey.

Seven of the eight clinics have since been established, and are being administered by the Law Foundation of B.C.

Issues

Although legal aid funding has finally been addressed by the government after legal aid lawyers across B.C. threatened to strike³⁹, and tariffs have been increased to enable more lawyers to offer services to legal aid clients⁴⁰, there is still a considerable gap in the provision of legal aid services to Indigenous peoples dealing with significant family law matters. Unable to obtain legal representation, many are forced to be self-represented litigants in matters that involve important issues such as custody/access, financial support, and division of property. It is estimated that between 40% and 57% of parties are self-represented when they appear in court for family law issues.⁴¹ As a result of this issue, the 2021 Agenda for Justice recommended that the Province expand the scope of representation on issues of divorce, guardianship and parenting arrangements, child and spousal support, and asset/debt division. The judicial system is complex as it pertains to family law matters, and this issue impacts single mothers and children on a disproportionate basis.

From a cultural perspective, it is recognized that the residential school program had a significant impact on families, which continues to impact the generations that have followed, yet the restrictions on legal aid services leave many Indigenous peoples attempting to navigate the system without proper legal representation and advice. Family Duty Counsel are available for Provincial or Supreme Court, but issues involved in family law proceedings are often complex and require full representation on an “ongoing basis” to protect the rights of the most vulnerable. In addition, there are specific rules concerning income assistance on reserves and the right to remain in the family home if it is located on a reserve. The *Family Homes on Reserves and Matrimonial Interests or Rights Act*⁴² may apply, resulting in the need for legal advice and direction to interpret the complexities of the legislation. While the Legal Aid BC website offers written advice on these matters, there is not an option to actually speak to a lawyer for

³⁹ *Vancouver Sun*, Ian Mulgrew, “Ian Mulgrew: B.C. government averts legal aid strike with interim deal”, March 30, 2019, Online at: <https://vancouver.sun.com/news/local-news/breaking-b-c-government-averts-legal-aid-strike-with-interim-deal>.

⁴⁰ *The Lawyer's Daily*, Ian Burns, “B.C. pact recognizes legal aid as essential service, lawyer’s association says”, October 17, 2019, Online at: <https://www.thelawyersdaily.ca/criminal/articles/16009/b-c-pact-recognizes-legal-aid-as-essential-service-lawyers-association-says>.

⁴¹ Department of Justice, June 2016, “Just Facts”, Online at: <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>>.

⁴² *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

advice. By expanding the scope of legal aid representation, these families will have the assistance needed to minimize the impact of legal proceedings on the family unit.

The Strategy has called for the transition of the Indigenous branch of legal aid to be moved from Legal Aid BC to an Indigenous controlled entity.⁴³ Under this proposal, the BC First Nations Justice Council and the Province would work with Legal Aid BC on the transition. The work plan would identify how the transition would result in increased access to justice for Indigenous accused, and outline clear criteria and standards for legal aid service. As part of that transition, Legal Aid BC announced on January 14, 2021 that it would be terminating its Gladue report writing program April 1, 2021, and the program has since transitioned to the BC First Nations Justice Council.

The 2021 CBABC Agenda for Justice advocates for the following:

- The Province to fund a legal aid system that expands the financial eligibility for all services, expands the scope of coverage for several law services, establishes a compensation system that allows for legal representation in both court and out-of-court resolution systems, and provides fair compensation for legal aid lawyers;
- establish legal aid as an essential service; and
- direct all PST revenue collected annually on legal fees to fund legal aid, which was the rationale for the tax when it was introduced in 1992.⁴⁴

The Agenda for Justice also points out that legal representation in family law cases is provided only when there are actual or threatened safety or violence issues, or to resolve a serious denial of access to children, and only to resolve that single problem.

These issues do not solely affect Indigenous peoples, but those that use legal aid services as a whole, as previously mentioned, Indigenous peoples use legal aid at a higher rate than non-Indigenous peoples. Therefore, these issues particularly impact Indigenous peoples.

⁴³ BC First Nations Justice Council, “BC First Nations Justice Strategy”, February 2020, Online at:<
https://news.gov.bc.ca/files/First_Nations_Justice_Strategy_Feb_2020.pdf>

⁴⁴ Canadian Bar Association, British Columbia Branch, *Ibid*, at p. 5.

Recommendations

CBABC agrees with the recommendations made by CBABC in the Agenda for Justice 2021 report. Specifically, CBABC recommends that the Province increase legal aid funding, which would result in expanded services available, expanded financial eligibility, increased representation for clients both in and out of court, and fair compensation for lawyers.

CBABC recommends that a minimum standard should be set for quality of access for legal aid, that the standard be applied everywhere in B.C., and that the Province work to ensure that the standard is exceeded across B.C.

CBABC also recommends the Province expand the scope of representation on all family law issues.

6. Transformation of the Child Protection System

Introduction

Indigenous children and families suffer the adverse impacts of the child welfare system disproportionately compared to non-Indigenous children and families. Two of the most pressing issues facing Indigenous children and families is the over-representation of Indigenous children in the child welfare system, as well as a lack of consultation with Indigenous communities when undergoing child protection legislative reform. Between 2015 and 2021, there have been several reports detailing the harm caused to Indigenous children and families by the child protection system as a result of this lack of consultation, including Edward John & British Columbia Ministry of Children and Family Development's report, "Indigenous Resilience, Connectedness and Reunification: From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia: Final Report of Special Advisor Grand Chief Ed

John”⁴⁵, as well as West Coast LEAF’s report, “Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare”⁴⁶.

In October of 2020, the British Columbia Law Institute (“BCLI”) released its “Consultation Paper on Modernizing the Child, Family and Community Service Act”, which set out seven tentative recommendations for specific legislative reform of the *Child, Family and Community Service Act* (the “CFCSA”).⁴⁷ On January 18, 2021, CBABC released their response to BCLI’s consultation paper.⁴⁸ CBABC agreed with the recommendations, but felt the scope of the paper was too narrowly defined. They believe that a much more substantive overhaul of the child protection system is needed, and that the recommendations found in BCLI’s consultation paper amount to “tinkering with the existing legislation under which the problems in the child protection system have continued to develop and flourish since 1996, when the CFCSA came into force”.⁴⁹ Specifically, CBABC points out that more needs to be done regarding the overrepresentation of Indigenous children and families in the child welfare system. Furthermore, the inadequate consultation with Indigenous communities must be addressed. The BCLI consultation paper asked the government to consider the need for broader consultations than BCLI was capable of carrying out, and CBABC stated that they were very concerned with how deeply this limits the reforms proposed. Any reform to child protection legislation is incomplete without proper consultation with Indigenous communities, which is a point that has been previously thoroughly addressed by:

- The work of the Truth and Reconciliation Commission of Canada;

⁴⁵ Grand Chief Ed John for the Ministry of Ministry of Child and Family Development, 2016, “Indigenous Resilience, Connectedness and Reunification: From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia: Final Report of Special Advisor Grand Chief Ed John”, Online at:< <https://fns.bc.ca/wp-content/uploads/2017/01/Final-Report-of-Grand-Chief-Ed-John-re-Indig-Child-Welfare-in-BC-November-2016.pdf>>.

⁴⁶ West Coast LEAF, September 2019, “Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare”, Online at:< <http://www.westcoastleaf.org/wp-content/uploads/2019/09/Pathways-in-a-Forest.pdf>>

⁴⁷ British Columbia Law Institute, Child Protection Project Committee, “Consultation Paper on Modernizing the Child, Family and Community Service Act”, October 2020, Online at:< https://www.bcli.org/wordpress/wp-content/uploads/2020/10/2020-10-14_BCLI-CP-on-Modernizing-the-CFCSA-FINAL.pdf>.

⁴⁸ Canadian Bar Association, BC Branch, January 18, 2021, “Modernizing the Child, Family and Community Service Act: Submitted to the British Columbia Law Institute in response to its Consultation Paper”, Online at:< https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/Submissions/CBABC_FLWG_BCLI_Submission_CSA_2021-01-18.pdf>.

⁴⁹ *Ibid*, a p. 5.

- UNDRIP;
- the commitments made in DRIPA; and
- the work anticipated by the Strategy.

After its consultation period, BCLI released its final report in April 2021.⁵⁰ This report prompted CBABC's Family Law Working Group to release a subsequent written submission to the Province on October 6, 2021, titled "Modernizing the Child Protection System in BC".⁵¹ CBABC's submission stressed the need to address the gaps in the final BCLI report, which they felt was narrow in scope. They also felt that there was a need to speak to changing the culture within the system by modernizing the policies that govern child protection in BC. Furthermore, CBABC's submission addresses the overrepresentation of Indigenous children in BC's child welfare system, and the need for any review of the child welfare system to be from "the perspective of harm done to Indigenous communities" from both the child welfare system, as well as the legacy of Residential Schools.⁵²

In 2015, Ardith Walkem, Q.C. (now the Honourable Madam Justice Walkem) wrote a guidebook for working with Indigenous communities in the context of the CFCSA, called "Wrapping Our Ways Around Them: Aboriginal Communities and the *Child, Family and Community Services Act* (CFCSA) Guidebook" (the "Guidebook"), which can be used as a guide in this area.⁵³ The goal of the Guidebook is for Indigenous communities to work with the systems that impact Indigenous children and families in a way that will achieve the best outcome for them. The Guidebook identifies tools in the CFCSA that can

⁵⁰ British Columbia Law Institute, Child Protection Project Committee, "Report on the *Child, Family and Community Service Act*", April 2021, Online at: https://www.bcli.org/wordpress/wp-content/uploads/2021/05/2021-04-21_BCLI-Report-on-Modernizing-CFCSA-FINAL.pdf.

⁵¹ Canadian Bar Association. BC Branch, "Modernizing the Child Protection System in BC", October 6, 2021, Online at: https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/Submissions/Modernizing_the_Child_Protection_System_in_BC.pdf.

⁵² *Ibid*, at p. 10.

⁵³ Ardith Walkem, ShchEma-mee.tkt Project (Nlaka'pamux Nation Tribal Council), 2015, "Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Services Act (CFCSA) Guidebook", Online at: < https://cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf >.

improve the outcomes of Indigenous children through the involvement of Indigenous communities in child welfare matters. A second edition of the Guidebook was published in June 2021.⁵⁴

Recently, there have been several legislative initiatives and developments on the child welfare front, including:

- Amendments to the provincial *Child, Family and Community Service Act*, RSBC 1996, c 46.
- New federal legislation, *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.
- BC's commitment to implementation of UNDRIP, and in particular, articles relevant to child protection.

Amendments to the provincial *Child, Family and Community Service Act*.

The *Child, Family and Community Service Act*⁵⁵ was amended in May 2018 to increase the involvement of Indigenous communities in the child welfare system. The amendments are meant to recognize that Indigenous communities share responsibility for the well-being of their children, and emphasize the importance of keeping children connected to their communities.⁵⁶ This is accomplished, in part, by new notice requirements and increased collaboration between the Ministry of Children and Family Development (“MCFD”) and Indigenous communities.

In her review of the amendments, Frances Rosner noted that “significantly more work is needed to change the trajectory of Indigenous children in care”.⁵⁷

⁵⁴ Ardith Walkem, ShchEma-mee.tkt Project (Nlaka’pamux Nation Tribal Council), 2021, “Wrapping Our Ways Around Them (Second Edition): Indigenous Communities and Child Welfare Guidebook”, Online at <https://nntc.ca/documents/WOW_Guidebook_2021_210214.pdf>.

⁵⁵ *Child, Family and Community Service Act*, RSBC 1996, c 46

⁵⁶ Province of British Columbia, “Indigenous Child and Family Development”, Online at:<<https://www2.gov.bc.ca/gov/content/governments/indigenous-people/supporting-communities/child-family-development>>.

⁵⁷ Frances Rosner, “Bill 26 The Child, Family and Community Service Amendment Act”, June 2018), *BarTalk*. Online at:<<https://www.cbabc.org/BarTalk/Articles/2018/June/Columns/Bill-26-The-Child,-Family-and-Community-Service-Am>>.

The amendments, which came into force in October 2018 and April 2019, provide:

- Additional guiding principles, including:
 - Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children; s. 2(b.1).
- Indigenous children are entitled to learn about and practise their Indigenous traditions, customs and languages and belong to their Indigenous communities; s. 2(f).
- Additional service delivery principles, including:
 - Indigenous peoples should be involved in the planning and delivery of services to Indigenous families and their children; s. 3(b).
- The impact of residential schools on Indigenous children, families and communities should be considered in the planning and delivery of services to Indigenous children and families; s. 3(c.1).
- Additional factors regarding the best interests of Indigenous children, including:
 - the importance of the child being able to learn about and practise the child's Indigenous traditions, customs, and language.
- The importance of the child belonging to the child's Indigenous community; s. 4(2).
- Provisions regarding MCFD's ability to make agreements with Indigenous communities; s. 92.1.
- Enhanced role for Indigenous communities in agreements between MCFD and parents, families and youth for the provision of services and support; ss. 5-8, 12.2.
- A framework for referring reports and sharing information on child protection; s. 16.
- Provisions allowing MCFD to withdraw from proceedings after parents enter into an agreement with the relevant First Nations authority; s. and 48.
- A framework for sharing custody orders with First Nations authorities and involving First Nations communities in planning for the needs of Indigenous children that continue in the care of the director; ss. 50(4) & 50.01.
- The rights of Indigenous children in care to receive guidance, encouragement, and support to learn about and practise their Indigenous traditions, customs and languages and belong to their Indigenous communities; s. 70(1.1).

New federal legislation, *An Act respecting First Nations, Inuit and Métis children, youth and families*.

On January 21, 2020, Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families* (“ARFNIM”) came into force.⁵⁸ ARFNIM recognizes the inherent right of self-government, which includes jurisdiction in relation to child and family services. First Nations law, once enacted, becomes a federal law. This is important because under our Constitution, federal laws are paramount to provincial laws. Therefore, if there is an inconsistency between the First Nation law and the provincial *Child Family and Community Services Act*, the First Nation law will prevail. This is significant because, under the current delegated service delivery model, the provincial act is the only recognized legal authority.

The new ARFNIM also sets out minimum standards that apply to all First Nations, Inuit and Métis child and family service providers. Indigenous laws must be consistent with both the minimum standards set out in ARFNIM, as well as the *Canadian Human Rights Act*.

The requirements are set out in section 20:

20 (1) If an Indigenous group, community or people intends to exercise its legislative authority in relation to child and family services, an Indigenous governing body acting on behalf of that Indigenous group, community or people may give notice of that intention to the Minister and government of each province in which the Indigenous group, community or people is located.

(2) The Indigenous governing body may also request that the Minister and the government of each of those provinces enter into a coordination agreement with the Indigenous governing body in relation to the exercise of legislative authority, respecting among other things,

- (a) the provision of emergency services to ensure the safety, security and well-being of Indigenous children;
- (b) support measures to enable Indigenous children to exercise their rights effectively;
- (c) fiscal arrangements, relating to the provision of child and family services by the Indigenous governing body that are sustainable, needs-based and consistent with the principle of substantive equality...

⁵⁸ *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

(d) any other coordination measure related to the effective exercise of the legislative authority.

The ARFNIM provides Indigenous groups who have developed their own child and family services laws with two options:

Option 1: Exercise their jurisdiction by sending notice of their intention to do so to Indigenous Services Canada and the provincial government. Under this option, federal, provincial or territorial laws will prevail over an Indigenous group's laws in the event of a conflict.

Option 2: Request to enter a "coordination agreement" with Indigenous Services Canada and the provincial government. The coordination agreement addresses emergency services, support measures and funding arrangements, among other things. Once a coordination agreement is concluded, an Indigenous group's laws will prevail over federal, provincial or territorial laws.

There has been some concern as to whether proper consultation was undertaken regarding this legislation.⁵⁹ As noted above, any legislation that especially affects Indigenous peoples that is not made in consultation with Indigenous communities is inherently flawed.

On July 6, 2021, the Government of Canada signed an agreement with the Cowessess First Nation and the Province of Saskatchewan to return child welfare responsibilities to the Cowessess First Nation.⁶⁰ This agreement is the first signed agreement under ARFNIM to allow Indigenous peoples to reclaim child welfare responsibilities.

⁵⁹ Kylee Wilyman, "A Nation of Hollow Words: An Act Respecting First Nations, Inuit and Metis Children, Youth and Families" (2020), online at: <

⁶⁰ *CBC News*, Nick Boisvert, "Trudeau signs agreement returning child welfare responsibilities to Cowessess First Nation", July 6, 2021, Online at <https://www.cbc.ca/news/politics/pm-cowessess-child-welfare-1.6092236>.

UNDRIP articles relevant to child protection

The following articles of UNDRIP are relevant to child welfare reform in BC:

Preamble

...Recognizing, in particular, the right of [I]ndigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child...

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples, and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - ...
 - (d) any form of forced assimilation or integration.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of education, employment, vocational training and retraining, housing, sanitation, health, and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of [I]ndigenous elders, women, youth, children, and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of [I]ndigenous elders, women, youth, children, and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with [I]ndigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, [I]ndigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Recommendations

CBABC recommends an overhaul of the child protection system in British Columbia, along with the *Child, Family and Community Services Act*. Such changes must have eliminating the overrepresentation of Indigenous children in the child protection system as a top priority. The specific details of these changes

should be made after extensive consultation with Indigenous groups and communities in BC. Furthermore, the reformed system should include an adherence to Indigenous laws and customs.

CBABC recommends that, as part of DRIPA, the Province ensures that the UNDRIP articles dealing with the child welfare system are implemented into BC legislation.

CBABC recommends that the Province negotiate in good faith with those Indigenous groups who express an interest in enacting their own laws pursuant to ARFNIM.

7. Cultural Competency Training

Introduction

Lawyers

The Truth and Reconciliation Commission's ("TRC") Calls to Action include a call to "[e]nsure lawyers receive appropriate cultural competency training."⁶¹ On December 6, 2019, the Law Society of BC (the "Law Society") announced mandatory cultural competency training for lawyers, starting in 2021.⁶² The mandatory course will be online and free of charge. The Law Society determined that "competence" in this case includes knowledge of the history of Aboriginal-Crown relations, the history and legacy of residential schools and specific legislation regarding Indigenous peoples of Canada. Lawyers will have up to two years to complete the six modules. The Law Society began piloting this course in September 2021. While there are other options available for cultural competency training that would be appropriate for lawyers, this new program is the first mandatory program for practicing lawyers in BC.

⁶¹Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action", call 27, Online at:< http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.

⁶² The Law Society of British Columbia, News Release, "Law Society adopts indigenous intercultural competency training", Online at:< <https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2019/law-society-adopts-indigenous-intercultural-compet/>>.

In response to the Truth and Reconciliation Commission's Calls to Action, the CBA has created an accredited online series called The Path – Your Journey Through Indigenous Canada.⁶³ It is a Canada-wide accredited program that consists of 5 online modules made up of videos and quizzes that focus on First Nations, Inuit, and Métis peoples of Canada, the history of Indigenous peoples and their relationship with European settlers, the British Crown, and Dominion of Canada. The CBA states that the purpose of the modules is to “demystify some of the legal issues surrounding the Canadian Constitution, the *Indian Act*, historical and modern treaties, recent rulings of the Supreme Court of Canada and what they mean in practical terms”.⁶⁴ Being part of the CBA, this program is the most well-known optional cultural competency training designed for lawyers, but there are other options in BC that lawyers could attend.

The Provincial Health Services Authority (the “Authority”) provides cultural competency training for service providers through its San'yas Indigenous Cultural Safety Training (“San'yas”) program. That program was originally known as the Indigenous Cultural Competency Training program, and was targeted solely at health practitioners in B.C. The program has expanded in recent years to provide training for the mental health, child welfare, and justice sectors in B.C.

The San'yas program offers two courses that could be relevant for justice system participants. The first is called Core ICS Foundations and “is designed to increase understanding of Indigenous peoples, increase self awareness and strengthen skills for any person working directly or indirectly with Indigenous peoples.”⁶⁵ The Authority suggests the course for professionals in several fields including the legal profession. The second course is called Core ICS Justice and is specifically designed for professionals working in law clinics, policing, court houses, sheriff's offices, the judiciary, and correctional facilities. Both courses are eight-weeks, self-paced, online, and cost \$300 per learner.

⁶³ Canadian Bar Association, “Professional Development”, Online at: <<https://www.cba.org/ThePath>>.

⁶⁴ *Ibid.*

⁶⁵ San'yas Indigenous Cultural Safety Training, “Frequently Asked Questions”, Online at: <https://www.sanyas.ca/training/faq-s#What%20is%20Core%20ICC%20training?>.

Court Workers, Crown, and Judges

It is worth noting any cultural competency training undertaken by the actors who make up the infrastructure of the justice system. In this case, this paper looks at court workers, Crown lawyers, judges, legal aid workers, corrections officers, and police officers. There is not any publicly available information regarding any cultural competency training that are mandatory for court workers, Crown lawyers or judges in BC. However, as mentioned above, there are courses in the San'yas program that are open to all professionals working in the justice system.

Legal Aid

Legal Aid BC's RAP covers their five-year plan to provide access to justice for Indigenous peoples in BC in an effort to work towards reconciliation in Canada.⁶⁶ As part of the plan, Legal Aid BC committed to finalizing a cultural competency training program by 2019, and then providing that training for staff, management, the board, legal aid lawyers, and service providers on an ongoing basis. They also committed to develop cultural competency requirements by 2020 for lawyers who accept contracts for Indigenous clients. This document does not state whether any of this training is mandatory or not. Since the Reconciliation Action Plan was released, the only mention of cultural competency training within Legal Aid BC was in their January 2020 report, titled "Strategies & Stories: Making a difference, one client at a time", which stated that "[m]any Legal Aid BC staff and lawyers who do legal work have attended cultural competency training".⁶⁷ Therefore, it is unclear who takes part in their training program, and whether it is mandatory.

Corrections

The section of the B.C. Corrections website that deals with specialized programs for Indigenous peoples in the provincial corrections system states that there is cultural competency training for correctional

⁶⁶ Legal Aid BC, "Reconciliation Action Plan:2018-2023", Online at: < <https://lss.bc.ca/sites/default/files/2019-05/RAP2018-web.pdf>>.

⁶⁷ Legal Aid BC, "Strategies & Stories: Making a difference, one client at a time", Online at:< <https://lss.bc.ca/sites/default/files/2020-06/Legal%20Aid%20BC%20Strategies%20%26%20Stories.pdf>>.

staff. Specifically, B.C. Corrections has dedicated staff who are assigned to “increase staff’s knowledge and sensitivity to Indigenous people’s experience with the criminal justice system.”⁶⁸ Many of their staff also have taken the San’yas program, and they partner with the Justice Institute of BC and Indigenous communities to deliver foundational training for probation officers and correctional officers, as well as more specialized courses. All B.C. Corrections staff have access to the University of Alberta’s Indigenous Canada program, an online course that “explores Indigenous histories and contemporary issues in Canada”,⁶⁹ and the program is required for probation officers as part of their training.

Corrections Canada states that the Director, Reintegration Programs, will ensure that staff involved in training and delivery for the Aboriginal corrections program are evaluated on their Indigenous-based cultural approach as part of the initial training, quality review and certification process.⁷⁰ As well, the National Corrections Program Trainer will ensure that the regional trainers respect cultural protocols for the Aboriginal correctional program training, as appropriate.

Police

In the fall of 2020, the RCMP started an online cultural competency training course called “Cultural Awareness and Humility” that is now mandatory for all RCMP members. The course description states that it is designed to “increase knowledge, enhance self-awareness and strengthen the skills of police and public safety professional employees who work both directly and indirectly with different cultures”.⁷¹ The course does not solely deal with issues surrounding Indigenous peoples, and is the only mandatory training dealing at all with Indigenous cultural competency, based on publicly available information.

⁶⁸ Province of British Columbia, “Indigenous Corrections Programs”, Online at: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/key-parts/corrections/indigenous-corrections-programs>

⁶⁹ University of Alberta, “Indigenous Canada”, Online at: <https://www.ualberta.ca/admissions-programs/online-courses/indigenous-canada/index.html>.

⁷⁰ Correctional Service Canada, “National Correctional Program Standards”, Online at: <https://www.csc-scc.gc.ca/lois-et-reglements/726-1-gl-eng.shtml>.

⁷¹ Canadian Police Knowledge Network, “Cultural Awareness and Humility”, Online at: <https://www.cpkn.ca/en/course/cultural-awareness-and-humility/>

The RCMP also offers a program called “Aboriginal Perceptions Training Course”, which is designed to provide members with “an understanding of Indigenous perceptions/attitudes towards the Canadian Justice System, the factors that have influenced perceptions, and how these factors can sometimes create tensions”.⁷² However, as Ret. Insp. Jim Potts, who was involved with the program, stated in a 2017 panel on Indigenous awareness training, “many do not make this training a priority unless it is recommended or ordered by an official inquiry into police conduct such as Oka, Donald Marshall and Ipperwash”.⁷³ There are also a growing number of cultural competency courses available at the RCMP training academy dealing with issues affecting Indigenous peoples, but there is no indication that any of these courses are mandatory.⁷⁴

The Vancouver Police Department (the “VPD”) has a number of cultural competency training course for their staff.⁷⁵ However, the only mandatory course is the Community Awareness: Indigenous peoples’ Awareness course, which has been mandatory for the Special Municipal Constable Program since 2014.⁷⁶ The term “Special Municipal Constable” refers to jail guards, traffic authority, and community safety personnel.⁷⁷ The VPD are in talks with Reconciliation Canada to create more training for their officers,⁷⁸ but VPD Police Chief Adam Palmer has stated that the new training protocol for all recruits is on hold because of the Covid-19 pandemic.⁷⁹

⁷² Royal Canadian Mounted Police, News Release, Accessed on *Cision*, Online at: <https://www.newswire.ca/news-releases/rcmp-statement-on-human-rights-watch-report-629441523.html>

⁷³ Royal Canadian Mounted Police, Panel Discussion, “Indigenous awareness training: What works and what doesn’t?”, Online at <https://www.rcmp-grc.gc.ca/en/gazette/indigenous-awareness-training>.

⁷⁴ Poland, Travis, *Gazette* magazine, Royal Canadian Mounted Police, “RCMP cadets learning more about Indigenous experiences”, Online at: <https://www.rcmp-grc.gc.ca/en/gazette/and-present>

⁷⁵ Vancouver Police Department, “Learning from Lost Lives: Examining the Calls for Justice for Police from the National Inquiry into Missing and Murdered Indigenous Women and Girls”, at p. 7. November 2019, Online at: <<https://vancouver.ca/police/assets/pdf/reports-policies/learning-from-lost-lives.pdf>>.

⁷⁶ *Ibid*, at p. 43.

⁷⁷ *Ibid*, at p. 23.

⁷⁸ Sterrit, Angela, *CBC News*, June 13, 2020, “It’s putting a Band-Aid on a broken leg’: Indigenous leaders say police training inept, join calls to defund”, Online at: <https://www.cbc.ca/news/canada/british-columbia/indigenous-leaders-say-training-not-working-1.5610501>.

⁷⁹ Howell, Mike, *Vancouver is Awesome*, June 19, 2020, “Indigenous Day: Police Chief Says VPD values its relationship with Indigenous peoples”, Online at: <https://www.vancouverisawesome.com/bc-news/indigenous-day-police-chief-vpd-values-relationship-indigenous-people-vancouver-bc-2447967>.

CBABC also has representatives who are part of a CBABC consultation team which made submissions to a Special Committee to reform the *Police Act*⁸⁰ in 2021, and further elaborated on the need for cultural competency training.⁸¹

Issue

There is currently no streamlined cultural competency training for actors involved in the justice system in British Columbia. While there is available training through programs such as The Path, and those offered by the Authority, there is a scarcity of mandatory programs for those working in the justice system. While there appears to be a growing awareness of the necessity of mandatory training, many professions within the justice system seem slow to want to implement such changes. There also seems to be an inconsistency with what such training would entail. The TRC singled out education on the history and legacy of residential schools, UNDRIP, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations as especially important in their Calls to Action⁸², and these subjects should be mandatory in any cultural competency training. The training should also be extensive, as it will take days and not hours, for those working in the justice system to fully understand these important matters. The information currently provided in the available courses and programs is mostly Pan-Indigenous. The programs do not add information specific to each Indigenous identity (First Nations, Métis, Inuit). Each Indigenous identity has struggles and needs specific to them, and this is information that should be addressed in the courses/programs provided to professionals in response to the TRC. Furthermore, there seems to be an absence of easily accessible and publicly available information regarding what, if any, mandatory cultural competency training members in each of the professions within the BC's justice system must undertake, and this lack of transparency makes it more difficult for the public to provide feedback and criticism, which is essential for potential improvement.

⁸⁰ *Police Act*, RSBC 1996, c 367.

⁸¹ Canadian Bar Association, BC Branch, "Submission on Reforming the Police Act: Submission to the Special Committee of the BC Legislature on Reforming the Police Act", April 30, 2021, Online at: https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/Submissions/CBABC_Police_Act_Reform_Submission.pdf.

⁸² Truth and Reconciliation Commission of Canada, *ibid*, at p. 3.

Recommendations

CBABC recommends that the regulators of all the above-mentioned professions within BC's justice system be made to implement mandatory cultural competency training, that the level of training, as well as the content of the material, be consistent throughout all the professions., and include the topics of the history and legacy of residential schools, UNDRIP, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations, engaging with Indigenous people using a trauma informed approach, among others. The Province should work with other justice system stakeholders, such as Corrections Canada or the RCMP, to ensure these federal programs utilize cultural competency training that meet the above standards. . Indigenous groups should be consulted as to the content of the material used in the training. Those organizations that are looking to implement mandatory cultural competency training should also consult with organizations such as the Law Society of British Columbia, which has undertaken their own consultation when creating their training program. This training should last no less than two days, and the details should be easily accessible for the public on the websites of the respective organizations.

8. Data Collection & Accountability

Introduction

Collecting data and sharing it publicly enables a better understanding of any changes being made to the justice system, promotes system improvements, and facilitates accountability. Effective data collection and public disclosure will facilitate the ability of the Province to work with Indigenous peoples in B.C. on important reforms of the justice system. Data can support important change, and allows the impacts of any reforms to be properly measured.

However, there is currently a gap in the collection and disclosure of data as it relates to the operation of our justice system, especially in relation to our courts. While this is an issue that affects the justice system as a whole, it is an issue that could specifically hinder any changes made to the justice system to benefit Indigenous peoples.

Data collection that is relevant for the issues discussed in this paper include, but are not limited to, the following:

- the number of Indigenous peoples that have had some interaction with the criminal justice system;
- the number of rural and Indigenous communities in B.C. that do not have access to a proper internet connection;
- the number of lawyers/articling students in rural and Indigenous communities in B.C.;
- the percentage of Indigenous peoples that go without proper representation in legal matters; and
- the number of Indigenous children currently in the child welfare system.

Analysis

In its 2021 Agenda for Justice, CBABC recommended the Province do the following:

- establish a robust data collection and disclosure infrastructure within Court Services, BC Corrections and administrative tribunals;
- provide adequate funding for all levels of court to establish their own robust data collection and disclosure infrastructure; and
- actively develop data protocols and standards to ensure alignment across the justice sector so that information can be collected and disclosed in a consistent manner.⁸³

In their 2020 report (“BCOHR Report”), the B.C. Office of the Human Rights Commissioner detailed the importance of having disaggregated data, rather than aggregated data.⁸⁴ Disaggregated data is data divided into more detailed sub-categories and provides information that aggregated data cannot provide. The BCOHR Report also details the importance of government taking a “decolonizing and human rights-based approach” to data collection, where “marginalized communities are meaningfully involved throughout the stages of collection, storage, use (including analysis and interpretation), and

⁸³ CBABC, *ibid*, at p. 19.

⁸⁴ B.C. Office of the Human Rights Commissioner (“BCOHR”), “Disaggregated demographic data collection in British Columbia: The grandmother perspective” (September 2020), online at < https://bchumanrights.ca/wp-content/uploads/BCOHR_Sept2020_Disaggregated-Data-Report_FINAL.pdf>.

distribution of disaggregated data”.⁸⁵ The BCOHRC Report recommends that any data collection must be done using the principles of data sovereignty and transformative justice, which is a relational approach to justice. Governments must develop long-term relationships with marginalized communities, and must ensure that the risks and benefits of collecting data according to marginalized communities are properly addressed. Government must work alongside, and take direction from, marginalized communities, and any data collection must be used to address systemic inequality. Finally, the BCOHRC Report recommends the government draft an Anti-Discrimination Data Act⁸⁶ that would focus on building respectful relationships with marginalized communities to ensure their needs and voices are included in the data collection, use, and disclosure process.

While data collection and distribution are a shared responsibility, leadership from the Province to recognize the gaps in data collection and disclosure, and enact a sufficient response, would lead others to do the same. Closing these gaps in data collection and disclosure is necessary to effectively implement the changes recommended in this paper.

Recommendations

CBABC recommends that the Province implement all three of the recommendations from CBABC’s 2021 Agenda for Justice.

CBABC recommends that the Province integrate the recommendations of the BCOHRC Report as it relates to the culturally sensitive collection and reporting of disaggregated data when collecting data regarding Indigenous peoples.

CBABC recommends that the Province ensures that any data collected include gender. For example, tracking systems of Gladue reports should indicate whether the ‘subject’ is male/female/two-spirit, etc. Including gender would enable a clear picture of where the gaps of service provisions are.

⁸⁵ *Ibid*, at p. 50.

⁸⁶ *Ibid*, at p. 10-12.

Conclusion

It is imperative that the Province implement major changes to our justice system to ensure it is better situated to meet the needs of Indigenous peoples in British Columbia. These changes would demonstrate a commitment to the principles of UNDRIP, and are necessary for reconciliation between the Province and Indigenous peoples. CBABC believes the recommendations in this paper are appropriate steps to take to ensure meaningful change in the justice system. However, these steps represent just the beginning of what is needed to transform the relationship between the Province and Indigenous peoples, and this work will need to continue into the future.

LIST OF RECOMMENDATIONS:

Moving Forward with DRIPA:

1. CBABC recommends that the Province move forward with the implementation of section 3 of DRIPA, and take all necessary measures to ensure the laws of British Columbia are consistent with UNDRIP, in consultation and cooperation with Indigenous peoples in BC.
2. CBABC recommends that the Province provide specific dates as to when each of the items in the Action Plan must be completed, and that these dates must be set based on consultation with Indigenous peoples in B.C.
3. CBABC recommends that the Province detail specific steps to be taken to implement a dispute-resolution procedure for any potential conflicts or disputes between Indigenous peoples and the Province, as well as any potential infringement of Indigenous rights by the Province. This procedure must be in accordance with Article 40 of UNDRIP, and any steps taken towards implementing such a procedure must be done in consultation and cooperation with Indigenous peoples in B.C.

BC First Nations Justice Strategy

4. Given the urgent need for change and reconciliation, CBABC recommends that the Province provide adequate funding and resources to fully implement the Strategy, including transparently reporting on the magnitude and sources of funding.

Restorative Justice

5. CBABC calls on the Province to increase access to restorative justice programs for Indigenous peoples in B.C. (particularly for youth and first-time offenders), through:
 - development of a restorative justice strategy and action plan in consultation with the Restorative Justice Association of BC, First Nations Justice Council, Métis Nation BC Justice Council, BC Corrections, police, Crown Counsel, as well as other legal stakeholders and restorative justice providers;
 - increased funding to Indigenous justice programs, as well as to organizations such as the Indigenous Justice Association that can facilitate the promotion of these programs throughout BC;
 - increased funding to restorative justice associations and societies to enable services in all parts of BC;
 - continued funding for police, Crown Counsel, criminal defence counsel, and BC Corrections teams to increase the benefits of, and access to, restorative justice programs.

6. CBABC recommends the Province work towards a more robust and comprehensive restorative justice program, which can be accessed at the discretion of both police forces and Crown Counsel, and has the potential for cost savings to both the judicial and corrections systems. Building this type of system would require:
 - a funding model for community-based restorative justice organizations that allows them to accept all referrals from both police forces and Crown Counsel, provide high-quality training to staff members, retain staff, provide a viable career path for those who wish to thrive as restorative justice practitioners, and constantly improve upon programming;
 - the development of common standards and training regimens across the province that will enhance the reputation of restorative justice organizations, while also allowing them to maintain their close community ties and reflect the nature and needs of their local communities;

- amended government policies guiding Crown Counsel to allow expanded referrals to restorative justice programs; and
 - a plan to educate those in the justice delivery and response system on the benefits of restorative justice programs.
7. CBABC urges the Province to begin doing work to achieve the goals set out by the Strategy, which include:
- establishing a presumption of using programs outside of the court system for Indigenous peoples, wherever possible;
 - establishing roles for Elders and Knowledge Keepers within the justice system; and
 - increasing the number of community justice programs in each Indigenous community.

These goals can be met through a comprehensive restorative justice strategy that should be written within 1 year and implemented province-wide within 3 years.

8. Indigenous Courts should be more holistic, and should handle all the same matters as non-Indigenous courts do, but tailored to meet the specific needs of Indigenous peoples. The jurisdiction of Indigenous courts should be the same as the jurisdiction listed in self-government agreements. Specifically, Indigenous Courts should deal with matters related to property rights and child welfare, in addition to criminal justice matters.
9. Until the previous recommendation is implemented, Indigenous Courts should officially change their name to reflect their function more accurately. Any name change should be based on consultation with Elders, as well as other actors involved with Indigenous Courts. A potential new name could be “Indigenous Sentencing Courts”. This change would indicate the fact that “Indigenous Courts” are not analogous to regular courts because they only deal with sentencing. This change would also make clear that there needs to be more alternatives for Indigenous peoples in the aspect of the court process prior to sentencing. Alternatively, Indigenous Courts

could be called “Indigenous Healing Courts” to better reflect that their focus on healing the offender and their relationship with their community is broader than simple sentencing.

10. CBABC recommends that the Province increased funding for Indigenous Courts, and make further changes that would include:

- court process or awareness training for Elders with ongoing training on an annual or bi-annual basis on subjects such as preventing vicarious trauma;
- regularly scheduled meetings for Elders that participate in Indigenous Courts, so they would have the opportunity to speak with one another;
- an increase in the compensation for Indigenous Elders participating, as their time is limited, and it is a challenge for them to attend; and
- an increase in Indigenous Court sittings scheduled, as there is currently a lack of sittings scheduled, especially in more populous areas such as New Westminster.

11. Sentencing judges must consider the Indigenous laws of the offender’s community when making sentencing decisions.

12. CBABC calls on the Province to increase funding to support the development of the articulation of Indigenous laws through community-based work, such as what is being done by the Indigenous Laws Research Unit.

13. While Indigenous Courts are vital tools when it comes to the sentencing of Indigenous offenders, there needs to be restorative justice alternatives that do not rely on Indigenous accused pleading guilty or being found guilty.

Rural Access to Lawyers & Technology

14. CBABC recommends that the Province provide Indigenous peoples, especially in rural communities, with high-speed internet access and the necessary computer equipment and computer literacy training for Indigenous peoples so that they can access, navigate, and participate in court and justice services.

15. CBABC recommends that the Province encourage new lawyers, through a student loan forgiveness program, to establish legal services in rural communities to increase the geographic proximity to people in rural communities, including Indigenous communities, and that such a program be implemented to give Indigenous lawyers an opportunity to serve their home communities;

16. CBABC recommends the Province work with and help fund Pathways to Technology to ensure all First Nations communities in B.C. have access to affordable high-speed internet that meets Canadian standards and is available in every home in the community.

17. CBABC asks the Province to provide full transparency regarding the funding for cellular service for the Highway of Tears, which would include providing progress reports for the implementation of this plan and its effectiveness. These reports should include data regarding the improvement in the lives and well-being of Indigenous peoples in the area, especially women, girls, and 2SLGBTQQIA people.

Legal Aid and Indigenous Peoples

18. CBABC agrees with the recommendations made by CBABC in the Agenda for Justice 2021 report. Specifically, CBABC recommends that the Province increase legal aid funding, which would result

in expanded services available, expanded financial eligibility, increased representation for clients both in and out of court, and fair compensation for lawyers.

19. CBABC recommends that a minimum standard should be set for quality of access for legal aid, that the standard be applied everywhere in British Columbia, and that the Province work to ensure that the standard is exceeded across B.C.

20. CBABC also recommends the Province expand the scope of representation on all family law issues.

Transformation of the Child Protection System

21. CBABC recommends an overhaul of the child protection system in British Columbia, along with the *Child, Family and Community Services Act*. Such changes must have eliminating the overrepresentation of Indigenous children in the child protection system as a top priority. The specific details of these changes should be made after extensive consultation with Indigenous groups and communities in BC. Furthermore, the reformed system should include an adherence to Indigenous laws and customs.

22. CBABC recommends that, as part of DRIPA, the Province ensures that the UNDRIP articles dealing with the child welfare system are implemented into BC legislation.

23. CBABC recommends that the Province negotiate in good faith with those Indigenous groups who express an interest in enacting their own laws pursuant to ARFNIM.

Cultural Competency Training

24. CBABC recommends that the regulators of all the professions within BC's justice system be made to implement mandatory cultural competency training, that the level of training, as well as the content of the material, be consistent throughout all the professions, and include the topics of the history and legacy of residential schools, UNDRIP, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. The Province should work with other justice system stakeholders, such as Corrections Canada or the RCMP, to ensure these federal programs utilize cultural competency training that meet the above standards. Indigenous groups should be consulted as to the content of the material used in the training. Those organizations that are looking to implement mandatory cultural competency training should consult with organizations such as the Law Society of British Columbia, which has undertaken their own consultation when creating their training program. This training should also last no less than two days, and the details should be easily accessible for the public on the websites of the respective organizations.

Data Collection & Accountability

25. CBABC recommends that the Province implement all three of the recommendations from CBABC's 2021 Agenda for Justice, which are the following:

- establish a robust data collection and disclosure infrastructure within Court Services, BC Corrections and administrative tribunals;
- provide adequate funding for all levels of court to establish their own robust data collection and disclosure infrastructure; and
- actively develop data protocols and standards to ensure alignment across the justice sector so that information can be collected and disclose in a consistent manner.

26. CBABC recommends that the Province integrate the recommendations of the BCOHRC Report as it relates to the culturally sensitive collection and reporting of disaggregated data when collecting data regarding Indigenous peoples.

27. CBABC recommends that the Province ensures that any data collected include gender.