BC FIRST NATIONS
JUSTICE COUNCIL

BC First Nations Justice Council Legal Services: Legal Aid Transition Preliminary Research

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PURPOSE

In partnership with BC First Nations, the BC First Nations Justice Council (BCFNJC) released the BC First Nations Justice Strategy which was endorsed by the BC Government in 2020. Specifically, Strategies 3 and 5 aim to improve Indigenous access to justice by addressing gaps in services under the current provincial Legal Aid system.

Justice Strategy 3: First Nations Capacity & Legal Services

Strategy 3 calls for changes in the following areas:

- **First Nations Legal Services:** The development of a newly established provincial First Nations Legal Aid Services, under the control of the BCFNJC. These services, while coordinated provincially, may be delivered through the Indigenous Justice Centres.

- **Supporting First Nations Justice Capacity:** A key role of the BCFNJC is to support First Nations in developing their own justice capacity.

Justice Strategy 5: Establish First Nations Legal Services

Strategy 5 calls for change in the following area:

- **Legal Aid Transition:** The BCFNJC will develop a workplan to transition Legal Aid services for Indigenous people in BC from the Legal Services Society to an Indigenous controlled entity.

Document Overview

This document is the result of pre-liminary research undertaken by the three authors and is organized in three parts:

- **Part One Legal Aid Historical Timeline:** Overview of the historical development and evolution of Legal Aid for Indigenous peoples in Canada.

- **Part Two Legal Aid Status Quo:** Overview of the current state of Legal Aid for Indigenous peoples in British Columbia

- **Part Three a New Era for Indigenous Legal Services:** Overview of Legal Aid services and best practices from other jurisdictions.

PART ONE: LEGAL AND POLITICAL HISTORY OF INDIGENOUS LEGAL AID IN CANADA TIMELINE OF EVENTS

Executive Summary

A Short History of Indigenous Legal Aid in Canada, 1860s to 1970s

The purpose of Part One is to provide a historical background of Indigenous peoples' access to justice and the historical development and evolution of the current state-run Legal Aid system. This executive summary of the history of Indigenous Legal Aid in Canada is divided into five time periods, spanning the 1860s to 1970s. Although the full study is on a national scale, this summary focuses on case studies and examples drawn from British Columbia; this focus on BC will provide contextual background for the significance of the BCFNJC's work, and the upcoming transition of Indigenous Legal Aid.

The first time period starts in the 1860s and continues until the turn of the century. In this era there were a large number of executions of Indigenous persons convicted at trials at which they had no legal representation, many following assertions of sovereignty during struggles such as the Chilcotin War and the North West Resistance. It was also during this time period that Legal Aid for Indigenous persons charged with capital murder emerged as an ad hoc practice of the federal government, despite there being no formal federal obligation to fund or administer such a policy.

The second time period started in the early 1900s and continued until the early 1930s. In this period the Department of Indian Affairs' policy for the provision of defence counsel for capital murder trials became more regular, and began to include features such as qualification criteria, and procedures for the appointment of counsel. This was an era in which the government sought to 'educate' Indigenous communities about the settler legal system via capital murder trials and punishments; in this context, defence counsel in Indigenous murder trials worked to conciliate and pacify Indigenous communities who were conscious of the administration of *in*justice.

By the third time period, from 1932 to the early 1950s, DIA Legal Aid was firmly established as a department policy. However, during this time period some DIA bureaucrats in Ottawa actively worked to bring an end to the Legal Aid policy through a series of internal reviews of the program, and through a number of test cases in which they refused to appoint counsel until outside

legal actors intervened. In this era, DIA Secretary T.R.L. MacInnes also worked to increase the numbers of Indigenous executions by writing a series of memoranda to the Department of Justice that emphasized the importance of "exemplary punishment" for the administration of Indian affairs.

Following significant revisions to the *Indian Act* in 1951 and a shift in the stated goals of 'Indian administration' by the DIA, the fourth time period extended until the later 1960s. This was a period that emphasized the development of 'provincial citizenship' for Indigenous peoples in Canada, and their integration into provincial service delivery. During this 1950s and 1960s, DIA bureaucrats in Ottawa continued their internal policy reviews of the program with the goal of devolving Legal Aid to the provinces, but actually saw the policy expanded to also include funding for defence counsel for preliminary hearings (for murder trials) starting in 1955, and to include capital and non-capital murder charges starting in 1961.

The final time period focuses on the creation of provincial Legal Aid programs in the later 1960s and into the 1970s, with an emphasis on British Columbia, and the end of DIA Legal Aid in many provinces. From 1967 the DIA modified its Legal Aid policy to stop providing defences in provinces that confirmed they would include 'status Indians' in their Legal Aid plans. In the years following the release of the DIA-commissioned 'Indians and the Law' report in 1967, the DIA also withdrew more broadly from administration of justice activities. The 'official history' of Legal Aid in Canada identifies 1972 as the *beginning* of the federal government's involvement in criminal Legal Aid, when it signed cost-sharing agreements with many provinces, including BC. This revised history of DIA Legal Aid demonstrates that the first Legal Aid program in Canada was a federally funded and administered Indigenous Legal Aid program.

Historical Timeline 1864-1979

Pre-Confederation

1864 - Six Tsilhqot'in Chiefs convicted of murder and executed in the colony of British Columbia while asserting their sovereignty during the 'Chilcotin War'. In March 2018, Prime Minister Justin Trudeau issued an official apology and exonerated the Chiefs in the House of Commons, and in November 2018 Trudeau visited the Tsilhqot'in Nation for a formal exoneration event and ceremony.

- Source re. 'Chilcotin War': John Lutz, *Makúk: A New History of Aboriginal-White Relations*, Vancouver: UBC Press, 2008, cited at pgs. 131-141.
- Source for government apology: Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 275 (26 March 2018) Available at: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-275/hansard

1860-1869 - In the 10-year period before the colony of British Columbia joined Confederation, 32 Indigenous persons were sentenced to death under British criminal law, and 25 were executed, including 6 Chiefs for their participation in the Chilcotin War (Indigenous persons comprised 93% of the total executions in BC in that decade). These numbers decreased in the 1870s following the Union of BC with Canada, but the proportion of Indigenous executions remained high through the end of the 19th century, at 50% in the 1870's, 57% in the 1880s, and 20% in the 1890s.

- Source: Tina Loo, "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia," in *Qualities of Mercy: Justice, Punishment, and Discretion*. Ed. Carolyn Strange. Vancouver: UBC Press, 1996. Cited at 106-107.

Post-Confederation

1867 *British North America Act/Constitution Act* division of powers allocated responsibility for the administration of justice to the provinces (s.92(14)); responsibility for criminal and procedures (s.92(27)), as well as management of penitentiaries to the federal government (s. 92(28)); and the responsibility for 'Indians and Lands Reserved for Indians' to the federal government (s.91(24)).

- Source: *The British North America Act*, SS 1867, c 3, <https://canlii.ca/t/l0zw>

1871 - British Columbia joined the Dominion of Canada. Article 13 of the *British Columbia Terms of Union* confirmed the role of the federal government as 'Trustee' of 'Indians' in British Columbia:

> "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. […]"

- Text available online at: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t42.html

1871/1872 Indigenous peoples in British Columbia (and other groups including Chinese persons) were disqualified from voting in provincial elections. The disqualification continued until 1949.

- Source: The Qualification and Registration of Voters Act 1871, SBC 1872, c 39 s 13.
- See also: "Discriminatory Legislation in British Columbia 1872-1948" [table], available at: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/our-history/historic-places/documents/heritage/chinese-legacy/discriminatory_legislation_in_bc_1872_1948.pdf

Indian Act Displacement & Assimilation

1876 - Parliament enacted the *Indian Act*, a consolidation of previous federal legislation regarding 'Indians and Lands Reserved for Indians'.

- Source: *The Indian Act*, SC 1876, c. 18. Available at: https://nctr.ca/wp-content/uploads/2021/04/1876_Indian_Act_Reduced_Size.pdf

1879 - Via an order-in-council, the federal Department of Justice formalized its authority to examine and approve the accounts of any lawyers employed by any department of the federal government, prior to payment.

- Source: 'Accounts Rendered by Legal Gentlemen Employed by Departments – [Minister of] Justice. April 12, 1879. Order-in-Council no. 1879-0495. Available at: Library and Archives Canada, RG2, Privy Council Office, Series A-1-a, volume 377, reel C-3325, item 14202.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 221-222.

1885 - For their roles in the Northwest Resistance, Louis Riel was executed at Regina, and 8 Indigenous men were executed at North Battleford. While Riel had the benefit of defence counsel during his trial for Treason, the 8 Indigenous men did not have lawyers for their murder trials. Regarding the 8 men executed at Battleford, Prime Minister Sir John A. Macdonald famously stated: "The execution of the Indians ought to convince the red man that the white man governs."

- Sir John A. Macdonald quotation from: John A. Macdonald to Edgar Dewdney, 20 November 1885, box 2, file 38, Dewdney papers, Glenbow

Archives (GA). Available at: https://searcharchives.ucalgary.ca/j-a-macdonald-to-dewdney-november-20-1885
- Riel source: https://www.thecanadianencyclopedia.ca/en/article/louis-riel
- See also: Cyril Greenland, (1987) "The Last Public Execution in Canada: Eight Skeletons in the Closet of the Canadian Justice System," *Criminal Law Quarterly* 29 (4): 415-420, available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/clwqrty29&div=47&id=&page=

1885 - Regina lawyer John Secord submitted his account for $49.01 for the defence of Eugana ('The Fast Runner'), on a charge of capital murder, to the Deputy Superintendent of Indian Affairs.

- Source: Lawrence Vankoughnet (Deputy Superintendent General of Indian Affairs) to the Deputy Minister of Justice. October 21, 1885. "Account from Mr. Secord for professional services re. trial of Eugana, Indian Convicted of Murder." Available at: Library and Archives Canada, RG13-A-2 vol. B1868 file 1885-1072.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, at pgs. 37-38; and Shelley Gavigan, *Hunger, Horses, and Government Men Criminal Law on the Aboriginal Plains, 1870-1905*, Vancouver: UBC Press (2012) at pgs. 140-148.

1888 - The Department of Justice provided a legal opinion to the Department of Indian Affairs regarding the provision of defence counsel for Indigenous accused in capital cases. The DOJ's opinion stated that the administration of justice is a provincial responsibility, and that the DIA had no responsibility to fund the defence. BC Judge Henry Crease was described as being "very anxious that the Indian should be defended" in the 1888 case.

- DOJ legal opinion source: Deputy Minister of Justice Robert Sedgewick to D.S.G.I.A. Lawrence Vankoughnet. June 8, 1888. Available at: Library and Archives Canada, RG10 vol. 7981 file 1/18-34 vol. 1.
- Source re. Judge Crease's concerns about defence: Dr. Israel W. Powell (B.C. Indian Superintendent) to the Superintendent General of Indian Affairs. June 1, 1888. Available at: Library and Archives Canada, RG10 vol. 7981 file 1/18-34 vol. 1.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 38-39.

1888 - Regina lawyer John Secord submitted an account for $237.60 for the defence of two 'Treaty Indians' on trial for murder, after being asked by Edgar Dewdney (Indian Commissioner for Manitoba and the NWT) to "protect the interests" of the accused. After the DOJ refused to pay the account, the DIA accepted the Auditor General's instruction that the account should be paid by Indian Affairs.

- Source: Auditor General William Dougall to D.S.G.I.A. Lawrence Vankoughnet. October 5, 1888. Available at: Library and Archives Canada, RG10 vol. 3806 file 51,583.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 39-41.

1898 to 1904 - In his role as DIA Law Clerk, federal bureaucrat Reginald Rimmer articulated the DIA's early Legal Aid policy for capital cases in a series of memos. Over a series of cases, Rimmer determined that to qualify for DIA Legal Aid, the provincial attorney general must refuse to provide aid in the case, and the accused must have a "claim on the department" as a 'Treaty Indian' or person with legal status under the *Indian Act*.

- Source: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 41-51.

1901 - DIA Law Clerk Reginald Rimmer identified that lawyers might be reluctant to provide 'gratis' defences for Indigenous accused, and he endorsed the DIA's provision of Legal Aid for a murder trial in the Keewatin District (then in the NWT). Rimmer acknowledged that in this case, "no counsel can be expected to volunteer his services and it will be necessary for the Dominion Government to retain counsel." Rimmer explained that "the costs of the defence will doubtless be heavy, but as the penalty in case of conviction is death the accused should certainly be defended by counsel."

- Source: DIA Law Clerk Reginald Rimmer to the DIA Secretary. March 19, 1901. Available at: Library and Archives Canada, RG10 vol. 7469 file 19123-2.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pg. 49.

1905 Southern Ontario Indian Superintendent E. D. Cameron wrote to the DIA requesting Legal Aid for an Indigenous person on trial for murder, explaining the risks to the accused if he were undefended. Defence counsel was

appointed by the DOJ and paid by the DIA in this case, but the accused was convicted of murder and executed.

> "I believe if [he] is not properly defended that he will not have a fair and impartial trial. The public opinion seems to be that it is about time somebody should be hanged in the County. As in the past many crimes of this nature have gone unpunished. [Name] being an Indian will not receive the same consideration when juries are entirely white. [...] I beg to recommend that the Department engage Counsel in [his] defense."

- Source: Indian Superintendent E. D. Cameron to Deputy Superintendent General of Indian Affairs Frank Pedley. July 28, 1905. Available at: Library and Archives Canada, RG10 vol. 7466 file 19032-7; and RG13 vol. 1450 file 373A.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pg. 43.

1913 - Duncan Campbell Scott was appointed the Deputy Superintendent General of Indian Affairs in Ottawa.

- Source: Robert McDougall, "Duncan Campbell Scott" *The Canadian Encyclopedia* (2018). Available at: https://www.thecanadianencyclopedia.ca/en/article/duncan-campbell-scott

1913 - Chiefs in the BC interior cooperated with the BC Attorney General's department and police to facilitate the arrest of two outlaws wanted for murder, on the condition that they would receive a fair trial and would not be executed. The BC Attorney General John Bowser had silver medals struck to commemorate the Chiefs' cooperation, but the medals were rejected by the Chiefs when one of the accused was convicted and sentenced to hang. BCAG Bowser was adamant that the execution should proceed.

When the Department of Justice asked the Department of Indian Affairs for their opinion on the execution from a policy perspective, Duncan Campbell Scott stated that the sentence should be commuted to imprisonment:

> "It is the desire of the Department that perfect faith should be kept with the Indians, especially in the present position of Indian Affairs in British Columbia."

The DIA arranged for defence counsel in the case, but the accused preferred to retain a different lawyer.

- Source: B.C. Attorney General J. W. Bowser to Minister of Justice C. J. Doherty. November 29, 1913. Available at Library and Archives Canada, RG13 vol. 1463 file 494A, and RG10 vol. 7473 file 19160-3.
- Source: Deputy Superintendent General of Indian Affairs Duncan Campbell Scott to the Deputy Minister of Justice. December 3, 1913. Library and Archives Canada, RG13 vol. 1463 file 494A, and RG10 vol. 7473 file 19160-3.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 74-77.

1922 Squamish Indigenous rights advocate Andrew Paull (Xwechtáal - Serpent Slayer) was denied admission to the Law Society of BC following his legal training with the Vancouver firm of Hugh St. Quentin Cayley. The Law Society had amended its rules in 1919 to disallow admission to the Bar to any person who was unable to vote in a provincial election. 'Indians' were excluded from voting in BC elections from 1872 to 1949.

- Source: Joan Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia," in Hamar Foster and John McLaren, eds. *Essays in the History of Canadian Law*, vol. 6, *The Legal History of British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995), 508-561, at pg. 521.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 343-345.

1926-1927 A Special Joint Committee of the Senate and the House of Commons was appointed to look into the claims of the Allied Indian Tribes of British Columbia, following the 1913-1916 McKenna-McBride Commission (formally known as the Royal Commission on Indian Affairs in BC). The Committee heard testimony from Indigenous representatives such as Andrew Paull, the Rev. Peter Kelly, and non-Indigenous BC lawyer Arthur E. O'Meara.

- Source: Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Inquire into the Claims of the Allied Indian Tribes of British Columbia, *Report and Evidence* (Ottawa: King's Printer, 1927).

- See also: Paul Tennant, "Cut-Offs, Claims Prohibition, and the Allied Tribes, 1916-27," *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990).

1927 - The *Indian Act* is amended to include section 141, which prohibited fundraising and the employment of counsel by Indigenous communities that wished to pursue claims against the government. The section was in force from 1927 to 1951. Scholars argue that the prohibition was enacted in response to the claims made during the 1926-27 Special Joint Committee.

> S. 141: "Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund of providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months."

- Source: *Indian Act*, RSC 1927, c 98, s 141.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 83-91; and Hamar Foster, "We are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-1928," in Raven, Webber and Foster, eds. *Let Right Be Done: Aboriginal Title, the Calder case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), pgs. 61-84.

1926-28 The DIA provided Legal Aid in the BC wrongful conviction case *R. v. Sankey*, in which the Indigenous accused was represented by esteemed human rights lawyer Joseph E. Bird. Appealing the case to the Supreme Court of Canada in 1927, Bird secured a new trial and a full acquittal in 1928. Duncan Campbell Scott and Joseph Bird corresponded regularly regarding the case, which was the most expensive the DIA had funded thus far, at over $6,000 for counsel fees and expenses.

Notably, the House of Commons debate on the s.141 addition to the Indian Act (prohibiting fundraising and employment of lawyers) was held on

February 15, 1927, while the original execution date was set for February 16, 1927 (it was postponed for the appeals).

- Source: Supreme Court of Canada decision, *Rex. v. Sankey* [1927] SCR 436. Available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7078/index.do
- Source: Library and Archives Canada, RG10 vol. 7476 file 19168-2; and LAC, RG13 vols. 1542, 1543 file CC258.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 83-91.

1932 Duncan Campbell Scott retired from the Department of Indian Affairs.
- Source: Robert McDougall, "Duncan Campbell Scott" *The Canadian Encyclopedia* (2018). Available at: https://www.thecanadianencyclopedia.ca/en/article/duncan-campbell-scott

1938 - Following a recommendation from Andrew Paull, an American lawyer wrote directly to the Minister responsible for Indian Affairs, asking to be paid $1,000 to defend an Indigenous 'Canadian' from BC charged with murder while living in Washington State as a seasonal farm worker. The DOJ did not object to the DIA employing a lawyer "to defend an Indian under foreign jurisdiction," and the lawyer was eventually paid $500 for the defence.

In 1952, Andrew Paull later attempted to use this 1938 precedent to advocate for the DIA to provide Legal Aid in the murder trials of three co-accused Indigenous 'Canadians' in the United States, but Paull's advocacy efforts were unsuccessful.

The DIA Secretary acknowledged in the 1952 case that "there is a precedent for paying the defence of an Indian charged with murder under foreign jurisdiction," but the DIA refused to fund the defence, calling the 1938 precedent "an exception."

- Source for the 1938 case: J. P. Tonkoff to Minister T. A. Crerar. November 30, 1938. Available at: Library and Archives Canada, RG10 vol. 7472 file 19152-3.
- Source for the 1952 case: DIA Director D. M. MacKay to Andrew Paull. October 9, 1952. Available at: Library and Archives Canada, RG10 file 887/37-7-44-*** [restricted file].
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 360-368.

1939 - The Department of Justice issued a new Order in Council clarifying its exclusive authority to appoint Legal Gentlemen to complete legal work on behalf of the federal government (these appointments held the title 'Agent of the Minister of Justice.') The Order in Council also clarified that all accounts for legal services must be submitted to the DOJ for "examination and taxation" (i.e. reduction), before payment would be made to lawyers.

- Source: 'Accounts Rendered by Legal Gentlemen Employed by Departments – [Minister of] Justice. April 12, 1879. Order-in-Council no. 1879-0495. RG2, Privy Council Office, Series A-1-a, volume 377, reel C-3325, item 14202.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 233-234.

1936-1952 - Throughout his time as the Secretary of the DIA, T.R.L. MacInnes wrote a series of memos to the DOJ recommending the "exemplary punishment" of execution in Indigenous capital cases. In many of the cases where MacInnes recommended execution, the DIA had refused to provide Legal Aid to the accused because they did not have legal status under the *Indian Act*.

- Source: Jacqueline Briggs, "Exemplary Punishment: T.R.L. MacInnes, the Department of Indian Affairs, and Indigenous Executions, 1936-52," *Canadian Historical Review* 100 no. 3 (2019): 398-438.

1944 - DIA Director Harold W. McGill initiated a 'test case' to bring an end to the Legal Aid policy by refusing to take the usual steps to have defence counsel appointed for a murder trial in BC. Following a telegram from the trial judge to the DOJ, a local lawyer was appointed just hours before the trial was set to begin. With no time to prepare, the case was traversed to the fall session of the circuit court. The crown prosecutor in the trial, and the Deputy Attorney General of BC, both sent letters to the DOJ admonishing the "dilatory methods of the Indian Department."

- Sources: Correspondence regarding this case is available in multiple case and policy files. See: Library and Archives Canada, RG10 vol. 7474 file 19163-5; LAC, RG13 vol. 1650 file CC581; and LAC, RG10 vol. 7981 file 1/18-34 vol. 1.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 99-109. For discussion of Andrew Paull's involvement in the 1944 case, see pgs. 369-375.

1944 In October 1944 the Department of Justice confirmed its 1888 legal opinion that the federal government "is not obliged to provide counsel for Indians charged with offences" in the provinces, but that the DIA can provide counsel if it so desires: "the matter is one of policy for the consideration of the department administering the Indian Act." Despite the DOJ opinion, the DIA Legal Aid program continued on the same basis.

- Source: Deputy Minister of Justice Federick P. Varcoe to Deputy Minister of Mines and Resources (responsible for Indian Affairs) Charles Camsell. October 10, 1944. Available at: Library and Archives Canada, RG10 vol. 7981 file 1/18-34 vol. 1.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 113-114.

1946-48 - From 1946-1948 a Special Joint Committee of the Senate and the House of Commons inquired into the Indian Act and Indian administration in Canada. Two Indigenous advocates who were deeply involved in DIA Legal Aid - Andrew Paull and Norman Lickers - participated in the SJC.

Lickers (Six Nations, Ontario) was one of the only Indigenous practising lawyers in Canada at the time (he practised from 1938-1950) and served as counsel and liaison officer for the committee.

Andrew Paull (Squamish, BC) was an Indigenous activist and president of the North American Indian Brotherhood, and he testified twice to the SJC.

In addition to Paull and Lickers, Indigenous representatives from across the country appeared to testify about the *Indian Act* and the DIA administration. The 1948 Final Report of the SJC recommended a complete overhaul of the Indian Act and of Indian administration, with the goal of transforming Indigenous peoples from 'wardship to citizenship'.

- Source: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021. See chapter eight, "Indigenous Advocates and Intermediaries, Norman Lickers and Andrew Paull," pgs 343-385.
- See also: "Indian Act," *The Canadian Encyclopedia*, 2022, available at: https://www.thecanadianencyclopedia.ca/en/article/indian-act ; and John Leslie, "Assimilation, Integration, or Termination? The Development of Canadian Indian Policy, 1943-1963," PhD Dissertation, Carleton University, 1999.

1949 - Chief Justice of the Supreme Court of BC, Wendell B. Farris, sent a telegram to the Deputy Minister of Justice in Ottawa, criticizing the DIA for its delay appointing Legal Aid counsel for a murder trial in Nelson BC. Farris wrote that the Indian Department has "embarrassed us [the court] in the trial of Indians for murder."

> "Rex versus [name]. This is a murder trial at Nelson, B. C. The accused [name] is an Indian. The trial has now been adjourned from November seventh to November fourteenth. The Indian Department have very much embarrassed us in the trial of Indians for murder in that they have not appointed Counsel in advance of the trial. The members of our Court will not proceed with a murder trial unless Counsel has been appointed in sufficient time to properly prepare the defence. No counsel has yet been appointed for [name]. The Indian has expressed a preference for Lawyer McBride in Nelson. Would appreciate it if you would see to it that Indian Department at once appoints Counsel in this case and that in future cases arrangements made in the case of Indians for appointing Counsel in advance of trial."

- Source: Chief Justice W. B. Farris to Deputy Minister of Justice. October 28, 1949; copied in letter of reply from Deputy Minister of Justice to Chief Justice W. B. Farris. November 2, 1949. Available at: Library and Archives Canada, RG10 file 982-37-7-7-13-** [restricted file].
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 195-196.

1949 – Provincial voting rights in BC were extended to Indigenous persons.

- Source: *Provincial Elections Act*, SBC 1949, c 19.
- See also: "Discriminatory Legislation in British Columbia" [table], available at: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/our-history/historic-places/documents/heritage/chinese-legacy/discriminatory_legislation_in_bc_1872_1948.pdf

1949 - Frank Calder, a Nisga'a Chief, was the first Indigenous person elected to the BC legislative assembly (the first elected to any legislative assembly in Canada).

- Source: Legislative Assembly of British Columbia, "First Indigenous Person is Elected to the Legislative Assembly," (no date). Available at: https://www.leg.bc.ca/dyl/Pages/1949-First-Indigenous-Person-Elected-to-the-Legislative-Assembly.aspx

- See also: Bennet McCardle, "Frank Calder," *The Canadian Encyclopedia* (2020), available at: https://www.thecanadianencyclopedia.ca/en/article/frank-calder

1951 - When an Indigenous fisherman was charged with murder in BC, Indian Agent F. Earl Anfield sold the accused's fishing boat to secure funds to pay the defence lawyers' fees for the murder trial. The Agent and the DIA felt that the accused's equity in the boat meant he was not 'indigent' and therefore did not qualify for DIA Legal Aid. When he was convicted of murder, the accused's friends and family raised funds for his appeal.

(Note that Agent Anfield was the same DIA official who arranged the lease of the Musqueam Reserve lands in Vancouver to the Shaughnessy Golf Club in 1958, a transaction which was eventually litigated in *Guerin v. Canada*, and which established the Crown's fiduciary duty to Indigenous peoples in Canadian common law).

- Source: Indian Superintendent F. Earl Anfield to the Indian Commissioner for B.C., W. S. Arneil. February 12, 1951. Available at: Library and Archives Canada, RG10 file 984/37-7-9-*** [restricted file].
- See also: Jim Reynolds, *From Wardship to Rights: The Guerin Case and Aboriginal Law* (Vancouver: UBC Press, 2020); and Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 294-296.

1951 - The *Indian Act* was amended; section 141 was deleted. In force from 1927 to 1951, s. 141 prohibited Indigenous communities from raising funds or hiring counsel to pursue claims against the government.

- Source: "Indian Act," *The Canadian Encyclopedia*, 2022. Available at: https://www.thecanadianencyclopedia.ca/en/article/indian-act

1951 The Law Society of Upper Canada established a province-wide Legal Aid plan in Ontario. Although the plan made some funds available for counsel disbursements and the law society's administrative expenses, the actual provision of Legal Aid services by lawyers in Ontario remained unpaid.

- Source: Law Society Amendment Act, 1951, S.O. 1951, c. 45.
- See also: John D. Honsberger, "The Ontario Legal Aid Plan," *McGill Law Journal*, 15 no. 3 (1969), available at: https://lawjournal.mcgill.ca/wp-content/uploads/pdf/98835-honsberger.pdf ; and Lauren Warner, "A Primer on Legal Aid in Ontario," Legislative Research Branch, Legislative

Assembly of Ontario, (2021), available at: https://www.ola.org/sites/default/files/node-files/llrs/document/pdf/2022/2022-07/A%20Primer%20on%20Legal%20Aid%20in%20Ontario%20RP17-09.pdf

1952 A province-wide Legal Aid plan for BC was inaugurated at the 1952 Annual Meeting of the Law Society of British Columbia. Initially the plan was organized by Legal Aid Committees of the local Bar Associations in Vancouver and Victoria, with the Law Society office administering the rest of the province. Eventually (by the early 1960s) the New Westminster Bar Association also established a Legal Aid clinic. Lawyers and other participants in Legal Aid provided their services without remuneration until the mid-1960s.

- Source: Law Society of British Columbia, "Legal Aid in British Columbia," (1963) [pamphlet].

1954 DIA Director Colonel H. M. Jones proposed the elimination of the DIA Legal Aid plan, after the DIA completed a survey of existing provincial Legal Aid. Jones recommended that the DIA "cease providing counsel [...] on the basis that the Indians should be entitled to receive the same Legal Aid available to non-Indians in like circumstances."

- Source: Director of Indian Affairs Col. H. M. Jones to the Deputy Minister of Citizenship and Immigration, Laval Fortier. November 4, 1954. Available at Library and Archives Canada, RG10 vol. 7981 file 1/18-34 vol. 2.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at 153-158.

1955 DIA Legal Aid policy was expanded: defence lawyers for 'status Indians' charged with capital murder would be appointed in time to prepare for and attend preliminary hearings.

- Source: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at 159-160.

1960 - The right to vote in federal elections was extended to all Indigenous persons with 'status' under the *Indian Act*.

- Source: John Leslie, “Indigenous Suffrage” *The Canadian Encyclopedia* (2016). Available at: https://www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage
- See also: Canadian Museum of History, “Aboriginal People and the Franchise,” (no date). Available at: https://www.historymuseum.ca/cmc/exhibitions/hist/elections/el_038_e.html

1961/62 DIA Legal Aid was again expanded to include both capital murder and non-capital murder trials, following the change in the Criminal Code.

- Source: Jacqueline Briggs, “Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970,” PhD Dissertation, University of Toronto, 2021, cited at 161-164.

1962 - The final executions in Canada occured in the Don Jail in Toronto. From 1963 onwards, all death sentences were commuted to life imprisonment, and a series of moratoria on executions were observed from 1967 until the abolition of capital punishment from the Criminal Code in 1976.
- Source: Paul Gendreau and Wayne Renke, "Capital Punishment in Canada," *The Canadian Encyclopedia*, 2020. Available at: https://www.thecanadianencyclopedia.ca/en/article/capital-punishment
- See also: Dominique Clement, “Capital Punishment,” *Canadian Museum of History* (no date). Available at: https://historyofrights.ca/encyclopaedia/main-events/capital-punishment/

1963 United States Supreme Court decision in *Gideon v. Wainright* established a right to counsel and the expansion of the public defender system across the United States. This in turn stimulated discussions about Legal Aid systems across Canada.

- Source: *Gideon v. Wainwright*, 372 U.S. 335 (1963) Available at: https://supreme.justia.com/cases/federal/us/372/335/
- See also: Lewis, Anthony. *Gideon’s Trumpet*. New York: Random House, 1964.

1964 The Attorney General of British Columbia agreed to provide $50,000 per year to the Law Society of British Columbia to provide honoraria to counsel providing criminal Legal Aid services. The honouraria agreement provided $30 for each day spent in court defending on an indictable offence, and $50 per day for more serious charges such as murder.

- Source: G. Kennedy (Deputy Attorney General of BC) to the Secretary of the Law Society of BC. March 24, 1964. Library and Archives Canada, RG10 vol. 7981 file 1/18-34 vol. 4.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 399-400.

1965 The Canadian Corrections Association released a report titled "Suggestions for a Good Legal Aid System in Canada." Regarding Indigenous peoples and Legal Aid, the report's recommendation precisely reflected the DIA's provincial integration policy goals. (Note that a senior bureaucrat from the DIA participated in the committee overseeing the report.)

> "Indians should be accepted by the provincial scheme for Legal Aid on exactly the same basis as non-Indians. The present anomaly where the federal government pays Legal Aid in capital cases but only in capital cases should be ended. The federal government should no longer pay for counsel in capital cases within the provinces, and the provincial schemes should accept Indian clients without discrimination. This is logical since all other provincial law enforcement, judicial and correctional services apply to Indians."

- Source: Canadian Corrections Association, "Suggestions for a Good Legal Aid System in Canada" [Draft report No. 4] 1965. Available at: Library and Archives Canada, RG10 Vol. 7981 File 1/18-34 vol. 4. Accession 1999-01431-6, vol. 51.

1966/67 In 1966 Ontario passed the *Legal Aid Act* to create the Ontario Legal Aid Plan, with financial contributions from the province, and administration by the Law Society of Upper Canada through an advisory committee and local area directors. The *Legal Aid Act* came into effect on March 27, 1967.

- Source: *Legal Aid Act,* SO 1966, c. 80.
- See also: John D. Honsberger, "The Ontario Legal Aid Plan," *McGill Law Journal*, 15 no. 3 (1969), available at: https://lawjournal.mcgill.ca/wp-content/uploads/pdf/98835-honsberger.pdf ; and Lauren Warner, "A Primer on Legal Aid in Ontario," Legislative Research Branch, Legislative Assembly of Ontario, (2021), available at: https://www.ola.org/sites/default/files/node-files/llrs/document/pdf/2022/2022-07/A%20Primer%20on%20Legal%20Aid%20in%20Ontario%20RP17-09.pdf

1967 - The *Indians and the Law* report was presented to the Minister of Indian Affairs by the Canadian Corrections Association. The report was commissioned by the DIA in 1966, and funded by a $60,000 contribution from Indian Affairs. The report was the first quantitative observation of Indigenous over-incarceration in provincial jails and federal penitentiaries.

The draft report suggested that the problem of over-incarceration "is sufficiently serious to warrant a Corrections Section within the Indian Affairs Branch." The final report was critical of the DIA's role in the provision of Legal Aid and recommended its expansion to include aid for all indictable offences.

From the final report: "The role of the Indian Affairs Branch in all phases of the law enforcement, judicial and correction process should be reviewed with the objective of ensuring that adequate programs are available to Indians through federal, provincial and private agencies. Professional staff should be provided to carry out the necessary liaison to ensure that effective services are available to Indians who come into conflict with the law. All Legal Aid plans operating in a province should be made readily available to Indian people but where provision for Legal Aid has not been made, the Indian Affairs Branch should broaden its own plan to ensure that legal counsel is provided to Indians for all indictable offences."

- Source for draft report: Dr. Gilbert. C. Monture to Members of the National Committee, The Canadian Welfare Council. February 28, 1967. (Enclosing the Preliminary Report 'Indians and the Law' and Recommendations.) Quoted at pg. 4. Available at: Library and Archives Canada, RG10 file 901/18-1-1 vol. 1 Accession PV 13425.
- Final report source: Canadian Corrections Association and Canada, Indians and the Law: A Survey prepared for the Honourable Arthur Laing, Department of Indian Affairs and Northern Development, Ottawa, Ottawa: Canadian Corrections Association, Canadian Welfare Council, 1967. Online access to the report available at: "Indians & the Law," Journal of Canadian Studies/Revue d'études canadiennes 3, no. 2 (1968): 31-55. [This is a publication of excerpts from the 1967 report.] muse.jhu.edu/article/676220.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 171-173.

1967 - Under the new provincial Legal Aid plan, Ontario agreed to Indigenous accused with status under the *Indian Act* and issued a Legal Aid certificate to an accused person in Kenora in April 1967. In response, the Department of Indian Affairs henceforth discontinued the provision of Legal Aid for cases in Ontario.

- Source: H. G. Sprott (Acting Head of the Indian Affairs Secretariate), Memo-to-file 'Ontario Legal Aid – Application to Indians'. April 28, 1967. Available at: Library and Archives Canada, RG10 vol. 51 file 1/18-34 vol. 5 Accession 1999-01431-6.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 387-390.

1967-68 Following Ontario, the provinces of Alberta, Manitoba, and Saskatchewan agreed to include Indigenous accused in their newly-established provincial Legal Aid plans. The DIA then discontinued the provision of Legal Aid in those provinces.

- Source: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 390-399.

1968 - In July 1968, the BC Attorney General agreed to extend provincial support for Legal Aid to 'status Indians' in all cases, under the Legal Aid plan operated by the Law Society of British Columbia. The BC Indian Commissioner notified all Indian Agents across the province of BC of this change in provincial policy and instructed them to henceforth "direct Indian people to the Provincial Legal Aid service."

- Source: J. V. Boys (Indian Commissioner for BC) to All Agency Superintendents, 'Circular 716.' July 30, 1968. Available at: Library and Archives Canada, RG10 file 901/18-34 vol. 2 Accession PV13428.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 399-404.

1969 - In the eastern provinces, the availability of DIA Legal Aid was actually expanded to include serious charges in addition to capital and non-capital murder. This expansion is attributed to the lower cost of legal services to the department, following the acceptance of Indigenous peoples to provincial Legal Aid in the western provinces.

> "As a result of the establishment of Legal Aid systems in five of the provinces, this Department's overall cost for the provision of Legal Aid to Indians and Eskimos is decreasing and will continue to decrease. The Minister has therefore approved the expansion of the Federal Legal Aid Program to include the provision of Legal Aid in all

cases which could result in life imprisonment. As an example, Legal Aid will be provided in a current case on the [name] Indian Reserve in New Brunswick where an Indian has been charged with criminal negligence causing death."

- Source: W. Evan Armstrong (DIA Director of Operations, Social Affairs) to Indian Affairs Regional Director F. B. McKinnon (Atlantic region). April 22, 1969. Available at: Library and Archives Canada, RG10 vol. 8506 file 50/18-1 pt. 3.
- See also: Jacqueline Briggs, "Networks of Colonial Governance: Department of Indian Affairs Legal Aid in Canada, 1870-1970," PhD Dissertation, University of Toronto, 2021, cited at pgs. 404-406.

1969 The Law Foundation of BC was established under the *Legal Professions Act*; since 1969, the Foundation has contributed funds earned from interest on lawyers' trust accounts in the province, to Legal Aid in BC.

- Source: The Law Foundation of British Columbia, "History of the Law Foundation." Available at: https://www.lawfoundationbc.org/about-us/history/

1969 - The federal government released the 'White paper'. The policy of formal equality proposed the termination of 'Indian status', the *Indian Act*, and existing Treaty agreements. The policy statement was formally withdrawn following widespread resistance by Indigenous organizations and activists across Canada.

- Source: Canada, *Statement of the Government of Canada on Indian Policy*, 1969. ['The White Paper'.] Available at: https://publications.gc.ca/collections/collection_2014/aadnc-aandc/R32-2469-eng.pdf
- See also: Naithan Lagace and Niigaanwewidam James Sinclair, "The White Paper, 1969", *The Canadian Encyclopedia* (2020), available at: https://www.thecanadianencyclopedia.ca/en/article/the-white-paper-1969

Renewal to Constitutional Entrenchment

1970 The BC Legal Aid Society was incorporated under the *Societies Act*, with the objective "to administer a program of Legal Aid in both civil and criminal matters throughout the Province to all persons unable to afford legal services."

- Source: Pauline Morris and Ronald N. Stern, C*ui Bono: A Study of Community Law Office and Legal Aid Society Offices in British Columbia*, Vancouver: Ministry of the Attorney General (1976), quoted at page 14.

1972 A cost-sharing agreement was made between the Province of BC and the government of Canada for Legal Aid in criminal matters. The federal contribution covered 90% of actual annual expenditures for fees and disbursements, or 50 cents per capita of the population of BC, whichever was lower.

- Source: Memorandum of Agreement between BC and Canada for Federal-Provincial cost-sharing for Legal Aid in criminal matters. December 21, 1972. [BC Order in Council 4387.] Available at: https://www.bclaws.gov.bc.ca/civix/document/id/oic/arc_oic/4387_1972

1973 The Native Courtworker and Counselling Association of BC was established.

- Source: Frederick H. Zemans and Ronni Richards, "Evaluation of the Native Courtworker and Counselling Association of British Columbia," (1978). Available at: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1092&context=faculty_books

1974 A cost-sharing agreement between the Province of BC and the government of Canada is made to share 50% of costs for the Native Courtworker and Counselling Association of BC programme. (The agreement was renewed in 1976.)

- Source: Memorandum of Agreement between BC and Canada for Federal-Provincial cost-sharing of a Native Courtworker Program in BC. April 30, 1974. [BC Order in Council 3489, renewing the agreement dated December 2, 1976.) Available at: https://www.bclaws.gov.bc.ca/civix/document/id/oic/arc_oic/3489_1976

1975 The Legal Services Commission of BC was established under the auspices of the Dept. of the BC Attorney General, resulting in the creation of Community Law Offices across the province of BC.

- Source: Legal Services Commission Act, SBC 1975, c. 36.
- Available at: https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/249472409

1976 Capital punishment was abolished from the Criminal Code.

- Source: *Criminal Law Amendment Act* (No. 2), RSC 1976, c. 105. Available at: https://archive.org/details/actsofparl197476v02cana/page/2126/mode/2up

1979 The Legal Services Society of British Columbia was established, combining the functions of the Legal Aid Society and the Legal Services Commission.

- Source: *Legal Services Society Act*, SBC 1979, c. 15. Available at: https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/683791030
- See also: Legal Aid Task Force, "A Vision for Publicly Funded Legal Aid in British Columbia," Law Society of British Columbia, 2017. Available online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/LegalAidVision2017.pdf cited at pg. 3, para. 6.

PART TWO: LEGAL AID STATUS QUO

Executive Summary

The purpose of Part Two is to provide an overview of the current state of Legal Aid for Indigenous peoples in British Columbia and to highlight the stages of the legal process as experienced by those moving through it with the assistance of Legal Aid (LA), with a focus on **criminal** and **child protection.** A few remarks on Legal Aid and cultural safety will close this section. This section is also informed by the lived experiences of the lawyers who contributed to this document. Specifically, as representatives of Legal Aid clients and Indigenous Nations in child protection matters.

Criminal Legal Aid in Its Current State

Criminal defence Legal Aid is available to those potentially facing incarceration who financially qualify for their services. The following are the steps along the criminal process and what clients experience when being assisted by LA.

Brydges Line

Brydges Line is a toll-free-number potential clients can call to retain a lawyer upon arrest if they do not have an existing relationship with a lawyer, or cannot reach their lawyer of choice. Some people also call Brydges when they learn that they are being investigated for something. Indigenous clients' experiences with this service are mixed. The primary complaint from clients about Brydges is that "they just tell you not to talk to the police."

Clients who have had more positive experiences with Brydges will say that someone spoke to them for several minutes. A more helpful interaction on Brydges means that the lawyer explained to the client why it is so important that they do not talk to the police without legal representation. A more helpful interaction on Brydges will also mean inquiring about the person's wellbeing and following up with the jailer to ensure their medical needs are met, or at least reported.

Clients often report one of the worst parts about the criminal process is simply not understanding what is happening following their arrest and what they can expect moving forward. A Brydges lawyer who takes the time to meaningfully engage with a client, will ask if s/he is Indigenous, has a criminal record, any potential conditions, and basic info about the alleged offence.

Doing so will better equipe the Brydges lawyer to explain to the client what s/he can expect to happen next in the process and avoid any decisions being made without legal advice that may prejudice or negatively impact the client's case.

A Brydges lawyer will also advise the client to think about who might serve as a potential "surety" if bail is a possibility and surety is necessary. A "surety," is a court-approved person who is responsible for ensuring that the client shows up for all of her or his hearings and remains reachable while released on bail. While the Brydges lawyer is not the one to argue for bail, if the client is prepared with information that the bail lawyer will need, this could expedite the process.

Duty Counsel

Clients report that duty counsel lawyers assisting clients before they have a lawyer, or who provide general assistance at the courthouse, varies tremendously in quality and service delivery for the client. Certainly, very busy courthouses might mean a few short minutes with a duty counsel lawyer who might not even have the time to read the Information that the client is there to address.

A duty counsel lawyer who takes more time with a client can assist with bail in a fulsome manner, explain the process and procedure and limit expectations in terms of the length of time a certain criminal matter may take to resolve. This is particularly important if this is the client's first experience with the criminal law system. Duty counsel lawyers should also assist clients to retain a lawyer to represent their interests moving forward, but some clients advise that duty counsel does not do this.

In some instances, duty counsel lawyers can even assist in entering guilty pleas and deal with sentencing for clients who wish to resolve their matters quickly. Situations such as this cannot guarantee that due process is followed or a just outcome for a client. There also does not appear to be a way to gauge how often this happens and how the outcome impacts the client in the long-term. Serious concerns should arise for any legal professional when a plea is entered and subsequent sentencing carried out in this manner because it does not allow for a proper review of the file or allow for adequate consideration to be given to the principles of sentencing, particularly Gladue Principles.

Bail Considerations

One of the biggest shortcomings of the criminal bar is the failure to ensure that Gladue Principles apply at every stage of the criminal law process, and in particular at the bail hearing stage. Many clients report that no one inquired about their Indigenous status at the bail stage, which can only be viewed as a gap in services and missed opportunity to ensure Indigenous peoples are treated fairly and properly represented.

Recognizing Gladue Principles at the bail stage can seriously influence the outcome of a bail hearing if a judge genuinely takes into account reported statistics that in-custody remand contributes to the higher rates of Indigenous peoples behind bars. Remand refers to the act of incarcerating an individual facing criminal charges until their trial date, which may take months. It is this author's experience that at the 90-day bail review, after the lawyer has had a chance to canvass Gladue factors, and worked to find a condition that will satisfy the Crown/Court then bail is a more likely outcome.

Criminal Early Resolution Contracts

Criminal Early Resolution Contracts (CERCs) are intended to avoid trials right from the beginning. It is certainly the case that if matters can be resolved by way of withdrawals, stays, or if there is no defence and the prospect of conviction is high, then it would seem that these contracts are a good idea.

One problem identified is that it is not always clear how Legal Aid determines what will be a CERC. Some CERCs are given for clients who are just above the financial cut off, so they get some legal services from Legal Aid, but are on their own should they wish to proceed to trial. It is clear in those cases that some clients might be compelled to resolve their criminal matter before trial even if they have a defence because they cannot afford to pay a lawyer out of pocket.

In the alternative, it is also possible for a lawyer to go back to Legal Aid and demonstrate that there are triable issues, in which case they can argue for a full contract to represent the client.

Trial Considerations

A smoothly functioning criminal justice system, if one exists, is one in which files that need not go to trial are resolved fairly and well before trial. For matters that cannot be fully resolved, however, a trial date must be set.

In the lead up to a trial, there may also be pre-trial applications, which are only paid by LA if the lawyer applies for funding. Completing the applications for funding is time consuming and LA lawyers are not compensated for this work.

Another important consideration is that LA lawyers are only paid for the actual days they spend in active trial and not for the many hours they likely spend on preparing for trial. Thus, when a matter resolves right before trial, the lawyer is not paid for the trial they have already prepared for.

Sentencing Considerations

Sentencing in matters involving Indigenous litigants must consider Gladue Principles. Although it is every Indigenous litigant's legal right to have their Gladue factors considered at every stage of the criminal law process, these principles are not always put into practice, particularly in criminal matters involving Indigenous youth. Current practice suggests that Gladue Report referrals only occur if the lawyer with conduct of the file makes the request. For more on sentencing, see First Nations Courts below.

Prison & Parole

Legal Aid does not address prison or parole issues for any clients. At the present time, those services are provided through the West Coast Prison Justice Society. They assist approximately 1000 inmates per year, and their focus is on the overuse of segregation, disciplinary hearings, sentence calculation, transfers, and parole applications and suspensions.

Diversion Programs

The use of diversion options and programs is inconsistent and not always used the way they are meant to be used. Some crown offices are operating under the impression that a weak file, one for which there is little prospect of conviction, means that they can automatically propose and impose alternative measures on the defendant. What happens in these cases is that the client is subjected to crown-prescribed interventions, regardless of the client's actual legal innocence.

Other offices are making good use of diversion possibilities without necessarily being prompted by defence, and in some locations, crowns will propose diversion from the start in cases that warrant this type of outcome.

Diversion options vary, which is encouraging, because it suggests that justice system participants are putting their mind to finding solutions that suit the accused person. Types of diversion include counselling and community service, restorative justice, and community-based justice and cultural programs.

Counselling and community-based services appear to be the most widely used supplementary diversion options. For the most part, such services also involve regular meetings with a probation officer, who can direct the client to engage in additional services. In some cases, clients who engage in additional services and successfully complete their diversion programs can conclude their interactions with the criminal legal system sooner and have their charge(s) stayed or withdrawn within a few months.

Importantly, Indigenous clients report more positive experiences when staff of diversion programs are Indigenous and the diversion programs are developed and hosted by Indigenous peoples.

First Nations Courts

Currently, despite a move toward Indigenous legal order recognition, there does not exist any regions where criminal matters are dealt with through Indigenous law. If the police are called, colonial law will apply. There are, however, a handful of courts for First Nations peoples throughout BC, located in Duncan, Kamloops, Nicola Valley, Hazelton, New Westminster, North Vancouver, Prince George, and Williams Lake.

First Nation Courts are not fact-finding courts and are often colloquially referred to as “Gladue Courts.” Barriers also exist because Indigenous clients are permitted to engage in First Nations Court processes with crown consent and a guilty plea is the price of admission. These two requirements result in a conviction being registered without any consideration given to the legal innocence of the client. First Nations Courts typically sit once a month in their respective locations.

Sentencing in these courts draws on Indigenous law in that there is a restorative justice focus. The overarching goal of these circles and this work is to restore balance and harmony between the offender and those s/he has offended against. A meeting is convened involving the offender, the victim, Elders, native court workers, possibly social workers, and other community members. Together, the participants will develop a healing plan that restores balance and harmony within the community and describes how the offender will be held accountable. The healing plan will also identify who is responsible

for holding the offender accountable whether it is community members, state actors, or a combination of the two.

Child Protection Legal Aid in Its Current State

Child protection is another area of law where Legal Aid frequently assists clients in need of legal representation. This is done two ways in BC: through several Parents' Legal Center offices located throughout the province, and through Standard Contracts taken on by members of the private bar.

Parents' Legal Centres

There are 10 Parents' Legal Centres in BC: Campbell River, Duncan, Prince George, Smithers/Hazelton, Surrey, Terrace, Vancouver, Victoria, and Williams Lake. These centers pair clients with a lawyer and an advocate to assist them in dealing with the Ministry of Children and Family Development. The types of services they provide are:[1]

- information and advice on options for resolving child protection issues out of court;
- legal advice and representation, where appropriate, through collaborative processes such as mediation and family case planning conferences;
- legal advice and representation at uncontested hearings;
- an advocate who will support you and go with you to meetings and appointments; and
- referrals to other services, including online resources and other public agencies.

There are also several Parents' Legal Centre Network Offices. These are typically staffed by local FNMI associations or Native Courtworkers, who can offer computer terminals, advocacy, and legal information. Some offices have a lawyer on staff who can be consulted on a limited basis. These offices are located in Abbotsford, Burns Lake, Chase, Clearwater, Courtney, Fort Nelson, Fort Ware, Houston, Merritt, Mission, Nanaimo, New Aiyansh, Port Hardy, Salmon Arm, Sooke, Terrace, Vancouver, Vernon, Victoria.
Parents' Legal Centres offer the following:[2]

- information and advice on options for resolving child protection issues out of court;

[1] Parents Legal Centres | Aboriginal Legal Aid in BC
[2] https://legalaid.bc.ca/legal_aid/parents-legal-centres

- legal advice and representation, where appropriate, through collaborative processes such as mediation and family case planning conferences;
- legal advice and representation at uncontested hearings;
- an advocate who will support you and go with you to meetings and appointments; and
- referrals to other services, including online resources and other public agencies.

It is worth noting that Parents' Legal Centres, who represent significant Indigenous clients, **will not carry out contested hearings.** Contested hearings, are hearings in which one or more of the parties do not agree with the application(s) being advanced by MCFD. It has been the experience lawyers working for parents that contesting the Ministry's applications often comes as a surprise to MCFD, which suggests that their applications are typically uncontested.

There are three points throughout the child protection process when hearings occur and applications are advanced by the Ministry: Presentation Stage, Protection Stage, and Final Resolution Stage (Continuing Custody Order, Adoption, Granting of Permanent Custody to Other, etc.). A brief overview of the stages of the child protection process and the importance of contesting Ministry applications may be found below. Importantly, it is essential that the parties and the court are made aware of a child's Indigenous heritage as soon as possible in the child protection process as Indigenous Nations automatically have standing in matters involving their children and can provide invaluable support to the parent(s) and child(ren) and can also contest the Ministry's applications.

The Presentation Stage

This is the first stage of the Child Protection process. This is the first instance at which a family encounters the court. The Presentation Stage begins when the social worker with conduct of the file forwards a report to the court. The first appearance must occur within 7 days of a child protection apprehension and/or the Ministry seeking a supervision order. A Supervision Order refers to the Ministry's request from the court for the legal right to create a supervision plan that will allow the child to remain in the care of the parents under the direct supervision of a social worker until such time as the social worker is satisfied that the child protection concerns have been addressed.

It is typically the case that the Ministry will be granted the order(s) they are seeking. However, if the parent is represented and understands her/his rights,

the parent has the right to contest the Ministry's application and if the judge agrees, the process can be halted at this point. It is very important that these applications be contested at the presentation stage, if reasonable. If an application is not stopped at this stage, the child(ren) will either be placed in the temporary custody of the Ministry, of another person, or a supervision order will be granted. The danger arises in the fact that such orders grant the Ministry copious discretion to make all decisions with respect to the child(ren) subject to the orders with no oversight of Ministry interventions.

The Protection Stage

If the child has been apprehended or a supervision order is not being followed to the Ministry's satisfaction, then the matter will proceed to the Protection Stage. It is at this stage that parent(s) are given the opportunity to demonstrate to the court, the efforts they have made to address the child protection concerns. It is also at this stage that parent(s) complain about the Ministry's "moving goalposts." To illustrate, the parent(s) will follow the conditions set by the Ministry's social workers, such as completing parenting or anger management courses, or addictions programs, and upon successful completion, the Ministry might decide they want the parent(s) to undertake additional programming thereby further extending the child's total time in care.

It is important to contest any applications made at this stage, if reasonable, so that reunification can occur, with or without supervision. If the court determines that supervision is necessary, it is important that the parent(s) legal counsel argue for least intrusive measures to ensure that parent(s) are given a fair opportunity to demonstrate that they have addressed any protection concerns without the oppressive oversight of social workers.

The Final Resolution Stage

After a period of time (usually 6 months or more), during which the child has been in the care of the Ministry or another person pursuant to a Temporary Custody Order, the Ministry can seek a final order from the court to make the placement of the child permanent. The need to contest these applications is obvious because a final application will result in either a Continuing Custody Order, which is effectively adoption, or a permanent "transfer of custody to other" pursuant to section 54.01 of the CFCSA. In both cases, once permanent custody has been transferred, the matter is no longer considered a child protection issue and any changes to the child's permanent custody may only

be challenged pursuant to the *Family Law Act*. In other words, a final order of the court pursuant to the CFCSA is very difficult to undo.

If parents do not consent to the orders sought by MCFD, or consent to orders that a PLC lawyer negotiated in consultation with the Ministry, the parent cannot remain with PLC. Due to this fact, parents are often left without active legal representation and the Ministry's actions remain unchecked and not subject to court oversight. As a result, parents find themselves having to self-represent, or seek other legal counsel working on a Standard Contract (see below). Both options result in delays and further extensions to the child(ren)'s total time in care.

Standard Contracts

Standard contracts are issued to lawyers who agree to take on a Ministry file. Ordinarily, an email will go out to a handful of lawyers in a region asking whether someone is available to be retained. The contracts will come with a set number of hours per task. The tasks include court appearances for administrative purposes, hearings, mediation, and general preparation for those events.

Importantly, lawyers accepting standard contracts are not always informed of the client's Indigenous ancestry, and owing to Covid, it is possible that a lawyer's only interaction with their client may be via telephone, particularly if the client resides in a remote location. Given this reality, it is essential that a the lawyer is made aware of the client's Indigenous ancestry immediately because it triggers special considerations pursuant to federal and provincial legislation, including priority placement and best interest of the Indigenous child principles. Declaring a client's Indigenous ancestry also enables the lawyer to work with the client's Indigenous community to provide support and advocate on behalf of the client and the client's child(ren) throughout the entire child protection process.

At the present time, standard contracts only permit an additional 2-hour block for Indigenous clients on top of the tasks noted above. This is entirely insufficient, particularly in situations where final or continuing custody orders are being contemplate or sought by the Ministry. Permanency decisions require significant thought, outreach, and collaboration among the parties to identify the most suitable placement for an Indigenous child, giving special consideration to the priority placement and best interest of the Indigenous child principles.

Pursuant to Bill C-92, every potential placement must be considered for an Indigenous child up to the moment when the final decision is made by the court. This includes, exhausting all potential placements with the child(ren)'s extended Indigenous family, with another Indigenous family from the same community, with an Indigenous family from another Indigenous community, and finally, with a non-Indigenous family. This type of planning cannot be completed within the strict time-limits placed on standard contracts and thus, Indigenous clients are left without adequate representation when compared to the unlimited time the Ministry and its lawyers can dedicate to their plans for the child(ren).

The time-limitations imposed by standard contracts will quickly be applied to the file in the early stages of the process, including but not limited to, reading case files to understand the history of the matter; researching and preparing arguments based on family preservation and reunification principles; advocating for the child(ren) to be placed with extended family where possible; and in cases where a placement in community is not possible, that close familial and cultural connections are maintained via negotiated cultural agreements with the child(ren)'s Indigenous community.

All of the limitations imposed on Indigenous parents throughout the child protection process, will typically result in Indigenous children being placed far from their communities, which can only be seen as a failure of the child protection system as it applies to Indigenous children and families.

Cultural Safety

It has long been noted that cultural safety is very much a live issue for Indigenous peoples coming into contact with the state-imposed legal system. Of that, Justice Ardith Walker, QC as she was in 2007 notes:

> Aboriginal people prefer to speak with an Aboriginal person and may not seek the legal help they need if they are unable to do so. This preference reflects the complex and difficult history of Aboriginal peoples' involvement within the justice system and inter-generational experience of institutional racism. The need to incorporate more Aboriginal people into the delivery model of legal services to Aboriginal people has been explained as follows:
>
> Aboriginal clients are uncomfortable with seeking help from non-Aboriginal people because most of the times non-Aboriginal people are not sensitive to or aware of Aboriginal history and

> culture, or do not understand their unique legal needs. Aboriginal peoples face ongoing stereotyping and discrimination…"[3]

While a formal survey has not been conducted for the purposes of this section, the importance of cultural competency among legal professionals has been researched extensively and Indigenous clients have often reported the relief they feel when their legal counsel is culturally competent, empathetic, and respectful. Indigenous clients have also reported feeling less judged and better understood even if they do not receive the most positive legal outcome. They also feel like they have been given a better chance than they otherwise would have been given if their Indigeneity and unique circumstances had not been recognized or considered throughout their interactions with the legal system.

The importance of cultural safety is a common theme shared across jurisdictions with significant Indigenous populations and will be discussed further in Part Three of this document.

[3]Walkem, A (2007) Building Bridges: Improving Legal Services for Aboriginal Peoples. Legal Services Society.

PART THREE: A NEW ERA FOR INDIGENOUS LEGAL SERVICES

Executive Summary

The purpose of Part Three is to review Indigenous legal services and programs from other jurisdictions with substantial Indigenous populations. Significantly, barriers to Indigenous access to justice is a common problem in every jurisdiction with a long history of colonialism. In each jurisdiction there exists a common law or civil law system that was imposed on the Indigenous populations after contact, was used to assimilate and marginalize Indigenous populations during the colonial era, and until very recently, ignored and dismissed Indigenous legal orders, laws, customs, and traditions entirely.

However, a new era appears to have brought new developments stemming from a collective move toward Indigenous Rights recognition. In jurisdictions where Indigenous Rights like self-determination are acknowledged, there has been a resurgence of Indigenous legal orders and Indigenous control of Indigenous justice.

Part Three begins with a summary of Key Findings and Common Themes found across jurisdictions followed by an annotated bibliography that includes key points from each of the articles and papers reviewed for this Part. Importantly, included among the key findings is that every attempt at Indigenous legal orders recognition and resurgence begins with self-determination and an understanding that true Indigenous justice cannot be achieved until Indigenous peoples have complete agency over their justice systems.

Key Findings & Common Themes

The following is a summarized, non-exhaustive list of recurring themes found throughout this jurisdictional scan.

Self-Determination

UNDRIP and the Indigenous Right to self-determination is the cornerstone to any Indigenous justice work. Rightsholders must be engaged early and often. Indigenous legal services programs must be built by communities based upon Indigenous legal traditions, customs, and traditions. Specifically, it is important that we do not simply try to “fit” Indigenous laws and customs into an already established colonial legal system that continues to entrench the

marginalization of Indigenous peoples. Research shows that the most effective forms of "Indigenous justice" occur when Indigenous peoples have full agency over their justice systems.

Contributing Factors

Social, economic, educational, political, etc. issues, the impacts of long-term colonialism, structural racism and inequalities are all contributing and underlying factors that lead to increased Indigenous interactions with the legal system. These factors must be considered carefully and holistically addressed where possible if the BCFNJC is to create an Indigenous legal services system that is better than what currently exists.

Identity Issues

Fraudulent self-identification is a very serious issue that must be addressed with proper and respectful due diligence processes. Indigenous legal services exist for Indigenous peoples because Indigenous peoples have been disproportionately impacted by a lack of access to quality and culturally competent legal services. Safeguards must be established to ensure legal services are being accessed by legitimate Indigenous peoples. The literature confirms that Indigenous identity fraud is harmful to Indigenous peoples and safeguards must be established to verify the claims made by self-identifying individuals seeking to retain Indigenous legal services via the BCFNJC Indigenous Legal Aid services.

There also exists important gender differences in some areas of law that are not adequately addressed. For example, women are significantly more likely to identify legal issues in the areas of child protection, workplace harassment, intimate partner violence, wage disparities, etc. While men are more likely to identify criminal law and parenting, access, and custody issues. There is also a lack of understanding regarding access to justice barriers faced by Indigenous LGBTQ2S+ individuals.

Healthy Communities

The importance of family and community in the development of Indigenous legal services cannot be overstated. Healthy Indigenous children are raised by healthy families and communities. Community-based justice systems will recognize the important and crucial role Indigenous communities and families play in addressing the contributing factors and creating a justice system that meets and exceeds the current provincial and federal standards.

Cultural and community connections should be prioritized when an Indigenous client is involved in the legal system. Unlike western ideas of family and community, Indigenous peoples do not view themselves as individuals isolated from their communities, but as part of a collective whole. Extended family and community takes on a very different meaning among Indigenous peoples. Thus, legal services provided to Indigenous peoples necessarily includes the active participation of the Indigenous Nations, communities, and families from which the clients come.

Duty of Care

Duty of care begins with the client's first contact with the justice system and must continue throughout the entire interaction (Cultural and Subject Matter Competency/Protocol Recognition/Community and Elder Involvement/Respectful Communication, etc.). Every person an Indigenous client encounters while they navigate the legal process must be culturally competent subject matter experts to ensure that the services the BCFNJC provides are reliable, equitable, and client-focused. Indigenous clients seeking representation must feel safe and valued and confident that they are receiving the best legal services available.

Duty of care extends beyond Indigenous client interactions with legal counsel and necessarily includes a client's interactions with police, crown counsel, judges, social workers, and third-party service providers, etc. There must be safeguards put in place to ensure that Indigenous peoples are treated with dignity and respect. Achieving this goal will take time and require oversight and accountability standards to be established and enforced by the BCFNJC as we have already seen how ineffective the current "independent oversight" committees have been in this regard.

Wrap-Around Services

Interactions with the legal system occur as a direct result of other social issues and thus, better access to justice must include the provision of holistic wrap around services that address more than just the legal issue (Gladue services at our IJCs is one example). In the literature, there is an emphasis placed on the importance of culture and community to Indigenous litigants. Often, special consideration is given to Indigenous litigants when their personal history is shared during sentencing, which further reinforces the need for wraparound services like Gladue Reports.

Non-criminal matters requiring wraparound services might include civil matters, Aboriginal Rights, family law issues, or child protection issues. To illustrate, child protection matters require more than just a lawyer to address. Family preservation and reunification supports must be provided to Indigenous parents and Indigenous communities, so they are better equipped to and in a position to keep their children home or have their children returned in a timely manner.

Funding Considerations

If the BCFNJC intends to provide a "better" legal experience, we will require sufficient and reliable funding (wraparound services/duty of care/cultural and subject matter competency/income limitations, etc). Another key consideration is the cross-over that exists between Legal Aid and First Nations Courts. If more money was invested in First Nations Courts (beyond criminal matters), Indigenous litigants dealing with civil matters would have greater access to justice, particularly in cases where mediation is not an option.

A recurring theme throughout this research has been the lack of personal face-to-face communication between lawyer and client, which is due in large part to the fiscal limitations imposed under the current Legal Aid system. Lawyers must be given adequate time and resources to provide Indigenous clients with quality legal services. This includes providing a wage that is competitive enough to attract and retain high quality lawyers and expand the income limit requirements currently imposed on Legal Aid clients. This approach will ensure that Indigenous peoples who do not qualify under the current income restrictions to retain a lawyer working at one of the BCFNJC IJCs.

Expansion of Legal Services

Other jurisdictions help Indigenous peoples with a variety of legal services beyond criminal and child protection (Civil Law/Wills & Estates/Youth Justice/Aboriginal Law/Land Defenders/Housing Disputes/Wage Theft/Human Rights Violations, etc.).

Access to justice must be seen as greater access to all forms of justice. Currently, the focus is on criminal law, which is meant to decrease the over-representation of Indigenous peoples in custody. However, if we are to lower the current incarceration rate, all areas of law must be considered and addressed.

Shortage of Lawyers

In order to provide high quality and culturally competent legal services, the BCFNJC must be able to staff its justice centres with legal professionals. Currently, there appears to be a shortage of lawyers in all jurisdictions willing and/or able to practice as Legal Aid lawyers. A shortage of lawyers results in a gap of services, which leaves Indigenous clients without legal representation.

One possible solution is to hire non-lawyer support staff to undertake some of the legal work that does not necessarily require a lawyer, such as paralegals, legal assistants, and law students, to conduct legal research, prepare court filings, manage caseloads, etc. or family support workers to assist with care plan development in child protection cases or restorative justice planning with Gladue Services for youth in corrections.

In British Columbia, an aspiring lawyer must first write the standardized Law School Admissions Test, apply and be accepted into one of very few laws schools in Canada, complete a JD degree, upon graduation complete nine months of articling under a practicing lawyer, complete the 12-week Professional Legal Training Course (PLTC), and then successfully pass both the Barristers and Solicitors Bar Exams, and five additional "mini-Bar exams" called legal assessments. Following the successful completion of the above-stated, an aspiring lawyer must then apply to be called to the BC Bar.

Despite having successfully completed all of the aforementioned requirements, newly licensed lawyers still require years of practical experience to become proficient at any specific area of law. Realistically, everything a new lawyer needs to know is learned during the 12-week PLTC course and on the job, which begs the question, why is so much emphasis placed on law school?

A possible long-term solution to the lawyer shortage is to adopt the licensing requirements already used in other jurisdictions like California, where one does not require a law degree to be licensed. Rather, an aspiring lawyer can be mentored (similar to articling) by a practicing lawyer and challenge the Bar Exams.

Regulatory & Oversight Considerations

Proper oversight and regulations are necessary if we are to ensure that every lawyer who works with Indigenous clients is culturally competent, respectful, trustworthy, and qualified to provide quality legal services. At this time, there are no safeguards in place to monitor a Legal Aid lawyer's knowledge of

Indigenous history, legal orders, customs, traditions, etc. or to ensure that Legal Aid clients are receiving the best legal help possible. Rather, an Indigenous person will reach out to Legal Aid and request a lawyer, they must wait to hear if they qualify and if they do qualify, they must wait for their request to be circulated to a roster of available Legal Aid lawyers.

Prospective Indigenous clients have no control over who will ultimately represent their interests or where the lawyer is located which unsurprisingly negatively impacts the solicitor-client relationship before the first introduction even takes place. Once a client is assigned a Legal Aid lawyer, the solicitor-client relationship and opportunities for personalized legal help is then severely limited by budgetary, time, and location restraints.

Inter-jurisdictional Cooperation

Indigenous peoples and Nations do not recognize imaginary colonial jurisdictional borders. Indigenous peoples often require legal services in this province for a matter in another province and vice-versa. Jurisdictional funding barriers in the current status quo Legal Aid system make it nearly impossible for an Indigenous client to retain state-funded legal counsel to represent their interests in another province, particularly in family and child protection matters.

Once established, the BCFNJC might address inter-jurisdictional issues that arise between provinces via MOUs with other provinces that enable clients in one jurisdiction to seek Legal Aid representation in another jurisdiction with no gaps or delays in services.

First Nations Courts & Alternatives to Litigation

Another recurring theme throughout the literature is the overlap that exists across Indigenous legal services. Some researchers suggest the creation of “neutral” or alternative dispute resolution processes grounded in Indigenous legal traditions. For example, if the BCFNJC expands its Legal Aid services to include civil law matters, such matters need not be litigated in a common law courtroom, but may be dealt with more efficiently and equitably by First Nations Courts or family and community circles in the same way sentencing circles are used as a restorative justice method in criminal matters.

Adopting such an approach may also solve the issues that arise when a client is involved in both a criminal matter and civil law matter simultaneously. For example, in an intimate partner violence situation, a client may be facing

criminal charges, family law, and child protection issues. Currently, there are no mechanisms by which these overlapping issues and interests can be addressed together. Instead, one legal matter is dealt with, while the other is on hold and vice-versa, thereby increasing court costs and emotional trauma experienced by families.

Legal Educational Materials

The state-run legal system is not user friendly for anyone, including lawyers. Access to Indigenous legal education materials for both legal professionals and clients must be improved. If we expect legal professionals to be culturally competent, we must improve access to learning materials, guides, mentorship opportunities, and programs that will ensure lawyers seeking to work with Indigenous peoples are culturally competent.

Simplified versions of complex legal matters must also be created for Indigenous clients. For example, small Aboriginal Rights cards or pamphlets that explain what to do if you are exercising your Aboriginal Right to hunt or fish and you are stopped by the police or questioned by a conservation officer, what information you are required to provide, who to contact to speak to a lawyer about your rights, etc. Cultural competency tool kits for lawyers seeking to work with Indigenous peoples and client-focused cheat-sheets are two examples of educational resources that may improve access to justice.

Annotated Bibliography

(The) Advocates' Society, The Indigenous Bar Association, and The Law Society of Ontario. (2018). Guide for Lawyers Working with Indigenous Peoples. Available at: Working with Indigenous Peoples - Lawyer | Law Society of Ontario (lso.ca)

The purpose of the guide is to supplement a lawyer's cultural competency training. It is not an exhaustive guide, but Ontario's attempt at creating resources that will improve the legal services provided by lawyers to Indigenous clients.

Key themes include, understanding the importance of the TRC Recommendations; understanding the importance of cultural competency; understanding Indigenous relationships; understanding differences in language; understanding the relationship between Indigenous peoples and Canada; understanding the implications of leading legal directives; how to

put learning into practice; and how to seek additional resources to guide your relationships with Indigenous peoples.

(The) Advocates' Society, The Indigenous Bar Association, and The Law Society of Ontario. (2022). Guide for Lawyers Working with Indigenous Peoples: 1st Supplement. Available at: Working with Indigenous Peoples - Lawyer | Law Society of Ontario (lso.ca)

The first supplement of the original guide is intended to be a living document that will continue to evolve as the law evolves. Major themes of the first supplement include an overview of land acknowledgments; developing a trauma-informed legal practice; MMIWG Inquiry Report and Calls for Justice; UNDRIP; developing Indigenous responses to national child welfare legislation; treaty interpretation; the duty to consult and accommodate FPIC; and applying and adapting Gladue Principles.

Allison, Fiona & Cunneen, Chris & Schwartz, Melanie. (2015). The civil and family law needs of Indigenous people in WA. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657323

The Indigenous Legal Needs Project (ILNP) conducted research in 2012-2014 to identify civil and family needs of Indigenous communities in Western Australia. The WA research was based on focus groups with Indigenous participants and interviews with legal stakeholders. Focus group participants completed a questionnaire covering civil law issues, and over 70 stakeholders organizations were interviewed to explore the experiences, perspectives and understanding of those providing legal or related services. [pages 8-10]

Five areas of legal need immediately stood out: stolen generations (stolen wages), consumer law issues, child protection, education, social security and wills. [page 10]

One in ten people identified removal of children into government care as an issue, and this caused concern amongst the ILNP community and stakeholder participants. [page 11]

There were important gender differences in some of the priority areas of legal need. Women were significantly more likely than men to identify legal problems in areas of housing, neighbour disputes, Stolen Wages and Stolen Generations and education, and more likely than men to identify a problem relating to child removal. [page 12]

Discrimination was seen as being pervasive throughout WA, evident in many areas of life. It intersects with a range of other civil law issues, including education, consumer law, housing, and neighbourhood disputes. Only 16.3% of those experiencing discrimination sought legal or other help or advice. Women were nearly four times more likely to have accessed assistance. [page 13]

The research highlights the complex interplay between civil, family, and criminal law problems, and how an unresolved civil law issue can create further civil law issues, and how criminal law can give rise to civil law needs. [page 16]

Additional funding is urgently required for civil/family work in Aboriginal communities, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people. Aboriginal people have a right to adequate access to justice, including through legal and other assistance, but government fails to properly fund legal services working to support individuals to respond effectively to such interventions. [page 17]

Lack of knowledge of civil and family law presents a significant barrier to Indigenous access to justice. Increased access to information and CLE is needed, as well as more effective means of undertaking this work. ILNP research confirms that Aboriginal people often have complex legal needs, which require a collaborative response on the part of legal and non-legal services. Services absolutely must have capacity to work responsively with culture, including through effective cross-cultural communication. [page 17]

Mistrust of the law and of legal services is a significant barrier to engagement. Organizations need to acknowledge and work with or around issues of trust. Effective referral processes and relationships between legal services and non-legal services are fundamental to improving civil and family law outcomes for Aboriginal people in WA. [page 18]

Barendrecht, Maurits, Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared (November 10, 2010). TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 010/2010, Tilburg Law School Research Paper No. 24/2010, Global Jurist, Vol. 11, Issue 1, January 2011, Available at SSRN: https://ssrn.com/abstract=1706825

Access to justice can be enhanced in many ways. The most effective way to do this, given limited resources, is through legal information and education strategies, followed by improving access to adjudication. [page 3]

In the access to justice literature three main strategies have been distinguished: individualized Legal Aid and legal advice, improved accessibility of individual or groups procedures, and empowerment through legal needs related information. [page4]

When talking about supporting individual Legal Aid, it is assumed that lawyers have sound legal knowledge about their area of practice and can lead a client through negotiation and litigation in standard situations. If we invest in access to courts, we focus on a modern, customer-friendly procedure before a formal or informal court, and on providing information about the process and the likely outcomes in a form that is understandable for the clients without having to consult an expert. [page 5]

The cost effectiveness of Legal Aid, better court procedures, and legal information can be evaluated in terms of money or in terms of procedural justice and outcome justice. [page 5]

Access to justice costs are assessed in terms of out of pocket expenses, opportunity costs, and emotional costs. [page 6]

Civil Legal Aid will also have some direct benefits, such as reducing the need for safety-net programs, re-arrests of juvenile offenders, the time children spend in foster care, the incidence of domestic violence, and improving client health. [page 6]

Costs and benefits of accessible court procedures must be considered. Investment in neutral intervention has benefits for the client in terms of money and assets recovered, the experience of procedural justice and outcome justice, and the indirect effects of fair and just outcomes on others (precedents), less need to spend on programs for the poor, prevention of violence. Simpler court procedures require less work from professionals and lower costs for clients, even if some clients still need representation. [page 7]

The impact of available legal information must be considered. Information about law takes many different forms, including codification, websites, and online dispute resolution tools. In developing countries, NGO's spread legal information through workshops, support groups for women, radio, drama, leaflets, or copies of legislation. [page 7]

The literature seems to agree that courts set up by governments tend not to be very efficient institutions. They are slow to take up information technology

and do not systematically incorporate innovations in conflict management in their services. [page 11]

In the more recent literature, there is agreement that judges have insufficient incentives to deliver high quality and low-cost services. This is because judges have two clients with conflicting views about what the court should do and how to resolve the case. [page 12]

To fight court delay, simplify procedures, publish performance data for individual judges, use individual calendars, increase accountability of individual judges, specialize, create interfaces where client needs can become clearer, and make clients pay fees that are proportional to court effort. [page 12]

Subsidizing Legal Aid is a widespread policy, but much less money is spent on improving court procedures for clients with legal problems of everyday life. Our analysis suggests that legal information and easy access to a neutral forum are more cost effective than Legal Aid. Providing legal information can be done using large economies of scale, even across borders. [page 17]

Bond, Christine, and Samantha Jeffries. "An Examination of the Sentencing Remarks of Indigenous and Non-Indigenous Criminal Defendants in South Australia's Higher Courts." ***Proceeding of the Annual Conference of the Australian Sociological Association*****. 2009. Available at: http://hdl.handle.net/10072/61186**

Recent Australian research on Indigenous sentencing primarily explores whether disparities in sentencing outcomes exist. This study presents a narrative analysis of judges' sentencing remarks for Indigenous and non-Indigenous criminal defendants convicted in South Australia's higher Courts. [page 2]

Research from three Australian jurisdictions has shown that Indigenous defendants are less likely to be imprisoned than non-Indigenous defendants after controlling for other factors known to influence the sentencing process. While little is known about how judges perceive Indigenous defendants, sentencing research has shown that judges make assessments of offender blameworthiness, predict risks to the community, and take account of practical constraints and consequences in their decision-making processes. [page 2]

Judges acknowledged Indigenous status in 55% of remarks reviewed in the study. Indigenous defendant's life stories were more strongly rooted in

descriptions of extreme trauma and dysfunction, and certain life traumas were presented as being unique to the Indigenous experience. Indigenous offenders' dislocation from their communities was presented as a precursor to offending, reducing assessments of blameworthiness in these Indigenous offenders. [pages 6-7]

Indigenous traditional law and custom was accepted by some judges as relevant to their assessments of culpability. Indigeneity makes prison a potentially harsher punishment, and the impact of imprisonment on communities is frequently highlighted in Indigenous sentencing remarks. [page 9]

Practical constraints and consequences were considered by some judges. You have experienced difficulties in prison, and your cultural differences will make serving prison harder. I reduce your sentence to reflect these difficulties. Indigeneity makes prison a potentially harsher punishment, and the impact of imprisonment on communities is frequently highlighted in Indigenous sentencing remarks. [page 10]

Boothroyd, Gabe. (2019). Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice, The Alberta Law Review, 56:3, 903-934, Available at: https://canlii.ca/t/sfd1

This paper discusses decolonization, restorative justice paradigms, failures of Canada's justice system, urban Indigenous courts, a framework for Indigenous legal participation and control, Indigenous legal principles, culturally appropriate processes, and protection of due process rights. [page 1]

The Akwesasne Court Law, established without federal or provincial authorization, is a potent example of how Indigenous Nations can enact the TRC's call for the creation of Indigenous justice systems that are expressions of "Aboriginal Self-Determination and Self-Government." [page 2]

In Canada, several courts have been established to better serve the needs of diverse Indigenous populations. These courts are not directly controlled by any one Indigenous Nation, but rather are firmly grounded in the settler colonial legal structure. [Page 2]

Mohawk law professor Patricia Monture-Angus argues that justice system reforms such as the introduction of native court workers and Elder participation in sentencing circles cannot effect substantial change. Heather Douglas argues that the incorporation of Aboriginal customary law into

settler courts in Australia creates a potential assimilative effect and that the programs have not succeeded in creating fundamental change. [Page 5]

A dichotomy cannot necessarily be constructed between Indigenous and Canadian legal systems. Indigenous control over Canadian institutions provides for greater self-determination, and reforms to the mainstream justice system could increase Indigenous control over justice. [Page 6]

The constitutional amendments to the Criminal Code and the Supreme Court of Canada's decision in *R. v. Gladue* have created the political space for more radical restructuring of the justice system. [Page 6]

A new Indigenous court should be subject to scrutiny by the Indigenous community, not by the colonial bureaucracy. A broad and deep consultative process led by Indigenous people and involving Indigenous communities would help ensure that any new Indigenous court is supported by and serves the needs of Indigenous people. [Page 16]

In mainstream courts, Indigenous communities do not exercise formal decision-making power. In contrast, diversion programs such as VATJSS involve decision-making by Indigenous community representatives, but their ambit is severely circumscribed by Crown decisions to refer only people who have committed very minor offences. [Page 19]

In British Columbia, Indigenous communities can participate in child protection hearings through their band government or an Indigenous organization chosen by the parent or child. However, adequate and clear information regarding child protection proceedings is often not provided, and many First Nations do not have sufficient financial resources to retain counsel. [Page 19]

Restorative justice processes should involve Elders and Indigenous communities, but in some urban Indigenous-oriented courts, a greater role has been accorded to police, probation officers, and other institutions that have been major contributors to the justice system's harmful effect on Indigenous people. [Page 20]

Indigenous-oriented courts allow for the avoidance of criminal convictions, with charges stayed upon successful completion of court-imposed conditions. This approach seems to provide significant added benefits in addressing Indigenous overrepresentation in the justice system and, more generally, the harms caused by that system to Indigenous people. [Page 23]

Indigenous-oriented courts allow for the avoidance of criminal convictions, with charges stayed upon successful completion of court-imposed

conditions. This approach seems to provide significant added benefits in addressing Indigenous overrepresentation in the justice system and, more generally, the harms caused by that system to Indigenous people. [Page 27]

A Downtown Community Court in Vancouver automatically exercises jurisdiction for anyone charged with certain categories of offences within a defined geographic area, and an urban Indigenous-oriented court could have similar "default jurisdiction" for Indigenous people. [Page 28]

Elders expressed the conviction that the Indigenous community should determine who the program serves, but the Aboriginal Caucus agreed to initially allow Crown discretion to determine referrals. [Page 28]

Many programs exist to ensure that Indigenous people are adequately protected from the negative consequences inherent in a criminal court proceeding. However, some programs require guilty pleas in order to be sentenced by the court. [Page 28]

Although taking responsibility and acknowledging wrongdoing is an important part of restorative justice principles, a more culturally appropriate and less punitive sentencing process could induce more people to plead guilty, interfering with the presumption of innocence. [Page 29]

The departure from mainstream procedures within the court process may raise due process concerns. One answer is to accord judges less power to decide outcomes, allowing instead for a community-led process. [Page 29]

In many Indigenous-oriented courts, police and probation officers are allowed to speak to sentencing, which could have negative impacts on a defendant's due process rights. Limiting who can provide input to the court process to Indigenous community members could be beneficial. [Page 29]

Brinks, Daniel M. (2019). Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America, The Journal of Developmental Studies, 55:3, 348-365, Available at: Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America (tandfonline.com)

Brinks argues that simply providing greater “access to justice” is not enough. He notes that a review of the legal landscape in Latin America forced the conclusion that simply facilitating access to the standard legal venues has not brought significant, consistent, improvement in the ability of Indigenous individuals or Indigenous peoples to deploy the law in the realization of their goals and aspirations, or the protection of their rights. [page 1]

Brinks identified two main issues with the traditional model of access to justice when applied to Indigenous peoples. First, 'justice' is less like a fruit that can be picked by whomever manages to get 'access' to it, and more like a terrain upon which contested notions of substantive justice get fought out. For individuals who bear the burden of social discrimination and prejudice the problem into simply a lack of access but inequality within the system itself. Second, and perhaps more importantly, it is clear that for many groups with a distinct cultural identity like the Indigenous Afrodescendants, the goal is not secure the same substantive notions of justice, but rather to pursue alternative ones altogether, ones that will more closely reflect their own normative frameworks. [pages 1-2]

Brinks further argues that the goal should be legal agency and not just access to justice. He argues that conventional Legal Aid is ill equipped to deal with plural legal systems and does not always contribute meaningfully to agency. [page 5]

Legal agency includes the potential of the subjects to exercise legal power and the notion that they might be held properly accountable for their actions. Individuals and communities have more legal agency when they have some substantive participation in crafting the rules that will be applied to them, and in operating the system that will apply those rules. [page 6]

Cunneen, Chris and Juan Marcellus Tauri, Indigenous Peoples, Criminology, and Criminal Justice. Annual Review of Criminology 2019 2:1, 359-381, Available at https://doi.org/10.1146/annurev-criminol-011518-024630

This review analyzes Indigenous peoples' interactions with the criminal justice system in four major Anglo-settler-colonial jurisdictions and argues that the colonial project has left Indigenous peoples in a position of profound social, economic, and political marginalization. [page 2]

We provide a socioeconomic profile of Indigenous peoples in Australia, New Zealand, Canada, and the United States, and then discuss key issues relating to their interactions with the criminal justice system. The review argues that centuries of colonization have left Indigenous peoples in a position of profound social, economic, and political marginalization, and that the settler-colonial state and the discipline of criminology must show a willingness to support Indigenous peoples' desire for self-determination. [page 3]

The key failings of governments and the academy in dealing with Indigenous over-representation in criminal justice is to not take Indigenous knowledge

seriously and to rely too heavily on Western theorizing, policy, and practice to solve “the Indigenous problem.” [page 7]

The criminalization of Indigenous peoples is one of the most effective ways in which their exclusion and marginalization are reproduced in settler colonialism. [page 7]

Cunneen, Chris and Tauri, Juan, Indigenous Criminology (July 1, 2017). Brisman, A., Carrabine, E. and South, N. (eds.), The Routledge Companion to Criminological Theory and Concepts, Routledge, Milton Park. ISBN 9781138819009, pp. 306-310, UNSW Law Research Paper No. 18-7, Available at SSRN: https://ssrn.com/abstract=3094054

Indigenous peoples in settler colonial states experience profound socio-economic disadvantage and political marginalization. The over-representation of Indigenous peoples in settler colonial systems of crime control has worsened over the past decades, in part due to the paternalistic tendencies of settler colonial governments and the Eurocentric bias of mainstream criminology. [page 2]

An Indigenous approach to criminological analysis is firmly based in historical and contemporary conditions, and the impact of colonialism. It requires a meaningful analysis of colonialism as an explanatory factor in Indigenous peoples’ experiences of settler colonial justice. Indigenous criminological research gives back to communities from which knowledge is taken by speaking truth to power, taking on the political role as agents of changes, and unmasking dominant ideologies and colonizing practices of the state and other institutions, including the Academy. [page 4]

The negative impact of deceptive or dishonest consultation and engagement is very real and often damaging for Indigenous communities. Therefore, it is essential that the knowledge about Indigenous peoples that we assemble and disseminate, reflects their experiences, and has a positive impact on their lives. [page 5]

Self-determination is the cornerstone of Indigenous criminology research and policy development.

Cunneen, Chris, Postcolonial Perspectives for Criminology (January 10, 2011). WHAT IS CRIMINOLOGY, M. Bosworth, C. Hoyle, eds., Oxford University Press, 2011, UNSW Law Research Paper No. 2011-6, Available at SSRN: https://ssrn.com/abstract=1739388

A postcolonial perspective on criminology can provide theoretical insights and grounded policy analysis. It does so by questioning the centrality of a western understanding of crime and control and by analyzing the structures of sentiment and ideology that determine the intersections of race, crime, and punishment. [page 3]

A postcolonial perspective allows us to understand how the historical injustices and abuses of human rights of Indigenous peoples can be understood in the context of state crime, and how contemporary Indigenous claims to human rights protections can impact on current criminal justice processes. [page 3]

A postcolonial perspective on criminology examines how marginalized peoples may view criminal justice intervention as unjust. It questions the legitimacy of the criminal justice system and examines how criminal justice systems can entrench the marginalization of minority peoples. [page 4]

A post-colonialist approach emphasizes the perspective of the marginalized in understanding and responding to over-representation in the criminal justice system. For example, the criminalization of Indigenous resistance to colonization silences criticism of the mass dispossession and the theft of land. [page 8]

Indigenous programmes are unique because they seek individual change within a collective context. Mainstream programmes ignore the nexus between oppression and liberation, between collective grief and loss and individual healing. [page 11]

Indigenous justice systems are based on a disbelief in the functionality and legitimacy of state-centered institutional responses and are seen as destructive avenues that cause further family and social disintegration. [page 12]

A postcolonial criminology considers the long-term effects of colonialism, including Indigenous political demands for self-determination, the position of formerly colonized and enslaved peoples within the metropolitan centres of former colonial powers, and the role and function of western criminology in developing or third-world nations. [page 12]

A postcolonial criminology offers insights for policy engagement by showing that marginalized groups have less capacity to utilize legal protections, that principles of fairness and equality seem remarkably absent when the marginalized are being criminalized, and that crime and justice are

experienced within particular socio-cultural and historical frameworks. [page 12]

Cunneen, Chris, Policing in Indigenous Communities (2007). POLICE LEADERSHIP AND MANAGEMENT, M. Mitchell and J. Casey, eds., Leichhardt, pp. 231-243, Federation Press, 2007, UNSW Law Research Paper No. 2008-25, Available at SSRN: https://ssrn.com/abstract=1333989

In 2005, 26.3 percent of police custodies in Australia involved Indigenous people. Indigenous people were 17 times more likely to be held in custody than non-Indigenous people, and twice as many Indigenous males and more than two and a half times as many Indigenous females reported being victims of physical or threatened violence. [page 2]

Policing in Indigenous communities demands attention to a range of broad political, socio-economic, cultural and historical contexts, as well as to the more mundane matters of police operational concern. [page 2]

The Royal Commission into Aboriginal Deaths in Custody led to the development of Aboriginal Justice Advisory Council Aboriginal Justice Agreements. The Royal Commission into Aboriginal Deaths in Custody was established in 1987 and reported to Parliament four years later. It investigated 99 deaths, of which nearly two thirds occurred in police custody. [page 4]

The Royal Commission found that the high number of Aboriginal deaths in custody was directly related to the over-representation of Aboriginal people in custody. However, the Commission also found that there were many failures to exercise proper care. The Royal Commission found that there were two ways to tackle the problem of the disproportionate number of Aboriginal people in custody: reform the criminal justice system and address the underlying issues relating to over-representation. [page 5]

The Royal Commission made 339 recommendations to reform the criminal justice system. Many of the recommendations dealt with diversion from police custody, including decriminalising public drunkenness, providing sobering up shelters, and changing practice and procedures relating to arrest and bail. [pages 5-6]

The report made recommendations, including that governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed in the design and implementation of any policy or program which will particularly affect Aboriginal people. [page 6]

The National Commitment placed a strong emphasis on developing a framework that respected Indigenous self-determination. The Indigenous Summit developed guiding principles for Justice Agreements that included empowerment, self-determination and self-management. [page7]

Twenty Commonwealth, State and Territory Ministers met with Indigenous representatives in 1997 to develop justice agreements. These agreements would address social, economic and cultural issues, justice issues, customary law, law reform, and Government funding levels for programs. [page 8]

Over the last two decades, there has been significant development in Indigenous community justice. Successful programs in Aboriginal communities have a number of themes that re-emerge, including the need for holistic approaches, the utilisation of community development models and the involvement of existing structures of authority. [page 11]

Department of Justice. (2002). Legal Aid Courtworker, and Public Legal Education and Information Needs in the Northwest Territories Final Report. Available at: Legal Aid, Courtworker, and Public Legal Education and Information Needs in the Northwest Territories (justice.gc.ca)

The report outlines the access to justice challenges faced by people who live in remote communities, including but not limited to, a majority of clients do not know how to contact a lawyer until after their first appearance in court; many individuals charged with crimes are transient and do not have telephones; there is a shortage of lawyers willing and able to practice family law; there is a general lack of Legal Aid lawyers, which delays a client's ability to retain a lawyer; face-to-face client meetings are rare and lawyers are often concerned about a client's ability to fully understand instructions or procedures over the phone, there is an interplay between criminal and civil matters that requires a more holistic and efficient approach to final resolutions; there is a lack of easily accessible legal information and 'self-help' educational legal information available to the public; costs are excessively high due to other contributing factors and there is not enough funding to address all of the issues.

First Nations University of Canada and National Indigenous University Senior Leaders Association. (2022). Indigenous Voices on Indigenous Identity: What was Heard Report. National Indigenous Identity Forum. Volume 01. Available at: National Indigenous University Senior Leaders' Association (NIUSLA) - FNUniv.ca

An Indigenous Elders Forum was held on March 9-10, 2022, to discuss ways to ensure that Indigenous peoples receive Indigenous-specific opportunities within the scope of Universities and Canadian Institutions. The Indigenous Only Safe Space Forum brought together over 400 post-secondary connected Indigenous peoples to discuss best practices for validating identity for Indigenous specific opportunities at academic institutions. [page 7]

The number of high-profile Indigenous identity fraud cases is increasing, and Indigenous peoples need to gather to outline wise practises and processes for determining who meets Indigenous citizenship or ancestry requirements withing the Canadian post-secondary context. [page 7]

To address this issue the report recommends that institutions provide training to verify claims of Indigenous identity, including a request for advance consent and a notice to applicants that their identity will be verified. [page 8]

Why we must move beyond self-identification was a key theme of the forum. The Honourable Murray Sinclair spoke of identity in the context of Indigenous peoples at post-secondary institutions, stating that identity starts at birth and that grandmothers are the first teachers of our children. The essence of knowing who we are as Indigenous peoples is based in life experiences, talking with Elders, and spending time with people who can convey teachings. [page 10]

Every institution that deals with issues of Indigenous identity should have Elders and traditional people involved in the process. This helps prevent people from being victimized by people who claim to be who they are. [page 10]

Elder Sol Sanderson inherited the generational knowledge of his Cree Nation. He believes that Indigenous self-governing processes must be reinstated, and that a major change is required in the education system to ensure Indigenous control of our own education. [page 11]

Elder’s voices also noted that in urban centres and large institutions, it is important to ask people about their connections to community, and to ask for evidence supporting that claim. Misappropriation of identity is disrespectful to the ancestors, and race-shifting damages Indigenous peoples. Elders are concerned that some Indigenous people holding top jobs in post-secondary institutions may have misrepresented their identity. [page 12]

There are two sides to legal issues: Indigenous law and settler laws. Indigenous laws and customs need to be articulated and communicated to institutions. Settler law gets Indigenous identity wrong, as it focuses on individual rights. However, an Indigenous person cannot exist disconnected from the people from whom they have come. The terminology of identity is problematic because it is an individual concept. Our peoples are citizens of nations, not members, and Nations may choose to bring people in who are not connected by blood according to their own laws and traditions. [page 13]

A strong theme emerged that we all need to understand the difference between indigenous identity, citizenship, and community membership. [page 24]

Legal Aid New South Wales & Victoria Legal Aid. (2018). Cross-border justice: Exploring ways to improve access to legal assistance along the NSW/Victoria border. Available at: Cross-border justice: exploring ways to improve access to legal assistance along the NSW/Victorian border (apo.org.au)

People living along the NSW and Victorian border experience additional barriers to timely legal assistance, including geographic isolation, limited public transport, poor telecommunications and gaps in legal providers. [Page 4]

Legal Aid NSW and Victoria Legal Aid established a joint project to investigate the unique challenges that arise for border communities needing legal help. The review found that collaboration between Legal Aid commissions could improve client services in cross-border regions. This would include increased coordination in the delivery of child protection/care and protection matters. Border communities can be subject to poor intake, triage and referrals when seeking legal help. A more flexible approach to determining eligibility for Commonwealth family law matters is needed. [Page 4]

Gaps in legal services arise when clients cross borders. Conflicts of interest can also limit the number of lawyers available to assist. [Page 13]

Parents in rural areas have limited access to legal assistance, and in some areas, there is no legal assistance at all. This is particularly concerning given the high proportion of Aboriginal families living along the border. [Page 14]

Non-legal support services are crucial to the effective delivery of legal services. However, many of these services rely on state-based funding. Consultations revealed examples of support workers driving clients but not

being able to cross the border to deliver their client to Court or to an appointment because their funding arrangement does not allow services to be delivered in the other state. [Page 15]

Recommendations stemming from the report include: coordination and collaboration between legal sector service providers; partnerships with Aboriginal Engagement Officers; community legal education resources; attract new lawyers with training resources for private practitioners; improving intake, assessment, and referral processes; simplify the forum test so there are no gaps in services when jurisdictional funding issues arise; simplify referral processes for applicants refused Legal Aid based on their forum test; family law cases should be heard in the court closest to the family's location and not according to which jurisdiction is responsible for costs. [Pages 16-21]

Provincial Court of Alberta. (2022). Indigenous Justice Strategy. Available at: Provincial Court of Alberta (albertacourts.ca)

The IJS is the product of two years of discussions with leaders of Indigenous communities across the Province as well as with leaders of legal and service organizations that interact with those communities. The Court acknowledges and recognizes the significance of the prior findings and recommendations of various commissions and inquiries, notably the Calls to Action of the Truth and Reconciliation Commission of Canada, the Calls for Justice of the Murdered and Missing Women and Girls Inquiry and 113 Pathways to Justice: Recommendations of the Alberta Joint Working Group on Missing and Murdered Indigenous Women and Girls.

The IJS consists of 20 concrete responses by the Court to the identified priorities and needs of the Indigenous peoples it serves. The 20 responses relate to the following priorities identified by the IJC: Education, Training and Enhanced Cultural Competency; Updated Bench Books that Implement the IJC; Relationship Building with Indigenous Nations; Greater Access to Justice for Indigenous Peoples; Implementation of Restorative Justice Processes; Expansion of Indigenous Courts; Incorporation of Indigenous Cultural Components; Increasing the Number of Indigenous Staff; Encouraging Mentoring Opportunities; Implementing Gladue Principles; and Recognition of September 30 National Day for Truth and Reconciliation. [pages 19-28]

Szczepanska Jo and Emma Blomkamp. (2020). Seeking legal help online: understanding the 'missing majority.' Justice Connect. Available at: Seeking legal help online: understanding the 'missing majority' (apo.org.au)

This research project was designed in early 2020, then revised in response to the COVID-19 pandemic, so that all research activities were carried out remotely in July and August 2020, with 15 participants from Victoria, Australia

Researchers recruited participants from priority groups with increased vulnerability to legal problems and often assumed to have lower capability or limited access to online resources. This includes recent migrants, people living with a disability, single parents, and people living in a regional, rural or remote community. They learned from a diverse range of people about what they found useful in online resources to help them begin to resolve legal problems related to debt, work, housing, and accessing courts remotely during the COVID-19 pandemic.

This comprehensive human-centred report outlines the context, rationale, methodology and findings of this almost year-long research project. It describes the hypotheses, strategy, tactics and assumptions of the research design, as well as its outcomes in the form of insights, recommendations and design principles. These are illustrated with words and images directly from research participants. Copious quotes throughout this document ensure that readers never lose sight of the people at the heart of this project and ensure that participants' thoughts, needs and experiences are described in their own words. Visual diagrams, tables, illustrations and screenshots help to bring the research to life and provide specific examples of the methods used and actual experiences of people in the priority groups.

The report also references other literature on legal self-help. While some of this project's findings confirm those from similar research, the conclusions of this report also differ from existing research and assumptions. In particular, our research found that demographic features such as education level, language spoken, disability, location and migration status did not determine a person's likelihood to use online legal resources. More significant features were a person's level of legal knowledge, based on prior experience, and their sense of self-efficacy in resolving legal issues independently.

Teillet, Jean. (2022). Indigenous Identity Fraud: A Report for the University of Saskatchewan. USask. Available at: Jean Teillet report on Indigenous identity fraud - DocumentCloud

This report was commissioned in June of 2022, during a time of tremendous change in the academy, about individuals who falsely take on Indigenous identity with the intention of gaining material benefits. The report proposes that the Indigenous identity problem has arisen because Canadians were ignorant about the complexities of Indigenous identity and because the

academy seriously underestimated the fact that so many individuals would seek to exploit that ignorance for their personal gain. [page 4]

The report documents the harm caused by non-Indigenous people claiming Indigenous identity. There are two kinds of Indigenous identity fraud: fabricators and embellishers. [page 5]

The report is divided into two sections, the first section addresses the issue of Indigenous identity fraud, and the second section looks at the harm caused by Indigenous identity fraud. [Page 6]

The academy is playing a major role in producing these Indigenous identity fraudsters because of five factors: recognition by the courts of Indigenous Rights, an absence of verification processes, an over-reliance on the honour system, and ignorance about how to identify Indigenous peoples. Some fraudsters construct their new Indigenous identities as students in university, some after a DNA test reveals a small percentage of Native American ancestry, and some after seeing that there is and advantage to identifying as Indigenous. [page 13]

Teillet makes many recommendations for addressing Indigenous identity fraud, including but not limited to, looking out for red flags such as when individuals claim to be from a certain Nation but can provide only very surface information, the use of purchased organization membership cards from organizations that do not require any evidence to support self-identification, the use of DNA or ancestry tests to show that the individual has a small percentage of Native American blood, etc.

Teillet also recommends that institutions create relationships with First Nations to address Indigenous identity fraud and provides USask's recently signed MOU with the Metis Nation-Saskatchewan as an example of how USask is engaging with Indigenous peoples to address this issue collaboratively.

Teillet views USask's proactive approach to verification of identity as a positive step forward as it also acts as a deterrent for fraudsters.
In short, if a fraudster knows in advance that you will investigate their claims to Indigenous identity, they may not even attempt to take advantage of your Indigenous-specific services.

Williams, M. & Ragg, M. (2019). Evaluation of Legal Aid NSW Civil Law Service for Aboriginal Communities. Sydney: UTS. Available at: Evaluation of Legal Aid NSW civil law service for Aboriginal communities (apo.org.au)

The Civil Law Service for Aboriginal Communities (CLSAC) is an example of a mainstream, government-funded service consciously attempting to enact policy, human rights instruments and evidence for best practice in meeting the needs of Aboriginal and Torres Strait Islander people. It has been invited by Aboriginal and Torres Strait Islander communities to do more work together.

Hence the authors of this report sought to understand (1) how a mainstream government service works with Aboriginal and Torres Strait Islander communities; (2) how capacities are built within the service to support Aboriginal and Torres Strait Islander staff and develop cultural competencies of other staff; and (3) how a government legal service impacts on the health and wellbeing of Aboriginal and Torres Strait Islander people, with access to justice being a determinant of health and wellbeing.

Key Findings of Report:

Aboriginal and Torres Strait Islander people in prisons and in communities in NSW will benefit if the Civil Law Service for Aboriginal Communities (CLSAC) NSW can work across sectors to include access to social and emotional wellbeing support, given its connection to people with urgent, complex and/or unmet legal needs.

The communities and prisons to which CLSAC delivers services are diverse. Each prison has distinct operating procedures, staffing and numbers. Each community has different histories, different languages, different cultural practices, different structures and different services available.

Working with Aboriginal and Torres Strait Islander women in and leaving custody are different to non-Indigenous women because almost all of the women have multiple and highly complex needs, with high prevalence of trauma and family violence experiences, mental health issues and cognitive impairment.