THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Responding to the Truth and Reconciliation Commission's *Calls to Action*

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was led by the CBA Aboriginal Law Section, with input from other CBA groups including the Criminal Justice Section, Family Law Section, International Law Section, Women Lawyers Forum and Children's Law Committee, and assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA.

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I. INTRODUCTION

The Canadian Bar Association (CBA) fully supports the goal of achieving reconciliation with Canada's Indigenous peoples. We commend the work of the Truth and Reconciliation Commission (TRC) for its invaluable contribution to this process through its June 2015 *Calls to Action*.

The CBA joins the TRC in encouraging all levels of government, and other public and private institutions in Canada, to carefully consider the calls to action and to take appropriate steps toward reconciliation. Many of the calls to action are consistent with CBA policies and have our unqualified support. We plan to continue our efforts to advance those positions, with reference to the TRC work and support for the same policy positions. For several other calls to action, we offer comments and suggestions, in addition to our general support.

II. CHANGING LEGAL EDUCATION AND CULTURE (CALLS TO ACTION 27 AND 28)

Education is a powerful tool for advancing reconciliation in Canada, and this is as true for legal professionals as for others. As a leader in the field of continuing legal education and professional development, the CBA organizes national, regional and local conferences, seminars and workshops for lawyers that include components of cultural competency training. Relevant topics to date include some of those referenced in calls to action 27 and 28 concerning the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), Treaties and Aboriginal rights, and Indigenous law and Aboriginal-Crown relations. CBA skills-based training has touched on intercultural competency, conflict resolution, human rights and anti-racism, areas that are often relevant for lawyers practicing in areas of law that impact Canada's Indigenous peoples, even if indirectly. The CBA will continue to sponsor these events, and consider how to further expand cultural competency training to our members.

The CBA Aboriginal Law Section is cooperating with Justice Canada and the Ontario Ministry of the Attorney General to present a conference on the "Honour of the Crown", scheduled for May 2016 in Ottawa. The theme is the central role of that concept for the process of reconciliation, and the need for dialogue with and involvement of Crown lawyers around this important topic.

Many law societies in Canada have taken steps to ensure that lawyers receive appropriate cultural competency training. Law schools offer courses about Indigenous people and the law, and we endorse the call to action directed at law schools requiring *all* law students to take a course in Aboriginal people and the law. Given the breadth of the topic, multiple courses may be required. In addition, content relevant to the relationship between Indigenous people and state law might be integrated systematically into the existing curricula of law faculties.

Virtually every aspect of the law – from criminal to estates to taxation to employment law – has the potential to be more complex when Indigenous peoples are involved. For this reason, it is imperative that all lawyers understand these issues. Further, a good understanding of Canada's legal system must include the history of our Indigenous peoples and their traditions, and this knowledge is also essential for reconciliation.

We believe that cultural competency education and training should address gender inequality from the perspective of Indigenous women, particularly given the disproportionate disappearance of, and violence against Indigenous women and the increasing number of Indigenous women being incarcerated,[1] often far from their families and communities.

Articles of the UNDRIP inform an understanding of Indigenous culture in the modern Canadian context and should be included in cultural competency training. In particular:

- **Article 1** – Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the *Charter* of the United Nations, the *Universal Declaration of Human Rights* and international human rights law.
- **Article 2** – Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity.

[1] While the over-incarceration of Indigenous people is a persistent and long standing problem in Canada, the number of Indigenous women incarcerated in particular has dramatically increased in recent years. In a recent CBC article, Howard Sapers, the Correctional Investigator of Canada, was quoted as saying that more than 36% of federal inmates in women's facilities are now of Aboriginal descent. See, www.cbc.ca/news/aboriginal/aboriginal-inmates-1.3403647.

- **Article 5** – Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
- **Article 12** – Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
- **Article 18** – Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.
- **Article 34** – Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
- **Article 40** – Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Other related international instruments should also be incorporated into a cultural competency curriculum, including the *Universal Declaration of Human Rights* (UDHR), the *UN Convention on the Rights of the Child (UNCRC)*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *UN Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and the *International Covenant on Civil and Political Rights* (ICCPR). Greater awareness and respect among lawyers for all these international instruments will lead to greater recognition and protection for the rights of all Indigenous people.

III. NATIONAL COUNCIL FOR RECONCILIATION (CALLS TO ACTION 53-55)

As the Supreme Court of Canada noted a decade ago, reconciliation is the fundamental objective of Aboriginal law and treaty rights.[2] The CBA is committed to the goal of reconciliation as a national concern relevant to the well-being of all Canadians. We endorse calls to action 53-55, which would establish, by statute, a National Council for Reconciliation as a national independent oversight body with membership from the federal government and national Aboriginal organizations. The Council would have monitoring, evaluating and reporting functions on progress towards the goal of reconciliation by all levels of government and throughout all sectors of Canadian society.

IV. CRIMINAL JUSTICE (CALLS TO ACTION 30-37, 42, 55(V), 55(VII))

Several calls to action give urgent voice to tragic circumstances that CBA members practicing in criminal courts see regularly, specifically in encounters between Indigenous people and the Canadian criminal justice and correctional systems. These calls to action would, in our view, immediately improve the situation faced by the disproportionate number of Indigenous people who find themselves in conflict with the law.

Other calls to action provide specific demands for systemic change to broken systems. The CBA believes these calls to action are urgent, and has adopted several policy positions in line with these TRC recommendations. We mention some relevant positions below.

A. Mandatory Minimum Sentencing

The CBA opposes mandatory minimum sentences and believes removing judicial discretion to design sentences tailored to the individual case is an inappropriate "one-size-fits-all" approach to justice.[3] This has disproportionately impacted already disadvantaged populations, notably including Indigenous people. In August 2011, the CBA canvassed evidence-based arguments against mandatory minimum sentences and recommended that if these sentences are to remain in Canadian law, judges must have recourse to a legislated exemption when they believe injustice would result from applying the sentences. Call to action 32 highlights the need

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2 *Mikisew Cree Nation v Canada* (Minister of Canadian Heritage) 2005 SCC 69, para. 1.

3 Resolution 11-09-A.

to return discretion to judges determining a criminal sentence to allow an appropriate balancing of all relevant facts, including those pertaining to being an Indigenous person.

B. Programs for Indigenous Offenders

The CBA recognizes the serious problem of overrepresentation of Indigenous Canadians in custody and the need to provide alternatives to incarceration, as well as culturally relevant programs for those who are incarcerated. In August 2015, the CBA called for a commitment from all levels of government to address this issue. Indigenous peoples cannot be lumped into a single collective category. There is tremendous diversity within the First Nations, Métis and Inuit communities. Failing to recognize the uniqueness of diverse groups from Cree to Ojibway to Gwich'in, for example, and their respective cultural expressions of justice, healing and reconciliation, undermines attempts at rehabilitation and reintegration of offenders from these groups.

Amendments to the *Criminal Code* in 1996 called for alternative sentences to be made available for Indigenous offenders. The legislative framework to encourage partnerships between Correctional Service of Canada and Indigenous communities already exists in the *Correctional and Conditional Release Act*, but those provisions remain neglected and underused.

The CBA endorses calls to action 30, 35, 36, 37, 38, 55(v) and 55(vii), which aim specifically to address the overrepresentation of youth and adult Indigenous offenders and to provide culturally specific justice options for Indigenous Canadians. To call to action 36, we would include reference to parenting and other courses to help Indigenous litigants deal with these same issues in a family context.

C. Solitary Confinement

In August 2015 the CBA condemned the debilitating and tragic effects of solitary confinement.[4] According to the Office of the Correctional Investigator, solitary confinement impacts Indigenous offenders especially harshly.[5] The CBA endorses calls to action 30, 35, 36 and 37 as well as 31.

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4 Resolution 15-04-A. The CBA has a long history of expressing these concerns. See general discussion in *Locking up Natives in Canada* (Ottawa: CBA, 1988) and *Justice Behind the Walls* (Ottawa: CBA, 1988) at 136, for two examples.

5 See, 2013-2014 *Annual Report* at: www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV.

D. Fetal Alcohol Spectrum Disorder (FASD)

In 2010 and 2013, the CBA called for greater sensitivity and flexibility in the criminal justice and corrections systems to deal more appropriately with people with brain injuries such as FASD.[6] The CBA and others recognize the disproportionate incidence of FASD in Indigenous communities. Calls to action 33 and 34 are consistent with the CBA position on this issue, and recognize the importance of seeing this problem through an Indigenous lens.

V. MURDERED AND MISSING INDIGENOUS WOMEN AND GIRLS (CALLS TO ACTION 41 AND 55(VI))

In 2013, the CBA called for an end to the social and systemic normalization of violence against Indigenous women by funding targeted programs and services, a national strategy to address violence against Indigenous women and a national inquiry into the issue of murdered and missing Indigenous women and girls.[7] We endorse call to action 41, which recommends a public inquiry into the disproportionate number of murdered and missing Indigenous women and girls in Canada and applaud the current government for beginning that work. As well, we support data collection and annual reporting by government on progress in reducing the rate of criminalization of Indigenous Canadians.

VI. INDIGENOUS CHILDREN (CALLS TO ACTION 1-12)

We suggest that all governments and governmental authorities adopt a more collaborative and conciliatory approach, with the common goal of protecting the rights and interests of Indigenous children. Many areas of law with an impact on those children fall under federal jurisdiction. For other matters, provincial and territorial authorities are fully engaged – from child protection to housing and education on reserve. In addition, both UNDRIP and UNCRC provide legal frameworks that are useful for protecting Indigenous children.

To advance cultural competency in the child welfare sector (call to action 1), we endorse Jordan's Principle. This principle for resolving jurisdictional disputes within and between federal, provincial and territorial governments puts children first. Where a jurisdictional dispute arises about payment and provision of services to an on-reserve First Nations child, the government or government department first contacted should, without delay or disruption,

6 Resolution 10-02-A and 13-12-A.

7 Resolution 13-02-M.

pay for and provide services ordinarily available to other children in Canada. The dispute over payment for services can be settled afterwards.[8] Jordan's Principle is also relevant to our support for call to action 3.

The Canadian Human Rights Tribunal recently ordered the Minister of Aboriginal Affairs and Northern Development (now Minister of Indigenous and Northern Affairs) to implement Jordan's Principle "in its full meaning and scope".[9] The CHRT found that federally-funded child and family services for Aboriginal people on reserve and in the Yukon were discriminatory in funding levels and design. We are encouraged that the federal government has welcomed the CHRT decision and announced planned increases to funding for child and family services, as also recommended by the TRC.

There is an urgent need to address ongoing problems that lead to too many Indigenous families becoming involved with child welfare systems and too many children being removed from their families. Calls to action 1-5 would not only reduce the number of Indigenous children in care, but also improve their and their families' experience of the child welfare system and promote earlier reunification of families. Funding to date has focused on resources *after* a child's removal, aimed at the eventual return of children in care to their families. Equally vital are resources and programs to *prevent* removal of children in the first place, available for families, child welfare authorities and Indigenous communities.

In 2013, the CBA called on the federal government to table a detailed action plan to improve Canada's implementation of the UNCRC, in response to the recommendations of the UN Committee on the Rights of the Child.[10] The CBA noted that Canada's commitment to fulfill its obligations under the UNCRC includes a special obligation to the Indigenous peoples of Canada and Indigenous children in particular.

Resources will be required to ensure children in care or in family law disputes have an appropriate voice. This applies particularly in Indigenous child protection proceedings, where the statutory emphasis is on making decisions quickly, for the sake of the child. That may be appropriate in situations where extended family resources are scarce and, if adoption is the alternative, it may be best to move quickly. But for many Indigenous families, this approach can

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8 A motion calling for the endorsement of Jordan's Principle was unanimously passed in the House of Commons in 2007.

9 *First Nations Child and Family Caring Society v Canada*, 2016 CHRT 2, para 481.

10 Resolution 13-11-A.

also be a disaster. As the TRC report states, for Indigenous families, making the best decisions can take some time. It is worth taking time to explore available alternatives, if not in the immediate family, then in the child's community or First Nation.

The CBA believes that any steps to advance the underlying goals of call to action 6 must carefully avoid over-criminalizing parents through education and prevention. That said, there are differing views on whether those underlying goals are best achieved by repealing section 43 of the *Criminal Code*. Section 43 provides a limited defence to parents, teachers and similar individuals who use reasonable force to correct a child. A 2004 Supreme Court of Canada decision limited this to use of a small amount of minor corrective force of a "transitory and trifling nature"[11] to correct or restrain a child. The Court considered Canada's international obligations in its decision.

In 2008, the CBA Criminal Justice Section opposed repeal of section 43, saying it "would result in an unwarranted expansion of criminal liability, over-criminalizing behaviour of parents, teachers and authorities attempting to deal with troubled children in extremely difficult circumstances."[12] Others take the view, particularly in light of the CBA's 2013 call for improved implementation of the UNCRC, that physical force against children is never acceptable in an educational setting.

VII. RECOGNIZING INDIGENOUS LEGAL TRADITIONS (CALLS TO ACTION 42 AND 50)

In 2013, the CBA acknowledged the historical interface between Indigenous and European laws and customs, the constitutional protection afforded to Indigenous legal traditions and the role of these systems in the fabric of Canadian society.[13] The CBA will continue to work to improve the recognition of Indigenous legal traditions in the legal system and build support for initiatives that acknowledge and advance Indigenous legal traditions in Canada. The CBA welcomes calls to action 42 and 50 and offers the collective experience of its members to assist in reconciling Indigenous and non-Indigenous legal traditions. Call to action 42 would also apply easily to traditional dispute resolution approaches for family justice files.

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11 Majority decision from CJ McLachlin in *Canadian Foundation for Children and Youth and the Law v Canada* (AG), [2004] SCC 4, 180 CCC (3d) 353 at para 40.

12 Letter regarding Private Members' Bill C-209, from Section Chair, Greg DelBigio to Senator Joan Fraser, Chair of Senate Standing Committee on Legal and Constitutional Affairs (Ottawa: CBA, 2008).

13 Resolution 13-03-A.

VIII. ALTERNATIVE DISPUTE RESOLUTION FOR VICTIMS OF HISTORIC ABUSE (CALL TO ACTION 29)

In 2009, the CBA called on the federal government to provide an alternative dispute resolution process for Indigenous students who were victimized in settings other the residential schools governed by the Indian Residential Schools Settlement Agreement, either by expanding the scope of the Independent Assessment Process or by creating a similar process for Indigenous Canadians who lost language and culture or suffered physical, sexual or psychological abuse while compelled to attend schools for indigenous children.[14] The CBA endorses call to action 29 as consistent with that approach.

IX. SUMMARY

The CBA applauds the work of the Truth and Reconciliation Commission. The TRC emphasizes a slow and careful approach, with emphasis on getting reconciliation right rather than getting it over.

This submission illustrates that existing CBA policy is generally in line with the June 2015 calls to action, and we will continue our work to advance those objectives. The CBA will continue to play a role in contributing to the reconciliation process. We offer our assistance to advance the work of the TRC and any successors to government and other organizations, groups and individuals in putting these proposals into action. The CBA calls on all levels of governments and the private sector, including businesses, employees and the public, to review the calls to action and take their own appropriate steps toward full reconciliation with Canada's Indigenous people.

14 Resolution 09-02-A.