Assembly of First Nations Recommendations for a First Nations Justice Strategy

February 20, 2024

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BACKGROUND

The Assembly of First Nations (AFN) is a national advocacy organization that works to advance the collective aspirations of First Nations individuals and communities across Canada on matters of national or international nature and concern.

The AFN hosts two Assemblies a year where mandates and directives for the organization are established through resolutions directed and supported by the First Nations in Assembly (elected Chiefs or proxies from member First Nations). Every Chief in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective, and cooperative measures on any subject matter that the First Nations delegate for review, study, response, or to advance the aspirations of First Nations.

In addition to the direction provided by Chiefs of each member First Nation, the AFN is guided by an Executive Committee consisting of an elected National Chief and Regional Chiefs from each province and territory. Representatives from five national councils (Knowledge Keepers, Youth, Veterans, 2SLGBTQQIA+ and Women) support and guide the decisions of the Executive Committee.

INDIGENOUS JUSTICE STRATEGY HISTORY

In January 2021, the Minister of Justice and Attorney General of Canada

was mandated with developing, in consultation and cooperation with Indigenous partners, provinces, and territories, an Indigenous Justice Strategy (IJS) to address systemic discrimination and the overrepresentation of Indigenous people in the justice system.[1]

On November 1, 2022, the Government of Canada, through the Minister of Justice and Attorney General of Canada, announced its commitment to advancing reconciliation with Indigenous peoples and to developing, in consultation and collaboration with Indigenous partners, provinces, and territories, an IJS that is informed by the lived experiences of First Nations, Inuit, and Métis.[2]

Justice Canada identified that the primary objective of its engagement with Indigenous people on its Indigenous Justice Strategy is to develop a culturally appropriate strategy, informed by Indigenous ways of knowing and healing, which would include concrete recommendations for action to address systemic discrimination and the overrepresentation of Indigenous people in the Canadian justice system.

Development of the Indigenous Justice Strategy is being informed by two streams of engagement: 1) Indigenous-led engagement being undertaken by communities and organizations with grant support from Justice Canada; 2) Justice Canada-led engagement.

1 Minister of Justice and Attorney General of Canada Mandate Letter (2021), https://www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-justice-and-attorney-general-canada-mandate-letter

2 Engaging with Indigenous partners to address systemic discrimination and overrepresentation in the Canadian justice system (2022): https://www.canada.ca/en/department-justice/news/2022/10/engaging-with-indigenous-partners-to-address-systemic-discrimination-and-overrepresentation-in-the-canadian-justice-system.html

Funding and calls for proposals soon followed this announcement and the government of Canada issued notice that a final Indigenous Justice Strategy will occur once the Indigenous-led engagement and Justice Canada-led engagement efforts are concluded, in 2024.

OVERVIEW OF AFN ENGAGEMENT

Like many other Indigenous groups, organizations, and academic institutions, the AFN received funding under the Indigenous-led engagement stream coordinated by Justice Canada. The AFN's mandate is to advocate and work with Justice Canada to urgently co-develop a strategic framework to develop and implement a National First Nations Justice Strategy with funding to support regional and community-based, self-determined holistic approaches to justice that are grounded in First Nations principles, protocols, laws, and traditions, including ensuring the framework is consistent with the minimum standards in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.[3]

The AFN is in the final year of a three-year project intended to develop a First Nations Justice Strategy. This report is the culmination of the AFN's three-year project, which included two virtual national forums and a national virtual speaker series. The first national forum was held together with the AFN National Forum on Policing and Justice in March 2021. The second virtual AFN National Justice Forum was held in April 2022. Finally, a four-part AFN Virtual Justice Speakers Series was held throughout October 2023 with diverse speakers representing youth, 2SLGBTQQIA+, women, men, Elders, Knowledge Keepers, legal practitioners, and legal scholars from various parts of Canada providing their insight, thoughts and recommendations on different themes related to a First Nations Justice Strategy.

In addition to this national engagement, First Nations-in-Assembly established an AFN Chiefs Committee on Justice to provide advice and direction on matters relating to justice reform and reclamation of First Nations justice systems, legal traditions, and customary laws.[4] At the inaugural meeting of the AFN Chiefs Committee on Justice on September 21-22, 2023, in Victoria, B.C., the Chiefs Committee members and their representatives provided guidance on the development of the strategy to provide recommendations to Justice Canada. This includes a two-staged approach: first, the drafting of a recommendations paper to be submitted to Justice Canada by the end of December 2023, and second, for the work to develop a First Nations Justice Strategy to continue with input from the Chiefs Committee on Justice.

The last component of engagement in developing this recommendation paper was coordinated during the AFN Special Chiefs Assembly from December 5-7, 2023, held in Ottawa, Ontario. A summary of the broader recommendations in this paper were presented at a Dialogue Session on December 5, 2023, to get feedback from leadership. Additionally, a voluntary questionnaire was taken during the week asking participants to identify desired changes to the Criminal Justice System (CJS), current community issues and best practices, and initiatives taking place in participants' communities.

Feedback from all the engagements outlined above and the activities during the December 2023 Special Chiefs Assembly are incorporated into this recommendations paper.

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3 AFN Resolution 36/2021, *Call for Recommitment, Funding and Clear Timeline for Development and Implementation of a National First Nations Justice Strategy*.

4 AFN Resolution 11/2022, *Establishing a Chiefs Committee on Justice*

METHODOLOGY:

This report puts forth recommendations on a First Nations Justice Strategy gathered from several sources. Specific reports either on or containing reference to Indigenous justice were examined, and certain recommendations contained therein are summarized in this paper. The insight, thoughts, and recommendations of participants of the AFN's National forums and Virtual Justice Speakers Series also inform and are part of these recommendations.

The direction and input of stakeholders, including leadership, Chiefs Committee members, and invited guest speakers in attendance at IJS dialogue sessions, and the information supplied by survey participants at the AFN Special Chiefs Assembly of December 5-7, 2023, is also considered and included.

A listing of the reports, documents and forums are listed in *Schedule A – Reports and Reference Materials at the end of this Report*.

The following reports were examined to identify common themes and recommendations:

a. The BC First Nations Justice Council – BC Justice Strategy (2020)

b. Report: Assembly of First Nations 2022 National Justice Forum (August 2022)

c. Ten Years since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada by Dr. Ivan Zinger, Correctional Investigator of Canada (July 2023)

d. Indigenous Justice Strategy – What We Learned: Wave 1 – Justice Canada-Led Engagement (August 2023)

e. Connecting hearts and making change: Building on breathing life into the Calls for Justice (2023)

Additionally, specific mandates and recommendations confirmed in resolutions of the AFN First Nations-in-Assembly are included in this recommendations document with the specific resolution cited in the footnotes.

BC First Nations Justice Strategy Overview (2020)

Collaboration between the BC First Nations Justice Council, First Nations in BC, the province of British Columbia and input from key justice system stakeholders resulted in the BC First Nations Justice Strategy. The BC First Nations Justice Strategy outlines a pathway to modernize the existing criminal justice system and seeks to facilitate the rebuilding of an Indigenous justice system. In keeping with the principles of UNDRIP and in response to the Truth and Reconciliation Commission Calls to Action, the BC First Nations Justice Strategy mandates the justice system in British Columbia and its partners to undertake systemic change along two paths:

1. Reform of the current justice system, and

2. Restoration of First Nation legal traditions and structures.

A key principle of the BC First Nations Justice Strategy is that wherever First Nations people encounter the justice system, culturally appropriate alternative responses for First Nations people should be considered and presumptively offered or pursued.

AFN National Forum on Policing and Justice (2021)

The goal of the AFN National Forum on Policing and Justice was to bring First Nations people together to discuss First Nations policing and a national justice reform strategy. The forum also sought to identify the considerations that would be needed in the development of a legislative framework for First Nations policing as an essential service. Participants were asked their input on ways to address systemic racism in Canada's law enforcement and justice systems. Lastly, the forum considered the status of Calls-to-Justice and Calls-To-Action in the final reports of the National Inquiry into Missing and Murdered Indigenous Women, Girls, and 2SLGBTQQIA+, and the Truth and Reconciliation Commission.

AFN National Forum on Justice (2022)

A second AFN National Forum on Justice was held virtually in April 2022. One of the key objectives of the forum was to redirect the conversation away from conventional notions of restorative justice to the reclamation of First Nations legal traditions and laws. The Truth and Reconciliation Calls to Action identified the need for revitalization of Indigenous legal traditions as a way of addressing the legacy of Residential Schools and the overrepresentation of First Nations Peoples in the justice system. Accordingly, the 184 delegates at the forum concentrated on a comprehensive rethinking of restorative justice based on reclamation of First Nations legal traditions and laws as a holistic way of addressing overrepresentation of First Nations Peoples in the Canadian justice system. First Nations self-determination and self-government is integral to the restoration and reclamation of First Nations justice systems.

Forum participants were divided into three focus groups and asked specific questions related to the following themes:

1. Revitalization of Indigenous legal traditions;
2. Reclamation of First Nations jurisdiction over justice systems; and
3. First Nations legal traditions and the Canadian criminal justice system

The three focus group discussions centered around similar concepts, including that core elements of Indigenous identity are the source of legal traditions and laws and are

resources to guide the process of reclamation. First Nations are diverse, and each will need to identify their own priorities for a justice system based on their traditions. Reconciliation means adequate funding based on First Nations' priorities and collaboration with provincial and federal governments will be needed to build capacity for Indigenous justice.

Ten Years since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada by Ivan Zinger, J.D., Ph.D., Correctional Investigator of Canada (2023)

The discriminatory treatment of Indigenous persons in federal custody has been a long-standing issue. Nearly 50 years ago, in its first annual report of July 1974, the Office of the Correctional Investigator (OCI) identified the discriminatory treatment of Indigenous persons in the federal correctional system. In subsequent annual reports, the OCI has issued more than 70 recommendations specific to Indigenous corrections.

In 2013, the OCI tabled a Special Report in Parliament entitled "Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act" (the "2013 Spirit Matters Report"). The 2013 Spirit Matters Report investigated the extent to which the federal corrections had implemented the Corrections and Conditional Release Act (CCRA), enacted twenty years earlier in 1992. The 2013 Spirit Matters Report focused on section 81of the CCRA (Healing Lodges managed by Indigenous communities) and section 84 (Indigenous community release and reintegration planning). Numerous and significant gaps were identified in the 2013 Spirit Matters Report.

Recommendations from the 2013 Spirit Matters Report and the annual reports of the OCI with respect to Indigenous persons in federal corrections included, among other corrections-related issues, the expansion of section 81 Healing Lodges managed by Indigenous communities and increased use of section 84 releases and facilitation of the process for such releases.

Since the release of the 2013 Spirit Matters Report, there have been numerous commissions, inquiries, articles, including investigative journalism, and parliamentary committee studies examining incarceration of Indigenous persons. These reports also called for specific recommendations and calls-to-action aimed at federal corrections, many of which appeared in other OCI reports and other investigative initiatives such as the *MMIWG Final Report: Reclaiming Power and Place*. Recommendations that were often included in these reports centered around four areas:

1. Increasing the use of Healing Lodges, section 84 releases, and engagement with Indigenous communities;
2. More and higher quality culturally informed programming;
3. Improvements to screening, assessment and classification tools; and
4. More Indigenous leadership, employee representation and cultural competence among all staff.

Ten years later, the OCI would revisit the progress and impact of the CCRA sections 81 and 84 and of recommendations directed at federal corrections contained in the 2013 Spirit Matters Special Report. In 2023, the OCI released its findings in its report, "Ten Years since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada" ("2023 Ten Years Report").

In the 2023 Ten Years Report, the OCI found that despite the various changes, inquiries, reports, and commitments to implementing changes aimed at addressing Indigenous corrections, "the various efforts have fallen disappointingly short of the goals of addressing system discrimination and the over-representation of Indigenous Peoples in the correctional system." [5]

5 Pg 5 Ten Years Since Spirit Matters

Indigenous Justice Strategy – What We Learned: Wave 1 – Justice Canada-Led Engagement (2023)

The first report of Justice Canada entitled "What we Learned: Wave 1 – Justice Canada-Led Engagement" ("Wave 1 Report") collected information from 700 participants over 26 virtual sessions. The Wave 1 Report summarized its findings narratively and in chart form both in collective overall finding and in interest specific group findings. Those findings of Justice Canada's consultation are listed below.

What We (Justice Canada) Heard Across All Meetings

1. The colonial system does not work for Indigenous Peoples;
2. Integrate traditional methods of healing in justice system;
3. Address the social determinants of justice;
4. Need better cultural awareness and mandatory training;
5. We must acknowledge and address intergenerational trauma;
6. The system must focus on community healing and use circle practices;

Connecting Hearts and Making Change: Building on breathing life into the Calls for Justice (2023)

In 2021, the Assembly of First Nations (AFN) Women's Council carried out regional consultation sessions across Canada to connect with MMIWG2S+ First Nations survivors and families. These sessions culminated in regional reports and a national report *Breathing Life into the Calls for Justice: An Action Plan to End violence Against First Nations Women, Girls, and 2SLGBTQQIA+ People.*[6]

In response to families' and survivors' concerns that they did not feel informed of progress and initiatives regarding MMIWG2S+, the AFN agreed to coordinate and host a National MMIWG2S Gathering in Vancouver, British Columbia, which was held in February 2023. The recommendations from that Gathering were captured in the report, Connecting hearts and making change: *Building on breathing life into the Calls for Justice* (2023), some of which are included in this document.[7]

6 Breathing Life into the Calls for Justice: An action plan to end violence against First Nations Women, Girls, and 2SLGBTQQIA+ People (2021): https://www.afn.ca/wp-content/uploads/2021/06/First-Nations-Action-Plan-Report.pdf
7 Connecting Hearts and Making Change: Building on Breathing Life into the Calls for Justice (2023): https://afn.bynder.com/m/39370b304bec684e/original/Connecting-Hearts-and-Making-Change.pdf

REGIONAL AND DEMOGRAPHIC CONSIDERATIONS:

Throughout the AFN's engagement activities, leadership, participants, Elders, women, youth and 2SLGBTQQIA+ people consistently emphasized that there cannot be a "one size fits all" or a "pan-Indigenous approach" to an Indigenous or First Nations justice strategy. Recognition of the diversity and unique situations for each First Nations was critical to developing a justice strategy. These considerations are listed in summary as follows:

Consideration 1: First Nations traditional laws and legal systems are as varied as each region, community, and First Nations group.

There are over 600 distinct First Nations in Canada, with many having their own distinct origins, Creation stories, culture, history, traditions, languages, lifestyles, locations, relationships to lands, waterways, and political and legal identification (i.e. Status Indian, Treaty, and non-Treaty), to name a few. There is no one way to classify, organize, or label traditional laws and legal systems.

Consideration 2: First Nations services should serve First Nations members whether rural, urban, on-reserve, urban settings on historical First Nations lands/treaty areas.

Time, necessity, and choice has given rise to an increasing number of First Nation persons living in urban and rural areas off-reserve. Shrinking land bases, increasing populations, the need for housing, economic, and educational opportunities, as well as other factors have all contributed to an increase in off-reserve living by First Nations members, whether those locations are rural or urban. Services intended for First Nations persons should not be limited to on-reserve First Nations populations only. This limited thinking is based on an outdated Indian Act service model where only on-reserve Indians would receive services.

Dialogue session participants clearly communicated that off-reserve locations, including adjacent lands, towns, cities and other areas, are Treaty lands, and that these lands either previously belonged, or still belong, to the First Nations who have occupied those lands for millennia.

Consideration 3: First Nations are each at a varied state of readiness in revitalizing First Nations laws and legal customs.

Dialogue session participants raised concerns that there can be no pan-Indigenous justice strategy or pan-First Nation justice strategy given the quantity, diversity, and uniqueness of First Nations. With respect to revitalization of Traditional First Nations laws, the state of readiness and capacity of First Nations communities is equally as diverse and varied. Some First Nations have already implemented their own traditional laws and systems, while at the other end of the spectrum are First Nations communities struggling with poverty, boil water advisories, and other social problems. Revitalization of First Nations Traditional Laws would need to account for or take into consideration that First Nations will each be at a different state of readiness: practicing, preparing, and those who aren't ready yet.

Consideration 4: First Nations Youth need more programs/centres, compassionate, and healing alternatives when in contact with the justice system.

Issues related to First Nations youth and the CJS include that youth identified a lack of programs and centres to

keep them focused and occupied. When some First Nations youth encountered the CJS, they did not understand what was happening at court, had limited to no access to legal aid/assistance, and little access to resources while being processed by the CJS. The OCI identified in its 2023 Ten-Year Report that youth were being incarcerated at increasingly young ages, for longer custodial terms, and were more prone to recidivism.

Participant feedback in the December 2023 questionnaires collected at the Special Chiefs Assembly identified that they would like to see less youth representation in the CJS and to let First Nations youth off easy/go easy on them.[8]

Consideration 5: Remote and Northern Communities

There are unique considerations for remote and northern communities. For instance, there may be challenges such as transportation that may present a barrier to making court appearances or returning to the community upon release from custody. First Nations citizens live in all parts of Canada, from their home communities to large urban centres. First Nations communities are often in remote and isolated areas, particularly those in the north. Many southern First Nations communities are located in rural areas.

The circuit court system is the main vehicle used by provincial governments to deliver criminal justice in First Nations. Circuit courts involve the flying-in of a court party for one to two days per month. The court party typically includes the judge, the Crown prosecutor, duty defence counsel, court staff and a child protection counsel. Court is held in a school, arena or other building made available by the First Nations community. These courts fly into the First Nations community in the morning and fly out at the end of the day.

The circuit court system is not ideal and poses many problems for First Nations individuals. In practice, housekeeping matters such as remands, setting future dates and disclosure occurs as the first order of business. This is followed by bail hearings, guilty pleas and sentencing of offenders. Once these matters are dealt with, criminal trials commence. If any time is left before the court party is scheduled to leave the community, family and child protection matters are dealt with. A number of inquiries have studied the circuit courts and were critical of its practices:

> *"Justice cannot be delivered on a monthly fly-in, fly-out basis. Judges must be prepared to go into Aboriginal communities and stay until dockets are completed. This may mean that courts have to sit for more than one day, particularly if there are family and youth matters to be dealt with (Manitoba Aboriginal Justice Implementation Commission Report, Chapter 8)."*

There are significant delays in the circuit court system. When an individual is detained for the commission of a criminal offense, these individuals are flown out of their home communities for a bail hearing in an urban centre. It is difficult for these individuals to arrange a bail plan, acquire surety and secure participation of witnesses. Often delays result in developing a plan to apply for bail. If an individual is granted bail, the individual may be responsible for the costs of arranging his/her travel back to their home community, depending on the jurisdiction they live in.

8 December 5-7, 2023 engagement for the Indigenous Justice Strategy Special Chiefs Assembly, Ottawa, ON.

With respect to trials in the circuit court system, very little time is allotted for trials to take place within the usual half-day. Trials are scheduled months in advance, and it is difficult to properly estimate the time required for a case. Significant delays can occur where one trial takes longer than expected and little time is left for other trials to be heard on the day the court is in the community. Where a trial needs to be rescheduled, there is minimal flexibility in available court dates as the court calendar is filled with other matters, and a new date may be months up to a year to reschedule.

Dialogue session participants identified the need for greater federal support to programs and resources that tackle the "revolving door" problem and help address over-representation of First Nations people in the criminal justice system. As well, they identified the need for federal funding to support specialized First Nations courts, diversion programs, availability of appropriate assessment, treatment and rehabilitative options as well as requirements for cultural competency and awareness training to those who deal with First Nations peoples.

THE WAY FORWARD: RECOMMENDATIONS FROM ASSEMBLY OF FIRST NATIONS

The recommendations from the AFN are separated into two parts: reform of the current criminal justice system and revitalization of First Nations Traditional Laws. The remainder of this paper outlines discussion and recommendations derived from the engagement.

Part I: Reform of Current Criminal Justice System

This part of the paper contains both a critique/discussion of the state of the system and recommendations on reform of the current CJS. The recommendations are put forth as temporary measures aimed at helping to reduce or slow down the negative impacts of the CJS until the revitalization work happens.

Consideration 1: Fundamental differences in worldviews between the Canadian Justice System's goals of deterrence and punishment and First Nations worldviews of restoration and healing lie at the heart of this discord.

There are fundamental differences in worldviews between the CJS goals of deterrence and punishment, and First Nations worldviews of taking responsibility, restoration, and healing. These conflicting paradigms are one reason why the CJS cannot be decolonized and the foundation of the system is incompatible.

Consistently, this clash of worldviews was heard in the AFN's National Forum on Justice (2022), the National Virtual Justice Speakers Series (2023), and in Justice Canada's What We Learned: Wave 1 Summary and Report. These philosophical differences are clear when one considers that First Nations persons will often plead guilty to charges as, in their worldview, their guilty plea equates to taking responsibility for their actions. The repercussions of that guilty plea factor into the high rates of incarceration of First Nations people.

Recommendation 1: Meaningful change requires going beyond mere acceptance and acknowledgement that Indigenous people have differing views of justice initiatives, restorative justice, and culturally appropriate victim offender treatment programs. Actively applying those differences to court decisions and approaches when dealing with remediation is required to reduce the amount of Indigenous people negatively affected by the colonial regiments of the CJS.

Consideration 2: Reform measures have not achieved results intended or desired.

Findings contained in the reports reviewed and, in the recommendations and concerns expressed in dialogue sessions, consistently point to a failure of the reforms and initiatives intended to address the over-representation of First Nations individuals in the CJS.

The 2023 Ten Years Later Report found that overincarceration of Indigenous peoples continue to increase. Despite accounting for approximately 5% of the adult population, Indigenous Peoples continue to be vastly overrepresented in the federal correctional system, accounting for 28% of all federally sentenced individuals and nearly one-third (32%) of all individuals in custody.[9]

Further, Indigenous people are being incarcerated at younger ages, serving longer prison times, and have higher recidivism - a revolving door exists on Canada's corrections system for Indigenous people.

Reform efforts to address the increasing rates of incarceration of First Nations people in the CJS must be taken immediately, including wherever First Nations people encounter the justice system, culturally appropriate alternative responses for First Nations people should be considered and presumptively offered or pursued.

Recommendation 2: Specific amendments to section 717.1 of the Criminal Code of Canada is required to make room for diversion of First Nations persons to appropriate restorative justice programs and services. (see Appendix B).

Recommendation 3: A policy directive to police, Crown prosecutors, courts and all related programs and services that deal with First Nations youth to presumptively divert First Nations youth to First Nations focused diversion/ rehabilitative programs/services instead of processing First Nations youth through the CJS is needed.

Recommendation 4: Legislative amendments to the Corrections and Conditional Release Act SC 1992, c.20, that provides greater power for the OCI to enforce its recommendations is required. Specifically, section 179(3) of the CCRA provides that recommendations of the OCI are not binding on the Commissioner nor the Chairperson of the Parole Board of Canada, but this should be required. (See Appendix 1).

Consideration 3: Services that support FN persons underfunded/understaffed.

As an example, the 2023 Ten Years Later Report discussed disparities in funding between Indigenous run Healing Lodges and CSC-run Healing Lodges and barriers faced by Indigenous inmates in accessing healing lodge beds.

Another example noted in the 2023 Ten Years Later Report revealed that staff dedicated to Indigenous cultural programming were pulled away from their role to perform other unrelated duties in the prison. Orientation, training, and CSC support for Elders/staff and programming intended for Indigenous inmates was lacking.

9 Ten Years Since Spirit Matters: A Roadmap for Indigenous Corrections in Canada p. 5

Current funding models that are short-term and do not provide clear mandates burden these programs as they contribute to high turnover rates among staff and inadequate services provided to Indigenous people involved with the justice system.

Indigenous court workers, Native Inmate Liaisons, Gladue Writers, Aftercare Workers, Reintegration Workers, and other justice supports are often operating with regularly high caseloads. In addition, in remote communities, there may be additional challenges when providing services for a large geographical area and serving multiple communities.

Recommendation 5: Clearly mandated long-term and equitable funding that adequately provides for fully staffed Healing Lodges and Indigenous cultural programming such as the First Nations court worker program are required.

Recommendation 6: Wrap around supports are needed to ensure First Nations people are supported throughout the criminal justice process. The availability of culturally appropriate aftercare services is critical.

Consideration 4: Systemic racism in the CJS continues.

The OCI's report found that there is a two-tier system of community-run, underfunded Healing Lodges when compared to Correctional Services Canada-run Healing Lodges. Further, Elders working at federal correctional facilities were paid less than their counterparts. These are examples of how systemic racism continues to exist within the CJS.

Another example of systemic racism is documented by the 2023 Ten Years Later Report where the CSC routinely labels almost all First Nations persons as high security risk, rendering them ineligible for rehabilitation, Healing Lodge placement, or cultural programming.

Participants at the first National MMIWG2S Gathering called for a review of all policies impacting First Nations peoples, including replacing the Indian Act with Women's Councils.[10]

First Nations individuals are often over-policed. The issue of over-policing was documented in the Aboriginal Justice Inquiry of Manitoba and other inquiries where examples illustrated First Nations citizens being stopped on the streets and questioned about their activities, or being carded for no reasons, when compared to Caucasians. These actions of the police were seen as a form of harassment. In addition, when coming into contract with the law, First Nation offenders are more likely to be charged, will be charged with multiple offenses, and will more likely be charged with more serious offenses than other groups.

The tactic of over-charging First Nations offenders is used by the police to increase the probability of a conviction on more significant charges carrying harsher penalties. There are a number of strategic reasons why police may overcharge First Nation citizens with multiple offenses. The key reason is that police are aware the courts have a large volume of files that must move through the court system. Secondly, the police know First Nations people will be more likely to plead guilty to an offense. Thus, a conviction is accomplished through the plea bargaining and negotiation process. Prosecutors are aware that when an individual is over-charged and that charges include serious indictable offenses, a defendant is encouraged to plead guilty to a lesser offence.

10 *Connecting hearts and making change: Building on breathing life into the Calls for Justice* (2023), Page 25.

There are other advantages that the police obtain by overcharging First Nations defendants. The granting of bail is more difficult where an accused faces multiple serious charges. Generally, higher bail amounts are required for more serious offenses. Because bail can be set at an artificially high rate due to overcharging, it is more difficult for First Nation families of those who are detained in remand centres to bail out family members. When a defendant must remain in custody while his or her case is pending, there is an increased likelihood that a defendant will plead guilty, particularly if it means they will be released from custody.

Over-charging and over-policing First Nation individuals tie up precious court resources. Firstly, individuals who should not have been charged in the first place are brought into the criminal justice system. Those individuals who opt to challenge criminal charges must spend considerable financial resources and time to prepare for a trial.

In *R. v. Gladue*, the Supreme Court of Canada instructed sentencing judges to consider other systemic issues faced by Indigenous offenders, including social and economic conditions and the legacy of dispossession and colonization faced by Indigenous peoples.[11] The Supreme Court also established that Indigenous offenders should, in certain cases, be treated differently from other offenders. Section 718.2(e) directs sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to make an effort to achieve fit and appropriate sentence.

From a First Nation perspective, Canadian courts have the ability to apply thoughtful reasoning and analysis before imposing sentences and the granting of a conditional sentence. While First Nations offenders are usually given harsher sentences by judges in a most unfair manner, conditional sentences are made available to First Nations citizens on the rare occasion. Similarly, the recommendations of a First Nations community and victims participating in a sentencing circle would be useless for a judge who has to impose a mandatory minimum prison sentences.

Gladue reports, intended to explore the reasons why a First Nations person came to be before the court, are problematic in that they require a First Nations person to plead guilty or be found guilty before it can be used by the court in arriving at a sentence. The same requirement, pleading guilty, is required to utilize Healing Circles and programs such as the Indigenous Peoples Court. The guilty plea or finding of a First Nations person as guilty means that the First Nations person is now going to be absorbed by the CJS, whether the sentencing results in custody or some other penalty/punishment under an order.

A large number of individuals held in custody waiting for trial date are Frist Nations citizens. Many of these individuals were denied bail. However, those individuals who are granted release face significant challenges in meeting the conditions of bail. Despite the criminal code applying across Canada, criminal law is not applied uniformly in each jurisdiction. For instance, in a number of provinces an accused person may be released on the basis of their own recognizance. In other provinces, an accused person is required to obtain a surety as a precondition to release.

Obtaining a surety is not an easy task for many First Nations citizens. The surety has to be someone who is employed, agrees to supervise the accused in the community, and is willing to take on a financial risk in the event that conditions of bail are breached. In First Nations communities a large number of individuals rely on social assistance to make ends meet. This limits the pool of potential sureties a First Nations individual can rely on. In some jurisdictions, a surety must also have real property as a prerequisite to act as a surety. This requirement is impractical in First Nations communities where is private ownership of real property is effectively prohibited by the Indian Act. Regardless, significant delays in securing one's release result in applications for bail.

11 *R v. Gladue* [1999] 1 SCR 688.

Very rarely is bail granted with one or two conditions. The majority of pre-detention release orders have a number of conditions attached, some of which are strict and onerous. With respect to First Nations offenders, conditions are imposed that are inappropriate, overly restrictive, and are often unrelated to the underlying offence. Some conditions of release are unrealistic and set up an accused person to fail. These conditions include individuals with addictions being ordered to abstain absolutely. At times, a person will be released with a requirement to participate in an addictions treatment centre. Finding a vacancy in such a treatment facility is difficult, and thus, an accused remains in custody until a stop in a treatment program become available.

Many regularly imposed bail conditions are vague for Frist Nations citizens where English is a second language. For instance, the common condition to "keep the peace and be of good behaviour" can presumably encompass a wide range of behaviours. An accused person is unlikely to know what behaviours will contravene these conditions. Furthermore, a breach of this condition will most likely be unrelated to the offences before the court.

In a number of jurisdictions, bail hearings are routinely adjourned due to a lack of court time available to hear these matters. Crown and defence counsel often ask for adjournments out of habit. However, the judiciary regularly fails to ensure that a request for an adjournment is necessary and fully justifiable in each individual case. Unjustifiable adjournments and those that are caused by systemic delays in the court system are unconstitutional.

Legislative reform is required to address access to service issues to these Indigenous focused programs meant to assist Indigenous individuals involved with the justice system. While such programs include First Nations concepts of justice, the approach to applying those concepts, courts, and healing circles is still heavily influenced by a colonial mindset that renders them less effective.

The OCI is recommending a "decarceration strategy" to be co-developed in partnership with the federal government and Indigenous people and organizations. The aim of the decarceration strategy would be:

1. Create and utilize alternatives to incarceration for Indigenous peoples.
2. Increase culturally relevant supports and services for Indigenous peoples under federal sentence.
3. Reallocate significant resources and expenditures from penitentiary to community-based reintegration efforts, including community-run Healing Lodges (Section 81) at both minimum and medium security levels.[12]

Recommendation 7: The OCI's call for a "decarceration strategy" be implemented and that this strategy is co-developed with First Nations people and organizations.

Recommendation 8: The requirement for a First Nations person to enter a guilty plea or be found guilty to access a Gladue Report/Healing Circles should be changed. Instead, the inquiry into the background and factors that has brought the First Nations person in contact with the CJS should be made at the earliest instance of contact. Police and Crown prosecution services should be encouraged/directed to use police discretion and prosecutorial discretion to investigate/inquire into the background and factors bringing that First Nations person into contact with the CJS. A pre-charge presumption of diversion of a First Nations person to restorative justice programs or services should form part of the policy and practices of police and Crown prosecution services.

12 Ten Years Since Spirit Matters, Page 22

Recommendation 9: Mandatory cultural sensitivity and human rights training for all corrections, police, prosecutors, lawyers, judges, clerks, and personnel in the CJS on an annual basis.

Recommendation 10: Policies and practices in corrections facilities should be reviewed to eliminate racism and bias and make mistreatment of First Nations persons by any corrections personnel a punishable crime.

Consideration 5: Legislative or other reforms are needed, including the development and creation of mandates for oversight committees, to address systemic racism in institutions such as policing and justice, health care, education, and child welfare.[13]

While oversight mechanisms have been put in place, such as the OCI providing oversight to the performance of corrections, the problem of systemic racism continues. Despite legislative change to the Corrections and Conditional Release Act (SC 1992, c.20) to address overrepresentation of Indigenous persons in the Canadian correctional system, two decades have gone by and the same systemic racism continues with unacceptable increases to the numbers of First Nations individuals serving sentences in the Canada correctional system.

In 2020, the AFN was given a mandate to advocate for sustained and increased funding for restorative and culturally informed justice programming in Canada. Furthermore, a directive to advocate that all legislative and programmatic reforms in every system be made in congruency with the Calls to Justice outlined in the Final Report of the Missing and Murdered Indigenous Women and Girls Inquiry to reduce the harm faced by First Nations women, girls and 2-Spirit peoples was also given.[14]

In addition, one of the Immediate Action Points from the National Indigenous Justice Summit recommended increasing Indigenous representation across all levels of the CJS[15], noting that with the same issues affecting First Nations people in the justice system persisting and getting worse, it is clear the current oversight mechanisms and legislation are not effective.

In response to the Missing and Murdered Indigenous Women and Girls National Inquiry Call for Justice 1.7, there have been recent discussions regarding the creation of a National Indigenous Ombudsperson, including Regional Indigenous Ombudspersons and respective offices to address growing human rights violations against Indigenous people. These newly constructed concepts have clear potential to address the issues with the CJS as well.

Recommendation 11: Creation of National Indigenous and Human Rights mechanisms to serve as oversight bodies that are independent from any federal, provincial, or territorial influence, and are internationally recognized by the United Nations Special Rapporteur Office which can be used to hold the CJS accountable.

Consideration 6: CJS retraumatizes First Nations peoples already traumatized.

It is well documented that many First Nations individuals suffer either directly or intergenerationally from trauma caused by Residential Schools, Day Schools, Sixties Scoop, the child welfare system, tragedies, and disease. The trauma manifests itself in domestic, sexual, physical, spiritual, and emotional violence perpetuated by or against First Nations members and other members of society. This trauma is further complicated by related social

13 AFN Resolution 06/2020, *Support for Advocacy of Systemic Racism in Canada*

14 AFN Resolution 07/2020 *Call for Reform to Address Institutional Racism in the Justice System*

15 AFN Resolution 11/2020, *Implementation of the National Indigenous Justice Summit's Immediate Action Points*

anomalies, including poverty, unemployment, food scarcity, and drug, alcohol, and substance abuse. Until and unless underlying issues of trauma in First Nations people are addressed, trauma cycles will continue in First Nations individuals affected by trauma and will remain a factor when First Nations individuals are in contact with and then become absorbed by the CJS.

Survivors and family members of MMIWG2S+ at the first National MMIWG2S+ Gathering reported that the concept of justice for MMIWG2S+ is a myth. Even when a perpetrator is caught and punished, the court process is traumatizing and sentences are too lenient, especially in comparison to the losses experienced by survivors and families.[16]

Recommendation 12: Staff, court officials, lawyers, judges, clerks, non-First Nations police officers, prison guards, and all staff working in the CJS must receive cultural sensitivity training that critically engages with the colonial influences that directly impact and create the trauma experienced by First Nations people mentioned above. Furthermore, the training received must be actively and routinely demonstrated in work plans, special measures utilized in court and within the prison systems, and through consistent workplace evaluations to determine the amount of cultural training being actively utilized.

Expanding on the area of CJS retraumatizing First Nations peoples, MMIWGS+ survivors and family members shared their experiences and maintain that it is unfair and traumatizing to first hear the details of a loved one's death in such a public forum, particularly when the Crown calls graphic evidence.[17]

Recommendation 13: Crown policy manuals should include provisions that MMIWG2S+ survivors and families are notified and given the opportunity to hear the statement of facts against the accused prior to being in the courtroom (e.g. in a meeting with the Crown).

Recommendation 14: Provide increased funding for Indigenous court worker programs to make available the necessary support for families and individuals who have experienced trauma from violent acts or abuse.

Part II: Revitalization of First Nations Traditional Laws

Part I discussed areas of needed reform with respect to First Nations people who encounter the CJS and made interim recommendations aimed at reform. This section, Part II, focuses on the transformational work that is needed as identified by First Nations in AFN's engagement and as given in other mandates.

Section 1: Revitalization of First Nations Traditional Laws

When exploring First Nations Traditional Laws it is important to start with a discussion on what First Nations Traditional Laws are and what they are not. Starting with the latter, First Nations Traditional Laws are NOT Aboriginal law, which is state law applied to First Nations peoples. First Nations Traditional Laws are also NOT Restorative Justice, Aboriginal Courts, Gladue Courts, or Healing Programs.

First Nations Traditional Laws may be ancient, deeply rooted, sourced in the sacred or the earth. First Nations

16 *Connecting hearts and making change: Building on breathing life into the Calls for Justice* (2023), Page 7.

17 *Connecting hearts and making change: Building on breathing life into the Calls for Justice* (2023), Page 7.

Traditional Laws may be recent, drafted as treaty, agreements, bylaws, or legislation. First Nations Traditional Laws may also have elements of both First Nations legal traditions and other sources of law.[18]

This section provides five considerations to help support and guide the work of revitalizing First Nations Traditional Laws.

Consideration 1: First Nations Traditional Laws do not look like western law.

Current constructs such as courtrooms in the western legal system, contrasts with First Nations laws, which could take place in a different setting such as outdoors or a community hall or other space that is suitable to the First Nations group practicing their own First Nations laws. Sources of First Nations laws are found in teachings, not necessarily in a book or a specific place. As well, roles and responsibilities of persons involved in First Nations laws may be different and the ways in which accountability, responsibility, restoration, and healing take place will look different from western law.

Consideration 2: First Nations Traditional Laws are inherent in Indigenous relationships to the earth, culture, language, ceremonies, customs, ways of being/knowing, captured in treaties.

Traditional stories and legends, Creation stories, language, ceremonies, treaties, relationships, teachings, and customs carry the laws of each First Nation. These are carried, passed on and preserved both by oral tradition, memory, ceremony, written record and treaty, and have sustained First Nations since pre-contact. The evidence of this is seen in the continued presence and resilience of the First Nations people that are still here today despite colonization, genocidal policies, and laws designed to eradicate First Nations peoples from this land.

First Nations Traditional Laws must be viewed in broader terms than the scope of the current CJS. Since First Nations Traditional Laws are often related to the land, nature, and the environment, First Nations concepts of justice and law extend to respecting the environment, and our relationship with the earth's elements, and animals. In this way, traditional concepts of justice include climate justice and protection of Mother Earth.

Consideration 3: First Nations Traditional Laws are unique to each First Nations community, region, or tribe.

There are over 600 First Nations in Canada, along with many regional and tribal governance structures giving rise to the number of unique variations in First Nations laws.

Recommendations from *Connecting hearts and making change* lends support to calls to revitalize traditional and customary laws within First Nations jurisdictions that are listed in the CFJ 5.11, 2.3, 2.4 and 2.5.[19]

Additionally, support for First Nations justice programs, particularly models grounded in traditional approaches to law and justice are to be found in the recommendations of the Breathing Life into the Calls for Justice report of 2021.[20]

Consideration 4: First Nations Traditional Laws are about responsibility to self and earth.

In contrast to Canadian law and statutes, First Nations laws teach that every individual has responsibilities to self, to others, and to the earth. Everyone is responsible for their own actions. First Nations laws teach that an individual's

18 *Wakohtewin Law and Governance Lodge -Indigenous Justice Strategy Dialogue Session* December 4, 2023

19 *Connecting hearts and making change: Building on breathing life into the Calls for Justice* (2023), Page 6.

20 *Breathing Life into the Calls for Justice* (2021), Page 12.

actions impact their own well-being as well as others including family, community, Nation, earth, and environment. All are interconnected in a circle. Anything that an individual does influences others in the circle.

Consideration 5: Full funding of a First Nations Justice System is required.

Revitalization of First Nations laws will require the careful consideration by each First Nation as to how and when they are ready. Readiness would include capacity and resources to develop First Nations laws, as well as the corollary needs of adjudication and enforcement. While these terms have a meaning to the CJS, First Nations concepts of adjudication and enforcement will be informed by that First Nation's laws, based on their unique Indigenous identity and sources of their laws.

Capacity building, law development, and questions of how laws will be heard and enforced in and by the First Nations will require funding. In addition, the needs of special interest groups within each First Nation will require consideration.

Special interest groups recommended that funding should be targeted specifically for special interest groups such as First Nations youth, 2SLGBTQQIA+ people, and women, and eliminate funding streams that require First Nations interest groups to compete among themselves for limited funding in that funding stream.

In the *Connecting Hearts and Making Change Report*, similar recommendations were made for increased funding for First Nations justice initiatives, restorative justice, and culturally appropriate victim offender treatment programs (CFJ 5.16, 5.21).[21]

Section 2: Creation of First Nations Traditional Laws

The use of the term Indigenous refers collectively to the First Nations, Inuit and Métis peoples of Canada, in a pan-Indigenous approach. The AFN will use the term First Nations, as it is more representative of the people that AFN represents. Thus, in this section, the term First Nations Traditional Laws is used instead of Indigenous Traditional Laws.

The difference between First Nations Traditional Laws and Aboriginal law must be understood. Aboriginal law is Canadian law applied to First Nations peoples such as statutes like the *Indian Act* and judge-made law (case law) created by Canadian courts (and some early decisions of American courts) that deal with First Nations people and their affairs.

First Nations Traditional Laws are not created by Canada or its Parliament. First Nations Traditional Laws are inherent to First Nations and their history, culture, stories, practices, languages, lands and waters, ways of being and knowing and, like the stars, are infinite and unique to each First Nation. First Nations Traditional Laws exist, are enacted, and practiced under each First Nation's own inherent right to govern itself.

The right to self-government is recognized in Canadian and international law and conventions. More specifically, Article 3 of UNDRIP provides that Indigenous peoples have the right to self-determination and Article 4 specifies that the right to self-government applies in matters relating to their internal and local affairs as well as ways and means for financing such autonomous functions.[22]

21 *Connecting hearts and making change: Building on breathing life into the Calls for Justice* (2023), Page 6.
22 https://www.un.org/development/desa/indigenouspeoples/wpcontent/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

A vital and consistent recommendation heard during the AFN's engagement was the role of treaties. For many First Nations, treaties form the basis for First Nations rights to self-government as historically, treaties were made between First Nations as sovereign nations and the Crown. The fact that treaties are not honored in some cases by Canada does not take away from the treaties as evidence of First Nations sovereignty and inherent right to self-government in all its manifestations.

In 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*, *SC 2021, c 14* ("UNDA") which requires Canada to, "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[23]

Furthermore, Canada bound itself to, "in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration."

UNDA requires that the action plan include measures to, "address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons."[24]

Transformational change, mentioned earlier, means that the current way that the CJS operates is no longer acceptable. Further, UNDRIP and UNDA and First Nations treaty rights and inherent rights to self-government collectively create optimal circumstances for transformational change including revitalization of First Nations laws.

Recommendation 15: First Nations have an inherent right to self-government and this necessarily extends jurisdiction over laws. A distinctions-based approach is necessary to ensure the uniqueness of First Nations Traditional Laws are recognized.

Recommendation 16: Provide a mandate to the CJS in Canada and its partners to undertake transformational and systemic change which supports the revitalization of First Nations laws and legal systems and provides full funding for revitalization work by First Nations in keeping with Canada's commitment under UNDA to address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous people.

Section 3: Administration of Justice

The mandate for the administration of justice by and for First Nations can be found in several resolutions of the AFN. For example, the mandate to support First Nations to administer justice in relation to their respective peoples and territories in accordance with their Inherent title and rights and Treaty rights and relationships, ensuring overlapping rights, claims and territories are considered.[25]

AFN has called upon the federal government to provide support to First Nations with rebuilding their justice systems by providing long-term predictable funding to develop, expand, or sustain alternative approaches to law enforcement and justice that are informed by First Nations laws and legal traditions.[26]

23 United Nations Declaration on the Rights of Indigenous Peoples Act S.C. 2021, c. 14 at section 5.
24 United Nations Declaration on the Rights of Indigenous Peoples Act S.C. 2021, c. 14 at section 6(2)(a).
25 AFN Resolution 10/2020, *Support for First Nations to Administer Justice*
26 AFN Resolution 12/2023, *First Nations Alternative Approaches to Justice*

Recommendation 17: Provide long-term predictable funding to develop, expand, or sustain alternative approaches to law enforcement and justice that are informed by First Nations laws and legal traditions.

Section 4: Enforcement of Indigenous Laws in First Nations communities

With First Nations Traditional Laws, the AFN has called on the federal government to provide clear and firm direction to the RCMP, provincial, territorial, and municipal services across Canada, and federal Crown prosecutors that First Nations by-laws enacted through the Indian Act are valid First Nations and federal laws, and must be recognized and enforced by the local policing authority, and, where charges are laid and where appropriate, prosecuted by provincial or federal Crown prosecutors.[27]

Recommendation 18: Provide long-term predictable funding to develop, expand, or sustain alternative approaches to law enforcement and justice that are informed by First Nations laws and legal traditions.

27 AFN Resolution 13/2023, *Enforcement of Band Council Resolutions and Bylaws On-Reserve*

CONCLUSION & SUMMARY OF RECOMMENDATIONS:

The Canadian Justice System:

Any effort to address the overrepresentation of First Nations people in the Canadian Justice System (CJS) and to make the CJS less racist, less adversarial, more responsive and supportive to First Nations people is to be commended in the interim.

The effectiveness of some measures designed to address First Nations concerns and issues with the CJS so far have failed (i.e. section 81 and section 84 amendments to the Canada Corrections and Release Act). Other elements of the CJS have retraumatized First Nations persons who are already traumatized (i.e. MMIWGS+ families hearing Crown disclosure of details of their loved one's passing in open court). The systemic biases and racism in the correctional system that automatically labels First Nations as "high security risk" upon admission to prison and the resistance to Elders' teachings in prisons are other indicators of the inappropriateness of the CJS for First Nations people. A system that requires a First Nations person to plead or be found guilty before a court can consider what has brought him before the court is flawed.

These outcomes, and not all of them are listed, point to a need for transformational change that goes beyond fixing the current CJS, in whole or in part.

Revitalization of First Nations Traditional Laws

With respect to the revitalization of First Nations Traditional Laws, transformational change in how Canada views and considers First Nations and First Nations Traditional Laws and First Nations legal systems is needed.

The legal basis for transformational change is manifested in First Nations inherent right to self-govern, in First Nations sovereign status that was never relinquished and continues to this day in treaties, and under international law and convention (UNDRIP and affirmed by Canada in UNDA 2021). The moral and ethical basis is demonstrated in the many problems and issues between First Nations peoples and the Canadian justice system as illustrated in this paper.

Revitalization of First Nations Traditional Laws goes hand in hand with the administration of justice and enforcement designed and rooted in First Nations values, principles, worldviews, customs, culture, language, ceremony, land and water, environment, Creation stories and legends. Each of these have been passed on and preserved by oral tradition, memory, ceremony, written record, and treaty, and have sustained First Nations since pre-contact.

Like the British Columbia First Nations Justice Strategy, a mandate to the Canadian justice system in Canada and its partners to undertake transformational and systemic change along two paths would consist of the following:

1. reform of the current Canadian justice system as an interim measure, and

2. restoration of First Nations Traditional Laws, legal traditions, structures and systems.

A principled approach to the design and development of a First Nations justice strategy should guide the work and implementation of such a strategy. The presumptive offering and pursuit of culturally appropriate alternative responses for First Nations people who are in contact with the CJS are examples of this principled approach.

If real reforms and improvements are to be achieved, interim and transformational change as contained in the recommendations put forth here ought to be considered.

APPENDIX A – REPORTS AND REFERENCE MATERIALS

1. Truth and Reconciliation Commission of Canada – Calls to Action
2. Missing and Murdered Women and Girls and 2SLGBTQQIA+
3. United Nations Declaration on Rights of Indigenous Peoples 2017
4. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c.14
5. BC First Nations Justice Council – BC Justice Strategy 2020
6. Report: Assembly of First Nations 2022 National Justice Forum
7. Ten Years since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada by Ivan Zinger, J.D., Ph.D., Correctional Investigator of Canada, July 2023
8. *Corrections and Conditional Release Act* SC 1992, c.20
9. Indigenous Justice Strategy – What We Learned: Summary
   Wave 1 – Justice Canada-Led Engagement August 2023
10. Assembly of First Nations - Chiefs Committee on Justice meeting – September 22-23, 2023
11. Assembly of First Nations – National Virtual Justice Speaker Series, October 2023
12. Assembly of First Nations - AFN Special Chiefs Assembly - December 5-7, 2023 dialogue session.
13. Assembly of First Nations – AFN Special Chiefs Assembly – December 5-7, 2023 questionnaires.
14. AFN Resolution 06/2020, *Support for Advocacy of Systemic Racism in Canada*
15. AFN Resolution 10/2020, *Support for First Nations to Administer Justice*
16. AFN Resolution 11/2020, *Implementation of the National Indigenous Justice Summit's Immediate Action Points*
17. AFN Resolution 12/2023, *First Nations Alternative Approaches to Justice*
18. AFN Resolution 13/2023, *Enforcement of Band Council Resolutions and Bylaws On-Reserve*
19. Connecting hearts and making change: Building on breathing life into the Calls for Justice (2023)
20. Breathing Life into the Calls for Justice (2021)
21. Wakohtewin Law and Governance Lodge -Indigenous Justice Strategy Dialogue Session December 4, 2023

APPENDIX B – Proposed Legislative Changes

Criminal Code (R.S.C., 1985, c. C-46)

Suggested wording for discussion

Alternative Measures

When alternative measures may be used

717 (1) Alternative measures may be used to deal with a non-Indigenous person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;

(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;

(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;

(d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

(f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and

(g) the prosecution of the offence is not in any way barred at law.

717.(1)(a) Where a First Nations person is alleged to have committed an offence, diversion to restorative justice programs/services are to be offered and pursued provided the First Nations person, having been informed of the alternative measures, fully and freely consents to participate therein.

(x).(i) It is the role of the First Nation and the First Nation restorative justice program/service to assess and determine the persons to be involved and the measures and actions that will be included in the restorative justice plan.

(x).(iii) where possible and where victim consent is given, victim(s) and affected family members are presumptively to be included in the restorative justice plan.

(x).(ii) The Attorney General or the Attorney General's agents shall not add conditional stipulations to the First Nations person who is being diverted.

(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person

(a) denies participation or involvement in the commission of the offence; or

(b) expresses the wish to have any charge against the person dealt with by the court.

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

Corrections and Conditional Release Act (S.C. 1992, c. 20)

Suggested wording for discussion

179 (3) The Commissioner and the Chairperson of the Parole Board of Canada is bound to act on any finding or recommendation made under this section ***and to publicly report their respective response to the findings and recommendations giving reasons.***

more detail, please feel free to reach out to our offices.

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