



DECOLONIZING FAMILY LAW

THROUGH TRAUMA-INFORMED PRACTICES

Rise 
WOMEN'S LEGAL CENTRE

WITH GENEROUS SUPPORT FROM THE LAW FOUNDATION OF BC



MYRNA MCCALLUM and HALEY HRYMAK

JANUARY 2022

Decolonizing Family Law through Trauma-Informed Practices

January 2022

© Rise Women's Legal Centre
(Myrna McCallum and Haley Hrymak)

This project was conducted between May 2020 and March 2021 and was made possible by generous funding from the Law Foundation of BC.



Photography by Melody Charlie

Editing by Naomi Pauls

Graphic design by Nadene Rehnby

This document does not contain legal advice. If you or someone you care about requires legal advice, please consult with a lawyer.



Our office is located on unceded territory of the **Skwxwu7mesh** (Squamish), **Tsleil-Waututh** (Burrard), and **xʷməθkʷəy̓əm** (Musqueam) Nations.

ACKNOWLEDGEMENTS

Thank you to the Rise Alumni UBC students Tiffany Valeska and Brianna McCann, who volunteered to assist our work on this project. Thank you to Kim Hawkins, who helped with this project at every phase, and to Emily Hill, Raji Mangat, Salima Samami, and Kaelyn Burns for their assistance with reviewing.

Thank you to the following experts we interviewed for our research as well as three more who preferred not to be named: Dawn Johnson, Laura Matthews, Susie Gray, Anne Fletcher, Emma Johnson, and Frances Rosner.

The views expressed by project participants are their own. Any errors or omissions, however, are the responsibility of Rise Women's Legal Centre.

516 Richards St, Vancouver, BC V6B 3A2
604-451-7447 | info@womenslegalcentre.ca
womenslegalcentre.ca

Contents

A Note on Terminology.....	4
INTRODUCTION	6
Methods	7
The Legal Context	8
Colonial Legal Systems	
The Need to Decolonize.....	11
PART 1 DECOLONIZING THE FAMILY LAW SYSTEM	13
1. Expanding Our Understanding of “Family”	13
2. Redefining the “Best Interests of the Child”	15
3. Making Space for Social Context	16
4. Education about Indigenous Law and Customs.....	17
5. Legal Specialization	19
6. Trauma-Informed Practice and Cultural Humility	19
7. Law Reform.....	20
8. Legal Aid and Legal Representation.....	21
9. Section 211 Reports	22
10. Acknowledging Racism.....	23
PART 2 BEST TRAUMA-INFORMED PRACTICES FOR FAMILY LAWYERS.....	24
1. Be a Safe Space.....	25
2. Meeting the Client	26
3. Ask About Culturally Appropriate Supports	27
4. Safeguard Your Practice from Cultural and Unconscious Biases	27
5. Become a Trauma-Informed Advocate	29
6. Vicarious Trauma and Vicarious Resilience	30
CONCLUSION	32
Appendix A: Conventions and Calls to Action.....	34
Appendix B: Further Education.....	38
Notes	42

A Note on Terminology

CULTURAL HUMILITY: We adopt the cultural humility framework created by Dr. Melanie Tervalon and Dr. Jann Murray-Garcia throughout this report because the framework focuses on partnerships, a commitment to self-reflection, lifelong learning, achieving equality, and self-critique.¹ In this approach, cultural humility is a lifelong commitment to understanding and respecting different points of view, while engaging with others humbly, authentically, and from a place of learning. This approach to advocacy is consistent with the principles that underpin trauma-informed lawyering.

DECOLONIZATION: Decolonization is the process of undoing Western European colonial structures, mindsets, and systems that are designed to exert control over Indigenous peoples, lands, resources, cultures, and systems. Just as colonial practices and systems exist to intentionally oppress Indigenous people, decolonial practices work to intentionally recognize and uphold the rights and powers of Indigenous peoples.

EXPERTS: This report includes experiential evidence from interviews with nine people who have significant experience and expertise working with Indigenous people navigating the justice system in British Columbia. The majority were themselves Indigenous and could often provide first-hand examples of the harms they were identifying. We recognize these individuals as experts.

FAMILY COURT: As British Columbia does not have specialized family courts, we use the term “family court” in a general sense to describe courts hearing family law matters. Family matters in BC may be heard in either the Provincial Court or the Supreme Court, and different procedural requirements apply to each court; however, the concerns raised in this report apply to both levels of court.

INDIGENOUS: The terms “Indigenous” and “Indigenous peoples” are used to represent First Nations, Inuit, and Métis peoples inclusively. We recognize that these terms do not reflect the significant diversity of Indigenous peoples in British Columbia. There are 198 distinct First Nations in the province of British Columbia with their own unique traditions, practices, identities, and histories, as well as Indigenous peoples who have moved to British Columbia from other places.

In the specific context of family court, the universal imposition of legal traditions and norms established by White European settlers offers unearned advantages to White people while creating further harm to Indigenous people.

RACISM: Racism refers to the systemic marginalization of some groups by others based on false assumptions about their relative social value; it is often used to justify unequal distribution of resources and power and is maintained through social institutions including government, policing, and courts.² Racism intersects with and reinforces other forms of oppression, such as sexism, gender discrimination, and ableism.

In Canadian society, racism manifests in the systematic marginalization of racialized people by White people; however, in the “racialized hierarchy of Canadian society,” Indigenous peoples may also experience discrimination, or negative treatment, from other settler groups, resulting in ongoing harm and oppression.³ In the specific context of family court, the universal imposition of legal traditions and norms established by White European settlers offers unearned advantages to White people while creating further harm to Indigenous people.

RECONCILIATION: We adopt the following definition of reconciliation from the work of the Truth and Reconciliation Commission of Canada: “Reconciliation is about establishing and maintaining a mutually respectful relationship between [Indigenous] and [non-Indigenous] peoples in this country. In order for that to happen, there has to be awareness of the past, an acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.”⁴

TRAUMA-INFORMED LEGAL PRACTICE: A trauma-informed lawyer or advocate is trained to recognize trauma when it presents. They engage with their client in a manner that centers safety, connection, and empowerment; adapt their approach to avoid triggering or re-traumatizing their client; and prioritize protecting their own mental health as they work through emotionally challenging legal processes. Trauma-informed legal practice requires that the lawyer or advocate be sufficiently self-aware to recognize and respect trauma in themselves before working with clients who have experienced trauma. Advocating on family law matters for any client, but especially an Indigenous client, will require self-awareness, self-care, courage, humility, and a resilience strategy.



Introduction

How do we decolonize something as colonially entrenched as Canada's legal system? Meaningful access to justice for Indigenous peoples in British Columbia is deeply connected to addressing the colonial roots of the legal system. Such access will require decolonizing strategies that are responsive to Indigenous peoples' own understandings of justice.

This research builds on Rise Women's Legal Centre's earlier work concerning the legal system's response to survivors' experiences of family violence. In a report titled *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger*, Rise highlighted how the legal system's response to survivors of family violence frequently exacerbated the risks women faced instead of enhancing their safety.⁵ In that report, we discussed what was shared with us by Indigenous participants in focus groups and individual interviews. However, one limitation of that research was that it did not directly engage with the ways in which the family court system furthers colonial violence against Indigenous families, particularly women and children. We recognize that the experiences of Indigenous survivors of family violence need to be centered to shed light on their unique concerns and experiences navigating colonial legal systems. We have undertaken this follow-up research to reflect on how our own legal practices can support the ongoing work of decolonization, and to support other members of the legal system in this work, with the long-term goal of moving towards reconciliation.

This report focuses specifically on private family law, as set out in the BC *Family Law Act (FLA)*⁶ and the *Divorce Act (DA)*,⁷ rather than on the practices and policies of the Ministry of Children and Family Development (MCFD) in connection with BC's child protection system.⁸ A decolonizing lens has been more frequently applied, albeit with mixed results, to legal processes that involve the state as a party, such as the criminal justice and child protection systems. Family law, which is typically viewed as a dispute between two private individuals, has attracted much less attention. We intend for this report to be a small contribution to a long overdue discussion.

First, this report compiles the findings from interviews with experts who work with Indigenous people within the family law system. These experts highlighted the ways in which the colonial framework embedded in BC's family law system causes ongoing harm to Indigenous families and made recommendations for improving BC's family law system. Second, this report focuses on how people working within family law can better serve Indigenous clients. With this in mind, we have provided a toolkit (see Part 2) to help lawyers establish trauma-informed practices and practise cultural humility. In addition, we have compiled further resources in two appendices.

We recognize that the experiences of Indigenous survivors of family violence need to be centered to shed light on their unique concerns and experiences navigating colonial legal systems.

Methods

Co-authors Myrna McCallum and Haley Hrymak collaborated on the design and implementation of this research project. Myrna McCallum is a Métis-Cree mother, grandmother, lawyer, and educator, and an expert in trauma-informed legal practice. Haley Hrymak is a settler working at Rise Women's Legal Centre as the research and community outreach lawyer. This project commenced during the COVID-19 pandemic, which prevented travel to Indigenous communities or in-person interviews. In light of these limitations, we were not able to meet directly with Indigenous women who could speak to their personal experiences of navigating BC's family court system. We rejected the option of conducting interviews with this population remotely, as we were concerned about our ability to conduct them in a trauma-informed way (for example, with a support person available and with an opportunity to spend sufficient time developing relationships). We were mindful of the possibility that such interviews could cause further harm by asking these individuals to relive difficult and traumatic experiences. We instead decided to speak with key informants who have expertise in Indigenous people's experiences of family law. We interviewed nine experts and drew key themes from the interviews. The majority of these experts are themselves Indigenous and were able to draw on their own experiences as well as provide insights about the broader system. Interviews were conducted by Haley Hrymak and transcribed with the assistance of two alumni of Rise's legal externship program.

All participants in our research were provided with honoraria for their time. Those whom we sought to quote in this report were also given an opportunity to review their quotes before publication. Experts were given the choice of being named in the report or remaining anonymous. The latter experts are cited in the notes as "Interview with expert." We were transparent with participants about our processes and the limitations of the project. Limitations included the relatively small number of interviews and the need to conduct all interviews by phone or via Zoom due to the COVID-19 pandemic. We recommend that further research be done in collaboration with Indigenous families, using a trauma-informed approach and with the goal of reciprocity always at the forefront.

The Legal Context

Indigenous Legal Frameworks

“ Our ceremonies and songs and dances emulated the honor of all life. It wasn't just on paper and about rules and processes, but you were guided in a good way to know how to offer greatest respect for everyone and all life.”⁹

For thousands of years, Indigenous legal systems effectively resolved disputes, protected children, and ensured safety and well-being for community members. Indigenous legal orders and laws existed successfully prior to contact and continue to persist today, outside of and despite the hegemony of the colonial legal system. As one expert described, “Most Indigenous nations would come together in a circle [with the starting point being:] ‘We have a problem here, how can we handle it?’”¹⁰

According to scholar John Borrows, Indigenous peoples were the earliest “practitioners of law” in North America, and “Indigenous peoples’ traditions can be as historically different from one another as other nations and cultures in the world.”¹¹ North America’s first treaties involved Indigenous laws and existed prior to the arrival of Europeans. For example, according to Borrows, the “Haudenosaunee of the eastern Great Lakes maintained a sophisticated treaty tradition about how to live in peace, that involved all of their relations: plants, fish, animals, members of their nations, and members of other nations.”¹² Professor Val Napoleon writes:

*Law is an intellectual process, not a thing, and it is something that people actually do. Indigenous peoples apply law to manage all aspects of political, economic, and social life including harvesting fish and game, accessing and distributing resources, managing lands and waters.*¹³

While there was, and continues to be, a wide diversity amongst Indigenous peoples’ specific beliefs and practices, care for children and families was “generally provided according to a holistic worldview that viewed children as important and respected members of an interdependent community and ecosystem.”¹⁴ Indigenous cultures are relationship based, and there is a common teaching that “relationships are medicine.”¹⁵ These relational cultures are underpinned by the knowledge that “all of life is connected — not just at the human level, but to the earth, the plants, the animals, and the cosmos.”¹⁶

Indigenous worldviews often focus on collective well-being as opposed to individualized, hierarchical, and competitive approaches to understanding the world.¹⁷ In describing Indigenous family structure, Kahkakew Larocque explains that extended family is “very active and relationships may cross. For example, cousins are considered sisters and brothers. Everyone older than you is an aunt or uncle or a grandmother or grandfather. The idea is that everyone is related ... eventually.”¹⁸

Indigenous legal systems often operated in stark contrast to Canada's colonial legal traditions and framework, which are based on an individual rights approach.¹⁹

Indigenous resistance has ensured that colonization has not abolished Indigenous laws, and there is a concerted effort underway to protect and revitalize them. Immediately prior to the appointment of Ardith Walpetko We'dalx Walkem, QC to the BC Supreme Court, she released a report commissioned by the BC Human Rights Tribunal about improving BC's human rights processes for Indigenous people. She wrote, "Indigenous legal systems have their own human rights concepts that should form part of the human rights framework that is used to assess and resolve complaints brought by Indigenous Peoples."²⁰ Indigenous communities are asserting their own jurisdiction in many areas of social, economic, and political concern, including applying Indigenous laws to resolve concerns within their own communities. As we will discuss below, creating space for Indigenous family law concepts to inform and resolve family disputes affecting them will be an important step towards decolonization.

Colonial Legal Systems

The colonization of North America, an area many Indigenous peoples refer to as Turtle Island, has included recurring attempts at cultural genocide that seek to extinguish Indigenous cultural practices, including Indigenous legal systems. The law is an especially potent site for colonization. In the words of D'Arcy Vermette, "Colonial law provides the colonizer with the ability to exclude and with the exclusive power to interpret."²² Canada's modern legal system has not only displaced all pre-existing legal orders, it is "culturally blind" to its own colonial structure, holding pretensions of neutrality and fairness.²³

In the late nineteenth century, and well into the twentieth century, the assimilationist goals of the federal and provincial governments were discharged through a variety of laws, policies, and practices that were explicit in their intention to erase Indigenous culture. One notorious example of a destructive and assimilationist policy was the residential school policy, later incorporated into the *Indian Act*.²⁴ The aim of this policy was to cause Indigenous peoples "to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."²⁵



"Any resistance will make you an angry person, a problematic person, a violent person, a troublemaker."²¹

The *Final Report of the Truth and Reconciliation Commission of Canada* quotes Sir John A. Macdonald's remarks to the House of Commons in 1883 in support of the residential school policy:

When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and[,] though he may learn to read and write[,] his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that the Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men...²⁶

Another example of the colonial attempt to extinguish Indigenous legal systems is reflected in section 10 of the original *Indian Act*, which made potlatch and other cultural ceremonies illegal between 1884 and 1951.²⁷ Judge Alfred Scow explained:

This provision of the Indian Act was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes.²⁸

In combination, the federal government's residential school system and the provincial child welfare systems across Canada have had a devastating effect on Indigenous peoples and families.²⁹ In BC, Indigenous children make up less than 10 per cent of the child population, yet account for 64 per cent of children in care and 43.4 per cent of youth receiving MCFD residential services.³⁰

The Need to Decolonize

The most prevalent theme that emerged from our interviews was that the colonial framework of family court proceedings is harmful to Indigenous families in and of itself; as Amber Prince and Myrna McCallum write, “This is a system which is imposed on Aboriginal people.”³² The colonial framework manifests in both substantive law, which excludes Indigenous worldviews and values, and in court processes that are inaccessible, rely heavily on European ways of communicating information, and are individualized rather than relational. As described by one of our experts, family court processes are deeply rooted in colonialism:

I mean, the entire structure is racist and so of course that leads to racist results. Indigenous people are just an afterthought and ... they're encountering systems that were never built for them ... you have to stand when the Judge enters the room ... you have to call a judge in Supreme Court “My Lord” and “My Lady.” If you're an Indigenous person, good luck resisting any of this. You're coming into a very colonial system, steeped in the traditions of the people that have oppressed you and ... that's the only system available to you.³³

Notably, our interviewees often described Indigenous people's interactions with the family law system in terms that are very similar to those used to describe their interactions with the criminal law system, despite the fact that only one of these systems is designed to be punitive. Scholars Patricia Barkaskas and Sarah Hunt have written that barriers for Indigenous women in the criminal justice system include “the colonial culture of the Canadian justice system; racism; fear and mistrust; and individualized approaches...”³⁴ and all of these barriers were repeatedly referenced during our interviews about family law. Experts described that Indigenous people going to family court also experience a lack of trust, because they have no choice but to seek to resolve family law problems using the very same court system where they may be fighting for the return of their children or have interactions with the criminal justice system.

Experts also identified that family lawyers and judges lack cultural humility and knowledge about Indigenous families, and this inhibits the ability of Indigenous people to participate fully and fairly in the existing family law system. Family law professionals also frequently



“Addressing the unmet legal needs of Aboriginal people requires acknowledging that solutions must be found within Aboriginal cultures and delivered in partnership with Aboriginal communities.”³¹

lack knowledge of the barriers that Indigenous clients may be facing. Many members of the legal community appear to be unaware that Indigenous people living on reserve may not have access to the full range of municipal services available to people living in downtown Vancouver, and this lack of access might impact their parenting decisions. Barkaskas gives an example of a family being judged harshly by child protection professionals for keeping bags of garbage inside their home; the professionals involved failed to recognize that there was no regular garbage pickup on-reserve, and that leaving garbage outdoors would attract bears, thereby placing the children at risk. Legal professionals may also have little understanding or recognition of the importance of Indigenous clients' cultural obligations to their communities or of important seasonal activities relating to food harvesting.

When the colonial powers imposed Western laws on Indigenous peoples, they caused disorder, disruption, and disconnection. In their most devastating forms, these disruptions result in the denial of Indigenous parents' right to raise their own children. While Indigenous legal traditions and cultures are diverse and distinct, Indigenous peoples "share a common experience that their ... legal traditions are not reflected in Canada's multi-juridical state."³⁵ The project of decolonization must create the necessary space to recognize and reflect the diversity of Indigenous laws and experiences.



Decolonizing the Family Law System

This section sets out ten major themes and recommendations we identified through our expert interviews. The most common themes, which were discussed by nearly all experts, were the need to expand the legal system’s understanding of family law to make room for Indigenous laws and concepts, the need for education, and the need for lawyers and other legal system professionals to engage in trauma-informed practice.

1. Expanding Our Understanding of “Family”

A key element in applying a decolonizing lens to family law involves shifting the Western European view of a nuclear family towards a more flexible concept of “family” that is more inclusive of Indigenous worldviews. Canadian family law is generally premised on the idea that only the parents of a child have legal rights to be involved in raising that child, rather than taking a community approach to raising children and the next generations.³⁶ The law gives little weight to other caregivers, and there is generally little to no legal assistance available for extended family members who may want to advance a claim regarding a child.

Experts described extended family members, who often play a critical role in raising Indigenous children, as being completely absent from consideration in family court.³⁷ Interviewee Frances Rosner explained, “Often extended family members literally take on a parenting role and occupy that role, and that is a recognized [and] valued tradition of a particular nation.”³⁸ Rosner went on to add that the concept of parents being the only person with a “right” to the child is not necessarily in line with the views of an Indigenous community. Another expert added:

The notion of family is different. For a child to be living with their grandparents, this isn’t necessarily a breakdown in the relationship between the parent and the child. It’s perfectly normal to be quite actively raised by grandparents or quite actively raised by an aunt. And that’s not necessarily due to any kind of shortcoming of that child’s parent. Kids are perfectly safe with other family members, and other family members that seem like “extended family” in the

settler context are actually your “immediate family.” You know, that’s not understood [by family lawyers and courts].³⁹

Indigenous families need to be involved in conversations about how children and families are understood within a pan-Indigenous worldview of family. As interviewee Dawn Johnson explained:

Recognizing first that there is diversity across nations, generally as Indigenous peoples we don’t view a child or children as separate from the ... broader community and the lands and the territory that they come from. There is this holistic view of that child and all the relationships that they have with their family, extended family, ... including those that are recognized as family but may not be blood relatives, which is ... the Western view of who family is. As well as community and land and territories and all of the things that come with that. It’s such a broad concept of who that child is that they’re really in the centre of that system, whereas the Western view separates them from all of those things.⁴¹

Johnson explained that under BC’s *FLA*, extended family, community, and connection to land and territory are seen as afterthoughts and not an intrinsic part of meeting the needs of Indigenous children. The application of the Western worldview to Indigenous families in family court contributes to the assimilation of Indigenous children into mainstream Western European society by privileging the nuclear family ahead of and before that of the child’s Indigenous community. Further, experts explained there is a tendency to favour families with more affluence, without a recognition of the bias inherent in this approach. Low socio-economic status is frequently seen as an individual failure, and there can be ignorance or misunderstanding about how Indigenous families have been intentionally and systemically disadvantaged by colonial processes. As a result, non-Indigenous parents and families may be given preference in court because of their access to resources or a real or perceived higher socio-economic standing.

“

“At the end of the day, we want children to be rich and wealthy. And that means having people around them. The more the better, to support them and love them and guide them. And that’s [the opposite] in family law. Cutting, cutting, cutting. Cut the ties. Cut the ties.”⁴⁰

2. Redefining the “Best Interests of the Child”

“ “ *They don’t think we love our kids. Yeah, they don’t think we hurt, we care, or not enough, or not in ways that they do... It’s hard to put my finger on it. I think that’s why in child protection, it’s certainly so much easier to yank a child out of their Native home. Because they don’t think we want our kids. And we do.*⁴²

One of the most significant themes we heard during our interviews was the call to reform the “best interests of the child” test, which currently fails to include Indigenous worldviews. According to one expert, “You cannot consider what is best for an Indigenous child without considering Indigeneity if you are viewing [the ‘best interests of the child’ test] through a culturally competent lens.”⁴³ The experts we spoke to uniformly agreed that the “best interests” of Indigenous children are inseparable from the best interests of their communities, and therefore determining the best interest of any Indigenous child must include meaningful allowances for the child to form part of their nation or community.

The *FLA* does reference a child’s Indigenous identity but positions the maintenance of this identity as a responsibility that can be allocated between the child’s parents. Indigenous identity is not a factor that the court is required to consider when determining the overarching “best interests of the child” under section 37 of the *FLA*.⁴⁴

One specific way that this issue can arise in family law is through orders that restrict movement. A non-removal order that prevents a parent from taking a child out of Vancouver may meet a family court’s goals respecting parental behaviour. However, at the same time, such an order may effectively prohibit the child from visiting their community in another part of BC, from having access to the land, to ceremony, and to extended kin. A child’s ability to access their community should be a special consideration even where their parents require supervision, and provisions should be made for visits to occur in the child’s community if necessary.

Experts explained that for many Indigenous children, involvement in their culture and spirituality are rarely accounted for in making determinations about their care, despite those having a significant impact on their well-being. Dawn Johnson told us the “best interests of the child” test needs to be “flipped on its head,” because rather than viewing a child as “separate from their parents or family and their broader community and nation, [the test needs to view] the best interests of the child as connected to all of those things; there isn’t a separation.”

Despite the limitations of the *FLA*, lawyers and advocates can and should be prepared to pursue arguments and bring forward information about the child’s relationship to their extended family, their lands and territories. As Frances Rosner explained, there needs to be a “breathing of life into the Indigenous laws and understandings” when courts make determinations about outcomes for children. Despite the failure to include Indigenous heritage in section 37 of the *FLA*, interviewees suggested that BC family courts have been open to hearing submissions on this issue, although it



“[Traumatic histories] need to be taken into account, but it’s also dangerous because as soon as you start talking about the trauma someone has survived, it’s a red flag to the system.”⁴⁵

remains unclear as to how much weight this information may be given in a court’s final determination.

3. Making Space for Social Context

What consideration should family courts pay to the unique circumstances of Indigenous parents if they are aiming to decolonize legal practices and bring Indigenous viewpoints, perspectives, and history into the modern family court?

One important consideration is ensuring that lawyers and judges provide time and space in court to address social context. Evidence about social context can allow a “framework against which to assess the testimony, a cultural context within which to make difficult determinations about the proper interpretation of contradictory testimony, credibility and the meaning of contested events.”⁴⁶ Such evidence helps judges “[understand] why parties might be likely to act in a certain way, given their social background and history.”⁴⁷

In family law cases, evidence about social context may be available through extended family members or members of Indigenous communities. It may also include recognizing Indigenous Elders as experts and knowledge keepers whose evidence should be given the same weight as other experts who are qualified in courts. *Servatius v Alberni School District No. 70*, 2020 BCSC 15 serves as an interesting example of a case where social fact history was introduced. The plaintiff in that case had sought to have a local school district prohibit Indigenous smudging, arguing that it violated their religious freedoms.⁴⁸ The Nuu-chah-nulth Tribal Council (NTC) intervened and described “smudging as a cultural practice, not a religious one.”⁴⁹ The NTC further described the importance of incorporating cultural events within mainstream curriculums, in part, because “people cannot honour difference if they cannot understand it.”⁵⁰

Another issue that requires a thoughtful approach is how to introduce an Indigenous client’s history of trauma. An inexhaustible list of studies and commissions confirms that Indigenous people in Canada are disproportionately impacted by poverty, criminalization, and lack of access to education and often basic necessities like drinking water—and that these circumstances are the direct result of the

colonial project. How can family courts competently understand the circumstances of Indigenous litigants without accounting for the role of intergenerational trauma caused by Indian residential schools, day schools, the Sixties Scoop and Millennial Scoop in shaping those circumstances?

At the same time, the experts that we spoke to saw real danger in providing family courts with this information. One expert advised us that “Gladue reports should be a cautionary tale for family law, because delving into a person’s history is frequently used to gauge the person’s risk. Once [a person’s] history is pulled out — now look at all the shitty things that have happened to them that can now be used to justify finding them high risk — dangerous offender, longer probation, more onerous conditions.”⁵¹ The experts we spoke to on the one hand recognized a need for courts to understand histories of systemic discrimination experienced by Indigenous clients. On the other hand, they remained deeply concerned that disclosing this information would be used by the court and/or the other parent as a basis for denying Indigenous parents time with their children. The family law system needs to start to collectively recognize and celebrate the resilience Indigenous parents exhibit in surviving trauma and, where necessary, provide resources and support.

Indigenous people also need space to create alternatives for the existing colonial structures. Given that the existing court system has not served Indigenous people well, this could include the creation of new alternatives and out-of-court processes that avoid minimizing or triggering trauma. For example, we were advised during our research of two Indigenous parents who were able to do mediation in an Indigenous way that involved Elders and traditional decision-makers from their respective communities.⁵² Permitting Indigenous people the opportunity to explore alternatives may require increased time and flexibility from a system that is known for strict adherence to timelines and protocols.

4. Education about Indigenous Law and Customs

“ Indigenous concepts are not taught in law schools. There may be opportunities, but it’s not examinable, it’s not important, it’s not something everybody needs to learn.”⁵³

In the “Calls to Action” of the Truth and Reconciliation Commission of Canada, recommendation 28 states:

*We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.*⁵⁴

This education needs to be provided for all law students, law professors, and lawyers registered to practise law in BC. Education needs to include information about Indigenous communities and histories as well as practical tools for dismantling racism and colonialism. Indigenous people must be given the resources to lead these conversations and develop this education.

The lack of educational opportunities, and small number of Indigenous lawyers, makes it all too common for Indigenous people to be represented by lawyers with no understanding of their culture or experiences. Experts explained that while there are some thoughtful and knowledgeable non-Indigenous lawyers practising family law, overall, there is a knowledge gap that negatively impacts Indigenous families.

One of the experts we interviewed, who works with restorative justice practices, explained that one of the biggest changes she hopes to see is for people working in the legal system to have a more comprehensive understanding of residential schools. She added, “People don’t understand what they [Indigenous people] have had to live through. It is generational, they pass it down. Until we can deal with it, it will always be there. I feel like that is the biggest thing.”⁵⁵ Experts also encouraged an expansion of education within law schools to build more substantive knowledge of Indigenous laws and the valuing of that information. This training is particularly important for lawyers and others working with Indigenous clients. One expert commented:

*There have been many lawyers in this province who have ... earned money by ... having Indigenous clients and ... what was their level of understanding? What was their level of competence? And you know, how is that Indigenous person served? Indigenous people can only be served better to the extent that ... lawyers do have those understandings of the unique needs of Indigenous people.*⁵⁶

Currently within the family court process, Indigenous families face fear of punishment, trauma, and racism. Lawyers need to have cultural humility and education to work with Indigenous families. Dawn Johnson told us, “There are challenges on not having access to a lawyer that understands their culture and experiences ... You’ve got that oppression and disempowerment and racism persists, and it makes these processes really overwhelming.”⁵⁷

When lawyers and judges have little understanding of cultural obligations and unique cultural practices, they may be disrespectful and offensive. It is incumbent on representatives of the legal system to proactively address gaps and barriers in their own knowledge of Indigenous protocols and practices by seeking out resources and assistance wherever possible.

The legal profession collectively needs to do much more to support Indigenous law students and lawyers within the profession. At the same time, responsibility for effectively representing Indigenous clients and reforming the legal system must not fall exclusively on the shoulders of Indigenous people. There needs to be a multifaceted approach to educating *everyone* about Indigenous law and culture, as well as the history of colonialism and its continuing impacts.

5. Legal Specialization

“ “ *We’ve really failed Indigenous people around providing competent legal services for people on reserve – it’s a huge gap.*⁵⁸

In addition to the more general education that is necessary for all members of the family bar and family courts to work effectively with Indigenous parents, there is a specific need for legal specialization in the laws that affect Indigenous people on reserves. Family law and wills and estates law for Indigenous families on reserves is very complicated, and very few lawyers have the training to competently handle these cases, which may involve overlap between other statutes and the *Indian Act*, negotiations between nations and governments, as well as Indigenous laws and customs.

Governments and other legal service providers need to give urgent consideration to targeted funding and service models to ensure that there are lawyers available who are trained and competent to take family law cases for clients on reserve. Given the complexity of this area of law, it is simply not realistic to expect that these services can be provided by well-meaning lawyers off the sides of their desks.

6. Trauma-Informed Practice and Cultural Humility

Trauma-informed legal practice, which is rooted in compassion and cultural humility, was widely identified by experts as an important mechanism for decolonizing family law practices. Working in a trauma-informed way requires “an awareness of how a history of colonial interventions over generations may be driving Indigenous Peoples’ reactions within legal processes today.”⁵⁹ It also requires an understanding of the ways in which clients’ actions may be a way of coping with the impacts of past or ongoing traumatic events. Trauma-informed legal practice in family law can be developed by Indigenous experts, who understand the specific gaps in the system and the needs and strengths of Indigenous families accessing it.⁶⁰

Cultural humility, as explained by Myrna McCallum and Amber Prince, “is developed by letting go of assumptions about a person based on their culture and creating space for learning about who they are as a person; it is an ongoing process recognizing that the person in front of you is the expert, not the textbook.”⁶¹

Practising cultural humility allows the lawyer or advocate to better support Indigenous clients by centering their safety and empowerment, first and foremost while recognizing that the client is the expert in their lived experience and the lawyer will serve the client in a good way if they approach this relationship as a learning opportunity. One expert explained that working with cultural humility also involves having a practice rooted in compassion:



“You know, I just laugh at myself when I even say this, but could there be a course in law school that talks about empathy? Could there?”⁶³

*As someone who’s done front-line advocacy for the last 14 years, [it has] really served me well to approach clients, especially Indigenous clients, but any client, with a sense of humility and compassion. Really, it’s those clients who are in the driver’s seat and should be making decisions about their own lives, and your role is not as some expert swooping in or some professional who knows better, but an ally, an ally to your client and what they need. And you know, for now we’re in this colonial structure and your job is really to assist your clients with navigating [that system] as best as they can to meet their needs.*⁶²

We explore these concepts further in Part 2, which recommends some helpful practices for lawyers and other legal professionals.

7. Law Reform

““ *There needs to be law reform and changes to both the CFCSA and the FLA in BC, and the Divorce Act ... all of these things need to change to come in line with proper consideration being paid to Indigenous perspectives of families.*⁶⁴

There was wide consensus among the experts we spoke to that the *FLA* needs to be reviewed in light of the United Nations *Declaration on the Rights of Indigenous Peoples (UNDRIP)*⁶⁵ and the *BC Declaration on the Rights of Indigenous Peoples Act (DRIPA)*.⁶⁶ Likewise, experts agreed on the need to create space in the *Child, Family and Community Service Act*, *Family Law Act*, and *Divorce Act* for a full consideration of the perspectives and needs of Indigenous families.⁶⁷

UNDRIP’s objective is “protecting the individual and collective rights of Indigenous peoples to be free from discrimination — to self-determination and self-government — to practice and preserve their language and culture — and to develop and improve political, social and economic systems within their communities.”⁶⁸ It requires the state to consult with Indigenous peoples before “adopting and implementing legislative or administrative measures that may affect them.”⁶⁹ In BC, *DRIPA* requires that laws be amended to be brought in line with *UNDRIP*.⁷⁰

Our interviewees stressed that Indigenous peoples need to be involved in all conversations and consultations about family law whenever law reform is contemplated. They must be resourced and remunerated in a manner that reflects their expertise and the value and importance of what they are sharing.

All family lawyers, and particularly those representing Indigenous clients, must familiarize themselves with *UNDRIP* and *DRIPA*, as they may be relevant to the interpretation of legislation and reinforce government commitments. These documents also serve as a reminder to the courts that Indigenous peoples have customs and laws that offer solution-based alternatives which prioritize cultural safety. See Appendix A for additional information about *UNDRIP* and *DRIPA*.

8. Legal Aid and Legal Representation

“ Courts have not had to adapt because First Nations don't have the resources to fight and so they don't respect the nation's influence.⁷¹

The legal aid coverage currently provided to lawyers assisting Indigenous families is insufficient to allow adequate preparation for complex matters. There is currently a two-hour tariff available for counsel working with Indigenous clients, and this is insufficient for counsel to learn about the particular values and needs of that parent, or to understand the context of the Indigenous community the parent comes from. In this regard, when working with Indigenous clients, “pan-Indigenous” training will be insufficient. There may be common cultural threads between different Indigenous cultures, but Indigenous peoples are distinct and have different customs, values, and histories. BC's legal aid system needs to prioritize funding for Indigenous clients, given the extra complexity in their cases.

Greater legal representation also needs to be made available to extended family members, including grandparents, who may need legal assistance in their role as caregivers for children.

Finally, one of our experts identified a strong need for dedicated and knowledgeable family lawyers to attend court circuits, which often provide the only access to legal services for remote Indigenous communities in BC.

Our interviewees stressed that Indigenous peoples need to be involved in all conversations and consultations about family law whenever law reform is contemplated. They must be resourced and remunerated in a manner that reflects their expertise and the value and importance of what they are sharing.

9. Section 211 Reports

We lack the tools, training, understanding of culture, and appropriate recommendations to consistently provide meaningful helpful psychological assessments to Indigenous Peoples. — Canadian Psychological Association and the Psychology Foundation of Canada, 2018⁷³

I assess Spanish people, refugees ... people who are Chinese. And I'm not Chinese and I'm not Spanish, so why would [assessing Indigenous clients] be different, you know?... Doesn't matter if the child is blue, navy, orange, yellow... What's important is you get a qualified professional who will take the best interests of the child. That's all. — BC 211 assessor, 2018⁷⁴

“In the 211 reports there is no consideration of the client’s culture other than saying they were Indigenous. Psychological testing broadly within all these systems is not done in a culturally safe way.”⁷²

Section 211 of the *FLA* allows the court to order a report to assess the needs and views of the child, as well as the ability and willingness of the parties within the family dispute to satisfy the needs of the child.⁷⁵ These reports, also known as “custody and access reports” in other jurisdictions, are often ordered in difficult cases where the judge needs further independent information about the views and needs of the children. In BC these assessments may include psychological testing as well as other methodologies that are inappropriate for Indigenous clients or clients who approach relationships and caregiving from diverse cultural backgrounds.⁷⁶

The experts we interviewed universally stated that the section 211 reports they have reviewed for clients did not take into account gender-based violence or Indigenous culture. One expert commented: “It’s not just no value, but zero understanding about different cultures. [These reports] are often done by White assessors who have no lived experience with racism and poverty. The parents may be penalized for trauma they’ve experienced. Assessors are not trauma informed.”⁷⁷

Section 211 reports should not be ordered in the case of Indigenous parents and children except by an expert who has the necessary training, background, and expertise to adequately and fairly address their circumstances and needs. Frances Rosner asserted, “A culturally incompetent doctor, psychiatrist, psychologist, or clinical counsellor should not be writing reports about the well-being of an Indigenous child.”⁷⁸

We have discussed the need for standards and guidelines relating to section 211 reports at length in our *Section 211 Toolkit* and specifically draw attention to the Australian guidelines, which recommend engaging Indigenous consultants wherever assessors lack the necessary expertise.⁷⁹

10. Acknowledging Racism

“ I’m a smart, educated, professional woman who paid a retainer. Take me seriously... I didn’t feel like I was taken seriously. I didn’t feel like what I wanted to fight for was what the lawyer wanted to fight for.⁸⁰

Both Indigenous lawyers and Indigenous parents face racism in the legal system. Lawyers need to know about the barriers, myths, and stereotypes Indigenous clients face when accessing the courts, because these myths will define how other legal professionals, including decision-makers, perceive them. When clients and colleagues say that they have experienced racism, believe them.

Lawyers and judges need to be vigilant not only about recognizing and responding to overt racism in the legal system, but about interrogating their own biases and beliefs as well. For many of us, learning about structural and systemic forms of racism, examining how our own words and actions can be racist, even if unintentionally, and unlearning harmful practices will be a lifelong process.

Frances Rosner asserted, “A culturally incompetent doctor, psychiatrist, psychologist, or clinical counsellor should not be writing reports about the well-being of an Indigenous child.”



Best Trauma-Informed Practices for Family Lawyers

This section of our report aims to help practitioners working in family law think about how they can decolonize their work, by adopting a trauma-informed legal practice rooted in cultural humility and compassion. It offers legal practitioners a solutions-based, strengths-based, and Indigenous-centered approach that respects and recognizes the historical and current experiences of Indigenous people embroiled in the family court process. We also examine the general benefits of trauma-informed advocacy and set out the necessary competencies required to become a trauma-informed advocate who demonstrates a commitment to cultural humility.

It is imperative that family lawyers learn about trauma, both generally and in specific terms, as it has been inflicted upon and experienced by their Indigenous clients, historically, collectively, individually. In other words, to avoid doing further harm to Indigenous people, lawyers must especially prioritize building a relationship with an Indigenous client to learn about who they are and the extent to which direct and/or intergenerational trauma may have informed their lived experiences and current life circumstances.

Only by learning about trauma from a cultural and evidence-based perspective can practitioners understand how to best meet the needs of their clients. Moreover, the lawyer or advocate will ultimately have to reflect on how they show up in spaces with their clients, and in doing so, they will have to reflect on whether they are contributing to the trauma experienced by their clients. Sometimes lawyers and advocates struggle to effectively create boundaries when they work with clients, and often, this results from a lack of self-awareness of their own traumas. This section of the report will assist the lawyer and advocate to identify barriers they bring to their advocacy and which can undermine their intention to do their best in representing their clients. In addition, we will offer strategies lawyers and advocates can implement to remove barriers and replace them with healthy boundaries, for a better overall experience for both lawyer and client.

1. Be a Safe Space

You cannot offer what you do not have. Before working with vulnerable, traumatized, and marginalized clients who are desperate and deserving of safety, ask yourself whether you are a safe space for others. Being a safe space is crucial to practising trauma-informed lawyering. Prior to an initial meeting with an Indigenous client, reflect on what you may already know about the client's circumstances, and consider whether you have relevant information about their history, experiences, and safety needs.

Family breakup can be a devastating experience for any client, and Indigenous clients are likely to experience additional stresses from interacting with the formal legal system, as outlined above. They may be unsure about meeting with a lawyer and apprehensive about how they will be treated in the legal system. Expect that this challenging time may cause your client to be angry, sad, anxious, and stressed. Consider how you will respond when these emotions present themselves, while keeping in mind that your client's anger, fear, or anxiety is not personal. Be prepared to acknowledge at the outset the reality of the situation and the limitations of the court process, to validate the actual and perceived injustices the client has experienced, and to acknowledge any emotional responses that present while offering reassurance that their emotional response is reasonable in the circumstances.

Prior to meeting with your client, be mindful of the meeting space reserved for critical and vulnerable conversations. Consider whether the space provides safety and comfort. Observe the layout of your meeting space. Is the location of the table and chairs inviting and less formal? Offer your client options for different seating arrangements and ask where they might like you to sit in relation to them. Be mindful of the lighting in the room and ask your client whether they would like it adjusted. Are there items on the table that your client could use as a distraction while they speak to their experiences? Such items might include a pen and paper or a stress ball. Is there anything between you and your client, such as binders or folders, that might be perceived as a barrier to trust-building?

IMAGINE

for a moment
what sort of
voice, expression,
responses, and
space you would
like to be met with
on what may be the
most frightening
and distressing
day of your life.
What might you
need to feel safe,
empowered,
and free from
judgment?

BECOME THAT SPACE FOR YOUR CLIENT.

2. Meeting the Client

For your first meeting, prioritize relationship-building with your client before diving into the heavy questions. At some point you should be asking, “How are you coping?,” followed by “What do you need from me to help you get through this in a way that feels safe for you?” and “Is there something I should know about specific needs or triggers which might cause distress for you?” Finally, ask “Do you have a support person or network to help you through this difficult time?” In the likely event that the answer is “no one,” ensure that you are prepared with a list of local resources or support providers who can fill this critical gap identified by your client. Be very clear about the process you represent and its limitations while also explaining your role, responsibilities, and limitations. Transparency is key to building trust while providing your client with an opportunity to adjust their expectations.

After taking the time to establish a connection with the client which is grounded in safety, humility, and empowerment, invite your client to ask any questions arising. Consider asking what they want and what they need from the legal process they are about to navigate. This is an opportunity to understand, inform, and plan your strategy so your client has access to supports, support providers, and/or other professionals.

Have an agenda prepared for your meeting, and review your agenda with the client. Be transparent about what will be done with the information gathered. Give the client an opportunity to ask questions or add to the agenda. Be prepared to actively listen to your client and to hear about their lived experience.⁸¹ Allow time for this purpose and practise silence when needed, without interruption. It is wise to build in some additional time so you do not feel rushed and more importantly, so you can take a moment to check in with how the meeting impacted you before moving on to the next file or the next meeting. By giving yourself lots of time, you will avoid feeling pressured to collect necessary information quickly while rushing a client who is presenting with trauma responses.

Try to strike a balance between your need to obtain evidence or information to inform a legal opinion or strategy and the psychological needs of your client. For example, if you expect that the meeting will be emotionally challenging, consider breaking the information gathering process into two separate meetings to avoid overwhelming yourself and your client. Alternatively, block off a large chunk of time and build in 10-minute breaks at one-hour intervals.

By giving yourself lots of time, you will avoid feeling pressured to collect necessary information quickly while rushing a client who is presenting with trauma responses.

3. Ask About Culturally Appropriate Supports

In exploring whether the client has people supporting them through the family law court process, you should inquire as to whether there are culturally specific resources that the client would benefit from accessing at significant stages of the legal process. Some Indigenous people have a strong relationship to spiritual resources or people, especially knowledge keepers such as Elders, who may be a source of spiritual and emotional support during challenging life events.

For instance, the client may wish to confer or pray with an Elder, begin the day with a spiritual ceremony such as a smudge, or perhaps they would prefer to take their oath on an eagle feather. A trauma-informed and culturally responsive approach ensures that the client and their family members have an opportunity to access these traditional resources. Accordingly, it will be incumbent upon you to ask your client about specific spiritual needs or supports required to assist them and/or the entire family through a challenging legal process. There is no “one size fits all” approach, and given the diversity of spiritual practices, it is always better to ask clients what, if anything, they need to feel safe and supported throughout the process.

Depending on what your client has requested, you may need to make arrangements ahead of court hearings to have their rights accommodated. It is the lawyer’s responsibility to remind the court that their Indigenous client maintains a spiritual practice which requires accommodation from the court, whether it is an opening prayer, an area to pray and smudge in the courthouse, and/or the right to swear their oath on an eagle feather. Without lawyers calling on the court to make space for Indigenous people and their spiritual practices, there will never be a decolonized court system. Such “accommodation” is not a private request between lawyer and client, it is one that should extend to and include the court.

Take steps to become familiar with the Indigenous organizations and supports in your area, and wherever possible reach out and form relationships. Ask them about referring clients, what they recommend in an emergency, and if they are aware of other services in the community that are responsive to Indigenous clients’ needs. Remember to check back at regular intervals to make sure that your information remains accurate or whether there are changes you should be aware of.

4. Safeguard Your Practice from Cultural and Unconscious Biases

An aspect of cultural humility calls on the practitioner to honestly and courageously reflect on their biases. Self-examination, in this context, requires asking questions such as: What do I know about Indigenous people? Where did I obtain this knowledge? Is it ill-informed? Have I gone directly to the source for clarification? How might my beliefs and education inform any unconscious

Sometimes trauma appears as fear, as anger, as resilience, as indifference, or as anxiety. Part of addressing your own unconscious bias is making the effort to recognize that trauma has many faces, and it presents in Indigenous clients in various ways.

biases operating? Are my beliefs feeding structural inequality in this relationship? If so, what is my responsibility to address this?

It is well known that racial or cultural bias in child protection court has resulted in high numbers of Indigenous children being removed from their families and placed in care, and this can have reverberating impacts on the ways that Indigenous people approach family court. Evidence of this ongoing practice is often referred to as the Millennial Scoop.⁸² Everyone has unconscious associations that can affect decisions, behaviours, and interactions with others. Understand that biases can and do bolster structural inequality. You can choose to avoid enforcing structural inequalities in your practice by adopting a self-awareness practice and reflecting often on your own beliefs, understanding, and sources of information with respect to specific groups of Indigenous people before serving Indigenous clients and communities.

A number of tools are available to identify common biases, including Harvard's Implicit Association Test, which is online and free.⁸³ Fortunately, once we have identified our biases, we can put safeguards in place to ensure our engagement, advocacy, or decision-making processes are protected from the influence of our biases. However, we cannot implement safeguards until we have first started the work of identifying and confronting our biases.

There is a common bias which permeates many workplaces and public spaces, referred to as the "angry Indian" stereotype. It is important that lawyers understand that if anger does indeed present in your client, there is likely a good reason for it, often rooted in racism and/or trauma. It is important that if you unconsciously subscribe to this bias, you will need to call on your courage to explore why you see Indigenous people in this way and consider whether your belief or bias has created barriers which impact your ability to openly engage with Indigenous clients.

Furthermore, sometimes trauma appears as fear, as anger, as resilience, as indifference, or as anxiety. Part of addressing your own unconscious bias is making the effort to recognize that trauma has many faces, and it presents in Indigenous clients in various ways. Regardless of its disguise, it is your responsibility to recognize it, respect it, and respond to it with compassion. You are helping your client and their children navigate a significantly vulnerable time in their life. This fact must always remain front and centre in your approach to advocacy.

5. Become a Trauma-Informed Advocate

Becoming a trauma-informed lawyer requires that you be able to identify trauma, accommodate it when it presents (particularly in your litigation strategy), engage with your client in a do-no-further-harm way, and safeguard your mental health as you advocate for people in crisis. This approach will require, among other things, seeing your client as a human being with human needs and vulnerabilities, as opposed to a legal issue in need of a legal solution. Is your client safe where they are living? What are the dynamics at home? You may need to employ alternative steps in some circumstances, for example, consider working with your client to create a safety plan that avoids exacerbating their vulnerabilities. Maybe you should only contact your client at a certain time of day? Maybe you should not leave a message if they do not pick up, but instead come to an agreement on how to connect when it is safe for the client? Lawyers and advocates must learn to put their client's safety at the forefront. It is when lawyers fail to prioritize their client's safety and needs that harm is done.

Cultural humility complements trauma-informed advocacy perfectly, as it is a framework which focuses on learning through active listening and relationship building. Unlike cultural competency, which suggests that we can become an expert in someone else's culture and experiences, cultural humility is an approach that calls upon us to commit to understanding and respecting other people's points of view, while humbly recognizing any potential power and privilege we ourselves hold. It is important to recognize and respect that this approach to engagement is a lifelong process of self-reflection and self-critique, which asks us to respect and recognize that our clients are the experts in their own lives and experiences.

Cultural humility is ultimately a call to action to reflect on what we think we know about someone different from us. Further, cultural humility calls us to critically consider the source of the education we have obtained to date about those who are different from us while committing to do better while building respectful relationships rooted in equity. Cultural humility, when combined with sensitive interviewing skills, provides an opportunity to grow and learn together, confront biases in an honest way, and keep us humble as we serve clients who have lived a life different from our own.

Cultural humility is an approach that calls upon us to commit to understanding and respecting other people's points of view, while humbly recognizing any potential power and privilege we ourselves hold.

6. Vicarious Trauma and Vicarious Resilience

Working for and with Indigenous people requires strong hearts and open minds, because the traumas that have resulted from colonization are ongoing, often evident in family law matters and in many cases severe and impactful. As lawyers practising family law, our work can expose us to stories and circumstances involving self-harm, harm inflicted upon others, sexual abuse, neglect, or abandonment. These circumstances — on their own and as seen through the lens of our own life experience — can be particularly hard to confront. Consider education and information about vicarious trauma as one form of “personal protective equipment” that will help you gain a clearer understanding of how you may need to protect yourself as you do the important work of helping decolonize the family court system.

Vicarious trauma can result from ongoing work with people who are experiencing a lot of trauma, which can impact our minds and hearts to the extent that our worldview becomes distorted and damaged.⁸⁴ Vicarious trauma is not compassion fatigue or burnout, which can be remedied by a vacation or a change in job. As a former adjudicator who examined hundreds of survivors of sexual violence, physical abuse, and acts of torture, Myrna has personally become well acquainted with vicarious trauma and learned to recognize its tendency to stick to us. It often presents as an unhealthy preoccupation with the story or history of others followed by negative experiences such as intrusive thoughts, hyperarousal, numbness, sleeping problems, a lack of interest in work, headaches/migraines, loss of interest in hobbies, or other adverse psychological symptoms that inevitably impact our professional and personal relationships.

Vicarious trauma tends to build up over time if we are not practising self-awareness, collective care, self-care, or some form of resilience building practices, and the experience can range from moderate to severe. Indicators of vicarious trauma impacting on your professional relationships can present as lateral violence in the workplace (also known as bullying, harassment, emotional outbursts, gossip and/or other toxic and destructive behaviours), alcohol or drug abuse, anxiety or depression, nightmares or poor sleep, lack of productivity, poor decision-making, absenteeism, desensitization, and/or feeling a loss of purpose. For lawyers and advocates, risk factors for vicarious

Vicarious trauma tends to build up over time if we are not practising self-awareness, collective care, self-care, or some form of resilience building practices, and the experience can range from moderate to severe.

trauma vary but often include carrying unhealed trauma, a lack of self-awareness, possessing a lot of empathy, being exposed repeatedly to the traumas of others, and lacking personal or organizational support.

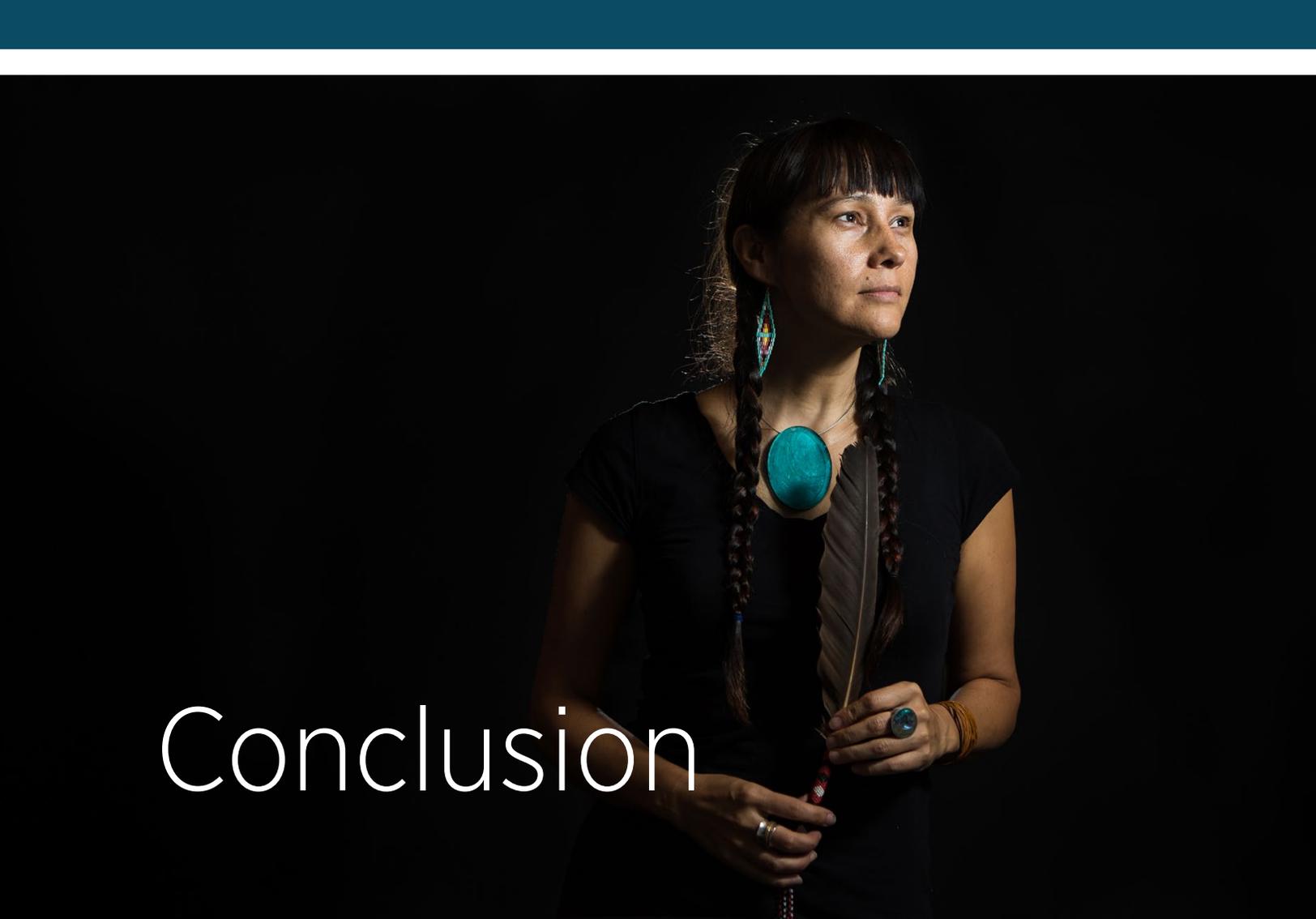
Self-awareness is key in recognizing how you cope when impacted by your client's experiences. Are you smoking again? Are you drinking more than usual? Are you not going into work or struggling to meet deadlines? Are you not sleeping? Are you experiencing headaches or nightmares? These indicators are some of the negative manifestations of vicarious trauma. Lawyers and advocates who do the heavy work of assisting families through family law courts need to establish a self-care or collective care plan. Keep in mind that what works for you may not work for others and vice versa. We must create time in our busy lives and schedules to maintain a routine that allows for mindful reflection and release of any traumatic information we may have been exposed to through our clients or the courts.

Just as lawyers can be affected by the traumas of others, the same can be said for witnessing resilience:

Vicarious resilience can include a profound sense of meaning in the lives of those working with survivors; increased empathy and compassion for other peoples' suffering and pain; increased knowledge and awareness of the sociopolitical context of violence; enhanced motivation for and commitment to engaging in social activism; enhanced self-esteem as a result of work with survivors; increased sense of hope that people can actually endure and overcome traumatic experiences and transform those experiences; and the development of a more realistic and less idealistic worldview.⁸⁵

The concept of vicarious resilience has been developed by psychotherapists as recognizing the helper's positive transformation and increased capacity for engaging in social justice efforts, when they are regularly exposed to the trauma of others in their practice. Vicarious resilience recognizes that we all have the capacity to overcome adversity—and sometimes it is as simple as being a witness to the resilience of our clients. Through witnessing our clients' experiences, we can learn the same adaptive strategies they have relied upon to overcome life's adversities, which ultimately serve to help us see the light, possibility, and hope for better days while bringing our worldview back into balance.

We must create time in our busy lives and schedules to maintain a routine that allows for mindful reflection and release of any traumatic information we may have been exposed to through our clients or the courts.



Conclusion

This report has discussed some of the ways in which BC’s family law system is failing to meet the needs of Indigenous parents. When Indigenous clients do not see their cultures, histories, language, practices, or laws reflected in family legal systems, they have little reason to place trust in these systems or see them as credible. When Indigenous people do choose to navigate the family law system, or have no choice but to engage with it, they may be subjected to real trauma, consciously or unconsciously, by their lawyer, opposing counsel, or the court. A failure to understand or make space for Indigenous concepts relating to the best interests of children and families can also result in decisions that impair the ability of Indigenous communities to maintain important connections. For all these reasons and more, we need to consider ways to decolonize the family law system.

Inviting Indigenous legal concepts, customs, and practices into lawyers’ offices and courtrooms, as well as the many boardrooms and meeting spaces in between, and showing them respect (giving them “weight”) is one way to start this process. Another way is for family law professionals to educate themselves about Indigenous laws and history as well as Indigenous clients’ specific community and situation. Lawyers can rely on evidence of social context – although this must be done

Adopting trauma-informed practices can assist lawyers to work effectively with Indigenous clients and may have the added benefit of creating a more compassionate legal system generally, for many clients from marginalized communities would benefit from this approach.

carefully and respectfully, and in a manner that highlights resiliency. Taking these steps will help the legal system better reflect the lived experiences, values, and customs of Indigenous families and their communities. Adopting trauma-informed practices can assist lawyers to work effectively with Indigenous clients and may have the added benefit of creating a more compassionate legal system generally, for many clients from marginalized communities would benefit from this approach.

Finally, we need look no further than the Truth and Reconciliation Commission’s “Calls to Action” to understand the desperate need to create Indigenous-centered processes to provide services specific to the cultures and customs of Indigenous children and families, with Indigenous people taking the lead to define what these processes will look like. Family law legislation at both the federal and provincial levels should be reviewed and brought in line with *UNDRIP*, in consultation with Indigenous peoples. We offer this resource to you with the hope that in applying a trauma-informed approach to advocacy alongside cultural humility, you will create a new pathway (which others will follow) towards decolonizing the family court system in BC.

Appendix A: Conventions and Calls to Action

The network of international and national standards, laws, and recommendations relating to the rights of Indigenous peoples in Canada is a complicated subject, and fully exploring these instruments is beyond the scope of this project. Lawyers and advocates who want to rely on these in a courtroom setting should take the time to familiarize themselves with the instrument in question and its specific legal effects. Here is a brief primer to help get you started.

INTERNATIONAL INSTRUMENTS

I. Conventions

International conventions or treaties are legally binding agreements between contracting states. There are generally two steps that are required for a treaty to enter into force. At the first stage, states conduct negotiations to reach an agreed-upon wording in the convention and national delegations *sign* the convention. *Signing* a convention does not make it legally binding on the state, although this does indicate support for the principles in the convention and an intention to complete the process. The second stage is called *ratification*. At this stage, each state will approve the agreement according to its own procedures. In Canada ratification is completed by Cabinet, with the Minister of Foreign Affairs signing an Instrument of Ratification or Accession.⁸⁶

Since conventions are legally binding on states, they are often implemented by treaty bodies that monitor compliance through regular reporting and can make decisions when a state is alleged to have breached the terms of the treaty. For example, when there is a complaint that a country is not following its commitments under the International Covenant on Civil and Political Rights (ICCPR), a complaint may be made to the Human Rights Committee (HRC) of the United Nations, which will adjudicate the question and may request that the state address the issue.

This mechanism can be used by individuals to bring complaints, called communications, against the state. In the late 1970s, Sandra Lovelace successfully brought a claim to the HRC stating that Canada's *Indian Act* contained sexually discriminatory rules that violated a number of rights under the ICCPR, particularly in relation to how marriage impacted access to Indian status.⁸⁷ In 1981, the HRC issued its view that the *Indian Act* violated ICCPR article 27 — rights of persons belonging to ethnic, religious, or linguistic minorities — and in 1985, Canada repealed and replaced the offending section of the *Indian Act*.⁸⁸

It should be noted, however, that international compliance systems are often relatively weak, and many international conventions have monitoring processes but no complaints processes. At the time of writing, in addition to complaints under the ICCPR, Canadians can bring complaints only under the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or under the Convention on the Rights of Persons with Disabilities.⁸⁹

II. Declarations

International declarations are statements of principles. They can signal a state's will or intention, but they are not generally considered legally binding.⁹⁰ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a declaration. Because UNDRIP is not a convention, there is no treaty body that monitors its implementation and no formal complaints process to a treaty body. However, the United Nations has expanded the mandate of the Expert Mechanism on the Rights of Indigenous Peoples to enable it to gather information and respond to violations, including by more directly communicating with the United Nations Human Rights Council.⁹¹

III. Reception / Incorporation

The *reception* or *incorporation* of international law relates to the way in which different countries turn international law into domestic law.

In some countries, international conventions and treaties are immediately enforceable once they are ratified. For example, in the United States, once a treaty is ratified by Congress, it becomes enforceable under US law.⁹²

In Canada, signing and ratifying a convention does not mean that the convention can be applied directly in Canadian courts in the same way as a domestic law. The convention must still undergo a process of being incorporated into domestic law through domestic legislation. The Supreme Court of Canada has repeatedly held that “international treaties and conventions are not part of Canadian law unless they have been implemented by statute.”⁹³

At the same time, even if the words of a convention do not take direct effect, they can still have an important *interpretive* effect on domestic law. The Supreme Court of Canada has acknowledged “the important role of international human rights law as an aid in interpreting domestic law” and that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”⁹⁴ The degree to which this interpretive impact is seen as opportunity for courts to play an important role in enforcing international obligations,⁹⁵ versus an “eviscerat[ion]” of the potential impact of international law,⁹⁶ is a matter that remains up for debate.

UNDRIP AND DRIPA

In June 2021, Canada's Senate voted to pass Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the *UNDRIP Act*) into law. The *UNDRIP Act* now affirms UNDRIP as a universal international human rights instrument with application in Canadian law and provides a framework for the federal government to implement UNDRIP.⁹⁷

The *UNDRIP Act* requires that the federal government bring Canada's federal laws in line with UNDRIP and prepare an action plan to achieve the objectives of UNDRIP in consultation with Indigenous people. It does not set out the exact mechanism by which consultations will take place or include mechanisms to allow ministers to enter into agreements with Indigenous peoples to establish joint decision-making processes.⁹⁸

At the time of writing, the legal implications of the *UNDRIP Act* remain unclear. Canada's Minister of Justice, the Honourable David Lametti, has stated that "we can look to the Declaration to inform the process of developing or amending laws and as part of interpreting and applying them"; but the *UNDRIP Act* does not mean that UNDRIP can override Canadian laws, nor does it give UNDRIP direct legal effect in Canada.⁹⁹

At a minimum it seems likely that the *UNDRIP Act* requires that UNDRIP inform and guide government action and be used as an interpretive aid for courts.¹⁰⁰ However, it has already been established by Canadian courts that UNDRIP is relevant to interpreting domestic legislation, and that it is "an important indication of the Government of Canada's commitment to treating First Nations people fairly and equitably" and "reflects emerging norms in international law regarding the rights of [I]ndigenous peoples."¹⁰¹

The BC government passed the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*, which came into force on November 28, 2019, making BC the first province to pass legislation to implement UNDRIP. *DRIPA* requires that, "in consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration," although *DRIPA* does not immediately change the effect of any existing laws. *DRIPA* also mandates "action plans" for all government departments and requires them to provide annual reporting on their progress towards fulfilling UNDRIP.¹⁰² Importantly, *DRIPA* creates the authority for the BC government to enter into agreements with Indigenous governing bodies. *DRIPA* is an important step forward in the implementation of UNDRIP, but its full impact also remains to be seen.¹⁰³

RECENT NATIONAL COMMISSIONS AND INQUIRIES

I. The TRC Calls to Action

The Truth and Reconciliation Commission of Canada (TRC) was established as part of the Indian Residential Schools Settlement Agreement, "the largest class action settlement in Canadian history."¹⁰⁴ Between 2007 and 2015, the TRC created a historical record of the legacy and consequences of residential schools, hearing from more than 6,500 witnesses across Canada. In 2016, the TRC released its final report,¹⁰⁵ which was accepted by the Government of Canada, which promised to implement it.

Included in the TRC's final report were 94 calls to action to address the ongoing impacts of residential schools on survivors and their families across a wide range of areas, including child welfare, education, health, justice, language, and culture.¹⁰⁶ Calls to action 25 to 42 specifically relate to justice, and all members of the legal community should familiarize themselves with them. The TRC also recognized UNDRIP as a framework for reconciliation and called on all levels of government in Canada to implement it. In response to the "Calls to Action," BC's provincial government introduced "Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples" to help guide this work.¹⁰⁷

II. National Inquiry into Missing and Murdered Indigenous Women and Girls

The National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) was launched by the Government of Canada to end the disproportionately high levels of violence faced by Indigenous women and girls. The Canadian government considered this inquiry to be part of its response to the TRC's call to action 41.¹⁰⁸

The National Inquiry into MMIWG lasted from 2016 to 2018 and gathered evidence from over 1,400 witnesses, "including survivors of violence, the families of victims, and subject-matter experts and Knowledge Keepers." The final report, *Reclaiming Power and Peace*,¹⁰⁹ was presented to the Government of Canada in June 2019, and once again the government stressed its commitment to addressing the issues laid out in the report.

This report importantly recognized and named Canada's actions towards Indigenous peoples as genocide.¹¹⁰ It includes 231 "Calls for Justice," with additional sub-recommendations, totalling 290 individual recommendations.

There is no statutory duty for the federal or provincial governments to implement recommendations or calls to action made through national commissions or inquiries, and the recommendations themselves do not form part of Canadian law. The calls to action may not be directly legally binding, but they provide a strong moral and political imperative, as well as identifying a path for Indigenous and non-Indigenous Canadians to respond to the wrongs visited on Indigenous people by the Canadian state. As with international instruments, these calls to action may have persuasive value in courts, particularly given the Canadian government's public commitments to follow the recommendations laid out in these important reports.

Appendix B: Further Education

COURSES

- Canadian Diversity Initiative: Truth and Reconciliation Edition Online Training, candiversity.com/courses/
- CBA's Reconciliation Project, The Path, cba.org/ThePath
- Indigenous Awareness Canada, indigenousawarenesscanada.com
- Indigenous Canada Course, University of Alberta (free and online), coursera.org/learn/indigenous-canada
- NVision: The Path, nvisionthepath.ca

VIDEOS

- But I was Wearing a Suit: Mini-documentary about racism facing Indigenous lawyers and law students, cle.bc.ca/butiwaswearingasuit/
- IIO Speaker Series: UNDRIP – What the Next Generation of Lawyers Needs to Know, youtube.com/watch?v=8IEIEH85DXw
- *Qallunaat! Why White People Are Funny* (NFB), nfb.ca/film/qallunaat_why_white_people_are_funny/
- Understanding Aboriginal Identity, youtube.com/watch?v=IcSnbXmJ9V0
- What non-Indigenous Canadians need to know, youtube.com/watch?v=b1E-3Hb1-WA

BOOKS

- Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality* (Indigenous Relations Press, 2018)
- Bob Joseph, *Indigenous Relations: Insights, Tips, and Suggestions to Make Reconciliation a Reality* (Indigenous Relations Press, 2019)
- Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Anchor Canada, 2013)

- Jessica McDiarmid, *Highway of Tears: A True Story of Racism, Indifference and the Pursuit of Justice for Missing and Murdered Indigenous Women and Girls* (Random House Canada, 2020)
- John S Milloy, *A National Crime: The Canadian Government & the Residential School System* (University of Manitoba Press, 2017)
- Bev Sellars, *Price Paid: The Fight for First Nations Survival* (Talonbooks, 2016)
- Jean Teillet, *The North-west is Our Mother: The Story of Louise Riel's People, the Métis Nation* (Harper Collins Canada, 2019)
- Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis and Inuit issues in Canada* (HighWater Press, 2016)
- Jody Wilson-Raybould, *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada* (Purich Books, 2019)

PODCASTS

- All My Relations, allmyrelationspodcast.com
- Appointed: A Canadian Senator Bringing Margins to the Centre, podcasts.apple.com/ca/podcast/appointed-canadian-senator-bringing-margins-to-centre/id1451228455. Specific episodes: July 2, 2020; September 1, 2020; April 8, 2021
- Don't Call Me Resilient, podcasts.apple.com/ca/podcast/dont-call-me-resilient/id1549798876. Specific episodes: February 2, 2021; March 9, 2021
- First Peoples Lawcast, firstpeopleslaw.com/public-education/first-peoples-lawcast. See also the public education offered by First Peoples Law, including a legal newsletter: firstpeopleslaw.com/public-education
- Taken – the Podcast, takenpodcast.com
- The Trauma-Informed Lawyer Podcast, thetraumainformedlawyer.simplecast.com/
- Unsettled: Journeys in Truth and Conciliation, tunein.com/podcasts/News--Politics-Podcasts/Unsettled-Journeys-in-Truth-and-Conciliation-p1386487/

REPORTS

- The MMIWG Report and Calls for Justice
Final Report: mmiwg-ffada.ca/final-report/
Calls for Justice: mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf
- The TRC Report and Calls to Action
Report: trc.ca/about-us/trc-findings.html
Calls to Action: trc.ca/assets/pdf/Calls_to_Action_English2.pdf
- Communicating Effectively with Indigenous Clients (Aboriginal Legal Services Toronto), Lorna Fadden, PhD, aboriginallegal.ca/assets/als-communicating-w-indigenous-clients.pdf
- Expanding Our Vision: Cultural Equality & Indigenous Peoples Human Rights (BC HRT), Ardith Walkem, January 2020, 1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/01/Expanding-Our-Vision-Report.pdf
- Red Women Rising: Indigenous Women Survivors in Vancouver’s Downtown Eastside, online.flowpaper.com/76fb0732/MMIWRReportFinalMarch10WEB/#page=1
- Trauma-Informed Legal Practice: Toolkit, Golden Eagle Rising Society, goldeneaglerising.org/initiatives-and-actions/trauma-informed-toolkit-for-legal-professionals/golden-eagles-trauma-informed-toolkit-for-legal-professionals-now-available-online
- Truth Before Reconciliation: Remarks on Interactions with Indigenous People Accessing Colonial Human Rights Processes, CLE report by Myrna McCallum and Amber Prince, November 2019, cle.bc.ca/CoursesOnDemand/ContentByCourse/Webinars?courseId=5558
- Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook, Ardith Walkem, cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf

BC EDUCATORS / CONSULTANTS

- Chastity Davis: chastitydavis.com
- Hummingbirds Rising Consulting: hummingbirdsrising.ca/#workshops
- Indigenous Antiracism: indigenoustantiracism.com/our-offerings
- KinShift: kinshift.ca
- M̓i tel'nexw Leadership Society: mitelnexwleadershipsociety.org/organizations
- Myrna McCallum
- Nahanee Creative: decolonizeeverything.org
- Reciprocal Consulting: reciprocalconsulting.ca
- Shannon Beauchamp: shannonbeauchamp.com

NOTES

- 1 Melanie Tervalon & Jann Murray-Garcia, “Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education,” *Journal of Health Care for the Poor and Underserved* 9, no. 2 (1998) at 117.
- 2 Samantha Loppie, Charlotte Reading & Sarah de Leeuw, “Social Determinants of Health: Indigenous Experiences with Racism and Its Impacts,” National Collaborating Centre for Indigenous Health at 2, nccih.ca/docs/determinants/FS-Racism2-Racism-Impacts-EN.pdf.
- 3 *Ibid.*
- 4 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 6, caid.ca/TRCFinExeSum2015.pdf.
- 5 Haley Hrymak & Kim Hawkins, *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger*, Rise Women's Legal Centre (2021), womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf.
- 6 *Family Law Act*, SBC 2011, c. 25, s. 211.
- 7 *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c. 6.
- 8 BC's child protection system was recently explored in a West Coast LEAF report, *Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare* (September 2019), westcoastleaf.org/wp-content/uploads/2019/09/Pathways-in-a-Forest.pdf [WCL Pathways].
- 9 Ardith Walpetko We'dalx Walkem, QC, “Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights,” Cedar and Sage Law (2020) at 14, 1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/01/Expanding-Our-Vision-Report.pdf.
- 10 Interview with Frances Rosner, Métis family law lawyer, September 24, 2020.
- 11 John Borrows, “Indigenous Legal Traditions in Canada,” *Washington University Journal of Law and Policy* 19, no. 1 (2005) at 175, openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/13.
- 12 *Ibid.* at 178, citing “Royal Comm'n on Aboriginal Peoples, Looking Forward, Looking Back” 119–30 (1996).
- 13 Val Napoleon, “What Is Indigenous Law? A Small Discussion,” Indigenous Law Research Unit, University of Victoria Law (2016) at 2, uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf.
- 14 Marlyn Bennett & Cindy Blackstock, “First Nations Child and Family Services and Indigenous Knowledge as a Framework for Research, Policy and Practice” (2002) at 3, paper presented at the Positive Systems of Child Welfare Conference, Waterloo, ON, scholars.wlu.ca/cgi/viewcontent.cgi?article=1013&context=pcfp.
- 15 University nuhelot'j'nethaiyots'j nistameyimâkanak (Blue Quills), “Honouring Sacred Relationships: Wise Practices in Indigenous Social Work” (February 2019) at 9, citing Larry P. Aitken, “The Cultural Basis for Indian Medicine,” in Larry P. Aitken & Edwin W. Haller, *Two Cultures Meet: Pathways for American Indians to Medicine* (15–40) (Duluth, MN: Garrett Park Press, 1990).
- 16 *Ibid* at 9
- 17 *Ibid* at 5.
- 18 *Ibid* at 9.
- 19 *Ibid* at 10.
- 20 Walkem, *supra* note 9, at 6.
- 21 Interview with expert, September 24, 2020.

- 22 D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice," *Ottawa Law Review* 40, no. 2 (2009) at 257, ssrn.com/abstract=2715267.
- 23 Daniela Escolar & Parminder Nizher, "Engaging Immigrant Women in the Legal System: Community Worker Engagement Reports" (2008), a Law Foundation study conducted by Battered Women's Support Services, at bwss.org/wp-content/uploads/2011/03/BWSS_Engaging_Immigrant_Women_in_the_Legal_System.pdf.
- 24 *Indian Act*, RSC 1985, c. I-5.
- 25 Truth and Reconciliation Commission, *supra* note 4 at 1.
- 26 *House of Commons Debates*, 5th Parl., 1st Sess., Vol. 2 (9 May 1883) at 1107-1108, as cited in *ibid* at 2.
- 27 *Indian Act*, 1876, SC 1876, s. 10.
- 28 Royal Commission on Aboriginal Peoples, *Transcriptions of Public Hearings and Round Table Discussions*, 1992-1993, Ottawa, 26 November 1992, 344-345 as cited by Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples a Reality* (Port Coquitlam, BC: Indigenous Relations Press, 2018) at 47.
- 29 Dale Blenner-Hassett, "KLW. and Warrantless Child Apprehensions: Sanctioning Gross Intrusions into Private Spheres," *Saskatchewan Law Review* 67, no. 1 (2004): 161-204.
- 30 *Supra* note 8, West Coast LEAF "Pathways in a Forest" *supra* note 8 at 18.
- 31 Ardith Walkem, "Building Bridges: Improving Legal Services for Aboriginal Peoples," Legal Services Society (2007) at i, lss.bc.ca/sites/default/files/inline-files/buildingBridges_en.pdf.
- 32 *R v Holmes*, 2018 ABQB 916, as cited in Myrna McCallum & Amber Prince, "Truth Before Reconciliation: Remarks on Interactions with Indigenous People Accessing Colonial Human Rights Processes," Human Rights Law Conference (November 2019) at 3, traumainformedlegal.ca/wp-content/uploads/2020/01/CLE-Human-Rights-Paper-Oct29-19version-mm.pdf#:~:text=Truth%20Before%20Reconciliation%3A%20Remarks%20on%20Interactions%20with%20Indigenous,ABQB%20916%2C%20Justice%20Langston%20began%20dispensing%20with%20the.
- 33 Interview with expert, September 24, 2020.
- 34 Patricia Barkaskas & Sarah Hunt (for the Department of Justice), "Access to Justice for Indigenous Adult Victims of Sexual Assault," Department of Just Canada (2017) at 4, publications.gc.ca/collections/collection_2018/jus/J2-484-2017-eng.pdf.
- 35 Lisa Chartrand, "Accommodating Indigenous Legal Traditions," Indigenous Bar Association in Canada (2005) at 4, indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf. See also John Borrows, "Indigenous Legal Traditions in Canada" unpublished paper for IBC/CBC Forum on Indigenous Legal Traditions, (March 2005) at 10 at openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1380&context=law_journal_law_policy.
- 36 The conditions for parentage are set out in part 3 of the *Family Law Act*, and they include adoptive parents and "intended parents," where children are conceived through assisted reproduction, regardless of whether their human reproductive material was used for conception.
- 37 *Family Law Act*, SBC 2011, c. 25, s. 37(c) does include a requirement to consider "the nature and strength of the relationships between the child and significant persons in the child's life," however, experts explained this is typically weighed most heavily with parents and not extended family.
- 38 Interview with Frances Rosner, September 24, 2020.
- 39 Interview with expert, October 1, 2020.
- 40 Interview with expert, September 28, 2020.
- 41 Interview with Dawn Johnson, children and families senior policy analyst, First Nations Leadership Council, September 22, 2020. Also quote on next page.
- 42 Interview with expert, October 1, 2020.

- 43 Interview with Frances Rosner, September 24, 2020. Also quote on next page.
- 44 *FLA*, ss 37 and 41. Note that Canada’s new *Divorce Act*, which came into force on March 1, 2021, has included Indigenous heritage in the “best interests of the child” test, although it is too early to say how it will be interpreted.
- 45 Interview with expert, October 1, 2020.
- 46 *Naraine v. Ford Motor Co.* (1996), 7 C.H.R.R. D/230 at para 31, cited in *Campbell v. Vancouver Police Board*, 2019 BCHRT 12 at 16.
- 47 *Campbell v. Vancouver Police Board*, 2019 BCHRT 12 at 17, citing *O.P.T. v. Presteve Foods Ltd.*, 2015 HRT0 675 at para 132.
- 48 *Servatius v Alberni School District No. 70*, 2020 BCSC 15 at 9. For more information, see Frances Rosner, “Indigenous Smudging and Hoop Dancing Prayer will Continue in Alberni District No. 70” April 2020 BarTalk online: cbabc.org/BarTalk/Articles/2020/April/Columns/Indigenous-Smudging-and-Hoop-Dancing-Prayer-Will-C.
- 49 The NTC represents approximately 10,000 members of 14 different Nuu-chah-nulth nations: the Ditidaht, Huu-ay-aht, Hupacasath, Tse-shaht, Uchucklesaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, Yuu-cluth-aht, Ehattesaht, Kyuquot/Cheklesah, Mowachaht/Muchalaht, and Nuchatlaht. The Nuu-chah-nulth traditional territories include most of the west coast of Vancouver Island, *ibid* Servatius at para 8.
- 50 *Servatius* at para 25 as cited in Rosner, *supra* note 48 at para 5.
- 51 Interview with expert, October 1, 2020 discussing *R v Gladue*, 1999 1 SCR 688. In *R v Gladue*, the Supreme Court of Canada interpreted section 718.2 (e) of the *Criminal Code* and crafted a directive to courts to consider the unique circumstances of Indigenous offenders, and how these may have impacted their offending behaviour. To counter the overrepresentation of Indigenous peoples in the criminal justice system, courts shall consider all alternatives available to incarceration. Overall, this decision has led to reports being written titled “Gladue reports” that vary in each jurisdiction, but typically outline the impact of colonialization and ongoing systemic discrimination on the Indigenous person before the court.
- 52 Interview with expert, September 28, 2020.
- 53 *Ibid*.
- 54 Truth and Reconciliation Commission of Canada, “Calls to Action” (2015), at 3, trc.ca/assets/pdf/Calls_to_Action_English2.pdf.
- 55 Interview with expert, September 25, 2020.
- 56 Interview with expert, September 24, 2020.
- 57 Interview with Dawn Johnson, September 22, 2020.
- 58 Interview with expert, September 24, 2020.
- 59 *Wrapping Our Ways Around Them: Indigenous Communities and the CFCSA Guidebook* at 116. See also: Myrna McCallum, *The Trauma-Informed Lawyer* (podcast), thetraumainformedlawyer.simplecast.com.
- 60 *Wrapping Our Ways*, *supra* note 59 at 121; Natalie Clark, “Shock and Awe: Trauma as the New Colonial Frontier,” *Humanities* 5, no. 1 (2016) at 4.
- 61 McCallum & Prince, *supra* note 32 at 3.1.5.
- 62 Interview with expert, September 24, 2020.
- 63 Interview with expert, September 28, 2020.
- 64 Interview with Frances Rosner, September 24, 2020.
- 65 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, refworld.org/docid/471355a82.html.
- 66 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.
- 67 Amendments to the *Divorce Act* in 2021 have included several additional factors that need to be considered when balancing a child’s well-being. Courts must consider the nature and strength of the child’s relationships with parents and grandparents; the child’s linguistic, cultural, and spiritual heritage and upbringing, including Indigenous heritage; and the child’s views and preferences. It is too early to say how this law will be implemented.

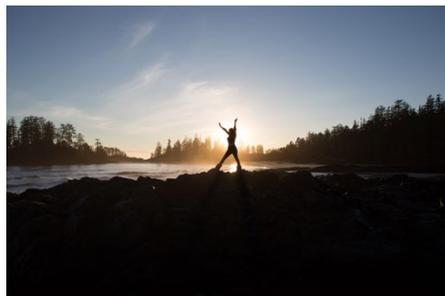
- 68 Frances Rosner, “BC Leads Canada on the Implementation of the United Nations Declaration of the Rights of Indigenous Peoples,” *BarTalk*, December 2019, at 9.
- 69 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 article 19 (UNDRIP), un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
- 70 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 s.3.
- 71 Interview with expert, September 28, 2020.
- 72 Interview with Dawn Johnson, September 22, 2020.
- 73 Canadian Psychological Association & Psychological Foundation of Canada, “Psychology’s Response to the Truth and Reconciliation Commission of Canada’s Report” (May 2018).
- 74 Quoted in Brielle Morgan, “Psychologists Are Using Biased Tests to Assess Indigenous Parents, Experts Say,” *The Discourse* (June 13, 2018), thediscourse.ca/child-welfare/psychologists-using-biased-tests-to-assess-indigenous-parents-experts-say.
- 75 *Family Law Act*, SBC 2011, c. 25.
- 76 Rise Women’s Legal Centre, *Section 211 Toolkit* at 19, citing Hanna Goddard-Rebstein & Amber Prince, “The Limits of Psychological Testing in Parental Capacity Assessment Reports: A Literature Review,” *Atira Women’s Resource Society* (December 2016), atira.bc.ca/sites/default/files/AWRS%20-%20Legal%20Advocacy%20-%20The%20Limit%20of%20Psychological%20Testing%20in%20Parental%20Capacity%20Assessment%20Reports.pdf; Morgan, *supra* note 74.
- 77 Interview with expert, September 24, 2020.
- 78 Interview with Frances Rosner, September 24, 2020.
- 79 *Section 211 Toolkit*, *supra* note 76 at 69.
- 80 Interview with expert, October 1, 2020.
- 81 Myrna McCallum & Gloria Ng, “A Toolkit for Navigating Section 276 and 278 *Criminal Code* Matters as Complainant Counsel in Criminal Proceedings” (West Coast LEAF, April 2020) at 14, westcoastleaf.org/wp-content/uploads/2020/04/lower-res-Complainant-Counsel-Toolkit-April-22-2020-web.pdf.
- 82 For some information on the Millennial Scoop, see CBC, *The Current*, “The Millennium Scoop: Indigenous Youth Say Care System Repeats Horrors of the Past” (January 25, 2018), cbc.ca/radio/thecurrent/a-special-edition-of-the-current-for-january-25-2018-1.4503172/the-millennium-scoop-indigenous-youth-say-care-system-repeats-horrors-of-the-past-1.4503179.
- 83 “Implicit Association Test,” implicit.harvard.edu/implicit/canada/takeatest.html.
- 84 Laurie Pearlman & Karen Saakvitne, *Trauma and the Therapist: Countertransference and Vicarious Traumatization in Psychotherapy with Incest Survivors* (New York: WW Norton, 1995).
- 85 Vicarious Trauma and Resilience Course 96621 2014 NetCE, ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/vt_vt_and_resilience_training-508.pdf.
- 86 Laura Barnett, “Canada’s Approach to the Treaty-Making Process,” Library of Parliament (2008), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E.
- 87 Andrew M. Robinson, “Boomerang or Backfire? Have We Been Telling the Wrong Story about *Lovelace v Canada* and the Effectiveness of the ICCPR?,” *Canadian Foreign Policy* 14, no. 1 (January 2007) at 3, <https://doi.org/10.1080/11926422.2007.9673449>. In this article, Robinson writes that the impacts of international human rights treaties on domestic policy are complex and create unique challenges for those seeking to use international instruments for domestic policy change.
- 88 *Ibid.*
- 89 Government of Canada, “International Complaints” (n.d.), canada.ca/en/canadian-heritage/services/human-rights-complaints/international.html.
- 90 There are exceptions, however, and it may be necessary in individual cases to bring evidence as to whether the parties intended to create

- binding obligations. See United Nations Treaty Collections, https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.
- 91 Indian Law Resource Center, “UN Expands Monitoring Body for Indigenous Human Rights,” <https://indianlaw.org/implementing-undrip/UN%20expands%20monitoring%20body%20for%20Indigenous%20Human%20Rights>. Note that the UN Human Rights Council is a political body and should not be confused with the Human Rights Committee established by the ICCPR.
- 92 Barnett, *supra* note 86.
- 93 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*) at para 69; *Capital Cities Communications Inc v Canadian Radio-television Commission*, [1978] 2 SCR 141 at 172-173; *Francis v the Queen*, [1956] SCR 618 at 621.
- 94 Baker, *ibid.* at para 70.
- 95 Gib van Ert, chap. 6, “Canada,” in *The Role of Domestic Courts in Treaty Enforcement* (Sloss & Jinks eds.), litigationchambers.com/pdf/vanErt-domestic-courts.pdf; Gib van Ert, “The Reception of International Law in Canada: Three Ways We Might Go Wrong,” *Canada in International Law at 150 and Beyond* (January 2018), Paper No. 2, cigionline.org/publications/reception-international-law-canada-three-ways-we-might-go-wrong/.
- 96 Jutta Brunnée & Stephen J. Troope, “A Hesitant Embrace: The Application of International Law by Canadian Courts,” *Canadian Yearbook of International Law/Annuaire canadien de droit international* 40 (2003): 3–60, <https://doi.org/10.1017/S0069005800007992>.
- 97 Sander Duncanson, Coleman Brinker, Kelly Twa, Maeve O’Neill Sanger, “Federal UNDRIP Bill Becomes Law,” Osler (June 22, 2021), osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law.
- 98 Justin Fontaine, “Bill C-15: United Nations Declarations on the Rights of Indigenous Peoples Act,” JFK Law Corporation (December 16, 2020).
- 99 Duncanson, *supra* note 97.
- 100 *Ibid.*
- 101 *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350–354; affirmed 2013 FCA 75.
- 102 Emily Chan, “New BC Legislation Now in Force to Implement Declaration on the Rights of Indigenous Peoples Act,” Norton Rose Fulbright (December 2019), nortonrosefulbright.com/en-ca/knowledge/publications/32ff0686/new-bc-legislation-now-in-force-to-implement-declaration-on-the-rights-of-indigenous-peoples-act.
- 103 Fontaine, *supra* note 98.
- 104 Truth and Reconciliation Commission of Canada, Government of Canada (December 2020), rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525.
- 105 Truth and Reconciliation Commission of Canada, “Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015), trc.ca/assets/pdf/Executive_Summary_English_Web.pdf.
- 106 Truth and Reconciliation Commission of Canada, “Calls to Action” (2015), trc.ca/assets/pdf/Calls_to_Action_English2.pdf.
- 107 British Columbia, “Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples,” https://news.gov.bc.ca/files/6118_Reconciliation_Ten_Principles_Final_Draft.pdf?platform=hootsuite.
- 108 “Backgrounder — National Inquiry into Missing and Murdered Indigenous Women and Girls,” Government of Canada (2019), canada.ca/en/women-gender-equality/news/2019/06/backgrounder--national-inquiry-into-missing-and-murdered-indigenous-women-and-girls.html.
- 109 National Inquiry into Missing and Murdered Indigenous Women and Girls, “Reclaiming Power and Peace: Executive Summary” (2019), mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf.
- 110 Maham Abedi, “Why ‘Genocide’ Was Used in the MMIWG Report,” *Global News* (June 4, 2019), <https://globalnews.ca/news/5350772/genocide-canada-mmiwg/>.

ABOUT THE PHOTOGRAPHER



MELODY CHARLIE Born and raised in Ahousat and proudly calling Nuu-chah-nulth home, I have been capturing light beams and beings since the early 1990s. Having worked most of my life in healing, I am naturally drawn to the strengths and medicines of Indigenous beings across Turtle Island. Culture, songs, ceremony, and learning my language offered some much-needed healing after the loss of my children's father. Losing him became a journey of finding me. Finding me led to the strengths and stories of First Peoples, through the lens, straight to the heart and back to our roots. melodycharlie.com





Rise 
WOMEN'S LEGAL CENTRE

Rise Women's Legal Centre is a community legal centre striving to create accessible legal services that are responsive to the unique needs of self-identifying women, particularly those who are survivors of violence, abuse, and unequal power dynamics.

For more information about Rise, visit [womenslegalcentre.ca](https://www.womenslegalcentre.ca)

Rise Women's Legal Centre respectfully acknowledges that our work takes place on the traditional, ancestral, and unceded homelands of the Skwxwu7mesh (Squamish), Tsleil-Waututh (Burrard), and x^wməθk^wəyəm (Musqueam) Nations.