



NATIONAL INDIGENOUS JUSTICE STRATEGY: BACKGROUNDER

Session Topic:

Developing a National Indigenous Justice Strategy (NIJS) that is consistent with, supports, and accelerates the full implementation of the BC First Nations Justice Strategy.

Session Objective:

Given that BC First Nations are far ahead of other jurisdictions, it is essential that the leadership of BC First Nations is recognized and reflected in the NIJS. The NIJS must be consistent with the BC First Nations Justice Strategy and accelerate its full implementation. Since the federal government was not a partner in the development of the BC First Nations Justice Strategy, there is a need to identify specific and detailed actions that the federal government will take to fully implement the BC Strategy.

The objective of this session is to define and specify the actions the federal government must include in the NIJS, namely, the key justice issues that fall within federal jurisdiction and/or are outside the scope of the BC First Nations Justice Strategy.

Background:

BC First Nations Justice Strategy

The BC First Nations Justice Strategy (2020) was developed by First Nations in partnership with the Government of British Columbia. It lays out a comprehensive pathway to transform the relationship of First Nations to the justice system consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The Strategy includes 25 individual strategies and 43 lines of actions along two paths:

- Reform of the current justice system so that it is less harmful to Indigenous people; and
- Restoration of First Nation legal traditions and structures.



Appendix A provides a list of the 25 strategies and lines of action and identifies areas of implementation that will require efforts of British Columbia, Canada, or both. Notably, over half of the strategies listed in the BC First Nations Justice Strategy (17 of 25) involve coordination—of some kind—with the federal government.

The Strategy is the first of its kind in Canada; no other jurisdiction has a co-developed a principled, rights-based, and comprehensive approach to transformation of the justice system.

The federal government was not an active partner in the development of the BC First Nations Justice Strategy. This was extremely problematic as the federal government has played a central role in the colonization of Indigenous peoples through the justice system and has on-going control of many aspects of that system which perpetuate the legacy of colonization (including through overrepresentation of Indigenous peoples in the justice system). The federal government has a central responsibility and essential role in addressing this legacy.

Through advocacy and leadership directed by First Nations in BC, the federal government is now becoming more engaged. A tripartite memorandum of understanding (MOU) between BCFNJC, BC, and Canada (Department of Justice (DOJ)) was signed in 2021 which provided for the federal government to fund implementation of aspects of the BC First Nations Justice Strategy, in particular the Indigenous Justice Centres (IJC) and the implementation of Gladue services. As this background details, Public Safety Canada (PSC) has significant powers related to the justice system (including, but not limited to policing and federal corrections). As such, BCFNJC is actively advocating for PSC to, along with DOJ, become a signatory to the tripartite MOU.

National Indigenous Justice Strategy

In 2021, the federal government began the co-development of a National Indigenous Justice Strategy (NIJS). The stated purpose of the NIJS is to develop a culturally appropriate strategy informed by the lived experiences of Indigenous peoples that includes recommendations for action to address systemic discrimination and the overrepresentation of Indigenous peoples in the Canadian justice system. It is anticipated the NIJS will include legislative, policy and program measures. These measures should “advance self-determination” and be responsive to the Calls to Action of the Truth and Reconciliation Commission and the Calls for Justice from the National Inquiry into Missing and Murdered Indigenous Women and Girls.

The NIJS is to be developed in 5 phases and is to be completed by 2024:



1. Pre-engagement (completed in 2021)
2. Indigenous-led and Justice Canada-led engagement (current)
3. Reporting and Development (2024)
4. Finalization and Validation (2024)
5. Release of the NIJS (2024)

First Nations engagement nationally on the NIJS is occurring through the Assembly of First Nations, as well as regional engagement led by First Nations and Indigenous organizations across the country. The federal Department of Justice is also leading some parallel engagement.

Engagement with First Nations on the NIJS in BC is being led by First Nations through the BCFNJC and the First Nations Leadership Council (FNLC), with a focus on ensuring the integrity and advancement of the BC First Nations Justice Strategy, and shaping an NIJS that is principled, rights-based, and transformative.

The development of the NIJS is currently in Phase 2, the engagement phase. Engagement on the NIJS is modeled on the same process as was used by BC First Nations in the development of the BC First Nations Justice Strategy. This includes regional sessions, province-wide sessions, as well as opportunities for focus groups and written input.

As part of this engagement, the **BCFNJC is seeking preliminary guidance from BC First Nations which will inform more intensive engagement throughout 2023.**

In developing priorities for the NIJS, it is also necessary to consider the division of powers between the federal and provincial governments, and which actions the each level of government must play a lead role, and where they have shared responsibility. The BC First Nations Justice Strategy was developed in collaboration with the Province of British Columbia and mandates radical reform in the areas of provincial and shared responsibility with the federal government. BCFNJC and the First Nations Leadership Council (FNLC) aim to ensure that through an NIJS the federal government respects and supports the implementation of the BC First Nations Justice Strategy, and that a NIJS identifies additional priority actions to be taken by the federal government that are consistent with the BC strategy.

Summary of Division of Powers Regarding Criminal Justice		
<i>Federal</i>	<i>Provincial</i>	<i>Shared</i>



<ul style="list-style-type: none">• Criminal law (Criminal Code of Canada)• Supreme Court of Canada<ul style="list-style-type: none">○ Judicial Appointments• Other Federal Judicial Appointments• RCMP• RCMP oversight• Federal Corrections• Restorative justice programs• Parole Board of Canada	<ul style="list-style-type: none">• Administration of criminal law (Criminal Code prosecutions and sentencing related to offenses under the Criminal Code and other federal criminal statutes (Youth Criminal Justice Act) – BC Prosecution Service (BCPS)• Administration of civil, family, and administrative law• Provincial Court operations• Provincial Corrections• First Nations Courts• Restorative justice programs• Parole• Bail	<ul style="list-style-type: none">• Policing• Police oversight• Youth justice• Corrections• Judicial appointments• Restorative justice programs• Parole• Probation
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Guiding Principles:

To support dialogue and decision-making by First Nations, the BCFNJC has developed the following ideas and considerations regarding priorities for a NIJS. The NIJS should focus on developing specific changes to laws, policies, and practices the federal government will make that will result in the full implementation of the Strategy. This commitment to specific federal actions will then form the federal government workplan that Canada has committed to with BC First Nations for the full development of the BC First Nations Justice Strategy.

The following factors have helped guide the development of options:

- **Recognizing and Reflecting the Distinct Position of BC First Nations:** BC First Nations are in a distinct position regarding transformation of the justice system. Through decades of efforts, including the adoption of the Strategy, the path forward is already comprehensively and specifically designed. No other jurisdiction has such a strategy or path. To state it simply, BC First Nations are ahead and leading. The NIJS must reflect this – that BC First Nations are in a distinct position – and not seek to impose a national approach on the BC specific path that BC First Nations have already determined. The NIJS must include new funding and capacity supports, changes to laws, policies, and practices to support the restoration of First Nations justice systems, new approaches to policing, and other measures.
- **A “One Strategy” Approach for BC:** Canada’s justice system has roles and responsibilities for both federal and provincial governments. Criminal laws, policing, the court system, prosecutions, and corrections all have elements that may be federal or provincial responsibility. As such, any strategy to transform the system must necessarily address issues of both federal and provincial jurisdiction. The Strategy reflects this. While the Strategy was only developed with the provincial government at the table, all aspects of the justice system – whether in federal or provincial jurisdiction – were addressed, and areas where federal government leadership was needed were noted. Reflecting this, a proper approach to transforming the justice system is to have one coherent and consistent strategy for BC. As such, any NIJS should – as it relates to BC – build upon and supplement the Strategy.
- **Implementing Self-Determination and Self-Government:** One critical aspect of the Strategy which the federal government must play a direct role is the recognition of First Nations criminal law jurisdiction, justice institutions, and



processes. This must be part of the work outlined in the *United Nations Declaration Act*. In effect, all elements of Track 2 – the restoration of First Nations justice systems – will require substantial federal government action. First Nations across BC are working in their own ways and at their own paces to rebuild their governments and governing structures, including their justice systems. For most First Nations, this work still requires movement from under the *Indian Act* toward self-determination and the inherent right of self-government. A particular focus of any NIJS must explicitly include how this principled recognition of First Nations criminal law jurisdiction, and the roles and responsibilities of First Nations justice traditions and institutions (including courts) will take place.

- **Prevention and Diversion:** the BC First Nations Justice Strategy identifies prevention (e.g., through social supports) and the presumption of diversion as essential principles for reducing Indigenous overrepresentation in all stages of interaction with the justice system. Prevention and diversion must be foundational components of the NIJS.



Considerations for the NIJS:

The following is a non-exhaustive list of considerations for the development of the NIJS:

1. **United Nations Declaration on the Rights of Indigenous Peoples Act:** Section 5 of the *UNDRIP Act* requires the Government of Canada to take all measures necessary to ensure that Canada's federal laws are consistent with the United Nations Declaration on the Rights of Indigenous Peoples, in consultation with Indigenous peoples. This provision requires the federal government to identify and remove systemic discrimination from all of its legislation, and to recognize Indigenous rights of self-determination regarding Indigenous justice systems and processes. Legislative space must be created for the recognition and operation of First Nations laws, institutions, and jurisdictions.
2. **Funding for Community Justice Initiatives and Indigenous Legal Orders:** Stable funding and investments need to be put in place to assist First Nations in rebuilding their legal orders, structures, and processes. Core funding commitments for the implementation of the Strategy could include: supplemental funding commitments for specific federal government actions within the Strategy; specific funding and capacity supports for First Nations community-based initiatives, including Indigenous-operated restorative justice (e.g., residential youth healing lodges as a better alternative to incarceration - none exist in the Province of BC); and funding to advance the restoration of First Nations justice systems.
3. **Missing and Murdered Indigenous Women and Girls Inquiry:** Ensuring safety and increasing access to culturally grounded, community-led victim supports for families of missing and murdered Indigenous women, girls and 2SLGBTQI+ people (MMIWG2S+), along with ensuring that community-based organizations have the tools they need to deliver responsive services for families of MMIWG2S+, are essential to any NIJS..
4. **Criminal Code Reforms:** Some provisions of the Criminal Code are contrary to core values of the BC First Nations Justice Strategy and contribute to the overrepresentation of Indigenous people in the criminal justice system. For example:
 - a. Mandatory minimum sentences in the Criminal Code currently preclude the presumption of diversion (e.g., community-based sentences) and the application of Gladue principles in sentencing (i.e., proportionate sentences that take into account systemic discrimination).



- b. The Criminal Code’s dangerous offender provisions permit an indeterminate detention period for those deemed “dangerous offenders.” The indeterminate sentence permits these offenders to be detained “until their dangerousness abates.”¹ Indigenous people are overrepresented as dangerous offenders. At the end of fiscal year 2019-2020, there were 860 offenders designated as dangerous offenders, and 36.3 per cent were Indigenous (as compared to ~5% of the overall population in Canada). The data exposes systemic racism with respect to the dangerous offender provisions.
- 5. Wrongful Convictions:** Under the current system, when someone who alleges they have been wrongfully convicted has exhausted avenues of appeal in the courts, they can apply for ministerial review of their case. If the justice minister is satisfied a miscarriage of justice likely occurred, he or she may refer the case to a court of appeal to be heard anew or direct that a fresh trial be held. New legislation has been proposed that would create a new federal commission to review, investigate, and decide which potential cases of wrongful conviction should be sent back to the justice system. First Nations people are more vulnerable to being wrongfully convicted, and less likely to get help after they’ve been wrongfully convicted.
- 6. Increasing the Number of First Nations Legal Professionals:** There is currently an underrepresentation of First Nations people in roles of authority within the justice system. Increasing First Nations representation throughout the justice system is essential for injecting cultural awareness and understanding, bringing diverse and lived experiences to the interpretation and application of the law, illustrating an understanding of the relevant contexts and conditions within First Nations, and informing the development of new policies and practices that can address the challenges of the *status quo*.
- 7. Policing:** Police reform demands direct involvement of First Nations, provincial, and federal governments. However, First Nations were excluded from the development of the Provincial Policing Services Agreement (which is a 20-year agreement that came into effect in 2012) that excluded First Nations from its development. The federal and provincial governments’ commitments to implement UNDRIP require that this agreement be cancelled and renegotiated.
- 8. Corrections:** the BC First Nations Justice Strategy speaks to the development of culturally safe programming in federal corrections to ensure that Indigenous offenders have access to relevant programming and supports in the community.

¹ <https://www.thecanadianencyclopedia.ca/en/article/dangerous-offenders>



While First Nations must lead the work, both the federal and provincial governments will play a role in implementation.

- 9. Youth Justice:** While youth justice in BC is currently under the control of the provincial Ministry of Child and Family Development (MCFD), the laws, legal processes, and regulations fall under federal jurisdiction pursuant to the *Youth Criminal Justice Act* (YCJA).
- 10. Inter-Jurisdictional Cooperation:** Gaps in services exist across the country because each province works in their own individual silos. More effort must be put into inter-jurisdictional cooperation to ensure that Indigenous peoples receive the legal support and services to which they are entitled, regardless of where they are residing.
- 11. Independent Oversight:** there have long been demands for an independent oversight function to address concerns regarding Indigenous people at all levels of the justice system, including complaints against judges, lawyers, police, and corrections. The BC First Nations Justice Strategy calls for an oversight role that would include the development of a unique process for First Nations complaints.
- 12. Dynamic Political Context:** Indigenous people across Canada understand the urgency of the work to transform the justice system. There is a clear opportunity ahead of us to advance this overdue work; however, the commitments of the sitting provincial and federal governments will only proceed if they remain in office. Thus, the schedules for the next federal and provincial elections must factor into discussions about the NIJS. The next federal election will be held on or before October 20, 2025. The next provincial election will be held on or before October 19, 2024.



Appendix A:

Implementation of the BC First Nations Justice Strategy (Canada and BC)

The following table lists the 25 Strategies and 43 Lines of Action from within the BC First Nations Justice Strategy. The columns on the right identify whether implementation will require efforts of BC, Canada, or both.

17 of the 25 strategies as listed below require coordination—of some kind—with the federal government.

STRATEGY	LINE(S) OF ACTION	B.C.	CAN
1. Reflecting the core value of a presumption of diversion throughout the existing justice system	A. BCFNJC and BC will establish a presumption of diversion workplan identifying every opportunity within the justice system where the presumption of diversion may be operationalized.		
2. Advancing First Nations self-determination of justice systems and institutions	A. BCFNJC, with support of BC, will develop a detailed “guidebook” to support First Nations in the work of re-building their First Nations Justice system and institutions. B. Co-develop a policy for how the administration of justice will be a subject-matter open for negotiation between First Nations and BC, in both stand-alone negotiations, and as part of comprehensive negotiation processes.		
3. First Nations Justice Capacity and Legal Services	A. Province and BCFNJC to confirm sustained long-term support for the work of the BCFNJC in implementing this Strategy. B. BCFNJC to develop and present to First Nations a plan for the long-term roles and responsibilities of the FNJC in implementing this Strategy, and how those confirm mechanisms for the on-going direction and guidance of First Nations		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
	<p>and proper BCFNJC accountabilities to First Nations.</p> <p>C. BCFNJC to work with the Province to develop an action plan for the implementation of the objectives of UNDRIP where it intersects with justice</p> <p>D. BCFNJC to proactively identify and work with partner organizations to advance the implementation of this Strategy, including but not limited to the Indigenous Bar Association, Law Foundation, BC law schools, and the Law Society of BC.</p>		
<p>4. Expand and invest in a comprehensive network of Indigenous Justice Centres</p>	<p>A. Establish a network of 15 Justice Centres across British Columbia within 5 years</p>		
<p>5. Establish First Nations Legal Services: Ensuring increased and more effective access to justice, and in particular defense counsel, for Indigenous accused</p>	<p>A. A. BCFNJC and BC will develop a workplan to transition legal aid services for Indigenous people in BC from LSS to an Indigenous controlled entity.</p>		
<p>6. Implement a comprehensive Gladue strategy supported by a dedicated First Nations controlled Gladue implementation agency</p>	<p>A. Establish a Gladue Implementation Agency (Agency)</p> <p>B. Increasing capacity and</p> <p>C. numbers of Gladue writers</p> <p>D. Development of Gladue awareness and education programs</p>		
<p>7. Establish a legislative and policy foundation for an independent</p>	<p>A. BCFNJC and BC will establish an oversight and accountability model which</p>		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
oversight and accountability function regarding Indigenous peoples and the justice system, and to provide public education and reporting on First Nations justice matters, including the implementation of the UN Declaration in the justice sector	will be used as a basis for legislative and policy proposal development.		
8. Undertake a joint review of legislation to align laws with the UN Declaration as required by DRIPA, and ensure space for the recognition and operation of First Nations justice systems and institutions	A. BCFNJC and BC will co-ordinate with processes being undertaken pursuant to section 3 of DRIPA to ensure review and necessary legislative changes in relation to the justice sector take place.		
9. Establish a Cross-Ministry Indigenous Justice Secretariat under the leadership of the Ministry of the Attorney General to lead the transformative work within government as identified within this Strategy	A. Establish a Cross-Ministry Indigenous Justice Secretariat		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
10. Prevention and Youth	A. BCFNJC and BC will develop a First Nations Youth Justice Prevention and Action Plan within 12 months.		
11. First Nations Women	<p>A. BCFNJC and BC, working with relevant partners, will develop a First Nations Women Justice Plan within 12 months that includes consideration of the MMIWG Inquiry Final Report and Calls for Justice.</p> <p>B. Jointly develop a strategy to address the challenges of intimate partner violence and the range of issues caused by enforcement of no contact orders, administrative offences and providing safety to victims of violence in communities.</p>		
12. Establish a joint approach to the future of First Nations Courts	A. Co-develop a joint policy and approach regarding First Nations Courts		
13. Implement measures to ensure there is a standard and accessible process for ensuring First Nations know where their members are being held in the corrections system, so that they can support and contact them	<p>A. Review and, if required, update the existing MOUs that First Nations and Corrections have in place, which can be used as templates to confirm and standardize the process for sharing of information.</p> <p>B. Review and identify potential legislative and policy changes to ensure that First Nations have access to information on their members who are incarcerated.</p>		
14. Review and identify potential legislative and policy changes to ensure that First Nations have access to information on	A. BCFNJC and BC will pilot two new correction alternatives within First Nations in BC over the next three years, as a basis for informing the development of a network of alternatives over the next decade.		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
their members who are incarcerated.	B. BCFNJC and BC will establish a workplan and budget for the expansion of cultural programs within BC Corrections.		
15. Support First Nations community-based justice programming, with the goal that within 5 years every First Nations community that seeks it, has a long-term community justice programming plan and has begun offering expanded programming	A. Create a long-term, sustainable, community-based programming fund. B. Identify and report on best practices in community-based programming C. Establish a co-ordinated approach with the First Nations Health Council on community-based programming that addresses healing initiatives.		
16. Establish formal mechanisms to track progress on the Strategy, and ensure that it is progressing and having an impact on both track 1 and track 2	A. Establish an annual Justice Summit on First Nations Issues B. Establish a joint process and standards for data collection and reporting on measurable outcomes, including the evaluation of the effectiveness of this Strategy.		
17. Engage and incorporate Canada in the work of this Strategy and broader Tripartite including BCFNJC, BC, Canada efforts on both track 1 and track 2	A. BCFNJC and BC to approach Canada to form a Tripartite process and protocol around the implementation of this Strategy.		
18. Significantly increase First Nations representation in the BC Prosecutorial	A. Set a target of 6% Indigenous people within BCPS and Crown Counsel.		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
Service and as Crown Counsel			
19. Establish structured relations between First Nations and Crown Counsel offices across the Province	A. Establish models of protocols to be established between First Nations and Crown Counsel offices.		
20. Development of standards of cultural competency, and a training program regarding First Nations and the justice system, to be used by all who interact with the First Nations in the justice system including police, BCPS and Crown Counsel, courts, and corrections.	<p>A. BCFNJC will establish a set of a core content and standards for cultural competency to enhance training programs related to justice matters. BCFNJC and BC will conduct a review of the existing training that could inform the content and standards.</p> <p>B. BCFNJC and BC will co-ordinate working with each sector within the justice system, police, BCPS and Crown Counsel, courts, and corrections, to establish or enhance a process and understanding of the implementation of the core content and standards.</p>		
21. Systematically establish roles for Elders and Knowledge Keepers across BC to help ensure cultural competency and appropriateness, support for First Nations community-based justice programming and the work of First Nations Justice Centres	<p>A. BCFNJC to establish an Elders and Knowledge Keepers Council to provide advice on all aspects of the implementation of this Strategy.</p> <p>B. BCFNJC and BC, with advice from the Elders and Knowledge Keepers Council, will establish a network of regional Elders and Knowledge Keepers Councils who have formal relationships with, and can provide support to all sectors of the justice system, including police, BCPS and Crown Counsel, courts, and corrections.</p>		



STRATEGY	LINE(S) OF ACTION	B.C.	CAN
<p>22. Establish new models of structured relations between First Nations, the RCMP, and other police forces, that support new strategic and policy level, as well as community level, and co-operative change, while supporting greater community-level police forces</p>	<p>A. Develop protocols between the BCFNJC and the RCMP, as well as the BCFNJC and other local police forces in BC.</p> <p>B. Co-Develop and implement a new approach to Community Tripartite Agreements (CTAs).</p> <p>C. Co-develop a framework for expansion and transition to increased community-based First Nations police forces.</p>		
<p>23. Development of a coordinated strategy to increase First Nations people serving as judges in British Columbia</p>	<p>A. Work with the Law Society of BC, the Judicial Council of BC, the Canadian Judicial Council, BCFNJC and BC to establish an approach to identifying and encouraging potential First Nations candidates for judicial appointments.</p> <p>B. BCFNJC will develop a system for regularly reaching out to and encouraging potential First Nations judicial applicants.</p>		
<p>24. Establish a sustainable set of supports to increase the numbers of First Nations justice workers to lead justice related work within First Nations</p>	<p>A. Create a long-term, sustainable plan to support First Nations in developing teams of justice workers within their communities, including an investment fund that can be accessed by First Nations to retain and build capacity.</p>		
<p>25. Establish a new, self-standing prosecution policy related to Indigenous Peoples</p>	<p>A. The BCFNJC will continue to support the BCPS in its review and revision of its Policy Manual with regard to Indigenous peoples.</p>		