Truth Before Reconciliation: Remarks on Interactions with Indigenous People Accessing Colonial Human Rights Processes

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By Myrna McCallum and Amber Prince

Recognizing the unique experiences of Indigenous people

In R. v. Holmes, 2018 ABQB 916, Justice Langston began dispensing with the sentencing of an Indigenous woman who was convicted of killing her spouse with these comments:

This is an Aboriginal offender. She is in a system which is imposed upon Aboriginal people, and I use that word deliberately. Our history, in relation to Aboriginal people, is one of deliberate destruction. We have systematically destroyed their culture, their way of living. We have done everything we can to take from them their sense of spirituality and identity. I’m not saying anything new. You can look in the volumes of reports and studies that have been done on Aboriginal people for decades. Those reports sit, gathering dust, in libraries and Parliament building (para 2).

…Aboriginal people are entitled to a sense of dignity when they come into our courts. They are entitled to a recognition of their history and their culture, and you cannot talk about those two things without a notional recognition of their spirituality (para 3).

…There is a fundamental disconnect between the Aboriginal view of justice and the system that I am part of (para 4).

There is a lot to unpack in Justice Langston’s profoundly accurate remarks. First, it must be recognized that current Canadian legal systems and processes are imposed on Indigenous people. Second, current Canadian legal systems and processes have served to deliberately destroy Indigenous ways of life. Third, Indigenous people have been denied dignity and recognition when accessing or otherwise forced into current

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1 Myrna McCallum owns and operates Miyo Pimatisiwin Legal Services in North Vancouver. She is a passionate promoter of trauma-informed lawyering and Indigenous cultural humility training for members of the legal profession and the judiciary. Amber Prince is a staff lawyer at Atira Women’s Resource Society, nehiyawmoniyaskwew, and member of the Sucker Creek Cree Nation. She is - as described by the Tribunal in Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302 (CanLII), http://canlii.ca/t/h08j7 - a “white passing” Indigenous person and acknowledges the privilege she’s experienced as fair-skinned Cree person also of mixed White ancestry. She has been providing legal services to women in the downtown eastside in Vancouver since June, 2006. Indigenous women disproportionately access her legal services (approximately 30%).

2 We use the word Indigenous in this paper for ease of reference to refer broadly to Indigenous people, First Nations, Metis, Inuit, and Aboriginal people. Indigenous people may identify by any of these terms or none.

3 R v Holmes, 2018 ABQB 916 (CanLII), http://canlii.ca/t/hvz7
Canadian legal systems and processes. Finally, current Canadian legal systems and processes do not provide justice as defined by Indigenous cultures and laws.

When you ask why Indigenous people don’t voluntarily approach your system or access your service without trepidation, suspicion or rage – or at all – begin here and contemplate these hard truths. Then, plan for change by consulting Indigenous people on how you might be invited in to learn from their realities, for the sole purpose of exploring a new way forward which embraces difference, recognizes a traumatic history perpetrated by colonial policies and laws and is reflective and respectful of the Indigenous people the system intends to serve.

We should all heed the wisdom of Justice Langston. His awareness is rooted in cultural humility and a recognition of the harms inflicted upon Indigenous people at the hands of the law maker, the law interpreter and the law enforcer which have resulted in long-standing traumas. Some of the harms resulting from decisions made by the authorities mentioned herein have resulted in direct trauma and intergenerational trauma. You may recognize these impacts in the lives of Indigenous people as they show up in our court rooms and hearing rooms in various forms:

- an inability to parent (child welfare system);
- an inability to problem-solve (educational system);
- an inability to cope with emotional and mental disturbance (addictions/self-harm);
- an inability to form healthy relationships (intimate partner violence);
- an inability to make good decisions (criminal justice system); and
- an inability to love, which fuels it all while generating crisis and chaos.

Do no further harm: this is the basic principle behind taking a trauma-informed approach in the court room and the hearing room. Once we recognize how Indigenous people have been harmed, we can examine the ways in which our processes can be transformed to minimize triggers and avoid causing further trauma. In order to become trauma-informed, some questions we must ask ourselves include:

- How can we become more accessible?
- How can we become more flexible with respect to space, time and structure?
- How can we reflect the communities our system is intended to serve?
- How can we ensure that our staff are trained to recognize trauma and sufficiently skilled to adapt their approach to minimize traumatic responses?
How can we ensure that our staff are sufficiently knowledgeable about cultural humility?

How can we become less transactional and more relational?

How can we make time and space to protect ourselves and each other from vicarious trauma?

Adapting our approach to recognize and respect the traumas of Indigenous people will not only make our institutions better but will provide dignity to a people who have long been denied dignity in our courts and hearing rooms. After which point, credibility and trust will follow along with the real potential to achieve the justice many Indigenous people so desperately deserve.

Truth before reconciliation

“I reckon this damnation will force reconciliation down the throats of our survivors and the people its displacing. I know you’re sorry and now you call on me to fix the broken hearts created by your policies” – “I Know You’re Sorry” by Leonard Sumner

The Truth and Reconciliation Commission provided us with 94 Calls to Action which we can use as a roadmap to build a new relationship with Indigenous people built upon truth, respect and recognition. The destination is reconciliation. Unfortunately, too many of us are so eager to arrive at the destination, we have altogether overlooked the journey itself which requires intense exploration of destructive policies and laws, hard truths and an attempt at genocide.

Why do we need to explore the truth before discussing reconciliation? So that we never repeat these acts of intentional destruction ever again. There is no way we can move into an era of reconciliation while refusing to acknowledge the truth. Moreover, Indigenous people should not be the ones responsible for providing others with solutions and a way forward.

Too often Indigenous people are asked to educate well-meaning non-Indigenous people on reconciliation and how it might appear in specific contexts or sectors. However, the one who is curious and asking the question ought to be the one exploring the possibilities in a personal way. To ask an Indigenous person to do this work instead suggests that achieving reconciliation is not worth your time or deep consideration and meaningful contemplation.

That said, in the interests of one day achieving reconciliation including human rights protections for Indigenous people in BC, this paper will explore some hard truths with respect to the ways in which Indigenous people experience the human rights process in BC. We will then offer helpful and specific suggestions for legal service providers engaging with Indigenous complainants in human rights processes.
Indigenous people are underrepresented at the Human Rights Tribunal

Recently the Human Rights Tribunal (HRT) recognized that Indigenous people are disproportionately underrepresented in HRT complaints "notwithstanding a long history of colonialization that continues to prejudice Indigenous people based on their race and ancestry." Why is that?

Indigenous people have repeatedly said that they prefer Indigenous service providers, but there are few Indigenous legal organizations and Indigenous lawyers / service providers available. In a 2011 report by West Coast LEAF, Indigenous women and service providers reported that many Indigenous people have a general mistrust of non-Indigenous organizations and service providers. The mistrust stems from historical and ongoing institutional abuse, discrimination and racism.

Indigenous people aren’t confident that a non-Indigenous person is going to understand the trauma they have faced nor the social context (i.e. colonization and oppression) that has contributed to their trauma and needs.

Non-Indigenous service providers may be perceived by Indigenous people as part of the colonial system that has oppressed them – as Justice Langston recognized in R v. Holmes, referenced above.

In spite of the needs and preferences of Indigenous people, there are very few Indigenous legal services providers offering assistance with human rights complaints.

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4 Campbell v. Vancouver Police Board, 2019 BCHRT 12 (CanLII), [http://canlii.ca/t/hx4vb](http://canlii.ca/t/hx4vb) ["Campbell No. 1"] at para. para. 18.
7 See above & ibid at p. 4.
8 Walkem, ibid.
9 R v Holmes, 2018 ABQB 916 (CanLII), [http://canlii.ca/t/hvxzi](http://canlii.ca/t/hvxzi) at para. 2
10 The Indigenous Community Legal Clinic (ICLC) has limited capacity to assist with human rights complaints, among a variety of other legal issues. The ICLC is a full-time course offered through the Allard School of Law where law students provide legal services to Indigenous clients under the supervision of lawyers. For more information see: [http://www.allard.ubc.ca/iclc/indigenous-community-legal-clinic](http://www.allard.ubc.ca/iclc/indigenous-community-legal-clinic)
Many Indigenous people will be dependent on a patchwork of pro bono, non-Indigenous, summary advice clinics to try to put together a human rights complaint on their own, while the respondent is generally well-resourced, with legal counsel throughout. Indigenous clients are unable to build, trust, rapport and understanding with one legal service provider in bringing a complaint.

Without the appropriate and necessary support to properly draft a complaint, setting out the appropriate facts and legal basis, the HRT might not accept the complaint or will provide a short timeframe for a complainant to amend their complaint or provide further information. With a lack of legal resources to amend their complaint or provide further information, Indigenous people may abandon their complaint at this stage.

It is likely that even if an Indigenous person’s complaint is accepted by the HRT they will ultimately face an Application to Dismiss without resources to obtain counsel. In this context it’s not surprising that 31% of human rights complaints are rejected on screening, 8% dismissed before a hearing and 11% withdrawn and abandoned.  

Even if an Indigenous person’s complaint is accepted, and they are successful in the Application to Dismiss stage, they will often not have the resources or pro bono counsel available for hearing.

Without access to appropriate legal representation Indigenous complainants may have to settle their complaints because they are unable to proceed without counsel. Settlement in this context is not a choice but an inevitable default, and results in a high settlement rate and low hearing rate at the HRT. Accordingly, settlement of HRT cases does not move the human rights common law forward for Indigenous complainants and, in fact, undercuts it.

In the 23 cases the HRT heard this past year 6 related to racism and only 2 were found justified. It doesn’t appear that these cases involved Indigenous complainants.

The HRT also noted in its Annual Report that complainants who have legal counsel “do much better” in the human rights process. This finding underscores the need for Indigenous complainants in particular to have access to legal representation for the entirety of their human rights complaints – from the drafting of their human rights complaint up to the hearing stage if settlement is not appropriate or successful.

How can legal service providers support Indigenous clients to advance human rights?

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12 Ibid.
13 Ibid. at p. 10.
14 Ibid.
Given the disproportionate underrepresentation of Indigenous complainants in HRT cases, and some of the barriers Indigenous people face, what can we do? Below we offer some recommendations and resources.

**Cultural humility**

At its essence, cultural humility 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. Indigenous people are experts in their lived experiences, in their history, their family, their culture, their spirituality and how it all may connect to their complaint.

For example, it may serve counsel well and be relevant to know the difference between the scent of sage and the smell off marijuana while advocating for a client’s right to practice their spiritual practice of smudging which is intrinsically connected to prayer and ceremony. It is equally critical to recognize that any difficulty in obtaining instructions from your Indigenous client may very well be the result of trauma they have or continue to experience as a result of being denied a human right.

Some questions to consider asking when an Indigenous person comes to you for help include: does this Indigenous complainant prefer to be referred to as Indigenous, Aboriginal, First Nations, Metis, Inuit, Cree, Native or something else? Many Indigenous people will have a western first and last name – usually imposed on them and their communities and nations by colonization. Do they prefer to be referred to by their traditional name? Do you know how to pronounce it? Do they want it written down or simply spoken on the record? Is there a preferred spelling?

Indigenous people know racism and colonization. It is important to take the time to listen and learn about their lived experiences and their unique needs and knowledge when they are seeking assistance from you. By being a responsive active listener, you will build rapport, trust and understanding.

Below is a list of the ways in which you can support Indigenous people in human rights processes:

- **Transparency** – what information are you collecting and is it accurate? Do you really understand what they are telling you? How will you use this information?

- **Privacy** – Will a publication ban or anonymization order increase a sense of privacy or safety?

- **Compassion, patience, flexibility and accommodations** – An Indigenous complainant may need more breaks, an adjournment of the HRT process,
and / or to meet in a space that feels safer / more comfortable like an Aboriginal Friendship Centre.

- Have an elder present at the entire meeting, hearing or HRT process. The HRT provides reimbursement for elders who attend hearings.
- Have an Indigenous or other trusted service provider / family member attend meetings or provide further information.
- Access to cultural practices in the HRT process such as smudging, a traditional welcoming and closing, and / or giving an oath on an eagle feather.
- Allow for an Indigenous expert (if an expert is being called).
- An Indigenous Intervenor – can assist the HRT and parties gain a better understanding of the historical and social context of Indigenous complainants.¹⁵
- If Indigenous counsel is not available, consider referrals to Indigenous counsel or collaborating or otherwise consulting them.
- If an Indigenous complainant needs something and there’s no precedent for it, use your legal skills and privilege to request or seek it.

**Cultural education**

You’re reading this, well done and thank you! Indigenous people have been telling (and re-telling) their stories and recording their needs for a long time. Their historical and ongoing experiences have been documented many times and in many ways over the years. As Justice Langston said in *R v. Holmes*:

“I’m not saying anything new. You can look in the volumes of reports and studies that have been done on Aboriginal people for decades. Those reports sit, gathering dust, in libraries and Parliament buildings” (para. 2).

We’ve included some links to recommended reading here as part of our collective continuing legal education.

If you are providing service to Indigenous people or merely interacting with Indigenous people as opposing counsel, it is important to have some awareness of the lived realities of Indigenous people you will encounter. As opposing counsel, a more fulsome understanding of Indigenous people will help you to understand what wrong between the complainant and your client. You will be better equipped to assess whether your client e.g. has insufficient training or policies to prevent discrimination.

¹⁵ See e.g. *Campbell v. Vancouver Police Board*, 2019 BCHRT 12 (CanLII), [http://canlii.ca/t/hx4vb](http://canlii.ca/t/hx4vb)
You will be better able to assist your client with making informed decisions to settle complaints and avoid complaints in the future. Dr. Phil likes to say: *you can’t change what you don’t acknowledge* (or understand). Mediation may be an opportunity to learn what went wrong. For many Indigenous people it’s not about the money; it’s about structural change that leads to better treatment of all Indigenous people in the future.

**Going Forward**

We acknowledge the steps the BC Human Rights Tribunal has taken to be inclusive to Indigenous complainants. We also recognize that the lack of appropriate and affordable legal services for Indigenous complainants is primarily the responsibility of the provincial government.

We call on the provincial government to adequately fund specialized human rights legal services for Indigenous complainants by Indigenous service providers. Indigenous women, girls, and two-spirit people have unique legal needs that require trauma-informed, gender and cultural-specific legal resources.

In the interim we call on non-Indigenous human rights legal service providers to prioritize both Indigenous complainants and Indigenous staff, due to their acute, historical and ongoing marginalization, oppression and underrepresentation. When Indigenous people apply to work with you, consider the value of the unique knowledge, experiences and understanding they bring to your workplace.

We also call on the federal government to adequately fund specialized human rights legal services for Canadian human rights matters. Indigenous complainants are often engaged with federal entities and have no legal resources to bring a complaint to the Canadian Human Rights Tribunal.

We call on the BC Human Rights Tribunal to publicize, in an accessible format: the services and accommodations available to Indigenous complainants at this time (such as welcoming ceremonies, elder compensation and smudging space); instructions on how to request a cultural accommodation not listed; and the process for Indigenous complainants and service providers to provide feedback.

We also ask that the BC Human Rights Tribunal amend its forms to allow space for chosen or traditional Indigenous names.

We call on the BC Human Rights Tribunal to hold mediations and hearings involving Indigenous complainants in Indigenous community venues to make these processes culturally safe, inclusive, reflective of culture / community and generally more comfortable for Indigenous complainants.
We further call on both the BC Human Rights Tribunal and BC Human Rights Commission to travel to other communities, including rural and Indigenous communities for outreach, mediation and hearings.

Finally, we ask that both the BC Human Rights Tribunal and the BC Human Rights Commission engage in ongoing, meaningful consultation with Indigenous individuals, communities, nations, groups and organizations across BC, to ensure that Indigenous people’s human rights are realized. Indigenous participants should be compensated for lending their expertise.

**Conclusion**

Recently the BC Human Rights Tribunal remarked that the Truth and Reconciliation Commission called on all participants in the justice sector to provide culturally competent services.  

We have offered this paper to you in the spirit of generosity, collegiality and a common goal to do better. Nothing contained within this material is intended to admonish anyone or their processes but rather to highlight the gaps and barriers which prevent Indigenous people from coming to you and accessing your services.

We hope that our suggestions for a new way forward that is predicated on being and becoming cultural humble and trauma-informed, we can improve the lives and experiences of Indigenous people through our service and engagement with them, now and in the future.

This is one small step, in demonstrating to Indigenous people that we recognize these legal systems were never built with them in mind and with this awareness we intend to specifically accommodate and reflect their needs and experiences so we can move towards better human rights processes and long-lasting positive outcomes for Indigenous people.

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16 *Campbell* at para. 18 [emphasis added].