



# Indigenous intercultural competence education for BC lawyers

## Joint Recommendation Report of the Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee

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## Executive Summary

1. The Law Society has identified intercultural competence training for BC lawyers as a central priority in its work to advance reconciliation, and has the statutory authority to introduce educational initiatives to achieve this goal. Over the last several years, both the Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee have recognized their overlapping roles in advancing lawyer education in relation to intercultural competence and have worked together to develop a joint recommendation to the Benchers in this regard.
2. Both the Truth and Reconciliation and the Lawyer Education Advisory Committees agree that providing lawyers with some form of Indigenous intercultural competence training and education is an integral part of the Law Society's response to the Truth and Reconciliation Commission's Call to Action 27 and one that requires action.
3. The Committees unanimously support the development of an online Indigenous intercultural competence course (the "Course") composed of a series of modules that would cover the topics identified in Call to Action 27 and additional topics identified by the Truth and Reconciliation Advisory Committee, as detailed in this report.
4. All members of the Truth and Reconciliation Advisory Committee and the majority of the Lawyer Education Advisory Committee recommend that the Course should be a mandatory requirement outside of the continuing professional development ("CPD") program, on the basis that the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the skills and topics identified in Call to Action 27.
5. Holding a different perspective, a minority of the Lawyer Education Advisory Committee recommends that instead of establishing the Course as a mandatory standalone requirement outside of the CPD program, the Course should be optional, with the incentive of providing "ethics and professionalism" accreditation within the CPD program. This approach aims to encourage and facilitate lawyers' participation in Indigenous intercultural competence education without mandating that all practitioners must complete a minimum number of training hours.
6. The Benchers are presented with these two options, for mandatory or optional Indigenous intercultural competence training, and a series of supporting policy rationale, for discussion and decision.

## Resolution

7. The Benchers adopt the joint recommendation of the Truth and Reconciliation Advisory Committee and the majority of the Lawyer Education Advisory Committee that:

The Law Society develop, in consultation with subject-matter experts, an online Course composed of a series of modules that cover the Topics identified in this joint recommendation report. The modules will be provided to lawyers at no cost, and must be completed by all full and part time practising lawyers in BC, within two years of the Course being made available. This new requirement will be established outside of the CPD program, however CPD credit hours will be provided for time spent completing the Course.

## Background

8. On June 2, 2015, the Truth and Reconciliation Commission of Canada (“TRC”) released its Report and Calls to Action to redress the legacy of residential schools and to offer guidance for reconciliation. The TRC defines “reconciliation” as:

. . . establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal 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.<sup>1</sup>

9. The TRC stated that Canada’s treatment of Indigenous peoples amounts to cultural genocide:

For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The . . . policy . . . can best be described as “cultural genocide.”<sup>2</sup>

10. The TRC reported that law was used to facilitate Canada’s assimilationist policies. As a result:

Many Indigenous people have a deep and abiding distrust of Canada’s political and legal systems because of the damage they have caused. They often see Canada’s legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests. Not only has Canadian law generally not protected Indigenous land rights, resources, and governmental authority, despite court judgments, but it has also allowed,

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<sup>1</sup> *Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (The Truth and Reconciliation Commission of Canada, 2015) [TRC Summary Report] at 6.

<sup>2</sup> *Ibid* at 1.  
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and continues to allow, the removal of Indigenous children through [residential schools] and [the] child-welfare system.... As a result, law has been, and continues to be, a significant obstacle to reconciliation.<sup>3</sup>

11. The TRC also acknowledged the potential of law to advance reconciliation:

In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Métis communities. Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system be transformed. It must ensure that Aboriginal peoples have greater ownership of, participation in, and access to its central driving forces.<sup>4</sup>

12. The TRC also stated that some lawyers were deficient in their provision of legal services with respect to residential school claims, highlighting the need for lawyers to develop greater understanding of Indigenous history and culture, including the legacy of residential schools:

The criminal prosecution of abusers in residential schools and the subsequent civil lawsuits were a difficult experience for Survivors. The courtroom experience was made worse by the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge to deal with the painful memories that the Survivors were forced to reveal. The lack of sensitivity that lawyers often demonstrated in dealing with residential school Survivors resulted, in some cases, in the Survivors not receiving appropriate legal service. These experiences prove the need for lawyers to develop a greater understanding of Aboriginal history and culture as well as the multi-faceted legacy of residential schools.<sup>5</sup>

13. Accordingly, the TRC's Call to Action 27 states:

We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on 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.

14. The Law Society is well positioned to respond to the TRC's call to action that lawyers receive appropriate cultural competence training. The Society's statutory mandate reflects its authority

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<sup>3</sup> *Ibid* at 202.

<sup>4</sup> *Ibid* at 205.

<sup>5</sup> *Ibid* at 215.

to ensure lawyers are competent and to set educational requirements and competence standards for lawyers in British Columbia:

3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
  - (a) preserving and protecting the rights and freedoms of all persons,
  - (b) ensuring the independence, integrity, honour and competence of lawyers,
  - (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
  - (d) regulating the practice of law, and
  - (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.<sup>6</sup>

15. Additionally, the *Legal Profession Act* provides the Benchers with the authority to “take any steps they consider advisable to promote and improve the standard of practice by lawyers.”<sup>7</sup>

16. The *Code of Professional Conduct for British Columbia* (the “*BC Code*”) recognizes that competency is critical to professional, ethical practice, and requires legal services undertaken on a client’s behalf to be performed to the standard of a competent lawyer.<sup>8</sup> The *BC Code* defines “competent lawyer” as “a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement.”<sup>9</sup>

17. Intercultural competence refers to an ability to interact effectively with people of different cultures, and a willingness to understand and respect their differences.<sup>10</sup> In relation to legal services, intercultural competence requires the ability to properly understand client instructions, an appreciation of the client’s social context, and an awareness of systemic factors that may have implications for a client’s legal issues.<sup>11</sup> Effective intercultural competence goes beyond knowledge to include self-reflection, positional awareness, interpersonal skills, critical thinking, attitudinal consciousness, and behavioural change.<sup>12</sup>

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<sup>6</sup> *Legal Profession Act*, s. 3.

<sup>7</sup> *Legal Profession Act*, s 28.

<sup>8</sup> *BC Code*, s. 3.1-2.

<sup>9</sup> *BC Code*, s. 3.1-1.

<sup>10</sup> Robert Wright, *Aspiring to Cultural Competence: The Why, What and How for Lawyers*, <https://slideplayer.com/slide/13310318/> at slide 6.

<sup>11</sup> Rose Voyvodic, “Advancing the Justice Ethic through Cultural Competence,” (available online: <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/f/fourthcolloquiumvoyvodic.pdf>).

<sup>12</sup>

18. In addition to these factors, Indigenous intercultural competence requires that lawyers be able to comprehend the implications of the unique worldviews, histories, and current realities of Indigenous people, in order to provide effective legal services in a respectful way and to understand how Canadian law has been used in different ways to the detriment of Indigenous peoples. Indigenous intercultural competence education also involves learning about Indigenous perspectives on Canadian history and laws to enhance lawyers' understanding of the legal system.
19. At the October 30, 2015 Benchers meeting, the Benchers unanimously agreed that addressing the challenges identified in the TRC Report is one of the most critical issues facing the legal system, and acknowledged that the Law Society has a moral and ethical obligation to advance truth and reconciliation. Therefore, the Benchers decided to take immediate action to demonstrate their commitment to respond meaningfully to the TRC Calls to Action that are within the purview of the Law Society. The Truth and Reconciliation Advisory Committee was established shortly thereafter and has continued to move this important work forward.
20. The Law Society's work to advance reconciliation has largely focused on Call to Action 27, and its emphasis on lawyer education, given that this was the only recommendation aimed directly at law societies. Accordingly, the Law Society has identified cultural competence training of lawyers in British Columbia as a central priority, as reflected in the following strategic documents:
  - a. The Law Society's Strategic Plan for 2018-2020, which states: "We will identify and implement appropriate responses to the Calls to Action from the Report of the Truth and Reconciliation Commission by encouraging all lawyers in British Columbia to take education and training in areas relating to Aboriginal law."
  - b. The Truth and Reconciliation Advisory Committee's Terms of Reference, which specify that a key goal of the Committee is: "to support the Law Society in its efforts to...improve cultural competence training for lawyers in British Columbia to recognize and respond to the diverse legal service needs of Indigenous people, and to understand the relevance and applicability of Indigenous laws within the Canadian legal system."<sup>13</sup>
  - c. The Law Society of BC's Truth and Reconciliation Action Plan, which indicates: "The Law Society of British Columbia will improve the intercultural competence of Law Society Benchers, staff, and committee members, and all lawyers and Admission Program candidates in British Columbia by mandating Indigenous intercultural

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<sup>13</sup> The Benchers endorsed the Terms of Reference at the September 30, 2016 Benchers meeting.  
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competence education for all Law Society Benchers, staff, and committee members, and all lawyers and Admission Program candidates in British Columbia.”<sup>14</sup>

21. Collectively, these documents – in addition to Call to Action 27 – clearly commit the Law Society to improve the intercultural competence of lawyers in BC. In recent years, both the Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee have been tasked with exploring the question of how this goal might best be achieved.

## Process

22. The Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee have recognized their overlapping roles in advancing lawyer education in relation to intercultural competence. The Committees have each discussed Call to Action 27 and the importance of intercultural competence education for lawyers in advancing reconciliation. What follows is a timeline that briefly summarizes the history of this work.
23. At the December 4, 2015 Bencher meeting, the Benchers resolved to create a Steering Committee, comprising Executive Committee members and Indigenous representatives, to develop the mandate and terms of reference for a permanent advisory committee to advise the Benchers on the TRC Calls to Action. In July 2016, the Benchers unanimously endorsed the creation of a permanent Truth and Reconciliation Advisory Committee.
24. In November 2017, the Law Society, in collaboration with the Continuing Legal Education Society of BC, held a Truth and Reconciliation Symposium where over 450 participants, including lawyers, judges, academics and representatives from Indigenous organizations, shared their ideas on what actions the Law Society could undertake to facilitate reconciliation. Numerous participants suggested improving intercultural competence education for lawyers as a starting point for the Law Society’s reconciliation efforts.
25. In December 2017, the Lawyer Education Advisory Committee released its final report on its review of the CPD program. As recommended in the report, the Benchers endorsed several changes to the CPD eligibility criteria that increased the accreditation of programming with Indigenous content.
26. In particular, programming that addresses “multicultural, diversity and equity issues that arise within the legal context” was added to the list of topics that may be counted toward the “practice management” requirement.<sup>15</sup> This permits Indigenous intercultural competence

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<sup>14</sup> See Truth and Reconciliation Action Plan, enumerated point 4.1. Online at:

<https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/TruthandReconciliationActionPlan2018.pdf>

<sup>15</sup> All practising lawyers in BC, both full-time and part-time, must complete 12 hours of accredited CPD within the calendar year. At least two of the 12 hours must pertain to any combination of professional responsibility and ethics and practice management (commonly known as the “ethics” requirement).



education to be eligible for “practice management” or “ethics” credit. The new subject matter “educational activities that address knowledge primarily within the practice scope of other professions and disciplines, but are sufficiently connected to the practice of law,” was also added to the CPD program. This allows accreditation of a number of topics that would fall within the ambit of Call to Action 27, including the history and legacy of residential schools.

27. The report confirmed that substantive law on issues such as treaties, Aboriginal rights, title and governance, legislation and international legal instruments related to Indigenous peoples would continue to be recognized for credit under the CPD program. The report also acknowledged that these outcomes represented a first step, and recommended exploring, in consultation with the Truth and Reconciliation Advisory Committee, how lawyer education could be further utilized as tool for advancing reconciliation.<sup>16</sup>
28. During this period, the Truth and Reconciliation Advisory Committee also developed a Truth and Reconciliation Action Plan, which was endorsed by the Benchers on July 13, 2018. The Truth and Reconciliation Action Plan specifies that the Law Society “will improve the intercultural competence of all lawyers in BC by mandating Indigenous intercultural competence education.”<sup>17</sup>
29. Determining how to establish a baseline of intercultural competence for BC lawyers has been a central focus for the Truth and Reconciliation Advisory Committee in 2019. In the course of this work, the Committee has considered the meaning of Indigenous intercultural competence, the topics that should be included to form a baseline of intercultural competency, and who should be required to participate in intercultural competence training.
30. After deliberation, the Truth and Reconciliation Advisory Committee reached a consensus that, in their view, the Law Society should implement mandatory, Indigenous-specific intercultural competence training for all lawyers in BC. To articulate the nuances of this position, the Truth and Reconciliation Advisory Committee prepared a memorandum outlining the objectives, rationales, and possible approaches for mandating this training. The memorandum was shared with the Lawyer Education Advisory Committee and discussed during a joint meeting of both Committees on May 2, 2019. The goal of the meeting was to consider and collaborate on the development of a joint recommendation on the role of lawyer education in advancing the Law Society’s commitment to reconciliation more generally, and intercultural competence training, specifically.

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<sup>16</sup> See Recommendation 26 of the Final CPD Report of the Lawyer Education Advisory Committee (December 8, 2017) at p. 49, online at: [https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LawyerEd-CPD\\_2017.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LawyerEd-CPD_2017.pdf)

<sup>17</sup> See Truth and Reconciliation Action Plan, enumerated point 4.1, online at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/TruthandReconciliationActionPlan2018.pdf>

31. The Lawyer Education Advisory Committee met on June 5, 2019 and affirmed that it agreed with many of the views presented by the Truth and Reconciliation Advisory Committee, and provided further input on a potential model of intercultural competence education that incorporated the principles agreed upon at the joint meeting. As part of this discussion, the Committee canvassed a range of issues, including clarifying the objectives of intercultural competence education, defining the content and scope of intercultural competence education, establishing who should receive intercultural competence education and exploring whether intercultural competence education should be voluntary or mandatory, as well as whether it should fall within, or exist outside of, the CPD program. The Committee also discussed possible delivery methods for intercultural competence education and the appropriate amount and frequency of the proposed training.
32. The Lawyer Education Advisory Committee subsequently developed a draft recommendation incorporating the views articulated by both Committees and outlined a proposed model for intercultural competence education in BC. On July 11, 2019, the Committees met separately to discuss the draft recommendation. At their respective meetings:
- a. The Truth and Reconciliation Advisory Committee expressed its support for the draft recommendation.
  - b. With the understanding that the Truth and Reconciliation Advisory Committee was supportive of the proposed model, the Lawyer Education Advisory Committee engaged in a further discussion to refine the draft recommendation.
33. On September 26, 2019, a second joint meeting was held to finalize the recommendation prior to its presentation to the Benchers.

## **Addressing Matters Identified by the TRC**

34. The release of the TRC Report and Calls to Action ignited an era of reconciliation. The Report brought attention to Canada's history of colonialism that was facilitated by assimilationist laws and policies that were based on notions of Indigenous inferiority and European superiority. Such laws and policies facilitated discrimination against Indigenous peoples, and have resulted in ongoing disparities between Indigenous peoples and the broader Canadian society.<sup>18</sup> These past and present inequalities have led Indigenous peoples to have a deep and abiding distrust of Canada's legal system,<sup>19</sup> and constitute a stain on Canada's claim to be a leader in the protection of human rights among the nations of the world.<sup>20</sup> The fundamental problem is that the role of Canadian law in generating and maintaining disparities between Indigenous peoples

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<sup>18</sup> *TRC Summary Report*, *supra* note 1 at 135.

<sup>19</sup> *Ibid* at 202.

<sup>20</sup> *Ibid* at 183.

and the broader Canadian society undermines public confidence in the administration of justice.

35. While identifying past harms caused by law, the TRC acknowledged the potential of law and the legal system to be a driving force for reconciliation. The TRC observed that reconciliation will require the legal system to be transformed, not only for the benefit of Indigenous peoples, but also to improve Canada's national and international reputation in relation to human rights. The Law Society acknowledges that reconciliation with respect to the legal system is a component of the Law Society's mandate to uphold the public interest in the administration of justice.
36. Because lawyers are integral to the development, interpretation, and application of laws, transformation of the legal system to further reconciliation will be contingent on lawyers. The Law Society expects that improving the intercultural competence of lawyers will help to advance reconciliation in relation to the legal system in British Columbia, and will be a step toward implementing, in a significant and meaningful way, Call to Action 27 from the TRC Report.
37. In the age of reconciliation, lawyer competence necessarily includes Indigenous intercultural competence. As a basis for truth and reconciliation, all lawyers in BC should understand the legal history of the province in which they live and work. In British Columbia, historical colonial laws were effected by a unilateral assertion by the Crown, based on notions of European superiority and Indigenous inferiority. The TRC has emphasized that reconciliation will require the repudiation of the concepts that were used to justify European sovereignty over Indigenous peoples and lands.<sup>21</sup> Intercultural competence training is intended to inspire lawyers to think critically about the legal history of British Columbia and the ongoing repercussions of this history within the current legal system.
38. The legal history of Canada includes principles and concepts from Indigenous law. There are precedents within the Canadian legal system for the recognition and application of Indigenous laws.<sup>22</sup> Intercultural competence training is meant to improve lawyers' knowledge of Indigenous laws, and the potential relevance and applicability of these laws within the Canadian legal system.
39. Understanding the role of law throughout Canada's history and the continuing implications of the colonial legal system for Indigenous people will also help to increase lawyers' empathy and

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<sup>21</sup> TRC Recommendations 45, 46, 47 and 49. For example, recommendation 47 states: "We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts." See *TRC Summary Report*, *supra* note 1.

<sup>22</sup> *Connolly v. Woolrich*, [1867] Q.J. No. 1, *The Queen v. Nan-e-quis-a-ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.), *R. v. Côté*, [1996] 3 SCR 139.

awareness in relation to the disparities between Indigenous peoples and the broader Canadian society. The Law Society anticipates that increased empathy and awareness on the part of lawyers will enhance the quality and delivery of legal services, and improve Indigenous peoples' experiences with, and perceptions of, the legal system.

40. Intercultural competence education is also intended to improve lawyer competence in general. The TRC reported that the shortcomings of some lawyers in residential school claims resulted in some Survivors not receiving appropriate legal service.<sup>23</sup> Although many lawyers do not practise in areas of law with high Indigenous usage rates, all lawyers should be aware of the possibility that Indigenous issues may affect legal matters in a broad range of areas of law, including but not limited to: human rights, administrative law, Aboriginal and treaty rights, lands and resources, real estate, commercial law, taxation, family (including child welfare) law, wills and estates, intellectual property, civil litigation, immigration law and criminal law. Even in areas of practice where Indigenous issues rarely arise, it is important for all lawyers to be capable of identifying when an Indigenous issue may be relevant to a legal matter, and responding appropriately.
41. Another objective of intercultural competence training is to increase respect for – and reduce subconscious biases against – Indigenous legal professionals in BC. The Law Society's Report from 2000 entitled "Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers"<sup>24</sup> revealed that presumptions of Indigenous inferiority, both in law schools and in the legal profession, have negatively affected Indigenous law students and lawyers in BC. More recently, Indigenous lawyers shared their experiences of racism within the legal profession in British Columbia in the mini-documentary video, "*But I was wearing a Suit*".<sup>25</sup> These examples demonstrate the need for enhanced intercultural competence education.
42. A significant goal of intercultural competence training is therefore to increase the legal profession's regard for Indigenous lawyers, articled students, and law students to further the Law Society's efforts to foster the recruitment, retention, and advancement of Indigenous legal professionals in BC. These efforts are in line with the TRC's observation that reconciliation will require Indigenous peoples to "have greater ownership of, participation in, and access to the central driving forces of the Canadian legal system."<sup>26</sup> Further, the enhanced contributions of Indigenous people in the legal profession is intended to help to imbue Indigenous worldviews and perspectives throughout the legal system.
43. Lawyers also play an important role in broader civil society, independent of legal practice. Lawyers often hold leadership positions with corporations, societies, non-profit, and

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<sup>23</sup> *TRC Summary Report*, *supra* note 1 at 215.

<sup>24</sup> <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/AboriginalReport.pdf> .

<sup>25</sup> Co-produced by the Law Society and the Continuing Legal Education Society of BC in 2017, available online: <https://www.youtube.com/watch?v=HTG7fi-5c3U>.

<sup>26</sup> *TRC Summary Report*, *supra* note 1 at 205.

community organizations. Their views about society, politics, and social issues are often well-respected and influential among families, friends, and social networks. In all of these roles, the Indigenous intercultural competency of all lawyers – even lawyers whose practices never require them to directly grapple with Indigenous issues or clients – becomes important to the overall reconciliation between Indigenous and non-Indigenous peoples in Canada.

44. All of the above-mentioned aspects of intercultural competence education are geared not only toward improving lawyer competence and advancing reconciliation, but also to the Law Society's broader objective of upholding and protecting the public interest in the administration of justice.

## **The Proposed Model**

45. Both Committees agree that providing lawyers with some form of intercultural competence training is an integral part of the Law Society's response to Call to Action 27 and one that requires concrete action. There is unanimous support for the development of an online Indigenous intercultural competence course (the "Course") composed of a series of modules that would cover the topics identified in Call to Action 27 and additional topics identified by the Truth and Reconciliation Advisory Committee, as listed below.
46. The Course would be funded and developed by the Law Society, in consultation with subject-matter specialists, and would be provided to lawyers free of charge. Although the Course would be independent of the CPD program, lawyers would be able to claim CPD credit for the time spent taking the Course.
47. At the outset, the Course should be framed in the broader context of a vision for a multi-phased intercultural competence education program, which is responsive to the concern that a "check-the-box" approach to intercultural competence education is not sufficient to achieve the objectives of the training, as articulated above. Intercultural competence demands more than simply acquiring new knowledge; it also requires developing new skills and changing attitudes. Achieving this learning and attitudinal change in a meaningful way will take time.
48. Accordingly, in the first phase of the educational program, the focus would be on establishing baseline knowledge for all lawyers in respect of the topics and skills identified in Call to Action 27 and several related areas identified by the Truth and Reconciliation Advisory Committee. Although many lawyers may already have some exposure to some matters identified in Call to Action 27 (e.g. through their practice areas, or as recent graduates of the Professional Legal Training Course or law school), the Course is intended to ensure that a baseline of information will be conveyed to all lawyers in the province. As this first phase progresses, the Law Society will assess the Course's effectiveness and develop proposals for subsequent phases of training. A discussion of potential future phases of intercultural competence education is provided in the final section of this report.

49. During the first phase, the Course would be specifically Indigenous in focus, rather than addressing intercultural competence more generally, given that Call to Action 27 is the key driver for introducing intercultural competence training for lawyers in BC. The goal behind Call to Action 27 might lose its intensity if intercultural competence training were initially broadened to a non-Indigenous focus during the first phase. This is not to say, however, that broad based intercultural competence training would be ignored; rather it would continue to be encouraged through the CPD program.<sup>27</sup>
50. The Committees both recognize that Indigenous intercultural competence is a broad and complex concept. It includes an appreciation of Indigenous worldviews, perspectives, legal systems, and laws; the diversity among Indigenous populations and other regionally significant information; and the unique legal context of Indigenous peoples in Canada, including the constitutional recognition of, and specific legislation in relation to, Indigenous peoples. It also includes an understanding of the history of the colonization of Canada and the ongoing repercussions of the colonial legacy; the systemic discrimination against, and racism experienced by, Indigenous peoples; and the international legal principles that apply to Indigenous peoples in Canada.
51. To address the core aspects of Indigenous intercultural competence, the Course would address the content of Call to Action 27 and include the following topics (collectively, the “Topics”):
- i. The meaning and purpose of reconciliation;
  - ii. The history and legacy of residential schools (including day schools, the “60s Scoop”, and ongoing overrepresentation of Indigenous children in the child welfare system);
  - iii. The disproportionate victimization of Indigenous people (including murdered and missing Indigenous women and girls);
  - iv. The overrepresentation of Indigenous people in the criminal justice system (including Indigenous principles of sentencing);
  - v. The United Nations Declaration on Rights of Indigenous Peoples;
  - vi. Treaties and Aboriginal rights;
  - vii. Indigenous law;
  - viii. The history of Aboriginal-Crown relations;
  - ix. Specific legislation regarding Indigenous peoples in Canada (including unequal treatment of Indigenous women under the *Indian Act*); and
  - x. Skills-based training in:
    - a. Intercultural competency;
    - b. Conflict resolution;

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<sup>27</sup> As mentioned above, programming that addresses “multicultural, diversity and equity issues that arise within the legal context” may be counted toward the “ethics” requirement under the CPD program. (CPD Review Report, *supra* note 19).

- c. Human rights;
- d. Anti-racism; and
- e. Trauma-informed service provision.

52. The objectives of the Course would be to:

- i. respond directly to Call to Action 27 to ensure that lawyers receive intercultural competence training;
- ii. make progress toward the implementation of the Law Society's Truth and Reconciliation Action Plan, which calls for mandatory intercultural competence education for all lawyers in BC;
- iii. increase the legal profession's respect for Indigenous peoples and their perspectives, including Indigenous lawyers;
- iv. enrich the legal profession's comprehension of the relevance and applicability of Indigenous laws within the Canadian legal system;
- v. ensure that the legal profession understands how Canadian laws have been, and continue to be used to the detriment of Indigenous peoples in various ways;
- vi. foster the legal profession's ability to recognize and respond to the diverse legal service needs of Indigenous people;
- vii. enhance Indigenous engagement with the Canadian legal system;
- viii. improve outcomes for Indigenous people in the Canadian legal system; and
- ix. recognize that in the "age of reconciliation" lawyer competence necessarily includes intercultural competence.

All of these objectives are aimed at advancing reconciliation in furtherance of the Law Society's mandate to uphold and protect the public interest in the administration of justice.

53. In considering the appropriate amount of Indigenous intercultural competence education for lawyers, there is a need to strike a balance between devoting sufficient time to the Topics, so as to create a baseline understanding of these issues, and the amount of time lawyers can reasonably be expected to commit to additional training. It is estimated that six hours, to be completed within a two year period, would be an appropriate amount of time to meaningfully address the Topics. Notably, six hours of training is similar to other educational requirements for BC lawyers that have been established outside of the CPD program.<sup>28</sup>

54. The proposed model offers a number of benefits.

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<sup>28</sup> Both the online Practice Management Course (Law Society Rule 3-28) and the training that family law arbitrators, mediators and parenting coordinators must take to maintain accreditation (Law Society Rules 3-35 to 3-38) are mandatory six hour educational requirements that are independent of the CPD program.

55. The Course would cover the broad range of Topics within a specific timeframe. The Law Society would work with subject matter experts to develop the curriculum and ensure that baseline knowledge covered by the Topics is being conveyed effectively. Additionally, the content would be broken down into a number of online modules. This modular approach would facilitate self-paced learning by lawyers, and would make it easier for the Law Society to update and revise the content as appropriate.
56. The modules would be delivered online, on the basis that an electronic tool is the most efficient and effective way to ensure the Course is accessible to every lawyer in BC.<sup>29</sup> The Law Society would fund the development of the modules, and make them available to all members free of charge. This approach would ensure that training is provided in a timely and cost-effective manner, and in a way that does not disadvantage any members of the profession who may struggle to pay for, or otherwise attend, intercultural competence training.
57. The Course would also be a standalone course, but eligible for credit within the CPD program. In creating a standalone Course, the Law Society will retain greater control over the content of the programming, so as to ensure that a standardized baseline of knowledge is acquired by BC lawyers within a defined period of time. Given the breadth of Topics, the number of additional CPD hours that could reasonably be added to, or devoted within, the existing 12 hour CPD requirement would be insufficient to cover the required material.<sup>30</sup>
58. Additionally, the proposed approach would neither result in any annual increase in the CPD requirement, nor would it commit any of the existing CPD hours to Indigenous intercultural competence training. CPD credit (including credit for the two hour “ethics” component of the CPD requirement) would be granted for completing modules, following the approach employed for the Law Society’s Practice Management Course.

## **Mandatory or Optional Training**

59. All members of the Truth and Reconciliation and Lawyer Education Advisory Committees unanimously recommend that the Law Society should develop an online Indigenous intercultural competence Course that covers all of the Topics, and make it freely available to every lawyer in British Columbia. The only divergence in opinion is whether the Course should be mandatory or optional for lawyers.

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<sup>29</sup> There are over 12,000 practicing lawyers and over 1,500 non-practicing lawyers in BC.

<sup>30</sup> For example, if lawyers were required to complete one hour of continuing education with Indigenous content each year (either within the existing 12 hour CPD requirement, or by adding an additional hour), and had the flexibility to count any Indigenous content toward the requirement, it would be difficult (if not impossible) for most lawyers to gain exposure to all of the Topics.



60. All members of the Truth and Reconciliation Advisory Committee and the majority of the Lawyer Education Advisory Committee recommend that the Course should be mandatory. A minority of the Lawyer Education Advisory Committee recommends that the Course be accredited toward the mandatory two hour “ethics” component of the CPD program, and made optional so that lawyers are encouraged, but not compelled, to take intercultural competence training as part of their “ethics” requirement.

## **Option 1**

61. Option 1 is to establish, through the Law Society rules, that the completion of the Course is mandatory for all BC lawyers, regardless of their year of call or whether they are part time or full time practitioners.<sup>31</sup> This option is recommended by all members of the Truth and Reconciliation Advisory Committee and the majority of the Lawyer Education Advisory Committee.
62. Those in support of Option 1 draw on both the TRC Action Plan and the Law Society’s Strategic Plan for guidance. Both of these documents reference “all lawyers” when addressing the need for intercultural competence education. The mandatory nature of this training is also reflected in the language of Call to Action 27, which directs that law societies “ensure” that lawyers receive intercultural competence training, and item 4(i) of the TRC Action Plan which “mandates” Indigenous intercultural competence training for all lawyers.
63. Guided by these documents, and recognizing that the objectives of intercultural competence education, including reconciliation, cannot be fully achieved unless all lawyers have a baseline understanding of the topics and skills identified in Call to Action 27, Option 1 is a proposal for the Law Society to introduce a mandatory Indigenous intercultural competence educational requirement for all practising lawyers in BC. Lawyers would be required to complete the six hour Course over a two year timeframe. Although the requirement would exist outside of the CPD program, time spent on the Course could be counted toward CPD “ethics” requirements.<sup>32</sup>
64. Those in support of Option 1 are strongly of the view that the Law Society’s efforts toward reconciliation will be less effective if only those lawyers who “opt in” participate in intercultural competence training, and are concerned that an optional approach may only engage those practitioners who already have an interest in, or awareness of, Indigenous issues.

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<sup>31</sup> “All lawyers” includes Indigenous lawyers.

<sup>32</sup> Permitting lawyers to complete the training over a two year period would provide practitioners with some flexibility as to when they participate in intercultural competency training. This flexibility is further enhanced by the relatively new CPD rule that permits lawyers to carry-over of six CPD credits from one year to the next.

65. The Committees considered whether the educational requirement should only apply to lawyers who practise certain areas of law or in particular geographic areas. The Committee members in support of Option 1 rejected these approaches in favour of a universally applicable mandatory requirement that avoids any real or perceived inequities that may arise from introducing a requirement that only applies to a subset of the membership. There was some concern that an approach in which only some lawyers are required to complete intercultural competence training may disproportionately affect certain groups or create disincentives to work in certain practice areas or locations, with unintended negative outcomes for Indigenous people.
66. Other problems with imposing a requirement on a subset of the profession were canvassed, including the concern that the Law Society does not track lawyers' practice areas or client bases and as such, lacks the information necessary to determine which lawyers might be subject to a new requirement (e.g. based on practice area or geographic area). Creating a system to collect and monitor this information would be complex and costly. Additionally, as the Law Society does not currently certify lawyers for specialized practice areas, establishing a system in which intercultural competence becomes a condition of practice would have considerable logistical and cost implications.
67. Introducing a mandatory intercultural competence requirement with an exclusively Indigenous-specific focus may be controversial. Although a proportion of the membership is likely to be supportive of the new requirement, it may also be met with resistance by some lawyers who are of the view that Call to Action 27, and reconciliation more generally, are not directly, or even indirectly, relevant to their legal practice. Others may suggest that an Indigenous focus is too narrow, and that the requirement should be expanded to intercultural competency more broadly, given the diverse and multicultural client base of many lawyers. The Committees have some concern that this opposition may shift the discussion away from reconciliation and toward controversy about what some lawyers may regard as an overly prescriptive educational requirement.
68. To address this concern, a communications campaign would be required to clearly articulate to the membership why Indigenous intercultural competence training, specifically, is relevant to all lawyers. The communications must show the link between lawyers, as key participants in the legal system, competency and the process of reconciliation. Additionally, the educational program itself should include material that clearly demonstrates why learning about these issues is an essential aspect of lawyer competence in BC.
69. Concern about opposition to the introduction of an Indigenous intercultural competence educational requirement is also mitigated by the fact that under the *Legal Profession Act*, the Law Society has the legislative authority to establish standards and programs for the education and competence of lawyers as part of its duty to protect the public interest in the administration

of justice. Requiring lawyers to participate in training activities that enhance their competence serves both the public interest and enhances confidence in the legal profession.<sup>33</sup>

70. Additional public interest benefits may include improved provision of legal services to both Indigenous and non-Indigenous clients and improved public perceptions of both the Law Society's regulation of the profession and the legitimacy and fairness of the legal system and the administration of justice.

## Option 2

71. Option 2, which is supported by a minority of the Lawyer Education Advisory Committee, is to ensure that completion of the Course is eligible for credit within the two-hour "ethics" component of the CPD, which is mandatory for all lawyers in the province. This would encourage, rather than require, lawyers to take intercultural competency training. If this option were pursued by the Benchers, the development of additional incentives may also be considered.
72. Under Option 2, the Law Society would still develop a series of online modules covering the Topics and ensure this programming is accessible to the membership free of charge. However, rather than establishing the modules as a mandatory standalone requirement outside of the CPD program, they would be eligible (but not required) for CPD credit under lawyers' existing, mandatory two-hour "ethics and professionalism" CPD requirement. If the Course is six hours long, and lawyers are given three years (rather than two years, as proposed in Option 1) to complete it, then lawyers could count the time spent on the Course toward their annual two hour "ethics" requirements over a three year period. The goal would be to encourage and facilitate lawyers' participation in this Indigenous intercultural competence education without mandating that all practitioners must complete a minimum number of training hours in this area over a certain period of time.
73. The minority view is that this approach will achieve many of the objectives of intercultural competence training, as listed earlier in this report, and is compatible with Law Society's strategic priorities in relation to truth and reconciliation. Specifically, the 2018-2020 Strategic Plan speaks to "encouraging" all lawyers in BC to take education and training in areas relating

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<sup>33</sup> A similar observation was made by the Supreme Court of Canada in [Green v. Law Society of Manitoba, 2017 SCC 20](#) at para. 3 in the relation to CPD "The Law Society is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing educational standards for practising lawyers. CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism." This sentiment equally applicable to mandatory educational requirements that exist outside of a CPD program.

to Aboriginal law. This approach is also within the purview of the Law Society's authority pursuant to s. 3(c) and s. 28 of the *Legal Profession Act*.<sup>34</sup>

74. Option 2 is responsive to the concern that requiring all lawyers in the province to complete Indigenous intercultural competency education is overcasting the net because many lawyers have no Indigenous clients, and do not come across Indigenous issues in their practice areas. Mandating a program that has little or no perceived value to them in their practices may cause a reaction that could undermine the Law Society's efforts toward reconciliation. Some concerns have been raised that although some lawyers will greatly benefit from participating in Indigenous intercultural competence training, others will be of the view that the topics and skills addressed in Call to Action 27 have no direct or indirect connection to their delivery of legal services.
75. It may, therefore, be in the public interest to ensure that the finite amount of time a lawyer has to devote to continuing education is allocated to learning that is directly relevant to their practice, based on the lawyer's evaluation of their educational needs.
76. Further, a mandatory requirement does not align with the increasingly liberalized approach to continuing legal education, as reflected in the Benchers' approval of the majority of the recommendations in the Lawyer Education Advisory Committee final CPD review report in 2017.<sup>35</sup> In recent years, the CPD program has made a marked shift toward providing lawyers with greater flexibility as to when and how they satisfy their learning requirements. The Law Society trusts that lawyers will make wise choices in selecting programming that will improve their professional competence, which may – or may not – require further training in relation to Indigenous intercultural competence.
77. Notably, at this point in time, no other Law Society has taken the step of introducing mandatory Indigenous intercultural competence training for all lawyers. There is a risk that imposing a mandatory requirement could create controversy that moves the profession further away from reconciliation rather than towards it. Therefore, the minority encourages caution before using regulatory requirements to impose mandatory education.
78. On the other hand, the supporters of Option 1 see this as an opportunity for the Law Society of BC to be a leader on this issue. British Columbia's position is unique in Canada. Other than a couple of historic treaties and a few modern day treaties, the vast majority of British Columbia's lands and waters are not yet subject to treaties with Indigenous peoples. As a result of this unique context, a number of lead cases on Indigenous issues have originated in British

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<sup>34</sup> *Supra* notes 6 and 7.

<sup>35</sup> CPD Review Report, *supra* note 19.

Columbia (examples include the *Calder*,<sup>36</sup> *Delgamuukw*,<sup>37</sup> and *Tsilh'qotin*<sup>38</sup> decisions regarding Aboriginal title, the *Sparrow*<sup>39</sup> decision on Aboriginal rights, and the *Haida*<sup>40</sup> and *Taku*<sup>41</sup> decisions regarding consultation.) Accordingly, the Law Society should support lawyers in this province in developing greater expertise and capacity in relation to Indigenous legal issues.

79. Option 2 may, however, generate criticism on a number of fronts. Adopting an intercultural competence option, rather than a requirement, may be challenged on the basis that it fails to align with the Law Society's TRC Action Plan, which refers to "mandating" Indigenous intercultural competence training for all lawyers, and Call to Action 27, which calls upon law societies to "ensure" lawyers receive intercultural competence training. Both of these provisions are grounded in the moral imperative for lawyers to advance reconciliation,<sup>42</sup> and the need for the Law Society to protect the public interest. Optional training may be perceived as falling short of these responsibilities.
80. Given the similarities between Option 2 and the recommendation presented to, and subsequently rejected by, the Benchers in 2015,<sup>43</sup> this approach may also face considerable opposition from the Indigenous bar and others. Additionally, intercultural competence training, more broadly, is already eligible for CPD "ethics" credits.

## Budgetary Implications

81. The Practice Support Department currently operates four online courses – Practice Management Course, Practice Refresher Course, Communications Toolkit, and Legal Research Essentials.

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<sup>36</sup> [1973] SCR 313.

<sup>37</sup> [1997] 3 SCR 1010.

<sup>38</sup> 2014 SCC 44.

<sup>39</sup> [1990] 1 SCR 1075.

<sup>40</sup> 2004 SCC 73.

<sup>41</sup> 2004 SCC 74.

<sup>42</sup> As mentioned above, the TRC reported that the law has been a mechanism for discrimination, and has the potential to be a driving force for reconciliation. Given that lawyers are integral to the development, interpretation and application of laws, the transformation of the legal system in furtherance of reconciliation will depend, to a great extent, on them.

<sup>43</sup> At the December 4, 2015 Bencher meeting, the Lawyer Education Advisory Committee put forward a resolution to amend the CPD requirements to add "appropriate cultural competency training" to the list of optional topics that are eligible for credit under the "ethics" component of the CPD program. The proposal was not to make such training mandatory, but rather, to provide an incentive for lawyers to take optional training in areas with Indigenous content by ensuring this programming was eligible to fulfill the "ethics" requirement. Although the resolution passed unanimously, two Indigenous lawyers in attendance expressed their dissatisfaction with this approach on the basis that it was not sufficiently responsive to the TRC's Calls to Action, and was developed without Indigenous input. The Benchers subsequently retracted the resolution, acknowledging that the resolution was premature, and committed to engaging with Indigenous leaders (including Indigenous judges, lawyers, and legal academics) for guidance in the development of a meaningful and effective response to Call to Action 27.

Earlier in 2019, the Law Society purchased a new online course platform to improve the quality of the existing online courses and allow for expanded course offerings. The 2020 budget, to be considered by the Benchers on September 27, includes the cost of setting up the new online site for existing courses, new course development, and annual user fees of \$98,000 for an estimated 3,500 members to access the online courses in 2020.

82. The estimated cost to develop and deliver a Phase I intercultural competence online course will total approximately \$330,000 for the 2020 and 2021 fiscal years. This estimate is based on three categories of expense:

- Course licensing fees: \$280,000 to be added in 2021

The Law Society's new license with the Desire2Learn (D2L) learning management system charges an annual user fee of \$28 per member to access the intercultural competence online course and any other Law Society online course. The current hosting agreement provides for access in 2020 for an estimated 3,500 users of the existing courses. In 2021, a mandatory Phase I intercultural competency course would add a \$280,000 expense for approximately 10,000 more users, at \$28 each.

- Subject matter expertise: \$25,000

A consultant with subject matter expertise would be contracted to research and write the Phase I course content.

- Instructional design: \$25,000

Once the Phase I course content is prepared, an expert in instructional design would edit the material, draft learning objectives, prepare learning elements, and develop a testing component.

83. The Practice Support department would absorb an in-kind staff contribution to install the course, pilot test it, set it for general release, and maintain it.

84. When Phase II course development begins, in 2021 or subsequently, the post-2020 budgets should together include an additional \$50,000 for subject matter expertise and instructional design.

## Recommendations

85. The following recommendations are presented to the Benchers for discussion and decision:

**Recommendation 1:** The members of the Truth and Reconciliation Advisory Committee and the Lawyer Education Advisory Committee unanimously recommend that the Benchers

endorse the Law Society developing an online Course comprising a series of modules that will cover the Topics identified in this report, and will be accessible to all BC lawyers at no cost.

**Recommendation 2:** All members of the Truth and Reconciliation Advisory Committee and the majority of the Lawyer Education Advisory Committee recommend Option 1 to the Benchers: that completion of the Course will be mandatory for all practising lawyers in BC.

## Subsequent Steps

86. If Recommendation 1 is approved by the Benchers, the Law Society will work with subject matter experts to develop the content of the Indigenous intercultural competence programming in 2020, with the goal of introducing the finalized set of online modules to the profession in 2021.
87. If Recommendation 2 is approved, a new Law Society rule will be drafted to establish that the Course is mandatory for all lawyers in BC. If Recommendation 2 is not approved, the Course will be eligible for credit within the two-hour “ethics” component of the CPD, which is mandatory for all lawyers in the province. Further work would be required by the Committees to determine whether any additional mechanisms are required to further encourage lawyers to take this Course within the CPD program.
88. As discussed at the beginning of this report, the proposed Course does not represent the totality of the Law Society’s efforts to address the Calls to Action. Rather, it is step along a continuum of learning that will, over time, advance reconciliation. The Course is envisaged as the first step in a multi-phased approach to improving the intercultural competence of BC lawyers.
89. As lawyers complete the Course, the Law Society will evaluate the results of Indigenous intercultural competence training using various methods, including the following:
  - i. reviewing the timeliness of the completion rate of the Course;
  - ii. seeking lawyers’ comments with respect to whether there are any areas where they feel additional learning is required;
  - iii. modifying the CPD declaration to inquire how many lawyers are completing the Course, and how many CPD hours contain Indigenous content that lawyers are taking outside of the Course;
  - iv. encouraging CPD providers to track attendance in programming with Indigenous content, as well as the amount of Indigenous content that is included within the general programming;
  - v. following developments in other jurisdictions, and at the Federation of Law Societies, with respect to Indigenous intercultural competence education;

- vi. assessing the Law Society's progress on other aspects of the TRC Action Plan, including the development of intercultural competence educational resources;
- vii. assessing what steps to take relating to the National Inquiry into Missing and Murdered Indigenous Women and Girls Report, including in particular Call to Justice 10.1 for training lawyers who participate in the criminal justice system (e.g. considering whether specialized training for certain practice areas is required); and
- viii. accounting for related learning by Canadian law school graduates and National Committee on Accreditation Certificate holders.

90. Following this review and analysis, further recommendations will be made to the Benchers in relation to:

- i. the extent to which lawyers should receive additional mandatory or optional intercultural competence training;
- ii. whether such training should be a part of, or independent from, the CPD program;
- iii. the focus of any future education (e.g. skills-based training, additional knowledge, expanding the content to address intercultural competence more broadly);
- iv. how to advance social awareness in addition to advancing baseline knowledge;
- v. how any additional education will be delivered; and
- vi. whether the Law Society or external providers will develop additional free or paid intercultural competence programming.