Survey found that 48 per cent of 30,000 children and youth in foster care in Canada were Aboriginal children, though Aboriginal people only made up 4.3 per cent of the population. In British Columbia, more than 55 per cent of children not living in their parents' home were Aboriginal.

Systemic bias in the Canadian justice system means that Aboriginal people are more likely to be sentenced to prison than non-Aboriginal people. Residential schools have left an intergenerational legacy; those who experienced or witnessed serious violence become accustomed to violence and continue violent practices in their later lives.

The reasons for placing Aboriginal children in the child protection system mainly fall under the category of "neglect," which may include the failure to provide necessities like food, clothing and hygiene, failure to supervise a child, or educational, medical or emotional neglect. Researchers have found that neglect in Aboriginal families is mainly driven by poverty, inadequate housing and substance abuse — factors that are often linked to the socio-economic situation of Aboriginal people and beyond the parents' control. Despite this, Aboriginal children continue to be taken away from their parents because they are poor.

The Truth and Reconciliation report states that this child-welfare system is simply continuing the assimilation that the residential school system started, and calls for a commitment from all levels of government to reduce the number of Aboriginal children in care and develop support systems to keep families together.

OVERREPRESENTATION OF ABORIGINAL PEOPLE IN PRISON

Aboriginal people are dramatically overrepresented in Canada's prison system. Despite only making up four per cent of the Canadian adult population, the number of Aboriginal people in prison was 28 per cent in 2011-2012. For Aboriginal women, the situation is even worse — 43 per cent of women admitted into custody were Aboriginal.

The reasons for overrepresentation of Aboriginal people in prison are complex. Systemic bias in the Canadian justice system means that Aboriginal people are more likely to be sentenced to prison than non-Aboriginal people. Residential schools have left an intergenerational legacy; those who experienced or witnessed serious violence become accustomed to violence and continue violent practices in their later lives. Some turned to alcohol and drugs as a means to cope, leading to tragic consequences for themselves and their families.

Section 718.2(e) of the *Criminal Code* and the Supreme Court of Canada in the 1999 *R.* v. *Gladue* ruling have stated that judges should consider the background and systemic factors of Aboriginal offenders and make efforts to find alternatives to imprisonment.

In February 2016, Richard Daniel Wolfe, one of the founders of the Indian Posse gang based in Saskatchewan, was sentenced to five years in prison for sexual assault and assault with a weapon. The Crown had initially asked for a 10-year sentence. Wolfe's *Gladue* report played a significant role in Madam Justice Lian Schwann's decision, documenting the intergenerational impacts of residential schools, including racism, abuse, parental neglect and alcoholism.

The Truth and Reconciliation Commission emphasized that, while *Gladue* reports are helpful in sentencing, some jurisdictions provide few resources for the lengthy and expensive process of producing adequate reports. Some judges have also concluded that the reports did not apply to serious offences or a connection between the crime and the legacy of residential schools or other background factors was required. The Supreme Court has reaffirmed in 2012 that these applications of *Gladue* are incorrect.

The Commission cautions that *Gladue* reports are not enough to address overrepresentation of Aboriginal people in prison,

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stating "[e]ven if excellent *Gladue* reports were prepared from coast to coast, they would still fail to make a difference in the amount of Aboriginal overrepresentation

The Federation of Law Societies conference in October 2015 (left to right): moderator Darrel Pink, Executive Director of the Nova Scotia Barristers' Society, Lorne Sossin, Dean of Osgoode Hall Law School, Aimée Craft, law professor at the University of Manitoba and the Honourable Justice Leonard Mandamin, judge of the Federal Court of Canada engaged in a panel discussion on why lawyers need to be culturally competent.

in the prison system without the addition of realistic alternatives to imprisonment."

When working with Aboriginal offenders, lawyers must consider the significant history and legacy of harms our nation has committed against them. Crossin reflects on a pro bono case he took on 30 years ago that demonstrated the devastating impact of residential schools on Aboriginal people. The court had asked him to speak to sentence on behalf of an Aboriginal man named William, who pleaded guilty to a series of violent rapes.

"Later, from jail, William sent me a couple of paintings. They were quite beautiful and I still have them. I was perplexed how such art demonstrating such beauty and grace could burst from such a dark and violent man.

"I had it wrong. The mystery really was how such darkness and violence could burst from such a man of beauty and grace. It was only later I realized the answer to that. As it turned out, William had spent almost his entire life in a residential school. I dare say hundreds of lawyers in our province have hundreds of stories exactly like this."

LAWYERS NEED TO PRACTISE RECONCILIATION

During the criminal prosecution of abusers and the subsequent civil lawsuits, lawyers contributed to survivors' difficult and sometimes painful experiences. The courtroom experience was often made worse by lawyers who lacked the cultural, historical or psychological knowledge to deal with survivors' painful memories. Survivors were revictimized through explicit questioning. In some cases, survivors did not receive appropriate legal services because of lawyers' lack of sensitivity. A few lawyers have even taken advantage of their clients' vulnerability and misappropriated settlement funds or mishandled their cases. Numerous residential school survivors have stepped forward in the past few years with complaints to law societies. At least one lawyer has been disbarred over fees in residential school cases while others are facing disciplinary hearings.

Two of the report's recommendations speak specifically to lawyers. The first called for action to ensure that lawyers receive appropriate cultural competency training. The second called on law schools to require all law students to take a course in Aboriginal people and the law.

Many of Canada's policies and laws on Aboriginal and treaty rights were founded on the racist assumption that Aboriginal people are inferior. Early Europeans relied on the legal basis of the Doctrine of Discovery — the belief that they had the right to claim lands they "discovered" — to justify the colonization of Aboriginal peoples and the abolishment of their rights to their territories, lands and resources. The Truth and Reconciliation Commission recommends laws based on these assumptions should be corrected. Lawyers will likely play an integral role in implementing these changes.

Other recommendations from the report reveal many legal issues that impact Aboriginal communities, including child welfare, overrepresentation of Aboriginal people in custody and the need for enhanced restorative justice programs, the disproportionate victimization of Aboriginal women and girls, the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, unresolved residential school claims, and issues concerning jurisdictional responsibility for Aboriginal peoples. The implementation of recommendations on all of these matters depends on the engagement of lawyers.

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– President David Crossin, QC

LAW SOCIETIES PRIORITIZE CALLS TO ACTION

All 14 Canadian law societies gathered in October 2015 at the Federation of Law Societies conference to participate in a national dialogue on the Truth and Reconciliation Commission's calls to action. Andrea Hilland, Staff Lawyer of Policy and Legal Services at the Law Society of BC, helped develop the agenda. At the conference, human rights lawyer Julian Falconer urged law societies to reflect on the role of lawyers in past and present injustices that affect Aboriginal peoples and to take steps to correct these injustices. The law societies have acknowledged the report's significance and are considering how best to move forward.

The Law Society of BC has identified the response to the recommendations as a priority. Its mandate to uphold and protect the public interest in the administration of justice goes beyond the responsibility of training lawyers. It also recognizes that there must be a balance between the desire to take action immediately and the need to ensure that actions taken are respective of Aboriginal perspectives.

The objective is not to develop additional recommendations, but to determine actionable steps within the Law Society's mandate. Reviewing previous consultations, reports and programs that have already been done will be essential in informing the Law Society's strategy and ensuring the same work is not repeated.

Actions in response to the recommendations should be meaningful, be credible and have a real impact on achieving reconciliation with Aboriginal peoples. The Benchers have identified that the next step will be to consult with members of the Aboriginal legal community and, with their input, develop a strategic plan of action.

"The Law Society is embarking upon a consultative process to determine how to go forward," said Crossin. "That process will disclose and reveal suggestions concerning what lawyers and law firms can do [to practise reconciliation]."

The Truth and Reconciliation Commission states, "Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed." The Law Society aims to create and implement an action plan that contributes to that new vision of healing, respectful relationships and reconciliation.❖

DISCIPLINE ADVISORY

Lawyers to exercise extreme caution when sending items or correspondence received from third parties to clients in correctional facilities

LAWYERS MAY BE asked by a client or by a third party to mail or deliver items or correspondence to inmates in correctional facilities. Lawyers must take particular care to ensure that such materials are not contraband as defined in the *Correction Act,* SBC 2004, c.46, or deemed to be contraband by the correctional facility.

Pursuant to section 17 of the *Correction Act*:

> A person commits an offence if at a correctional centre the person possesses, delivers or sends to or receives from an inmate anything that is referred to in paragraph (a), (b) or (c) of the definition of "contraband"…

The *Correction Act* defines contraband as:

(a) an intoxicant;

(b) if possessed without prior authorization, a weapon, any component of a weapon or ammunition for a weapon, or anything that is designed to kill, injure or disable or is altered so as to be capable of killing, injuring or disabling;

(c) an explosive or bomb, or any component of an explosive or bomb;

(d) if possessed without prior authorization, any currency;

(e) if possessed without prior authorization, tobacco leaves or any products produced from tobacco in any form or for any use;

(f) if possessed without prior authorization, any other object or substance that, in the opinion of an authorized person, may threaten the management, operation, discipline or security of, or safety of persons in, the correctional centre…

Electronic disclosure now being relied upon by the Crown has created an additional dimension to the delivery of contraband that, according to some correctional facilities, includes movies, music, pornography and drugs secreted inside a hard drive. Alternatively, the hard drive itself may be deemed contraband, as some are large enough to be able to contain a weapon or drugs, all of which could result in a threat to the safety and security of correctional staff and inmates.

RELEVANT BC CODE PROVISIONS

Several rules in the *BC Code* set out lawyers' professional obligations to ensure that their actions do not facilitate delivery of contraband:

Rule 2.1-1 (a):

> A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

Rule 3.2-7:

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Rule 3.2-7, commentary [1]:

> Lawyers should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

Rule 6.1-1:

> A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

If asked by a third party or client to mail or deliver items or correspondence, the best practice is for a lawyer to consider whether the request has anything to do with the matter the lawyer has been retained on and, if the answer is no, to decline the request.

CAUTION REGARDING MARKING COMMUNICATIONS AS PRIVILEGED

According to a Correctional Service Canada Commissioner's Directive, correspondence between an inmate and legal counsel is privileged and shall be forwarded unopened to the addressee. This procedure shall normally include the office and/or staff thereof. In addition to the Commissioner's Directive, each correctional facility may have policies and procedures with respect to the treatment of correspondence received from lawyers and/or their office. Lawyers who mail or deliver items or correspondence to their clients in correctional facilities must be aware of the law and other applicable policies and procedures of each correctional facility. They must also inspect and be aware of the contents being mailed or delivered to their client. Lawyers who delegate the administrative duties of mailing or delivering items or correspondence to correctional facilities must still ensure that they are aware of the contents and that the packages are marked correctly.

Correctional facilities have expressed concern that drugs and other contraband are being sent on a regular basis into jails purporting to be from law firms, often on letterhead, when the letters were in fact not sent by a law firm. Letters purporting to be sent by law firms, after raising suspicion, have been intercepted by corrections and drugs have been discovered.

The mutual trust relationship between

all parties to the criminal justice system, including defence counsel, is integral to the proper administration of justice.

CONDUCT REVIEWS ORDERED

Two conduct reviews were recently ordered to address such conduct. In one case, a lawyer sent a hard drive (deemed contraband by the correctional facility) received from a third party to his inmate client. The lawyer failed to supervise his assistant, who labelled the envelope in the usual way, as "solicitor-client privileged." The hard drive was examined and contraband was discovered (CR 2016-01).

In the other case, a lawyer unwittingly sent an illegal drug to his client in a correctional facility. The drug was embedded in letters and photographs, which had been delivered to the lawyer's office from a friend to send to the inmate client. The lawyer inspected the material before sending it to the client but did not discover the drugs. The envelope was examined by corrections and the illegal drug was discovered on one of the pieces of paper (CR 2016-02).

A conduct review is one form of disciplinary action that may be ordered by the Discipline Committee pursuant to Law Society Rule 4-4 (1)(d). A written report is prepared following the conduct review and, once accepted by the Discipline Committee, forms part of the lawyer's professional conduct record.❖

CRA demands for client documents and information

IN PREVIOUS *BENCHERS' Bulletins* (Winter 2010 and Summer 2010), we alerted lawyers to their professional obligations if they receive a notice of requirement to produce information from Canada Revenue Agency (CRA) in connection with a client's information or documents, and in particular a lawyer's duty to ensure that any privilege in the information is maintained unless the client waives it (see rule 3.3-2.1 of the *Code of Professional Conduct)*. Moreover, as noted in the Summer 2014 *Benchers' Bulletin*, the Quebec Court of Appeal declared the provisions of the *Income Tax Act* under which the notices of requirement are issued to be constitutionally invalid (*Chambre des Notaires du Québec* v. *Procureur Général du Canada*, 2014 QCCA 552). That decision was appealed to the Supreme Court of Canada and the appeal was argued in early November. The decision is on reserve.

Until the Supreme Court of Canada issues its decision, the Law Society suggests that a lawyer who receives a notice of requirement to produce information under either the *Income Tax Act* or the *Excise Tax Act* should identify the documents sought by the notice, place them in a sealed envelope and hold the sealed envelope in the lawyer's office safe against risk of loss or destruction. The lawyer should expect that CRA will not seek a compliance order for the production of the documents prior to the decision in *Chambre des Notaires* being rendered.

If, after that decision is released, the sections authorizing notices of requirements are upheld insofar as they apply to lawyers, the lawyer may expect to be contacted by CRA prior to any compliance order being sought. The lawyer can expect to be advised that the lawyer will have seven days within which to provide the documents, after which CRA may bring an application for a compliance order.

We understand that CRA, where it deems there to be an imminent risk of loss, may decide to pursue a compliance order against the lawyer prior to the decision in *Chambre des Notaires* being released, if CRA believes the documents sought are of a kind repeatedly held in the past not to be privileged. We expect these cases to be rare, but in the event a lawyer receives an application for a compliance order in such circumstances, the lawyer should immediately contact Michael Lucas (mlucas@lsbc.org) or Barbara Buchanan, QC (bbuchanan@lsbc.org) at the Law Society to obtain further guidance as to the lawyer's professional obligations.❖

Services for lawyers

Law Society Practice Advisors

Dave Bilinsky
Barbara Buchanan, QC
Lenore Rowntree
Warren Wilson, QC

Practice Advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

All communications with Law Society Practice Advisors are strictly confidential, except in cases of trust fund shortages.

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Optum Health Services (Canada) Ltd. – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families. Tel: 604.431.8200 or 1.800.663.9099.

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Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers. Tel: 604.685.2171 or 1.888.685.2171.

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Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson **Anne Bhanu Chopra** at tel: 604.687.2344 or email: achopra1@novuscom.net.