First Nations Leadership Council

Written Submission to the Special Committee on Reforming the *Police Act*

April 30, 2021

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Dear Special Committee on Reforming the Police Act,

This *Police Act* reform work occurs at a pivotal time. Policing and justice institutions in BC and across Canada have been challenged to reckon with disturbing levels of increasingly puclicized systemic injustice and discrimination. The gravity of this committee's mandate cannot be overstated. For Indigenous peoples, it is literally a matter of life and death.

We must reform the justice system so that it stops perpetuating harm against Indigenous people. We must improve people's encounters with police and the justice system. It is often said that the justice system is broken. However, Indigenous people know that it is functioning exactly as it was intended to – to disposes us of our lands, undermine our political and legal systems, criminalize our people, and destroy our families.

For this reason, we urge the committee to look beyond reform, to transformation. We need a new foundation. The second pathway of the BC First Nations Justice Strategy emphasizes the need to revitalize and stand up First Nations justice systems and laws. It revolves around creating new ways of being and relating to one another as orders of government.

The vision that First Nations people have for self-determined systems of justice must be recognized and upheld. We are not calling for changes to be made around the edges of policing services when it comes to First Nations people. Rather, we need a complete overhaul. We need to have recognized and supported what First Nations have never relinquished; jurisdiction over our territories and peoples, based on our own legal orders, cultural protocols and our own understandings and approach to justice.

To this end, we urge the Special Committee to use the *United Nations Declaration on the Rights of Indigenous Peoples* as the minimum standard for its recommendations, and to fulsomely engage with Indigenous peoples in all stages of your work.

Sincerely,

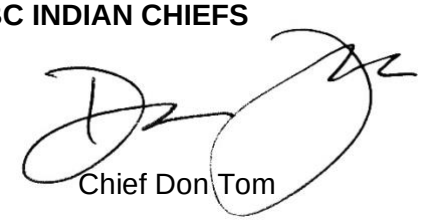
FIRST NATIONS LEADERSHIP COUNCIL

On behalf of the FIRST NATIONS SUMMIT

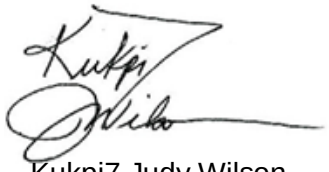
Cheryl Casimer Robert Phillips Lydia Hwitsum

On behalf of the UNION OF BC INDIAN CHIEFS

Grand Chief Stewart Phillip



Chief Don Tom



Kukpi7 Judy Wilson

On behalf of the BC ASSEMBLY OF FIRST NATIONS:

Regional Chief Terry Teegee

1. DEDICATION

This submission is made in recognition and honour of all those who have experienced the injustice of colonial policing and justice systems. We extend our gratitude to all those who have gone before us, sharing their truths, and dedicating their lives to create the change we continue to advance today.

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3. SUMMARY OF RECOMMENDATIONS

Recommendation 1: Accelerate work to establish a dedicated Secretariat, located centrally within government, to support proper and enhanced engagement between the Province and First Nations directly regarding the implementation of the UN Declaration in BC. The mandate of the Secretariat needs to be characterized by work that is strategic and cross-government/systemic in nature.

Recommendation 2: The historic opportunity that *Police Act* reform presents must be fully taken advantage of, and must be accompanied by sustained political will and resourcing, if we are to restore trust and uphold justice. It is not enough to make adjustments to the framework. Rather, new legislation must support a transformed reality for those today and generations to come through principled and bold action.

Recommendation 3: In order to uphold the province's obligation to ensure laws are in alignment with the UN Declaration, ensure the *Police Act* upholds the rights of Indigenous peoples: to be free of any kind of discrimination; the right to self-determination and participation in decisions that affect them; the right to liberty, peace and security; and the right to establish our own systems and institutions. This should include fulsome processes and capacity support for First Nations leadership to participate in the development and review of new and amended legislation.

Recommendation 4: Align *Police Act* reform work with the BC First Nations Justice Strategy and work in partnership with the BC First Nations Justice Council and First Nations communities to do so.

Recommendation 5: *Police Act* reform should adopt a Gender-Based Analysis Plus approach that is distinctions-based, accounts for historical and present-day power dynamics, and integrates Indigenous knowledge. Part of this approach should include work to identify and rectify data, capacity, and knowledge-related gaps that hinder the implementation of GBA+. Partnership with First Nations should inform the respectful integration of Indigenous knowledge.

Recommendation 6: Policing and justice reform must be grounded in and address the myriad of existing findings and recommendations. There must be accountability for those who contributed their voices to earlier recommendations that have not been fully implemented. The time for action is now.

Accountability, responsiveness, and respect for the truths, time, and energy of those who participated in previous initiatives, and those who make presentations and submissions to the Special Committee must anchor this process and outcomes.

Recommendation 7: Legislation must explicitly address anti-Indigenous systemic racism and mandate concrete steps to counter racism and establish a vision for justice and substantive equality.

These provisions should be accompanied by mechanisms to conduct public, systemic reviews of practices and policies that disproportionately negatively impact Indigenous peoples. Data must be reported in a number of areas, including use of force, police procurement of paramilitary unit and military equipment, and many others, to better understand the current reality of policing and to measure progress towards change.

Recommendation 8: The practice of street checks should be eliminated.

Recommendation 9: Immediately establish an Independent Commission of Inquiry into the Forced Removal, Arrest and Imprisonment of Indigenous Peoples as a result of Court Injunctions for Resource Development Projects, with a mandate to support the full implementation of Free, Prior and Informed Consent and to find alternative solutions to these conflicts that align with a government-to-government relationship and Articles 10 and 32 of the UN Declaration. The Commission of Inquiry must be led by Indigenous people and should be observed and audited by the UN Special Rapporteur on the Rights of Indigenous Peoples or other international representative, to maintain its legitimacy in the eyes of Indigenous peoples in BC.

Recommendation 10: Establish a Protocol for Police Engagement with Indigenous Peoples. This protocol should, at minimum: Comply with Charter principles for engagement by police or others in the justice system with Indigenous land and water protectors and other Indigenous protestors, recognize the sui generis nature of Indigenous protests relating to the potential of irreversible harm to Indigenous lands and waters in the context of unresolved Aboriginal and Treaty rights claims, and reflect international principles of self-determination and Indigenous title recognition outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[1] The Protocol should include ceasing the use of injunctions for private corporations against Indigenous peoples.

Recommendation 11: Legislation must address discretion by carefully weighing the degree, scope, focus, and locus of discretion given to members of police services with an eye toward standardizing protocols to restrict discretion, and create opportunities to divert Indigenous peoples from the justice system.

Recommendation 12: Implement a multi-pronged Indigenous de-escalation strategy, including a no-carry policy in Indigenous communities, or in urban areas with large Indigenous populations, and on calls involving Indigenous identified individuals as a first response.

This should be accompanied by vigorous and ongoing Indigenous trauma-informed de-escalation training and teams for Police, which include Indigenous Peoples and mental health professionals.[2]

Recommendation 13: Legislation should ensure that all police forces operating within BC must follow the BC Policing Standards, and rigorous accountability mechanisms for the enforcement of these standards must be in place.

A fulsome review of use of force standards and the use of conducted energy weapons is required. Standards must explicitly prioritize an evidence-informed, trauma-informed, non-punitive, destigmatizing, and harm-reduction focused approach.

Recommendation 14: The use of all lethal weapons, restraint devices, and police dogs must be eliminated. Officers must be equipped to de-escalate situations without perpetuating violence.

Recommendation 15: Expand the use of police body cameras in First Nations communities and access to video records.

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[1] National Indigenous Justice Summit, “Immediate Action Points.”
[2] National Indigenous Justice Summit.

Recommendation 16: Searches and monitoring of Indigenous women and girls by male officers must be eliminated.

Recommendation 17: Create a class of unarmed community peacekeepers.

Recommendation 18: Implement the Calls for Justice and engage specifically with survivors and families regarding improvements and supports required regarding missing person investigations.

Recommendation 19: Create enhanced mechanisms to provide financial support to the families of missing and murdered Indigenous peoples.

Recommendation 20: Ensure written procedures governing intimate partner violence are consistent with the provincial policy on relationship violence, including trauma informed practice.

Recommendation 21: Ensure particular attention is paid to ensuring resourcing and capacity in northern and remote areas and communities.

Recommendation 22: Written procedures should be in place governing investigations likely to involve persons in vulnerable circumstances, including, but not limited to:

(a) Intimate partner violence;
(b) Individuals vulnerable to the opioid crisis;
(c) Sexual assaults;
(d) Offences related to prostitution;
(e) Youth crime; and
(f) Incidents motivated by racism, bias, prejudice or hate.

Recommendation 23: Written procedures and guidance must be available to officers governing police response to persons in vulnerable circumstances, including, but not limited to:

(a) Victims or witnesses who may be vulnerable due to age (i.e., children or older adults);
(b) Persons who may have communication barriers (e.g., language, hearing or speech);
(c) Victims or witnesses who have outstanding warrants against them, or who have precarious legal status;
(d) Persons living in public spaces;
(e) Persons with apparent mental health and/or substance use problems;
(f) Individuals vulnerable to the opioid crisis;
(g) Police response to persons who are transgender or non-binary.

Recommendation 24: Legislation must explicitly prioritize an evidence-informed, trauma-informed, non-punitive, destigmatizing, and harm-reduction focused approach throughout training.

All members should have thorough training in de-escalation, implicit bias, intercultural competency, trauma-informed practice, and on the ground training and education with the local First Nations they serve. All training programs should be developed in collaboration with Indigenous experts and communities.

All officers should complete a basic level of trauma-informed training, regardless of whether they are specifically responsible for conducting interviews with vulnerable witnesses or victims.

Ensure all front-line officers have completed Evidence-based, Risk-focused Domestic Violence Investigations, and Assessing Risk and Safety Planning in Domestic Violence Investigations.

Ensure that all front-line workers understand the intersection between Domestic Violence Investigations and Child and Family Community Services Act investigations as it relates to the removal of children.

We recommend that these types of issues must be given much more emphasis at the outset, as well as throughout members' careers.

Recommendation 25: First Nations must have a meaningful choice among policing arrangements, from the ability to establish their own police forces and priorities to meaningful collaboration and partnerships with RCMP and municipal police forces. A relationship-based approach to policing transformation, which includes the relationships between police and other service providers can help meet the needs for wholistic safety in communities.[3]

The Government of BC must work in partnership with First Nations governments and the federal government to develop a legislative basis for First Nations policing that recognizes the inherent title and rights, and treaty rights of First Nations, responds to the imperatives of the UN Declaration, the TRC Calls to Action, and the Calls for Justice, and which is funded to a level that provides for substantive equality.

Recommendation 26: Opportunities for discretion at the policing level that would support diversion from the criminal justice system should be considered. The First Nations Justice Strategy emphasizes a "presumption of diversion" at every stage of the criminal process.

Recommendation 27: Recruitment and promotion practices must proactively support the equitable representation of Indigenous peoples within the police system, including in senior level positions. Workplace policies must also be in place to ensure Indigenous employees are supported, feel welcome in the workplace, and that the workplace is free from harassment and discrimination.

Recommendation 28: A reallocation of resources to support community-based mental health response teams and social services is necessary to meaningfully address the over-reliance of police forces in responding to individuals experiencing a mental health crisis. Police forces should only be called upon in the most extreme circumstances, and when appropriately trained in trauma-informed de-escalation techniques.

Recommendation 29: Treat addictions as a health matter, rather than a criminal justice matter within every step of the justice system by creating policies that support diversion and access to wrap around mental health and addictions supports.

Recommendation 30: Police are often called upon to enforce removal orders, and so must be equipped with the proper understanding and practice standards to recognize Indigenous jurisdiction when it comes to children and families, and the federal legislation.

[3] *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. xvi

Recommendation 31: Increase financial support and support increased access to the Aboriginal Head Start in Urban and Northern Communities Program.

Recommendation 32: Build in legislative mechanisms that support partnerships and capacity among community organizations, including social services providers, mental health supports, victims' services, and affordable housing, with the goal of providing holistic, community-based responses and supports, rather than police-based responses to complex social issues.

Recommendation 33: Build in legislative mechanisms to collect data and conduct systemic reviews on excessive force and deaths in custody and that includes ethnicity, gender, and age. Work with Indigenous peoples to ensure Indigenous data sovereignty and governance principles are respected.

Recommendation 34: Legislation must support accountability at the local level, including appropriate mechanisms for appeals that do not overrule elected leadership.

Recommendation 35: The legislative framework should set a strong basis for enhancing partnerships, coordination, integration, and communication, and First Nations jurisdiction within all sectors.

Recommendation 36: Legislation should make the following fundamental changes to the OPCC's investigative powers:
The *Police Act* should be amended to give the Office of the Police Complaints Commissioner freestanding powers of inquiry and the resources and discretion to:

- retain jurisdiction over investigations of misconduct rather than forwarding them to police departments for investigation
- retain jurisdiction over policy and service complaints and, if deemed necessary, conduct systemic reviews, rather than monitor policy issues from arms-length
- hold public hearings, call witnesses, commission evidence, and impose disciplinary sanctions on officers.

Recommendation 37: Full civilianization of the OPCC: The *Police Act* should set out a timeline and a plan for the full civilianization and accompanying training of OPCC staff, including management, supervisory staff, and investigators.

Recommendation 38: Section 83(3) of the *Police Act* should be amended such that the police officer in question not be informed of the name of the complainant should the complainant choose to remain anonymous.

Recommendation 39: Reporting on allegations of misconduct affecting Indigenous people - Pursuant to section 177(e) and (f), the *Police Act* should require mandatory documentation and reporting of all public trust complaints and policy and service complaints where the complainant or affected persons are Indigenous, and the percentage of those complaints that are investigated and/or substantiated. This information should be made clearly available to the public in the Annual Report.

Recommendation 40: Indigenous representation in the OPCC - The *Police Act* should require the OPCC to hire Indigenous staff, including into decision-making roles, and to form and train an Indigenous committee that can be part of admissibility reviews, investigation oversight, and reviews of discipline authority decisions, especially when the complainant or affected person is Indigenous.

Recommendation 41: Indigenous Civilian Oversight - Legislation should provide for the establishment of an independent Indigenous civilian oversight body for all police misconduct cases involving Indigenous peoples and systemic issues.

Recommendation 42: Independent investigative and oversight bodies must be properly resourced with legislated funding.

Recommendation 43: Legislation should provide for standardized training for investigators under the *Police Act*

Recommendation 44: The legislature must act to bring municipal jail guards in RCMP-policed municipalities under an appropriate oversight body so that the public complaints process includes them. The RCMP operating in BC must also be brought under provincial oversight bodies as the national Civilian Review and Complaints Commission for the RCMP lacks accountability and timeliness. Special provincial constables must also have enhanced, civilian oversight as has been recommended for the OPCC.

Recommendation 45: Create an integrated independent unit, as was contemplated in 2007 and again in the 2019 review, that is cost-shared between police departments and the OPCC and includes civilian analysts to handle investigations of the public trust complaints involving abuse of authority allegations.

Recommendation 46: Immediately order an independent audit of the substantive content and results of complaint files, equal to or greater than the depth of that conducted in 2007, to ascertain whether amendments to the *Police Act* have resulted in improvements to the integrity of investigations, especially as regards abuse of authority complaints. Include demographic data as to ethnicity and gender of complainants, and any trends, in this audit.

Recommendation 47: The FNLC recommends implementation of Recommendations 6 and 7 of the Josiah Wood Inquiry.

Recommendation 48: Fully and immediately civilianize the IIO. Conduct an immediate audit of the IIO to review its operations and progress towards civilianization

Recommendation 49: Sexual assault is a criminal offence and constitutes serious harm. It must be included in the IIO's mandate through changing the definition of "serious harm" in Part 7.1 of the *Police Act*.

Recommendation 50: Immediately implement the 2015 Recommendation to "aggressively pursue" the use of body-worn cameras by all police agencies in BC, as a protective measure for Indigenous lives as well as to improve police accountability. Amend the *Police Act* and update the Provincial Policing Standards to make their use mandatory across police agencies.

4. BACKGROUND

4.1 Mandate of the First Nations Leadership Council

The British Columbia Assembly of First Nations (BCAFN), the Union of BC Indian Chiefs (UBCIC), and the First Nations Summit (FNS), working together as the First Nations Leadership Council

(FNLC), are pleased to make a written submission to inform the work of the Special Committee on Reforming the Police Act (Special Committee).

The FNLC works to advocate for and develop coordinated approaches to issues relevant to First Nations communities throughout the province. Together, the membership of the FNLC organizations is comprised of all 204 First Nations in BC. The mandate and work of the FNLC is collectively directed by Nations' governments through resolutions of the three political organizations. The FNLC is not a Nation, and therefore does not hold Aboriginal Title, Rights or Treaty Rights; the FNLC acknowledges that any government-to-government relationship is between individual Nations and the Crown, and is clear that the Crown's duty to consult is with individual Nations and not with the FNLC.

The BCAFN, UBCIC, and FNS each have longstanding mandates, received through resolutions by Chiefs and leaders, to advance and uphold the rights and interests of First Nations with respect to the justice system, policing, and the complex social issues this Special Committee is tasked with considering.

The FNLC was instrumental in the establishment of what is now known as the BC First Nations Justice Council[4], and unequivocally supports the full implementation of the BC First Nations Justice Strategy[5]. The FNLC also supports the development of a National First Nations Justice Strategy[6] and that First Nations Policing be supported as an essential service[7].

The FNLC organizations have also supported a number of resolutions seeking to address violence and discrimination against women, girls, and two spirit, lesbian, gay, bisexual, trans, queer, questioning, intersex, and asexual (2SLGBTQQIA+) people[8]; homelessness[9]; the opioid crisis[10]; and First Nations jurisdiction regarding children and families[11]. The FNLC has played a key role in supporting the development and ongoing implementation of the *Declaration on the Rights of Indigenous Peoples Act*[12].

4.2 Mandate of the Special Committee

The Special Committee has been established to:

[4] Resolutions: BCAFN 2014-05e, 2017/10g, and 2019/02; FNS 1014.09, 0217.23, and 0219.06; UBCIC 2019-15
[5] Resolutions: BCAFN 2020-12; FNS 0220.06; UBCIC 2020-12
[6] Resolution: BCAFN 2020-16
[7] Resolutions: BCAFN 2019-28
[8] Resolutions: BCAFN 2017-10h, 2018-01, 2018-03d, 2018-16, 2019-07g, 2019-21a, 2020-11 (SCA), and 2020-06 (AGM); UBCIC 2019-11, 2019-25, 2019-44, and 2021-19
[9] Resolutions: BCAFN 2019-08, and 2020-17; UBCIC 2021-22, and 2021-23
[10] Resolution: BCAFN 2019-07a; UBCIC 2019-13
[11] Resolutions: BCAFN 2019-01; FNS 0616.21, 1016.11, 0217.19 and 0619.15; UBCIC 2019-20, 2019-26, 2019-50
[12] Resolutions: BCAFN 2019-08, and 2020-07; FNS 1020.04; UBCIC 2020-20

… examine, inquire into, and make recommendations to the Legislative Assembly on the following:

1. Reforms related to independent oversight, transparency, governance, structure, service delivery, standards, funding, training and education, and any other considerations which may apply respecting the modernization and sustainability of policing under the *Police Act* (R.S.B.C. 1996, c. 367) and all related agreements.

2. The role of police with respect to complex social issues including mental health and wellness, addictions, and harm reduction; and in consideration of any appropriate changes to relevant sections of the *Mental Health Act* (R.S.B.C. 1996, c. 288).

3. The scope of systemic racism within British Columbia's police agencies, including the Royal Canadian Mounted Police, independent municipal police and designated policing units, and its impact on public safety and public trust in policing.

4. Whether there are measures necessary to ensure a modernized Police Act is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (2007), as required by section 3 of the *Declaration on the Rights of Indigenous Peoples Act* (S.B.C. 2019, c. 44).

It is with the aforementioned role and mandate in mind that the FNLC makes this submission in order to inform the recommendations of the Special Committee.

At the outset, we must note that the mandate of the Special Committee was established without any level of engagement with First Nations leadership. In order to align with the *Declaration on the Rights of Indigenous Peoples Act*, the process of *Police Act* reform must involve meaningful partnership with Indigenous peoples. It is evident that the current mechanisms of the provincial government itself must undergo transformation in order to implement the *Declaration on the Rights of Indigenous Peoples Act.*

First Nations have long advocated for the BC Government to become better organized for a relationship with First Nations that aligns with the legal pluralism that exists under the Constitution Act and First Nations' inherent jurisdiction and self-determination rights. The *Declaration on the Rights of Indigenous Peoples Act* requires the BC Government to appropriately organize itself in order to achieve literacy and competency within the machinery of government regarding the standards and objectives of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration), Indigenous rights, Crown obligations, and carrying out steps to fulfilling these commitments.

It will be the government's responsibility to carry forward the work of *Police Act* reform once the Special Committee has fulfilled its mandate. Our first recommendation addresses the structure and capacity of government to work with First Nations leadership as full partners in justice reform and transformation.

Recommendation 1: Accelerate work to establish a dedicated Secretariat, located centrally within government, to support proper and enhanced engagement between the Province

and First Nations directly regarding the implementation of the UN Declaration in BC. The mandate of the Secretariat needs to be characterized by work that is strategic and cross-government/systemic in nature.

5. FIRST NATIONS VISIONS, LAWS, AND JUSTICE SYSTEMS

First Nations in BC are strong, unique, evolving, self-determining and self-governing peoples. First Nations hold inherent rights and responsibilities in relation to their traditional territories, which have never been ceded, released, or surrendered. There are 204 First Nations throughout what is now known as British Columbia. We hold distinctive rights, which are affirmed in the Canadian *Constitution Act*, numerous court decisions, and the UN Declaration, for which the government of BC has created a legal framework for implementation through the *Declaration on the Rights of Indigenous Peoples Act*.

First Nations peoples' collective rights and jurisdiction flow from the authority of Indigenous legal orders, which pre-exist Canadian law and extend across First Nations' traditional territories. In many cases, Indigenous legal orders have been fragmented by the imposition of colonial law. However, many First Nations are choosing to revitalize and rebuild their legal orders within, alongside, and outside of Canadian legislative frameworks.

Indigenous legal orders are distinct from one another, and encompass distinct areas of law, including criminal law. They encompass legal procedures related to governance, decision-making and dispute resolution.[13] Sources of law within Indigenous legal orders include, but are not limited to: formal oral histories; intellectual and cultural property such as stories, songs, dances and crests; patterns of interaction between people and the natural world; and public deliberative processes. Legal principles, procedures, rights and obligations expressed by these sources can and do inform law-making regarding crime prevention, sanctions, victim protection, and community restoration. Indigenous legal orders, especially as they pertain to criminal law and law enforcement, are not frozen in time – rather, they can and do evolve and adapt to present circumstances just as Canadian law does. Indigenous peoples are reasoning and reasonable[14], and Indigenous forms of legal reasoning and democracy include the ability to reason through criminal law. Within the criminal justice system as in with other areas of law, Indigenous legal approaches are often referred to as "culturally appropriate". The FNLC maintains that the language of cultural appropriateness must be in many cases replaced with the language of legal pluralism, recognizing that Indigenous justice approaches have a legal as well as a cultural character, and reflecting the reality of Canada as a multi-juridical society.

> Research and community engagement with BC First Nations and justice system partners culminated in this 2019 vision for the Justice Strategy:
>
> > *Transforming the relationship of First Nations with the criminal justice system through Nation to Nation partnerships, with a goal of advancing First Nations' self-determination and self-governance through the application of First Nation laws, traditions, and jurisdictions, making changes to the existing system and its*

[13] Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent", in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45 at 56

[14] Supra note 24.

administration, and building capacity for Nations to increase holistic wellness, safety and security for their communities.

– BC First Nations Justice Summit participants, 2019[15]

The BC First Nations Justice Strategy works along two tracks to revitalize First Nations legal traditions and structures across the province, while at the same time, addressing the crisis of systemic racism and discrimination that First Nations peoples experience within the existing systems through reform.

In this way the Strategy will, "reduce the number of First Nations people who become involved with the criminal justice system, improve the experience of those who do, increase the number of First Nations people working within the justice system and support First Nations to restore their justice systems and structures."[16] The systemic racism that exists in policing systems in BC and Canada is part of a continued system of colonialism that police forces defend and perpetuate. Only sweeping institutionalized changes will help alleviate the structural oppression that exists against First Nations peoples today.

The values of Canadian justice system conflict with Indigenous values. Many Indigenous understandings of justice are based on individual responsibility to the collective, and the land. Instead of discipline and punishment, we aim for restoration and harmony. The land, family, elders, and the community are all involved.[17]

Moreover, as observed by Norm Leech, Executive Director of the Vancouver Aboriginal Community Policing, at a First Nations Justice Council Engagement Forum in 2019, "we are not in conflict with the law, the law is in conflict with our continued existence and use of the land."[18]

While the Special Committee undertakes its work regarding *Police Act* reform, the vision that First Nations people have for self-determined systems of justice must be recognized and upheld. We do not need to tweak policing services in BC and Canada when it comes to First Nations people. We need a complete overhaul. We need what First Nations have never relinquished; jurisdiction over our territories and peoples, based on our own legal orders and our own understandings of justice.

Recommendation 2: The historic opportunity that *Police Act* reform presents must be fully taken advantage of, and must be accompanied by sustained political will and resourcing, if we are to restore trust and uphold justice. It is not enough to make adjustments to the framework. Rather, new legislation must support a transformed reality for those today and generations to come through principled and bold action.

[15] BC First Nations Justice Council, https://bcfnjc.com/why-a-bc-first-nations-justice-strategy/ (accessed February 5, 2021)
[16] BC First Nations Justice Council, https://bcfnjc.com/strategy-by-sector/ (accessed February 5, 2021)
[17] Daniel Bellegarde, director of the Canadian Association of Police Governance, testimony, in the National Inquiry Final Report p 689
[18] Participant. First Nations Regional Justice Forum. Chilliwack, July 2019.

6. IMPLEMENTING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

While the Special Committee's terms of reference mandate the Committee to explore "whether" there are measures necessary to ensure alignment of the *Police Act* with the UN Declaration, our position is that the more appropriate question is "how" alignment and implementation of the UN Declaration should be supported throughout the processes of *Police Act* modernization. Section 3 of the *Declaration Act* obligates the Province to "take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration". *Police Act* reform is a pressing and clear opportunity to do this properly.

There are procedural and substantive measures that must be taken and enacted to ensure a new or amended *Police Act* is in alignment with the UN Declaration. Under the *Declaration Act*, these measures constitute legal imperatives.

The UN Declaration is a powerful international human rights tool, which:

> … establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.[19]

It affirms the right to self-determination for First Nations and includes a number of articles which specifically point to issues being dealt with by the Special Committee:

> Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> Article 7 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

[19] "United Nations Declaration on the Rights of Indigenous Peoples"

> Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect 16 their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Article 22 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.
>
> Article 23 Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
>
> Article 34 Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

These articles point to several major imperatives: Measures to ensure alignment with the UN Declaration would include ensuring the *Police Act* upholds the rights of Indigenous peoples: to be free of any kind of discrimination; the right to self-determination and participation in decisions that affect them; the right to liberty, peace and security; and the right to establish our own systems and institutions.

A key component of implementing the UN Declaration involves ensuring the full participation and free, prior, and informed consent of Indigenous peoples in decisions that impact them. Changes to the *Police Act* will clearly have implications for First Nations peoples. Thus, measures must be taken to ensure that First Nations are able to partner in amending and developing legislation in a meaningful way. The *Police Act* modernization process must ensure that First Nations governing bodies are engaged on a government-to-government basis that respects the inherent Rights, Title, and Treaty Rights of First Nations. This means developing processes for consultation and cooperation with Indigenous peoples, including expert review of the Bill by our justice and legal experts, and an opportunity for our leaders to review the Bill.

In this case, self-determination means both recognizing First Nations jurisdiction and ensuring that First Nations have the requisite authorities and capacity to choose and develop for themselves, how they would like to see policing, justice, and community safety initiatives operate within their territories; and how those activities should be governed. It means that no one but First Nations themselves should determine how they promote well-being and community safety for their peoples. Whether First Nations wish to establish partnerships, service agreements, or their own police services, they should be respected and empowered to do so.

Finally, a key imperative of the UN Declaration is that proactive measures and an intersectional lens is required to promote substantive equality. We must ensure that the "rights to life, physical and mental integrity, liberty and security of person" are guaranteed on an equal basis to all people, regardless of their identity and experience. This requires particular consideration for the rights of women, gender-diverse people, children, elders, those living with disabilities, those living with addictions, those experiencing homelessness, those engaging in sex work, and both status and non-status First Nations, regardless of their place of residence.

Recommendation 3: In order to uphold the province's obligation to ensure laws are in alignment with the UN Declaration, ensure the *Police Act* upholds the rights of Indigenous peoples: to be free of any kind of discrimination; the right to self-determination and participation in decisions that affect them; the right to liberty, peace and security; and the right to establish our own systems and institutions. This should include fulsome processes and capacity support for First Nations leadership to participate in the development and review of new and amended legislation.

6.1 BC First Nations Justice Strategy

The BC First Nations Justice Strategy (Justice Strategy) sets out a roadmap to fundamentally transform the justice system in BC for both Indigenous and non-Indigenous people, and ensure the *Police Act* is consistent with the UN Declaration. At a high level, we need to:

1. reduce the number of First Nations people who become involved with the criminal justice system;
2. improve the experience of those who do;
3. address violence against Indigenous people, especially women, girls and 2SLGBTQQIA+ individuals;
4. increase the number of First Nations people working within the justice system;
5. improve access to justice services by Indigenous people; and
6. support First Nations to restore their Indigenous justice systems and structures.

The Justice Strategy sets out a path to accomplish this vision along two tracks – reform, and transformation. The foundation for criminal justice reform presented in the Justice Strategy is embedding and implementing a presumption of diversion for Indigenous peoples throughout the system, from policing to courts to corrections. This presumption must place an onus on decision-makers to justify decisions not to divert Indigenous peoples from the system. As the BC First Nations Justice Council (BCFNJC) observes, a presumption of diversion is much harder to implement in the absence of trust-based relationships between police and First Nations communities, such as when the RCMP is the dominant law enforcement provider for a First Nation.

The Justice Strategy also observes that the over-representation of Indigenous peoples in the criminal justice system corresponds with their under-representation in roles of authority and responsibility within the system. It also recognizes that reform of the existing system and the transformation and rebuilding of Indigenous justice systems are interrelated. The Justice Strategy states: "In order to build capacity toward an Indigenous based justice system, structures must be put in place within the Province to ensure this work proceeds as a sustainable, and funded, priority led by Indigenous people. It calls for:

1. First, a new integrated, strong and coordinated cross-ministry structure to help lead the implementation of this Strategy throughout government including influencing social sector areas that provide health and housing supports for individuals in the justice system;
2. Second, Indigenous people must be in the lead throughout the system in championing this work.

With respect to police and justice system oversight, the Justice Strategy states that the BCFNJC will have an oversight role with respect to criminal justice system conduct that includes the development of a unique process for First Nations complaints about policing service.

The rebuilding of Indigenous Justice Systems includes policing, law enforcement and uniquely Indigenous forms of ensuring community safety. The Justice Strategy calls for the development, implementation, and coordination of 15 Indigenous Justice Centres across the province[20], which will integrate and inform Indigenous policing. While there will be a provincial framework within which each Justice Centre operates, each centre will uniquely reflect the needs and approaches of First Nations in each region. As law enforcement is interconnected with every aspect of justice, the full funding and support of Indigenous Justice Centres is an important aspect of First Nations policing as an essential service.

The Justice Strategy's policing-specific approaches include:

Strategy 22: Establish new models of structured relations between First Nations, the RCMP, and other police forces, that support new strategic and policy level, as well as community level, and cooperative change, while supporting greater community-level police forces.[21]

> A. Develop protocols between the BCFNJC and the RCMP, as well as the BCFNJC and other local police forces in BC.
>
> B. Co-Develop and implement a new approach to Community Tripartite Agreements.
>
> C. Co-develop a framework for expansion and transition to increased community-based First Nations police forces.
>
> D. Create a long-term, sustainable plan to support First Nations in developing teams of justice workers within their communities, including an investment fund that can be accessed by First Nations to retain and build capacity.

These Strategies clearly respond to the inadequacies of the First Nations Policing Program as it has been implemented in BC, which will be explored later in this submission. A new approach to Community Tripartite Agreements will address the need for the 132 First Nations currently served by the RCMP under this program to receive better funded, safer, and more culturally appropriate policing, on par with and exceeding other police services in the province. A simultaneous framework for the expansion and transition to community-based First Nations police forces will build capacity and resources for more and broader Self-Administered, independent police forces,

[20] BC First Nations Justice Strategy
[21] BCFNJS, p. 49.

so that BC First Nations can be in control of policing within their communities in accordance with their inherent right to self-determination.

Recommendation 4: Align *Police Act* reform work with the BC First Nations Justice Strategy and work in partnership with the BC First Nations Justice Council and First Nations communities to do so.

7. AN INTERSECTIONAL APPROACH

First Nations people represent a dynamic, distinct, and growing population within the province of BC. In addition to the distinguishing characteristic of First Nations as distinct rights holders, and peoples with unique social, economic, cultural, and political values and contexts, it is crucial that the demographic characteristics of First Nations are taken into account when developing law, regulation, policy, and committing resources. Demographically, First Nations are distinct from the general population and from other Indigenous populations. An intersectional lens must be applied to interrogate and respond to how First Nations people experience and are impacted by laws, regulations, policy, and practice in diverse ways.

The Government of Canada has developed tools for adopting Gender-Based Analysis Plus (GBA+), which is "an analytical process used to assess how diverse groups of women, men and non-binary people may experience policies, programs and initiatives." Early approaches focused specifically on gender. Now, "the "plus" in GBA+ acknowledges that GBA+ goes beyond biological (sex) and socio-cultural (gender) differences. We all have multiple identity factors that intersect to make us who we are", and GBA+ considers these too.[22]

More recently, several Indigenous-led initiatives have worked to develop culturally-relevant, First Nations or Indigenous-specific approaches to GBA+. Mainstream GBA+ typically do not foundationally grapple with the historical and present-day power structures of colonialism, racism, sexism, homophobia, biphobia, and misogyny. They also do not foundationally integrate Indigenous knowledge, including methodologies, values, and ways of knowing, understanding, and being.

The Native Women's Association of Canada has developed a guide affirming a framework which adopts the following 4 pillars[23]:

1. Distinctions-based
2. Gender diversity
3. Intersectionality
4. Indigenous knowledge and Indigenous women's knowledge

[22] Women and Gender Equality Canada https://cfc-swc.gc.ca/gba-acs/course-cours/eng/mod00/mod00_02_01.html
[23] Native Women's Association of Canada, A Culturally-Relevant Gender-Based Analysis Starter Kit, July 14, 2020, https://www.nwac.ca/

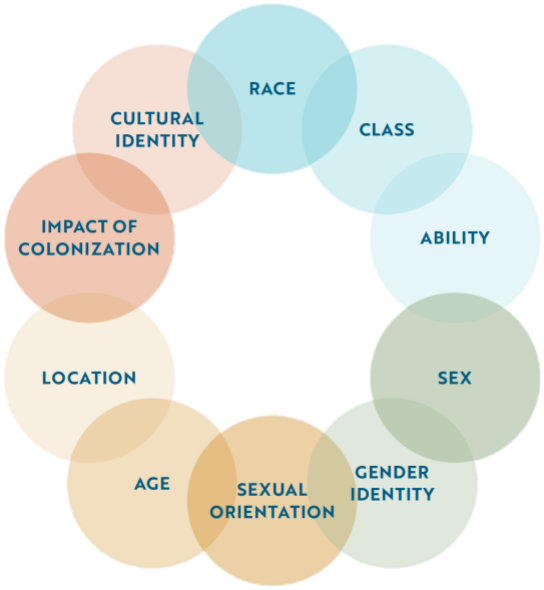

Figure 1: Intersectionality, From *NWAC CR-GBA Starter Kit 2020*

While data and capacity gaps present challenges in conducting a thorough First Nations-specific GBA+ in this submission, the considerations and recommendations outlined in this submission are made with these principles at the centre.

Recommendation 5: *Police Act* reform should adopt a Gender-Based Analysis Plus approach that is distinctions-based, accounts for historical and present-day power dynamics, and integrates Indigenous knowledge.

Part of this approach should include work to identify and rectify data, capacity, and knowledge-related gaps that hinder the implementation of GBA+. Partnership with First Nations should inform the respectful integration of Indigenous knowledge.

8. INJUSTICE SYSTEM

8.1 The Scope and Impact of Systemic Racism

Leaders of institutions across Canada, and members of the Special Committee, have been challenged to address systemic racism. This is urgent work, given the prevalence of systemic racism in Canada's institutions and broader society. The systemic nature of racism in healthcare was exposed in Hon. Dr. Mary Ellen Turpel-Lafond's recent report, *In Plain Sight*. Systemic and deeply troubling issues were found in every aspect and stage of the healthcare system. We know that it is no different when it comes to justice and policing.

It is often said, in the myriad of reports, commissions and studies over the decades, that policing and the justice system in Canada have failed Indigenous peoples. The truth is that they are functioning exactly as they were originally intended to – to remove and dispossess us from our lands and territories, to fragment our communities, to destroy our cultures and to disrupt our systems of law and governance. This is the legacy of colonial mindsets, which continue to

fundamentally shape institutions and guide the actions of individuals within the larger system that permits and upholds colonial violence.

We often hear people attribute incidents of mistreatment and negligence to individual "bad apples" within police forces, and insist that there are adequate standards, and procedures for response and discipline in place. This is a critical failure to acknowledge the root causes of racist incidents. Anti-Indigenous bias can be explicit or implicit. Existing inequalities, laws, regulations, policy, funding, and practice can also reinforce inequitable outcomes, apart from, or in conjunction with an individual's bias. Addressing systemic racism must go beyond having appropriate policies and "good" people. That is a start, but transformation has to happen in implementation, accountability, and practice in each and every interaction with the justice system.

This status quo is often perceived as normal, naturally occurring, or not controllable. However, the systemic factors that result in alarming statistics and personal tragedies for Indigenous peoples are not natural nor do they constitute unavoidable outcomes that society must accept as normal. Each factor arises from action, and is part of a cause-and-effect relationship. These factors should be the focus of intervention and must be accounted for in legislative reform.

First Nations in BC and Canada have faced, and continue to experience, genocide through government legislation, practices, and policies. This includes the forced removal of our peoples from our territories, the stealing of our children from our families via the residential school system, Sixties Scoop, and child welfare system, and the criminalization of our laws and culture. The foundation and rationale for these policies is rooted in colonialism and racism toward Indigenous peoples. Police have been the frontline agents and enforcers of these policies, marking the relationship between Indigenous peoples and the police as one of adversary and oppression.

The Royal Canadian Mounted Police were instrumental in enforcing Canada's early policy and legislation against Indigenous peoples, including the *Indian Act*, *Criminal Code*, *Juvenile Delinquents Act*, and *Trespass Act*, among others.

Early on, Indian agents who acted as the judiciary, and police were part of a discriminatory justice system in which Indigenous peoples were subject to conflicts of interest and criminalized for practicing their way of life, and exercising fundamental human rights.

> All Indian agents automatically were granted judicial authority to buttress their other powers, with the result that they could not only lodge a complaint with the police, but they could direct that a prosecution be conducted and then sit in judgment of it. Except as accused, Aboriginal persons were excluded totally from the process.[24]
>
> … official disapproval and the pressure generated by it, harassment from the Indian agents, use of the Indian Act trespass provisions to evict Indians from other reserves, and mass arrests and trials did have the desired effect of eliminating or at least undermining the potlatch and other traditional ceremonies in many cases. This was particularly so under the leadership of Deputy Superintendent Duncan Campbell Scott, who led a virtual crusade against traditional Indian cultural practices and who sponsored an amendment to

[24] *Report of the Royal Commission on Aboriginal Peoples*. P 266

> the Indian Act in 1918 that gave Indian agents the additional power when acting as justices of the peace to prosecute the anti-dancing and anti-potlatching provisions.[25]

The role of the police is also evident in enforcement of mandatory residential school attendance. The RCMP played an active role in recruiting and transporting children to schools, fining parents, and searching for “truants”. Before the 1990s, there were also very few complaints of physical or sexual abuse conveyed to the RCMP, despite what we now know of its prevalence. “The police were not perceived as a source for help but rather as an authority figure who takes members of the community away from the reserve or makes arrests for wrong-doing.”[26]

The causes and impacts of these colonial institutions have been documented in numerous high-profile commissions and inquiries such as the Royal Commission on Aboriginal Peoples, The Truth and Reconciliation Commission, and the National Inquiry into Missing and Murdered Indigenous Women and Girls. These, among many other reports, clearly demonstrate the discrimination and abuse that has been, and is, distinctively experienced by Indigenous peoples in Canada across all sectors of society.

Too often, the voices of Indigenous peoples have contributed to powerful recommendations which demand urgent action – only to have our truths and calls to action collect dust on shelves or lose urgency amidst competing needs borne of decades-long underfunding.

A multitude of commissions, reports, and inquiries have been produced regarding the need for police and justice reform.[27] They detail the abuses and systemic discrimination faced by Indigenous peoples. Below is a list of reports, commissions and inquiries that have outlined the failures of the Canadian justice system regarding Indigenous peoples and provided recommendations for reform. We urge that the recommendations enclosed in these reports be taken seriously.

1. 1967: Laing Report which highlights the over-representation of Aboriginal people in prison and the existence of racial profiling;

2. 1972: Commission of Inquiry on the Administration of Justice in Nunavik "Justice Beyond the 50th Parallel" highlights the tensions between the police forces and the Inuit and the illegitimacy of police practices;

3. 1980: Study on the Administration of Justice among the Inuit of Nunavik and the Tlicho. N.W;

4. 1983: Report "National Evaluation Overview of Indian Policing" highlights that the safety of Aboriginal people is less secure;

5. 1984: "Natives and Criminal Justice Policy: The Case of Native Policing", which highlights the hostility and mistrust of Native people towards the police. It also addresses the difficulties of

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[25] *Report of the Royal Commission on Aboriginal Peoples*. P 268
[26] Marcel-Eugène LeBeuf on behalf of the Royal Canadian Mounted Police, “The Role of the Royal Canadian Mounted Police During the Indian Residential School System.”
[27] For an overview of Commissions and Inquiries in Canada see *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. P 37-41

indigenous special constables who are ostracized and discriminated against because of their role;

6. 1986: Solicitor General's report "Policing Canada's Native Peoples: A Review of the Issue" highlights the over-representation of Aboriginal people in prisons, inconsistent policing with disproportionate arrest rates, various deficiencies including those related to officer skills, and lack of cultural adaptation of structures;

7. 1989: "Policing for Canada's Aboriginal Peoples: The Role of the RCMP" was a major review of RCMP policing in First Nations communities that demonstrated the shortcomings and limited effectiveness of the RCMP 3B system (special constables);

8. 1989: "Royal Commission on the Donald Marshall, Jr., Prosecution" which deals with discrimination, racism and stereotyping;

9. 1991: "Commission of Inquiry into the Administration of Justice and Aboriginal People in Manitoba", which addressed an inadequate and racist justice system and the over-representation of Aboriginal people;

10. 1996: Report of the Royal Commission on Aboriginal Peoples (RCAP) and Criminal Justice Beyond Cultural Divisions: Aboriginal People and the Criminal Justice System, which addressed, among other things, the over-representation of Aboriginal people, discrimination and racism in the justice system;

11. 2003: Aboriginal Deaths and injuries in custody and/or with police involvement, Nancy Hannum (for NCCABC);

12. 2007: Report of the Review on the Police Complaint Process in B.C. - the Wood Report;

13. 2008: Alone & Cold - Frank Paul Inquiry;

14. 2009: Missing subjects: Aboriginal deaths in custody, data problems, and racialized policing;

15. 2009: Commission for Public Complaints Against the RCMP, Police Investigating Police;

16. 2009-2010: Braidwood Inquiry Parts 1 and 2 (Robert Dziekanski) 2009-2010;

17. 2011: Small Town Justice BCCLA report on the RCMP in Northern and Rural British Columbia;

18. 2012: Forsaken: The Report of the Missing Women Commission of Inquiry;

19. 2012: Police-Involved Deaths in BC Report (BCCLA);

20. 2013: Human Rights Watch report: Those who take us away: abusive policing and failures in protection of indigenous women and girls in Northern British Columbia, Canada;

21. 2015: Review of Reports and Recommendations on Violence Against Indigenous Women in Canada Master List of Report Recommendations Organized by Theme[28];

22. 2015: Truth and Reconciliation (TRC) Report;

23. 2017: Commission for Public Complaints Against the RCMP regarding Policing in Northern British Columbia;

24. 2019: Viens Commission in QC;

25. 2019: Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls;

26. 2019: RED WOMEN RISING Indigenous Women Survivors in Vancouver's Downtown Eastside[29];

27. 2019: BCHRT Campbell v. Vancouver Police Board;

28. 2020: Expanding Our Vision: Cultural Equality & Indigenous Peoples Human Rights;

29. 2020: In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care[30]

As demonstrated by these works, in the late twentieth and early twenty-first centuries, there have been numerous incidents involving police and other members of the justice system grossly abusing Indigenous people, in particular women, girls, and 2SLGBTQQIA+ people, and those in vulnerable positions.

Rape, sexual assault, beatings, harassment, and neglect by police have become normalized across BC; from the north, to the interior, to coastal regions, and urban centres. In many cases, the impact has been severe – up to and including death. There is a crisis in over-representation of Indigenous peoples killed by use of deadly force by police: over 15% of all fatal police encounters since the year 2000. Too often, these crimes have been committed with impunity. These types of incidents point directly to deeply embedded racism operating at systemic and personal levels. In turn, this is responsible for the high levels of fear and normalization of police harassment and brutality.

Police also act in concert with other facets of the justice system, reinforcing complicity and obstructing access to justice.

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[28] Pippa Feinstein and Megan Pearce, *Review of Reports and Recommendations on Violence Against Indigenous Women in Canada Master List of Report Recommendations Organized by Theme*. https://www.leaf.ca/wp-content/uploads/2015/02/Master-List-of-Recommendations.pdf

[29] Carol Muree Martin and Harsha Walia, *RED WOMEN RISING Indigenous Women Survivors in Vancouver's Downtown Eastside*.

[30] Hon. Dr. M.E. Turpel-Lafond (Aki-Kwe), "In Plain Sight: Addressing Indigenous-Specific Racism and Discrimination in B.C. Health Care."

Finally, too often Indigenous peoples are unable to seek or receive protection and help from law enforcement, leaving them exposed to a range of other risks.

> Over-policing results from the targeting of people based on where they live or their ethnic or racial background, and may manifest in a number of ways, including over-surveillance, harassment, provocation, excessive charges for minor offences, or premature arrests. In contrast, under-policing refers to lack of police presence or action, leading to unmet safety needs of individuals or communities.[31]

The following sections will briefly deal with the most glaring issues with the existing system.

Recommendation 6: Policing and justice reform must be grounded in and address the myriad of existing findings and recommendations. There must be accountability for those who contributed their voices to earlier recommendations that have not been fully implemented. The time for action is now.

Accountability, responsiveness, and respect for the truths, time, and energy of those who participated in previous initiatives, and those who make presentations and submissions to the Special Committee must anchor this process and outcomes.

Recommendation 7: Legislation must explicitly address anti-Indigenous systemic racism and mandate concrete steps to counter racism and establish a vision for justice and substantive equality.

These provisions should be accompanied by mechanisms to conduct public, systemic reviews of practices and policies that disproportionately negatively impact Indigenous peoples. Data must be reported in a number of areas, including use of force, police procurement of paramilitary unit and military equipment, and many others, to better understand the current reality of policing and to measure progress towards change.

8.2 Over-policing and the Militarization of Police

Over-policing impacts the daily lives of Indigenous people, and creates situations that endanger Indigenous lives and well-being.

The criminalization of land defenders is one manifestation of the militarization of police and failure to recognize First Nations rights. In the 1990 Oka Crisis, Quebec police and the Canadian army were deployed against land defenders in Kanesatake. Despite the claims in the 1996 Royal Commission on Aboriginal Peoples that such a conflict should never be repeated, Canada's law enforcement agencies continue to be deployed against First Nations peoples asserting their constitutionally-protected rights on their territories.

In 2020, the RCMP's implementation and enforcement of the exclusion zone in Wet'suwet'en territory infringed on the inherent title and rights of the Wet'suwet'en people. A large contingent of RCMP was brought in and prepared to use lethal force against the land defenders. Use of

[31] Ontario Human Rights Commission, *Under Suspicion: Issues Raised by Indigenous Peoples*.

language such as “rule-of-law”, “national security”, and “radicalized protestors” served to de-legitimatize the laws, authority, and legitimate interests of Indigenous communities involved.

In Coast Salish territories, Indigenous Elders, knowledge keepers and youth have been incarcerated for peaceful non-consent, with one land defender recently sentenced to 90 days in prison. This, despite an updated Crown Counsel policy directive to pursue alternatives to prosecution for Indigenous persons.

> Part of the government strategy to dispossess Indigenous lands is to criminalize Indigenous land defenders, and the use of the RCMP (and in some cases, military and paramilitary forces) and criminal justice system to arrest and charge Indigenous land defenders with trespass, obstruction, unlawful assembly, and criminal contempt for violating civil injunctions has actively undermined Indigenous rights.[32]

Targeted surveillance, encroachment onto First Nations territory, and disregard for First Nations law by the RCMP is unacceptable and not aligned with the UN Declaration.

The militarization of police goes beyond the criminalization of peaceful political demonstrations and land defenders, and has implications for day-to-day policing as well, as seen in the examples of wellness checks, resulting in injury and death.

Racial bias has also meant that Indigenous and racialized communities are over-represented in police stops, or street checks.[33] While BC released its Promotion of Unbiased Policing Standards - Police Stops on January 15, 2020, the continuation of the practice under these new standards still enables the arbitrary perpetuation of biases against those experiencing homeless and poverty, those who use drugs, sex workers, and those with mental health challenges. The level of hypervigilance and surveillance involved in the practice is not conducive to healthy relationships between police and community members, and creates opportunities for escalating encounters. At the same time a definable justification for police stops remains wanting.

Women in the Downtown Eastside (DTES) report being subjected to harassment and brutality, including:

> routine street checks; detentions, arrests, and search and seizure; being issued frivolous bylaw tickets; use of force; extortion of information; use of police dogs; escalation during a mental health crisis (a majority of police-shooting deaths in B.C. involve individuals experiencing a mental health crisis); entry into their homes; and ‘catch and release’ as a form of intimidation and often without legal cause. It is also noteworthy that private security in the DTES has dramatically increased in the past decade and, due to presumed authority, illegally move people off public property, seize property, issue tickets, or use force.[34]

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[32] Carol Muree Martin and Harsha Walia, *RED WOMEN RISING Indigenous Women Survivors in Vancouver’s Downtown Eastside*. P 60

[33] Savehilaghi, “Community Groups Call for a Moratorium on Street Checks.”

[34] Carol Muree Martin and Harsha Walia, *RED WOMEN RISING Indigenous Women Survivors in Vancouver’s Downtown Eastside*.

The Davies Commission famously investigated the untimely death of Frank Paul, who was left out in the cold, unable to care for himself, after being arrested off the street. This should impress upon readers that currently no interaction with police is without risk to Indigenous peoples' safety.

Recommendation 8: The practice of street checks should be eliminated.

Recommendation 9: Immediately establish an Independent Commission of Inquiry into the Forced Removal, Arrest and Imprisonment of Indigenous Peoples as a result of Court Injunctions for Resource Development Projects, with a mandate to support the full implementation of Free, Prior and Informed Consent and to find alternative solutions to these conflicts that align with a government-to-government relationship and Articles 10 and 32 of the UN Declaration. The Commission of Inquiry must be led by Indigenous people and should be observed and audited by the UN Special Rapporteur on the Rights of Indigenous Peoples or other international representative, to maintain its legitimacy in the eyes of Indigenous peoples in BC.

Recommendation 10: Establish a Protocol for Police Engagement with Indigenous Peoples. This protocol should, at minimum: Comply with Charter principles for engagement by police or others in the justice system with Indigenous land and water protectors and other Indigenous protestors, recognize the sui generis nature of Indigenous protests relating to the potential of irreversible harm to Indigenous lands and waters in the context of unresolved Aboriginal and Treaty rights claims, and reflect international principles of self-determination and Indigenous title recognition outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[35] The Protocol should include ceasing the use of injunctions for private corporations against Indigenous peoples.

8.3 Use-of-Force, Deaths in Custody, and Abuse by Police

A host of issues involving standards, training, practice, and accountability and oversight converge in allowing the continuation of police abuses, over-policing, excess use-of-force, and deaths in custody.

Since 2017, three Indigenous men have died in custody in Prince George, raising concerns about use-of-force and standards, accountability and disciplinary action, the timeliness of investigations, access to information, and gaps related to municipal jails. The officers involved are back on duty.

In addition to concerns around the excessive use of police force, truths shared, in particular by Indigenous women, girls, and 2SLGBTQQIA+ people, reveal that police are directly implicated in perpetrating violence, including sexual violence against Indigenous peoples. Those Who Take Us Away documents excessive use of force against girls, use of tasers, cross-gender searches, unsafe conditions in city holding cells, rape, sexual assault, and physical abuse in northern communities in BC. [36]

[35] National Indigenous Justice Summit, "Immediate Action Points."
[36] Rhoad, *Those Who Take Us Away*.

In 2004, Judge Ramsay, a provincial court judge in Prince George, pleaded guilty to sexual assault causing bodily harm, obtaining sexual services from someone under 18 and breach of trust by a public officer. Although he was sentenced and died in jail, a full inquiry into the situation was never held, which may have been able to reveal the extent to which the police were implicitly and directly involved in child sexual exploitation, as allegations suggest.[37]

Through the National Inquiry final report, and the community, expert and institutional hearings truths were shared of the atrocities that police have committed against Indigenous women, girls, and 2SLGBTQQIA+ people. These abuses, which are initiated, perpetrated and condoned by the Canadian state, "have resulted in the denial of safety, security, and human dignity. They are the root causes of the violence against Indigenous women, girls, and 2SLGBTQQIA+ people that generate and maintain a world within which Indigenous women, girls, and 2SLGBTQQIA people are forced to confront violence on a daily basis, and where perpetrators act with impunity."[38]

A review of reports regarding the use of force by police found that core issues and problems at the individual level include:

- Discriminatory treatment of Indigenous peoples
- Rough treatment
- Cross-gender searches
- Lack of police protection, particularly for Indigenous women and girls
- Retaliation for complaints
- Jail facilities problematic in their conditions, treatment of detained persons, lack of medical attention, as well as lack of visibility via video monitoring
- Particularly discriminatory treatment for Indigenous youth and women is repeatedly emphasized

Systemic issues include bias and racism, inadequate training, a lack of oversight and accountability, and a lack of disaggregated data and reporting. The same geographic areas attracted repeated focus:

- Williams Lake
- Prince George
- Anahim Lake
- Ft. St. John
- Terrace, and
- Highway of Tears

CBC's Deadly Force Database of people killed in police encounters shows that:

- "The number of cases has continued to rise over the past 20 years, even when corrected for population growth.
- Black and Indigenous people are disproportionately represented amongst the fatalities compared to their share of the overall population.

[37] Rhoad.
[38] National Inquiry Calls for Justice, (2019) p 1

- Mental health and substance abuse issues were present in the majority of cases."[39]

While the discretionary powers of the police are increasingly being documented and exposed through the proliferation of self-recorded evidence and the reach of social media, the extent to which they are being eroded is less clear as police continue to enjoy relative impunity and evade accountability when misconduct is involved.

Recommendation 11: Legislation must address discretion by carefully weighing the degree, scope, focus, and locus of discretion given to members of police services with an eye toward standardizing protocols to restrict discretion, and create opportunities to divert Indigenous peoples from the justice system.

Recommendation 12: Implement a multi-pronged Indigenous de-escalation strategy, including a no-carry policy in Indigenous communities, or in urban areas with large Indigenous populations, and on calls involving Indigenous identified individuals as a first response.

This should be accompanied by vigorous and ongoing Indigenous trauma-informed de-escalation training and teams for Police, which include Indigenous Peoples and mental health professionals.[40]

Recommendation 13: Legislation should ensure that all police forces operating within BC must follow the BC Policing Standards, and rigorous accountability mechanisms for the enforcement of these standards must be in place.
A fulsome review of use of force standards and the use of conducted energy weapons is required. Standards must explicitly prioritize an evidence-informed, trauma-informed, non-punitive, destigmatizing, and harm-reduction focused approach.

Recommendation 14: The use of all lethal weapons, restraint devices, and police dogs must be eliminated. Officers must be equipped to de-escalate situations without perpetuating violence.

Recommendation 15: Expand the use of police body cameras in First Nations communities and access to video records.

Recommendation 16: Searches and monitoring of Indigenous women and girls by male officers must be eliminated.

Recommendation 17: Create a class of unarmed community peacekeepers.

[39] CBC, "Deadly Force." 2020, https://newsinteractives.cbc.ca/fatalpoliceencounters/
[40] National Indigenous Justice Summit.

8.4 Under-protected

While the over-policing of First Nations people is one spectrum of a system in which First Nations people's safety is threatened, we also face challenges on the opposite end. First Nations people find themselves simultaneously over-policed *and* under-protected, which result in different, but serious safety gaps, and which are similarly rooted in racism, sexism, and colonialism.

First Nations people are more likely to be victims of violent crime. In BC in 2018, 60.11% of First Nations people reported they experienced violent victimization since the age of 15, compared to 42.12% among non-Indigenous peoples.[41] Indigenous women and girls experience violent victimization at a rate 2.7 times that of non-Indigenous women and girls.[42] "Indigenous women made up roughly 16% of all female homicides between 1980 and 2012, despite making up only 4% of the female population. … Indigenous women and girls now make up 24% of female homicide victims."[43]

While addressing the root causes of this violence is key to transformational change, it is important that, when First Nations people do seek help from police and first responders, they receive it. Decades of inadequate responses impact the modern-day relationship, and may cause First Nations peoples to be less willing to seek help from the police. This reticence can itself contribute to lack of safety.

Indigenous peoples have not been properly served when seeking help from police. This is most evident in situations where reports of missing persons have not been accepted, taken seriously, or properly resourced. In his final report, Commissioner Wally Oppal concluded that "the initiation and conduct of the missing and murdered women investigations were a blatant failure."[44] Operationally, these failures amounted to poor report taking and follow up on reports of missing women; faulty risk analysis and risk assessments; inadequate proactive strategy to prevent further harm to women in the DTES; failure to follow Major Case Management practices and policies; failure to consider and properly pursue all investigative strategies; failure to address cross-jurisdictional issues and ineffective coordination between police forces and agencies; and failure of internal review and external accountability mechanisms.

The Commissioner attributed these failures to discrimination, system institutional bias, and political and public indifference; a want of leadership; poor systems, limited and outdated policing approaches and standards; fragmentation of policing; inadequate resources and allocation issues; police force structure and culture, personnel issues and inadequate training; and allegations of conspiracy and cover-up. While some measures have been taken to improve the

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[41] Statistics Canada. Table 35-10-0168-01 Self-reported violent victimization among Indigenous people DOI: https://doi.org/10.25318/3510016801-eng

[42] Tina Hotton Mahony, Joanna Jacob and Heather Hobson, Women and the Criminal Justice System (Statistics Canada, June 21, 2017), https://www.statcan.gc.ca/pub/89-503-x/2015001/article/14785-eng.htm

[43] National Inquiry Final Report, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf p 55

[44] The Honourable Wally T. Oppal, QC, *Forsaken: The Report of the Missing Women Commission of Inquiry*. P 26

response of police to missing persons and support investigations, such as establishing the E-PANA task force, the BC Provincial Policing Standards governing missing person investigations, and the Family Information Liaison Unit, further analysis and engagement with family members and loved ones is paramount in order to evaluate the effectiveness and practice of existing measures. Families and loved ones require enhanced support and information throughout investigations.

Recommendation 18: Implement the Calls for Justice and engage specifically with survivors and families regarding improvements and supports required regarding missing person investigations.

Recommendation 19: Create enhanced mechanisms to provide financial support to the families of missing and murdered Indigenous peoples.

Recommendation 20: Ensure written procedures governing intimate partner violence are consistent with the provincial policy on relationship violence, including trauma informed practice.

Recommendation 21: Ensure particular attention is paid to ensuring resourcing and capacity in northern and remote areas and communities.

Recommendation 22: Written procedures should be in place governing investigations likely to involve persons in vulnerable circumstances, including, but not limited to:

(a) Intimate partner violence;
(b) Individuals vulnerable to the opioid crisis;
(c) Sexual assaults;
(d) Offences related to prostitution;
(e) Youth crime; and
(f) Incidents motivated by racism, bias, prejudice or hate.

Recommendation 23: Written procedures and guidance must be available to officers governing police response to persons in vulnerable circumstances, including, but not limited to:

(a) Victims or witnesses who may be vulnerable due to age (i.e., children or older adults);
(b) Persons who may have communication barriers (e.g., language, hearing or speech);
(c) Victims or witnesses who have outstanding warrants against them, or who have precarious legal status;
(d) Persons living in public spaces;
(e) Persons with apparent mental health and/or substance use problems;
(f) Individuals vulnerable to the opioid crisis;
(g) Police response to persons who are transgender or non-binary.

While there are various forms of training taking place in different parts of the system, a coherent and consistent approach is needed so that core practices are being reinforced throughout the system.

Training and standards are especially important when it comes to vulnerable populations and issues such as sexual assault and other forms of gender-based violence, mental illness, homelessness, substance use, and child welfare. For example, we need guidelines throughout the province to support the safety of sex workers, and better protocols for communications between police, family and housing organizations. Too often we see people fall through the cracks.

Recommendation 24: Legislation must explicitly prioritize an evidence-informed, trauma-informed, non-punitive, destigmatizing, and harm-reduction focused approach throughout training.

All members should have thorough training in de-escalation, implicit bias, intercultural competency, trauma-informed practice, and on the ground training and education with the local First Nations they serve. All training programs should be developed in collaboration with Indigenous experts and communities.

All officers should complete a basic level of trauma-informed training, regardless of whether they are specifically responsible for conducting interviews with vulnerable witnesses or victims.

Ensure all front-line officers have completed Evidence-based, Risk-focused Domestic Violence Investigations, and Assessing Risk and Safety Planning in Domestic Violence Investigations.

Ensure that all front-line workers understand the intersection between Domestic Violence Investigations and Child and Family Community Services Act investigations as it relates to the removal of children.

We recommend that these types of issues must be given much more emphasis at the outset, as well as throughout members' careers.

8.5 First Nations Policing Programs

Insufficient mechanisms and capacity support for First Nations policing is a key contributor to the lack of protection that First Nations people receive.

The First Nations Policing Program (FNPP) was introduced in 1991 to provide professional and dedicated policing services to enhance public safety and personal security in First Nations communities. The FNPP is intended to provide policing services over and above the level of policing services provided under the Provincial Police Services Agreement, and which are professional, effective, culturally appropriate, and accountable to the communities they serve.

> … however, since its inception, the program has suffered from a range of problems, including insufficient resources and support. Rather than augmenting existing police services, as was the intention, FNPP funding is often used to provide basic services, and often in ways that are not sufficient given the challenges faced in many Indigenous communities.[45]

[45] *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. P xv

Public Safety Canada (PSC) is the lead agency for the program. In BC, the program is cost shared between Canada at 52% and the Province at 48%. First Nations can either enter into Community Tripartite Agreements (CTAs) or establish Self-Administered (SA) police services. See Figure 2[46] for a comparison of CTA and SA models.

In BC, 132 First Nations communities, representing approximately 70% of First Nations in BC receive enhanced police services through 59 CTAs by an authorized force of 112.5 RCMP members. The Stl'atl'imx Tribal Police Service is the only First Nations administered police service in BC.

	SAs	CTAs
Autonomy and Integration	• Stand-alone, semi-autonomous police services under local direction (though subject to federal and provincial legislation). • Not integrated into larger services but able to access the specialized capabilities, such as emergency response teams or forensics, of the RCMP or other standing services.	• Contractual provision of dedicated, culturally informed and appropriate policing through a standing service such as the RCMP, OPP, or SQ. • Intended to supplement existing arrangements or resources already in place for policing in these communities and regions.
Local Governance and Accountability	• Under direction of local police governance boards.	• Local advisory boards called Community Consultative Groups liaise between the band council, police, and other community organizations. • Not all CTAs have Community Consultative Groups in place.
Service Composition, Training, and Community	• Lower ratio of officers per capita. • Less likely to have received regular recruit training and specialized training. • More likely to emphasize community policing model. • Officers more likely to have joined based on community-oriented concerns. • Fewer mentoring opportunities for officers.	• Higher ratio of officers per capita. • More likely to have received regular recruit training and specialized training. • More emphasis on conventional law enforcement model. • Officers more likely to have joined based on security, income, or opportunities for training and travel. • More mentoring opportunities.
Policing Style	• Policing style more focused on social or community development. • Officers more likely to say that policing style emphasizes culturally appropriate policing.	• Policing style places more emphasis on conventional law enforcement. • Officers more likely to say their emphasis is on more effective policing.

Data Source: Kiedrowski, 2016; Murphy, 1996; Alderson-Gill & Associates, 2008; PS, 2010

Figure 2: From *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*

The RCMP also has several programs dedicated toward Indigenous peoples, including the Aboriginal Policing Services Branch that is involved in the Law Enforcement Preparation Program (LEPP) at the Nicola Valley Institute of Technology; the Indigenous Gang Unit; the Division Liaison Team; and recruitment initiatives. The Indigenous pre-cadet training is another such initiative.

First Nations who live outside of First Nations communities, such as in urban areas, are not served by the FNPP. However, in BC there are several integrated units involving First Nations. The RCMP and West Vancouver Police Department integrated First Nations policing unit was formed through a policing agreement between BC, the District of West Vancouver, the Squamish Nation, and Tsleil-Waututh Nation. The Delta Police Department delivers enhanced policing to

[46] *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. P 89

Tsawwassen First Nation through an agreement between Canada, the Province, the Corporation of Delta and the Tsawwassen First Nation.[47]

Besides this, Indigenous residents in regions served by municipal police services and the RCMP, receive more limited attention in terms of being able to define, implement, and lead Indigenous specific-priorities in policing. Some municipalities have Indigenous-specific policies or programs, such as the Vancouver Police Department's (VPD) Diversity and Indigenous Relations Section. The VPD Indigenous Liaison Officer and the VPD Indigenous Community Policing Centre Officer work with the Vancouver Aboriginal Community Policing Centre Society (VACPCS) and other community agencies to engage Indigenous community members and priorities. VACPCS is one example of a community organization established to "address social justice issues, improve safety for Aboriginal people and build the relationship between the Vancouver Police Department (VPD) and the Aboriginal community through education, awareness and open dialogue."[48] Many such front-line and grassroots advocacy organizations operate in urban areas, bringing Indigenous community safety needs to the attention of municipal police departments and endeavoring to strengthen relationships.

The RCMP in BC has been operating with vacancies under the FNPP in order to stay within budget as funding under the current Framework Agreement has failed to cover rising policing costs. This means First Nations communities will continue to experience underfunded and inadequate policing. Further, underfunding has meant that the program is not able to accommodate new communities that are interested in participating in the FNPP.

The FNPP is classified as a discretionary program which permits its underfunding in comparison to municipal and provincial police forces. The program's inefficient funding structure and "cookie-cutter" approach has led to chronic underfunding of essentials required for First Nations to operate an adequate police service, such as underfunding for infrastructure, salaries, equipment and training. This has meant that First Nations people are met with a lower standard of policing in comparison to the general population. This issue is especially acute in remote or fly-in communities.

Underfunding of such elementary components of policing have real implications on the FNPP's ability to meet its goals of enhanced, culturally appropriate policing. The limited number of officers per community are often stretched thin and spend their time attending to basic policing functions. Community Consultative Groups, and Letters of Expectations – key mechanisms by which community are meant to liaise and develop priorities with local RCMP detachments and FNPP officers - are difficult to sustain, and regularly monitor for accountability.

In addition to underfunding, there are aspects of CTAs that hinder the FNPP's ability to deliver truly enhanced, culturally appropriate policing. The short-term nature of agreements makes long-term, strategic planning challenging. Without this ability, community leadership is not able to effectively build vision and capacity around community safety needs.

In January 2018, PSC announced $291.2 million in renewed national funding for the FNPP over five years, starting in 2018/19. It was intended to begin to bridge the gap that had developed between the actual cost of policing and the amount of funding provided under FNPP. In November

[47] Services, "Structure of Police Services in First Nation Communities - Province of British Columbia."
[48] Vancouver Aboriginal Community Policing Centre Society, "About Us."

2018, the Government of Canada created a new program, Funding for First Nation and Inuit Policing Facilities, investing $88.6 million over seven years to improve policing facilities in First Nation and Inuit communities.

However, these funds are not sufficient to bridge the gap created by chronic, program-based underfunding. While increased and sustainable funding is direly required, on its own it is not the solution. There is opportunity to fundamentally transform the FNPP into a policing model that upholds self-determination and meets community needs.

On December 9, 2020, Minister Bill Blair announced $1.5 million in funding to support the AFN to begin discussions on the co-development of legislation which recognizes First Nations policing as an essential service. The announcement highlighted the need for collaborative engagement with provincial partners.[49] A legislative basis that recognizes the inherent title and rights, and treaty rights of First Nations will provide an appropriate foundation for closing the gap in policing services, while responding to the imperatives of the UN Declaration, the TRC Calls to Action, and the Calls for Justice .

The need for self-determined First Nations policing was highlighted by the National Inquiry into Missing and Murdered Indigenous Women and Girls, which recognized that, "colonial structures and policies are persistent in Canada and constitute a root cause of the violence experienced by Indigenous women, girls, and 2SLGBTQQIA people"[50], and made the following Call for Justice:

> 5.4 We call upon all governments to immediately and dramatically transform Indigenous policing from its current state as a mere delegation to an exercise in self-governance and self-determination over policing. To do this, the federal government's First Nations Policing Program must be replaced with a new legislative and funding framework, consistent with international and domestic policing best practices and standards, that must be developed by the federal, provincial, and territorial governments in partnership with Indigenous Peoples. This legislative and funding framework must, at a minimum, meet the following considerations:
>
> > i Indigenous police services must be funded to a level that is equitable with all other non-Indigenous police services in this country. Substantive equality requires that more resources or funding be provided to close the gap in existing resources, and that required staffing, training, and equipment are in place to ensure that Indigenous police services are culturally appropriate and effective police services.
> >
> > ii There must be civilian oversight bodies with jurisdiction to audit Indigenous police services and to investigate claims of police misconduct, including incidents of rape and other sexual assaults, within those services. These oversight bodies must report publicly at least annually.
>
> 5.5 We call upon all governments to fund the provision of policing services within Indigenous communities in northern and remote areas in a manner that ensures that those

[49] Canada, "Minister Blair Announces $1.5 Million for Assembly of First Nations."
[50] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. *Supplementary Report – Genocide*, p 1

> services meet the safety and justice needs of the communities and that the quality of policing services is equitable to that provided to non-Indigenous Canadians …

8.6 Law and By-law Enforcement

A critical gap in the existing legislative framework is the inability for First Nations to effectively enforce and prosecute their own by-laws and laws. *Police Act* reform should take into account the critical need for First Nations governments to be able to enforce their laws and undertake community safety and prevention initiatives, either through their own dedicated services or in partnership with the federal and provincial governments.

Currently, there are gaps in jurisdictional coordination regarding which order of government is responsible for prosecution. Often, neither the provincial or federal government will choose to prosecute, and First Nations governments typically do not have the capacity to dedicate the financial resources required for prosecution. "First Nations by-laws are ignored by many police forces across the country because those police forces know that in most cases, there is no effective way to prosecute or convict those who violate these by-laws."[51] This contributes to a lack of public safety and is part of the broader issue of under-protection experienced by First Nations. Moreover, it demonstrates a fundamental gap in the recognition of First Nations jurisdiction. In addition to challenges enforcing by-laws there is the greater challenge of enforcing First Nations laws, especially those that may not align with federal or provincial law. First Nations may also wish to decide how to have police, first responders, social service professionals, or other community-led bodies respond to incidents or infractions within their territory; and how to go about prosecution or undertake another approach to resolution and enforcement, such as a process based on traditional practices and laws.

Recommendation 25: First Nations must have a meaningful choice among policing arrangements, from the ability to establish their own police forces and priorities to meaningful collaboration and partnerships with RCMP and municipal police forces. A relationship-based approach to policing transformation, which includes the relationships between police and other service providers can help meet the needs for wholistic safety in communities.[52]

The Government of BC must work in partnership with First Nations governments and the federal government to develop a legislative basis for First Nations policing that recognizes the inherent title and rights, and treaty rights of First Nations, responds to the imperatives of the UN Declaration, the TRC Calls to Action, and the Calls for Justice, and which is funded to a level that provides for substantive equality.

8.7 Over-representation in custody and under-representation in leadership

The need for reform and for the revitalization of First Nations legal orders and systems of justice is evidenced through disturbing statistics of incarceration rates:

> In 2016/2017, Indigenous adults accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1%

[51] "Solving the Indian Act By-Law Enforcement Issue."
[52] *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities*. xvi

of the Canadian adult population. This is an increase from 21% and 19% respectively, one decade ago. Making up 8% of the youth population in Canada, Indigenous youth comprised 50% of custody admissions and 42% of community admissions.[53]

The trend is even more dire for Indigenous women and girls, who represented 47 percent of all women remanded in custody in 2016-2017 – up from 36 percent in 2008-2009.[54]

The Gladue rights of Indigenous women and girls require an additional gender lens that examines the particular histories of gendered violence that result in women coming before courts as offenders. Scholars have described the victimization-criminalization continuum and how victimization of Indigenous women can lead to their incarceration.[55] Indigenous women are often left responsible for protecting themselves and those they care for when the criminal justice system fails to protect them. If they respond to threats of violence with reactive force, they often face the full weight of the law, with use of a weapon as an aggravating factor.[56] The combination of Gladue and gender requires defence counsel, sentencing judges, and others to consider systemic factors and the totality of violence in Indigenous women's lives, not only isolated incidences of violence.

Policing is often the first point of contact a person has with the justice system, making it a crucial intervention point to change this trajectory. The BC First Nations Justice Strategy emphasizes the principle of diversion in every interaction with the justice system, including interactions with police.

Recommendation 26: Opportunities for discretion at the policing level that would support diversion from the criminal justice system should be considered. The First Nations Justice Strategy emphasizes a "presumption of diversion" at every stage of the criminal process.

At the same time Indigenous peoples are underrepresented in senior level and leadership positions within the justice and policing system. This is both evidence of systemic discrimination, and a factor in its perpetuation.

Recommendation 27: Recruitment and promotion practices must proactively support the equitable representation of Indigenous peoples within the police system, including in senior level positions. Workplace policies must also be in place to ensure Indigenous employees are supported, feel welcome in the workplace, and that the workplace is free from harassment and discrimination.

9. THE INTERSECTION OF HEALTH AND COMPLEX SOCIAL ISSUES

The issues set out below are presented in order to further deepen the understanding and recommendations for change set out earlier in this submission, and are inter-related with the issues of over-representation in the criminal justice system, over-policing, under-protection, and excessive use of force.

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[53] BC First Nations Justice Council Strategy

[54] Government of British Columbia; BC Corrections Operations Network (CORNET); demographic data from Statistics Canada census 2011 and 2016 population tables.

[55] Elspeth Kaiser-Derrick, "Listening to what the justice system hears and the stories it tells: Judicial sentencing discourses about the victimization and criminalization of Indigenous women". Masters thesis, UBC, 2012.

[56] Senator Kim Pate, "Rising Incarceration Rates of Racialized Women". 2018. Policy4Women.com

With regard to complex social issues, there is an urgent need to make law, policy, and practice significantly more responsive to Indigenous peoples in BC. The opioid crisis, mental health issues, poverty, homelessness, child welfare, and gender-based violence are multi-faceted issues that require a whole-of-society and whole-of-government effort.

Disturbing examples reveal how police forces are not currently suited to address and respond to complex social issues and wellness checks, in particular. Instead of culturally-relevant, trauma-informed mental health supports, victims' services, and culturally-informed social workers, oftentimes, Indigenous peoples and many other individuals are met with criminalization, force, ignorance, and disregard for their personhood. This is especially true of those experiencing substance abuse disorders and homelessness. First Nations people are disproportionately represented in both of these populations, and often experience both homelessness and addictions.[57]

9.1 Mental Health

Over the past two decades, police are increasingly called upon to respond to instances related to mental health and/or substance use issues. In 2018, the BC Coroners Service ("BCCS") reviewed 127 deaths that had occurred in BC during, or within 24 hours, of a police encounter[58]. Mental health or substance use issues were found to be present in more than half of the lives of the decedents, with this being the primary reason the police were called to attend. The report also found that on average, police across the province are called upon to respond to approximately 74,000 mental health calls a year. Under the *Mental Health Act*, police are given the authority to apprehend and detain someone if they believe that person may be a harm to themselves or to someone else[59]. In one year, Vancouver Police alone apprehended 17,000 people under the *Mental Health Act*. Indigenous people and young adults are disproportionately reflected in these numbers. The BCCS reported 20% of those who died during or following a police encounter were Indigenous peoples, and a 2021 report from the Representative for Children and Youth found that involuntary detentions of youth under the *Mental Health Act* had increased by 162% in a ten-year period.[60]

These numbers are indicative of a system that is not adequately equipped or resourced to meet the unique vulnerabilities of those dealing with mental health and substance use issues, and instead relies on enforcement and constraint. Police are often the point of first contact for youth and adults experiencing a mental health crisis, and without having the necessary capacity and skillset to properly de-escalate these situations, the last twenty years of data has shown this can mean deadly outcomes for the person in crisis.[61] Complete systemic reform is required to better

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[57] 2018 Report on Homelessness Counts in BC, https://www.bchousing.org/research-centre/housing-data/homeless-counts

[58] BC Coroners Service, *Opportunities for Different Outcomes. Police: A Crucial Component of BC's Mental Health System*. Published June 2019.

[59] Mental Health Act, RSBC 1996, c 288, s 28(1).

[60] Representative for Children and Youth of BC, *Detained: Rights of children and youth under the Mental Health Act*. Published January 2021.

[61] *Ibid* note 44; Georgia Straight, *Deaths involving police reveal a long pattern of mental illness and addiction*, February 11, 2015, https://www.straight.com/news/389476/deaths-involving-police-reveal-long-pattern-mental-illness-and-addiction.

support those in our communities with mental health challenges, and to create a continuum of care that is trauma-informed, holistic, and community based.

Recommendation 28: A reallocation of resources to support community-based mental health response teams and social services is necessary to meaningfully address the over-reliance of police forces in responding to individuals experiencing a mental health crisis. Police forces should only be called upon in the most extreme circumstances, and when appropriately trained in trauma-informed de-escalation techniques.

9.2 The Opioid Crisis

The global war on drugs and corresponding punitive drug laws in Canada have criminalized people who use drugs, including Indigenous peoples who use drugs. Susan Boyd and others have discussed the intersecting race, gender, and class issues that make the "war on drugs" a war on the poor, on women and on racialized people who use illegal substances.[62] This submission would be incomplete if it did not address the devastating results of drug policy in Canada in the opioid overdose crisis, which is disproportionately killing our people.

Between January and May 2020, 89 First Nations individuals died from overdose. This is a 93% increase compared to the same time period in 2019. The overdose death rate for First Nations people was 5.6 times that of other BC residents, and 8.7 times more for First Nations women compared to other women in BC.[63]

De-criminalizing people who use drugs, working towards regulating illicit substances, increasing harm reduction programming and education, and vastly increasing supports for culturally-appropriate addiction treatment must be part of a national strategy to reduce the number of Indigenous people drawn into the criminal justice system through drug offences, especially simple possession offences. Furthermore, substance use is associated with breach of conditions resulting in administration of justice charges, which also disproportionally affect Indigenous people.

Drug use must be treated as a health matter, not a criminal justice matter, and drug policy must take an evidence-based approach that centres the needs and priorities of Indigenous communities. For example, we know that by holding people in situations where they cannot avoid withdrawal symptoms causes an increase in risk of subsequent overdose. This should inform harm-reduction approaches to detention as well as provincial standards for addictions and mental health treatment.

Decriminalization of drugs can play a key role in the presumption of diversion, and ultimately the successful implementation of path one of the BC First Nations Justice Strategy. Recent changes to federal mandatory minimum sentences related to non-violent drug offences are a step in the right direction, but it is imperative that both the provincial and federal government champion

[62] Susan Boyd and Karlene Faith, "Women, illegal drugs and prison: views from Canada". International Journal of Drug Policy 10 (1999) 195 – 207.
[63] First Nations Health Authority. (2020). First Nations in BC and the Overdose Crisis. Available at: https://www.fnha.ca/about/newsand-events/news/covid-19-pandemic-sparks-surge-in-overdose-deaths-this-year

initiatives and policies that provide support and programs intended to divert Indigenous peoples from the criminal justice system towards programs focused on their health and wellness.

Recommendation 29: Treat addictions as a health matter, rather than a criminal justice matter within every step of the justice system by creating policies that support diversion and access to wrap around mental health and addictions supports.

9.3 Children and Families

One of the most disturbing and well-documented correlations with criminal justice overrepresentation is the overrepresentation of Indigenous children in the child welfare system. This correlation was strongly identified by the *Report of the Aboriginal Justice Inquiry in Manitoba*, which stated that "part of the reason for the high numbers of Aboriginal people in correctional facilities is the fact that Aboriginal people still do not fully control their own lives and destinies, or the lives of their own children. Aboriginal people must have more control over the ways in which their children are raised, taught and protected."[64] Aboriginal children are taken "from institution to institution, from foster home to young offender facility, and finally, on to adult jails", begging the question posed by Oscar Lathlin: "Is the current system conditioning our young for lives in institutions and not in society?"[65] Incarceration of Indigenous children began with residential schools, where Survivors have testified they were treated like criminals and punished like prisoners, and that "the path from residential school to prison was a short one".[66] The foster system emerged during the decline of residential schools as "the new method of colonization", removing children from their homes and placing them within the control of non-Indigenous people.[67] The class action case of *Brown v Canada (Attorney General)*[68] found that Canada was liable in law for the class members' loss of aboriginal identity after they were placed in non-aboriginal foster and adoptive homes. The SCC affirmed that the loss of identity left children "fundamentally disoriented", resulting in all of the markers discussed previously that lead to criminal justice involvement. Numerous other studies and reports have identified a link between family disruption, including removal of Indigenous children, and the likelihood of incarceration. In 2001, approximately two thirds of Indigenous inmates said they'd been adopted or placed into group homes at some point in their childhoods, compared to about one third of non-Indigenous inmates.[69] Additionally, 39% of Indigenous youth, who are incarcerated at a rate 8 times that of non-Indigenous youth, report being involved with child protection agencies at the time of their admission.[70]

Despite this uncontroverted evidence, the numbers of Indigenous children in care are higher than ever. Nationally, 40 000 Indigenous children under 14 are in the foster system, representing 52%

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[64] A.C. Hamilton and C.M. Sinclair. *Report of the Aboriginal Justice Inquiry of Manitoba*. Winnipeg: Queen's Printer, 1991, at 509
[65] Ibid.
[66] Supra note 3 at 183
[67] Ibid at 520
[68] *Brown v Canada (Attorney General)*, 2017 ONSC 251
[69] Shelley Trevethan, Sarah Auger, and John-Patrick Moore, Correctional Service Canada. "The effect of family disruption on Aboriginal and non-Aboriginal inmates". 1991.
[70] Department of Justice Canada, A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II. 2004.

of all children in care despite making up 7.7% of all children in the country.[71] In BC, two-thirds of children in care in 2018 were Indigenous – up from 50% in 2006. Indigenous children are 12 times more likely to be removed from their families than other children. Indigenous families are 8 times more likely to be specifically investigated for child neglect, which is directly correlated with socioeconomic conditions.[72] This is further amplified by the reality of systemic racism, as the definition of "neglect" is broad, including a failure to provide "supervision", or "nurturing". In addition, a recent Auditor General report found that the Ministry of Children and Family Development fails to adequately protect First Nations children and youth in their care, especially with regards to contracted residential services.[73] (It should be noted that, although this was a valuable report, it was prepared without the engagement or involvement of First Nations, who have specific expertise and would have contributed additional information). The Report makes concrete recommendations that must involve First Nations people and transfer jurisdiction for child welfare back to First Nations communities.

Federal Bill C-92, *An Act respecting First Nations, Metis and Inuit children, youth and families*, was passed into law on June 21, 2019. It legislatively supports our Nations in resuming jurisdiction over child and family services, which was never surrendered. The legislation affirms that Nations have the jurisdiction to pass their own laws and create their own policies regarding the welfare of their children. It also sets out a number of minimum standards that must be adhered to in the delivery of child and family services to Indigenous peoples. C-92 must be implemented to its fullest extent to mitigate the gross overrepresentation of Indigenous children in care. Children and youth must be raised within their families and communities and connected to their identity in alignment with the principles of cultural continuity and substantive equality. The legislation explicitly provides that it is to be interpreted consistently with the laws of the Indigenous society to which the child belongs.

Recommendation 30: Police are often called upon to enforce removal orders, and so must be equipped with the proper understanding and practice standards to recognize Indigenous jurisdiction when it comes to children and families, and the federal legislation.

In addition to recognizing inherent jurisdiction over child welfare and robustly supporting capacity development for this transition, the FNLC recommends increasing support and reach for the Aboriginal Head Start in Urban and Northern Communities Program. This recommendation was made as part of the Standing Committee on Public Safety and National Security Report on Indigenous people in federal corrections[74], and reflects a holistic understanding of the reasons for Indigenous over-incarceration. As of the time of the Report, this program had only reached about 4% of all Indigenous children aged 0 – 6 living off-reserve across Canada.

Recommendation 31: Increase financial support and support increased access to the Aboriginal Head Start in Urban and Northern Communities Program.

[71] https://www.theglobeandmail.com/canada/article-how-one-bc-community-is-fighting-to-keep-indigenous-children-with/
[72] Canadian Incidence Study of Reported Child Abuse and Neglect.
[73] Office of the Auditor General. *Oversight of Contracted Residential Services for Children and Youth in Care.* June 2019.
[74] Standing Committee on Public Safety and National Security. *Indigenous People in the Federal Correctional System*. 2018.

9.4 Urban Indigenous Communities and Non-Profit Organizations

For decades, urban Indigenous communities have played and continue to play a strong role in organizing for change, advocating for human and Indigenous rights, and protecting vulnerable people from becoming caught in the criminal justice system (or from re-entering it once released). The DTES community is a case study of these efforts. First Nations and allied organizations active in the DTES include Aboriginal Community Policing Centres, Vancouver Native Housing Association, Aboriginal Front Door Society, Aboriginal Mother Centre, Urban Native Youth Association, Culture Saves Lives, the Saa-Ust Centre, VANDU, Downtown Eastside Women's Centre, Atira, PHS Community Services Society, Raincity, and others. They provide housing, cultural programming, advocacy, employment, harm reduction, and health services that provide the structural supports to avoid negative police interactions, decrease crime through employment and paid program participation, assist clients in complying with bail and parole conditions, create demilitarized spaces for people who use drugs, and simply build meaningful communities for those who may otherwise be "in conflict with the law". Indigenous-led organizations are particularly important for supporting urban Indigenous peoples, and these organizations need dedicated funding to help them serve the vital role they play within this landscape of services.

Unfortunately, the vital role of these non-profit organizations in stemming the flow of people into the criminal justice system is often overlooked. They tend to be underfunded and are reduced to competing for project funds with onerous and bureaucratic administrative and evaluative requirements. A vital part of crime prevention in the context of police reform is that Indigenous-led service organizations remain secure in their funding while being self-determining, operating within their own governance and service provision models to create places of cultural safety and community ownership over programs.

The Missing and Murdered Indigenous Women and Girls (MMIWG) Final Report found that systemic underfunding and mis-funding of Indigenous programming of all kinds is a manifestation of discrimination and a contributing factor to ongoing genocide.[75] The Report also found that project-based funding that must be continually justified according to external standards in order to receive further funding is an oppressive approach. Evaluation for funding purposes must reflect each Indigenous community's definitions of success and must respect the long-term, iterative nature of preventative program development. Only stable, long-term financial support can create the conditions for communities to develop models that work through an iterative process. Governments and their subsidiaries, health authorities, and other major funders must move away from project-based funding that is tied to externally-defined outcomes foreign to a community's values, timelines, and goals, and move towards models that reflect the real costs of community-based prevention work.

9.5 Toward a Holistic Approach

The lack of capacity among police forces to respond to complex social issues can be addressed in some part by training. However, while a culturally-relevant, trauma-informed policing service is crucial, it cannot mitigate the need to engage the expertise and services of other social service professions and organizations. Having police respond to incidents that do not require police

[75] Supra note 51.

presence results in unnecessary, harmful interactions. Especially in rural and remote areas that are underserved by other social services - we see police responding to non-police-related calls.[76]

There is a significant need to engage and co-develop, with Indigenous peoples, the mandates and standards that dictate which incidents require police involvement, and those that would be better served by other responders, or a hybrid approach.

Complex social issues must be tackled at the root. Social services, mental health supports, victims' services, and affordable housing for First Nations are chronically underfunded, despite calls for increased resources. To see real, transformative change, the government must place a greater emphasis on the holistic needs people have. This can be done by building community partnerships and providing wrap around services. Building capacity within other sectors of society and our communities will require sustainable, adequate funding, and potentially a reallocation of resources.

The Path Forward Report on Women and Girls Safety Community Sessions Action Plan, focused on the need for healing supports and safe spaces, capacity and resources for community-based action plans, and made specific recommendations for service providers.[77] It points to one example of how community-level priorities can show the way to improving safety and well-being in an integrated way.

Recommendation 32: Build in legislative mechanisms that support partnerships and capacity among community organizations, including social services providers, mental health supports, victims' services, and affordable housing, with the goal of providing holistic, community-based responses and supports, rather than police-based responses to complex social issues.

Recommendation 33: Build in legislative mechanisms to collect data and conduct systemic reviews on excessive force and deaths in custody and that includes ethnicity, gender, and age. Work with Indigenous peoples to ensure Indigenous data sovereignty and governance principles are respected.

Even when local communities attempt to democratically shift or cap resources of police forces, the *Police Act* allows un-elected police boards to appeal their decisions. Recently, Vancouver City Council passed a budget to freeze police spending at $340 million, but because the *Police Act* allows police boards to appeal to the provincial director of police services, the Vancouver Police Board asked the director to overturn the council decision and allocate them a $5.7 million increase. This is not citizen accountability.

Recommendation 34: Legislation must support accountability at the local level, including appropriate mechanisms for appeals that do not overrule elected leadership.

[76] Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) p 686
[77] Path Forward Action Plan, (2019), https://www.pathforward.ca/action-plan.html

9.6 Emergency Management

Emergency management is another sector where the role of the RCMP intersects with the well-being and jurisdiction of First Nations communities. The 2017 Flood and Wildfire Review made 108 recommendations following community engagement regarding the 2017 wildfire season. One theme that emerged regarding the RCMP was the need for greater training, cultural sensitivity, coordination with First Nations governments, and communication of up-to-date information when communicating evacuation orders.[78] The report made a number of recommendations regarding enhancing partnerships, coordination, integration, communication, and First Nations jurisdiction throughout all pillars of emergency management. RCMP and first responders must be full participants in the implementation of these new relationships.

Recommendation 35: The legislative framework should set a strong basis for enhancing partnerships, coordination, integration, and communication, and First Nations jurisdiction within all sectors.

10. POLICE COMPLAINTS PROCESSES[79]

Full civilian oversight over complaints of police misconduct is needed to restore the faith of Indigenous peoples in policing. Given the shared history discussed earlier, Indigenous peoples will not simply take for granted that police are fair and impartial because of an internal policy. There must be independent and harmonized oversight for all police forces operating in BC that is seen as capable of upholding accountability. The practice of police investigating police must end. There must be greater accountability for the protection and respect of the fundamental human rights of First Nations.

10.1 Office of the Police Complaint Commissioner

Complaints handled by the Office of the Police Complaint Commissioner (OPCC) under Part 11 of the *Police Act* are divided into three categories: public trust complaints, which involve specific allegations of misconduct by an officer, policy and service complaints, regarding a departments policies, procedures, or services, and internal discipline, regarding matters which do not involve or affect the public. According to the Annual Report of the Police Complaint Commissioner[80], between April 1, 2017 and March 31, 2018, the OPCC received 522 registered public trust complaints. 223 of those were deemed inadmissible due to no misconduct identified in the complaint. Another 233 were forwarded to a discipline authority within police departments for investigation. Of these, 38 complaints were fully investigated to determine whether the officer committed misconduct – the rest were discontinued due to lack of participation by the complainant or other reasons, withdrawn by the complainant, or resolved through a complaints resolution

[78] George Abbott and Chief Maureen Chapman, *Addressing the New Normal:21st Century Disaster Management in British Columbia*.
[79] The FNLC made submissions to the Special Committee to Review the Police Complaints Process in June 2019 and a submission reviewing the BC Provincial Policing Standards to promote unbiased policing in September 2019. Excerpts are incorporated into this submission.
[80] Office of the Police Complaint Commissioner 2017/2018 Annual Report. https://opcc.bc.ca/wp-content/uploads/2018/11/2017-2018-Annual-Report-Revised-on-2019-Mar-27.pdf

process. This means that only a fraction of registered complaints received that year underwent formal investigation.

Each public trust complaint received may contain several allegations of misconduct. Of the allegations that were investigated by police departments in 2018, only 19% were substantiated, while 81% were unsubstantiated, with no resulting discipline.[81] Allegations are unsubstantiated because there is insufficient evidence to make a finding of misconduct. This can include evidentiary uncertainty. The Commissioner's Report provides case studies of some unsubstantiated allegations, but for the most part it is unclear why so many of these allegations do not have enough evidence to be substantiated. Under the *Police Act*, if the OPCC disagrees with a discipline authority's decision of no misconduct, it has the power to order a review of the decision by a retired judge. The OPCC referred 8 matters to a retired judge in 2018.[82] This means that 8 allegations of misconduct out of 522 complaints were substantively reviewed by an adjudicative body external to a police force.

The conclusion that one can draw from the data is that less than half of registered complaints were considered admissible. Only a fraction of those were fully investigated. And the vast majority of complaints that were investigated were unsubstantiated. Few matters move to a discipline proceeding, and even fewer receive a public disciplinary hearing. Officers who are found to have committed misconduct are often disciplined with a verbal or written reprimand. If an independent civilian oversight body were fully responsible for these investigations and findings, Indigenous members of the public might have more confidence that they are procedurally fair and proper. However, because these investigations are conducted by the police departments themselves, that confidence, and confidence in the complaints process, is eroded. The result is that Indigenous people in urban areas rarely consider filing a formal police complaint as an effective method for holding the police accountable. Representatives of Pivot Legal Society have publicly stated that they have seen the result of "no misconduct" so many times that the organization now "seldom even bothers to file a complaint" due to the perception of bias.[83] If organizations with that kind of capacity don't have faith in the process, why would individual community members? No wonder there is a perception among urban Indigenous communities that, as one community member put it, "it seems like a lot to pursue with very little return".[84]

Effectiveness: Systemic Complaints

A gap in the report of the Police Complaint Commissioner is data about how many allegations of misconduct involve Indigenous people, as an indicator of possible systemic discrimination. The FNLC would like to see mandatory documentation and reporting of all allegations of misconduct where the complainant or affected person is Indigenous, and the percentage of those complaints that are investigated and substantiated.

The Supreme Court of Canada has recognized the operation of institutional and systemic discrimination in Canadian society, as well as the relationship between individual instances of direct discrimination. It has stated that "to the extent that manifestations of direct discrimination

[81] Ibid.
[82] Ibid.
[83] https://www.straight.com/news/584021/first-nations-activist-appeals-vancouver-police-dismissal-complaint
[84] Private communication, DTES community worker

are so much a part of an institutional culture as to be accepted as practice, they constitute systemic discrimination".[85] Examples of systemic discrimination in a policing context include negative stereotyping about a particular group of victims or offenders that affects all aspects of the investigative process, and can contribute to neglect or over-enforcement, racial profiling, and harassment of Indigenous peoples by police.[86] In 2012, the Oppal Report made a finding that systemic bias contributed to critical police failings in missing women investigations by Vancouver police[87], as a manifestation of systemic discrimination within Canadian society. Article 1 of the UN Declaration states that Indigenous peoples and individuals are free and equal to all others and have the right to be free from any kind of discrimination.[88] Systemic bias and systemic discrimination need to be top priorities for the OPCC.

A failure of the current police complaint process is the inability of the OPCC to undertake external investigations into systemic allegations, including allegations of bias or discrimination, against a police department as a whole. Section 82(3) of the *Police Act* specifies that a complaint is inadmissible as a public trust complaint if it relates to policy and service matters, including staffing or resource allocation, training programs, standing policies, ability to respond to requests for assistance, or internal procedures. Currently, the Commissioner has no authority to substantively investigate these policy allegations, but is restricted to forwarding them to the board of the police department for processing under the less rigorous Division 5. Our concern is that discriminatory practices hidden within these policy and service complaints go under-investigated. Even if systemic issues are investigated by a Police Board, the lack of truly independent control over the investigation can result in further damage to Indigenous people's confidence in the complaints process.

44% of registered complaints in 2018 were deemed inadmissible due to no misconduct identified in the complaint.[89] The OPCC report does not provide data on how many of the "no misconduct identified" complaints were policy and service matters, and how many of those alleged systemic bias or discrimination. More information is needed to understand the nature of these inadmissible complaints, and why so many are found to contain no identifiable misconduct. Even if no identifiable misconduct has occurred, it is still possible that harm has been done and should be addressed. Admissibility screening needs to be more accountable to improve Indigenous public perception of the police complaints process.

<u>Accessibility: Barriers to Making Public Trust Complaints</u>

Even in cases where identifiable misconduct has occurred, safety concerns and other barriers prevent Indigenous people and other marginalized citizens from going through the formal complaint process. In 2018, Pivot Legal Society and the Overdose Prevention Society, responding to widespread allegations of misconduct from DTES community members, facilitated a collective complaint drafting process regarding two VPD officers.[90] They received 22 complaints regarding one or both officers, including disparaging conduct, intimidation, harassment, and even assault. A significant number of those making complaints, including Indigenous complainants, said that

[85] Supra note 10 at 117
[86] Ibid.
[87] Ibid at 94.
[88] United Nations Declaration on the Rights of Indigenous Peoples. https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
[89] Supra note 28
[90] http://www.pivotlegal.org/vpd_group_complaint

they wanted to share their stories but felt too concerned about their personal safety to go through the formal complaint process themselves. Currently under section 83(3) of the *Police Act*, officers are given the name of the person making an allegation against them if the complaint is deemed admissible. Those contemplating making a complaint recognize that they may be policed by that very officer again in the future.

The Vancouver Police Department took issue with flyers created for the event that showed photos of the police officers in question. However, as Pivot Legal Society stated in an online publication[91], DTES community members most often recognize police officers by their faces, not by their names or badge numbers. Furthermore, a bureaucratic process for filing a formal complaint is often inaccessible to those who may be homeless, dealing with addiction, or involved in survival street work. It is ironic that those who are most vulnerable to police misconduct are also prevented from making formal complaints by the very nature of the process. There need to be accessible, safe, and, if desired, anonymous avenues for frontline workers and community members, especially Indigenous community members, to make public trust complaints to the OPCC. The FNLC recommends that section 83(3) be amended such that the police officer in question not be informed of the name of the complainant should the complainant choose to remain anonymous. This will increase the perceived safety of marginalized community members to bring complaints forward.

The *Police Act* section 177(2)(g) specifies that the Commissioner must develop and provide outreach services to inform and educate the public. Past reports have concluded that the OPCC needs a concentrated public education program, particularly for agencies that serve populations living in inner city areas, including Indigenous people.[92] To this we add that, in addition to education and training, there need to be more informal and accessible avenues for marginalized community members and those who work alongside them to report anecdotal experiences of their interactions with police and have those reports meaningfully followed up on. Too often, negative interactions with police are left undocumented and allowed to fester into increased mistrust. The OPCC should have the resources and the mandate for dedicated outreach programs to engage organizations serving vulnerable urban communities and do more to facilitate the police complaint process for these citizens.[93] In-person options, straight-forward email submission options, public engagement to gather anecdotal data, and better training about how to effectively make public trust complaints would make the process more accessible. Individuals should not have to go to a police department to file a complaint in person.

<u>Reporting on Allegations of Misconduct Affecting Indigenous People</u>

The *Police Act* section 177(2)(e)(i) requires the OPCC to compile demographical information in respect of people who make complaints, and section 177(2)(f) requires that this information be made available to the public at least annually – yet, it is not clear from the 2017/2018 Annual Report how many allegations of misconduct involved an Indigenous person. The *Police Act* should require mandatory documentation and reporting of all complaints and allegations of misconduct where the complainant or affected person is Indigenous and the percentage of those complaints

[91] Ibid.
[92] Josiah Wood, QC. Report on the Review of the Police Complaint Process in British Columbia. (2007). https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/independent/police-complaint-process-report.pdf
[93] https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/

that are investigated and substantiated. Without this data clearly available, the picture of police accountability with respect to Indigenous people remains incomplete.

Indigenous Representation in Police Oversight

The FNLC calls for the OPCC to more fully reflect the diversity of the Indigenous communities it serves. If Indigenous individuals were an integral part of screening, investigation, and review of complaints, Indigenous members of the public could have more confidence in the fairness, impartiality, and relevance of the process to them. The OPCC needs to be resourced and mandated by legislation to hire Indigenous staff, including into decision-making roles, and to form and train an Indigenous committee that can be part of admissibility reviews, investigation oversight, and reviews of discipline authority decisions. This is another safeguard against allegations of systemic bias going unaddressed. Indigenous peoples have existing legal orders that, historically and today, function to resolve disputes and address harm in our communities – this must include harm done to our communities by police.

Definition of "Serious Harm"

Under the current legislation, instances where a person dies or sustains serious harm while in police custody are investigated by the Independent Investigations Office, an external civilian body. Section 76(1) of the *Police Act* sets out that "serious harm" is injury that may result in death, disfigurement, or substantial loss or impairment of mobility in whole or in part. We call on the legislature to expand the definition of "serious harm" in to include sexual assault, psychological harm, and less serious physical injuries than the current standard. This should include all injuries resulting from Police Service Dog bites, which are prevalent in municipalities such as Vancouver and Abbotsford and have resulted in significant bodily and psychological harm.[94] The definition change of "serious harm" has been called for by human rights advocates and even by police constables for nearly a decade.[95] Physical and psychological harm done by police officers and police dogs should always be fully investigated by an external, independent, and civilian body.

Gaps in Oversight in Municipal Jails

The BC Ombudsperson has raised concerns that jail guards in RCMP-run municipal jails are not subject to oversight either by the OPCC or by the RCMP's Civilian Review and Complaint Commission (CRCC).[96] While this issue does not fall directly within the scope of this review, it is an important and concerning issue that directly affects Indigenous peoples in municipalities throughout BC. Municipalities in BC with populations over 5000 must provide policing services either by establishing a municipal police force or contracting policing services from the RCMP. In both cases, they are required to operate detention facilities. Detention centre staff in municipalities with their own police forces are designated as special municipal constables under the *Police Act*, and subject to the OPCC's complaints process. Detention centre staff in municipalities who contract the RCMP's police services – such as Kamloops, Prince George, and other significant urban centres in the province – are not subject to the CRCC's oversight because they are municipal employees or contractors, not RCMP officers. Given the large population of Indigenous

[94] Beyond Minimum Force. http://www.pivotlegal.org/moving_to_minimum_force
[95] https://www.leg.bc.ca/documents-data/committees-transcripts/20140911am-IIOReview-Vancouver-n5#5:1150
[96] https://www.bcombudsperson.ca/documents/ombudsperson-calling-independent-oversight-municipal-rcmp-police-lockups

peoples living in these centres, the FNLC urges that this gap be urgently addressed. The Ombudsperson stated that the issue requires a "full independent statutory process" for the oversight and investigation of these kinds of complaints.[97]

Incomplete Civilianization of Oversight Bodies

The Independent Investigations Office (IIO) is an oversight body with investigative powers in incidences of serious harm or death while in police custody. While the IIO is outside the scope of this review, it is worth including in a discussion of civilian composition of the OPCC. One third of OPCC staff in decision making roles and just under half of IIO investigators are former police officers.[98] [99] The goal for these bodies since their respective creation in 1998 and 2011 has been to become fully "civilianized" by providing training over time so that former officers can be phased out. This goal is not only reasonable, it was recommended in the Braidwood Commission of Inquiry leading to the creation of the IIO, which stated "at the end of the day, the investigative body should, in my view, be entirely civilian. By that I mean that none of its management, supervisory staff, or investigators should have served anywhere in Canada as a police officer."[100] This is a process that takes time and requires resources from the Province for appropriate training and building competency – the timeline the Braidwood report recommended for the full civilianization of the IIO was 5 years. This goal is necessary for the OPCC as well to restore trust in the police complaints process respecting all alleged police misconduct. The FNLC calls for the Province to dedicate the financial and human resources needed for the full civilianization of oversight bodies.

Lack of Independent Civilian Control Over Investigations

This brings us to the most important of our concerns regarding the police complaints process. Throughout this submission, we have raised concerns related to the real and perceived lack of independence in the process of investigating police complaints under the *Police Act*. External, independent civilian oversight is fundamental to maintain public trust in policing. It is vital to that trust that police are not investigating police[101] – yet that is exactly how allegations are handled under the current OPCC model. Currently, the OPCC is a screening body, not an investigative one. As discussed, once the OPCC determines that a public trust complaint is admissible, it is forwarded to the Chief Constable of the accused officer's department for investigation. That Constable acts as the discipline authority for the investigation. Similarly, when the OPCC receives policy and service complaints that pertain to the entire police force, it refers the issue back to the police department. Once that referral is made, the OPCC has discharged its legal responsibility, and the matter now belongs to the Police Board. This fails to inspire public confidence and particularly the confidence of Indigenous peoples in the complaints process or in policing in general.

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[97] Ibid.
[98] Supra note 28.
[99] Independent Investigations Office 2017/2018 Annual Report. https://iiobc.ca/app/uploads/sites/472/2019/05/17-18-Annual-Report_Web-Version.pdf
[100] Braidwood Commission on the Death of Robert Dziekanski. (2010). https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf at 419
[101] Ibid.

One of the concerns articulated by former Police Complaint Commissioner Stan Lowe was the possibility of analytical bias in former police officers who are investigating police allegations of misconduct.[102] Analytical bias is unconscious bias that operates to lead an investigating officer towards a foregone conclusion, such as "everything is fine".[103] Analytical bias remains a serious concern when it comes to the effectiveness of police investigating police. The FNLC supports civilian control over not only investigations of serious harm and death, but all police misconduct and systemic bias allegations. Especially when the complainant is Indigenous, the investigation needs to be truly independent to ensure that systemic discrimination described earlier is not being reproduced in the investigation's findings.

In our respectful submission, the *Police Act* needs fundamental changes giving broad discretionary power and corresponding resources to the OPCC to conduct its own investigations, taking police investigation out of the hands of police departments and into the hands of external, civilian oversight bodies. The Commissioner should:

> a) have the discretion to retain jurisdiction over investigations of misconduct rather than forwarding them to police departments for investigation,
>
> b) have the discretion to retain jurisdiction over policy and service complaints and, if deemed necessary, conduct systemic reviews, rather than monitor policy issues from arms-length, and
>
> c) have freestanding power to hold public hearings, call witnesses, and commission evidence - in short, the power to become their own mini-Commission of Inquiry if a systemic issue is identified.

This freestanding power is not without precedent. The Civilian Review and Complaints Committee for the RCMP has this ability. Given the extensive contact between urban Indigenous people and municipal police forces in BC, the same power should be vested in the external civilian body that monitors municipal police.

Ending the practice of police investigating police has been called for by numerous commissions, most recently the 2017 Tulloch Report of the Independent Police Oversight Review in Ontario.[104] We echo the findings of that report that "independent investigation would help foster public trust in not only the complaints system, but policing more generally".[105] We also echo its recommendation that an external civilian body, in this case the OPCC, should be the sole body to investigate public conduct complaints. This means the OPCC needs to be restructured and resourced accordingly.

Year after year, governments, committees, and reports emphasize the importance of public confidence in policing. But which public's confidence matters enough to make real changes? The confidence of Indigenous peoples in municipal police is deeply tainted by an insufficiently external, independent, and civilian process to review allegations of misconduct and systemic

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[102] https://www.leg.bc.ca/documents-data/committees-transcripts/20140911am-IIOReview-Vancouver-n5#5:1150
[103] Ibid.
[104] Michael Tulloch. Report of the Independent Police Oversight Review. https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/
[105] Ibid.

discrimination. In an era of Truth and Reconciliation, how fundamentally are Canadians willing to transform their institutions to repair relationships between Indigenous peoples and Canadian society?

Recommendation 36: Legislation should make the following fundamental changes to the OPCC's investigative powers:
The *Police Act* should be amended to give the Office of the Police Complaints Commissioner freestanding powers of inquiry and the resources and discretion to:

- retain jurisdiction over investigations of misconduct rather than forwarding them to police departments for investigation
- retain jurisdiction over policy and service complaints and, if deemed necessary, conduct systemic reviews, rather than monitor policy issues from arms-length
- hold public hearings, call witnesses, commission evidence, and impose disciplinary sanctions on officers.

Recommendation 37: Full civilianization of the OPCC: The *Police Act* should set out a timeline and a plan for the full civilianization and accompanying training of OPCC staff, including management, supervisory staff, and investigators.

Recommendation 38: Section 83(3) of the *Police Act* should be amended such that the police officer in question not be informed of the name of the complainant should the complainant choose to remain anonymous.

Recommendation 39: Reporting on allegations of misconduct affecting Indigenous people - Pursuant to section 177(e) and (f), the *Police Act* should require mandatory documentation and reporting of all public trust complaints and policy and service complaints where the complainant or affected persons are Indigenous, and the percentage of those complaints that are investigated and/or substantiated. This information should be made clearly available to the public in the Annual Report.

Recommendation 40: Indigenous representation in the OPCC - The *Police Act* should require the OPCC to hire Indigenous staff, including into decision-making roles, and to form and train an Indigenous committee that can be part of admissibility reviews, investigation oversight, and reviews of discipline authority decisions, especially when the complainant or affected person is Indigenous.

Recommendation 41: Indigenous Civilian Oversight - Legislation should provide for the establishment of an independent Indigenous civilian oversight body for all police misconduct cases involving Indigenous peoples and systemic issues.

Recommendation 42: Independent investigative and oversight bodies must be properly resourced with legislated funding.

Recommendation 43: Legislation should provide for standardized training for investigators under the *Police Act*

Recommendation 44: The legislature must act to bring municipal jail guards in RCMP-policed municipalities under an appropriate oversight body so that the public complaints process includes them. The RCMP operating in BC must also be brought under provincial

oversight bodies as the national Civilian Review and Complaints Commission for the RCMP lacks accountability and timeliness. Special provincial constables must also have enhanced, civilian oversight as has been recommended for the OPCC.

10.2 Reviews of the Police Complaints Process

Between 2001 and 2021, there have been three special committees to review the police complaints process appointed under s. 51(2), and one review of the police complaints process directed by the Minister under s. 42(1). The first, appointed in 2001 under s. 51(2), released its 2002 Report with 42 recommendations.[106] The second Report was ordered by the Minister in 2005 under s. 42(1) and was conducted by Josiah Wood, QC, and released in 2007.[107] In 2012, a special committee was appointed under s. 51(2), which in turn appointed the Office of the Auditor General (OAG) to conduct the audit, releasing its report in 2013. At that time, the OAG report noted that "it may be appropriate for a future special committee to consider whether a more comprehensive external examination is appropriate in order to determine if the outcomes intended by Justice Wood are being achieved."[108] The most recent Special Committee to Review the Police Complaint Process under s. 51(2) released its Report on November 25, 2019 with 38 recommendations.

This section analyzes selected thematic recommendations from these reports and the extent to which the Province has implemented them in a 20-year period.

Accessibility of the Police Complaint Process to Marginalized Communities

In 2002, the Special Committee to Review the Police Complaint process recommended:

> "that section 50(2)(e) (now s. 177) be amended to clearly specify that the Police Complaint Commissioner must develop and provide public education and outreach programs regarding the police complaint process and the mandate of the Office of the Police Complaint Commissioner, and that such education and outreach initiatives acknowledge and address the needs of diverse communities, including marginalized groups."[109]

At the time of the 2007 Wood Report, none of the recommendations for change to Part IX of the *Act*, proposed in the 2002 Report, had been implemented.[110] The 2007 report echoed the need for dedicated language in the legislation for an outreach program and emphasized that it be targeted towards marginalized groups:

> "the results of the Core Area Survey demonstrate that s. 50(2)(e) must emphasize the duty to direct such educational and outreach initiatives, in particular, to the marginalized groups in our society whose condition in life is such that they are likely to come into more frequent contact with the police. Accordingly, I recommend that s. 50(2)(e) be amended to include

[106] Special Committee to Review the Police Complaints Process Final Report (2002) [2002 Report].
[107] Josiah Wood, Review of the Police Complaints Process (2007) [2007 Report or Wood Report].
[108] Special Committee to Review the Police Complaints Process Final Report (2013) [2013 Report].
[109] 2002 Report, supra note , p. 8.
[110] Wood Report, supra note , p. 11.

> the duty to develop outreach programs with particular emphasis on those that address the needs of diverse communities including marginalized groups in our society."[111]

While the duty to create educational and outreach initiatives has been taken up in amendments to the *Police Act*, these amendments have ignored the special emphasis of the 2002 and 2007 Reports. Section 177(1)(g) and (h) now specify that the Police Complaint Commissioner must develop and provide outreach programs and services to inform and educate the public with respect to the police complaint process, with a requirement to consider and address "the particular informational needs of British Columbia's diverse communities"[112].

The most recent review of the complaint process again saw submissions from a number of organizations serving marginalized and over-policed communities asserting that the complaint process is inaccessible to them. The Final Report suggested that the OPCC should look at opportunities to improve the accessibility of the complaint process, noting that the office does not currently have outreach programs aimed at police departments or the public. The Committee recommended:

> Recommendation #8: The Office of the Police Complaint Commissioner should prioritize its existing plan to perform analysis of all stakeholders and develop specific outreach programs.[113]

With particular recommendations to:

> Increase engagement and outreach activities to inform and educate British Columbians about the police complaint process, with a particular focus on agencies that serve Indigenous people living in urban areas, settlement service organizations, and organizations that serve vulnerable communities.
>
> Examine ways to make the police complaint process more accessible for those from Indigenous and newcomer communities.[114]

Of course, the inaccessibility of the complaint process to marginalized communities is not only a result of a lack of outreach programs. It stems from fundamental distrust and lack of confidence that complaints will be taken seriously and properly investigated, *especially* those complaints from marginalized and over-policed communities, due to systemic discrimination within the system. The Special Committee also recommended actions to more generally make the complaint process more accessible beyond outreach programs:

> Examine and address the need for advocacy and support for those living with mental health issues in navigating the police complaint process.

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[111] Ibid, p. 13.
[112] Police Act, supra note , s. 177(1)(h).
[113] 2019 Report, supra note , p. 9.
[114] Ibid, p. 26.

> Increase resources for community advocacy groups to provide support and assistance to those who wish to initiate a police complaint and to provide other accessible locations that are safe and respectful spaces for complainants.
>
> Provide opportunities for meaningful consultation with diverse community groups as part of statutorily-required reviews of the *Police Act* to ensure that the Act is free of systemic discriminatory practices.[115]

What is most telling about these recommendations is that they demonstrate that in 2002, in 2007, and again in 2019, the police complaint process is seriously inaccessible to marginalized communities. As yet, this issue has not been meaningfully addressed. The Police Complaint Process continues to be inaccessible and is not trusted by those in our society who are most vulnerable, come into the most frequent contact with police, and are most likely to witness and be victims of police misconduct.

This well-placed mistrust is compounded by the continued situation that police departments are responsible for investigating their own, and can only be addressed by the full civilianization of police oversight.

Civilian Oversight of the Police Complaints Process

Justice Wood's 2007 audit of the police complaint process found that the number of serious abuse of authority complaints, including 38% of allegations of excess force, but also other serious public trust complaints such as allegations of deceit, neglect of duty, wrongful arrest and wrongful seizure of property, were "materially deficient", meaning they were either not properly investigated or improperly concluded, making it impossible to know for certain that the ultimate disposition of the complaint would have been the same had the complaint been fully investigated.[116] Justice Wood rightly deemed this unacceptable and that it warranted greater civilian oversight and participation in the investigative process. He found that the *ex post facto* oversight process in the legislation, in which the OPCC reviewed investigations after the fact and had little substantive involvement in investigations as they were happening, was inadequate, especially with regards to the more serious public trust complaints.

Justice Wood suggested that an integrated investigated unit consisting of police from various departments alongside civilians could be created to investigate complaints, creating in effect an external investigative process, rather than each police department being responsible for its own investigations. Because of what he saw as cost barriers, he stopped short of recommending this, stating that he was not convinced that the time had come for a completely independent investigative process. Instead, he recommended enhanced powers of the OPCC powers to have more active and authoritative involvement in the police complaint process conducted by police departments, rather than just reviewing investigations after the fact.

This was partially addressed in amendments to what is now **section 97, Police complaint commissioner's powers relating to investigation**, which now gives the police complaint

[115] Ibid, p. 14-15.
[116] Wood Report, supra note, p. 43-44.

commissioner the power to issue binding directions on investigations after consulting with the investigating officer and discipline authority.[117]

The 2019 Special Committee audit under s. 52(1) was focused primarily on the OPCC's compliance with the *Police Act* and did not provide an in-depth audit, as did the 2007 report, of the appropriateness of decisions rendered through the complaints process. However, Recommendation #5 states:

> "The police complaint system would benefit from a more comprehensive and independent review of the complaint files to obtain assurance that the complaints are properly addressed and thoroughly investigated."[118]

This recommendation points to the lack of trust and accountability that still plagues the police complaint process. In 2007, Justice Wood felt that the moment had not yet come for the most serious public trust complaints to be dealt with by a fully independent civilian unit. Instead, he suggested that issues with complaints being improperly investigated could be dealt with by changes to the *Police Act* that gave the OPCC greater substantive powers of oversight. These changes were made, but 12 years later, in 2019, there has been no audit or review of these changes to know if they have, indeed, resulted in complaints being properly investigated.

The 2019 report notes that diverse stakeholders in the review, including, in a rare moment of agreement, the BC Association of Police Boards, the BC Association of Municipal Chiefs of Police, and the BC Civil Liberties Association (BCCLA), supported the creation of an independent integrated unit consisting of police officers from various departments as well as civilian analysts[119], echoing Wood's suggestion in 2007. The BCCLA noted that a cost-sharing model could be developed across departments for this unit to reduce the costs for individual departments over time, and some Committee Members agreed that a civilianized complaint process could help alleviate the strain on resources imposed by the investigative process on police departments.[120] Yet the Committee in its Report stopped short of recommending such an integrated unit even as it recommends the benefits of a more independent complaint process, apparently out of cost and operational concerns and concerns over the quality of investigations if the process was to be civilianized. To this point, the following observation from the Wood Report is relevant:

> "Most of the professional standards officers to whom we spoke, both past and present, told us they had no significant investigative experience before being assigned to investigate public complaints of police misconduct. This was a curious revelation, given that the consistent argument advanced as the justification for the police investigating the police is that they, and they alone, have the investigative skills necessary to do the job properly."[121]

Most bafflingly, the Committee's 2019 Report muses that "one option would be to ensure that police departments are adequately resourced to handle the complaints investigation process

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[117] Police Act, supra note, s. 97.
[118] 2019 Report, supra note, p. 9
[119] Ibid at p. 17.
[120] Ibid.
[121] Wood Report, supra note , p. 8.

without impacting other services".[122] If, after all the Committee heard, it can cite providing more funding to police departments to investigate themselves as a solution, then there has been a serious breakdown in communication and understanding between the Committee Members and the participants in the review process.

To conclude this section with an observation from the Wood report, now 14 years ago:

> "Acceptance of civilian oversight by the police is not something that can be legislated. But what can be legislated is an entirely different model for processing complaints against the police, one that removes that process in its entirety from their control, placing the responsibility for investigation in the hands of a completely independent investigative force and the responsibility for adjudicating the results of those investigations, and imposing discipline, in the hands of an independent civilian agency."[123]

The FNLC submits the time has long come for investigations into public trust complaints, at the very least the most serious ones that deal with allegations of abuse of authority, to be conducted by an independent civilianized unit rather than merely overseen by the OPCC.

Recommendation 45: Create an integrated independent unit, as was contemplated in 2007 and again in the 2019 review, that is cost-shared between police departments and the OPCC and includes civilian analysts to handle investigations of the public trust complaints involving abuse of authority allegations.

Recommendation 46: Immediately order an independent audit of the substantive content and results of complaint files, equal to or greater than the depth of that conducted in 2007, to ascertain whether amendments to the *Police Act* have resulted in improvements to the integrity of investigations, especially as regards abuse of authority complaints. Include demographic data as to ethnicity and gender of complainants, and any trends, in this audit.

Addressing Systemic Bias or Problematic Trends

In 2007, having seen evidence during the review of potential trends in certain types of complaints, such as one-third of public trust complaints including allegations of excess force, Justice Wood observed that the OPCC was in a position to make that sort of judgment and it was part of the mandatory duties of its oversight role to do so. He recommended that:

> "s. 50(2) be amended by adding thereto a duty to conduct reviews with respect to the frequency and demographics of complaints so as to identify the development or existence of trends of alleged misconduct and to make whatever recommendations or take whatever actions as may seem necessary in the circumstances."[124]

This recommendation has not taken up in the intervening years. The 2019 Report similarly observed that the OPCC is in a unique position to examine data for trends, and that employing further measures to highlight trends and systemic issues may lead to proactive measures aimed

[122] 2019 Report, supra note , p. 17.
[123] Ibid, p. 89.
[124] Wood Report, p. 14

at preventing misconduct among police officers. The Special Committee Recommendations #6 and #7 state:

> Recommendation #6: The Office of the Police Complaint Commissioner should develop a data analytics role to track trends in policing. This role should manage a database of cases which provides sufficient detail to assist discipline authorities with imposing consistent corrective and disciplinary measures.
>
> Recommendation #7: The Office of the Police Complaint Commissioner's data analytics role should also be responsible for providing trend analysis on a department and provincial level.[125]

With a specific recommendation to:

> Amend the *Police Act* to enable the Office of the Police Complaint Commissioner to conduct self-initiated systemic reviews, including data analysis, to highlight emerging or high-level trends, and to report publicly on any findings.[126]

Recommendation 47: The FNLC recommends implementation of Recommendations 6 and 7 of the Josiah Wood Inquiry.

Independent Investigations Office

The Independent Investigations Office (IIO) was established in 2011, becoming fully operational in 2012, on the recommendation of two inquiries into police-related deaths: the Davies Inquiry into the 1998 death of Frank Joseph Paul, a First Nations man who was released from custody by Vancouver police into an alleyway and died of hypothermia, and the Braidwood Commission into the 2007 death of Robert Dziekanski at the Vancouver airport after he was tasered by an RCMP officer. Both reports, released respectively in 2009 and 2010, recommended the creation of a civilian-based criminal investigation body to be named the Independent Investigation Office. The Braidwood Report recommended that the organization, which would be empowered to examine serious incidents involving police resulting in serious harm and death, be fully civilianized within 5 years of its becoming operational.[127]

Legislation was introduced in 2011 to amend the *Police Act* to establish the IIO. Section 38.13 required that a special committee conduct a review of the IIO's operations by 2015. In February 2015, the Special Committee to Review the Independent Investigations Office released its Report with 24 Recommendations.

Civilianization

One of the express mandates of the Special Committee was to review the IIO's progress towards full civilianization, or being staffed entirely with employees and investigators who have never served as officers or members of a police or law enforcement agency. The 2015 Report recommended that:

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[125] 2019 Report, p. 19
[126] Ibid, p. 31.
[127] Braidwood Commission on the Death of Robert Dziekanski, p. 423.

> "The provincial government support the continued civilianization of the Independent Investigations Office;"[128]

The Committee accepted the views of police representatives that the IIO was in its early years and that the immediate priority of the IIO was establishing a competent investigative team and that complete civilianization was a "long-term goal" of the organization.[129] This has allowed the 5 year timeline to be stretched to the present day, now just a year shy of the 10 year anniversary of the IIO. Since the time of the Special Committee Report in 2015, there have been no amendments to the *Police Act* to require further review of the IIO, and therefore, no reviews of its progress towards the goal of civilianization and other recommendations contained in the Report. A s. 42 Review of the IIO was conducted in 2016/2017, but it focused on investigative practices, case management and training, and was not directed towards the goals of civilianization and other substantive topics regarding police oversight. Six years after the 2015 Report, and four years past the five-year deadline set out by the Braidwood Commission, it is past time for another detailed audit of the IIO to hold it to account in the goal of full civilian oversight of police-related deaths and serious harm, more urgent than ever in light of the escalating deaths of Indigenous people at the hands of police in BC and Canada.

Recommendation 48: Fully and immediately civilianize the IIO. Conduct an immediate audit of the IIO to review its operations and progress towards civilianization.

Definition of Serious Harm

Sexual assault is included in civilian oversight mandates in other jurisdictions across Canada. Offices in Ontario, Nova Scotia, and Manitoba have provisions to include sexual assault cases. In Alberta, a sexual assault incident may be assigned to the oversight office by the Solicitor General, but in BC, such a case is only investigated if it involves death or serious harm as currently defined in the statute.[130]

Leading up to and throughout the existence of the IIO, there have been calls to include sexual assault in the mandate for independent criminal investigations, and since the creation of the IIO, in the definition of "serious harm" in the *Police Act*. In 2009, the Commission for Public Complaints Against the RCMP recommended that police-related deaths, serious injuries and sexual assaults be referred to a provincial criminal investigative body.[131] The reasoning cited for the exclusion of sexual assaults in the 2015 Report was that it would require the hiring and training of sexual assault investigators and require the creation of appropriate policies and procedures, which would "take time" and "be difficult to do" given the operational challenges the organization was facing at the time.[132]

The 2019 Special Committee to Review the Police Act received submissions from a number of stakeholders, including the FNLC, to include sexual assault in the definition of serious harm. This

[128] 2015 Report, p. 18.
[129] Ibid.
[130] 2015 Report, p. 9.
[131] Braidwood Commission, p. https://opcc.bc.ca/wp-content/uploads/2017/04/Why-The-Robert-Dziekanski-Tragedy.pdf
[132] 2015 Report, p. 9.

fact was noted in the Report, but it does not appear to have been discussed by the Committee, let alone included in the recommendations.

Recommendation 49: Sexual assault is a criminal offence and constitutes serious harm. It must be included in the IIO's mandate through changing the definition of "serious harm" in Part 7.1 of the *Police Act*.

Body Cameras

One of the most unequivocal of the 2015 Special Committee's recommendations was that:

> "The provincial government aggressively pursue the steps necessary to implement the police use of body-worn cameras, in consultation with police and non-police stakeholders."

The deliberations of the Committee in 2015 are reproduced below in full:

"In their discussions with presenters during the public consultations, Committee Members noted that the use of body-worn cameras was increasing in other jurisdictions, and that these devices had been used recently by police in Vancouver enforcing evictions. Members stated that the use of body-worn cameras in BC was a really practical suggestion, and their use was a natural progression, particularly with today's technology. It was agreed that the experience of other jurisdictions provided evidence that a full subscription to the use of body-worn cameras by BC police forces was feasible and would benefit law enforcement and citizens alike, citing testimony by the Chief Civilian Director that police use of body-worn cameras could assist the IIO's conduct of investigations. The experience of other jurisdictions also provided insight into best practices for addressing privacy issues related to the use of body-worn cameras.

Members noted that a review of issues related to the use of body-worn cameras was underway by the Ministry of Justice, in consultation with police and non-police stakeholders, and expressed concern about the urgency of action to support the use of body-worn cameras in BC, given the benefits this would provide to police agencies, citizens, and the IIO.

Members concluded by strongly supporting the use of body-worn cameras in BC, and calling on government in consultation with police and non-police stakeholders to aggressively pursue the steps necessary to implement the use of body-worn cameras by BC police members."[133]

Most concerning about the absence of meaningful review of the IIO since 2015 is that the "aggressive pursuit" of the use of body-worn cameras was not taken up. Currently, the BC Provincial Policing Standards for body-worn cameras do not require police agencies to implement them, but set requirements for agencies that do choose to[134] – those standards were only developed in 2019, and were not widely adopted[135]. The IIO's Chief Civilian Officer told the media in 2020 that, in his opinion, all front-line officers in Canada should be equipped with body

[133] 2015 Report, p. 22
[134] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/4-2-1-body-worn-cameras-principles.pdf
[135] https://globalnews.ca/news/7035711/bc-police-body-cameras-george-floyd-protests/

cameras.[136] There is no justification for not following through on this unequivocal recommendation.

Recommendation 50: Immediately implement the 2015 Recommendation to "aggressively pursue" the use of body-worn cameras by all police agencies in BC, as a protective measure for Indigenous lives as well as to improve police accountability. Amend the *Police Act* and update the Provincial Policing Standards to make their use mandatory across police agencies.

11. CONCLUSION

This previous section has sampled a small number of recommendations and trends from the many reports, reviews and studies conducted into the police complaint process, the *Police Act*, and policing generally and revealed persistent deficiencies over a 20-year period in responding to calls to improve the police complaints process, and in some cases, outright failure to implement actions that could have better held police accountable – an accountability that may have saved the lives of the Indigenous people killed by police during that time.

This Special Committee on Reforming the Police Act, now convened at a time when the deaths of Black, Brown and Indigenous people at the hands of police is a national and international priority, cannot solicit another round of submissions and produce recommendations for the Province to selectively ignore. As First Nations leaders across the province and the country have stated, the time for reports and commissions is over. Now is the time for action.

[136] Ibid.