

News

Commission chair calls for legal cultural training

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OTTAWA

Law schools and legal regulators should require all law students and lawyers to take “appropriate cultural competency training,” the Truth and Reconciliation Commission (TRC) has urged.

“The legal community needs to read carefully what the TRC has said about lawyers and the judiciary,” said Manitoba Court of Queen’s Bench Justice Murray Sinclair, the commission’s chair. “There is a significant need for lawyers to be competent in dealing with Aboriginal people. Cultural awareness is a major aspect of that, but also understanding the impact residential schools and colonialism have had on the lives, communities and cultures of Aboriginal people is very important.”

Among the wide-ranging justice-related proposals in its June 2 report, the TRC’s recommendation that lawyers and would-be lawyers be required to learn about Aborig-



Janes

inal history and law, treaties and Aboriginal rights, and Aboriginal-Crown relations arose out of problems the commission saw in the legal representation of Aboriginal survivors of residential schools.

“It is more than knowing that residential schools existed that we call for, but the specific events that occurred and what impact they had on individuals,” he said by e-mail. “The Supreme Court in *Gladue* held that information such as resi-

dential school impact should be part of understanding the ‘unique circumstances of Aboriginal offenders,’ but we still see far too many lawyers misunderstanding its application.”

The TRC calls for lawyers and law students to undertake “skills-based training in intercultural competency, conflict resolution, human rights and anti-racism.”

“Awareness and cultural competency are the key things,” Justice Sinclair said. “In addition, simply understanding that Aboriginal peoples had, and in many cases, still have, a different functional regime of local protocols, behaviours and understandings that would fit quite nicely into the definition of a legal system would be an inevitable benefit.”

He stressed that “Aboriginal self-determination is a real expectation among Aboriginal peoples, and lawyers of the future will need to know how to work with such demands and expectations.”

He noted the president of the

Federation of Law Societies, the umbrella group for Canada’s legal regulators, has undertaken to review the TRC’s report. Law schools at Lakehead University and the University of B.C. have already developed mandatory Aboriginal law courses for all law students.

“It’s still very early, but individual contacts within the legal community have been very positive,” Justice Sinclair said.

Enhancing legal education is among the more ready recommendations of the TRC. Others are apt to be more difficult and controversial, such as the call for the United Nations’ *Declaration on the Rights of Indigenous Peoples* (UNDRIP) to function as “the framework for reconciliation in Canada.”

The commission’s call to “fully implement” the UN declaration, which Canada endorsed in 2012—including a requirement that Aboriginal communities give their prior, free and informed consent before resources are developed on their ancestral lands—will face

the most resistance, said Aboriginal law practitioner Robert Janes of Victoria’s JFK Law Corp.

“Opposition to these [recommended reforms] is rooted deeply in the political and legal system, and would require a real change in the relation between Canada, the provinces, and First Nations based on recognition of rights and respect for First Nations decision-making, rather than the superficial system of consultation that drives most resource development today,” said Janes, who has argued at the Supreme Court 14 times on behalf of First Nations.

The TRC’s 388-page summary report—*Honouring the Truth, Reconciling for the Future*—was six years in the making and reflects the testimony of thousands of former residential school survivors. The commission concludes that the residential schools, attended under compulsion by more than 150,000 children, were “the central element” of Canada’s policy of “cul-

Sharma, Page 10

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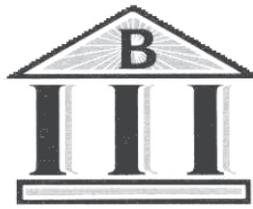
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News

Sharma: Panel recommendations are ‘a call to action’

Continued from page 5

tural genocide” which aimed to make Aboriginal peoples “to cease to exist as distinct legal, social, cultural, religious and racial entities.”

Established pursuant to the May 2006 Indian Residential School Settlement Agreement, the TRC makes 94 multi-pronged recommendations in areas including health, justice, language and culture, education, child welfare, and reconciliation.

As with the multi-volume report of the 1996 Royal Commission on Aboriginal Peoples, the federal government “will be quite reluctant to actually take any significant steps” to implement the TRC’s major recommendations, Janes predicted, as they run against core philosophies of the Harper government such as its “tough-on-crime” agenda and its desire to get out of areas of provincial jurisdiction such as education, health, and child and family welfare, he explained via e-mail.

However, Janes also pointed to practical steps to implement the report that Ottawa can take



Sharma

immediately “that would send a strong message that there is a commitment to do something real.”

These include implementing “Jordan’s Principle,” which aims to improve First Nations children’s access to government services by requiring that the government which has first contact with the child must fund the service and resolve any jurisdictional dispute later.

Another relatively straightforward measure recommended by the TRC is repeal of s. 43 of the

Criminal Code, which allows persons in authority such as teachers and parents to inflict reasonable corrective force on children. Such reforms “are easily done and would send a signal of engagement and interest in the TRC’s recommendations,” Janes said.

Vancouver Aboriginal law practitioner Niki Sharma of Donovan & Company said the recommendations “are a call to action to reverse chronic and institutionalized problems with how Aboriginal people interact with our justice system. The proposals are not radical but urgently necessary to reverse the decades of institutional abuse on our aboriginal population.”

Sharma said one pressing TRC recommendation is an amendment to the *Criminal Code* that would exempt offenders with Fetal Alcohol Spectrum Disorder (FASD) from mandatory minimum penalties.

“The report identifies FASD as a tragic legacy of the residential school system that has contributed to high rates of incarceration,” she said by e-mail. If the TRC’s recom-

mendations aimed at ensuring proper diagnosis of FASD, community programs, and targeted support were in place, “the number of these individuals incarcerated would hopefully decline.”

Sharma said the recommendation that Canada recognize and implement Aboriginal justice systems, based on Aboriginal peoples’ right to self-government, is far-reaching. “If implemented, these systems would depart from Canada’s criminal justice system and could be as diverse as the First Nations in Canada.”

In keeping with UNDRIP, the commission also called on Ottawa to fund the establishment of indigenous law institutes “for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.”

It also recommends amendments to statutes of limitations, as needed, to ensure that lawsuits by Aboriginal people for historic abuse are not time-barred.

As well, the commission calls on

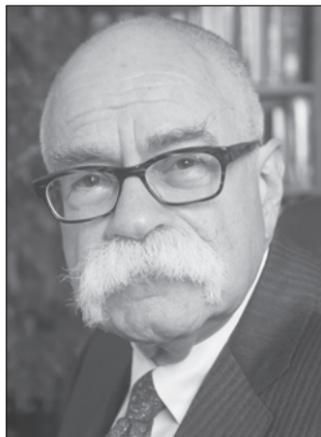
the federal government to “work collaboratively” with the thousands of plaintiffs suing Canada—such as day students and others who were not included in the Indian Residential Schools Settlement Agreement—“to have disputed legal issues determined expeditiously on an agreed set of facts.”

“We call upon the government to take a more conciliatory approach,” Justice Sinclair said.

The TRC also urges Ottawa and the provinces to commit to eliminating over the next decade the over-representation of Aboriginal adults and youths in custody, to compile detailed annual progress reports, and to give “sufficient and stable funding” for community sanctions “that provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.”

Janes said the “real means of change” will be the courts and other institutions. “First Nations will rally around these recommendations, and likely we will see a more united front on many of these matters,” he predicted.

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