

Documenting the Experience and the Successes of First Nations Courts in British Columbia

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Introduction

The Provincial Court of British Columbia responded to the needs of First Nations communities in part by establishing several First Nations Courts (FNCs). First Nations Courts sit in four communities: New Westminster, North Vancouver, Kamloops, and Duncan. Other communities have also expressed an interest in developing a FNC. These include Prince George, Williams Lake, Port Hardy, Merritt and Hazelton/Smithers communities.

The Legal Services Society (LSS) is also an important partner in the development of and support for the FNCs. LSS provides funding for duty counsel and elder honorariums. The FNCs were developed in consultation with local First Nations, the community at large, police, Community Corrections, Crown counsel, defence lawyers, and other support service groups like the Native Courtworker and Counselling Association of British Columbia. As a result, there is considerable variation among these courts in terms of their stated goals, the process they follow, and the ways and extent to which they have engaged the community.

The Ministry of Justice *Specialized Courts Strategy* emphasizes the importance of the regular collection, analysis and reporting of data on outcomes and processes to continually improve the overall functioning of any specialized court process. It notes that “given the variation in specialized court models, research into the variables that result in more effective outcomes will shed much needed light on the question of what models and outcomes can and should be replicated”(Ministry of Justice, 2016, p.9).²

Monitoring the implementation of FNCs and measuring their success is becoming a priority for everyone involved. At this point, however, it is not clear what data are being collected on the functioning of the four existing FNCs. Also, as they are being developed, new FNCs will be looking for guidance on the kind of data they should be systematically gathering. Finally, to date, none of the FNCs have been the object of a systematic evaluation and there is a need to consider more concretely how these initiatives could be evaluated and what would need to be in place in order to do so.

² The province currently has a number of specialized courts – including First Nations Courts, Domestic Violence Courts, the Victoria Integrated Court, the Downtown Community Court and the Vancouver Drug Treatment Court.

Purpose of the Review

The purpose of the present review is to establish the nature and extent of the data currently being collected with respect to the FNCs, taking into account the differences and variations among them. The goal is also to identify data gaps and suggest additional data elements that could be collected in order to guide the future development of the FNCs and eventually be able to assess their success. Finally, at the suggestion of the Ministry of Justice, the project also includes a preliminary evaluability assessment of the FNCs. It is presented in Appendix 1.

Method

The review consisted of visits to the four FNCs during which observations were made and discussions were held about the functioning of the courts and the data currently being captured by various participating agencies and organizations. Following the visits, a tentative list of data elements to be captured was developed. This list was then used by a representative of the Ministry of Justice to consult internally within government agencies to establish whether these data are currently available and, if so, in what form. All the information thus gathered was analyzed to produce a list of available data and to identify the gaps that still exist in available data. Finally, after a review of selected evaluations of specialized courts, we reviewed the objectives of the FNCs, their current activities and processes, as well as the available data on the FNCs in order to identify relevant evaluation questions and reflect on the evaluability of these courts at this point in time.

The First Nations Court

The First Nations Court (FNC) was established in part because it was recognized that the traditional criminal justice system does not well serve the needs of either Indigenous offenders or their communities. The goal of the FNC is to offer a holistic and restorative approach to sentencing Indigenous persons. The FNC is primarily a disposition or sentencing court, but it also deals with offenders at other stages of court proceedings, including: bail hearings; while on remand; and, in monitoring any community-based portion of the sentence. Crown counsel and defence counsel maintain their normal advocacy roles and are not required to enter a joint submission. So long as the sentence imposed involved some aspect of a community-based disposition, the offender may remain in FNC. If the offender is sentenced to a period of incarceration, he or she may be permitted to return to the FNC in the future; each case is determined on its own merits.

Participation of Elders in FNC proceedings enhances cultural awareness and understanding. Elders contribute in the restorative justice process and advise the FNC as to the appropriate sentence and healing plan from the community's

perspective. Elders also offer advice and support to the offender throughout the process.

The term “healing plan” refers essentially to the terms and conditions of the sentence imposed on the offender, even if it may also contain elements that are not explicitly included in the sentence. Compliance with court orders and success in following the healing plan are supported through judicial review of progress and acknowledgement of success, reducing or relaxing the conditions imposed, and in appropriate cases, early termination of the healing plan (court order). Accused or convicted persons who are adhering to a healing plan that includes a conditional sentence order (CSO) or probation order may be brought back to the Court for periodic reviews. An individual may be ordered to appear before the FNC dedicated judge to review the current terms of his or her healing plan.

Brief Description of Existing FNCs

There is not a single model for all FNCs. However, a First Nations Court’s focus is meant to be holistic, recognizing the unique circumstances of Indigenous offenders within the framework of existing laws. This approach is consistent with some of the key objectives of the BC First Nations Justice Action Plan (2005), including ensuring that First Nations justice is viewed with a holistic approach that places an emphasis on healing, and ensuring that the criminal justice process reflects an understanding of the First Nations cultures, traditions, and aspirations. For some, the FNCs is part of a broader movement towards an Indigenous therapeutic jurisprudence and process that recognizes the traditional role of Elders at the centre of Indigenous peace-making processes (e.g.: Johnson, 2014).

The FNCs aim to address the problems of offending and victimization in a local area by engaging with the local community and making the court more culturally sensitive and responsive to local circumstances. They work in partnership with criminal justice agencies, support groups and community resources.³ Local First Nations communities are encouraged to participate in the proceedings, usually through the participation of Elders and other community resource persons. The FNCs, together with service providers and other agencies, provide support and healing to assist in the rehabilitation of offenders and reduce the likelihood of recidivism.

The FNCs also seek to acknowledge and repair the harm done to victims and the community. In some instances, they create a space for victim participation in the process. They generally adopt a restorative justice approach to sentencing, preferring a non-adversarial and non-retributive approach to justice that focuses on healing, holding the offender accountable, and reintegrating the offender into the community to achieve better justice outcomes.

³ See generally, on community justice initiatives: Jolliffe, D & Farrington, D.P., 2009.

1) New Westminister First Nations Court

The New Westminister First Nations Court (NW-FNC) started in November 2006 under the leadership of the Hon. Judge Marion Buller. The Court operates on the traditional territories of the QayQayt (Ki-Kite) First Nation, as well as all Coast Salish Peoples. Physically, the courtroom is located in the provincial courthouse in New Westminister. The room and furniture has been reconfigured so that the Judge sits at a rectangular table with Crown counsel, Duty counsel, and the offender. The Native Courtworker and Counselling Association's outreach worker provides information, case management, referrals, and support to the offenders. Prior to beginning court proceedings, Elders can be observed smudging in the courtroom and mixing with those attending court. During the proceedings, Elders are invited to offer advice and support to offenders from their location in the public seating area. Others who may also be in attendance to support the offender or to participate in the court proceeding include family members, friends, counselors and outreach workers from supporting agencies.

The main features of the NW-FNC are as follows:

- The NW-FNC can deal with any offence over which the provincial court has jurisdiction, but has mostly, if not exclusively, been dealing with summary convictions offences.
- The criminal charges involved have arisen in the New Westminister court catchment area. The NW-FNC accepts waivers from any jurisdiction in the province
- Anyone who self identifies as an Indigenous person may participate. Many of the offenders who participate in the court are in fact from other regions, sometimes other provinces. They do not necessarily have strong ties (or any ties) with the local First Nations.
- The court is primarily a sentencing court. However, the Court may also function as a pre-adjudication diversion mechanism (Aboriginal restorative justice) for individuals who have not formally entered a plea but accept responsibility for their behavior.
- In some instances, the healing plan is set in motion as part of a bail supervision order and the possibility is entertained that the charges may be withdrawn or stayed if the offender successfully completes the plan; in such instances, the process functions more as a court-based diversion program.
- In some exceptional circumstances, with the consent of the prosecutor, a case may be transferred to another FNC after a healing plan has been developed.

- The format of the proceedings are more conversational than adversarial and involve the participation of Elders.
- The offenders and the Elders may not necessarily be from local first Nations communities and may identify with other Aboriginal or Metis communities from across Canada.
- The offender engages, without prejudice, with the judge and others around a table.
- One of the main purposes of the proceedings is to determine what the offender needs in order to find a way forward on a path to healing and desistance from crime.
- Sentences, when pronounced, are all community-based sentences and sometimes involve a direct restorative component.
- Gladue reports are infrequently available to the court. In some instances, a pre-sentence report (PSR) with a “Gladue component” is produced.
- The court is actively involved in supervising the healing plan or probation order and monitors the progress achieved by the defendant. To that effect, the defendant must appear in several “review hearings”.
- Breaches of conditions attached to court orders are dealt with in a manner that recognizes that desistance from crime and deviant behavior is a process, not a single event, and relapse is recognized as a part of recovery. Imprisonment for administrative offences is generally avoided.
- At the end of the sentence, there is a graduation or blanketing ceremony to formally acknowledge and celebrate the individual’s success in completing his/her healing plan (completion of a sentence).

2) North Vancouver First Nations Court

The North Vancouver First Nations Court (NV-FNC) was established in February 2012, and its catchment includes Whistler, Squamish and the North Shore. The NV-FNC was initiated by Judge Challenger and developed in collaboration with the Squamish Nation, the Tsleil-Waututh Nation, the Bar, the RCMP, the West Vancouver Police, Community Corrections and many other stakeholders.

Physically, a remand courtroom has been reconfigured in the provincial courthouse in North Vancouver to create a square table with seating on three sides. A feather is placed in the center of the table for those who wish to hold it and the judge’s chair has a blanket hung over the back. There is also some local Indigenous art in the room. The judge sits at the table with Crown counsel, Defense counsel and the

accused. Anyone else who is there to support the accused is also invited to sit at the table and participate. This includes family, friends, counselors or other support workers, a Native Court Worker or Justice Workers from the Nations. Starting a few months ago, Elders from local communities sit in a half circle behind those at the table and may join in at the table to offer advice or emotional support.

The main aspects of the NV-FNC are as follows:

- The FNC deals with all offences over which the provincial court has jurisdiction.
- Anyone who self identifies as an Indigenous person may participate.
- Defendants must first plead guilty before they are referred to the FNC for sentencing.
- The criminal charges involved must have arisen in North or West Vancouver or from the Sea to Sky corridor to Pemberton.
- Members of the Squamish Nation (Skwxwú7mesh Úxwumixw) and the Tsleil-Waututh Nation who do not have outstanding matters in the jurisdiction may request to have their matter waived in to the NV-FNC, subject to the consent of Crown Counsel.
- The proceedings are more conversational rather than adversarial in format.
- The defendant engages in an open and somewhat informal exchange with the judge and others around the table.
- One of the main purposes of the proceedings is to determine what the person's needs are in order to progress on the path to healing and desistance from crime.
- Sentences tend to be community-based.
- PSR reports are sometimes available. Gladue reports are infrequently available to the court.
- The court is not actively involved in supervising the healing plan or probation order, or the progress achieved by the individual.
- Breaches of conditions attached to court orders are dealt with in a manner that recognizes that desistance from crime and deviant behavior is a process, not a single event, and relapse is recognized as a part of recovery.
- There is no "graduation" ceremony or formal process for acknowledging or celebrating the completion of a sentence (or healing plan).

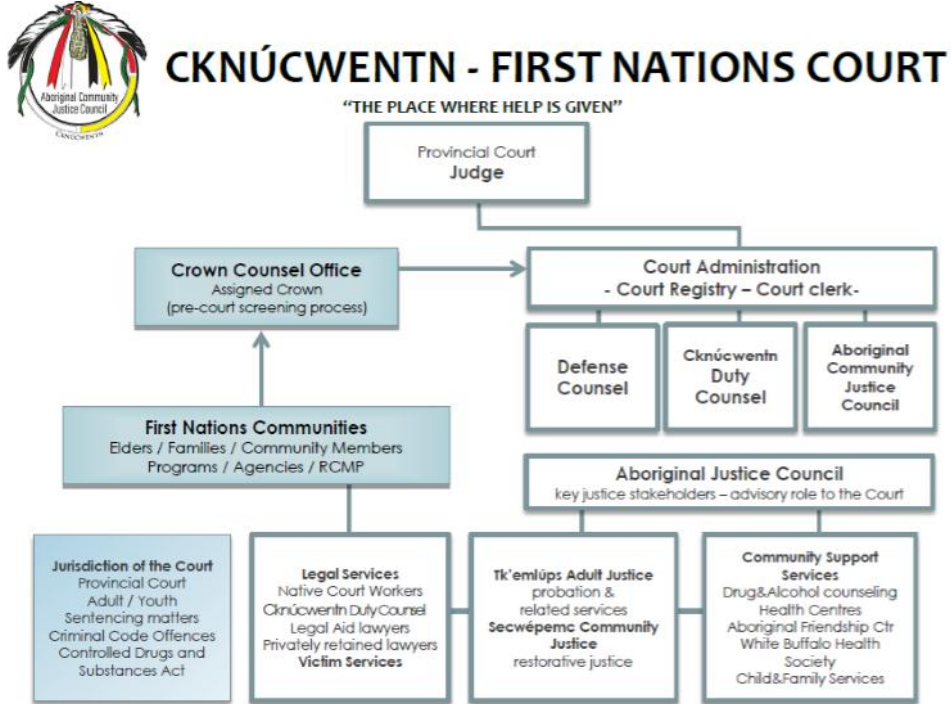
- Elders have only recently begun participating in the court sitting following initial training. More training is being planned.

According to Judge Challenger's description of the process: "the views of the victims are always heard but in some matters the victim(s) are also at the table. The provisions in the Code respecting victim impact statements can be relaxed with the consent of the person to be sentenced. The purpose of a victim's attendance is reconciliation for both the offender and themselves" (Challenger, 2017, p.43).

3) The Cknúcwentn First Nations Court

The Cknúcwentn First Nations Court (C-FNC) was established in Kamloops in March 2013, in the traditional Secwepemc territory. It is linked to the local Aboriginal Community Justice Council (ACJC). The court hearings are held on the second floor of the provincial courthouse in Kamloops. The room is set up so that the Judge can be seated at a relatively large rectangular table with Crown counsel, Duty counsel or defence counsel, several Elders, and the accused. It is not unusual to have the offender's probation officer, an advocate from the Native Court Workers and Counselling Association of BC, and/or a family member or friend be invited to join and be seated at the table. Elders can also be noted promoting an Indigenous cultural atmosphere prior to the start of court by greeting people or offering individuals to participate in a smudging ritual. In the public seating area, family and friends, as well as counselors and outreach workers from supporting agencies are in attendance and have opportunities to contribute from the public seating benches as invited by the Judge.

The C-FNC receives on-going guidance from an Aboriginal Justice Council (AJC) comprised of community and government agency representatives who oversee aspects related to funding, court scheduling, recruiting of Elders and formalizing their activities through terms of reference and operating manuals. The AJC includes representatives of Restorative Justice, Friendship Centre, Crown, Criminal Bar Association (see chart for others). An Aboriginal Justice Worker provides administrative support for the C-FNC which includes coordination and scheduling of Elders, arranging lunch and coffee breaks, providing secretarial services to the AJC, and setting up activities for Elders.



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The main features of the C-FNC are as follows:

- The FNC can deal with any offence over which the provincial court has jurisdiction, but has mostly if not exclusively been dealing with summary convictions offences.
- Anyone who self identifies as an Indigenous person may participate.
- The criminal charges involved must have arisen within the court's catchment area and the defendants must plead guilty.
- The offender engages, without prejudice, with the judge and others around a table.
- One of the main purposes of the proceedings is to develop a healing plan for the offender. Suggestions from Elders and from community agencies are welcome. Elders typically play an important role in that process and in the process of monitoring the defendant's success.
- Most sentences are community-based with a view to applying restorative justice principles and restoring the offender's relationship with his/her community. However, a sentence can include a period of jail and a probation order.

- Gladue reports are infrequently available to the court. In some instances, a PSR with a “Gladue component” is produced.
- The court is actively involved in supervising the healing plan or probation order and monitors the progress achieved by the defendant. To that effect, the defendant must appear in several “review hearings”.
- Breaches of conditions attached to court orders are dealt with in a manner that recognizes the circumstances of the defendants and the reasons why compliance may be difficult for them to achieve. Imprisonment for administrative offences is generally avoided.
- There is a graduation or blanketing ceremony at the successful completion of the healing plan.
- This court has a rotating Judge circuit with rotations occurring every three months.

4) The Duncan First Nations Court

The Duncan First Nations Court (D-FNC) started in May 2013. The majority of the defendants involved, as well as the Elders, are from the Coast Salish Nations. The process followed is very similar to that followed in the NW-FNC. The court sits in a small room in the provincial courthouse in Duncan. The room is configured to permit the Judge to sit at a round table with Crown counsel, several Elders, the defendant, and as needed, defense counsel, duty counsel, the probation officer, community-based social work professionals or other supporters of the defendant including family, friends, or members from the public seating area. Elders participate in the court on a rotational basis with four Elders scheduled for each FNC sitting. The Native Courtworker and Counselling Association of BC counsellor organizes a court schedule from a pool of twelve Elders. In addition to their participation during court, Elders can also be observed providing opening prayer in their traditional language. Elders have access to the pre-sentence report, when one is available.

The Native Courtworker offers a regular court presence and dedicated assistance for offenders before, during and after court appearances. The probation officer is generally present during proceedings and provides regular updates to the court regarding the progress made by the offenders with regard to their healing plan. There is a formal graduation or blanketing ceremony once the offender has completed his/her sentence and healing plan. This involves an official (often the duty counsel) retelling the client’s story regarding the behaviour that brought them to court and the accomplishments that they have subsequently made. This is followed by wrapping a blanket around the offender to symbolize his/her growth, belonging, as well as the community’s support for his/her continued success and well-being.

5) Common Characteristics

All four FNCs sit once a month in the local provincial courthouse. Some of the common characteristics generally attributed to problem solving courts (Slinger and Roesch, 2010) are also found in the FNCs. They include: (1) a single court docket composed of a collaborative team which provides connections to community resources and treatment and monitors compliance with imposed sentence and conditions; (2) voluntary participation; (3) accountability through judicial monitoring; (4) a less formal, but procedurally fair process; and, (5) a focus on outcomes (i.e., rehabilitation, healing and problem solving). At this point, however, only three of the four FNCs involve active judicial supervision of defendants (the North Vancouver FNC does not).

These courts aim to address the underlying reasons for criminal behaviour within a community context. The process is one that gives the defendants a voice and an ability to participate and be engaged in the decision making process. All courts accept a range of ages including youth. Since October, 2016, all FNCs involve the participation of Elders, although the latter's precise role and training provided for their role varies.

Many specialized courts include a triage team with experts and professionals to produce assessments and inform decisions about admission into the program; this is not currently the case for FNCs. However, FNCs are in a position to request an assessment of the defendant's criminal background, needs and circumstances (PSR or a Gladue report), but not necessarily as a condition of admission in the program.

It appears that in many cases, the FNCs delay the imposition of a sentence to allow the defendant the opportunity to put in place or complete a treatment plan or fulfill other conditions before sentencing (as it is made possible by Section 720 of the Criminal Code when both the Crown and the defendant agree). In those cases, the bail supervision order (or amended form) is used to continue the supervision of the defendant during that period. Delaying the imposition of the sentence may be inevitable when the court does not have the information it requires to proceed with sentencing. It is also a useful way of determining whether an offender is motivated and prepared to comply with a healing plan (see: Goldberg, 2011).

All FNCs involve a commitment to restorative justice or to a non-adversarial and non-retributive approach to justice that focuses on healing, holding the offender accountable, and involving the victim whenever possible. To various degrees, they all seek the active participation of the Indigenous community. Community engagement is sought through the participation of Elders and through community agencies who offer specialized or culturally responsive support services to the offenders prior to, during, and following, sentencing.

The issue of compliance with court orders and how FNCs respond to non-compliance is important. The reasons for the relatively high rate of administration of justice offences among offenders (failure to appear in court, breaches of bail or probation conditions) are complex and, to some extent, related to culture and the clients' unique circumstances, marginalization, and alienation from the justice system. It is quite clear that FNCs attempt to distinguish themselves from other courts by the way they respond, often with the assistance of Elders, to situations where offenders fail to appear in court or breach conditions of their bail supervision or probation order. Even if that distinction is sometimes hard to make, it may be important for them to distinguish between offender behaviour that results from non-responsivity to the intervention or simply from willful noncompliance with supervision requirements (Marlowe, et al., 2009). The distinction between noncompliance and non-responsivity suggests that some behaviours are better responded to by treatment rather than sanctions because they do not represent willful noncompliance (Matejkowski, Festinger & Benishek, 2011).

In addition to illness or addiction, there are obviously many other factors and circumstances that can explain noncompliance with court orders other than willful noncompliance. It is quite clear that in dealing with the offenders' non-compliance or poor-compliance with their healing plan, the FNCs make an effort to recognize and address those factors through various means. In some instances, the FNC may vary the healing plan and the conditions attached to the order in an effort to take these factors into account. Like many other problem-solving courts, the FNCs may use an informal system of graduated rewards and sanctions to motivate compliance (Porter, Rempel & Mansky, 2010). This approach may in time contribute to reducing the number of incarcerated Indigenous offenders.

6) Variations

Just as there is a lot of variation in the ways in which specialized courts operate (Slinger & Roesch, 2010), there is no single model for FNCs currently functioning in BC. Each court represents an initiative to respond to a unique problem or set of circumstances in a given community. The FNCs differ greatly with respect to whom they will accept, why, and when they will accept them (e.g., before or after plea). They vary in how they involve Elders, social work professionals, and those in the public area attending court. They also differ in how they respond to completion (e.g., what is done with the charge, acknowledging graduations in court) and non-compliance (what sanctions are applied to the offenders).

7) Theoretical Model

It is sometimes argued that, generally speaking, problem-solving courts tend to lack a cohesive theoretical model, sometimes borrowing from rational models, but ultimately failing to explain how they are intending to influence offenders (Wiener, Winick, Georges & Castro, 2010). To our knowledge, a theoretical model for the

FNCs has not yet been fully articulated. Based on current descriptions, it would seem that the model relies on the assumptions that the rehabilitation and successful reintegration of Indigenous offenders can be facilitated by eight separate but interrelated factors:

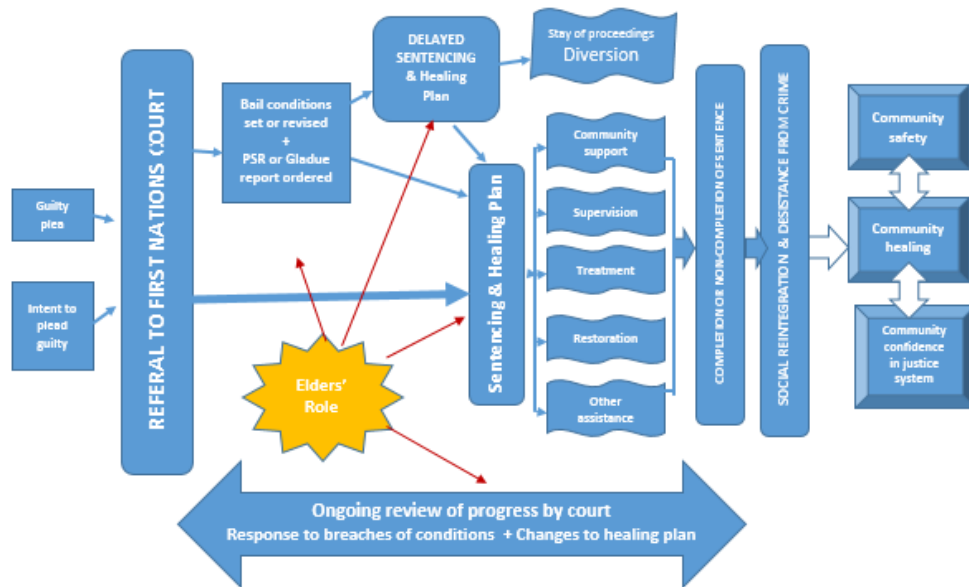
- (1) **deterrence** (by holding the offender accountable for his/her behaviour and imposing a sentence, including follow-up sanctions in response to noncompliance with the original court order);
- (2) **application of healing plans and community-based sentences** (or in some cases, a bail supervision order) that allow offenders to participate in treatment or receive other forms of culturally appropriate support to address underlying criminogenic needs;
- (3) a focus on **reconciliation, restoration and reintegration** of the offender in the community, and sometimes include measures to repair the harm caused by the offence;
- (4) **effective support or treatment** for the offenders;
- (5) **judicial supervision** of the offenders' progress and compliance with the condition of their sentence or bail order;
- (6) **participation of community Elders** and other community members, as appropriate, in the sentencing and judicial supervision processes;
- (7) **active participation of the offenders** and sometimes the victims in the sentencing process or the development of a healing plan; and,
- (8) enhanced **perceived legitimacy** of the justice system by the offenders and their community.

These various elements of the intervention, operating jointly, are intended to encourage the offenders to:

1. comply with the conditions of their sentence (or healing plan),
2. develop a sense of obligation to follow the law,
3. strengthen their ties to the community,
4. address with the assistance of various community resources the issues and needs responsible for their criminal behaviour, and
5. desist from crime.

The following graphic is a simple logic model for the FNCs which does not necessarily account for the variations among the courts. The model does not show that some offenders may be sentenced to incarceration. It also does not show what may happen to offenders who do not complete their healing plan or constantly fail to comply with court orders.

First Nations Courts – Logic Model



Available Data on the FNCs

After consultation, we have identified ten categories for which data should be captured routinely in relation to the functioning of the FNCs and their outcomes. They are the following:

1. Data on which cases come before the FNCs (FNC caseload data)
2. FNC workload data
3. Court time requirements data
4. Appearance and court review data
5. Data on reports submitted to the FNCs
6. Data on legal assistance / representation
7. Data on healing plans and sentences
8. Data on breach of conditions and failure to appear
9. Data on role and participation of Elders
10. Recidivism data

The main sources of data are: JUSTIN (Court Services Branch (CSB)) database; CORNET (Corrections) database; Native Courtworkers and Counselling Association of British Columbia (NCCABC); the Legal Services Society (LSS). The data captured by the NCCABC are limited to that which concern their own clients and do not necessarily cover all FNC clients. Similarly, the data on legal representation that can be captured through LSS are limited to that which concerns

clients represented by duty counsel (probably the majority of FNCs clients, but not the totality).

With respect to the court data currently captured by JUSTIN, it must be noted that there is no flag specifically identifying FNC files and fairly broad selection criteria methodology for querying FNC files. There is a risk that some files in the FNC cohort group may not actually be FNC files, and alternatively that some FNC files will not be captured. However, according to senior managers at the four FNCs, it is possible to identify many FNC files through a query instead of a file review with a fairly high confidence level. This ability to query and identify all cases appearing before an FNC should be tested more systematically before a FNC monitoring system or an evaluation is finalized on that basis.

It is also important to note that (JUSTIN) does not collect data on the ethnicity of the accused. In the case of FNCs, it is sufficient for the individual to self-identify as Indigenous. However, this may become an issue at the time of trying to establish a control group for the purpose of an evaluation. CORNET has data on the ethnicity of its clients (individuals managed by B.C. Corrections).

The NCCABC collects information about its clients, a lot of it is collected at time of intake. This information includes: name of client; gender; date of birth; address and contact information; Indigenous status; living on reserve or off-reserve; band name; current employment; charges; sentence. We were not able to establish what proportion of FNC clients are also clients of the NCCABC. The NCCABC maintains its own client database.

The following are our observations about the availability of these data elements at the present time. These observations are also summarized in Table 1, at the end of this section. It should be noted however that, even when the data elements are currently included in JUSTIN, it is not currently possible to generate specific data for the FNCs because JUSTIN does not yet identify which cases are processed through the FNCs. The availability of these JUSTIN data elements is subject to being able to identify the FNC, something which is not currently done within that database.

1) Data on Cases before the FNCs

Data on the referral decisions: It appears that there are no data gathered on the source of a case referral to the FNCs. At this point, there is no data that would allow one to document who is involved in a decision to refer a case to a FNC, the criteria actually used to make that decision, or the reasons behind a decision not to refer certain cases to an FNC. Our observations suggest that the criteria may indeed vary from one FNC to another, and that they have evolved over time.

Data on the individuals/cases before the FNCs: To the extent that individual offenders appearing before the court can be systematically identified by a query of court administration data, there is a unique identifier for each offender appearing before the FNCs. The offender's gender and date of birth are also recorded. However, "FNC cases" cannot currently be identified in JUSTIN through a simple query. This limitation affects our ability to rely on JUSTIN to identify individuals who appeared in one of the FNCs. This should be addressed in order to facilitate future evaluations.

Data on the nature of the offence(s) (charges) involved: Data on the prior criminal convictions and previous sentences received by an offender is potentially available, but would likely require a file review.

2) FNC Workload Data

Number of new cases referred each month to each FNC: This could be available from JUSTIN provided that FNC cases can be identified, or based on minimum appearance date in FNC.

Number of offender appearances in FNC each month: This is available from JUSTIN subject to being able to identify FNC cases.

Number of cases concluded each month in each FNC: This is available from JUSTIN subject to being able to identify FNC cases. The definition of "case concluded" is not the same for each court, since not all courts are involved in reviewing the offender's progress.

Number of hours each FNC is sitting each month: Available from JUSTIN subject to being able to identify FNC cases

Number of review hearings conducted each month: This information is not currently gathered.

Number of graduation/blanketing ceremonies held each month: Not currently available. Does not apply to all FNCs.

3) Time Data

Date at which the individual is referred to the FNC: Data not available.

Date of first appearance at FNC: JUSTIN subject to being able to identify FNC cases.

Date of case conclusion: JUSTIN can provide data on the date of case conclusions, subject to being able to identify FNC cases. This is not the same as

date of “graduation”, because cases can be concluded for other reasons than successful completion of sentence or healing plan.

4) Appearances and Court Review Data

Whether the individual appeared on first scheduled appearance: This information is available from JUSTIN data, based on the appearance results, but subject to being able to identify FNC cases.

Date of sentencing: This information is available from JUSTIN data, but may require a file review. Note also that the sentences may be amended later during the review process.

Date of each review appearance: This information may be available from JUSTIN data, but not consistently, and is subject to being able to identify FNC cases. The appearance may have been coded as “REV”, but this coding may not be consistent. Alternatively, a file review may be required.

Whether the offender appeared in court as ordered (for each scheduled appearance): This information is based on the offender’s attendance record. If an individual fails to appear, the court may issue a bench warrant, but this is not done in all instances. In fact, the practice of the FNCs is often to try to find out first why the offender did not appear. There is information on file about bench warrants issued, but these data are not currently collected.

Whether the individual is accompanied by a family member or other members of the community during appearances: This information is not currently being collected. However, given that that one of the objectives of the FNCs is to enhance the engagement of the defendant’s family and community in their healing and social reintegration, this may need to be collected as part of an evaluation.

5) Reports Prepared for the FNCs

Whether a pre-sentence report is submitted (& total numbers): This information is available from CORNET. However, identifying the total number of defendants for which a PSR has been submitted, as a proportion of all the defendants sentenced in a FNC would rely on having successfully identified all the cases that were referred to a FNC. Capturing more details on the PSR would require a file review of the reports.

Whether a Gladue report was prepared and submitted: This information is not available from JUSTIN; the data captured in that database are only for PSR and does not distinguish between Gladue reports and PSRs. However, this is information that LSS could start collecting moving forward. Currently, there are no

statistics on the frequency of use of such reports, but these reports appear to be unfrequently available to the courts. There is an interest as well in the question of how long it typically takes for a Gladue report to become available to the FNC – at this point, that information could be manually extracted from LSS files. It would be easy for LSS to answer this question, particularly once LSS starts collecting data on which Gladue reports funded by LSS are submitted in a FNC

The date at which the PSR or Gladue report was submitted to the FNC: This information is available from JUSTIN for PSR, but not for the Gladue reports. More information on the Gladue reports submitted could also be available through a file review of court records. LSS knows the date when defence counsel receives a completed Gladue report. Defence counsel (not LSS) then submits the report to court, and does not inform LSS of the date when that happens. In the past, LSS has not required lawyers to inform it if a Gladue report is used in FNC or in another court. LSS could start collecting that data going forward. However, it might be simpler and more reliable for the date of submission of the Gladue report in FNC to be collected and recorded by the FNC court clerk.

6) Data on Legal Assistance and Representation

Whether the defendant is represented by duty counsel or other counsel: This information is captured by JUSTIN, but only at the level of each appearance, not at the case-file level. Data could be available from LSS files on the number of client assists by duty counsel for each FNC sitting, but there is no other information available on the service offered in each case. LSS is not currently able to identify cases where an individual is represented by legal aid counsel in a FNC. In the future, it may be possible to collect such data through structural functionality changes to the LSS client information system.

Other assistance provided: NCCABC court workers provide direct services to their clients and regularly collect data on the worker's contacts with their clients and interventions they make on their behalf (e.g., speaking to sentence; speaking to request changes in court order; assisting with bench warrants; explaining the FNC process to clients; scheduling of hearing and facilitating attendance at hearings, working with clients on referrals to community service organization, etc.). That information is available on all NCCABC clients on the organization's database.

7) Data on Healing Plans and Sentences

Data on bail supervision orders, conditions attached to supervision orders and actual length of the bail supervision period: CORNET contains data on the length of supervision, but not on the specific conditions.

Sentence ordered by the FNCs: These data are currently available from JUSTIN, subject to being able to identify FNC cases.

Date at which a healing plan/sentence is communicated to defendant: The date the sentence is ordered is kept in JUSTIN

Elements/conditions included in each sentence/healing plan: This information is not currently being collected. The information would only be accessed through a file review.

Changes brought to sentence/healing plan: Data not currently collected. This data would be important because the fact that the sentences are judicially supervised often results in changes being brought to the healing plan and/or to the conditions attached to the court order.

Date at which changes were brought to the sentence/healing plan: Data not currently collected.

Whether the sentence/healing plan was completed by an individual: It is not clear at this point whether that data is available from JUSTIN. Data on case completion is being captured, but this may include cases that are completed for reasons other than sentence completion.

Date at which healing plan/sentence is officially considered completed: Data on case completion are being captured, but this may include cases that are completed for reasons other than sentence completion.

8) Administrative Offences (Breach of Conditions & Failure to Appear)

Breach reports and nature of breaches (or non-compliance): These data are not currently available. Gathering that data would require a file review.

Response to breaches (non-compliance): This data is not currently available. Gathering that data would require a file review.

Whether a bench warrant is issued: This data is not currently available. Gathering that data would require a file review.

Whether a defendant has been charged with or convicted of an administrative offence: Data on charges relating to an administrative offence are available. It would be a matter of determining whether the charges are related to the FNC sentence/process. Conviction data are available.

Whether a defendant has been transferred to another provincial court: This data could be available from JUSTIN.

9) Role of Elders

Number of elders present at each hearing: Data available from LSS.

Length of service of Elders on the FNC: Data could be compiled from LSS files.

Interventions by Elders during hearings: Data not currently collected.

Contact between Elders and defendants outside of FNC hearings: Data not currently collected.

10) Recidivism Data

New charges or convictions during FNC process (while under the authority of the FNC) and nature of offence: Data on new convictions could be extracted from JUSTIN by looking at courts history during the period of time an individual was under the authority of the FNC or was serving his/her sentence. These data, however, are not currently being generated because FNC cases are not currently identified in the database.

New criminal conviction (or new charges) within 12 months after sentence ordered in FNC, and nature of the offence: That data could be extracted from JUSTIN by looking at courts history during the one year after the FNC sentence was ordered. These data, however, are not currently being generated and would require FNC cases to be identified.

New criminal conviction (or new charges) in the 12 months following case completion: Information is collected by JUSTIN on “case completion”, which is not necessarily the same as sentence completion. It would therefore be possible to generate data based on JUSTIN by looking at courts history during the one year after the case was registered as “completed”. The data, however, are not currently being generated and would required FNC cases to be identified in the database.

New criminal convictions (or new charges) in 12 months following completion of FNC sentence: Data on new convictions can be generated based on JUSTIN provided that the date of completion of sentence can be established and that FNC cases are identified. However, data on sentence completion is only available from CORNET and cannot be linked automatically to JUSTIN data. Linking the two sources of data would likely require an approved APWC application to share data across the program areas.

TABLE 1 - Summary : Availability of Data Elements		
Data Categories and Elements	Currently available	Source
DATA ON CASES - INDIVIDUALS BEFORE THE FNCS		
Data on the referral decisions	No	
Data on the individuals/cases before the FNCS	Yes	JUSTIN (CSB)*
• Unique identifier for each case	Yes	JUSTIN (CSB)*
• Gender of individual	Yes	JUSTIN (CSB)*
• Age (d.o.b.) of individuals	Yes	JUSTIN (CSB)*
Data on nature of offence(s) (Charges)	Yes	JUSTIN (CSB)*
• By gender	Yes	JUSTIN (CSB)*
• By age	Yes	JUSTIN (CSB)*
Prior record of offender	Yes	JUSTIN (CSB)*
Remands in custody	No	JUSTIN (CSB)*
• Length of stay in custody prior to 1 st FNC appearance	No	JUSTIN (CSB)*
• Length of stay in custody after 1 st FNC appearance	No	JUSTIN (CSB)*
FNC WORKLOAD DATA		
Number of new cases in each FNC each month	Yes	JUSTIN (CSB)*
• By gender	Yes	JUSTIN (CSB)*
Number of defendant appearances in FNC each month	Yes	JUSTIN (CSB)*
Number of cases concluded each month in each FNC	Yes	JUSTIN (CSB)*
Number of hours each FNC is sitting each month	Yes	JUSTIN (CSB)*
Number of review hearings conducted each month	No	
Number of graduation/blanketing ceremonies held each month	No	
Time devoted by each FNC presiding judge on FNC process	No	
TIME DATA		
Date at which the individual is referred to the FNC:	NO	
Date of first appearance at FNC:	Yes	JUSTIN (CSB)*
Date of case conclusion	Yes	JUSTIN (CSB)*
APPEARANCES AND COURT REVIEW DATA		
Whether the individual appeared on 1 st scheduled appearance	Yes	JUSTIN (CSB)*
Date of sentencing (sentence pronounced)	Yes	JUSTIN (CSB)*
Date of each review appearance	Not always	JUSTIN (CSB)*
Whether the defendant appeared in court as ordered		
• Number of bench warrants issued for non appearance	Yes	JUSTIN (CSB)*
Presence of family and community members in court	No	
REPORTS PREPARED FOR THE FNCS		
Whether pre-sentence report (PSR) is submitted (& total numbers)	Yes	CORNET
Whether a Gladue report was prepared and submitted	No	LSS
The date at which a report was submitted to the FNC		

• Gladue reports	No	LSS
• PSR	Yes	JUSTIN (CSB)*
Elders' access to PSR or Gladue Report or part of it	No	
DATA ON LEGAL ASSISTANCE / REPRESENTATION		
Defendant represented by duty counsel or other counsel	Yes	JUSTIN (CSB)
Other assistance provided	Yes	BC NCCA
DATA ON HEALING PLANS AND SENTENCES		
Data on bail supervision orders	Yes	CORNET
Conditions attached to supervision order	Summary only	CORNET
Data on actual length of bail supervision period	Yes	CORNET
Sentence ordered by the FNCs	Yes	JUSTIN (CSB)*
• Whether an defendant has been sentenced by FNC	Yes	JUSTIN (CSB)*
• Nature of the sentence	Yes	JUSTIN (CSB)*
Date at which a healing plan/sentenced is ordered	Yes	JUSTIN (CSB)*
Elements/conditions included in each sentence/healing plan	No	
Changes brought to sentence/healing plan	No	
Date at which changes were brought to the healing plan	No	
Whether the sentence was completed by the offender	Not clear	JUSTIN (CSB)*
Date at which healing plan/sentence is officially considered completed	No	
ADMINISTRATIVE OFFENCES (BREACH OF CONDITIONS & FAILURE TO APPEAR)		
Breach report and nature of breach	No	
Response to breach (non-compliance)	No	
Whether a bench warrant is issued	No	
Whether individual was charged with administrative offence	No	
Whether defendant was transferred back to other prov. court	Yes	
ROLE OF ELDERS		
Number of Elders are present at each hearing	Yes	LSS
Length of service by Elders on the FNC	No	LSS
Interventions by Elders during hearings	No	
Contact between defendants and Elders outside of FNCs	No	
RECIDIVISM DATA		
New convictions (or charges) during FNC process (+ type of offence)	Yes	JUSTIN (CSB)*^
New criminal convictions (or charges) (in 12 months after sentencing)	Yes	JUSTIN (CSB)*^
Criminal convictions (or charges) (in 12 months following case completion)	Yes	JUSTIN (CSB)*^
Criminal convictions (or charges) in 12 months following completion of FNC sentence	Not clear	JUSTIN (CSB)*^

(*): Provided that FNC cases can be identified in JUSTIN.

(^): It should be noted that data on new conviction could be extracted from JUSTIN, but that JUSTIN does not contain data on the date of sentence completion. Sentence completion data is available from CORNET but cannot be automatically linked to JUSTIN data.

CONCLUSION

It is clear from the above, that the data currently available on the FNCs are still limited. There is very little information being systematically collected on the cases referred to and dealt with by these courts. In particular, data are needed on the information available to the judges, the sentencing decisions, the healing plans and their implementation, the review process, the role of Elders, the offenders' actual access to assistance and services, the way the courts respond when offenders fail to comply with courts orders (and healing plan), and, the offenders' response to this process.

Not all of this information can necessarily be collected routinely by JUSTIN. However, it would be possible to set in place a simple data collection system in each of the courts which would supplement the JUSTIN data currently available. It is not clear which organization would be best placed to collect such information, and it may not necessarily be the same organization for each of the FNCs. However, setting in place such a data collection system should be treated as priority for the future of the FNCs.

Appendix 1 - Preliminary Evaluability Assessment

1. Introduction

This preliminary evaluability assessment outlines the goals and the logic behind the FNCs while acknowledging that there are variations among the four existing FNCs and in the process they follow. The following attempts to identify some of the key evaluation questions that might be formulated from the perspective of various stakeholders, as well as some viable approaches for the monitoring and evaluation of the FNCs, including data collection and analysis.

2. Objectives of the FNC

“Closely linked to, and perhaps a partial explanation for the lack of rigorous evaluations of problem solving courts, is the lack of consensus on their goals and how the success of courts should be measured in terms of achieving these objectives” (Ministry of Justice, 2014: 9).

As is apparently the case for many problem-solving courts, there is no definitive statement of the goals pursued by the FNCs. Each FNC may have to determine its own objectives, in consultation with First Nations, before validation is contemplated. Alternatively, it may be possible for the B. C. Aboriginal Justice Council to lead a consultation with local Indigenous communities and their representatives to come to a shared definition of these goals. In the meantime, however, it can be assumed that in pursuing the broader objectives of community safety and the prevention of recidivism, the FNCs effectively aim to achieve several specific goals, including:

1. Holding offenders accountable for their conduct
2. Contributing to the rehabilitation or healing of offenders
3. Ensuring that offenders receive effective assistance and support
4. Reducing the number of offenders who are sentenced to imprisonment or detained while awaiting a disposition of their case
5. Responding to offenders in a culturally sensitive way and in accordance with the Gladue principles
6. Applying restorative justice principles and processes
7. Involving victims whenever possible to participate in the sentencing and healing process
8. Making the court more responsive to local circumstances, challenges and strengths

9. Creating meaningful opportunities for First Nations communities to contribute to the rehabilitation and reintegration of Indigenous offenders
10. Increasing public confidence in the justice system (both for First Nations communities and for the population at large) – perhaps also enhancing the perceived legitimacy of the system

Achieving these complex goals is ultimately meant to contribute to public safety by preventing recidivism while hopefully reducing the imprisonment of Indigenous offenders. It is also meant to help remove the barriers between Indigenous people and the criminal justice system, enable a better understanding of the court process by Indigenous participants, and improve understandings of indigenous cultural norms and values by non-Indigenous participants.⁴ At the same time, the FNCs potentially contain a politically and culturally transformative dimension by strengthening cultural recognition and Indigenous empowerment through the involvement of Elders and community members, and the incorporation of Indigenous knowledge and values.⁵

Judge Challenger, who initiated the NV-FNC, also referred to the more general goal of reconciliation: “The nature of the proceedings themselves and the sentences imposed attempt to redress the effects of the social and personal dysfunction and breakdown in the communities and lives of Indigenous peoples which are a direct result of the assimilation policies and residential school system. In my view, another important role of the judge and lawyers in FNC is to address reconciliation” (Challenger, 2017).

The way all of these goals are effectively operationalized by each FNC may vary. For example, a restorative justice process generally refers to a non-adversarial and non-retributive approach to justice that focuses on healing, holding the offender accountable, and involving the victims and the community. In practice, however, whether victims are involved in the FNC process, the nature of their involvement and participation varies from one FNC to another, as does the extent to which the sentences become an element of reparation.

Each FNC may have its own reasons for wanting to proceed with an evaluation and may define the purpose of an evaluation in a manner that fits its circumstances and its own level of implementation and development. At present, the Cknúcwentn First Nations Court in Kamloops has expressed an interest in proceeding with an evaluation. At the same time, the communities that are currently working to

⁴ For a discussion of the goals of Indigenous sentencing courts in Australia, see: Marchetti and Ransley, 2014, p.8-10. Also, King (2010).

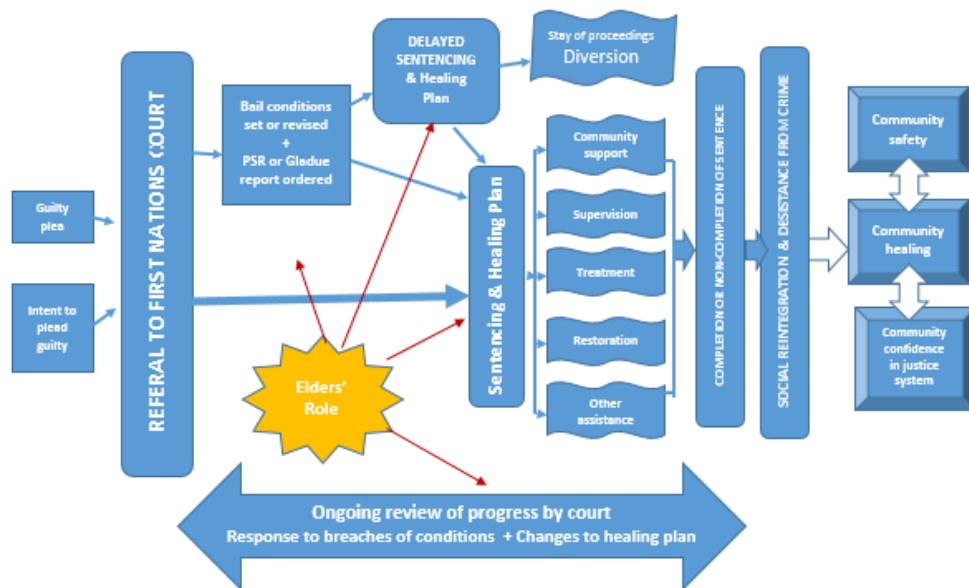
⁵ On the question of the transformative dimension of Indigenous Sentencing Courts in Australia, see: Marchetti, 2014.

establish new FNCs are curious to find out what the evaluation framework will be for these new initiatives.

Other problem solving courts have been evaluated although most of these evaluations have been process rather than outcome focused. In fact, some of these evaluations are blamed for their lack of scientific rigour (Slinger & Roesch, 2010).

Logic Model

First Nations Courts – Logic Model



3. Purpose and Scope of Evaluation

The main purpose of conducting a formal evaluation of one or all of the FNCs at this time has yet to be fully articulated. However, one might expect an evaluation of the FNCs to fulfill one or all of the following purposes:

- to assess the extent to which the objectives of the FNCs are being achieved;
- to identify and explain any unintended consequences resulting from the FNC process and related programs;
- to compare the FNCs to each other in relation to the process they follow and the outcomes they achieve, so as to identify some best practices;
- to identify possible improvements or enhancements to the FNC processes and associated programs in order to increase positive outcomes;

- to compare the outcomes of the FNCs to the outcomes achieved by other forms of intervention for Indigenous offenders (e.g., diversion, regular sentencing process);
- to assess the cost-efficiency of FNCs as compared to other forms of intervention; and,
- to inform a potential model for FNCs in BC

As was mentioned above, the FNCs pursue several important objectives and measuring the extent to which these objectives are achieved may require a number of concurrent activities. The following might be retained as key indicators of achievement:

- Whether the FNCs contribute to public safety by effectively preventing recidivism by offenders who participate in the process
- Whether the FNCs effectively contribute to decreasing the incarceration rate of Indigenous offenders:
 - Reducing the number of defendants remanded in custody
 - Reducing the length of time defendants are remanded in custody
 - Increasing the number or proportion of defendants who can avoid a formal conviction
 - Sentencing offenders to a community-based sentence without any period of detention
 - Reducing the number of offenders who are sentenced to a form of detention as a result of a failure to appear or a breach of a bail or probation order (administrative offences)
- Whether the FNCs develop effective and culturally appropriate healing plans for offenders
- Whether the FNCs are able to ensure that offenders receive effective support and assistance (to support their desistance from crime and effective reintegration in the community)
- Whether the FNCs provide meaningful opportunities for Aboriginal communities to engage in and support the rehabilitation and reintegration of offenders who participate in the process

In the past, when an evaluation of a problem solving court included a focus on outcomes, it tended to focus more or less exclusively on the prevention of recidivism as a measure of success. Furthermore, when outcomes were measured, the evaluations were seldom able to identify what components of these

courts made them successful (Koetzle Schaffer, 2011; Edgely, 2014). They could not determine which one of the various aspects of the problem solving courts was actually responsible for the observed outcomes. That question is certainly relevant to the evaluation of the FNCs.

For example, since FNCs do not all involve a continuous review of the progress made by offenders, one may ask to what extent is this time consuming and resource intensive aspect of the process in some courts responsible for any of the observed outcomes. Similarly, one may be curious about the extent to which the active involvement of the court in monitoring the progress of offenders is actually contributing to the observed case outcomes.

In the same way, since one of the FNCs has functioned for quite some time without the presence and contribution of Elders, one may ask what is the contribution of the presence and involvement of Elders to the observed outcomes.

Given that the FNCs each operate in a different community, with different resources and facilities, it may be important to determine the extent to which the level of resources available in the community is related to the observed outcomes in each of the local FNCs.⁶

Finally, as was revealed in several evaluations of problem-solving courts, the presence of a case management team (as in the Downtown Community Court)⁷ or intensive supervision can perhaps account for a large part of the observed outcomes of such courts, and yet this supervision model is mostly absent from the FNCs.

All of these questions relate to a general impact attribution issue and the need to carefully consider the respective impact of various aspects of the FNCs on the outcomes they produce. In the end, they are also directly relevant to an analysis of the cost-effectiveness and cost-efficiency of the various FNCs.

Specifically, since the judge's role is at the heart of the problem-solving approach, determining the impact of that role on the outcomes of the process is particularly relevant. Most problem solving court models involve the active participation of the judge not only in the sentencing process, but also in monitoring the offender's progress and compliance with the conditions imposed as part of the intervention.

⁶ As recently observed by the Hon. Judge Challenger: "We are often faced with too little information and the lengths to which dedicated counsel and others go to obtain information is commendable. In the same vein, community resources are limited and sometimes difficult to access" (Challenger, 2017).

⁷ In the case of the Downtown Community Court in Vancouver, Somers and his colleagues (2014) found that the presence of a Case Management Team achieved significantly greater reductions in recidivism than traditional court among offenders with complex needs and high numbers of previous offences.

Although judges play a significant role in most existing models, the real impact of the proactive role of the judges is hard to determine.

Studies of mental health courts, for example, have suggested that observed reductions in recidivism from participation in mental health courts are caused in part by the role of the judge in conveying elements of procedural justice (Wales, Hiday & Ray, 2010). A White Paper of the American Judges Association, having reviewed the experience of drug treatment courts, concluded that there is convincing evidence that the power of the judge-participant relationship is absolutely central in leading to desired outcomes (MacKenzie, 2016).

In problem-solving courts judges use their authority and oversight to hold offenders accountable for their actions and make them responsible for their own rehabilitation. The relationship between the defendants and the judges is so central that it is often suggested that the frequent rotation of judges in such courts may affect that judge participant relationship and, eventually, the outcomes of the intervention.

In a FNC, as opposed to another problem solving court, judicial authority is not the only authority at play. To some extent the process is relying on the joint authority of the judge and the Elders. Elders have been characterized as “the embodiment of Indigenous law” (Johnson, 2014, p1) suggesting that the co-existing and mutually reinforcing roles of Judge and Elder supports an Indigenous-oriented justice process. The Elders participate to varying degrees in the process, presumably increasing the perceived legitimacy of the process in the eyes of both the offenders and the community, and helping mobilize the community to support the offenders’ rehabilitation and reintegration.

Discussions about the purposes and scope of any FNC evaluation that may be undertaken must obviously involve the main stakeholders, and most importantly the participating communities. Most likely, the various purposes listed above will not necessarily be met at the same time. A draft evaluation framework should soon be developed that could serve as a basis for consultations. In the meantime, a simple process should be developed to ensure that data are systematically and consistently gathered on a number of key aspects of the court, over and above what is presently being collected currently.

4. Key Evaluation Questions

The following are some of the key evaluation questions (KEQ) that will deserve attention⁸:

⁸ For example, the evaluation of the Queensland Murri Court in Australia focused on measuring the extent to which the Murri Court was meeting its objectives of: reducing the over-representation of Indigenous offenders in prison; reducing the rate at which Indigenous offenders fail to appear in court; decreasing the rate of reoffending and the

1. To what extent are the FNCs resulting in a reduction of incarceration among people of the participating Indigenous community or communities?
2. To what extent are FNCs able to improve offender compliance with court orders or the conditions attached to their sentence or bail order (as compared to other courts)?
3. Does participation in a FNC reduce the likelihood that an offender may be convicted of an administrative offence (e.g. for failure to appear, or breach of conditions of bail or probation order), as compared to a non-FNC control group?
4. How often are the FNCs revising the conditions attached to a healing plan (or a bail or probation order)?
5. Does participation in a FNC change the likelihood that an offender will complete his or her sentence without committing a further offence (excluding administration of justice offences)?
6. Are the FNCs significantly increasing the likelihood of desistance from crime among offenders, as compared to other interventions?
In other words, is participation in a FNC responsible for a lower rate of recidivism after completion of a sentence? Also, are there noticeable differences in recidivism outcomes among offenders in the different FNCs?
7. To what extent are the observed individual outcomes the result of the fact that the participation of offenders in a FNC is voluntary?
8. Who are the offenders who are excluded from participating in a FNC?
9. What is the impact of the participation of Elders in the sentencing and supervision process on offender related outcomes?
10. What is the impact of the review process on offender outcomes?
11. How many offenders sentenced by a FNC have served a previous community-based sentence in the past?

number of court orders breached by Indigenous offenders, and, strengthening the partnership between Magistrate Courts and Indigenous communities with regard to how they deal with Indigenous offenders (Morgan & Louis, 2010).

12. What is the impact of the participation of Elders in a FNC on the relevant Indigenous community's perception of the justice system (reconciliation)?
13. Is there any evidence that requiring restitution, community service, or various other type of restorative action is associated with better offender outcomes?
14. Do members of the First Nations communities involved in a FNC have greater confidence in the justice system than members of other First Nations communities?
15. Are referrals to the FNCs producing a net-widening effect?
It is often suggested that problem-solving courts can produce a "net-widening" effect (Bowen & Whitehead, 2015). Could the further development of FNCs inadvertently lead to more people being drawn into the court system and made subject to its supervision? Is the linking of the supervision of the offender to a healing plan or a treatment intervention increasing the length (and potential consequences) of that person's involvement with the criminal justice system? For instance, are FNCs leading to longer period of supervision and increased social control as compared to other interventions? In communities where resources are scarce, is there a risk that the FNCs may become the only place to secure help for people in conflict with the law? Does a FNC model requiring offenders to plead guilty before entering the program erode other community-based efforts at diversion and other more informal conflict resolution processes? Are referrals to a FNC a symptom of poor exercise of discretion in the first instance and the absence of more effective conflict resolution systems outside of the formal justice system?
16. Is a FNC an appropriate front door for offenders' access to services?
Critics have argued that the justice system is not the appropriate front door to access services and that the coordinated provision of services should be made available much sooner: "Having courts act as the gateway to accessing services can also lead to unintended consequences, such as entrenching people in the justice system unnecessarily and unintended 'net-widening' (e.g., police arrest someone for a petty crime so they can receive services)" (Ministry of Justice, 2014, p. 8).
17. To what extent do FNCs contribute to victims' confidence in the justice system?

In addition to the above questions, there are several process evaluation questions that deserve attention:

1. Exactly how are cases referred to the FNCs and by whom?
2. What criteria are used by Crown counsel in agreeing to refer a case to the FNC? And, are these criteria consistently applied?
3. How often is sentencing postponed to allow an offender to put in place a healing plan or fulfill other conditions before a sentence is pronounced?
4. What is the average case processing time in a FNC and how does it compare to other provincial courts?
5. Is there an optimal number of Elders that should be present at each sitting of the court? (And what are the Elder's training needs?)
6. What information is available to the FNCs in reviewing a case and preparing healing plans?
7. To what extent are the FNCs using Gladue reports or PSRs with a Gladue component in preparing a healing plan?
8. What are the typical conditions imposed on offenders by the FNCs?
9. How much community supervision is there through the probation service or other agency?
10. How important is it for the Elders to be able to follow a particular offender through the successive review of his/her progress?
11. What are the typical interventions promoted by Elders in the FNC process?
12. How important is it for the same judge to be managing the review process over time?
13. What are the typical responses of the FNCs to situations of offender non-compliance?
14. Are there sufficient and effective resources to assist and support offenders in the communities where the FNCs operate?
15. What are the obstacles encountered by offenders sentenced by the FNC in accessing the treatment and resources they need in the community?
16. Are FNCs able to connect offenders to more or better services than they would otherwise have access to?

17. What is the proportion of offenders who complete their sentence successfully? (Program completion may have to be defined more specifically. However, some of the FNCs have a formal graduation or completion of sentence process, sometimes including a blanketing ceremony).
18. What is the level of community engagement with the FNC?⁹
19. What is the process in place for ensuring community input into the FNC's decision making process?
20. To what extent is the community involved in supporting offenders with their healing plans?
21. To what extent do judges (and perhaps Crown counsel, duty counsel and defence counsel) feel that the FNC process is serving its purpose?
22. What are the typical circumstances leading to a court-based diversion in FNC? Is this an understood process?

Finally, from a cost-effectiveness perspective, one may wish to consider whether the additional costs involved as a result of the judicial supervision of offenders (including the amount of time invested by judges, prosecutors and duty counsel) is the most cost-effective way to support Indigenous offenders and ensure that they receive the necessary assistance from service providers and from their community.

5. Proposed Evaluation Approach

Not all FNCs may be ready for a formal evaluation. However, it may be useful to proceed with the development of a simple framework to evaluate one of them. We learned during the course of our review that the C-FNC is interested in proceeding with an evaluation.

It will be necessary to put in place a process to monitor the FNC process, and to measure the FNCs outputs and immediate outcomes. The data currently collected do not include information to help us distinguish between the process, outputs and immediate outcomes of FNCs and other provincial criminal courts. A system must be put in place to collect this additional data.

The good news is that it may be immediately possible to compare some of the outcomes of FNCs to those of other provincial courts. Based on his previous experience, Dr. Julian Somers (Faculty of Health Sciences, SFU) concluded that it would be possible to measure some of the individual outcomes for offenders who participate in the FNCs, as compared to all individuals who are sentenced in other

⁹ In the case of the evaluation of the DCC in Vancouver, community engagement was measured through a public survey.

provincial courts. These would rely on finding a way to retroactively identify cases that proceeded through the FNCs. It would also be possible to compare the individual outcomes observed in the FNCs to the outcomes for Indigenous offenders who are dealt with in other courts. It would be possible to compare characteristics of offenders and process outcomes for both those who appear in FNC and those who appear in other courts (by Indigenous/non-Indigenous). Such a study would make it possible to identify differences (current offence, criminal history, mental health, addiction issues, etc.), if any, between the characteristics of clients of FNC and clients of other provincial courts.

The Somers Research Group, was able to build an integrated database that links health, social services and justice data. It has applied this to Community Court research, Drug Court research, etc. The ability to cross-reference data from various sources would make it possible to characterize all people going through a FNC in terms of: (1) the history of contacts with social assistance system; (2) history of contacts with health care system; (3) history of contacts with justice system (including multiple current contacts); and, (4) nature of the matter that brought them to the FNC. It is also possible to keep monitoring individuals' future contacts (re-contacts) with the systems (including criminal recidivism). All this is predicated on an ability to identify FNCs either retroactively or going forward.

The Somers study could capture timeline information for each case (e.g., when the accused first appears in court – FNC and other courts – as well as dates marking the beginning and the end of the FNC interventions. Similar information can of course be captured on cases that appear before criminal courts. The database currently captures data on more than 250,000 individuals (linking CORNET & JUSTIN data). There is even the possibility of statistically creating a matching group (on key variables) with which to compare people who go through the FNC. These variables would have to be identified.

It should be clearly understood that this kind of high-level data analysis would not be sufficient to address the many key evaluation questions we have listed above. Nevertheless, it would be, together with the development of a complementary data monitoring system on the FNCs process and outputs, an excellent starting point.

6. Conclusions and Recommendations

There currently are opportunities to proceed with a formal evaluation of some of the existing FNCs. The high-level approach suggested by Dr. Somers would be a good starting point as it would allow, at a very general level, to measure whether and to what extent FNCs produce better results than other courts in terms of helping offenders desist from crime and preventing recidivism. However, the FNCs also pursue other important objectives which should also be considered as a part of a comprehensive evaluation. As can readily be seen, there are many key

evaluation questions that would require a finer analysis. Finally, there are many aspects of the FNCs that need to be further documented so that their proponents may be in a better position to understand what specific aspects of the FNC process is most likely to produce the desired outcomes.

References

- Bowen, P. & Whitehead, S. (2015). *Problem-solving Courts: An evidence review*. London: Centre for Justice Innovation.
- Challenger, J. (2017). Therapeutic Justice and Reconciliation in First Nations Sentencing Court, *The Verdict*, 151 (Winter), 40-45.
- Clark, S. (2016). *Evaluation of the Aboriginal Youth Court, Toronto*.
- Edgely, M. (2014). Why Do Mental Health Courts Work? A confluence of treatment, support and adroit judicial supervision, *International Journal of Law and Psychiatry*, 37, 572-580.
- Goldberg, S. (2011). *Problem-solving in Canada's Courtrooms: A Guide to Therapeutic Justice*. Ottawa: National Justice Institute.
- Johnson, S. (2014). Developing First Nations Courts in Canada: Elders as foundational to Indigenous Therapeutic Jurisprudence, *Journal of Indigenous Social Development*, 3 (2), 1-14.
- Jolliffe, D & Farrington, D.P. (2009). *Initial evaluation of reconviction rates in Community Justice Initiatives*. London (U.K.): Ministry of Justice.
- King, M. S. (2010). "Judging, Judicial Values and Judicial Conduct in problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts", *Journal of judicial Administration*, 19, 133.
- Koetzle Shaffer, D. (2011). Looking Inside the Black Box of Drug Courts: A meta-analytic review, *Justice Quarterly*, 28(3), 493-521.
- Mackenzie, B. (2016). The Judge is the Key Component: The importance of procedural fairness in drug-treatment courts, *Court Review*, 52 (1), 8-34.
- Marchetti, E. (2014). "Delivering Justice in Indigenous sentencing Courts: What tis means for judicial officers, Elders, community representatives, and Indigenous court workers", *Law and Policy*, 36 (4): 341-369.
- Marchetti, E. & Ransley, J. (2014). Applying the critical Lens to judicial Officers and Legal Practitioners involved in sentencing Indigenous Offenders: Will anyone or anything do?, *UNSW Law Journal*, 37 (1), 1-33.
- Marlowe, D., Festinger, D.S. Arabia, P.L., Dugosh, K.L., Benasutti, K.M. & Crift, J. R. (2009). Adoptative Interventions May Optimize Outcomes of Drug Courts: A pilot study, *Current Psychiatry Reports*, 11 (5), 370-376.

- Marlowe, D.B. (2011). The Verdict on Drug Courts and Other Problem-solving Courts, *Chapman Journal of Criminal Justice*, 2(1).
- Matejkowski, J., Festinger, D. S., Benishek, L. A., & Dugosh, K. (2011). Matching Consequences to Behavior: Implications of failing to distinguish between noncompliance and nonresponsivity, *International Journal of Law and Psychiatry*, 34, 269-274.
- Ministry of Justice (2016). *Specialized Courts Strategy*, British Columbia, March 2016.
- Morgan, A. & Louis, E. (2010). *Evaluation of the Queensland Murri Court: Final Report*. Canberra: Australian Institute of Criminology.
- Porter, R., Rempel, M., & Mansky, A. (2010). *What Makes a Court Problem-solving?* New York: Centre for Court Innovation.
- Slinger, E. & Roesch, R. (2010). Problem-solving Courts in Canada: A review and a call for empirically-based evaluation methods. *International Journal of Law and Psychiatry*, 33, 258-264.
- Somers JM, Moniruzzaman A, Rezansoff SN, Patterson M (2014). *Examining the Impact of Case Management in Vancouver's Downtown Community Court: A Quasi-Experimental Design*. PLoS ONE 9(3):
- Wales, H. W., Hiday, V. A., & Ray, B. (2010). Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism, *International Journal of Law and Psychiatry*, 33, 265–271.
- Wiener, R.L, Winick, B.J., Georges, LS., & Castro, A. (2010). A Testable Theory of Problem Solving Courts: Avoiding past empirical and legal failures. *International Journal of Law and Psychiatry*, 33, 417-427.

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