

A Commitment to Reconciliation: Canada's Next Steps in the Post-TRC Phase



International Human Rights Internships Program - Working Paper Series



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Abstract

This paper explores the connection between a commitment to reconciliation and accountability in the context of the Canadian Truth and Reconciliation Commission after the publication of its final report in December of 2015. I suggest that the establishment of a National Council for Reconciliation as a monitoring mechanism would assure that the government be held accountable to its commitment to reconciliation by informing the general public on its progression in implementing the recommendations in the Commission's final report. First, I lay out the theoretical framework of reconciliation in a political context and establish the links between commitment, accountability and reconciliation. Second, I survey some of the criticism surrounding the Truth and Reconciliation Commission's initiatives and flesh out what some have flagged as its serious shortcomings. Third, backed by Canada's adoption of the United Nations Declaration on the Rights of Indigenous Peoples in May of 2016, I take a closer look at the recommendation in the Commission's final report for the establishment of a National Council for Reconciliation and explain why it constitutes the logical next step in assuring the federal government fulfills its commitment to implementing all subsequent recommendations made by the Commission.

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Introduction

The practice of truth telling has evolved over decades, from a private experience shared among tight-knit acquaintances, to a formal, institutionalized and mediatized affair, often spanning a few years, and resulting in a collection of testimonies that are widely disseminated by means of an official final report. Public authorities are usually expected to acknowledge the final report and take matters into their own hands, often accompanying the gesture with promises of “making it right” and “striving to reconcile” the broken ties between the past oppressors and the designated group of “victims” for whom the truth telling event was intended.

But what happens when these promises are not fulfilled? Who is responsible for the fulfillment of these promises, and what are some of the mechanisms that can assure these obligations are met?

The idea for this research paper was inspired by recent work I conducted on Peru’s Truth and Reconciliation Commission and the ensuing recommendations made by commissioners to the Peruvian State in its official final report of 2003. This summer, I completed a research internship at the Institute for Democracy and Human Rights in Lima, Peru. I was tasked with compiling the numerous recommendations listed in the final report, and measuring their degree of implementation in domestic law and policies. To my surprise, I observed that following the sixteen years that had passed since the end of the Peruvian commission and the publication of its final report, the implementation rate of the report’s recommendations remained very low, and in the case of some recommendations, their implementation was null.¹ Some Peruvians with whom I interacted had no recollection of the Commission’s events in the early 2000s, and their symbolic significance to some of their fellow citizens who had been significantly harmed by their country’s violent episodes. These observations led me to think about Canada’s own recent experience with its truth commission, and the promises of reconciliation that were made by the federal government following the presentation of the commission’s final report in December of 2015.

¹ See Sofía Macher, *Hemos avanzado? A 10 años de las recomendaciones de la Comisión de la Verdad y Reconciliación* (Lima : Instituto de Estudios Peruanos, 2014) [Macher].

The Peruvian and Canadian contexts are very different but do share some similarities.² That said, this paper does not purport to draw a comparison between the Peruvian and Canadian contexts. Rather, it intends to conceptualize ways in which Canada can steer clear of the common shortcomings in post-commission phases, namely at the stage of implementing recommendations, to ensure that the Canadian government builds on the momentum created by the Commission with the publication of its final report and recommendations last year. However, I do turn to Peru later in this paper to study a monitoring strategy it implemented in their post-commission context.

Specifically, I argue that a commitment to reconciliation is the foundation upon which concrete initiatives are built. It generates obligations borne by those who have committed, who can in turn be held accountable to it. Finally, the establishment of monitoring mechanisms by which those responsible for the commitment are held accountable serves to demonstrate the sincerity and authenticity of the commitment made, which may in turn help foster a climate for reconciliation between historically divided groups. In the case of Canada, I suggest that the establishment of a National Council for Reconciliation as a monitoring mechanism would assure that the government be held accountable to its commitment to reconciliation by informing the general public on its progression in implementing the recommendations in the Commission's

² Peru's Truth and Reconciliation Commission was the product of two decades of an internal violent conflict between guerilla groups and the State. Roughly 69,000 innocent victims lost their lives to violence primarily instigated by the *Sendero Luminoso* (Shining Path) insurgents, whose radical communist ideology called for a "people's war" against the State, the use of terror being its principal tactic to overthrow the existing institutions of power and replace it with a new revolutionary government. While the legal declaration of a state of emergency and the use of military forces quickly became necessary to counter the insurgency, the State and its agents were also found accountable for numerous violations of their citizens' fundamental rights. The ethnical dimension of the conflict hardly went unnoticed: most of the violence was concentrated in the Peruvian highlands, a region that remains difficult to access, economically poor and majorly populated by indigenous Quechua speakers, a people said to be modern descendants of the Inca civilization. At the beginning of the millennium, a truth and reconciliation commission was established to study the extent of the violence and its effects, produce official statistics and start the reparation process for victims. Unlike the Peruvian case, the Canadian Truth and Reconciliation Commission was the product of a racist century-long policy that sought to assimilate Indigenous peoples into mainstream colonial Canada. Children from Indigenous communities were taken away from their families and placed in government-sponsored religious boarding schools, where they were stripped of their Indigenous identity. Most children endured systematic physical and sexual abuse, which left permanent scars as they grew into adulthood. Many children also perished in the schools, due to malnutrition and unsanitary conditions. Much like the Peruvian case, the ethnical divides between Indigenous communities and political leaders was the State's driving force behind the nation-wide policy. The Canadian Truth and Reconciliation Commission was the result of a class action settlement between residential school survivors and the federal government.

final report. I argue that such a Council is the logical first step in securing the successful implementation of all subsequent recommendations and eventually forging a reconciled relationship between all actors concerned.

This paper is divided into three sections. In section one, I lay out the theoretical framework of reconciliation in a political context and establish the links between commitment, accountability and reconciliation. In section two, I survey some of the criticism surrounding the Truth and Reconciliation Commission's initiatives and flesh out what some have flagged as its serious shortcomings. Finally, in section three I take a closer look at the recommendation in the Commission's final report for the establishment of a National Council for Reconciliation and explain why it constitutes, in my view, the logical next step in assuring the federal government fulfills its commitment to implementing all subsequent recommendations made by the Commission.

Lastly, the term *survivor* has been favoured where possible over the commonly used term *victim*, in line with what some have suggested is more conducive to a move away from dichotomized identities and subconscious victimization that can be hard to circumvent in truth telling processes.³

1. A relationship between commitment, accountability and reconciliation

Reconciliation is a context-specific concept. In the context of national truth commissions, reconciliation is often considered the end goal of the truth-telling process. During South Africa's Truth and Reconciliation Commission hearings, a panel hung behind the commissioners that read: "Truth. The Road to Reconciliation."⁴ I believe that this kind of statement, while partially true, is incomplete. In this section, I show that the process of truth-telling is important to reconciliation, but that it often falls short of its aspirational objectives when no sincere

³ See Lisa Laplante & Kimberly Theidon, "Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru", (2007) 29:1 HRQ 228-250.

⁴ Patricia Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (New York : Routledge, 2011) at 183 [Hayner].

commitment to reconciliation, such as implementing recommendations or reforms, is made by those responsible for past harm. I argue that a sincere commitment to reconciliation is demonstrated by how those responsible for past harms *voluntarily* establish independent monitoring mechanisms to ensure that they are held accountable to their commitment to reconciliation. First, I unpack the concept of reconciliation and its significance in the Canadian context. Second, I shed light on the connection between commitment, accountability and reconciliation. I conclude by illustrating the interplay between these three concepts in the Canadian context, and how their co-dependence will be fundamental to the Truth and Reconciliation Commission's legacy. Finally, I use the term "truth commission" throughout this section to speak of a generalized process of truth telling, as unlike Canada, some countries mentioned in this section have not chosen to include "reconciliation" in the official name of their truth commissions.

1.1 What is reconciliation?

As stated above, reconciliation is a context-specific concept and the understanding of its purpose varies tremendously. For example, the Honourable Justice Murray Sinclair, Chair of the Canadian Truth and Reconciliation Commission, defines reconciliation as educating non-natives about indigenous peoples, examining indigenous experiences of injustice and strengthening Aboriginal languages and cultures.⁵ James analogizes the Canadian Commission's approach to reconciliation to that of the South African experience, expounded by the Chair of the South African Commission, Desmond Tutu as a "non institutional and predominantly interpersonal" conception that "emphasizes understanding between former antagonists and forgiveness of wrongdoers by victims".⁶ For Flisfeder, reconciliation means restorative justice. He analogizes the wrongs suffered by survivors of the residential school system to principles of tort law, by which reconciliation of wrongs must attempt to determine "what could have been"

⁵ The Honourable Justice Murray Sinclair, *Presentation to the Senate of Canada Standing Committee on Aboriginal Peoples*, (Ottawa: Truth and Reconciliation Commission of Canada, September 2010) at 2.

⁶ Desmond Tutu, *No Future Without Forgiveness* (New York: Image, 1999), cited in Matt James, "A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission", (2012) 6:2 Int J Transit Justice 182 at 13 [James].

if not for the atrocities committed to Aboriginal communities.⁷ Chrisjohn and Wasacase speak of “conciliation” before “reconciliation”, arguing that before two parties can reconcile, they must have been “conciled” at an earlier stage in history, when “two distinct parties, independent and moving in their own directions for their own reasons, meet, share, and decide to make their independent ways forward into a single, combined effort”.⁸ For reasons I will touch upon later, Chrisjohn and Wasacase argue that conciliation never happened between settlers and Indigenous peoples, which in turn make reconciliation an impossible prospect.

While these interpretations of reconciliation contribute to a broad understanding of the purposes of reconciliation, they lack the normative quality found in Patricia Hayner’s definition of reconciliation and the empirical framework she sets out to identify stages of reconciliation in a given context. Hayner devotes an entire chapter to reconciliation in her book entitled *Unspeakable Truths – Transitional Justice and the Challenge of Truth Commissions*.⁹ Her extensive research in the field of transitional justice spans over three decades of truth commissions, resulting in convincing conclusions as to the successes and pitfalls of these mechanisms, as well as to how reconciliation is achieved and what elements are needed to assure its progress.

Definition of reconciliation

In the context of a political conflict, Hayner summarizes the concept of reconciliation as a “mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups.”¹⁰ She then identifies two levels of reconciliation: national reconciliation and individual reconciliation. At the national level, reconciliation consists of easing political tensions between opponents by ironing out the truth of past events:

⁷ Marc A Flisfeder, “A Bridge to Reconciliation: A Critique of the Indian Residential School Truth Commission”, (2010) 1:1 IIPJ 1 at 13 [Flisfeder].

⁸ Roland Chrisjohn & Tanya Wasacase, “Half-Truths and Whole Lies: Rhetoric in the ‘Apology’ and the Truth and Reconciliation Commission,” in Gregory Younging, Jonathan Dewar and Mike DeGagné, eds, *Response, Responsibility and Renewal*, (Ottawa: Aboriginal Healing Foundation, 2009) at 199 [Chrisjohn & Wasacase].

⁹ Hayner, *supra* note 4.

¹⁰ Louis Kriesberg, “Paths to Varieties of Inter-communal Reconciliation” (Paper delivered at the Seventeenth General Conference of the International Peace Research Association, Durban, South Africa, 22 – 26 June 1998), cited in Hayner, *supra* note 4 at 182.

By speaking openly and publicly about past silenced or highly conflictive events, [...] a commission can ease some of the strains that may otherwise be present in national legislative or other political bodies. This is not to suggest that the knowledge or memory of past practices should not influence current politics, but if basic points of fact continue to be a source of conflict and bitterness, political relationships may be strained.¹¹

At the individual level, Hayner notes that reconciliation is much more complex and difficult to achieve through a national truth commission.¹² The process of truth telling will not necessarily lead the victim to reconcile his or her past with the actions of the perpetrator, and if it does, it usually takes more time than allotted within the time span of a truth commission.¹³

Obstacles to reconciliation

She goes on to highlighting other issues that arise when contemplating reconciliation at the individual level. First, reconciliation is often not considered a reasonable expectation to retain after a truth commission. As evidenced in testimony taken from an Argentinean journalist after episodes of state terror during the 1980s, reconciliation can be inconceivable:

Reconciliation by who? After someone takes away your daughter, tortures her, disappears her, and then denies ever having done it – would you ever want to “reconcile” with those responsible? That word makes no sense here. The political discourse of reconciliation is profoundly immoral because it denies the reality of what people have experienced. It isn’t reasonable to expect someone to reconcile after what happened here.¹⁴

Second, reconciliation as a product of truth commissions is often contested because truth commissions by nature do not prosecute the perpetrators of violence or those responsible for past harms. Therefore, they are sometimes perceived as offering an easy way out to those presumed guilty, or as Argentine human rights expert Juan Méndez put it, letting torturers “do nothing”.¹⁵ This perception is all the more exacerbated by the fact that the perpetrators

¹¹ Hayner, *supra* note 4 at 183.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Interview from Horacio Verbitsky (Buenos Aires: 10 Decembe1996), cited in Hayner, *supra* note 4 at 187-188.

¹⁵ Interview from Juan Méndez (Notre Dame, IN: 22 March 1996), cited in Hayner, *supra* note 4 at 188.

recurrently refuse to show remorse, express regret or accept responsibility.¹⁶ In the case of the commission on the disappeared in Sri Lanka, commissioners did not even suggest reconciliation as an end goal and limited its mandate to strictly documenting the disappeared and determining which families were eligible for reparations.¹⁷

Finally, Hayner cautions against exaggerated expectations that can result from high hopes of full reconciliation expressed at the outset of a truth commission. Many truth-telling processes have fallen short of reaching the results intended, mainly due to a lack of political will, legislative initiative and social and individual readiness for change.¹⁸ This last point will become important in the next subsection and serve as the basis for which I will propose a solution in section three.

On the whole, the distinction between national and individual reconciliation, the reasonableness of reconciliation as an expectation and the perception that truth commissions let perpetrators of violence off the hook are fundamental considerations to take into account when determining reconciliation as the final objective of a truth commission. Insensitivity to these concerns can lead to exaggerated expectations and ultimately, loss of faith in the capacity of the truth-telling process.

Test for assessing reconciliation

Beyond these cautionary forewords, Hayner establishes a test comprised of three questions for assessing whether a country is moving towards reconciliation. First, one must look at how the past is dealt with in the public sphere.¹⁹ This entails looking for traces of remaining animosity between victims of past harm and their perpetrators, and asking “have past conflicts been processed or absorbed in such a way that people can talk about these events with former opponents?”²⁰ Second, one must identify the current relationships between former opponents and determine whether the relationships are based on the present rather than on the past,

¹⁶ *Ibid.*

¹⁷ Hayner, *supra* note 4 at 188.

¹⁸ *Ibid.*

¹⁹ Hayner, *supra* note 4 at 189.

²⁰ *Ibid.*

because constant reminders of past harm can point to lagging antagonisms.²¹ Third, one must assess whether a single or multiple versions of the past exist in the public discourse. “To reconcile means not only re-establishing friendly relations, but reconciling contradictory facts or stories ‘to make discordant facts consistent, accordant, or compatible with each other’”.²² In short, Hayner underlines the importance of “debunking lies” and “challenging dishonest denial” in allowing a country to accept a common understanding of the truth before any talk of reconciliation can take place.²³

Elements for successful reconciliation

Finally, Hayner lists elements that are necessary for reconciliation to develop in a political context: an end to the violence or threat of violence; acknowledgement and reparations; binding forces through cooperation on development projects; addressing structural inequalities and material needs; and time.²⁴ These elements will become important when I discuss the link between commitment, accountability and reconciliation in the following subsection, as I will demonstrate that strong political will to implement recommendations proposed by a truth commission, and accepting to be held accountable to this commitment, can in turn help foster a successful reconciliation.

Before, I propose to examine how the Canadian context situates itself against Hayner’s theoretical framework. The aim of this article is not to empirically assess whether Canada is on its way to reaching reconciliation between Aboriginal peoples and non-Aboriginal Canadians. Nevertheless, it is interesting to consider Canada’s official perspective on what reconciliation is, and what is necessary to achieve it.

Canada’s Truth and Reconciliation Commission defined reconciliation as “establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Hayner, *supra* note 4 at 190.

peoples.”²⁵ Similarly, the Truth and Reconciliation Commission’s initial mandate described reconciliation as

an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups.²⁶

Moreover, the commission does not mention anywhere that proper responsibility must be taken by the federal government to provide redress. Sweeping statements like “repairing damaged trust by making apologies” and “following through with concrete action that demonstrate societal change” are left up to interpretation.²⁷ In phrasing the issue this way, the Commission has opted for a perspective on reconciliation that attributes equal weight to reconciliatory efforts from both the victims of past harm, the perpetrators, and everyone else who makes up society at large. Whether this is a fair distribution of responsibilities is a debate that I will address further in this article. What matters here is that construing reconciliation as a joint, equal effort between all interested parties poses the risk of victims feeling like they are not capable of reconciliation, especially if no *additional* effort is made by past perpetrators to rectify the harm done. It welcomes the question: “*why should I have to work as hard at reconciliation when I am the survivor of the harm for which reconciliation is now an objective?*” As Hayner pointed out, reconciliation is not always conceivable, especially when the perpetrators are perceived as getting off unscathed.

As for necessary conditions to achieve reconciliation, the Commission emphasized four: awareness of the past, acknowledgement of the harm inflicted, atonement for the causes, and action to change behaviour.²⁸ In my opinion, these conditions are very broad, but more concrete elements, like those Hayner set out above, have the potential to be read into them. For example,

²⁵ Truth and Reconciliation Commission of Canada, “Canada’s Residential Schools: Reconciliation” in *The Final Report of the Truth and Reconciliation Commission of Canada*, (Montreal: McGill-Queens University Press, 2015) vol 6 at 3 [Final Report].

²⁶ *Ibid* at 11.

²⁷ *Ibid*.

²⁸ *Ibid*.

reparations can be a way to atone for the causes (this process has already begun), and addressing structural inequalities and material needs can be interpreted within the Commission's fourth condition on action to change behaviour.

1.2 How does commitment and accountability influence reconciliation?

In this subsection, I focus on the connection between commitment, accountability and reconciliation. My intention is to demonstrate that reconciliation as a result of a truth telling process is incomplete if no commitment is made on the part of perpetrators of past harm to rectify the situation that led to harm being done, and if there are no monitoring mechanisms in place to hold these same actors accountable to their commitment.

The previous subsection sought to unpack the common understanding of what reconciliation meant in a political context, as well as certain obstacles to achieving reconciliation and necessary elements for successful reconciliation. Hayner's examples of selected testimonies in her chapter on reconciliation pointed to a common problem shared by many truth commissions she surveyed: the lack of acknowledgment and engagement from past perpetrators led to the loss of momentum of truth commissions as they neared the end of their mandates, resulting in victims feeling disappointed and less inclined to reconcile with their opponents. A quote taken from the South African Truth and Reconciliation final report succinctly summarizes this outcome:

Reconciliation is not an event. People cannot simply one day decide that they want to forgive and forget. Most of the victims of this community are committed to a process of reconciliation. They are not necessarily demanding vengeance. They are, at the same time, not simply willing to move ahead as if nothing happened. They demand to hear the truth and to be given time to consider it. They are not often willing to forgive unless the perpetrators show remorse and some form of reparation is offered. (Emphasis added)

In light of this, I argue that the assumption that truth telling leads to reconciliation is not necessarily flawed, but it is incomplete. It is naïve to assume that public testimonies and uncovering the truth will lead to automatic reconciliation between the victims who share their experiences, and the public who is willing to listen to them. In my opinion, such a process is cathartic at best. What is needed for successful reconciliation is for past perpetrators, or the governments accepting responsibility on behalf of past perpetrators, to first acknowledge the

findings of a truth commission, then publicly commit to making impactful changes in the lives of these survivors, whether by implementing recommendations made by the truth commission or by initiating other kinds of reforms. In most cases, truth commission findings usually make their way into the hands of authorities who publicly acknowledge the receipt of the commissions' conclusions and pronounce something to the effect of victim reparations and other reforms.

In my view, a truth commission's influential capacity for change loses its momentum at the accountability stage, because interested observers naturally doubt the government's (or any other actor who has taken on the responsibility of reform) sincerity in following up on its initial commitment to change. In my opinion, scepticism towards the government's sincerity, combined with delays in political will to act on the commitment taken is the biggest barrier to reconciliation because it sends a message of devaluing the importance of the lives affected by inaction, in turn fostering sentiments of dissatisfaction on the part of those whose expectations are not met.

What can be done in light of this barrier to reconciliation? Hayner's elements for a successful reconciliation are a good place to start. Whether these elements be advised through formal recommendations or in other forms, committing to acknowledging, repairing, and addressing structural inequalities and material needs is important to change how victims perceive the perpetrators that have harmed them in a new light. However, I take a step further and suggest that the establishment of some kind of monitoring mechanism can work in complementarity to Hayner's elements and is essential to reconciliation because it can help keep the government accountable to its initial commitment, deepening the sincerity of the engagement taken. While Hayner does not develop this idea extensively, she does flag the necessity of monitoring mechanisms for truth commissions' recommendations.

Other authors have also highlighted the importance of accountability in the reconciliation process. Skaar, García-Godos and Collins speak of impunity and accountability as two opposites on a continuum, where full accountability would suggest the most complete imaginable level of official and social repudiation of past abuses. This would include comprehensive truth telling, holistic reparations packages, and the possibility of attribution of responsibility to individual and/or institutional perpetrators. The authors also note that the presence of a TJM (transitional

justice mechanism, like truth commissions) does not suffice to move the country along the impunity – accountability spectrum: “The adoption, presence, and extent of TJMs can be both contributors and indicators of these shifts [towards accountability]. Explanation for particular changes are to be found [...] in the structural forces and institutional and individual actors responsible for the decisions and outcomes that situate a society on the spectrum.” They identify outside contextual factors that help explain a country’s gradual move towards accountability, such as state institutions, government policies, prevailing norms, and other factors. What this idea implies is that truth commissions alone do not bring about accountability. Rather, external factors, often dependent on political will, are what truly help turn the truth-telling conclusions into grounds for accountability.

In the same vein, Gibson argues that a supportive culture was essential to South Africa’s Truth and Reconciliation Commission’s success: “Where a truth and reconciliation process is established in a country without the requisite supportive culture and institutions, that process would likely fail since the root cause of reconciliation lies in the culture and institutions of the country, not in the truth and reconciliation process itself”. Perhaps the most interesting point Gibson makes is what he refers to as the “logic of rational hypocrisy”. In his view, vindicating the past by prosecuting the perpetrators of violence and the pragmatic granting of amnesties to these same perpetrators are two polarizing ways to think about the objectives of truth commissions. Rather, he puts forth a compromising third way of rationalizing the purpose of truth commissions that he judges most effective for reconciliation: strict condemnation of all who violate human rights standards without extensive prosecution, but with a vision to a better future. In thinking along these lines, “the principle of universalism is compromised to a lesser degree, while pragmatic considerations prevail in documenting the past by preparing for the future”. To observers of the Canadian Truth and Reconciliation Commission who criticize the pragmatic approach it has taken to uncovering the truth but choosing not to name individual perpetrators publicly in the report, Gibson’s logic of rational hypocrisy may offer some comfort or explanation. Nevertheless, for such a policy choice to preserve its legitimacy, “preparing for the future” must yield concrete changes. In short, as he highlights throughout his article, a supportive culture and institutions is more important than the truth telling process itself. This lends further support to my argument on the importance of accountability. A truth commission

is only the first step: reconciliation will be deemed a futile goal if those responsible for past harm do not commit to change and assure they are held accountable to their commitment.

To summarize, this subsection has shown that there exists a rational link between commitment, accountability and reconciliation. I have argued that the expectation of reconciliation at the end of a truth telling process is misplaced if it is not accompanied by a public commitment to change and monitoring mechanisms to hold authorities accountable to their commitment. Without proper mechanisms for accountability, a commitment to change risks being perceived as hollow and does not instil confidence of interested observers in the sincerity of such a commitment, which can in turn discourage efforts to reconcile. The authors cited in this section confirm the idea that accountability is fundamental to a truth-telling process and its success, without which momentum and expectations of change coming out of such a process are extinguished.

In the following section, I cast light on some of the criticism surrounding the Canadian Truth and Reconciliation Commission's work, to which I will suggest a conciliatory solution in section three.

2. Criticism of Canada's Truth and Reconciliation Commission and the way forward

In the previous section, I analyzed the meaning of reconciliation from the official point of view of the Canadian Truth and Reconciliation Commission. The current section seeks to unpack the meaning of reconciliation to the very people for whom the commission was set in motion and to the broader Canadian society. I survey different opinions on the Commission's mandate and work, and endeavour to understand how many perceive the Commission as having failed them in living up to their own interpretation of reconciliation.

I start with the criticism of the Canadian Truth and Reconciliation Commission's victim-centred approach, unpopular to many scholars and observers.²⁹ For one, James describes the victim-centred approach as a "bottom up", grassroots process of rebuilding, driven by the

²⁹ See James, *supra* note 6; Flisfeder, *supra* note 7.

voices and aspirations of atrocity survivors.³⁰ It puts victims of injustice in charge and “reverses the dominance-submission logic of state-inflicted atrocity by foregrounding the voices and truths that atrocity sought previously to stifle”.³¹ In the Canadian context, this kind of approach could alter the colonial relationship with indigenous communities. In a way, the commission is their voice and tribute.³²

Despite its “transformative potential”, James argues that the victim-centred approach of the Commission neglects a more “accountability-promoting” focus, directed at the agents and institutions responsible for past harm.³³ This problem is usually avoided when the mandate of a truth commission provides for a “perpetrator-centred” approach, less concerned with the voices and individual experiences of victims than with how their testimony can help identify and apportion blame to past perpetrators.³⁴ James notes that in the Canadian case, the well-intentioned victim-centred approach has a downside:

Official obstinacy, self-interested majoritarian complacency and a sharply delimited investigative mandate make it difficult for the Commission to uncover and convey in appropriately detailed ways the individual and institutional acts of Canadian decision making responsible for the innumerable injustices associated with the schools [...] A diminished emphasis on legal truths and definitive judgements brings with it a correspondingly diminished focus on redesigning institutions and redistributing property and power.³⁵

In short, James suggests that a more aggressive faultfinding focus could better help Aboriginal and non-Aboriginal Canadians confront the realities of the past and present, understand the ongoing complicity in the residential schools agenda, and in turn stimulate a better relationship between communities.³⁶

³⁰ James, *supra* note 6 at 2.

³¹ *Ibid* at 7.

³² *Ibid* at 3.

³³ *Ibid* at 1.

³⁴ *Ibid* at 6.

³⁵ *Ibid* at 3.

³⁶ *Ibid* at 21.

Similarly to James, Flisfeder argues that the Commission as an alternative dispute resolution mechanism is flawed because it focuses too much on truth at the expense of reconciliation.³⁷ In his view, a “holistic” form of reconciliation, understood as going beyond judicial recognition of rights and adopting measures of restorative justice, will not be successful if the Commission does not address the “many ripples” that have flowed from the Indian Residential Schools system.³⁸ He argues that the investigative and truth-collecting work has already been accomplished by the 1996 Royal Commission on Aboriginal Peoples (RCAP), and that the Commission ought to spend more time “discovering ways of restoring justice to Aboriginal communities.”³⁹ Because this article dates back to 2010, it is unclear whether the Commission’s publication of the *Calls to Action* in its final report would satisfy Flisfeder’s demand for restorative justice to be at the forefront of the Commission’s objectives. In my opinion it would not, simply because the *Calls to Action* require further concrete steps. In his view, the mandate of the Commission lacks the authoritative power the RCAP conclusions had on influencing policy makers and Canadian courts in the years that followed. While this last point is debatable, his underlying concern is akin to one shared by many others: the Commission’s mandate risks gathering truth at the expense of yielding structural changes.

Pushing this point further, Chrisjohn and Wasacase criticize the Commission for its fundamental lack of justice. At the outset of their chapter, they flag the irony of the government’s characterization of the words “truth”, “reconciliation” and “apology” in their policies, stating that the Harper government (at the start of the Commission) was the “ideological, legal, ethical, and political successor to those governments that created residential schools in the first place”.⁴⁰ Furthermore, they criticize the Commission for purporting to expose the truth about the past, arguing that while the survivors’ testimonies are undoubtedly truthful, they fail to tell the whole truth, that which lies within Cabinet documents, consultation documents and memoranda of agreement.⁴¹ They hold that the truth telling process built into

³⁷ Flisfeder, *supra* note 7.

³⁸ *Ibid* at 2.

³⁹ *Ibid* at 18.

⁴⁰ Chrisjohn & Wasacase, *supra* note 8 at 197.

⁴¹ *Ibid* at 199-200.

the Commission's mandate cannot provide justice for the crimes committed against survivors of the Indian Residential School system, and to suggest that the Commission offers at least a cathartic outlet to victims is at best a therapeutic benefit no different than one could obtain from a placebo:

How many days or how many hours will it be before those who testify find themselves back where they started, with the additional task of having to face the enormity of the realization that public castigation of an identified personal oppressor has not only done nothing to resolve personal issues, but it has let the offending party and the institution standing behind him or her off the hook?⁴²

In short, the authors' foreboding scepticism of the Commission's mandate and work did not deter the Commission from collecting parcels of the truth, at worst. What authorities will do with this collection of testimonies to counter the image it has created for itself due to past policies is still to be assessed.

Finally, Dale Turner contends that the Commission fails to incorporate the inherent right of Aboriginal self-government into its mandate, creating a disjuncture between the government's idea of reconciliation and Aboriginal nationhood, so critical to renewing the legal and political relationship.⁴³ He argues that the Commission's idea of reconciliation focuses on healing "unhealthy" Aboriginal communities, whereas what is needed is a renewal of the nation-to-nation political relationship, elevating the Aboriginal peoples from their current status of inferiority. He uses the Canadian Constitution to add weight to his argument, stating that article 35(1) is understood as protecting the Aboriginal inherent right to self-government, which should in turn be part of the political objectives of the Canadian Truth and Reconciliation Commission if reconciliation is to be considered possible at all.

In summary, the four opinions I have unpacked in this section share the view that the Commission prioritizes partial truth over accountability and reconciliation. Its mandate lacks the capacity to bring about justice to victims, and does not explore ways of restoring justice by means of structural change to the affected communities. Finally, the mandate's lack of a nation-

⁴² *Ibid* at 203.

⁴³ Dale Turner, "On the Idea of Reconciliation in Contemporary Aboriginal Politics" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress*, (Toronto: University of Toronto Press, 2013).

to-nation perspective perpetuates the indigenous communities' position of inferiority in relation to the government of Canada. In the next section, I suggest that a National Council for Reconciliation is the logical next step in the post-commission context. I argue that this initiative could help restore the Commission's reputation and satisfy its critics by demonstrating a strong commitment to reconciliation through the provision of a monitoring mechanism to increase accountability.

3. Prioritizing accountability: the establishment of a National Council for Reconciliation

As I demonstrated in section one, a commitment to reconciliation is the first step towards accountability for past harms and fostering a climate for reconciliation between Aboriginal peoples, official institutions and non-Aboriginal Canadians. In this section, I seek to identify and explain why the establishment of a National Council for Reconciliation set out as the fifty-third recommendation in the *Calls to Action* should be prioritized in order to assert the Government of Canada's sincere commitment to reconciliation.

3.1 A National Council for Reconciliation: the idea behind the initiative

The proposal for the creation of a National Council for Reconciliation reads:

We call upon the Parliament of Canada, in consultation and collaboration with Aboriginal peoples, to enact legislation to establish a National Council for Reconciliation. The legislation would establish the council as an independent, national, oversight body with membership jointly appointed by the Government of Canada and national Aboriginal organizations, and consisting of Aboriginal and non-Aboriginal members. Its mandate would include, but not be limited to, the following:

ii. Monitor, evaluate, and report to Parliament and the people of Canada on reconciliation progress across all levels and sectors of Canadian society, including the implementation of the Truth and Reconciliation Commission of Canada's Calls to Action.⁴⁴

⁴⁴ Final Report, *supra* note 25 at 232. Parts (i), (iii) and (iv) of the recommendation are beyond the scope of this paper.

I consider the establishment of a National Council for Reconciliation as the logical next step in securing the successful implementation of all subsequent recommendations in the hopes of eventually forging a reconciled relationship between all actors concerned. A National Council for Reconciliation as described in the *Calls to Action* would constitute both a legitimate and expedient monitoring body in the post-commission phase towards reconciliation.

Firstly, the recommendation calls for an “independent, national oversight body [...] consisting of Aboriginal and non-Aboriginal members”. While some may question the independence of such a body, especially if established through federal legislation, its legitimacy would be preserved by its diverse membership. Moreover, the appointment of its members as a responsibility shared between the Government of Canada and national Aboriginal organizations at its outset points to a concern for indiscriminate representation, further legitimizing the creation of such a council.

Secondly, the recommendation construes but does not limit the National Council for Reconciliation’s suggested mandate to “monitor[ing], evaluat[ing] and report[ing] to Parliament and the people of Canada on reconciliation progress [...], including the implementation of the Truth and Reconciliation Commission’s *Calls to Action*” (see recommendation above). This mandate, if adopted along with the legislation to establish a National Council for Reconciliation, would assist Aboriginal and non-Aboriginal Canadians in keeping the government accountable to its commitment to reconciliation. Through monitoring, evaluating and reporting on the status of implementation of the TRC’s recommendations, as well as broadcasting its research results nation-wide, the National Council for Reconciliation would help inform the public on the government’s progress. Ideally, the work of the council would effectively equip citizens with reliable and independent information that in turn would assist citizens in evaluating the progress of the implementation process, ultimately empowering the people of Canada to hold the government accountable to its commitment. In short, through the establishment of a National Council for Reconciliation, the federal government would endow itself with a monitoring body that would involve citizens in holding it accountable to implement the remaining ninety-three recommendations in the Truth and Reconciliation Commission’s *Calls to Action*.

A few concerns must be addressed beyond the general recommendation for a National Council for Reconciliation. Who determines the council’s research and monitoring priorities?

How is information broadcasted and distributed? Through which means is the council funded and who is responsible for its budget? In seeking answers to these questions, I turn to Peru as an example of a country that has established this kind of monitoring body in its post-commission context.

Peru's Truth and Reconciliation Commission published its final report in 2003.⁴⁵ In the report, the commission included a list of eighty-five recommendations, divided into five broad sections: (1) institutional reforms; (2) an integral reparations plan; (3) a national anthropologic-forensic investigation plan; (4) prosecutions; and (5) collective memory.⁴⁶ Under the second section (the reparations plan), the Commission recommended the creation of sub-categories of reparations to be made available to survivors of the conflict based on different eligibility criteria, such as educational scholarships for descendants of the *desaparecidos* (the disappeared), access to a special national medical insurance plan, and economic reparations. These recommended forms of reparations were compiled into one general *Plan Integral de Reparaciones – PRI* (Integral Reparations Plan), established in law in 2005.⁴⁷ The Commission also recommended the creation of a governmental body whose responsibilities would include coordinating and following-up on the State's policies with regards to peace, collective reparations and national reconciliation.⁴⁸ A year later, a presidential decree was passed, establishing this monitoring organ as the *Comision Multisectorial de Alto Nivel* (CMAN), recognizing in its preamble the necessity to establish mechanisms to ensure the State would achieve its objectives of national reconciliation.⁴⁹ In its capacity as coordinator of state policies on peace, reparations and reconciliation, the CMAN was instrumental in the creation of the Integral Reparations Plan (above) and for its subsequent implementation. The CMAN was set up as a monitoring body composed of an executive secretary and permanent representatives from each ministry of the

⁴⁵ See Comisión de la Verdad y Reconciliación, *Hatun Willakuy – Versión abreviada del Informe Final de la Comisión de la Verdad y Reconciliación*, (Lima, PE: Comisión de Entrega de la Comisión de la Verdad y Reconciliación, 2004) [Hatun Willakuy].

⁴⁶ *Ibid* at 411-427.

⁴⁷ Congreso de la República, *Ley que crea el Plan Integral de Reparaciones*, n° 28592 (28 July 2005).

⁴⁸ Macher, *supra* note 1 at 32.

⁴⁹ See Presidente de la República, *Decreto Supremo* n° 011-2004-PCM (5 February 2004).

government involved in the reparations plan (PRI)⁵⁰, namely the Ministries of the Interior, Economy and Finances, Justice, Women and Social Development and Defense, as well as representatives from the National Assembly of Rectors and the Deans of Professional Colleges Council.⁵¹ Finally, funding for the CMAN was established as an entity of the national budget and an obligation was created for the Minister of Finances to hold public consultations on matters related to the national budget, including costs related to the reparations plan.⁵²

The rapidity with which this monitoring body was established after the Commission's final report illustrates the importance of such an endeavor for the effective implementation of subsequent recommendations. Granted, the CMAN was only instituted to supervise a portion of the eighty-five recommendations made by the Commission overall, but the underlying principle and objective remains the same. Questions could also be raised as to its efficiency, given that it is still in operation nearly thirteen years later and that some victims have not yet received their share of reparations for which they are eligible.⁵³ In answering these concerns, I contend that political will and civil society's demands play a significant role in the progress status of implementation, the former largely motivated by the collective strength of the latter. It is my impression that a significant fraction of Peru's civil society remains largely uninformed of the violent episodes of their country's history, namely because of the ethnical and geographical divide that characterized its internal conflict. Nonetheless, the fact remains that the CMAN has been and keeps serving its purpose.⁵⁴ As such, the government of Canada should turn to Peru for inspiration, namely for the expediency with which the Peruvian government enacted the CMAN.

3.2 The current state of affairs

At the time of writing, there has been no official mention of the establishment of a National Council for Reconciliation beyond the recommendation made in the *Calls to Action*. Urging for

⁵⁰ *Ibid*, art 6.

⁵¹ *Ibid*, art 2.

⁵² *Ibid*, arts 4-5.

⁵³ Macher, *supra* note 1 at 143.

⁵⁴ *Ibid*.

the creation of such a council, former Chair of Canada's Truth and Reconciliation Commission Murray Sinclair was quoted in the *National Post* earlier this year, stating that "[t]he council for reconciliation might be the first logical step to put in place because it will have [...] an overall responsibility to develop a vision about what the relationship between governments and indigenous people will look like in the future."⁵⁵ Despite Justice Sinclair's vision, the federal government has yet to follow up on the idea. This conclusion raises the further question: what *has* the federal government done since the publication of the Truth and Reconciliation Commission's Final Report?

Prime Minister Justin Trudeau received the Final Report on December 15, 2015. In his official address at the release event, he spoke of establishing goals for his government; one among which was for the government to fully accept its responsibilities and failings.⁵⁶ Later in his address, he stated the following:

This is a time of real and positive change. We have a plan to move towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, and we are already making it happen [...] And we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the *Calls to Action* of the Truth and Reconciliation Commission, starting with the implementation of the United Nations *Declaration on the Rights of Indigenous Peoples*.⁵⁷

Five months later, the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, represented Canada at the fifteenth' session of the United Nations Permanent Forum on Indigenous Issues in New York City to officially endorse the United Nations

⁵⁵ Marie-Danielle Smith, "Former TRC chair calls for creation of a national council for indigenous people", *National Post* (26 May 2016), online: <<http://news.nationalpost.com/news/canada/canadian-politics/former-trc-chair-calls-for-creation-of-national-council-for-indigenous-people>>.

⁵⁶ Office of the Primer Minister of Canada, News Release, "Statement by the Prime Minister on release of the Final Report of the Truth and Reconciliation Commission" (15 December 2015), online: <<http://www.pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission>>.

⁵⁷ *Ibid.*

Declaration on the Rights of Indigenous Peoples (UNDRIP) on behalf of the Liberal government.⁵⁸ In her official statement, Minister Bennett declared:

Today's announcement that Canada is now a full supporter of the Declaration, without qualification, is an important step in the vital work of reconciliation. Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples.⁵⁹

Canada's endorsement of the UNDRIP is agreeably a significant step in the country's direction towards reconciliation. Nevertheless, some remain skeptical of its implementation into domestic law. In an address before the Assembly of First Nations' Annual General Assembly, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, shared her thoughts on Canada's endorsement of the UNDRIP and why she respectfully referred to it as a "simplistic approach", and a political distraction from the hard work required to implement it. In cautioning against possible legal and economic uncertainty caused by replacing existing legislation (such as the *Indian Act*) too fast and too soon, she called for an efficient process of transition that "[lit] a fire under the process of decolonization", but that [did] so in a controlled manner, "respectful of where the Indigenous communities are in terms of rebuilding".⁶⁰

Against this backdrop, I situate my argument along the same cautionary lines. Canada's endorsement of the UNDRIP should not draw attention away from the focus on concrete measures that must be gradually adopted with reconciliation as the end goal. In light of this, I consider the UNDRIP to serve as a springboard for the creation a National Council for Reconciliation and as the proponent of its existence.

⁵⁸ Government of Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: < http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602 >.

⁵⁹ *Ibid.*

⁶⁰ The Honourable Jody Wilson-Raybould, PC, QC, MP Minister of Justice and Attorney General of Canada, "Notes for an address" (Address delivered at the Assembly of First Nations Annual General Assembly, 12 July 2016) at 9 [unpublished].

Canada's endorsement of the UNDRIP does not confer any binding obligations on the government. However, it reflects its commitment to a renewed, nation-to-nation relationship with Indigenous peoples. As such, it should be employed by the Canadian government to legitimize policy and legislative initiatives at the domestic level, such as the establishment of a National Council for Reconciliation. Article 8(2) of the UNDRIP affirms that "states shall provide effective mechanisms for prevention of, and redress for: (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; and (d) any form of forced assimilation or integration".⁶¹

The requirements for application of article 8(2) set out in subsections (a) and (d) corroborate with the Canadian experience of colonization. Therefore, in thinking about redress, the creation of a National Council for Reconciliation is not an impossible solution, especially because of the subsequent benefits interested Aboriginal and non-Aboriginal Canadians can reap from its establishment. A National Council for Reconciliation would allow for the production of independent information that would subsequently serve two purposes: informing all levels of government for the development of legislation and policy; and providing the Canadian population with the necessary knowledge to advocate for redress through more or better implementation of the Truth and Reconciliation Commission's recommendations. Ultimately, it would empower citizens in holding the government accountable to its commitment to reconciliation. Going a step further, I argue that access to knowledge produced by a National Council for Reconciliation would be in itself a form of redress if we consider that knowledge is fundamental to advocacy.

Lastly, this article would be incomplete if it did not mention the important role that civil society has already taken upon itself to foster the engagement of the Canadian people to reconciliation. Pioneers in this field include the organization known as *Reconciliation in Action*. Born from the vision of Chief Dr. Robert Joseph, a Gwawaenuk Elder, *Reconciliation in Action* is an Indigenous-led registered charity inaugurated in 2012, whose vision is to promote

⁶¹ *Universal Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th Sess, UN Doc A/61/L.67 and Add.1 (2007) at art 8(2)(a)(b).

reconciliation through dialogue.⁶² Their four main lines of work include reconciliation dialogue sessions, economic reconciliation action plans, reconciliation-based leadership training and public awareness and education.⁶³ Their work started primarily within the scope of the province of British Columbia, but later grew to the national level, through the organization of reconciliation dialogue workshops across Canada, as well as the co-hosting of events in Ottawa and Vancouver at the closing of the Truth and Reconciliation Commission. Today, *Reconciliation in Action* has become a Canada 150 Pan-Canadian Signature Project, funded in part by the Department of Canadian Heritage' Canada 150 Fund.⁶⁴

Reconciliation in Action is a wonderful illustration of Indigenous leadership and of Canadian civil society's dedication to the cause. However, it cannot and should not make up for the Canadian government's shortcomings in fulfilling its commitment to reconciliation. As emphasized above, the government has pledged to implement the *Calls to Action* in the Commission's final report, one of which recommended the establishment of a National Council for Reconciliation, whose mandate would include monitoring, evaluating and reporting to the Parliament as well as the people of Canada on the progress of implementation of the *Calls to Action*. Organizations such as *Reconciliation in Action* have different mandates, and do not benefit from sufficient financial means to tackle such a paramount task. Having said this, it is imperative for the federal government to consult with representatives from civil society groups like *Reconciliation in Action* at the very commencement of the elaboration of plans for a National Council for Reconciliation. Likewise, the enacting legislation should provide for equal allocation of positions for representatives of interested groups as for government representatives in its council membership configuration.

To summarize, the Canadian government has yet to explicitly state its intention to establish a National Council for Reconciliation. However, since Prime Minister Justin Trudeau's receipt

⁶² See Reconciliation Canada, "Our Story", online: <<http://reconciliationcanada.ca/about/history-and-background/our-story/>>.

⁶³ For a detailed description of each line of work, see Reconciliation Canada, "Current Programs and Initiatives", online: <<http://reconciliationcanada.ca/programs-initiatives/current-programs-initiatives/>>.

⁶⁴ See Reconciliation Canada, "Reconciliation Canada Receives \$1.8 million from Canada 150 Fund", online: <<http://reconciliationcanada.ca/?s=150>>.

of the Truth and Reconciliation Commission's Final Report last December, the Liberal government has officially endorsed the UNDRIP and has qualified it as "the first step towards implementing the recommendations." As such, I have suggested that the UNDRIP, namely article 8(2) and subsections (a) and (d) should act as the springboard from which the establishment of a National Council for Reconciliation is born and legitimized. Finally, the Government of Canada has granted financial support to *Reconciliation in Action*, a national registered charity that seeks to foster reconciliation through dialogue. While civil society organizations like this one deserve much credit and recognition for their championing of the cause, I have argued that they cannot and should not have to fulfill the responsibilities created by the commitment to reconciliation that the Canadian government has taken upon itself.

Conclusion

In this paper, I have held that the establishment of a National Council for Reconciliation is the logical next step in securing the successful implementation of all subsequent recommendations and eventually forging a reconciled relationship between all actors concerned. I have suggested that a monitoring mechanism like the Council would help citizens and organizations stay informed on the government's progress in implementing the Truth and Reconciliation Commission's recommendations, which would in turn empower them to hold the government accountable to its commitment, in the hopes of ultimately fostering a prosperous environment for reconciliation.

I do not pretend to know what is needed for reconciliation in the Canadian context, nor do I claim to know what each individual survivor of the Indian Residential School System may consider reconciliation or be willing to forgive. I recognize that to perhaps many, reconciliation does not constitute a viable likelihood. Nevertheless, I believe that the Canadian government has committed to working towards reconciliation, and must take its commitment seriously, with its attention turned to Indigenous peoples' own interpretations of reconciliation if it is at all sincere about this undertaking. If not, the project of reconciliation runs the risk of becoming yet another historical marker on the path towards perpetuating the status quo.

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