Indigenous Peoples in Canada: Understanding Divergent Conceptions of Reconciliation

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EXECUTIVE SUMMARY

This working paper explores divergent conceptions of reconciliation in the context of relations between Indigenous and non-Indigenous peoples in Canada. It begins with a brief discussion of the nature of conflict between Indigenous and non-Indigenous peoples and the range of legal responses to such conflict. A narrower conception of reconciliation is often premised on the assumption that the conflict giving rise to the harm is over—that we are in a post-conflict situation, and that reconciliation requires an apology for past wrongs, acceptance of the apology, forgiveness, and adequate compensation. Pursuant to this vision, reconciliation often focuses more on the past and on individual apologies and forgiveness in interpersonal relations rather than the reshaping of collective relationships or redress for broader structural and systemic harms. A broader conception of reconciliation is often linked to the view that Indigenous peoples are still being harmed by the policies, laws and practices of governments controlled by non-Indigenous Canadians. Reconciliation, pursuant to this broader vision, is premised upon a willingness to promote structural and systemic change in the relationship between Indigenous and non-Indigenous peoples.

Approaches to conflict resolution and mediation have included negotiation, dialogue, popular protest, and criminal, civil and constitutional litigation. The predominant theme in most legal processes has been truth, justice and remedial relief, rather than reconciliation. Nevertheless, the courts have identified reconciliation as an important component of the constitutional protections of Aboriginal rights. The most significant and direct attempt to date to promote reconciliation within the Aboriginal community and between Aboriginal and non-Aboriginal peoples in Canada has been the establishment of the historic Truth and Reconciliation Commission (TRC), with a specific mandate to uncover and memorialize truth, while promoting and engaging in reconciliation between Aboriginal and non-Aboriginal Canadians.

Although the Truth and Reconciliation Commission of Canada is primarily focused on hearing survivors’ stories and promoting individual and community healing, its mandate extends to assessing systemic and structural harms, intergenerational injustices, and the continued legacy of residential schools. These concerns open up a much broader lens through which to examine reconciliation. Reconciliation, from this perspective, must address not only the harms of Indian residential schools; it must also acknowledge and redress the panoply of practices and policies (some of which continue to operate) aimed at assimilating Indigenous peoples and undermining their survival as flourishing and self-governing peoples.

Inspired in part by the many truth and reconciliation commissions in countries around the world, a comparison of the Canadian TRC with its counterparts in other countries reveals that the Canadian commission faces some difficult obstacles to success. To be effective, moreover, it is critical to ensure widespread engagement of non-Indigenous Canadians in reconciliation processes.

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2 The author wishes to thank McGill law student Éloïse Ouellet-Décoste for her excellent research assistance in preparing this working paper.
Reconciliation has emerged as an important concept in the struggle to secure harmonious relationships and to resolve historical and ongoing conflict between Indigenous and non-Indigenous peoples. At this historical juncture in Canada, however, recurrent tensions can be observed between different approaches to reconciliation, and even the rejection of the possibility of reconciliation by some.

An important starting point for understanding different conceptions of reconciliation is the recognition of divergent understandings of the nature of conflict between Indigenous and non-Indigenous peoples. A narrower conception of reconciliation is often premised on the assumption that the conflict giving rise to the harm is over – that we are in a post-conflict situation, and that reconciliation requires an apology for past wrongs, acceptance of the apology, forgiveness, and adequate compensation. Pursuant to this vision, reconciliation often focuses more on the past and on individual apologies and forgiveness in interpersonal relations rather than the reshaping of collective relationships or redress for broader structural and systemic harms.³

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³ Matt James, “A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission”, online: (July 2012) 6:2 Int’l J Transit’l Just 182 at 194-196
http://ijtj.oxfordjournals.org/content/6/2/182.full.pdf+html
A broader conception of reconciliation is often linked to the view that Indigenous peoples are still being harmed by the policies, laws and practices of governments controlled by non-Indigenous Canadians. Understanding reconciliation in contexts where conflict persists is more complex. While some view continued conflict as healthy and inevitable, in many contexts, conflict denotes ongoing negative tension and discord in a relationship. Moreover, it is aggravated when there is a failure to recognize the full extent of past harms, where there is inadequate remedying of past harms and/or where there is continuing harm. These underlying concerns about the nature of conflict and harm, therefore, inform in large part how different communities and stakeholders understand the scope, need, promise or futility of reconciliation. Though some suggest that reconciliation cannot occur in situations of ongoing harm and continued conflict, others maintain that “reconciliation can and should be integrated into different steps of conflict transformation.”

In addition to the narrower or broader approaches to reconciliation, there is a third current of thought that rejects altogether the possibility of reconciliation in the current socio-political Canadian context. From this perspective, reconciliation cannot occur until there is full restitution (for lost territory and resources) and an end to continued policies that undermine Indigenous self-governance, dignity and well-being. It is only in the wake of these fundamental changes that reconciliation could be imagined.

This working paper explores divergent conceptions of reconciliation in the context of relations between Indigenous and non-Indigenous peoples in Canada. It begins with a brief discussion of the nature of conflict between Indigenous and non-Indigenous peoples and the range of legal responses to such conflict. Although reconciliation emerges as a theme in some legal approaches to conflict mediation and

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5 Dan Sinh Nguyen Vo, “Reconciliation and Conflict Transformation”, Beyond Intractability (July, 2008) at 1, online: Beyond Intractability [http://www.beyondintractability.org/casestudy/vo-reconciliation](http://www.beyondintractability.org/casestudy/vo-reconciliation) outlines the distinction between conflict resolution and transformation as follows: “Conflict resolution implies the goal of ending undesired conflicts in a relatively short timeframe, focusing on the content of conflict as something that is disputed and which gives rise to conflict in the first place. Conflict transformation, however, professes the goal of transforming the conflict into something desired in a longer timeframe, focusing not only on the content of the conflict but more importantly on the context and relationship between the actors involved.”

resolution, it has not been the predominant concern until quite recently. The Truth and Reconciliation Commission of Canada (TRC) – with its overt mandate to promote reconciliation – is then analysed in relation to divergent conceptions of reconciliation. In his comprehensive review of conflicts between Indigenous and non-Indigenous peoples in Canada, John Borrows also highlights the centrality of disputes over land. In examining the roots of such conflict, moreover, Borrows reminds us that historically, “in many instances, non-Aboriginal occupations and blockades prevented Aboriginal peoples from accessing their land.” Despite the focus on Aboriginal blockades and occupations in recent years, Borrows emphasizes the role of non-Aboriginal peoples, noting that the occupation of Aboriginal lands created conditions ripe for subsequent conflict, including attempts by Aboriginal people

II. CONFLICT AND INDIGENOUS PEOPLES: DIVERSE RESPONSES

In her study of conflict and Indigenous peoples, Ellen Lutz identifies three pre-conditions to healthy conflict in human relations: “the parties share similar values and cultures, have equal status and ability to press their claims, and are equally protected by the rules under which the conflict materialized and must be resolved.” She maintains, however that “such "healthy" conflict conditions do not characterize the asymmetrical conflicts between indigenous peoples and states or other outside interests.” She further notes that “Indigenous rights to land and to self-determination are what most threaten non-indigenous interests involved in conflict with indigenous peoples.” In his comprehensive review of conflicts between Indigenous and non-Indigenous peoples in Canada, John Borrows also highlights the centrality of disputes over land. In examining the roots of such conflict, moreover, Borrows reminds us that historically, “in many instances, non-Aboriginal occupations and blockades prevented Aboriginal peoples from accessing their land.” Despite the focus on Aboriginal blockades and occupations in recent years, Borrows emphasizes the role of non-Aboriginal peoples, noting that the occupation of Aboriginal lands created conditions ripe for subsequent conflict, including attempts by Aboriginal people

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9 Ibid.
12 Ibid at 1-2.
to “reoccupy their lands through physical means.” Conflict, therefore, is relational and deeply connected to the historical treatment of Aboriginal people by non-Aboriginal Canadians.

Conflicts about land and control over natural resources have often prompted extensive efforts to resolve differences through negotiation and dialogue. In instances where negotiation and dialogue have failed to result in a settlement of disputes about land use and/or natural resource exploitation, Aboriginal communities have resorted either to litigation or to direct action (protests, occupations, blockades). The courts have been a critical last resort for Aboriginal peoples, and have interpreted and affirmed rights based on Aboriginal title, treaty entitlements and on the Constitution Act 1982. Moreover, the Supreme Court of Canada has affirmed a duty to consult and to accommodate Aboriginal peoples even prior to the determination of underlying land and resources disputes. Fiduciary obligations and the principle of the honour of the Crown have also been held to inform Crown-Aboriginal relations.

In many cases, the courts have affirmed important legal rights and entitlements of Aboriginal peoples, resulting in a fundamental recalibration of the balance of bargaining power. In other cases, the courts have read-in limits to the scope and exercise of Aboriginal rights and title. Furthermore, in the

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13 Ibid at 2.
14 Ibid.
16 Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511.
17 Ibid. See also, Guerin v. The Queen, [1984] 2 SCR 335.
18 For a recent example, see Manitoba Métis Federation Inc v Canada (Attorney General), 2013 SCC 14 at paragraph 9, where the court concluded that “s.31 of the Manitoba Act constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. (...) as a solemn obligation to the Métis people of Manitoba aimed at reconciling their aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. (...) the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled.”
19 See, for e.g., R. v. Gladstone [1996] 2 SCR 723 per Lamer C.J. at para 73: “Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.” See also Delgamuukw v. British Columbia, [1997] 3 SCR. 1010 per Lamer C.J. at para. 125: “The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land -- it is a sui generis interest that is distinct from “normal” proprietary interests, most notably fee simple.”
constitutional jurisprudence, reconciliation has emerged as an important, but contested idea. Reconciliation has been used in diverse ways in the jurisprudence – from a meaning that denotes the need for restrictions on the exercise of Canadian governmental sovereignty on issues affecting Aboriginal rights,\(^{20}\) to requiring Aboriginal peoples to become reconciled to limitations on their rights in a post-colonial Canada.\(^{21}\) Thus, for some justices, reconciliation is about Aboriginal peoples reconciling their rights with the proclaimed sovereignty of non-Aboriginal peoples in Canada.\(^{22}\) For others, reconciliation speaks to the need for non-Aboriginal peoples in Canada to develop harmonious and just relations with Aboriginal peoples by acknowledging the unfairness of the colonial assertion of sovereignty, assimilation policies and denials of self-governance.\(^{23}\) Although the courts have articulated a preference for negotiation and dialogue in the resolution of continued conflicts over land and resources, litigation continues to be a critically important mechanism for resolving disputes and uncertainty.

Beyond conflict over land and resources, conflict between Aboriginal and non-Aboriginal peoples has concerned grievances over the extreme mistreatment of Aboriginal children,\(^{24}\) structural poverty, inadequate social services, food insecurity, and sub-standard housing and living conditions on reserves.\(^{25}\) Responses to these concerns have also included both political and legal approaches. At the political level, there has been lobbying by Aboriginal leaders, negotiations for increased funding, and popular protests, including hunger strikes by Aboriginal leaders, and the emergence of the Idle No More

\(^{20}\) For example, see \textit{R. v. Sparrow} [1990] 1 SCR 1075 where the Court stated: “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.”

\(^{21}\) \textit{R. v. Van der Peet}, [1996] 2 SCR 507 per Lamer C.J. at paragraph 31: “… what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.”

\(^{22}\) \textit{Ibid}, per Lamer CJ at paragraph 31: “the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”


\(^{24}\) For a compelling historical overview of the mistreatment of Aboriginal children in residential schools, see John S. Milloy, \textit{A National Crime – The Canadian Government and the Residential School System, 1879 to 1986} (Winnipeg: University of Manitoba Press, 1999),

movement. Legal responses have involved individual criminal or tort claims where allegations involve specific instances of mistreatment or abuse. Remedies in these cases include potential punishment of the wrongdoers through the criminal justice system as well as individual compensation to survivors of physical and sexual abuse and/or loss of culture. At a more collective level, it is significant that the multiple claims alleging abuse and harm from Indian Residential Schools in Canada were combined into the largest class action suit in Canadian history. Defendants included the Canadian government, as well as the Catholic and Protestant Churches. Of particular significance in the case of the Indian Residential Schools litigation was the negotiation of a complex settlement agreement in 2008, which included processes for individual damage claims by survivors of residential schools and as well allocating $60 million dollars in settlement funds to the establishment of a Truth and Reconciliation Commission.

More recently, numerous discrimination complaints have been filed with the Canadian Human Rights Commission alleging continued inequities and discrimination in the funding of child protection services and on-reserve schools. For example, in 2007, the First Nations Child & Family Caring Society of Canada and the Assembly of First Nations filed a human rights complaint against the Federal government, alleging that Canada’s failure to provide equitable and culturally-based child welfare services to First Nations children on-reserve amounts to discrimination on the basis of race and ethnic

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26 On December 11th, 2012, Theresa Spence, Chief of Attawapiskat, started a hunger strike that lasted six weeks in the hope of securing a meeting with Prime Minister Stephen Harper, Governor General David Johnston and First Nations leaders to discuss improvements in native housing and education. Idle No More is a grassroots, nationwide movement that emerged in November 2012 to oppose the Conservative government bills, such as Bill C-45, that are seen as threatening aboriginal and treaty rights. Idle No More is also mobilizing to promote environmental protection and indigenous sovereignty and respect. See interview with Chief Theresa Spence: http://www.youtube.com/watch?v=2UQ4vMoeD2s. See also http://idlenomore.com/


28 The class action lawsuit, led by Canadian Mi’kmq activist, Nora Bernard, sought compensation for an estimated 79,000 survivors of the Canadian residential school system. The In re Residential Schools Class Action Litigation lead to the signing, in May 2006, of the Residential Schools Settlement Agreement by the Government of Canada, the Assembly of First Nations and Inuit Representatives, the legal representatives of the residential schools survivors, and the involved Churches. For more information, see Indian Residential Schools Settlement Agreement (8 May 2006), online: Residential School Settlement Official Court Website http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf


origin. After unsuccessful efforts by the Federal government to have the case dismissed on legal technicalities, the hearings at the Canadian Human Rights Tribunal finally began in February 2013. 

In short, approaches to conflict mediation have included negotiation, dialogue, popular protest, litigation, and the establishment of the historic Truth and Reconciliation Commission– with a specific mandate to uncover and memorialize the truth, while promoting and engaging in reconciliation between Aboriginal and non-Aboriginal Canadians. The predominant theme in most legal processes has been truth, justice and remedial relief, rather than reconciliation. Nevertheless, the courts have identified reconciliation as an important component of the constitutional protections of Aboriginal rights. The most significant and direct attempt to promote reconciliation within the Aboriginal community and between Aboriginal and non-Aboriginal peoples in Canada has been the TRC.

III. Indigenous Peoples and the Truth and Reconciliation Commission of Canada

Over the past three years, the Truth and Reconciliation Commission has emerged as an important catalyst for renewed dialogue and debate about the importance of reconciliation between Indigenous and non-Indigenous peoples in Canada. While the TRC has affirmed a broad and inclusive conception of reconciliation that has both individual and collective dimensions, its mandate is specifically linked to the historic harms and ongoing effects of Indian residential schools. Its goals include the following:

(a) Acknowledge Residential School experiences, impacts and consequences;

(b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;

(c) Witness, support, promote and facilitate truth and reconciliation events at both the national and community levels;

(d) Promote awareness and public education of Canadians about the IRS system and its impacts;

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

(g) Support commemoration of former Indian Residential School students and their families ...  

With the exception of the mandate to make recommendations regarding systemic harms, intergenerational consequences and the ongoing legacy of residential schools, the TRC’s objectives are understandably quite focused on Indian residential schools.

The TRC defines reconciliation as follows:

Reconciliation is 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.  

The underlying principles that inform the work of the TRC include:

...accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.  

As part of its mandate, therefore, since 2009, the TRC has been holding national events to provide public occasions for hearing testimonials from survivors of residential schools, their families, community members, and all other interested participants in residential schools. Though focused on residential schools and the effects on individual survivors, the definition and principles extend to “collective” reconciliation and the “rebuilding and renewing” of relationships.

Within this context, it is possible to identify a variety of approaches to the concept of reconciliation. The first is a narrower conception that focuses predominantly on the specific harms of residential schools,

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33 Ibid
34 Ibid
understood as discrete, historical harms of the past. Pursuant to such an approach, reconciliation requires an apology and acknowledgement of the wrongs caused, compensation to the survivors of the schools, support for individual healing (particularly for those individuals subjected to physical and sexual abuse), and memorializing projects.

Yet, for many, the reconciliation initiatives of the Truth and Reconciliation Commission – while explicitly linked to the harms of residential schools -- raise larger questions and concerns about reconciliation. Thus, a second and much broader conception of reconciliation situates residential schools within an historical and macro context of policies of assimilation and colonization of Indigenous peoples. Indeed, as noted above, the mandate of the TRC does include analysing and making recommendations about “the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools...”. A consideration, of “systemic harms,” “intergenerational consequences” and the “ongoing legacy” of residential schools, opens up a much broader lens through which to examine reconciliation. Reconciliation, from this perspective, must address not only the harms of Indian residential schools, it must also acknowledge and redress the panoply of practices and policies (some of which continue to operate) aimed at assimilating Indigenous peoples and undermining their survival as flourishing and self-governing peoples. Pursuant to the second conception, reconciliation requires a fundamental transformation of the relationship between First Nations, Inuit and Métis peoples and non-Aboriginal people in Canada.35 It also embraces an approach to reconciliation that goes beyond the emotional and personal dimensions (as important as these are) to highlight the structural and political dimensions of reconciliation.36

Divergent understandings of reconciliation also emerge in the various statements of apology and reconciliation emanating from the Canadian government. As a response to the 1996 Royal Commission Report on Aboriginal Peoples,37 the then-Minister of Aboriginal Affairs, Jane Stewart, issued a very broad “Statement of Reconciliation” in 1998 that addressed the full panoply of Aboriginal grievances, governance and relations with non-Aboriginal communities.

36 James, supra, note 1.
37 Supra, note 30.
Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike. We are announcing today a comprehensive framework for action based on the following objectives:

- **First**, we will renew the partnership to engage all possible partners and resources so the relationship will be a catalyst to better the lives of Aboriginal people in Canada.
- **Second**, we will strengthen Aboriginal governance so that communities have the tools to guide their own destiny and to exercise their inherent right of self-government.
- **Third**, we will design a new fiscal relationship that provides a stable flow of funds in support of transparent and accountable community development.
- **Fourth**, we will sustain the growth of strong, healthy Aboriginal communities, fuelled by economic development and supported by a solid, basic infrastructure of institutions and services.  

The TRC’s mandate explicitly states that it is to “build upon the 1998 “Statement of Reconciliation””. However, a much more restrictive approach characterizes the apology of Prime Minister Stephen Harper in 2008. His words focus exclusively on Indian residential schools and their after-effects. There is no mention of how Indian residential schools fit into a broader policy framework of assimilation of Aboriginal peoples.

Thus, there is some uncertainty about the breadth of the mandate of the TRC and continued debate about what is required to make reconciliation a reality. Nevertheless, it is important to underscore that the TRC is truly historic and represents a belief in the importance of using non-legalistic, forward-looking institutional mechanisms to secure more harmonious relations between Indigenous and non-Indigenous peoples in Canada. Unique in its focus on survivors of Indian residential schools and its genesis as part of

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39 *Supra*, note 27.

a class action settlement, the TRC nevertheless was inspired by emerging principles of restorative justice gleaned from Truth and Reconciliation Commissions around the world.\textsuperscript{41}

IV. **COMPARATIVE INSIGHTS: CHALLENGES AND CONTEXTS**

Since the 1970s, there have been numerous truth and reconciliation commissions in countries around the world, sponsored by the UN, non-governmental organizations, and/or governments.\textsuperscript{42} Most were set up in post-conflict situations by transitional governments to address violent crimes and human rights abuses of former regimes.\textsuperscript{43} Since processes for truth and reconciliation are deeply connected to the historical context, geo-political and socio-cultural realities, and the specificity of particular countries, comparison is difficult. Despite this caveat, it is interesting to consider some recurrent debates through a comparative lens, particularly in relation to the underlying objectives and scope of truth and reconciliation initiatives.

One very important contribution to the comparative assessment of truth and reconciliation commissions is Matt James’ article, “Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context.”\textsuperscript{44} After reviewing truth and reconciliation commissions in a number of countries, he concludes that “Canada shares some similarities with those truth commission countries whose political contexts have been least hospitable to thoroughgoing processes of accountability and truth.”\textsuperscript{45} Firstly, where there has been a complete change of regime, where victims are empowered and perpetrator groups weak, there is often much more optimism about the potential for a truth and reconciliation commission to be what James describes as “a robust, accountability-promoting inquiry into gross injustices that goes on to exert a strong and positive impact on state and society.”\textsuperscript{46} Using the


\textsuperscript{43} Ibid, at 37

\textsuperscript{44} Matt James, “Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context” online: (Fall 2010) 5:2 La Revue du CREUM 23 [https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/4336/4/pdf_02_James.pdf](https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/4336/4/pdf_02_James.pdf)

\textsuperscript{45} Ibid, at 24.

\textsuperscript{46} Ibid, at 25.
historical examples of Argentina, South Africa, Chile, El Salvador, and Uganda, James illustrates the impact of regime change, and the relative power of victims and perpetrators.\textsuperscript{47} Secondly, James considers the “nature of the injustices” and maintains that “[t]he more difficult injustices scenario involves a truth commission investigating abuses in which there was widespread societal complicity; a prolonged period of occurrence; and victims targeted on the basis of group membership” rather than ideology.\textsuperscript{48} Drawing on Latin American examples, he notes the historical significance of the fact that the injustices were understood to have emanated in large part from previous government and military actors (rather than society at large), over a relatively short time period, and that they targeted ideological differences rather than being specifically directed at Indigenous peoples (although there was significant disparate harm experienced by Indigenous peoples).\textsuperscript{49} The third consideration is the nature of the mandate of the truth and reconciliation commission in terms of its fault-finding capacities, the breadth of injustice it is to address, and whether it has sufficient resources.

In analysing the Canadian Truth and Reconciliation Commission according to these considerations, James is not optimistic about its likely impact. As he explains with respect to the first set of factors:

Although the constitutional changes of 1982 entrenching treaty and other Aboriginal rights are significant regime modifications, the same governmental system under which the injustices were perpetrated continues. In particular, the key political foundations on which the residential schools policy developed – the Indian Act, the reservation system, and the basic status of Aboriginal communities as constitutionally subordinated jurisdictions controlled by a government primarily accountable to outsiders—are all in place today. The balance of power... is also largely unfavourable to victims. ... Indigenous and Inuit peoples in Canada are colonized, disrespected, and largely poor minorities.\textsuperscript{50}

Regarding the injustice scenarios, he notes that the residential schools involved widespread institutional, societal and political complicity and were directed against a specific group because of their group membership. The Canadian TRC’s mandate, timeframe and resources are also quite limited. Thus, James’ comparative analysis raises some fundamental questions about the likelihood of a robust and successful truth and reconciliation commission in Canada.

\textsuperscript{47} Ibid. Argentina is characterised as a successful commission (26); whereas Uganda “sets the standard for truth commission adversity.” (27)
\textsuperscript{48} Ibid, at 28-29.
\textsuperscript{49} Ibid, at 29.
\textsuperscript{50} Ibid at 28.
Examining truth and reconciliation commissions through a comparative lens also reveals recurrent concerns about the need to ensure a broad rather than narrow approach to reconciliation – that is – an approach that addresses larger structural and systemic issues of injustice rather than simply individual crimes and wrongdoing. As one commentator noted with respect to South Africa, “because the process was slanted toward individual amnesty, there was little hope of the structural evils of apartheid being held accountable. Apartheid, being a crime against humanity, was to go largely unpunished as the TRC had chosen rather to forgive and forget those making contrite confessions.”

Similarly, in their review of truth and reconciliation commissions in Latin America, Margaret Popkin and Naomi Roht-Arriaza praised the commissions for providing accounts of past atrocities, but they concluded that the “commissions have done less well at catalyzing structural change and at accountability. Although all the commissions and the institutions that created them stated that ending impunity and providing justice were fundamental objectives, the results have been rather limited.”

Similarly, Jeff Corntassel and Cindy Holder, in their study of Canada, Australia, Guatemala and Peru, maintain that in many contexts, truth and reconciliation commissions fail to address underlying problems and instead require victims “to be become reconciled to their loss.” In their view, “decolonization and restitution are necessary elements of reconciliation because these are necessary to transform relations with indigenous communities in the way justice requires.”

Thus, for many scholars, reconciliation should engage with broader structural injustices to ensure that violence and human rights abuses do not recur and that the ongoing systemic effects of past injustices on communities are effectively addressed. The importance of addressing larger systemic and structural issues is also linked to a concern that truth and reconciliation commissions contribute to meaningful recognition and redress for past harms rather than being used simply to buttress the legitimacy of a state, nationally or internationally. Corntassel critiques initiatives in which “reconciliation is framed according to the logic of legitimating state authority rather than offering meaningful restitution for harms committed against Indigenous communities and homelands.”

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53 Corntassel & Holder, supra, note 4 at 914; See also Steward Motha, “Reconciliation as Domination” in Scott Veitch, ed., Law and Politics of Reconciliation (Edinburgh: Ashgate, 2006).
54 Corntassel & Holder, ibid at 467.
55 Jeff Corntassel “Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination” (2012) 1:1 Decolonization: Indigeneity, Education & Society 86 at 96. On the importance of
Finally, a comparative lens can shed important light on societal engagement. More successful reconciliation initiatives have engaged societies broadly in addressing the past and charting a new course for the future. In part, regime change prompts widespread societal engagement with reconciliation processes. In contexts where the regime has not changed, there may be less incentive for those who have benefited from past injustices to engage in reconciliation processes. Of significance with respect to participation is the Australian experience, which mobilized non-Aboriginal peoples widely in apologizing for residential schools and seeking forgiveness. Addressing the injustices linked to residential schools for Indigenous peoples in Canada has been a challenge in this regard. Many non-Indigenous people in Canada are neither aware of, nor engaged in the reconciliation processes. As Ken Coates has urged in the Canadian context: “The Government requires a firm signal from all Canadians, and not just First Nations, that addressing intelligently the poverty, despair and hardship in Indigenous communities is a national priority. Their policies must be designed to motivate and inspire all Canadians to make reconciliation with Aboriginal peoples a Canada-wide movement.”

V. CONCLUSION

Reconciliation is on our national agenda. We are living through an important historic moment, as we witness the testimonies of Indian residential school survivors at national truth and reconciliation events across the country. The survivors’ stories teach us about the profound personal, emotional and familial effects of a government policy aimed explicitly at assimilation and the destruction of Aboriginal cultures and communities. Together, they weave a tapestry of broader structural and systemic inequalities in the social, political and economic realities facing Indigenous communities today.


56 For example, the South African Truth and Reconciliation Commission is famous for adopting a victim-centered approach that featured public hearings at which victims or their family would confront perpetrators. See Robert I. Rotberg and Dennis Thompson, eds., Truth v. Justice: The Morality of Truth Commissions (Princeton, NJ: Princeton University Press, 2000).

57 James, supra note 1 at 183, 184 and 203.


Faced with our past and our present, it is possible to discern two predominant strands in conceptions of reconciliation – a narrower strand that focuses on individual victims and perpetrators and that treats the residential schools as an isolated governmental policy initiative of the past, and a much broader strand that views residential schools as one small part of a much larger structural, systemic and ongoing problem in the relationship between Indigenous and non-Indigenous Canadians. While it is essential to be attentive to the individual dimensions of reconciliation, it is also critical to address the collective, structural and systemic legacy of residential schools, and to ensure that current government policy does not replicate the harms of the past. To address these latter concerns, we need to build a broad, comprehensive and relational conception of reconciliation.

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