

THE TRANSFORMATIVE POTENTIAL OF THE TRUTH AND RECONCILIATION COMMISSION: A SKEPTIC'S PERSPECTIVE

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From 2009 to 2014, Canada's Truth and Reconciliation Commission (TRC) heard the testimony of Indigenous persons who had once been students in Indian Residential Schools and held events to permit discussions with the Canadian public about the impact and consequences of the historic effort to assimilate Indigenous individuals and erase their cultures. In doing so, the TRC performed its mandate with sensitivity and skill. This article focuses on the final report of the TRC that, the author argues, fails to focus sufficiently on the means by which Canadian law and policy continues to deny Indigenous peoples the power to assure their own welfare. The project of reconciliation with Indigenous peoples was not aided by this failure to communicate clearly the extent to which the colonial attitudes that led to the residential schools policy remains firmly anchored in the structures of the Canadian state. Through an examination of the basic elements of the concept of reconciliation, including reciprocal engagement and relational change, this paper concludes that a different approach will be required to mobilize the transformation implicit in meaningful reconciliation.

De 2009 à 2014, la Commission de vérité et réconciliation du Canada (CVR) a entendu le témoignage d'Autochtones qui autrefois ont été élèves de pensionnats indiens et a organisé des événements permettant les échanges avec le public canadien au sujet des conséquences et contrechocs des tentatives passées cherchant à assimiler les Autochtones et à effacer leurs cultures. Ce faisant, la CVR a accompli sa mission avec sensibilité et habileté. Le présent article porte essentiellement sur le rapport final de la CVR qui, selon l'auteur, ne met pas suffisamment l'accent sur le fait que les politiques et les lois canadiennes continuent de priver les peuples autochtones des prérogatives nécessaires pour assurer leur propre prospérité. Le projet de réconciliation avec les peuples autochtones n'a pas été facilité par cette omission d'indiquer clairement jusqu'à quel point les attitudes coloniales ayant mené à l'instauration de la politique des pensionnats indiens demeurent solidement ancrées dans les structures de l'État canadien. Après avoir examiné les composantes fondamentales du concept de

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réconciliation, dont l'engagement réciproque et le changement relationnel, l'auteur de cet article conclut qu'il faudra adopter une approche différente afin de mener à bien la transformation qui est inhérente à une réconciliation digne de ce nom.

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I sit on a man's back, choking him and making him carry me, and yet assure myself and others that I am very sorry for him and wish to ease his lot by all possible means—except by getting off his back.

Leo Tolstoy, *What Then Must We Do?*²

1. Introduction

On January 15, 2007, the Supreme Court of the Northwest Territories became the ninth and final Canadian court to approve a settlement of the largest class action lawsuit in Canadian history.³ The suit had been brought by almost 15,000 Indigenous Canadians who had been separated from their families and communities to attend residential schools managed by the Canadian government and church organizations in Canada. The plaintiffs were the modern representatives of many of the 150,000 Indigenous students who had, over the course of 150 years, been forcibly subjected to re-education in government-approved schools.⁴ Thousands of those students were subjected

² Leo Tolstoy, *What Then Must We Do?*, translated by Aylmer Maude (London, UK: Oxford University Press, 1925) at 54.

³ *Kuptana v Canada (AG)*, 2007 NWTSC 1, 154 ACWS (3d) 347. The [equivalent judgments from other provinces and territories](http://www.residentialschoolsettlement.ca/english_index.html), together with the settlement agreement, can be found online: <www.residentialschoolsettlement.ca/english_index.html>.

⁴ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) at 3 [TRC Summary].

not only to the denigration of their cultures, religions, and languages, and forcible separation from their families, clans, and communities, but also to systemic physical and sexual abuse. Conditions in the schools were often sub-standard, leading to disproportionately high rates of disease, malnutrition, and death among the students.⁵ Many students complained that the psychological effects of the residential schools were a primary cause of subsequent alcoholism, domestic, and other intra-community violence, and lasting damage to their own ability to function in a healthy family environment. In all, it was an experience that caused great suffering among students who attended the schools, but also significant intergenerational harms. Those harms, the students alleged, amounted to legal wrongs as well, including negligence, breach of the federal government's fiduciary duty, and, in many cases, assault and battery. The settlement of the class action led to a public apology from the Prime Minister of Canada,⁶ a fund for healing projects aimed at survivors of the school experience, individual compensation payments totaling more than \$4.6 billion⁷ for the living graduates of the schools, and the establishment of a neutral "Truth and Reconciliation Commission" mandated to provide a safe forum for former students to recount their experiences and to promote public awareness about the residential school system and its impacts.⁸

Some eight years later, on June 2, 2015, the Truth and Reconciliation Commission of Canada ("TRC") released its final report.⁹ In all, the TRC had heard from more than 6,700 witnesses about their experiences in the Residential School System—a system that spanned most of Canada's history as a nation. Its published report comprised seven volumes, and contained 94 "Calls to Action". Justice Murray Sinclair, the TRC's chair, described the recommendations as "the first step toward redressing the legacy of Indian Residential Schools and advancing the process of reconciliation."¹⁰ There

⁵ *Ibid* at 85–99; see also Canada, Legal and Legislative Affairs Division, "The Indian Residential Schools Truth and Reconciliation Commission", by Julian Walker (Ottawa: LLAD, 11 Feb 2009) at 6–7.

⁶ Office of the Prime Minister, News Release, "[Statement of Apology to Former Students of Indian Residential Schools: Prime Minister Harper Offers Full Apology on Behalf of Canadians for the Indian Residential Schools System](#)" (11 June 2008), online: <[www.aadncaandc.gc.ca/eng/1100100015644/1100100015649](#)> [Statement of Apology].

⁷ Indigenous and Northern Affairs Canada, "[Statistics on the Implementation of the Indian Residential Schools Settlement Agreement](#)", (Ottawa: INFC, 30 June 2017) online: <[www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192](#)>.

⁸ Canada, *Indian Residential Schools Settlement Agreement*, Schedule N: [Mandate for the Truth and Reconciliation Commission](#), (8 May 2006), online: <[www.residentialschoolsettlement.ca/Schedule_N.pdf](#)> [*Formal Mandate Schedule N*].

⁹ Truth and Reconciliation Commission of Canada, Press Release, "[TRC Releases Calls to Action to Begin Reconciliation](#)" (2 June 2015), online: <[www.trc.ca/websites/trcinstitution/File/TRCReportPressRelease%20\(1\).pdf](#)>.

¹⁰ *Ibid*.

is no question that the extensive hearings and public meetings conducted by the TRC played an important role in giving voice to large numbers of Indigenous witnesses who had suffered through the residential schools system and in permitting them to share their personal experiences of the suffering that the system caused them. Equally commendable was the Commissioner's reliance on Indigenous cultural practices and their sensitivity to the witnesses' vulnerability as they described those experiences.

The purpose of this paper is to examine critically the extent to which the TRC process and particularly its final report are likely to promote reconciliation at the collective level between Indigenous peoples and non-Indigenous Canadians. In particular, this paper will highlight some fundamental difficulties inherent in the aspirational emphasis given to "reconciliation" in the TRC's mandate and the final product of its work. Those difficulties, as we shall see, flow in part from the semantic wooliness of the term "reconciliation" as a marker of tangible improvement in political and legal relationships. They are compounded by the narrowness of the mandate that the TRC inherited, a mandate that largely prevented the TRC from coordinating a process of *reciprocal* engagement between Indigenous and non-Indigenous Canadians. Further, the length of the TRC's final report obscures the causal link between the sources of historical residential school policy and the contemporary political and legal structures that continue to subordinate Indigenous peoples' ability to determine their own destinies. That failure to make clear the connection between the norms reflected in the historical framework that led to the residential schools experiment and the legal and political norms that continue to frame the relationship is unfortunate, for it risks obscuring the depth of the challenge faced by those who would seek to restore respectful relations between the state and Indigenous peoples in the future.

To better understand the limitations of the TRC's likely contribution to a fundamental transformation of a relationship characterized in the past by disrespect and disempowerment, we will begin from first principles. The word "reconciliation" is not a term of art, but its usual meaning comports three elements. Our analysis will begin by teasing out in general terms the implications of each of those elements: commitment to relational change, reciprocal engagement, and introspection about the past events that damaged the relationship. We will then review whether the substance of the TRC's final report is likely to mobilize collective action in each of these three areas, taking into account the limitations in its mandate and the political and legal context in which the report was issued. Those reflections, while acknowledging the merit of the TRC's work in fulfilling its mandate, give reason to be skeptical about its potential to transform the relationship between Indigenous peoples and the state.

2. Reconciliation: An Elusive Concept

In addressing the question of whether the work of the TRC can be expected to advance reconciliation between Indigenous peoples and other Canadians, it must be acknowledged that an enormous amount of the TRC's activities focused on providing a culturally sensitive opportunity for the individuals who attended residential schools to share their experiences and compiling an exhaustive history of the operation and the harmful effects of those schools. Further, the TRC itself formed only one aspect of a multi-faceted settlement aimed at addressing the damage caused by the residential school system. Indeed, the crafting of a multiplicity of processes aimed at compensation, healing, apology, and the creation of a neutral historical record has been described by Carrie Menkel-Meadow, the thoughtful doyenne of American dispute resolution scholarship, as a remarkable example of the parties to a lawsuit tailoring multiple processes to address the polycentric impacts of a legal wrong.¹¹ This paper is not intended to critique or diminish these other important aspects of the TRC's work and the Settlement Agreement.

There can be little doubt, however, that the concept of reconciliation did occupy a central role in the mandate of the TRC as well as the Commissioners' own view of their work. The term appears in the TRC's formal mandate, in its name, and on 474 occasions in the text of the executive summary of the TRC's final report. Interestingly, no comprehensive definition of this term appears in either the formal mandate of the TRC, whose terms formed a part of the final settlement of the class action, or the TRC's final report. The formal mandate merely notes that the establishment of the TRC is intended "to contribute to truth, healing and reconciliation," noting that reconciliation is "an ongoing individual and collective process."¹² The TRC itself preferred to offer a vague explanation of the term in its final report, defining reconciliation as "an ongoing process of establishing and maintaining respectful relationships."¹³ Their report rightly points out that the diversity of Indigenous cultures means that processes of reconciliation and their implications are understood differently across Indigenous traditions.¹⁴ In a separate volume, the TRC explained that reconciliation is "about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people,

¹¹ Carrie Menkel-Meadow, "Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice" (2014) 64:4 UTLJ 620 at 636.

¹² *Formal Mandate Schedule N*, *supra* note 8 at 1.

¹³ Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation* (Ottawa: TRC, 2015), vol 6 at 11 [TRC Final Report]. For reconciliation to occur, "there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour." *Ibid* at 3.

¹⁴ *Ibid* at 12–15, 54–79.

going forward.”¹⁵ There is no doubt that the Commissioners of the TRC were attentive to the need to address reconciliation in the context of relationships among individuals, within Indigenous families and Indigenous communities, and the destructive effects wreaked by residential schools on those individual relationships. Nonetheless, consistent with their mandate, the TRC devoted a large portion of its final report to the significance of “reconciliation” in the context of the broader relationship between Indigenous and non-Indigenous peoples in Canada.¹⁶

Before considering the likely contribution of the TRC in advancing reconciliation between Indigenous peoples and the Canadian state, it is worth noting that the reluctance of the TRC to define precisely what it means by reconciliation reflects an underlying slipperiness of the concept as it is used both in everyday speech and in scholarly research. Indeed, as Ian McIntosh has noted, the word itself is considered by many to be problematic precisely because of the imprecision of its meaning.¹⁷ The term is used in settings as diverse as the tallying of columns in accounting, the forgiveness of sins through the institution of a church, the decision by spouses to return to “ordinary” marital relations, and the restoration of peace and social order in nations emerging from the violence of civil war or social conflict. The latter context seems particularly relevant to the TRC, which follows in the path of institutions like the South African Truth and Reconciliation Commission, and as a word established in a variety of countries to facilitate the transition to a new political order. It would be inappropriate to critique the role and work of the TRC based on a specific definition of reconciliation that does not appear in the TRC’s mandate. Nevertheless, it will be useful to examine three aspects of the concept that are central to its use in both common and technical parlance, namely *transition*, *reciprocity*, and *restoration*.

¹⁵ TRC Summary, *supra* note 4 at 6.

¹⁶ Reconciliation, to the TRC, “is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country.” *Ibid.*

¹⁷ See e.g. Ian S McIntosh, “Reconciliation, You’ve Got to Be Dreaming: Exploring Methodologies for Monitoring and Achieving Aboriginal Reconciliation in Australia by 2030” (2014) 32:1 Conflict Resolution Q 55 at 72 [McIntosh]; see also Daniel Bar-Tal & Gemma H Bennink, “The Nature of Reconciliation as an Outcome and as a Process” in Yaacov Bar-Siman-Tov, ed, *From Conflict Resolution to Reconciliation* (Oxford: Oxford University Press, 2004) 11; Colleen Murphy, *A Moral Theory of Political Reconciliation* (Cambridge: Cambridge University Press, 2010); Andrew Rigby, *Justice and Reconciliation: After the Violence* (Boulder: Lynne Rienner, 2001); Ernesto Verdeja, *Unchopping a Tree: Reconciliation in the Aftermath of Political Violence* (Philadelphia: Temple University Press, 2009).

A) Transition

As its etymology makes clear, reconciliation implies the restoration of some past state.¹⁸ Necessarily, then, reconciliation involves a transition from the present state. The term also has a forward-looking dimension: it involves a movement of the parties, at least at a psychological level, beyond obstacles that in the present appear to limit their progress toward a shared future. To move beyond those obstacles is not to deny that they existed in the past; on the contrary, for reconciliation to be more than ephemeral, the parties must come to grips with the events that have generated conflict between them and develop a shared understanding of how they wish to proceed in light of those past conflicts. Reconciliation, then, necessitates a change in the parties' relationship.¹⁹ A stable process of reconciliation will include an assessment of the past by both parties and their engagement on a new course aimed at overcoming those conflicts in the future. An effort at reconciliation that fails to account for and address the sources of past conflict in the relationship is unlikely to endure.

We might compare here the role attributed to the condolence ceremony in the restoration of peaceful relationships among feuding nations at the time of the founding of the League of the Haudenosaunee before the arrival of Europeans in North America. The ceremony, said to have been introduced by the Seneca prophet Deganawidah, is described by Richter, as follows:

Offering strings of wampum, Deganawidah spoke several words of condolence: the first dried Hiawatha's weeping eyes, the second opened his ears, the third unstopped his throat, and so on until his sorrow was relieved and his reason restored. These condolence ceremonies were at the core of a new gospel, the Good News of Peace and Power, that ... message, "they will stop killing, and bloodshed will cease from the land."²⁰

¹⁸ *New Shorter Oxford English Dictionary*, 4th ed, *sub verbo* "reconcile". The first definition of "reconcile" reads: "Restore (a person) to friendly relations with oneself or another after an estrangement."

¹⁹ For two thoughtful perspectives on the relational aspect of reconciliation in the context of Indigenous peoples' contemporary relationship with the Crown, see Mark D Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165; Jeffery G Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67:1 SCLR (2nd) 259.

²⁰ Daniel K Richter, "Ordeals of the Longhouse: The Five Nations in Early American History" in Daniel K Richter & James H Merrell, *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800* (New York: Syracuse University Press, 1987) 11 at 17; see also Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford: Oxford University Press, 1997) at 1003;

The condolence ceremony, later relied on in Haudenosaunee diplomacy and still in regular use among the Haudenosaunee, allowed participants to overcome their grief over past violence and open their minds to changing their relationships. Importantly, it was accompanied by the creation of new institutions of peace and governance among the Haudenosaunee nations that enabled them to transform the relationship among once-divided and warring peoples into one of alliance and confederacy.

In the case of the Canadian TRC, the concept of transition appears to be problematic, as several commentators have noted, because the establishment of the TRC was not accompanied by independent structural changes aimed at altering the relationship between Indigenous peoples and the Canadian state.²¹ The residential school system had already been abandoned by the time the TRC was established, the last such school having closed its doors in 1996.²² At an individual level, the payment of compensation for past wrongs and the opportunity afforded to former students to share their experiences both represented changes from the status quo prevailing at the time of the Settlement Agreement. But the absence of commitment to broader structural changes to coincide with the establishment of the TRC means that much of the burden of provoking such change has rested with the work of the TRC itself, an important point to which we will return.

B) Reciprocity

Also essential to the concept of reconciliation, whether between individuals or between groups, is the active engagement of both parties. Quite apart from any external changes in the structuring of the relationship, reconciliation implies an evolution in the perceptions held by each party about the other and about the nature of their future relationship. As Arie Nadler, Nurit Shnabel, and others have pointed out, such attitudinal change inevitably implicates each party's sense of identity.²³ In the context of reconciliation

William N Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman: University of Oklahoma Press, 1998).

²¹ See e.g. Courtney Jung, "[Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society](#)" (Paper delivered at the annual meeting of the American Political Science Association in Toronto, Ontario, 3–6 September 2009), online: SSRN <ssrn.com/abstract=1374950> [Jung]; Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 *Contemporary Political Theory* 437; Jeff Corntassel & Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru" (2008) 9:4 *Human Rights Review* 465 at 470–72.

²² *TRC Summary*, *supra* note 4 at 3.

²³ Arie Nadler & Nurit Shnabel, "Intergroup Reconciliation: Instrumental and Socio-Emotional Processes and the Needs-Based Model" (2015) 26:1 *European Rev Social Psychology* 93 at 94–96 [Nadler & Shnabel]; Nevin T Aiken, "Learning to Live Together:

between social groups, where one such group is perceived as a victim of the other's actions and the other is viewed as an advantaged group, each side's sense of identity is likely to be affected in different ways. For a group that perceives itself to have been victimized by the other group, changes to their relationship will typically engage perceptions of their own sense of power, honour, and control over their own destinies.²⁴ From their perspective, the attitudinal changes involved in reconciliation with the other group will necessarily be twofold: one inward-looking, in terms of their perception of their own identity, and the second focused on their recognition by their advantaged counterpart. For the group perceived as having been advantaged in the past, changes to the parties' relationship typically involve not just altered perceptions of their collective path forward, but also their own identity as moral beings who have responded appropriately to the grounds of the conflict between the collectivities.²⁵

Reconciliation, therefore, necessarily involves, in addition to any structural changes affecting the parties' relationship, reciprocal adjustments to each party's attitudes about itself as well as the other. The importance of each side's sense of identity is emphasized by Nadler, who identifies the outcome of intergroup reconciliation as "trustworthy positive relations between former adversaries *who enjoy secure social identities* and interact in an equality-based social environment."²⁶ Reciprocal adjustments to the relationship between two parties require, of course, the engagement of both parties in the process of reconciliation. Some degree of interaction through listening, empathy, and shared reflection about their past relationship and opportunities for change is necessarily required. This focus on reconciliation through participatory interaction and the sharing of horizons is, of course, an important feature of many Indigenous legal orders, whether manifested through Talking Circles that engage all affected members of the community, or ceremonial feasts that serve to renew and rebalance relationships.²⁷

Transitional Justice and Intergroup Reconciliation in Northern Ireland" (2010) 4:2 Intl J Transitional Justice 166 at 169; Ervin Staub et al, "Healing, Reconciliation, Forgiving and the Prevention of Violence after Genocide or Mass Killing: An Intervention and its Experimental Evaluation in Rwanda" (2005) 24:3 J Social & Clinical Psychology 297; Nurit Shnabel & Arie Nadler, "A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation" (2008) 94:1 J Personality & Social Psychology 116.

²⁴ Nadler & Schnabel, *supra* note 23 at 98.

²⁵ *Ibid* at 99.

²⁶ *Ibid* at 95 [emphasis added, footnotes emitted].

²⁷ For a useful review of the participatory emphasis of sentencing circles as currently used in the Canadian justice system, see Barry D Stuart, "Sentencing Circles: Making 'Real Differences'" in Julie Macfarlane, ed, *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997) 201; on the role of feasts among the Gitksan and Wet'suwet'en, see Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation

Central to the concept of reconciliation is a respect for the agency of all parties, first, as an actor capable of engaging in the process and, second, as a party whose worth is acknowledged by the other side as they move forward. The residential schools policy proceeded from misrecognition and disrespect for Indigenous identity, and the denial of mutual agency fundamental to the challenge of repairing relationships between colonized Indigenous peoples and settler states like Canada. Accordingly, when we consider the challenge of reconciliation in the aftermath of the residential schools experience, we will need to examine the extent to which both groups are actively engaged as partners in the process and in reimagining their relationship.

The project of achieving that reciprocal engagement must contend with the reality that non-Indigenous Canadians generally know little about the history of that relationship and have few opportunities to participate directly in the evolution of that relationship. The necessary elements of reciprocal engagement in the context of Indigenous peoples will be examined shortly, but it is worth noting that the narrow mandate given to Canada's TRC further distanced non-Indigenous Canadians from that enterprise, as we shall see.

C) Repair

The term reconciliation implies more than transition and reciprocal engagement. Inherent in the concept is the objective of repairing damaged relations. In this sense, reconciliation is closely tied to the principles of restorative justice, and diverse Indigenous traditions of collective response to conflict through forms of dialogue aimed at recreating harmony within communities.²⁸ Such Indigenous justice traditions often rely on mechanisms

for Consent” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: University of British Columbia Press, 2010) 45; Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus” in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: University of British Columbia Press, 2004) 70.

²⁸ It would be misleading, of course, to suggest that the dozens of Indigenous nations in Canada share some “pan-Indigenous” tradition in their practices aimed at restoring social order. For examples of the diversity of restorative principles among Indigenous cultures in Canada, see the TRC’s descriptions of the Mi’kmaq tradition of “making things right” and the differing healing and restoration practices relied upon by the Haudenosaunee, Inuit, Métis, Cree, Anishinaabe, Hul’q’umi’num, Tlingit, and Gitksan peoples: TRC Final Report, *supra* note 13, vol 6 at 55–74. For useful descriptions of the modern implications of specific Indigenous restorative justice concepts, see Jeffery G Hewitt, “Indigenous Restorative Justice: Approaches, Meaning & Possibility”, (2016) 67:1 UNBLJ 313; Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999); Catherine Bell, “Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada”

aimed at encouraging consensus on reparative action among those affected by conflict. Repairing relationships between parties in conflict is also a central theme of modern theories of transformative mediation.²⁹ The latter theories focus on the goal of repairing relationships through techniques of reciprocal empowerment and recognition, although they tend to give less shrift to the role of substantive reparation in facilitating the parties' transformation.³⁰

Repairing damaged relations implies addressing the events or impediments that have provoked that damage. The parties' response may be symbolic, as in the use of apology to address past events that can no longer be altered. In such cases, effectively repairing the relationship will ordinarily require a commitment to amending conduct that would lead to a repetition of those events. In other cases, however, the transition implicit in reconciliation will require tangible reparation of harms done by one party to the other, or some other concrete accounting for injustices caused. In this way, reconciliation is inextricably bound up with conceptions of justice. Restoring relationships does not mean eliminating all future conflicts and disagreements between the parties. Human relationships are inherently dynamic, that is, subject to change, mutual influence, and contestation. Still, for damaged human relationships to be restored in a respectful and enduring way, both sides must at a minimum perceive the parameters of the renewed relationship to be fair.

Scholars who have written about efforts at reconciliation between social groups have paid particular attention to the need to account for past injustices if reconciliation is to be effectively achieved. Of course, justice between social groups can be viewed through a variety of lenses: cultural, social, political, legal, and economic, among others.³¹ Further, these facets

in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: University of British Columbia Press, 2004) 241; see also Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present" (1986) 24:3 *Osgoode Hall LJ* 605.

²⁹ For the classic descriptions of transformative theory in the context of mediation, see Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) [Bush & Folger]; Joseph P Folger & Robert A Baruch Bush, "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice" (1996) 13:4 *Mediation Q* 263. For a well-known critique of the premises of transformative theory, see Robert J Condlin, "The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype" (2013) 14:3 *Cardozo J Dispute Resolution* 621.

³⁰ See Bush & Folger, *supra* note 29 at 108–12.

³¹ For insightful theories on the various types of injustice that are potentially implicated in processes of reconciliation between Indigenous and non-Indigenous peoples, see Rosemary L Nagy, "The Scope and Bounds of Transitional Justice and the Canadian

of justice are frequently intertwined: political disenfranchisement can lead to social and economic harms, while legal outcomes may reproduce patterns of cultural and social subordination. The inter-relation of such forms of injustice has led some commentators, such as Nancy Fraser, to conclude that the transformative processes required for inter-group reconciliation need to be associated with “correcting inequitable outcomes ... by restructuring the *underlying regenerative framework*.”³² Put differently, the path toward effective reconciliation between social groups necessarily involves identifying and attending to ingrained systems of subordination that have undermined the groups’ relationship in the past. It follows that any review of the possible impact of the TRC process on reconciliation between the Canadian state and Indigenous peoples in the wake of the residential schools experience must necessarily examine the extent to which the TRC’s final report attends to and highlights the underlying framework that made possible the subordination of Indigenous autonomy to the unilateral exercise of state power over Indigenous lives.

In sum, although one can debate the precise connotations of the word reconciliation in the context of divisions between social groups, it is clear that the concept has at least three core elements. Reconciliation implies *transition* in the state of a relationship. It is the product of *engagement by both parties* in the renewal of their relationship and reciprocal alterations in their perceptions of that relationship going forward. Finally, reconciliation denotes the *repair* of relationships by parties who have attended to and agreed to transcend the main patterns of destructive interactions that damaged their relations in the first place. Those three core elements will form the template of our reflection on the likelihood that the TRC process is capable of driving effective reconciliation between the Canadian state and Indigenous peoples.

3. The TRC: A Transition in the Relationship?

Unlike other bodies across the world that share the same name, the Canadian TRC was not created in the context of fundamental political and

Truth and Reconciliation Commission” (2013) 7:1 Intl J Transitional Justice 52; Konstantin Petoukhov, “Recognition, Redistribution, and Representation: Assessing the Transformative Potential of Reparations for the Indian Residential Schools Experience” (2013) 3:1 McGill Sociological Rev 73; Jeff Corntassel, Chaw-win-is & T’lakwadzi, “Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation” (2009) 35:1 English Studies in Canada 137; Gerald Taiaiake Alfred, “Restitution is the Real Pathway to Justice for Indigenous Peoples” in Gregory Younging, Jonathan Dewar & Mike DeGagné, *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, (Ottawa: Aboriginal Healing Foundation, 2009) 181.

³² Nancy Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age” (1995) 212:1 New Left Rev 68 at 82 [emphasis added].

legal changes. The use of the title “Truth and Reconciliation Commission” in the parties’ Settlement Agreement appears to have been a conscious attempt to mirror the language used elsewhere to describe institutions designed to promote transitional justice in times of upheaval, such as the aftermath of civil war (as in Rwanda and Sierra Leone) or the disbanding of state-sponsored discrimination (as in South Africa). However, as we have seen, the Canadian TRC was the product of the settlement of a legal action against the state and several other defendants. Its creation, in the summer of 2008, was accompanied by the establishment of a \$300 million “Aboriginal Healing Foundation,” administrative processes to deliver compensation to individual plaintiffs, and a formal apology for the residential schools given by the Prime Minister on behalf of the government of Canada.³³ In Canada, then, expectations of change in the relationship between Indigenous peoples and other Canadians seem to largely have focused on the work of the TRC itself. That expectation was reflected, for example, in the apology given by Prime Minister Harper, which described the TRC as “a positive step in forging a new relationship between Aboriginal peoples and other Canadians.”³⁴

Much of the work of the Canadian TRC has been devoted to listening to the voices of individual Indigenous victims of the residential school system, sharing their stories with the Canadian public, and producing a lasting record of the impacts of residential schools on individuals, their families, and their communities. The recorded testimonies of the individual witnesses who appeared before the TRC were moving and sometimes heartbreaking. The opportunity to offer that testimony in a safe and culturally sensitive setting was demanded by the plaintiffs in their class action. The respect and recognition given to the voices of those witnesses was undoubtedly welcome after years of government denial and marginalization of their lived experiences. Whether that opportunity also brought about a change in those individuals’ perceptions of their relationships with the Canadian government or the Churches involved is beyond the scope of this paper. To this writer, a student of dispute resolution theory, it is not clear in what sense it is meaningful to suggest that an individual who has suffered wrongs might be “reconciled” with a faceless government or institution.

It is the issue of collective change that will be the focus of this analysis, rather than the possibility of individuals’ reconciliation with the state. The operation of residential schools did not simply cause harm to thousands of individuals who all happened accidentally to be Indigenous. The residential schools experience was a collective experience, designed and implemented to impose the values and decisions of one collective on another. Put differently,

³³ *TRC Summary*, *supra* note 4 at 130–31.

³⁴ Statement of Apology, *supra* note 6.

the residential schools resulted from the refusal of Canadian institutions to recognize Indigenous peoples' ability to make decisions for themselves, and further, from those institutions' utter rejection and denigration of Indigenous legal traditions and culture.³⁵ It was that collective rejection that led to the experiment in assimilation that was the residential schools. Equally, it is that refusal to recognize Indigenous peoples' right to make decisions for themselves that has contributed to a continuing and desperate sense of Indigenous powerlessness to control their own destiny in providing for their own children's welfare, in making decisions about their children's education, in attracting investment and prosperity to their reserves, and in countering the cycle of despair that has left First Nations communities the victims of disproportionately high rates of violence, suicide, unemployment, and incarceration.³⁶

The residential schools, then, were not only a collective Indigenous experience; they were the product of colonial structures that denied, and continue to deny, the ability of Indigenous nations to make decisions for themselves, and that marginalize the value of Indigenous norms and political traditions as vehicles for contemporary decision-making. It is surely quixotic, if not worse, to promote reconciliation in this context without concomitant changes to the decision-making structures that made the residential school tragedy possible. In this respect, the name of the TRC is arguably not only inapt, but also misleading. It is misleading because it connotes

³⁵ In the words of John A MacDonal, speaking to the House of Commons in 1883: "When the School is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men." (*TRC Summary*, *supra* note 4 at 2).

The disdain felt by Canadian politicians and policy makers toward Indigenous cultures was also enshrined in Canadian legislation. Between 1876 and 1952, the federal *Indian Act*, RSC 1985, c I-5, [*Indian Act*], and other statutes contained provisions that banned traditional dances, traditional feasts, forms of governance, removed Indian status from those who completed university education, and even denied status Indians the right to vote in federal elections: see e.g. John Leslie & Ron Maguire, eds, *The Historical Development of the Indian Act*, 2nd ed (Ottawa: Department of Indian and Northern Affairs Canada, 1978); Canada, Library of Parliament, "Aboriginal People: History of Discriminatory Laws", by Wendy Moss & Elaine Gardner-O'Toole, Catalogue No YM32-2/175-1991E-PDF (Ottawa: Parliamentary Research Branch, November 1991).

³⁶ For a review of the socio-economic conditions faced by Indigenous persons in Canada, see *TRC Summary*, *supra* note 4 at 160–61, 170–72; James Anaya, [Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada](#), UNGAOR, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014), online: <ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/52/Add.2>.

and encourages notions of “transitional justice”, while unaccompanied in Canada by a transition to a new justice or set of rights for Indigenous peoples. To expect change in the relationship between Indigenous peoples and the state without changing the structures that led to systemic injustice in the past would be the equivalent of expecting reconciliation between black and white South Africans without the abolition of Apartheid. In the words of Ian McIntosh, describing the challenge of reconciliation between Indigenous reconciliation in Australia:

A well-known anecdote from Father Mxolisi Mapanbani of South Africa became a touchstone for South Africa’s Truth and Reconciliation process. It goes like this. Once there were two boys, Tom and Bernard. Tom lived opposite Bernard. One day Tom stole Bernard’s bicycle, and every day Bernard saw Tom riding it to school. After a year, Tom went up to Bernard, stretched out his hand and said, “Let us reconcile and put the past behind us.” Bernard looked at Tom’s hand and said, “And what about the bicycle?” “No,” said Tom, “I’m not talking about the bicycle. I’m talking about reconciliation.”³⁷

In Canada, colonial structures continue in 2017 to dominate the lives of Indigenous collectivities. Provisions in the federal *Indian Act* prevent the enforcement of bank security on most Indian reserves, effectively preventing the residents of those reserves from securing mortgages for themselves or for their businesses.³⁸ The same legislation denies First Nation governments the regulatory powers related to modern land use planning that are enjoyed today by the smallest of municipalities.³⁹ And it assigns to a minister of the federal government statutory authority to appoint truant officers on reserve to designate the school attended by every Indian child, to operate farms on reserves, to dispose of wild grass on reserves, to administer the property of Indian children, and even to invalidate the last testament of any “Indian” for a number of reasons, including the minister’s view that the will’s provisions are contrary to the interest of the testator’s reserve community.⁴⁰ Finally, federal paternalism continues to govern any decision by a First Nation community to sell or enter long-term leases in relation to reserve lands. Their ability to do so is constrained by provisions in the *Indian Act* that require them to “surrender” such lands to the Crown.⁴¹ The result of this interposing of the federal government in reserve land transactions, which dates back more than 250 years to the Royal Proclamation of 1763 and the Treaty of

³⁷ McIntosh, *supra* note 17 at 73 [footnotes emitted].

³⁸ *Indian Act*, *supra* note 35, s 89(1).

³⁹ The regulatory powers of First Nation band councils, which enumerate authorities such as the power to pass bylaws for “the protection against and prevention of trespass by cattle and other domestic animals,” are set out in section 81 of the *Indian Act*, *supra* note 35, s 81(1)(e).

⁴⁰ *Ibid*, ss 119(1), 71(1), 58(4), 52, 46(1).

⁴¹ *Ibid*, ss 37, 38, 39.

Niagara the following year, is to add uncertainty, delay, and complication for every First Nation that seeks to do business with the outside world.⁴² It is no coincidence that these provisions, which impose federal oversight on the smallest details of reserve life, and the first consolidated *Indian Act* originated within a decade of the federal government's decision to begin funding residential schools.⁴³

Faced with a legislative regime that subordinates Indigenous autonomy, and the absence of Indigenous governments from the delineation of jurisdictions within the Canadian constitution, Canadian courts have been reluctant to recognize independent sources of Indigenous governmental authority. In recent decades, the Supreme Court of Canada has taken pains to ensure that the voices of Indigenous communities form an important part of decision-making about government-authorized projects that threaten Indigenous uses of their traditional lands.⁴⁴ That jurisprudence has had a major impact in empowering Indigenous communities in their dealings with governments and resource companies. But the principles articulated by the Court do not flow from principles of self-determination. Instead, the state's obligation to consult Aboriginal peoples finds its source in their vulnerability to constitutionally authorized exercises of state power.⁴⁵ On the question of whether Indigenous peoples in Canada might have a legally cognizable inherent authority to make binding decisions to govern their communities (arguably confirmed by the guarantee of "Aboriginal

⁴² For a description of the Royal Proclamation and the Treaty of Niagara, see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 155 at 155 [Borrows]; *Chippewas of Sarnia Band v Canada (AG)*, 139 OAC 201, 51 OR (3d) 641.

⁴³ Federal funding of residential schools began in 1867. The *Indian Act*, *supra* note 35, itself dates back to 1876: see Truth and Reconciliation Commission of Canada, *They Came for the Children* (Ottawa: TRC, 2015) at 5–6. The *Indian Act* was promulgated without the involvement or consent of Indigenous peoples in Canada: for a brief review of the development of the *Indian Act*, see John F Leslie, "The Indian Act: An Historical Perspective" (2002) 25:2 Canadian Parliamentary Rev 23.

⁴⁴ The Crown's obligations in this regard are set out in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*] and subsequent case law.

⁴⁵ Federal and provincial governments must comport themselves in a manner that respects the "honour of the Crown", a concept that the assertion of sovereignty by the Crown over Indigenous peoples results in vulnerability of Indigenous communities to the unbridled exercise of that sovereignty. See *Haida Nation*, *supra* note 44 at paras 16–25; see also *R v Sparrow*, [1990] 1 SCR 1075 at 25, [1990] 3 CNLR 160, per Dickson CJC: "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."

rights” in section 35 of the *Constitution Act, 1982*),⁴⁶ the Court has yet to offer definitive guidance.⁴⁷ The question of how and whether the Canadian state acquired sovereignty over the lives of Indigenous peoples has recently been the subject of vigorous debate in academic circles.⁴⁸ It is clear that the Supreme Court of Canada takes the view that delineating the scope of the rights of Indigenous peoples and tailoring contemporary solutions aimed at implementing those rights are polycentric issues that are best addressed through negotiation.⁴⁹ Given the historical treaty relationships that continue to bind the Canadian state and Indigenous nations, and the complexity of the challenges involved in dismantling colonial structures, it is undoubtedly true that fundamental changes to the status quo are best addressed by the parties themselves.

What is likely to be the effect of the Settlement Agreement and the establishment of the TRC in facilitating lasting change in the relationship

⁴⁶ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

⁴⁷ In *R v Pamajewon*, [1996] 2 SCR 821 at para 30–32, [1996] 4 CNLR 164, the Supreme Court adopted a narrow interpretation of Aboriginal rights in dismissing two Anishinaabe communities’ authority to regulate gambling on their reserves. In its subsequent judgment in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115, [1998] 1 CNLR 14 [*Delgamuukw*], Lamer CJ clarified in passing that Indigenous communities have a collective right to make decisions with respect to Aboriginal title lands. However, the Court declined to uphold the plaintiffs’ claim to self-government, finding that limitations in the trial judgment of that case and the complexities associated with the concept of self-government required the issue to be determined at a subsequent trial. No such trial has taken place. A number of leading scholars have argued that Aboriginal rights protected by section 35 (*Constitution Act, 1982*, *supra* note 46) include the right of Indigenous peoples to govern themselves. See e.g. Brian Slattery “First Nations and the Constitution: A Question of Trust” (1992) 71:2 *Can Bar Rev* 261 at 278; Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (2001) 46:2 *McGill LJ* 382; John Borrows, “Questioning Canada’s Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism” in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto, 2002) 111.

⁴⁸ See e.g. John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*” (1999) 37:3 *Osgoode Hall LJ* 537; Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23:1 *Windsor YB Access Just* 17; Kent McNeil, “The Crown’s Fiduciary Obligations in the Era of Aboriginal Self-Government” (2009) 88:1 *Can Bar Rev* 1.

⁴⁹ Its most famous pronouncement to this effect was perhaps that of Chief Justice Lamer in *Delgamuukw*, *supra* note 47 at para 186: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... a basic purpose of s. 35(1) — ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’” Chief Justice McLachlin made the same point in *Haida Nation*, *supra* note 44 at para 14: “While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests.”

between the Canadian state and Indigenous peoples? Two obstacles immediately present themselves. First, the creation of the TRC was not accompanied by a clear determination to alter the power relations between Indigenous peoples and the state in Canada. Although the systemic subordination of Indigenous peoples' autonomy instigated and shaped the entire residential schools program, concerns about that general paradigm were undoubtedly peripheral to the legal claims brought by the graduates of those schools. Further, a determination to correct the continuing manifestations of colonialism in Canada's relationship with Indigenous peoples implies recognition of their existence and their persistence in shaping that relationship today. Regrettably, the Prime Minister of Canada was quoted shortly after the creation of the TRC as publicly insisting that Canada has no history of colonialism.⁵⁰ For those who accept the Prime Minister's view, changes to the domination of Indigenous peoples by the Canadian state are not required; not only does such domination not characterize the relationship today, it never did. Second, as several commentators have pointed out, the final settlement of residential school claims and the establishment of the TRC might even be interpreted by the general public as drawing a line under the past and addressing in themselves the need for change in Canada's relationship with Indigenous peoples.⁵¹ Yet the legal context and mandate of the TRC did not permit it to effect any systemic reforms on its own.⁵² Nor could the payment of compensation for past harms and the delivery of an apology for those harms address current aspirations for greater Indigenous autonomy. To expect the events surrounding the establishment of the TRC to address those aspirations is as absurd as expecting the people of Quebec to accept kind words and compensation in exchange for their current rights of self-government within Canada.

Accordingly, to the extent that the Settlement Agreement and formation of the TRC were capable of stimulating any meaningful transition in settler-Indigenous relations, the burden of doing so was placed squarely on the

⁵⁰ Speaking at a summit of G20 nations in Pittsburgh, Stephen Harper declared, "We also have no history of colonialism." See David Ljunggren, "[Every G20 Nation Wants to be Canada, Insists PM](#)", *Reuters* (25 September 2009), online: <www.reuters.com/article/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926>.

⁵¹ See e.g. Jung, *supra* note 21; Jessica K Howsam, *The Canadian Truth and Reconciliation Commission: Healing, Reconciliation, Resolution?* (MA Thesis, The University of Western Ontario Department of Political Science, 2015), online: <ir.lib.uwo.ca/cgi/viewcontent.cgi?article=4712&context=etd>; Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

⁵² A product of the settlement of litigation between individual plaintiffs and the government of Canada that did not directly involve Indigenous peoples as collectivities, the TRC could not legitimately have been given a mandate to alter relations between Indigenous nations and the Crown.

content of the TRC's communications and public reports. The challenge faced by the TRC in this regard was complicated because its central mandate was to report on the history of the residential schools, the students' experience at those schools, and the personal and social harms they produced.⁵³ Unsurprisingly, then, the bulk of the TRC's public events, press releases, and public reports focused on the details of the residential school experience and its consequences for those who attended the schools. Of the TRC's 94 Calls to Action, some two-thirds were devoted to memorializing the history of the schools, or to addressing gaps in social and cultural programs currently available to Indigenous people, particularly in the areas of child welfare, education, health, language, and justice.⁵⁴ The final reports of the TRC identify the links between Canada's historical assimilation policies and the operation of the residential schools, but the direct link between those policies and the legal and policy framework that currently limits the autonomy of Indigenous peoples is obscured within the 3,053 pages and two million words that comprise the text of the final report.⁵⁵

While the bulk of the analysis in the TRC reports focuses on the residential schools experience, the intergenerational consequences they engendered, and the failure of current social programs to offer Indigenous persons equal life chances in Canada, the Commissioners also prominently urged respect for Indigenous self-determination and implementation of Indigenous treaty rights. Perhaps most prominently, the framework that the TRC recommended to achieve those goals was the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").⁵⁶ Indeed, the TRC refers to this UNDRIP in seven of its Calls to Action. The UNDRIP itself is a declaration adopted by the United Nations General Assembly in 2007.⁵⁷ Its 46 Articles give a central place to the principle of Indigenous self-determination in matters relating to their internal affairs, traditional lands, economic development, education, and culture.⁵⁸ For the TRC, the UNDRIP principles are not merely aspirational. According to its final report, "Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and into its civic institutions in a manner consistent with the principles, norms, and standards of the *Declaration*."⁵⁹ In what specific ways should Canada's legal framework be altered to affect this goal? The TRC's response is disappointingly vague. It

⁵³ TRC Final Report, *supra* note 13.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ [United Nations Declaration on the Rights of Indigenous Peoples](#), GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008), online: <www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf> [UNDRIP].

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ TRC Final Report, *supra* note 13, vol 6 at 28.

recommended that the federal government develop a national action plan to implement the UNDRIP, that it work with Indigenous peoples to issue a “Royal Proclamation of Reconciliation,” that it legislate to establish a national oversight body to monitor progress on reconciliation, that it repudiate historic justifications for asserting sovereignty over Indigenous peoples, and that Aboriginal peoples be recognized as full partners in Confederation.⁶⁰ This emphasis on general processes is understandable from the perspective that collaborative dialogue will be necessary to design and implement changes from Canada’s present legal relationship with Indigenous peoples. Nevertheless, it is unfortunate that the TRC report did not clearly focus on the primary aspects of contemporary Canadian law that are inconsistent with Indigenous self-determination. A notable exception here is the TRC’s detailed recommendations for the recognition of Indigenous legal traditions as a fundamental part of the renewed relationship.⁶¹

The abstraction of the TRC’s recommendations for restructuring Canada’s relationship with Indigenous peoples may have rendered them easier for governments to embrace. Although Canada’s then Prime Minister, Stephen Harper, declined even to attend the ceremony accompanying the TRC’s final report, the current government indicated almost immediately that it would fully implement the TRC Calls to Action, including using the UNDRIP as the framework for reconciliation.⁶² It is not clear at this time what systemic changes, if any, the Canadian government intends to implement in relation to their relationship with Indigenous peoples. It is clear, however, that some degree of support from the Canadian public will be required if the relationship is to be transformed. The failure of the TRC’s report to communicate more forcefully to the public the link between past government policies subordinating Indigenous peoples and the current legal regime will not assist efforts in this regard. It is worth noting that the

⁶⁰ *Ibid* at 28–33, 37–40.

⁶¹ See e.g. *ibid* at 38–40, 45–74.

⁶² Office of the Prime Minister, News Release, “[Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission](#)” (15 December 2015), online: <www.pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission> [Statement of Prime Minister]. The government appeared to backtrack from its wholesale commitment to implementing UNDRIP in July 2016 when its Justice Minister suggested that “simplistic approaches” like adopting the Declaration into Canadian law are “unworkable”. Her statement was, perhaps, unsurprising given that the UNDRIP itself does not take into account the specificities of Canadian law or the history of Indigenous/Crown relations in Canada. Nevertheless, one week later Justice Minister Wilson-Raybould clarified that the current Canadian government’s support for all of the Articles of the Declaration was “without reservation”. See Kristy Kirkup, “[Government Supports Indigenous Declaration Without Reservation: Wilson-Raybould](#)”, *Canadian Press*, (20 July 2016), online: <www.cbc.ca/news/aboriginal/government-supports-undrip-without-reservation-1.3687315>.

TRC report follows the work of two other Canadian commissions, the six-volume Report of the Royal Commission on Aboriginal Peoples published in 1996,⁶³ and the four-volume Report of the Ipperwash Inquiry published 11 years later.⁶⁴ Both of those reports recommended significant legal reform to recognize the principles of treaty partnership with Indigenous peoples. Neither of these earlier reports provoked such reform. It will be worthwhile to reflect on at least one of the possible impediments to fundamental change.

4. Reciprocity: The Importance of Mutual Engagement

This paper has already drawn attention to the centrality of reciprocal engagement to the concept of reconciliation. It is worth noting that there is considerable evidence that Indigenous partners in Canada's historical treaties placed great emphasis on the capacity of treaty-making to create new ties of kinship between themselves and the Crown. Examples of this emphasis are too numerous to enumerate here, but they included the symbolism of the "Two-Row Wampum Belt" exchanged at the Treaty of Niagara in the summer of 1764 depicting two peoples moving forward in parallel, and the Great Covenant Chain Belt also exchanged at Niagara, in which the settlers and Indigenous peoples were shown with linked arms.⁶⁵ Even earlier, perhaps the most famous treaties in Eastern North America were known as "Covenant Chain Agreements," because they memorialized the connections of loyalty and care that were expected to tie the parties together.⁶⁶ In subsequent treaties, from Ontario west to Alberta, Indigenous representatives often marked their consent by images of their totems, a gesture that has been interpreted as an invitation to the Crown to enter familial and clan-like kinship with those signatories and the animals, plants, and spirits with whom the latter were connected.⁶⁷ Crown representatives

⁶³ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996).

⁶⁴ Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ministry of the Attorney General, 2007).

⁶⁵ On the background to the Treaty of Niagara, see Borrows, *supra* note 42; Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Oxford: Oxford University Press, 1997) at 51-61.

⁶⁶ Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall" (2001) 24:2 Dal LJ 75 at 80-81.

⁶⁷ Niigonwedom James Sinclair, *Nindoodemag Bagijiganan: A History of Anishinaabeg Narrative* (PhD Thesis, University of British Columbia Department of Philosophy, 2013), online: <open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0071931>; Leanne Simpson, "Looking After Gdoo-Naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev 29 at 33; Matthew J Glass, *Canada's Duty to Consult: Communicative Equality and the Norms of Legal Discourse* (LLM Thesis, The University of Western Ontario, 2015) 125-32, online: <ir.lib.uwo.ca/cgi/viewcontent.cgi?article=4151&context=etd>.

gladly adopted Indigenous symbols of kinship during treaty-making, presenting wampum belts at Niagara and other treaties and emphasizing the care that the Crown would take of her Indigenous kin.

Later in the colonial period, Canadian governments paid less heed to fostering respectful relationships with Indigenous peoples. Although treaty-making continued, First Peoples were absent from the negotiations to establish the Confederation, which formed Canada in 1867, and absent, as we have seen, from the formulation of the *Indian Act*, which purported to regulate everything from membership in Indigenous nations to Indigenous governance and the use of reserve lands.⁶⁸ Indigenous peoples were not even represented in the leading Canadian court case on land and treaty rights between 1867 and 1980, and, during that period, they received little consideration in Crown decisions to authorize resource extraction on treaty land.⁶⁹ The reciprocal engagements of the Covenant Chain Agreements and the Treaty of Niagara had faded from public view. As late as 1971, the government of Quebec considered it politically feasible to develop and publicly announce a hydro project that would flood 11,500 square kilometres of untreated Indigenous lands without even notifying the First Nations whose traditional lands would be devastated.⁷⁰ It was not until 1981 that Indigenous voices again had a significant effect on Canadian law, with the inclusion of guarantees of Aboriginal and treaty rights in the *Constitution Act, 1982*.⁷¹

If lack of reciprocal respect was a significant feature of Canada's relationship with Indigenous peoples in the 150 years preceding the TRC, the work of the TRC was also fraught by issues of reciprocal engagement. The TRC had no power under its mandate to compel the participation of the non-Indigenous staff and leaders of the residential schools. Apart from public education events, therefore, the vast majority of the independent hearings processes and the activities of the TRC itself involved Indigenous survivors, as well as elders and spiritual leaders, speaking to a neutral intermediary about their experiences and perspectives.⁷² In that sense, the processes associated with the TRC were largely one-sided: it was not

⁶⁸ *Supra* note 35.

⁶⁹ *St Catherine's Milling and Lumber Co v R* (1888), 14 AC 46, 2 CNCL 541, aff'g sub nom *St Catharines Milling and Lumber Co v the Queen* (1887) 13 SCR 577, 13 OAR 148.

⁷⁰ [The James Bay Project and the Cree](http://www.cbc.ca/archives/topic/the-james-bay-project-and-the-cree), CBC Digital Archives, online: <www.cbc.ca/archives/topic/the-james-bay-project-and-the-cree>.

⁷¹ *Constitution Act, 1982*, *supra* note 46, s 35(1)–(2) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ... In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.”

⁷² One innovative technique that the TRC adopted to include non-Indigenous Canadians in its events was to select “Honorary Witnesses” to participate in listening to the

a balanced dialogue between representatives from both parties to the Indigenous-settler relationship. That issue of mutual engagement from both sides of the relationship must also be considered in any assessment of the likely effectiveness of the TRC's final reports in provoking change. Here it is necessary to acknowledge the influence of certain historically based barriers to such engagement.

On the non-Indigenous side of the equation, the TRC correctly notes that “[t]oo many Canadians know little or nothing about the deep historical roots” of contemporary conflicts between Indigenous peoples and the Crown.⁷³ In response, many of the TRC recommendations focus on enhancing education regarding Indigenous issues. This is obviously a necessary step in a country where educational curricula have largely ignored Indigenous peoples in the past.⁷⁴ But education will not be sufficient to induce change if it does not lead to empathy for the legally prescribed powerlessness of contemporary Indigenous peoples. In the words of Thucydides, the classical Greek historian, “justice will not come to Athens until those who are not injured become as indignant as those who are injured.”⁷⁵ For non-Indigenous Canadians to embrace and respect significantly enhanced Indigenous autonomy within Canadian federalism, additional information must be accompanied by attitudinal change concerning the present status of Indigenous peoples as collectivities.⁷⁶ Current attitudes of non-Indigenous Canadians are not the product of a *tabula rasa* concerning the place of Indigenous peoples in Canadian society. Members of the Canadian public already hold views about this issue. Indeed, as the former premier of Ontario, Bob Rae, has observed, Indigenous and non-Indigenous Canadians tend to subscribe to two different and conflicting narratives regarding the history of

testimonies of victims, their families, and others affected by the residential school policy (TRC Summary, *supra* note 4 at 12).

⁷³ TRC Final Report, *supra* note 13, vol 6 at 4.

⁷⁴ Ontario, Canada's most populous province, only adopted mandatory attention to the history of colonialization and the importance of treaties in its public high schools in 2016. See: Office of the Premier, News Release, “[Ontario Implementing New Indigenous Training and Education Requirements: Province Committed to Working with Partners to Address Truth and Reconciliation Commission Calls to Action](#)” (17 February 2016), online: <news.ontario.ca/opo/en/2016/2/ontario-implementing-new-indigenous-training-and-education-requirements.html>; Kairos, “[Winds of Change: Read the Read Card](#)” (October 2015), online: <www.kairoscanada.org/what-we-do/indigenous-rights/windsofchange-report-cards#on>.

⁷⁵ Thucydides, *The History of the Peloponnesian War*, translated by Richard Crawley (London, UK: Logmans Green, 1874), online: <www.gutenberg.org/files/7142/7142-h/7142-h.htm>.

⁷⁶ Interestingly, the TRC Commissioners seemed skeptical about whether federal officials support significant change in their relationship: “The Government of Canada appears to believe that reconciliation entails Aboriginal peoples’ accepting the reality and validity of Crown sovereignty and parliamentary supremacy in order to allow the government to get on with business.” TRC Final Report, *supra* note 13, vol 6 at 25.

their relationship.⁷⁷ The Indigenous narrative views themselves as partners in a treaty that grounded the creation of this country. Non-Indigenous Canadians appear largely to have adopted a very different narrative in which the First Peoples of Canada were passive observers of the nation's settlement and development. Accordingly, Indigenous people are essentially Canadians of a different cultural heritage entitled to be treated fairly under Canadian law, but with no special rights to govern themselves, whose future prosperity depends upon their assimilating into Euro-Canadian economies and social structures. It is this second narrative that produced the residential schools. So long as a sizable number of Canadians subscribe to that narrative, there will be limited public engagement with proposals to recognize the collective agency of Indigenous peoples. For the reasons given in the previous section of this paper, we may be skeptical about the extent to which the TRC's final report will disrupt that narrative.⁷⁸ Failing such disruption, public attitudes about the appropriate path forward will continue to focus on individual equality of opportunity as the proper moral response to the sources of conflict between Indigenous and non-Indigenous Canadians.

There are also challenges that must be recognized and addressed on the side of Indigenous peoples' engagement in reimagining the relationship. Centuries of restrictions on their power to determine their own destinies have had inevitable effects, both practical and symbolic, on Indigenous perceptions of that relationship. It would be surprising if past efforts by the state to control Indigenous lives, and the damage visited on Indigenous communities by those efforts, had not created widespread distrust toward state representatives who declare that they wish to make future changes to that relationship. In addition, at a practical level, Indigenous governments currently have severely limited resources, either to negotiate with the state

⁷⁷ Bob Rae, "[The Gap between Historic Treaty Peoples and Everyone Else](#)" (31 October 2014), *Bob Rae* (blog), online: <bobrae.ca/the-gap-between-historic-treaty-peoples-and-everyone-else/>.

⁷⁸ An Environics survey conducted in June 2016 appears to confirm this. Asked about the biggest challenges facing Aboriginal peoples today, non-Indigenous Canadians were most likely to cite inequality and discrimination, followed by isolation and inability to integrate, and lack of education. Only 6% mentioned self-government issues. Although two thirds of those surveyed were aware of the history of residential schools (up considerably from 2008) and the physical and familial trauma created by the schools, four out of ten did not believe the schools reflected an effort to destroy Aboriginal cultures. The number who linked the residential schools to the rejection of Indigenous peoples' control over their own societies does not appear to be statistically significant. Finally, of the 40% who had heard of the TRC, two-thirds could not state anything specific about any of the TRC's calls to action. The Environics Institute, [Canadian Public Opinion on Aboriginal Peoples: Final Report](#) (Toronto: The Environics Institute, June 2016), online: <www.environicsinstitute.org/uploads/institute-projects/canadian%20public%20opinion%20on%20aboriginal%20peoples%202016%20-%20final%20report.pdf> at 19, 29, 32.

or to support extension and enforcement of their governmental and law-making authorities. This issue of capacity is a significant one, but it is exacerbated by the fact that Indigenous peoples in Canada have little recent experience in taking responsibility for dramatic changes to the regulation of their community life. The latter phenomenon is likely to raise issues both of internal and external confidence in Indigenous agency. Equally, the history of disregard for Indigenous agency in Canada has drawn, and will continue to draw, logical demands for formal recognition of Indigenous jurisdiction over their own communities. Of course, such demands have significant practical implications, but it would be a mistake to underestimate their symbolic importance to Indigenous peoples in their quest to restore respectful relationships with the Canadian state.

5. Repairing the Relationship

Thus far in this analysis, we have suggested that movement toward reconciliation will require addressing the underlying causes of imbalance in the present relationship of Indigenous peoples and the Canadian state, and a reciprocal engagement to establish a more harmonious relationship grounded in respect for the individual and collective aspirations of Indigenous peoples. The residential schools settlement and the mandate of the TRC have brought public attention to one catastrophic symptom of that imbalance. The work of the TRC itself has increased the likelihood of policy changes that will address disparities in the quality of life experienced by Indigenous Canadians. Only months after the publication of its final report, it is clear that several provincial and federal agencies are actively reviewing the specific recommendations of the TRC in this regard.⁷⁹ As for the prospect of fundamental change to contemporary structures of legal domination, the outlook is less clear. The TRC has helpfully focused on the acknowledgement, study, and revitalization of Indigenous legal orders as an essential element of restoring respect for Indigenous authority within Canadian federalism. Unfortunately, however, the TRC reports shed much

⁷⁹ For the Ontario government's policy announcements in response to the TRC Calls to Action, see: Ministry of Indigenous Relations and Reconciliation, News Release, "[The Journey Together: Ontario's Commitment to Reconciliation with Indigenous Peoples](http://news.ontario.ca/mirr/en/2016/05/the-journey-together-ontarios-commitment-to-reconciliation-with-indigenous-peoples.html)" (30 May 2016), online: <news.ontario.ca/mirr/en/2016/05/the-journey-together-ontarios-commitment-to-reconciliation-with-indigenous-peoples.html>. In June 2015, the Province of Manitoba announced a new plan for indigenous education in the classroom: "[Manitoba Moves on TRC Recommendations on Indigenous Education](http://www.metronews.ca/news/winnipeg/2015/06/21/manitoba-moves-on-trc-recommendations-on-indigenous-education.html)", *Metro* (21 June 2015), online: <www.metronews.ca/news/winnipeg/2015/06/21/manitoba-moves-on-trc-recommendations-on-indigenous-education.html>. The Canadian Federation of Law Societies has also committed to effectively respond to the TRC recommendations: "[Federation of Law Societies Commits to Effective Response to TRC Report](http://flsc.ca/federation-of-law-societies-commits-to-effective-response-to-trc-report/)", *Federation News* (11 March 2016), online: <flsc.ca/federation-of-law-societies-commits-to-effective-response-to-trc-report/>.

less light on the challenge of how the parties might effect systemic change to the subordination of Indigenous peoples' governance rights and to the attitudes that currently make such subordination conceivable.

The past two decades have seen extremely limited success in efforts to achieve consensus on reform to the overarching constraints of the federal *Indian Act*.⁸⁰ Demands for formal restoration of Indigenous jurisdiction over the issues central to the health and future of their collectivities have occasionally met with symbolic recognition. As long ago as 1985, the province of Ontario signed a declaration acknowledging First Nations' right to self-determination.⁸¹ Equally, the recent announcement by the federal government that it intends to implement the UNDRIP⁸² implicitly confirms the right to self-determination enshrined in Article 3 of the Declaration.⁸³ But actual implementation of new Indigenous law-making powers, outside the context of certain Aboriginal title settlements, has been limited to the areas of land use management, property taxation, and matrimonial real property.⁸⁴ Lack of consensus among Indigenous communities has undoubtedly played a part in impeding reform, as has federal and provincial governments' tendencies to require negotiation, in advance, of the proposed methods of exercising Indigenous jurisdiction within the framework of Canadian federal relations. It is likely that the effective recognition of Indigenous law-making authorities as a third order of government within Canada will require formal federal and provincial acknowledgement of Indigenous jurisdiction in a number of key areas, including education, child care, land use, policing, language protection, and internal governance arrangements. Such recognition also implies the power to enforce Indigenous laws through appropriate sanctions and to permit the review of governmental decisions through mechanisms that accomplish the same goal as administrative law regimes in non-Indigenous communities. Finally, given the disparate capacities of current Indigenous governments in Canada, the implementation of such systemic change will need to allow

⁸⁰ *Supra* note 35.

⁸¹ This was the "Declaration of Political Intent," signed by the province's NDP government with the major First Nations territorial organizations in the province. See Donald Purish, "The Future of Native Rights" in J R Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 431.

⁸² Statement of Prime Minister, *supra* note 62.

⁸³ UNDRIP, *supra* note 56, arts 3–4. Article 3 reads: "Indigenous peoples have the right to self-determination." According to Article 4, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

⁸⁴ See e.g. *First Nations Land Management Act*, SC 1999, c 24; *First Nations Fiscal Management Act*, SC 2005, c 9; *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

Indigenous groups to implement their law-making powers over time, in accordance with their own timetables and their own priorities. And the orderly development of governmental capacity to implement Indigenous laws will require agreement among Canada's federal and provincial governments on their respective obligations to support that development. Whatever the modality of reform, these issues will need to be addressed. For reconciliation implies that both parties can envisage their new relationship as one that is marked by fairness and respect for their autonomy.

As we have seen, the final report of the TRC describes in considerable detail the symptoms of inequality of treatment of Indigenous individuals in the delivery of services by the state.⁸⁵ The report also explains clearly how the European political doctrine of "discovery" was used historically to justify philosophically the extension of European power over land deemed to be *terra nullius* and the Indigenous peoples who occupied such land.⁸⁶ It provides a valuable description of the potential role of recognizing the force of Indigenous legal orders as a tool of self-determination, as well as the relevance of the general principles of UNDRIP in the journey toward greater self-determination. As the product of a private settlement of the residential schools litigation, the TRC was not in a position, politically or morally, to indicate the concrete forms that such a restoration of Indigenous autonomy might take for each of the Indigenous peoples who live on this land. Still, the failure of the TRC to highlight for Canadians the importance of addressing the current legal framework that limits Indigenous peoples' autonomy means that it is less likely to be the catalyst for broader action to repair that framework and clear a path toward respectful relations with Indigenous peoples.

In the past, it has proved difficult to persuade non-Indigenous governments and most non-Indigenous Canadians that the circumstances of Indigenous peoples merit systemic political and legal reform. While it may be unrealistic to expect a groundswell of public attention to and active support for Indigenous self-government, the necessary threshold for change is lower. Perhaps all that is necessary is for non-Indigenous Canadians and their governments to be convinced that they get no benefit, moral or material, from continuing to impose themselves on every level of Indigenous life, from policing to education to validating their Indigenous neighbours' wills. Certainly, the history of the residential schools is a stark reminder of this. And, just perhaps, by spurring a constructive dialogue about the current situation of Indigenous peoples, the work of the TRC might usefully contribute not only to increased public knowledge of a historical injustice, but also to promoting just such an epiphany among non-Indigenous Canadians,

⁸⁵ TRC Final Report, *supra* note 13.

⁸⁶ *Ibid.*, vol 1 at 14–24.

one that permits a real transformation in the relationship between Canada's First Peoples and the state.