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## **Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission**

**KIM STANTON\***

Cet article traite du concept de « réconciliation » tel qu'utilisé dans deux forums : la Cour suprême du Canada (la Cour) et la Commission de vérité et de réconciliation sur les répercussions des « pensionnats indiens » (CVR). Le développement du concept dans la jurisprudence de la Cour, comparé à la littérature universitaire sur la justice transitoire, mérite un examen soigné. La Cour a utilisé ce terme dans ses décisions visant à contrebalancer les déclarations de souveraineté autochtone dans le contexte du colonialisme canadien. Ce concept de réconciliation est par ailleurs bien différent de celui qui s'est développé dans le discours canadien, grâce à la CVR. L'auteur suggère que la vision de la réconciliation de la CVR, c'est-à-dire comme processus mutuel dans lequel les peuples autochtones et non-autochtones doivent s'engager, est un concept plus juste à adopter.

This paper considers the concept of "reconciliation" as it is utilized in two fora: the Supreme Court of Canada (the Court) and the Truth and Reconciliation Commission on the legacy of the "Indian residential schools" (TRC). The concept's development in the Court's jurisprudence, as compared to the scholarly literature of transitional justice, warrants careful consideration. The Court has used the term in decisions seeking to balance assertions of Indigenous sovereignty in the context of Canadian colonialism. However, this concept of reconciliation is quite different from that which has entered Canadian discourse from the TRC. The author suggests that the vision of reconciliation enunciated by the TRC as a mutual process to be engaged in by Indigenous and non-Indigenous peoples alike would be a more just conception to adopt.

**IN THIS PAPER, I CONSIDER THE CONCEPT OF "RECONCILIATION"** as it is utilized in two fora: the Supreme Court of Canada (SCC) and the Truth and Reconciliation Commission of Canada (TRC) on the legacy of Indian Residential Schools.<sup>1</sup> The concept's development in the SCC's jurisprudence, as compared to its meaning in the scholarly literature of transitional justice, warrants careful consideration. The SCC has used the term reconciliation in decisions seeking to balance assertions of Indigenous sovereignty with assertions of sovereignty by the Canadian

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<sup>1</sup> I presented an initial version of this paper at a conference "Evaluating the Impact of the Truth and Reconciliation Commission of Canada," hosted by the Centre for Transitional Justice and Post-Conflict Reconstruction, Western University, 8 May 2014.

state.<sup>2</sup> However, Canada has now seen itself reflected in the proceedings of the TRC. Truth commissions are understood internationally to be mechanisms that assist states with addressing periods of extreme societal rupture. These transitional justice mechanisms enable states to create accurate historical records of such periods and make recommendations to prevent their recurrence. In transitional justice parlance, reconciliation refers to “societal healing.”<sup>3</sup> This understanding of reconciliation is quite different from that which has entered Canadian legal discourse. The SCC articulates reconciliation as a process flowing from the recognition of Aboriginal rights in the *Constitution Act, 1982*. Unfortunately, the SCC’s version of reconciliation is formed from the litigation process in a Canadian court system imposed upon Indigenous peoples, which uses colonial precepts and terminology that precludes genuine reconciliation.

In this paper, I provide an overview of the concept of reconciliation as it has developed in Canada since 1990, first by a royal commission, then the SCC, and finally by the TRC. I note the framework for reconciliation advanced by the TRC, and I suggest that its vision of reconciliation as a mutual process to be engaged in by Indigenous and non-Indigenous peoples alike would be a more just conception to adopt than that enunciated by the SCC.

## I. RECONCILIATION IN CANADA

In the 1990s, the term “reconciliation” began to appear in Canadian discourse with respect to Indigenous/non-Indigenous relations in both jurisprudence and in the language of public inquiries. A particularly important enunciation of the concept is found in one of Canada’s landmark reports on Indigenous and non-Indigenous relations, the report of the Royal Commission on Aboriginal Peoples (RCAP).

### A. THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

The Oka crisis prompted the 1991 establishment of a national commission of inquiry to address the glaring gulf between Indigenous and non-Indigenous peoples that the confrontation in Mohawk territory south of Montreal had brought to the national consciousness. Though its recommendations were largely ignored by the federal government of the day, RCAP continues to provide this country’s most comprehensive review of the historical, social, cultural, economic, and political circumstances of Indigenous peoples. It is critical reading for anyone who wishes to better understand the broken relationship between Indigenous and non-Indigenous peoples in what is now called Canada.

The Commission’s proceedings spanned five years, and included 178 days of public hearings in 96 communities. Many of those who testified before the Commission were survivors of residential schools, which had been run by the Canadian government and churches for a period spanning more than a century. Indeed, the last school did not close until the year RCAP released its report in 1996. It was the first major inquiry to report on residential schools in a comprehensive way. Devoting an entire chapter to the topic, RCAP recommended a public inquiry be held specifically on residential schools:

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<sup>2</sup> See discussions below regarding the Supreme Court’s decisions in *Van der Peet*, *Delgamuukw*, and *Haida Nation*.

<sup>3</sup> Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001) at 133 [Hayner].

No segment of our research aroused more outrage and shame than the story of the residential schools ... . A public inquiry is urgently required to examine the origins, purposes and effects of residential school policies, to identify abuses, to recommend remedial measures and to begin the process of healing.<sup>4</sup>

RCAP's purpose has been described thus: "The over-arching task of the Royal Commission was to help restore justice in the relationship between Aboriginal and non-Aboriginal people. It was believed that harmony can only emulate from a spirit of justice."<sup>5</sup> Further:

The commissioners themselves stated that fundamental change will only occur if the Canadian government and Canadians understand that *Aboriginal people are nations*; that is, that they are political and cultural groups with values and life-ways distinct from those of other Canadians ... . This is something that cannot be accomplished through a document. Rather, it must be accomplished by educating Canadian citizens and fostering dialogue among governments and Aboriginal and non-Aboriginal citizens.<sup>6</sup>

As noted in the TRC's interim report: "RCAP's guiding principles of mutual recognition, mutual respect, sharing and mutual responsibility are critical to any reconciliation process."<sup>7</sup> Justice René Dussault, Co-Chair of the Royal Commission on Aboriginal Peoples, stated: "First and foremost, reconciliation is a matter of trust."<sup>8</sup> That trust would be built through a reformulation of the political structure of Canada. As Asch noted, RCAP "eschewed the *terra nullius* thesis ... RCAP asserted that resolution to the question of the political status of the parties would be achieved through mutual recognition that both Canada and Indigenous peoples hold sovereignty today."<sup>9</sup> Further, "[RCAP] favoured political solutions because of the uncertainty involved in litigation."<sup>10</sup> Needless to say, the RCAP approach has not been adopted in any meaningful way by successive Canadian governments, though RCAP laid the groundwork for the TRC by bringing the experience of survivors to the national consciousness, and setting out the terrible intention, structure and operation of the residential schools as undeniable factual truths. However, it would be another two decades after the release of RCAP's report before the TRC's inauguration. The lack of an adequate political response to RCAP's report prompted the survivors of the schools to turn to legal responses. Criminal prosecutions, civil suits, alternative

<sup>4</sup> The Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), Vol. 1, Part 2, Chapter 13 [RCAP Report].

<sup>5</sup> Bradford W Morse & Tanya M Kozak, "Gathering Strength: The Government of Canada's Response to the Final Report of the Royal Commission on Aboriginal Peoples" in Aboriginal Rights Coalition, *Blind Spots: An Examination of the Federal Government's Response to the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Aboriginal Rights Coalition, 2001) at 33 [*Blind Spots*].

<sup>6</sup> *Ibid* at 35.

<sup>7</sup> Truth and Reconciliation Commission of Canada: Interim Report, (Winnipeg: TRC, 2012) at 24.

<sup>8</sup> René Dussault, "Indigenous Peoples and Child Welfare: The Path to Reconciliation." (2007) 3 *First Peoples Child & Family Review* 3 at 10.

<sup>9</sup> Michael Asch "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17 *Can LJ & Society* 23 at 35.

<sup>10</sup> David Stack "The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom" (1999), 62 *Sask L Rev* 471 at para 90 [Stack].

dispute resolution processes and class action lawsuits eventually led to the Indian Residential Schools Settlement Agreement, a part of which provided for the formation of the TRC.<sup>11</sup>

As Brant Castellano recalls, RCAP's report observed that in the search for reconciliation between peoples, it is critical for public institutions to take the lead in adopting a more respectful stance.<sup>12</sup> Leadership is necessary from our major institutions and this must certainly include the courts. One of the panel members charged with determining RCAP's terms of reference was former Supreme Court of Canada Chief Justice Brian Dickson. In 1990 Dickson CJ penned the decision in *R v Sparrow*,<sup>13</sup> the SCC's first discussion of reconciliation. Yet RCAP's understanding of the limits of judicial processes in effecting societal change is evident in its report. RCAP provided some keen analysis of the courts' jurisprudence on Aboriginal rights and foregrounded later SCC jurisprudence on the duty to consult and the language of reconciliation:

Whenever governments intend to exercise their constitutional powers to legislate or make policies that may affect Aboriginal peoples in a material way... they would be wise to engage first in a process of consultation ... .

There is no further need, if indeed there was ever a need, for unilateral government action. The treaty is still Aboriginal peoples' preferred model ... .

The role of the courts is limited in significant ways. They develop the law of Aboriginal and treaty rights on the basis of a particular set of facts before them in a case. They cannot design an entire legislative scheme to implement self-government. Courts must function within the parameters of existing constitutional structures; they cannot innovate or accommodate outside these structures. They are also bound by the doctrine of precedent to apply principles enunciated in earlier cases in which Aboriginal peoples had no representation and their voices were not heard. For these reasons courts can become unwitting instruments of division rather than instruments of reconciliation ... .

Participation in the courts requires Aboriginal people to plead their cases as petitioners in a forum of adversaries established under Canadian law.<sup>14</sup>

Nonetheless, over the last half century since it became legal for Indigenous peoples to hire lawyers to represent them,<sup>15</sup> the courts have been an important venue for the assertion of Indigenous rights in Canada.

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<sup>11</sup> See Kim Stanton "Canada's Truth and Reconciliation Commission: Settling the Past?" (2011) 2:3 International Indigenous Policy Journal, online: <ir.lib.uwo.ca/iipj/vol2/iss3/2/> [perma.cc/F9EH-MY9R].

<sup>12</sup> Marlene Brant Castellano, "Renewing the Relationship: A Perspective on the Impact of the Royal Commission on Aboriginal Peoples" in Aboriginal Rights Coalition, *Blind Spots*, *supra* note 5 at 12. Marlene was RCAP's co-director of research.

<sup>13</sup> *R v Sparrow* [1990] 1 SCR 1075.

<sup>14</sup> RCAP Report, *supra* note 4, Vol. 1, Introduction, "Opening the Door" <[http://www.collectionscanada.gc.ca/webarchives/20071124125216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg1\\_e.html#0](http://www.collectionscanada.gc.ca/webarchives/20071124125216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg1_e.html#0)>.

<sup>15</sup> The *Indian Act* was amended in 1926 to make it illegal for a lawyer to receive fees to represent an Indian or a band to commence claims against the Crown. See Public Inquiry into the Administration of Justice and Aboriginal People: A C Hamilton & Murray Sinclair, Commissioners, *Report of the Aboriginal Justice Inquiry of Manitoba*

## B. THE SUPREME COURT'S CONCEPTION OF RECONCILIATION

The SCC has now presided over several decades of litigation regarding Aboriginal rights and title—such cases as *White and Bob*, *Calder*, *Guerin*, and *Sparrow* are now part of the Canadian legal canon.<sup>16</sup> Walters credits RCAP with having “reintroduced reconciliation into Canadian political discourse,”<sup>17</sup> since the Court’s use of “reconciliation” in the *Van der Peet* trilogy of decisions coincided with the release of the 1996 report. However, as noted above, the Court’s first discussion of reconciliation came in the *Sparrow* decision in 1990. McNeil asserts that:

The notion of reconciliation as a legal concept affecting the relationship between the Aboriginal peoples of Canada and the Crown appears to have originated with recognition and affirmation of Aboriginal and treaty rights by s.35(1) of the *Constitution Act, 1982*. In its first decision interpreting and applying s. 35(1), the Supreme Court of Canada, in the unanimous judgment delivered by Dickson CJ and LaForest J in *Sparrow*, said this:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts Aboriginal rights. Yet, we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, *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.*<sup>18</sup>

The SCC then enunciated what is known as the *Sparrow* test for justification of infringement of Aboriginal rights, requiring the federal government to prove both a valid legislative objective and respect for the Crown’s fiduciary obligations to Aboriginal peoples. McNeil notes: “The concept of reconciliation that the Supreme Court had in mind in *Sparrow* therefore seems to relate to the impact of constitutional recognition and affirmation of Aboriginal and treaty rights on the legislative authority of the Parliament of Canada.”<sup>19</sup>

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(Winnipeg: Province of Manitoba, 1991) at 70. Between 1927 and 1951 the *Indian Act* prohibited the soliciting of funds to advance “Indian claims” of any kind without official permission.

<sup>16</sup> *R v White and Bob* (1964), 50 DLR (2d) 613 (BCCA); aff’d (1965), 52 DLR (2d) 481 (SCC); *Calder v British Columbia (Attorney-General)*, [1973] SCR 313; *Guerin v The Queen*, [1984] 2 SCR 335; *Sparrow*, *supra* note 13.

<sup>17</sup> 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 at 176 [Walters, “The Jurisprudence of Reconciliation”].

<sup>18</sup> Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2:1 Indigenous LJ 1 at 2 [emphasis McNeil’s] [McNeil]. Section 35 recognizes and affirms the “existing [A]boriginal and treaty rights of the [Aboriginal] peoples of Canada.”

<sup>19</sup> *Ibid.*

A trilogy of cases related to Aboriginal commercial rights contained the SCC's next major use of the concept of reconciliation.<sup>20</sup> Dickson CJ had retired from the Court in 1990 and in *Van der Peet*, Chief Justice Lamer discussed the purpose of the recognition of Aboriginal and treaty rights in the Constitution:

[W]hat 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. The substantive rights which fall within the provision must be defined in light of this purpose; 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.<sup>21</sup>

Barsh and Henderson refer to the SCC's conception of reconciliation in *Van der Peet* as a "doctrine plucked from thin air."<sup>22</sup> Despite RCAP issuing two reports the year before on the nature of the Crown-Aboriginal relationship, which spoke in terms of "partnership" and "co-existence," they note that the Chief Justice did not refer to RCAP's views on the matter. They conclude: "The *Van der Peet* test entrenches European paternalism because the courts of the colonizer have assumed the authority to define the nature and meaning of Aboriginal cultures."<sup>23</sup> The dissent of Justice McLachlin and Justice L'Heureux-Dubé in *Van der Peet* found that Lamer CJ's interpretation was too narrow and that the constitutional nature of Aboriginal rights requires that they be construed broadly.<sup>24</sup> Chief Justice Lamer's interpretation departed from the more generous interpretation of section 35 established in *Sparrow*.

The next landmark Aboriginal rights case, *Delgamuukw*, wended its way through the courts for thirteen years until the Supreme Court's decision in 1997.<sup>25</sup> This was a legal claim for ownership and self-governance over 58,000 square kilometres of land in British Columbia. The SCC's judgment addressed Aboriginal title but did not allocate ownership. Instead, it called for a new trial, as noted in Lamer CJ's iconic passage:

By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and settle their dispute through the courts ... . 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 ... the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.<sup>26</sup>

This is a continuation of the view expressed in *R v Gladstone* in 1996 by the Chief Justice that the Crown is sovereign over all of Canada:

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<sup>20</sup> *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]. The other two cases were *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672 and *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*].

<sup>21</sup> *Ibid*, *Van der Peet*, at para 31.

<sup>22</sup> Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 999.

<sup>23</sup> *Ibid* at 1002.

<sup>24</sup> *Van der Peet*, per McLachlin J at para 231ff; and per L'Heureux-Dubé J at para 142ff.

<sup>25</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>26</sup> *Ibid* at para 186.

Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. 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.<sup>27</sup>

Of course this approach does not account for self-determination of Indigenous peoples. Indeed the Chief Justice stated in *Delgamuukw*:

The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.<sup>28</sup>

To some degree, this failure of the parties to provide the Court with submissions on self-government simply illustrates the broader societal failure to address the central question of Indigenous sovereignty. If a broader dialogue and recognition of sovereignty were to permeate and prevail in discussions of title between the Crown and Indigenous nations, then the submissions in any given case would likely reflect that acknowledgement. Unfortunately, the colonial narrative has persisted for so long in Canadian legal institutions that it has often obscured the real parameters of claims. Indigenous peoples are not seeking “Aboriginal title” and “self-government”; they are seeking Canadian legal recognition as peoples on their own territory, over which they are entitled to govern. They do so because Canadian governments and companies will not recognize the Indigenous laws in place governing those territories. Without this context, judges are operating on a set of principles that will always produce an unsatisfactory outcome. The courts’ version of reconciliation will necessarily be lacking in depth and, critically, truth.

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<sup>27</sup> *Gladstone*, *supra* note 20 at para 73[emphasis in original].

<sup>28</sup> *Delgamuukw*, *supra* note 25 at para 171.



It is notable that Lamer CJ references the work of RCAP in *Delgamuukw* yet chooses not to rely upon it as evidence. While the RCAP report relied upon exhaustive evidence from testimony and scholarly research, like many royal commissions, its conclusions are not uniformly accepted as factual evidence in courts of law. Without a doubt, the TRC's report will similarly be challenged as evidence by litigants who wish to prevent its conclusions from gaining traction in court. Stack notes that various courts have struggled with whether to view RCAP's findings as evidence or as authority. Certainly Crown counsel have argued the latter.<sup>29</sup> While noting that Justice Abella readily accepted RCAP's conclusions in her dissenting judgment on a residential schools case,<sup>30</sup> Stack observed that:

In contrast, the British Columbia Supreme Court in *F.A. v. Henley* found the Report to be inadmissible. The Court found that “the Report cannot be admitted to prove the truth of any conclusions stated by the Commission.” The Court also ruled that the facts which the Report purportedly established were not beyond controversy.<sup>31</sup>

Even where RCAP's work is adopted by the courts, the interpretation applied to it is sometimes discouraging. Justice Binnie's concurring judgment in *Mitchell v MNR* relies upon RCAP's concept of “merged sovereignty”:

The modern embodiment of the “two-row” wampum concept, modified to reflect some of the realities of a modern state, is the idea of a “merged” or “shared” sovereignty. “Merged sovereignty” asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. ... If the principle of “merged sovereignty” articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.<sup>32</sup>

It is clear that Binnie J read the RCAP report and was influenced by its conclusions.<sup>33</sup> However, his reading of reconciliation still cleaves to the notion that Indigenous peoples must reconcile themselves to a loss of sovereignty. He relies upon RCAP's historical review to reject the assertion of Mohawk autonomy within “the broader framework of Canadian sovereignty.”<sup>34</sup>

The RCAP report is in fact referenced in various court decisions, including *Delgamuukw*, but the SCC's conception of reconciliation remains at odds with that expressed in RCAP. As noted by Borrows, “[f]or the Court, colonialism is a justifiable infringement of Aboriginal title,” but, “[c]alling colonization ‘infringement’ is an immense understatement.”<sup>35</sup>

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<sup>29</sup> Stack, *supra* note 10 at para 29.

<sup>30</sup> *Ibid* at para 30, citing *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* 2005 SCC 60 at paras 72–73.

<sup>31</sup> *Ibid* at para 30, citing *Aksidan et al v Henley et al* 2006 BCSC 1008 per Halfyard J at para 57, footnotes omitted.

<sup>32</sup> *Mitchell v MNR* 2001 SCC 33, Binnie J, at paras 129–130 [*Mitchell*].

<sup>33</sup> He also cites the RCAP Report in *McDiarmid Lumber v God's Lake First Nation* 2006 SCC 58 at various points in his dissenting reasons.

<sup>34</sup> *Mitchell*, *supra* note 32 at para 113.

<sup>35</sup> John Borrows, “Aboriginal Peoples After RCAP” (2001) 46 McGill LJ 615 at 648.

Indeed, according to Borrows, “[c]ourts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.”<sup>36</sup>

The approach to reconciliation articulated by Lamer CJ in *Delgamuukw* is referred to by Walters as “a one-sided or mechanical way or as just another way of balancing competing interests.”<sup>37</sup> However, this concept of reconciliation became woven into further SCC judgments in the ensuing years.<sup>38</sup> While according to Jung: “the Supreme Court has interpreted reconciliation as an obligation to reconcile Canadian and aboriginal legal systems,”<sup>39</sup> this is perhaps too generous a view of the Court’s decision in *Delgamuukw*. Rather, the SCC saw reconciliation as a process of recognizing that Indigenous societies pre-existed Crown sovereignty, while simultaneously subjecting their rights to limits that make them consistent with the goals of the larger Canadian society of which they are now a part.

Despite Jung’s suggestion that the Court’s conception of reconciliation as enunciated in *Delgamuukw* should be imported into the transitional justice framework, there is much in these decisions that warrants caution.<sup>40</sup> The later “duty to consult” cases such as *Haida Nation v British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*<sup>41</sup> provide a more positive approach to reconciliation insofar as they seem to suggest that it is not simply Indigenous peoples that must reconcile themselves to the assertion of Crown sovereignty, but rather that Crown sovereignty may not be legitimate unless the Indigenous and non-Indigenous peoples in question have made a treaty.<sup>42</sup>

A shift is evident in these duty to consult cases (*i.e.*, *Haida Nation* and *Taku River*); now Chief Justice Beverley McLachlin describes reconciliation as a process flowing from section 35 rights. Under her leadership, the Supreme Court developed the concept of the honour of the Crown and deepened the government’s duty to consult with First Nations about land use in their traditional territories. In *Haida Nation*, the Crown argued that there is no legal duty to consult or accommodate a First Nation with respect to land use until the scope and content of their Aboriginal title is finally determined. This approach would allow the Crown to draw out at

<sup>36</sup> *Ibid* at 660–661.

<sup>37</sup> Walters, “The Jurisprudence of Reconciliation,” *supra* note 17 at 190.

<sup>38</sup> This jurisprudence has been well-documented by others and will not be reviewed here. See McNeil, *supra* note 18 and D’Arcy Vermette “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples” (2011) 29 Windsor YB Access Just 55.

<sup>39</sup> Courtney Jung, “Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society” *Social Science Research Network* (8 April 2009), online: <ssrn.com/abstract=1374950> at 23 [perma.cc/99W3-SS9H].

<sup>40</sup> *Ibid* at 23. See *Delgamuukw*, *supra* note 25 at para 165. For a thoughtful analysis of the Court’s conception of section 35 rights and the limits of its approach to reconciliation, see Minnawaanagogiizhigook (Dawnis Kennedy), “Reconciliation without Respect? Section 35 and Indigenous Legal Orders” in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007).

<sup>41</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*].

<sup>42</sup> See Mark D Walters, “The Morality of Aboriginal Law” (2006) 31 Queen’s LJ 470 [Walters, “The Morality of Aboriginal Law”] at 501 and Walters, “The Jurisprudence of Reconciliation,” *supra* note 17 at 178. See also Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85:2 Can Bar Rev 255 at 282 in which he proposes “Principles of Reconciliation” that “posit that historical aboriginal title has been transformed into a *generative right*, which can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties.” And see Brian Slattery’s influential argument on the Court’s developing jurisprudence on Aboriginal title, “The Generative Structure of Aboriginal Rights,” (2007) 38:2 Supreme Court Law Review 595.

length the legal process to determine Aboriginal title. This argument was rejected by the Court in a unanimous judgment delivered by McLachlin CJ:

[T]he duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.<sup>43</sup>

This shift from Lamer CJ's enunciation of justifiable infringement in *Delgamuukw* to a greater preference for negotiated solutions<sup>44</sup> is encouraging. Yet this formulation of reconciliation is still problematic—while it is of course a process, the Court inherently accepts the legitimacy of the initial assertion of sovereignty by the Crown, which seems to boil down to the idea that “yes, we are taking your land, but fairly.”<sup>45</sup>

I have previously suggested that if the concept of reconciliation found in the Supreme Court's jurisprudence were to inform the TRC process in any way, it is the approach found in these later cases, emphasizing elements of respect, mutuality, and reciprocity, which would be a more fruitful basis for discussions of reconciliation.<sup>46</sup> Walters suggests that this form of “reconciliation through negotiation” is “about establishing the legal and moral authority of the Canadian state.”<sup>47</sup>

Although there has been a shift over time in the Court's approach to Aboriginal title and changes in Chief Justices from Dickson to Lamer to McLachlin, the Court's jurisprudence with respect to reconciliation remains fundamentally problematic given its basis in an assumption of Crown sovereignty.<sup>48</sup> However, can the courts be expected to provide a robust roadmap for reconciliation when the broader Canadian society continues to invest in a colonial narrative that suggests that Canada legitimately exerted sovereignty and that Indigenous peoples should rightly be subsumed under Canada's domain? As noted by Land:

Justice in the courts has not resulted in political changes. Five years after [RCAP's] report and four years after the landmark *Delgamuukw* decision on Aboriginal title, government policy on Aboriginal land rights has not changed in any significant way

... .

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<sup>43</sup> *Haida Nation*, *supra* note 41 at para 32.

<sup>44</sup> See McNeil *supra* note 18 at 12.

<sup>45</sup> See Felix Hoehn's exploration of how this jurisprudence of the Court can move us toward a “sovereignty paradigm,” a way to reconcile pre-existing Indigenous sovereignty with Crown sovereignty in a manner premised on the equality of all peoples: *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: U of S Native Law Centre, 2012).

<sup>46</sup> Kim Stanton, “Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies,” (SJD diss., University of Toronto, 2010); online: <tspace.library.utoronto.ca/handle/1807/24886> [perma.cc/K5VN-2GCQ].

<sup>47</sup> Walters, “The Jurisprudence of Reconciliation,” *supra* note 7 at 186.

<sup>48</sup> See McNeil's exploration of the latter two Chief Justices' approaches, *supra* note 18.

There remains a deep denial in Canadian society about the historic and contemporary systematic destruction of Aboriginal peoples and cultures in this land. After five hundred years, we still live a lie in Canadian society. We try to remain willfully oblivious to the destruction of Aboriginal communities. We still maintain that these issues are someone else's responsibility and have nothing to do with us. ... Confronting what has been called "Canada's original sin"—the devastating impact of colonization, historically, and currently—is a litmus test of the Canadian public's commitment to just relationships.<sup>49</sup>

Nonetheless, the SCC continues to make decisions that walk the difficult line between acknowledgement of Aboriginal and treaty rights and acceptance of Crown sovereignty, more recently in its decision in *Tsilhqot'in*.

## 1. THE *TSILHQOT'IN* DECISION

In *Tsilhqot'in Nation v. British Columbia*, the SCC affirms a trial decision that engaged with considerable effort in a discussion of reconciliation. The preference expressed by both RCAP and the Court for negotiated settlements is picked up by Justice Vickers in the trial decision in *Tsilhqot'in*. The entire concluding section of his 2007 decision focuses on reconciliation and implores the parties to negotiate a settlement rather than continue to an appeal.<sup>50</sup> Justice Vickers expressed considerable angst about the fact that the court process simply cannot do justice and urged the parties to negotiate:

Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.<sup>51</sup>

McNeil's analysis of Vickers J's decision identifies the perplexing situation that judges find themselves in when required to adjudicate assertions of sovereignty, or "land claims" after governments have failed to negotiate treaties:

The "invidious position" courts have been placed in as a result of these failures is this: when claims such as this come to court, judges are faced with the task of trying to achieve reconciliation of the competing interests ... but are unable to do so, given the constraints of the law and the inappropriate adversarial context in which judges are obliged to make their decisions.<sup>52</sup>

<sup>49</sup> Lorraine Land, "Gathering Dust or Gathering Strength: What Should Canada Do with the Report of the Royal Commission on Aboriginal Peoples?" in *Blind Spots*, *supra* note 5 at 61-62.

<sup>50</sup> His advice on this point proved to be in vain, as the parties continued their battle in the courts for another seven years. The BCCA decision was released in 2012 and the SCC's in 2014.

<sup>51</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, at para 1338.

<sup>52</sup> Kent McNeil. "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia*" (2010) 8:1 *Indigenous LJ* 7 at 13.

Justice Vickers made it clear to the parties that his purpose in setting out in considerable detail his views on factual matters (that he did not strictly speaking need to provide) was to “force Canada and British Columbia to modify their views on Aboriginal title, and push the parties into honourable negotiations that would result in genuine reconciliation, a goal unattainable in court.”<sup>53</sup> Despite this exhortation, the case made its way to the SCC. Chief Justice McLachlin penned the Court’s unanimous decision in *Tsilhqot’in*.<sup>54</sup> She noted that:

The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a “necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part.”<sup>55</sup>

She recounted the Court’s application of *Delgamuukw* in *Haida Nation*, noting that: “The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims ... . The governing ethos is not one of competing interests but of reconciliation.”<sup>56</sup> However, as McNeil notes, the *Haida* and *Tsilhqot’in* decisions contain a contradiction: “The pre-existing sovereignty of the Indigenous nations is acknowledged, and yet the Crown in some sense was able to acquire sovereignty over them and their territories unilaterally by discovery or assertion.”<sup>57</sup> Indeed, McNeil acknowledges that Indigenous scholars Tracey Lindberg and Felix Hoehn have demonstrated that “Canadian law faces a crisis over the unresolved tension between pre-existing Indigenous sovereignty and asserted Crown sovereignty.”<sup>58</sup>

Despite the “courageous” shift that McLachlin CJ initiates in *Tsilhqot’in*,<sup>59</sup> the colonial narrative is difficult to escape—assertions of sovereignty are characterized as “land claims” which suggests that they are merely unproven allegations, thus ascribing a character to the Indigenous position from the outset, even in this decision that sent shudders through resource extraction companies and their legal counsel. References to “pre-sovereignty Aboriginal interests”<sup>60</sup> further reveal the difficulty in avoiding this colonial narrative. Discussing this basic issue of framing and language in terms of their outflow from colonialism is perhaps viewed as radical in mainstream Canadian legal circles, but it is a necessary conversation if we are sincere about reconciliation, however conceived. We simply cannot fail to interrogate the assumptions implicit in the language used in the courts to address these cases that arise out of fundamentally different views of how this country was formed, how it has prospered, and how we can proceed in a just way.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 [*Tsilhqot’in SCC*].

<sup>55</sup> *Ibid* at para 16.

<sup>56</sup> *Ibid* at para 17.

<sup>57</sup> Kent McNeil, “Review Essay: The Doctrine of Discovery Reconsidered: Reflecting on *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and *Reconciling Sovereignties, Aboriginal Nations and Canada*, by Felix Hoehn” (2016) 53 *Osgoode Hall LJ* 699 at 721.

<sup>58</sup> *Ibid* at 727.

<sup>59</sup> *Ibid* at 728. See also Felix Hoehn, “Back to the Future – Reconciliation and Indigenous Sovereignty After *Tsilhqot’in*” (2016) 67 *UNBLJ* 109 at 109 [Hoehn], citing John Borrows, “The Durability of Terra Nullius: *Tsilhqot’in Nation v British Columbia*” (2015) 48 *UBC L Rev* 701 at 703 [Borrows]; and Brenda Gunn, “Case Note: *Tsilhqot’in Nation v British Columbia* 2014 SCC 44” (2014) 8:14 *Indigenous L Bulletin* 27.

<sup>60</sup> *Tsilhqot’in SCC*, *supra* note 54 at para 32.

Notwithstanding the difficulties implicit in the terminology regularly used by litigants, there is some hope to be found in the Chief Justice's view that defects in the pleadings in such cases should not bar the claim:

... cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.<sup>61</sup>

The SCC does firmly reject the applicability of the doctrine of *terra nullius* in what is now Canada, but simply accepts that the Crown has “underlying” title, while acknowledging that this title is “burdened” by an Aboriginal interest in land.<sup>62</sup> The Court uses the concept of reconciliation as a way to bridge the pre-existence of Aboriginal societies in what is now Canada with the reality of the Canadian state's assertion of sovereignty.<sup>63</sup> As in its previous decisions, particularly *Delgamuukw*, the SCC in *Tsilhqot'in* notes that the government can encroach upon Aboriginal title if there is a public interest reason for doing so, stating that this is “a process of reconciling Aboriginal interests with the broader public interests under s. 35.”<sup>64</sup> This of course ignores the public interest of Indigenous peoples, which in this era of pipeline expansion, fracking, and other resource extraction is increasingly arguably converging with the interests of non-Indigenous peoples in protecting the water, land, and air for future generations.

The Chief Justice does state that: “Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.”<sup>65</sup> However, this presumes equal ability to assert and defend sovereignty when the government likely holds much more of the power than any First Nation in any given court battle. Although the Crown has a procedural duty to consult prior to carrying out an action contrary to a people's right to Aboriginal title, the efficacy of efforts to consult are varied and frequently inadequate, and it requires resources to challenge the Crown's actions. Many First Nations lack the resources to make such challenges.<sup>66</sup> Furthermore, the Court's unconscious use of a variant of the term “reconciliation” in its use of the word “irreconcilable” here suggests that the real conflict underlying the reconciliation debate is what use is each side going to make of the land, and which use is going to benefit more people? This insight into the underlying motivation for discussing reconciliation makes it all the more important to insert into the notion

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<sup>61</sup> *Ibid* at para 23.

<sup>62</sup> *Ibid* at para 69.

<sup>63</sup> *Ibid* at para 81, citing *Gladstone*, *supra* note 20 at para 72. For critical explorations of the SCC's decision, see Michael McCrossan & Kiera L Ladner, “Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power” (2016) 49:3 Canadian Journal of Political Science 411; Borrows, *supra* note 59; Hoehn *supra*, note 59.

<sup>64</sup> *Tsilhqot'in* SCC, *supra* note 54 at para 71.

<sup>65</sup> *Ibid* at para 74.

<sup>66</sup> Borrows, *supra*, note 59 at 730–731.

of “public interest” that there is independent value in respecting the self-determination of Indigenous peoples, sometimes at a fairly high monetary cost.<sup>67</sup>

The Court’s discussion of section 35 in the *Tsilhqot’in* decision is noteworthy for its return to the *Sparrow* decision:

Section 35 of the *Constitution Act, 1982* represents “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights”... . It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.<sup>68</sup>

The framework for analysis in *Sparrow* is at least closer to a just vision of how we might proceed. However, the Court’s jurisprudence since *Sparrow* has enabled considerable incursions into the Aboriginal rights deemed to be “existing,” particularly those enunciated by Lamer CJ in *Delgamuukw*. Although McLachlin CJ for the Court in *Tsilhqot’in* states that the limits imposed by section 35 on governments “protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of broader society,”<sup>69</sup> in practice this comes about only after protracted legal struggles and enormous expenditure of resources.

### C. THE TRUTH AND RECONCILIATION COMMISSION

The Court’s conception of reconciliation is completely different from that of the TRC. The reconciliation process has been (appropriately) framed by the TRC as a mutual process to be engaged in by Indigenous and non-Indigenous peoples alike; it cannot be a one-sided process. One commentator notes that reconciliation on a national level must be at least in part a political process that includes acknowledgement of political and legal rights of Indigenous peoples.<sup>70</sup> The concept of reconciliation is a bit amorphous, in no small part because it will mean different things to different people. In the transitional justice literature, the concept of reconciliation refers to repairing “torn relationships between ethnic, religious, regional, or political groups, between neighbours, and between political communities. In short, societal healing.”<sup>71</sup>

Regan notes that while in Australia reconciliation has been a social movement, in Canada it has largely been a legal remedy,<sup>72</sup> primarily concerned with reconciling Aboriginal and Crown land title. Since the inauguration of the TRC in Canada there has arguably been some change in this assessment. The TRC process, particularly toward the end of its mandate in 2015, gathered momentum in some Canadian and Indigenous communities, as evidenced by marches in Vancouver and Ottawa that attracted thousands of Indigenous and non-Indigenous people.

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<sup>67</sup> I acknowledge with gratitude a conversation with Mary Eberts, who noted this use of “irreconcilable” and enunciated the meaning ascribed to its use here.

<sup>68</sup> *Tsilhqot’in* SCC, *supra* note 54 at para 118, citing *Sparrow* *supra*, note 16, at para 1105.

<sup>69</sup> *Tsilhqot’in* SCC, *supra* note 54 at para 139.

<sup>70</sup> Chris Cunneen, “Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights” in Heather Strang & John Braithwaite, eds, *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001) 83 at 90.

<sup>71</sup> Hayner, *supra* note 3 at 133.

<sup>72</sup> Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010) at 58.

The TRC could not reasonably be expected to reconcile on its own the entire relationship between Indigenous and non-Indigenous peoples in Canada. On the face of it, the TRC's mandate was limited to creating a historical record of the residential schools system and educating the public about the residential schools legacy. As Llewellyn has observed, the TRC's mandate did not provide much detail with respect to the reconciliation aspect of its work.<sup>73</sup> The mandate refers to healing the relationship between peoples:

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 (residential schools) students, their families, communities, religious entities, former school employees, government and the people of Canada.<sup>74</sup>

Even the opening line to the preamble to Schedule N, the TRC's terms of reference, suggests this idea that the government would simply like to close the door on the past and move on: "There is an emerging and compelling desire to put the events of the past behind us."<sup>75</sup> This approach leaves us in danger of repeating the travesty of the policy that brought about the residential schools legacy in the first place—the desire to get to a point where there is no Indian question.<sup>76</sup>

The means of reconciliation as envisioned by the TRC include truth telling, acknowledgement of past wrongs, reparations for the victims, addressing the structural causes of the wrongs, and a rebalancing between societal groups to prevent the harms from recurring. When he was Lieutenant Governor of Ontario, James Bartleman, warned that unless Canadian society as a whole signals that it is serious about according equal economic and social rights to Indigenous Canadians, the TRC's Commissioners will find that "they have been shod with shoes

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<sup>73</sup> Jennifer Llewellyn, "Bridging the Gap Between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission" in Marlene B. Castellano, Linda Archibald & Mike DeGagné, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 185 at 186.

<sup>74</sup> The *Indian Residential Schools Settlement Agreement* (the "Settlement Agreement") was concluded May 8, 2006, following an Agreement in Principle ("AIP") signed November 23, 2005. Schedule N of the Settlement Agreement, "Mandate for the Truth and Reconciliation Commission" (Schedule E of the AIP), sets out the terms of a truth commission, which forms part of the Settlement Agreement.

<sup>75</sup> *Ibid.* Indeed, Dale Turner notes that the TRC focus on reconciliation elides the idea of implementing a nation-to-nation political relationship as urged by RCAP: "On the Idea of Reconciliation in Contemporary Aboriginal Politics" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: U of T Press, 2013) at 109.

<sup>76</sup> See Georges Erasmus, Third LaFontaine-Baldwin Symposium Lecture (Vancouver, 2002). Published as "Conversation Three" in Rudyard Griffiths, ed, *A Dialogue on Democracy in Canada: Volume 1 of the LaFontaine-Baldwin Lectures* (Toronto: Penguin Canada, 2002). Scott's statement was:

I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone... Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.

Ottawa, National Archives of Canada, (RG 10, vol. 6810, file 470-2-3, vol. 7, at 55 (L-3) and 63 (N-3)). Thanks to Amar Bhatia for this insight.



of clay. There can be no true reconciliation and Canada cannot claim it is a just and equal society unless economic and social equality is accorded to Aboriginal people.”<sup>77</sup>

The apology from Canadian Prime Minister Stephen Harper in 2008 was a critically important step for survivors and for bringing the residential schools legacy to the attention of Canadians, but it was only a step.<sup>78</sup> The national leadership on this issue must continue in a visible way. During the course of the TRC’s mandate, such leadership was seriously lacking from the government side, as highlighted by the government’s refusal to provide documents to the TRC and forcing the TRC to expend resources in going to court to obtain orders for production of the documents.<sup>79</sup> The TRC had an inspiring and extraordinary leader in Chief Commissioner Murray Sinclair, and the TRC produced powerful recommendations,<sup>80</sup> but without ongoing leadership from other major institutions in Canada, reconciliation will remain elusive.

The Harper government provided a lacklustre response to the TRC’s interim report. In contrast, the government of Justin Trudeau was elected in 2015 on a platform that included a promise to implement the TRC’s Calls to Action.<sup>81</sup> It was the Trudeau government that received the final report in December 2015, declaring its intention to implement the Calls to Action that relate to the federal government and to establish a nation-to-nation relationship with Indigenous peoples.<sup>82</sup> While the Trudeau government’s approach marked a departure from that of the Harper government, to date, their adherence to the initial bold intentions has been uneven, and there remains a long way to go before the nation-to-nation relationship discussed in the RCAP report becomes a reality.<sup>83</sup>

Aside from the frustrations of the lack of a political response to the residential schools legacy and the dissatisfaction with the other legal mechanisms available, a further reason that survivors sought a truth commission in the residential schools negotiations was the widespread ignorance amongst non-Indigenous Canadians about the residential schools system and its

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<sup>77</sup> James Bartleman, “The Importance of Truth Telling in a Just Society” (Lecture delivered 15 June 2007, at “Preparing for the Truth Commission: Sharing the Truth about Residential Schools. A Conference on Truth and Reconciliation as Restorative Justice,” University of Calgary, June 15, 2007) [unpublished].

<sup>78</sup> The Prime Minister’s apology was issued on 11 June 2008, online <aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> [perma.cc/5PAF-GFZ4].

<sup>79</sup> Canadian Press. “Ottawa ordered to provide all residential schools documents: Truth and Reconciliation Commission took federal government to court over denial of millions of documents” (30 January 2013) online: <cbc.ca/news/politics/ottawa-ordered-to-provide-all-residential-schools-documents-1.1345892> [perma.cc/7RM3-LW9N].

<sup>80</sup> Truth and Reconciliation Commission of Canada, “Calls to Action” (2015) online: <trc.ca/websites/trcinstitution/File/2015/Findings/Calls\_to\_Action\_English2.pdf > [perma.cc/322K-XSBP] [Calls to Action].

<sup>81</sup> Press Release, Liberal Party of Canada “Liberals Call for Full Implementation of Truth and Reconciliation Commission Recommendations” (2 June 2015) <liberal.ca/liberals-call-for-full-implementation-of-truth-and-reconciliation-commission-recommendations/> [perma.cc/BS5K-7528].

<sup>82</sup> Justin Trudeau “Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission” (15 December 2015) <pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission> [perma.cc/2WAW-9VAP].

<sup>83</sup> See for example, Andrew Kurjata, “Justin Trudeau accused of ‘bulldozing Aboriginal rights’ with Site C” *CBC News* (23 September 2016) <cbc.ca/news/canada/british-columbia/justin-trudeau-accused-of-bulldozing-aboriginal-rights-with-site-c-1.3776792> [perma.cc/TE9A-HM9T]; CBC The Current, “Indigenous leaders give Trudeau government failing grade on delivering promises” (25 January 2017) <cbc.ca/radio/thecurrent/the-current-for-january-26-2017-1.3951896/indigenous-leaders-give-trudeau-government-failing-grade-on-delivering-promises-1.3951900> [perma.cc/XH8R-FMD6].

profound and continuing effect on Indigenous communities.<sup>84</sup> The advantage of a truth commission for combatting such ignorance is the ability to create an incontrovertible historical record and enable significant public education.<sup>85</sup> The TRC was tasked with creating a record of the residential schools system and its impacts.

Released in 2015, the TRC report added an important chapter to the redefinition of the Indigenous/non-Indigenous relationship in Canada, prompting some necessary conversations. A Symposium on Reconciliation in Ontario reported that:

Reconciliation between Indigenous and non-Indigenous peoples in Canada is not just about the legacy of residential schools. It is a multi-faceted process that restores lands, economic self-sufficiency, and political jurisdiction to First Nations, and develops respectful and just relationships between First Nations and Canada.<sup>86</sup>

The TRC Calls to Action offer a number of methods for engagement by Canada's political and legal institutions. Included in the TRC's recommendations is the framework for promoting reconciliation provided by international law, specifically the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>87</sup>

## II. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Canada was slow to ratify this comprehensive instrument adopted by the General Assembly in 2007, despite having had an active role in its drafting over a period of a couple of decades. Indeed, Canada was one of four states (the others being Australia, New Zealand and the United States) that opposed its adoption by the General Assembly. Eventually all four nations relented in their opposition to endorsing UNDRIP, but generally offered a qualified endorsement, noting its non-binding and "aspirational" character, as illustrated by Canada's November 2010 press release:

Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.<sup>88</sup>

International law is often viewed as persuasive but not determinative in Canadian courts and it is clear that the current Canadian government will seek to limit any application of this

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<sup>84</sup> Stanton, *supra* note 46.

<sup>85</sup> Kim Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry" (2012) 27:1 Canadian J of Law & Society 81 at 84.

<sup>86</sup> Symposium on Reconciliation in Ontario, Opportunities & Next Steps. *Report on Proceedings* (University of Toronto, National Centre for First Nations Governance: 4 March 2011) at 2.

<sup>87</sup> GA Res 61/295, UN GAOR, 61st Sess, UN Doc A/61/L.67 (2007) [UNDRIP]. See Calls to Action, *supra* note 81, #43 and #44.

<sup>88</sup> Canada. *Canada's Statement of Support on the United Declaration on the Rights of Indigenous Peoples*. 12 November 2010. online: < aadnc-aandc.gc.ca/eng/1309374239861/1309374546142 > [perma.cc/R8UV-9T3G].

most important international law instrument for Indigenous peoples. The Harper government was careful to note in the press release that UNDRIP “is a non-legally binding document that does not reflect customary international law nor change Canadian laws.”<sup>89</sup> It further took the opportunity to reiterate:

Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties. These concerns are well known and remain.<sup>90</sup>

Notwithstanding the government’s stated concerns with UNDRIP, the TRC called upon “federal, provincial, territorial, and municipal governments to fully adopt and implement [UNDRIP] as the framework for reconciliation.”<sup>91</sup> Further, the TRC called upon the federal government “to develop a national action plan, strategies, and other concrete measures to achieve the goals of [UNDRIP].”<sup>92</sup> These recommendations are the leading statements in the section of the TRC’s recommendations entitled “Reconciliation.” Following this, the TRC also urges the government to jointly develop a new Royal Proclamation of Reconciliation with Aboriginal peoples. The TRC also asserts that the new Royal Proclamation must:

- i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.
- ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
- iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
- iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.<sup>93</sup>

The Trudeau government initially stated that it would seek to comply with UNDRIP, but has since retreated from that position.<sup>94</sup> The government’s reluctance to adopt UNDRIP’s recognition of inherent Indigenous rights and the TRC’s confidence that UNDRIP offers the framework for reconciliation provide a starkly contrasting view of the way forward for the Indigenous/non-Indigenous relationship in Canada. The contrasting conceptions of reconciliation held by the Court and the TRC act as a metaphor for the difficulty with the Canadian situation—the two visions are based on fundamentally different narratives, worldviews, and mythologies.

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> Calls to Action, *supra* note 81, #43.

<sup>92</sup> Calls to Action, *supra* note 81, #44.

<sup>93</sup> Calls to Action, #45.

<sup>94</sup> Nancy McDonald, “The Liberals’ relationship with Indigenous communities sours” *Maclean’s* online: <macleans.ca/politics/liberals-relationship-with-indigenous-communities-sours/> [perma.cc/9CTA-CCD5].

One assumes dominance of the Canadian state while the other assumes resurgence of Indigenous cultures, nationhood, and sovereignty as evidenced by the Idle No More movement, and the increasing prominence of Indigenous voices in scholarship, politics and the arts.

### III. A SHIFT IN NARRATIVE IS NEEDED

Although there is some illustration (if not acknowledgement) of the differing conceptions in the general rhetoric regarding preference for negotiation/treaties over litigation/courts, the *Tsilhqot'in* case shows that the conceptions are in fact irreconcilable. That is, you cannot reconcile if your assertion of sovereignty continues to be challenged from the outset, as Indigenous sovereignty is challenged by the Canadian state in its court arguments; and you cannot assert sovereignty and “underlying” Crown title where no evidence of conquering exists. Until the narrative shifts from the colonial constructs that enable the Canadian state to continue to benefit from its presumed ownership of the lands and all their wealth here, reconciliation cannot occur. This is why Indigenous voices such as Alfred prefer to discuss restitution rather than reconciliation.<sup>95</sup>

The narrative shift that is required must come from a broader societal dialogue. While flawed, the Court’s references to reconciliation can contribute to this shift, along with processes such as commissions of inquiry and the TRC. This sort of change is slow in coming because it requires people, especially non-Indigenous people, to take a hard look at ourselves and our history and try to reflect honestly upon how we have built our society. Taking responsibility for how we have benefited from the mass human rights violations committed in our past is not easily done. However, as the RCAP report stated:

It is true, as Tom Siddon, a former minister of Indian affairs, has observed, that there can be no real change within the confines of the *Indian Act*. However, it is equally true that even if the *Indian Act* were repealed, there could be no real change without repeal of the attitudes and assumptions that have made legislation like the *Indian Act* and its precursors possible. A royal commission cannot make laws. It can inform and recommend, however. In that role, we can call attention to the factors, attitudes and continuing assumptions that brought about the *Indian Act* and that continue to prevent progress in moving away from the restrictive *Indian Act* vision.

Those factors are to be found in past assumptions and the shadows they have cast on present attitudes. They must be recognized for what they are and cast away as the useless legacy of destructive doctrines that are as inappropriate now as they were when first conceived.<sup>96</sup>

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<sup>95</sup> Taiaiake Alfred, “Restitution is the Real Pathway to Justice for Indigenous Peoples” in Gregory Younging, Jonathan Dewar & Michael DeGagné, eds, *From Truth to Reconciliation: Response, Responsibility and Renewal – Canada’s Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation, 2009) 179. See also John Amagoalik, “Reconciliation or Conciliation? An Inuit Perspective” in Shelagh Rogers, Mike DeGagné & Jonathan Dewar, eds, *Speaking My Truth: Reflections on Reconciliation & Residential School* (Ottawa: Aboriginal Healing Foundation, 2012) at 35.

<sup>96</sup> RCAP Report, *supra* note 4, Vol. 1, Part 2, Chapter 9 “The *Indian Act*.”

Usually truth commissions are mechanisms of transitional justice and it is generally thought that established democracies are non-transitional states. However, just as I argue that we need to disrupt the national narratives in which Canada is identified as a human rights defender, I argue that we must also rethink the idea of transitional justice. It is a measure of the western liberal bias of much transitional justice literature that established democracies are described as non-transitional. From the perspective of the peoples who have been oppressed by these democracies, this may not be the case.<sup>97</sup> Canada has waged a consistent and comprehensive attack upon the legal and political institutions of Indigenous peoples since prior to Confederation.<sup>98</sup> It is only in the last half century that First Nations have been able to reassert their voices and rebuild their societies.<sup>99</sup> Indigenous peoples are in a period of transition, therefore transitional justice mechanisms may be entirely appropriate for their passage into renewed sovereignty.

In addition to the idea that Indigenous legal institutions in Canada are transitional, many Indigenous communities question the legitimacy of Canada's governance over them. They argue that under international law, no government can be imposed upon a people without their consent; this would be a denial of their right of self-determination.<sup>100</sup> They argue that they never consented to be governed by the French, the British, the Americans or anyone else, and furthermore they were not conquered. As noted by Kennedy:

To establish respectful relations with Indigenous legal orders, Canadian law must renounce its previous attempts to deny the existence, relevance, and legitimacy of Indigenous law. It must acknowledge that such laws exist within dynamic legal orders that continue to operate in Indigenous communities. It must also recognize that these laws are integral to understanding what constitutes respectful relations between Indigenous and Canadian legal orders.<sup>101</sup>

The term "reconciliation" in the transitional justice literature is problematic in the Canadian context, since it implies that the parties were once whole, experienced a rift, and now must be made whole again. In colonial settings such as Canada, this is not the case. The relationship between Indigenous and settler peoples in Canada was one of nations encountering nations, where one gradually oppressed and marginalized the other. Indigenous peoples never agreed to the denial of their sovereignty, cultures or identities.<sup>102</sup> Indeed, as noted by Chief Justice McLachlin in *Haida Nation*: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered." Yet this statement by the Chief Justice is not representative of how the larger Canadian population views their history, and nor does it ultimately ground the Court's conception of reconciliation.

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<sup>97</sup> Thanks to Dawnis Kennedy for our discussion on this point.

<sup>98</sup> See Law Commission of Canada. *Justice Within: Indigenous Legal Traditions*. Discussion Paper, August 2006, at 11:

In spite of the importance of Indigenous laws in regulating the lives and affairs of Aboriginal peoples, their influence was greatly eroded following the enactment of the *Enfranchisement Act of 1869* and the *Indian Act* in 1876, embodying a policy of assimilation and imposing a foreign system of governance and laws.

<sup>99</sup> *Ibid* at 12: "Many Aboriginal communities today are actively revitalizing their legal traditions." See also Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007).

<sup>100</sup> RCAP Report, *supra* note 4, Vol. 2, "Restructuring the Relationship," chapter 1, section 2 "Governance."

<sup>101</sup> Kennedy, *supra* note 40 at 80.

<sup>102</sup> *Haida Nation*, *supra* note 41 at para 25.

## IV. CONCLUSION

As I have argued in the past, the TRC follows from a long list of Canadian commissions of inquiry that have each assisted with the development of increased understanding of the Indigenous and non-Indigenous relationship in Canada.<sup>103</sup> Some of these commissions (Marshall, Stonechild, Ipperwash) have had more direct impact on the court's treatment of Indigenous people with respect to criminal law. RCAP has arguably had an influence with respect to the court's treatment of Aboriginal title cases though the Court has not yet understood the underlying premise of RCAP's work. While it is too soon to measure any impact the TRC may have on the courts, the TRC has the potential to contribute to a change in the narrative arc of Canada's story:

Truth commissions are not so much concerned with the specifics of establishing the legal and institutional framework for a new political order as they are in serving to generate and consolidate new and distinctive conceptions of political morality that can henceforth inform the political culture.<sup>104</sup>

As stated by Commissioner Sinclair:

A commitment to change will also call upon Canadians to realize that reconciliation is not a new opportunity to convince Aboriginal people to "get over it" and become like "everyone else." That is, after all, what residential schools were all about and look how that went.

It is an opportunity for everyone to see that change is needed on both sides and that common ground must be found. We are, after all, talking about forging a new relationship, and both sides have to have a say in how that relationship develops or it isn't going to be new.

Canada's unilateral use of law to define and limit that relationship is a vessel that can no longer hold water, so a discussion between equals must occur.<sup>105</sup>

The words of RCAP are once again applicable:

We now have an unprecedented opportunity to learn from the mistakes of the past and to set out, both as governments and as peoples, in totally new directions. If Canada has a meaningful role to play on the world stage ... then it must first set its domestic house in order and devise, with the full participation of the federal

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<sup>103</sup> Stanton, *supra* note 46.

<sup>104</sup> Du Toit, André, "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition" in Robert Rotberg and Dennis Thompson, eds, *Truth v Justice: The Morality of Truth Commissions* (Princeton UP, 2000) 122 at 125.

<sup>105</sup> Murray Sinclair, "Opinion: Reconciliation not opportunity to 'get over it'" *CBC News* (18 April 2014) online: <[cbc.ca/news/aboriginal/reconciliation-not-opportunity-to-get-over-it-justice-murray-sinclair-1.2614352](http://cbc.ca/news/aboriginal/reconciliation-not-opportunity-to-get-over-it-justice-murray-sinclair-1.2614352)> [perma.cc/PXK4-R8TK].

government, the provinces and the Aboriginal peoples, a national policy of reconciliation and regeneration of which we can all be proud.<sup>106</sup>

Despite some positive developments with respect to non-Indigenous society beginning to awake to our responsibility with respect to repairing the damage our country has wrought, there are still considerable distances to travel toward an honest assessment of ourselves as a nation. Regan's disquiet on this is instructive:

At the heart of my misgivings was a growing realization that this reconciliation discourse was actually a living testament to the ongoing dysfunction, violence, denial, and unequal power that characterizes Indigenous-settler relations.<sup>107</sup>

It is our responsibility as non-Indigenous lawyers, scholars, and citizens to name myths for what they are and to do our best not to compound the errors of our leadership. We must start being more accurate and careful with our use of terminology whether making submissions to courts, or writing opinion pieces, and scholarly articles. We must continue to urge our professional and regulatory bodies, our universities, communities, municipalities, and provincial and federal governments to adopt the TRC's recommendations.<sup>108</sup>

While the TRC was forced to resort to the courts to seek enforcement of the Settlement Agreement, it does not appear that the TRC has had a particular impact on jurisprudence as of yet. It is possible that the TRC's conception of reconciliation could inform jurisprudence eventually. If some of the other TRC recommendations take hold, such as cultural competency training for lawyers,<sup>109</sup> and mandatory Aboriginal law courses in Canadian law schools,<sup>110</sup> we may have a generation of legal counsel who not only use decolonized language in making their submissions but who eschew the courts altogether and make legitimate efforts to negotiate with Indigenous peoples. The success of transitional justice processes cannot be measured in the short term. They must be viewed in terms of their contribution to the changing of a nation's narrative about itself. Such change will never occur quickly enough but it must certainly occur if reconciliation is to have any hope.

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<sup>106</sup> RCAP Report, *supra* note 4, Vol. 1, Part 1, Section 2 "The Role of the Courts."

<sup>107</sup> Regan, *supra* note 72 at 113.

<sup>108</sup> To date there have been a number of efforts to adopt and implement the TRC Calls to Action within Canadian educational, regulatory and other institutions. For example, the Federation of Law Societies of Canada struck a working group to develop a response to the Calls to Action online: < [flsc.ca/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/) > [perma.cc/5LJ4-2PEF]; see also the Canadian Bar Association "Responding to the Truth and Reconciliation Commission's *Calls to Action*" (March 2016), online: < [cba.org/CMSPages/GetFile.aspx?guid=6aa3e794-551d-4079-b129-e9b7be414b26](http://cba.org/CMSPages/GetFile.aspx?guid=6aa3e794-551d-4079-b129-e9b7be414b26) > [perma.cc/JQG2-27R8]; University of Regina Faculty of Education, "Responding to the Truth and Reconciliation Commission's Calls to Action: Faculty of Education" online: < <https://www.uregina.ca/education/assets/docs/pdf/for-faculty/TRC-Response-Faculty-of-Education.pdf> > [perma.cc/A7D2-GHWN]; "Royal BC Museum and Archives Official Response Regarding the Truth and Reconciliation Commission's Calls to Action" (24 August 2016), online: < [royalbcmuseum.bc.ca/assets/TRC\\_Projects\\_August\\_2016.pdf](http://royalbcmuseum.bc.ca/assets/TRC_Projects_August_2016.pdf) > [perma.cc/9UPB-QDMD].

<sup>109</sup> Calls to Action, *supra* note 81, #27

<sup>110</sup> *Ibid.*, #28.