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Canada's Truth and Reconciliation Commission: Settling the Past?

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Canada's Truth and Reconciliation Commission: Settling the Past?

Abstract
The Indian Residential Schools (IRS) system has been referred to as "Canada's greatest national shame". The IRS system is now the subject of the Canadian Truth and Reconciliation Commission (TRC). Unlike other truth commissions that have been created due to regime change, where a majority of citizens sought a truth-seeking process, Canada's TRC arose as a result of protracted litigation by survivors of the IRS system against the government and churches that ran the schools. This article reviews the genesis of TRC in a legal settlement agreement, along with some of the challenges this origin entails.

Keywords
Truth and reconciliation commission, residential schools, legal settlement agreements

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The Indian Residential Schools (IRS) system[1] has been referred to as "Canada's greatest national shame".[2] The IRS system is now the subject of the Canadian Truth and Reconciliation Commission (TRC). Unlike other truth commissions that have been created due to regime change, where a majority of citizens sought a truth-seeking process, Canada's TRC arose as a result of protracted litigation by survivors of the IRS system against the government and churches that ran the schools. This article reviews the genesis of TRC in a legal settlement agreement, along with some of the challenges this origin entails.

For over a century, the Canadian government sought to assimilate Indigenous children into the non-Indigenous culture by promoting and then requiring their attendance at church-run schools. The first Indian residential schools opened in the 1880s in western Canada and eventually, they operated in every province and territory except Prince Edward Island, New Brunswick and Newfoundland. The system was at its height in the 1920s with compulsory attendance under the *Indian Act* and over 80 schools in operation.[3] Most Indian Residential Schools were run by entities of the Catholic church,[4] with others run by the Anglican, Presbyterian, Methodist and later the United churches.

Children were separated from their families and communities and sent far away to schools where they were forbidden to speak their languages, practice their spirituality or express their cultures. The impacts of this policy as manifested through IRS have echoed down the generations. Indigenous people who never attended an IRS have nonetheless suffered from the harms inflicted there due to the interruption of traditional cultural transmission and parenting skills, the loss of skills enabling traditional life on the land, the pathologies and dysfunction now endemic in many Indigenous communities and the loss of language, culture and spirituality. It is only in the last few years that the government has acknowledged that its assimilation policy was harmful.[5] It has done so only in response to overwhelming legal pressure.

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[1] Books that provide much more extensive information about IRS than is possible to provide here include J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996) and John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999). See also the *Report of the Royal Commission on Aboriginal Peoples* vols. 1-5 (Ottawa: Supply and Services Canada, 1996) [RCAP Report], especially vol. 1, part 2 "False Assumptions and a Failed Relationship", c. 10 "Residential Schools". "Indian" is the antiquated and incorrect moniker used in government parlance for Canada's Indigenous peoples.

[2] Adrienne Clarkson, "Her Excellency the Right Honourable Adrienne Clarkson Address at the University of Toronto Faculty Association's C.B. Macpherson Lecture" (31 March 2004).

[3] Miller, *Shingwauk's Vision, supra* note 1, at 142.

[4] See RCAP Report, vol. 1, *supra* note 1, part 2, c.10, text accompanying Table 10.1: "In 1931 there were 44 Roman Catholic (RC), 21 Church of England (CE), 13 United Church (UC) and 2 Presbyterian (PR) schools. These proportions among the denominations were constant throughout the history of the system." Note that the Catholic Church is not organized as one central body, but rather as individual orders. See Canadian Conference of Catholic Bishops, "Apology on Residential Schools by the Catholic Church", online: <http://www.cccb.ca/site/content/view/2630/1019/lang,eng/>: "The Catholic community in Canada has a decentralized structure. Each Diocesan Bishop is autonomous in his diocese and, although relating to the Canadian Conference of Catholic Bishops, is not responsible to it."

[5] According to Pamela O'Connor, "Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment" (2000) 28 Int'l J. Legal Info. 232 at 236, the federal government only recently admitted that the policy purpose of IRS was one of assimilation rather than education.

While it is true that there were caring individuals among the teachers and workers at some of the schools, and some children did receive an education, the dominant narrative of the schools reveals the violence inherent in the policy behind the IRS system: to "kill the Indian [to] save the man".[6] Those that escaped physical or sexual abuse still suffered the loneliness of separation from family, the confusion of being taught their culture was inferior, and the loss of their language and spirituality. Eventually the government concluded that the schools were not successful tools of assimilation. The government withdrew from its partnership with the churches in 1969, at which time it took over the IRS and began to transfer control to Indian bands. The majority of residential schools were closed by the mid-1980s, with a few remaining until the last closure in 1996.

Despite earlier press reports[7] and several criminal investigations by police in the late 1980s,[8] the IRS issue did not garner national attention until 1990, when Chief Phil Fontaine went public with his experience of IRS abuse,[9] opening the door for other survivors to begin sharing their experiences. The extent of the IRS legacy became better known with the establishment of the Royal Commission on Aboriginal Peoples (RCAP).[10] RCAP was established in 1991, and during the course of 178 days of public hearings in 96 communities, many survivors of the schools gave emotional and troubling testimony recounting the abuses they had suffered, thus bringing wider attention to the IRS legacy. In 1996, RCAP made its recommendation calling for a public inquiry into IRS. No public inquiry was established in response to that recommendation. The federal government made what it called a Statement of Reconciliation.[11] Minister of Indian Affairs Jane Stewart made the statement but for many, it fell short of an apology.[12] The Native Women's Association of Canada formally refused to accept the Statement as an apology, and the Inuit Tapirisat of Canada found the Statement to be incomplete.[13] Indeed, the word "apology" did not

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[6] J.A. Macrae, Department of Indian Affairs Inspector of Schools for the North West in the 1880s, quoted in Milloy, *supra* note 1, at 27.

[7] See for example: Maureen Brosnahan, "Indians recall bitter school days" *Winnipeg Free Press* (22 June 1982), at 21.

[8] Miller, *Shingwauk's Vision, supra* note 1, at 329, citing investigations at Williams Lake and Lytton, British Columbia.

[9] Assembly of Manitoba Chiefs, "Residential Schools: A Chronology", online: Assembly of Manitoba Chiefs, http://manitobachiefs.com/issue/residential.html (accessed January 2009).

[10] J.R. Miller, "Troubled Legacy: A History of Indian Residential Schools" (2003) 66 Sask. L. Rev. 357 at 381. The five volume, 3,500-page RCAP Report covers 500 years of history between non-Indigenous and Indigenous peoples in what is now Canada, and makes 440 recommendations calling for comprehensive changes in the relationship between Canada's Indigenous and non-Indigenous peoples: RCAP Report, *supra* note 1.

[11] See Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Indian Affairs and Northern Development: Public Works and Government Services Canada, 1997); "Statement of Reconciliation: Learning from the Past." Statement read by Hon. Jane Stewart, Minister of Indian Affairs and Northern Development (7 January 1998).

[12] Buti, Antonio. "Responding to the Legacy of Canadian Residential Schools." (2001) *Murdoch University Electronic Journal of Law* 8 (4) at para. 36, citing Law Commission of Canada, *Minister's Reference on Institutional Child Abuse: Discussion Paper* (1999) 15.

[13] Morse, Bradford W., and Tanya M. Kozak. "Gathering Strength: The Government of Canada's Response to the Final Report of the Royal Commission on Aboriginal Peoples." *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), ["*Blind Spots*"] 32, at 36.

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appear in the statement. Observers suggest that the government did not issue a full apology for fear it would be viewed as an admission of liability that would weaken its legal position in the various court claims being brought by IRS survivors.[14]

In the late 1990s, the failure of the government to adequately respond to RCAP, and in particular, to adequately address the recommendations on IRS, created enormous frustration amongst survivors and dashed any hopes of a political resolution to the issue.[15] This frustration with the lack of a political response prompted IRS survivors to turn to legal responses in an effort to seek redress in the courts for the harms they suffered, a strategy that ultimately led to a negotiated solution.[16] The legal mechanisms survivors turned to included criminal prosecution, civil litigation, and Alternative Dispute Resolution. Criminal prosecution resulted in some retributive justice with respect to a few individual aging perpetrators of sexual abuse, but could not address systemic issues and harms of IRS. Civil litigation also resulted in some damage awards for a few survivors, but the process was lengthy and again the harms acknowledged by the courts were limited. Alternative Dispute Resolution (ADR) was an attempt to remedy the difficulties of the civil litigation system but it too ultimately failed to fulfill the goal of having a streamlined and effective process to address survivors' needs. Thus, each mechanism offered a measure of assistance in bringing the IRS legacy to public attention, but each mechanism failed to adequately address the historical injustices created by the IRS system.

In 1997 Phil Fontaine was elected National Chief of the Assembly of First Nations and commenced negotiations with the churches and the federal government for a settlement for IRS survivors. Settlement discussions began to be impacted when the courts started to decide some of the first IRS civil cases, apportioning liability between the government and the churches.[17] Following the launch of multiple class action lawsuits,[18] a consensus developed around the Assembly of First Nations' recommendations in its 2004 report which called for a lump sum reparations payment, additional compensation for specific abuses, expedited payments for the sick and elderly, and a truth-sharing and reconciliation process.[19] In November 2005, the parties reached an Agreement in Principle that was finalized in May 2006,[20] and approved by the courts later in the year.[21] The Settlement Agreement came into effect 19 September 2007. By the time of the Settlement Agreement, 14,903 survivors had filed claims against the government. Only 2,805

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[14] Morse, *Blind Spots*, at 46.

[15] Stewart, Phillip. "Federal Government's Response to the Royal Commission on Aboriginal Peoples" in *Blind Spots,* 49 at 54.

[16] These are legal mechanisms utilized in the Canadian legal order to address the IRS legacy.

[17] See for example *Blackwater v. Plint* (1998), 161 D.L.R. (4th) 538 (BCSC).

[18] In addition to the *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (Ont. CA) class action in Ontario, there were four others within a few years: Canada, *Notice of Class Actions* (Indian Residential School Alternative Dispute Resolution Process), online: Assembly of First Nations, http://www.afn.ca/residentialschools/PDF/Notice_of_Class_Actions.pdf (accessed 30 November 2010).

[19] See Letter from Indigenous Bar Association to Frank Iacobucci (17 October 2005), on file with the author.

[20] The *Indian Residential Schools Settlement Agreement* (the "Settlement Agreement") was concluded May 8, 2006, following an Agreement in Principle ("AIP") signed 23 November 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.

[21] See for example the 15 December 2006 decision *Quatell v. Attorney General of Canada*, 2006 BCSC 1840, per Brenner C.J.; and *Baxter v. Canada*, (2006) 83 O.R. (3d) 481 (Ont. Sup. Ct.) per Winkler J (as he then was).

claims had been resolved through litigation or the ADR process, with damage awards upwards of $110 million.[22]

The IRS Settlement Agreement is the largest class action settlement in Canadian history[23] and has well over 100 signatories. The Settlement Agreement sets aside $1.9 billion for the approximately 80,000 living survivors of the IRS schools.[24] The Settlement Agreement comprises several mechanisms of redress for survivors of IRS, including a Common Experience Payment,[25] an Independent Assessment Process,[26] a fund for commemorative projects,[27] and a fund for healing projects.[28] Finally, the Settlement Agreement provides for the establishment of the Truth and Reconciliation Commission.

The TRC is like other truth and reconciliation commissions in that it is an official, temporary, non-judicial fact-finding body set up to investigate a pattern of abuses of human rights committed over a number of years.[29] That is, it is a government-sponsored commission, with a five-year mandate, intended to investigate the IRS system and its legacy. Like other truth commissions, the TRC mandate includes the creation of a historical record and the making of recommendations. However, aside from the unique mandate and structure that reflect the national context in which the TRC is taking place, the TRC is distinctive in that it is the only truth commission to be created out of litigation. In other contexts in which truth commissions have arisen, they have been instigated by a new regime to look into the abuses of a past regime, as in Argentina, Peru and Chile. Occasionally, a truth commission arises as part of a peace accord brokered between parties to a conflict, as in El Salvador, Guatemala and Sierra Leone. In Canada, the TRC is a result of negotiations between multiple parties of class action lawsuits. This means that the TRC will be faced with the need to prompt Canadians to invest in and take ownership of a process that they did not instigate. That is, the TRC was not created out of a groundswell of concern about IRS survivors by the public; rather it was agreed to by their government's legal advisers in order to settle costly litigation. Were it not for the enormous financial cost to the government of continuing to defend against the class actions, the TRC would not exist in Canada.

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[22] Canada, Indian Residential Schools Resolutions Canada, "Backgrounder: Indian Residential Schools" (Ottawa: Indian Residential Schools Resolutions Canada, 2005).

[23] Indian and Northern Affairs Canada, "Backgrounder - Indian Residential Schools Settlement Agreement" (2008), http://www.ainc-inac.gc.ca/ai/rqpi/info/nwz/2008/20080425b_is-eng.asp (accessed 30 November 2010).

[24] Survivors who wished to retain their right to sue the government and the churches had to formally opt-out of the Settlement Agreement by 20 August 2007. Had more than 5,000 survivors opted out, the settlement would have been void: Settlement Agreement, *supra* note 20, at para. 4.14.

[25] The Common Experience Payment is $10,000 for the first year a person attended IRS and $3,000 for each additional year. The payment is symbolic and intended to acknowledge the fact that simply attending an IRS was a harm: Settlement Agreement, *supra* note 20, Schedule N, Art. 5.

[26] Those survivors who wish to be compensated for harms that are ordinarily compensable in the tort system, such as serious physical and sexual abuse, can make a claim under the Independent Assessment Process, which has a schedule of monetary compensation for a range of abuses depending on their severity. Settlement Agreement, *supra* note 20, Schedule D "Independent Assessment Process".

[27] This is a $20 million fund for activities that commemorate the children and communities affected by the schools. Settlement Agreement, *supra* note 20, Schedule J.

[28] The Settlement Agreement provides for an additional $125 million over five years to support the projects of the Aboriginal Healing Foundation. Settlement Agreement, *supra* note 20, Schedule M, s. 3.03.

[29] Based on the definition set out in Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616, para. 50 at 17.

As adverted to above, one of the reasons that people sought a truth commission in Canada was that the usual legal mechanisms had proven to be inadequate. In response to survivor experiences with the criminal and civil litigation processes, it appears from Schedule N that the Settlement Agreement negotiators sought to establish a body that would not mimic a legal proceeding such as a trial. Schedule N specifies the powers, duties and procedures of the TRC, including receiving statements.[30] The Schedule also sets out what the TRC may not do in pursuit of its mandate; it shall not hold formal hearings, have subpoena powers, or name names, as discussed below. The TRC's responsibilities with respect to methodology and procedure are enumerated.[31] The factors the TRC must take into account in exercising its duties are set out, including a direction that the commissioners: "shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process".[32] With this wording, the negotiators of the Settlement Agreement likely were trying to stress their intention for the TRC not to duplicate criminal or civil court proceedings or the Independent Assessment Process. Nor is the TRC to repeat the perceived difficulties encountered with public inquiries in the past, where adversarial processes overtook the substance of the inquiry. This section of the mandate can be read as eschewing a formal legal process for the TRC, and by formal, it seems to refer to adversarial processes.

The guiding principles state at the outset of the mandate that the TRC will focus on being victim-centred, and respect the health and safety of participants. These aspects acknowledge that previous legal mechanisms have caused grief and pain to survivors, and attempt to avoid duplication of that occurrence.[33] The TRC was sought as a mechanism that would operate in a non-adversarial manner. In other contexts, truth commissions have been expected to be less 'lawyer-driven' than other legal mechanisms.[34] While all truth commissions do involve lawyers in their activities to varying degrees, the idea that negotiators in Canada gleaned from international examples is to emphasize the focus on victims, and reduce the focus on the skill of legal counsel to shape the information gained. This reduced focus on legal personnel arose because sometimes truth commissions are established in environments where the legal system may be in disarray, with few lawyers and judges left in a country (either alive, or who are not part of the prior regime). It may also be because the number of violations is so large that the prosecutorial system is overwhelmed and another mechanism is necessary to seek accountability. A truth commission may also be sought in order to elicit truth-telling in an environment where the adversarial approach of a trial, with its tools such as cross-examination, would be inappropriate.

In Canada, where the government and the churches have acknowledged that abuses occurred and that the IRS system was harmful, the evidence that is presented to the TRC is not for the purposes of convincing the Commissioners that the abuses occurred. The TRC is occurring separately from the reparations process and other elements of the Settlement Agreement. The

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[30] Settlement Agreement, *supra* note 20, Schedule N, s. 2.

[31] *Ibid.,* Schedule N, s. 3.

[32] *Ibid.,* Schedule N, s. 2(b).

[33] Mike Cachagee, Executive Director of the National Residential School Survivors' Society, has noted that it will be difficult for some survivors to trust an organization run by the government when the schools were mandated by that government: Canadian Press, "Truth commission may not bring forgiveness: chair" (21 February 2010), http://www.cbc.ca/news/canada/manitoba/story/2010/02/21/man-truth-reconciliation-commission-sinclair.html (accessed 23 March 2011).

[34] See Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge, New York: Cambridge University Press, 2006) at 124.

purpose of having the TRC as a separate body allows for a focus on its distinctive goals: acknowledging and witnessing the IRS experience, promoting awareness of the IRS system and its impacts, and creating a public record of the IRS legacy.[35] These goals suggest a desire for a less adversarial process than the court process.

Alleged perpetrators have no incentive to participate in the TRC but perhaps they may be more willing to engage in the process if they know that they will not be subject to any legal proceedings as a result of their participation. A truth commission is intended to promote public accountability and combat impunity for human rights violations, so a refusal to name names where there is clear evidence of culpability may attract criticism. On the other hand, while most truth commissions have the power to name perpetrators, few have done so.[36] And in the Canadian context, the institutional nature of the main "perpetrators" – the government and the churches – alters the dynamic. Many of the people who staffed the schools or directed government IRS policy are dead, thus there will be more participation of present day government and church institutional representatives than of individuals who were directly involved with the IRS. As parties to the Settlement Agreement, there is an expectation that the institutions will participate in the TRC process. Given that most of their representatives will not themselves have been perpetrators of specific abuses, it is perhaps not surprising that the TRC has neither subpoena power nor the power to name names, two commonly allocated powers for truth commissions.

Aside from the frustrations of the lack of a political response to the IRS legacy and the dissatisfaction with the other legal mechanisms available, a further reason that survivors sought a truth commission in the IRS negotiations was the widespread ignorance amongst non-Indigenous Canadians about the IRS system and its profound and continuing effect on Indigenous communities. The advantage of a truth commission for combating such ignorance is the ability to create an incontrovertible historical record and enable significant public education. The TRC is tasked with creating a record of the IRS system and its impacts.

However, while gaining the truth about IRS for non-Indigenous people may be educational, it may be re-traumatizing for survivors.[37] In addition, the truth will be different for each person depending on their experiences. Some survivors and church or government representatives will resist the idea that the IRS system was wholly negative, preferring to focus on the fact that some children did receive an education and that some survivors look back to their teachers with fondness.[38] Still, the truth that the IRS system existed and that it has been largely devastating for Indigenous peoples is already known to Indigenous peoples, but this truth is not well known to the majority of Canadians:

> Consensus that residential school experience was injurious in itself, not just in instances of physical and sexual abuse, is shared by only a small proportion of

[35] See Settlement Agreement, *supra* note 20, Schedule N, "Mandate for the TRC", s. 1.
[36] Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001) [Hayner, *Unspeakable Truths*], at 107.
[37] I acknowledge that there is no one truth to be found or uncovered, but rather a narrative to be constructed based on the information gathered by the truth-seeking process.
[38] Miller, *Shingwauk's Vision*, *supra* note 1 at 341-2.

> Canadian citizens, in contrast to the view of most First Nations, Inuit and Métis people.[39]

There are significant gaps between the knowledge and understanding of the IRS system that many non-Indigenous people may be expected to have as compared to that of many Indigenous people.[40] These gaps arise from longstanding beliefs about the history and intentions of government policy, and the legacies of such policies such as cycles of dependency and negative social indicators.[41] In other contexts, truth commissions have attempted to create a more complete historical record of a tragic period in a state's history by rounding out the state's version of events with information gained from investigation, records and testimony.

As with other truth commissions, it is not that the TRC is likely to expose facts that were previously unknown; rather, it will "make an indispensable contribution in acknowledging these facts".[42] In Canada, the factual truth about IRS may be publicly available, but that truth is still resisted in the dominant narrative. This dominant narrative says that the schools were created and run with the best intentions and that in hindsight some of the methods used and some of the individuals involved may have been overly harsh or abusive. At variance with that narrative is a conflicting account that views the schools as one attempt at obliterating the Indigenous cultures in what is now Canada.[43] Some view the IRS system as only one component of a larger colonial project that is embodied in many aspects of the *Indian Act*.[44] However, non-Indigenous Canadians will largely be unaware of the systemic aspect of the IRS legacy.[45] In the Canadian case, the fact that the government has issued an unequivocal apology may help to refute the myth held by many non-Indigenous Canadians that IRS was akin to a bad boarding school, where individual

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[39] Marlene Brant Castellano, "A Holistic Approach to Reconciliation: Insights from Research of the Aboriginal Healing Foundation" in Marlene B. Castellano, Linda Archibald and Mike DeGagné, eds. *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 385 at 386.

[40] This is not to suggest that all the learning will be on the non-Indigenous side; rather, it is just to note that more non-Indigenous people will have more to learn than non-Indigenous people since the IRS system is generally better known in Indigenous communities. For polling information on the latter point, see Environics Research Group, *Final Report: 2008 National Benchmark Survey* (Prepared for Indian Residential Schools Resolution Canada and the Truth and Reconciliation Commission, 2008) [Environics, *Benchmark Survey*], at 13*ff*.

[41] The differing perceptions are evident in the stereotypes that are visible in mainstream media coverage of the Settlement Agreement. See for example Jack Branswell and Ken Meaney, "Residential school cash has deadly fallout; Suicides, drug abuse attributed to compensation" *Calgary Herald* (26 January 2009) A7; Canadian Press, "Racist overtones surround residential school payments: national chief" *Guelph Mercury* (20 September 2007) A6.

[42] Pablo de Grieff, "Justice and Reparations" in Jon Miller and Rahul Kumar, eds. *Reparations: Interdisciplinary Inquiries* (Toronto: Oxford University Press, 2007) 153 at 161-162.

[43] Roland Chrisjohn, Sherri Lynn Young and Michael Maraun, eds. *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, B.C.: Theytus Books, 2006) at 4-5.

[44] See Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society" (8 April 2009), Social Science Research Network, http://ssrn.com/abstract=1374950, (accessed 30 November 2010) at 2.

[45] A poll conducted for Indian Residential Schools Resolution Canada and the TRC in May 2008 found that six in ten Canadians were unable to cite any long-term consequence for survivors of having gone through the IRS system: Environics, *Benchmark Survey*, *supra* note 40, at 20.

teachers were abusive. The apology acknowledged that IRS was intended to force assimilation of Indigenous children – "to kill the Indian in the child".[46] The importance of the work the TRC must do, at the outset, to address these differing narratives cannot be underestimated if the reconciliation aspect of the mandate is to have any chance of success.

Canadians may find that a commission addressing the legacy of residential schools provides a manageable way to learn about and understand the larger causes of the colonial policy under which IRS was created. Still, given that the TRC will not be able to identify perpetrators in its report, the truth it tells about IRS will necessarily be incomplete. The TRC report will therefore need to address the broader truth about the IRS system itself, identifying the structures and institutions that created and perpetuated the toll upon Indigenous peoples. The ability to focus on the larger picture can then be a strength of the TRC.

One of the most important things a truth commission can do is to engage the wider public with its work. The utility of the commission is lessened if it compiles a history that is destined to silently land on a library shelf.[47] A commission must create a narrative that may form the basis of national reconciliation, but the commission must first "manage to penetrate the collective consciousness of the people."[48] How can this be achieved? Hayner and Freeman set out factors that are likely to improve the chances of a truth commission being effective. In particular, they note the importance of public support for the establishment of a truth commission; the presence of a vigorous and engaged civil society (and in particular of strong victims' groups, human rights groups, religious leaders and intellectuals); widespread social identification with the victims of the abuses; vocal and independent media; and persistent international attention and pressure.[49] The Canadian TRC has not yet attained all of these factors. It is unclear how wide public support was for its establishment since the Canadian public at large was not formally consulted in the IRS negotiations. While Canada has strong civil society organizations, there is not yet any organized coalition (outside the parties to the Settlement Agreement) vocally supporting the TRC's work. There has been some positive media coverage but the TRC is yet to be ubiquitous in the press, either domestic or international.[50] Certainly with a country as large as Canada, the media will be an important tool in engaging those who are unable to participate in the TRC's national events because the events are distant from where they live.

An unusual aspect of this TRC is that its mandate does not direct that it will hold hearings. Rather, Schedule N refers to receiving "statements", holding "sessions", "consultations" and

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[46] Stephen Harper, Prime Minister, "Statement of Apology – to former students of Indian Residential Schools" (Ottawa, 11 June 2008), online: http://www.ainc-inac.gc.ca/ai/rqpi/apo/index-eng.asp>.

[47] Neil J. Kritz, "Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation" in A. Henkin, *The Legacy of Abuse* (New York: The Aspen Institute and NYU School of Law, 2002) 21, at 38.

[48] Erin Daly and Jeremy Sarkin, in *Reconciliation in Divided Societies* (University of Pennsylvania Press, 2007) at 110.

[49] Priscilla B. Hayner and Mark Freeman, "'Truth-Telling' in International Institution for Democracy and Electoral Assistance", *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International IDEA, 2003) [IDEA *Handbook*] 122 at 128-9.

[50] Most Canadians who had heard about the Settlement Agreement had done so due to mass media: Environics, *Benchmark Survey, supra* note 40 at 27. The polling report notes at 25 that overall, awareness among Canadians of the Settlement Agreement was "fairly low" – only four in ten had heard of the Common Experience Payment, and two in ten or fewer had heard of the other elements of the Settlement Agreement.

"public events".[51] As noted above, the mandate states that the TRC: "shall not hold formal hearings".[52] While this is no doubt in part to protect the privacy of survivors, it also shields the government and churches from scrutiny by the public. It means that the TRC will not hold an activity that is virtually a hallmark of truth commissions elsewhere. This aspect of the TRC's mandate must be explained to and by the media for the public to understand, since most people associate truth commissions with the South African TRC, which held public hearings, and people may thus reasonably expect a truth commission to hold hearings.[53]

Other truth commissions have held institutional hearings to focus on the issues arising in certain sectors of the public service or society at large. For instance, South Africa had hearings on the legal profession and the judiciary, while Ghana had institutional hearings with respect to the security sector, media, prisons, as well as the legal profession and the judiciary.[54] The purpose is to reveal the structural and institutional nature of the human rights violations that occurred in order to recommend ways in which to prevent future recurrences, regardless of the individuals who may be in charge of or working for those institutions. It is not clear if the TRC will hold any such hearings, yet institutional hearings with respect to government policy in different areas of Indigenous people's lives may be useful and important for preventing recurrences of abuses such as IRS.[55] There is no requirement for a report at the end of the five-year mandate of the TRC, but such a report would be useful in order for the TRC to have the opportunity to assess the material it has reviewed and heard to identify structural or systemic issues. Both institutional hearings and a final report are vehicles with important potential for public education by the TRC.

The mandate as set out in Schedule N of the Settlement Agreement frames the TRC as part of a process of "rebuilding and renewing … the relationship between Aboriginal and non-Aboriginal Canadians", requiring "commitment from … the people of Canada". In order to work toward reconciliation of the Canadian society as a whole, there needs to be active, sustained and significant outreach to civil society beyond the parties to the Settlement Agreement. Such processes of dialogue and consultation help to generate awareness and then cultivate ownership of the national reconciliation process.

While the Canadian TRC is a result of a legal settlement that includes parties that represent some components of civil society, they are by no means broadly representative of Canadian society as a whole. Although some of the major Aboriginal organizations are involved in the TRC process, not all Aboriginal organizations are parties to the Settlement Agreement. Large

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[51] The TRC held its first national event in Winnipeg in June 2010. The event did not receive broad media attention such as to captivate the nation.

[52] Settlement Agreement, *supra* note 20, Schedule N, s. 2(b).

[53] Perhaps the best known truth commission, the South African Truth and Reconciliation Commission reported to then President Nelson Mandela in October 1998, after conducting hearings over the course of three years in which it heard from close to 20,000 victims of the apartheid era.

[54] Ghana's National Reconciliation Commission was inaugurated in 2002 to investigate periods of unconstitutional rule since independence.

[55] See for example Edward John, "From Apology to Action: A Response to the Residential Schools Apology" *Vancouver Sun* (12 June 2008):

> Today we find that over 50 percent of all children in government care are aboriginal and in the north region of the province the percentage is a staggering 77 percent. … It is estimated that there are three times the number of children in government care now than there were children in residential schools at the height of their operations.

Edward John is Grand Chief, Tl'azt'en Nation.

swaths of the non-Indigenous public have no involvement in the TRC so far. Involving the broader public will be easier if civil society organizations, beyond the parties to the Settlement Agreement, get involved and support the work of the TRC. This could be instigated by outreach from the TRC itself, but given its limited resources, it would be useful if the parties to the Settlement Agreement could take the initiative. Church groups and survivor groups could collaborate and contact other civil society organizations to form a broad-based coalition to support and to increase awareness of the TRC's work.

In Canada, Indigenous legal institutions and systems have often been ignored and devalued. The TRC must proceed with an acute awareness of this history and adopt the advice of RCAP on the concept of respecting the systems of traditions of the peoples whom it hopes to reconcile. As Llewellyn observes, the TRC's mandate does not provide much detail with respect to the reconciliation aspect of its work.[56] The mandate refers to healing the relationship between peoples.[57] In the transitional justice context, mechanisms such as apologies, commemoration, reparations, and truth commissions are viewed as means for achieving societal reconciliation. Reconciliation is a multifaceted process and often, as with South Africa, truth commissions are expected to engage several of these mechanisms in an effort to achieve societal healing. Canada's TRC is not asked to do all the work of redress because the elements of commemoration and reparations are structured as different parts of the Settlement Agreement. This means that the focus of the TRC's work need not be to determine the compensation that survivors should receive or to duplicate the commemorative work that is already being done by the Aboriginal Healing Foundation, a body created in response to RCAP's recommendations on IRS.[58]

An additional element critical to the reconciliation process that the TRC does not have to address is that of an apology. The TRC was inaugurated on 1 June 2008. Although not part of the Settlement Agreement, on 11 June 2008, the government gave its long-awaited apology to survivors of the IRS.[59] The Prime Minister gave this apology in the House of Commons. The leaders of the other federal parties represented in Parliament also gave an apology. The leaders of five national Aboriginal organizations responded from the floor of the House. The apology received a generally positive response from survivors and the public and marked a rare moment of awareness in the general Canadian population.[60] The apology also provided the TRC with a good start: the government acknowledged the truth of the IRS system's harms, enabling the TRC to commence its work without having to convince the country that the IRS legacy existed.

Truth commissions are often expected to make recommendations with respect to appropriate reparations for the victims such as compensation that may enable the victims to improve their quality of life. These recommendations are adopted to varying degrees by the state. In the Canadian context, the reparations have already been determined in large part through the

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[56] Jennifer Llewellyn, "Bridging the Gap Between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission" in Castellano, Archibald and DeGagné, *supra* note 39, 185 at 186.

[57] See Settlement Agreement, *supra* note 20, Schedule N, preamble.

[58] Despite its reputation for excellence, the Aboriginal Healing Foundation's funding was not renewed by the Government of Canada in the March 2010 federal budget, signaling a lack of concern by the Harper Conservatives for the reconciliation process that the AHF's work supports.

[59] Stephen Harper, "Statement of Apology" *supra* note 46.

[60] Just after the apology, a poll found an unusually high level of awareness: 83 percent of those surveyed were aware of the apology: Omar El c, "School-abuse apology widely backed" *Globe and Mail* (14 June 2008) A4, citing an Innovative Research Group conducted the poll between June 11 and 13.

Common Experience Payment and Independent Assessment Process. What if the TRC makes determinations that go far beyond what the reparative mechanisms of the Settlement Agreement encompass? What can be the response to the TRC's findings if the apology and reparations have already been meted out? These are challenges that may arise given the ambitious structure of the Settlement Agreement. It is too early to tell whether these matters will arise, but they are possibilities that the TRC can contemplate in determining its process.

The fact that the IRS negotiators decided to have a TRC in addition to and separate from these other aspects of the settlement suggests that there is something to be gained from having the TRC process itself. That is, something is expected from the TRC that is different from the usual truth commission results of making recommendations for commemoration, apology and reparation. There is something about the *process* itself that is valued here; something unique to the Canadian context. It remains to be seen if separating the truth-seeking process from the reparations process is an appropriate way of proceeding. Again, this is one of the reasons why it will be so important for the TRC to actively educate the public as to its operations and goals.

How well a truth commission educates the public about its work will determine its ability to garner public support. A high level of public support can bolster a commission's credibility and thus its reputation, which can in turn smooth the way for the commission to access information and address the needs of victims. Also important for maintaining its own credibility is a truth commission's management of public expectations about its work. This is another task that does not appear in any written mandate for a truth and reconciliation commission. The TRC will need to be extremely conscious of the expectations that it may arouse in survivors of IRS. These expectations will be of an order entirely different and more complex than those of the non-Indigenous public. Truth commissions have often raised expectations of victims that there will be some resolution to their situation because the very existence of a commission suggests that its presence will make a difference.[61] Expectations may be even higher when the commission seeks not just truth but also reconciliation as a central goal.

Another challenge for the TRC relates to the likelihood that most of the testimony it receives will come from survivors. This may create the appearance that the TRC will rely upon the survivors to do the work to be reconciled or perhaps reintegrated (or "conciled"/integrated) into Canadian society. The TRC must be careful not to reinforce the idea rejected by RCAP: that the government avoided responsibility by expecting IRS survivors to do the work to heal themselves.[62] The means of reconciliation 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 recurring. The TRC must find a way to include the non-Indigenous public such that they acknowledge the IRS system is everyone's problem to address. The reconciliation process must be framed by the TRC as a mutual process to be engaged in by Indigenous and non-Indigenous peoples alike; it should not be a one-sided process.

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[61] See Sam Garkawe, "The South African Truth And Reconciliation Commission: A Suitable Model To Enhance The Role And Rights Of The Victims Of Gross Violations Of Human Rights?" (2003) 27 Melbourne U.L.Rev. 334, at 351.

[62] See discussion of Report, vol. 1, *supra* note 1, part 2, c. 10, section 4 "Epilogue", text accompanying notes 330-332, 335.

While the Settlement Agreement negotiators emphatically sought to distinguish the TRC from the South African version,[63] it is important to glean from the comparative experience some realistic guidance about what this TRC can achieve. Not all truth commissions have framed their goal as reconciliation of the country, but "[t]hose that have – including South Africa's TRC and the National Commission on Truth and Reconciliation in Chile – have found it to be a very difficult mission."[64] Reconciliation may or may not occur on an individual or national level; calling the exercise "truth and reconciliation" sets up both concepts as a goal, but no one can declare a person or nation to be reconciled. In addition, it is possible that truth (a slippery concept at the best of times) and reconciliation will be viewed completely differently depending upon who is asked. Some may see that these objectives have been achieved while others will dispute that perception. The latter may be concerned that those in power have appeared to support reconciliation for their own political purposes.

Further, the term "reconciliation" implies that the parties were once whole, experienced a rift, and now must be made whole again. But in colonial settings, 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.[65] Thus, in the Canadian context, reconciliation must refer to "transformative" as opposed to "restorative" reconciliation.[66] 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.[67] This highlights the difficulty with public expectations that can be created when a body called a "truth and *reconciliation*" commission is created. The TRC cannot 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 is limited to the IRS system: to create a historical record of the IRS system and to educate the public about the IRS legacy.

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[63] At a June 2007 conference on the then upcoming Canadian Truth and Reconciliation Commission, National Chief Phil Fontaine adamantly stated that the Canadian commission was not modeled on the South African Truth and Reconciliation Commission: Phil Fontaine, "The Long Journey to Justice: The Personal as Political" (Lecture presented 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) [Calgary Conference, 2007] [unpublished]. Fontaine stepped down as National Chief at the Assembly of First Nations Annual General Meeting in Calgary on July 21, 2009.

[64] Priscilla Hayner, "Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide" in Charles Villa-Vicencio and Wilhelm Verwoerd, eds. *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) 32 at 39.

[65] Indeed, as noted by McLachlin C.J.C. in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 25: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."

[66] Will Kymlicka and Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) "Introduction" at 19, describe these two modes of reconciliation: "The restorative dimension seeks to restore and heal a pre-existing 'we', by closing up a temporary breach, while the transformative dimension seeks to create a new 'we', which requires opening up new possibilities that did not exist before."

[67] Chris Cunneen, "Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights" in Heather Strang and John Braithwaite, eds., *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001) 83 at 90.

In Canada, continued power imbalances will make it difficult for a reconciliation process to truly take root.[68] When he was Lieutenant Governor of Ontario, James Bartleman, a member of the Chippewas of Mnjikaning First Nation, 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 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."[69]

How can the TRC contribute to a broader sense of reconciliation in a society that is only prepared to address these power imbalances in an incremental way?[70] Castellano recalls the observation in RCAP's report that in the search for reconciliation between peoples, the leadership of public institutions in adopting a more respectful stance is extremely important.[71] The fact that the mandate does not provide much detail does offer an opportunity for the TRC to broadly interpret its possibilities. While the TRC must exercise caution with respect to what it can reasonably accomplish in the five years it has been granted, perhaps the IRS system can be a springboard for the exploration of broader issues in Indigenous/non-Indigenous relations in Canada. After all, there is a distinction to be made in the TRC's mandate – the TRC is expected to address the IRS *system*, but it is also expected to address the IRS *legacy*. The IRS system is something that can be quantified with respect to how many schools, where they were in operation, for how long, and under what government directives. The IRS legacy is a much more amorphous question. The TRC can complete an effective historical study of the IRS system while exploring broader political questions in its discussion of the IRS legacy. This may include situating the IRS legacy within colonialism, making connections between IRS and socioeconomic conditions for Indigenous communities, consideration of the levels of violence, criminalization, marginalization and discrimination experienced by Indigenous people, or a myriad of other possible avenues of investigation.

Gonzales lists advantages Canada has compared to other states in holding a truth commission, including the government's apology, the presence of "sophisticated advocacy institutions" that have assisted survivors, and the Settlement Agreement on reparations and

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[68] *Ibid.* at 146.

[69] James Bartleman, "The Importance of Truth Telling in a Just Society" ((Lecture presented at "Preparing for the Truth Commission: Sharing the Truth about Residential Schools. A Conference on Truth and Reconciliation as Restorative Justice", University of Calgary, 15 June 2007) [unpublished].

[70] Indeed, some critics of the TRC process view the concept of "reconciliation" as a way for the Canadian government to appear to address an issue without actually addressing it. See Roland Chrisjohn and Tanya Wasacase, "Half-Truths and Whole Lies: Rhetoric in the 'Apology' and the Truth and Reconciliation Commission" in Gregory Younging, Jonathan Dewar and Michael DeGagné, eds. *From Truth to Reconciliation: Response, Responsibility and Renewal – Canada's Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation, 2009) 217 and see Taiaiake Alfred, "Restitution is the Real Pathway to Justice for Indigenous Peoples" in Younging, Dewar and DeGagné, *ibid.*, 179, at 184, for an assessment of Canada as an "imperial enterprise … operating in the guise of a liberal democratic state [that] is, by design and culture, incapable of just and peaceful relations with Indigenous peoples."

[71] 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 15, 1, at 12.

truth-telling.[72] He states that unlike most societies seeking to inaugurate a truth commission, Canada is not emerging from a period of prolonged or significant violence that has left legal and governance institutions in disarray.[73] Nonetheless, even if Canada does have certain advantages compared to other countries establishing truth commissions, it has some challenges ahead: "Multiple violations of the human dignity of Aboriginal peoples over generations and their relative powerlessness in the face of public institutions have created distrust that public dialogue can bring about change."[74]

Canada has a comparatively privileged opportunity to make considered decisions with respect to institutional design of mechanisms to address deep societal problems. It has a functioning parliament and justice system, a constitution that includes a *Charter of Rights and Freedoms*, an independent judiciary, thousands of trained legal professionals, an active civil society and a rights-conscious culture. These factors can facilitate a process that is responsive to survivors of historical injustice. However, it was a legal settlement agreement that produced the TRC in Canada. Survivors called for the truth commission after years of seeking redress through other legal mechanisms; a truth commission was not the government's choice of how to proceed.[75] Other established democracies that are faced with addressing historical injustices might glean from the Canadian process that a truth commission process may have stronger prospects if it arises from a societal decision, rather than as a result of a settlement of litigation. The survivors sought a legal mechanism other than those that have been tried so far in Canada to address the legacy of IRS. In its mandate, the TRC is designed to fulfill the goals of the parties. However, while the TRC may fulfill some of the needs expressed by survivors for a reconciliation process, given the negligible involvement of the non-Indigenous public, it is hard to say whether reconciliation on a broader societal level can be initiated.

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[72] Eduardo Gonzales, "Residential Schools: Give truth a chance, Canada" *Globe and Mail* (4 November 2008). Gonzales is a senior associate with the International Center for Transitional Justice, and has consulted for the TRC.

[73] Jung, *supra* note 44, subtitles her 2009 article "Transitional justice for Indigenous people in a non-transitional society". This assessment may not accord with perspectives of Indigenous communities whose legal and governance institutions have been severely damaged by colonization and who may consider that a transition is underway.

[74] Castellano, "A Holistic Approach to Reconciliation", *supra* note 39, at 386.

[75] The proposal for including a truth commission in the Settlement Agreement did not come from the government; it came from the survivors of the schools: Rick Mofina, "'Truth commission' urged: Hearings may satisfy victims of residential school abuse without assigning blame" *The [Saskatoon] Star Phoenix* (6 June 2000) front page.

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