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## The Truth and Reconciliation Commission of Canada and Crown-Aboriginal Relations

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science

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## **Abstract**

The Indian Residential School system was one of the most visible instances of a broader colonial project that sought to destroy Aboriginal difference in Canada and overthrow a relationship based on treaties and mutual respect. As part of an out-of-court settlement of several class action law suits by school survivors against the federal government and churches, the Truth and Reconciliation Commission of Canada was tasked with setting a historic record of the effects of the residential schools and fostering reconciliation between the parties to the settlement (including Aboriginal plaintiffs, the Government of Canada, the Roman Catholic Church, Anglican Church, United Church, and Presbyterian Church). This research argues that the Truth and Reconciliation Commission of Canada represents a transformative opportunity in Crown-Aboriginal relations that has the potential to initiate a decolonial and collaborative framework where Crown and Aboriginal governments will interact as equals. This conclusion is supported by interviews with influential individuals involved in the establishment of the commission from the Assembly of First Nations, former government ministers, bureaucrats, and church leaders. Far from prescribing an outcome of reconciliation this study argues the Crown needs to follow a political ethic that makes room for Aboriginal agency in negotiating the continuing relationship between the Crown and various Aboriginal peoples in order to move away from the current colonial interactions.

## **Keywords**

Truth and Reconciliation Commission of Canada, Indigenous, Aboriginal people, Crown, Decolonisation, Indian Residential Schools, Reconciliation.

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## CHAPTER ONE

### Introduction

The Indian Residential School (IRS) system in Canada was only one aspect of a broader colonial project that sought to rid Canada of Aboriginal peoples.<sup>1</sup> It sought to destroy important aspects of Aboriginal identity such as language, custom, and religion, to be replaced by the settler society's version of these. It sought to make Aboriginal children less Aboriginal by teaching them English and French, Western habits, and the Christian religion. To accomplish its assimilationist goals the IRS system required the removal of children from their home, and their community, degrading familial and community bonds. In short, this system sought to "kill the Indian in the child."<sup>2</sup>

While the last Indian Residential School closed in 1996, the architecture of the colonial project remains largely in place, with Aboriginal peoples systematically marginalized from centres of political, social, and economic power. Underfunding by governments for Aboriginal services, indifference from the general public, and the *Indian Act* that regulates and relegates "Indians" to the social, economic, and political margins, all combine to support a colonial juridical and social system that tells the lie of Aboriginal inferiority and enforces it. While there are paths out of this colonial system, the Government of Canada has significantly failed to act. Take for example the Royal Commission on Aboriginal Peoples (RCAP) which was a wide-reaching critical assessment of the state of Aboriginal peoples in Canada that has been little noticed amongst the majority of Canadians and virtually ignored by the Canadian governments in the nearly two decades since it was published.

It is against this backdrop that we once again see the Government of Canada's willingness to stand on the sidelines while an opportunity to address colonialism in Canada, in the wake of the TRC, flounders for lack of interest and participation from those outside Aboriginal communities. After interviews with elites from the government

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<sup>1</sup> While I recognize the preferred term for the first inhabitants of North America is Indigenous (See Taiiike Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism," *Government and Opposition* vol.40, issue 5, 599), I mean to highlight the constitutional relationship between the Crown and Indigenous people by using the term Aboriginal peoples. In some very narrow cases I use the term "Indian" to refer to a person so defined by the *Indian Act*.

<sup>2</sup> John S. Milloy, *A National Crime: the Canadian government and the residential school system, 1879-1986*, (Winnipeg: University of Winnipeg Press, 1999), xiii

and the bureaucracy, churches, and Aboriginal communities, it is clear to me that the TRC is in serious danger of going the way of RCAP. That is to say, it is in danger of going unnoticed in the government's policy and approach to Crown-Aboriginal relations, and by the wider Canadian society. A 2015 change in federal government occurred after I conducted the interviews herein. This election brought a Liberal government under Justin Trudeau to power and with it a seemingly new approach to reconciliation. While the rhetoric of this new government is more amenable to reconciliation than the Conservatives', it remains to be seen if words will be followed by action. If it is the case that the cost of action is too high, either fiscally or politically or both, as it was with RCAP, this will be a significant missed opportunity to create a truly just and decolonialised Canada.

#### *Context and History of the Truth and Reconciliation Commission of Canada*

Many of the recommendations of RCAP went unimplemented, but the commission's identification of the Indian Residential Schools system as a place where "neglect, abuse and death of an incalculable number of children... [caused] immeasurable damage to Aboriginal communities" stirred the government of the day to some action.<sup>3</sup> In 1998 then-minister of Indian Affairs Jane Stewart issued the *Statement of Reconciliation*, which expressed regret for the Indian Residential School system's treatment of students and acknowledged the federal government's role in creating and maintaining that system.<sup>4</sup> This acknowledgement, while short of an apology, was accompanied by a commitment of \$350 million for community-based healing, which the Aboriginal Healing Foundation was created to manage, and implementation of an alternative dispute resolution (ADR) mechanism to provide compensation for school survivors.<sup>5</sup> The ADR process was well-intentioned. As Paulette Regan points out the "impetus for using ADR to address residential school claims was threefold: it would move claims out of the adversarial litigation process; it would be more timely and cost-effective; and it would

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<sup>3</sup> *Report of the Royal Commission on Aboriginal Peoples Volume 1: Looking Forward, Looking Back* (Ottawa: Minister of Supply and Service Canada, 1996), 353.

<sup>4</sup> Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Nontransitional Society," in *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Paige Arthur ed. (New York: Cambridge University Press, 2011), 224.

<sup>5</sup> *Ibid.*, 225.

better support healing and reconciliation.”<sup>6</sup> To be sure, these are laudable goals, but while better than an expensive court-driven process for both appellant and defendant, it fell well short of meeting the needs of survivors, becoming re-inscribed with colonial attitudes and approaches.<sup>7</sup>

By 2002 the failure of the ADR approach was clear as more than 11,000 legal cases had been filed against both the federal government and churches responsible for operating the schools.<sup>8</sup> In 2004, following a conference at the University of Calgary, the Assembly of First Nations (AFN) issued a report on the ADR process stating that “there [was] a real fear that the present system of compensation is causing additional harms to the survivors” and that “reconciliation [was] impossible under the model as it stands.”<sup>9</sup> Testifying before the House of Commons Standing Committee on Aboriginal Affairs, Chief Robert Joseph put it this way: “By neglecting to address residential school survivors and forcing them through an onerous process like ADR, Canada accepts the risk of being accused of institutionalized racism yet again.”<sup>10</sup> Recognizing the weakness in the ADR, the federal government undertook a political agreement with the Assembly of First Nations in May of 2005, committing to a negotiation that would resolve the issues highlighted by the AFN and others.

Feeling the federal government needed a further incentive and to ensure as many as possible who were affected by the IRS system were included in the settlement, the AFN launched a class action lawsuit against the government, claiming \$12 billion in general damages, \$12 billion in special damages for negligence and breach of duty, and \$12 billion in punitive damages.<sup>11</sup> The negotiation process agreed to by the government and the AFN, and supervised by the court, concluded with the Indian Residential Schools

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<sup>6</sup> Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010), 111. I will only briefly treat the ADR here, however Regan devotes a chapter to it locating its philosophical roots within a colonial mentality. See Chapter 4 especially.

<sup>7</sup> *Ibid.*, 112.

<sup>8</sup> Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013), 42.

<sup>9</sup> Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: Assembly of First Nations), 40. Available at [http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian\\_Residential\\_Schools\\_Report.pdf](http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf).

<sup>10</sup> Jeff Corntassel and Cindy Holder, “Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru,” *Human Rights Review* vol.9 iss. 4 (2008), 474.

<sup>11</sup> Jung, “Canada and the Legacy of Indian Residential Schools,” 225.

Settlement Agreement in May of 2006. The Agreement was endorsed by Parliament on May 10<sup>th</sup> 2006 and the court late that year.<sup>12</sup> Throughout the negotiation process the old ADR system continued to operate, having received 14,903 claims by the time of the Settlement Agreement, but only having resolved 2,805 of those claims, indicating the need for another process.<sup>13</sup> The Indian Residential Schools Settlement Agreement (IRSSA) set aside \$1.9 billion to compensate survivors and additional funds for claims of sexual and physical abuse, but required claimants to pursue no further legal action against the federal government and churches, except in cases of sexual and serious physical abuse. In addition there was a further five years of funding for the Aboriginal Healing Foundation totaling \$125 million.<sup>14</sup>

The compensation under the terms of the IRSSA was delivered in two ways: the Common Experience Payment and the Independent Assessment Process. The Common Experience Payment consisted of \$10,000 for the first year a student attended an IRS and \$3,000 for each additional year.<sup>15</sup> By September 2012 there were over 100,000 applications for compensation with the average successful claimant receiving \$28,000, resulting in \$1.6 billion in compensation from the federal government.<sup>16</sup> The Independent Assessment Process was established to provide compensation for specific abuses (physical and sexual) suffered by survivors. The Indian Residential Schools Adjudication Secretariat was created to administer the Independent Assessment Process and adjudicate claims of abuse. As of December 31<sup>st</sup> 2015 the secretariat had processed 89% of the 37,998 applications received.<sup>17</sup> This has resulted in \$2.95 billion in compensation, a simple average of \$86,995 per successful applicant.<sup>18</sup> Together the Common Experience Payment and Independent Assessment Process represent \$4.55 billion in compensation to individual survivors. For many survivors, however, it was not “about the money” but

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<sup>12</sup> Ibid., 226.

<sup>13</sup> Kim Stanton, “Canada’s Truth and Reconciliation Commission: Settling the Past?” *The International Indigenous Policy Journal* vol.2 iss.3 (2001), 3.

<sup>14</sup> Cornstassel and Holder, “Who’s Sorry Now?” 474.

<sup>15</sup> Niezen, *Truth and Indignation*, 44.

<sup>16</sup> Ibid.

<sup>17</sup> Indian Residential Schools Adjudication Secretariat Annual Report 2015. Available at: <http://www.iap-pei.ca/information/pub-eng.php?act=ar-2015-eng.php#sec-1>.

<sup>18</sup> Ibid. I calculated the mean based on data available in this report.



represented a kind of “recognition value” that set the stage for a more reconciliatory process.<sup>19</sup>

Importantly for the purpose of this project, the IRSSA also mandated the creation of a truth and reconciliation commission. Established with a \$60 million budget to operate for five years, the Truth and Reconciliation Commission of Canada began its work in 2009, after an initial start-up in 2008 under a set of commissioners who declared they were unable to find a common path forward and resigned. The June 2009 appointments of Justice Murray Sinclair, Marie Wilson, and Chief Wilton Littlechild as commissioners allowed the work of the TRC to get underway to create a historic record through survivor testimony, to acknowledge the impact of the Indian Residential Schools system, and ultimately to issue a report to the parties to the IRSSA.<sup>20</sup> In its five years of operation the TRC took 6,750 recorded statements from survivors in both public and private settings, hosted national events, and created a historic record and report which it issued in 2015.<sup>21</sup> It is important to note these events that led to the creation of the TRC and compensation payments. The legal maneuvering and negotiations with the backdrop of the largest class action lawsuit in Canadian history should cue us to be critical of the institution of the TRC and the project of reconciliation itself.<sup>22</sup> That is to say, the TRC was created against a backdrop of obfuscation, where the government sought to minimise responsibility and liability.

### *Purpose, Themes, and Structure*

This study seeks to understand the significance of the Truth and Reconciliation Commission of Canada (TRC) for Crown-Aboriginal relations. It is particularly interested in the prospect for the TRC to contribute to a reconciled relationship between the Crown and Aboriginal peoples. The study seeks to explain the Indian Residential Schools (IRS) system in its historic context. Establishing its connection to a system of colonisation in Canada helps to give dimension to the harm that the TRC sought to address, while a comparative perspective with other TRCs will help to highlight the obstacles that the

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<sup>19</sup> Niezen, *Truth and Indignation*, 44.

<sup>20</sup> Indian Residential Schools Settlement Agreement Schedule N.

<sup>21</sup> Truth and Reconciliation Commission of Canada, *Survivors Speak* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), 1.

<sup>22</sup> See Appendix I for a condensed timeline of significant events leading up to the TRC.

Canadian TRC faced. This is explored in order to qualify the type of relationship between Crown and Aboriginal peoples that the TRC might help to create. This study, significantly, points out potential problems with the TRC's project of reconciliation. This critical perspective has been informed by the opinions of elite interviewees closely involved with the Indian Residential Schools Settlement Agreement, as well as in the formation and creation of the TRC.

The research has been organized around two central questions: Is the TRC a transformative opportunity in Crown-Aboriginal relations? And if so, towards what might this be a transformation? By a "transformative opportunity" I mean something quite specific. I discuss this concept in some detail in Chapter Seven. In that chapter, I am interested in the special qualities that accompany the specific time and place of an event like the one the TRC occupies, something that I have called a "transformative opportunity." Following Andrew Schaap and Eric Doxtader in their understanding of the time of reconciliation, of a special time outside time in which there is little time, I apply this concept to further develop this idea of a transformative opportunity.<sup>23</sup> The transformative opportunity is a special time in which balances *can* be tipped, but there is not much time in which to do so.

Following from this, I ask whether the Canadian TRC represents such a transformative opportunity. Concluding that it does, I argue that it follows that there is the potential for a transformation away from the *status quo* toward something else. This is where my corollary research question comes to the fore, because it is subsequently critical to ask: Towards what might this be a transformation? It is by no means necessary for the relationship between Crown and Aboriginal peoples to improve as a result of a transformative opportunity. For example, the Royal Commission on Aboriginal Peoples, established by the Government of Canada in 1991 and whose seminal report was issued in 1996, itself represented a transformative opportunity in Crown-Aboriginal relations. But, even years after the report was issued there is little evidence to indicate that RCAP has meaningfully improved Crown-Aboriginal relations. Thus, if it were representative of a transformative opportunity, it certainly failed in its promise of changing Crown-

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<sup>23</sup> See Andrew Schaap, "Reconciliation as Ideology and Politics," *Constellations* vol. 15, no.2 (2008); Andrew Schaap *Reconciliation and Politics* (New York: Routledge, 2005); and Eric Doxtader, "Reconciliation a Rhetorical Concept/ion," *Quarterly Journal of Speech* vol. 85, no. 4 (2003).

Aboriginal relations.<sup>24</sup> If the TRC is a transformative opportunity, then assessing how Crown-Aboriginal relations may change is an important aspect of this project.

The chapters set the stage for the evaluation of the TRC and the project of reconciliation, and it is against this set that the main findings based on elite interviews play out. The conceptual groundwork laid out in Chapter Three, builds a link between colonisation, decolonisation, and reconciliation, the three concepts most important to this project. In a sense the link is sequential: colonisation necessarily comes before decolonisation and moreover, a thorough understanding of colonisation is required to grasp what is at stake in decolonisation. Conceptually decolonisation must be understood before reconciliation, because reconciliation in Canada involves decolonisation, or put differently reconciliation is decolonial. Setting out this line of thought that runs from colonisation through to reconciliation (reconciliation contains the specter of colonisation because reconciliation is decolonial) is necessary to understand the historical processes that are detailed in Chapters Four and Five. Having a solid historical understanding, not only of the IRS system, but also of colonialism is important as a backdrop for the whole study, and indispensable to understanding approaches to decolonisation.

Chapter Four deals with colonisation starting with European-Aboriginal contact in the 15<sup>th</sup> century. The detailed account that I offer is important to include in order to set the overall backdrop for understanding the TRC. In this chapter it is important to note the changing character of the relationship between Crown and Aboriginal peoples. What started off as a symbiotic relationship in 16<sup>th</sup> century by the 19<sup>th</sup> century ended up becoming one where the British Crown dominated and subjugated Aboriginal peoples. This complete change in the relationship between Crown and Aboriginal peoples, led to decisions taken by the Crown for the welfare of its “Indian wards” that have resulted in disastrous outcomes for Aboriginal communities and which, fundamentally, call into question the honour of the Crown. The Indian Residential School system, as one of these attempts to improve the welfare of Aboriginal peoples, can be seen in its most charitable light as a good intention that paved the way to a personal Hell for so many. Seen in a less

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<sup>24</sup> Idle No More’s 2012 protests against the Conservative government’s budget bill that undercut Aboriginal and treaty rights is but one recent example of the continued strained relationship between Crown and Aboriginal peoples. (Gloria Galloway, “Winter Fails to Slow Idle No More’s Momentum,” *The Globe and Mail* 23 Dec. 2012: <http://www.theglobeandmail.com/news/national/winter-fails-to-slow-idle-no-mores-momentum/article6699001/> (accessed 15 Jan. 2013).

charitable light, the IRS system was something far more sinister, a deliberate attempt to destroy family bonds and Aboriginal culture itself. Here the good intentions prove to be far outweighed by the results of privation and abuse that were endemic to the IRS system. It is also important to understand the IRS system against the backdrop of the colonisation of Canada and the paramount nature of land for colonial settlement. That is to say, the IRS system cannot simply be understood as “education policy gone wrong,” but must be seen as part of a concerted effort to remove alterity and radical difference from a newly formed Canada in order to reproduce the idealized form of European “civilization” out of the savagery of the wilderness of North America.<sup>25</sup>

The drive to destroy Aboriginal difference was multifaceted, but involved the juridical apparatus of the state. How Aboriginal peoples have been included and excluded in Canada is key for understanding how pervasive colonialism was and still is in Canada. Understanding Chapter Four in terms of “exception”, outlined Chapter Three, allows colonialism to become more visible in contemporary Canada and helps sketch the contours of it, ultimately allowing for a meaningful decolonial response. Thus, Chapter Five discusses the attempts and approaches to dealing with the legacy of colonialism in Canada. In the approaches to decolonisation discussed below, it can be seen again that intentions need not accord to results. Well-intentioned liberal reformers who sought to give Aboriginal peoples the benefit of European philosophy, religion, and industry were among the most supportive of the IRS system. In Chapter Five, I argue, well-intentioned liberals wishing to give Aboriginal peoples the benefit of democracy, individual liberty, and market economy today are in serious danger of the same sort of colonialism, conscious or unconscious, as their reforming forbearers. With colonialism as the backdrop, approaches to decolonisation can be seen as set-piece obstacles around which the TRC and, more importantly, reconciliation, must manoeuvre.

Chapter Six fleshes out truth and reconciliation commissions as a mechanism that can promote reconciliation. To give perspective to the form of the Canadian TRC I have undertaken a comparative study of South Africa and Australia, because of their direct

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<sup>25</sup> The suggestion of “education policy gone wrong” was made by then Minister of Aboriginal Affairs John Duncan. See Taryn Della, “Residential School Survivors Outraged Over Duncan’s Residential School Statement,” *APTN National News*, <http://aptn.ca/pages/news/2011/10/28/residential-school-survivors-outraged-over-duncans-statement/> (accessed 25 Oct. 2012).

connection to British colonialism. These cases also prove useful in a discussion of the differing stages of decolonisation. This chapter not only lays out the mechanism of the TRC, but through the comparison with South Africa and Australia, it draws attention to the problems faced by the Canadian TRC, which operated in a colonial context. It is important to understand the general backdrop of colonisation here as well as the various approaches to decolonisation in Canada that have failed to fundamentally overturn the colonial order, to understand the specific challenges faced by the Canadian TRC. Without the chapters that lay out the context within which the TRC was put into place, it is difficult, if not impossible, to adequately understand what is at stake in the Canadian TRC.

Likewise, discussions of reconciliation are unintelligible without the context set out in Chapters Four and Five. Reconciliation as a political concept, discussed in Chapter Three, is brought back to the specific case of Canada in Chapter Six, where my contention is that reconciliation is decolonial and must be understood alongside the discussion of decolonisation. I take reconciliation's decolonial aspect to require autonomy rather than representation, eschewing the assimilationist tendency of the latter. It is with the history of colonisation and decolonisation as a backdrop that approaches to reconciliation in Canada can be understood more clearly. The aim here is to avoid a well-intentioned, but ultimately colonial approach whereby the settler society seeks to "fix" the "Indian problem," as was the case in the Indian Residential School system.

Overall then, Chapters 4, 5, and 6 present a rich context that is necessary to understand and address the main research questions of this project. The discussion, in Chapters Four and Five especially, highlights the unthinking colonialism that can result with an insufficient appreciation for history and context, especially combined with the theoretical framework of Chapter 3. And Chapter Six shows the obstacles to resolving these issues in the context of truth and reconciliation. Thus, it is of vital importance to this project to set out a context in which to situate the Canadian TRC and the questions of transformation in Crown-Aboriginal relations, as without an understanding of colonialism it is far too easy to reproduce colonialism.

More specifically, this context allows the reader to gain an understanding of what is at stake in this transformative opportunity in Crown-Aboriginal relations. The findings of

my fieldwork must be taken within this context if they are to be intelligible in any way. Chapter Seven, concerning transformative opportunities, not only details the special aspects of transformative opportunities, it also examines the opinions of elites from government, church, and Aboriginal communities about the possibility of the Canadian TRC contributing to change in Crown-Aboriginal relations. In order to avoid an unthinking colonialism that continues to treat Aboriginal peoples as objects, lacking agency and full humanity, exploring the background of not only colonialism, but also decolonisation proves necessary. The context of the first three chapters helps to make this danger more apparent and the trepidation of some observers more understandable.

The history and comparison of colonisation and decolonisation that run throughout Chapters Three, Four, and Five are also necessary to understand Chapter Eight, which deals with the possible relationship that may result from this transformative opportunity. The Canadian TRC could have no impact; or, worse, it could be used as a screen to continue a neo-assimilationist policy, whether it is a conscious policy or not. The government of Stephen Harper took important decisions that affected Aboriginal peoples with little or no consultation with Aboriginal peoples. The frustration on the part of Aboriginal peoples was evident in the brief and sensational protests in late 2012 and early 2013, including the “Idle No More” movement and the hunger strike of Chief Theresa Spence. While there is at time of writing a Liberal government, it is new and its resolve has yet to be tested on Aboriginal issues.

Ultimately, I conclude that the TRC does represent a transformative opportunity for Crown-Aboriginal relations, where a certain political ethic of reconciliation will be able to play out. Yet, while there is hope that the relationship between Crown and Aboriginal peoples will be decolonised as a result of the transformative opportunity offered by the TRC, there were signs from Stephen Harper’s Conservative government that indicate that the re-inscription of the same colonial dynamics will be present in the relationship in future. This is mainly due to the disjuncture in the understanding of the depth and breadth of reconciliation, between, on the one side, those who did not hold formal power in Ottawa at the time of the interviews (Liberals, Indigenous, and church leaders) and on the other side, the federal government. With a new Liberal government elected in October 2015 there has been a rhetorical shift in the government’s approach to reconciliation, but

it remains to be seen how actions will match with words. Those in power at the time of my interviews took the view that the role of reconciliation is a more limited one, and only the specific harms of the Indian Residential School system need to be addressed in this reconciliatory process. Moreover, the lack of public engagement with the Canadian TRC is a significant hurdle to reconciliation, as drawing Canadians into this process is the key to the political action that reconciliation so desperately needs.

More than just the analysis of the Canadian TRC within its context, the chapters as laid out are meant to convey a central contention of the TRC itself. That is, far from being relegated to the annals of history, colonialism is very much present in the lives of Aboriginal peoples, and, moreover, that these colonial attitudes are embedded institutionally. It is far too easy to dismiss past and ancient wrong. But, the IRS system is not ancient; the last school closed in 1996.<sup>26</sup> Further, the effects of the IRS system are all too present in many Aboriginal communities. It is the very presence of the colonialism that makes Harper's contention so right, that Canada has "no history of colonialism,"<sup>27</sup> for it is present, alive and well. The presence of colonialism is key to understanding the TRC and the possibility of reconciliation here.

Living up to the words of Prime Minister Harper's apology in 2008 requires reconciliation. To do this the TRC's impact must be felt by both the Canadian people and their government. If the Government of Canada cannot be moved by its citizens or by the TRC to deal honourably with Aboriginal peoples, then the TRC will serve as little more than a cover for a renewed effort at assimilation. If Canadians are concerned about living in a just society, then these impediments need to be overcome to create a pathway to reconciliation. The real value of this study is in pointing to these potential problems faced by the TRC and the reconciliation process in the context of the opinions of those elites who were intricately involved in the Settlement Agreement and in the creation of the TRC.

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<sup>26</sup> The last school in operation was St. Michael's Indian Residential School, originally the Duck Lake Indian Residential School, in Duck Lake, SK.

<sup>27</sup> David Ljunggren, "Every G20 nation wants to be Canada, insists PM," *Reuters*, <http://www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926> (accessed 27 Sept. 2012).

## CHAPTER TWO

### Methodology

#### *Introduction*

Before moving on to the discussion of the theoretical underpinnings of colonisation, decolonisation, and reconciliation, some discussion of the structure of the project and its methodological approach will be helpful, especially the methodology used for the interviews. This project is organized around two related research questions: First, is the Truth and Reconciliation Commission of Canada a transformative opportunity in Crown-Aboriginal relations in Canada? Second, toward what might this be a transformation? While there are valuable questions about healing, and community/family relations to be asked about the Indian Residential School system, I am interested, primarily, in the relationship between Crown and Aboriginal peoples in Canada. To help address these two research questions I have carried out elite interviews, with what Lewis Dexter terms “elite personnel.”<sup>1</sup> For Dexter, these elite personnel are “people in important or exposed positions.”<sup>2</sup> These interviews, in conjunction with analysis from the literature, form the basis for assessing where the TRC has come from, what was initially expected of it, and how far it went towards those expectations. Below, I discuss each aspect of the research design and method I have used in conducting the interviews.

#### *The Sample*

In order to establish who might be helpful to interview for this project, I started by identifying individuals who held public and influential positions during and after the Indian Residential Schools Settlement Agreement process. It seemed that talking to members of government at the time of negotiations would be helpful in understanding the Agreement and the genesis of the TRC. Similarly, talking to those in leadership roles within the churches that had been involved in the running of the IRS system and, especially, the leaders of the Assembly of First Nations, would round out a view of not only the Indian Residential Schools Settlement Agreement, but also the TRC, and Crown-

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<sup>1</sup> Lewis Dexter, *Elite and Specialized Interviewing* (Chicago: Northwestern University Press, 1970).

<sup>2</sup> *Ibid.*, 5.



Aboriginal relations more broadly. As the interviews began, I employed a response directed method of selecting further potential interviewees. This non-probabilistic method, often referred to as “snowball sampling,” allowed me to get at the “hard to reach populations” of government, church, and Aboriginal communities.<sup>3</sup> While I asked each interviewee for suggestions of others who were important to the Agreement and TRC, this method ultimately produced very few people whom I had not initially identified.<sup>4</sup>

There are, in essence, three main communities that are party to the Indian Residential Schools Settlement Agreement, the document that led to the creation of the TRC. These three broad groups are: the Government of Canada; Aboriginal peoples; and the churches that operated the Indian Residential Schools. Thus, I sought to interview representatives from each of these communities.

I conducted interviews with sixteen people from these three main groups. Eight were related to the Government of Canada. Four of these were former Liberal privy councillors: Irwin Cotler, who served as Minister of Justice from 2003-2006; Paul Martin, who served as Prime Minister of Canada from 2003-2006; Anne McLellan, who served as Deputy Prime Minister from 2003-2006; and Andy Scott who served as Minister of Indian Affairs and Northern Development from 2004-2006. Two were high level bureaucrats: Mario Dion who served as Executive Director and Deputy Head of the Office of Indian Residential Schools Resolution of Canada from 2003-2006 and then Public Sector Integrity Commissioner; and Michael Wernick, who at the time of interview was Deputy Minister Indian Affairs and Northern Development Canada (appointed 2006) and later Clerk of the Privy Council (appointed 2016). Both of these civil servants worked on the Aboriginal Affairs portfolio at the time of the Agreement’s negotiation and at least part of its implementation. One, Ian Brodie, was a former Chief of Staff to Conservative Prime Minister Stephen Harper (2006-2008). And one, former

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<sup>3</sup> Mark Handcock and Krista Gile, “Comment: On the Concept of Snowball Sampling,” *Sociological Methodology* vol. 41 no. 1 (2011), 369. Discusses the use of snowball sampling in such hard to reach populations.

<sup>4</sup> The interview with Andy Scott (telephone interview with author, 25 Oct. 2011) produced information related to cabinet leadership on the negotiation process. I had assumed that Scott, as Minister of Indian Affairs, would have taken the lead, but, rather, it was the Deputy Prime Minister. This instance was not as much an example of snowball sampling as adjusting my interviewee list based on emergent information. The other referral which identified an interviewee not initially identified was the suggestion by Michael Wernick (telephone interview with author, 1 Nov. 2011.) to speak with his former colleague at Indian Affairs, Mario Dion.

Supreme Court of Canada Justice Frank Iacobucci (1991-2004), was a former government negotiator/representative in the Indian Residential Schools Settlement Agreement process.

From within the Aboriginal community, the four people whom I interviewed were leaders and former leaders of the Assembly of First Nations and the Aboriginal Healing Foundation: Mike DeGagné who served as Executive Director, Aboriginal Healing Foundation from 1998-2012 and President of Nipissing University at the time of interview; Phil Fontaine who served as National Chief of the Assembly of First Nations from 1997-2000, and 2003-2009; Ghislain Picard who served as Regional Chief of Québec and Labrador, Assembly of First Nations from 1992; and Bob Watts who served as Interim Executive Director of the TRC from 2007-2008 and former Chief Executive Officer and Chief of Staff, Assembly of First Nations from 2003-2007. The fifth elite interviewee who falls into this division, but who, herself, is not an Aboriginal person, is Kathleen Mahoney. Professor Mahoney serves as legal counsel to the Assembly of First Nations (AFN) and worked closely with the National Chief, Phil Fontaine, at the time of the negotiations. She also helped to represent the AFN at the negotiations.

From within the church community, I interviewed David McDonald, Special Advisor on Residential Schools of the United Church of Canada (appointed 1998), and Gerry Kelly, former director of the Canadian Conference of Catholic Bishops' secretariat on Aboriginal affairs and current advisor to Roman Catholic entities regarding the Indian Residential Schools legacy.

I also interviewed Jane Morley, a former Commissioner of the TRC, who was appointed in the commission's first iteration. Unlike the other two commissioners appointed to the first commission, Morley is not an Aboriginal person. While I attempted to establish communication with all three of the former commissions, I received no response from Claudette Dumont-Smith and Harry LaForme.

The interviews I conducted were based on the availability and willingness of those contacted to speak with me. While I contacted many potential interviewees from both the Conservative and Liberal parties, it is important to note that the positive responses are skewed toward to the political left, with many more Liberals than

Conservatives responding to my request. That is to say, there is a selection bias<sup>5</sup> at work here, as I interviewed so many more Liberals than Conservatives—based on their respective willingness to participate. This bias gives me a slanted perspective, as I have a clear view of the vision of Paul Martin’s Liberal government, but only one interviewee from Stephen Harper’s Conservative government, Ian Brodie, and as of 2008 Dr. Brodie no longer worked for the Prime Minister’s Office. Understanding government action and thinking is important in addressing my research questions, but without more interviews with the Conservatives who were in government for much of time the TRC has operated, this understanding is necessarily limited and based on my interpretation of that government’s actions. It is important to include Conservatives *and* Liberals, not just for representative reasons, but also because of the changeover in government that occurred in the 2006 general election. Thus, the exclusion of Conservative elite interviewees was not by design. I contacted two former Ministers of Indian Affairs, John Duncan when he was the minister, and the Prime Minister’s Office, in an attempt to get Conservative views. None of these people were willing to talk with me, either not responding to repeated attempts at contact or citing a busy schedule. In an attempt to ameliorate this deficit of Conservative voices I have used public statements made by members of Harper’s Conservative government, and referred to actions taken by that government. While these public statements do not give the same candid assessment that an elite interview might, these public statements do point to sentiments expressed by these individuals, for which they are accountable.

This sample has its deficiencies. However, there is still merit in the study and it does provide insights. The main virtue of the sample is that I have interviewed many of the people who were most involved in negotiating the Settlement Agreement, from the Aboriginal community, the political party in power at the time, the bureaucracy, and the federal representative in the negotiation. These people have given me a picture of what the intent of the TRC was and have been actively involved in following its work, thus being able to give a unique analysis of how far the TRC has gone toward those original

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<sup>5</sup> For a discussion of selection bias see Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994) 130-1. While I am not drawing causal inferences in this research the issue of biased interviews is important to bear in mind. Even at the level of intuition, having five times the number of Liberal interviewees compared to Conservatives impacts on my understanding of the situation.

goals. These interviews have given me first-hand accounts, at the highest political levels, of the process that led to the TRC and its inception.

### *The Interviews*

With each person who responded positively to my request for an interview, I carried out either an in-person or by-telephone interview. The length of each interview varied, based on the time each elite interviewee had available, how long their answers lasted, and how much additional information each wanted to provide. All interviews were conducted “on the record” and each interviewee agreed to be quoted and cited directly.

Each interview was recorded on a digital recorder, except the interviews with Phil Fontaine and Irwin Cotler because of environmental constraints.<sup>6</sup> In all of the interviews, in addition to the recordings, I made notes throughout the interview. For my interviews with Fontaine and Cotler, these notes were more careful and detailed, as they were the only record of the interview. Understanding the constraints, Fontaine paused often to let me finish copying down his answers. In Cotler’s interview, it was not as easy to make thorough notes as the background noise was distracting and Cotler was interrupted several times by colleagues and, at one point, a phone call. I transcribed each of the digital audio recordings I did make with the aid of a transcription software package.<sup>7</sup>

In conducting the interviews, a hybrid method was used to keep the conversation directed to matters related to the TRC, yet allow the interviewee to convey what they thought was important. I followed the model of what Sue Arthur and James Nazroo call a “topical interview,” which has “a stronger emphasis on factual and descriptive data than in the more exploratory forms of data collection.”<sup>8</sup> That is to say, I kept these elite interviewees directed toward a set of topics through my selection of questions, and kept the interview from wandering as much as possible. This allowed room for what Dexter calls “special, nonstandardized treatment,” which allows each interviewee to reveal what

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<sup>6</sup> The interview with Fontaine was conducted at an Ottawa bistro where background noise prevented the use of recording equipment. The interview with Irwin Cotler was conducted in the Opposition Lobby of the House of Commons, where background noise prevented effective audio recording.

<sup>7</sup> Dragon Naturally Speaking was used.

<sup>8</sup> Sue Arthur and James Nazroo, “Designing Fieldwork Strategies and Materials,” in Jane Ritchie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: SAGE Publications, 2003), 110.

he or she considers important and to share his or her perspective on the situation.<sup>9</sup> Thus, my questions did not follow a script; rather, a skeleton outline was used so each interviewee could discuss his or her opinion and expertise related to the Indian Residential Schools Settlement Agreement, the TRC, and Crown-Aboriginal relations. While some of the same questions were asked of each interviewee such as “Do you think the Government of Canada has a sincere commitment to reconciliation?” the interviewees were not each asked the very same questions in each interview nor in the same order. The skeleton outline of questions used to keep the conversation on topic and directed toward the information I was most interested in, similar to the “grand tour or main questions” that William Miller and Benjamin Crabtree describe as “open, easily understood, descriptive question that seek to elicit understandings.”<sup>10</sup>

There was a fluidity to each conversation, where I asked follow-up questions on issues identified by the interviewee and allowed each one to highlight what he or she felt was significant. At some points I found it necessary to “teach the interviewee what [I was] looking for,” by clarifying the meaning of the question, “so that the interviewee [could] later teach [me],” as Dexter puts it.<sup>11</sup> The questions I asked, and especially the “grand tour or main questions” were used to “open a space for discovering what others think and feel about”<sup>12</sup> issues related to the TRC. It was my intention to conduct an interview that was more like a conversation, as recommended by Dexter. Many of the interviews, however, ended up as a “quasi-monologue [on the part of the interviewee] stimulated by understanding comments [on my part].”<sup>13</sup>

In order to get the best answers possible from the interviewees, I tried to engage each one by being enthusiastic, nonjudgmental, relaxed, and by showing interest in the information, as suggested by Miller and Crabtree.<sup>14</sup> I also maintained a professional distance, keeping the interview warm and at the same time serious. I advised each interviewee at the beginning of the interview that they would have an opportunity to

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<sup>9</sup> Dexter, *Elite*, 5.

<sup>10</sup> William Miller and Benjamin Crabtree, “Depth Interviewing,” in Sharlene Nagy Hesse-Biber and Patricia Leavy eds. *Approaches to Qualitative Research: A Reader on Theory and Practice* (New York: Oxford University Press, 2004), 192.

<sup>11</sup> Dexter, *Elite and Specialized Interviewing*, 63.

<sup>12</sup> Miller and Crabtree, “Depth Interviewing,” 192.

<sup>13</sup> Dexter, *Elite and Specialized Interviewing*, 56.

<sup>14</sup> Miller and Crabtree, “Depth Interviewing,” 196.

review the statements they made, a practice known as member checking.<sup>15</sup> Interviewees were given the opportunity to review their statements as included in this work for accuracy, to ascertain “whether the data analysis is congruent with the participants’ experience.”<sup>16</sup> As is often the case, interviewees were given a single opportunity to verify and correct their statements.<sup>17</sup> While this gives interviewees a high level of control over the final version of the interview material, it is hoped that this has set each one at ease and allowed for fuller participation. Moreover, member checking helps to ensure the accuracy and credibility of the statements taken from interviewees.

### *Supplementary Material*

To overcome some of the difficulty of not having many Conservatives interviewees, I further undertook a study of public statements made by prominent members of that party on issues related to Aboriginal peoples. By searching Hansard, ministerial websites, and national media sources, it has been possible to include the opinions of additional Conservatives. During the tenure of the Conservative government there have been a number of high-profile decisions taken on the Aboriginal affairs portfolio, providing a rich source of media coverage, notably in the area of education and language policy. While some of these publicly available statements have been used, they have not been relied on as much as the interviews because of my inability to engage the individuals directly and establish a context for their views and ensure a proper understanding.

### *The Analysis*

The 16 interviews I conducted gave me over twelve hours of recorded material, from which I produced transcripts.<sup>18</sup> It is these transcripts that form the textual data that I have analyzed, compared, and from which, ultimately, I have drawn conclusions.

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<sup>15</sup> Julie Carlson, “Avoiding Traps in Member Checking,” *The Qualitative Report*, vol. 15, no. 5 (2010), 1105.

<sup>16</sup> Michael Curtin and Ellie Fossey, “Appraising the Trustworthiness of Qualitative Inquiry: Guidelines for Occupational Therapists,” *Australian Occupational Therapy Journal*, vol. 54, no. 2 (2007), 92.

<sup>17</sup> Carlson, “Avoiding Traps in Member Checking,” 1105.

<sup>18</sup> In each case I recorded the conversation, with the exception of Phil Fontaine as the meeting was in a public place and it was not possible to make an effective audio recording in this instance. In this case many notes were taken with Mr. Fontaine pausing at several instances to let me accurately and thoroughly record his statements.

In addressing the research questions, a folk Bayesian approach was used. In a folk Bayesian approach, the researcher moves “back and forth between theory and data, rather than taking a single pass through the data.”<sup>19</sup> The folk Bayesian approach helped me to revise many of my prior beliefs as a process of the research and allowed me to better address the research questions. This approach allows for a dynamic element in the research, which can lead to a better description of the possibility of transformation and an indication as to where the relationship between the Canadian government and Aboriginal peoples might be going.

By analysing and seeking connections and conclusions from these interviews, that is, in writing my findings, I engaged in a process of representation of others and their views on key questions. As Norman Denzin points out, “representation... is always self-presentation. That is, the Other’s presence is directly connected to the writer’s self-presence in the text.”<sup>20</sup> This is even more the case here, as in the text of the transcript I am actually asking questions and encouraging statements from interviewees, to say nothing of my presence in the moment of the interview itself. As a male member of the dominant society and denominationally Anglican, there are a variety of ways in which I may be biased. I have tried to be reflexive in approach and analysis, but I am still open to bias in two important regards. First, as a Christian member of the one of the church that operated residential schools I am hopeful that this period can be addressed in a truly just way, perhaps overly hopeful. Moreover, hope is an important worldview forming concept for me and may bias my analysis. Second, the term reconciliation is one that has special meaning for me in a religious context and I may be overly attached to and invest in its use and conceptual appropriateness. While I take pains to show reconciliation as political ethic that can be useful and broadly intelligible for the various stakeholders involved, my fondness for it may be informed by my subjectivity. There may be other areas that are affected by my subjectivity to be sure, but these strike me as two prominent areas where I can identify my own biases. Knowing that I am a white male Anglican may put the reader

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<sup>19</sup> Timothy McKeown, "Case Studies and the Statistical Worldview: Review of King, Keohane, and Verba's *Designing Social Inquiry: Scientific Inference in Qualitative Research*," *International Organization* vol. 53 no. 1 (1999), 180.

<sup>20</sup> Norman Denzin, "The Art and Politics of Interpretation," in Sharlene Nagy Hesse-Biber and Patricia Leavy eds. *Approaches to Qualitative Research: A Reader on Theory and Practice* (New York: Oxford University Press, 2004), 452.

on the search for other unconscious biases herein, but it is my hope that this search will not be distracting.

The problem of self-presentation here is even more important as several interviewees were Aboriginal peoples. In the many areas of the academy, there has been a history of colonisation through social science research,<sup>21</sup> and it has especially been the case that “research involving Aboriginal peoples in Canada has been defined and carried out primarily by non-Aboriginal researchers.”<sup>22</sup> Notwithstanding the inherent process of representation present in writing, in a real effort not to appropriate the voice of anyone whom I interviewed, but especially Aboriginal peoples interviewed, I have tried to let the interviewees speak for themselves as much as possible in presenting my findings.

Moreover, in conducting the interviews and in my subsequent analysis, I have tended towards a “thick description” rather than a “thin description.”<sup>23</sup> Denzin puts the difference between the two this way: “a thin description simply reports facts, independent of intentions or circumstances. A thick description, in contrast, gives the context of an experience, states the intentions and meanings that organized the experience, and reveals the experience as a process.”<sup>24</sup> The intent of this approach was to “create the conditions that will allow the reader, through the writer, to converse with (and observe),” that which has been studied.<sup>25</sup> This thick approach has been taken with regards to the context of the interviews and the TRC, located as they are within a specific political-historical frame of Canada. While wanting to let interviewees speak for themselves as much as possible, a full and rich context is essential for the reader to understand what is at stake with the TRC and reconciliation.

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<sup>21</sup> See, Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999).

<sup>22</sup> Panel on Research Ethics, Chapter 9 “Research Involving the First Nations, Inuit and Métis Peoples of Canada” <http://www.ger.ethique.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter9-chapitre9/#toc09-1> (accessed 17 Oct. 2012).

<sup>23</sup> It is important to note that this understanding of “thick” and “thin” description is not based on Clifford Geertz’s theory. It is based on Denzin’s discussion of thick and thin (Denzin, “The Art and Politics of Interpretation,” 455).

<sup>24</sup> Denzin, “The Art and Politics of Interpretation,” 455.

<sup>25</sup> *Ibid.*, 456.



### *Conclusion*

Broadly speaking, the methodology used here could be said to be critical. The most relevant sense in which my approach is critical is the spirit in which I open the field of what constitutes evidence to include broader and more prevalent social texts. For example, I not only understand political oppression as an indication of colonialism, but also understand social repression in its many forms as a means of colonialism. That is to say, I recognize both social constructions of “Aboriginality” as well as overt government policy as aspects of a complex system that seeks to exclude Aboriginal peoples and ways from the social, political and economic order of Canada, in what is broadly understood as colonialism or colonisation. I take seriously the “gut feelings” that Canadians have of Aboriginal peoples that are not based in reality, such as moral corruptness, indecency, and sloth, identified in my interview with Mike DeGagné, as part of colonisation.<sup>26</sup>

More generally, as Laurel Richardson argues, “the core of postmodernism is *doubt* that any method or theory, discourse or genre, tradition or novelty, has a universal and general claim as the ‘right’ or privileged form of authoritative knowledge.”<sup>27</sup> It is this doubt that I have tried to carry around with me throughout the process. Concretely, this has meant a rejection of the idea of objective description and a self-reflective process of writing and researching that recognises my own presence in the work. As Denzin argues, “writers create their own situated, inscribed versions of the realities they describe.”<sup>28</sup> That is to say, I do not take my findings to be anything but my interpretation of what these elite interviewees told me during the interviews, combined with a certain analysis on my part. These findings cannot be generalised. At most, they tell us that particular people hold certain attitudes or opinions. I do not make claims about the extent of an opinion or attitude in a community or population, but the few interviewees from a given population give us an idea that an attitude or opinion might exist there, if only because these communities are represented in formal ways by those whom I interviewed.

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<sup>26</sup> Mike DeGagné, former director of the Aboriginal Healing Foundation (1998-2012), telephone interview with author, 21 Feb. 2012.

<sup>27</sup> Laurel Richardson, “Writing: A Method of Inquiry,” in Sharlene Nagy Hesse-Biber and Patricia Leavy eds. *Approaches to Qualitative Research: A Reader on Theory and Practice* (New York: Oxford University Press, 2004), 475.

<sup>28</sup> Denzin, “The Art and Politics of Interpretation,” 455.

The thesis makes clear a way of understanding the process of colonisation, decolonisation, and reconciliation in Canada by offering theoretical lens for each, applying them to the historical process of colonisation, approaches to decolonisation, and the prospect for reconciliation offered by the TRC. But the major contribution this work makes is in making public the opinions of influential figures that helped created the TRC, on the prospects for the TRC's success.

## CHAPTER THREE

### Theory

#### *Introduction*

There are three complex concepts involved in this work: colonisation, decolonisation, and reconciliation. While each of these concepts could constitute dissertations in and of themselves, space here only allows for a limited discussion of each. But these are necessary concepts to understand in order to proceed to the main questions of this dissertation, namely: is the TRC a transformative opportunity in Crown-Aboriginal relations? And if so, toward what might this be a transformation?

Dealing with colonisation, decolonisation, and reconciliation is necessary to adequately address the possibility offered by the TRC, as the TRC is expressly directed toward one of the most visible sites of colonisation, the Indian Residential School system, and is specifically tasked with fostering reconciliation among the parties to the Indian Residential School Settlement Agreement (although here I am most interested in Crown-Aboriginal reconciliation). For a thoroughgoing reconciliation, a reconciliation that is more than resignation to one's circumstance, decolonisation must be strongly at work in the Canadian case, as I argue below. This understanding better helps to situate the analysis presented in Chapters Five and Six, as well as giving a theoretical backing to the historical process of colonisation outlined in Chapter Four, and past approached to decolonisation discussed in Chapter Five.

The goal of this chapter is to draw these three concepts together in more than a simple chronological way, in order to provide insights into the work and possibility of the

TRC. While these processes are discussed in detail in later chapters, here I want to detail the theory that informs my thinking on colonisation, what I take decolonisation to mean, and how I understand reconciliation.

First I start with the work of Giorgio Agamben, which gives a useful structure to understand colonisation at its very core. The theory of the “state of exception” that runs through some of Agamben’s works is a helpful tool for seeing a process of normative exclusion of Aboriginal peoples from the political, economic, and cultural constructions of Canada. Here I only discuss Agamben’s theory, leaving a detailed discussion of the historical unfolding of colonisation in Canada for Chapter Four. This history of colonisation importantly informs the context for the Indian Residential School system and a discussion thereof. Having a theory of colonisation in mind is important when reading Chapter Four, and will add clarity to the balance of the work.

Second, I discuss what I take decolonisation to mean, particularly in light of my discussion of the state of exception. As decolonisation is a fraught term and can become violent or revolutionary, it is important to lay out how I understand decolonisation before moving on to discuss reconciliation. At its heart, I take decolonisation to mean the removal of alien structures of power from a people *as well as* the overturning of a hierarchical taxonomy of humanity that relegates the colonised to a qualitatively different form of humanity than the coloniser. However, I want to eschew the economy of violence upon which colonisation is built in redressing it with decolonisation, so that violence is not the means to remove violence, perpetuating a cycle of that which it seeks to overcome. That is to say, I am keen to avoid rectifying colonial violence perpetrated against the colonised with violence perpetrated against the coloniser. Whereas a revolutionary decolonisation, such as that advocated by Frantz Fanon, seeks to overcome colonialism through its violent negation, I understand decolonisation to be more closely linked to a peaceful reconciliation that transcends the economy of violence that separates and enforces a hierarchical taxonomy of humanity.<sup>1</sup> The concept of decolonisation is recurrent in discussing reconciliation and thus must be carefully delimited here. It is discussed in the Canadian context in Chapter Five.

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<sup>1</sup> Frantz Fanon, *The Wretched of the Earth*, trans. Richard Philcox (New York: Grove Press, 2004), 1.

Last, and most directly relevant to the research questions, I discuss reconciliation. As I understand reconciliation, it is inseparable from decolonisation: understanding both colonisation and decolonisation builds towards reconciliation. Here reconciliation is seen as a political-ethical approach that relies on an agonistic politics, which I detail below. This understanding of reconciliation needs to be kept in mind when assessing the possibility that the TRC offers in reconciling Crown and Aboriginal peoples.

These concepts hang together loosely, to be sure, but are important to understand, in order to clarify the balance of this work. In a sense, their link is transitive. We need a theoretical structure to begin to understand colonisation in a thoroughgoing way, which makes the aim of decolonisation intelligible. As decolonisation itself is a fraught concept, delimiting it, and outlining a structure that is non-violent is important. It is in part through this link to non-violence that decolonisation is connected to reconciliation. At its heart, as I understand it, reconciliation is decolonial, as both reconciliation and decolonisation aim to restore basic human dignity. This trail, from colonisation, to decolonisation, to reconciliation, is not direct or comprehensive, but tracing this line provides insights for Chapters Four through Six. These chapters give the necessary context with which to approach the Canadian TRC and inform the interview finding discussed in Chapters Seven and Eight.

*Towards a Historico-Political Understanding of Aboriginal peoples in Canada*

Chapter Four contains a detailed discussion of the colonisation of Canada by Europeans. What is at stake in this process, I argue, is made more visible by the application of the theoretical lens detailed here, the “state of exception” outlined by Giorgio Agamben. It is through this rubric of exception that the tensions and contractions of colonisation can be better understood. With the groundwork laid, the historical context laid out in Chapter Four, can be understood in much fuller way. I am not interest here in tracing a legal history *per se*, but rather using the legal notion of exception to help understand colonisation within a political-philosophical context. I am not looking for declared states of emergency or suspensions of constitutions. Rather, this part of the project concerns conceiving of the legal-political fact of colonisation within a philosophical framework that, as we will see, takes Aboriginality as outside the norm. If we see colonisation as the

extension of the Western legal tradition, as Robert Williams argues, I argue that it is in the exception, inherent in the law, that we see this extension.<sup>2</sup> Thus, Agamben's theory of exception gives a productive lens to use in understanding colonisation in more than a historical way and to see what is at stake in addressing it.

Understanding what Agamben means by the "state of exception" is not as straightforward as it first appears, as it is more than a simple suspension of the law. By beginning with the semantic origins of the term, we can move on to understand how the law always already contains its own rupture in the form of exception, opening up a space where unlicensed force is used, or at least force licenced only by force. In Chapter Four I will return to this to help make sense of the historical process of colonisation there detailed.

The state of exception, as Agamben outlines it, is an intricate concept. However, the roots of it can be easily seen in the colloquial understanding of states of emergency. A cursory examination of our history indicates that in war the suspensions of certain activities are justified as "exceptions," for the maintenance or defence of the state. The *Defence of the Realm Act* (DORA) during the First World War and the *Emergency Powers Act 1939* during the Second World War in the United Kingdom are corollaries to the Canadian *War Measures Act*, which was invoked in Canada during both world wars. Indeed, even in times of extreme threat, absent war, like the October Crisis of 1970 in Canada, invocations of extraordinary power by the state (or sovereign) are often welcomed, if not expected. These instances share the suspension of the law as such, and are moments or sites where the only law is force. That is to say, in each there is a state excepted from the normal operation of law. It is here that we glimpse visible localized invocations of states of exception from the past century. However, in order to understand this term, it is helpful to utilize the type of historical and philosophical treatment that Giorgio Agamben offers.

This concept of exception is common in the West. In German it is referred to as a "state of necessity."<sup>3</sup> In the more familiar Anglo tradition, the terms "martial law" and "emergency powers" are generally used. Agamben's term "state of exception" refers to

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<sup>2</sup> Robert Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990). See especially Chapter 5 and 6.

<sup>3</sup> Giorgio Agamben, *State of Exception* (Chicago and London; University of Chicago Press, 2005), 4.

instances where the state suspends the operation of law as it is commonly practiced, thus creating a state of exception for law, as such, under its pre-exception form. In the modern Western constitutional tradition there are provisions for the exception or derogation of rights and even the constitution itself, which presents an interesting way of containing within law its own suspension.

This is the central paradox of the exception. The law always tries to annex or relate to the exception, despite the impossibility of it. Following Carl Schmitt, whose famous declaration “Sovereign is he who decides on the exception”<sup>4</sup> for Agamben “the paradox of sovereignty consists in the fact the sovereign is at the same time both outside and inside the juridical order... the paradox can also be formulated this way: ‘the law is outside itself,’ or ‘I, the sovereign who am outside the law, declare that there is nothing outside the law.’”<sup>5</sup> For the state of exception, “what is excluded in the exception maintains itself in relation to the rule in the form of the rule’s suspension.”<sup>6</sup> It is not that “the exception subtracts itself from the rule; rather, the rule, suspending itself, gives rise to the exception.”<sup>7</sup> In this way, Agamben links exception to law in a Heideggerian syntagma: the law “always already contains its own virtual rupture in the form of a ‘suspension of every law.’”<sup>8</sup> That is, the law is inconceivable without conceiving of a potential need to suspend it. The exception is indispensable to the rule, “the exception does not only confirm the rule, the rule as such lives off the exception alone.”<sup>9</sup> This only seems counterintuitive, as it is clear in the case of mortal danger to the state itself (the law itself) such as Lincoln’s suspension of *habeas corpus*, the invocation of the Defense of the Real Act in the UK, the Patriot Act in the US, even the peacetime invocation of the War Measures Act in Canada.<sup>10</sup> These exceptions ensure the rule; they support and allow the existence of the rule through its suspension, to preserve the conditions of the rule

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<sup>4</sup> Carl Schmitt, *Political Theology: Four Chapters in the Concept of Sovereignty*, George Schwab trans. (Cambridge, MA: MIT Press, 1988), 4.

<sup>5</sup> Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford; University of Stanford Press, 1995), 15.

<sup>6</sup> *Ibid.*, 17-18.

<sup>7</sup> *Ibid.*, 18.

<sup>8</sup> *Ibid.*, 37.

<sup>9</sup> *Ibid.*, 16.

<sup>10</sup> Lincoln justified his suspension of this ancient right in a speech before Congress “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Abraham Lincoln, “July 4<sup>th</sup> Message to Congress” (speech, Washington, DC, July 4, 1861), Miller Center, <http://millercenter.org/president/lincoln/speeches/speech-3508>.

itself. The outside must be kept outside, if possible destroyed by *all* means, but destroyed outside to preserve the purity of that which is inside. The exception fully reveals the rule, that which is other is dehumanised, subjected to a force-of-law-without law.<sup>11</sup> Thus it is for Agamben, following Kierkegaard, that “the exception explains the general as well as itself.”<sup>12</sup>

Moreover, this exception can become lodged as the rule, which can only subvert the rule utterly. It is here where the state of exception “becomes the rule, then the juridical-political system transforms into a killing machine.”<sup>13</sup> While Agamben has in mind here the Nazi regime, with its unambiguous recourse to exception as rule—what Oren Gross calls “exceptionless exception”<sup>14</sup>—and its clear realization as “killing machine,” most visibly in places like concentration camps, it is nonetheless applicable for my purpose here. It is especially fit in the context of the “camp,” which for Agamben is “a piece of territory that is placed outside the normal juridical order... The camp is the structure in which the state of exception is permanently realized,”<sup>15</sup> localised and contained, as well as physically manifested in certain terrain or location. The system of reserves and legislation separating Indian from settler are at least designed to destroy a way of life, if not a whole people, a body politic. The residential school was explicitly charged with “killing the Indian in the child,” if sometimes it erred and merely killed the child. In either case the exception-cum rule in these sites created a “machine” whose foremost interest was to kill a people.

To the extent that we see the construction of a legislative framework around Indians in Canada (*The Gradual Civilisation Act, Indian Act, etc.*), detailed in Chapter Four, we see the playing out of law’s desire to annex the exception, a problematic and impossible task. Referring to the ‘War on Terror’ and the accompanying anti-terror legislation, Cox, Levine, and Newman point out that in this state of exception “the law is

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<sup>11</sup> Agamben, *State of Exception*, 39.

<sup>12</sup> Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archives* (New York: Zone Books, 1999), 48.

<sup>13</sup> Agamben, *State of Exception*, 86.

<sup>14</sup> Oren Gross, “The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the ‘Norm-Exception’ Dichotomy,” *Cadozo Law Review*, vol. 21 (2000), 1825.

<sup>15</sup> Giorgio Agamben, “What is a Camp?” in Giorgio Agamben *Means Without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 39.

used to suspend and weaken itself.”<sup>16</sup> Put somewhat differently “rather than law imposing constraints on sovereignty, the law increasingly operates as its instrument or weapon... the law embodies its own lack, its own suspension—and thus there is a paradoxical relationship between law and lawlessness, between the rule of law and its abrogation.”<sup>17</sup> This is precisely what Agamben means by a force of law without law; “the state of exception is an anomic space in which what is at stake is a force of law without law... in which potentiality and act are radically separated... [it is] a *fictio* by means of which law seeks to annex anomie itself.”<sup>18</sup> Thus, the exception is not extra-legal *per se*. That is to say, it is not simply outside the law. Rather it is “a kind of grey zone between sovereignty and law, in which the limits of each become indistinct and blur into one another.”<sup>19</sup>

For Cox, Levine, and Newman, in the context of the ‘War on Terror’ this means “the sovereign decision on the exceptional situation refers not just to the ability to act unilaterally outside the law in response to a real or perceived terrorist threat, but also to work through and use the law to suspend and limit the legal constraints that would normally be imposed on sovereign power.”<sup>20</sup> While I am not concerned with a terrorist threat to the state, this logic obtains nonetheless. As I detail in Chapter Four, the radical alterity of Aboriginal peoples posed a perceived threat to the Anglo-European construction of Canada, culturally, economically, and politically. Thus, the derogation of the treaties and the extension of a legislative framework devoid of the normal operation of law (indeed respect for ancient rights as a subject of the Crown) amounts to a declaration of exception, the goal of which is the maintenance of the settler state, no matter the cost. The most visible localization of the exception being the Indian Residential School system.

The paradox of exception can be useful not only in understanding Aboriginal peoples and their relation to the state of Canada, but also to the people of Canada. Having always been “other” to the colonial project, the history detailed in Chapter Four shows how Aboriginal peoples have been *outside* and *unnecessary* to the governmental and

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<sup>16</sup> Damian Cox, Michael Levine, and Saul Newman, *Politics Most Unusual: Violence, Sovereignty and Democracy in the ‘War on Terror’* (New York: Palgrave MacMillan, 2009), 72.

<sup>17</sup> *Ibid.*, 72-3.

<sup>18</sup> Agamben, *State of Exception*, 39.

<sup>19</sup> Cox, Levine, and Newman, *Politics Most Unusual*, 73.

<sup>20</sup> *Ibid.*



cultural construction of Canada. In the case of the Upper Canadian treaties, it was exactly the removal of Aboriginal peoples from the land that allowed the creation of Upper Canada, in its agrarian and European form. Yet, paradoxically, through law and assimilation in particular, the colonial project has continuously tried to annex the rebellious outside that is the otherness of Aboriginality. Here we can see that in not only the civilizing policy of the 1830s, but also the hard bargains the Western treaties sought in an effort to settle the more nomadic plains tribes that hold Aboriginal peoples outside the construction of Canada. When Williams argues that “the West’s archaic, mediievally derived legal discourse respecting American Indians is ultimately genocidal in both its practice and its intent,”<sup>21</sup> he is exactly right. But it is not the rule of law *per se* that is at the core of this “genocidal practice and intent,” but rather the exception from the law that licences this genocide, that licences a force-of-law-without-law. By holding Aboriginal peoples in such a state of exception, anything becomes “legal” to inflict upon them, for theirs becomes a state without law. The Canadian state has sought a relation of domination with the otherness, the exteriority, of Aboriginal peoples, to control and regulate with a *force-of-law-without-law*. However, it has continually failed to master this exteriority. It is this exteriority, this absence that puts Aboriginal peoples at the centre of a meaningful understanding of Canadian history. That is to say, the absence *is* the presence.

The cruelty of the residential school is the clearest instance of the state of exception, where the inmates were reduced to the whim of the guards, whether white or gangs of Aboriginal students, in such a way as not to seem like a crime to the perpetrators. That is to say, the treatment of Aboriginal children in the schools was not isolated nor was it individual. Instead, we must see the schools against a backdrop that systemically dehumanises all Aboriginal peoples, subjecting them to means of transformation outside the order applicable to settler Canadians.

Thus, rather than reading a history of Canada absent of Aboriginal peoples, or, worse, the suggestion by John Ralston Saul of reading a history of Canada as

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<sup>21</sup> Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990), 326.

Indigenous,<sup>22</sup> we must see the complex topology of Canada, which includes an exteriority that is irreducibly outside of Canada in the way we usually understand it. That is, Aboriginal peoples are present in the historical construction of Canada, economic, cultural, and political, because of their exclusion, their exception. While it is not incorrect to include Aboriginal peoples as something like a “third solitude”<sup>23</sup> this misses, *per se*, their inclusion through exception to the politics and culture of Canada. By understanding colonisation in this way, the events outlined in Chapter Four can be seen as appropriately insidious, and building on this understanding, what is at stake in decolonisation. For understanding decolonisation relies expressly on understanding colonisation, and here understanding what I take to be decolonisation relies on the above historical-political view of colonisation as what it seeks to address.

### *The project of unravelling*

Taking seriously the state of exception invoked around Aboriginal peoples in Canada brings into focus the true enormity of colonisation and thus the scope of decolonisation. As “decolonisation” is a recurrent theme in later chapters, and a fraught and amorphous term, here I sketch the contours of what I understand decolonisation to mean. In Chapter Five, below, I examine particular attempts at decolonisation in Canada. Starting with the cultural underpinnings of colonialism gives us a sense of the extent of unravelling that needs to occur with decolonisation, as cultural (mis)representations are bound so closely with political domination. It is colonisation and decolonisation as political relations with which I am most concerned here, but it would be irresponsible to take them as separate from their cultural aspects and give an unnecessarily reductive view of colonialism.

The colonisation described in Chapter Four is a historical one, concerned mainly with the settlement of European newcomers over the land of North America, and with the increasingly uneven relationship between the British Crown and Aboriginal nations. That is to say, it concentrates on one aspect of the colonial paradigm: governmental relations. This is my main concern here. However, it is not the entirety of the colonial project. As

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<sup>22</sup> The central contention of Saul’s book is that Canada exhibits more Aboriginal characteristics than European, but this can obscure a history that involves clearing Aboriginal peoples from the land in order to create Canada. John Raulston-Saul, *A Fair Country* (Toronto: Viking Canada, 2008), 3.

<sup>23</sup> The term of “two solitudes” to refer to French and English Canada comes from the novel written by Hugh McLennan ( Hugh McLennan, *Two Solitudes* (Toronto: Macmillan of Canada, 1945)).

Edward Said notes, colonialism and imperialism—allied concepts wherein colonialism is the process, and imperialism is the ideology—are “supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination.”<sup>24</sup> Moreover, this domination continues “in a kind of general cultural sphere as well as in a specific political, ideological, economic, and civil practices.”<sup>25</sup> It is important to say something of the cultural aspects of colonisation that are latent and so insidious. I should not like to give a false impression of what decolonisation must counter, nor delay too long from the main point; however, acknowledging the cultural aspects of colonisation are important here.

Land and peoples are not only targeted through governmental relations, but also through cultural representations that reinforce the hierarchy of coloniser and colonised. Said argues that specific cultural forms such as the novel, for example, contain in their early, and especially in early British, formulations many references and allusions to “empire.” Taken together, these references and allusions constitute a “structure of attitude and reference.”<sup>26</sup> At the very genesis of modern European empires was a new literary form that contains a legitimating expression of the imperial project. For Said, it was not the novel that “‘caused’ imperialism, but the novel, as a cultural artefact of bourgeois society, and imperialism are unthinkable without each other.”<sup>27</sup> This is but one example of culture and imperial power working together to ingrain a European attitude of superiority toward indigenous people the world over.

While Said is discussing the expansion of European powers over the globe more generally, the cultural representations of alterity in North America—in the image of the “Indian”—are nonetheless important for European colonisation here as elsewhere. As Wayne Warry notes, the stereotypical view of Aboriginal peoples in Canada is helpfully adaptive to colonial objectives, and likewise indispensable, as “the enemy has to be created before they are defeated—or converted.”<sup>28</sup> Culture, as well as policy, has been used to construct a view of the “Indian” that European settlers have come to possess, as a

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<sup>24</sup> Edward Said, *Culture and Imperialism* (New York: Knoff, 1993), 9. Emphasis original.

<sup>25</sup> *Ibid.*, 9.

<sup>26</sup> *Ibid.*, 62.

<sup>27</sup> *Ibid.*, 70-1.

<sup>28</sup> Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (Toronto: University of Toronto Press, 2000), 21.

necessary condition to overcome the other, the “Indian,” by way of the colonial project. In policy, as discussed below, and especially under the *Indian Act*, the homogenized and reified form of the “Indian” has been constructed from a diverse range of First Nations, which are as different from one another as European nations are. Thus, in a very real sense: “The Indian is an invention of the European.”<sup>29</sup>

As Thomas King states, expectations can be fostered by the imagined visage of the other.<sup>30</sup> King tells the story of Edward Sherriff Curtis, the famed American photographer of the West and its Aboriginal people.<sup>31</sup> “Curtis was fascinated by the idea of the North American Indian, obsessed by it. And he was determined to capture that idea, that image, before it vanished.”<sup>32</sup> Curtis sought to construct the image of the other in the form of a reified Aboriginality. This period sought to construct a pre-historic narrative, a provenance for the American nation, one it found in the noble savage being left behind by progress and modernity: “The Romantics [of which Curtis was one] imagined their Indian as dying. But in that dying, in that passing away, in that disappearing from the stage of human progress, [they interpreted] a sense of nobility.”<sup>33</sup> There was the heroic male character of Americana literature that framed the “Indian” as the last of his race; the “noble savage” was noble in his graceful dying away.<sup>34</sup> And to ensure that it was this very “Indian,” this vanishing savage, whom Curtis captured on film, he used crate-loads of traditional costumes, head-dresses, blankets, painted backgrounds, and wigs to costume his “Indian” models.<sup>35</sup> The images in Curtis’ highly

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<sup>29</sup> Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 2008), 5.

<sup>30</sup> Thomas King, *The Truth About Stories: A Native Narrative* (Anansi: Toronto, 2003), see especially 31-60.

<sup>31</sup> Edward Sheriff Curtis was an American photographer from about 1885 until about 1935. His most famous and controversial work was *The North American Indian*, which was a sweeping and lavishly illustrated twenty volume set of photographs and text relating to American Indian tribes. The first volume was published in 1907 and the last in 1930. See “The *North American Indian* in the Northwestern University McCormick Library of Special Collections—a description,” <http://curtis.library.northwestern.edu/curtis/description.html> (accessed 30 August 2011). This site also contains an electronic version of the twenty volumes, “Content” <http://curtis.library.northwestern.edu/curtis/toc.cgi?sec=nai.01.book,nai.13.book,&psec=#nai.01.book> (accessed 30 August 2011). For a thorough study of the project of *The North American Indian* itself, see Mick Gidley, *Edward S. Curtis and the North American Indian, Incorporated* (Cambridge; New York: Cambridge University Press, 1998).

<sup>32</sup> King, *The Truth About Stories*, 32.

<sup>33</sup> *Ibid.*, 33.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 34.

popular book, *The North American Indian*—published in twenty volumes with a forward written by Theodore Roosevelt—reinforced an image of Aboriginal peoples of North America as objects of history, unable to adapt to a changing world, from which they were consigned to vanish.

Pauline Wakeham argues that Curtis was essentially seeking a taxidermic object in his photography. “Curtis pursued mastery over nature not by the literal practice of taxidermy by employing photography and film as technologies of taxidermic preservation, technologies that sought to reconstruct the bodies of ostensibly extinct species in the guise of liveness.”<sup>36</sup> Curtis began his career as a nature photographer, but shifted into the preservation of a nature that contained this image of the vanishing “Indian,” turning from a documentary naturalist preserving landscapes and animal species to a sort of ethnographic documentarian capturing the disappearing “Indian.” As Wakeham puts it, this was “a shift that, according to the colonial stereotypes of Indianness, was hardly a shift at all.”<sup>37</sup> It is the desire to preserve an evaporating image, to preserve a species that never really existed, against the reality of cultural change and dynamism, which marks the project of Curtis as a problematic colonial exercise. Curtis retouched his images to remove any hint of modernity from them, to preserve the “Indian” the colonisers could only imagine had existed before their arrival, regardless of Aboriginal people’s reality or self-representation. White society could change, but the Aboriginal society needed to be fixed to an anachronistic image, an imagined visage.<sup>38</sup>

This cultural form of colonisation is not merely a historical feature of the paradigm of Aboriginal exclusion and marginalisation. As Daniel Francis notes, the image of a constructed “Indian” continues to be used in advertising and as a sort of shorthand for out-doors and Canadiana.<sup>39</sup> Advertising is an increasingly important source of cultural expression in our advanced appetitive and capitalist society. From the smoke shop Indian—the tall austere wooden carving of a feather head-dressed First Nations purveyor of tobacco, often placed outside tobacconist shops across North America—to the use of a stylised Inuit sculpture as the logo for the Vancouver 2010 Winter Olympics,

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<sup>36</sup> Pauline Wakeham, *Taxidermic Signs: Reconstructing Aboriginality* (Minneapolis: University of Minnesota Press, 2008), 87.

<sup>37</sup> *Ibid.*

<sup>38</sup> Francis, *The Imaginary Indian*, 59.

<sup>39</sup> *Ibid.*, 173.

“Indians” in advertising have been and continue to be very much in evidence.<sup>40</sup> Like the novel at the outset of the age of empires, these cultural expressions fetishize and caricature Aboriginality reinforcing the subordination of Aboriginal peoples to the dominant Euro-centric order.

Cultural representation of Aboriginality comes also to inform our political-philosophical ideas of state and community. I am thinking here in particular of the influential figures of Hobbes and Locke. Hobbes in searching for an analogy for the state of nature, which he uses as a device in understanding sovereignty, likens this condition, wherein life is “nasty, brutish, and short,”<sup>41</sup> to that of “the savage people in many places of *America*.”<sup>42</sup> To be sure this view would have been informed by travel literature of the period which consists of, as Stephanie Martens puts it, “very subjective, biased, ill-informed descriptions, mixing in nascent ethnography with mythology, dreamt antipodes and marvelous being.”<sup>43</sup> The veracity of these accounts is immaterial here, as the perception by Hobbes of the anarchic natural state of these “savage people” importantly puts them in a condition in need of controlling through the imposition of sovereign power. After all it is the sovereign that is constructed to end the state of the constant war of all against all, that is, the state of nature.<sup>44</sup> This certainly places in our political-philosophical imagination the image of Aboriginal-as-savage in need of the colonizing benefit of the law and the sovereign power which constructs and maintains it. This clearly creates a ‘straw Indian’ that theorists and practitioners are licensed to bring up to the full level of civility through the extension of the sovereign power to create the security conditions of civilisation. This also admits the specter of the exception discussed above, where we see this supposed state of nature re-emerge and controlled by the sovereign

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<sup>40</sup> Bob Lovelace made the suggestion that the Vancouver Winter games logo was yet another example of Aboriginal culture being appropriated to the nationalistic purposes of Canada, and in so doing the is denuded of Aboriginal content. This argument was made during his remarks in the “Welcome and Opening Plenary Session” of the Rethinking Multiculturalism: Brazil, Canada, and the United States conference held at York University 29 and 30 January 2010.

<sup>41</sup> The famous arrangement of nasty brutish and short is found in the final sentence to a long list of those things which are impossible in the state of nature (the “Warre, where every man is Enemy to every man”) where the life of any individual is “solitary, poore, nasty, brutish, and short.” (Thomas Hobbes, *Leviathan*, C.B. MacPherson ed. (London: Penguin, 1968), 186).

<sup>42</sup> *Ibid.*, 187.

<sup>43</sup> Stephanie Martens, “Aboriginal imaginary, state of nature, and modern subjectivity: the example of Hobbes’ *Leviathan*,” paper presented at the Canadian Political Science Association Conference 2012, University of Alberta available at: <https://www.cpsa-acsp.ca/papers-2012/Martens.pdf>, 4.

<sup>44</sup> Hobbes, 223.

power in exception, a perceived lawlessness whose answer becomes a real lawlessness and destruction of those it is ostensibly charged to protect. For Agamben this is explicitly the case when the state of exception becomes the rule, the state of nature and the state of exception become indistinguishable from each other.<sup>45</sup> Thus, our modern political philosophy always already contains this imagined view of the ‘savage Indian’ used by Hobbes.

Similarly in the work of John Locke we see a representation of the “Indian” importantly off the mark to ensure a consistent European right to their land.<sup>46</sup> It is clear from Locke’s work in the *Second Treatise on Government* that, like Hobbes, he considered the inhabitants of the Americas to be in a state of nature.<sup>47</sup> It is important to note that Locke’s state of nature differs from that of Hobbes. The former consisting of the absolute liberty to person and property subject only to the law of nature that “teaches all mankind who will but consider it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possession.”<sup>48</sup> The latter in a war of all against all, the natural law of “*Justice, Equity, Modesty, and (in summe) doing to others, as we would be done to*” only obtains under the sovereign.<sup>49</sup>

For James Tully, Locke’s natural state has two important implications. First, the settlers of the Americas have an absolute right to wage war against the Aboriginal peoples there found.<sup>50</sup> Second, settlers have a right to appropriate land without consent of the Aboriginal peoples found upon it.<sup>51</sup> The first follows from a view of retaliatory right by the settlers to protect themselves against any violation of the natural rights by the Aboriginal peoples. Transgression of the natural right to health, liberty, and possession indicates that the transgressor “declares himself to live by another rule than that of common reason and equity” and gives the transgressed “a right to punish the offender and be executioner of the law of nature.”<sup>52</sup> The second owes to Locke’s views of the

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<sup>45</sup> Agamben, *Homo Sacer*, 38.

<sup>46</sup> This thesis is advanced by James Tully, *An Approach to Political Philosophy: Locke in Contexts*, (Cambridge: Cambridge University Press, 1993), see Chapter 5.

<sup>47</sup> In discussing property Locke asserts that “in the beginning all the world was America” (John Locke, *Second Treatise of Government*, J.W. Gough ed. (Oxford: Basil Blackwell, 1946), par. 49.

<sup>48</sup> *Ibid.*, par. 6.

<sup>49</sup> Hobbes, 223.

<sup>50</sup> Tully, *An Approach to Political Philosophy*, 142.

<sup>51</sup> *Ibid.*, 145.

<sup>52</sup> Locke, par. 8.

ownership of labour and the productive use of land. Since humans have an absolute ownership in their labour, it is by mixing labour (“improving”, enclosing, cultivating) with the land that an individual comes to own it. For example, “the labour that was mine removing them out of that common state they were in, hath fixed my property in them.”<sup>53</sup> Tully points out the importance of the state of nature, where the law of nature rules, for the removal from the common land without consent. It is here that “the appropriation of common fruits and nuts, fish and game, and vacant land by means of individual labour is legitimate and creates a property right in the products as long as they do not spoil and there is enough and as good left in common for others.”<sup>54</sup> Hunters and gatherers have a right to the *produce* of the land, but not the land itself, and farmers only have a right to as much land as is under their cultivation. For Locke, then, it is possible, due to the immense size and scarce use of land in America, to remove without consent as much as a person could mix their labour with, as “the *Possession* he could make himself upon the *measures* we have given [i.e. that there be no spoilage and that there is enough and as good left in common for others], would not be very large, nor, even to this day, prejudice the rest of Mankind, or give them reason to complain, or think themselves injured by this Man’s Incroachment.”<sup>55</sup>

The essence of the Lockean approach is to explicitly devalue Aboriginal ways of being to license the colonial activity Locke was involved in. As Tully puts it “First, Locke defines political society in such a way that Amerindian government does not qualify as a legitimate form of political society... Second, Locke defines property in such a way that Amerindian customary land use is not a legitimate type of property.”<sup>56</sup> Locke’s problematic and racist views of Aboriginal people place them in a state of nature, one where even their natural law rights to health, liberty, and property are in fact in doubt, even though he is at pains to detail how they obtain for Europeans. Even if Kathy Squadrito is correct in concluding that “arguments in the *Second Treatise* were often taken out of context and occasionally used by policy makers to support their goal of

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<sup>53</sup> Ibid., par. 28.

<sup>54</sup> Tully, *An Approach to Political Philosophy*, 146.

<sup>55</sup> Locke, par. 36.

<sup>56</sup> Tully, *An Approach to Political Philosophy*, 139.



taking native resources; Locke is not responsible for such use,”<sup>57</sup> what Locke can be held responsible for is furthering the imagined view of the “Indian” in Western thought. Like that of Hobbes, this degraded view of Aboriginality is always already in the tradition of Western political and philosophical thought. A view that may or may not have been historically invoked (or invoked consistently), but none the less, philosophically, licences the exceptional treatment of Aboriginal peoples. After detailing what right humans naturally have in the state of nature, indeed carry with them into society, Locke is at pains to exclude Aboriginal peoples from natural law.

More broadly, that Williams argues the “Doctrine of Discovery and its discourse of conquest asserts the West’s lawful power to impose its vision of truth on non-Western people through racist, colonizing rule of law,”<sup>58</sup> highlights exactly the subversion this exception wreaks on the rule. For the Doctrine of Discovery to be lawful notions of the Law of Nations, natural law and common law need to be suspended, as Hobbes and Locke do above. Important common law precepts of equality before the law, consent, and property are denied Aboriginal peoples as exception to them.

In analogy, then, to the state of exception, both legally and in formal political structures, into which, I have argued, Aboriginal peoples historically have been placed, there is a sort of cultural exception as well.<sup>59</sup> Here again, we have a complex zone of indistinction, where the image of the “Indian” serves as shorthand for both idyllic Canadian concepts, such as wilderness and undisturbed nature, and also as a signifier for that which is “other” and irreconcilable, forever outside the norm, yet necessarily in relationship with that norm. In either case, as symbolic of the rugged Canadiana, or that which is exotically outside and “other” than ourselves, the image of the “Indian” is constructed and appropriated by the dominant society; and in that reification and co-option, even when it stands in for what it means to be Canadian, the image of the “Indian” contains the germ, at its very centre, of the colonial project which dehumanises and misidentifies the other of the “Indian.” As the exception of “Indian” is used in this way to culturally articulate the rule of Anglo-European Canada, it subverts this very rule

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<sup>57</sup> Kathy Squadrito, “Locke and the Dispossession of the American Indian,” in *Philosophers on Race: Critical Essays*, Julie Ward and Tommy Lott eds. (Oxford: Blackwell Publishers, 2002), 121.

<sup>58</sup> Williams, *The American Indian in Western Legal Thought*, 325.

<sup>59</sup> Indeed, Aboriginal peoples continue to find themselves in a state of exception that is undergirded by the continuation of the *Indian Act*.

and lays bare the very problematic relationship at the heart of Canada between the other of Aboriginal people and the familiar of Anglo-European settlers.

In addition to the formal attempts at decolonisation set out in Chapter Five, it is important to note that an ongoing cultural decolonisation is occurring in Canada. From mainstream CBC Radio programs such as *The Dead Dog Cafe Comedy Hour* and *Revision Quest*, to the publication of works by accomplished contemporary Aboriginal literary figures such as Thomas King, Drew Hayden Taylor, and Sherman Alexie, to the Indigenous-produced content on the Aboriginal Peoples Television Network, the cultural imperialism discussed above is being eroded, albeit piecemeal and slowly. While this cultural imperialism is an important source of Aboriginal disadvantage in Canada, rectifying this is more properly done in the social sphere and with a healthy dose of Aboriginal voice—a voice I in no way want to appropriate or abuse. Thus, while decolonisation encompasses both cultural and formal political arrangements, I am concerned here with the latter.

#### *Decolonisation, Revolution and Reform*

Decolonisation is set against these cultural aspects of colonisation, the overt governmental colonisation outlined in Chapter Four, and theoretical structure of the state of exception above. It is important to understand colonisation through the lens of exception in order to get at the heart of decolonisation, while realizing how widely a thorough going decolonisation will have to reach to redress the cultural aspects of colonialism.

At its core I understand decolonisation as an attempt to free peoples from the subjugation of alien structures of power that dominate them through formal political mechanisms, as well as through the cultural and symbolic representations, which provides reassurance to the oppressor of the oppressed's participation in a qualitatively different form of humanity.<sup>60</sup> In using the terms cultural and symbolic representations, I mean

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<sup>60</sup> If colonisation is a process of overt subjugation supported by cultural and symbolic justifications for domination, then decolonisation is the very unravelling of this. For this reason, I take decolonisation to include the formal structures as well as informal ones. Colonisation, as discussed above, is not only control over land and people, but, also, the power to construct the representation of those people. Therefore, decolonisation must free the subjugated from alien institutions and restore the power for them to construct their own representation.

exactly the general background of cultural articulations of Aboriginality discussed above that forms a shorthand of alterity in refereeing to Aboriginal peoples. Decolonisation frees the colonised from the paternal imposition of alien structures of power *and* the image of the noble savage represented in cultural artefacts and articulations. As Frantz Fanon puts it, “decolonisation is quite simply the substitution of one “species” of mankind by another.”<sup>61</sup> By this, he means the inclusion of formerly excluded “species” of mankind—that is, the colonised—into places of economy, state, and society from which they had been excluded. This inclusion is important as Sium, Desai, Ritskes point out “decolonization is not interested in simply turning the colonial world upside down, but requires the courage and imagination to envision and construct a new future.”<sup>62</sup>

The very metaphysical, epistemological, and ontological basis of Aboriginal peoples is threatened and subverted by colonialism’s totalizing assimilation. Take for instance the issue of land, of place, which we return to in a formal political sense below. Deloria Vine argues that land is central to Aboriginal metaphysics and informs Aboriginal ethics and ways of being. Deloria argues that “American Indians hold their lands—places—as having the highest possible meaning, and all their statements are made with this reference in mind,” which is in contrast with the Western mode of thinking that places historical development, time, at the centre of the narrative.<sup>63</sup> As Glen Coulthard points out, this is “a profound misunderstanding to think of land or place as simply some material object of profound importance to Indigenous cultures (although it is that too); instead, it ought to be understood as a field of relationships to other things.”<sup>64</sup> Paying insufficient attention to this metaphysical perspective, Coulthard argues, means the very instrument of land-claims settlement attempts to “coercively integrate our land and communities into the fold of capitalist modernity.”<sup>65</sup>

Key then in decolonisation is the reprioritizing of Aboriginal knowledge, of ways of knowing.<sup>66</sup> For as surely as the territory of Aboriginal peoples have been colonized so

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<sup>61</sup> Frantz Fanon, *The Wretched of the Earth*, trans. Richard Philcox (New York: Grove Press, 2004), 1.

<sup>62</sup> Aman Sium, Chandni Desai, Eric Ritskes, “Towards the ‘tangilbe unknown’: Decolonization and the Indigenous future,” *Decolonization: Indigeneity, Education & Society* vol.1, no.1 (2012) xi.

<sup>63</sup> Deloria Vine, *God is Red: A Native View of Religion* (Golden, CO: Fulcrum Publishing, 2003), 61.

<sup>64</sup> Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 61.

<sup>65</sup> *Ibid.*, 53.

<sup>66</sup> Sium, Desai, and Ritskes, “Towards the ‘tangilbe unknown’”, ii.

too have their minds.<sup>67</sup> As Alfred and Corntassel argue “it is remembering ceremony, returning to homelands and liberation from the myths of colonialism that are the decolonizing imperatives.”<sup>68</sup> It is not merely the retrograde image of the “Indian” that license colonialisms’ exception of Aboriginality that must be dealt with by decolonisation, but the interpretation and internalisation of that image. As it is “a self-conscious kind of traditionalism that is the central process in the ‘reconstruction of traditional communities’ based on the original teachings and orienting values of Indigenous peoples,” which is decolonisation’s ally in the form of regeneration.<sup>69</sup> These two concepts are allied as “both decolonization and resurgence facilitate a renewal of our roles and responsibilities as Indigenous peoples to the sustainable praxis of Indigenous livelihoods, food security, community governance, and relationships to the natural world and ceremonial life that enables the transmission of these cultural practices to future generations.”<sup>70</sup> That is to say, at least part of decolonisation is decolonisation within the self and within Aboriginal communities. It would be a mistake, however, to take decolonisation as a complete rejection of everything furnished by the coloniser, and return to pre-colonial times for Aboriginal peoples. Speaking as an Indigenous woman Linda Smith argues it “is about centring our concerns and world views and then coming to know and understand theory and research from our own perspectives and for our own purposes.”<sup>71</sup>

Decolonisation has another formal political sense in which territory and the people upon it are freed from an alien structure of formal political power. In the case of European decolonisation of its former colonies in the 1960s and 1970s, the Union Jack was lowered across much of southern Africa, and the French Tricolour across the northwest of Africa. But this process is only one manifestation of decolonisation; at its heart decolonisation is the removal of alien formal political structures imposed upon a people and the ending of the hierarchical taxonomy of human beings, the latter being as

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<sup>67</sup> Linda Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* Second Edition (London: Zed Books, 2012), 62.

<sup>68</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism,” *Government and Opposition* vol.40, issue 5, 601.

<sup>69</sup> *Ibid.*, 605.

<sup>70</sup> Jeff Corntassel, “Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination,” *Decolonization: Indigeneity, Education & Society*, vol.1, no.1 (2012), 97.

<sup>71</sup> Smith, *Decolonizing Methodologies*, 41.

much concerned with culture as with formal politics. Decolonisation is a process that ultimately points to a goal of emancipation and equality and “it starts from the very first day with the basic claims of colonized.”<sup>72</sup> In Canada this means, centrally, addressing the issue of sovereignty. As discussed below in Chapter 5, approaches to treaty federalism importantly point to an understanding of Aboriginal sovereignty conceived independently and equally with Crown sovereignty. I want to leave a thorough discussion of this issue for Chapter 5, but suffice it to say here that this approach aims at a truly nation-to-nation relationship between the Crown and Aboriginal nations. Dealing with the imposition of the Canadian state on Aboriginal peoples, however, is only one aspect of the complex phenomena of colonialism in its formal political guise. As Ladner points out, decolonisation is called for within Aboriginal communities as “decolonising Indigenous political structures means marking a departure from the *Indian Act* and its imposed system of band council government (designed to provide for indirect colonial rule) and allowing Indigenous peoples to decide how to govern themselves.”<sup>73</sup> Here the facet of formal political decolonisation can be linked to epistemological decolonisation, as Aboriginal people decide for themselves how to be governed, how to organize their society. As Linda Smith puts it “decolonization, once viewed as the formal process of handing over the instruments of government, is now recognized as a long-term process involving the bureaucratic, cultural, linguistic and psychological divesting of colonial power.”<sup>74</sup>

In the more specific context of Canada and the Indian Residential School system, it is clear that the colonial project, especially the IRS system, was a violent one. As Milloy carefully details, the philosophy of the IRS system was to “kill the Indian in the child.”<sup>75</sup> Fanon expressly argues that decolonisation “is clearly an agenda for total disorder”<sup>76</sup> and in Fanon’s conception violence is an indispensable part of the de-colonial project. It forms a sort of praxis where “each individual represents a violent link in the

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<sup>72</sup> Fanon, *The Wretched of the Earth*, 1.

<sup>73</sup> Kiera Ladner, “Colonialism Isn’t the Only Answer: Indigenous People and Multilevel Governance in Canada,” in *Federalism, Feminism and Multilevel Governance*, ed. Melissa Haussman, Marian Sawyer, and Jill Vickers (Farnham, UK: Ashgate, 2010), 80.

<sup>74</sup> Smith, *Decolonizing Methodologies*, 101.

<sup>75</sup> John S. Milloy, *A National Crime: the Canadian government and the residential school system, 1879-1986*, (Winnipeg: University of Winnipeg Press, 1999), xiii

<sup>76</sup> Fanon, *The Wretched of the Earth*, 2.

great chain, in the almighty body of violence rearing up in reaction to the primary violence of the colonizer.”<sup>77</sup> For Taiaiake Alfred, colonization is beastly assimilation, and it that beast that must be “beat[en] into submission and taught to behave.”<sup>78</sup> It is easy to see how calls for decolonisation in Canada, as elsewhere, can run toward the violent in resisting such a violent force as colonisation. However, as the history of Algeria’s independence shows, Fanon may have “overstated the cleansing value” of violence.<sup>79</sup> In a complex colonial environment like Canada where colonialism is not neatly localized, but rather diffuse, what Alfred describes as a “fluid confluence of politics, economics, psychology and culture,”<sup>80</sup> violent resistance or violent decolonial revolution seems ill suited to the project of decolonisation.

Thus, rather than a revolutionary decolonisation, which calls upon violent resistance and liberation through force, this project is concerned with a more reformatory decolonisation in Canada. At the end of the decolonial process in Canada, both the settler society and Aboriginal peoples will be left in the same territory. In the specific context of Canada then, decolonisation need involve not only the removal of an alien structure of power from Aboriginal peoples and the overturning of hierarchical taxonomies of humanity, both explicit and implicit, but must also contain some means of settler and Aboriginal peoples living together as neighbours in those shared spaces and territories. Unlike in Africa in mid-20th century, decolonisation in Canada cannot consist of any great power simply lowering its flag and the settlers leaving the territory; the situation is far too complicated for this as we have seen above. Aboriginal peoples live outside traditional territories in areas lawfully ceded to the Crown and inhabited by non-Aboriginal peoples; land *has been* lawfully ceded and settled by newcomers, Aboriginal peoples *have* chosen to share this land with non-Aboriginal peoples. Canadian colonialism is not a matter of a few white administrators, but rather is a complex interconnection between settlers and Aboriginal peoples, which cannot be addressed by a

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<sup>77</sup> Ibid. 50.

<sup>78</sup> Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005), 37.

<sup>79</sup> Coulthard, *Red Skin, White Masks*, 47.

<sup>80</sup> Alfred, *Wasase*, 30.

simple transfer of formal power. Decolonisation, therefore, I argue must provide a way of living in peace and friendship once more.<sup>81</sup>

Thus, without prescribing a particular form of decolonisation, I wish to highlight what I take to be its most central qualities. In recognising the “inside” and “outside” that colonisation so problematically seeks to draw and dominate, decolonisation premised on striking down taxonomies of humanity and centred on dialogue rather than violence, can provide a fruitful path to living in true peace and concord. It is not that decolonisation can provide a final “bringing in” of the outside, but starting from the understanding of this complex relationship can drive an agency centred approach.

### *What is Reconciliation?*

While colonisation and decolonisation have an explicit relationship, the latter seeking to undo the former, the connection of these concepts with reconciliation is not, on its face, clear. I argue here, however, that reconciliation is a decolonial process in the Canadian case, making this connect much more explicit. This section outlines what I take reconciliation to mean, which is bound up in a decolonisation that must work to unravel a state of Aboriginal exception in Canada. Thus, reconciliation builds on the above chain of concepts, for if exception is at work in colonisation and decolonisation seeks to remove alien power and a hierarchy of humanity inherent in colonialism, then reconciliation is unintelligible without these concepts. Here I provide the theoretical basis for the later discussion of reconciliation in Canada, and its prospect in relation to the Canadian TRC discussed in Chapter Six. Before we can move on to what I take reconciliation to be it will be helpful to ground that discussion in what others have said about reconciliation. It is important to note here that there is considerable debate about reconciliation in the literature and by highlighting these differences the groundwork will be laid for understanding reconciliation as politics. Looking to reconciliation as a process, goal, or

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<sup>81</sup> The language of “peace and friendship” is used deliberately here to evoke the image of the original interactions between Crown and Aboriginal nation outlined in Chapter Four, especially in the evolution of treaties discussed by Jim Miller, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada* (Toronto: University of Toronto Press, 2009). The language used above is meant to reflect the content, if not the sentiment, of the original relationship between native and newcomer. While this language can be seen as overly romantic or sentimental, it is not intended to be; rather, it is meant to be true to original relationship. Peace and friendship in the 21st century is a difficult relationship to sort out. However, the connection with the past that it contains is a helpful reminder for us all of the long history of interaction between native and newcomer in Canada.

relationship, where it can occur alone, between people, between communities, and between states, helps us understand what might be meant by reconciliation. All of this points to reconciliation's fundamentally political nature.

There are a variety of ways in which the term reconciliation is used and understood. This has led to discussion and disagreement in the literature. Reconciliation as a concept and as an object of observation is difficult to define.<sup>82</sup> As will be discussed below, much hangs on the way reconciliation is used and what it is taken to mean. As David Bloomfield notes, the absence of a clear definition of reconciliation is "observable not only among scholars and their writings; it is also reflected in policy circles, within governments, donor agencies, INGOs, IGOs, and so on."<sup>83</sup> There is deep uncertainty over what reconciliation is, no doubt due to its various "psychological, sociological, theological, philosophical, and profoundly human roots."<sup>84</sup>

Moreover, while many consider reconciliation to be a process,<sup>85</sup> reconciliation can also be viewed as an end state to be reached, and as both an end and a process. Audrey Chapman, for example, sees that reconciliation can "best be understood as a multi-dimensional and long-term process,"<sup>86</sup> while John Paul Lederach sees reconciliation as a process "aimed at peace building and healing."<sup>87</sup> Daniel Bar-Tal and Gemma Benniuk, however, argue that reconciliation is an end state, albeit one that is brought about by

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<sup>82</sup> Clearly there has been the difficulty of conceptualizing and subsequently the difficulty of operationalizing reconciliation. Donna Pankhurst notes the variability of linguistic definition of the verb "to reconcile" and the attending problems this presents see Donna Pankhurst, "Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace," *Third World Quarterly* vol. 20, no. 1 (1999), 240.

<sup>83</sup> David Bloomfield, *On Good Terms: Clarifying Reconciliation* (Berlin: Berghof Research Centre for Constructive Conflict Management, 2006), 4.

<sup>84</sup> Johan Galtung, "After Violence, Reconstruction, Reconciliation, and Resolution," in *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), 4.

<sup>85</sup> See for example John De Gruchy, *Reconciliation: Resorting Justice* (Minneapolis: Fortress Press, 2002), especially Part 3, and Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 2000). In fact Erin McCandless argues that "the idea of reconciliation as process of building or changing relationships is growing" (Erin McCandless, "The Case of Land in Zimbabwe: Causes of Conflict, foundation for Sustained Peace," in *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), 213.

<sup>86</sup> Audrey Chapman, "Approaches to Studying Reconciliation," presentation to the Conference on Empirical Approaches to Studying Truth Commissions, Stellenbosch, South Africa, November 2002, 1 cited in Bloomfield, *On Good Terms*, 6.

<sup>87</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington: USIP Press, 1997), 842.



psychological processes,<sup>88</sup> while Bloomfield notes that reconciliation is both a process and end-state or goal.<sup>89</sup> Daniel Philpott argues that in whatever form, as process or end state, reconciliation contains a “core proposition” that it is “itself a concept of justice.”<sup>90</sup> Further, the “animating virtue” of reconciliation is “mercy, and its goal peace.”<sup>91</sup> How reconciliation is understood, as process, end state, or both, has important implication for what is meant by reconciliation, as we will see below.

Justice may not and, in fact, need not be the core concept or aim of reconciliation. Some rituals of reconciliation aim more at reintegration of the perpetrator back into the community and may not even have justice as a referent at all.<sup>92</sup> That is to say, there need not be punishment or any offsetting action (restitution, apology, etc.) of some sort. Rather, simply the aim and desire to have an offender reintegrated into the community after the violation that caused them to break with it.

Perhaps more usefully, and without excluding justice *per se*, reconciliation can be thought of as relational. This relational view of reconciliation is well supported in the literature. Hizkias Assefa argues that reconciliation seeks to “allow future positive relationships between opposing parties,”<sup>93</sup> and Brandon Hamber and Gráinne Kelly see reconciliation as “the process of addressing conflictual and fractured relationships.”<sup>94</sup> For Erin McCandless, reconciliation is a process that has as its goal a “more cooperative relationship.”<sup>95</sup> Seen as a relationship the above distinction between process and goal becomes less helpful in understanding reconciliation, as a relationship is both at the same time.

Moreover, this relationship need not be ideal. Louis Kriesberg argues that reconciliation is “the processes by which parties that have experienced an oppressive

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<sup>88</sup> Daniel Bar-Tal and Gemma Bennink, “The Nature of Reconciliation as an Outcome and as a Process,” in *From Conflict Resolution to Reconciliation*, ed. Yaacov Bar-Siman-Tov (New York: Oxford University Press, 2004), 26-27.

<sup>89</sup> Bloomfield, *On Good Terms*, 6-7.

<sup>90</sup> Daniel Philpott, “An Ethic of Political Reconciliation,” *Ethics and International Affairs* vol.23, no. 4 (Winter 2009), 390.

<sup>91</sup>Ibid.

<sup>92</sup> Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007), 79.

<sup>93</sup> Hizkias Assefa, “The Meaning of Reconciliation,” in *People Building Peace: 35 Inspiring Stories From Around the World* (Utrecht, Netherlands: European Centre for Conflict Prevention, 1999), 37.

<sup>94</sup> Brandon Hamber and Gráinne Kelly, “Reconciliation: A Working Definition,” Democratic Dialogue Discussion Papers, <http://cain.ulst.ac.uk/dd/papers/dd04recondef.pdf> (accessed 20 August 2012), 3.

<sup>95</sup> McCandless “The Case of Land in Zimbabwe,” 213.

relationship or a destructive conflict with each other move to attain or restore a relationship that they believe to be minimally acceptable.”<sup>96</sup> Here reconciliation has, as its primary referent, the restoration of the relationship between parties, rather than punishment and mitigation of wrongs. Thought of in this way, reconciliation is both process and end point, of sorts. As with a friendship between two people, reconciliation continues to be acted out in the interaction of the parties, but can be thought of an end point reached, as one thinks of acquiring a new friend. This friend will not remain such for long if the friendship is not acted out in the interaction, creating a paradoxical relationship between being and becoming. I take reconciliation to be a relationship in this way, and thus it requires continued action to sustain.

Beyond the realm of relationships, there are many dimensions of reconciliation. There is both *internal* reconciliation and *external* reconciliation.<sup>97</sup> The former encompasses the psychological aspects of reconciliation, while the latter, the physical conditions of socio-political interactions and the space in which they occur.<sup>98</sup> In the Canadian context, reconciliation is meant in this internal sense when it refers to “the diversity of individual or collective practices that Indigenous people undertake to reestablish a positive ‘relation-to-self’ in situations where this relation has been damaged or distorted by some form of symbolic or structural violence.”<sup>99</sup> External reconciliation, meanwhile, is concerned with “restoring estranged or damaged social and political relationships.”<sup>100</sup> But, these two dimensions of reconciliation can be seen as linked in the psychological context, as Bar-Tal and Benniuk argue that the internal process of psychological transformation leads to the end-goal of reconciliation, which is “the construction of lasting peaceful relations.”<sup>101</sup> Thus, reconciliation is a complex and multifaceted phenomenon that works both in the public square, but also in the human psyche.

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<sup>96</sup> Louis Kriesberg, “Changing Forms of Coexistence,” in *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), 48.

<sup>97</sup> Rafi Nets-Zehngut, “Analyzing the Reconciliation Process,” *International Journal of World Peace* vol. 23, no.3 (2007), 59.

<sup>98</sup> *Ibid.*

<sup>99</sup> Coulthard, *Red Skin, White Masks*, 106-7.

<sup>100</sup> *Ibid.*, 107.

<sup>101</sup> Bar-Tal and Bennink, “The Nature of Reconciliation as an Outcome and as a Process,” 37.

There are also different levels at which reconciliation can function. Mark Amstutz broadly conceives of two levels at which reconciliation can operate, the micro-level and the macro-level.<sup>102</sup> In contrast, Erin Daly and Jeremy Sarkin argue for a more nuanced understanding, one in which reconciliation can happen either “alone or with others.”<sup>103</sup> Moreover, it “can be oral (‘I’m sorry’; ‘I forgive you’) or written (a charter or a peace accord) or symbolic (a handshake, or wearing of the other side’s colors, the payment of money, the sharing of a drink, a hug).”<sup>104</sup>

These instances of reconciliation can operate on the *individual* level alone, but it is once reconciliation happens *between* individuals that we can see it much more clearly. This is the level of *interpersonal reconciliation*.<sup>105</sup> At this level, acts that are both private and public begin to overcome the state of enmity that exists between people and can be as simple as neighbour talking to neighbour. This type of regular contact can take the form of an incremental process by which people “begin to trust each other in smaller and then in progressively more significant ways.”<sup>106</sup> Intra-community reconciliation can consist in these spontaneous acts, many of which involve compelling visuals such as handshakes or hugs, but it can also consist of more ritualized reintegrative measures.

*Inter-community reconciliation* is another level at which reconciliation can operate. Here reconciliation is between communities, within a state. This level of reconciliation is quite different than the ones outlined above and need not “depend on the kind of intimacy that religious and some forms of individual reconciliation may demand.”<sup>107</sup> Operating nationally, reconciliation can be about the constitution or reconstitution of shared ties of belonging; for example the aim of the South African TRC was to promote national unity by linking white and black South Africans to a new multi-racial view of South Africa. This was also the goal in the reunification of East and West Germany, where the challenge was to foster identity and a sense of loyalty to the newly

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<sup>102</sup> Mark Amstutz, *The Healing of Nation: The Promise and Limits of Political Forgiveness* (Oxford: Rowman & Littlefield, 2005), 98-99.

<sup>103</sup> Daly and Sarkin, *Reconciliation in Divided Societies*, 41.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, 69.

<sup>106</sup> *Ibid.*, 70.

<sup>107</sup> Charles Villa-Vicencio, “Reconciliation,” in *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, ed. Charles Villa-Vicencio and Erik Doxtader (Cape Town: Institute for Justice and Reconciliation, 2004), 4.

recreated Germany.<sup>108</sup> At this level, reconciliation “can be thought of as the development of a sense of national citizenship, or loyalty to the nation.”<sup>109</sup> This loyalty could be the aim of a new constitution, national anthem, or new holidays. As cultural symbols such as the anthem, flag, and other civic rituals have become tarnished by the abuse that is to be overcome, it is at these sites that there are important opportunities to say something new and different about a people. That is to say, the construction of a new national narrative can be an important part of national reconciliation.<sup>110</sup> But here we must be careful as these new narratives and symbols can as easily exclude and marginalise as those they replaced did. Perhaps more insidious, these new claims to inclusive nationalism can be a distraction or misdirection from meaningful social, political, and economic changes that would substantially include those previously excluded.

In South Africa, the post-Apartheid government adopted a new flag that no longer featured the colonial imagery of the British flag and the two Dutch colonies amalgamated into British South Africa.<sup>111</sup> In Australia’s quest for reconciliation, a national “Sorry Day” was enacted as a day on which to commemorate the past, and hundreds of thousands of Australians signed “Sorry Books” in the wake of the report on the stolen generations.<sup>112</sup> These types of symbolic actions can significantly help to recreate a new national narrative, where the previously excluded can be included. They can form a backdrop for more substantive action that would bring these people into the new national fold.

*Inter-community reconciliation* can also occur at the international level. This sort of reconciliation may be the easiest to observe and understand, as it is often public and newsworthy. It can be made manifest as normalized diplomatic and economic relationships between states, or a process leading toward these. Inter-state reconciliation is usually less emotional than that of individual, intra-community, or national reconciliation. This is the case “in part because it is more abstract and in part because

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<sup>108</sup> Karol Soltan, “1989 as Rebirth,” in *Between Past and Future: The Revolutions of 1989 and Their Aftermath* eds. Sorin Antohi and Vladimir Tismaneanu (Budapest: Central European University Press, 2000), 28.

<sup>109</sup> Daly and Sarkin, *Reconciliation in Divided Societies*, 100.

<sup>110</sup> *Ibid.*, 100-1.

<sup>111</sup> The Union of South Africa adopted a flag that incorporated the British Union Jack, the flag of the Orange Free State, and flag of Transvaal and this design was used until 1994.

<sup>112</sup> Gustav Nossal, “Symbolism and Substance in Surge Towards Reconciliation,” in *Reconciliation*, ed. Michelle Grattan (Melbourne: Black Inc., 2000), 299.

those who would resist reconciliation need not participate or even accept it; most citizens will not be substantially affected by international reconciliation one way or the other.”<sup>113</sup> Inter-state reconciliation that would lead to the reestablishment of an embassy or normal diplomatic relations demands little effort from most citizens and may not even impact them at all.

In addition to these various levels at which reconciliation can operate, what reconciliation actually is can be understood in a variety of ways. Definitions of reconciliation abound, ranging from the colloquial contained in a dictionary definition to the philosophical and theological. There are seemingly simple definitions such as that brought forth by Asmal, Asmal, and Roberts, who argue that reconciliation is “making good again.”<sup>114</sup> Daniel Bar-Tal and Gemma Benniuk argue that all scholars of reconciliation agree that the concept “concerns the formation or restoration of genuine peaceful relationship between societies that have been involved in an intractable conflict, after its formal resolution is achieved.”<sup>115</sup> There are definitions that seek to reclaim conceptual precision such as Jens Meierhenrich’s contention that “reconciliation refers to the accommodation of former adversaries through mutually conciliatory means, requiring both forgiveness and mercy.”<sup>116</sup> And the above definition of reconciliation by Philpott as a kind of mercy that purposefully draws a link to theological considerations of the Abrahamic faiths, to create a broader reach for reconciliation.<sup>117</sup> There is also the explicitly theological, such as St. Paul’s description of the figure of Jesus Christ as reconciliation.<sup>118</sup> Thus, as with other terms and concepts that exist in a complex network of practices, reconciliation can be seen as what W. B. Gallie famously called an “essentially contested concept.”<sup>119</sup> That is to say, reconciliation is a concept “the proper

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<sup>113</sup> Daly and Sarkin, *Reconciliation in Divided Societies*, 117.

<sup>114</sup> Asmal, Amsal, and Roberts, *Reconciliation Through Truth*, 47.

<sup>115</sup> Bar-Tal and Bennink, “The Nature of Reconciliation as an Outcome and as a Process,” 14.

<sup>116</sup> Jens Meierhenrich, “Varieties of Reconciliation,” *Law and Social Inquiry*, vol. 33, no.1 (Winter 2008), 211.

<sup>117</sup> Philpott, “An Ethic of Political Reconciliation,” 393.

<sup>118</sup> See 2 Corinthians 5: 19. “in Christ God was reconciling the world to himself” (New Revised Standard Version) St. Paul’s theology of the crucifixion of Christ especially, as means of reconciliation between God and humanity is also mentioned in other epistles: 1 Corinthians 5:11-21; Ephesian 2:11-22; Colossians 1:15-22.

<sup>119</sup> W.B. Gallie, “Essentially Contested Concept,” *Proceedings of the Aristotelian Society*, vol. 56, (1956), pp. 167-198.

use of which involves endless disputes about [its] proper use on the part of [its] users.”<sup>120</sup> We should be sanguine about the challenges of giving content to reconciliation, and aware that reconciliation may mean different things to different people. This is a significant aspect of the political nature of reconciliation.

Adding to this problem of definition in the case of Canada is the complex interaction between overarching colonial and assimilationist policies and the specific abuses and colonial policies of the Indian Residential School system. At least part of reconciliation in Canada is meant to deal with the abuse that took place within the residential school system—sexual, physical, and emotional—neglect, and racism, while recognising these harms stemmed from government policies. But I argue that beyond these individual incidents reconciliation must deal with the system of colonisation that led to the creation of the Indian Residential School system itself, exactly because colonialism is so intricately connected to the IRS system. While directing reconciliation to such a large system phenomena as colonisation might be overly ambitious, at minimum reconciliation in Canada needs to go beyond the individual acts committed against the school survivors and address the colonial aspect of the IRS system.

The diversity of meanings of the term “reconciliation” makes talk of reconciliation particularly complicated in transitional or divided societies. There can be a great deal of suspicion on the part of both parties over the invocation of reconciliation. For something like reconciliation to emerge, there needs to be some agreement on the content of the term. However, as Richard Wilson points out, the requirement for a “shared moral fabric” which is implied by reconciliation “has the potential to coerce individuals into compliant positions they would not adopt of their own volition.”<sup>121</sup> This may lead to a peace that is bought by an inequality of power, one that begs quiet resignation to the hopelessness of overturning it. In this way, a “shared moral fabric” can have the effect of re-inscribing the violence that reconciliation is meant to transcend. That is to say, reconciliation contains a danger of being reconciled to one’s fate, or *de facto* acceptance because there is no alternative. The definition that Bar-Tal and Benniuk offer above, for example, need not involve overturning currently unjust relations at all, as the

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<sup>120</sup> Ibid., 169.

<sup>121</sup> Richard Wilson, “Justice and Retribution in Postconflict Settings” *Public Culture*, vol. 15, no. 1, (2003), 189.

“formation or restoration of genuine peaceful relationship” could mean nothing more than a cessation of hostilities. Such a cessation could be brought about by overwhelming force, or the realization that overcoming the force of the other is impossible.

In fact, Susan Dwyer argues that reconciliation is nothing more than “bringing apparently incompatible descriptions of events into narrative equilibrium.”<sup>122</sup> For Dwyer, reconciliation is a much less ambitious project than a peaceful or just relationship. It is meant simply to “lessen the sting of tension: to make sense of injuries, new beliefs, and attitudes in the overall narrative context.”<sup>123</sup> It is understandable that one party having a fuller interpretation of reconciliation might be dubious of the process if the other party holds this thin view. Narrative coherence and consistence needs neither point to a new cooperative environment nor be linked to conciliatory mechanisms such as forgiveness or apology. It should not, for Dwyer, be “touted as aiming at the happy and harmonious coexistence of former enemies.”<sup>124</sup>

Moreover, for Dwyer reconciliation should not be confused with justice. “Political leaders should not pretend that reconciliation is the same as justice.”<sup>125</sup> A perspective on reconciliation that sees it as coexistence or toleration need not even imply a cessation of hostility, or a background of hostility; as seen in the Cold War where the great powers of the West and the Soviet bloc coexisted, but were still quite hostile.<sup>126</sup>

The difficulty in defining reconciliation, taken with its quality of essential contestation,<sup>127</sup> tells us, not trivially, that reconciliation is, at its heart, political.<sup>128</sup> It is not necessarily political in the sense of formal or electoral politics. Rather, reconciliation is political in a fuller sense of being dialogical, contestable, and contingent.<sup>129</sup>

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<sup>122</sup> Susan Dwyer, “Reconciliation for Realists,” *Ethics & International Affairs*, vol. 13, no. 1 (1999), 89.

<sup>123</sup> *Ibid.*, 96.

<sup>124</sup> *Ibid.*, 98.

<sup>125</sup> *Ibid.*

<sup>126</sup> Meierhenrich, “Varieties of Reconciliation,” 213.

<sup>127</sup> Andrew Schaap also argues that reconciliation is an essentially contested concept. See Andrew Schaap *Reconciliation and Politics* (New York: Routledge, 2005), 12.

<sup>128</sup> Bloomfield also makes room for the politics of reconciliation when it is acknowledged that “The positive side of this multiplicity means that we can generate distinct and multidimensional versions of practice that better suit specific contexts, without the need to produce definitive, universal models. The downside, however, is that we must learn to live with a degree of flexibility and self-conscious contradiction in our processes of definition.” (Bloomfield, *On Good Terms*, 5.)

<sup>129</sup> Some limit reconciliation to the sphere of the political for analytical purposes, see Philpott’s discussion of political reconciliation as “involving only those relationships that are proper to the political order.” (Philpott, “An Ethic of Political Reconciliation,” 392.).

Reconciliation does have clear formal political applications. In South Africa, for example, the enabling legislation of the TRC made explicit reference to reconciliation's role in the creation of a new South Africa. Thus, reconciliation was explicitly bound up with nation building. In South Africa it was stated "the object of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."<sup>130</sup> In the case of Australia, a formal reconciliation process was undertaken against the backdrop of Australian nationalism, where it was the desire of at least part of the government to clear up "the unfinished business that the Aboriginal affairs policy represented" by the time of the centenary of the Australian federation in 2001.<sup>131</sup> While these two examples, discussed in greater detail in Chapter Six, had formal political aspects, these are just aspects of the broader work to overturn the view of the colonised as inferior to the coloniser.

For reconciliation to be more than reconciliation to one's fate it must be a disruptive disjuncture with the past. Theodor Adorno argues that the "spell of the past" must be broken and that "we will not have come to terms with the past until the causes of what happened then are no longer active."<sup>132</sup> It is not a denial of the past or a "whitewashing" of it, but, rather, crucially depends on a transformation of the present relationship to it. "It is a matter of the *way* in which the past is called up and made present."<sup>133</sup> Even Dwyer's thin definition of narrative coherence identifies two important facets of reconciliation: that it is linked to language, and that it unsettles something that had previously been unfairly settled. For Asmal, Asmal, and Roberts, reconciliation in South Africa was going to bring about "a rupture with the skewed ethics of apartheid, and so upset any possibility of smooth sailing on a previously immoral course."<sup>134</sup> In a sense, then, reconciliation holds out the offer of being not just a *politics*, but also a *generative politics*; a politics that is capable of transformational change. Taking reconciliation seriously as politics, I argue, can leave us in a fertile place for understanding what to do in the wake of conflict. Moreover, taking a close look at what reconciliation as politics

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<sup>130</sup> Republic of South Africa, *Promotion of National Unity and Reconciliation Act*, 1995.

<sup>131</sup> Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge*, Chapter 1 available from <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text01.htm> (accessed 15 Feb. 2013).

<sup>132</sup> Theodor Adorno, "What Does Coming to Terms with the Past Mean?" in *Bitburg in Moral and Political Perspective*, ed. Geoffrey H. Hartman (Bloomington: Indian University Press, 1986), 129.

<sup>133</sup> *Ibid.*, 126.

<sup>134</sup> Asmal, Asmal, and Roberts, *Reconciliation Through Truth*, 48.



means can help us better understand its specific applicability in the case of Canada and the Indian Residential Schools truth commission.

### *Reconciliation as Politics*

At one level, political reconciliation involves matters of state, and the state's relation to its citizens. Here it is a matter of formal politics: Bloomfield, Barnes, and Huyse claim that reconciliation is "a necessary requirement for the long-term survival of democracy."<sup>135</sup> They further note that a polity left unreconciled will be unable to support a "political system based on respect for human rights and democratic structures."<sup>136</sup> Similarly, the type of political reconciliation Philpott argues for is primarily concerned with "those relationships that are proper to the political order, that is, rights and duties that are shared reciprocally among citizens, between citizens and states, and between states in the international system."<sup>137</sup>

Reconciliation certainly has a formal political aspect, but at another level political reconciliation involves so much more. Here it is closely bound to justice, as it "seeks not only to restore rights and the laws and institutions that guarantee them but also to redress [a] wide range of injuries."<sup>138</sup> Injustices that are social or economic, beyond the ambit of formal politics *per se*, yet clearly related to it, are also the subject of reconciliation. For Philpott, the "primary wounds" that political injustice inflicts can be redressed with six practices to which an ethic of political reconciliation is directed: building socially just government institutions; acknowledgment of the suffering of victims by the community; reparations; punishment; apology; and forgiveness.<sup>139</sup> Again, some of these are clearly about formal political arrangements and a state's relationship with its citizens. Making these institutions workable requires more than state action.

Reconciliation is broadly applicable to the public square, not just formal political arrangements between state and citizen. As Philpott's definition recognizes,

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<sup>135</sup> David Bloomfield, Teresa Barnes, and Luc Huyse, *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 15.

<sup>136</sup> *Ibid.*, 168. Robert Rothstein shares a concern here too, arguing that "total failure at reconciliation will guarantee a very cold peace and perhaps a return to violence" (Robert Rothstein, "Fragile Peace and its Aftermath," in *After the Peace: Resistance and Reconciliation*, ed. Robert L Rothstein (London: Lynne Reiner, 1999), 238.

<sup>137</sup> Philpott, "An Ethic of Political Reconciliation," 392.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*, 398.

reconciliation *involves* speech, but for Doxtader, reconciliation can be understood best as a rhetorical concept. That is to say, reconciliation is an idea that is made in speech. This is necessary because of its ambiguity. “What is reconciliation? If not paradox, our answers court performative contradiction: the act of defining reconciliation depends on a logic that the concept and practice of reconciliation appears to upset.”<sup>140</sup> Moreover, “in (re)making what is, somehow converting one state of affairs or mind to another, reconciliation opposes the way in which we establish the essence (the exclusivity) of things, challenges the ways that we justify the value of such distinctions, and endeavours to dismantle those modes of definition that legitimize identitarian violence.”<sup>141</sup>

In addition to generating new (political) arrangements, I argue that reconciliation has the ability to transform what already exists. This is not unimportant, as the generation of an entirely new state, or new institutions, may not always be possible or desirable. In ancient Athens, the “reconciliation” of the 5th century B.C.E. involved “a close relation between *poiēsis* and *logos*.”<sup>142</sup> *Poiēsis* is Greek for production, and *logos* means, broadly, philosophy, or, put differently, reasoning and discussion. Thus, reconciliation here brings together practice and theory (or thought).<sup>143</sup> It was conceived as a “question that calls for speech, [it] is a potential (*dunamis*) to make with words.”<sup>144</sup> It is within language and speech that the potential and reason of reconciliation is present. Reconciliation’s fundamental promise of transformation is in its “power to turn one kind of relationship into another,” notably through words.<sup>145</sup> Here this turn of one kind of relationship into another may be less structural and more ideational, as formal aspects of it remain unchanged whereas how these aspects are understood have the ability to transform the relationship. Indeed, it is easy to imagine how this might work in the case of institutions, where formal aspects of them remain scarcely altered overtime, but how the institution is theorized may transform it, effectively transforming the institution itself. How agents of the institution may act can change, but the institution itself can remain unaltered.

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<sup>140</sup> Eric Doxtader, “Reconciliation a Rhetorical Concept/ion,” *Quarterly Journal of Speech* vol. 85, no. 4, 267

<sup>141</sup> Ibid.

<sup>142</sup> Ibid., 271.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

To be clear, Doxtader also contends that reconciliation has a generative aspect; just when the law fails in its promise of justice, reconciliation offers an opportunity of generation, of (re)constitution. “It affords standing to citizens, creating a time in which it is possible to invent *topoi* that recover and support deliberation in the wake of its collapse.”<sup>146</sup> What is significant and exciting about this concept is that it puts dialogue and discussion at the centre of reconciliation, which holds out the possibility of establishing the rules and structure of these discussions to transform peoples’ philosophical understanding of what is established.

Doxtader’s approach can help us understand the time of reconciliation, and the space for its performative speech actions. Doxtader understands this “time in which it is possible to invent *topoi*,” as a moment in which to make history and break from the past. It is a time of generation that stands apart from normal time; it is a time of opportunity.<sup>147</sup>

The rhetorical aspects of reconciliation are important in adding another layer to the complexity of politicking about reconciliation. Dialogue and interaction between parties are intimately connected to language. The transformative power of reconciliation, and its generative power, for that matter, involves the rhetoric that brings reconciliation into being. As Doxtader argues, the reality of reconciliation is “wed to words, the power of *logos* to turn us from one condition to another and the actions of speech that provoke us to reflect on how we talk and to what ends.”<sup>148</sup> What this moment in a time set aside from time can open up is “an occasion for talk, [which] performs the movement of relationships, and inaugurates deliberative controversy about the form and substance of collective life.”<sup>149</sup> Transforming and transcending the identities of oppressor and victim is a dialogical, speech-centred, endeavour that is part of the aim of reconciliation. Moreover, the centrality of dialogue to reconciliation gives us a clue to its cooperative basis, for a conversation is not made alone, without something like equal engagement it is a monologue.

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<sup>146</sup> Ibid. *Topoi* are classic Greek standard rhetorical constructs; they allow forms of discourse that are standardized and, thus, understood by their interlocutors. Here, Doxtader means that reconciliation is a time for creating new mechanisms of interaction that are mutually agreeable and understood.

<sup>147</sup> Ibid., 271-2.

<sup>148</sup> Ibid., 278.

<sup>149</sup> Ibid.

Reconciliation as a project of politics is not straightforward, especially in colonial societies. Motha argues that the emphasis that reconciliation places on commonality can have the perverse effect of reinforcing the unjust relations of power it seeks to overturn. For Motha, “reconciliation is marked and delineated by the possibility of producing a renewed polity or ‘political community.’”<sup>150</sup> The danger here is that the “process of re-inscribing the ‘political’ under ‘one-law’ subordinates indigenous laws and customs, once again, in the name of ‘civilization,’ and its new effigies, democracy and human rights.”<sup>151</sup> Corntassel, similarly views reconciliation with suspicion, seeing it, along with rights and resources, as one of “three main themes that are commonly invoked by colonial entities to divert attention away from deep decolonizing movements and push us towards a state agenda of co-optation and assimilation.”<sup>152</sup> So reconciliation conceived as politics does not entirely resolve the ongoing concern to avoid having a process directed against colonialism contain colonialism. For example the unilateral subjection of Aboriginal peoples to a Western human rights framework (such as a bill of rights) does not overturn the paternalism of colonisation, but merely re-inscribes it into a new rights discourse, as the coloniser still in part seeks to save the colonised from their barbarity. This may be motivated by the best of intentions, but in the unilateral construction of “one-law” to rule the land, the inequalities of power between settlers and natives are played out again and what is left is not a new law, but rather the same colonial law re-invented.

Motha argues that Australia has suffered just this sort of impediment to reconciliation. With an insistence on a “unitary political community,” the Australian approach has only reproduced an assimilationist tendency.<sup>153</sup> This highlights a central tension so often felt in the application of reconciliation, between creating a just order and just creating order. Motha calls this unfortunate result a “double move: both emancipatory demand and device by which an enforced commonality can be re-inscribed. In the latter move reconciliation is nothing less than domination.”<sup>154</sup>

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<sup>150</sup> Stewart Motha, “Reconciliation as Domination,” in *Law and the Politics of Reconciliation*, ed. Scott Veitch (Aldershot: Ashgate, 2007), 69.

<sup>151</sup> Ibid.

<sup>152</sup> Jeff Corntassel, “Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination,” *Decolonization: Indigeneity, Education & Society* vol.1, no.1 (2012), 91.

<sup>153</sup> Motha, “Reconciliation as Domination,” 70-1.

<sup>154</sup> Ibid., 88.

### *Refining Reconciliation*

Picking up on this double movement, Schaap argues that the tensions of reconciliation can be viewed as politics and ideology, respectively.<sup>155</sup> Schaap deals with six prominent objections to reconciliation. Rather than countering these critiques of reconciliation as an ideology with moral idealism, Schaap demonstrates how reconciliation can be recast as “politics that is reducible neither to violence nor consensus, although it is conditioned by the possibility of both.”<sup>156</sup> By discussing each of these objections and how Schaap responds to them, we can see how reconciliation fits into the realm of politics, refining reconciliation as political concept. As I want to follow Schaap closely in understanding reconciliation, it is helpful to detail his response to these six objects, and in so doing elucidate the *political* character of reconciliation.

First, Schaap argues against the objection that reconciliation is problematic because it has, at best, an ambiguous definition. Schaap calls this the “ambiguity objection.”<sup>157</sup> This ambiguity refers to the difficulty of defining reconciliation, highlighted above. In addition to the problems of conceptualizing and then operationalizing reconciliation that have been highlighted by Meierhenrich, there are the practical problems that arise in the application of reconciliation when there is not a clear definition, or when stakeholders have differing definitions of reconciliation. In the case of the formal Australian reconciliation process, Andrew Gunstone argues that the education goal of the process failed, in part, because of “the confusion over the meaning of the term reconciliation.”<sup>158</sup> However, it is this vague and contestable quality that most commends reconciliation as a political approach. As Schaap points out: “[i]f we had to agree on a definition of reconciliation before we could begin to reconcile, reconciliation would never be initiated.”<sup>159</sup> Moreover, it is this tension of contestability that can prove most fruitful as it gives hope to those involved by providing “the basis for an overlapping dissensus in relation to which people can debate and contest the terms of their political

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<sup>155</sup> Andrew Schaap, “Reconciliation as Ideology and Politics,” *Constellations* vol. 15, no.2 (2008), 250.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*, 251.

<sup>158</sup> Andrew Gunstone, *Unfinished Business*, 94.

<sup>159</sup> Schaap, “Reconciliation as Ideology and Politics,” 251.

association.”<sup>160</sup> This dissensus goes to the very foundation of political association, in contrast to consensus, which presupposes having sorted out fundamental principles of interaction and legitimacy. An overlapping dissensus mobilizes reconciliation around the very issues of injustice that necessitate reconciliation and provides fertile ground for a political (re)association.<sup>161</sup> In this way, the contestability of reconciliation “enables an agonistic politics that is potentially constitutive of political community.”<sup>162</sup>

A predetermined approach to reconciliation opens the process—especially in post-colonial or de-colonizing societies—to the domination with which Motha is concerned. Thus, as Schaap rightly asserts: “If reconciliation depends on a population within a state coming to think of itself as a people, then a particular conception of reconciliation cannot be determined in advance but must be worked out politically by those who would get together to reconcile in the first place.”<sup>163</sup> This aspect is important to keep in mind in the case of Canada, as the inequality of power between the Crown and Aboriginal peoples raises the possibility of domination in the reconciliation process. The full and active participation of the parties to the Indian Residential School Settlement Agreement is important for reconciliation to avoid the negative aspects of a predetermined approach.

Second, Schaap deals with the criticism that reconciliation is illiberal. Critics posit that to the extent that reconciliation is pursued in liberal societies, or as Philpott suggests, builds on the “liberal peace,”<sup>164</sup> reconciliation’s illiberality is problematic.<sup>165</sup> It is specifically problematic that to the extent that reconciliation seeks to enact an ideal society that is united and harmonious, it demands too much.<sup>166</sup> This leads some, such as Dwyer, to pursue a more limited and “realistic” reconciliation; perhaps, something closer to peace and coexistence.<sup>167</sup> Schaap, however, argues that this misses the “constitutive, foundational dimension of human rights that is implicit in the promise ‘Never Again.’”<sup>168</sup> More importantly, it fails to deal with why people who live in close proximity *should*

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Philpott, “Reconciliation as Ideology and Politics,” 393.

<sup>165</sup> See Timothy Garton-Ash, “True Confession,” *The New York Review of Books*, July 17, 1997. Cited by Schaap.

<sup>166</sup> Schaap, “Reconciliation as Ideology and Politics,” 252.

<sup>167</sup> Susan Dwyer, “Reconciliation for Realists,” *Ethics & International Affairs*, vol. 13, no. 1 (1999).

<sup>168</sup> Schaap, “Reconciliation as Ideology and Politics,” 252.

look to the same institutions and laws to safeguard their rights.<sup>169</sup> That is to say, it presumes too much, failing to return to the beginning to re-establish an order that avoids the pitfalls of the past. An approach to reconciliation that eschews anything more than peaceful coexistence expressly denies the “constitutive” function of articulating a “thick” description of reconciliation based on a respect for others and expressed in commitments to human rights. When human rights are themselves cast in the light of the political, the declaration “Never Again” can be seen “insofar as it expresses a *collective intention*, [as] an act of self-determination.”<sup>170</sup> This is to say that reconciliation, from a political standpoint, cannot presuppose a party’s interest in securing human rights, but, rather, must make the discussion of the good a foundational part of the politics of reconciliation. In Canada the monological idea of the supposed good forced on Aboriginal people, perhaps most clearly through the Indian Residential Schools System is part of what needs to be overturned through reconciliation. More specifically the *dialogue* over a new and shared concept of the good cannot take the Crown at its word alone, nor presuppose that it respects human rights, as it is exactly its obfuscation of these that must be reckoned with in reconciliation.

Third, Schaap deals with the “question-begging objection.” The question that is begged by reconciliation is what relationship is there to return to, as implied by the “re” in reconciliation. There can be considerable debate whether anything like a justice relation ever existed between parties before the rupture; thus, the appropriateness of “reconciliation” is brought into question. This is an important consideration for Canada and is discussed in more detail below. Here Schaap points out that reconciliation often involves or refers to a restoration of friendly relations. However, as in some post-colonial or de-colonising societies, there is no such *a priori* state to be restored.<sup>171</sup> To the extent that reconciliation is conceived in an ethical-philosophical sense of the reunion with a community that one has been disunited with by violation of common norm—which as Bennett describes is a “story of alienation and return”<sup>172</sup>—it is problematic in communities that have definitive norms to which to return. Schaap again, points to the

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid., 253.

<sup>171</sup> Ibid., 253-4.

<sup>172</sup> Christopher Bennett, “The Varieties of Retributive Experience,” *The Philosophical Quarterly*, vol. 52, no. 207 (2002), 162.

example of Australia, describing it as a context “in which violence and oppression against the colonized was legitimated in the terms of the shared moral norms of the colonizers.”<sup>173</sup> Here reconciliation as a story of alienation and return would run headlong into the dominating norms of colonisation itself, which is expressly what reconciliation seeks to overturn. It can be of little surprise then, that colonized peoples are “suspicious of the ‘re’ in reconciliation.”<sup>174</sup>

Again, this is the domination with which Motha is concerned. To subsume reconciliation into a false “we,” or some sort of imagined unity, is to deny the “emancipatory demand” that reconciliation makes. What Schaap offers here is a politics of reconciliation that is a way of “distinguishing between the proto-political community of equals to which the “re” in reconciliation refers, and the determinate political association that it potentially calls into question.”<sup>175</sup> In this way reconciliation cannot be an end of politics, and cannot aim at an ideal community, which a given community would approximate. Rather, it stands in complex relationship with that community, in its impossibility of realization; it is not “a blue print for a new society as utopias are sometimes interpreted.”<sup>176</sup> As Kerruish argues, this means that reconciliation’s “conceptual link is to freedom, [and] in the Australian context, decolonisation.”<sup>177</sup> This is also the case for Canada, I argue below, where reconciliation must be linked to decolonisation and must aim at some finishing place where a way of living together and sharing—land, or institutions, or whatever may be negotiated—is not the final realization of its own goal, at least not in a way that limits freedom and other constitutive aspects of agonistic politics. In this way, the “re” does not involve return to a prior community, but the return to the beginning of constructing community itself in a political, and therefore discursive, way.

Fourth, objections can be raised against reconciliation in its capacity for nation building. In the case of South Africa, it was the nation building project of Apartheid which led to wide spread injustice, as it excluded black South Africans from the white

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<sup>173</sup> Schaap, “Reconciliation as Ideology and Politics,” 254.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, 255.

<sup>176</sup> *Ibid.*, 255. See also Valerie Kerruish, “Reconciliation, Property and Rights,” in *Lethe’s Law: Justice, Law and Ethics in Reconciliation*, ed. Emiliios Christodoulidis and Scott Veitch (Portland: Hart Publishing, 2001), 191-206.

<sup>177</sup> Kerruish, “Reconciliation, Property and Rights,” 200.



dominated polity, society, and economy. In the cases of Australia and Canada, again, a nation-building project is at the heart of injustice, this time directed not at exclusion, *per se*, but toward assimilation. This is what Schaap calls the “assimilation objection.” Reconciliation can overdetermine the incorporation of disparate factions into the new political community. In cases where wronged parties may not want to remain in the same community as their perpetrators, there is a danger that reconciliation as nation building will presuppose and then guarantee the incorporation of the wronged party into the new community, regardless of the understandable and legitimate reservations of the wronged. In post-colonial or de-colonising contexts especially, there is a danger that reconciliation will be assimilative, “since it seeks to overcome the state’s crisis of legitimacy by *incorporating* the colonized into the political community as free and equal citizens rather than recognizing their right *not* to reconcile.”<sup>178</sup>

If the wrong to which reconciliation is directed is one that emanates from the foundation of a nation, or to its incorporation of other peoples into its polity, then reconciliation as nation building runs the serious danger of failing to transcend or overturn the very wrong it has sought to redress. The national unity to which the South African TRC was expressly directed forestalled any questions about whether white and black South Africans even wanted to live under shared institutions. Reconciliation that seeks to correct historical inconsistencies with current national projections, especially in post-colonial societies, overdetermines the composition of the political community, the questioning of which may be the demand of an emancipatory reconciliation. That is to say, it may be the case that victims of past abuses no longer want to live under the same institutions as their perpetrators, and it is this questioning of the composition of the new political community that might well be demanded by an emancipatory reconciliation. Schaap points out that reconciliation in Australia “was supposed to be achieved to coincide with the centenary of the Australian Federation in 2001, pointing to the close connection between the concept of reconciliation and nation-building in Australia in the 1990s.”<sup>179</sup> Following Christodoulidis’ discussion of reconciliation as risk,<sup>180</sup> Schaap

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<sup>178</sup> Schaap, “Reconciliation as Ideology and Politics,” 255.

<sup>179</sup> *Ibid.*, 255.

<sup>180</sup> Emiliios Christodoulidis, “Truth and Reconciliation as Risks,” *Social and Legal Studies* vol. 9 (2000), 179-204. Christodoulidis concludes that we can richly theorize a reconciliation that “involves a certain leap

argues that a politics of reconciliation can help to (re)found a political community, if attention can be drawn to the political risk involved in attempting such an ambitious project.<sup>181</sup> Risk of a generative politics must be assumed, which can create a community that overcomes the injustices of the past. That is to say, this sees “the present as a *point of origin*.”<sup>182</sup> That an endeavour to create such a community might fail is not necessarily a weakness, but bespeaks the sincerity of the effort. As Christodoulidis argues, and Schaap would appear to agree:

Reconciliation is ‘not yet’; and this ‘*not-yet*’ is a risk brought into the present to become constitutive of the experience of the present. As such, it is to be celebrated. Because this ‘not-yet’, this tending into the future imports an awareness that keeps community both attuned to the aspiration of being-in-common and aware of its vulnerability; it thus taps the source of its being, to the extent that community must be conceived as dynamic, as always in the process of becoming.<sup>183</sup>

In Canada determining the exact shape of the community that will ultimately result from decolonisation is part of the process, but a community of some sort will inevitably have to exist as Aboriginal peoples and Canadians overlap geographically. At the very least it will involve a relationship between communities.

Fifth, Schaap deals with the “quietest objection,” which involves the invocation of reconciliation as a form of resignation, with the maligned party being reconciled to its fate. In the name of enforced commonality victims may be required to forgive and forget, making reconciliation little more than being “reconciled to domination.”<sup>184</sup> Reconciliation becomes quietist to the extent that it is not concerned with justice. Rather, Schaap argues, “a willingness to reconcile should be understood as providing a political context in terms of which justice can be staged.”<sup>185</sup> Justice and politics exist in a complex relationship to one another, and in reconciliation both justice and politics are at the heart

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of faith” (199). That is, a reconciliation that dares us to believe it in the absence of evidence, where we *must*, therefore, risk being wrong.

<sup>181</sup> Schaap, “Reconciliation as Ideology and Politics,” 256.

<sup>182</sup> Christodoulidis, “Truth and Reconciliation as Risks,” 199.

<sup>183</sup> Ibid. Schaap quotes part of this section: “As Emiliios Chritodoulidis has observed, this risk that the beginning we seek might fail should be celebrated since, in contrast to the reification of the nation, it ‘imports an awareness that keeps community both attuned to the aspiration of being-in-common and aware of its vulnerability.’” (Schaap, “Reconciliation,” 256).

<sup>184</sup> Schaap, “Reconciliation as Ideology and Politics,” 257. Quoting Motha, “Reconciliation as Domination,” 70.

<sup>185</sup> Ibid.

of the thing itself. As Schaap rightly points out, it is justice “that depends on political institutions for its (imperfect) realization,”<sup>186</sup> and it is these very institutions that reconciliation scrutinizes. A politics of reconciliation is intimately linked to justice and should refuse a demand for resignation on the part of the oppressed. Instead, it “requires finding reasons to reconcile in order to redeem the offer of forgiveness that made possible the foundation of a new political association.”<sup>187</sup> It recognizes the gift of the oppressed in their willingness to reconcile in the face of their right not to and introduces reflexivity to the oppressor and demands they furnish reasons for reconciliation.<sup>188</sup> This theme is discussed again below, but what it means for the Canadian case is that reconciliation concerns the dominant society and more importantly the Crown. This implies the active participation by the coloniser in an ethical-political process that requires the case to be made for living together in peace and friendship, as I put it earlier. But the participation of the dominant society must take a form that allows Aboriginal expression, lest it force a dominating reconciliation on Aboriginal peoples.

Sixth, Schaap deals with the “exculpatory objection,” which says reconciliation “enables those ordinary citizens collectively implicated in past injustices as beneficiaries of a regime to evade assuming any real responsibility by lapsing into a sentimental politics of guilt or shame.”<sup>189</sup> While guilt and shame on the part of the oppressor may be helpful emotions that lead to constructive action that might redress the injustice over which these people feel guilty or shameful, these can also lead to an empty sentimentality. A feeling of shame or guilt can become sentimental, argues Schaap, “when it centers attention on feeling good about ourselves and our nation rather than on what can be done to redress the situation.”<sup>190</sup> These feelings of shame or guilt need to lead oppressors to shared responsibility that “needs to be thought of in terms of a responsibility that is *responsive to* the political claims of those who suffered previous injustices.”<sup>191</sup> These feelings can neither be ephemerally sentimental nor paralyzingly real, but, rather, must be part of a continual unsettling that will lead to a politics of

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<sup>186</sup>Ibid., 258.

<sup>187</sup> Ibid.

<sup>188</sup>Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid., 259.

<sup>191</sup> Ibid.

reconciliation that “would seek to realize political community while acknowledging the impossibility of any final settling of accounts.”<sup>192</sup> In Canada, the dominant society cannot rest at feeling guilt for past actions by the Crown, centring reconciliation unduly on the oppressors. Rather, the disquiet we ought to feel as part of the reconciliation process needs to be mobilised to political action and dialogue to ensure a return to living together in peace and friendship and the maintenance thereafter.

Schaap’s politics of reconciliation is shifting, contingent, and contestable. Rather than the ideological approach that seeks to prefigure and overdetermine reconciliation as an end—and by doing so, to specify in advance its content—a politics of reconciliation sets the forum in which the contestability of reconciliation can play out. Thus, we can understand the politics of reconciliation in these terms: it is a generative and transformative ethic, one that provides a forum for a dialogue of possibility with urgency, but without pre-scribing the ultimate end of reconciliation. It must take seriously the conversational quality, and parties to reconciliation must approach it with the understanding of the contestability and contingency of reconciliation, and willingly be open to the self-transformation and opposition that can be wrought through reconciliation. This helps form the basis for how I understand reconciliation, which will have implications for understanding reconciliation in the Canadian case. This discussion, however, leaves open the question of return that the “re” in reconciliation implies, which is especially important as I continue to refer to living together in peace and friendship.

### *(Re)Conciliation or Reconciliation?*

The problem of reconciliation in post-colonial or de-colonising societies, as discussed by Schaap above, is a problem of return (regeneration) or constitution (generation). This is the problem of the “re” in reconciliation. For the Canadian case it is an important to deal with the disjuncture between conciliation and reconciliation. John Amagoalik argues that, properly speaking, in Canada we need conciliation, rather than reconciliation.<sup>193</sup> There is nothing positive to return to, as “the history of this relationship [between Europeans and

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<sup>192</sup> Ibid.

<sup>193</sup> John Amagoalik, “Reconciliation or Conciliation? An Inuit Perspective,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, ed. Marlene Brandt Castellano, Linda Archibald, and Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2008), 91-97.

the original inhabitants of North America] is marked by crushing colonialism, attempted genocide, wars, massacres, theft of land and resources, broken treaties, broken promises, abuse of human rights, relocations, residential schools, and so on.”<sup>194</sup> Thus, as there “has been no harmonious relationship, we have to start with *conciliation*.”<sup>195</sup> This requires the coming together for the first time in peaceful and harmonious way. The difference here is more than semantics, as the Canadian TRC contains within its terms of reference, as a principle, the fostering of *reconciliation* on many levels and between many groups, not a commitment to *conciliation*.

Moreover, conciliation’s effective link is to notions of mere coexistence. As Amagoalik notes in his definition of conciliation, it is directed towards overcoming distrust, gaining good will, or being agreeable.<sup>196</sup> That is understandable, as the degree to which conciliation is connected to coexistence is less epistemologically demanding than reconciliation and can circumvent many of the above pitfalls. Reconciliation is demanding, much more so than conciliation, and may be an “unrealistic goal for postconflict peacebuilding, especially in the aftermath of genocide.”<sup>197</sup> However, the suspicion of reconciliation is also justified in a worry over its nation-building qualities. If, as Motha has described reconciliation in Australia, it is “a neo-imperial gesture... [that] subordinates indigenous laws and customs, once again, in the name of ‘civilisation,’”<sup>198</sup> then Canadian Aboriginal peoples have good cause to treat reconciliation with scepticism, if not hostility. To do so would be a mistake, one that would make the project of dealing with the legacy of the Indian Residential School System much more difficult.

In Chapter Four I outline a history of Indigenous-European relations that does have a harmoniousness to which it can return. This, in fact, is part of the decolonial contention of “treaty federalism” discussed in Chapter Five. But I want to bracket this fact and follow Schaap here, and suggest that in Canada, what is called for is exactly the politics of reconciliation that can avoid the ideological tendencies that lead to the weaponization of reconciliation. As Motha puts it, the “emancipatory demands” of

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<sup>194</sup> Ibid., 93.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid. Taken from the Dictionary.com definition of conciliation.

<sup>197</sup> Wendy Lambourne, “Justice and Reconciliation: Postconflict Peacebuilding in Cambodia and Rwanda,” in *Reconciliation, Justice, and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer, (Lanham, MD: Lexington Books, 2001), 317.

<sup>198</sup> Motha, “Reconciliation as Domination,” 77.

reconciliation are what matter. Part of a politics of reconciliation, which overcomes the suspicions of the “re” in reconciliation, is the need for “an admission of the facticity of the political community with its origin in violence and the fiction of any reference to an original harmony that might be restored.”<sup>199</sup> In many important ways, as will be seen, any harmony between the Crown and Aboriginal peoples predates the establishment of the Canadian state as we know it now.

It is also important to note the role of treaties in the early context of Canada, as a device that might prove fruitful for the articulation of a new relationship between the Canadian Crown and Aboriginal peoples. In January 2012 a Crown-First Nations meeting was held in Ottawa, called to address issues facing First Nations, especially in the wake of widely publicized reports of substandard housing on remote reserves.<sup>200</sup> The state of housing was brought under public scrutiny late in 2011 when Attawapiskat, a remote First Nations community in Northern Ontario, declared a state of emergency due to many of its inhabitants living in poorly heated tents and garages with winter about to set in. The outcome of the Crown-First Nations summit highlighted the need to begin to take the words and spirit of the *Royal Proclamation 1763* seriously in addressing issues facing First Nations in Canada.<sup>201</sup> That is, taking seriously a relationship of equals between Crown and Aboriginal nations could be a productive starting position for addressing issues created under the unequal colonial relationship.

More specifically, what is called for by a politics of reconciliation in Canada is a politics of agonism that follows Schaap and that is mindful of the transformational and

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<sup>199</sup> Schaap, “Reconciliation as Ideology and Politics,” 255.

<sup>200</sup> A series of articles ran in national media starting in November of 2011. See for example Gloria Galloway, “Aboriginal Affairs Minister dispatches team to Attawapiskat,” *The Globe and Mail* November 25, 2011 <http://www.theglobeandmail.com/news/politics/ottawa-notebook/aboriginal-affairs-minister-dispatches-team-to-attawapiskat/article2249828/> (accessed 21 Feb. 2013); Gloria Galloway, “Chiefs from Across Canada stand with Attawapiskat,” *The Globe and Mail* December 6, 2011 <http://www.theglobeandmail.com/news/politics/chiefs-from-across-canada-stand-with-attawapiskat/article2261600/> (accessed 21 Feb. 2013); and Kim Mackrael, “UN official blasts ‘dire’ conditions in Attawapiskat,” *The Globe and Mail* December 20, 2011 <http://www.theglobeandmail.com/news/politics/un-official-blasts-dire-conditions-in-attawapiskat/article2278146/> (accessed 21 Feb. 2013).

<sup>201</sup> In an article on McLean’s online Aaron Wherry has gone as far as to describe the *Royal Proclamation* as a found constitutional document. See Aaron Wherry, “Immediate Steps for Action,” McLeans.ca available at: <http://www2.macleans.ca/2012/01/24/immediate-steps-for-action/> (accessed 30 Jan. 2012).

speech aspects of reconciliation highlighted by Doxtader.<sup>202</sup> This is a politics that eschews the “friends and enemies” economy of Polemarchus or Schmitt.<sup>203</sup> Rather it is a politics that gives standing to the other as interlocutor and understands the contestability of political decisions. It is Schmitt’s understanding of politics that Mouffe extends and contradicts in building up a theory of agonistic politics.<sup>204</sup> While I do not want to belabour the point, it is worth pausing for a moment to understand Mouffe’s argument for agonism, especially given the off-hand reference by Schaap to the politics of reconciliation being agonistic.<sup>205</sup>

For Mouffe, politics is conflictual. Agonistic politics, however, seeks to see the other “not as an enemy to be destroyed, but as an adversary whose existence is legitimate and must be tolerated.”<sup>206</sup> Politics cannot, in a sense, be seen as settlement, as finally and completely deciding something. Decisions have to be open to be re-decided. As Schaap says, it is not the closing of accounts, but the taking seriously of the political claims of those who have suffered injustice.<sup>207</sup> Reconciliation as agonistic politics cannot seek to destroy the other with a settlement or suppose that once an argument is settled that the act of politicking is over. Agonistic politics is juxtaposed to liberal politics, as at its heart there is significant contingency and undecidability.<sup>208</sup> The proper task, therefore, of politics, “instead of shying away from the component of violence and hostility inherent in social relations, is to think how to create the conditions under which those aggressive forces can be defused and diverted and a pluralist order made possible.”<sup>209</sup> It is the essential contestability of all decisions that needs to be recognized. These decisions

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<sup>202</sup> Schaap discusses how understanding the contestability of reconciliation “enables an agonistic politics,” however, does not discuss what is meant by agonism.

<sup>203</sup> In Plato’s *Republic* 331e-332c. Polemarchus picks up the discussion from his father Cephalus concerning justice and indicates that justice is doing good to friends and ill to enemies. Later in the discussion at 334b Polemarchus reiterates that “to benefit one’s friends and harm one’s enemy’s is justice.” While Socrates deals with this argument in time, Polemarchus starts by articulating a form of politics that is bifurcated between friends and enemies. Similarly Carl Schmitt, argues that politics can be seen as a conflict between friends and enemies much more intelligibly than the liberal neutralist view of politics and individual rights. He articulated this in his famous book *The Concept of the Political* (1927; reprint, Chicago: University of Chicago Press, 2007).

<sup>204</sup> Chantal Mouffe discusses this in more than one publication, but perhaps most thoroughly in *The Return of the Political* (London: Verso, 2005).

<sup>205</sup> Schaap, “Reconciliation as Ideology and Politics,” 251.

<sup>206</sup> Mouffe, *Return of the Political*, 4.

<sup>207</sup> Schaap, “Reconciliation as Ideology and Politics,” 259.

<sup>208</sup> Mouffe, *Return of the Political*, 145.

<sup>209</sup> *Ibid.*, 153.

necessarily occur in an arena of undecidability and represent only a contingent ordering of values to reach a decision. It *must* be recognized that in choosing there has been an un-choice; that is, some other avenue has been closed as a result of the specific decision taken. It is because of the dual nature of choice that contestability must be retained after political decisions have been taken. For Mouffe, the political decision *must* be subjected to the conflict of interests that constitutes politics.

In this way, it is fair to say that Canada needs *reconciliation*, both between Aboriginal peoples and the Crown, and between Aboriginal peoples and Canadians generally. What reconciliation will look like is a matter of dialogical and political interaction that can fruitfully use the existing tension if it refuses to condemn it to a failed consensus or settlement. An agonistic politics of reconciliation that takes seriously the fact of the past, the contingency of agreement, and the contestability of even reconciliation itself, is necessary in order to move forward into a shared future. If a process of reconciliation cannot be mindful of these things, it runs the serious risk of reinscribing the colonial relationship in the “reconciled” relationship it seeks.

#### *Four Aspects of Reconciliation in Canada*

Having a political understanding of reconciliation and being attuned to the pitfalls of recolonisation points us toward four aspects of reconciliation to keep in mind for Canada: reconciliation is not painless, it is continually (re)enacted, it hinges on the agency of the transgressed, and the transgressed owe nothing. These four aspects can give guidance for interlocutors to engage in this relationship of reconciliation, respecting each other and what they build together.

First, reconciliation is not painless. The transformative and generative aspects of a politics of reconciliation should point to a meaningful departure from the status quo. That is, a politics of reconciliation will be at the least uncomfortable and quite possibly may be disorienting for participants. Reconciliation is possible only through a difficult process of change, not a sentimental expression of guilt, shame, contrition, not as a simulacrum, or a commitment to the rule of law—especially when it is the law itself that is in question—but through a costly risk and payment of that cost. As Taiaiake Alfred argues:



without massive restitution made to Indigenous peoples, collectively and as individuals, including land, transfers of federal and provincial funds, and other forms of compensation for past harms and continuing injustices committed against the land and Indigenous peoples, reconciliation will not permanently absolve colonial injustices and is itself a further injustice.<sup>210</sup>

Canadians need to expect that reconciliation will be costly. According to some estimates the compensation as stipulated in the *Indian Residential Schools Settlement Agreement* will likely exceed five billion dollars.<sup>211</sup> However, Canadians need to be prepared for great costs that risk more than the public purse.

A commitment to reconciliation in Canada means addressing more than the specific injustices of the Indian Residential Schools system. The IRS system was not created in a vacuum, and the schools created wider harm than that suffered by the school survivors alone. The system of colonisation created significantly more widespread harms within the Aboriginal community, which continue today, including familial strife, domestic violence, and substance abuse. The Kelowna Accord would have been an example of paying the cost to support the health of Aboriginal communities. But the Kelowna approach pays another cost of changing minds and overturning epistemologies that reserve knowledge and solutions to the Crown alone.<sup>212</sup> The difficult process of land claims can be seen as part of reconciliation. Some people from the dominant society own land that was fraudulently obtained and exchanged in a series of good faith transactions; it still remains, however, that land was taken outside of even the colonial laws. Land claims and treaty making will be costly. This high cost, however, does not have to involve settlers taking down the Canadian flag and returning to the land from which we have come, or from which our ancestors travelled. Neither can this be seen as what is being demanded by Aboriginal peoples as restitution. As Alfred puts it “irredentism has

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<sup>210</sup> Taiaiake Alfred, “Restitution is the Real Pathway to Justice For Indigenous Peoples,” in *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, ed. Gregory Younging, Jonathan Dewar, Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2009), 181.

<sup>211</sup> Billy Curry, “Cost to Redress Native Residential School Abuse set to pass \$5-billion,” *The Globe and Mail* Nov. 18, 2011 available at: <http://www.theglobeandmail.com/news/politics/cost-to-redress-native-residential-school-abuse-set-to-pass-5-billion/article2242226/> (accessed 21 Nov. 2011).

<sup>212</sup> More will be said about the “Kelowna approach” in Chapter Eight. Significantly, however, it involves allowing Aboriginal peoples to participate in both defining the issues their communities face and designing the solutions to these issues.

never been in the vision of our peoples.”<sup>213</sup> Rather, it is a costliness that will involve risking more than property in coming into dialogue with the very people who have shared their land with us.

A second consideration is that reconciliation must be perpetually (re)enacted. The constitutional change that has been brought by the challenge in and enforcement of the Supreme Court, especially accelerated after the 1982 patriation of the Canadian constitution, is not a settlement once and for all, but rather is commitment to an ethic that will inform how disagreements are resolved. Even the legacy of the failed accord, the Kelowna approach, is only reconciliatory to the extent that it informs future dealings. And this type of consultation is continued. What this helps illuminate for Canadians is that reconciliation is not a ledger book to be closed or a debt to be paid off. Reconciliation in Canada strikes so close to the core of the political community and vision of sharing the territory that the end of reconciliation must be its constant living. While the cost of reconciliation is decolonisation, even in a post-colonial Canada the continual (re)enactment of reconciliation will be necessary to live in peace and friendship.

Third, reconciliation hinges on the agency of the transgressed. It is key to take measures that focus on restoring or conceiving of an Aboriginal agency that is no longer diminished because of colonial stereotypes. To be sure, Aboriginal agency is not completed in such measures. Rather, it can be seen as constitutive. Canadians need to understand that the central actor in reconciliation is that of the transgressed, that of Aboriginal peoples. This does not mean that Canadians should sit idly by as reconciliation plays out before them, indeed some aspects cannot play out without them. There is enough work in reconciliation to go around, but what this helps us understand is that reconciliation concerns us, without being all about us. If Canadians see themselves as the prime mover in the economy of reconciliation, the danger of co-opting the process for neo-colonial ends is very present. The Canadian community cannot be self-congratulatory in seeing itself as being good enough to address the concerns of Aboriginal peoples, nor mired in self-indulgent guilt over the Indian Residential School system. Rather knowing the place of Canadians within this economy of reconciliation means being poised to

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<sup>213</sup>Alfred, “Restitution is the Real Pathway to Justice For Indigenous Peoples,” 182.

respond to the needs and just demands of Aboriginal communities. That is to say, the story of reconciliation in Canada must make enough room for Aboriginal peoples, more so than the histories we usually tell, and be willing to hear the story in Aboriginal voices.

Canadians need to pay attention to the truth that the truth commission established. Canadians need to listen to the stories being told by Aboriginal peoples, and the claims that are advanced: cultural, legal, experiential, and epistemological. Canadians need to be willing to do the heavy work of overturning *stasis*. Canadians need to take their cues from Aboriginal peoples for reconciliation to blossom. As Walter Wink points out, the victim initiates reconciliation.<sup>214</sup> Canadians cannot impose reconciliation, but must take seriously its rhetorical quality and our own ability to be transformed through conversation. If we can see the reconciliation process in Canada as dialogical, then we must come to see that it is our chance to listen and be transformed, as well as to speak and participate.

Last, it is important to recognize that Aboriginal peoples owe nothing. That is to say, there is a danger of reading the components of reconciliation as steps in a predetermined transaction, the ultimate outcome of which is reconciliation. This is a mistake. We cannot know the outcome of our actions and we can only hope that the result will be a desirable one. To think that our contrition will lead to forgiveness and ultimately, perhaps after restitution, lead to reconciliation, is to grossly misunderstand what is at stake. This understanding could create a sentiment that vilifies Aboriginal peoples for not responding as this transactional account has us expect. Canadians can make apologies, as has been done on our behalf on the floor of the House of Commons, but that fact alone neither guarantees their acceptance nor does it ensure that Canadians, whether collectively or individually, will be forgiven.<sup>215</sup> We do not exchange one for the other. Even if, as I contend, reconciliation is costly, perhaps far costlier than it has been already, it cannot be worked out in any other way than through dialogue, and we cannot mistake what penance we pay to be sufficient or for us to determine that sufficiency. We

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<sup>214</sup> Walter Wink, *When the Powers Fall: Reconciliation in the Healing of Nations* (Minneapolis: Fortress Press, 1997) 22.

<sup>215</sup> Apology can certainly be an important aspect of reconciliation especially when it is given in heartfelt way. Michael Murphy discusses the role of apology in reconciliation, noting that apologies “signal a willingness to take responsibility.” ( See Michael Murphy, “Apology, Recognition, and Reconciliation,” *Human Rights Review* vol. 12, no.1 (2011), 64-5). This, however, does not mean that apologies must be accepted when they are first offered or at all.

can only hope that in earnestness and in time we can be forgiven and move toward the living out of reconciliation.<sup>216</sup>

Importantly, this gives Canadians a place to begin. Taken with an agonistic politics of reconciliation as outlined above, these considerations focus on the importance of being an attentive and responsive interlocutor in the dialogue. We need to look for the generative, transformative, and continual qualities of reconciliation in our own lives and in the space we share with Aboriginal peoples, hoping that we can offer enough, risk enough, and that it will be accepted.

### *Conclusion*

These three central concepts, colonisation, decolonisation, and reconciliation, run throughout the balance of this work and are foundational to the Truth and Reconciliation Commission of Canada and the relationship between Crown and Aboriginal peoples. In all three I want to put Aboriginal agency at the fore and seek to provide a fully humanised discussion. In the case of colonisation, this is, at least in part, at risk.

In recasting colonisation as state of exception I do not want to remove Aboriginal agency in the least. There are important stories to tell of resistance and cultural continuity in the face of determined efforts to erase Indigeneity from Canada. I know that in saying the system of reservation lands is a construction of exception—its manifestation in Agamben’s conception of the “camp”—I seriously risk overextending myself. While it is clear that reserves are problematic, both removing Aboriginal peoples from the normal operation of Canada as I argue above *and* providing a homeland, a geography from which to resist, I maintain that they can be read through the lens of exception. Missing here is a discussion of resistance; however, this is a story I can say I feel less comfortable telling, as it is unequivocally not mine. Discussing this important aspect of Aboriginal experience in Canada can lead too easily to appropriation, while adding little to the main line of argument of this dissertation. Thus, I have tried to maintain a voice that is authentic to myself, detailing a view of colonisation from my vantage point in the dominant society.

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<sup>216</sup> In the American context, Howard McGary argues that reparations are required to overcome the distrust between black American and their government; however, these reparations need not entail reconciliation. Rather, “reparation, when they are properly conceived, involve reassessment.” This reassessment can help “to make reconciliation more likely,” but does not entail reconciliation *per se*. (See Howard McGary, “Reconciliation and Reparations,” *Metaphilosophy* vol. 41, no. 4 (2010), 552.)

Moreover, I think exception gives a good way of understanding colonisation's intent. Whether it is entirely successful in removing a form of life, colonisation certainly seeks to violently transform life, in a way that requires the "other" to be less than human. So if exception leaves too little room for Aboriginal agency, then it is an exaggeration, but only an exaggeration of colonialism.

It is key to understand colonisation to see what is at stake for decolonisation. Decolonisation, then, is centrally about restoring agency to those from whom colonisation sought to deny it. It must unravel a tightly bound package of political and social perceptions and policies. While culture is an important source of colonialism, the decolonisation with which I am most concerned is centered on governmental relations, that is, relations between Aboriginal forms of government and the Crown. This link is explicitly discussed below in Chapter Five, but at its heart I take decolonisation in this area to mean the removal of alien structures of power and dismantling of a taxonomy of humanity that qualitatively separates oppressed from oppressor, without subsuming difference.

Reconciliation also centres on Aboriginal people, but requires the Canadian society more broadly to engage, and especially concerns the Crown. It is here that an ethical-political process, that at its very heart is decolonial, provides a form to follow, without prescribing an outcome. This agonistic politics is not co-extensive with decolonisation, but clearly these two concepts are linked here. Understanding the political nature of reconciliation importantly points to four aspects to consider in Canada: reconciliation is not painless, it is continually (re)enacted, it hinges on the agency of the transgressed, and the transgressed owe nothing. This will be important to keep in mind for Chapter Eight and the discussion of the sort of relationship the Canadian TRC might create between Crown and Aboriginal peoples.

## CHAPTER FOUR

### Colonisation: From Partnership to Wardship

#### *Introduction*

To make sense of the work of the Truth and Reconciliation Commission of Canada, an understanding of the Indian Residential Schools system is required. While the IRS system was created in 1886, the seeds of the system were sown in the very early years after European contact in the sixteenth century. It is important to understand the reasons and sites of interaction, cooperation, and fracture between Aboriginal peoples and Europeans over the history of North America and particular Canada, to see the context out of which the Indian Residential School system was created. Seeing colonisation through the lens of exception gives a new life to discussing the historical process of colonisation in Canada. This historical process is key to understanding the IRS system in an intelligible context, and will be helpful for us not to mistaking what decolonisation seeks to redress, discussed in Chapter Five.

Every narrative must have a beginning; this chapter starts with contact between the English and Aboriginal peoples on the eastern seaboard of what would become North America. In part, this is done to limit the scope of the history discussed, as the inclusion of precolumbian history would make this chapter unwieldy. But it is also because the history that is most relevant in the context of this overall project is the history that is shared between Aboriginal peoples and European settlers. Particularly relevant for my purposes is the interaction between the English and Aboriginal peoples, as this most directly informs the Canadian context. Moreover, it is important not to lose sight of the multiplicity of nations with whom the English Crown would gradually come into contact as exploration and settlement continued westward. Thus, I begin with a section entitled “*The Start of Contact*,” to remind us of this fact as we progress through what can only be a gloss of a long history.

In addition, I want to be clear in stating that there were complex social, economic, and diplomatic arrangements *within and between* Aboriginal nations prior to contact with Europeans—and as will be seen, these continued to be important after contact. It is not

my intention to ignore these facts by starting my discussion in 1497, but it is contact with Europeans that most informed the Indian Residential School system and, thus, this is the context needed to understand the Truth and Reconciliation Commission of Canada.

The history traced is not meant to be comprehensive. Highlighting the contours and outline of a history dating back centuries is meant to convey a narrative that builds to a discussion of the residential school and can make sense of my claim above to see residential schools through the lens of exception. The chapter covers contact, treaties, the changing nature of the European- Aboriginal relationship, the legal regulation of “Indians,” and the Indian Residential Schools system. It is after this history is traced that we can see that Aboriginal peoples have been attached to Canada through a state of exception.

### *The Start of Contact*

In 1497, five years after the famed voyage of Christopher Columbus to the “New World,” John Cabot, in service of the English Crown, sailed across the Atlantic to the shores of an isolated island that had been inhospitable to the Norse nearly five centuries earlier. What Cabot found there changed the course of North American history. The sheer abundance of large fish, specifically codfish, quickly made the area around present-day Newfoundland a hub of European fishing. The dietary requirements of Catholicism (i.e. no meat on Friday), and the long overfished Mediterranean, coupled with a population boom in Europe, led to a voracious need for new and reliable sources of fish.<sup>1</sup>

It may have been John Cabot who first discovered this source of fish, but Iberian fishers were among the first to exploit it. The Portuguese and Spanish who fished the waters around Newfoundland and Nova Scotia made few forays onto the land, as they had the ability to cure the fish with salt derived from their ready access to sea salt in the Basque country.<sup>2</sup> English and French fishers, on the other hand, had to establish curing facilities on land to smoke the fish in preparation for long voyages back to European markets, as they lacked access to the necessary salt for preserving fish.<sup>3</sup> This forced both

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<sup>1</sup> Brian Fagan, *Fish on Friday* (New York: Basic Books, 2006), 124-5.

<sup>2</sup> J.R. Miller, *Skyscrapers Hind the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2001), 17.

<sup>3</sup> *Ibid.*, 27.

the English and French into contact with the Aboriginal peoples of the new land. What started as temporary facilities quickly morphed into permanent settlements. As a consequence of living on the land, the European newcomers discovered another valuable resource: fur. The desire for this valuable commodity propelled Europeans deeper into the continent and brought them into contact with more and more Aboriginal nations.

The early relationship that developed between the natives of North America and the European newcomers was largely shaped by these reasons for interaction: fur and fish. Europeans, motivated by gain, relied heavily on the Aboriginal peoples with whom they came into contact to achieve their economic goals.<sup>4</sup> Especially in regard to the fur trade, Europeans required the labour of Aboriginal peoples to make this trade economically viable. Europeans lacked the expertise and knowledge of where to find animals for fur and thus acted as middlemen in the trans-Atlantic fur trade; “The Europeans, for the most part, purchased furs gathered by others and transported them to overseas markets.”<sup>5</sup> This relationship between Aboriginal hunters and European merchants was significantly symbiotic, where each benefited from the interaction, Europeans receiving furs for the trans-Atlantic trade and Aboriginal peoples access to goods and tools.

The economic basis of the early relationship between Europeans and Aboriginal peoples may have been mutually beneficial, but the Europeans’ very survival was dependent upon their trading partners.<sup>6</sup> Even in the economic relationship, the significant power lay in the hands of Aboriginal peoples. For example French fur traders seeking to do business with the Wendat had to do so in the language of the Wendat, who refused to “lower themselves to learn the newcomers’ language.”<sup>7</sup>

In the early period after contact between Aboriginal peoples and the newly arrived Europeans, there was a considerable exchange of goods and technology between them. Profits were made on both sides, but Aboriginal peoples engaged in trade and used

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<sup>4</sup> Ibid., 18. See also Harold Innis, *The Fur Trade in Canada: An Introduction to Canadian Economic History*, revised and reprinted (Toronto: University of Toronto Press, 2001) for a discussion of European and Aboriginal interaction in the fur trade, especially Chapter II for the early relationship.

<sup>5</sup> Miller, *Skyscrapers Hind the Heavens*, 37.

<sup>6</sup> Ibid., 42.

<sup>7</sup> Ibid., 45. See also Brian Trigger, “The French Presence in Huronia: The Structure of Franco-Huron Relations in the First Half of the Seventeenth Century,” *Canadian Historical Review*, vol.49 no.2 (1968), 107-41.



European technologies for traditional reasons, such as hunting and internal commerce. For as long as these motives “remained dominant, trade and European goods did not fundamentally remake Indian societies.”<sup>8</sup> By the late seventeenth century, however, European methods and incentives began to change some Aboriginal ways. For example, in what is now the Atlantic region of Canada, the Mi’kmaq began to take scalps from their traditional enemies, a practice learned from their French allies.<sup>9</sup> Moreover, the bounties offered by both the French and English, designed to reduce certain Aboriginal populations, fostered this new technique of terror and caused it to expand in the region.<sup>10</sup>

What is important to note in this brief discussion of contact between the inhabitants of North America and Europeans is that European explorers and traders found sophisticated, well organized societies in the “New World.” It is neither the case that the land was empty, nor that what was found were backward savages. In the case of Australia for example, the rationale used for settlement was that of *terra nullius* wherein the continent was considered to be empty territory, and the British colonized and settled there without considering the original inhabitants.<sup>11</sup> This was not the case in Canada. Whether the newcomers to the continent were there for fish, fur, evangelism, or exploration, at every turn they required the help and cooperation of the native peoples they encountered; fishing needed the approval of Aboriginal peoples —this task would have been at least extremely dangerous in the face of opposition—and fur, evangelism and explorations required their cooperation.<sup>12</sup> Aboriginal peoples encountered by Europeans had much to teach these newcomers about surviving and flourishing in an often-hostile environment.

Moreover, the exchanges between Aboriginal peoples and Europeans were not, in this early period, one-sided. That is, Europeans were not the unquestioned purveyors of technology, language, and culture. In the case of the French dealing with the Wendat it was, in fact, the French traders who learned the language and customs of their trading partners, not *vice versa*. Aboriginal peoples were not the savage ‘Indian’ seen in the

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<sup>8</sup> Ibid., 58.

<sup>9</sup> Ibid., 76.

<sup>10</sup> Ibid. See also Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (New York: Macmillan, 1969), 6-7.

<sup>11</sup> Bruce Buchan and Mary Heath, “Savagery and Civilization: From Terra Nullius to the ‘Tide of History,’” *Ethnicities* vol.6 no.1 (2006), 6.

<sup>12</sup> J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), 11.

images of the Saturday matinée Westerns popular in the 1950s, in which wagons were burned and women and children killed, the cowboy or homesteader usually being the hero, while the Aboriginal peoples were usually portrayed as villains. It is important to understand that Aboriginal peoples had agency. As historian J.R. Miller has put it, “Indian people were not the passive victims that were found in so many of the older accounts of Canadian history.”<sup>13</sup> Rather, they actively engaged with Europeans, deciding in the early years especially, what tools and technologies to adopt from their new allies and trade partners. By understanding the cooperative early interaction between European and Aboriginal peoples in North America alongside the agency that Aboriginal peoples possessed in these interactions, the seeds are sown for understanding the arguments of decolonisation proposed by many Aboriginal scholars and activists (discussed in Chapter Five).

### *Treaties*

Perhaps the most visible signs of the respectful and cooperative nature of early contact are the treaties that European crowns concluded with Aboriginal peoples with whom they dealt. In some colonial exploits, Europeans did not consider the peoples they found to constitute entities with whom they could negotiate.<sup>14</sup> Yet, in North America the Dutch, French, and English crowns all dealt with Aboriginal peoples through treaty and recognized the need for the support of the Aboriginal peoples in pursuing trade, war, and peace.<sup>15</sup> It must be understood that even in the time before treaties as we know them

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<sup>13</sup> Ibid., xii.

<sup>14</sup> Australia is an example of this. The doctrine of *terra nullius* (empty land) was invoked to justify the expropriation of land from the Aboriginal peoples the British colonisers found there (Bruce Buchan and Mary Heath, “Savagery and civilization: From terra nullius to the ‘tide of history,’” *Ethnicities* vol. 6(1) (2006): 5-26). While Merete Borch questions at what point the legal doctrine of *terra nullius* overtook conquest and cession as legal justifications for indigenous land coming under the ownership of the Crown, by at least the nineteenth century *terra nullius* was explicitly used in the debate that surround the establishment of the state of New South Wales (Merete Borch, “Rethinking the Origins of *Terra Nullius*,” *Australian Historical Studies*, vol. 32 issue 117 (2001):222-239.).

<sup>15</sup> European settlement in present-day New England necessitated interaction with the Haudenosaunee. Both the Dutch and the English undertook treaties to secure peaceful relations with the Haudenosaunee, the treaties themselves having been significantly influenced by Haudenosaunee norms (Michael Pomed, “Eighteenth-Century Treaties: Amended Iroquois Condolence Rituals,” *American Indian Quarterly*, vol. 19 mo. 3 (1995), 334).

today, Europeans—importantly for Canada, the British—concluded agreements with Aboriginal peoples.<sup>16</sup>

Miller argues, “the nature of a relationship between two people of different backgrounds is largely determined by the reasons they have for interacting.”<sup>17</sup> The main reason for interaction in the early contact and post-contact period was commercial, owing to the pursuit of fish and fur by Europeans. However, this commercial relationship was not left ungoverned, as Europeans needed access to territory and agreements for the purchase and exchange of goods. Europeans did not create trade in North America. Rather, they found pre-existing trade networks and rules governing trade to which they needed to adhere.<sup>18</sup> Because trade was premised on peace for the Aboriginal peoples encountered in north-eastern North America, treaties were an important part of commercial interactions. The simple commercial compacts that were established to allow trade between Aboriginal nations and Europeans, and the need for good relationship to establish these compacts, quickly drew Europeans into political alliances with Aboriginal people.<sup>19</sup>

The Europeans found well-developed political systems existing in Aboriginal nations in North America well before contact between Aboriginal peoples and Europeans. The clearest examples of these political systems are the Wendat and the Haudenosaunee.<sup>20</sup> The Wendat formed at some point between 1440 and 1550, although the Wendat themselves place its creation around 1440.<sup>21</sup> While the Confederacy was not empowered to conduct war, it was a political arrangement put in place to end the blood feuds between the nations that constituted it.<sup>22</sup> The relationship was built first between the Attignawantan and Atigneenongnahac and was later expanded. In essence, it was a dispute resolution mechanism, a council that met regularly to resolve the disputes that led

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<sup>16</sup> These early agreements were not treaties *per se* in the way they have come to be understood, but agreements of alliance, or “peace and friendship.”

<sup>17</sup> Miller, *Skyscrapers Hide the Heavens*, xii.

<sup>18</sup> Miller, *Compact, Contract, Covenant*, 5. See also Catherine McClellan, “Cultural Contacts in the Early Historic Period in Northwestern North America,” *Arctic Anthropology*, vol.2 no.2, (1964), 3-15. McClellan details cultural interactions between Aboriginal nations arising from inter-Aboriginal trade.

<sup>19</sup> Miller, *Compact, Contract, Covenant*, 32.

<sup>20</sup> Older literature refers to these people as the Huron Confederacy and Iroquois League, respectively.

<sup>21</sup> Miller, *Compact, Contract, Covenant*, 34.

<sup>22</sup> Bruce Trigger, *The Children of Aataentsic: A History of the Huron People to 1660*, Volume One (Montreal: McGill-Queens University Press, 1976), 162.

to blood feuds.<sup>23</sup> It represented a sophisticated constitutional arrangement between Aboriginal nations, and was negotiated and maintained in traditional ways.

The Haudenosaunee, originally located in what became present-day New York State, and whose territory stretched to the east as far as the St. Lawrence River, was created to maintain peace amongst its members, much like the Wendat.<sup>24</sup> It was a complex relationship with a division of labour between unequal members of the League.<sup>25</sup> The original members consisted of five First Nations: Mohawk, Seneca, Oneida, Cayuga, and Onondaga. The prophet Deganawidah and his follower Hiawatha, sometime in the sixteenth century, brought these five nations together into a relationship of mutual benefit in order to end blood feuding amongst them.<sup>26</sup> This was achieved, as in the case of the Wendat, through a complex and ceremonial relationship of kin and *entente*, which drew the nations together into peaceful coexistence and mutual protection.<sup>27</sup>

More than sophisticated constitutional structures within Aboriginal communities, Europeans found treaty relationships *between* Aboriginal communities. A prominent example for Ontario is the *Dish With One Spoon* wampum. The two great powers of this region, the Haudenosaunee and the Wendat, established this treaty to share resources and the land that was common to both. This treaty “acknowledged that both the Nishnaageg and the Haudenosaunee were eating out of the same dish through shared hunting territory and the ecological connections between their territories.”<sup>28</sup> It established certain protocols that regulated the interaction with the goal of maintaining peace. As Sherman notes “it would have been expected that upon leaving one’s own territory to cross into someone else’s territory, that an individual or group would build a fire to announce that they were ‘waiting in the woods’ or waiting ‘at the wood’s edge’ to be welcomed.”<sup>29</sup> What would follow was well understood and expected by both sides. A white wampum would have

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<sup>23</sup> Ibid., 157-8.

<sup>24</sup> Donald Lutz, “The Iroquois Confederation Constitution: An Analysis,” *Publius* vol. 28 no. 2 (1998), 101.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid. 124.

<sup>27</sup> Ibid.

<sup>28</sup> Leanne Simpson, “Looking after Gdoonaaganinaa: Percolonial Nishnaabeg Diplomatic and Treaty Relationships,” *Wicazo Sa Review*, vol.23 no.2 (2008), 37. Simpson uses the updated terms to refer to the Wendat and the Hodensaunee.

<sup>29</sup> Paula Sherman, “Indawendiwin: Spiritual Ecology as the Foundation of Omàmiwinini Relations” (PhD diss., Trent University, 2007), 213.

welcomed the guest and feast prepared for them.<sup>30</sup> After the protocols required by the *Dish With One Spoon* treaty were complete “the visitors would have gone on to what they had come to do.”<sup>31</sup> The ritualization of interactions here is identical to forms of diplomatic interactions, protocols, and norms developed by Europeans, the legacies of which are still seen in formal diplomatic encounters today. And like treaties in the Western sense, it is important to note that this arrangement “did not involve interfering with one another’s sovereignty as nations.”<sup>32</sup>

This is all to say that the Aboriginal peoples encountered by Europeans in the northeastern woodlands of North America had already established sophisticated political and economic relationships of which the newcomers needed to take account. As discussed above, the French fur traders who sought to do business in the land of the Wendat carried out their transactions in the language and by the native custom. These transactions, however, were impossible outside of an agreement of peace and friendship secured with the treaties that became more formalized in the late eighteenth century. The “forest diplomats” of the French and English crowns were enormously successful in building trade networks and alliances with the Aboriginal peoples they encountered, specifically because they were able to adapt to “Aboriginal rituals and behavior.”<sup>33</sup> These diplomats were so-called as they travelled the forests and interacted with Aboriginal peoples on behalf of their respective crowns, learning the language and customs of those with whom they interacted. The most famous British “forest diplomat” was Sir William Johnson, who helped cement British ties with the Haudenosaunee, and whose grandson would negotiate many of the Upper Canadian treaties.<sup>34</sup>

These early dealings and alliances made using Aboriginal ways and Aboriginal languages prefigured how future agreements would be made between Europeans and Aboriginal peoples and gave Aboriginal negotiators to understand that Aboriginal nations would be full partners in these agreements and that Aboriginal ritual and customs in making these arrangements would be followed, at least until the numbered treaties of the

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<sup>30</sup> *Ibid.*, 214.

<sup>31</sup> *Ibid.*

<sup>32</sup> Simpson, “Looking after Gdoonaaganinaa,” 37.S

<sup>33</sup> Miller, *Compact, Contract, Covenant* 43,

<sup>34</sup> For a comprehensive study of Sir William Johnson see David S. Igneri, *Sir William Johnson: The Man and his Influence* (New York: Rivercross, 1994).

West that began in 1871.<sup>35</sup> In the alliances built between Aboriginal peoples and European powers, “the one consistent theme was that Indians chose their fighting partners... according to their own definition of where their interest lay.”<sup>36</sup> During the Seven Year’s War between the French and the English, many Aboriginal nations took sides and fought for their interests, mainly alongside the French against the English and their colonists in New England. The New England colonists, soon to become Americans, tellingly called this the “French and Indian War.” The alliances and wars fought in North America are important in understanding the changing relationship of Aboriginal peoples and Europeans. After the Seven Years’ War, for example, Aboriginal peoples increasingly allied with the British, as they gained the upper hand in the European contest for North America. Where the seventeenth century was characterized by commercial relationships, by the eighteenth century, the site of Aboriginal and European interaction was military alliance.<sup>37</sup>

By the end of the Seven Years’ War, and under the Peace of Paris in 1763,<sup>38</sup> Britain had gained control over vast swathes of French North America north of the Great Lakes, and with these territories, a number of new Aboriginal peoples with whom to deal. The aftermath of this conflict with France brought an important commitment by the British Crown to dealings with the Aboriginal peoples in proximity to and within the territory of New France. The *Royal Proclamation of 1763* opened “a new chapter in treaty-making between Aboriginal peoples and the British Crown.”<sup>39</sup> While the Proclamation dealt with a host of issues related to the newly acquired colonies of France, of primary importance for this discussion are the provisions made for “Indian lands.” The Proclamation sought to regulate the conditions under which land could be acquired from Aboriginal peoples, reserving for the Crown alone the ability to so deal.<sup>40</sup> The “Indian Provisions” of the Proclamation start by setting the terms by which colonial authorities could deal with Aboriginal peoples, stating that:

the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of

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<sup>35</sup> Miller, *Compact, Contract, Covenant*, 185-6.

<sup>36</sup> Miller, *Skyscrapers*, 94.

<sup>37</sup> *Ibid.*, 99-100.

<sup>38</sup> Signed in 1763 by Great Britain, France, and Spain.

<sup>39</sup> Miller, *Compact, Contract, Covenant*, 66.

<sup>40</sup> *Ibid.*, 66-67.

such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.<sup>41</sup>

It is significant that King George specified the conditions under which land, supposedly owned by the Crown—as indicated by the language of Aboriginal peoples living under the protection and in the dominion of the King—could be acquired. Moreover, the process of acquiring land by purchase and negotiation between Crown and Aboriginal peoples formed the basis of the more familiar treaty relationship that was begun in the early nineteenth century. This policy implicitly recognized the fact of Aboriginal title to and sovereignty over the land which they used. This is important, as the interactions between Crown and Aboriginal nations after the American Revolution turned increasingly on issues of land.<sup>42</sup> Moreover, the Crown did not simply issue this Proclamation, but through the famed forest diplomat Sir William Johnson, convened a conference of over 2000 Aboriginal leaders at Niagara to discuss and garner approval for the *Royal Proclamation of 1763*.<sup>43</sup>

The significance of the *Royal Proclamation of 1763* bears further investigation. John Burrows argues that the role of First Nations people in the process of the preparation of the *Royal Proclamation of 1763* has gone little noticed even by recent scholars and that it must be recognized as “a fundamental document in First Nations and Canadian legal history.”<sup>44</sup> While the *Proclamation* itself was issued by the British Sovereign to settle issues that remained after the Seven Year’s War and to assure lawful and fair exchange of

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<sup>41</sup> *Royal Proclamation of 1763*.

<sup>42</sup> Following the American Revolution Loyalist settlers sought refuge in Canada, as well as Aboriginal allies no longer able to live in the newly independent United States of America. Between 1781 and 1836 twenty-three land cessions treaties were negotiated in Upper Canada (Robert Surtees, “Introductory Essay,” *As Long as Sun Shines and Water Flows: A Reader in Canadian Native Studies*, edited by Ian Getty, Vancouver: UBC Press, 2011, 8). This influx of settlers continued through the nineteenth century. In 1826 the population of Upper Canada was 166, 379, in 1830 the population had increased to over 210,000 and by 1839 the population had nearly double to 409,000. By 1850 the Upper Canadian population had nearly doubled again to over 800,000 (Frank Lewis and M.C. Urquhart, “Growth and the Standard of living in a Pioneer Economy: Upper Canada 1826-1851” *The William and Mary Quarterly*, Third Series, vol.56, no.1 (1999), Tables XIII to XVI, p180-1). Sixty percent of families in 1851 were farm families living in rural areas (Ibid., 162). This agricultural expansion was only possible because of land freed up by treaty.

<sup>43</sup> Miller, *Skyscrapers Hide the Heavens*, 90.

<sup>44</sup> John Burrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in Michael Asch, Ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997), 155.

property,<sup>45</sup> the convening of the Niagara conference demonstrates a treaty-like approach to Crown-Aboriginal relations. In fact, the Crown's representative, Sir William Johnson, saw this as a treaty exercise.<sup>46</sup> It is exactly because of the conference at Niagara and the manner in which the *Proclamation* was presented that it is clear it represents a treaty: "The *Royal Proclamation* became a treaty at Niagara because it was presented by the colonialists for affirmation, and was accepted by the First Nations."<sup>47</sup> It was, in a sense, a "treaty of treaties," in that it laid out a systematic approach for future dealings between the Crown and Aboriginal nations, specifically in regard to land that must be purchased and negotiated for by the Crown alone. Significantly, the meeting at Niagara in 1764 ended with the creation of a "two-row wampum belt" which reflected the Aboriginal nations' understanding of what been concluded there.<sup>48</sup> A wampum belt is a ceremonial belt used to record important diplomatic dealings. In this beaded belt, two parallel white lines run along a blue background, representing two ships traveling the same river, yet not interfering with each other.<sup>49</sup> For Burrows and other scholars the *Royal Proclamation* represents "the foundation-building principles of peace, friendship, and respect agreed to between the parties [to the *Proclamation*]."<sup>50</sup>

The military basis of the European- Aboriginal relationship continued through the American Revolution, and had one final appearance in the War of 1812. Like the colonial wars fought in North America between the English and the French, during these conflicts, many Aboriginal nations allied themselves and fought for reasons of their own interest; this time, Aboriginal nations joined the British cause against Britain's erstwhile colonists in New England. The contribution of Aboriginal warriors to the War of 1812 was both significant and decisive in helping the British to win the most important battles of that war, including the battles of Michilimackinac, Detroit, Queenston Heights and Beaver Dam.<sup>51</sup> Aboriginal forces bolstered the numbers of the scant British imperial and colonial militia troops then present in British North America; in fact Robert Allen argues that the

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<sup>45</sup> There had been much fraud on the part of speculators. See Miller, *Compact, Contract, Covenant*, 69-70.

<sup>46</sup> *Ibid.*, 73.

<sup>47</sup> Burrows, "Wampum at Niagara," 161.

<sup>48</sup> *Ibid.*, 163-4.

<sup>49</sup> Kathryn V. Muller, "The Two 'Mystery' Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt," *The American Indian Quarterly*, vol.31 no.1 (2007), 150-1.

<sup>50</sup> Burrows, "Wampum at Niagara," 165.

<sup>51</sup> Miller, *Compact, Contract, Covenant*, 93.



employment of Aboriginal warriors was “the single most important factor in the successful defence of Upper Canada.”<sup>52</sup> However, with Tecumseh’s death at the Battle of the Thames in 1813, Aboriginal military support waned.<sup>53</sup> This battle between the new American republic and the British was significant as it was the last conflict between these powers, and the last time Britain called on its Indian allies to defend its colonies in British North America.<sup>54</sup>

The peace ushered in by the Treaty of Ghent in 1814 (which ended the War of 1812) and the subsequent Rush-Bagot treaty of 1817 between Britain and the United States largely secured peace in northern North America. This security led to a boom in settlement that increasingly brought colonists into close contact with Aboriginal peoples in Upper Canada and elsewhere. In 1812, Upper Canada had a population of 95,000. However, by 1851, that population had increased to 952,000.<sup>55</sup> This rapid increase in immigration necessitated the opening of new lands to settlement and agriculture, thus changing the imperatives of the relationship of alliance and commerce, turning to focus mainly on issues of land. In the treaties concluded in Upper Canada in the first decades after the War of 1812, the key consideration for the Crown was access to land, negotiated in accordance with the *Royal Proclamation of 1763*.<sup>56</sup>

Between 1815 and 1827, seven treaties were negotiated in Upper Canada, through which “the Crown secured access for non-Natives to almost all the remaining arable land in southern Ontario.”<sup>57</sup> Access to land for new settlers gained by one such treaty concluded in eastern Ontario in 1819 also had a strategic motive to secure land for the construction of the Rideau Canal: to secure a supply line to the capital of Upper Canada at Kingston.<sup>58</sup> The issue of land figured prominently in Indigenous-settler relations,

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<sup>52</sup> Robert S. Allen, *His Majesty’s Indian Allies: British Indian Policy in the Defense of Canada, 1774-1815* (Toronto: Dundurn Press, 1993), 120.

<sup>53</sup> Donald Hickey, *The War of 1812: A Forgotten Conflict* (Urbana, Ill.: University of Illinois Press, 1989), 183.

<sup>54</sup> This was the last time Aboriginal warriors were called upon to defend against *foreign* invaders. While mostly deployed as rear guards, warriors from nations in Upper Canada were deployed in 1837-8 against the rebels (Allen, *His Majesty’s Indian Allies*, 184).

<sup>55</sup> Miller, *Compact, Contract, Covenant.*, 94.

<sup>56</sup> The land acquired under these “land surrenders” allowed the Crown to then allocate it to “individual settlers” (Sidney Haring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), 94).

<sup>57</sup> Miller, *Compact, Contract, Covenant*, 95.

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

which contrasts with the earlier treaties that had focused on peace, alliance, and commerce. In these early treaties in Upper Canada, while the subject matter had changed, much of the form remained consistent with the earlier expression of peace and friendship. Rather than strategic alliances, these treaties increasingly sought to secure land for settlement. In meetings between the Crown's representative, William Claus grandson of Sir William Johnson, and Aboriginal leaders in 1818, the same ceremony of earlier pacts was continued: "Employing the rhetoric of family and relationship, invoking the deity, and distributing gifts from the Crown were all reassuring indicators that familiar practices were being continued."<sup>59</sup>

*Relationship in Transition: Towards Wardship*

Something important, however, had changed in these treaties, despite the familiar form of their negotiation and promulgation. In the seven treaties negotiated between 1815 and 1827, the payment meted out by the Crown for the lands to which it gained access changed in a subtle but significant way: in the older agreements, when the Crown gained land, the payments for that land were made as a one-time payment. For example, the 1806 Head of the Lake Treaty with the Mississauga near present-day Toronto exchanged 85,000 acres for £1000, "...Province currency, in goods at the Montreal price..."<sup>60</sup> By the time of the 1818 surrender of territory at Smith's Creek (near present-day Port Hope), the terms for the purchase price were transformed into an annuity, pledging that "...a yearly sum of seven hundred and forty pounds Province currency in goods at the Montreal prices to be well and truly paid yearly, and every year..."<sup>61</sup>

This shift in payment, while subtle, was significant in that it sought to shift the cost of settlement (acquiring land as only could be done by the Crown due to the *Royal Proclamation of 1763*) to the colonies themselves by, in effect, purchasing by installment these lands and establishing a continuing financial relationship between the Crown and Aboriginal peoples. In the case of the Smith's Creek surrender of 1818, the sum of £740 (in goods) was to be paid *annually* in perpetuity for the land the Crown acquired as a

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<sup>59</sup> Ibid., 97.

<sup>60</sup> Canada, *Indian Treaties and Surrenders*, 3 vols (Saskatoon: Fifth House, 1992; Ottawa: Queen's Printer, 1891), 1:35. In Miller, *Compact, Contract, Covenant*, 97.

<sup>61</sup> Treaty 20, in Canada, *Indian Treaties and Surrenders*, 3 vols (Saskatoon: Fifth House, 1992; Ottawa: Queen's Printer, 1891), 1:48. In Miller, *Compact, Contract, Covenant*, 97.

result. This decreased the current cost of settlement, allowing future revenue from settlement activity to pay the annuity, with the by-product of establishing a long-term fiscal relationship between the Crown and Aboriginal nations. The logic on the part of the Crown was clear: to shift the burden of settlement off the Imperial Crown, and to fund it out of colonial economic growth and tax growth.<sup>62</sup> This desire on the part of the Crown to limit its immediate financial liability for Aboriginal peoples foreshadows the underfunding and outright derogation of its fiduciary responsibility concerning Aboriginal peoples detailed below. That is to say, it seems at this point Aboriginal peoples became an expense to be minimized.

Miller's argument that "the nature of a relationship between two peoples of different back-groups is largely determined by the reasons they have for interacting"<sup>63</sup> further helps us to understand the shifting relationship between Aboriginal peoples and the Crown. The relative peace and security brought by the Rush-Bagot treaty all but eliminated Aboriginal allies from the strategic equation in British North America. Simply put, the services of the warriors, who had largely saved Upper Canada from American invasion during the War of 1812, were no longer required in this new time of peace.

This peace brought further change in the composition and demographics of Upper Canada. Prior to the War of 1812, what European settlement existed in Upper Canada was either self-generating (that is, its population increase relied mainly on the birth rate) or resulted from flows of refugees following the Revolutionary War in the form of the "United Empire Loyalists."<sup>64</sup> Once established, Loyalist communities spread by establishing "daughter colonies" comprised of new generations of Loyalists.<sup>65</sup> However, once peace was secure in northern North America in the years after 1817, this slow pattern of settlement changed in important ways. The steady growth of self-perpetuating settlements of largely Loyalist stock was eclipsed by the rapid growth of immigration from the British Isles.<sup>66</sup> This expanding population pushed settlement deeper and deeper

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<sup>62</sup> Miller, *Compact, Contract, Covenant*, 101.

<sup>63</sup> Miller, *Skyscrapers*, xii.

<sup>64</sup> J. David Wood, *Making of Ontario: Agricultural Colonisation and Landscape Recreation before the Railway* (Montreal; Kingston: McGill-Queens University Press, 2000), 26.

<sup>65</sup> *Ibid.*, 26.

<sup>66</sup> *Ibid.*, 28.

toward present-day Northern Ontario.<sup>67</sup> The population of Upper Canada in 1810 was approximately 60,000 people, but by 1827 it had increased to somewhere around 200,000 people.<sup>68</sup> The amount of land under cultivation tells a similar story and confirms the appetite for such tracts that were arable and needed to be acquired by the Crown. In 1805, prior to the War of 1812, there were 179,000 acres under cultivation; by 1836 there were over 1.2 million acres under cultivation in Upper Canada.<sup>69</sup> Little wonder that a land-hungry Crown was keen to let the agricultural development of Upper Canada pay the bills for the acquisition of the land needed for settlement by shifting to annuities rather than one time payments for land.

The transformation in the land base also transformed the economy of the Aboriginal peoples from one of traditional hunting to a more agrarian economy helped by the policies of the Indian Department's "civilization policy," as it had become known by the 1830s.<sup>70</sup> In 1830, Britain transferred the responsibility for Indian affairs from the imperial military authority to civilian administrators in Upper and Lower Canada.<sup>71</sup> This transfer was the final signal that their Aboriginal allies had outlived their usefulness in the defense of British North America and brought a new cadre of colonial personnel into contact with Aboriginal leaders.<sup>72</sup> The approach to Aboriginal relationships begun by Sir William Johnson was changed by bureaucrats who had been raised in the settler society, who had not come to appreciate the military, diplomatic and commercial skills of the Aboriginal peoples with whom their forebears had dealt.<sup>73</sup> Practically, this meant many changes to the interactions between the Crown (through this new cadre of bureaucrats) and Aboriginal peoples. This new "civilization policy" meant encouraging a more sedentary lifestyle for Aboriginal peoples—which is as much to say encouraging Aboriginal peoples to emulate the settlers, to homestead and grow crops—convert to Christianity, and send their children to school, where they would be educated in the

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<sup>67</sup> Ibid., 31.

<sup>68</sup> Ibid., 24. (from Figure 3.1)

<sup>69</sup> Douglas McCalla, *Planting the Province: The Economic History of Upper Canada* (Toronto: University of Toronto Press, 1993), Appendix B

<sup>70</sup> Miller, *Compact, Contract, Covenant*, 105.

<sup>71</sup> Miller, *Skyscrapers*, 118.

<sup>72</sup> Miller, *Compact, Contract, Covenant*, 105.

<sup>73</sup> Ibid., 104-5.

English (or French) language and schooled in the ways of western European Christianity.<sup>74</sup>

What in Upper Canada was a policy of civilization increasingly became part of the treaties negotiated between the Crown and the western plains peoples. That is to say, this civilization strategy became part of the fundamental relationship between the Crown and Aboriginal peoples in the Canadian West. In the 1850s, there was little settlement in the West outside of the Red River colony (at present-day Winnipeg).<sup>75</sup> However, an increasing influx of missionaries into the north-west sought to convert the peoples of the boreal forest and the plains to Christianity.<sup>76</sup> The Christianization of the Aboriginal peoples provided an important source of authority for churches that pushed them to the negotiation table and secure their loyalty to the Crown.<sup>77</sup>

Throughout the 1850s, missionary work and settlement in the West provided the need and impetus for treaty negotiation, which started in 1871. With the creation of the North West Mounted Police in 1874, Canada increased and consolidated its control over the former Rupert's Land domain of the Hudson's Bay Company.<sup>78</sup> However, as in Upper Canada, the motivation of the colonial government was somewhat self-serving in its desire to avoid the crippling expense of fighting an Indian War—as the United States was then doing in its interior plains—and secure the peaceful relations that would allow the construction of the Pacific-bound railway.<sup>79</sup> That is to say, like the Upper Canadian concern for arable land for agricultural settlement, the overreaching policy of the Dominion government to avoid an expensive guerrilla war while expanding the railway

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<sup>74</sup> Ibid., 105.

<sup>75</sup> W.L. Morton, *Manitoba: A History* (Toronto: University of Toronto Press, 1957), 65-88 contains a detailed description of the first settlement on the Red River.

<sup>76</sup> Miller, *Compact, Contract, Covenant*, 155. See also Morton, *Manitoba*, 56 for a discussion of church and missionary establishment on the prairies as settlement increased around the Red Rive Colony, especially the drive by Father Provencher to work on “Christianising and pacifying” the Aborginial peoples in the area.

<sup>77</sup> Ibid., 185. The Roman Catholic bishop in the Red River Colony, Bishop Taché, was instrumental in negotiating with Riel's rebels and advocating for both Metis and Catholic interests in Ottawa, helping keep Manitoba loyal to the Crown (Morten, *Manitoba*, 139-140).

<sup>78</sup> The North West Mounted Police gradually took over from the Hudson's Bay Company, engaging in personal diplomacy to develop relationship at the highest levels between NWMP officials and local Aboriginal leaders (R.C. McLeod and Heather Driscoll, “Natives, Newspapers and Crime Rates in the North-West Territories, 1878-1885” in Theodore Binnema, Gerhard Ens, and R.C. McLeod eds. *From Rupert's Land to Canada* (Edmonton: University of Edmonton Press, 2001) 249-270), 254). Nonetheless, it was an important change from Company control to state control.

<sup>79</sup> Miller, *Compact, Contract, Covenant*, 156.

loomed large in its motivations for treaty-making in the West.<sup>80</sup> Moreover, peace was necessary as a precondition to large-scale settlement of the Canadian West. And land—as in Upper Canada—was needed for agricultural development.<sup>81</sup>

The contents of the “Numbered Treaties,” so-called as they were numbered rather than named, concluded between 1871 and 1877 in the southern Great Plains area of Western Canada, were primarily centered on land.<sup>82</sup> The first three treaties, between 1871 and 1873, significantly subjected the signing Aboriginal nations to the law and authority of the British Crown: the “new treat[ies] tended to reinforce government control over reserve lands and resources.”<sup>83</sup>

While the trend was toward more total control over the welfare of Indians, the numbered treaties had an uneven approach to education. The desire of the various Aboriginal peoples of the West (Saulteaux, Cree, and Ojibwa, among others) to “learn the cunning of the white man” was as clear as the government’s desire to reduce the costs of this provision as more treaties were negotiated.<sup>84</sup> In the first treaty, education was covered by the commitment of the Crown to “maintain a school on each reserve hereby made [in the treaty] whenever the Indians of the reserve should desire it.”<sup>85</sup> By the time Treaty 7 was concluded in 1877, the Crown only agreed to “pay the salary of teachers to instruct the children of said Indians as to Her Government of Canada may seem advisable, when said Indians are settled on their Reserves and shall desire teachers.”<sup>86</sup> This demonstrates a small, but significant, change in the willingness of the Crown to fund the education of the Aboriginal peoples who were by then living on reservation lands, over the course of Western treaties. It furthered the strategy that had been pursued in

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<sup>80</sup> Treaty 3 and 5 in present-day Manitoba were concluded specifically to allow railroad access (Jill St. Germain, *Indian Treaty-Making Policy in the United States and Canada 1867-1877* (Toronto: University of Toronto Press, 2001), 45.

<sup>81</sup> This was part of the First National Policy, which was characterized by “a deliberate effort at constructing a national entity from the disparate and distant British colonies” (Lorraine Eden and Maureen Molot, “Canada’s National Policies: Reflections on 125 Years,” *Canadian Public Policy*, vol.19, no.3 (Sept. 1993), 233). Eden and Molot argue that the First National Policy involved three prongs: tariffs, railways, and land settlement (235). In the case of railways and land settlement, access to land occupied by Aboriginal peoples in the West was necessary.

<sup>82</sup> St. Germain, *Indian Treaty-Making Policy in the United States and Canada 1867-1877*, 40.

<sup>83</sup> Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence: A History of the Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen’s University Press, 2000), 60.

<sup>84</sup> Miller, *Compact, Contract, Covenant*, 185.

<sup>85</sup> Canada, *Treaty 1*,

<sup>86</sup> Canada, *Treaty 7*,

Upper Canada to defray and minimize the cost of controlling Aboriginal peoples by limiting Dominion liabilities for Aboriginal welfare.

Essential to the western experience of treaty making—like that of Upper Canada—was the agreement and participation of Aboriginal peoples in the process. That is to say, Aboriginal peoples were both present for, and agents in, treaty making. Whereas in Upper Canada it was the influx of settlers that pushed Aboriginal peoples to accept less than favourable treaties (especially concerning payments), in the West it was more deceptive. The pressure put on Aboriginal peoples by agricultural settlement in Upper Canada was expressed by Buckquaquet, Chief of the Mississauga of Rice Lake, saying:

From our lands we receive scarcely anything and if your words [responding to Deputy Superintendent General for Indian Affairs William Claus' offer of purchase] are true we will get more by parting with them than by keeping them. Our hunting is destroyed and we must throw ourselves on the compassion of our Great Father the King.<sup>87</sup>

The encroachment on fisheries and hunting lands in Upper Canada had pushed the Aboriginal peoples there into a situation by which they could not refuse any but the most objectionable terms of the Crown.

In the West, however, there was a significant discrepancy in what the Indian Department officials told Aboriginal peoples and what the treaties actually contained. Sir Adam Archibald, Lieutenant-Governor of Manitoba, left Aboriginal peoples of southern Manitoba at the negotiation of Treaty 1 with the impression that the treaty only sought to make room for new settlement and that Aboriginal peoples could continue to hunt and roam over much of land as they always had.<sup>88</sup> However, the written text of the treaty required that “The Chippewa and Swampy Cree Tribes of Indians and all other the [*sic*] Indians inhabiting the district hereinafter described and defined do hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included...” in the treaty.<sup>89</sup> The discrepancy between what promises were made orally by the Treaty Commissioner and what the treaty document stated was a problem whose root lay in the epistemological difference of Europeans and Aboriginal peoples. Europeans gave authority to a written tradition that recorded events in textual documents, while for

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<sup>87</sup> Miller, *Compact, Contract, Covenant*, 99.

<sup>88</sup> Ray et al., *Bounty*, 67.

<sup>89</sup> Canada, *Treaty 1*.

Aboriginal nations on the plains “history was transmitted orally in stories passed on by elders.”<sup>90</sup>

This difference between treaty discussions, remembered in the Aboriginal tradition of storytelling and treaty documents is a hallmark of the Numbered Treaties of the Canadian West. At the 1889 adhesion to Treaty 6 the Indian Commissioner promised that the Woodland Cree would be able to continue their traditional way of life, hunting and trapping. However, this understanding is significantly at odds with the written text of the adhesion which contains a “blanket extinguishment clause,” which removed these rights.<sup>91</sup> Pressed by the necessity of economic conditions as the Upper Canadian tribes had been, the western plains peoples were often duped into signing restrictive treaties. Or, as Neu and Therrien argue, Aboriginal peoples were given “choices,” the logical selection of which would “fit neatly into the government’s managerial design, a design in perfect accord with the mother country’s imperialistic strategies.”<sup>92</sup> Even if we should want to be less skeptical than this, the problems of language, concepts, and priority of written over oral records created significantly different understandings between the agreeing parties.

In each case there were significant differences in understanding of access to traditional resources, such as game, fish, and other food. In the negotiation of Treaty 9, Chief Missabay expressed concern that by signing the treaty his people would lose access to the land used for hunting and fishing. Having been assured this was not the case by the Crown representative, the treaty was signed, but guarantees of access were not quite as robust as the promises, and, of course, there was the same extinguishment of title as all the previous treaties.<sup>93</sup> Treaties 3 through 11 actually contain language to the effect that Aboriginal nations would be able to continue their traditional way of life on the land.<sup>94</sup>

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<sup>90</sup> Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal : McGill-Queens University Press, 1996), 124.

<sup>91</sup> Ray et al., *Bounty*, 145-6.

<sup>92</sup> Dean Neu and Richard Therrien, *Accounting for Genocide: Canada’s Bureaucratic Assault on Aboriginal People* (Winnipeg: Fernwood Publishing, 2003), 24.

<sup>93</sup> Miller, *Compact, Contract, Covenant*, 211.

<sup>94</sup> The wording of each is almost identical and varies mainly on the gender of monarch and if the traditional way of life is referred to as “avocation” or “vocation,” (Canada, *Treaty 3-6* and *7-11*, respectively). Each treaty states, in as many words, “Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described” (Canada, *Treaty 5*).



Although these treaties were explicit that the Aboriginal peoples “shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered,” they were equally clear in the restriction of this right, “subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.”<sup>95</sup> Again each treaty from Treaty 3 to Treaty 11 contains similar caveats to the right to pursue traditional modes of life on the land. In each case the caveat makes explicit reference to land that might “from time to time, be required or taken up for settlement, mining, lumbering or other purposes.” The caveat is not only startling in its scope, but as much so in that it comes immediately after the announcement of the right in the very same paragraph. The imperial hand gives what is not in its power to give and the dominion hand takes what is not its to take. The only arbiter being the Crown itself in the form of the courts, the litigation of disputes arising from these treaties seems to have been “the lot of First Nations in twentieth-century Canada.”<sup>96</sup>

Stemming from the epistemological differences between the treaty parties “it is questionable whether a ‘mutually understood agreement’ was ever arrived at between a people representing a written culture on the one hand and a people representing an essentially oral culture on the other.”<sup>97</sup> Treaty 7 is instructive here as by the time Treaty 7 was signed in 1877, the degree to which the Crown considered its Aboriginal allies and trading partners of the past to be wards or charges had increased substantially. The *Indian Act* was in place to legislate and regulate “Indians,” to say nothing of the civilizing policy begun in the 1830s, which continued apace throughout the 19th century. The once militarily and economically important First Peoples of British North America now became children of the “Great White Mother.”<sup>98</sup> Thus, the intent of Crown representatives negotiating Treaty 7 to gain access to the land and resources is at odds

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<sup>95</sup> Canada, *Treaty 3*.

<sup>96</sup> Miller, *Compact, Contract, Covenant*, 217.

<sup>97</sup> Hildebrandt, Carter, and First Rider, *The True Spirit and Original Intent of Treaty 7*, 195.

<sup>98</sup> Wade A. Henry “Imagining the Great White Mother and the Great King: Aboriginal Traditions and Royal Representation at the ‘Great Pow-wow’ of 1901,” *Journal of the Canadian Historical Association*, vol.11 no.1 (2000), 87. Henry describes this term, “Great White Mother,” referring to Queen Victoria who was a significant figure for many plains nations.

with understanding of the elders who “have said that Treaty 7 was a peace treaty; none of them recalled any mention of a land surrender.”<sup>99</sup> As Chief John Snow puts it “certainly we requested, and understood that we had been promised, the continuation of our traditional life of hunting, trapping, fishing, and gathering berries, plants and herbs in our traditional hunting grounds. We had no idea we would be forced to settle on small pieces of land and become agriculturalists.”<sup>100</sup> The Aboriginal peoples of Treaty 7 acted in good faith in the negotiations, but the Crown significantly failed to honour the spirit of the treaty and promises made by the treaty commissioners. Instead, as Snow puts it “we now realize that the treaties were the vehicle through which the government achieved its objective of opening the North West Territories to settlement and commercial exploitation.”<sup>101</sup> The numbered treaties, especially the later northern treaties from Treaty 8 on, clearly demonstrated the Dominion government’s approach to Aboriginal relations, it “consistently acted in the interest of non-Native economic concerns. It ignored early requests from First Nations for treaties to evade financial responsibility for relieving them when hardships inflicted by southern development undercut their livelihoods, and initiated treaty talks when northern lands became vulnerable to southerners.”<sup>102</sup>

### *Legal Regulation of “Indians”*

This shift in how the Crown conceived of its erstwhile allies can be read as based more on necessity than principal. That is, the colonial attitude of control and expansion is ever present even in the early relationship of respect, undertaken by the Crown from reasons of survival. Robert Williams argues North American colonialism grows-out of and is consistent with the Western legal tradition.<sup>103</sup> In detailing the roots, or first experience with, British colonialism in the Elizabethan conquest of Ireland, Williams highlights the story of Sir Humphrey Gilbert, military governor of Ireland.<sup>104</sup> Gilbert was reputed for his

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<sup>99</sup> Hildebrandt, Carter, and First Rider, *The True Spirit and Original Intent of Treaty 7*, 324.

<sup>100</sup> John Snow, *These Mountains Are Our Sacred Places: The Story of the Stoney Indians* (Toronto: Samuel Stevens, 1977), 33.

<sup>101</sup> *Ibid.*, 24. To be clear Treaty 7 covers present-day southern Alberta, but at the time of its negotiation the area was part of the North West Territories.

<sup>102</sup> Miller, *Compact, Contract, Covenant*, 221.

<sup>103</sup> Robert Williams, *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford: Oxford University Press, 1990).

<sup>104</sup> This period in English/Irish history, indeed since at least the time of the Commonwealth, was characterized by great cruelty and harsh treatment of the native Gaelic Irish by the English.

harsh treatment of the Irish, and as Williams argues, Gilbert believed this treatment to be perfectly within his right as governor and in keeping with the laws of England.<sup>105</sup> Williams quotes Gilbert's justification in a letter to his superior, Lord Deputy Sir Henry Sidney, that "the Prince had a regular and absolute power, and that which might not be done by the one, I would do it by the other in cases of *necessity*."<sup>106</sup> The key here is necessity, and as I have argued above in Chapter Three, necessity's connection with exception. That the prerogative powers, those proper only to the sovereign, can be invoked to preserve or construct the order of society, we can see Agamben's force-of-law without law, the state of exception. It is both in Gilbert's hideous means and his support from the prerogative powers that we see the state of exception at the very beginning of colonialism, revealed in the case of Ireland in its *de facto* invocation for the maintenance of the stated order, an Elizabethan order complete with English law, nobility/gentry, and plantations.

In the case of Canada the exception becomes the rule in the system of laws constructed to regulate "Indians." This system, importantly, set Aboriginal peoples outside the norm of Canadian society and can be seen especially in two pieces of legislation: *The Gradual Civilization Act* and *The Indian Act*. Both arose in the midst of treaty negotiations. While the Upper Canadian treaties were still being negotiated, and well before any discussion of the western treaties began, the legislature of the United Canadas (Upper and Lower Canada) passed the 1857 *Act to encourage the gradual civilization of the Indians in the Province*.<sup>107</sup> The goal of this legislation, better known as *The Gradual Civilization Act*, was to transform Aboriginal peoples into Europeans, rather than to give them means and technology to deal with European settlement as had been the policy since the 1830s. The new goal was for Aboriginal peoples "to become European and to be fully indoctrinated with European values and thereby made capable of being assimilated."<sup>108</sup> However, the Act contained the paradox that was embodied by the civilization policy itself: to at once transform the "savage" into a civilized European and

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<sup>105</sup> Williams, *The American Indian in Western Legal Thought*, 151.

<sup>106</sup> *Ibid.*, italics added.

<sup>107</sup> John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" In Ian Getty and Antoine Lussier eds. *As Long as the Sun Shines and water flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983), 42.

<sup>108</sup> *Ibid.*

yet separate and categorize the “Indian” as distinct from the white colonial society. Despite its preamble committing to the removal of legal distinctions and integrating Aboriginal peoples into colonial society, *The Gradual Civilization Act* went on to define who was an “Indian,” and who among this community could and could not be given the rights and privileges of white subjects in the colony.<sup>109</sup> This tension between annexing Aboriginal peoples to the colonial society while keeping them apart from it follows the exception that Agamben outlines and importantly signals the deeply problematic approach of colonisation.

*The Gradual Civilization Act* started a system known as “enfranchisement” that later became consolidated under the *Indian Act (1876)* and its subsequent amendments. In defining the contours of membership in the white colonial society, the Act provided a process by which Aboriginal peoples would be transformed into colonial subjects. If an “Indian” were to meet standards of literacy in French or English, be debt free and be of high moral standards, he would be transformed into a legal subject no different from a white settler, albeit by attaining a standard that few of the white settlers themselves could meet.<sup>110</sup> This enfranchisement policy was a clear attempt to assimilate Aboriginal peoples into colonial society, yet still managed to hold to a racist pre-supposition that Aboriginal peoples were pre-disposed to immorality.<sup>111</sup> It was no longer sufficient to provide the knowledge and technology of the European to Aboriginal peoples, as had been the aim of the civilizing policy until this time. Rather, the need was felt to provide for the orderly destruction of Aboriginal communities through transformation of Aboriginal peoples themselves into legal subjects. Under the terms of enfranchisement, Indian males<sup>112</sup> who met the above criteria would become citizens with all right and duties thereto, but, as significantly, would receive a grant of free-hold land out of the land set aside in reserve for his tribe.<sup>113</sup> The allotment of twenty hectares for a male who qualified would serve to give him a basis for agricultural production and also alienate what land base was left to his people as a source of identity and traditional practice.

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid., 43.

<sup>111</sup> Clearly it would not be necessary to require moral rectitude as a condition of enfranchisement were it not supposed that Aboriginal peoples were immoral.

<sup>112</sup> Only males could be full citizens at this time, even in the dominant white society.

<sup>113</sup> Tobias, “Protection, Civilization, Assimilation,” 43.

The *Gradual Civilization Act* was based on the assumption that to be a subject of the Crown, in the sense that white settlers were, Aboriginal peoples would have to have the ability to possess private property, in distinction to traditional communal ownership.<sup>114</sup> The significance of the colonial Act was threefold for the constitutional arrangements between Crown and First Nations, according to Milloy. First, the Act overstepped the “traditional constitutional relations anchored to the Royal Proclamation of 1763, for it removed the exclusive tribal control over reserves for the sake of enfranchisement.”<sup>115</sup> Second, it threatened the very existence of Aboriginal communities by changing the goal of civilization to “the disappearance of [Indigenous] communities as individuals were enfranchised and the reserves were eroded, twenty hectares by twenty hectares.”<sup>116</sup> Third, the Act represented the first legislative salvo in what would become a continuous effort to take total control of Aboriginal government.<sup>117</sup>

Once the Dominion of Canada was created by the *British North America Act of 1867*, responsibility for “Indians, and Lands reserved for Indians” was given to the federal government of the new Dominion.<sup>118</sup> The *Gradual Civilization Act* and other acts of the colonial governments, now collected into the Dominion of Canada, were consolidated and restated in federal Dominion statutes. However, in 1876, the *Act to amend and consolidate the laws respecting Indians*<sup>119</sup> was passed, significantly regulating Indians as a legal category, and set the foundations for Crown-Aboriginal relations that persist at the time of writing.<sup>120</sup>

An important innovation for the colonial strategy of assimilation, according to Tobias, was the “location ticket.” The location ticket provided another hurdle to enfranchisement—in addition to the requirements of earlier legislation—and involved something like an apprenticeship to complete the transformation into subject from savage. Once an Indian male was literate in French or English, debt free, and of high moral character, he would be given provisional title to twenty hectares on a probationary

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<sup>114</sup> John S. Milloy, “The Early Indian Acts: Developmental Strategies and Constitutional Change” in Ian Getty and Antoine Lussier eds. *As Long as the Sun Shines and water flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983), 58.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Section 91.24 *British North America Act 1867* (Also *Constitution Act 1867*).

<sup>119</sup> Otherwise known as *The Indian Act*.

<sup>120</sup> Tobias, “Protection, Civilization, Assimilation,” 44.

basis for three years “during which he had to demonstrate that he would use the land as a Euro-Canadian might and that he was fully qualified for membership in Canadian society.”<sup>121</sup> Successful completion of the three-year probation entitled the Indian man to the land.

Moreover, *The Indian Act* abolished traditional forms of Aboriginal government on the reserves and replaced it with a type of “municipal government” over which officials in Indian Affairs exerted unprecedented control.<sup>122</sup> It became clear from *The Indian Act* that the relationship between Crown and Aboriginal nations was unilaterally changed forever, and that Aboriginal peoples were not necessary to the creation of Canada nor were their cultural aspirations tolerable.<sup>123</sup> Subsequent amendments to *The Indian Act* in the 1880s outlawed Aboriginal cultural practices throughout Canada. From the “potlatch” to “sundances” and “giveaway dances” practiced by various Aboriginal people, important sources of tradition and culture were outlawed and authority given to Indian Agents and police to stop Aboriginal peoples from participating in these institutions.<sup>124</sup>

This system of laws, the system of legal administration of Aboriginal people, established in the late 19th century and refined over the course of the 20th century highlights a central paradox in the relationship between Crown and Aboriginal peoples of northern North America: namely, that attempts to assimilate Aboriginal peoples—to destroy their separateness—ultimately involved continued distinction and separation as a category distinct from that of Canadian citizen. It further points to the means by which the state of exception, in which I argue above Aboriginal peoples are placed by colonisation, becomes lodged as the rule.

### *The Indian Residential Schools*

It is in the context of the history sketched above that the Indian Residential School system (IRS system) emerged in 1886 as perhaps one of the clearest sites of destruction of

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<sup>121</sup> Ibid.

<sup>122</sup> Milloy, “The Early Indian Acts,” 62.

<sup>123</sup> Ibid., 63.

<sup>124</sup> J.R. Miller, “Owen Glendower, Hotspur, and Canadian Indian Policy,” in J.R. Miller *Reflections on Native-New Comer Relations: Selected Essays* (Toronto: University of Toronto Press, 2004) 110.

Aboriginal difference in the assimilationist aspirations of Canadian policy towards Aboriginal people. As discussed in Chapter Three above, this was the site of the “camp” as Agamben describes, as the localization of the exception, where a force of law without law subjects inmates to the caprice of the guards and makes permanent the exception.<sup>125</sup> In one of the most detailed histories of the Indian Residential School system, Milloy characterizes the system as a “national crime” that involved the state, several powerful Christian churches, the Anglican, Roman Catholic, Presbyterian, Methodist churches and, later, the United Church, and the ignorance of ordinary Canadians. The IRS system was operated through a church-state partnership that involved these Christian denominations and orders running the schools, but the federal government was always the senior partner providing operational support and funding.<sup>126</sup> The enabling philosophy behind the system was a violently colonial one that relegated Aboriginal peoples to subhuman levels of barbarity and sought to “kill the Indian in the child for the sake of Christian civilization. In that way, the system was, even as a concept, abusive.”<sup>127</sup> As Milloy describes it, the colonial project of residential education can be found in a 1908 statement by Frank Oliver, then minister of Indian Affairs, who described the design of education as seeking to “elevate the Indian from his condition of savagery.”<sup>128</sup> But this elevation from savagery, for too many within the schools, involved their subjection to treatment that was dehumanising.

Like the colonial legislation of 1857 and the Dominion acts of the 1870s and 1880s, the IRS system ultimately had its own destruction (or at least obsolescence) in mind from the outset. The goal of enfranchisement was both to ensure the disappearance of Aboriginal peoples as cultural groups and to destroy the evidence of their separate existence, as the last “Indian” enfranchised would take with him the last twenty hectares of reserve land.<sup>129</sup> That is to say, once the government of the Dominion sought to exercise its newfound exclusive control over Aboriginal peoples, it “had as its purpose the eventual extirpation of this jurisdiction by doing away with those persons and lands that

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<sup>125</sup> Agamben, “What is a Camp?” 39.

<sup>126</sup> John S. Milloy, *A National Crime: the Canadian government and the residential school system, 1879-1986*, (Winnipeg: University of Winnipeg Press, 1999), xiii.

<sup>127</sup> *Ibid.*, xv.

<sup>128</sup> *Ibid.*, 3.

<sup>129</sup> Tobias, “Protection, Civilization, Assimilation,” 45.

fell within the category of Indians and Indian lands.”<sup>130</sup> The goal of the residential school was to remove all traces of Aboriginal identity from the youth educated there.<sup>131</sup> From language to knowledge, even food, the substitution of European ways for Aboriginal ways was the expressed purpose of the system. The schools functioned so that “one culture was to be replaced by another through the work of the surrogate parent, the teacher.”<sup>132</sup> The schools would eventually provide their own obsolescence by ensuring that the children of the uncivilized “Indian”—who the government had failed to enfranchise into extinction or civilize—would be raised from the depths of savagery and take their place as an indistinguishable citizens of Canada.

This goal in itself constitutes a certain epistemic violence, violence against Aboriginal knowledge and ways of knowing. However, as is now well known, there were many instances of physical, sexual, and emotional violence perpetrated against children in the care of these schools.<sup>133</sup> While not every school abused the children in its care or neglected their sanitary, nutritional, and emotional needs, neglect and abuse were sad facts of many students’ experience. The system itself mediated against care through chronic underfunding, blame shifting between individual school administrators, churches, and the Department of Indian Affairs. Far from serving their goal of a civilized education for Aboriginal youth, the schools were more often transformed into sites of extreme inhumanity and neglect. For example, disease, especially tuberculosis, ran rampant in many schools, which were badly built and poorly maintained, providing a furtive environment for “a dreadful crisis in sanitation and health.”<sup>134</sup> An Anglican lawyer, S.H. Blake, who conducted an audit of Anglican schools in 1908, bluntly reported to the Minister of Indian Affairs Frank Oliver: “The appalling number of deaths among the younger children appeals loudly to the guardians of our Indians. In doing nothing to obviate the preventable cause of death, brings the Department [of Indian Affairs] within unpleasant nearness to the charge of manslaughter.”<sup>135</sup>

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<sup>130</sup> Milloy, *A National Crime*, Ibid.

<sup>131</sup> The philosophy of the schools were to “kill the Indian in the child,” Ibid., xiii.

<sup>132</sup> Milloy, *A National Crime*, 33.

<sup>133</sup> For accounts of the treatment of children at Mount Elgin and the Mohawk Institute see Elizabeth Graham, *The Mush Hole: Life at Two Indian Residential Schools* (Waterloo, ON: Heffle Publishing, 1997).

<sup>134</sup> Milloy, *A National Crime*, 75.

<sup>135</sup> Ibid., 77.



This disturbing lack of concern for the spread of disease, especially tuberculosis, on the part of both the Department and schools led to endemic illness that followed students even after they left the schools. Dr. P. Bryce of Indian Affairs, who first published a report on disease in the schools in 1907, found in a subsequent report that of 1,537 children studied, 24% of those children had died, almost all had their cause of death listed as “consumption or tuberculosis,” and almost invariably these children had been listed as healthy upon their admission to the school.<sup>136</sup> Meaning it was the schools themselves that were the source of the disease for many who were infected.

Infection was often spread through the exposure to bovine tuberculosis in unpasteurized milk produced and consumed at the schools.<sup>137</sup> Many schools needed to produce foodstuffs for consumption or sale—the labour for which was carried out by students and often substituted for more scholastic pursuits at the schools due to underfunding by the state.<sup>138</sup> Thus, students were forced into producing the source of their own affliction in many cases. While the condition of individual schools was the result of decisions made by local school administrators or individual churches, the Department of Indian Affairs consistently “turned its back on its own wards [the Aboriginal children at the schools] and refused to hear or support the children’s real parents when they protested conditions in the schools and the treatment of their children.”<sup>139</sup> John Burrows discusses his family experience with Indian Residential Schools and that of his community elders, some of whom “have chosen not to acknowledge deep loss but instead focus on what they gained. They report having positive and uplifting experience... despite being neglected, starved, and degraded.”<sup>140</sup> But the key here is their neglect, starvation, and degradation.

Worse than neglect of the children’s health, there was a general background of violence in the schools in the form of corporal punishment often administered by the principal for infractions of school rules.<sup>141</sup> While corporal punishment was not unusual

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<sup>136</sup> Ibid., 91.

<sup>137</sup> Ibid., 84.

<sup>138</sup> Ibid., 20.

<sup>139</sup> Ibid., 130.

<sup>140</sup> John Burrows, “Residential Schools, Respect, and Responsibility for Past Harms,” *University of Toronto Law Journal*, vol.64, no.4 (2014), 487.

<sup>141</sup> J.R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996), 322.

for much of the time the schools operated, even in dominant society schools, it is clear that principals of IRS system schools had nothing like a monopoly on the use of force in their schools. In 1934, at the Anglican Onion Lake school the school engineer was dismissed for violating the rule that no staff member, aside from the principal, was to administer corporal punishment.<sup>142</sup> In this particular instance, the details of the violence used are not known. However, in many other cases, they are documented and are all too disturbing. Even when administered by proper authority, punishment was often excessive, as was the case with the principal of the short-lived Crowstand Presbyterian school in Saskatchewan, where runaways who had been recaptured were forced to run behind his buggy, tied to it by a rope around their arms.<sup>143</sup> In other instances “excessive” could only hope to capture the nature of the punishment as some of the staff were outright sadists:

A Sister of Charity at Shubenacadie school ordered a boy who had accidentally spilled the salt from the shaker while seasoning his porridge to eat the ruined food. He declined, she struck him, and told him to eat it. When he downed a spoonful and then vomited into his bowl, the sister hit him on the head and said, ‘I told you to eat it!’ A second attempt produced the same result. On his third try, the student fainted. The sister then picked him up by the neck and threw him out to the centre aisle in the dining hall.<sup>144</sup>

Moreover, physical abuse was not the limit of abuse suffered by students in residential schools as many were also sexually abused by their caretakers and supervisors. At a Presbyterian school in 1910-1911 in northwestern Ontario, girls reported that the principal forced them to put their hands under his clothing and play with his breasts, and he was reported to often kiss the older girls in his care.<sup>145</sup> At Shingwauk Residential School in Sault Ste. Marie Ontario in the 1950s, one male supervisor was “in the habit of sitting little boys on his lap and moving them about until he became sexually aroused.”<sup>146</sup>

It was not only school officials who were sources of sexual abuse for Aboriginal wards of the schools. As one woman reported in later life, sexual abuse by a visiting doctor saw the pelvic exam of a fourteen year old take fifteen minutes, rather than the

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<sup>142</sup> Ibid., 323.

<sup>143</sup> Ibid., 325.

<sup>144</sup> Ibid., 325-6.

<sup>145</sup> Ibid., 330

<sup>146</sup> Ibid.

usual minute or so it ought to have taken.<sup>147</sup> Sexual abuse was not simply an instrument of gratification for the pedophilic abusers inside and outside the school, but was also used as method of punishment. A former student of the Elkhorn school described his experience of sodomy after a harsh beating by the principal as punishment for speaking his native language.<sup>148</sup>

The sexual and physical abuse the students suffered in the schools created an environment where they could never feel safe, and they learned they never really were safe. Having been informed that her brother had died, one female student was taken to a room where she was bound and raped.<sup>149</sup> Many children were not safe, even away from administrators and staff. At the File Hills school a female student recalled a boy she had known who was “the victim of repeated sexual assaults, sometimes gang rapes, by bigger boys.”<sup>150</sup> These abuses, too, were known by school and Indian Affairs officials, yet nothing was done. In 1922 an Oblate brother from a Prairie school advised his church superiors to take precautions and to supervise the student threshing crew which camped away from the school, writing that “I know that in a bunch of nine big boys & [*sic*] eight small boys fearful immorality would result if not carefully watched by myself or a teacher.”<sup>151</sup> The complicity, however, of some school officials went beyond the knowledge of student on student sexual and physical abuse. In some cases, this abuse was organized to support the rule of supervisors. For example, in Albert Bay in the 1950s, the school allowed a gang of girls to control the girls’ quarters and impose arbitrary and abusive rule:

A former student recalled that a group of bullies would beat up girls on command by Barbara, ‘the head honcho’ in the junior girl’s dormitory. One evening the girls were informed one by one that ‘Barbara wants to see you in the bathroom.’ When she got to the lavatory, she found out that Barbara ‘had a mirror on the floor and she was looking at everyone’s vagina.’<sup>152</sup>

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid., 331.

<sup>149</sup> Ibid., 332.

<sup>150</sup> Ibid., 336.

<sup>151</sup> Ibid., 335.

<sup>152</sup> Ibid., 336 from an interview with Roberta Smith.

There were often no school supervisors to be found when such violations took place, and school officials were as happy as not to have school rules enforced by these gangs of children, even if it came with the enforcement of their own whims and dictates.<sup>153</sup>

These specific instances of physical and sexual abuse are not exhaustive and are but examples of what was suffered by some students in the residential school system. They are not offered here to be sensational or salacious. Rather, it behooves us to understand in an unequivocal way that some students suffered the most dreadful and inexcusable abuse. We must confront the sordidness of the residential school system in some detail to appreciate what is contained in the terms “physical and sexual abuse” that the survivors allege. These examples should make us uncomfortable, and help us to understand just how appalling was the treatment of some children. To avoid these examples of abuse is to sanitize the discussion and risks treating too lightly the abuse suffered by students.

Moreover, the physical and sexual abuse suffered in the schools was emblematic of the perceived inferiority of Aboriginal people, but, ultimately, incidental to the assimilationist colonial project undertaken by imperial and dominion governments in the aftermath of the changing utility of Aboriginal peoples to the dominant paradigm of settlement. The Indian Residential School system must be considered alongside the process of wardship begun in the decade after the end of the War of 1812 and the abrogation of governmental duties contained in the *Royal Proclamation of 1763*. In a sense, the IRS system represents the fulfillment and the failure of the assimilationist project: fulfillment as it was the most comprehensive and concerted attempt to destroy Aboriginal culture and community; and failure, as, even after a hundred years in operation (1886-1996), Aboriginal peoples continue to exist and are in a process of reclaiming elements of lost or degraded traditions. That is to say, while the IRS system sought to “kill the Indian in the child” the resistance and resilience of these supposed savages was too great for the IRS system and the assimilationist project. Indeed even within some of the schools themselves children were able to create a counter-culture. For example in the Kamloops Indian Residential School, the students built a “separate culture of their own within the school. Much of this culture was built around opposition to the

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<sup>153</sup> Ibid., 336.

severity of the rules and regulations guiding students' daily lives."<sup>154</sup> This culture included the stealing of food, because of its inadequate provision, and as Haig-Brown found in interviewing former students from the school "camaraderie created by the common involvement in the crime," and that "it became an integral and exciting part of daily life—one in which children unless they were caught, could feel some sense of power and control."<sup>155</sup> We must be careful to mark the students' agency, their humanity, as this simple example of resistance reminds us.

### *Conclusion*

This brief history of colonisation shows the exclusion of Aboriginal peoples from the political, economic, and social construction of Canada. It is here that Agamben's concept of state of exception can be helpful in understanding colonisation, and what is at stake in decolonisation. It may be unremarkable to point out Aboriginal peoples' exclusion in this way; however, Agamben's state of exception gives us an idea of the *systemic* reach of colonisation. Seeing Aboriginal peoples as drawn outside Canada, culturally, economically, and politically, does not capture the true complexity of the situation. Rather, seeing the interaction between inside and outside in Agamben's state of exception helpfully complexifies this relationship and gives us an accurate view to engage with decolonisation.

It is important here not to see exception as a simply set of discriminatory laws or superior attitude in determining policy. Far more insidiously, it is the suspension of not only ordinary statutory law and ancient rights of subjects (not least to be secure in one's own possessions), but also of the very constitutional order established in the treaties and through *The Royal Proclamation*. Accepting for a moment the contention of the coloniser that they had absolute right to legislate for and regulate the colonised, the method of exclusion amounts to a localised exception that denied Aboriginal peoples access to the law, and their rights guaranteed in the treaties and proclamation, as well as their rights as subjects of the colonial system. It may be an exaggeration to contend that this subjugated Aboriginal peoples to the whim of their guards (Indian Agent, magistrate, peace officer,

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<sup>154</sup> Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988), 88.

<sup>155</sup> *Ibid.*, 90.

even Parliament), but is only an exaggeration. In the case of Indian Residential Schools, however, it is all too clear that this location of exception did exactly that.

More centrally, exception in the form of the camp gives us a theoretical lens with which to see Indian Residential Schools. This concept not only connects the Indian Residential Schools system to the broader process of Aboriginal exception, but also highlights the *systemic* qualities of Indian Residential Schools. To appreciate what was at stake for the TRC it is key to understand the concerted, coordinated effort to erase Inigeniety the IRS system represents. While the TRC was not empowered to address colonialism writ large, seeing the IRS system connected to the larger colonial picture can only give us a more accurate view.

It is important to note in discussing the “history” of colonialism that it is also present. That is to say that Canada is still a colonial country. As will be discussed in Chapter 5 there have been attempts at decolonisation in Canada, but the very legal structure discussed above remains intact, as well as the cultural structures and attitudes of European superiority. It is evident that Aboriginal people in Canada continue to suffer from injustice and disadvantage, the basis of which is colonialism.

Moreover, this reading of colonisation outlines the transforming relationship from early contact’s cooperative approach to complete control over Aboriginal peoples in Canada. This is important as it highlights the prior existence of a constructive relationship between the Crown and Aboriginal peoples. While this is not meant to provide an overly romantic view, it does provide a framework for, or least idea of, the relationship between Crown and autonomous Aboriginal peoples. This theme is taken up in Chapter Five, but here it is significant as there was once a time of “peace and friendship” between Crown and Indigenous people.

## CHAPTER FIVE

### Decolonisation: Representation and Autonomy

#### *Introduction*

Colonisation's impact on Aboriginal peoples is profound and is still felt. Aboriginal peoples who live on reserve, often have reduced access to healthcare, education, and economic opportunity. From tainted water, to regular flooding, to substandard housing, many Aboriginal peoples on reserve live in conditions that are vastly inferior to those in the majority of the settler society. The unsuitable location of reserves and lack of resources are due to the logic of colonialism that seeks to destroy difference, to starve the colonised out, so to speak. This colonial approach engenders dependence, or forces Aboriginal people into environments that more fully demand assimilation. Substandard housing and over-population contribute to lower life expectancies for Aboriginal peoples.<sup>1</sup> The 2001 Canadian Census found that First Nations men live 8.1 years less than the average Canadian male, and First Nations women 5.5 years less than the average Canadian female.<sup>2</sup> These conditions are the direct result of inadequate government funding and interference in the affairs of First Nations through the *Indian Act* which actively mediate against self-sufficiency, to say nothing of the effort to destroy Aboriginal ways of being and knowing, most visibly in the IRS system.

Addressing the legacy of colonialism in Canada is a pressing issue with potentially far reaching implications for the quality of life of Aboriginal peoples. While determinants of health and longevity are one important aspect of colonialism's legacy, this chapter is mainly concerned with formal political arrangements. In particular I am interested in two kinds of responses to the formal political arrangements between Aboriginal peoples and the Crown, namely inclusion in, and autonomy from, these political institutions. Below I seek to detail these two approaches, which substantively

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<sup>1</sup> The National Aboriginal Health Organization, *The Role of Housing as Determinants of Health for Inuit in Canada*, presentation at the 14th International Congress of Circumpolar Health, Yellowknife, July 14th, 2009. This presentation points to overcrowding, poverty, and aging housing stock as negative determinants of health.

<sup>2</sup> Statistics Canada, *First Nations Comparable Health Indicators*, [http://www.hc-sc.gc.ca/fniah-spnia/diseases-maladies/2005-01\\_health-sante\\_indicat-eng.php#life\\_expect](http://www.hc-sc.gc.ca/fniah-spnia/diseases-maladies/2005-01_health-sante_indicat-eng.php#life_expect) (accessed 11 July, 2011). The life expectancy of Registered Indians has been calculated by Indian and Northern Affairs using information from the Indian Register, while the life expectancy for the Canadian population has been calculated by Statistics Canada using 2001 Canadian Census data.

include Aboriginal peoples in the formal structures of Canadian democracy on the one hand, and provide autonomy from the power of the Crown through self-government on the other hand. I call these “representation” and “autonomy,” respectively. These are decolonial approaches to the formal process and structure of colonisation. However, this is not the entirety of the colonial project, as a cultural support exists to license the subjection of peoples to a structure of power. Colonialism fundamentally sees two people as qualitatively different and licences the subjection of one to other rhetorically through art and culture, and substantively through formal political mechanisms. This underpinning of the colonial project was outlined in Chapter Three above, and is important to keep in mind here, so as to not lose the true complexity of colonisation. This chapter puts flesh on the bones of the theory of decolonisation, and will be helpful to have in mind for Chapter Six and Seven as I assess reconciliation in Canada. This tension of Aboriginal peoples being drawn into the centre of Canadian institutions, or increasing their autonomy from these institutions, is key in understanding the challenges of decolonisation in Canada.

Understanding that colonisation is about more than representation in the Commons or lack of control over local communities, I now turn to a discussion of decolonisation in the context of these formal political arrangements. That is, I want to understand how the colonial arrangements could be undone in the most effective way. The following section discusses different approaches to decolonisation that have been proposed and evaluates their potential utility against the contours of the colonial project outlined above.

*Dominant Approaches: “Representation in”*

One mechanism of decolonisation that seeks to alter the domination of Aboriginal peoples in Canada by structures of formal political power is simply the inclusion of Aboriginal peoples within the structures from which they have been previously excluded. This approach is what I call “representation in,” meaning that Aboriginal peoples could simply be granted representation in the existing institutional arrangements. The representational approach has been used historically to ensure the “peace, order, and good government” of the Canadian federation. Since the inception of the Canadian state, issues



of regional, religious and ethnic representation have been defining the political landscape. From the very beginning, the inclusion of a largely French Roman Catholic population in the province of Quebec within a larger Anglo-Protestant state precipitated discussion of representation at the federal level. While regional representation is a hallmark of Canadian federalism, discussions of broader representation have come to the fore only relatively recently. There has been a push from some quarters to have the Canadian population reflected more closely within Parliament and other institutions of government, in terms of diversity and race, and especially gender. Aboriginal representation in legislative assemblies, both provincial and federal, in a substantive (institutional) way is a species of this drive for representative inclusion. There have been three major initiatives over the last two decades that have sought to provide Indigenous representation in federal institutions of the Canadian state: the Royal Commission on Electoral Reform and Party Financing (also known as the Lortie Commission) proposal for Aboriginal Electoral Districts (hereafter AEDs); the Charlottetown Accord proposal for protected Aboriginal Senate seats; and the Royal Commission on Aboriginal Peoples (RCAP) proposal for an Aboriginal house of Parliament. All these were proposed but never enacted. They represent substantive approaches of the dominant society to provide Aboriginal representation within the central institutions of Canadian democracy, in response to historic Aboriginal exclusion.

### *Aboriginal Electoral Districts*

Among the options for the increased representation of minority groups in legislatures is a technique known as “affirmative gerrymandering.” In affirmative gerrymandering, electoral boundaries are drawn in a way that produces a “majority-minority” electorate in that riding. That is to say, the majority of the riding is from a minority group who historically has been underrepresented. It has been used in the United States to increase, especially, black representation in legislatures. This type of electoral district reshaping has occurred in the Canadian context, at the provincial level in New Brunswick.<sup>3</sup> In New Brunswick, this method has been used in the creation of provincial ridings and

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<sup>3</sup> John C. Courtney, *Elections* (UBC Press: Vancouver, 2004), 64.

redistricting to provide greater representation for both black and Acadian minorities in the province.<sup>4</sup>

The Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) recommended a similar sort of response to the under-representation of Aboriginal peoples in the Parliament of Canada, in the form of Aboriginal Electoral Districts (AEDs). Underlying this suggestion was a notion of democratic equality that has been increasingly prominent in Canada since the 1970s. It envisioned that Aboriginal peoples would be elected to Parliament in numbers more reflective of their proportion of the population as a whole, which is between three to four percent.<sup>5</sup> The difficulty with standard constituency boundaries is that very few ridings contain a sufficiently large Aboriginal population to constitute a majority, and thereby have a greater ability to elect an Aboriginal representative to Parliament. During the Lortie Commission's work there were only two federal ridings where Aboriginal peoples constituted a majority of electors, one in the Northwest Territories and the other in the Manitoba riding of Churchill.<sup>6</sup>

In order to increase the number of Aboriginal members in the House of Commons, Lortie recommended the creation of specific electoral districts for Aboriginal peoples. By using the "communities of interest" redistricting criteria found in the enabling legislation for provincial boundary commissions, Aboriginal Electoral Districts (AEDs) could be set up "in which Aboriginal populations would be sufficient to wield enough electoral strength to influence or even determine election outcomes, even to the point of electing 'one of their own' to the House of Commons."<sup>7</sup> Lortie recommended the creation of up to eight electoral districts in total, to be awarded to provinces "when the number of voters on a specially mandated Aboriginal register met a minimum requirement of 85 percent of the per seat electoral quotient for the province."<sup>8</sup> Specifically the Commission recommended that "the *Canadian Elections Act* provide for the creation of Aboriginal constituencies by electoral boundaries commissions in any

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<sup>4</sup> Ibid.

<sup>5</sup> Tim Schouls, "Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality" in *Canadian Journal of Political Science*, vol.29, no.4, (Dec., 1996), 729-30.

<sup>6</sup> David Small, "Enhancing Aboriginal Representation within the Existing System of Redistricting" in David Small ed. *Drawing the Map: Equality and Efficiency of the Vote in Canadian Electoral Boundary*, Research Studies for the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991), 307.

<sup>7</sup> Ibid., 308.

<sup>8</sup> Courtney, *Elections*, 65.

province where the number of self-identified Aboriginal voters enrolled on an Aboriginal register warrants the establishment of one or more constituencies in relation to a province's electoral quotient."<sup>9</sup> And that the number of these constituencies be "equal to such integer obtained by dividing the number of voters on the Aboriginal voters register by a number equal to 85 percent of the electoral quotient for the province."<sup>10</sup> This formula conforms to the federal *Electoral Boundaries Readjustment Act* limit of 15 percent deviation from the provincial electoral quotient for communities of interest, which would mean that Aboriginal peoples would be only slightly over-represented as a portion of the population.

David Small points out that because of the distribution of the Aboriginal population, only British Columbia, Alberta, Saskatchewan, Manitoba, northern Ontario and northern Quebec would qualify for AEDs.<sup>11</sup> The Atlantic provinces lack sufficient populations and population concentrations of Aboriginal peoples to qualify for AEDs. These eight AEDs would further be part of the overall seat allotment of the province, rather than being a "top-up."<sup>12</sup> Small's plan called for AEDs to be integrated into qualifying provinces by redistributing and readjusting existing seats to allow a majority, or at least a large minority, of Aboriginal electors in the riding, thus making them territorially contiguous and containing both Aboriginal and non-Aboriginal electors.<sup>13</sup> Lortie's suggestion was, conversely, for these AEDs to comprise non-territorial districts for Aboriginal peoples, giving individuals the choice to self-identify as members of Aboriginal districts or to remain in a traditional electoral riding.<sup>14</sup> This was expressly the case if the calculation detailed above yielded only one AED in a province, "the boundaries of the province would serve as the boundaries of the Aboriginal constituency."<sup>15</sup> In the case of more than one AED, Lortie recommended that "a special boundaries commission be created, composed of the chairperson of the boundaries

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<sup>9</sup> Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* Vol.1 (Ottawa: Minister of Supply and Services Canada, 1991), Recommendation 1.4.12 p.187.

<sup>10</sup> *Ibid.*, Recommendation 1.4.13 p. 189.

<sup>11</sup> Small, "Enhancing Aboriginal Representation within the Existing System of Redistricting," 316.

<sup>12</sup> Courtney, *Elections*, 65.

<sup>13</sup> Small, "Enhancing Aboriginal Representation within the Existing System of Redistricting," 338-9.

<sup>14</sup> Melisaa S. Williams, "Sharing the River: Aboriginal Representation in Canadian Political Institutions," in David Laycock ed. *Representation and Democratic Theory* (Vancouver: UBC Press, 2004), 97.

<sup>15</sup> Canada, Royal Commission of Electoral Reform and Party Financing, *Reforming Democracy* Vol.2 (Ottawa: Minister of Supply, 1991), 149.

commission for the province, who shall also act as chair for this special commission, plus two Aboriginal voters appointed by the Speaker of the House of Commons, with the mandate to determine the boundaries and names of the Aboriginal constituencies.”<sup>16</sup>

It is a matter of speculation whether AEDs would come about as Small suggests, or as Lortie envisioned, because the issue has failed to gain traction at the federal level. Especially since the advent of the Charlottetown Accord, and its subsequent defeat, and the Royal Commission on Aboriginal Peoples (RCAP), AEDs have, as Courtney points out, “become little more than an academic question.”<sup>17</sup> This might be because AEDs have been superseded by other institutional reforms. However, as Schouls argues, the creation of AEDs is more complex than it appears at first glance. Aboriginal peoples are not a monolithic group; there is a wide range of difference within the rubric of Aboriginal peoples. “There are status and non-status Indians, urban and rural dwellers, a diversity of tribes, nations and linguistic groups, treaty and non-treaty Indians, and men and women.”<sup>18</sup> In short, Aboriginal peoples are a diverse group that might not be well suited to coalescing in one riding (as Lortie suggests) for the representation of their interests. Schouls helpfully gives examples in a series of rhetorical questions: “For example, does the Shuswap nation of south central British Columbia possess sufficiently compatible objectives with the Musqueam nation of Vancouver to be represented by a single MP? Or, similarly, if a Metis politician were elected in Saskatchewan, would status Indians in the province feel represented?”<sup>19</sup> Surely going too far down this line of argument we would get to the position that one could only be represented by oneself; however, the point is well made. That is to say, this solution contains, at least in part, a colonial attitude toward Aboriginal peoples as homogeneous.

To further muddy the AED waters, Aboriginal nations not only often cross electoral boundaries, but also provincial boundaries and international ones. Under the Lortie proposal, AEDs would not be able to provide representation across provinces, as seats would be apportioned to provinces directly. These complexities might have been very much at work in the lack of federal enthusiasm for AEDs. However, it is not just the

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<sup>16</sup> Ibid., Recommendation 2.5.13 p. 150.

<sup>17</sup> Courtney, *Elections*, 66.

<sup>18</sup> Schouls, “Aboriginal Peoples and Electoral Reform in Canada,” 743-4.

<sup>19</sup> Ibid., 744.

technical problems of representation that might have led to the failure of AED's to materialise. While diverse interest from Aboriginal peoples themselves and geographic dispersion are significant, although not insurmountable, Schouls highlights the further problem of institutional mistrust on the part of many Aboriginal peoples. Specifically, it is the application of "communities of interest" criteria that raises "the assimilationist sensitivities of Aboriginal peoples" as "Aboriginal peoples regard themselves as distinct nations within Canada, with the concurrent political authority and power that flows from their claim to inherent sovereignty."<sup>20</sup> From Residential Schools to the 1969 Trudeau government White Paper, Aboriginal peoples in Canada have good cause to be suspicious of proposals that "bring them in" and, therefore, hold the possibility for degrading their unique position in Canadian society or assimilating their culture into the dominant one.<sup>21</sup> Schouls' criticism is certainly understandable, but the Committee for Aboriginal Electoral Reform, whose recommendations for AEDs found their way into the final Lortie recommendations, was clear that its vision was that "specific measures be taken to ensure that the legislative enactment of AEDs in no way derogates from Aboriginal and treaty rights of Aboriginal people."<sup>22</sup> What was meant by reference to this vague constitutional language is not entirely clear, but Lortie certainly did acknowledge the distinct claims and rights Aboriginal peoples have in Canada.

Notwithstanding the above concerns, in 2001, the federal boundary commission in New Brunswick, a province with experience in affirmative gerrymandering as mentioned above, proposed the creation of one AED to represent all of New Brunswick's reserves. This AED would have been non-territorial and would have linked the province's 11,000 to 12,000 residents of Indian reserves "to one another and to one single MP in a new and different fashion: racial ancestry would trump geography."<sup>23</sup> Due to its opposition by Aboriginal peoples in New Brunswick, this proposal was dropped in the final report of the Boundary Commission.<sup>24</sup> Courtney points out that "most Native leaders called for its

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<sup>20</sup> Ibid., 745.

<sup>21</sup> The White Paper called for the elimination of the *Indian Act*, but provided no mechanism for providing Aboriginal and treaty rights. It would have, in essence, made all Aboriginal people legal indistinguishable from Canadian citizens, an overt act of assimilation.

<sup>22</sup> Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* Vol. 4 (Ottawa: Minister of Supply and Services Canada, 1991), 251.

<sup>23</sup> Courtney, *Elections*, 67.

<sup>24</sup> Ibid.

rejection on the grounds that it was better to keep the province's reserves within the federal riding that territorially encompassed them. That way Natives would be able to seek the services of several different MPs..."<sup>25</sup>

What is clear is that AEDs represent an innovative, yet problematic, means of enhancing Aboriginal representation in the House of Commons. Due to the complexity of Aboriginal identity, Aboriginal population distribution, and the goals of different Aboriginal groups, the issue of AEDs has largely been set aside to consider other means of Aboriginal representation and to concentrate on a project of Aboriginal self-government—most recently in the form of the Nisga'a Treaty.<sup>26</sup> While New Brunswick considered creating an AED as recently as 2001, Aboriginal peoples in that province ultimately rejected it, in favour of a more strategic option.

### *Charlottetown Accord*

The 1982 constitutional reforms recognised the rights of Aboriginal peoples in the form of Sections 25 and 35 of the *Constitution Act 1982*. It is Section 25 that guarantees that rights upheld by the *Charter of Rights and Freedoms* "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."<sup>27</sup> Section 35 recognises and affirms existing treaty rights of Aboriginal peoples, while Section 35.1 commits the federal and provincial governments to a consultative process in the event of changes to land or land claims.<sup>28</sup> While these measures represent significant guarantees for Aboriginal peoples, the proposal made in the Charlottetown Accord "would have radically transformed the

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<sup>25</sup> Ibid.

<sup>26</sup> See Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty," *University of British Columbia Law Review* vol. 35 no.2 (2002), 455-510 and Douglas Sanders "'We Intend to Live Here Forever': A Primer on the Nisga'a Treaty," *University of British Columbia Law Review* vol.33 no. 1(1999), 103-128.

<sup>27</sup> *Constitution Act 1982* sec. 25.

<sup>28</sup> *Constitution Act 1982* Section 35.1 reads: "The government of Canada and the provincial governments are committed to the principal that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

constitutional status of Aboriginal peoples in Canada.”<sup>29</sup> The Accord would have made broad changes to the constitutional place of Aboriginal peoples, such as recognising an inherent right to self-government. The Charlottetown Accord was ultimately defeated by referendum in 1992; however, the proposed legislative representation for Aboriginal peoples, like the Lortie Commission’s proposal, was a novel one, if flawed. The substantive representational proposal for Aboriginal peoples was that of Aboriginal seats being set aside in the Senate of Canada.

Articles 7 and 8 of the Charlottetown Accord provided for a “triple-E” senate,<sup>30</sup> with Article 9 concerning Aboriginal representation in this new senate. It called for Aboriginal representation to be “guaranteed in the Constitution. It stipulated that Aboriginal Senate seats should be additional to provincial and territorial seats, rather than drawn from any province’s or territory’s allocation of Senate seats.”<sup>31</sup> While short on other details, Article 9 stated that specifics “[would] be discussed further by governments and the representatives of the Aboriginal peoples in the early autumn of 1992.”<sup>32</sup> It was unclear under the Accord how many Aboriginal representatives would be in the Senate; however, these senators would have acted in the same capacity as all other senators. Further, Charlottetown “proffered the possibility that on issues of Aboriginal concern a double majority would be required to pass legislation.”<sup>33</sup>

Although exact representation for Aboriginal peoples in the Senate was unclear in the Charlottetown Accord, Williams argues “it seems sensible to suppose that [representation] would be at the same level as the provinces. Following the Charlottetown proposal, then, there would [have been] six Aboriginal senators.”<sup>34</sup> Williams saw little problem with putting Aboriginal representation on par with provincial representation—the proposal was for an elected, *equal* and effective senate—as the population of Aboriginal peoples “exceeds that of the smaller provinces.”<sup>35</sup>

For the Charlottetown proposals, the problem did not lie in a lack of interest on the part of the central government or possible objections on the part of Aboriginal groups,

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<sup>29</sup> Williams, “Sharing the River,” 98.

<sup>30</sup> “Triple E” refers to a senate that is equal, elected, and effective.

<sup>31</sup> *Charlottetown Accord*, Section 9.

<sup>32</sup> *Ibid.*

<sup>33</sup> Williams, “Sharing the River,” 98.

<sup>34</sup> *Ibid.*, 111-2.

<sup>35</sup> *Ibid.*, 112.

as all major national parties supported the Accord, as did many Aboriginal leaders. The failure of Charlottetown, and with it the innovative proposal for Aboriginal senate seats, was due to the rejection of the Accord by a 54.4 to 44.6 per cent vote in the national referendum held on 26 October 1992.<sup>36</sup>

*Royal Commission on Aboriginal Peoples*

Where the Lortie Commission and Charlottetown Accord failed to provide the legislative representation that each proposal contained for Aboriginal peoples, the Royal Commission on Aboriginal Peoples (RCAP) sought to renew the legislative representation debate, from the position of a nation-to-nation relationship.<sup>37</sup> This change in the conceptual starting position for legislative representation was, at least in part, due to the concerns of Aboriginal peoples with regards to shared institutions, as detailed by Schouls above. The Lortie Commission and the Charlottetown proposals both proposed changes within existing institutional structures of Canadian democracy. However, “RCAP’s response to justifiable Aboriginal distrust of existing parliamentary institutions was not to seek reform within those institutions but to create an altogether new institution that would stand alongside them in the legislative process.”<sup>38</sup>

Rather than bringing Aboriginal peoples into existing institutions, RCAP’s proposal was to radically remake the orders of government in Canada by creating an Aboriginal order that was “not a replica of the second provincial order, as it differs from it in numerous ways.”<sup>39</sup> The complexity of Aboriginal peoples was, again, here, a prominent feature in discussing congruence with a traditional understanding of legislatures and institutional relations. Ultimately RCAP’s recommendation was “the creation of a third chamber of Parliament to go with the third order of government: a House of First Peoples. This third chamber would [have been] comprised of between 75 and 100 Aboriginal representatives.”<sup>40</sup>

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<sup>36</sup> Paul Chartrand, “Canada and Aboriginal Peoples: From Dominion to Condominium,” in F. Leslie Seidle and David C. Docherty eds., *Reforming Parliamentary Democracy* (Montreal and Kingston: McGill-Queens University Press, 2003), 102.

<sup>37</sup> Alan Cairns, “Report on the Royal Commission on Aboriginal Peoples: Aboriginal Nationalism, Canadian Federalism, and Canadian Democracy” *Saskatchewan Law Review*, (2007) vol.70, no.1, 113.

<sup>38</sup> Williams, “Sharing the River,” 100.

<sup>39</sup> Cairns, “Report on the Royal Commission on Aboriginal Peoples,” 113.

<sup>40</sup> Williams, “Sharing the River,” 100.



This third chamber of Parliament would have needed to have substantial power in order to provide adequate representation for Aboriginal peoples and to be something more than merely a symbolic nod to Aboriginal inclusion in Parliament. RCAP understood that the proposal of legislative representation in the past suffered, in part, from this apparent lack of credibility and efficacy. This House of First Peoples, according to RCAP, would need “real power... [by] this, we mean the power to initiate legislation and to require a majority vote on matters crucial to the lives of Aboriginal peoples. This legislation would be referred to the House of Commons for mandatory debate and voting.”<sup>41</sup> That is to say, RCAP saw the House of First Peoples as a partner with the House of Commons and the Senate (and presumably the Crown), in the Parliament of Canada.

With the experience of the failed “mega-constitutional” reforms, Meech Lake and Charlottetown,<sup>42</sup> fresh in their minds, and realising that the creation of a House of First

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<sup>41</sup> Royal Commission on Aboriginal Peoples, *Final Report*, vol. 2 (Ottawa: Ministry of Supply and Services Canada, 1996), 375. In Williams, 100.

<sup>42</sup> The Meech Lake and Charlottetown Accords were failed attempts in 1987 and 1992, respectively, to amend Canada’s recently patriated constitution. The 1982 partition of the constitution failed to garner the support of Québec and the accord negotiated at Meech Lake in 1987 was meant to gain Québec’s support of the constitution by amending it to contain a recognition of Québec as a “distinct society,” give provinces a role in Supreme Court appointments, expand the role of provinces on immigration, set limits to federal power in federal-provincial shared programs, and give Québec a veto on future constitutional amendments (Majorities Montgomery Bowker, *The Meech Lake Accords: What it will mean to you and to Canada* (Hull, Québec: Voyageur Publishing, 1990), 17). The Meech Lake Accord required ratification in all the legislatures of Canada and in 1990 the measures expired failing to gain the support of Manitoba and Newfoundland and Labrador (For a detailed account see Peter H. Russell, *Constitutional Odyssey: Can Canadians be a Sovereign People?* First Edition (Toronto: University of Toronto, 1992) especially Chapter 9). Meech was negotiated among the premiers and prime minister behind closed doors and presented to the public without the possibility of change. Russell argues that the narrow focus of Meech Lake made it unpopular outside Québec (154). The Charlottetown Accord, or the “Canada Round” of constitutional change, was a more expanded proposal for change that dealt not only with issues related to Québec as Meech did, but, also, proposed a triple-E Senate (elected, equal, and effective), Aboriginal self government and guaranteed representation in the upper house, changes to the *Charter of Rights and Freedoms* to include property rights, and clear up federal-provincial divisions of power (Russell, *Constitutional Odyssey*, 171-3). In addition to the legislative approval that Charlottetown required and received from the 10 provinces, federal government, and the territories, the Accord was also endorsed by the four main national Aboriginal groups, Assembly of First Nations, the Native Council of Canada, the Inuit Tapirisat, and the Métis National Council. Charlottetown, unlike Meech, however, required the endorsement of the people of Canada through a referendum. The referendum was rejected by 54% of the national electorate and decisively rejected in the West and Québec on October 26, 1992 (Martin Westmacott, “The Charlottetown Accord: A Retrospective Overview,” in *Challenges to Canadian Federalism* Martin Westmacott and Hugh Mellon eds. (Scarborough, ON: Prentice Hall, 1998), 109). For an expanded discussion of Meech Lake see Michael D. Behiels ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1990) and Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas and MacIntyre, 1990). For an expanded discussion of the

Peoples would require constitutional amendment, RCAP suggested an interim measure through normal legislation to construct a consultative house.<sup>43</sup> The main purpose of this house, as opposed to the fully constitutional one RCAP envisioned, would be to “advise the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples.”<sup>44</sup> However, this interim house has never come close to fruition and has become, as a means of legislative representation, a non-issue for the federal government and the public at large.

Williams argues that the traditional frame of Aboriginal issues sees binary opposition and incongruence with increased representation for Aboriginal peoples on the one hand and meaningful self-government on the other.<sup>45</sup> Through the course of her analysis, Williams argues that this is not a *necessary* incongruence, and that both self-government and representation may be useful in many policy areas.<sup>46</sup> Indeed, in both the Charlottetown Accord and the RCAP report, self-government is affirmed, while at the same time, representation of Aboriginal peoples in the central institutions of Canadian democracy is provided. However, each of these proposals’ commitment to Aboriginal self-government would have subjected these Aboriginal governments to ultimate authority of the Canadian state. In the case of RCAP, the final recommendation fell significantly short of the vision of empowered self-government the Commissioners themselves held. As Ladner argues, this view of self-government represented “negotiated inferiority or an *unequal* partnership”.<sup>47</sup> This is due to the conflict between the assertion of an inherent right to self-government at the same time as an insistence on the negotiation of certain agreements because Aboriginal jurisdiction and the reliance on existing orders of Canadian government. Moreover, this view of self-government would subject Aboriginal jurisdiction to judicial mechanism of Canada, including the *Charter of*

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Charlottetown Accord see Kenneth McRoberts and Patrick Monahan eds., *The Charlottetown Accord, Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993), in addition to Russell, *Constitutional Odyssey*.

<sup>43</sup> Williams, “Sharing the River,” 100.

<sup>44</sup> Chartrand, “Canada and Aboriginal People,” 112.

<sup>45</sup> Williams, “Sharing the River,” 94.

<sup>46</sup> *Ibid.*, 114.

<sup>47</sup> Kiera Ladner, “Negotiated Inferiority: The Royal Commission on Aboriginal People’s Vision of a Renewed Relationship,” *American Review Of Canadian Studies* vol. 31, no1. (2001), 241. Emphasis in original.

*Rights and Freedoms*.<sup>48</sup> This would have provided some local authority, but substantially bring Aboriginal governments into an existing framework of federalism, which would implicitly mean a failure to recognise the *sui generis* relationship that Aboriginal nations have with the Crown, as outlined throughout this project.

Thus, while these proposals advance a complex approach of representation at the centre and some measured autonomy at the periphery, ultimately the approaches outlined above represent an “inclusion in” approach to decolonisation that sees Aboriginal peoples as one minority group among many within a multicultural Canada. To be clear, both the RCAP Report and the Charlottetown Accord contained mechanisms for increased representation within the federal democratic structure of Canada, as well as some measured autonomy—not unlike the measure of autonomy of Canadian municipalities, except Aboriginal governments would be more creatures of the federal level rather than any respective provincial government. These movements, however, seek ultimately to provide representation in the democratic and federal structure of Canadian government, with the full implications thereof.

*Alternative Approaches: “Autonomy from”*

Within the above approaches to representation there are affirmations of a right of self-government for Aboriginal peoples. However, this commitment raises some doubt about the meaning of the concept of self-government when read alongside the arguments for self-government made by several other scholars. These arguments, as advanced by Ladner, Henderson, and Tully, conceive of a relationship between the Crown and Aboriginal nations that subjects neither one to the authority of the other.<sup>49</sup> This contrasts with other approaches articulated by mainstream scholars such as Courchene and Powell, Cairns, and LeSelva, who posit a form of self-government that submits to the ultimate

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<sup>48</sup> *Ibid.*, 245.

<sup>49</sup> See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge and New York: Cambridge University Press, 1995); James Youngblood Henderson, “Empowering Treaty Federalism,” *Saskatchewan Law Review* 58 (1994); Russel Barsh and James Youngblood Henderson, *The road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980), this book is identified by Ladner as the source of the term “treaty federalism,” however, will be little used here as it is concerned with the American case; Kiera Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalism,” in *New Trends in Canadian Federalism* 2nd edition, edited by Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 2003).

authority of the Canadian state rather than conceiving co-autonomous entities.<sup>50</sup> The following discussion of “treaty federalism” and approaches to delegated government seeks to highlight the definitional differences in the contest over self-government and provide a thorough understanding of autonomy-motivated decolonisation. In the case of scholars advocating “treaty federalism,” as discussed below, we can see most clearly an alternative approach to decolonisation from the one outlined above, which features representation *within* the central institutions of Canadian democracy. Here we see decolonisation as autonomy from the central institution of Canada, rather than the re-articulation of representational approaches that I argue we see in Courchene and Powell, Cairns, and LeSelva. It is important to draw out these difference as the line between intention and result is not always straight, especially when dealing with colonialism.

What Henderson, and Ladner following him, call “treaty federalism” and what Tully terms “treaty constitutionalism” is a historically rooted understanding of the relationship between the Crown and Aboriginal peoples in Canada. As the term treaty federalism indicates, this relationship is based on the treaty order established by European crowns upon the arrival of Europeans in North America. For Canada, the relevant crown is that of Britain, which concluded many treaties in the period after contact with the first peoples of North America. As Ladner argues “treaties were signed between nations as incoming Europeans (at least initially) recognized Indigenous polities as constituting nations and dealt with them as such.”<sup>51</sup> In fact, Henderson argues that without this understanding, the whole treaty process makes no sense.<sup>52</sup> The analogy here is of the “two row wampum” discussed above in Chapter Four, where two parallel beaded rows in a ceremonial belt represent the paths of two distinct vessels traveling the same river; where one ship is for the newcomers and the other for the natives, each traveling in their own boat while agreeing: “Neither of us will try to steer the other’s vessel.”<sup>53</sup>

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<sup>50</sup> See Thomas Courchene and Lisa Powell, *A First Nations Province* (Kingston: Queen’s University Institute of Intergovernmental Relations, 1992); Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000); Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen’s University Press, 1996).

<sup>51</sup> Ladner, “Treaty Federalism,” 171.

<sup>52</sup> Henderson, “Empowering Treaty Federalism,” 246.

<sup>53</sup> Michael Mitchell, “An Unbroken Assertion of Sovereignty” in *Drumbeat: Anger and Renewal in Indian Country*, edited by Boyce Richardson (Toronto: Summerhill Press, 1989), 110.

As Henderson outlines, treaty federalism as a historical relationship was concerned with “(1) protection of inherent Aboriginal rights; (2) distribution of shared jurisdictions; (3) territorial management; (4) human liberties and rights; and (5) treaty delegation.”<sup>54</sup> Significantly, these treaties provided land for the incoming settlers, yet retained all rights and privileges for Aboriginal nations not expressly ceded in the treaty, including the right to self-determination and sovereign authority.<sup>55</sup> These treaties are seen as being reciprocal, with each party responsible for both the rights and duties guaranteed at the time of signing. In a sense the treaties not only confirm the sovereign autonomy of Aboriginal nations, but also license the authority—to say nothing of the land base—of the Crown over its subjects on the continent. As Ladner puts it: “Treaties not only recognize and affirm a right to self-government and a continuation of sovereignty for Aboriginal peoples, but they also recognize and affirm a right to self-government and create sovereignty for ‘aliens’ within Indigenous territories.”<sup>56</sup> Recall the *Royal Proclamation of 1763*, which reserved to the Crown of Great Britain alone the authority to deal with Aboriginal nations, and specified that all lands were to be purchased from Aboriginal nations by the Crown.<sup>57</sup>

Moreover, this relation, through the mechanism of the treaty, created a constitutional framework for interaction, one that the Crown came to unilaterally alter. This is a constitutional framework in the most fundamental sense, as it established the terms of reference for sharing the territory covered by the treaty. It also established a federal, or, more precisely, confederal, type of relation, as both the Crown and Aboriginal nation constituted distinct and sovereign authorities. “Because the treaties established the terms by which nations would co-exist as sovereign entities and because they delegate power and jurisdiction from Indian nations to the Crown, it has been argued that the treaties constitute a constitutional arrangement of federalism.”<sup>58</sup> However, this federal constitution was quite different from the one created by the *British North America Act 1867*. This treaty federalism was quite a bit looser and less institutionalized than the federation of the British colonies, which occurred later. Significantly, the treaties did not

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<sup>54</sup> Henderson, “Empowering Treaty Federalism,” 251.

<sup>55</sup> *Ibid.*, 244.

<sup>56</sup> Ladner, “Treaty Federalism,” 173.

<sup>57</sup> *Royal Proclamation of 1763*.

<sup>58</sup> Ladner, “Treaty Federalism,” 174.

create superior and subordinate orders of government, as the *British North America Act* did.<sup>59</sup> Henderson argues that the transfer of authority over Aboriginal peoples to the Crown would have been inconsistent with the notions of authority held at the time the treaties were concluded. “Only positive law empires created around centralized rulers or aristocratic society can transfer total control to another ruler. This attribute was missing in First Nations.”<sup>60</sup> Thus, it would not have been possible to include something like Section 90 of the *British North America Act 1867*, which provided the federal government considerable—although little used—powers of disallowance and reservation over the provinces, in the constitutional framework of Crown-Aboriginal relations.

This understanding of treaty federalism as “an agreement on a framework for mutual coexistence of two sovereign entities within the same territory”<sup>61</sup> is consistent with the history of the relationship, before the transition towards a system of colonial control. However, this relationship was unilaterally altered by the advent of the *Indian Act* and the policy of civilization, detailed in Chapter Four. Ladner, then, argues for a return to this form of treaty federalism in order to overcome the colonial project, for it is, she argues, “[b]y replacing the existing state of oppression, subordination, genocide, and colonisation, [that] treaty federalism would enable all to live together on this land in peace and friendship.”<sup>62</sup> As we have seen, this would significantly entail a *return* to a relationship of peace and friendship, unilaterally abandoned by the Crown and its agents.

Similarly, Tully provides a justification for a thoroughgoing understanding of Aboriginal self-government, which he calls “treaty constitutionalism.” Tully seeks to rescue the constitutional order, as a concept, from its inculturated articulation in the Anglo-American tradition. It is Tully’s position that constitutionalism has within it all that is needed for an increasingly culturally and racially diverse age; constitutionalism can be amended rather than rejected.<sup>63</sup> Rather than locating the means of amending constitutionalism in the modern era of constitution making—and rightly so, as the modern agenda which underpins the constitutions of their time was at work in the drive to assimilate Aboriginal peoples in North America—Tully looks to an ancient

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<sup>59</sup> Ibid.

<sup>60</sup> Henderson, “Empowering Treaty Federalism,” 253.

<sup>61</sup> Ladner, “Treaty Federalism,” 178.

<sup>62</sup> Ibid., 190.

<sup>63</sup> Tully, *Strange Multiplicity*, 37-8.

understanding of constitutionalism. By Tully's understanding, three important conventions are of paramount importance to constitutionalism: mutual recognition, consent, and continuity.<sup>64</sup>

In the first instance, he contrasts modern imposition with ancient recognition.<sup>65</sup> For Tully, the hallmark of the modern constitution is "an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason and agreement."<sup>66</sup> The very language of modern constitutionalism was constructed so as to "exclude or assimilate cultural diversity and justify uniformity."<sup>67</sup> By contrast, the ancient constitution does not constitute or create a people and their system of relation, but, rather, *recognizes* "how the people are already constituted by their assemblage of fundamental laws, institutions and customs."<sup>68</sup>

In the case of consent, Tully argues that modern constitutions establish the pre-conditions for democracy and are not seen as a part of democracy<sup>69</sup>—which we can see here as a mechanism of consent. Tully characterizes this as an anti-democratic feature of the modern constitution which "is mitigated by the assumption that the people gave rise to it at some time, and by the elaborate theories of modern constitutionalism from Hobbes to the present which serve to persuade us that we would consent today if we were reasonable people."<sup>70</sup> This, however, only serves to reinforce the imposed nature of the modern constitution as it constructs within its theory a normative exclusion criteria under the heading "reasonability." The ancient constitution, on the other hand, appears more democratic, as it is amended and changed, continually consented to by living the customs and conventions that it embodies.<sup>71</sup>

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<sup>64</sup> Ibid., 30.

<sup>65</sup> Ibid., 62.

<sup>66</sup> Ibid., 60. This is quite different from a constitution rooted in history. As J.G.A. Pocock notes, John Locke significantly departs from others in the Anglo tradition as he roots his constitutionalism in an individual appeal to liberty. See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: a study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).

<sup>67</sup> Ibid., 58.

<sup>68</sup> Ibid., 60.

<sup>69</sup> Ibid., 69.

<sup>70</sup> Ibid.

<sup>71</sup> The ancient constitution here refers to pre-modern political arrangements that are embodied by the living out of political obligation and duties on the part of the sovereign and their subjects. In the tradition most relevant to Canadians, this would be the English constitution.

Last, continuity is expressly denied by the modern constitution. As the background agreement of the foundation of democracy, the modern constitution seeks a once-and-for-all agreement that is a comprehensive set.<sup>72</sup> Whereas, in the ancient constitution, the agreement to the constitution is “seen as one link in an endless chain, stretching back to what one’s ancestors have done before and forward to what one’s children will do in the future.”<sup>73</sup> Linked with consent, the ancient constitution continues as it is continually consented to, and is a living concept, not unlike the “living tree” concept of constitutional interpretation.<sup>74</sup>

The combination of mutual recognition, consent, and continuity is most embodied, Tully argues, in the form of “treaty constitutionalism” between the Crown and Aboriginal peoples in Canada. Like the treaty federalism of Henderson and Ladner, above, treaty constitutionalism is a relationship of equality between Crown and Aboriginal nations, representing the three most basic principles of the ancient constitution: mutual recognition, consent, and continuity. As Tully argues, treaty constitutionalism “is expressly designed not only to recognise and treat the Aboriginal people as equal, self-governing nations, but also to continue, rather than extinguish, this form of recognition through all treaty arrangements over time. Indeed the legitimacy of *non-Aboriginal* governments in America depends on this continuity, for it is the condition of Aboriginal consent to recognise them.”<sup>75</sup>

Thus, in the view of Henderson, Ladner, and Tully, the proper and legal relationship between Crown and Aboriginal nations is a type of compact federalism, where each consenting party represents a separate sovereignty, and where any authority of one over the other can only be accomplished by express consent of both. This treaty federalism approach contrasts with other approaches to more autonomous relations

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<sup>72</sup> Tully, *Strange Multiplicity*, 135.

<sup>73</sup> *Ibid.*

<sup>74</sup> In significant ways the living tree is quite different from the ancient constitution. Whereas in the ruling of the Judicial Committee of the Privy Council on the famous “Persons Case” referred to the *British North America Act 1867* as “a living tree capable of growth,” the concept I mean to invoke above is the growth of the constitution, not merely the growth of its interpretation. The hallmark of the ancient constitution is that it lacks a concrete form in a written document, but rather consists in a lived relationship; thus, rather than the interpretation changing *per se*, the actual form of the constitution itself has the ability to organically change.

<sup>75</sup> Tully, *Strange Multiplicity*, 124. Note, the use of “America” here is in the English style of reference to, ostensibly, British North America, which includes Canada.



between the Crown and Aboriginal nations. While both use the terminology of self-government, it is clear that this concept does not hold the same connotations for treaty federalists as it does for those who advocate what Ladner calls the “Aboriginal orthodoxy.”<sup>76</sup> The proponents of the Aboriginal orthodoxy cannot relinquish the ultimate sovereignty of the Crown, and thus understand self-government in a more limited sense.

Cairns argues for a relationship between the Canadian state and Aboriginal peoples characterized by a “citizens plus” model. This view sees “Aboriginal difference fashioned by history and the continuing desire to resist submergence and also recognize our need to feel that we belong to each other.”<sup>77</sup> This concept of “citizen plus” was first articulated in the 1966-7 Hawthorn Report. The report was prepared for the Minister of the Department of Citizenship and Immigration to inquire “into the socio-economic, political, and constitutional conditions of status Indians, with the task of advising policy makers of the route to a better future for the Indian peoples of Canada.”<sup>78</sup> The main thrust of this position, as the name indicates, is that status Indians—although Cairns sees little problem with extending this to all Aboriginal peoples<sup>79</sup>—are full citizens of Canada, but also possess other special rights as founding members of the Canadian community.<sup>80</sup>

The “citizens plus” conception contains within it measures of self-government for on-reserve Aboriginal peoples. However, self-government cannot fully address the complex relationship of interdependence between Aboriginal peoples and the Canadian state, according to Cairns.<sup>81</sup> Moreover, like other transitional societies, and here Cairns mentions post-communist Czechoslovakia and post-Apartheid South Africa, the conditions are not always going to be favourable to self-government in First Nations communities. In this context:

Self-government will be partial, not total. Even where the maximum of self-government is possible, it will fall far short of total independence. The small size of all Aboriginal nations limits the jurisdiction they can wield. The citizens of self-governing nations will continue to be intimately linked to federal and

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<sup>76</sup> Lader, “Treaty Federalism,” 167. These advocates are orthodox in the sense that they leave the source of sovereignty in Crown unexamined and, thus, leave the fundamental underpinning of the colonial relationship intact.

<sup>77</sup> Alan Cairns, *Citizens Plus*, 9.

<sup>78</sup> *Ibid.*, 11.

<sup>79</sup> *Ibid.*, 9.

<sup>80</sup> *Ibid.*, 161-2.

<sup>81</sup> *Ibid.*, 110.

provincial governments for services, funds, and so on. Part of the Aboriginal future then resides in their civic relations to the non-Aboriginal governments of the federation.<sup>82</sup>

Thus, overall, Cairns rejects the type of thoroughgoing self-government advocated by Henderson, Ladner, and Tully. The two-row wampum model is “unworkable,” according to Cairns, as it “would lack staying power as its sensitivity to Aboriginal difference is not matched by an equal concern for the cohesion of the Canadian community. We need to strike a balance.”<sup>83</sup> Historically, however, this “balance” has involved the Canadian state steering both ships.

It is in this “concern for cohesion”<sup>84</sup> that we can see the problematic kernel at the centre of Cairns’ solution. Cairns’ “citizens plus” formula still seeks to subsume Aboriginality under the rubric of Canadian nationalism and belonging, which is central to the colonial project. While Cairns discusses the history of colonial relations in this work, he does not accept the proposition of treaty federalism—with its maximum of autonomy for self-governing nations—rather, he favours the inclusion of Aboriginal peoples through the mechanism of citizenship, albeit as “citizens plus.”<sup>85</sup> That is to say, this view of self-government advanced by Cairns is admittedly limited. It also, I argue, fails to transcend the colonial relationship. The rejection of the two-row wampum as “unworkable” misses the centrality of the de-colonial position of two row wampum that posits Aboriginal peoples as not Canadian, *per se*, but, rather, in a relationship of peace and friendship with the Crown. Under bargains made for the land and the loyalties of the people first found upon it, the Crown has continuing responsibilities, under treaty, to Aboriginal peoples. Cairns rightly points out that even self-governing First Nations “will continue to be intimately linked to federal and provincial governments.”<sup>86</sup> However, he misses that this relationship would exist in a treaty federalism arrangement as well, *because* of the treaty relationship.

Moreover, Cairns is concerned with economies of scale in asserting that self-government called only be partial, due to the small size of some communities. The treaty

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<sup>82</sup> Ibid., 113.

<sup>83</sup> Ibid., 115.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., 182.

<sup>86</sup> Ibid., 115.

federalism argument, however, nowhere specifies that each of the over two thousand reserves would be self-governing. This comment seems to replicate a latent paternal attitude that supposes Aboriginal peoples cannot make associational and governance decisions for themselves. This could not be further from the truth. Not only do Aboriginal communities have a right to determine the shape of the institutions which govern them, but they also have, even by metrics of the dominant society, an increasing capacity to carry out the functions of government, whatever shape that government might take. There is a relationship between Aboriginal peoples and the Canadian state, however, conceived of as a “citizenship” relationship that does not provide an autonomy-motivated de-colonial approach, but, rather, an implicitly representational one.

Cairns, clearly, does not represent the entirety of the “Aboriginal orthodoxy,” and the self-described limited self-government that he proposes is by no means the most extensive self-government advocated from that quarter. Courchene and Powell advance a much more extensive proposition for self-government of First Nations in Canada, in detailing the workability of a First Nations province.<sup>87</sup> As these authors are both economists, the main concern of their work is the fiscal viability of such a province, which is not an unimportant concern for any approach to self-government.

Courchene and Powell argue that, “[s]ince a federal system is, by its very nature, designed to accommodate the sharing of ‘sovereignty’ and/or self-government, one obvious ‘Canadian’ solution to aboriginal aspirations for self-government is to integrate the First Nations fully into the federal structure—that is, to grant provincial status to the First Nations.”<sup>88</sup> The balance of their work is dedicated to elaborating the shape and character of the First Nations province. First, the province would, like the other provinces of the federation, be a territorially bounded one. However, unlike other provinces, this First Nations province would not be contiguous. The more than 2,200 reserves across the country would form the territory of this new province, which is, as Courchene and Powell point out “largely how the reserves are currently administered...”<sup>89</sup> Second, this First Nations province would have all the powers accorded under Section 92, 93, and 109 of the *British North America Act, 1867*, having control over property, civil rights, direct

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<sup>87</sup> Courchene and Powell, *A First Nations Province*.

<sup>88</sup> *Ibid.*, 5.

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

taxation, borrowing, regulation and incorporation of companies, and resource management.<sup>90</sup> In other words, the First Nations province would be as much a constitutional partner as any other province. Third, this First Nations province would have jurisdiction to exercise its power within its territory and over all the people within that territory. That is to say, there would be “a *territorial* definition of an FNP [First Nations province] resident.”<sup>91</sup> Like any other province there would be a very straightforward application of jurisdiction over any person within the territory, Aboriginal or non-Aboriginal. Last, Courchene and Powell recognize a substantial financial commitment from the federal government is necessary “for it [the First Nations province] to be viable fiscally.”<sup>92</sup> While the authors spend considerable time detailing under which model of fiscal transfer—whether the existing equalization program or the Yukon Territorial Government<sup>93</sup>—fiscal viability might be secured, suffice it to say here, Courchene and Powell argue that the First Nations province would be treated similarly to other provinces in its ability to provide “reasonably comparable levels of public services at reasonably comparable levels of taxation.”<sup>94</sup>

Thus, they make an argument for what seems to be a thoroughgoing self-government for First Nations in Canada.<sup>95</sup> Indeed, the powers afforded to the proposed province would be equal to those of the existing provinces. It should be noted, however, that the concentration on the reserve of status Indian population is not only a more limited category than what Cairns proposes, but also would subject urban Aboriginal peoples (status and non-status) to the full authority of the province in which they live, which would not be the First Nations province. While Courchene and Powell do not discuss whether the differentiated rights of status Indians would be continued in the existing

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<sup>90</sup> Ibid., 7.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid. 51.

<sup>93</sup> Ibid., 37-46.

<sup>94</sup> This is the language of Section 36(2) of the *Constitution Act, 1982* which reads “Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”

<sup>95</sup> It should be pointed out explicitly here that Courchene and Powell are only looking at Indians, as defined under the *Indian Act*, who live on reserve. While Cairns uses the more inclusive category of Aboriginal, as do Ladner, Henderson, and Tully, the solution considered by Courchene and Powell for Aboriginal claims (specifically land and self-government) is directed to on-reserve status Indians.

provinces after the creation of the First Nations province, it would not be inconsistent to their argument to continue these rights.

More to the point, however, Courchene and Powell propose a system that seeks to represent First Nations within the existing provincial/federal system, as a largely undifferentiated province in the federation. I do not dismiss the considerable nods to self-government contained in this proposal; indeed, the authors acknowledge the role of Aboriginal consent required to establish the proposed system.<sup>96</sup> The major problem, however, is in the lack of reflection on sovereignty, which is central to a truly autonomy-based approach. Courchene and Powell assert that a federal system is “designed to accommodate the sharing of ‘sovereignty.’”<sup>97</sup> In the context of the current Canadian federal system, however, it is the sharing of Crown sovereignty with itself. The Crown of the province and of the federation, like a reducible fraction, resolves to the same personage of the Queen of the United Kingdom, Elizabeth II, and the same office of Queen. That is to say, properly speaking, it is the Crown-in-right of a province and the Crown-in-right-of-Canada—the same office, embodied by the same person, in Canada occupied by delegates—that is the font of sovereignty in Canada. It is a matter of convenient fact that these different offices are held *de jure* by the same person and subsumed under the superior office of Queen of the United Kingdom, held today by Elizabeth II. To fit a First Nations province into this Crown-based federation without problematizing or thoroughly discussing the basis of sovereignty within it fails to transcend the representational approach. In fact, one of the virtues of this approach, according to the authors, is the seat that the first minister of this First Nations province would have at the table of other provincial first ministers.<sup>98</sup> However, in the absence of being integrated into the federation as a province, Aboriginal peoples in Canada have achieved executive federalism-like representation through the lobbying of the Assembly of First Nations. That is to say, the National Chief of the Assembly of First Nations already has a conventional (*de facto*) seat at the table of first ministers.<sup>99</sup>

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<sup>96</sup> Courchene and Powell, *A First Nations Province*, 51.

<sup>97</sup> *Ibid.*, 5.

<sup>98</sup> *Ibid.*, 14. Since this work came out, a more regularized Council of the Federation has evolved and presumably the first minister of the First Nations province would represent there as well.

<sup>99</sup> While there is no statutory obligation to consult in recent decisions of the Supreme Court of Canada, the *Hiada* and *Taku River* decision of 2004 and the *Mikisew Cree* decision of 2005, there has been found to be

Moreover, this proposal of a First Nations province ignores the advocacy of Aboriginal peoples themselves to become thoroughgoing self-governing nations. Not only would this First Nations province subsume the difference of the 60 to 80 distinct Aboriginal nations into one structure of government within the existing Canadian federal structure, it would also sidestep the existing constitutional relationship between Aboriginal peoples and the Crown contained in the treaties and reinforced in Section 35 of the *Constitution Act, 1982* and further shielded by Section 25 of the *Charter of Rights and Freedoms*. Setting aside the impossibility of constitutional change in the wake of Meech Lake and Charlottetown, as this proposal would require the agreement of the federal government and seven provinces with fifty percent of the population, a First Nations province would short-cut the complex nation-to-nation relationship contained in the treaties and reinforced in the *Constitution Act, 1982* in favor of a streamlined integration into the existing federal structure.<sup>100</sup>

Thus, while initially Courchene and Powell's proposal seems to be an autonomy-motivated approach, since a First Nations province would provide substantial provincial powers to one governing body of all First Nations reserves, this proposal ultimately seeks to represent only First Nations within the existing federal structure. It would give this order of government substantial executive federalism-like representation within the federation, as well as constitutional influence over the central institution of Canadian democracy. It is a proposal that would "bring in" First Nations—and remember that this would include only status on-reserve First Nations people—rather than provide the thoroughgoing autonomy of Henderson, Ladner, and Tully's approach to self-government.

LaSelva's discussion of Aboriginal self-government arises from a strand of liberal minority-rights, and gives a theoretic underpinning for the "Aboriginal orthodox" view of self-government. That is, LaSelva is arguing from a modern-liberal perspective. "What

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a constitutional obligation to consult with Aboriginal people when Crown conduct might adversely impact Aboriginal or treaty rights. For more information on federal policy on consultation see Government of Canada, "Aboriginal Consultation and Accommodation: Updated Guide for Federal Officials to Fulfill the Duty of Consult," (March 2011) <http://www.ainc-inac.gc.ca/ai/arp/cnl/ca/intgui-eng.pdf> (accessed 5 Sept. 2011).

<sup>100</sup> Peter Russell has suggested that in the defeat of *Charlottetown* the mega-constitutionalism begun in the 1980s is over, and that opening up the constitution for a specific amendment would be the only workable change, however, keeping the constitutional agenda so limited would be difficult. (See Peter Russell, *Constitutional Odyssey*, 3rd edition, Toronto: University of Toronto Press, 2004, especially Chapter 2).

makes the right to self-government so important is that it prevents non-Aboriginals from interfering in the affairs of Aboriginal communities.”<sup>101</sup> Thus, self-government is premised on a mutual and reciprocal duty of non-interference, very much in the liberal vein of thought, and consistent with minority protection.

This modern-liberal perspective is the subtext of the discussion that LaSelva undertakes. For LaSelva “democracy is crucial because self-government dispels the legacy of paternalism and restores Aboriginal dignity.”<sup>102</sup> Thus, there is some link between self-government and democracy. LaSelva puts this more strongly: “For [Aboriginals], self-government is associated with democracy.”<sup>103</sup> This connection overdetermines Aboriginal self-government, as no necessary connection exists between self-government and democracy, for one can be self-governed non-democratically. However, for LaSelva “Canadian Aboriginals reject such [a non-democratic] understanding of self-government.”<sup>104</sup> Aboriginal self-government, then, is bound up in democracy, in a discourse that is intelligible to a modern-liberal perspective of individuality and autonomy. Here we can see why a type of self-government that represents Aboriginal orders of government within the Canadian structure of government, or virtually guarantees direct representation within the central institutions of Canadian democracy, is so natural to the orthodox view.

Furthermore, LaSelva sees that “Aboriginal self-government has as its goal Aboriginal emancipation.”<sup>105</sup> In the pursuit of emancipation, it first appears that Aboriginal peoples are pursuing de-colonisation. However, LaSelva points out that “[w]hat Aboriginals appear to want is not decolonisation as such, but equal *partnership* in a reconstituted Canada.”<sup>106</sup> That is, Aboriginal peoples are not seeking to throw off the yoke of colonial oppression, but, rather, to strike a better bargain within the colonial regime. It is an implicit submission to the sovereignty claims of the Crown; it does not threaten the current federal order in a meaningful way. Thus, self-government for

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<sup>101</sup> LaSelva, *The Moral Foundations of Canadian Federalism*, 139.

<sup>102</sup> *Ibid.*, 143.

<sup>103</sup> *Ibid.*, 144.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, 147.

<sup>106</sup> *Ibid.*, 151. emphasis added.

Aboriginal peoples seems to exist in a “freedom” to participate in and replicate the prevailing colonial democratic order.

Thus, the term “self-government” has quite different meanings for autonomy and orthodox approaches to self-government. The autonomy approach makes a claim for self-government-as-treaty-federalism that places sovereignty with Aboriginal nations, while the orthodox approach supports the current conception of sovereignty emanating from the Crown. The particular historical understanding of treaties that Henderson, Ladner, and Tully expound is the basis of the sovereignty claim made by them. In being sceptical of this historical perspective, or simply ignoring it, the approach of Cairns, Courchene and Powell, and LaSelva supports the sovereignty claim of the Crown and sees self-government as a didactic process that delegates authority from the Crown to Aboriginal nations. The fundamental difference here is the directionality of sovereignty, either from Aboriginal peoples to the Crown or from the Crown to Aboriginal peoples. Thus, while both use the term ‘self-government’ the content of the term is quite different in each approach. This significantly changes the level of autonomy from central institutions that each approach can expect. Moreover, this discussion helps us to further understand the problem of escaping latent colonialism in decolonial approaches, as these orthodox views fail to deal with the source of Aboriginal subjugation in the governmental context. That is to say, by failing to centrally interrogate Crown sovereignty, the orthodox view cannot hope to address the unilateral extension of Crown sovereignty over Aboriginal peoples, which lies at the heart of formal political colonisation.

### *Conclusion*

Decolonisation as I outline it is a reform-oriented approach to the removal of alien structures of power from Aboriginal peoples in Canada, as well as the degradation of a hierarchical taxonomy of humanity. Whereas decolonisation in former European colonies in Africa and South East Asia has involved the withdrawal of imperial power and forces, decolonisation in Canada cannot practically involve millions of people leaving this country, and the Canadian state (vested with the authority of the imperial Crown) ceasing to exist. Thus, finding a way to share the land with the first peoples of what has become Canada is of the utmost importance to overcoming the colonial constellation of power. In



the context of government relations, as I have argued above, the only approach that gives the very autonomy necessary for a thoroughgoing de-colonial approach is the treaty federalism or treaty constitutionalism argued for by Henderson, Ladner, and Tully. The representational mechanism and the “self-government” offered by the orthodox approach fail to adequately address the claims of Aboriginal peoples and ultimately reinforce a colonial constellation of power where the supremacy and sovereignty of the Crown go unquestioned. What is important is that self-government is conceived of as a nation-to-nation relationship, in which the sovereignty of neither the Crown nor any Aboriginal nation is unilaterally or fraudulently extended over the other party.

To be clear, however, this kind of self-government will not be a panacea for what ills persist in Aboriginal communities as a result of the IRS system and colonialism generally. Self-government by itself will not reverse the cultural representations of the “Indian” as other. But, self-government can be an important symbol and act of moral leadership on the part of the Crown in removing its alien power over Aboriginal nations and dealing equitably with these governments as legitimate nations. Having a space to deal with issues surrounding culture, language, and empowerment is an important aspect of self-government. A study conducted by Hallett, Chandler, and Lalonde reported that increased Aboriginal language knowledge in Aboriginal communities results in a decrease in youth suicide rates at the “band” or reserve level.<sup>107</sup> Moreover, Chandler and Lalonde find in another study that the more local control is had over aspects of self-government such as education and healthcare, the lower the youth suicide rate on reserve will be.<sup>108</sup> These are preliminary findings to be sure, and the generalizability from the British Columbia cases is unclear; however, they point to the social and cultural impact that autonomy *might* bring to Aboriginal communities.

Overall, Canadian decolonisation will require the autonomy-motivated approach to self-government represented by treaty federalism or treaty constitutionalism. It is only in this approach that specific legal claims of authority in Aboriginal structures of governance can be addressed and only by dealing with the issue of sovereignty, as this

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<sup>107</sup> Darcy Hallett, Micheal Chandler, and Christopher Lalonde, “Aboriginal Language Knowledge and Youth Suicide,” *Cognitive Development* vol. 22(2007), 392-399.

<sup>108</sup> Michael Chandler and Christopher Lalonde, “Cultural Continuity as a Hedge against Youth Suicide in Canada’s First Nations,” *Transcultural Psychiatry*, vol. 35, no. 2( June 1998), 192.

approach does, that the removal of alien power structures can be accomplished; at least at one level—that of government relations—the hierarchy of humanity explicit in the colonial project can be removed. While the representational approach and the orthodox approach seem sincerely motivated to address the claims of Aboriginal peoples, they ultimately fail to transcend the colonial paradigm that can see no authority equal to the Crown. Keeping this in mind as background for the discussion of reconciliation in Chapter Eight is important, as I have drawn the conceptual link above between decolonisation and reconciliation. In analysing toward what the Canadian TRC might be a transformation in Chapter Eight, again this distinction outlined here between approaches of representation and autonomy is important to understand as background to the possibility of change and what kind of change there might be. While lengthy it is important to delimit these two approaches, both of which are ostensible decolonial, exactly because the representational approach fails so utterly to transcend a colonial paradigm. Moreover, that well intentioned advocates unwittingly reinscribe colonialism into their decolonial approach should give us pause to consider the very construction of the Canadian TRC itself, as it originates from a negotiated settlement and is government funded.

## CHAPTER SIX

### Truth and Reconciliation Commissions: A Comparative Perspective

#### *Introduction*

It is out of this context of decolonisation that The Truth and Reconciliation Commission of Canada (Canadian TRC) emerged, where some approaches to dealing with Aboriginal peoples in Canada have failed to transcend the colonial paradigm of Crown sovereignty; have not significantly undermined a hierarchical taxonomy of humanity; and pose little or no risk to the constellation of colonial power which created the IRS system. Thus, we should consider these very issues when looking at the Truth and Reconciliation Commission of Canada, in its design and operation.

This chapter mainly concerns how we can see the prevailing constellation of power at work behind the construction of truth and reconciliation commissions, with the view of analysing the specific Canadian manifestation with which I am chiefly interested. Below, I compare the post-Apartheid South African Truth and Reconciliation Commission and the still-colonial Australian approach to interrogate where the dynamics of power may be seen in the construction of such temporary institutions as truth commissions, especially where that constellation remains colonial.<sup>1</sup> South Africa and Australia were selected here because both countries have a history of British colonisation and both have undertaken truth commissions to deal with mistreatment of indigenous peoples.<sup>2</sup> With South Africa being, arguably, the most successful truth commission comparison to it is instructive. With Australia sharing many features with Canada, including the Crown, federalism, a history of British colonisation, and a similar demographic split between native and newcomer, comparison to it will yield directly applicable insights to Canada. These two cases, I argue, represent two quite different conditions in the constellation of power at the time of their respective truth-seeking exercises as part of their efforts at decolonisation. In this way, the experience in these

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<sup>1</sup> While Australia's approach was not technically a truth commission it shares affinities with such a body and following Freeman and Stanton below can be categorized as such for my purposes here (see Mark Freeman, *Truth Commissions and Procedural Fairness* (New York: Cambridge University Press, 2006), 125-126, Kim Stanton, "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies" (PhD dissertation, University of Toronto, 2010), respectively).

<sup>2</sup> For a list of truth commissions to date please see Appendix IV.

cases can provide valuable analysis for, and insight into, the Truth and Reconciliation Commission of Canada. First, however, something needs to be said about what a truth commission is and where it comes from.

*From Restorative Justice to Truth Commissions*

Mechanisms of transitional justice such as truth commissions seem quite divorced, on their face, from justice as we colloquially understand it, in the familiar form of prosecution, court proceedings, and imprisonment. Indeed, the whole philosophy of justice that licenses truth commissions is of a different sort than the one we see at work in domestic courts and justice systems, and which is sometimes termed “retributive.” This retributive form of justice is about “the actual definition of harms awarded legal recognition and about the connection between punishment and desert.”<sup>3</sup> However, this formal process of justice leaves out certain harms that we know “do not have corresponding legal remedies.”<sup>4</sup> The retributive approach is often seen as the first best option for the punishment of crimes, and anything less than a court proceeding and imprisonment for offenders is seen as a dilution of justice.<sup>5</sup> The retributive form of justice, while it has a general background concern for victims, is not directed towards victims.<sup>6</sup> Rather, it is concerned with punishing offenders for transgressions. Moreover, only when seen through the lens of retribution—the desire to retaliate in response to wrongdoing, through which we express “our basic self-respect”<sup>7</sup>—is something other than criminal prosecution seen as second best. As Jennifer Llewellyn and Robert Howse

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<sup>3</sup> Nancy L. Rosenblum, “Justice and the Experience of Injustice,” in *Breaking Cycles of Hatred: Memory, Law, and Repair*, edited by Martha Minow (Princeton N.J.: Princeton University Press, 2002), 81.

<sup>4</sup> *Ibid.* Such harms as the degradation of relationships, or trust.

<sup>5</sup> At the intuitive level there is a desire to see crime punished, a desire that Michael Moore argues goes beyond utilitarian arguments to prevent repeat offense or deter others (Michael Moore, *Placing Blame: A Theory of Criminal Law* (New York: Oxford University Press, 1997), 99). That wrongdoers get “what they deserve” is an important emotional response and constitutes “a strategy designed to see (and let the victim see) that people get their just deserts” (Jeffrie Murphy, “Hated: a qualified defense,” in *Forgiveness and Mercy*, Jeffrie Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1998), 95).

<sup>6</sup> Rosenblum, “Justice and the Experience of Injustice,” 83.

<sup>7</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 10.

argue, when justice is seen through a restorative lens, mechanisms such as the truth commission become first best solutions.<sup>8</sup>

Distinct from familiar retributive approaches to domestic criminal prosecution, restorative justice “is about restoring both the victim and perpetrator of crimes back into harmony with the community.”<sup>9</sup> Rather than eschewing the victim in favour of concentrating on the perpetrator, as the retributive approach does, restorative justice seeks to address the unique needs of victims and perpetrators, to bring their relationship back to some form of equilibrium.<sup>10</sup> It provides for a living-together that retributive justice disrupts with imprisonment and a continuation of a cycle of violence through punishment. As Minow describes, this approach seeks a middle path between retribution and forgiveness that can foster healing, or strengthen human rights, or provide closure—and, indeed, may seek to do all of these.<sup>11</sup> The emphasis of restorative justice is “on reintegrative measures that build or rebuild social bonds, as opposed to measures such as imprisonment and the death penalty that isolate and alienate the perpetrator from society.”<sup>12</sup> The hallmark of restorative justice is the inclusion of both victim and perpetrators in a process “giving centre stage to both victims and perpetrators,” that seeks a dignity and empowerment of the formerly degraded and disempowered.<sup>13</sup> Minow supports this view of restorative justice, describing it as seeking “to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships, and in future behavior.”<sup>14</sup> While Minow may agree with the basic outline of restorative justice and the idea that truth commissions can afford many benefits to a society in addressing mass human right abuse,<sup>15</sup> she argues that there are still benefits inherent in prosecutions, in terms of closure, that may be afforded. That is to say, a truth commission “severed

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<sup>8</sup> Jennifer Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,” *University of Toronto Law Journal* vol. 49 (1999), 356. See also Priscilla Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), 88; and Minow *Between Vengeance and Forgiveness*.

<sup>9</sup> Joanna R. Quinn, “Transitional Justice,” in *Human Rights: Politics and Practice*, ed. Michael Goodhart (London: Oxford University Press, 2008), 368.

<sup>10</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 357.

<sup>11</sup> Minow, *Between Vengeance and Forgiveness*, 22-23.

<sup>12</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 357.

<sup>13</sup> Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver: UBC Press, 2010), 15.

<sup>14</sup> Minow, *Between Vengeance and Forgiveness and Forgiveness*, 91.

<sup>15</sup> *Ibid.*, 57.

from prosecutions, avoids vengeance and even retribution... [but] it fails to create the potential closure afforded by criminal trials that end in punishment.”<sup>16</sup> In fact one study has found that truth commissions have a negative impact on human rights when used alone, rather than when accompanied by trials and amnesties.<sup>17</sup> Olsen, Payne, Reiter, and Wiebelhaus-Brahm calculate the scores of three widely accepted human rights measures, measuring changes over time in these measures in countries that have experienced truth commissions, and conclude that “only two combinations of transitional justice mechanisms show statistically significant, positive effects on human rights: (1) trials and amnesties, and (2) trials, amnesties and truth commissions.”<sup>18</sup> To be clear the authors do conclude truth commission have a benefit when combined with trials and amnesties to “increase accountability by exposing systematic patterns of abuse” and “by providing a blueprint for reform.”<sup>19</sup> What is significant, however, is their finding that truth commissions alone do not have a positive impact on human rights.

Whatever the status of their efficacy, truth commissions are established in this restorative justice context as bodies to “look at widespread human rights violations that took place during a specified period of time, on a temporary basis.”<sup>20</sup> That is to say, truth commissions are non-permanent bodies that look at a specified period of rights violations defined according to their terms of reference. This contrasts with ordinary judicial proceedings, which seek to punish law-breakers and constitute a permanent apparatus of the state, whose ability over time to prosecute crimes is only bounded by statutes of limitation. This, however, does not separate truth commissions from other ad hoc state sponsored investigations such as commissions of inquiry or in the Canadian context royal commissions, which are often struck in developed democracies. In fact, Kim Stanton argues that truth commissions are a specialised form of public enquiry.<sup>21</sup> While sharing attributes with a commission of inquiry, a truth commission differs in its “symbolic quality that aligns with its explicit social function of public education about human rights

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<sup>16</sup> Ibid., 127.

<sup>17</sup> Tricia Olsen, Leigh Payne, Andrew Reiter, and Eric Wiebelhaus-Brahm, “When Truth Commissions Improve Human Rights,” *International Journal of Transitional Justice*, vol.4 (2010), 462.

<sup>18</sup> Ibid., 464.

<sup>19</sup> Minow, *Between Vengeance and Forgiveness and Forgiveness*, 475.

<sup>20</sup> Quinn, “Transitional Justice,” in *Human Rights: Politics and Practice*, edited by Michael Goodhart (London: Oxford University Press, 2008), 368-9. See also Priscilla Hayner, “Fifteen Truth Commissions--1974-1994: A Comparative Study,” in *Human Rights Quarterly*, vol.16, no.4 (1994), 604.

<sup>21</sup> Kim Stanton, “Truth Commissions and Public Inquires,” 7-8.

violations.”<sup>22</sup> Mark Freeman similarly sees truth commissions as a special case of commissions of inquiry, one that focuses on the victim, rather than being lawyer driven, and on *recent* human rights abuses.<sup>23</sup> In Canada it is this social function that makes the TRC a true truth commission for Stanton, but we can also see how the TRC fits Freeman's criteria, as it concentrates on interviewing survivors of the IRS system, which persisted until 1996.<sup>24</sup>

Perhaps the most famous truth commission was the one conducted in post-Apartheid South Africa starting in 1995. However, there have been many others around the world, beginning in Uganda in 1974.<sup>25</sup> Between 1974 and 1994, fifteen truth commissions were established, including eight in Africa, five in South America, one in Asia-Pacific, and one in Europe. In the space of a year and a half alone, from March 1992 until late in 1993, six truth commissions were established.<sup>26</sup> While 1992 to 1993 was an intense period of truth commission creation, there have been many new ones since. The International Centre for Transitional Justice reports approximately forty official truth commissions in total “as of early 2011.”<sup>27</sup> These truth commissions have been established in places dealing with atrocities (or mass human rights violations) and often are seen in transitions from an authoritarian form of governance to a democratic one. It is in this sense that in addition to being licensed by a restorative approach to justice, truth commissions are instances of an emerging field of study called “transitional justice.”<sup>28</sup>

Starting with the work of Neil Kritz, in his three volume work *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*,<sup>29</sup> there has been an explicit

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<sup>22</sup> Ibid., 22.

<sup>23</sup> In seeking to refine Hayner's definition of a truth commission Freeman offer a number of additional criteria, with these two being most helpful in distinguishing TRCs from commissions of inquiry more broadly (Freeman, *Truth Commissions and Procedural Fairness*, 125-126).

<sup>24</sup> Stanton, “Truth Commissions and Public Inquires,” 126.

<sup>25</sup> Hayner, “Fifteen Truth Commissions,” 611.

<sup>26</sup> Alexander Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (New York: Oxford University Press, 1997), 2.

<sup>27</sup> International Centre for Transitional Justice, “Truth and Memory,” <http://ictj.org/our-work/transitional-justice-issues/truth-and-memory> (accessed 26 Oct. 2011).

<sup>28</sup> There is quite a debate surround what qualifies as transitional justice and where the field is headed. See Joanna R. Quinn, “Whither the ‘Transition’ of Transitional Justice?” a paper prepared for presentation at the Annual Meeting of the Canadian Political Science Association, 16 May 2011, Waterloo, Canada.

<sup>29</sup> This analysis fits into one of a number of competing narratives about transitional justice. For another view on these narratives see: Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* vol. 31 no.2 (2009), 321-367; Jon Elster, *Closing*

link between mechanisms of restorative justice, such as the truth commission, and a transition from an authoritarian regime type to a democratic one.<sup>30</sup> It is the truth commission, or any of a number of similar retrospective processes such as commissions of inquiry, that seeks to understand and redress past crimes along with “a wider process of fundamental, forward-looking institutional reform to promote present and future accountability... that they can become a key to democratic consolidation.”<sup>31</sup> Thus, the mechanism of accountability for past wrongdoing is bound up in the post-Cold War wave of democratization, and the mechanisms themselves—perhaps chief amongst them, the truth commission—are born, as it were, as a twin to infant democracy. This twin birth is important as it bespeaks a view that human rights violations do not occur in democracies—something discussed in more detail below—exactly because “consolidated democracies include the capacity to call the powerful to account.”<sup>32</sup> This ability to “call the powerful to account” certainly was not the case in Canada during the IRS system’s operation.

Where truth commissions have been established, most often they have been the result of an act from the legislative or executive branch of government.<sup>33</sup> Priscilla Hayner characterizes truth commissions as always possessing the following four primary elements: First, truth commissions are backward looking. That is, their focus is “on the past.”<sup>34</sup> Second, truth commissions do not focus on a specific event, but rather look at a broader picture of human rights abuses.<sup>35</sup> Third, truth commissions conduct their work within a specified period of time; that is, they are non-permanent bodies, which disband with the completion of their work.<sup>36</sup> Fourth, Hayner argues that truth commissions are always vested with certain powers by their sponsor that allows them to conduct their work with great access to information and the ability to deal with sensitive issues.<sup>37</sup> These

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*the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004); and Ruti Teitel, *Transitional Justice* (Toronto: Oxford University Press, 2000).

<sup>30</sup> Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (Washington, D.C.: United States Institute of Peace Press, 1995).

<sup>31</sup> de Brito, *Human Rights and Democratization in Latin America*, 7. See also Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), 11.

<sup>32</sup> *Ibid.*, 214.

<sup>33</sup> Hayner, “Fifteen Truth Commissions,” 600; Martha Minow, *Between Vengeance and Forgiveness*, 53-4.

<sup>34</sup> Hayner, “Fifteen Truth Commissions,” 604.

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

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*



four characteristics differentiate the functioning of a truth commission from the ordinary operation of the judiciary that exists on a permanent basis to provide law and order by punishing individual breaches of law in many societies. Moreover, the first characteristic—being backward looking—differentiates truth commissions from human rights commissions that might be needed on a permanent basis to uphold standards of human rights within states. Truth commissions are backward-looking and “generally do not investigate current human rights conditions.”<sup>38</sup> Freeman builds on Hayner’s definition and nicely encapsulates a definition of TRCs in a couple of sentences:

A truth commission is an ad hoc, autonomous, and victim-centred commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their future redress and future prevention.<sup>39</sup>

Thus, truth commissions do not fill the need for either a permanent judiciary or a permanent human rights commission, and differ in their location within the restorative justice paradigm.

In addition to these more technical aspects of truth commissions, they share other basic objectives, one of the more straightforward of which is “sanctioned fact-finding: to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.”<sup>40</sup> While it is not always the case that events of past wrongdoing are unknown, truth commissions can have an important function of publicizing these facts, or, as Hayner puts it, they seek to “lift the veil of denial about widely known but unspoken truths.”<sup>41</sup> Truth commissions can also help to build a comprehensive record of systematic abuses and human rights violations. Indeed, this is their “social function” mentioned by Stanton above. Overall, truth commissions are meant to establish an accepted and publicly acknowledged past, and to enable the society to move forward to establish a new way of living that respects human rights. That is to say that truth commissions have as a goal the creation of an

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<sup>38</sup> *Ibid.*, 611.

<sup>39</sup> Freeman, *Truth Commissions and Procedural Fairness*, 18.

<sup>40</sup> Hayner, *Unspeakable Truths*, 24-25.

<sup>41</sup> *Ibid.*, 25.

intersubjectively agreeable truth narrative, which can be legitimately held or believed among and between various groups within the society. This narrative, as has been noted by Borer, is not a singular one, but we can “profitabl[y] think of various truths.”<sup>42</sup> For example, the South African truth commission was guided by four concepts of truth: factual/forensic, personal/narrative, social, and healing/restorative truth.<sup>43</sup> However, Wilson argues that these four categories can be collapsed into two “paradigms of truth,” those of forensic and narrative truth.<sup>44</sup> I think that we should look at these various truths as conceptual levels at which any commission might attempt to establish an intersubjective agreement on the “truth” of the past. It is in this way that truth commissions have as their goal the establishment of an unquestionable and publicly acknowledged past. While this has most often been the case in societies transitioning to democratic forms of rule, two prominent examples of truth commissions have occurred in democratic polities: Australia and Canada.

In seeking to establish a truth about past events, factually and narratively, truth commissions are open to the machinations of politics, no matter where they are created. They involve some of the most political aspects of human interaction: power, influence, and money. Some believe that truth commissions are first best solutions to human rights violations.<sup>45</sup> This, however, does not imply that a truth commission is something like perfect justice, as “even in the ideal or most favorable of circumstances, the uncompromising nature of truth and justice are compromised.”<sup>46</sup> The shape of truth and justice that is created to redress past crimes is inextricably linked to the (im)balance of power in the society concerned. For example, in Uruguay and Chile de Brito found that the truth and justice produced there after mass human right violations was “intricately

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<sup>42</sup> Tristan Anne Borer, “Truth Telling as a Peace Building Activity: A Theoretical Overview,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, edited by Tristan Anne Borer (Notre Dame, Indiana: University of Notre Dame Press, 2006), 21.

<sup>43</sup> Ibid. This fact is noted by the South African TRC itself in the *Truth and Reconciliation Commission of South Africa Report* (1999), 227-9.

<sup>44</sup> Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge; New York: Cambridge University Press, 2001), 36-7.

<sup>45</sup> See Jennifer Llewellyn and Robert Howse, “Institutions for Restorative Justice,” 356. Also Hayner *Unspeakable Truth*, 88; and Minow, *Between Vengeance and Forgiveness*.

<sup>46</sup> de Brito, *Human Rights*, 5.

tioned up with and shaped by the legacy of repressive rule, the dynamics of the politics of transition and the balance of power under the new democratic governments.”<sup>47</sup>

To more carefully understand the dynamics and (im)balance of power in the construction of truth processes, a brief study of the experiences of South Africa and Australia is provided below. With this discussion we can better understand the case of the Truth and Reconciliation Commission of Canada.

### *South Africa*

Although by no means the first truth commission that was created, the South African Truth and Reconciliation Commission (TRC) has become the most famous instance of such a mechanism. The South African TRC was established to create a record of the crimes committed under the Apartheid regime of South Africa.<sup>48</sup> Adopted by the National Party government of South Africa in 1948, Apartheid was a system of racially differentiated citizenship, which lasted until 1993. Apartheid, the Afrikaans word for “separateness”, established a legal hierarchy of “races,” wherein white South Africans sat at the pinnacle of economic, political, and social power. By far the demographic minority in South Africa, the white regime employed extra-legal (even under its own racist laws), violent and repressive tactics to enforce the separation between blacks and whites, and produced a tyranny of the minority. Racist laws enacted in 1958 stripped black South Africans of their citizenship and concentrated them in specially created self-governing “homelands” called “bantustans.” Apartheid, however, was not a unique occurrence in South African history, nor a break from the past. Rather it was the most institutionalized point of a 350-year exclusion of the black majority from political and economic life.<sup>49</sup>

Internal resistance and international pressure mounted against the South African government throughout the latter half of the twentieth century, to which the state response was an escalation of violence and repression. Internal violence and international

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<sup>47</sup> Ibid., 213.

<sup>48</sup> South Africa, *Promotion of National Unity and Reconciliation Act 34 of 1995*, Sec. 3 (1)(a). There are three other main objectives of the Act contained in Sec. 3:(b) facilitating amnesty; (c) making known the fate or whereabouts of victims; (d) and compiling a comprehensive report of the finds. For the full text of this section see Appendix II.

<sup>49</sup> Johnny de Lange, “The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission,” in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, edited by Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 16.

pressure, including embargoes, led to reforms of the Apartheid system in the 1980s. These adjustments, however, could not save Apartheid, and in 1990, President F.W. de Klerk was forced to negotiate its end.<sup>50</sup> This led to multi-party, multi-racial elections in 1994, which resulted in a victory for the African National Congress and the election of Nelson Mandela as President of post-Apartheid South Africa.<sup>51</sup>

While 1994 signalled an important break from Apartheid, South Africa remained (indeed, remains, at the time of writing) a society with deep racial cleavages. In an attempt to provide the basis for healing in South Africa, the Truth and Reconciliation Commission was created in 1995 under the terms of the *Promotion of National Unity and Reconciliation Act*.<sup>52</sup> The South African TRC represents an instance of a broader transition in South African society to a more equitable and inclusive community, one based on justice.<sup>53</sup> While Apartheid itself represents a sort of crime against most liberal and democratic principles,<sup>54</sup> the TRC was only tasked with investigating crimes in the context of Apartheid committed by the regime. That is to say, the TRC's focus was on the extra-judicial/extra-legal activities committed by officials outside the law of the Apartheid regime itself. Despite the fact that most resisters of Apartheid did not recognize the "legal order" of Apartheid as legitimate, this compromise was necessary for reconciliation to get underway.<sup>55</sup> De Lange argues that this compromise was necessary to bring Apartheid officials to the table.<sup>56</sup> Even in this context, the TRC had many crimes to set on the public record, as extra-judicial action under Apartheid law was common. It is, however, clear that such a compromise could be viewed negatively by those who suffered from abuse and discrimination, legally sanctioned under Apartheid and implicitly recognized in the legitimacy of the racist order of Apartheid.

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<sup>50</sup> Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and Birth of the New South Africa* (New York: W.W. Norton & Co., 1997), 161.

<sup>51</sup> Waldmeir argues that this first free election was "the equivalent of a racial census—South Africans voted by race, almost to a man" (Ibid., 262).

<sup>52</sup> de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," 16. For a detailed description of the lead up to the TRC see Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 2000), especially Chapter One.

<sup>53</sup> de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," 17.

<sup>54</sup> Since 1998 Apartheid itself has been a crime under international law, included as such in the *Rome Statute of the International Criminal Court*.

<sup>55</sup> de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," 19-20.

<sup>56</sup> Ibid.

Similarly objectionable was the compromise over job security for the five years following the beginning of the TRC process that was given to civil servants (including security forces), and which was needed to establish the TRC process.<sup>57</sup> In fact, the very people who operated the key apparatus of Apartheid, by law, retained their positions for a period of five years. De Lange argues, however, this was necessary to get elements of white South Africa to the reconciliation table.<sup>58</sup>

The South African TRC was possible because of an historic transition in power from the Apartheid regime to an inclusive democratic government that was taking place. This process was fragile in its infancy, as it took significant, albeit unjustly acquired, political power away from white South Africans, as well as threatened the unjust domination of the economy by white citizens. Whether white South Africans could legitimately claim the accrued benefits of Apartheid is entirely beside the point. Rather, any increase in the diffusion of economic, social, and political power to include non-white South Africans necessarily implied a reduction in power and a threat to the interests of white South Africans. There was a real fear that the old regime, in the police and military especially, would refuse the negotiated settlement that brought about the TRC.<sup>59</sup> Thus, to avoid further alienation of the right-wing core of Apartheid, and rather than risk an outright revolt by the white security forces, the above limitation on the scope of crimes and job security for white-elite officials were necessary.<sup>60</sup>

Within this context, the TRC was tasked with addressing the legacy of Apartheid South Africa by promoting national unity and reconciliation to help the nation to heal.<sup>61</sup> To accomplish this, the TRC set out to undertake four main tasks. First, the TRC needed to construct as complete an account as possible of the violations committed under Apartheid between 1 March 1960 and 10 May 1994, dates established by the terms of reference. Second, people who were reluctant to disclose crimes they may have committed were granted amnesty from those crimes in exchange for testimony. Third, the

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<sup>57</sup> Ibid., 22.

<sup>58</sup> Ibid. This decision, however, was controversial (See James L. Gibson and Amanda Gouws, "Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid," *American Political Science Review*, vol. 93, no. 3 (Sept. 1999), 502.)

<sup>59</sup> Kader Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective," *Modern Law Review* vol.63, no.1 (2000), 11.

<sup>60</sup> Ibid.

<sup>61</sup> de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," 22.

TRC was meant to restore dignity to victims and survivors of these crimes by locating them, giving them an opportunity to relate their story, and recommending reparations for them. Last, the TRC had to issue a report at the end of the five-year period that detailed the abuses and crimes, and recommended measures to prevent future abuses.<sup>62</sup>

The South African TRC is part of a genealogy of truth commissions that began in Uganda in 1974 with the Commission of Inquiry into Disappearances of People in Uganda Since the 25th of January 1971.<sup>63</sup> While it shared affinities with the truth commissions that preceded it, the South African TRC was quite different from its predecessors.<sup>64</sup> Hayner argues that the South African TRC differed in the powers granted to the commission, in particular the power to grant amnesty; the quality of the public hearings; and the emphasis on reconciliation as its main focus.<sup>65</sup> While most Latin American TRCs granted amnesties, it was the South African TRC's ability to grant individual amnesties that set it apart.

The power that was afforded to the TRC in South Africa to grant specific amnesty in exchange for testimony was a significant tool to secure the truth and construct a public record of it; in fact, it has been characterized as the most important innovation of the South African TRC.<sup>66</sup> Unlike previous truth commissions in Latin America that had granted blanket amnesty, there was a *quid pro quo* in the South African case, where amnesty was granted individually in exchange for testimony and admissions of guilt. For the first time, a truth commission heard and recorded testimony from a large number of perpetrators regarding the crimes they committed.<sup>67</sup> As well, the South African TRC heard the public testimony of over 1,800 victims, conducted over 21,000 victim interviews outside the public hearings, and processed approximately 7,000 amnesty

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<sup>62</sup> This list of tasks is detailed in *Ibid.*, 22-3

<sup>63</sup> Hayner, "Fifteen Truth Commissions," 611.

<sup>64</sup> Priscilla Hayner, "Same species, different animal: how South Africa compares to other truth commission world wide," in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, edited by Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 32-41.

<sup>65</sup> *Ibid.*, 36.

<sup>66</sup> Jennifer Llewellyn, "Restorative Justice in Transitions and Beyond: The Justice Potential of Truth-Telling Mechanisms for Post-Peace Accord Societies," in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, edited by Tristan Anne Borer (Notre Dame, Indiana: University of Notre Dame Press, 2006), 98.

<sup>67</sup> Hayner "Same Species, Different Animal," 36.

requests.<sup>68</sup> This unprecedented source of information allowed the TRC to thoroughly build a historical record rich with detail. Moreover, its powers of subpoena and witness protection allowed the commission to call uncooperative witnesses and protect fearful ones.<sup>69</sup> The special powers that the South African TRC possessed allowed it to access the truth in a way that other TRCs could not.

The public nature and the widely publicized South African TRC was a significant departure from other TRCs, the proceedings were carried live on television and radio and involving so many witnesses. The Uganda commission of 1986, for example, held public hearings, some of which were broadcast live on state television, and attracted a wide following,<sup>70</sup> but the number of witnesses that came before the South African TRC differentiated it from other commissions.<sup>71</sup> No other truth commission saw so many people testify in public proceedings, often carried live on radio and television.<sup>72</sup> This can be related to the powers of amnesty and protection, as these created a safe environment in which perpetrators *and* victims could share their stories.<sup>73</sup>

The crafting of the terms of reference for the South African TRC was a collaborative and deliberative process that took over a year and involved many debates in the legislature of South Africa, as well as consultation with many non-governmental organizations and civil society groups.<sup>74</sup> In fact, nominations for commissioners were taken from NGOs, churches, and political parties.<sup>75</sup> This consultative approach dovetails with the TRC's major emphasis on reconciliation. Even before the TRC was established there were high hopes for a mechanism that would provide a transition to a new South Africa, one premised on acknowledging the truth of the past, which it was felt needed to

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<sup>68</sup> Audrey Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly*, vol. 23, no. 1 (2001), 8.

<sup>69</sup> Hayner, "Same Species, Different Animal," 37.

<sup>70</sup> Hayner "Fifteen Truth Commissions," 619. As Hayner points out in this article Uganda is the only case in which there have been two commissions in a country in the recent past. For a discussion on the limited impact of the 1986 Commission of Inquiry into Violations of Human Rights in Uganda see Joanna R. Quinn, "Constraints: The Un-Doing of the Ugandan Truth Commission," *Human Rights Quarterly*, vol. 26 (2004) 401-427.

<sup>71</sup> Hayner, "Same Species, Different Animal," 37.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, 38

<sup>75</sup> Antjie Krog, *Country of My Skull* (London: Vintage, 1999), 23.

be undone.<sup>76</sup> The emphasis on reconciliation in the TRC was made to restore “a fractured nation and heal the wounds of its troubled soul.”<sup>77</sup> As Asmal, Asmal, and Roberts argue, reconciliation based on an acknowledgment of the crimes of the past could “trigger real catharsis, a word which, in its original Greek meaning, contains the idea of purification and spiritual renewal.”<sup>78</sup> Moreover, it is the process of reconciliation alone that offers the possibility of charting a new course and “so upset any possibility of smooth sailing on a previously immoral course.”<sup>79</sup>

The South African TRC, then, represents a concerted and famous example of one society’s attempt to deal with a history of colonialism and mass human rights abuses. However, as de Lange points out, the TRC itself was only one such mechanism put in place to deal with past abuses. He further argues that TRCs are not objects, but processes.<sup>80</sup> That is to say, a TRC *can help* to create an environment that can facilitate meaningful reconciliation and justice, but is not reconciliation or justice itself, *per se*.<sup>81</sup> The TRC here is something like a symbolic site in a landscape of processes that work toward the goal of creating a just society. In South Africa the TRC’s value lies in what Asmal calls “the impact on social consensus.”<sup>82</sup>

Apartheid had placed white South Africans at the pinnacle of social, economic and political power. Yet addressing the crimes and excesses of political power alone—the human rights abuses and extra-legal activity of the state—cannot facilitate the type of new discourse for which Asmal et al. had hoped. Rather, scholars almost uniformly agree that the TRC must be seen within a much broader context, along with a package of initiatives, such as the multi-party and multi-racial elections that brought Nelson Mandela and the African National Congress to power in 1994. This sea change in political power and the opportunity to establish the South African TRC is part of a broader process of redressing historic injustice in South Africa. The TRC itself recognized the holistic approach that a new “just” South Africa required, proposing redistributive taxation

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<sup>76</sup>Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid’s Criminal Governance* Second Edition (Cape Town: David Philip Publishers, 1997), 47.

<sup>77</sup> Hayner, “Same Species, Different Animal” 40.

<sup>78</sup> Asmal, Asmal, and Roberts, *Reconciliation Through Truth*, 48.

<sup>79</sup> *Ibid.*

<sup>80</sup> de Lange, “The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission,” 30.

<sup>81</sup> *Ibid.*

<sup>82</sup> Asmal, “Truth, Reconciliation, and Justice,” 16.



policies to correct the concentration of economic power in the hands of white business elites.<sup>83</sup>

The answer to such a pernicious and society-wide set of injustices must be articulated at a number of levels and at different sites. As Asmal points out: “It is less important to me, personally and as a Minister of State, to see P.W. Botha behind bars than to see his ideological followers stalled in their quest to perpetuate his socio-economic legacies.”<sup>84</sup> Thus, the truth commission offered not a mechanism of punishment, but, rather, the opening of the conversation in which the fallacies and pseudoscience of Apartheid could be dealt with and a new social agreement made. The TRC was a part of “generative conversation” that could “result in new horizons of thought and action,”<sup>85</sup> one ultimately begun by the change in power over the state in 1994. I take this change in the constellation of power, from the colonial Apartheid structure to a more democratic one, to be key for the generative conversation to which the TRC contributed. As discussed in detail later in this chapter, whether a colonial power arrangement remains in place importantly impacts the construction of reconciliatory mechanisms such as TRCs and foreshadows the likelihood of their success.

### *Australia*

If South Africa is one of the most famous examples of a truth and reconciliation commission, then Australia’s approach through the inquiry by the Human Rights and Equal Opportunity Commission—known as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families—is among the least well known. It was an inquiry commissioned to look into the actions of the British and Commonwealth governments in the case of the “stolen generations.”<sup>86</sup> While technically

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<sup>83</sup> Sampie Terreblanche, “Dealing with systematic economic injustice,” in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, eds. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 276.

<sup>84</sup> Asmal, “Truth, Reconciliation, and Justice,” 16. Botha was both Prime Minister of South Africa and later State President of South Africa under the National Party. He famously refused to testify at the TRC and was fined.

<sup>85</sup> Charles Villa-Vicencio, *Walk with us and Listen: Political Reconciliation in Africa* (Washington D.C.: George Georgetown University Press, 2009), 111.

<sup>86</sup> Kim argues that commissions of inquiry fulfill the function of a truth commission. See Kim Stanton, “Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry,” *Canadian Journal of Law and Society* vol. 27, no. 1 (2012), 87.

a commission of inquiry the National Inquiry was, in essence, a truth commission for the reasons outlined by Stanton and Freeman.

Unlike the South African TRC, the truth function of the National Inquiry and the reconciliation process embodied by the Council for Aboriginal Reconciliation (CAR) were separated in Australia. Unique to Australia, the formal reconciliation process predates the truth-finding process. The CAR was established in 1991 to “undertake initiatives for the purpose of promoting reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community...”<sup>87</sup> Moreover, the CAR was mandated to educate the public on the history of relations between the dominant society and Aborigine and Torres Strait Islander communities and provide a forum for issues related to reconciliation to be discussed.<sup>88</sup> The Report of the Aboriginal and Torres Strait Islander Children Inquiry was a significant truth-establishing event within the formal reconciliation approach, but it was not issued until 1997, several years after the establishment of the CAR.<sup>89</sup>

### *Reconciliation*

In 1991 the Parliament of Australia established the Council for Aboriginal Reconciliation to issue a report by 2001. As the final report of the CAR notes, it had become “most desirable that there should be such a reconciliation [between Aboriginal and Torres Strait Islanders and Australia]” by 2001.<sup>90</sup> The desire was present because of the “unfinished business that the Aboriginal affairs policy represented.”<sup>91</sup> As with every other colonial venture undertaken by the great European powers in the Age of Exploration, the colonial development of Australia brought settlers into direct contact with pre-existing communities. Unlike British colonisation in other parts of the world, the settlement of Aboriginal lands in Australia was made possible by legal fiat known as

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<sup>87</sup> Australian, *Council for Aboriginal Reconciliation Act 1991* Section 6 (1)(a).

<sup>88</sup> Australia, *Council for Aboriginal Reconciliation Act 1991* Section 6 (1)(b) and (d), respectively. For the full list of the functions of the CAR see Appendix III.

<sup>89</sup> Commonwealth of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from Their Families*, (1997) “Terms of Reference.”

<sup>90</sup> Council for Aboriginal Reconciliation, *Reconciliation: Australia’s Challenge*, Chapter One found at <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text01.htm> (accessed 12 Jan. 2013).

<sup>91</sup> Michelle Gratton, “Introduction” in *Essays on Australian Reconciliation*, edited by Michelle Gratton (Melbourne: Black Inc, 2000), 3.

*terra nullius*.<sup>92</sup> This meant that the British literally and legally considered Australia to be empty land, and allowed settlement to occur without regard to the First Peoples found there. While Captain Cook, the first British explorer to reach the Australian continent, had a favourable view of the native population and suggested that the Crown negotiate with them as they had done with indigenous peoples elsewhere, it was the botanist Joseph Banks who fostered the view of the land as being effectively vacant.<sup>93</sup> Banks' view won out, and by the time the first convict settlement was established in 1788, the governor of the new colony was given instructions only to establish friendly relations with the people encountered there, and not to negotiate with them on any terms of settlement.<sup>94</sup>

This contrasts with the settlement of Canada by the British, where lands were opened up to settlement only by agreement of Aboriginal peoples through treaties and the purchase of land from them by the Crown alone.<sup>95</sup> This is not to suggest that there were no problems with the settlement of British North America, as many treaty obligations were derogated almost as soon as they were signed, especially in the numbered treaties of the Canadian West.<sup>96</sup> However, the legal notion of *terra nullius* meant that the Aboriginal peoples of Australia were effectively afforded status only as “non-persons.”<sup>97</sup> They were not only excluded from the constitutional construction of the Australian Federation in 1901, but I argue, were also formally and normatively excluded from the society, polity, and economy of the Federation, much in the same way colonisation operated in Canada, albeit on firmer legal footing to support this exclusion.

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<sup>92</sup> Bruce Buchan and Mary Heath, “Savagery and Civilization: From Terra Nullius to the ‘Tide of History,’” *Ethnicities* vol.6 no.1 (2006), 6.

<sup>93</sup> Peter H. Russell, *Recognizing Aboriginal title: the Mabo case and indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005), 69-70.

<sup>94</sup> *Ibid.*, 70.

<sup>95</sup> This method of land acquisition and Aboriginal negotiation is provided for in United Kingdom *Royal Proclamation* (1763) and forms the basis of arguments for recognition by the Crown of preexisting Aboriginal nations in Canada.

<sup>96</sup> In the case of Treaty One the Lieutenant-Governor of Manitoba essentially duped the Aboriginal signatories into believing that the treaty would only make room for agricultural settlement, whereas the text of the treaty demanded the surrender of considerable hunting lands to the Crown in perpetuity. Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence: A History of the Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000), 67. Moreover, the *Indian Act* significantly transformed Indian governance at the same time treaties respecting the independence and traditions of the plains peoples were being negotiated.

<sup>97</sup> By implication, to consider a territory inhabited by human beings to be empty land or land without ownership, in face of the fact of its possession and inhabitants, is to consider the people found there to be less than fully human, less than equal to those who declare *terra nullius*.

Aboriginal land rights were denied under the rubric of *terra nullius* and something like indigenous land rights were only restored by the High Court of Australia in the landmark 1992 Mabo case.<sup>98</sup> For the entirety of post-contact history in Australia, Aboriginal peoples faced systemic disadvantage and exclusion from the whole of Australian society. The terms of reference for the CAR, therefore, expressly set as an objective the goal of “ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.”<sup>99</sup>

Perhaps the clearest example of exclusion and secondary status of the Aboriginal peoples of Australia is what has been called the “stolen generations.” This refers to the rounding up of mixed-race children in the Northern Territory of Australia, which began in 1911 and lasted well into the 1960s. These children were separated from “full blooded” Aborigines and put in institutionalized settings.<sup>100</sup> Ostensibly for their own protection, these “half-caste” children were removed from their families and homes to “rescue” them from “the prospect of a worthless and degraded life among the blacks.”<sup>101</sup> It was the view of the time that full-blooded Aboriginal people in Australia were “a dying race, doomed in the fullness of time to extinction.”<sup>102</sup> Moreover, it was not until the 1950s that the welfare of the child was considered, beyond the simple goal of improvement through removal from his or her indigenous culture and family.<sup>103</sup> That is to say, until the 1950s, regardless of whether stable and loving home environments existed, all mixed race children were removed from Aboriginal homes, so as to save them from this extinction. As Robert Manne argues, this half-century of colonial abuse of children was motivated

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<sup>98</sup> This case revolved around the land rights of Meriam people of Murray Island in the Torres Strait. The case was brought as a test case to discover the extent of Aboriginal title to land. The plaintiff argued for ownership based on long possession (consistent with English common law), while the State of Queensland argued that through annexation the Crown acquired absolute beneficial ownership (in essence relying on the doctrine of *terra nullius*). In 1992, the High Court of Australia ruled against the State of Queensland and upheld the common law principle of title through long use and possession, rejecting *terra nullius*. The judges further held that Crown title was based on the extinguishment of Aboriginal title by legal means. See Peter H. Russell, *Recognizing Aboriginal title: the Mabo case and Indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005), especially Part 4.

<sup>99</sup> Australia, *Council for Aboriginal Reconciliation Act 1991*, Section 5.

<sup>100</sup> Robert Manne, “The Stolen Generations,” in *Essays on Australian Reconciliation* ed. Michelle Gratton (Melbourne: Black Inc, 2000), 131-2.

<sup>101</sup> *Ibid.*, 131.

<sup>102</sup> Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot, U.K.: Ashgate Publishing Ltd., 2008), 88.

<sup>103</sup> Manne, “The Stolen Generations,” 137.

by good (albeit racist) intentions on the part of the “removalists.”<sup>104</sup> This fact, however, neither saved the children who were removed from their families over the 50 years the program was in existence from the squalid conditions in the institution to which they were removed, nor did it save the children removed in the latter years from the institutionally inflicted physical and sexual abuse, and moral humiliation they suffered.<sup>105</sup> This practice that resulted in the “stolen generations” exemplifies the deeply held racism in Australia that Manne argues is most clearly expressed in the inability of the dominant society to understand the suffering inflicted on parents and children by this policy.<sup>106</sup> This policy, however, must be read as part of a history of dehumanization of Aboriginal Australians, the legal-philosophical genesis of which can be traced to the declaration of *terra nullius*. In fact Peter Read places the blame for the Stolen Generations squarely at the feet of “every generation of Australians, including the current generation, for the last 210 years.”<sup>107</sup>

Against this backdrop of exclusion from the Australian society, there was a desire on the part of the government of Australia to create reconciliation with Aboriginal Australians before the centenary of the Federation in 2001. The enabling legislation of the CAR passed by the House of Representatives on 31 May 1991 allowed the CAR to operate until 1 January 2001.<sup>108</sup> This expansive, nearly ten year period allowed the CAR ample time to undertake the activities mandated by the *Council for Aboriginal Reconciliation Act 1991*. The objective of the CAR, as established in the Act, was to “promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements.”<sup>109</sup> To foster this process of reconciliation the CAR was empowered: “(a) to invite submissions; (b) to hold inquiries; (c) to organise conferences; (d) to undertake research and statistical surveys; (e)

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid., 138. See also Peter Read, *A Rape of the Soul So Profound: The Return of the Stolen Generations* (St Leonard’s, Australia: Allen & Unwin, 1999), especially Chapter 3.

<sup>106</sup> Ibid.

<sup>107</sup> Read, *A Rape of the Soul So Profound*, ix.

<sup>108</sup> Australia, *Council for Aboriginal Reconciliation Act 1991* Section 2 established the conditions for commencing activities and Section 32 for cessation.

<sup>109</sup> Australia, *Council for Aboriginal Reconciliation Act 1991*, Section 5.

to organise public education activities.”<sup>110</sup> That is to say, in contrast to the South African TRC, the Australian Council had very limited powers to undertake its mandate to promote a process of reconciliation, limited to “encouraging the formation of locally based groups committed to shaping better relationships with Indigenous peoples.”<sup>111</sup>

Moreover, bipartisan support for the bill that created the CAR was secured by “stepping gingerly around the question of a treaty.”<sup>112</sup> Under the terms of *terra nullius* no treaty was ever concluded between Australia’s Indigenous people and the Crown, making this a central issue in Crown-Indigenous relations. As Ravi de Costa argues, CAR and the National Inquiry ensured that “reconciliation became delinked from legitimate Indigenous expectations for recognition and protection of rights and provision of social justice.”<sup>113</sup> Like Canada, it was ultimately another facet of the Crown, the judiciary, which started the earnest discussion of Aboriginal title with the High Court’s *Mabo* cases.

While the CAR was generally limited in its powers, it had some success in raising awareness of the issues of systemic disadvantage and, in particular, of the Stolen Generations. In 1992, along with the Labour government then led by Paul Keating, the CAR championed the *Mabo* decision “as a new history, believing that it set the record straight and provided a new foundation for the Australian nation.”<sup>114</sup> Late in 1992 Prime Minister Keating made a now famous speech at Redfern wherein he acknowledged that mistreatment of Indigenous Australians and came very close to offering an apology (the official apology was finally offered in 2008 by another Labour prime minister, Kevin Rudd).<sup>115</sup> In the speech Keating stated that Australians need:

to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional

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<sup>110</sup> Australia, *Council for Aboriginal Reconciliation Act 1991*, Section 7(2)(a)-(e).

<sup>111</sup> Russell, *Recognizing Aboriginal title*, 226.

<sup>112</sup> *Ibid.*, 227. It was important that Prime Minister Hawke’s Labour Government have the support of conservative elements within Parliament as Labour only held a majority in the House Representatives, but not the Senate.

<sup>113</sup> Ravi de Costa, “Reconciliation as Abdication,” *Australian Journal of Social Issues*, vol.37, no.4 (Nov. 2002), 398.

<sup>114</sup> Bain Attwood, “‘Leaning about the truth’: the stolen generations narrative,” in *Telling Stories: Indigenous history and memory in Australia and New Zealand* ed. Bain Attwood and Fiona Magowan (Crows Nest, Australia: Allen & Unwin, 2001), 201.

<sup>115</sup> Kevin Rudd, “Prime Minister Kevin Rudd, MP – Apology to Australia’s Indigenous peoples” (speech, Canberra, 13 February 2008), Australian Government, <http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>.

way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask – how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us.<sup>116</sup>

Keating's was a powerful speech remarked upon for its content and along with *Mabo* gave cause for hope "that the government would legislate measures to facilitate return of Indigenous lands to Indigenous control."<sup>117</sup> This may have been too much to hope for as the Liberals were elected under the leadership of John Howard in 1996. But, even under Keating this may have been mostly a dream as Elizabeth Povinelli argues Keating thought a "new multicultural society could be painlessly achieved," and that reconciliation "meant 'acknowledging' and 'appreciating' Aboriginal Australians and providing a "measure of justice' for them."<sup>118</sup> Whatever Keating's approach was, the Redfern speech, along with a major conference held by the CAR in 1994, helped push the advancement of issues relating to the Stolen Generation on the public agenda.<sup>119</sup> In 1995 the Labour Government called for an inquiry into the issue.

While the National Inquiry got underway, the CAR continued its work. Peter Sutton argues this work was overly bureaucratic becoming "an extension of the federal public service and its generous capacity for 'metawork,' work about work."<sup>120</sup> More damning than this Sutton argues the CAR's approach to understanding Aboriginal disadvantage ignored the difference between Indigenous culture and tradition and the West's, "there seemed to be a willing blindness" to past and present Indigenous ways of knowing and being.<sup>121</sup> Perhaps this approach is less surprising as the work of the CAR

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<sup>116</sup> Ibid.

<sup>117</sup> Damian Short, "When sorry isn't good enough: Official remembrance and reconciliation in Australia," *Memory Studies* vol. 5(3), 295.

<sup>118</sup> Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002), 171.

<sup>119</sup> Attwood draws a direct connect between the CAR conference in 1994 and the creation of the National Inquiry, while Bronwyn Fredricks argues "Keating's speech was monumental and it formed a platform for later work, including the National Inquiry" (Attwood, "Leaning about the truth," 203; and Bronwyn Fredricks, "We've Had the Redfern Park Speech and The Apology: What's Next?" *Outskirts: Feminisms Along the Edge* vol. 23 online <http://www.chloe.uwa.edu.au/outskirts/archive/volume23/fredericks>).

<sup>120</sup> Peter Sutton, *The Politics of Suffering: Indigenous Australia and the end of the liberal consensus* (Carlton, Australia: Melbourne University Press, 2009), 84.

<sup>121</sup> Ibid., 84-5.

concentrated on educating non-Aboriginal Australians on their history, as Short argues “official Australian reconciliation focused less on the needs of the victims and more on the educational needs of non-Indigenous Australians.”<sup>122</sup>

### *Truth*

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families formed the major truth telling function of the truth and reconciliation process in Australia. The findings of the National Inquiry were published in 1997 in a report entitled *Bringing Them Home*. It is interesting to note that the truth telling and reconciliation aspects of the Australian experience were institutionally separate, unlike those of other truth and reconciliation commissions. It is important to remember that in Australia the formal reconciliation process was begun before the National Inquiry. In South Africa the very name of the commission, the truth *and* reconciliation commission linked these two aspects much more closely than the distinct formal reconciliation process and the Aboriginal and Torres Strait Islander Children Inquiry in Australia. Although as we have seen above these two aspects of Australian truth and reconciliation are not as tidily separated as they would first appear.

The Aboriginal and Torres Strait Islander Children Inquiry travelled the country, conducting private and public hearings and sought to enable Aboriginals to “represent their own past.”<sup>123</sup> It received over 700 written submissions and recorded the testimony from Aboriginal witnesses in person who told their stories of removal and the suffering it caused.<sup>124</sup> The National Inquiry was tasked with examining the laws and practices that led to separation of Aboriginal and Torres Strait Islander children from their families, examine the adequacy of current policies, and the principles of determining the justification for compensation.<sup>125</sup>

In 1997 the National Inquiry issued its report, *Bringing Them Home*, to a now Liberal government in Canberra which was much less receptive to Indigenous claims than the previous Labour government. Among the 54 recommendations of the

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<sup>122</sup> Short, “When sorry isn’t good enough,” 295.

<sup>123</sup> Attwood, “Learning about the truth,” 203.

<sup>124</sup> Short, *Reconciliation and Colonial Power*, 93.

<sup>125</sup> *Bringing Them Home* “Terms of Reference.”



commission was the proposal that the government of Australia should offer an apology to the “stolen generations” and should, further, offer compensation to victims.<sup>126</sup> While many of the state governments offered apologies, the federal government under John Howard refused to offer a full apology.<sup>127</sup> This refusal derailed the movement toward reconciliation that *Bringing Them Home* helped create, as the truth that Australians learned of the church and state practice of child removal helped “galvanise [a] movement, helping to form a reservoir of concern about the inherent injustice of the Australian story.”<sup>128</sup> But Howard’s intransigents “helped to catalyse opposition to apology... the implications and assumptions of an apology: ‘Why should I say sorry? I have done nothing to them — I didn’t take their kids away, or steal their land, I wasn’t even here, my ancestors didn’t arrive until,,’”<sup>129</sup> While this position on the part of the Government of Australia persisted, perhaps too long, it was reversed by Kevin Rudd, head of a new Labour government, who eventually apologized in 2008.<sup>130</sup> The recommendation for compensation was first taken up by the government of Tasmania in 2006, and the government of Western Australia created a broader fund for compensation for any child who suffered abuse while in state care, including those of the Stolen Generation.<sup>131</sup> Overall the National Inquiry raised “awareness of a relatively unknown negativity in Australia’s past, but at the same time it enhanced victimhood as a basis of positive regard for Indigenous people, and polarised opinion about state or other collective historical guilt.”<sup>132</sup>

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<sup>126</sup> Appendix A: “Recommendations,” *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), section 5a (2) and (3).

<sup>127</sup> Augoustinos, Lecouter, and Soyland argue this was an attempt by Howard to discursively position himself among the “majority” of Australians, committed to a practical approach that realises that “everyone should be treated equally”, ‘resources should be used in a cost-effective manner’, ‘you cannot turn the clock backwards’, ‘present generations cannot be held responsible for the mistakes of past generations’... and [above all] ‘you must be practical’”(Martha Augoustinos, Amanda Lecouter, and John Soyland, “Self-sufficient arguments in political rhetoric: constructing reconciliation and apologizing to the Stolen Generation,” *Discourse and Society* vol. 13(1), 2002, 134).

<sup>128</sup> De Costa, “Reconciliation as Abdication,” 401.

<sup>129</sup> *Ibid.*

<sup>130</sup> Australian Government, <http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>.

<sup>131</sup> Coral Dow, “‘Sorry’: The Unfinished Business of the *Bringing Them Home* Report,” Parliament of Australia Parliamentary Library, 4 Feb. 2008, <http://www.aph.gov.au/library/pubs/BN/2007-08/BringingThemHomeReport.htm> (accessed 15 Sept. 2011)

<sup>132</sup> Sutton, *The Politics of Suffering*, 210.

*(Im)Balance of Power*

Compared with South Africa, the Australian approach seems backward, putting reconciliation before the pursuit of truth, ultimately making the task of reconciliation unnecessarily difficult. I argue the difference between these two cases shows the influence the constellation of power within these societies has had on the construction of these respective truth and reconciliation institutions, as well as their prospect for success. Ultimately, a colonial constellation of power results in a weak commission, lacking requisite formal powers and unable in itself to seriously threaten the prevailing colonial power which created it.

As discussed above, the South African TRC was just one of a number of concessions to Apartheid-era agents in order to include them in the overall process of change. The job security and amnesty provisions of the TRC, motivated by a fear of outright insurrection among white security forces, were among the concessions to the changing power imbalance between white and black South Africa at the time of the TRC's creation. The dismantling of the political regime of Apartheid meant that white South Africans' power over the state was being diminished and democratic principles of equality and proportionality in the function and creation of government was beginning. That is to say, post-Apartheid South Africa was a truly transitional society both before and during the creation of the TRC; indeed, at the time of writing, it is still wrestling with the legacies of inequality. Moreover, there were genuine questions that required answers in dealing with the legacy of extra-judicial actions by the Apartheid regime. People had disappeared and the whereabouts of bodies, along with details of how people had met their deaths and why, obviously were not in the public record. The truth generation process was a main function of the South African TRC, and the wide publication and high participation levels in, and testimony before, the TRC were among its most distinguishing features. The South African TRC helped to establish a public record of the abuses.

By contrast, Australia's formal reconciliation process seems to have been motivated more by a symbolic celebration of the centenary of the Federation and a desire to clear up "unfinished business," as Grattan puts it.<sup>133</sup> There was certainly a desire to

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<sup>133</sup> Grattan, "Introduction," 3.

address inequality between the minority Aborigines and Torres Strait Islander population and the dominant Australian society. However, actions have not lived up to words. In discussing both Keating's Redfern speech and Rudd's apology speech Fredricks asks "how many more speeches do we need?"<sup>134</sup> A significant disconnect between "good intension," even by the supposedly more sympathetic Australian Labour Party, "are considerably diminished by the positively colonial contemporary political context."<sup>135</sup>

There was little desire on the part of the Howard Liberal government to discuss, consider, and least of all to apologize for past wrongs. Unlike South Africa, the history of colonialism was all too apparent in Australia, and extra-judicial, or at least unjust, acts such as the "stolen generations" were not a secret in the same sense that extra-judicial abuses in South Africa were. The CAR and National Inquiry, however, still had the goal of creating a public record of the history of colonialism in Australia. The CAR's main truth function appears to have been the education of the general population on the history of government policies, to which the Australian population was largely indifferent. However, Gunstone contends the CAR failed to carry out the education function adequately.<sup>136</sup> The National Inquiry had a much more thorough truth agenda, hearing testimony and making recommendations for compensation, apology, and commemoration.<sup>137</sup> In fact, Chris Cunneen argues that the truth agenda of the Aboriginal and Torres Strait Islander Children Inquiry was "an essential measure of reparation for people."<sup>138</sup> But, to the extent that Gunstone is correct that the dominant society still lacked a thorough knowledge of past abuses, the truth told by the Aboriginal and Torres Strait Islander Children Inquiry is of limited use for reconciliation.

The main difference in the constellation of power between South Africa and Australia is that in South Africa a process of decolonisation was legitimately underway.

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<sup>134</sup> Fredricks, "We've Had the Redfern Park Speech and The Apology."

<sup>135</sup> Short, "When sorry isn't good enough," 302.

<sup>136</sup> Andrew Gunstone, *Unfinished Business: The Australian Formal Reconciliation Process* (Melbourne: Australian Scholarly Publishing, 2009), 5.

<sup>137</sup> The full scope of the recommendations is laid out in "Appendix 9" of *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from their Families*. The recommendation listed for compensation can be found at Sec. 4, 14, and 18; apology at Sec. 5a, 5b, and 6; and commemoration Sec. 7a, and 7b.

<sup>138</sup> Chris Cunneen, "Reparations and Restorative Justice: Responding to Gross Human Rights Violations," in *Restorative Justice and Civil Society*, edited by Heather Strange and John Braithwaite (New York: Cambridge University Press, 2001), 91.

The TRC became an important site for the larger transitional process that sought to reshape unjust political, social, and economic power dynamics of the country. In Australia, on the other hand, the concentration of political, social, and economic power in the hands of the settlers remains largely unchanged from the colonisation period and the time of the abuses. That is to say, the power constellation in Australia remains a colonial one. Indeed even after Keating's Redfern speech the Labour government "enacted legislation to limit the impact of common law land rights in favour of powerful commercial interests to such an extent as to render them largely meaningless."<sup>139</sup> A powerful reminder of how colonial Australia remained during the process of formal reconciliation.

Thus, the power arrangement, colonial or post-colonial, can significantly impact the process by which a society deals with historic wrongdoing. While such efforts may be very well-intentioned, in as much as they emanate from within the dominant part of a colonial society, any effort to deal with historic injustice is carried out against the general background of colonial hierarchy, which normatively excludes indigenous ways of being and knowing. This does not make the goal of dealing with historic injustice impossible, but, rather, imposes many constraints, both conscious and unconscious on the part of the colonial power, upon the process. This process may ultimately require the dismantling of the colonial regime itself in order to fully address historic injustice. It should not be controversial to say that reconciliation in South Africa under Apartheid would be unintelligible.

The legislature that created the CAR and the orders that established the Aboriginal and Torres Strait Islander Children Inquiry were effectively (dis)empowering these institutions to investigate the very source of its power, the colonial constellation. That is to say, that being a product of a colonial legislature they could never adequately address the legacy of colonialism. It is a process that seeks to finish the "unfinished" business of creating a just colonial state without seriously threatening the foundations of the edifice of colonial power; the bifurcation of the truth and reconciliation aspects in Australia hint at this point. The National Inquiry was tasked with telling the truth of *one*

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<sup>139</sup> Short, "When sorry isn't good enough," 302.

instance of colonial abuse of children—and by extension their families—in a long history of colonial oppression, while the CAR aimed to foster reconciliation in the context of ongoing disadvantage on the part of Aboriginal people in Australia, without having to tell any truths about colonisation or oppression.

The clearest manifestation of the constellation of power in the institutional design of the National Inquiry is found in the power distribution. As discussed above, special powers are a key characteristic of truth commissions, according to Hayner.<sup>140</sup> Special powers are all but absent from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. While the Aboriginal and Torres Strait Islander Children Inquiry clearly did not need the same sorts of special powers as the South African TRC did in the revelation of the truth surrounding Apartheid, such as witness protection or subpoena, the ability to compel documents and meaningfully tell the truth of the actions of the colonial government throughout the history of Australia may have helped the Aboriginal and Torres Strait Islander Children Inquiry. However, the colonial power dynamic seems to have mitigated against this, lacking sufficient introspection or out of a more deliberate aim to maintain its supremacy.

For both South Africa and Australia, the formal commission was conceived as a part of a process of addressing inequality and disadvantage. The fundamental difference, however, is in the ordering of the process. In the case of South Africa, a formal handover of political power occurred before the TRC was struck. This was manifest in the 1994 election of the African National Congress as the government. In Australia, the CAR was conceived as the beginning of a process that it was hoped would lead to a correction of Aboriginal disadvantage, and the National Inquiry cropped up in the middle of the process. However laudable the goals of reconciliation in Australia may have been, the unwillingness to explore symbolic gestures of acknowledgement; and the concentration on current and future “practical reconciliation;” combined with the CAR’s failure to address key issues identified by Aboriginal peoples have led to little movement toward a just and reconciled society. Howard is right in certain ways when he contends that reconciliation cannot be legislated.<sup>141</sup> At least certain kinds of reconciliation cannot be

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<sup>140</sup> Hayner, “Fifteen Truth Commissions,” 604.

<sup>141</sup> John Howard, “Practical Reconciliation,” in *Essays on Australian Reconciliation*, edited by Michelle Gratton, (Melbourne: Black Inc, 2000) 89.

legislated, such as the fellow feeling between neighbours, for example.<sup>142</sup> But other aspects certainly can, such as overturning discrimination by the state or granting self-determination. However, this emphasis on practical over symbolic reconciliation—aside from artificially separating these two approaches—misses an important opportunity for the government to show moral leadership in fostering the type of reconciliation that could have been encouraged in “the hearts and minds of the Australian people.”<sup>143</sup> This lack of leadership may have been motivated, wittingly or not, by a desire not to undermine or threaten the colonial power of the state. To seriously wrestle with the actions of past governments would threaten some of the moral foundations of the Australian community, and to the extent that this may lead to questioning of doctrines such as *terra nullius*, the very legal foundations of the Federation may be in danger. The dominant society in colonial states must come to understand the nature and history of colonialism in order to address the inequality that persists between native and newcomer, without replicating the colonial hierarchy of saviour and savage. That is to say newcomers must understand how they have come to possess the land, the institutions of the state, and the fruits of the economy if they hope to escape the worst excesses of the colonial relationship. This may involve a grave threat to the power of the colonial state.

A final difference between the two truth and reconciliation mechanisms can be seen in the funding of each. In the case of the South African TRC, the funding of operations was accomplished by the creation of a “President’s Fund” that received money from Parliament under the *Promotion of National Unity and Reconciliation Act 1995*.<sup>144</sup> The guarantor of operational funds for the TRC was ultimately the Parliament of South Africa. In contrast, the Council for Aboriginal Reconciliation in Australia had no source of funding established in its enabling legislation.<sup>145</sup> Moreover, the follow-on body that the CAR established in 2001, Reconciliation Australia, which was tasked with continuing

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<sup>142</sup> Adam Smith discusses at length in *The Theory of Moral Sentiments* how humans identify and sympathize with each other. In the context of reconciliation it is the disruption to natural sympathies that is, at least in part, in need of restoration. As Smith puts it, “When we see one man oppressed or injured by another, the sympathy which we feel with the distress of the sufferer seems to serve only to animate our fellow-feeling with his resentment against the offender” (Adam Smith, *The Theory of Moral Sentiments* (Indianapolis, Indiana: Liberty Classics, 1976), 141). It is both the resentment of the victim and bystander that needs restoration, and cannot be legislated.

<sup>143</sup> Howard, “Practical Reconciliation,” 91.

<sup>144</sup> South Africa, *Promotion of National Unity and Reconciliation Act 1995*, Section 42.

<sup>145</sup> *Council for Aboriginal Reconciliation Act 1991*.

the work of reconciliation, is a not-for-profit body that is funded by private donations, rather than government funds.<sup>146</sup>

This is not to suggest that the comparison here is between unmitigated success and failure, but that the powers given to these reconciliation bodies, their place in the overall process of reconciliation, and their source of funding are, in part, a function of the power dynamics of their respective societies. More fundamentally, however, the way that the Howard government conceived of reconciliation in Australia as addressing deficits in education, health, and housing, meant that there was no real threat to the prevailing colonial power dynamic. In fact, in important ways, I argue this reinforced at least the cultural or social power imbalances. That is to say, the efforts in Australia and South Africa differed in their effectiveness by the extent to which each was already de-colonial, which was fundamentally affected by the pattern of power in the two societies; there are significant differences between colonial and post-colonial societies. This directly bears on any analysis of the Truth and Reconciliation Commission of Canada, as it has been created in colonial society with the colonial constellation of power largely intact.

*The Truth and Reconciliation Commission of Canada*

In Canada the Indian Residential School system was a church/state partnership, established in 1886, funded by the federal government and run by the churches, and which continued until the last school closed in 1996. The goal of the schools was to educate Aboriginal children in a “civilized” way, which meant education in the dominant society’s customs, manners, language, and the Christian faith.<sup>147</sup> Many of the children lost important sources of Indigenous language, culture, and family as a result of their time in the schools. Often these schools were sites of extreme emotional, physical and sexual abuse, as discussed in Chapter Four, above. This abuse continues to cause many problems within Aboriginal families and communities. The abuses were little talked about in Aboriginal communities and all but unknown or poorly understood in the settler society. The effects of the abuses suffered in residential schools did not necessarily end when a student left, or even when the system was finally shut down. Survivors of residential schools, particularly those who suffered physical and/or sexual abuse, often experienced

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<sup>146</sup> Reconciliation Australia, “About RA,” <http://www.reconciliation.org.au/home/about-ra/who-is-ra-> (accessed 5 Sept. 2012).

<sup>147</sup> Milloy, *A National Crime*, 33.

problems with alcoholism, drug abuse, dependency, low self-esteem, suicide, prostitution, gambling, and homelessness.<sup>148</sup>

The negative impacts of residential school in these social pathologies not only affected school survivors, but also have intergenerational impacts. Jacobs and Williams argue that the continuing impact of the colonial mentality embodied by the residential school has contributed to the disappearance and murder of hundreds of Aboriginal women in Canada.<sup>149</sup> Sisters in Spirit—a research, education, and policy initiative led by Aboriginal women—estimated that 582 Aboriginal women and girls went missing or were murdered in Canada between 2005 and 2011.

<sup>150</sup> This is not meant to dwell on the adverse effects of the Indian Residential School System—although they are many—but, rather, to indicate the continued nature of the injustices suffered. Before 2008, there had not been any compensation or meaningful apology made to IRS system survivors by the Government of Canada.<sup>151</sup>

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<sup>148</sup> Beverly Jacobs and Andrea J. Williams, “Legacy of Residential Schools: Missing and Murdered Aboriginal Women,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, edited by Marlene Brant Castellano, Linda Archibald, and Mike DeGagné (Ottawa: The Aboriginal Healing Foundation, 2008), 126.

<sup>149</sup> *Ibid.*, 121. The crux of colonialism, as discussed earlier, is to categorize some people as other than human, or at least participating in a qualitatively different form of humanity than those in the dominant category. The link here is that women, who are already economically and socially marginalized from a male-centered society, are further marginalized by virtue of being Aboriginal women.

<sup>150</sup> Native Women’s Association of Canada, “Sisters in Spirit,” <http://www.nwac.ca/programs/sisters-spirit> (accessed 6 Oct. 2011).

<sup>151</sup> There was a scheme that existed prior to the Indian Residential Schools Settlement Agreement, called the Alternative Dispute Resolution (ADR) process. There were many problems with this process, not the least of which was that of compensation. While the ADR was less traumatic than court cases, where individuals were subjected cross examination over their experience in Residential School and the cost of mounting a legal cast, (See Jennifer Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice,” *The University of Toronto Law Journal* vol. 52 no.3 (2002), 264, especially note 45.) it was inadequate to provide anything like justice to claims of survivors of the Residential School System. In my interview with Kathleen Mahoney (10 Feb 2012), Legal Counsel for the AFN, she discussed a situation in which a survivor was beaten and had her hair chopped off for running away to attend her mother’s funeral. This woman was granted \$1200 in compensation for the specific trauma (never mind being remove from her family and being forcibly subjected to the Residential School). This ruling was appealed by the government on the grounds that she did not fit the category for compensation. However, issues such as these, where compensation did not seem to be motivated by generosity, were not the only problem with the ADR. Abuse suffered in different areas of Canada were compensated differently, even for the same type of abuse (See Assembly of First Nations, *Report on Canada’s Dispute Resolution Plan to Compensate for Abuse in Indian Residential School* (Ottawa: Assembly of First Nation, 2009), 14-5.). If abuse occurred in British Columbia, the Yukon, or Ontario the maximum that could be awarded was \$50, 000 more than anywhere else in Canada. Churches were responsible for 30% of the award with the federal government paying the 70%. However, if a claim was awarded in a case where the religious organization had not entered into an indemnity, then the claimant would only get 70% of their award. At a conference held in 2004 at the University of Calgary, the ADR



While the churches involved in the operation of the IRS system first began to apologize for their role in the schools in the late 1980s—starting with the United Church of Canada in 1986, the Roman Catholic Missionary Oblates of Mary Immaculate in 1991, the Anglican Church of Canada in 1993, and the Presbyterian Church in Canada in 1994<sup>152</sup>—it was not until the summer of 2008 that the Government of Canada, in the person of Prime Minister Stephen Harper, offered an apology for the IRS system on behalf of all Canadians. The timing is significant, as it came after the effective date of the Indian Residential Schools Settlement Agreement of September 2007, when an admission of guilt implicit in an apology could no longer be used against the Government of Canada in legal proceedings. This timing, coming as it did *after* a deal to resolve the outstanding litigation and massive claim made by survivors, should give us pause to carefully question the sincerity and commitment of the federal government to the project of reconciliation, of which the TRC was meant to be a part.

By 2002 former students of the residential schools had launched over 11,000 legal actions against the Government of Canada and the various churches that operated the schools.<sup>153</sup> Either as insurance against the uncertain cost of the lawsuits,<sup>154</sup> or for other

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was discussed and criticized by academics, elders, and lawyers. The account given by Kathleen Mahoney (10 Feb. 2012) is that the conference was well attended and officials, including the Minister of Indian Affairs, attended and were receptive to the ideas put forward. To that end, Mahoney undertook a fact-finding mission to the Republic of Ireland where she examined the response by the Ministry of Education to the issue of sexual and physical abuse committed in the Industrial Schools there by Roman Catholic orders and organizations (for a good history of the system see Mary Raftery and Eoin O’Sullivan, *Suffer the Little Children: The Inside Story of Ireland’s Industrial Schools* (Dublin: New Island Books, 1999.)). The conclusions reached by the fact-finding mission were that the Irish scheme was “much more coherent, generous and principled than that of the Canadian model.” (Kathleen Mahoney, *Report on Fact-Finding Mission to Ireland Regarding Compensation Scheme and Related Benefits for Industrial School Survivors in Ireland*, prepared for the Assembly of First Nations, 12). In Ireland victims were being paid nearly four times as much as in Canada on average, and the Irish government paid the full cost, while going after the Roman Catholic Church for compensation as a separate matter. Kathleen Mahoney credits this mission as providing valuable insights as to the way forward for Canada at that time prior to negotiations that led to the Indian Residential Schools Settlement Agreement. Moreover, it was the willingness of the Government of Canada to listen to this example that helped shift the discussion toward the negotiation process (Interview with Kathleen Mahoney, conducted by author, 10 Feb 2012).

<sup>152</sup> Aboriginal Healing Foundation, “Apology and Reconciliation: A Timeline of Events,” in *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, edited by Gregory Younging, Jonathan Dewar, and Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2009), 176-7.

<sup>153</sup> Ronald Niezen, *Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013), 42.

<sup>154</sup> This was suggested as an act of “governmentality” in Andrew Woolford, “Governing Through Repair: Colonial Injustice and Aboriginal peoples in Canada,” (paper presented at the One Day Academic Conference at the First National Event of the Truth and Reconciliation Commission of Canada, Winnipeg Manitoba June 17, 2010).

reasons, the lawsuits were settled and the Indian Residential Schools Settlement Agreement was signed on April 24, 2006 by the Assembly of First Nations; Anglican, Roman Catholic, Presbyterian, and United churches; and by the Government of Canada. Among the terms of the agreement was “Schedule N,” which provided for the creation of “an historic Truth and Reconciliation Commission [that would] be established to contribute to truth, healing and reconciliation.”<sup>155</sup>

The mandate of the Canadian TRC focused the Commission’s work on the past abuses of the Indian Residential Schools System. The Canadian TRC was tasked with taking statements from school survivors and creating a record of the abuse that was suffered in the Indian Residential School System. The TRC was, in fact, barred from considering other modes of discrimination against Aboriginal peoples, such as unsafe housing, access to clean drinking water, and so on. While this type of investigation requires reviewing individual rights abuses, the Canadian TRC’s focus was on the macro event of the IRS system, rather than the experiences of individual rights abuse *per se*. The focus of the TRC, through the articulation of the individual experiences of survivors, was on a *system* of abuse and the pain (individual and collective) caused by it, rather than only on the individual instances of criminal neglect and abuse. While it took individual statements from survivors and promised to create a record out of these individual experiences—just as the South Africa TRC was mandated—the Canadian TRC was not empowered to make individual reparations and was directed to foster community reconciliation between the parties to the Agreement, most significantly for this project between Crown and Aboriginal peoples. The commission was given a five-year time frame in which to complete its work and issue a report and an allotment of funding from the federal government.<sup>156</sup>

The Canadian TRC was not invested with any specific powers that allowed it better access to information. The commission was only empowered to “receive statements and documents from former students, their families, community and all other interested

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<sup>155</sup> *Indian Residential Schools Settlement Agreement*, (2006) “Schedule N,” 1.

<sup>156</sup> *Indian Residential Schools Settlement Agreement* “Schedule N,” 7. The Commission had a false start initially where all three of the Commissioners were eventually replaced. There is more discussion of this below.

participants.”<sup>157</sup> But it could not compel the production of documents or testimony.<sup>158</sup> It certainly had an increased ability to deal with the sensitive nature of survivor testimony and much of the mandate document deals with privacy and care for those giving testimony. In design and in practice the Canadian TRC was a body searching for the truth of the IRS system and striving to provide reconciliation between the signatories.<sup>159</sup> Thus if not exactly matching Hayner’s definition above, it is in spirit and practice a truth and reconciliation commission proper.

### *Canadian (Im)Balance of Power*

The timing of the Canadian TRC is significant, especially when examined alongside the truth commission in South Africa and the Council for Aboriginal Reconciliation and Aboriginal and Torres Strait Islander Children Inquiry in Australia. In the South African case, the TRC was initiated *after* a process of transition had begun in the country, and *after* the balance of formal political power had largely shifted with the election held in 1994, which brought Nelson Mandela and the African National Congress to power. In contrast, within the Australian context, the formal reconciliation process was meant to proceed or propel the society into a process of transition, and even the truth component in the Aboriginal and Torres Strait Islander Children Inquiry came *after* the drive for reconciliation. This opened the reconciliatory institution to the machinations of the prevailing colonial power constellation. Similarly, the process of transition—indeed, if there is one at all—in Canada is meant to be opened up by the Canadian TRC, as the CAR in Australia was meant to do. As with Australia, Canada remains a colonially

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<sup>157</sup> *Ibid.*, 2.

<sup>158</sup> Access to documents has been a problem for the TRC. The federal government has been slow to release documents to the commission, which prompted the TRC to take them to court in 2012. In late January 2013 the Ontario Superior Court ordered the federal government to produce archived documents related to the IRS system, the presiding judge stating the federal government “is to provide all relevant documents to the TRC.” See Gloria Galloway, “Ottawa ordered to find and release millions of Indian residential school records,” *The Globe and Mail* Jan. 30, 2013 <http://www.theglobeandmail.com/news/politics/ottawa-ordered-to-find-and-release-millions-of-indian-residential-school-records/article8001068/> (accessed 18 March 2013).

<sup>159</sup> The parties to the agreement as listed in the *Indian Residential Schools Settlement Agreement* are: the Government of Canada; Plaintiffs; the Assembly of First Nations and Inuit Representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and Roman Catholic Entities.

oriented country, with the dynamics of power between Aboriginal peoples and the Canadian state remaining largely unchanged from the residential school era.

The Indian Residential Schools Settlement Agreement (IRSSA) that provided for the creation of the TRC also created a compensation regime in the form of the Common Experience Payment (CEP) and Independent Assessment Process (IAP). The CEP provided compensation based on time spent in the IRS system. This compensation was straightforward and only required claimants to show they attended a school, with the compensation allowing many recipients to turn “their temporary financial gain into opportunities with lasting effects, helping out family members, clearing up debts, and investing in the future.”<sup>160</sup> As Niezen points out, there were also negative impacts of the sudden influx of \$1.6 billion into Aboriginal communities from the CEP, notably for those suffering from substance abuse and addiction.<sup>161</sup> While the sudden influx of money had positive and negative effects, a major weakness of the CEP process was that it failed to recognize the intergenerational effects of the IRS system, as family members of deceased school survivors were ineligible for compensation.<sup>162</sup> The IAP was more problematic, even though it was created as an out-of-court process that sought to compensate specific abuse claims more efficiently and in a less adversarial way than a litigation process. The Indian Residential Schools Adjudication Secretariat that was created to review applications and determine compensation was a body which had to receive evidence and investigate claims. It allowed identified abusers to respond to allegations, although survivors and alleged perpetrators did not come into contact as in a courtroom setting. Though not court-like *per se*, claimants were encouraged to be represented by legal counsel, meaning that those with the most compelling and provable narratives were prioritised by lawyers.<sup>163</sup>

Moreover, as a fact based process of proving harm, the IAP excluded those “who had clearly been abused in the schools but were unable to remember those basic details that were prerequisites of a successful claim... most commonly, the name of the person

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<sup>160</sup> Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013), 44.

<sup>161</sup> *Ibid.*, 44-45. For lawyers there was clearly a financial incentive to represent these survivors and concentrate on them as the IAP provided lawyer fee payments.

<sup>162</sup> Jennifer Henderson and Pauline Wakeham, “Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada,” *English Studies in Canada* vol.35 iss.1 (March 2009), 11.

<sup>163</sup> Niezen, *Truth and Indignation*, 48.

who victimized them.”<sup>164</sup> Even in determining the level of compensation after verifying abuse, the approach was somewhat cold, relying “upon a point-based scale that calculates monetary value via the reduction of traumatic experience to itemization within a clinical taxonomy of injuries.”<sup>165</sup> The compensation regime, while an important symbolic gesture and part of broader reconciliatory approach, was framed within a Western legal construction that proved problematic for some Aboriginal peoples to access. It prioritized colonial attitudes about the scope of harm and how to verify and compensate it.

The consideration of how the colonial power constellation has affected the Canadian TRC is neither ephemeral nor theoretical. After the appointment of the first slate of commissioners, including Justice Harry LaForme as chair, in 2008, the TRC ran into a series of problems that led to Justice LaForme’s resignation in October of 2008 and the resignation of the other two commissioners over incurable problems that they believed would doom the commission to failure.<sup>166</sup> Justice LaForme believed that the Canadian TRC would not be able to focus on reconciliation but, rather, would operate as a strict truth commission and “leave reconciliation for another day.”<sup>167</sup> The Canadian TRC, especially in the form of the negotiated settlement, was seen from the beginning as an exercise in “governmentality” where uncertainties for the Canadian state could be mitigated and direct financial liability could be quantified with greater certainty than in a proceedings of the court.<sup>168</sup> This is, in fact, what was at work in the IAP process of limiting and classifying harm so that government knows in advance what its liability will be, using a scale of abuse that it determines. The construction of the TRC itself left unquestioned agents and institutions of the IRS system, eschewing a “more aggressing fault-finding focus... [that] might serve more effectively to confront Canadians with their historical and ongoing complicity in the residential schools agenda.”<sup>169</sup> This desire to narrow focus and limit liability importantly pre-sages and constrains reconciliation before

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<sup>164</sup> Ibid.

<sup>165</sup> Henderson and Wakeham, “Colonial Reckoning, National Reconciliation?” 11.

<sup>166</sup> Joe Friesen, “Resignation paralyzes residential schools commission,” *The Globe and Mail* Monday Oct. 20, 2008, online: <http://www.theglobeandmail.com/news/national/article717816.ece> (accessed 1 Oct. 2011)

<sup>167</sup> Ibid.

<sup>168</sup> Again this suggestion was made by Andrew Woolford, “Governing Through Repair: Colonial Injustice and Aboriginal peoples in Canada,” a paper presented at the One Day Academic Conference at the First National Event of the Truth and Reconciliation Commission of Canada, Winnipeg Manitoba June 17, 2010.

<sup>169</sup> Matt James, “A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission,” *The International Journal of Transitional Justice*, vol.6 (2012), 202.

a discussion has begun. This is more than one party staking out its position as in a negotiation, as the state has significant powers to set the very conditions of the discussion of reconciliation.

Moreover, this is not a unique approach to Crown-Aboriginal relations in Canada. Negotiations in British Columbia between First Nations, the British Columbia provincial government, and the federal government have increasingly focused on matters of practical certainty—on questions of land base, treaty rights, and government obligations.<sup>170</sup> As Woolford argues, for governments especially, certainty is created by transferring existing Aboriginal rights to the current normal constitutional order of government and citizen interaction.<sup>171</sup> In the process of treaty making in British Columbia, Aboriginal rights are transformed into constitutionally protected treaty rights, under Section 35 of the *Constitution Act*, while all undefined rights are deemed to be released, thereby normalizing Crown-Aboriginal relations within the existing constitutional order, without undermining or threatening that order, and thus leaving in place its colonial constellation of power.<sup>172</sup> The approach in the British Columbia Treaty Process is one of extinguishment and assimilation, according to Taiaiake Alfred and the Office of the British Columbia Regional Chief for the Assembly of First Nations.<sup>173</sup>

This is just one example of the continuing colonial relationship between the Government of Canada and Aboriginal peoples in Canada. Another is that the expressly colonial *Indian Act* remains in place, constraining and regulating the lives of Aboriginal peoples. A number of other examples could be named here. The point remains that, given that the colonial power constellation is little altered from the time of residential schools, finding traces of this power inequality on the institution of the Canadian TRC in itself is not surprising.

First, there is the issue of funding. The level of funding was established by the Settlement Agreement and pegged at \$60 million for the five years the Canadian TRC

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<sup>170</sup> Andrew Woolford, “Genocide, Affirmative Repair, and the British Columbia Treaty Process,” in *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence*, ed. Alexander Hinton (New Brunswick, N.J.: Rutgers University Press, 2010), 146.

<sup>171</sup> *Ibid.*, 149.

<sup>172</sup> *Ibid.*

<sup>173</sup> See Taiaiake Alfred, “Deconstructing the British Columbia Treaty Process,” *Balayi: Culture, Law, and Colonialism*, vol. 3 (2001), 64; and Assembly of First Nations, Office of the BC Regional Vice-Chief (Satsan), *Changing Canada's Comprehensive Claims Policy: Developing a Negotiation Strategy* (January 2000), 2.

was mandated to operate.<sup>174</sup> Moreover, the Canadian TRC could not spend the funds independently, as the transfer of the bulk of the money to the Commission—some \$58 million—was contingent upon the Government of Canada approving the commission’s budget at each stage of its work.<sup>175</sup> While \$60 million seems on its face to be a large sum, given the geography of the country and the remoteness of many First Nations and Inuit communities, high travel costs were incurred just to send statement takers to these locations to collect survivors’ stories. Add this to the mandated requirement to hold seven national events, at the expense of the Canadian TRC, in various regions of the country,<sup>176</sup> and it is easy to see the limited funds available to the commission. Hayner points out that the \$18 million per year budget in South Africa was seen as insufficient by many observers of that commission in 1995.<sup>177</sup> Factoring in the Canadian TRC’s longer mandate and inflation, the allocation to the Canadian TRC should have approximated something closer to \$117.5 million, or nearly twice the allotted funds, just to bring it on par with the South African commission’s budget.<sup>178</sup> In addition, at the end of its five year mandate, out of the \$60 million budget, the Settlement Agreement mandated the establishment of a permanent research centre.<sup>179</sup> In 2010, then-Director of Research for the Canadian TRC John S. Milloy expressed frustration over the level of funding for the research division and indicated the near impossibility of conducting the research function of the commission with funds available, let alone establishing a research centre at the end of the Canadian TRC mandate.<sup>180</sup>

Exacerbating these inadequacies in funding for the Canadian TRC was the decision made by the Conservative government in 2010 to discontinue funding to the Aboriginal Healing Foundation, which was created in 1998 as part of the federal government’s response to the recommendations of the Royal Commission on Aboriginal Peoples. The

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<sup>174</sup> *Indian Residential Schools Settlement Agreement*, Section 3.03 (1), pg. 23.

<sup>175</sup> *Ibid.*

<sup>176</sup> This requirement is laid out in the terms of reference *Indian Residential Schools Settlement Agreement*, “Schedule N,” 7.

<sup>177</sup> Hayner, *Unspeakable Truths*, 223.

<sup>178</sup> The conversion of 1995 dollars to 2008 dollars was made using the Bank of Canada Inflation Calculator found at <http://www.bankofcanada.ca/rates/related/inflation-calculator/>. In addition this estimate does not take into account exchange rates at any point, opting to assume Canadian dollar values overall.

<sup>179</sup> *Indian Residential Schools Settlement Agreement*, “Schedule N,” 7.

<sup>180</sup> John S. Milloy made these remarks at the “Truth, Reconciliation and the Residential Schools” conference March 5th 2010, Nipissing University.

mission of the Aboriginal Healing Foundation was to “provide resources which will promote reconciliation and encourage and support Aboriginal people and their communities in building and reinforcing sustainable healing processes that address the legacy of physical, sexual, mental, cultural, and spiritual abuses in the residential school system, including intergenerational impacts.”<sup>181</sup> While not directly linked to the Canadian TRC itself, the task of the Aboriginal Healing Foundation to provide funding to support community-led healing initiatives clearly was complimentary to the work of the Canadian TRC. The decision to cut funding, however, meant that the Aboriginal Healing Foundation had to cut back significantly on its operations and had no new funds available for healing processes developed within Aboriginal communities.<sup>182</sup> Even with the \$125 million set aside in the Indian Residential Schools Settlement Agreement, the Aboriginal Healing Foundation was forced to close completely in September of 2012, at which time the twelve regional healing centres that operated under its auspices were no longer funded.<sup>183</sup> This closure occurred before the Canadian TRC finished its work and left a massive funding void in the support of healing initiatives, thus making the Canadian TRC the only “well-funded” source of healing.<sup>184</sup> This may have the effect of increasing demands on the statement taking and support capacity of the Canadian TRC, ultimately increasing costs—in the form of increased on-hand counsellors at nation events for instance—just at the time that the commission ran out of its funds ceded under the Indian Residential School Settlement Agreement.

The other major instance of power imbalance that can be seen in the institution of the Canadian TRC was the limited powers given to the Commission. The South African TRC received several special powers, discussed above, while the Australian process had no special powers to speak of at all. Here there is a striking similarity with the Canadian TRC, which was not allocated special powers. The terms of reference for the Canadian

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<sup>181</sup> Aboriginal Healing Foundation, “Vision, Mission, Values,” <http://www.ahf.ca/about-us/mission> (accessed 30 September 2011).

<sup>182</sup> Aboriginal Healing Foundation, “FAQ: Is there Funding Available,” <http://www.ahf.ca/faqs> (accessed 30 September 2011).

<sup>183</sup> Aboriginal Healing Foundation, “FAQ: Is the Foundation closing its doors?” <http://www.ahf.ca/faqs> (accessed 30 September 2011).

<sup>184</sup> While not, strictly speaking, a part of the mandate of the TRC, “healing” is part of reconciliation, or at the very least a condition of it.



TRC only empowered it to “receive statements and documents.”<sup>185</sup> Moreover, the commission could not act in the fashion of a public inquiry, had no subpoena power to compel participation or attendance, and the commissioners are compelled to perform their duties “without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings.”<sup>186</sup> This last prohibition is then elaborated upon in a subsequent subsection where the “naming of names” is expressly forbidden, unless that individual consents to be so named.<sup>187</sup> In effect, the Canadian TRC can only record the stories of those who wish to volunteer them and thus can only create a truth document without the ability to compel documents or testimony from school operators. This leaves an important aspect of understanding the IRS system out of the analysis of the Canadian TRC, namely that of the federal government and churches. That is to say, while it is valuable to record and archive the experience of survivors, important explanations for the failure of Canada and the churches to safeguard children are lacking as a result of the TRC’s inability to access documents from these organizations.

Moreover, the motivations for the entire system remain unaccounted for by those who operated or supported it. The lack of powers here can be seen as a major concession to the prevailing colonial constellation, as the truth that was constructed in the Canadian TRC process was anecdotal, narrative, and derive largely from survivors alone. While it is important for survivors to tell their stories, it is exactly the form of personal experience and story that the “truth” from this Commission will take that will allow it to be discounted in the legalistic and positivistic dominant society. That is to say, if the “truth” established by Canadian TRC can be seen as one experiential truth among others—especially more compelling truths within the Western tradition, such as empirical truth—lacking a broad coalition of intersubjective belief, then the Canadian TRC will have little effect outside Aboriginal communities. This would represent a tragic loss of an opportunity to change the colonial dynamics of Crown-Aboriginal relations in Canada.

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<sup>185</sup> “Schedule ‘N,’” *Indian Residential Schools Settlement Agreement*, 2.

<sup>186</sup> *Ibid.*, 2-3.

<sup>187</sup> *Ibid.*, 3.

*Conclusion*

To write that dynamics of power affect the character of institutions should be a relatively uncontroversial statement; but it is certainly not a trivial one. For the Canadian TRC, noting that an imbalance of power between Aboriginal peoples and the Crown was an important, if obvious, observation for considering the construction of the Canadian TRC and the possibility and probability of its success. We have seen that the prevailing arrangements of political power have shaped other truth commissions, as noted above in the case studies of South Africa and Australia. Where the colonial constellation of power remains unchanged from the period of abuse, as in Australia, we have seen limited success and policy measures taken that do not significantly challenge the prevailing order. When we turn to consider the Canadian context, understanding the still-colonial state of relations between Crown and Aboriginal peoples importantly leads us to consider how colonial power first manifests in the institutional design of commissions and how it may affect their outcome.

## CHAPTER SEVEN

### **Transformative Opportunities: The Canadian TRC and the Possibility of Change**

#### *Introduction*

With various understandings of reconciliation explored in Chapter Three, it is important to investigate what the TRC sought to accomplish and whether it was able to do so. Following from my research question: “Does the TRC represent a transformative opportunity in Crown-Aboriginal relations in Canada?” it appears that the answer is ‘yes.’ Interviews conducted with civil servants, former politicians, and Aboriginal leaders indicate that the TRC is a transformative opportunity in the history of Crown-Aboriginal relations. The people with whom I spoke were asked a series of questions about the nature of reconciliation, impediments to its success, and ultimately about the relative sincerity of the Government of Canada in its commitment to reconciliation. When the interviews were conducted the government was led by Stephen Harper. Despite misgivings over the sincerity of the Harper government in their approach and commitment to reconciliation the interviewees expressed optimism for the possibility of change. With the change in federal government in October of 2015 there is every reason for increased optimism of improvement in Crown-Aboriginal relations toward a more positive and equitable relationship. While the new Liberal government led by Justin Trudeau has to date only managed a change in tone, their commitment to implementing the findings of the TRC gives hope that a new relationship will result from the TRC. The commitment of the Liberal government, even in the absence of concrete action, and the optimism of the interviewees gives us some evidence to suppose that the TRC did in fact represent a transformative opportunity. In addition, as discussed below, the condition of *existing potential* in the wake of the TRC leads strongly to the conclusion that the TRC does represent a transformative opportunity in Crown-Aboriginal relations. Before discussing the possibility of transition in more detail, however, the term “transformative opportunity” must first be unpacked.

*What is a Transformative Opportunity?*

The TRC brought with it a special opportunity to transform particular aspects of Canadian society and change the way that the Crown and Aboriginal peoples interact and view their relationship within the shared land and as political entities. To be sure this will not occur all at once. A transformative opportunity is a *time of potential*. Its accomplishment is not a foregone conclusion; the transformative opportunity is one of potentiality, a potentiality that separates one mode of being from another in a threshold that both unites and separates what is and what could be. In defining this time of potential, I want to adapt Agamben's interpretation of the Aristotelian conception of potential to a localized "time," rather than having it as a sort of standing reserve of all action. That is to say I am concerned with a specific potentiality bounded by a certain time.

At one level the meaning is fairly clear. A transformative opportunity can be seen after a point of change, perhaps not unlike the idea of a "tipping point" popularized by Malcolm Gladwell, as he describes a "moment of critical mass, the threshold, the boiling point."<sup>1</sup> In idiomatic English there is this idea, as well, of a liminal position at which a great change occurs. For instance, we might use the expression "the straw that broke the camel's back," or in allusion to this idiom, "the last straw" and the "the final straw." These expressions indicate that something on its own, in this instance the addition of a single piece of straw to a laden camel should have no great effect. But, placed at the right time, and given the right sequence of events, any given straw can bring about a most dramatic and observable effect: in the case of the camel, the unfortunate outcome of a broken back. This moment of actuality, the broken back, discretely separates two modes of being for the camel; before the straw, the camel is whole; after, its back is broken. These two modes, however, need not be so dichotomous, and as we will see, even after transformation the camel continues to contain at least the specter of the possible. What is important here is that this is the accomplishment of the transformation from one mode of being to another—the existence of the moment of potentiality exists *before* the accomplishment of the transformation, in a sort of threshold while the straw is being

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<sup>1</sup> Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Boston: Little Brown, 2000), 12.

piled. This is what I take to be the transformative opportunity, a *time of potential* that can be seen as separate from actuality, but nonetheless related to it.

Identifying the *actuality* of a transformation can only be done *post hoc*, which is clear, perhaps even tautological. Crossing over the threshold can be said to be accomplished once it is done, once one is on the other side. But identifying the *potentiality* that also is part of the transformative opportunity is possible, given that we can identify certain conditions for a transformation: that is, for its potential. In discussing the senses, Aristotle puts it this way: “sensibility is not actual but only potential. This is why it does not give sensation, just as the combustible does not burn by itself, without a principle of combustion; otherwise it would burn itself and would not need actual fire.”<sup>2</sup> Potentiality is both a positive and negative act-in-becoming, as the combustible material is potentially fire and not-fire. In our ability to do and not do we have potential, the potential exists in complex relationship to being and not-being actualised.

Following Aristotle, Agamben points out there are two potentialities, the *generic* and *existing*, and Agamben is concerned with the latter.<sup>3</sup> The generic potential is just that: generic. It is the potential of a child to learn, or we might say colloquially all children have the potential to grow up and be prime minister. The *existing* potential consists of the ability to use—or not—some ability already gained through a prior actuality of the generic potential. Aristotle discusses this distinction in terms of wisdom, “we might speak of man as wise, because man is one of the genus of beings which are wise and have wisdom; secondly, in the sense in which we at once call the man wise who has learnt.”<sup>4</sup> Each human, human as genus and individual human as possessor of wisdom, has the potential for wisdom, “but in a different sense: the one because the genus to which he belongs, that is to say, his matter, is potentially wise; the other because he is capable, if he chooses, of applying the wisdom he has acquired.”<sup>5</sup>

It is the *existing* potential that is more salient and interesting for both Agamben and Aristotle, and for Agamben it crucially allows for the relationship between potentiality and impotentiality to be explored. The architect having the potential to build,

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<sup>2</sup> Aristotle, *De Anima*, 417a 2-5, ed. and trans. R.D. Hicks (Amsterdam: Adolf M. Hakkert, 1965).

<sup>3</sup> Giorgio Agamben, *Potentialities; Collected Essays in Philosophy* (Stanford, CA: Stanford University Press, 1999), 179.

Aristotle, *De Anima*, 417 a 21-25.

<sup>5</sup> *Ibid.*, 417 a 25-28.

or the poet the potential to write, has in it this choice of use of an ability that Aristotle highlights above. For Agamben potential is potential because of the possibility of not using, of impotential: “we say of the architect that he or she has the *potential* to build, of the poet that he or she has the *potential* to write poems... the architect is potential insofar as he has the potential to no-build, the poet the potential to not-write poems.”<sup>6</sup> This is to say that the potential exists in its relation to impotential, the potential to build or write is only significant in relation to the impotential to build or write. Potentiality is “a potentiality that is not simply the potential to do this or that thing but potential to not-do, potential not to pass into actuality.”<sup>7</sup>

The relationship between potential and impotential, however, is not that the one negates the other in its realisation of actuality or non-actuality. For Agamben the often quoted section of *The Metaphysics* is misunderstood: “A thing is capable of doing something if there is nothing impossible in its having the actuality of that which it is said to have potentiality.”<sup>8</sup> This is not, Agamben argues, the simple tautology that whatever is not impossible is possible. Rather, recognizing that impotentiality belongs to all potentiality points us toward something more complex. As Aristotle puts it “it is possible that a thing may be capable of being and yet not be, and capable of not being and yet be.”<sup>9</sup> Agamben argues that what Aristotle means here is that “*if potentiality to not-be originally belongs to all potentiality, then there is truly potentiality only where the potentiality to not-be does not lag behind actuality but passes fully into it as such.*”<sup>10</sup> Thus, impotentiality turns back on itself in actualisation, creating an impossibility of not doing this or that. This potentiality to not-be (impotentiality) passing fully into actuality “does not mean that it disappears into actuality; on the contrary, it *preserves itself* as such in actuality. What is truly potential is thus what has exhausted all its impotentiality in brining wholly into the act as such.”<sup>11</sup>

The potentiality of the transformative opportunity, then, consists of an existing potential to disengage from the current state of affairs, without negating it, with the

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<sup>6</sup> Agamben, *Potentialities*, 179.

<sup>7</sup> *Ibid.*, 179-180.

<sup>8</sup> Aristotle, *The Metaphysics*, 1047a 24-26 trans. Hugh Tredennick (London: William Heinmann Ltd., 1936).

<sup>9</sup> *Ibid.*, 1047a 21-22.

<sup>10</sup> Agamben, *Potentialities*, 183.

<sup>11</sup> *Ibid.*

(im)potential to create something new, with the specter of what could have been always beside it. The actualisation of which exhausts its own impotentiality in its act of realisation. But the potential of the transformative opportunity itself is a threshold that *both* unites and separates pre and post, what came before and what will come after, in the fullness of each. This potential is significant, or at least all the more significant, in its impotential. Its actualisation in the form of product is separate, but connected to, the potential; the transformative opportunity is not transformation, but it is a threshold.

The parties to the Indian Residential School Settlement Agreement, most importantly, here, the Crown and Aboriginal peoples, have the existing (im)potential to transform their relationships. To be clear this opportunity is nothing less than transformational, but it is also the impotential of transformation. That is, they can chose or not chose to transform this relationship, with the implications of potentiality noted above. Whether one party is unwilling or another party needs to do more to accomplish this transformation is immaterial here. Both have existing capabilities to accomplish this transformation; it is not a generic potentiality. But, it seems to sit as a sort of standing reserve of potential. I do not take a transformative opportunity to *be* potential, but to be a *time of potential*. It is a specific concept of time that helps to focus the potentiality of transformation, in the transformative opportunity.

By time, I do not refer to simple chronological time, the sequence of historical events. I do not mean, for example, that the transformative opportunity is potential for transformation from December 2015 to December 2018. What I have in mind is a concept of time called *kairos*. The ancient Greeks had two understandings of time: *chronos*, the normal time of sequential events; and *kairos*, a special time of possibility. Some might wrongly conclude that *chronos* and *kairos* are therefore opposing concepts. In translation, *kairos* is usually conveyed as “occasion,” which hints at its connection to *chronos*, and underscores that *kairos* is not a concept that is heterogeneous or opposed to *chronos*.<sup>12</sup> Agamben’s understanding of *kairos* in its complex relation to *chronos* is the most helpful for elucidating this point: quoting the collection of ancient Greek medical texts often associated with Hippocrates, the *Corpus Hippocraticum*, Agamben defines the

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<sup>12</sup> Giorgio Agamben, *The Time That Remains: A Commentary on the Letter to the Romans* (Stanford: Stanford University Press, 2005), 66.

relationship this way: “*chronos* is that in which there is *kairos*, and *kairos* is that in which there is little *chronos*.”<sup>13</sup> Put differently, *kairos* is an occasion in which there is little time, but a momentous opportunity for transformation. As Agamben states, “*kairos* does not have another time at its disposal; in other words what we take hold of when we seize *kairos* is not another time, but a contracted and abridged *chronos*.”<sup>14</sup>

In the example of the camel, above, the *kairos* of piling a camel with straw with the (im)possibility of transformation, a decisive change for the camel, which now has a broken back, is more than just a certain chronological time. Like Ernest Hemingway’s “moment of truth,” the final sword thrust in a bull fight, the transformative opportunity has a *timeliness*, it is a time of occasion.<sup>15</sup> For Hemingway “the whole aim and culmination of the bullfight was the final sword thrust, the moment of truth.”<sup>16</sup> This, however, is not the solitary pursuit, as Hemingway has it, that “all art is only done by individuals.”<sup>17</sup> Rather, as Malcolm Cowley points out “the matador’s performance would be impossible without the collaboration of nameless people, dozens of them, hundreds, thousands.”<sup>18</sup> The *kairos* of this moment of truth is not individual, constructed of one piece of time out of *chronos*, nor necessarily even sequential. But it does involve a concrete time of *chronos* in timeliness and occasion. This is because, as Agamben points out, “*kairos* does not have another time at its disposal.”<sup>19</sup> It is in this sense of urgent timeliness that I mean transformative opportunity. That is to say, the time of the transformative opportunity is the time of *kairos*.

A transformative opportunity is a moment of transformational potential, where transformation can begin rather than be accomplished all at once. But it is just that: potential. This means it is also impotential. In the context of reconciliation, a transformative opportunity is a potential turn toward reconciliation, a turn toward a relational concept that must be renewed continually. This transformative opportunity is the “point of rupture” with which transitional justice is so concerned, but it does not

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<sup>13</sup> Ibid., 66-7.

<sup>14</sup> Ibid., 67.

<sup>15</sup> Ernest Hemingway, *Death in the Afternoon* (London: Jonathan Cape, 1966), 167.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 98.

<sup>18</sup> Malcolm Cowley, “A Farwell to Spain,” *New Republic* iss. 73 (30 November 1932), 76.

<sup>19</sup> Agamben, *The Time That Remains*, 67.



suppose the tidy linear progression that transitional justice does.<sup>20</sup> The occasion of the TRC can be understood as the transformative opportunity where the Crown-Aboriginal relationship sits in a threshold of potential, in a time where there is not much time, there is a sense of urgency.

### *Transformation and Reconciliation*

Answering ‘yes’ to the research question “Is the TRC a transformative opportunity in Crown-Aboriginal relations?” I refer to a momentous time of potential from which transformation can begin to occur. Because the potentiality of the opportunity created by the TRC has an *existing* (im)potential to change Crown-Aboriginal relations, indeed the recommendations of TRC call for it, we can say that it is indeed a transformative opportunity. What is more interesting, perhaps, is *whether* the change will be actualised *and* what that change will be. I return to these questions below and in the following chapter, respectively. For this section it is important to understand that transformation in the relationship is linked to reconciliation. Those whom I interviewed for this project across the spectrum of stakeholders—from the government sector, the churches, and the Aboriginal community—all defined reconciliation necessarily involving a shift in the Crown-Aboriginal relationship. In a sort of ordering, then, we can see that transformation and reconciliation are distinct, but related, in a similar way to which transformative opportunity and transformation are linked, but distinct.

Former Minister of Indian Affairs Andy Scott stated that reconciliation works through a change in how Aboriginal peoples and other Canadians see one another. It involves bridging the gap in knowledge in Aboriginal and non-Aboriginal histories. That is, “reconciliation has to contain a shared history and we, at this point, do not have a shared history.”<sup>21</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), similarly argued that understanding history is an important place to start; he held that reconciliation needs “a better understanding on the part of all Canadians about what exactly [Indian Residential

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<sup>20</sup> Jennifer Balint, Julie Evans, and Nesam McMillian, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *The International Journal of Transitional Justice* vol. 8 (2014), 200-1.

<sup>21</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

Schools] were, and what impact they have had.”<sup>22</sup> When this history of Indian Residential Schools is commonly shared, Scott said, it will give people “a better sense of this awful period in our country” and “there will be a greater appreciation of the challenges the community faces.”<sup>23</sup> Similarly, former Prime Minister Paul Martin views the change in the relationship between Crown and Aboriginal peoples as being precipitated by a transformation of how Indian Residential Schools and the negative consequences they caused are understood by both Aboriginal and non-Aboriginal communities. This would mean “a recognition by both Aboriginal and non-Aboriginal communities of the very real tragedy that occurred.”<sup>24</sup> Once this is understood more broadly, Martin contends, the relationship will change, as many Canadians he has talked to on the subject “really are interested.”<sup>25</sup>

Jane Morley, one of the Commissioners appointed to the TRC in its first iteration, talked about the reconciliation aspect of the TRC as being expressly concerned with changing relationships. Indian Residential Schools, she said, affected relationships at various levels, and reconciliation is about the “repairing of relationships.”<sup>26</sup> While there will be reconciliation at a local level, among families for example, what “justifies [the TRC] as a truth and reconciliation commission for Canada is the idea of reconciliation between Aboriginal and non-Aboriginal peoples in Canada, or between Aboriginal peoples and the Canadian state.”<sup>27</sup>

For the Aboriginal people whom I interviewed, changing relationships are an important part of reconciliation, and of the Canadian TRC, and are very much linked to healing. Phil Fontaine described a continuum all “about healing.”<sup>28</sup> Each of the key components Fontaine lists is linked in this understanding, as Fontaine noted because “you can’t have healing without reconciliation, you can’t have reconciliation without apology,

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<sup>22</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2011.

<sup>23</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

<sup>24</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>25</sup> *Ibid.*

<sup>26</sup> Jane Morley, former commissioner of the TRC, telephone interview with author, 6 Feb. 2012.

<sup>27</sup> *Ibid.*

<sup>28</sup> Phil Fontaine, former national chief of the Assembly of First Nations (1997-200, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa.

and you can't have apology without acknowledgement."<sup>29</sup> For Fontaine, reconciliation is about being "better partners" in relationships, whether at the family, community, or at the national level.<sup>30</sup> Mike DeGagné, former Executive Director of the now-defunct Aboriginal Healing Foundation, described reconciliation as "the repair of a relationship," and saw the Healing Foundation's work as helpful in this regard.<sup>31</sup> Ghislain Picard, Quebec Regional Chief of the Assembly of First Nations, argued reconciliation is "finding ways to build new relationships... [and] how do we plan for the years forward."<sup>32</sup> Bob Watts, former Interim Director of the Truth and Reconciliation Commission of Canada, recounted a story in which a friend "who is in his sixties [only] told his daughter that he loved her for the first time a few years ago because he didn't know that that was part of the father-daughter bargain."<sup>33</sup> These types of moments, for Watts, are what can lead to changed relationships "on more a regional basis or national basis."<sup>34</sup>

Moreover, this understanding of changing relationships as operating through reconciliation is supported in the literature on reconciliation. Many scholars consider reconciliation's main concern to be "positive relationships between opposing parties."<sup>35</sup> Changing relationships are also an operative factor in the political reconciliation outlined above. As Doxtader details, acts of reconciliation are often speech acts that have the "power to turn one kind of relationship into another."<sup>36</sup> As Schaap argues, reconciliation is directed toward the (re)founding of a political community, which must entail dynamism and a certain ethical-relational interaction.<sup>37</sup> As I note in discussing political

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<sup>29</sup> Ibid.

<sup>30</sup> Bob Watts, former Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

<sup>31</sup> Mike DeGagné, former Executive Director of the Aboriginal Healing Foundation (1998-2012), telephone interview with author, 21 Feb. 2012.

<sup>32</sup> Ghislain Picard, regional chief Assembly of First Nations (since 1992), telephone interview with author, 14 Dec. 2011.

<sup>33</sup> Bob Watts, former Interim director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

<sup>34</sup> Ibid.

<sup>35</sup> Hizkias Assefa, "The Meaning of Reconciliation," in *People Building Peace: 35 Inspiring Stories From Around the World* (Utrecht, Netherlands: European Centre for Conflict Prevention, 1999), 37. See also, Erin McCandless "The Case of Land in Zimbabwe: Cause of Conflict, Foundation for Sustained Peace" in *Reconciliation, Justice and Co-existence*, Mohammed Abu-Nimer ed. (Maryland: Rowman and Littlefield Publishing Group, 2001); and Louis Kriesberg, "Changing Forms of Coexistence," in *Reconciliation, Justice and Co-existence*, Mohammed Abu-Nimer ed. (Maryland: Rowman and Littlefield Publishing Group, 2001) for other examples.

<sup>36</sup> Doxtader, "Reconciliation a Rhetorical Concept/ion," 271.

<sup>37</sup> Schaap, "Reconciliation as Ideology and Politics," 255.

reconciliation in Chapter Three, it should be understood as a generative and transformative ethic: one which enters a dialogue of possibility with urgency but without prescribing the ultimate outcome of what that reconciliation would look like. Furthermore, political reconciliation aims at decolonisation. That is, the possibility of great change in the relationship between Crown and Aboriginal peoples exists when reconciliation is thought of in this political sense, and follows a relational understanding. In the Canadian context, the TRC presented a potential of transformation in the relationship between Crown and Aboriginal peoples, bound closely to reconciliation.

*The Prospects for Change*

Perhaps more interesting than whether the TRC was a transformative opportunity is the implicit question contained therein of *if* the legacy of the TRC will fulfill its potential for change. Each person I interviewed was asked how likely he or she thought it was that the TRC would foster reconciliation, as is required by its mandate. While there was some variation in answers, a basic division emerged within the interviews. Members of the dominant, non-Aboriginal society, government officials, and former politicians, were fairly optimistic about the prospect of the TRC succeeding in fostering reconciliation. The Aboriginal leaders I interviewed, though hopeful, remained more guarded about the TRC's ability to foster reconciliation in the form of a new relationship of respect and dignity between Canadian and Aboriginal societies. It is important to note that those whom I interviewed were circumspect about what the TRC itself could achieve in terms of reconciliation. Many described the TRC as merely laying the groundwork for reconciliation. Bob Watts presented the image of the TRC as a caterer: "They're going to get the table set, they're going to have this banquet prepared, and as a country we're going to have to decide whether or not we're going to sit down and eat together and share together."<sup>38</sup>

Officials close to the negotiation of the Indian Residential Schools Settlement Agreement were quite optimistic about the possibility for success. Mario Dion contended that the TRC was very likely to succeed because of the "very able leadership... with

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<sup>38</sup> Bob Watts, former Interim director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

strong experience” that has been at work on the project.<sup>39</sup> Michael Wernick, Deputy Minister of Aboriginal Affairs and Northern Development, said he was optimistic because “other people are making attempts at reconciliation from whatever lens they can.”<sup>40</sup> The federally appointed representative in the Indian Residential School Settlement Agreement process, Frank Iacobucci, was similarly optimistic about the TRC’s chances for success: “I’m optimistic... I think there will be a lot of input into this commission. There will be lots of food for thought. And I’m confident that the product will be a very, very important component of going ahead and living together.”<sup>41</sup>

In the interviews carried in late 2011 and early 2012, former members of the Martin government were optimistic about a successful TRC contributing to reconciliation as well. Martin himself expressed the highest level of confidence among the former cabinet ministers interviewed, feeling “pretty optimistic” about it.<sup>42</sup> Anne McLellan, former Deputy Prime Minister, and Andy Scott, former Minister of Indian Affairs, expressed hopefulness rather than the more enthusiastic optimism of Martin. McLellan was “certainly hopeful that [reconciliation] is an ongoing process.”<sup>43</sup> Scott expressed that “in the end I’m hopeful that I will be able to characterize the exercise as a success.”<sup>44</sup> Interestingly, though, Scott noted that he did not “believe it will be as comprehensive as my fondest wish, but I don’t think I would hold this exercise to that threshold to be successful.”<sup>45</sup> For Scott, it was important that the TRC aspire to “even the impossible and fall somewhat short, than to go into an exercise like this from the very beginning, lowering expectations.”<sup>46</sup> While Scott’s opinion seems pessimistic, his hope springs from his trust in the Canadian public’s transformation via learning about the troubling history of the Indian Residential Schools through the activities of the TRC.

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<sup>39</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2011.

<sup>40</sup> Michael Wernick, Deputy Minister Aboriginal Affairs and Northern Development (appointed 2006), telephone interview with author, 1 Nov. 2011.

<sup>41</sup> Frank Iacobucci, former federal representative, telephone interview with author, 16 Nov. 2011.

<sup>42</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>43</sup> Anne McLellan, former Deputy Prime Minister of Canada (2003-2006), telephone interview with author, 16 Dec. 2011.

<sup>44</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

In fact, this link between the public and government action in the context of reconciliation is present in all three of these former cabinet colleagues. Martin put the view clearly as he described the reaction of students to whom he has spoken:

I go into a lot of universities and high schools and I talk with students. I get asked to talk about some of the things I'm involved in, such as the G20. I would be happy to talk about Aboriginal Canada, but mostly I get asked about things such as the G20. Whatever I am there to talk about, I will normally try and take some time at the end of my remarks and talk about something else: Aboriginal issues. Then I find that 90% of the questions are on Aboriginal issues. Once you open it up to Canadians they really are interested.<sup>47</sup>

As Scott noted, while there is hope that the general public will become interested in Aboriginal issues, the importance of this to reconciliation is clear: “the more people who can be informed, the more support government will have to do the right thing” because if “the population is not there with them, governments will very often withdraw by virtue of that.”<sup>48</sup>

Those leaders from within the Aboriginal community whom I interviewed had a different view of the prospect for the success of the TRC. While hopeful, overall the opinions of these individuals were more tepid than those of the government officials and politicians I interviewed. Regional Chief Ghislain Picard was unqualified in supporting the TRC, having “no reason to believe that [the TRC] will not be successful.”<sup>49</sup> This seems like a stronger statement than those outlined above. However, in answering my question regarding the possibility of the TRC achieving any success, Picard drew a link to the truth aspects of the TRC, and in particular pointing to survivor statement-gathering. There might be a link here to reconciliation or to changing the relationship, but Picard commented specifically on statement-gathering. And with that as a measure of success, he expressed optimism.

DeGagné, former director of the Aboriginal Healing Foundation, argued that the TRC, under the leadership of Murray Sinclair, was more concentrated on truth and document gathering than on reconciliation. On this basis, DeGagné was “not very”

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<sup>47</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>48</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

<sup>49</sup> Ghislain Picard, Regional Chief of the Assembly of First Nations (since 1992), telephone interview with author, 14 Dec. 2011.

optimistic about the TRC fostering reconciliation. Instead, for DeGagné, success would lie in the ability of the TRC to “acknowledge and say ‘Hello, we’re not in the reconciliation business. We’re more in the truth business, and the truth is supported through documentation and stories. So we feel truth will lead to reconciliation. So don’t judge us on the reconciliation outcomes.’”<sup>50</sup> Watts, likewise, was circumspect about what the TRC might accomplish, noting “there’s only so much that the Truth and Reconciliation Commission can do in the time period that it’s been mandated.”<sup>51</sup> Almost necessarily, the TRC was going to “leave at least a partially unfinished project in terms of reconciliation.”<sup>52</sup> It would be too much to expect any single commission to achieve reconciliation, especially when dealing with a complex and long-lived phenomena like colonisation. As noted in Chapter Six, above, even South Africa continues to struggle with the legacy of colonialism embodied in Apartheid. Similarly, Fontaine described reconciliation as “a work in progress, and the effects might not be felt for some years.”<sup>53</sup>

These moderated expectations from these Aboriginal leaders are understandable in the context of other commissions and efforts that have been convened, and earlier attempts to place issues facing Aboriginal peoples in Canada at the top of the political agenda. DeGagné, Fontaine, and Watts all mentioned the Royal Commission on Aboriginal Peoples, expressing, in one way or another, the hope that “it [the TRC] doesn’t go the way of RCAP.”<sup>54</sup> There is more discussion on RCAP in Chapter Five, above, but the importance of it here is that the Royal Commission’s report was largely ignored. The report contained many recommendations for creating a new relationship between the Government of Canada and Aboriginal peoples, such as treaty-making, respecting existing treaties, protecting Aboriginal land bases, and understanding the fiduciary responsibility on the part of the Government of Canada, among others.<sup>55</sup> John Borrows argues that the *Report of the Royal Commission on Aboriginal Peoples* is a

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<sup>50</sup> Mike DeGagné, former executive Director of the Aboriginal Healing Foundation (1998-2012), telephone interview with author, 21 Feb. 2012.

<sup>51</sup> Bob Watts, former Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

<sup>52</sup> Ibid.

<sup>53</sup> Phil Fontaine, former national chief of the Assembly of First Nations (1997-2000, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa.

<sup>54</sup> Ibid.

<sup>55</sup> *The Report of the Royal Commission on Aboriginal Peoples* was published in five volumes and in the fifth volume there is an extensive plan to chart the way forward.

relevant and significant document. However, for Borrows the way it has been used represents a “domestication of Aboriginal and treaty rights” in a way that is “another stage in the development of colonialism for indigenous peoples.”<sup>56</sup> This is often the case, with the more expansive view of Aboriginal peoples and their place in Canada expressed in the report being down played.<sup>57</sup> While the *Report of the Royal Commission on Aboriginal Peoples* has other issues aside from being largely ignored by the general public as well as policy makers,<sup>58</sup> it is against this background of promise and possibility, which RCAP embodied, that the impact of the TRC continues to play out, and which may inform the cautiousness of those in the Aboriginal community whom I interviewed.

It is important to note that there is this circumspection, on the part of many whom I interviewed, about the extent to which the TRC, within its mandated time period, can create reconciliation. This underlines the idea discussed earlier that reconciliation is both a process and a goal that must be constantly acknowledged and renewed to be successful.<sup>59</sup> In many regards, the commission itself is the start of a conversation, or at least designates a time and place in which a conversation about the IRS system and its legacy can happen. Gerry Kelly from the Canadian Conference of Catholic Bishops characterized the TRC as “a framework for success,” where it started a conversation that “will take fire... and be a catalyst” for reconciliation.<sup>60</sup> Former commissioner Morley saw the TRC in a similar light, stating that while reconciliation will involve “a shift in public opinion” and a changing “relationship with indigenous peoples in Canada,” the TRC was “no more than a catalyst to that happening.”<sup>61</sup> Both Martin and Scott, also, see

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<sup>56</sup> John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission,” *McGill Law Journal* vol. 46, no.3 (2001), 661.

<sup>57</sup> *Ibid.*, 660.

<sup>58</sup> Kiera Ladner criticizes RCAP for conceiving of Aboriginal self-government as negotiated, qualified, and limited. See Kiera Ladner, “Visions of Neo-Colonialism? Renewing the Relationship with Aboriginal Peoples,” *The Canadian Journal of Native Studies* vol. 21, no. 1 (2001), 115. The RCAP’s concentration on concepts of “nation” in the approach to understand Aboriginal peoples is also problematic as it prioritizes Aboriginal peoples with a land base, leaving out urban Aboriginal peoples. See Chris Andersen and Claude Denis, “Urban Natives and the Nation: Before and After the Royal Commission on Aboriginal Peoples,” *Canadian Review of Sociology* vol. 40, no. 4, (2003), 373-390.

<sup>59</sup> This point is discussed in the Chapter Three, but even the political reconciliation I outline is about both process and goal. For discussing of reconciliation as both goal and process see: Philpott, “An Ethic of Political Reconciliation,” 390; Bloomfield, *On Good Terms*, 6-7; and David Hoogenboom and Stephanie Vieille, “Rebuilding Social Fabric in Failed States: Examining Transitional Justice in Bosnia,” *Human Rights Review* 11 no. 2 (2010), 195.

<sup>60</sup> Gerry Kelly, Canadian Conference of Catholic Bishops, telephone interview with author, 6 March 2012.

<sup>61</sup> Jane Morley, former commissioner of the TRC, telephone interview with author, 6 Feb. 2012.



reconciliation continuing beyond the completion of the TRC's mandate. This is an important point to highlight, as it is doubtful the Truth and Reconciliation Commission of Canada, with a \$60 million budget and a five-year mandate, could have accomplished reconciliation, assuming that reconciliation is attainable at all.<sup>62</sup>

It is important not to overdraw this distinction between those who are hopeful about a new relationship, and those who are more measured in assessing the likelihood of creating a new relationship. But the distinction did exist in the interviews I conducted. The important qualification to this is the extent of the expectation placed on the TRC in itself as the method for “accomplishing” this type of reconciliation. Here, there is little difference at all in the opinions of those interviewed. As was noted above by Bob Watts, the TRC can merely be the caterer but it is who—if anyone—shows up to the banquet that presents an entirely different problem.

### *Impediments to Success*

Continuing with Bob Watts' metaphor of the Canadian TRC's role as caterer, there are certainly strategies to ensure more guests come to the “banquet.” Even among those who responded optimistically to the prospect of a new relationship, their faith in the TRC was neither blind nor naive. The major issue consistently identified by the individuals I interviewed was the extent to which the TRC could reach the broader Canadian community. Scott was clear in his understanding of the importance of dissemination of the findings, since “governments are, from time to time, very conscious of public opinion... so, consequently, if public opinion is not supportive of the kind of energy that should be expended by government to address First Nation, Métis, and Inuit issues because they're not informed,” it is easier for the government not to expend that energy.<sup>63</sup> DeGagné shared this view of the role of the public pushing government to act, when he

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<sup>62</sup> It is important to note that in the Chapter Three I outline an understanding of reconciliation that is continually practiced in an ethic of interaction between Crown and Aboriginal peoples, and, thus, not accomplishable *per se*. That is to say, I argue that reconciliation is a practice and not an outcome.

<sup>63</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

said, “I think that public opinion could drive the government to a deeper understanding.”<sup>64</sup>

And there is certainly evidence to suggest that this knowledge among the public is lacking. Scott offered anecdotal evidence during our interview recounting his experience teaching at the University of New Brunswick, where even at the graduate level, “in a class of thirty, if one person was aware of Indian Residential Schools when I brought it up, it was a good day.”<sup>65</sup> While Martin was hopeful about Canadians becoming interested once they know about the issue, he acknowledged that many are indifferent because they are unaware of the issues faced by Aboriginal peoples as a result of the Indian Residential Schools system.<sup>66</sup>

Likewise, both Morley and Watts, the two people to whom I spoke who were most involved with the TRC itself, identified reaching out to the dominant society as crucial and something that is just not happening. Morley was clear, when it came to reconciliation, that “absolutely crucial is an engagement of the settler society, if you want to call it that, including non-indigenous people, many who are recent immigrants or children of immigrants.”<sup>67</sup> Watts argues that the TRC was “flying under the radar as far as I can see, and doesn’t really seem to be capturing the imagination of Aboriginal people either.”<sup>68</sup>

Not everyone I interviewed mentioned a concern about the level of awareness on the part of the dominant society. There was no specific question in the interview that elicited the concerns above. It is, however, important to note that not everyone agreed with the characterization of the TRC as failing to reach out to the dominant society. Dion expressed optimism at the level of awareness about Indian Residential Schools, as well as their broader impact. As Dion described, reconciliation involves “a greater sympathy and empathy for survivors and their descendants. And I think it’s already starting to do that, because in 2002 or even five years ago, the level of understanding of Residential Schools

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<sup>64</sup> Mike DeGagné, former executive Director of the Aboriginal Healing Foundation (1998-2012), telephone interview with author, 21 Feb. 2012.

<sup>65</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

<sup>66</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>67</sup> Jane Morley, former commission of the TRC, telephone interview with author, 6 Feb. 2012.

<sup>68</sup> Bob Watts, former Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

within the Canadian population was very low... but it is greater [now] than it was.”<sup>69</sup> Dion was not exactly disputing the perceptions of the TRC failing to reach out to the broader public, as he clearly stated that understanding of the IRS system is “still low.”<sup>70</sup> Rather, the difference is that Dion was more optimistic about the *increase* in awareness of Aboriginal issues that has occurred since his involvement began in 2002, and he attributed that to the workings of the TRC.<sup>71</sup>

While these opinions are few and anecdotal, there is more solid evidence to support the conclusion that the TRC was not reaching out to the dominant society. An Environics survey conducted in 2008 for the Truth and Reconciliation Commission of Canada found that just over one-third of Canadians “report[ed] familiarity with the issue of native people and residential schools, with only one in twenty very familiar.”<sup>72</sup> More problematic than this, the same survey found that some six in ten Canadian were unable to cite any consequence of Indian Residential Schools for the people who attended them.<sup>73</sup> In a more up-to-date study conducted by Angus Reid in July 2015, the survey found that only 17% of respondents were following the TRC closely, a number that dropped to 12% when the respondents did not personally know any Aboriginal people.<sup>74</sup>

The lack of wide diffusion and dissemination is a large impediment to the success of the TRC in fostering reconciliation through a change in the relationship between Crown and Aboriginal peoples in Canada. Hjortur Sverrisson, discussing the case of Kosovo, argues that a record of historic wrongdoings is important in combatting deniers of those wrongs. But more important than merely having an official record of wrongdoings is that this must be widely disseminated.<sup>75</sup> In the case of the Canadian IRS system, it is less that the TRC is uncovering previously unknown facts, but, rather, that it is giving voice to the Indian Residential School experience through survivor testimonies. Hayner argues that in some cases TRCs do not “find new truth so much as break the

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<sup>69</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2011.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Environics Research Group, “2008 National Benchmark Survey,” May 2008, i.

<sup>73</sup> *Ibid.*, ii.

<sup>74</sup> Angus Reid Institute, “Truth and Reconciliation: Canadians see value in process, skeptical about government action,” (9 July 2015), 2.

<sup>75</sup> Hjortur Sverrisson, “Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?” *Peace and Conflict Development*, issue 8 (2006), 13,

silence about widely known but unspoken truths.”<sup>76</sup> More generally, Bloomfield, Barnes, and Huyse argue that public outreach “by a truth commission is critically important.”<sup>77</sup> This outreach can be accomplished by a number of activities including “holding public information meetings and... the preparation, publication and dissemination of pamphlets, video and publications in popular form.”<sup>78</sup> Similarly, a truth commission needs to effectively engage with NGOs, other community organizations, and the media.<sup>79</sup>

It is this last mechanism for mass dissemination, the media, that could be most useful for engaging Canadians in the work of the TRC, and which was identified as lacking by several of those interviewed. The Canadian TRC was mandated to hold seven national events meant to engage the population and to facilitate statement gathering. Yet, even around these national events, Morley was dissatisfied with the level of coverage by the media. Morley stated, “I watched around the national events that happened and I saw that the CBC really didn’t have very much about it.”<sup>80</sup> If Morley’s impressions are correct, this could go some way to explaining the low level of awareness among Canadians at the time of the interview.<sup>81</sup> Without national but, more importantly, sustained media coverage the TRC would have great difficulty reaching those in the dominant society and raising awareness of the IRS system and its lasting effects.

Even within groups that were party to the agreement it may be difficult to foster engagement. Watts expressed frustration at the level of participation by the churches that were party to the agreement that led to the TRC. Speaking specifically about the Atlantic National Event in Halifax, Watts stated that he had “talked to some of church leaders there and said, ‘Where are your people?’”<sup>82</sup> While church leaders were engaged and attending these events, “you see a lot of the same, really wonderful, church

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<sup>76</sup> Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd edition (New York: Routledge, 2011), 20.

<sup>77</sup> David Bloomfield, Teresa Barnes, and Luc Huyse, *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 133.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Jane Morley, former commissioner of the TRC, telephone interview with author, 6 Feb. 2012.

<sup>81</sup> An Environics benchmark study in 2008 found only half of Canadian had heard about Indian Residential Schools (Environics Research Group, “2008 National Benchmark Survey,” May 2008), however, in an updated study in 2016 Environics found this number had increased to 66%, perhaps due to news coverage of Aboriginal protests and the final report of the TRC (Environics Research Group, “Canadian Public Opinion on Aboriginal Peoples,” June 2016, 29).

<sup>82</sup> Bob Watts, Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

representatives.” But, Watts wondered, “Where [were] the everyday, ordinary Anglicans [and Catholics, and United Church congregants]?”<sup>83</sup> Overall, for Watts, “those partners in reconciliation that are out there need to be better partners. They are not doing their job.”<sup>84</sup> This sentiment is highlighted in a 2015 Angus Reid survey that found only 20% of respondents thought the TRC was worthwhile for their community, indicating a feeling of divorce from it and its work.<sup>85</sup> For Watts it is the federal government that needed to be a better partner. He felt it did not even adequately engaging its own staff. It is important to inform churchgoers or federal employees. Watts saw this as crucial to aiding in the dissemination of information about the TRC and the experience of the IRS system as well as forming an indispensable part of the reconciliation process. Watts put it this way:

There are 300,000 people working for the federal government. How many of them know that their government is in a reconciliation process? And how easy would it be for the government to do a half day training session with every government employee. That’s not asking a whole lot. And imagine those 300,000 people, each of them, talking to their spouse that night or to their cousins, or to whomever, I mean, that could be tremendous.<sup>86</sup>

Here, then, in the lack of media coverage, and lack of followers of this coverage, there was a significant impediment to the reconciliation process and to changing the relationship between the Crown and Aboriginal peoples. The lack of engagement on the part of non-Aboriginal Canadians poses a challenge to the reception of the TRC report. While it is still possible that the final report of the TRC could widely disseminate the commission’s findings, and thereby create the type of engagement that currently seems to be minimal, it may be unreasonable to expect a public largely unaware of and disconnected from the events and findings of the TRC to react much, if at all, to the final report. The sheer size of the final report itself, too, may mediate against engaging the general public, the executive summary alone constitutes 337 pages not including appendices and notes, and contains 94 Calls to Action.<sup>87</sup> Having an engaged and

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Angus Reid Institute, “Truth and Reconciliation: Canadians see value in process, skeptical about government action,” (9 July 2015), 7.

<sup>86</sup> Bob Watts, Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012

<sup>87</sup> The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015).

informed public on this issue will be important in pushing the government to action and in holding that government accountable for its past and future actions and inactions.

Many Canadians may find it difficult to engage with the TRC as they are simply unaware of the facts of Indian Residential Schools. This facet of Canadian history is little taught and many Canadians have no knowledge of what the IRS system was or what happened to Aboriginal youth within it. This reality is borne out by the survey research cited above. The sad reality against which the TRC must struggle is that too few Canadians have a working knowledge of the IRS system.

Another reason it was so difficult to engage the broader Canadian society may be that the dynamic of the TRC simply did not connect with them. Kelly referred to the TRC's media coverage as "reinforcing the idea that residential schools legacy is one that comes with victims and perpetrators, and that puts everyone else who is not a perpetrator or a victim on the side lines."<sup>88</sup> If this is the case, a reductive binary of victim and perpetrator leaves little room for other Canadians, especially recent immigrants, who view themselves as neither victim nor perpetrator. Laurel Fletcher argues that this is exactly the weakness of transformative justice mechanisms such as truth commissions because they do not "engage bystanders directly—they are the audience for, but not the subject of" these mechanisms.<sup>89</sup> However, as many of my interviewees argued, in the case of the Canadian TRC, we lacked even this removed spectator audience. Arne Johan Vetlesen notes that those not involved directly have "a passive role, that of onlookers, although what starts out as a passive stance may, upon decision, convert into active engagement in the events at hand."<sup>90</sup> Vetlesen, draws lessons from the experiences of the Bosnian International Tribunal, and while he specifically discusses the Bosnian genocide, one lesson from his analysis is applicable in the case of the TRC in Canada: that "the bystander is the one who decides whether the harm wrought by the aggressor is permitted to stand uncertified or not."<sup>91</sup>

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<sup>88</sup> Gerry Kelly, Canadian Conference of Catholic Bishops, telephone interview with author, 6 March 2012.

<sup>89</sup> Laurel E. Fletcher, "Facing Up to the Past: Bystanders and Transitional Justice," *Harvard Human Rights Journal* vol.20 (2007), 47.

<sup>90</sup> Arne Johan Vetlesen, "Genocide: A Case for Responsibility of the Bystander," *Journal of Peace Research* vol.37, no.4 (2000), 520.

<sup>91</sup> *Ibid.*, 529.

In Canada, the inability of the TRC to engage the Canadian public could seriously impact the prospects for a changed Crown-Aboriginal relationship, based on Vetlesen's analysis. While I do not propose an alternative framework, Kelly highlighted something very important when he assesses the victim-perpetrator binary as excluding a large and important population from the process of reconciliation: the bystanders. This matches my own experience of discussing the TRC with students, friends, family, and even strangers. The general public might be sympathetic to the issue of Indian Residential Schools, but they fail to see how it is connected with their own lives in any way. As Kelly pointed out, there is often some sort of vicarious-perpetrator argument, from which it follows that everyday Canadians are not party to the policies of the Canadian government. The effect of this argument is that the injustice of the IRS system "just isn't real" for people.<sup>92</sup> This, again, further diminishes the dominant society's awareness of the IRS system and its lasting effects, as they can find no credible place in the binary of victims and perpetrators for themselves.

### *Sincerity of the Partners*

What will be key to the transformation in the relationship between Crown and Aboriginal peoples is the willingness of each of the partners in reconciliation to transform their own position in relation to Aboriginal peoples. That is to say, in the choice to change the relationship, quite aside from the *potential* to change, there have to be a will to change. A lack of a sincere commitment towards reconciliation, which can be read as a lack of will to change, would be an impediment to any kind of meaningful transformation, especially if this willingness is lacking on the part of government. Each interviewee was asked specifically about his or her opinion of the sincerity about the federal government's commitment to reconciliation. Those who were in the government bureaucracy, perhaps unsurprisingly, answered most positively to this question. For those who were affiliated with the political parties, the views on the government's sincerity was mixed. Again, perhaps unsurprisingly, the lone Conservative party member who consented to an interview with me believed that the Harper government was sincere, while the former Liberal cabinet ministers interviewed were less convinced. Those from the Aboriginal

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<sup>92</sup> Gerry Kelly, Canadian Conference of Catholic Bishops, telephone interview with author, 6 March 2012.

community answered with the most suspicion regarding the government's commitment, citing many cancelled programs and unilateral moves by the then-Conservative government. Survey research bears out this feeling; in 2013 Angus Reid found that 43% of respondents said that since the Conservatives came to power in 2006 relations between the federal government and Aboriginal peoples had worsened.<sup>93</sup> In the same survey 55% of respondents thought that the meeting to be held in January 2013 between Stephen Harper and Aboriginal leaders would be moderately or very unsuccessful in improving relations between the federal government and Aboriginal peoples.<sup>94</sup>

When asked about the sincerity of the Government of Canada's commitment to reconciliation, Dion responded: "Yes they do [have a sincere commitment] and I'm convinced of that."<sup>95</sup> Although Dion made it clear that his opinion was "as a citizen,"<sup>96</sup> his former position as Executive Director of IRS Resolution of Canada, as well as his general interest in the area, makes his analysis significant. Further, Dion cited the apology offered by Prime Minister Harper on the floor of the House of Commons in 2008 as evidence of the sincerity of the government. For Dion, the apology was "indicative of the state of mind that [Harper] had reached" and that while Harper "didn't do this in 2006, it took two years to come to this conclusion that it was the right thing to do... [It] is very significant, it is not a knee-jerk reaction... It was deeply felt."<sup>97</sup> It is important to point out, again, that Dion as a citizen observer offered these comments, and Dion had no inside access to how Stephen Harper felt about all this. Speaking as both a citizen and a deputy minister, Wernick was resolute in his answer about the Canadian Government's commitment to reconciliation, stating "I don't doubt that [commitment] for a second."<sup>98</sup> The reason for this optimism was first-hand experience: Wernick had been involved in drafting Harper's apology, and the movement on "expensive land claim settlements that have been navigated, notwithstanding all the fiscal restraint, and the clincher argument

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<sup>93</sup> Angus Reid Public Opinion, "Few Canadians are Hopeful Before Harper Meets Aboriginal Leaders," (9 Jan. 2013), 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2011.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Michael Wernick, Deputy Minister of Indian Affairs (appointed 2006), telephone interview with author, 1 Nov. 2011.



has always been that it's the right thing to do.”<sup>99</sup> Iacobucci, too, felt encouraged that the government was committed to reconciliation. He indicated the continuity of process despite a change in power, from Martin to Harper, as evidence, further arguing “it's in everybody's interest to make great strides in our relationship [with Aboriginal peoples].”<sup>100</sup>

Ian Brodie, former Chief of Staff to Prime Minister Harper, was similarly confident in the sincere commitment of the Government of Canada to reconciliation. In addition to the Prime Minister's commitment, Brodie noted “Prime Minister Harper has got some not inconsiderable people in his cabinet to help [the government] through some of the issues.”<sup>101</sup> For these members of the government, Brodie contended, “there's always an opportunity to press forward with a plan that deals with poverty, housing, various forms of inequality, substance abuse, economic opportunity, and on all these sorts of concerns I think there's quite a bit of room.”<sup>102</sup> As evidence of this commitment, Brodie cited the Crown-First Nations gathering in Ottawa in January of 2012, and he noted that it was a “high profile summit” some time in the making.<sup>103</sup>

The Liberals I interviewed held different opinions on the issue of government commitment to reconciliation. It is impossible to identify how much of this might be due to partisan division. The Liberals, having lost power to the Conservative Party of Canada in the 2006 general election at the time of interview, were sitting on the opposition benches. The Liberals I interviewed, however, did offer reasons for doubting the resolve of the government. Interestingly, members of the Aboriginal community whom I interviewed also mentioned some of the reasons offered by Liberals. For Scott, criticism of the lack of government resolve on reconciliation is not limited to the Conservatives. As he stated, “generally speaking the Government of Canada, regardless of political affiliation, is inadequately engaged in this issue.”<sup>104</sup> It is improbable that this comment was meant to criticize the government in which Scott served as Minister of Indian

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<sup>99</sup> Ibid.

<sup>100</sup> Frank Iacobucci, former federal representative, telephone interview with author, 16 Nov. 2011.

<sup>101</sup> Ian Brodie, former chief of staff to Stephen Harper (2006-2008), telephone interview with author, 3 Feb. 2012.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

Affairs, as later in the answer to the same question about sincerity Scott praised former Prime Minister Martin's approach to Aboriginal issues. Scott discussed how he was committed, himself, but "didn't bring to the job near the passion that Mr. Martin brought."<sup>105</sup> While at first Martin was motivated by concern for current "First Nations, Métis, and Inuit conditions," Scott noted that when sincerely addressing these conditions, "you run up against Indian Residential Schools, immediately."<sup>106</sup>

Martin certainly agreed with the assessment of his former minister. When asked if he thought the Government of Canada under Stephen Harper had a sincere commitment to reconciliation Martin was unequivocal: "No, I do not."<sup>107</sup> The reasons for this scepticism on the government's willingness to change the relationship between Crown and Aboriginal peoples were several and related to (in)action on the part of the Harper government since 2006. The delay in offering an apology was one factor Martin identified. Before the general election, a deal had been reached between the parties, at least in principle, and not wanting to campaign on the apology, Martin did not raise it. But "once the election was over it would have been done."<sup>108</sup> The delay in the apology was only one issue that caused Martin to doubt the sincerity of the commitment of the Government of Canada.

Martin also cited "the UN Resolution [61/295], the negotiation of which was led by the Government of Canada for many, many years. And then when it finally passed, the Canadian government [under Harper's Conservatives] refused to ratify it."<sup>109</sup> Martin referred here to the *United Nations Declaration on the Rights of Indigenous Peoples* which was passed in September of 2007 in the UN General Assembly, and against which Australia, Canada, New Zealand, and the United States voted.<sup>110</sup> While the Canadian government, under Harper, initially rejected this declaration, by 2010 Canada had signed

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> United Nation Permanent Forum on Indigenous Peoples, "Declaration on the Rights of Indigenous Peoples," <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx> (accessed 27 Sept. 2012). Canada finally acceded to UNDRIP in 2016.

on.<sup>111</sup> With the Trudeau government that came to power in 2015, instructions were given to the Minister of Indigenous Affairs to implement the Declaration, and by May 2016 the Minister announced that “Canada is now a full supporter, without qualification, of the declaration.”<sup>112</sup> What concerned Martin here was the delay in the Declaration’s adoption, which mirrors the delay in the apology, and so he suggested this indicated “that this was not an important issue” for the government.<sup>113</sup>

Perhaps most problematic from Martin’s point of view was the Conservative government’s decision not to honour the Kelowna Accord. While for Martin this refusal to follow through on an agreement reached by his government “made me [Martin] mad,” it indicated the Conservative government’s decision to significantly break with the Liberal approach on Aboriginal issues.<sup>114</sup> This approach was characterized by collaboration with Aboriginal peoples rather than an imperious attitude towards Aboriginal peoples. It is the difference between treating Aboriginal peoples as wards and treating Aboriginal peoples as partners.

It is important to note that there was no doubt expressed by those whom I interviewed over Harper’s perceived sincerity when he proffered the historic apology, on behalf of all Canadians, in the House of Commons in 2008. McLellan was clear in addressing this issue: “I will give Prime Minister Harper credit. He stood in the House, and invited the right people to the floor of the House of Commons. And I think the apology, the words of the apology were the right words. I have no reason to doubt the Prime Minister’s sincerity in that.”<sup>115</sup> McLellan, like both Scott and Martin, still, however, had doubts about “this government and its sincerity in relation to certain things on this file,”<sup>116</sup> but no one from the Liberal Party I interviewed doubted Harper’s sincerity in his apology.

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<sup>111</sup> John Ibbitson, “Ottawa wins praise for UN indigenous-rights declaration,” *The Globe and Mail*, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/ottawa-wins-praise-for-endorsing-un-indigenous-rights-declaration/article4081652/> (accessed 27 Sept. 2012).

<sup>112</sup> Canada, Indigenous and Northern Affairs Canada, “United Nations Declaration on the Rights of Indigenous Peoples,” <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958> (accessed 5 Oct. 2016).

<sup>113</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>114</sup> *Ibid.*

<sup>115</sup> Anne McLellan, former Deputy Prime Minister (2003-2006), telephone interview with author, 16 Dec. 2011.

<sup>116</sup> *Ibid.*

Those Aboriginal people whom I interviewed similarly had no reason to doubt the sincerity of the apology, but they were less sure about the government's sincerity in the process of reconciliation. Phil Fontaine clearly stated that he felt that Harper's apology, while overdue, was, in the end, sincere.<sup>117</sup> On the issue of a sincere commitment to reconciliation, however Fontaine was less positive. He noted that "the government has had difficulty in giving action to the words of the apology."<sup>118</sup> Fontaine outlined a real difference in approach between many Aboriginal peoples and the government, especially Harper's government, suggesting that it comes down to collective versus individual rights and values.<sup>119</sup> Negotiating this difference is intimately linked to reconciliation and the creation of a new Crown-Aboriginal relationship. Fontaine further stated that he "still needs to be convinced" that the actions, policies, and words of the Government of Canada will reflect an understanding of Aboriginal difference in Canada.<sup>120</sup> Far from affirming and understanding this difference, Fontaine contended that the government has been largely suspicious of Aboriginal peoples, with the exception of Martin, whom Fontaine described as "a breath of fresh air."<sup>121</sup> This praise for Martin was largely due to the Kelowna Accord, which the Conservatives subsequently did not honour. During the Kelowna negotiations, Fontaine felt as though the government, under Paul Martin, was treating Aboriginal government as a *legitimate* order of government in Canada.<sup>122</sup> For Fontaine, this view was further strengthened by the close contact fostered between himself as National Chief of the Assembly of First Nations and the office of Prime Minister while Martin held that post.<sup>123</sup>

Ghislain Picard also had reservations regarding the sincerity of the government's commitment to reconciliation. Picard pointed out that there would be a possible conflict between the government's view of reconciliation with that of Aboriginal peoples; on the question of the government's sincerity, he stated: "I think if the question was asked to them [the Government of Canada under Stephen Harper] they would say 'of course we

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<sup>117</sup> Phil Fontaine, former national chief of the Assembly of First Nations (1997-2000, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

are.’ But if it’s according to their own definition and what it implies than I have to say it doesn’t work that way.”<sup>124</sup> It was evident in Picard’s response that he had reason to suspect that this was, in fact, occurring, as he indicated that he had to “base [his] opinion on the current situation.”<sup>125</sup> He further stated that if “the attitude [of the government] is going to be tinted with the same colonial attitude and approaches, going back 60 or 70 years, then I would have to say we are in for a long haul.”<sup>126</sup> Judging the Harper government on the actions it took once it came to power, Picard argues, gives reason to be suspicious of its commitment and cause to worry about old colonial attitudes making their way into the government’s approach. According to Picard, the Conservative victory in the general election in 2006 “slowed down the process” of the TRC Agreement and signalled a negative change in tone by cutting back “on Aboriginal languages which was tens of millions [of dollars].”<sup>127</sup> In fact, in 2007 the Harper government cut some \$172 million in funding for Aboriginal language preservation, which the previous Liberal government had promised.<sup>128</sup> Like Fontaine, Picard also identified the delay in endorsing the *UN Declaration on the Rights of Indigenous Peoples* as cause for doubting the resolve of the government to move forward on reconciliation in a meaningful way.

Perhaps the clearest sign that the Harper government did not fully understand the governments required scope of work towards reconciliation was the comment made by Harper at the G20 meeting in September of 2009 that Canada has “no history of colonialism.”<sup>129</sup> In answering a routine question regarding the financial crisis, Harper extolled the virtues of Canada’s relatively strong financial position, stating “we are one of the most stable regimes in history... We also have no history of colonialism. So we have all of the things that many people admire about the great powers but none of the things

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<sup>124</sup> Ghislain Picard, regional chief of the Assembly of First Nations (since 1992), telephone interview with author, 14 Dec. 2011.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Muriel Draaisma, “Endangered Languages,” CBC.ca, <http://www.cbc.ca/news/background/aboriginals/endangered-languages.html> (accessed 27 Sept. 2012).

<sup>129</sup> David Ljunggren, “Every G20 nation wants to be Canada, insists PM,” *Reuters*, <http://www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926> (accessed 27 Sept. 2012).

that threaten or bother them.”<sup>130</sup> This statement shows a significant misunderstanding of facts of Canadian history, while at the same time it insults those Aboriginal peoples who have felt the effects of Canada’s colonial history, perhaps most tangibly in Indian Residential Schools.

Kathleen Mahoney, Legal Counsel to the Assembly of First Nations and a University of Calgary Law professor, mentioned similar concerns over actions taken by the Harper government. These concerns had caused her to “start doubting” the sincerity of any commitment of the government to reconciliation.<sup>131</sup> While mentioning water, housing, and the situation in Attawapiskat, Mahoney discussed, with much concern, issues related to justice and the administration of justice. On this front, she had not “seen any clear indication that there is this desire to reconcile. I mean look at the Justice Department policy on mandatory minimum sentences. Who is that going to affect the most? Obviously it’s going to affect Aboriginal peoples because they’re so grossly over-represented in prison already, and they are routinely going to jail for things that will be affected by mandatory minimums.”<sup>132</sup> More than mandatory minimum sentencing, Mahoney was troubled by suggestions from the government that special sentencing considerations which take into account Aboriginal ancestry and residential school legacy were “racist and unfair”<sup>133</sup> even though they had been mandated in the Supreme Court decision *Gladue*. Mahoney’s disappointment is founded in the government’s drive for mandatory minimums and the desire to do away with the provisions of *Gladue* on the premise that special sentencing conditions treat Aboriginal peoples differently. While the *Gladue* decision may not have achieved reductions in Aboriginal incarceration yet,<sup>134</sup> the concern here was that the basis of advocacy for its inapplicability demonstrates a

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<sup>130</sup> Reuters, “Every G20 nations wants to be Canada, insists PM,” <http://www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926> (accessed 2 May 2015).

<sup>131</sup> Kathleen Mahoney, legal counsel for the Assembly of First Nations, telephone interview with author, 10 Feb. 2012.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> In 2008, ten years after *Gladue*, Aboriginal incarceration had increased to nearly 25% of admissions to provincial custody and among youth admissions to custody Aboriginal youth represent 1 in 3 admissions, leading Kent Roach to conclude that “the hopes of *Gladue* have not be realized” (Kent Roach, “One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal,” *Criminal Law Quarterly* vol. 54, no. 4 (2009), 471.).

misunderstanding of the impact of Indian Residential Schools and the immensity of the problem of Aboriginal over-representation in prison.<sup>135</sup>

Watts argued that the sincerity of the government can be seen by simply looking for evidence that the current government's actions matched its words, which is "just fair."<sup>136</sup> Setting aside cancelled deals, cancelled programs, and a fundamental difference in understanding Canadian history, Watts expressed concern that "people shouldn't be able to say a whole bunch of really wonderful, flowery things and not be expected to follow through on them."<sup>137</sup> On this limited criteria, Watts had seen little cause for optimism, stating bluntly that "even from this mild sort of test, I'm disappointed and I think that there has been a real failure in terms of attempting to reconcile."<sup>138</sup> Where Picard mentions the possibility of bringing the past colonial governmental approach into the issue of reconciliation, Watts gave startling voice to this possibility when he said "What we are going to see, more and more, is the federal government taking up a view, just like they did with the Residential Schools, which is 'We know what's best for you. You may not like the bitter medicine but you're going to take it.'"<sup>139</sup> In the same answer, Watts goes on to say, without identifying them by name, "some of the church leaders I have heard from say 'We can't just stand idly by and watch what's going on, because that's what got us here in the first instance.'"<sup>140</sup> Here, Watts referred to the Harper government's status quo colonial approach, which is incompatible with a new relationship based on an ethic of political reconciliation.

David MacDonald of the United Church of Canada seemed to raise similar concerns about the sincerity of the government. When asked about the government, MacDonald started by saying "It's hard to know" whether the government is sincere.<sup>141</sup> Later in the answer MacDonald listed some of the outstanding issues on which the

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<sup>135</sup> Kathleen Mahoney, legal counsel for the Assembly of First Nations, telephone interview with author, 10 Feb. 2012. Michelle Mann argues that implementing a vigorous *Gladue* consideration by judges during sentencing is linked to principles of reconciliation (Michelle Mann, "Sentencing Aboriginal Offenders: The Honour of the Crown, Reconciliation and Rehabilitation of the Rule of Law," (masters of law thesis, Queen's University, 2012)).

<sup>136</sup> Bob Watts, former Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> David MacDonald, United Church of Canada, interview with author, 16 Jan. 2012, Toronto.

government has failed to act, such as reservation housing and the issue of Aboriginal children in state care. He expressed serious concern about reconciliation, stating “If the government is sincere about reconciliation, it can’t leave those things standing out there. And you can’t use Mickey Mouse arguments like ‘Well we gave them so much money and what happened to it?’ or get into a fight with the local band council over who’s going to administer the funds.”<sup>142</sup> Moreover, MacDonald expressed concern over Harper’s subscription to the “Tom Flanagan School of what should be done about First Nations, which is really a more sophisticated view of assimilation.”<sup>143</sup> Of the two people interviewed from the church community, MacDonald certainly articulated the more stinging assessment of government sincerity. But Gerry Kelly from the Canadian Conference of Catholic Bishops also had cause for concern. Initially Kelly answered quite positively regarding government sincerity, stating, “I’m going to give a positive answer to that [question].”<sup>144</sup> Not wanting to disrespect those “on the ground working so hard on this,” Kelly opted for an affirmative answer on sincerity. However, he did express concern that “the Government of Canada would like to contain this to a conversation that is fairly narrow at this point.”<sup>145</sup> Kelly held out hope that this might

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<sup>142</sup> Ibid. This last point regarding funds is allusion to the situation around housing in Attawapiskat, a remote First Nation near James Bay which experienced a housing crisis in 2011 that resulted in the band chief declaring a state of emergency in early November. Winter was coming and many residents were in makeshift housing arrangements, as there was a 250 unit housing deficit in the community (CBC News, “Attawapiskat housing help talks ongoing,” *CBC.ca*, <http://www.cbc.ca/news/canada/story/2011/11/24/attawapiskat-housing.html> (accessed 27 Sept. 2012)). This state of emergency made national news and moved on reserve First Nation issues to the top of the agenda, for a time. The response of the Harper government was to appoint a third party trustee to “get to the bottom of what happened to millions in funding,” in essence accusing the First Nation of financial malfeasance (Andrea Janus, “Feds to put Attawapiskat under third-party management,” *CTV News*, <http://www.ctvnews.ca/feds-to-put-attawapiskat-under-third-party-management-1.733715> (accessed 27 Sept. 2012)). While later a Federal Court decision found the government’s response “unreasonable,” (Meagan Fitzpatrick, “Attawapiskat handed victory by Federal Court,” <http://www.cbc.ca/news/politics/story/2012/08/01/pol-attawapiskat-court-ruling.html> (accessed 27 Sept. 2012)), MacDonald is alluding to this situation demonstrating the approach of the Government of Canada under Stephen Harper.

<sup>143</sup> Ibid. The mention of Tom Flanagan, an academic at the University of Calgary, presumably refers to his role as advisor to Stephen Harper which ended in 2004 and Flanagan controversial views on Aboriginal policy as outlined in *First Nation? Second Thoughts* (Montreal: McGill-Queens University Press, 2008). In this work Flanagan sets out to dispel what he calls Aboriginal orthodox positions on nationhood, sovereignty, and rights. Premised on the superiority of Europeans, whose “civilization was several thousand years more advanced than the aboriginal cultures” (6) they found in North America, Flanagan proceeds to make an argument that Aboriginal peoples receive no special treatment, rights, or consideration. Aboriginal peoples are citizens like any other.

<sup>144</sup> Gerry Kelly, Canadian Conference of Catholic Bishops, telephone interview with author, 6 March 2012.

<sup>145</sup> Ibid.



change, but was not naive: “I don’t think [the Government of Canada] is going to, in one great moment, embrace the whole ball of wax”—meaning an expanded conversation on reconciliation.<sup>146</sup>

It is not, perhaps, surprising that those closest to government at the time of interview—current civil servants, a former federal negotiator, and a former Chief of Staff to Prime Minister Harper—most favourably assess the commitment of the Government of Canada to reconciliation. The difference between their assessments and those of people from the other groups interviewed, however, is important.

The Liberals started the process that led to the TRC, but were not influential in crafting government policy, having lost power in the 2006 general election. The Liberals pointed to a sentiment that there was not enough being done. More significant, however, is the sentiment expressed by a few Aboriginal leaders interviewed, as well as Mahoney, who were more circumspect about the sincerity of the government. This perception by some within one of the parties to the agreement impacts on what is referred to in the literature as acknowledgement and responsibility. It points to possible problems with the Government of Canada acknowledging their own complicity in the Indian Residential Schools System and taking responsibility for it, in more than a minimal way. While the assessment is complicated by the 2015 change in government back to the Liberals, what remains clear is the suspicion at the time of the interviews of the Conservative government.

In discussing the cases of Uganda and Haiti while building a theory of acknowledgement, Quinn argues that acknowledgment itself is a way to determine the relative success or failure of a truth commission.<sup>147</sup> Acknowledgement is located in a flow of processes “which can lead to forgiveness, and to strengthened networks of civic engagement, all of which may lead, ultimately, to increased levels of social trust and reconciliation.”<sup>148</sup> The use of the word “may” here is deliberate, as Quinn contends that acknowledgement “forms a necessary but not sufficient condition for rebuilding.”<sup>149</sup> Moreover, Quinn describes acknowledgement as a process which has at least three

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<sup>146</sup> Ibid.

<sup>147</sup> Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver: UBC Press, 2010), 6.

<sup>148</sup> Ibid., 15.

<sup>149</sup> Ibid.

elements: “coming to terms with the past, emotional response, and memory and remembering.”<sup>150</sup>

The constituent components that Quinn describes match well with the mechanism of a truth and reconciliation commission. Hayner notes “official acknowledgement can be powerful precisely because official denial can be so pervasive.”<sup>151</sup> The way to provide this “official acknowledgement,” for Hayner, is through a truth commission, whereas for Minow truth commissions are only one among a number of other mechanisms, such as reparations, and trials.<sup>152</sup> Rajeev Bhargava draws a closer link, arguing that acknowledgment is bound up in remembering, both general and specific memory of wrongdoing, and it is both the general and specific memory that a truth commission can facilitate, “but they must be concerned primarily with public recall of specific wrongdoing.”<sup>153</sup>

Of course, acknowledgement on its own is insufficient to address wrongdoing; it must imply corrective action, too. Acknowledgment is linked to action through the taking of responsibility, the double utterance of “this happened” *and* “it will not happen again.” As Bhargava notes “the acknowledgement that an act was immoral is a moral judgement and, like all moral judgements, has implications for action. Therefore, to acknowledge past injustice is to commit ourselves to avoiding it in the future.”<sup>154</sup> In Quinn’s model, the important component of “coming to terms with the past” contains a taking responsibility for past actions, exactly because of the action implied by the recognition of something as wrong. That is to say, “coming to terms with the past... is affected not only by confronting its past but also by beginning to do something to overcome that past.”<sup>155</sup> This understanding of acknowledgement links back to the concept of reconciliation as an on-going process as discussed above, which would see the occasion of the TRC as the transformative opportunity where the Crown-Aboriginal relationship can begin to change

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<sup>150</sup> Ibid., 16.

<sup>151</sup> Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd ed. (New York: Routledge, 2011), 21.

<sup>152</sup> Ibid., Chapter 3, especially 21-23; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press 1998), chaps. 3, 4, and 5, cited in Quinn *Politics of Acknowledgement*, 17.

<sup>153</sup> Rajeev Bhargava, “Restoring Decency to Barbaric Societies,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 54.

<sup>154</sup> Ibid., 65 n.25.

<sup>155</sup> Quinn, *The Politics of Acknowledgement*, 19.

and that in order for decolonisation to occur this changed/changing relationship must continually be acknowledged and re-enacted to fulfill its potential.

In this context, then, the doubts of the Aboriginal leaders I interviewed about the sincerity of the government's commitment to reconciliation really are a doubting of the degree to which the Government of Canada is *acknowledging* the Indian Residential Schools system and its legacy. The apology offered in 2008 by Conservative Prime Minister Stephen Harper; the billions in compensation for school attendance and specific abuse; and the TRC itself; are all components of certain aspects of acknowledgement. Yet acknowledgment, importantly, implies and requires an action substantially different than that which led to the wrongdoing. The evidence offered by those interviewed points to a continued colonial attitude on the part of the Government of Canada and its political leaders, that is, the Conservatives. Former Assembly of First Nations Chief Shawn Atleo has described "the rate and pace of change" as "too slow."<sup>156</sup> In fact, to listen to the way in which those whom I interviewed tell it, changes may have been happening in the wrong direction. The most visible sign of this was Harper's failure to honour the Kelowna Accord negotiated by the preceding Liberal government under Paul Martin. As will be discussed in Chapter Eight this multi-billion dollar multi-year deal had a novel and reconciliatory approach to Crown-Aboriginal relations. Not only did the Conservative government walk away from the Kelowna Accord after its negotiation, then Conservative finance critic Monte Solberg criticized the agreement as "something the Liberals crafted at the last moment on the back of a napkin."<sup>157</sup> Of those Aboriginal leaders interviewed, the perception that the government of Stephen Harper did not take adequate responsibility and adequately acknowledging Indian Residential Schools could have a devastating impact on the success of the TRC to produce a new and respectful relationship between Crown and Aboriginal peoples. Villa-Vicencio and Verwoerd highlight the importance of acknowledgment that "reconciliation requires a profound

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<sup>156</sup> Heather Scoffield, "Native patience runs thin four years after residential-school apology," *The Globe and Mail* <http://www.theglobeandmail.com/news/politics/native-patience-runs-thin-four-years-after-residential-school-apology/article4248862/> (accessed 29 Sept. 2012).

<sup>157</sup> CBC News "B.C. questions Conservative commitment to First Nations Deal," *CBC.ca* [http://www.cbc.ca/news/canada/british-columbia/story/2006/01/11/bc\\_solberg20060111.html](http://www.cbc.ca/news/canada/british-columbia/story/2006/01/11/bc_solberg20060111.html) (accessed 30 Sept. 2012).

change in people,” one that cannot be brought about by a TRC alone.<sup>158</sup> All of this makes the actions and willingness of those in government to sincerely commit themselves to reconciliation all the more important.

It is important to reiterate that there was change in government in 2015 that returned the Liberals to power. It was not possible to re-interview the interviewees from 2011-12 to get their assessment of the new government and its sincerity to reconciliation. I will say that there have been signs of a new approach to dealing with Aboriginal issues, not least the change of the name of the federal department responsible to Indigenous Affairs. The new government announced the striking of a commission on murdered and missing Aboriginal women, the chair of which was recently appointed.<sup>159</sup> Also, in receiving the final report of the TRC, Trudeau himself announced that “we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>160</sup> These are just *signs* of a new sincere approach. While there has been much talk and some symbolism on the part of the Liberal government, in key areas identified by the TRC and the government to improve relations and foster reconciliation, such as child welfare, some are disappointed in the inaction taken.<sup>161</sup> Given the timing of the election, October 2015, the parliamentary calendar, and the inertia of nearly a decade of Conservative government to overcome, it may be too soon to adequately judge the Trudeau Liberals’ approach. If it is not too soon, it seems they are open to Watts’ criticism of the previous Conservative government, long on words short on action.

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<sup>158</sup> Villa-Vincencio and Verwoerd, *Looking Back, Reaching Forward*, 66-7.

<sup>159</sup> Catharine Tunney, Kathleen Harris, “Marion Buller, B.C. First Nations judge, to lead MMIW inquiry,” *CBC.ca*, 3 Aug. 2016 available from: <http://www.cbc.ca/news/politics/mmiw-inquiry-launch-details-1.3704191> (accessed 3 Aug. 2016).

<sup>160</sup> Prime Minister of Canada, *Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission*, 15 Dec. 2015, available from: <http://www.pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission> (accessed 3 Aug. 2016).

<sup>161</sup> See for example Tavia Grant, “Cindy Blackstock, Canada’s ‘relentless moral voice’ for First Nations equality,” *The Globe and Mail* 14 Jul. 2016, available from: <http://www.theglobeandmail.com/news/national/cindy-blackstock-canadas-relentless-moral-voice-for-first-nations-equality/article30915894/> (accessed 3 Aug. 2016).

*Conclusion: Better than What Came Before*

While there are attitudes discussed above that are critical of the government and identify important obstacles to the TRC's success, no one identified the negotiation process that led to the TRC as any worse than previous approaches to dealing with the Indian Residential School system legacy. As discussed in Chapter One and Chapter Six, the genesis of the TRC lies in lawsuits and the inadequacy of the courts to deal with the volume of claims emerging from within the Aboriginal community. Iacobucci described how overwhelming the challenge was, with some 15,000 individual claims and 23 class action suits, all of which would have taken years to work their way through the courts.<sup>162</sup> In 2003, when Dion was brought in on the file, only 200 of the 15,000 claims had been settled and it looked as though it would take an additional 53 years to resolve the outstanding actions. At that time, the average age of IRS survivors was 68, meaning that many of the survivors would not have lived to see justice done.<sup>163</sup> Thus, the importance of finding a faster way to deal with these claims was manifest. An alternative dispute resolution process was then employed as a way of taking these suits out of the courts and dealing with them in a faster and less adversarial way. As discussed in Chapter One and Chapter Six the alternative dispute resolution process was a flawed and unfair system that was a better alternative to protracted court proceedings, but still failed to adequately and fairly deal with the claims made by survivors.

Out of this emerged the Indian Residential Schools Settlement Agreement process that led to the TRC. Those involved in the negotiation found it to be a fine process, thanks in great part to the work of the federal representative Frank Iacobucci. Fontaine described Iacobucci as “a wonderful man” who “believes in human dignity and demonstrated that in managing the negotiations.”<sup>164</sup> Watts, too, felt Iacobucci was exactly the person needed to move the negotiations along. “He was wonderful, I think, in terms of the whole process, in terms of trying to keep people honest with each other.”<sup>165</sup> Those on the government side, too, had great respect for the former Supreme Court justice.

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<sup>162</sup> Frank Iacobucci, former federal representative, telephone interview with author, 16 Nov. 2011.

<sup>163</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2012.

<sup>164</sup> Phil Fontaine, former national chief of the Assembly of First Nations (1997-2000, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa.

<sup>165</sup> Bob Watts, former Interim Director of the TRC (2007-2008), telephone interview with author, 19 Jan. 2012.

McLellan, who, as Deputy Prime Minister, had primary cabinet responsibility for the negotiations, praised the approach of Iacobucci.<sup>166</sup> This process was certainly preferable to either lawsuits or the alternative dispute resolution process, but it is important to note that it was a *negotiation* process and that the TRC emerged from negotiations with massive lawsuits, and unknown government liability, as a backdrop.

It may, then, be less surprising that the TRC was imperfect, that it failed to engage the dominant society, those outside the binary of victim and perpetrator, having been the product of elite negotiation and legal settlement. Moreover, it cannot be surprising that what reconciliation the TRC could foster would possibly be limited by this failure as well as the seeming lack of sincerity on the part of the Conservative government.

Was the TRC a transformative opportunity in Crown Aboriginal relations? Yes, in that it had the *potential* to transform, as many leaders from the various communities were concerned with relationships and changing them for the better and there is in this process the presence of an urgent moment of possibility. What tempers enthusiasm here is the likelihood of transformation, but this likelihood is a separate question from transformative opportunity. While there was troubling doubt of Aboriginal elites, and formerly influential Liberal privy councillors, about how far the Conservative government was willing to go to change the Crown-Aboriginal relationship, with a new Liberal government there is more reason for optimism. While there is cause for more optimism under this government lead by Justin Trudeau, it remains to be seen whether this approach is different in practice from the previous Conservative government. What is clear, however, is that a sincere change in approach is needed to undertake a thorough going political reconciliation in Canada, the *potential* for which was given by the TRC. It is in this *existing potential*, as detailed above, that I can answer affirmatively to the research question.

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<sup>166</sup> Anne McLellan, former Deputy Prime Minister (2003-2006), telephone interview with author, 16 Dec. 2011.

## CHAPTER EIGHT

### What Comes Next: Towards What is This a Transformation?

#### *Introduction*

In the last chapter, I discussed my interview findings and how they informed my primary research question regarding whether the TRC represents a transformative opportunity in Crown-Aboriginal relations in Canada. Building upon this primary objective, this chapter discusses my findings as they relate to my secondary question: toward what is this a transformation? That is to say, what future relationship between the Crown and Aboriginal peoples in Canada could result from the processes and outcomes of the TRC? Part of understanding whether the TRC is likely to impact Crown-Aboriginal relations is to assess how this relationship could change as a *direct result* of the proceedings of the TRC. Seeking insight into the outcome of this transformative opportunity is a valuable undertaking as a preparatory measure, since a change in the Crown-Aboriginal relationship may not necessarily prove to be a positive one, indeed may not occur at all. As we saw with the RCAP in the mid-1990s, attention paid to Aboriginal issues, even some popular and political support for change in Crown-Aboriginal relations, do not guarantee change. The relationship could, in fact, worsen, leaving Aboriginal peoples further outside of the Canadian governmental decision-making process. Alternatively, the relationship could stay the same, or even improve, with the Government of Canada progressing towards a position that acknowledges Aboriginal peoples' role in determining their own futures. The point being that a change in relationship need not imply a bettering of a relationship, but simply marks a shift from one mode to another. In asking toward what is this transformation, we must acknowledge the range of possibilities, especially given the recent history of Crown-Aboriginal relations.

While acknowledging this range of possibilities it is not my intention to catalogue them. This would be overly speculative and distracting to the main point here, that the relationship has the *existing potential* to change, and that change may lead toward a political ethic of reconciliation or away from it. That is to say the potential to change is nothing less than the promise of transformation. In addressing this question what I present is necessarily speculative. While I am hopeful that the Crown-Aboriginal

relationship will eventually become a de-colonialized relationship that strives for an ethic of political reconciliation, some policy-based decisions taken by the Conservative government point to a relationship that will be characterized by a neo-assimilationism that seeks, ultimately, to remove the unique place of Aboriginal peoples in Canada. With a Liberal government recently elected and at least rhetorically committed to reconciliation, there is greater cause for hope that a change in Crown-Aboriginal relations will toward a decolonial political ethic of reconciliation. It was clear from my interviews that a positive change in Crown-Aboriginal relations was unlikely under the previous government due to the differing understandings of the extent of reconciliation between the government and Aboriginal peoples, but that the possibility of such a change was present. As seen in the interviews I conducted and considering the actions taken by the Government of Canada under the Conservative party, this difference in understanding could prefigure what form relations between the Crown and Aboriginal peoples would result from the TRC, eschewing a political ethic of reconciliation.

As with any relationship, however, the relationship between the Crown and Aboriginal peoples continues to change as it is lived out through interactions. As governments change and become a new face of the Crown in its relationship with Aboriginal peoples, new possibilities are opened up. Before moving on to discussing the interviewees' respective appraisals of where the Crown-Aboriginal relationship might be heading, it is important to point out that there have been some signs of positive, de-colonising, change from different facets of the Crown or its representatives. These incipient signs of reconciliation may help us to visualise reconciliation in Canada, helping us to understand what form reconciliation may take.

### *Toward Reconciliation in Canada*

The generative political aspects of reconciliation are difficult to deal with because of the uncertainty they involve. It is not possible or desirable to lay out exactly what reconciliation would look like in Canada, as it needs to be the product of an agonist politics of generation in order to avoid the reconstruction of colonial power dynamics. That is to say, reconciliation as I have outlined it above in Chapter Three, requires a process that will bring about a realisation through dialogical interaction between the



parties, where adversaries interact rather than enemies destroy. Some aspects of the changing relationship between the Crown and Aboriginal peoples are discussed below, linking them to something like the beginnings of reconciliation that can be seen in constitutional law, land claims and governance, criminal law, and the Kelowna Accord. My unwillingness to sketch reconciliation is not obfuscation; rather, I want to take seriously the contingent, contestable nature of reconciliation and instead highlight the ethic with which to engage in the process of relational change. Outside of its connection to decolonisation, I hesitate to make reconciliation too present a thing. Thus, what follows here are just gestures at what might be reconciliation. These gestures will give further context to the interviews and help us to glimpse reconciliation.

It may be the case that reconciliation is already underway in Canada and has been for some time, namely in the area of jurisprudence. McHugh argues that many former British colonies have undertaken policies of reconciliation in order to address the grievances of indigenous peoples, but only in Canada has this policy been one of a “constitutional and court-driven jurisprudence of reconciliation.”<sup>1</sup> As Walters argues, this process began in 1973 with the Supreme Court of Canada ruling on *Calder*, in which “Canadian judges rediscovered the common law doctrine of Aboriginal title.”<sup>2</sup> Successive rulings by courts in Canada, aided in 1982 with the insertion of Section 35 into the *Constitution Act*, have led to the Supreme Court putting reconciliation front and centre in adjudicating cases involving first peoples in Canada. In 1996, the Supreme Court held in its ruling on *Van der Peet* that “reconciliation provides the cornerstone of Canadian Aboriginal rights law.”<sup>3</sup> Again in 2005, the Court stated the importance of reconciliation in the *Mikisew* decision that “the fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”<sup>4</sup> While the law through the courts can only have a limited ability to create reconciliation, the courts, as a powerful institution of the Crown are an important ally in reconciliation. This reconciliation may

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<sup>1</sup> Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 579.

<sup>2</sup> Mark D. Walters, “The Jurisprudence of Reconciliation,” in *The Politics of Reconciliation in Multicultural Societies*, eds. Will Kymlicka and Bashir Bashir (Oxford: Oxford University Press, 2008), 176.

<sup>3</sup> *Van der Peet* 1996: para. 31 in Walters “The Jurisprudence of Reconciliation,” 176.

<sup>4</sup> *Mikisew* 2005: para.1 in Walters “The Jurisprudence of Reconciliation,” 176.

be quite limited, directed toward bringing competing, and sometimes-incompatible, claims in to some sort of equilibrium, but nonetheless represents a version of reconciliation.

The Supreme Court of Canada itself has recognized the limited ability of the law as a mechanism of reconciliation, and as Walters points out, the Court now views its primary role as encouraging reconciliation through dialogue.<sup>5</sup> In cases where land is disputed and no authoritative determination has been made about ownership of it, according to two rulings in 2004, *Haida Nation* and *Taku River*, the government is obliged to consult First Nations before opening lands to development. This significantly changed the role of First Nations in the development of lands in and near their traditional territories. In the *Haida Nation* ruling, Chief Justice McLachlin found the government to have a duty to “honourable dealings toward Aboriginal peoples” and to seek “compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.”<sup>6</sup> As the Court wrote in a subsequent decision, *Tsilhqot’in*, citing *Haida Nation*, “the governing ethos is not one of competing interest but of reconciliation.”<sup>7</sup>

In 2014 the Court further refined its interpretation of both Section 35 of the constitution and its understanding of Aboriginal title in the *Tsilhqot’in* decision. They found that the Tsilhqot’in nation had title to the land in question, due to sufficiency of occupation, and found this title to consist of the “right of exclusive use and occupation of the land... the title holders have the right to the benefits associated with the land—use it, enjoy it and profit from its economic development.”<sup>8</sup> It is important to note that the Court held that the Crown does not retain a beneficial interest in Aboriginal titled land. As Borrows puts it “First Nations who have title can use their lands as they choose subject to two limits: 1) Aboriginal title cannot be alienated except to the Crown, and 2) nor can be encumbered, developed, or misused in ways that would prevent future generations of the group from using and enjoying it.”<sup>9</sup> While this is a notable advance in the thinking of the

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<sup>5</sup> Walter, “The Jurisprudence,” 185.

<sup>6</sup> *Haida Nation* 2004: para. 32 and 47, respectively, in Walter, “The Jurisprudence,” 186.

<sup>7</sup> *Tsilhqot’in* 2014, para. 17.

<sup>8</sup> *Ibid.*, para. 70.

<sup>9</sup> John Borrows, “The Durability of Terra Nullius: *Tsilhqot’in* Nation v. British Columbia,” *University of British Columbia Law Review*, vol. 48 iss. 3 (2015), 721.

Court, and for Borrows this decision is “unparalleled in Canadian law,” it still gives him cause for concern.<sup>10</sup>

The problem here revolves around underlying Crown title and sovereignty that is supported in the decision. It is the Crown that enables Aboriginal title, licences it, restricts it and determines it within the framework of the Western legal tradition. This may be all the Court *can* do given its limited scope as one aspect of the Crown. This fact, however, does not change the radical difference between Crown and Aboriginal title, as “unlike Crown title, Aboriginal title must be established by the courts or through agreement with the Crown.”<sup>11</sup> For Borrows it is exactly this unevenness that is at issue:

Underlying Crown title and overarching Crown sovereignty do not respect the dignity of peoples. They do not facilitate the negotiation of first principles related to the Crown’s legitimacy in Canada. They imply that Indigenous peoples are politically subordinate because of their Aboriginal status. They make the Crown the paramount power, rather than showing how power can be shared in reconciling legal interests.<sup>12</sup>

Even though this decision represents a step towards repairing the relationship between Crown and Aboriginal peoples, it is only a step. It is telling that the most receptive aspect of the Crown to Aboriginal issues is also the most restrictive, in terms of its scope of action. The advancement of Aboriginal acknowledgement and reconciliation within the legal processes has as its aim, argues Walters, the transformation of the legal authority of the settler state, which is *de facto* in view of the ideals of rule of law, into a *de jure* system that “legalizes” the settler state.<sup>13</sup> That is it to say, a *post facto* legitimation. I argue, this is also the institution of the exception as rule, as it constructs a system of laws and interpretations (court decisions) that except Aboriginal sovereignty and title.

This aim to legally legitimize the state is, at least in part, motivated by the inclusion of Aboriginal rights in the *Constitution Act 1982* under Section 35, where “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>14</sup> While the meaning of this section is not entirely clear, its intent, Asch argues, is to “place a constraint on the Parliament of Canada, the provincial

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid., 729.

<sup>12</sup> Ibid., 725-726.

<sup>13</sup> Walter, “The Jurisprudence,” 189.

<sup>14</sup> *Constitution Act 1982* Sec. 35(1).

legislative assemblies and other members of the body politic to act in accord with the acknowledgement of these rights, regardless of their political will to do otherwise.”<sup>15</sup> This view is sustained by the Court’s interpretation of Section 35, stating in *Tsilhqot’in* that “where title is asserted, but has not been established. S.35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interest.”<sup>16</sup>

The ambiguous content of these “aboriginal and treaty rights” was viewed suspiciously even at the time of the patriation discussions, most notably by then-Alberta premier Peter Lougheed, who worried that the rights affirmed by the section were not defined or fixed in time. That is to say, Lougheed worried that “new rights” could “continually be added... some of which, in the premier’s view, might have a negative impact on the rights of other citizens.”<sup>17</sup> The exact content of such rights remains unclear despite political efforts to give more concrete content to them. However, Asch argues that both the federal government and Aboriginal groups agreed, at the time of patriation at least, that Section 35 should afford self-government and land rights to Aboriginal peoples.<sup>18</sup> Despite the commitment to further constitutional negotiations to sort out the implications of Section 35, no such content has been arrived at outside the court. Indeed, the refinement and extension of “Aboriginal rights” has come from the courts, not a political process aimed at clarifying this section’s meaning.

The failure of “mega-constitutional” politics in Meech Lake and Charlottetown has marked an end of political attempts to give this section of the constitution more definition, for now. In the absence of political agreement, or even a new *Royal Proclamation*,<sup>19</sup> it has been left to one aspect of the Crown—the courts—to resolve the outstanding issues. As Walters points out, it has been the courts that have significantly

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<sup>15</sup> Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), 8.

<sup>16</sup> *Tsilhqot’in* 2014, para. 2.

<sup>17</sup> *Ibid.*, 7.

<sup>18</sup> *Ibid.*, 87.

<sup>19</sup> Arnot suggests this could be a solution to what he calls a “deliberate policy of avoidance of the issue,” (David Arnot, “The Honour of First Nations – The Honour of the Crown: The Unique Relationship of First Nations with the Crown,” a paper presented at The Crown in Canada: Present Realities and Future Opportunities conference 10 June 2010, 20.) of treaties by Canada. While an “elaborate solution” this new proclamation would “supplement the *Royal Proclamation of 1763* and restore the fundamental principles between First Nations and the Crown of the bilateral nation-to-nation relationship, the treaty making tradition and, most important, the method for treaty implementation and renewal”(20-1).

defined the contours of Aboriginal rights in Canada. In the absence of political will, it is the courts that can protect and extend rights. With the interpretation of Section 35, it has provided the backstop to defend and extend some Aboriginal and treaty rights.

The duty to consult that was found by the Court in the 2004 decisions *Haida Nation* and *Taku River*, along with the extension of this duty in the 2005 *Mikisew* decision, is an important elaboration by the Supreme Court, in the absence of political will, to constitutionally define the content of the rights affirmed in Section 35. These three cases taken together read-in the duty to consult to Section 35, even in the absence of a change in the written constitution.<sup>20</sup> According to the author of the majority decision, Chief Justice Beverley McLachlin, the duty to consult is grounded “in the honour of the Crown.”<sup>21</sup> That “honour” is rooted in an ancient British tradition of separating the Crown *per se* from the government of day, to save the former from the intransigence and misconduct of the latter.<sup>22</sup> What this concept means in practice is that ministers of the Crown, when acting on behalf of the Crown, must be held to a higher standard of fairness that “demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law.”<sup>23</sup> This concept is, perhaps, most clearly seen in the context of treaties, but as David Arnot argues, it is an essential commitment to “justice” and “fairness” on the part of the Crown.<sup>24</sup> This is not an inconsiderable constitutional principle to have read-in to Section 35 in the absence of political will and in the context of a history of dishonourable dealings.

To the extent that Section 35 provides an avenue for reconciliation this “reconciliation” is not unproblematic as it still relies on and fails to scrutinize the basis of the Canadian state and Aboriginal rights in this context: Crown sovereignty. As Dale Turner argues it is Section 35 that “demands that Aboriginal laws, customs, and practices be reconciled with Crown sovereignty. Aboriginal laws, customs, and practices need to be articulated in the language of the common law, as opposed to Aboriginal peoples

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<sup>20</sup> Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon, SK: Purich Publishing, 2009), 14.

<sup>21</sup> *Haida Nation*: para. 16. in Newman, *The Duty to Consult*, 16.

<sup>22</sup> Arnot, “The Honour of First Nations – The Honour of the Crown,” 8.

<sup>23</sup> *Ibid.*, 9.

<sup>24</sup> *Ibid.*, 10.

looking to their spiritual practices and philosophical systems of thought as the logical sources of their rights.”<sup>25</sup> Even the Supreme Courts more robust reading of Section 35 has the effect remedying past abuses of Aboriginal right with a promise not to do it again. Because this fails to deal directly with the issue of sovereignty, Dale argues that Aboriginal leaders and legal scholars “have resisted this characterization of Aboriginal rights and continue to press for greater recognition of Indigenous nationhood in how we ought to understand the meaning of s. 35(1).”<sup>26</sup> Without dealing with Crown sovereignty directly, the very basis of the colonial order remains unexamined and, as Coulthard argues, “in such conditions, reconciliation takes on a temporal character as the individual and collective process of overcoming the subsequent *legacy* of past abuse, not the abusive colonial structure itself.”<sup>27</sup>

The re-emergence of the question of Aboriginal land title in the wake of the 1973 *Calder* case focuses on another aspect of reconciliation that may already be underway in Canada, that of treaty-making and land claims. While it is the case that Great Britain made treaties with many northeastern woodland peoples and plains peoples, a notable exception to the practice of treaty making happened in what is now British Columbia and some parts of the high Arctic. Resolving the lack of treaties in these areas, as well as resolving outstanding land claims in other parts of Canada, shows a significant reversal of policy that have left many Aboriginal peoples without a bilateral relationship with the Crown and denied their rightful lands. The case of British Columbia is instructive in seeing this relatively recent push for treaty making.

When the Hudson's Bay Company landed in the Pacific northwest, rather than purchase land and conclude treaties with the people they found there, the Company opted for the Lockian conception of possession through occupation.<sup>28</sup> For Locke, the primary ownership any person has is of his own body, and thus when has labour is mixed with an

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<sup>25</sup> Dale Turner, “Aboriginal Relations in Canada: The Importance of Political Reconciliation,” Federation of the Humanities and Social Sciences Blog, *Equity Matters*, 31 May 2011 available from: <http://www.ideas-idees.ca/blog/aboriginal-relations-canada-importance-political-reconciliation> (accessed 30 Aug. 2016)

<sup>26</sup> *Ibid.*

<sup>27</sup> Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 108-9.

<sup>28</sup> Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas and McIntyre, 2006), 73-74.

object, he comes properly to own it.<sup>29</sup> When it comes to land there is only one recognizable use for Locke: agricultural development. Tilling the soil and growing crops, or enclosing with a fence for use as pasture, removes the land from the common stock given by God to all men, as Locke would have it, and make it properly one's own: that is to say property in our usual understanding of it.<sup>30</sup>

What James Douglas, chief factor of the Hudson's Bay Company, did, then, when dealing with the Aboriginal peoples of present day British Columbia, was to grant "land rights" over only such lands as were cultivated or had houses built on them. The rest of the land was declared unimproved and could be settled by Europeans with underlying Crown sovereignty over the land.<sup>31</sup> Out of the grace and beneficence of the Crown, the people who had just lost their traditional hunting lands were allowed to use whatever Crown land had not yet been settled or developed, but only had proper claim to what had been developed or built upon before 1846.<sup>32</sup> However, no formal treaties were concluded for these lands that the Crown claimed and no terms of relationship were established between the natives and newcomers. While, thirty years after the expropriation of lands, these Pacific coast peoples would be governed by the *Indian Act*, unlike the northeastern woodlands and plains peoples, no formal or treaty relationship was established. Even the lands set aside for Aboriginal peoples Douglas—by 1851, governor of Vancouver Island and later British Columbia—considered inalienable only because they belonged to the Crown and the creation of these reserves was a humanitarian measure.<sup>33</sup> After Douglas retired in 1864, the government in British Columbia abandoned even this measure of land protection for Aboriginal peoples and systematically sided with settlers in disputes over land, further alienating traditional lands. In 1865, the British Columbia government, then still an independent colony, outside of the Canadian federation, adopted a land ordinance which provided free land grants for colonists of 160 acres per family, with the option to

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<sup>29</sup> Locke's discussion of how this works is contained in Chapter 5 of the *Second Treatise of Government*. See John Locke *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2004) especially 285-287.

<sup>30</sup> The discussion of land specifically comes later in Chapter 5, see Locke, *Second Treatise*, especially 290-292.

<sup>31</sup> Penikett, *Reconciliation*, 74.

<sup>32</sup> *Ibid.*

<sup>33</sup> Daniel Raunet, *Without Surrender, Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas and McIntyre, 1984), 75-6.

purchase from the Crown an additional 480 acres, while at the same time using 10 acres per family as the standard in the establishment of reserves for Aboriginal peoples.<sup>34</sup>

While a thorough history of the issues in British Columbia is not necessary here, this brief context ties in with a broader problem of land expropriation in colonial and contemporary period, that only since the *Calder* case has begun to be addressed by the Crown. As Raunet argues, it has been the insistence by the Nisga'a people that the land belongs to them that has frustrated attempts to legalize the expropriation of lands with guarantees of hunting or trapping access and the like.<sup>35</sup> It is the problem of competing narratives; as Harris puts it, there is "one that [is] about dispossession, and the other about development. The former told, almost entirely by Native people... [t]he development story, told by newcomers."<sup>36</sup> Thus, the Nisga'a Treaty can be read as reconciliation of these competing stories into something new, in the spirit of the Court's ruling with the desire to set the legal foundation of Canada within the bounds of its own laws. The Nisga'a Treaty, the first modern treaty in British Columbia, came into effect on 11 May 2000. The Nisga'a Treaty established a 2,019 square kilometer area in which the Nisga'a people will govern themselves, be provided funds for operating such a government, and allocated fisheries and game.<sup>37</sup> The authority afforded the new Nisga'a Lisims government is more expansive than other treaties and includes administration of justice and dispute resolution. However, as John Burrows points out, this is not an exclusive authority. Rather, it is concurrent with provincial and federal jurisdiction.<sup>38</sup> What this means in practical terms is that Nisga'a law must comply with provincial and/or federal law; where provincial or federal standards are exceeded, then Nisga'a law prevails. However, in many cases if there is a conflict, it is provincial or federal law that would supersede Nisga'a law.<sup>39</sup>

While more expansive than other treaties, the Nisga'a Treaty still limits the authority of the government established in the Nass Valley. This has led to criticism by

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<sup>34</sup> *Ibid.*, 76.

<sup>35</sup> *Ibid.* 233.

<sup>36</sup> Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 294-5.

<sup>37</sup> Aboriginal Affairs and Northern Development, "Key Features of the Agreement," <http://www.aadnc-aandc.gc.ca/eng/1100100016428> (accessed 25 May 2012).

<sup>38</sup> John Burrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 100.

<sup>39</sup> *Ibid.*



some scholars including Taiake Alfred, who rejects this type of “collaboration with colonial power [which] cannot be supported within the framework of a traditional culture.”<sup>40</sup> For Alfred, this fails to be a truly decolonising approach, as it legitimizes the Crown’s claim to sovereignty while failing to recognize the full autonomy of Aboriginal peoples. Even this expanded authority is “unable to accept the essential compromise that would be key to developing processes that are truly decolonising: Settlers must come to accept Onkwehonwe existence as autonomous nations and, with this, recognize the need for a fundamental reshaping of their countr[y].”<sup>41</sup> Controversy aside, what the Nisag’a Treaty may represent is a flawed attempt at reconciliation that is already underway.

Moving from constitutional and property law to criminal proceedings, here, again, there might be an extant drive for reconciliation underway. There have been significant changes to the way Aboriginal people are dealt with by the criminal justice system over the past three decades. This has, in part, been the result of concern of Aboriginal over-representation in the justice system and also driven by the decisions of the Court. Aboriginal people come into contact with the criminal justice system more often and are incarcerated in disproportionately high numbers when compared to the general Canadian population. According to Proulx, between 1989 and 1994 on average, while Aboriginal people represented only 3% of the Canadian population, they accounted for 12% of federal and 20% of provincial prisoners.<sup>42</sup> In 1997-1998, the Canadian Centre for Justice Statistics reported that Aboriginal people made up a total of 32% of all incarcerated persons in Canada, from a low of 1% of the incarcerated population in Quebec to a high of 72% in Saskatchewan.<sup>43</sup> These numbers have come down slightly since the late 1990s, but are still persistently high. In 2010/2011 Aboriginal people represented 27% of adults in provincial custody and 20% of adults in federal custody, or roughly 7 times greater than their proportion of the general population.<sup>44</sup> Aboriginal people are 29 times more

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<sup>40</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* 2nd edition (Toronto: Oxford University Press, 2009), 124.

<sup>41</sup> Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005), 158.

<sup>42</sup> Craig Proulx, *Reclaiming Aboriginal Justice, Identity, and Community* (Saskatoon: Purich Publishing, 2003), 25.

<sup>43</sup> Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada 1997-98* (Ottawa: Ministry of Industry, 1999), 14, quoted in Proulx *Reclaiming*, 25.

<sup>44</sup> Mia Dauvergne, “Adult Correctional Statistics in Canada 2010/2011,” *Juristat* vol.31 no. 1, 11.

likely to be arrested, even if that arrest does not lead to conviction, than non-Aboriginal peoples.<sup>45</sup>

In recognition of these stubbornly high rates of contact with the justice system and the discriminatory nature of some justice practices toward Aboriginal peoples, programs have been undertaken to address this issue and offer culturally appropriate ways of dealing with Aboriginal offenders.<sup>46</sup> One such program is the diversion program of the Community Council Project in Toronto. Begun in 1991, this program gives the Toronto Aboriginal community a measure of control over how Aboriginal offenders are dealt with by the legal system.<sup>47</sup> For a certain set of offences this diversion program allows justice to be unfettered from the usual “precedent-bound sentencing, that until recently did not take in to account the effects on Aboriginal peoples of colonialism, cultural difference, and economic and social structural discrimination.”<sup>48</sup> This means that less retributive action can be taken against Aboriginal offenders, recognizing the unique circumstances of Aboriginal people in Canada.

More broadly, in 1996 a bill to amend the provisions of the *Criminal Code of Canada* came into effect, which inserted consideration of Aboriginal affiliation as a consideration for sentencing.<sup>49</sup> Subsequent cases before the Supreme Court of Canada refined the interpretation of Section 718.2(e) and clarified its purpose in addressing Aboriginal overrepresentation in prison.<sup>50</sup> The *Gladue* case revolved around the interpretation of Section 718.2(e) of the *Criminal Code*, which was added by Bill C-41 in 1996.<sup>51</sup> A lower court had neglected to take Aboriginality into account in sentencing a woman found guilty of killing her common law husband, and this lower court did not

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<sup>45</sup> Proulx, *Reclaiming Aboriginal Justice, Identity, and Community*, 26.

<sup>46</sup> *Ibid.*, 10-11.

<sup>47</sup> *Ibid.*, 42.

<sup>48</sup> *Ibid.*, 46.

<sup>49</sup> Philip Stenning and Julian V. Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders,” *Saskatchewan Law Review* vol. 64 no.1 (2001), 138. The Section 718.2 reads “A court that imposes a sentence shall also take into consideration the following principles:” with the part added in 1996 (e) reading “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal [*sic*] offenders,”

<sup>50</sup> The *Gladue* case in 1999 and the *Wells* case in 2000, where the latter held that 718.2(e) applied with inverse strength to the severity of the crime.

<sup>51</sup> Jonathan Rudin, “Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going,” *Supreme Court Law Review* (2008), vol. 40, 693.

apply Section 718.2(e) because the women in question, Jamie Gladue, lived off reserve.<sup>52</sup> The Supreme Court found this to be inconsistent with Section 718.2(e), stating that “Section 718.2(e) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area.”<sup>53</sup> The Court clearly understood the issue of Aboriginal overrepresentation in prisons and that “the issue was not that Aboriginal people were necessarily committing more crime than non-Aboriginal people, but rather that Aboriginal people went to jail for their actions much more frequently than non-Aboriginal people.”<sup>54</sup> However well the Court understood and set out the problem in their decision, it is the guidelines for everyday use of the section that have “proven not to be as clear as the Court’s statement of the problem.”<sup>55</sup> This means Aboriginal peoples continue to be overrepresented in prison, as indicated by the above statistics, pointing to systemic bias in the administration of justice.

While this approach is not uncontroversial, what I mean to illustrate here is that in criminal proceedings there have been attempts to address Aboriginal inequality that *may* be read as incipient reconciliation.<sup>56</sup> Moreover, it demonstrates that some within the legal establishment recognize that colonial values of settler superiority in ways of conduct, correction, and justice are embedded within formal Canadian institutions of justice to the detriment of Aboriginal peoples, and begins to recognize the special disadvantage that Aboriginal peoples may have in a colonial society that normatively excludes Aboriginal ways of knowing and being. Sentencing reform may have been sparked by a legislative initiative. However, it was the Court that extended and refined the practice. In any event justice system related reforms can only address symptoms of a larger and systemic

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<sup>52</sup> *Gladue* 1999, para. 18.

<sup>53</sup> *Ibid.*, para. 91.

<sup>54</sup> Rudin, “Aboriginal Over-representation and *R. v. Gladue*,” 695.

<sup>55</sup> *Ibid.*

<sup>56</sup> Obvious objections on the grounds of equality before the law are possible here, but other more nuanced critiques can be found on the grounds of inadequate understand of the causal relationship between sentencing practices and the overrepresentation of Aboriginal offenders in prison (See Stenning and Roberts “Empty Promises,” especially 155-168). In contrast to sentence reform a more restorative approach that address dislocation and lack of opportunity is called for by some (See Susan Haslip, “Aboriginal Sentencing Reform in Canada—Prospects for Success,” *Murdoch University Law Journal* vol. 7 no. 1 (2000) 1-44). For a book length treatment of restorative justice approaches see Jane Dickson-Gilmore and Carol LaPrairie *Will the Circle be Unbroken: Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).

exclusion of Aboriginal peoples. That is to say, as Rudin argues “real societal change cannot come from courts.”<sup>57</sup>

Perhaps the most notable exception to the court-driven process of some sort of reconciliation in Canada prior to the Settlement Agreement is the Kelowna Accord. This \$5 billion, ten-year plan to support Aboriginal peoples in key areas, such as education, health, and economic development, was concluded in November of 2005 by the Government of Canada and the first ministers of the provinces and territories with the Assembly of First Nations, Inuit Tapiriit Kanatami, Métis National Council, Native Women’s Council of Canada, and the Congress of Aboriginal Peoples.<sup>58</sup> The combination of all these groups in establishing such an agreement was “unique in Canadian history.”<sup>59</sup> Because of Section 91(24) of the *Constitution Act 1867*, which gives to the federal Crown alone jurisdiction over “Indians, and Lands reserved for Indians,” the participation of subordinate levels of government in the negotiation process is not necessary. Kelowna represents the first time that both federal and provincial Crowns together have negotiated an agreement with Aboriginal peoples in Canada. What is perhaps more is what former Prime Minister Paul Martin has called the “Kelowna approach.”<sup>60</sup> This new approach left significant room for Aboriginal voices to both articulate the issues facing their communities and to propose solutions.<sup>61</sup> This new approach seems to have been very important to Paul Martin, as he writes in his auto-biography:

Our native peoples have had far too much experience of being brought in for decorative effect, then being ignored. I wanted Aboriginal Canadians to see that they were an integral and important part of our society. I wanted to establish a partnership with them based on mutual respect rather than dependence.<sup>62</sup>

It is exactly this “decorative” problem that Kelowna was meant to overcome, taking the Crown out of defining and solving problems facing Aboriginal peoples, and instead

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<sup>57</sup> Rudin, “Aboriginal Over-representation and *R. v. Gladue*,” 713.

<sup>58</sup> Lisa L. Patterson, “Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005” Library of Parliament, available at:

<http://www.parl.gc.ca/Content/LOP/researchpublications/prb0604-e.pdf> (accessed 31 May 2012), 2.

<sup>59</sup> *Ibid.*, 12.

<sup>60</sup> Paul Martin, former Canadian Prime Minister, interview with author, 9 Jan. 2012.

<sup>61</sup> *Ibid.*

<sup>62</sup> Paul Martin, *Hell or High Water: My Life in and Out of Politics* (Toronto: Emblem McClelland & Stewart, 2009), 256.

becoming a partner to work with what Aboriginal leaders had come up with as the solutions.<sup>63</sup> It was the chance to “give [Aboriginal peoples] the instruments that would allow [them] the chance to take advantage of all the opportunities that are out there, but doing [it in their] way not in our way.”<sup>64</sup>

While one of the first acts of Stephen Harper’s government after its election in 2006 was to dismiss the Kelowna Accord,<sup>65</sup> the lasting impact of the agreement may just be the approach to negotiations that it embodied. Paul Martin believes the Kelowna approach is “inevitable.”<sup>66</sup> While he, as the former Prime Minister who undertook the process, is hardly an impartial source, it is hard to imagine that Aboriginal leaders would countenance a return to the older, more dictatorial ways of conducting discussions between Crown and Aboriginal peoples. Despite the failure of Kelowna, it is the very approach that led to the agreement that is a significant sign of reconciliation already at work in Canada.

These few signs of positive change in Crown-Aboriginal relations are not meant to be comprehensive, but, rather, to indicate that something like “reconciliation” may be beginning to play out in Canada between the Crown and Aboriginal peoples. As one of the mandates of the Truth and Reconciliation Commission of Canada was to foster reconciliation between the parties to the Settlement Agreement,<sup>67</sup> it is important to understand that it is not starting from nothing. The above examples outlined are encouraging indications that something is occurring and provide context from which post-TRC reconciliation might be understood.

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<sup>63</sup> Paul Martin, former Canadian prime minister, interview with author, 9 Jan. 2012.

<sup>64</sup> Ibid.

<sup>65</sup> CBC New Online “Undoing the Kelowna agreement,” 21 Nov. 2006 <http://www.cbc.ca/news/background/aboriginals/undoing-kelowna.html> (accessed 30 May 2012). While the Harper government did allocate some money in their first budget to issues facing Aboriginal peoples, these allocations fell well short of the commitments made in Kelowna. There was by no means silence on the issue when the decision to walk away from Kelowna was taken. Jean Charest, Premier of Quebec, insisted Stephen Harper honour Kelowna (Canwest News Service “Charest calls on Harper to honour Kelowna accord,” Canada.com 4 March 2007 (accessed 30 May 2012)). Clearly the AFN and other Aboriginal groups were not pleased the agreement was not honoured (Lloyd Dolha, “Assembly of First Nations Urge Harper to Honour Kelowna Accord,” *First Nations Drum*, 3 January 2006 <http://www.firstnationsdrum.com/news/page/52/>(accessed 30 May 2012)).

<sup>66</sup> Martin, *Hell or High Water*, 425.

<sup>67</sup> *Indian Residential Schools Settlement Agreement*, “Schedule N,” 1.

*The Depth and Breadth of Reconciliation*

To begin to answer the research question with which we are engaged (i.e. toward what is this a transformation) it is helpful to get something of an outline of reconciliation in Canada, as it is understood by the elites I interviewed. There was definite agreement among the Aboriginal elites, Liberal Party members, and church representatives, about the extent of the reconciliation project. At the same time, it was not entirely clear to me that those currently serving in the bureaucracy or the lone Conservative I interviewed had a similar understanding of the potential depth and breadth of reconciliation. As highlighted in the previous chapter, the difference here should not be overdrawn, but it is important to recognize. What is interesting to note is that the two bureaucrats and the one Conservative Party member whom I interviewed, saw reconciliation very similarly to the others whom I interviewed, but, in an important distinction, they did not identify the IRS system as being connected to a broader system of colonisation. Neither saw reconciliation in a broader context. Rather, they limited reconciliation to the specific harm of residential schools.

The four people interviewed from within the Aboriginal community identified reconciliation between the Crown and Aboriginal peoples in a much more holistic way that connected the TRC with a remediation of the whole colonial system. That is to say, while the TRC is mandated to focus narrowly upon the Indian Residential Schools, for the Aboriginal peoples interviewed for this project, reconciliation was intrinsically connected to the larger and more systemic problem of colonisation. Ghislain Picard, Québec Regional Chief of the Assembly of First Nations, links the whole project of reconciliation to “a question of trust.”<sup>68</sup> The fundamental break in this trust, as identified by Picard, is related to the “discovery” of North America in 1492 and the colonisation process that followed for centuries, which sought to repress, or deny, any history that preceded this first landing of European settlers. For Picard, at least part of any successful process of reconciliation will lie in the rediscovery of this knowledge for the broader Canadian society, and also for Aboriginal peoples. He stated that, “as First Nations people we don’t know much because we went through the schools to learn the same

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<sup>68</sup> Ghislain Picard, AFN regional chief for Québec, telephone interview with author, 14 Dec. 2011.

history [as the dominant society] and it's a history that doesn't really provide much place for Aboriginal contributions."<sup>69</sup> The Indian Residential Schools were part of this systemic attempt identified by Picard to control Aboriginal peoples, and, more importantly, their lands.

Mike DeGagné, former Executive Director of the Aboriginal Healing Foundation, similarly argued that reconciliation must be more broadly linked to issues facing Aboriginal peoples in Canada. He stated that reconciliation is about "starting to erase people's gut reactions and gut judgements and biases towards the 'other,'" in this case, the Aboriginal "other."<sup>70</sup> DeGagné clearly did not deny that some within the Aboriginal community face difficult circumstances and sometimes lead dysfunctional lives but he was quick to identify that in response to these social issues the proper question should be, "Why is that happening? Is it because they are lazy or because they can't manage money? Or is it because of other historical forces and trauma that the Canadian public has little understanding of?"<sup>71</sup> Just as Picard identified, DeGagné associates this *understanding* of the Aboriginal experience as not just resulting from the IRS system and he specifically identifies this broader project of colonisation as underpinning many of the social issues facing Aboriginal people today. Understanding the IRS experience and the IRS system has to frame the discussions around the beginning, rather than the end, of the reconciliatory process but for both Picard and DeGagné. Reconciliation must also necessarily seek to understand the IRS system as only a part of larger systemic issues resulting from colonisation. Thus, to truly begin to deal with the full vestiges of system colonialism the TRC will require a larger, more holistic, and systemic reconciliation than for that which it was mandated.

The need for shared knowledge and understanding as part of the reconciliation process was highlighted by Bob Watts, former Interim Director of the TRC, as well as by Phil Fontaine, former National Chief of the Assembly of First Nations. Watts was careful not to constrain reconciliation. Instead he posited that reconciliation involves understanding, learning, and a shared idea of the future between Aboriginal and non-

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<sup>69</sup> Ibid.

<sup>70</sup> Mike DeGagné, former director of the Aboriginal Healing Foundation (1998-2012), telephone interview with author, 21 Feb. 2012.

<sup>71</sup> Ibid.

Aboriginal peoples in Canada.<sup>72</sup> Fontaine identified reconciliation as, “an all inclusive approach.”<sup>73</sup> For these two interviewees, the concept of reconciliation must be directed towards the whole of the Crown-Aboriginal relationship, since the Indian Residential School experience “touches everything in Aboriginal communities.”<sup>74</sup> Indian Residential Schools, therefore, must be read within a history and process of colonisation, where the experience of the IRS system, personally and inter-generationally, affected many, if not all, aspects of Aboriginal life. That is to say, that the IRS system itself is seen by these two interviewees as only one facet of a colonial system that places Aboriginal peoples outside of it, or, at the very most, at the bottom of its social and political hierarchy. As argued in Chapter Three, colonisation is a continual process that places Aboriginal peoples in a state of exception, in complex relation to, and outside of Canada or notions of Canadian identity.

Those Liberal privy councillors whom I interviewed expressed similar opinions to those conveyed above on the scope, breadth, and depth of reconciliation. Andy Scott, who served as Minister of Indian Affairs at the time of the IRS settlement negotiation, described reconciliation as a shared history. Scott stated that, “once the people of Canada and the government have a better sense of this awful period of public policy in our country, I believe there will be a great appreciation of the challenges the [Aboriginal] community faces.”<sup>75</sup> Scott’s understanding of the systemic effects of the IRS system leads directly to an identification of the need for a deep and broadly affecting reconciliation. In my interview with him, Scott detailed a concept of reconciliation that involves starting with a shared history between Aboriginal peoples and Canadians. He identified this shared knowledge as the key to gaining support from everyday Canadians for a broad-based government action that would rectify this history.<sup>76</sup>

Paul Martin, former Prime Minister of Canada, made it clear that “what we are dealing with here is not the first wrong that has been done to Aboriginal Canadians,” and

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<sup>72</sup> Bob Watts, former Interim Executive Director of the TRC and former Chief Executive Officer and Chief of Staff (2007-2008), Assembly of First Nations (2003-2007), telephone interview with author 19 Jan. 2012.

<sup>73</sup> Phil Fontaine, former National Chief of the Assembly of First Nations (1997-2000, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa, ON.

<sup>74</sup> Ibid.

<sup>75</sup> Andy Scott, former Minister of Indian Affairs (2004-2006), telephone interview with author, 25 Oct. 2011.

<sup>76</sup> Ibid.



that the Indian Residential Schools were “the result of colonisation [which] was tragic in many, many ways.”<sup>77</sup> For Martin, reconciliation is an essential part of providing a level playing field for Aboriginal opportunity and participation in Canadian society, polity, and economy. As a collaborator in its creation, Martin linked reconciliation to larger governmental policy moves, such as the Kelowna Accord. In my interview with him, Martin argued that reconciliation is about political change, which he felt he tried to implement while in government.

The two church representatives I interviewed understood reconciliation along similar lines to Martin. David MacDonald, Special Advisor on Residential Schools for the United Church of Canada, argued that “there has to be a political change... a lot of settling treaties and acknowledging existing treaties.”<sup>78</sup> For MacDonald, reconciliation involves, at least partly, “finding ways for treaties to become meaningful.”<sup>79</sup> That is to say, reconciliation has an intensely political dimension, a return to Crown-Aboriginal interactions guided by treaties, rather than legislative means that are contested by many in Aboriginal communities.<sup>80</sup>

Gerry Kelly, Advisor to Roman Catholic entities regarding the Indian Residential Schools legacy, saw reconciliation in a complementary way, as dealing with “a relational break on both sides.”<sup>81</sup> Kelly argued that the TRC could “model a kind of conversation” that would help to provide a new basis for relationship.<sup>82</sup> Kelly was less explicit about the broader colonial context in which the IRS system merged and of which the IRS system is an example, but he was clear about his opinion that the IRS system forms a sort of “original sin, that exists at the origin of who we are [as Canadians].”<sup>83</sup> Framing the IRS

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<sup>77</sup> Paul Martin, former Prime Minister of Canada (2003-2006), telephone interview with author, 9 Jan. 2012.

<sup>78</sup> David MacDonald, United Church of Canada, interview with author, 16 Jan. 2012, Toronto, ON.

<sup>79</sup> Ibid.

<sup>80</sup> There is an extended discussion of treaties in Chapters Four and Five, above. Some Indigenous scholars see treaties as constitutional documents that ought to regulate the interactions of two different governments, Crown and Indigenous. See for example James Youngblood Henderson, “Empowering Treaty Federalism,” *Saskatchewan Law Review* 58 (1994); Russel Barsh and James Youngblood Henderson, *The road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980); Kiera Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalism,” in *New Trends in Canadian Federalism* 2nd edition (Peterborough: Broadview Press, 2003); John Burrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>81</sup> Gerry Kelly, Canadian Conference of Catholic Bishops, telephone interview with author, 6 March 2012.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

system this way not only places it at the very heart of Canada, as both a country and as an identity, but it also shows the enormity of the wrong the IRS system represents for Kelly. Like original sin, the wrongfulness of the IRS system here touches broadly and has a foundational relationship to Canada itself.

In contrast, the two current bureaucrats and one Conservative political operative whom I interviewed did not place the IRS system within a broadly colonial agenda. These three interviewees saw the breadth and depth of reconciliation differently. I do want to highlight at the outset that those three people I interviewed were sympathetic and seemed to genuinely care about the problems faced by many Aboriginal people. Yet, their understanding was more nuanced, and was tied to a very different narrative. Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), used similar language to that used by the Aboriginal peoples and Liberal privy councillors whom I interviewed. Dion spoke of reconciliation as “a better understanding on the part of all Canadians... about what actually happened, what this actually was, and what impact it has had,”<sup>84</sup> referring to the Indian Residential Schools system. Dion explained that, in his view, “we are living in a society that is full of prejudices that are not based on any concrete evidence. So [reconciliation] will contribute to dispelling some myths that exist about First Nations. Why it is that there is so much intoxication, substance abuse, and so, on and so forth.”<sup>85</sup> More specifically, Dion told me he believes that reconciliation will provide “a greater degree of sympathy and empathy for survivors and their descendants.”<sup>86</sup> These comments, however, are limited to the context of the IRS system and do not imply any need for change in Crown-Aboriginal relations outside of the serious treatment of the very real trauma that the IRS system has caused in Aboriginal communities.

Going a little further than his former colleague Mario Dion, Deputy Minister of Indian Affairs Michael Wernick saw the link from the work of the TRC to reconciliation as helping to “force the rest of the country to look at itself in the mirror and say ‘look

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<sup>84</sup> Mario Dion, former Executive Director and Deputy Head, Office of Indian Residential Schools Resolution of Canada (2003-2006), telephone interview with author, 12 Dec. 2012.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

what happened here’ and provoke greater knowledge of First Nations.”<sup>87</sup> He felt that it could help explain, in a certain context, why Aboriginal peoples “have such trust issues with the federal government... about education, language, and culture.”<sup>88</sup> This, again, is helpful and even necessary. But what Wernick did not do, as some others did, was to link this to the need for broader change in Crown-Aboriginal relations. That is to say, there is no mention of the treaties, or, as MacDonald put it, of “finding ways for treaties to become meaningful.”<sup>89</sup> Nor is there mention of the IRS system as being within the broader colonial context.

Former Chief of Staff to Prime Minister Harper, Ian Brodie, similarly understood and was sympathetic to the negative effects of the IRS system. Brodie was clear about his own journey through the process of setting up the TRC and what has come out of the TRC, and how that has changed his way of looking at Aboriginal issues. Brodie said that “going through the process [of helping set up the TRC] personally and then seeing situations like the one in Attawapiskat, and hearing the comments from the Chief and people there about the ongoing legacy of residential schools, that has made me much more sensitive.”<sup>90</sup> (Here Brodie referred to the incident in the Northern Ontario First Nations community, which in late 2011 declared a State of Emergency over its housing situation.<sup>91</sup>) Brodie felt that through his experience he had gained an understanding as to why moving a community to another location would be looked on with suspicion in the context of the IRS system. As he said “the road to hell is paved with the best of intentions.”<sup>92</sup>

These views expressed by two government bureaucrats, as well as the only Conservative who consented to an interview, are subtly, but importantly, different from those expressed by the others with whom I spoke. They indicated that reconciliation is limited to the specific harms of the residential school. The contrast in these opinions

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<sup>87</sup> Michael Wernick, Deputy Minister of Indian Affairs (appointed 2006), telephone interview with author, 1 Nov. 2011.

<sup>88</sup> Ibid.

<sup>89</sup> David MacDonald, United Church of Canada, interview with author, 16 Jan. 2012, Toronto, ON.

<sup>90</sup> Ian Brodie, former Chief of Staff to Prime Minister Harper (2006-2008), telephone interview with author, 3 Feb. 2012.

<sup>91</sup> CBC News, “Attawapiskat housing help talks ongoing,” *CBC.ca*, <http://www.cbc.ca/news/canada/story/2011/11/24/attawapiskat-housing.html> (accessed 27 Sept. 2012). This situation is discussed in more detail in the previous chapter, above.

<sup>92</sup> Ian Brodie, former chief of staff to Prime Minister Harper, telephone interview with author, 3 Feb. 2012.

between the government under the Conservatives, and the opposition along with Aboriginal and Church leaders, becomes even sharper when examined alongside comments made by the then-Minister of Indian Affairs, John Duncan. In the fall of 2011, Duncan created controversy when he characterized the IRS system as simply “education policy gone wrong,”<sup>93</sup> rather than the determined policy of forced assimilation. This lack of understanding on the part of some within the Conservative party was sadly present at the time of Harper’s apology in 2008, as well. Then-Parliamentary Secretary to the President of the Treasury Board, and later Parliamentary Secretary to the Prime Minister, Pierre Poilievre, wondered if Canada was “getting value for all this money [paid to IRS system survivors]” and supposed that what was needed instead was to “engender the values of hard work and independence and self-reliance. That’s the solution in the long run — more money will not solve it.”<sup>94</sup> These statements downplay the role of Euro-Canadian colonisation in creating the conditions for systemic Aboriginal disadvantage in Canada, or outright deny it. Duncan dismisses the carefully considered tool of assimilation that was the residential school, one of many constructed, as simply a poor policy choice. Indeed, leaving unclear if the problem was the damage caused to Aboriginal people and their communities or the schools’ failure to destroy Aboriginal culture. Poilievre places the blame quite squarely on Aboriginal peoples’ lack of industry and self-reliance, entirely unreflective of *how* Aboriginal peoples have found themselves in their current state.

The difference of opinion regarding the breadth and depth of reconciliation held by those occupying the bureaucracy and the government benches, those in political opposition, and Aboriginal peoples themselves, could, importantly, impact the sort of change in Crown-Aboriginal relations the TRC might hope to achieve. Clearly, if those who are in political power do not see the IRS system as linked to and part of a broader colonial enterprise, the change of relationship that might seem appropriate to them will be similarly limited. Taken with the differing understanding of those in political opposition and among Aboriginal peoples themselves, this constrained understanding of the IRS

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<sup>93</sup> Taryn Della, “Residential School Survivors Outraged Over Duncan’s Residential School Statement,” *APTN National News*, <http://aptn.ca/pages/news/2011/10/28/residential-school-survivors-outraged-over-duncans-statement/> (accessed 25 Oct. 2012).

<sup>94</sup> CBC News “Conservative MP apologizes for ‘hurtful’ comments on aboriginal people,” <http://www.cbc.ca/news/canada/story/2008/06/12/poilievre-aboriginals.html> (accessed 11 Nov. 2012).

system will likely lead to a relationship that does not significantly overcome any of the problems of a colonial paradigm.

*Why this difference could matter*

This differing understanding of the nature of the harm of the IRS system, the system's location within a broader colonial project, and, thus, the extent of reconciliation, could presage the very relationship between Crown and Aboriginal peoples that the TRC was meant to reconcile. If there is a new relationship to be forged—and this is not a forgone conclusion, as the findings of the TRC could very simply be ignored by both the government and the majority of Canadians—it need not be based on the decolonial and ethical approach outlined above. It is quite possible that a new relationship between Crown and Aboriginal peoples will still involve too much of the old colonial one, but simply updated and utilized in a drive toward a renewed effort of assimilation.

It was clear from my interview with Ian Brodie that he believes that not everyone in the Conservative caucus understood the impact of the IRS system and the severity of its legacy. Brodie did talk about how it was necessary for Harper to “settle down some folks in the party”<sup>95</sup> not only about the apology in 2008, but also the whole Indian Residential Schools Settlement Agreement. It must be remembered that the Conservative party inherited the Agreement when it came to power in 2006. A deal in principle had already been reached between the Government of Canada under Martin's Liberals, between Aboriginal organizations, survivor litigants, and the churches. There were other related deals, notably the Kelowna Accord, that the Conservatives also inherited and chose not to uphold. The move to scrap the Kelowna Accord, as well as other initiatives, certainly calls into question the kind of relationship the Government of Canada under the Conservatives were open to having with Aboriginal peoples as part of the broader reconciliatory process.

The approach that the Conservatives took on the Aboriginal file has also involved new policies. One policy initiative, announced in August of 2012 by the Conservative government, was the introduction of legislation to allow private property on reserves. In August of 2012 the Conservative government proposed to introduce legislation to allow a

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<sup>95</sup> Ian Brodie, former chief of staff to Prime Minister Harper, telephone interview with author, 3 Feb. 2012.

voluntary system of on-reserve property rights.<sup>96</sup> The proposed legislation would affect hundreds of thousands of on-reserve First Nations and millions of hectares of land.<sup>97</sup>

This drive to allocate private property for First Nations on reserves fits into the approach advanced by former Harper advisor Tom Flanagan.<sup>98</sup> For Flanagan, Aboriginal issues are largely an economic project and require a remedy that allows economic development on reserves. He argues that “Indians cannot make progress in the contemporary world without reliance on property rights and economic competition.”<sup>99</sup> For Flanagan, private property is about bringing the benefit of the modern capitalist world to First Nations and freeing First Nations from the prison of collective ownership. As Flanagan argues, both “the treaties and the Indian Act have conspired to imprison [First Nations] within a regime of collective rights that fit badly with the needs of a market economy.”<sup>100</sup> The rationale is to provide modernization so that on-reserve First Nations persons can avail themselves of the benefits of modern economic activity in Canada’s globalized economy.

It is, perhaps, understandable that in the historic context of government programs such as enfranchisement many Aboriginal people are suspicious of any policy of individual property rights on reserve. There is a more thorough discussion of enfranchisement as a tool of colonisation in Chapter Four but to recapitulate here: a key aspect of the *Gradual Civilization Act*, the forerunner to the *Indian Act*, was the policy of “enfranchisement” where First Nations people living on reserve who attained a certain level of education, literacy, and moral standing would lose their status as Indians under the *Indian Act* and gain Canadian citizenship.<sup>101</sup> Further, these “enfranchised former Indians,” as defined under the *Indian Act*, were entitled to privately own a tract of land of

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<sup>96</sup> John Ibbitson, “Harper Government to Introduce Law to Allow Private Property On Reserve,” *The Globe and Mail* <http://www.theglobeandmail.com/news/politics/harper-government-to-introduce-law-to-allow-private-property-on-reserves/article4464434/> (accessed 27 Oct. 2012).

<sup>97</sup> Ibbitson, “Harper Government to Introduce Law to Allow Private Property On Reserve.”

<sup>98</sup> Flanagan was an advisor to Stephen Harper until 2004. In addition Flanagan was Chief of Staff to Harper while leader of the Opposition 2002-2003, and sometimes co-author with Harper.

<sup>99</sup> Tom Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queens University Press, 2000), 114.

<sup>100</sup> *Ibid.*, 133.

<sup>101</sup> John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy,” in *As Long as the Sun Shines and water flows: A Reader in Canadian Native Studies*, Ian Getty and Antoine Lussier eds. (Vancouver: University of British Columbia Press, 1983), 42-3.

some twenty hectares, taken from the reserve lands.<sup>102</sup> Once all the status Indians were sufficiently educated, any such distinction would cease to exist, and with it any notion of the First Nations' different and complex relationship to the Crown. The land base that supported these communities in the form of reserves would also cease to exist. It is little wonder then, that with this backdrop of the historical enfranchisement as a Crown policy for assimilation, that there is general trepidation on the part of the First Nations for a current policy of privatized reserve land. In fact, there is great suspicion surrounding this policy and many Aboriginal leaders, including Shawn Atleo, then-National Chief of the Assembly of First Nations, criticized it.<sup>103</sup>

Moreover, as with the *Gradual Civilization Act* approach to private property, this initiative is yet another unilateral approach on the part of the Government of Canada. So as not to be hyperbolic, it is important to note that this plan would not *require* on-reserve private property, but, rather, would provide a voluntary framework for band councils to opt-in to this private property scheme.<sup>104</sup> This voluntary opt-in is the only aspect that comes close to any kind of consultation or collaboration with First Nations that the government had on this issue. Clearly, making a policy voluntary is no substitute for meaningful consultation with Aboriginal leaders. Thus, when this issue was first raised in the 2012 budget by the Conservative government, then-Assembly of First Nations National Chief Atleo spoke out against the move, saying "First Nations, by and large do not support private property."<sup>105</sup> Further, Atleo argued that there are more creative solutions to land use that are consistent with treaty rights, rather than imposed (settler) notions of private property.<sup>106</sup> In my interview with him, Phil Fontaine expressed a similar view. Fontaine stated that there are "successful reserves in Canada, but they have [become successful] in the current system of communal ownership."<sup>107</sup>

This example of the Conservative government's general understanding and policy towards Aboriginal people makes it clear why the difference in the understanding of the

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<sup>102</sup> Ibid., 43.

<sup>103</sup> Shawn Bell, "Private Property Bill has First Nation Fearing Loss of Reserve Land," *Wawatay News Online* [http://www.wawataynews.ca/archive/all/2012/8/29/private-property-bill-has-first-nations-fearing-loss-reserve-lands\\_23364](http://www.wawataynews.ca/archive/all/2012/8/29/private-property-bill-has-first-nations-fearing-loss-reserve-lands_23364) (accessed 27 Oct. 2012).

<sup>104</sup> Ibbitson, "Harper Government to Introduce Law to Allow Private Property On Reserve."

<sup>105</sup> Ibid.

<sup>106</sup> Bell, "Private Property Bill has First Nation Fearing Loss of Reserve Land."

<sup>107</sup> Phil Fontaine, former National Chief of the Assembly of First Nations (1997-200, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa, ON.

breadth and depth of reconciliation can have a huge impact on Crown-Aboriginal relations. There are those who understand the IRS system within the context of the whole colonial project and history of Canada, and see reconciliation as necessary on a number of fronts, not only as helping to resolve the specific harm of the IRS experience and its aftermath, but also as being essential for mitigating the larger colonial experience. That is why Martin characterized the negotiation of the Kelowna Accord as reconciliatory in nature, specifically identifying the way that the Kelowna Accord was negotiated as a collaborative and respectful deal involving the Crown, at both its federal and provincial levels, and Aboriginal leaders, particularly in the Assembly of First Nations.<sup>108</sup> Moreover, this “Kelowna approach,” as Martin termed it, was viewed in a similar way by Phil Fontaine—who was National Chief of the Assembly of First Nations at the time of its negotiation. Fontaine saw the Kelowna Accord as representing a shift in the Crown’s approach that treated Aboriginal governments as “legitimate orders of government.”<sup>109</sup> Understanding reconciliation as a broad and deep initiative would move the Crown-Aboriginal relationship toward a place where an ethic of political reconciliation can be played out, rather than constraining it to a place of unilateral government policy, however well-intentioned that policy may be.

If the actions of the Conservative government on Aboriginal issues since taking office in 2006, especially the unilateral approach to these issues, are read as embodying a limited understanding of reconciliation, then the relationship that might come about as a result of this transformative opportunity will be of an altogether different quality than the ethic of political reconciliation I have outlined in previous chapters. While no one I interviewed questioned the sincerity of Harper when he delivered an official apology on the floor of the House of Commons in 2008, there were some who felt that not enough had been done to live up to those words. Bob Watts stated his dismay that the government had not done “things differently, [in a way] that would really manifest and breathe life into the words that the prime minister said.”<sup>110</sup> It is fairly clear that thoroughgoing reconciliation under a Conservative government would have been unlikely.

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<sup>108</sup> Paul Martin, former prime minister, telephone interview with author, 9 Jan. 2012.

<sup>109</sup> Phil Fontaine, former National Chief of the Assembly of First Nations (1997-200, and 2003-2009), interview with author, 6 Sept. 2012, Ottawa, ON.

<sup>110</sup> Bob Watts, former interim director of the TRC, telephone interview with author, 19 Jan. 2012.



The unilateral actions taken by the Conservative government are significantly at odds with the spirit, if not the words, of the apology given in 2008. This should give us cause to consider what form the relationship between the Crown and Aboriginal peoples will take as it emerges from the transformative opportunity presented by the TRC, and if this relationship will be adequately decolonial. While the words spoken by the new Liberal government have been significantly more friendly to reconciliation, it remains to be seen how different a course they will chart on this file. To continue on the tack presented by the Conservative government's policies would taint this emergent relationship with the old colonial mentalities. I do not want to spare Liberal governments of blame on this score either, especially in light of their 2015 election. It will be recalled that a previous Trudeau's government, in 1969, called for the elimination of the *Indian Act* to completely remove any special status for Indians in Canada. The White Paper authored by then-minister of Indian affairs and later prime minister, Jean Chrétien, was a unilateral move by the Crown to destroy Aboriginal legal difference in the name of equality. It was also under a Liberal government led by Chrétien in the 1990s that the recommendations of the Royal Commission on Aboriginal people went largely ignored. It is important not to hold the son accountable for the sins of the father, in this case both figuratively and literally, but unilateral colonial action by the Government of Canada is neither historical nor limited to one political party.

What these strategies of "betterment" entail, I argue, is what Bourdieu and Wacquant and call a "screen discourse,"<sup>111</sup> in which a new form of assimilation is shielded by a discourse of "betterment" or "equality." As Bourdieu and Wacquant argue, a screen discourse is "the product of a gigantic effect of national and international *allodoxia*, which deceives both those who are party to it and those who are not."<sup>112</sup> *Allodoxia* is the term that Bourdieu used in his later years to indicate a sort of misrecognition at "a global level."<sup>113</sup> The specific form of screen discourse surrounding Crown-Aboriginal reconciliation involves the concealment of an assimilationist agenda, such as the privatization of property. Bourdieu and Wacquant argue that globalization

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<sup>111</sup> Pierre Bourdieu and Loïc Wacquant, "New Liberal Speak: Notes on the New Planetary Vulgate," *Radical Philosophy* vol. 105 (2001), 2-5.

<sup>112</sup> *Ibid.*, 4.

<sup>113</sup> Andrew Miller, "Pierre Bourdieu and the Perils of *Allodoxia*; Nationalism, Globalism and the Geopolitics of Intellectual Exchange," *Cultural Studies* vol.17 no.3/4 (2003), 566.

seeks to dress up the effects of economic fatalism, thus making “transnational relations of economic power appear like a natural necessity.”<sup>114</sup> If this is the case, then it follows that a certain type of economic ordering is not only necessary for Aboriginal peoples to flourish—an order that mirrors that of the dominant market-economic society—it is also a natural stage in the evolution of any society.<sup>115</sup> This places Canadian society high above Aboriginal communities and implores a condescending hand to lift Aboriginal peoples out of their inferiority. This type of unilateral movement on the part of the Crown, in the political executive or Crown-in-Parliament, as the power the Prime Minister appropriates in dealing with Aboriginal peoples, replicates an evolutionary trajectory of social, political, and economic development, which cannot escape the re-inscription of colonialism—albeit, in the guise of a new form of economic necessity and in the language of emancipation, or in a language of reconciliation that either perpetuates a colonial attitude or renews a drive for assimilation. Even Justin Trudeau’s Liberals might find it hard to abandon liberalism’s insistence on a more or less homogenous equality.

It is important to recognize that a colonial attitude will prefigure the outcomes of reconciliation, once again constraining the Crown-Aboriginal relationship to the old policies of “Crown-knows-best” which fail to acknowledge Aboriginal peoples as participants in their own destinies. This approach sees Aboriginal peoples as objects to be transformed or overcome, rather than as partners in a narrative. This accomplishes assimilation in the same way as the Indian Residential Schools system itself sought to transform, evolve, and civilize the savage Indian, giving them the benefit of European culture. Here, though, rather than European *civitas*, this assimilation project offers all the benefits of a particularly American form of economic organization, which has been forced on even “advanced societies through the pauperization of the state, the commodification of public goods and the generalization of job insecurity.”<sup>116</sup>

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<sup>114</sup> Bourdieu and Wacquant, “New Liberal Speak,” 4.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

*Building a Nation*

Chapter Six explored the mechanisms of a TRC and the reconciliation it can foster. One of the objectives of TRCs is often to be part of nation building. In the case of South Africa, home of perhaps the most famous truth commission, the objective of building a new multi-racial South Africa was an expressed goal of the TRC.<sup>117</sup> Similarly, in Australia, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, and the later Council for Aboriginal Reconciliation were part of an effort to wrap up “the unfinished business” of Aboriginal issues in Australia by the time of the federation’s century celebration.<sup>118</sup> Yet, understanding the Canadian TRC under such a rubric of nation building could prove problematic. This sort of nation-building objective could hinder the ethic of reconciliation sought for the relationship between the Crown and Aboriginal peoples that would allow the relationship to move beyond its historical colonial framework.<sup>119</sup>

In the interviews I undertook, only one person brought up the idea of nation-building specifically. Bob Watts conveyed how “the Governor General even talked about the importance of the TRC for the unfinished work of nation-building in this country.”<sup>120</sup> In discussions about whether the TRC can move reconciliation forward, Watts again brought up this notion of nation-building when he said “[the TRC is] going to leave at least a partially unfinished project in terms of reconciliation and in terms of nation-building.”<sup>121</sup> Taken in the context of other comments made by Watts, about the breadth and depth of reconciliation, for example, these comments about nation-building indicate that Watts has a multi-national understanding of Canada. While I cannot speak for Watts, I extrapolate that the nation-building that will be left unfinished by the TRC will be the building of a nation, the building of a Canada, that substantively includes Aboriginal

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<sup>117</sup> See Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (New York: Cambridge University Press, 2001). Also South Africa *Promotion of National Unity and Reconciliation Act* 1995.

<sup>118</sup> Michelle Gratton, “Introduction” in *Essays on Australian Reconciliation* ed. Michelle Gratton (Melbourne: Black Inc, 2000), 3. See also Andrew Gunstone, *Unfinished Business: The Australian Formal Reconciliation Process* (Melbourne: Australian Scholarly Publishing, 2007). As I argue in Chapter 6, the project of reconciliation in Australia is very bound up in an Australian nationalism.

<sup>119</sup> Andrew Schaap “Reconciliation as Ideology and Politics” *Constellations* vol. 15, no.2 (2008), 255, discusses this as an objection leveled against reconciliation.

<sup>120</sup> Bob Watts, former Interim Director of the TRC, telephone interview with author, 19 Jan. 2012.

<sup>121</sup> *Ibid.*

peoples. Nation-building and “Canadianness,” here, however, can be dangerous to a reconciliation that seeks to eschew assimilation. At least two problems present themselves here for understanding reconciliation within a nation-building framework.

First, as discussed in Chapter Four, if we understand the history of Crown-Aboriginal relations after 1830 as the normative and legal exception of Aboriginal peoples from society, polity, and economy in Canada, then the invocation of this type of Canadianness as an aim clearly cannot help but exclude Aboriginals from a concept of “Canada.” As discussed in Chapter Three, it bears repeating here, that Agamben’s understanding of the state of exception, when applied to the construction of a Canadian identity, means at the very least a new understanding of the Canadian nation is needed, rather than simply including Aboriginal peoples in the older understanding that relies exactly on their exclusion.

Second, and more expansively, there is the problem of the term “nation” and what is left out by its invocation. Giorgio Agamben argues that “the constitution of the human species into a body politic comes into being through a fundamental split... [between] naked life (*people*) and political existence (*People*), exclusion and inclusion.”<sup>122</sup> Partly, this is a problem of semiotics, with the disjuncture between the particular and the universal in linguistic articulation. As Agamben notes, “the antinomy of the individual to universal has its origin in language... [and the] linguistic being is a class that both belongs and does not belong to itself.”<sup>123</sup> When we use any word, such as “tree,” we mean both the particular and the universal class. “Tree” could mean this particular American mountain ash, and the category of existence of a tree, as distinct from a frog, or a flower, or an onion. It could mean both simultaneously. As Agamben argues “the word ‘tree’ designates all trees indifferently, insofar as it posits the proper universal significance in place of singular ineffable trees... [it] is a set (the tree) that is at the same time a singularity (*the tree, a tree, this tree*).”<sup>124</sup> That is to say, within an articulation there is this tension between the particular and the class to which it belongs.

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<sup>122</sup> Giorgio Agamben, *Means Without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 31-2.

<sup>123</sup> Agamben, *The Coming Community* (Minneapolis: University of University of Minnesota Press, 2007), 9.

<sup>124</sup> *Ibid.*, 9.

Though a semantic distinction, it is an important distinction nonetheless, and one which when taken in the context of the nation of Canada, has important results for Aboriginal identity. In the example of the nation of Canada, with the invocation of people, there is a singularity (*this* Canadian) as subsumed in the entire body politic (Canadian). This invocation contains what Agamben calls the “*fundamental biopolitical fracture*” between pure life and a form of life. An invocation of peoplehood, of nation, necessarily admits a paradox, it contains what “cannot be included in the whole of which it is part as well as what cannot belong to the whole in which it is always already included.”<sup>125</sup> The remainder, this excluded particular that is subsumed but does not fit within the larger class is what is not meant by, but always already in, the invocation of something like the Canadian people. The very invocation of peoplehood reinforces a national identity that both *includes* and *excludes*. Taken with my argument in the Chapter Three about the normative exclusion of Aboriginal peoples, this remainder would certainly include Aboriginal peoples among others who are already generally considered “marginalized.” This understanding gives another enriching lens through which to see the interactions between Crown and Aboriginal peoples, namely government action directed toward “the radical elimination of the excluded.”<sup>126</sup>

This is the problem of using a term like “nation-building” here. Constructing a new concept of the Canadian “People” through reconciliation admits again the problem of the particular and the class, and the possibility of seeking once more to eliminate the excluded. With the inequalities of power between Crown and Aboriginal peoples, this approach invites requirements or policies that demand a certain form of life that will be over-determined by the Crown or the dominant society. Thus, nation building could leave us in the same situation as that which produced the IRS system.

### *Conclusion*

Addressing the question “toward what might this be a transformation in Crown Aboriginal relations?” is inherently speculative, and it is not my intention here to forecast the future. More than this, it might be most beneficial to consider the question rather than

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<sup>125</sup> Agamben, *Means Without End*, 32.

<sup>126</sup> *Ibid.*, 33.

provide an outright answer. Providing some specific causal link or narrative arch will require more time, it can only be done retrospectively. But, considering the question of what character transformation may take can be fruitful for all concerned. Clearly there are a variety of possibilities, and it is not my intention to catalogue them. I have offered some analysis of themes raised in my interviews and the possible problems with some of these approaches to reconciliation. Certainly the Canadian state needs to rethink its approach to dealings with Aboriginal peoples, be less paternalistic and more accommodating. Structures of government may need to change including reform of the Ingenious Affairs Department, and the legislative control over “Indians” should be replaced or abolished, not unilaterally as was suggested in 1969, but in negotiation with Aboriginal peoples.

While I am hopeful that a political ethic of reconciliation can emerge from this transformative opportunity, one that will provide a (re)new(ed) foundation for an equitable relationship between Crown and Aboriginal peoples, this is not a necessary outcome. I think there is some cause to have hope with the new government and their stated commitment to reconciliation. This is not to say that serious threats to a healthy post-colonial relationship do not exist. The difference in opinions about the understanding of the breadth and depth of reconciliation could constrain this relationship and renew efforts to assimilate Aboriginal peoples. Seeing the Indian Residential Schools system as separate from a system of colonisation would limit reconciliation, providing a screen discourse for continued efforts to force homogeneity on Aboriginal peoples. Similarly, framing reconciliation within nationalism or nation building could, intentionally or unintentionally, readmit the politics of exclusion and elimination that characterized the period of the Indian Residential School system.

What seems clear from action and the one interviewee from the Conservative party is that the Conservative idea of reconciliation was significantly at odds with that expressed by the Aboriginal people I interviewed. While there is now a Liberal government in Ottawa, it remains to be seen how much it agrees with the statements made by former privy councillors while their party was in opposition. If those interviewed from the Liberal party represent the views of the Trudeau government then there seems to be a basis to engage in a political ethic of reconciliation. Words, however, are relatively cheap, while a political ethic of reconciliation will be costly in a number of

ways, financially, politically, and emotionally. Ultimately, whether the Liberal government, indeed any government, will change their approach to Aboriginal peoples, the question of what form this change will take is an important one to consider and recall, publically and privately.

## CHAPTER NINE

### Conclusion

This study has cast a wide net in seeking to understand the significance—as well as any possible outcomes and ramifications—of the Truth and Reconciliation Commission of Canada. As I have argued, the TRC, as well as the Indian Residential School system, whose abuses the TRC hoped to address, need to be placed within the broader context of colonialism in Canada, including past attempts at addressing the colonial legacy. I have sought to relate the more conceptual politics and histories relevant to the TRC with the current understanding of the goals and interest involved in the Canadian TRC. Context is an important part of understanding and intelligibly acting. To that end, I argue, the most relevant contribution this study can make is to inform a context to understand the TRC and reconciliation, as well as providing the views of elites influential at the time of the TRC's creation.

#### *Context is King*

In the early period after contact between Europeans and Aboriginal peoples, when independent and self-sufficient European settlement was relatively sparse and fragile, a symbiotic relationship based on trade with Aboriginal peoples helped keep European settlements alive. As more settlers arrived from Europe, more land was needed to support these settlements. Treaties became the vehicle for both French and English Crowns to secure lands and win allies among their Aboriginal trading partners. As rivalries from the “Old World” were replicated in the “New World” the importance of Aboriginal allies increased primarily to allow Great Britain and France to secure their colonies without the need for raising troops from the settlers or from Europe. As Aboriginal warriors fought alongside their European allies, more treaties were signed to garner more land for incoming settlers. It is important to understand this early contact period as one where individual Aboriginal nations were treated as “nations,” with the rights and treaties afforded by the European newcomers for other state entities.

This period of Aboriginal-European relations was built on mutual advantage and respect until the early 19th century. The year 1830 is especially significant for the



decisive change in Crown-Aboriginal relations. As Jim Miller highlights, that was the point at which local colonial authorities in British North America were delegated the responsibility for administration of Aboriginal affairs with the transfer of responsibility from the military to the civilian governor.<sup>1</sup> By the 1850s, the legislative assemblies of British North America assumed legislative control for Aboriginal policy, meaning decisions were no longer made by imperial authorities in a distant land but by the representatives of the colonial apparatus of Crown authority in pre-confederation Canada. As a result, Aboriginal policy changed dramatically, becoming very one-sided, with the Crown taking unilateral action on Aboriginal affairs, often abrogating earlier treaties or even those newly signed. This switch in policy signalled the beginning of the exclusion of Aboriginal peoples from the creation of the new state of Canada. This was a decisive moment in Crown-Aboriginal relations, when Aboriginal peoples ceased to be seen as independent and valuable partners, and began to become integrated into what Giorgio Agamben calls a “state of exception,” as they were placed juridically outside of the emerging Canadian state—but also normatively excluded from the social, political, and economic order. This “state of exception” is a complex topology of inside and outside, and the antinomy that exists between them. As Agamben puts it, it is a force-of-law without-law.<sup>2</sup> I argue that this idea of a state of exception helps to bring into focus what is at work in colonialism, and gives us a way of understanding the Indian Residential School system within a broader conceptual context. Agamben’s idea of the “camp” as a place, “a piece of territory that is placed outside the normal juridical order... the camp is the structure in which the state of exception is permanently realized,”<sup>3</sup> becomes the main mechanism in understanding the specific instances of the IRS system in a broader state of exception represented by the colonial project.

Seeing colonisation as having the ultimate result of placing Aboriginal peoples in a state of exception, and specifically seeing Indian Residential Schools as camp in Agamben’s sense, helps us to realize the enormity of what has happened in Crown-Aboriginal relations. It cannot simply be a case of reading Aboriginal peoples back into

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<sup>1</sup> J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 2001), 118.

<sup>2</sup> Giorgio Agamben, *State of Exception* (Chicago and London: University of Chicago Press, 2005), 40.

<sup>3</sup> Giorgio Agamben, “What is a Camp?” in Giorgio Agamben *Means Without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 39.

the Canadian creation narrative, or seeing Aboriginal peoples as something like a third solitude. Rather, the lens of Agamben's theory allows us to see the very real way in which Canada was constructed in the *absence* of Aboriginal peoples, while in antinomy with the very idea of Aboriginality that it sought to annex and control. A "Canada" that would substantively include Aboriginal peoples requires a much more critical approach to this history of colonisation and must directly confront issues of Aboriginal exception and exclusion. It is this "Canada" which substantially includes Aboriginal peoples that the TRC may be able to help create.

Agamben's theory of a state of exception also helps us think critically about decolonisation in Canada. As detailed in Chapter Five suggestions have been made about ending the overtly colonial relationship that exists in law between the Crown and Aboriginal peoples in Canada. As I argued in that chapter, many approaches to decolonisation fail to overcome a colonial ethic. While suggestions such as that from Thomas Courchene and Lisa Powell for a "First Nations province," are an improvement over the inferiority of First Nations governments in the *Indian Act*, this approach fails to confront the issue of Aboriginal sovereignty in a meaningful way.<sup>4</sup> Courchene and Powell propose that reserve lands be collectively governed by one authority that would have status as a province within the Canadian federation, but only consist of First Nations.<sup>5</sup> It is an approach, however, that subsumes Aboriginal difference into one voice that would still result in subjecting Aboriginal peoples to a European style of federalism that is premised on an underlying sovereignty of the Crown.

Seen through the lens of exception, decolonisation needs to be more critical and involves unpacking notions of Canada and the relationship between Crown and Aboriginal nations. I argue that this is best represented by the idea of treaty federalism, or treaty constitutionalism, as outlined by scholars such as James Henderson, and Kierra Ladner.<sup>6</sup> These approaches recognize Aboriginal sovereignty in a way that is historically

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<sup>4</sup> Thomas Courchene and Lisa Powell, *A First Nations Province* (Kingston: Queen's University Institute of Intergovernmental Relations, 1992)

<sup>5</sup> *Ibid.*, 5-7.

<sup>6</sup> James Youngblood Henderson, "Empowering Treaty Federalism," *Saskatchewan Law Review* 58 (1994), and Kierra Ladner, "Negotiated Inferiority," *American Review Of Canadian Studies* vol. 30, no1. (2001), 241.

rooted and helps to unpack the “Canada” that has excluded Aboriginal peoples from its narrative.

More than merely historical background, this colonial history is present in the continued exclusion of Aboriginal peoples and importantly informs any theories that might lead us to a way out of the present colonial structure of Canada. Colonisation and decolonisation must form a significant backdrop to the Truth and Reconciliation Commission of Canada, and reconciliation itself.

### *The Commission in Context*

This colonial context, I argue, becomes an important part of the overall picture when assessing the Truth and Reconciliation Commission of Canada. In Chapter Six above, I argued that the Canadian TRC was established in what still remains a colonial society. It was not preceded by any material or conceptual change in the colonial relationship between Crown and Aboriginal peoples. The constellation of colonial power remains intact from the period of the IRS system and could distort attempts to deal with the legacy of the IRS system and reconciliation. This colonial constellation of power, importantly, leads us to consider the forces and interests at play in the creation of the Canadian TRC.

In the same chapter, I examined the Canadian TRC by comparing it to two other truth commissions, including perhaps the most famous commission, the South Africa truth commission, as well as the Australian National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from Their Families and the CAR. Here I have argued that the difference in how colonial power was wielded in Canada, Australia, and South Africa had important implications for the relative outcomes and successes of these respective commissions. This was specifically the case in the varying levels of power given to each respective commission, the commissions’ centrality or lack of placement in the overall process of reconciliation, and the level of funding that was provided for each commission.

Priscilla Hayner outlines a definition of truth commissions as backward-looking entities that focus on a broad pattern of human rights abuses, and limit their inquiry to a specified period of abuses. They tend to be designated special powers of investigation that allow a commission to access the requisite information needed to deal with sensitive

issues.<sup>7</sup> These are the aspects of the truth commission that, for Hayner, have differentiated this mechanism from other judicial or quasi-judicial standing bodies on human rights.<sup>8</sup> In my comparison of the South African and Australian commissions, this last aspect of designated specific powers becomes especially significant. The South African TRC was given powers of amnesty and reparation, among others, to undertake its work.<sup>9</sup> In Australia, the Inquiry had no such powers. At least part of this difference, I argue, lies in the transitional nature of South African society at the time of the commission, away from a rigid colonial society, while in the Australian case there was still a colonial constellation of power. These differences can significantly impact the ability of a commission to effectively operate and achieve goals of reconciliation. While the comparison here is not between success and failure, that South Africa is continuing on a decolonial path while in Australia non-Aboriginal peoples dominate society, economy, and polity, is of great significance.

Another key difference between the South African and Australian commissions that demonstrates the impact colonial power can have on these mechanisms is the establishment of the commission during an effort at broader reform. In South Africa, the TRC was created after the 1994 electoral victory of Nelson Mandela's African National Congress and became part of a transition away from Apartheid. In contrast, the Australian Council on Aboriginal Reconciliation was conceived of as the beginning of a process which would identify and address Aboriginal disadvantage, and the Inquiry was specifically undertaken in the middle of the CAR's mandate. Then-Australian Prime Minister John Howard argued that reconciliation was a not legislatable initiative, and he chose to focus, instead, on acts of on "practical reconciliation" rather than the transformative and more difficult and elusive type of reconciliation that could only be felt in the "hearts and minds of the Australian people."<sup>10</sup> This lack of a broader context of reform and change, in the case of the Australian commission, provides a screen discourse by which the colonial constellation of power is protected from any serious threat.

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<sup>7</sup> Pricilla Hayner, "Fifteen Truth Commissions--1974-1994: A Comparative Study," in *Human Rights Quarterly*, 16:4 (1994), 604.

<sup>8</sup> Ibid.

<sup>9</sup> These powers were outlined in the South Africa, *Promotion of National Unity Act*, 1995.

<sup>10</sup> Howard, "Practical Reconciliation," 89.

A last but a very significant difference between the South African and Australian mechanisms was the funding of each commission. In South Africa the TRC was financed by a fund set up by the President, and, thus, operational funds were guaranteed by the state.<sup>11</sup> While in the case the Australian commission was state-funded, Reconciliation Australia, the agency created after the mandate of the CAR expired in order to complete its work, is a not-for-profit body funded by private donations.<sup>12</sup>

I argue that these differences highlight the operation of the prevailing colonial power dynamics in a decolonial South Africa and a still-colonial Australia. This gives us a significant indication as to the ability of the Canadian TRC to function as a justice mechanism, since it was created in a colonial context. As it did in the comparative cases, South Africa and Australia, the dominant colonial power has affected the Canadian TRC in at least three ways.

First, the Canadian TRC comes from a negotiated settlement of legal actions against the Government of Canada and the churches that operated the schools. Andrew Woolford argues that the Settlement, which contained provisions for the TRC, was an act of “governmentality,” in the Foucauldian sense.<sup>13</sup> By this, Woolford means that the Government of Canada has sought to mitigate and quantify financial liability with greater certainty than in a court process.<sup>14</sup> The Government of Canada, in this instance, has used the asymmetry of power in its relation to Aboriginal peoples to create the certainty that it desired. This use of power pre-figures the outcome and stifles the possibility of reconciliation as it re-inscribes the process with the same colonialism it is meant to overcome.

Second, and closely related to this first point, is the issue of funding. While the TRC was funded by the Canadian state, the overall funding was established in the settlement process and was fixed at a specific amount, which required governmental approval of how the money was to be spent before any funds could be released.<sup>15</sup> The Canadian TRC was allotted a budget of \$60 million to finance seven national events, in

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<sup>11</sup> South Africa, *Promotion of National Unity and Reconciliation Act 1995*, Section 42.

<sup>12</sup> About RA, <http://www.reconciliation.org.au/home/about-ra/who-is-ra->

<sup>13</sup> Andrew Woolford, “Governing Through Repair: Colonial Injustice and Indigenous peoples in Canada,” a paper presented at the One Day Academic Conference at the First National Event of the Truth and Reconciliation Commission of Canada, Winnipeg Manitoba June 17, 2010.

<sup>14</sup>Ibid.

<sup>15</sup> *Indian Residential Schools Settlement Agreement*, Section 3.03 (1), pg. 23.

addition to funding research, and the administration of the TRC, as well as its final task of creating a permanent research centre.<sup>16</sup> The Canadian TRC's former Director of Research, John S. Milloy, expressed frustration over the level of funding available for such a broad mandate. Milloy indicated that it would be next to impossible to conduct the research that was part of the TRC's mandate on such a limited budget, let alone to establish a working research centre.<sup>17</sup> The unexpectedly high costs of collecting and cataloguing documents stressed the meagreness of the budget of the TRC and in December of 2011 the TRC Chair, Murray Sinclair, pointed out in an interview with CBC News that "this commission cannot do all of the things you've asked us to do with the resources you've given us."<sup>18</sup> Clearly, lacking these necessary funds the Canadian TRC may fall short of expectations for it to fulfill even basic aspects of its mandate, such as commemoration and the collection of documents. Additionally, the Canadian TRC's inability to effectively operate due to lack of funds could impact reconciliation that it seeks to foster.

Last, the issue of designated and special powers given to the Canadian TRC reflects a very real colonial imbalance of power. Unlike the case of the South African TRC, and, indeed, contrary to Hayner's expectation that most truth commissions are given special powers, the Canadian TRC has no extra-ordinary powers. Under the terms of reference the Canadian TRC is simply empowered to "receive statements and documents."<sup>19</sup> The commission cannot compel documents or testimony and, in fact, must perform its duties "without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings."<sup>20</sup> Without special powers, the work of the TRC could become hobbled. In late 2012 the TRC took court action against the Government of Canada to force it to release documents that the TRC is

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<sup>16</sup> *Indian Residential Schools Settlement Agreement*, "Schedule N."

<sup>17</sup> John S. Milloy made these remarks at the "Truth, Reconciliation and the Residential Schools" conference March 5th 2010, Nipissing University.

<sup>18</sup> CBC News, "Residential Schools Commission Faces Financial Crunch," *CBC.ca*, 4 Dec. 2011, <http://www.cbc.ca/news/canada/north/story/2011/12/04/truth-reconciliation-commission-funding.html> (accessed 26 Nov. 2012).

<sup>19</sup> "Schedule 'N,'" *Indian Residential Schools Settlement Agreement*, 2.

<sup>20</sup> *Ibid.*, 2-3.

unable to compel due the lack of special powers.<sup>21</sup> This crucial function of the TRC, that of collecting documents to create a historic record of abuse, is severely limited by its lack of special powers to compel documents in this case which could a significant impact on the outcomes of the TRC.

Read against the backdrop of the Canadian colonial history and approaches to decolonisation, the TRC as a mechanism of a settlement and an attempt by the Government of Canada to create certainty in an uncertain situation, the TRC can be seen as an institution marked by the colonial power constellation. This makes the work of the TRC difficult, as structural aspects, funding, and powers limit the scope of the commission and its ability to function. The TRC is hamstrung if its goal is to overcome colonial relations between Crown and Aboriginal peoples as a part of reconciliation, as I argue reconciliation itself implies. This holds back the TRC from the role of catalyst it might otherwise play fostering a thoroughly decolonial reconciliation and overcoming the colonial relationship between Crown and Aboriginal peoples in Canada.

### *Reconciliation in Context*

The historical context of colonisation and decolonisation are, further, helpful in wrestling with what reconciliation means in Canada, as the TRC was tasked with fostering reconciliation between the parties to the Agreement.<sup>22</sup> I argue that reconciliation is an expansive concept and is linked to a thoroughgoing understanding and goal of decolonisation. Reconciliation would require substantive changes in Crown-Aboriginal relations, since reconciliation at a fundamental level involves justice and the righting of past wrongdoings.<sup>23</sup>

Following Schaap and Doxtader, I argue that reconciliation implies a political ethic of interaction that is based on elements of agonistic democracy. Reconciliation, as I

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<sup>21</sup> Gloria Galloway, "Ottawa Taken to Court Over Release of Residential-Schools Documents," *The Globe and Mail* 3 Dec. 2012, <http://www.theglobeandmail.com/news/politics/ottawa-taken-to-court-over-release-of-residential-schools-documents/article5904543/> (accessed 30 Dec. 2012). In January 2013 an Ontario court ruled that the Federal Government is obliged to hand over all documents related to Indian Residential Schools (CBC News, "Ottawa Orders to Provide All Residential Schools Documents," *CBC News* Jan. 30, 2013, <http://www.cbc.ca/news/canada/thunder-bay/story/2013/01/30/pol-cp-truth-reconciliation-commission-documents.html> (accessed 5 April 2013)).

<sup>22</sup> "Schedule 'N,'" *Indian Residential Schools Settlement Agreement*, 1.

<sup>23</sup> Daniel Philpott, "An Ethic of Political Reconciliation," *Ethics and International Affairs* vol.23, no. 4 (Winter 2009), 390.

outline it, is a form of politics that is characterized by contingency and contestability. It is an ethic that allows for the specifics of reconciliation to be dynamically worked out, without overdetermining the outcome. Applying this concept of reconciliation as a political ethic to Canada, I argue, highlights at least four aspects of the Canadian reconciliation project.

First, reconciliation will not and cannot be a painless activity. Exactly because of the state of exception that characterizes the post 1830-1850 Crown-Aboriginal relationship, a reconciliation process will need to reckon with how “Canada” has been constructed in the absence of Aboriginal peoples. This requires tough questions and reflection on historical motivations and actions. Moreover, given the size and scope of this historic wrong, even just in the case of the Indian Residential Schools system, adequately addressing this will be financially costly, and thus, to some, very painful. Beyond financial pain, reconciliation demands that Canadians seriously examine their history, which may prove psychologically painful.

Second, reconciliation requires (re)enactment. As a political ethic, reconciliation is an orientation or a mode of interaction. It requires that an agonistic approach be taken that admits contingency and contestability to the interaction. That is to say, it is a politics that sees the “other” as an adversary, rather than an enemy to be destroyed and takes seriously the ability of the process to produce something for all parties, not a site where a predetermined solution can be legitimized or sold. This means that political reconciliation does not merely do away with colonialism, but also replaces it in a continuing method of interaction and engagement. This is not a “quick fix” so much as a way of living together.

Third, reconciliation concerns non-Aboriginal Canadians, yet it cannot be all about non-Aboriginal Canadians. Related to the second aspect, interaction, I mean that reconciliation must be understood to require room for Aboriginal voices and perspectives. The Kelowna approach, for example, recognized the agency of Aboriginal peoples in identifying both problems and solutions within their own communities. Reconciliation requires that Aboriginal agency be recognized and not diminished by colonial stereotypes. Reconciliation concerns non-Aboriginal Canadians, especially the government, as it requires something of them. However, it is not all about non-Aboriginal Canadians or the Government of Canada. The new relationship must be dialogical, rather



the old colonial monologue. This means overturning the paternalism that smacks of Rudyard Kipling's "white man's burden" in favour of a relationship that will make room to hear how Aboriginal peoples would address what issues there are within their own communities.

Last, Aboriginal peoples owe non-Aboriginal Canadians nothing. By this, I mean to point out that reconciliation cannot be read as a staged plan where A leads to B leads to C. Specifically, apology to a wronged group does not imply forgiveness by that wronged group, and contrition does not in itself lead to absolution. Reconciliation is a way of living, not a transactional economy where apology and compensation lead to a state of reconciliation. To think this way mistakes what is at stake in reconciliation. It must be clearly understood that the apology offered by Prime Minister Harper in 2008, the compensation and even the TRC, do not in themselves imply reconciliation.

These aspects of reconciliation in Canada are important to bear in mind, as the type of reconciliation that the TRC is meant to foster cannot be easily separated from the colonial experience as a whole. It is also clear that a political ethic of reconciliation containing these aspects is significantly decolonial as it aims to transcend a system of exclusion that has left Aboriginal peoples significantly outside the society, polity, and economy of a colonial Canada that was built around them.

### *Assessing the TRC*

This project has sought to understand the genesis, function, and the work of the Truth and Reconciliation Commission of Canada. In particular, I have been concerned with assessing whether the TRC represents a transformative opportunity in Crown-Aboriginal relations, and towards what kind of relationship this might actually be a transformation. These questions are addressed directly in the Chapters Four and Five above.

In Chapter Seven, I argued that based on elite interviews and the analysis of government actions, reconciliation can be seen to represent this type of transformative opportunity in Crown-Aboriginal relations. Some of those interviewed were critical of the government and identified important obstacles to the TRC representing a transformative opportunity, but not one person interviewed disputed that the creation and

working of the TRC as an improvement over previously employed mechanisms to resolve the Indian Residential School situation.

The two important obstacles that the TRC faces, as identified by the people whom I interviewed, were the failure of the TRC to reach the broader non-Aboriginal Canadian community and the lack of sincere commitment on the part of the Government of Canada, under Stephen Harper. Both of these shortcomings will impede the government if it takes a different action and a different approach in engaging with Aboriginal peoples. Without broad dissemination, the findings of the TRC will fail to inform the public and bring public attention to reconciliation. Without the government's sincere commitment, because of the concentration of power in its hands, Crown-Aboriginal relations cannot change. If the government will not come to the table with an honest effort to change Crown-Aboriginal relations, then the old colonial paternalism will continue to the detriment of Aboriginal peoples in Canada.

It must be kept in mind that the TRC was created as a part of a court-monitored negotiated settlement that cancelled numerous individual and class legal actions against the Government of Canada and the churches that operated the schools. Even acknowledging that it is an imperfect solution, the TRC is considered by many to be part of a transformative opportunity. The simple answer to this first question asking if the TRC is a transformative opportunity in Crown-Aboriginal relations is "yes." While a sincere commitment on the part of government is a necessary condition for reconciliation, to take advantage of this transformative opportunity to make a change in Crown-Aboriginal relations, it is not a sufficient condition for reconciliation. As the more powerful partner the government is key here; however, non-Aboriginal Canadians themselves are also needed to create a new relationship and ensure that it is lived out with integrity. There is more reason to hope for this commitment in light of the election of Justin Trudeau's Liberals after my interviews. But, at the time of writing it is yet unclear if the new rhetoric of the Liberals will be met with serious action.

I addressed the second research question, towards what might this be a transformation, by analyzing interviewee responses, public statements made by Conservative politicians, and government action, to assess the type of relationship between Crown and Aboriginal peoples that might result from this transformative

opportunity. This question is a fruitful one to keep in mind, even in the absence of an outright answer. My goal in addressing the question is not to catalogue the possible outcomes, but rather discuss the ones raised in my interviews, assessing them in relation to a political ethic of reconciliation. While there is some reason to hope that the new relationship between Crown and Aboriginal peoples will be a thoroughly decolonial one based on an ethic of political reconciliation, it is far from clear that this will be the case. There is a significant danger that far from being a break with the colonial ethos of the Indian Residential School period, this relationship will be re-inscribed by the colonial paradigm.

The main reason for concern about the relationship that results from the transformative opportunity being re-inscribed with colonial attitudes, being a neo-assimilationist approach, is the gap in how reconciliation is understood by those in power and those who are not in power. If reconciliation is directed only to the narrow instance of the IRS system, as it seems the Government of Canada under the leadership of Stephen Harper was committed to, then a whole array of related wrongs and adverse conditions suffered by Aboriginal people will be left to be dealt with in the same “government-knows-best” paternal way. The public statements of some Conservatives, especially the Minister of Aboriginal Affairs, the understanding of reconciliation offered by bureaucrats, and also by the one Conservative interviewed, point to such a limited form of reconciliation, addressed to little more than the immediate impacts of the Indian Residential School system. Those whom I interviewed who were by then out of power, the Aboriginal leaders, Liberal privy councillors, and church representatives, characterized an expanded understanding of reconciliation. I have framed this distinction as between a limited reconciliation on the one hand, and a broad and deep reconciliation on the other. The main difference between these two views is the connection of the Indian Residential Schools system to a broader colonial project that sought to exclude, except, and destroy Aboriginality in Canada. By seeing the Indian Residential School system connected in this broader way, reconciliation becomes similarly broad and directed at the entire relationship, not just specific harms of one policy and its impact on Aboriginal communities. For a thorough reconciliation to emerge as following the Canadian TRC this more expansive view of the placement of the IRS system within a broader colonial

project is necessary, without it there is a very real danger that the paternalism of the colonial project will be left intact and Aboriginal peoples may be subject to a new and sophisticated effort to assimilate them into Canada. While the 2015 election of a Liberal government has given hope that a neo-assimilationist will be avoided, thus far it has offered little more than hope. If non-Aboriginal Canadians want to live in a just society, if they want to live up to the rhetoric of what Canada is, then beginning to change how the Crown deals with Aboriginal peoples is important. For the TRC to help contribute to positive change in this transformative opportunity the commission needs to be heard and government needs to come to the table. If the Crown is not moved, by this process or by its citizens, to deal honourably with Aboriginal peoples, then the TRC is little more than a screen discourse for the long-standing colonial goal of assimilation. The very real importance of this study is to point to the potential problems of the TRC and a process of reconciliation, in the context of opinions and analysis by elites who were intricately involved on the subject. In particular, for the idea of reconciliation in Canada, I have presented the opinions of many of the most influential leaders at the time of the TRC's inception, giving a glimpse of how this mechanism was conceived and present a view against which to measure the current reality. Answering the question of where the TRC may be leading Crown-Aboriginal relations is not possible *per se*, but is a helpful guide in considering colonial pitfalls that this new relationship may want to avoid.

It is clear that some reform will be need on the part of the Canadian state. The Indigenous Affairs Department's role and structure can be changed as First Nations are treated as legitimate orders of government. The limited of Crown legislative control of Aboriginal peoples needs to be rethought in order to take seriously their claims of integrity, sovereignty, and legitimacy. This cannot be done unilaterally as the White Paper suggested in 1996, but must be subject to thorough and honourable negotiation with Aboriginal peoples

While it is my hope that the relationship will be one characterised by a political ethic of reconciliation, it is just that, a hope. But this question is an important one to bear in mind as the effects of the TRC continue to ripple out now that its work is done. As I undertake future research the second research question of this project will be important in assessing the continuing relationship in Canada between Crown-and Aboriginal peoples.

*Future Research*

This project is only a beginning. While I have given a context for the Indian Residential School system with a large colonial project and pointed out obstacles to the TRC contributing to a transformative opportunity in Crown-Aboriginal relations, there is much work left to be done in assessing the ongoing impact of reconciliation in Canada. This dissertation contributes to the assessment of the Canadian TRC within its specific context and helps to understand the difficulties encountered and what possible difficulties the commission's impact will face.

More broadly this project can help those who study and practice transitional justice understand the truth and reconciliation commission mechanism when used in colonial societies that have yet to go through a transition, or are in the midst of transition. The Canadian TRC is one of very few such uses of a TRC in a colonial society. However, as other colonial states seek to use this mechanism an amended approach is in order to reckon with colonial constellations of power. In the United States, the state of Maine has announced a TRC to deal with a history of child custody issues with the Wabanaki people.<sup>24</sup> In such a setting, special care needs to be taken and the colonial structures that still exist need to be reckoned with to properly construct and assess a truth commission there.

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<sup>24</sup> Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, "History and Background," <http://mainetribaltrc.org/history.html> (accessed 20 Jan. 2013).

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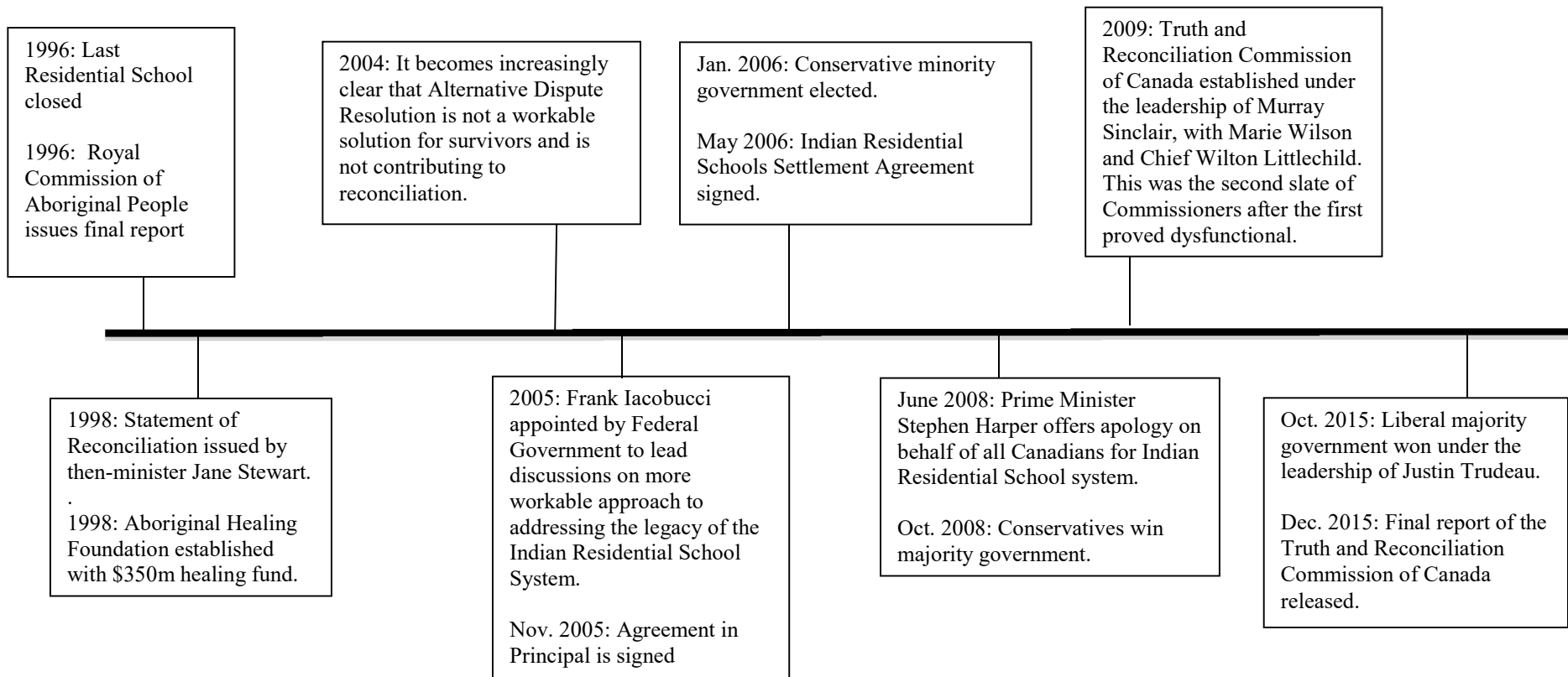
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## Appendix I

### Condensed Timeline of Significant Events Leading to the TRC



## Appendix II

### PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995

- (1) The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by-
- (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
  - (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
  - (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
  - (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a) , (b) and (c) , and which contains recommendations of measures to prevent the future violations of human rights.

### Appendix III

## COUNCIL FOR ABORIGINAL RECONCILIATION ACT 1991 No. 127 of 1991

### (section 6)

#### Functions

6. (1) The functions of the Council are:

- (a) to undertake initiatives for the purpose of promoting reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, focusing in particular on the local community level; and
- (b) to promote, by leadership, education and discussion, a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders and of the need to redress that disadvantage; and
- (c) to foster an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage; and
- (d) to provide a forum for discussion by all Australians of issues relating to reconciliation with Aborigines and Torres Strait Islanders and of policies to be adopted by Commonwealth, State, Territory and local governments to promote reconciliation; and
- (e) to advise the Minister on policies to promote reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community; and
- (f) to provide information and advice to the Minister in accordance with section 8; and
- (g) to consult Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or formal documents of reconciliation; and
- (h) after that consultation, to report to the Minister on the views of Aborigines and Torres Strait Islanders and of the wider Australian community as to whether such a document or documents would benefit the Australian community as a whole, and if the Council considers there would be such a benefit, to make recommendations to the Minister on the nature and content of, and manner of giving effect to, such a

document or documents; and

- (i) to report, in the Council's annual report, on progress towards reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community; and
- (j) in accordance with Part 3, to develop strategic plans that include a statement of the Council's goals and objectives in the promotion of the process of reconciliation and of its strategies for achieving them, together with indicators and targets for measuring the Council's performance in relation to those goals and objectives.

(2) In carrying out its functions, the Council must:

- (a) have regard to the fact that the Aboriginal and Torres Strait Islander Commission has, under the Aboriginal and Torres Strait Islander Commission Act 1989 , specific functions and responsibilities in relation to matters involving Aborigines and Torres Strait Islanders; and
- (b) make use of the Aboriginal and Torres Strait Islander Commission and Regional Councils established under the Aboriginal and Torres Strait Islander Commission Act 1989 as the principal means of facilitating consultation with Aborigines and Torres Strait Islanders; and
- (c) co-operate with and consult Commonwealth, State, Territory and local government bodies and other bodies and organisations, including Aboriginal and Torres Strait Islander community-based organisations; and
- (d) focus on the need to promote, at the local community level, the process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community.

(3) The Minister is to cause a copy of any recommendations made by the Council in performing its function under paragraph (1) (h) to be laid before each House of the Parliament within 15 sitting days of that House after they are made to the Minister.

## Appendix IV

### Global Truth Commissions to Date

Country	Commission Name	Date Struck
Algeria	Ad hoc Commission (Commission ad hoc)	2003
Argentina	National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP)	1983
Australia	Council on Aboriginal Reconciliation (1991) and The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1995)	1991, 1995
Bolivia	National Commission of Investigation of Disappeared Citizens (Comisión Nacional de Investigación de Ciudadanos Desaparecidos)	1982
Brazil	National Truth Commission	2011
Burundi	International Commission of Inquiry	1995
Burundi	National Truth and Reconciliation Commission (Commission Nationale pour la Vérité et Réconciliation)	2004 (not appointed)
Canada	Qikiqtani Truth Commission	2007
Canada	Indian Residential Schools Truth and Reconciliation Commission	2006
Chad	Commission of Inquiry on the Crimes and Misappropriations Committed by the Ex-President, His Accomplices and/or Accessories (Commission d'enquête sur les crimes et détournements commis par l'ex-Président, ses co-auteurs et/ou complices)	1991
Chile	National Commission for Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación)	1990
Chile	National Commission on Political Imprisonment and Torture (Comisión Nacional sobre Prisión Política y Tortura)	2003
Colombia	National Commission for Reparation and Reconciliation	2005
Democratic Republic of Congo (DRC)	Truth and Reconciliation Commission (Commission vérité et réconciliation)	2004
Ecuador	Truth and Justice Commission (Comisión Verdad y Justicia)	1996
Ecuador	Truth Commission (Comisión de la Verdad)	2007
El Salvador	Commission of Truth (Comisión de la Verdad)	1992
Federal Republic of Yugoslavia	Truth and Reconciliation Commission (Komisija za istinu i pomirenje)	2001
Germany	Commission of Inquiry on Working through the History and Consequences of the SED Dictatorship in Germany (Enquete-Kommission 'Aufarbeitung von Geschichte und Folgen des SED-Diktatur in Deutschland')	1992
Germany	Commission of Inquiry on Overcoming the Consequences of the SED Dictatorship in the Process of German Unity (Enquete-Kommission 'Überwindung der Folgen des SED-Diktatur im Prozeß der deutschen Einheit')	1995
Ghana	National Reconciliation Commission	2004
Grenada	Truth and Reconciliation Commission	2001
Guatemala	Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico)	1997
Haiti	National Commission for Truth and Justice (Commission Nationale de Vérité et de Justice)	1991
Indonesia	Truth and Reconciliation Commission (Komisi Kebenaran dan Rekonsiliasi, KKR)	2004 (not appointed)
Kenya	Truth, Justice and Reconciliation Commission	2008
Liberia	Truth and Reconciliation Commission	2006



Country	Commission Name	Date Struck
Mauritius	Turht and Justice Commission	2009
Morocco and Western Sahara	Equity and Reconciliation Commission (Instance Equité et Réconciliation)	2004
Nepal	Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period	1990
Nigeria	Judicial Commission of Inquiry for the Investigation of Human Rights Violations	1999
Panama	Truth Commission (Comisión de la Verdad)	2001
Paraguay	Truth and Justice Commission (Comisión de Verdad y Justicia)	2003
Peru	Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación)	2003
Republic of Korea	Presidential Truth Commission on Suspicious Deaths	2000
Republic of Korea	Truth and Reconciliation Commission	2005
Serbia	Yugoslav Truth and Reconciliation Commission	2000
Sierra Leone	Truth and Reconciliation Commission	2000
Solomon Islands	Truth and Reconciliation Commission	2008
South Africa	Truth and Reconciliation Commission	1995
South Africa	Commission of Enquiry into Complaints by Foermer African National Congress Prisoners and Detainees	1992
South Africa	Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC	1979
Sri Lanka	three regional Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons (Western, Southern and Sabaragamuwa Provinces; Central, North Western, North Central and Uva Provinces; Northern & Eastern Provinces)	1994
Timor Leste	Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação, CAVR)	2005
Togo	Truth Justice and Reconciliation Commission (Commission Vérité, Justice et Réconciliation)	2009
Tunisia	Truth and Dignity Commission	2014
Uganda	Commission of Inquiry into the Disappearances of People	1974
Uganda	Commission of Inquiry into Violations of Human Rights	1986
Uruguay	Investigative Commission on the Situation of Disappeared People and its Causes (Comisión Investigadora sobre Situación de Personas Desaparecidas y Hechos que la Motivaron)	1985
Uruguay	Peace Commission (Comisión para la Paz)	2000
United States	Greensboro Truth and Reconciliation Commission	2004
United States	Maine Wabanaki-State Child Welfare Turht and Reconciliation Commission	2012
Zimbabwe	Commission of Inquiry	1985

Adapted from Amnesty International, *Commissioning Justice: Truth Commissions and Criminal Justice*, (London: Amnesty International, 2010) and Joanna R. Quinn “Transitional Justice,” in *Human Rights: Politics and Practice*, 2<sup>nd</sup> and 3<sup>rd</sup> ed., ed. Micheal Goodhart (London: Oxford University Press, 2012, 2016 respectively).

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Robert Maciel and Timothy E.M. Vine, "Re-Approaching Multiculturalism in Canada: Understanding the Limits of Redistribution" *International Indigenous Policy Journal* (2012) vol. 3, no. 4.

**Book reviews**

Timothy E.M. Vine, Review of 'When the Gods Changed: The Death of Liberal Canada' by Peter C. Newman. *British Journal of Canadian Studies* (Spring 2013), vol. 26, no. 1.

Timothy E.M. Vine, Review of 'Moving People Moving Images: Cinema and Trafficking in the New Europe' by William Brown, Dina Iordanova, and Leshu Torchin. *Millennium Journal of International Studies* (May 2011) vol. 39, no. 3.

Timothy E.M. Vine, Review of 'Treaty Promises, Indian Reality' by Harold LeRat with Linda Ungar. *Canadian Ethnic Studies* (forthcoming).

**Conference Presentations**

May 16-18, 2011. "Power, Politics, and Truth: A case study of Australia and South Africa." Conference: annual meeting of the Canadian Political Science Association. Waterloo, On.

March 3-5, 2011. "Repression and Exception: Understanding Aboriginal peoples in the creation of Canada." Conference: 'People and Politics: Interactions Between Citizens and the Canadian State.' Mount Alison University.

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