

THE
ADVOCATE

JANUARY 2017



**VOL. 75
PART 1**

RECONCILIATION – A LAWYERING IMPERATIVE

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Together, Canadians must do more than just talk about reconciliation; we must learn how to practice reconciliation in our everyday lives—within ourselves and our families, and in our communities, governments, places of worship, schools, and workplaces. To do so constructively, Canadians must remain committed to the ongoing work of establishing and maintaining respectful relationships.¹

The Truth and Reconciliation Commission (“TRC”) was mandated to record and address the legacy of Indian residential schools and advance the process of reconciliation in Canada. It was established in 2009, it released its findings and calls to action in June 2015 and its final report (the “TRC Report”) was published in December 2015.

In a *Globe and Mail* editorial published on the day the TRC released its findings, the editor evoked the image of parents watching, powerless, as their terrified and crying children were led away by a government agent to the back of a truck to begin their residential “schooling”. The image is a powerful one: no family should ever have to endure the forced removal of their children under any conditions, let alone as part of a cultural genocide. Yet such a traumatic experience was the reality for tens of thousands of Aboriginal families for over a century. For Aboriginal children, the knock on the door was just the first step toward what would be years dominated by fear, loneliness, lack of affection, institutionalized neglect, cultural transformation and often horrendous physical, sexual and mental abuse.

Evoking the image of the removal of one's own children is extremely powerful in underlining the enormity of the injustices inflicted upon Aboriginal families. The *Globe and Mail* editor wants us to put ourselves in the place of peoples who have faced ongoing and painful racism. Yet for those of us who are not Aboriginal, our minds cannot possibly do the work that is being demanded by the image evoked. At best, we will be able to extend our

empathy to the Aboriginal communities whose children were so wrongly stolen from them. But because the risk to those of us who are not Aboriginal is not real, because we do not daily live in the shadow of state-sanctioned racism, supported by churches and other powerful institutions, it is a challenge to maintain our commitment to transformative change based only on even such a powerful image.

The lesson from the TRC Report is that reconciliation between Aboriginal and non-Aboriginal people can no longer be conceived of as a feel-good objective or as a response to some sentimental concern that can be forgotten tomorrow. The devastating stories of the residential school survivors recounted in the TRC Report, and the reverberating impact the harms those schools have inflicted on the lives of Aboriginal peoples in Canada, make it plain that the future well-being of all Canadians depends on us achieving meaningful reconciliation.

The pursuit of reconciliation will be complex and ongoing. On a formal level, it must inform every aspect of Crown and First Nation relationships. But that will not be sufficient. The public, non-governmental institutions and the private sector must also be involved. Achieving reconciliation will require transformative action on the part of all non-Aboriginal Canadians, in every sphere of life.

The legal profession has a unique role. Law has been used as an instrument of oppression against Aboriginal people. It was the instrument used to force Aboriginal children out of their homes into residential schools. As lawyers we have the ability to address some of harms these laws have caused.

Although it is important for each of us, as Canadians who care about a just society, to review the recommendations of the TRC in detail and decide how they apply to our own lives, the purpose of this article is to suggest actions the legal profession could take to begin the process of reconciliation. As a preliminary matter, to provide some context, the background to the TRC Report, its significance and its basic recommendations will be briefly reviewed.

BACKGROUND TO THE TRC REPORT

The TRC was established as a result of the 2006 Indian Residential Schools Settlement Agreement (the "Settlement Agreement"), the largest class-action settlement in Canadian history. The purpose of the Settlement Agreement was to address the tragic legacy of Indian residential schools.

The Honourable Justice Murray Sinclair (Chair), Dr. Marie Wilson and Chief Wilton Littlechild were commissioners of the TRC. Their mandate,

found in Schedule “N” of the Settlement Agreement, was to reveal to Canadians the truth about the history and ongoing legacy of Indian residential schools and to guide a process of reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments and Canadians.

Between 2008 and 2015, the TRC hosted seven national events across Canada, and provided opportunities for affected individuals and communities to share their experiences of residential schools. The TRC Report was based on 7,000 survivor statements and 5 million documents from government, churches and schools, as well as a plethora of secondary sources.

At the closing event in June 2015, the TRC released its executive summary, which included its findings and 94 calls to action aimed at redressing the legacy of residential schools and advancing the process of reconciliation in Canada. The final report was released on December 15, 2015.

Prime Minister Justin Trudeau has committed to implementing all the recommendations, including the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and a national inquiry into missing and murdered indigenous women and girls.

HONOURING THE TRUTH

The TRC Report is the most comprehensive account of the past harms to Aboriginal peoples at the hands of the government and the continuing inequalities that burden Aboriginal peoples. The commissioners found that the residential schools were abysmal failures as educational institutions. Many residential schools implemented half-day systems whereby students were in class for half the day and engaged in what amounted to child labour for the other half. But key to the commissioners' findings was that the residential schools had a more sinister agenda. The commissioners found that the residential schools were part of a larger government agenda to destroy those structures and practices that allow Aboriginal people to continue as a group. To summarize, the commissioners made the following findings:

- Residential schools were based on the assumption that European civilization and Christian religion were superior to Aboriginal culture, which was seen as savage and brutal.
- Residential schools were part of a larger government mandate to eliminate Aboriginal people as distinct peoples and assimilate them into the Canadian mainstream against their will.
- Residential schools were designed primarily to separate children from their parents to break their link to their culture and identity.

- Residential schools prohibited children from speaking their own languages and Aboriginal spiritual practices were banned.
- Residential schools' mission was the cultural transformation of Aboriginal children.
- Residential schools were closely tied to colonization and missionary crusades.
- Residential schools were dangerous and harsh institutions, and many Aboriginal children experienced corporal punishment, public humiliation and physical and sexual abuse.
- Between five and seven per cent of the children who attended the schools died from tuberculosis, malnutrition and other diseases resulting from poor living conditions.

In making these findings, the commissioners observed that Canada's approach to dealing with Aboriginal people had the characteristics of cultural genocide:

States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things.²

Chief Justice McLachlin of the Supreme Court of Canada made a similar observation a few days before the TRC released its findings. In the annual Pluralism Lecture, she claimed that Canada's attempt to commit cultural genocide against Aboriginal peoples was the worst stain on Canada's human rights record.³

Nevertheless, despite all of the coercive measures adopted by the government, despite its violent attempts to eradicate Aboriginal peoples as a group, the commissioners note that it failed to achieve its ultimate policy goal. Aboriginal people have refused to surrender their identity and they continue to assert rights to self-government.

RECONCILING FOR THE FUTURE

The commissioners made it clear that reconciliation is not an Aboriginal problem; it is a Canadian one, and virtually all aspects of Canadian society may need to be reconsidered. To this end, the TRC made 94 far-reaching calls to action. The calls to action are meant to redress past wrongs and

abuses (the “Legacy Calls to Action”) and to propel Canadian/First Nations people towards a fairer future together (the “Reconciliation Calls to Action”). Together they address child welfare, education, language and culture, health, justice, sports, media, commemoration, memorial, the development of a Royal Proclamation of Reconciliation, and more.

RESPONSIBILITIES OF THE LEGAL PROFESSION

The legal profession is addressed specifically in Legacy Calls to Action 27 and 28. The TRC calls on law societies and law schools to ensure that legal professionals are educated about Aboriginal people and the law, including the history and legacy of residential schools, the UN Declaration on the Rights of Indigenous Peoples, and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. The calls to action also require legal professionals to be trained in intercultural competency, conflict resolution, human rights and anti-racism. These calls to action were considered necessary because of the deficiencies noted by the TRC in the legal profession's understanding and competency in representing individuals, communities, the government and the private sector when dealing with Aboriginal-related issues.

Equity for Aboriginal people in the legal system is addressed in Reconciliation Calls to Action 50 to 52. They call on the government to fund the establishment of Indigenous law institutes, to publish legal opinions on the scope and extent of Aboriginal and treaty rights, and to adopt just legal principles with respect to accepting Aboriginal title claims.

Law schools and law societies across Canada have begun to take action, holding conferences and developing forums for dialogue to begin the process of transforming legal education and professional training to address the TRC's calls to action.⁴ And while the calls to action require a transformative approach to the delivery of those services, the spirit of reconciliation demanded by the TRC requires us to do more than mandatory Aboriginal education. Dean Webber of University of Victoria argues that the calls to action (27 and 28) form part of a revolutionary project. As noted by Dean Sossin of Osgoode Hall Law School, they are situated under the report's section on “Justice” (rather than “Education”). *Justice* is the desired outcome. Reconciliation, therefore, must also include ways to challenge non-Aboriginal Canadians' complicity with colonialism. Given the role laws and lawyers have played in the long history of injustice toward Aboriginal people, it is imperative that the legal profession respond profoundly and thoughtfully to this challenge.

THE ROLE OF THE LEGAL PROFESSION

The legal profession in British Columbia has good reason to lead the country in reconciliation. With the exception of the Douglas Treaties negotiated with Aboriginal groups on Vancouver Island between 1850 and 1854 and Treaty 8 negotiated with eight First Nations in northeastern British Columbia in 1899, no treaties were signed in British Columbia until 1998. Many First Nations wished to negotiate treaties, but the province refused to recognize Aboriginal title. Therefore, most of British Columbia is unceded Aboriginal land traditionally under the jurisdiction of distinct nations. The process of reconciliation in British Columbia has barely begun.

One way to develop transformative reconciliatory practices among the private bar is for law firms, or individual lawyers, to consider adopting, in consultation with willing Aboriginal communities, a Reconciliation Action Plan ("RAP"). The RAP program was initiated by Reconciliation Australia in 2006. Under the RAP program, Reconciliation Australia works with organizations to develop frameworks for organizations to implement their vision for reconciliation.⁵ A RAP is a document that sets out the commitments an organization will make to contribute to reconciliation. Following the example provided by Reconciliation Australia, the following is a list of reconciliation activities and principles that could be adopted by a law firm in British Columbia (or by individual lawyers) using a RAP framework:⁶

Recognition

- Recognize the residential school legacy comes from a deeper history of colonialism and the taking of Aboriginal land, actions supported by law.
- Recognize the unceded traditional territories of B.C. First Nations.
- Recognize that Aboriginal peoples possess distinct cultures and identities, and have unique relationships to the land, waters and resources.
- Recognize the cultural, linguistic, economic, and geographic barriers that confront Aboriginal people in accessing the legal system and seeking legal redress.
- Recognize the over-representation of Aboriginal people in Canadian prisons, and the under-representation of Aboriginal people in the legal profession.

Build Cultural Capacity

- Provide training on TRC recommendations.
- Promote awareness of the historical injustices, rooted in law, that have existed for Aboriginal people in Canada.

- Promote awareness of the important contributions Aboriginal people have made to Canada, including to the development of law, and celebrate those contributions.
- Promote the development of intercultural competencies for non-Aboriginal members of the legal profession.
- Provide training on ethical lawyering for First Nations and being a responsible ally.

Participation in the Legal System

- Identify and address the systemic barriers faced by Aboriginal people seeking access to the legal system, and their unique client needs.
- Promote methods for reducing the over-representation of Aboriginal peoples in the criminal justice system.
- Promote methods for conducting court hearings on Aboriginal rights and title claims in a culturally appropriate manner.
- Promote methods for advancing Aboriginal rights and title claims in a manner that facilitates the timely, efficient and just resolution of those claims.

Commitment to Pro Bono Work to Support the Development of Aboriginal Communities

- Develop strategic relationships with Aboriginal advocacy organizations to connect to Aboriginal people who need legal advice.
- Develop and deliver pro bono legal education workshops, and host them in various communities.

Promoting Indigenous Legal Systems

- Provide education sessions on Indigenous legal systems.
- Critically examine current practices and assess whether Indigenous legal systems and perspectives are being advanced.
- Incorporate Indigenous legal perspectives into service delivery to clients.

Creating Employment and Educational Opportunities

- Investigate opportunities to increase and retain Aboriginal employment.
- Provide a scholarship to support an Indigenous student program.
- Identify and address the unique needs of Aboriginal lawyers.

- Support opportunities for Aboriginal lawyers to advance within the legal profession and legal institutions.

Supporting the Development of Aboriginal–Owned Businesses

- Prefer Aboriginal businesses and suppliers where available.
- Host firm events in Aboriginal centres and businesses.
- Support local Aboriginal artists and galleries by choosing and displaying their work in law firm offices.

Law firms or individual lawyers could commit to taking any (or all) of the above actions to contribute to reconciliation in Canada through a RAP, or simply as a personal commitment statement. In addition to setting out specific initiatives and targets, RAPs are usually implemented and monitored through a RAP committee, which reports annually on whether or not the RAP initiatives are being achieved and proposes new initiatives for the following year to continue to deepen the firm's reconciliation commitments.

MOVING FROM TRUTH TO RECONCILIATION

The TRC calls on all Canadians to rise to the challenge of reconciliation. The legal profession has a special obligation to advance reconciliation. The above suggestions are just a beginning, and despite the strength of their statement, are not meant to be prescriptive. Instead, they are intended to support the legal profession in British Columbia in beginning the hard work of moving from truth to reconciliation and to ensure that we take time to understand the experience of Aboriginal peoples in Canada and set a course that will best build a just and fair future.

ENDNOTES

1. The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 21.
2. *Ibid* at 1.
3. Chief Justice of Canada Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" (Annual Pluralism Lecture delivered at the Aga Khan Museum, Global Centre for Pluralism, Toronto, 28 May 2015) [unpublished].
4. For example, the Federation of Law Societies sponsored a conference in Winnipeg in October 2015. Law school professors Gillian Calder and Rebecca Johnson started a shared blog (Reconciliation Syllabus: a TRC-Inspired gathering of materials for teaching law, online: <<http://reconciliationsyllabus.wordpress.com>>). Many law deans have written extensively on transforming legal education. See Lorne Sossin, "The TRC Calls to Action & the Pursuit of Reconciliation" (18 October 2015), online: <<http://deansblog.osgoode.yorku.ca/2015/10/the-trc-calls-to-action-the-pursuit-of-reconciliation/>>; Jeremy Webber, "The Law Schools and the Future of Indigenous Law in Canada" (14 August 2015), online: <<http://www.slaw.ca/2015/08/04/the-law-schools-and-the-future-of-indigenous-law-in-canada/>>.
5. For more about the program offered by Reconciliation Australia see its website: <http://www.reconciliation.org.au/raphub/about/>. More information about the impact of implementing RAPs can be found online: <<https://www.reconciliation.org.au/wp-content/uploads/2016/02/RAP-Impact-Measurement-Report-2015.pdf>>.
6. Some of these are drawn from the RAP adopted by the author's firm, JFK Law Corporation. The entire RAP can be found online: <<http://www.jfkllaw.ca/wp-content/uploads/2016/09/Reconciliation-Action-Plan-1.pdf>>.