

UNITED NATIONS



NATIONS UNIES

DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS
Division for Inclusive Social Development
Indigenous Peoples and Development Branch - Secretariat of the Permanent Forum on
Indigenous Issues

International Expert Group Meeting
“Truth, transitional justice and reconciliation processes”
15 to 17 November 2022, Santiago, Chile
Economic Commission for Latin America and the Caribbean (ECLAC) Headquarters

Conflict Resolution, Truth, Transitional Justice and Reconciliation: International Law and the UN System

Expert paper prepared by:
Brenda Gunn*
Academic and Research Director, National Centre for Truth and
Reconciliation

* The views expressed in this paper are those of the author and not necessarily represents those of the United Nations.

Lessons Learned: Canadian Experiences with Transitional Justice

1. Background

For over 150 years, residential schools operated in Canada. More than 150,000 children attended these schools. Many never returned. Often underfunded and overcrowded, these schools did not have education as their primary goal, but rather were used as a tool of assimilation by the Canadian state and churches. Thousands of students suffered physical and sexual abuse. All suffered from loneliness and a longing to be home with their families. The damages inflicted by these schools continue to this day.

In the 1980s, students began various legal processes to address the abuse they experienced. The Indian Residential Schools Settlement Agreement was signed in 2007 by representatives of former students of the schools, the Government of Canada, churches, the Assembly of First Nations and Inuit representatives. The settlement had five key parts: the common experience payment, the individual assessment process, commemoration, health and healing, and finally the creation of the Truth and Reconciliation Commission.

In 2009, the TRC began a multi-year process to listen to Survivors, their families, communities and others affected by the residential school system. The TRC spent six years travelling to all parts of Canada to hear from the Aboriginal people who had been taken from their families as children, forcibly if necessary, and placed for much of their childhoods in residential schools. The TRC notes that Residential Schools “were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.” This was explicitly stated by Deputy Minister of Indian Affairs Duncan Campbell Scott in 1920, when he told a parliamentary committee that “our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic.”¹

In its final report in 2015, the TRC released 94 Calls to Action to redress the legacy of residential schools and advance the process of Canadian reconciliation. These Calls to Action set out a path for governments, and different sectors toward reconciliation by addressing the history and legacy of Residential Schools and. The CTAs address legacy concerns such as child welfare, education, language and culture, health, justice; as well as reconciliation through the role of the UN Declaration as the framework for reconciliation, a royal proclamation and covenant of reconciliation, equity for Indigenous peoples in the legal system, establishing a national council for reconciliation, professional development for public servants, church apologies, education for

¹ TRC Executive Summary at 3.

reconciliation, youth programs, museums and archives, missing children and unmarked burials, the establishment of National Centre for Truth and Reconciliation, commemoration; and finally the role of different sectors in reconciliations such as the media, sports, business, and newcomers.

Another part of the TRC mandate was to create a permanent archive for all of the statements, documents and other materials it would gather over its years of operation. This led to the establishment of the National Centre for Truth and Reconciliation, hosted by the University of Manitoba. In 2015, the NCTR officially opened and the statements, documents and other materials collected through the TRC formed the sacred heart of the Centre.

The NCTR's mandate is:

- To be a responsible and accountable steward for the experiences, photos, and memories entrusted to the Centre by the Survivors of Residential Schools, to honour their truths, and ensure that they can never again be forgotten or ignored.
- To continue the research work begun by the Truth and Reconciliation Commission and in this way contribute to the continuing healing of First Nations, Inuit and Métis peoples and the country as a whole.
- To build a foundation for reconciliation by promoting public education and understanding of the Residential Schools and how they are part of a larger history of violent assaults on the distinct cultures and identities of First Nations, Inuit and Métis peoples.

Beyond the Truth and Reconciliation Commission of Canada, there has also been a Royal Commission on Aboriginal Peoples, which was mandated to investigate and propose solutions to the challenges affecting the relationship between Aboriginal peoples (First Nations, Inuit, Métis Nation), the Canadian government and Canadian society as a whole. The final precipitating event for the RCAP was the Siege at Kanesatake (also referred to as the Oka Crisis) where the Canadian military was called in when the Mohawks defended their burial grounds from the expansion of a golf course. The RCAP released its final report in 1996. Many of these recommendations have never been implemented.

There was also a National Inquiry into Missing and Murdered Indigenous Women and Girls.² Notably, this Inquiry found that the violence “amounts to a race-based genocide of Indigenous Peoples, including First Nations, Inuit, and Métis, which especially targets women, girls, and 2SLGBTQIA people. This genocide has been empowered by colonial structures, evidenced notably by the Indian Act, the Sixties Scoop, residential schools, and breaches of human

² <https://www.mmiwg-ffada.ca/final-report/>.

and Inuit, Métis and First Nations rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.”³ The final report of the Inquiry included the calls for justice to end and redress this genocide.

In 2018, the National Centre for Truth and Reconciliation (the NCTR) initiated a project to hear from Survivors about their experiences related to the Indian Residential Schools Settlement Agreement (IRSSA) and to identify important lessons that should inform future work on settlements, truth-telling, reconciliation and healing. This paper is based on the recommendations that were recorded in this report, “Lessons Learned: Survivors Perspectives.”⁴

Indigenous customary laws and legal traditions to be integrated in transitional justice processes

Forgiveness and Truth Telling

There are several key aspects of Indigenous peoples’ own laws and customs that should be integrated into transitional justice processes. One of the key areas for inclusion is Indigenous peoples’ own concepts of and processes for justice. In Canada, part of Indigenous justice concepts includes ideas of truth telling and apology, and then rectifying the wrong caused. Thus, in the Canadian context, the truth telling aspect of the Truth and Reconciliation Commission was a critical part of the process.

In the Canadian context of the TRC, apologies that accepted responsibility for the wrong-doing and where forgiveness was sought was impactful to many Survivors. The Lessons Learned report notes that the apology by the Prime Minister “had a profound effect on the Survivors in terms of feeling believed and having their personal experiences validated. It was noted that this resulted in a monumental shift in the Canadian public consciousness from Survivors’ experiences being discounted to being widely understood as part of Canada’s history.”⁵

In developing processes and outcomes to address the harms caused by the conflict, healing must play an important part. The Lessons Learned report highlights Indigenous peoples’ perspective on healing must also be the basis for healing: “Many participants defined healing in a collective and intergenerational sense, as keeping children safe from harm, including physical, emotional and sexual abuse, as well as enabling the revitalization and practice of Indigenous cultures and

³ MMIWG Final Report at 1-2.

⁴ National Centre for Truth and Reconciliation, “Lessons Learned: Survivors Perspectives,” 2020, available at https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Lessons_learned_report_final_2020.pdf.

⁵ Lessons Learned at 16.

identities. Healing supports were seen as necessary for Survivors and their families to overcome intergenerational impacts of residential schools, such as addictions and other mental health and emotional issues, lack of parenting skills, violence, bullying, gang involvement and family breakdown.”⁶

Another critical area for incorporation of Indigenous laws is dispute resolution processes including engaging in non-adversarial processes. The Lessons Learned report notes the limitations of Western adversarial processes, including the structural discrimination and inequalities. Western adversarial process were detrimental to “the overall goals of truth, reconciliation and healing.”⁷ Beyond just non-adversarial dispute resolution processes, transitional justice process much also engage traditional ceremonial practices.⁸

Incorporating the UN Declaration into Conflict Resolution Processes

The Truth and Reconciliation Commission of Canada set out that the UN Declaration on the Rights of Indigenous Peoples is the framework for reconciliation.⁹ They explained that the UN Declaration “provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.”¹⁰

We can further understand how the UN Declaration provides a framework for reconciliation by reviewing the preamble. The preamble of the UN Declaration recognizes the essential humanity of Indigenous peoples: “Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.” UNDRIP proclaims that Indigenous peoples can no longer be denied fundamental human rights based on imperialist/racist ideas that Indigenous peoples as inferior and resultant doctrines such as discovery and terra nullius.

Continuing to read the preamble, it recognizes that colonization had a negative impact on Indigenous peoples, in particular the dispossession from their lands, territories and resources. The preamble then sets out that the path forward requires resetting the relationship between Indigenous peoples and Canada through recognizing and protecting Indigenous peoples’ rights, according to their own legal traditions. It states the United Nations is “convinced that the recognition of the rights of indigenous peoples in this declaration will enhance harmonious and cooperative relations between the state and indigenous peoples, based on principles of justice, democracy, respect for

⁶ Lessons Learned at 23-24.

⁷ Lessons Learned at 31.

⁸ Lessons Learned at 33.

⁹ TRC Executive Summary at 21.

¹⁰ TRC executive Summary at 21.

human rights, non-discrimination and good faith.” What this preambular paragraph sets out how the fundamental principle in addressing colonial relationships is shifting from a relationship where state governments exercise control over Indigenous peoples to a new relationship grounded in human rights, including self-determination of Indigenous peoples. This is an important point because many people in Canada believe that recognizing special rights for Indigenous peoples will tear Canada apart.

More specifically, when considering the role of the UN Declaration in transitional justice processes, the UN Declaration provides guidance on the substance to be addressed and the processes themselves. Beyond the oft considered rights such as right to security, and the right to participate in decision making and free, prior and informed consent, key rights to consider include: the right to culture, the right to language, the right to improvement of social and economic situation, the right to health, and the Right to have aspirations properly reflected in public materials, including educational materials.

Right to Culture

Many conflicts that lead to the need for a truth process are conflicts that at their essence threaten Indigenous peoples’ collective cultural security as distinct people, in addition to person security. Given the threats and impacts conflicts have on Indigenous peoples’ culture, cultural elements must be included in truth and peace processes both in the methodologies used and the substance of the processes. Negotiations should engage Indigenous cultural and customary processes for meetings. Individual leaders involved in the negotiation process must also have access to cultural supports throughout the process to support their own well-being.¹¹ Any people involved in leading these peace processes must also have cultural competency.

Right to Language

The Residential School system in Canada, the main source of the conflict that lead to the TRC, targeted Indigenous languages as part of the genocidal policies to “kill the Indian in the Child.” Survivors have indicated that “Language revitalization is a critical area where greater support is needed to address the impacts of the residential school system. Residential schools caused a profound loss in language fluency as students were punished for speaking their languages, and denied access to their parents and grandparents who were Indigenous language speakers.”¹²

¹¹ Lessons Learned at 16.

¹² Lessons Learned at 25.

Right to improvement of Economic Situation

Both the direct impacts and the intergenerational impacts of Residential Schools contribute to the current economic situation of Indigenous peoples in Canada. The Lessons Learned report notes that “Low socio-economic status and economic marginalization impacted Survivors’ ability to participate in the IRSSA processes, contributed to unhealthy power dynamics in the IAP and CEP processes, and remains an unresolved barrier to reconciliation.”¹³ The Survivors further noted that “healing requires that all communities in Canada be on an equal footing, for example, in relation to access to water, clean water supplies, affordable housing and other basic infrastructure needs.”¹⁴ In the Canadian context, improving Indigenous peoples’ economic situation is a critical part of reconciliation and addressing the harms of Residential Schools.

Right to Health

If a transitional justice process is going to include a truth-telling process, health supports are a critical component of the processes. In the Lessons Learned report, Survivors noted a need for “Dedicated, well-trained and well-equipped” and culturally competent health supports, and that these health supports must be available to participants before, during and after the process.¹⁵

Right to have aspirations properly reflected in public materials, including educational materials

A critical aspect of addressing the conflict is the truth surrounding the conflict. History has oft been told from the colonizers perspective. Moving forward and addressing the impacts requires the truth to be broadly and publicly know. This truth must ensure that it properly reflects Indigenous peoples’ aspirations before, during and after the conflict.

Role of UN in supporting Indigenous Peoples in Peace Processes

Truth telling as part of the peace-process

A critical part of the TRC process in Canada, was the opportunity for Residential School Survivors to tell their truths of the history of Canada and government assimilationist policies.¹⁶ The Lessons Learned report recommends “Attention needs to be paid to the role that settlements can have in enabling the truth of survivors to be recorded and made known to future generations, which is

¹³ Lessons Learned at 25-26.

¹⁴ Lessons Learned at 53.

¹⁵ Lessons Learned at 16.

¹⁶ Lessons Learned at 6.

linked to ensuring the overall guarantee of non-recurrence.”¹⁷ Survivors noted that truth tell processes were a critical part of breaking the cycle of silence that had surrounded their experience of abuse, and provided a place where their experiences were believed.¹⁸ The UN can play a role in ensuring that truth tell processes occur and that these truth telling processes must be culturally appropriate and trauma-informed.

Engaging in truth telling processes and peace accord agreements open Survivors up to re-victimization and re-traumatization. Processes need to be designed from the outset to be trauma-informed.¹⁹ Part of trauma-informed processes may include ensuring Indigenous ceremony and traditional protocols are included throughout the processes, that the staff are a majority Indigenous and well-grounded culturally, and careful consideration is given to how often a Survivor may be asked to recount their experiences, providing supports before, during and after engagement with the truth processes.²⁰ The Lessons Learned report notes “Survivors identified the need for culturally competent, community-based, in-person supports, for not only themselves, but also their children and grandchildren in order to overcome the inter-generational effects of the residential school system.”²¹ Attention must also be paid to vicarious-trauma that is experienced by staff and people associated with the process. The UN can look for ways to ensure that the necessary healing supports are available on an ongoing basis and provide training for trauma-informed and culturally relevant health supports.

Transitional justice processes must also include space for healing and justice. Healing needs to occur at the individual, family, community and national level. For some, telling their truth is part of the healing journey. Opportunities to get together and share truths together can provide space for family and community level healing to begin. Here again, there are opportunities for the UN to support Indigenous peoples in these healing gatherings.

The Lessons Learned report also highlighted the need for communications and accessible information. Survivors noted that “Poor communication fosters mis-information and misunderstandings.”²² Accessible communications addressing barriers such as “the language used, literacy levels, geographic reach and accessible for people with disabilities.”²³ There also needs to be consideration given to “Indigenous methodologies for disseminating information, such as building networks of family contacts and frontline workers who could share information orally

¹⁷ Lessons Learned at 21.

¹⁸ Lessons Learned at 6.

¹⁹ Lessons Learned at 28.

²⁰ Lessons Learned at 28

²¹ Lessons Learned, at 23.

²² Lessons Learned at 33-34.

²³ Lessons Learned at 34.

and in the Indigenous languages spoken in communities.”²⁴ This requires a “Survivor-led, trauma-informed communications strategy,”²⁵ including high quality translation, attentive to the different dialects.²⁶ The UN could work to support the necessary communication during these processes and afterward.

Related to the truth telling processes, public Education is critical for all ages to understand the history of the conflict.²⁷ Public education plays a key role in addressing racism that underlies many conflicts.²⁸ This education should draw on the resources of Indigenous Elders and Knowledge Keepers.²⁹ Anti-Racism training and education should also be made available to different professions such as educators, social workers, justice and healthcare workers.³⁰ Here again, there is a role for the UN to support Indigenous peoples as they work with states to ensure public education accurately portrays the history and legacy of the conflict.

In many instances, having adequate legal representation may be necessary for Indigenous peoples to fully and effectively participate in transitional justice processes. The UN can play a role in ensuring legal representation is culturally competent. As well as addressing any breaches of professional conduct.

One area for the UN to support transitional justice processes is in the area of commemoration. Commemoration plays a role in national recognition of the conflict, honouring those those who lost their lives, and protection of sites related to the conflict.³¹ The UN can support the commemoration work through sharing best practices and supporting Survivors in coming together to discuss what commemoration may be appropriate in the circumstances.

Archives play an important part of remembering the history of the conflict. But issues continue regarding the preservation and storage of records, as well as the need for records to be publicly available.³² Archives also play a key role in creating a public record of the conflict. Ensuring that archives meet the standards set out in the UN Declaration (right of access and ownership of records) also creates space for the UN to set these standards and support states in reaching these standards.

²⁴ Lessons Learned at 34-35.

²⁵ Lessons Learned at 35.

²⁶ Lessons Learned at 35.

²⁷ Lessons Learned at 52.

²⁸ Lessons Learned at 52.

²⁹ Lessons Learned at 52.

³⁰ Lessons Learned at 53.

³¹ Lessons Learned at 51.

³² Lessons Learned at 52.