INTRODUCTION: LAW, JUSTICE, AND RECONCILIATION IN POST-TRC CANADA

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The articles in this special issue all take up some of the many challenges and opportunities that the Truth and Reconciliation Commission of Canada (TRC) identified as crucial for reconciliation in its 2015 Final Report.[1] Some engage with the current Canadian political and legal system's impact on Indigenous peoples, while others acknowledge these but focus more on the enduring principles and possibilities of Indigenous legal traditions and the potential for operationalizing jurisdictional spaces for implementation. All speak to the importance of developing a narrative and understanding of intergenerational responsibility and relationality at the core of any enduring reconciliation.

The TRC's Final Report's 97 Calls to Action[2] and the *United Nations Declaration on the Rights of Indigenous Peoples*[3] highlight the role Canadian law and legal institutions play in the colonization of, and continuing injustices perpetrated on Indigenous peoples in Canada. Mandated to report on the "complex truth about the history and the ongoing legacy of the church-run residential schools" for First Nation, Inuit, and Métis children, the TRC did so within the wider context of colonization and the legal and policy frameworks for the forced assimilation of Indigenous peoples into Canadian society.[4]

The goals of the TRC were to (1) reveal the truth about the "history and the ongoing legacy of the church-run residential schools, in a manner that fully documents the individual and collective harms perpetrated against Aboriginal peoples, and honours the resilience and courage of former students, their families, and communities," and (2) to "guide and inspire a process of truth and healing, leading toward reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians generally [to] renew relationships on a basis of inclusion, mutual understanding, and respect."[5] In calling for redress from the impact of state laws and policy the TRC calls for the principles, standards, and norms embodied in the *UNDRIP* be adopted as the framework for reconciliation moving forward.[6] Central to the *UNDRIP* framework is recognition of the right of self-determination of Indigenous peoples including to "freely determine their political status and freely pursue their economic, social and cultural development"[7] and not to be subjected to "forced assimilation or destruction of their

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1 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* (Ottawa: TRC, 2015) [TRC, *Honouring the Truth*].

2 *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015), online: <trc.ca/assets/pdf/Calls_to_Action_English2.pdf> [TRC, *Calls to Action*].

3 GA Res 61/295, UNGAOR, 61st Sess, Sup No 53, UN Doc A/61/295 (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [*UNDRIP*].

4 TRC, *Honouring the Truth*, *supra* note 1 at 27.

5 *Ibid*.

6 *Ibid* at 20–21.

7 *UNDRIP*, *supra* note 3, art 3.

culture."[8] Indigenous peoples also have the right to "live in freedom, peace and security as distinct peoples"[9] and to redress for state actions "depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities" and "dispossessing them of their lands, territories or resources."[10]

The TRC also stresses that "[e]stablishing respectful relations … requires the revitalization of Indigenous law"[11] and stresses that "Aboriginal peoples must be able to recover, learn, and practise their own, distinct, legal traditions."[12] The Calls to Action include several specific measures to support the greater recognition, revitalization, and implementation of Indigenous legal traditions. Some of these include the TRC calls on the federal government to recognize and implement "Aboriginal justice systems,"[13] to integrate Indigenous laws into treaty and land claim negotiation and implementation processes,[14] and to establish "Indigenous law institutes for the development, use, and understanding of Indigenous laws."[15] The TRC also calls on law schools to create mandatory courses that include Indigenous laws and law societies to ensure that lawyers receive training in Indigenous laws.[16]

In its *Summary of the Final Report*, the TRC strongly advocates for Indigenous peoples to have greater control over their own laws and legal mechanisms: "Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies."[17]

The articles gathered in this volume explore the impact of Canadian law, colonial ideology, and national myths on Indigenous people in a variety of contexts from criminal law to cultural appropriation, and offer ideas for reconciliation. They speak to the role of systemic racism in dehumanizing Indigenous peoples; the continuing impact of law, language, and policy in perpetuating colonial objectives including dispossession of Indigenous identity and apprehension and removal of Indigenous children, youth, and adults from their homes and families; and forced assimilation, distortion, and destruction of Indigenous culture. However, they also speak to the resilience of Indigenous peoples, laws, and legal institutions despite the ravages of colonialism and the importance of respecting the rights of Indigenous peoples to develop, revitalize, and maintain Indigenous laws and rebuild legal institutional capacity, whether in ancient or new forms, to more fully rebuild and maintain Indigenous jurisdiction and authority.

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8 *Ibid*, art 8.
9 *Ibid*, art 7.
10 *Ibid*, art 8.2.
11 TRC, *Honouring the Truth*, *supra* note 1 at 16.
12 *Ibid* at 258.
13 TRC, *Calls to Action*, *supra* note 2 at Recommendation 42.
14 *Ibid* at Recommendation 45(iv).
15 *Ibid* at Recommendation 50.
16 *Ibid* at Recommendations 27–28.
17 TRC, *Honouring the Truth*, *supra* note 1 at 258.

A consistent theme is that unexamined discriminatory assumptions inform Canadian law and policy including more recent initiatives aimed at reconciliation. Readers are challenged to consider what should or could be if we reveal and reject those assumptions, accept reconciliation as an ongoing individual and collective national process, and fulfill our commitment to implementing the TRC Calls to Action and *UNDRIP*. Readers are also shown examples of the depth and scope of Indigenous laws and legal theory, from criminal justice to adoption, relationality and citizenship, and are provided with practical and principled ways of moving toward a fuller implementation of the Indigenous peoples' right of self-determination as well as more respectful relations between Indigenous and non-Indigenous peoples.

Reflecting on her experience as Canada's representative during hearings of the Independent Assessment Process (IAS) — a program that assesses and provides monetary compensation to Indian Residential School (IRS) survivors of sexual and physical abuse — Maegan Hough explores the limits of the IAS and its failure to engage her "sense of responsibility as a non-Indigenous Canadian" and society more broadly in intergenerational justice.[18] For example, the process is confined to "unintended" harms of the IRS policy and not the "intended harms" collectively described by the TRC as cultural genocide,[19] including the removal of Indigenous languages and cultures from Indigenous children. Reviewing mechanisms grounded in Euro-Canadian criminal law, civil law, and alternative dispute resolution, she suggests *ex gratia* payments by the state to compensate victims, public inquiries, and redress programs are potential avenues to address some issues affiliated with IRS claims but also fail to adequately address "collective causes or effects of cultural harm" and do not include non-Indigenous Canadians who have "no role in the IRS policy but nonetheless [live] in tandem with survivors, their families, and the consequences of the policy" as responsible parties.[20] Here she argues transitional justice mechanisms used to address large-scale human rights abuses offer some ideas. Typically "applied in states that are in transition, often from an authoritarian regime to a liberal democratic state following a period of large-scale and inter-cultural conflict," mechanisms such as truth commissions, commemorations, and institutional reform are "designed to investigate, recognize, and attempt to address historical and recent harms perpetrated by a state against a minority."[21] Hough ultimately argues an intergenerational theory of responsibility is necessary for reconciliation.

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18 Maegan Hough, "The Harms Caused: A Narrative of Intergovernmental Responsibility" (2019) 56:3 Alta L Rev 841 at 841.

19 As explained by the TRC, a state engages in cultural genocide when it sets "out to destroy the political and social institutions of [a] targeted group," land is seized and populations forcefully transferred, "families are disrupted to prevent the transmission of cultural values and identity from one generation to the next" and "[s]piritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed" (TRC, *Honouring the Truth*, *supra* note 1 at 1). For over a century, the central goal of Canada's Aboriginal policy were, again in the words of the TRC, "to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada" (*ibid*).

20 Hough, *supra* note 18 at 863–64.

21 *Ibid* at 864–65.

Moving from the excruciating intimate and individual harms perpetrated through the residential schools to the conflicts entrenched by judicial characterizations of broader societal relationships, Robert Hamilton and Joshua Nichols challenge the characterization of Crown and Indigenous peoples as sovereign and subject, historically and legally. With a focus on the *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*[22] and the Quebec *Secession Reference*[23] cases, they argue that a duty to negotiate contested issues affecting Indigenous territories is more consistent with the Nation to Nation relationship called for by the TRC and *UNDRIP* than current Canadian consultation law and policy. However, transformative change requires exposing and rejecting many assumptions that inform asserted Crown sovereignty over, and title to, Indigenous lands and the power of the Supreme Court of Canada to "unilaterally determine the weight of Aboriginal claims, situate them on a spectrum, determine the degree of consultation required, and ultimately justify unilateral infringement of constitutional rights."[24] Viewed through the lens of self-determination, treaty federalism, and sovereign relations, the issue is not one of reconciling de facto sovereignty of the Crown with Indigenous rights arising from former occupation and dispossession, but one of jurisdictional conflict. As the *Secession Reference* demonstrates, the role of the court in constitutional disputes is not to determine the outcome, but to exercise judicial restraint and provide "a constitutional framework that can be legitimated through good faith negotiations."[25]

Judicial treatment of the duty to consult and accommodate that stay within the legal sovereign and subject paradigm can lead to decisions that are at odds with other court decisions and the grand purpose of reconciliation in section 35 of the *Constitution Act, 1982*,[26] as demonstrated in Angela D'Elia Decembrini and Shin Imai's analysis of the *Neskonlith* case,[27] which found that municipalities do not owe a duty to consult to First Nations.[28] Decembrini and Imai outline the inconsistencies in rejecting a duty for municipalities but accepting it in the case of other entities created through statutes, such as the National Energy Board, and also point out that in practice, municipalities are proceeding as if they do have a duty to consult, regardless of the *Neskonlith* decision.

Judicial approaches to reconciliation also raise issues of hierarchies of knowledge and bias in legal process as demonstrated in David Isaac's consideration of admissibility of information co-produced by Indigenous knowledge-holders working together with non-Indigenous scientists. Although co-production is done by people with different perspectives to ensure accuracy, trustworthiness, and eliminate bias, such information does not fit within evidentiary rules for oral history as "oral history is only a part, and not a necessary part, of

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22 2017 SCC 54.
23 *Reference re Secession of Quebec*, [1998] 2 SCR 217.
24 Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 730.
25 *Ibid* at 732.
26 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.
27 *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 [*Neskonlith*].
28 Angela D'Elia Decembrini & Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put *Neskonlith* to Rest" (2019) 56:3 Alta L Rev 935.

co-produced information."[29] Further critiques of this method within the scientific community mean it may not meet the "general acceptance" requirement for admitting novel scientific evidence.[30] Possible responses include educating scientists more about co-production or identifying a "relevant group" of scientists who are more likely to accept co-production for the purposes of falling into the category of novel science. However these approaches do challenge judicial biases against orality and reliability standards, for example a standard for reliability of novel scientific information is whether it has been subjected to peer review and publication.

Rights of political and economic self- determination and Canada's promise of a "renewed relationship with Indigenous peoples," through a "nation-to-nation" relationship[31] is central to Konstantia Koutouki and Katherine Lofts' critique of the new federal *Cannabis Act*[32] which they argue placed control over implementation in the federal and provincial governments without adequate consultation or consideration of how the law applies to reserve lands and traditional territories or the right of First Nations to participate in the excise tax revenue.[33] They also explore how the definition, classification, and regulation of cannabis in domestic and international law runs contrary to other legal regimes concerning Indigenous genetic plant resources and associated knowledge including Indigenous rights to "practise and revitalize their cultural traditions and customs"[34] and "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions."[35] Although cannabis has and continues to be valued for a range of ceremonial, recreational, therapeutic, and medicinal purposes, it became "intertwined with the processes of colonialism and the industrial revolution" and along with other drugs with psychoactive properties, became "novel, exotic commodities for consumption by others elsewhere."[36] This has impacted the way cannabis has been characterized in Canadian law and who can regulate it. However, viewed through the lens of reconciliation and Indigenous rights, they argue for a more appropriate legal framework to assess Indigenous cultural, political, and economic rights and to address past harms (such as the disproportionate impact of cannabis prohibition on Indigenous peoples) in the *UNDRIP* and other international laws that speak to Indigenous control and benefit from use of their genetic resources and associated Indigenous knowledge.

While there are many principles informing *UNDRIP*, important principles running through it are self-determination and the significance of protection, control, and revitalization of Indigenous cultural heritage, traditional knowledge, and cultural expressions to self-determination and survival of distinctive Indigenous peoples. Appropriation and destruction

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29 David Isaac, "Novel Science or Oral History? The Admissibility of Co-Produced Information in Canadian Courts" (2019) 56:3 Alta L Rev 881 at 881.

30 *Ibid* at 882 .

31 Liberal Party of Canada, *Real Change: A New Plan for a Strong Middle Class* (2015) at 55, online: <https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>.

32 SC 2018, c 16.

33 Konstantia Koutouki & Katherine Lofts, "Cannabis, Reconciliation, and the Rights of Indigenous Peoples: Prospects and Challenges for Cannabis Legalization in Canada" (2019) 56:3 Alta L Rev 709.

34 *UNDRIP*, *supra* note 3, art 11.

35 *Ibid*, art 31.

36 Koutouki & Lofts, *supra* note 33 at 712.

of cultural heritage formed part of the wider cultural genocide perpetrated on Canada's Indigenous peoples which the TRC identified and defined as "the destruction of those structures and practices that allow the group to continue as a group."[37] Daniel Dylan argues that cultural violence has not only been perpetrated through colonial policies intended to assimilate Indigenous peoples, but continues in many ways including through language that communicates colonial ideology and cultural caricatures. He explores how the slogan "We the North" adopted by the Toronto Raptors is a mythologized Canadian metanarrative that subsumes Indigenous peoples "into a larger more benign narrative of the nation's identity"[38] and how it dispossesses and appropriates facets of Inuit and authentic northern Indigenous identity. He suggests that as part of the westernized intellectual property rights regime, geographical indicators may be a mechanism to prevent and provide remedies for the type of geographical, cultural, and identity appropriation this example presents.

Reconciliation through constitutional frameworks and "relationality within Indigenous legal orders" is explored further by Alan Hanna.[39] Asking first "how and by whom is reconciliation defined," he suggests diverse and specific historical relationships between Indigenous groups and the Crown generate many different understandings of reconciliation in addition to those developed by courts.[40] The latter adopt approaches to reconciliation and Indigenous Crown relations which assume a hierarchy and unilateral authority of the Crown. Examples include Canadian law and policy on definition, termination, and exercise of Aboriginal and treaty rights and consultation. Hanna argues reconciliation in a manner more meaningful and transformative for Indigenous peoples and Canadians is better achieved through "relationality as a function of Indigenous legal orders, which requires Canada to learn how to be in respectful relationships with others on whose territories the state's society exists."[41] Looking to kinship based models of relationality within Gitxsan legal order and anthropological research on other ways law regulates relationality from within Indigenous legal traditions, he argues that Canada can and should be open to entering relationships based on such laws. Such approaches as contrasted to litigating relationships in Canadian courts are more aligned with the TRC's definition of reconciliation as through "establishing and maintaining a mutually respectful relationship."[42]

Nowhere is the need for more mutually respectful relationships more evident than in the clear and crushing failure of the justice system in relation to Indigenous people. Angelique EagleWoman's article on Indigenous community courts as a means to realize justice examines jurisdictional relationships that may offer a more constructive path forward in Canada.[43] She identifies 18 Calls to Action which highlight concerns in the areas of criminal

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37 TRC, *Honouring the Truth*, *supra* note at 1.

38 Daniel W Dylan, "'We the North' as the Dispossession of Indigenous Identity and a Slogan of Canada's Enduring Colonial Legacy" (2019) 56:3 Alta L Rev 761 at 765.

39 Alan Hanna, "Reconciliation Through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817 at 817.

40 *Ibid* at 819.

41 *Ibid* at 819–20.

42 TRC, *Honouring the Truth*, *supra* note 1 at 6.

43 Angelique EagleWoman (Wambdi A Was'teWinyan), "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2019) 56:3 Alta L Rev 669.

law and child welfare. She explores the over-representation of Aboriginal adults and youth in custody and care; intergenerational impacts of child welfare law and policy on survivors; problems in access to justice, family, and social services faced by Indigenous communities; the limits of legal and political responses to this crisis (such as sentencing reform, specialized courts, rehabilitation and restorative justice programs, the implementation of Jordan's principle, and increased Indigenous participation in family and child welfare services); and the role of systemic racism in the exercise of judicial and administrative discretion. Drawing on Canadian examples including the Kahanwa:ke and the Akwesasne Court as well as the well-established jurisdiction and operations of American tribal courts and governments, she proposes a system of Indigenous community courts to provide more effective, just, and culturally appropriate dispute resolution processes and a potential way to help address the current crisis and reinstate the application of Indigenous legal principles into the resolution of Indigenous child welfare and criminal matters.

Revitalization of Indigenous laws and "resurgence of Indigenous justice" to mitigate "the harm caused by the settler colonial justice system" is further explored by Gabe Boothroyd in the context of urban Indigenous courts.[44] Although "firmly grounded in the settler colonial legal structure,"[45] these courts adopt more culturally appropriate processes and awareness of social context into decision-making and a "meaningful break from the status quo" for example, by applying principles of restorative justice and engaging various levels of Indigenous participation.[46] Drawing on domestic and international examples he argues such courts have significant limitations, "including the retention of Crown control over who may appear before them."[47] However, aspects of these courts, including meaningful application of Indigenous legal principles and Indigenous control by community organizations or elders, are potential ways in which urban Indigenous courts can further resurgence of Indigenous justice. Looking to international and domestic examples, including the Akwasane court, he argues "the practices of existing courts show ways in which Indigenous people and communities can exercise substantial input and control over court processes and Indigenous legal principles can be enacted."[48]

The role of Canadian settler law and legal institutions in dismantling Indigenous families and communities and the importance of Indigenous legal traditions in revitalization and reconciliation are also emphasized in Damien Lee's consideration of Anishinaabe citizenship law. Drawing on the work of Indigenous legal and political scholars, adoption stories shared by Fort William knowledge holders, and his personal experience "[a]s someone who has no 'Indian blood' yet belongs with the Anishinaabeg at Fort William,"[49] he demonstrates how Anishinaabe adoption laws continue to be practiced and used to control citizenship by families in the Fort William First Nation. Central to his argument that

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44 Gabe Boothroyd, "Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice" (2019) 56:3 Alta L Rev 903 at 903.

45 *Ibid* at 905.

46 *Ibid* at 903.

47 *Ibid* at 916.

48 *Ibid* at 933.

49 Damien Lee, "Adoption Constitutionalism: Anishinaabe Citizenship Law at Fort William First Nation" (2019) 56:3 Alta L Rev 785 at 790.

adoption is "a relevant lens through which to see Anishinaabe citizenship law"[50] despite regulation of band membership under the *Indian Act*,[51] is the idea of treaty constitutionalism which assumes "that there exists in Canada competing constitutional orders whereby both Indigenous and the Canadian constitutional orders and their respective nations claim jurisdiction over the same territory."[52] Indigenous constitutional orders are manifested in many ways including through stories, songs, ceremonies, language, and family-making practices. When families adopt someone "they are not simply claiming a child, *but are also exercising a political-legal order rooted in Anishinaabe law*."[53] Belonging is not dependent on Indian status or band membership alone but "interplay between families, individual adoptees, and broader community processes."[54] The mutually constitutive relationships between individuals, families, communities, and underlying constitutional orders reveal a path for mutually cognizable and respectful relationships that require ongoing affirmation and renewal.

CONCLUSION

Each of these articles brings unique insights, but together they push back against a false public and private divide. Reconciliation involves the individual and intimate, from unspeakable harms perpetrated on individuals in residential schools (Hough) and life altering consequences of the current justice system in criminal and child welfare matters (EagleWoman, Boothroyd), to adoption and the core institution of the family within Indigenous communities and constitutional orders (Lee). Reconciliation equally involves the explicitly constitutional and systemic, from courts' legal characterizations of constitutional principles (Hamilton and Nichols, Hanna, Decembrini and Imai) to the failure to recognize the continuing erasure of Indigenous peoples' intellectual, legal, and cultural traditions, within judicial treatment of co-produced scientific evidence (Issac), new cannibas laws (Koutouki and Lofts) or team slogans that invoke the "north" without acknowledging Inuit and other northern Indigenous peoples (Dylan). Further, all of these articles demonstrate that the harms of colonialism are not past atrocities we have collectively overcome, but rather continuing injustices, which move in an odd and jarring misstep with public narratives in an age of reconciliation.

Twenty five years ago, in relation the criminal justice system, Mary Ellen Turpel rejected the "distracting debate over whether justice reform involves separate justice systems or reforming the mainstream system."[55] She emphasized this "is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can be better described as getting away from the colonialism and domination of the Canadian …

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50 *Ibid* at 790.
51 RSC 1985, c I-5.
52 Kiera L Ladner, "(RE)creating Good Governance Creating Honourable Governance: Renewing Indigenous Constitutional Orders" (Paper delivered at the Annual Conference of the Canadian Political Science Association, Ottawa, 27–29 May 2009) at 2.
53 Lee, *supra* note 49 at 795 [emphasis in original].
54 *Ibid* at 815.
55 Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 206 at 215.

justice system."[56] The articles in this special issue demonstrate that this insight has applicability beyond just criminal justice reform, and applies to the broader goal of realizing self-determination and lasting reconciliation in a post-TRC Canada. Mutually respectful relationships within Canada require self-reflection, responsibility, and serious reforms by non-Indigenous legal actors within the current justice system, and increasing space for the robust application of Indigenous laws and inherent jurisdiction. The articles in this issue provide useful insight and direction for the work needed on both of these fronts and demonstrate how deeply inter-related they are.

[56] *Ibid*.

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