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Résumé de l'article

La Commission canadienne de témoignage et réconciliation des pensionnats indiens constitue une nouvelle incursion dans un genre précédemment associé à l'étude des démocraties « en transition » du monde postcommuniste ou encore du tiers-monde. En dépit de ce fait essentiel, une comparaison méthodique au sein de l'univers des pays hôtes de commissions de vérité révèle que les circonstances entourant la CTR du Canada ne sont pas entièrement nouvelles. L'article déploie cet argument par l'examen dans la littérature sur la justice en transition de nombreuses bases de comparaison, et ainsi expliquer comment la capacité d'une commission de vérité à promouvoir de nouvelles cultures de justice et de responsabilité à la suite d'importantes violations des droits humains est affectée par le contexte sociopolitique dans lequel survient la commission, par les injustices qu'elle est chargée d'examiner, ainsi que par la nature de son mandat. L'article conclut que ces facteurs, combinés à des préoccupations propres au contexte canadien, contreviennent au succès de la commission. Si les citoyens et stratèges politiques canadiens ne relèvent pas ce profond défi éthique, ils feront alors figure de saboteurs de transitions, un rôle généralement attribué aux forces de sécurité et aux forces militaires récalcitrantes et non-réformées des États plus ouvertement autoritaires.

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UNCOMFORTABLE COMPARISONS: THE CANADIAN TRUTH AND RECONCILIATION COMMISSION IN INTERNATIONAL CONTEXT

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ABSTRACT

The Canadian Truth and Reconciliation Commission on Indian Residential Schools is a novel foray into a genre previously associated with so-called “transitional” democracies from the post-Communist world and the global South. This basic fact notwithstanding, a systematic comparison with the broader universe of truth commission-hosting countries reveals that the circumstances surrounding the Canadian TRC are not entirely novel. This article develops this argument by distilling from the transitional justice literature several bases of comparison designed to explain how a truth commission’s capacity to promote new cultures of justice and accountability in the wake of massive violations of human rights is affected by the socio-political context in which the commission occurs; the injustices it is asked to investigate; and the nature of its mandate. It concludes that these factors, compounded by considerations unique to the Canadian context, all militate against success. If Canadian citizens and policymakers fail to meet this profound ethical challenge, they will find themselves occupying the transition-wrecking role played more familiarly by the recalcitrant and unreformed military and security forces in the world’s more evidently authoritarian states.

RÉSUMÉ

La Commission canadienne de témoignage et réconciliation des pensionnats indiens constitue une nouvelle incursion dans un genre précédemment associé à l’étude des démocraties « en transition » du monde postcommuniste ou encore du tiers-monde. En dépit de ce fait essentiel, une comparaison méthodique au sein de l’univers des pays hôtes de commissions de vérité révèle que les circonstances entourant la CTR du Canada ne sont pas entièrement nouvelles. L’article déploie cet argument par l’examen dans la littérature sur la justice en transition de nombreuses bases de comparaison, et ainsi expliquer comment la capacité d’une commission de vérité à promouvoir de nouvelles cultures de justice et de responsabilité à la suite d’importantes violations des droits humains est affectée par le contexte sociopolitique dans lequel survient la commission, par les injustices qu’elle est chargée d’examiner, ainsi que par la nature de son mandat. L’article conclut que ces facteurs, combinés à des préoccupations propres au contexte canadien, contreviennent au succès de la commission. Si les citoyens et stratèges politiques canadiens ne relèvent pas ce profond défi éthique, ils feront alors figure de saboteurs de transitions, un rôle généralement attribué aux forces de sécurité et aux forces militaires récalcitrantes et non-réformées des États plus ouvertement autoritaires.

INTRODUCTION

For more than a century, successive Canadian federal governments operated a policy that took over 100,000 Native children from their families and placed them in residential schools operated by the country's major Christian denominations.¹ The schools were established with the specific goal of eradicating Indigenous languages and cultures, a goal the schools sought to achieve by separating children from their families and communities, denigrating Native traditions and ways, and practicing ruthlessly punitive forms of quasi-military discipline.² Physical and sexual abuse was rampant in the schools and shockingly high mortality rates from disease and neglect were common.³ The residential schools also advanced a broader agenda of colonization; by systematically attacking Native capacities for cultural and community reproduction, the schools aimed to ensure that distinct self-governing Indigenous communities would no longer exist.

Since at least 1990, survivors and communities affected by the schools have fought for an official inquiry that might investigate, uncover, and publicize the outrages and crimes associated with the establishment and operation of the schools. These efforts bore fruit in 2005 when the Canadian federal government and Christian churches agreed to employ the increasingly well-known international model of the “truth commission”: a form of official inquiry into patterns of past abuses used by countries seeking to move beyond periods of authoritarianism and abuse.⁴ Canada's Indian Residential Schools Truth and Reconciliation Commission was formally established in 2009.

Yet more than two years into its five-year mandate, the commission's goals of “truth” and “reconciliation” seem distant—hypothetical at best. One set of commissioners has departed and been replaced. There are concerns about the willingness of key players, particularly the Catholic churches, to allow commission researchers to access relevant documents.⁵ Stories about political interference and internal disarray in the commission have also surfaced.⁶ One possible explanation for this apparent morass is the novel scenario in which the commission finds itself; truth commissions are almost without exception familiar only to less-developed countries grappling with widely acknowledged and fairly recent experiences of dictatorship or authoritarian rule. To use legal scholar Ruti Teitel's phrase, perhaps there is scant precedent for guiding a truth commission in an “established democrac[y] in normal times.”⁷

This article takes a somewhat contrary position. Drawing on the literatures dealing with both truth commissions and the broader field of transitional justice with which truth commissions are associated, it argues that many of the most daunting obstacles facing the Canadian commission are in fact familiar ones and that international experience has much to teach. What is disconcerting, however, is that the Canadian obstacles are precisely those that have been widely associated with past failures of truth commissions to satisfactorily address their countries' experiences of authoritarian or dictatorial rule. In this sense, and indeed in others that this article will explore, Canada surely deserves its place among the ranks of truth commission-hosting countries: transitional liberal democracies emerging—precariously, controversially, and, above all, always only potentially—from experiences of gross and systematic violations of human rights.

Although Canada's Indian residential school system certainly counts as a gross and systematic violation of human rights,⁸ there are inevitable questions about the appropriateness of comparing a developed G8 country with countries that, on factors such as GDP, economic structure, legal development, and constitutional history, are so markedly different. However, or so I will argue, the dissimilarities are not so gaping as to vitiate comparison. The point of this article's enterprise of comparison is not to collapse all distinctions between Canada and, say, Uganda, South Africa, and El Salvador. Rather, it is to develop a broader perspective on truth commissions in contexts of transitional justice in order to better understand the challenges facing the Canadian commission. As I have already suggested, one important result of this comparison is to place Canada squarely within the troubled, transitional universe of truth commission-hosting countries and thus to dispute its assumed status as an “established democracy in normal times.”

This article develops two basic and in some ways quite disturbing conclusions, which I can state here in abstract and summary form. First, Canada shares some similarities with those truth commission countries whose political contexts have been least hospitable to thoroughgoing processes of accountability and truth. Second, key differences distinguish the Canadian case from several key instances in which truth commission enterprises appear to have been relatively successful. The ethical challenge that these findings raise about the Canadian truth commission is discussed in the article's conclusion. The pages between develop a series of bases of comparison that aim

to tease out some of the key similarities and differences between Canada and other truth commission countries, using what are in some cases established measures from the truth commission and transitional justice literatures and in other cases distilling or developing my own.

THE BASES OF COMPARISON

While contributions to the transitional justice literature often pursue a simultaneously normative and pragmatic focus on advocating particular solutions to the characteristic dilemmas and problems of democratic transition,⁹ this article takes a more broadly social scientific focus on grasping the impact on truth commissions of the environments and circumstances in which they are enmeshed. Its reason for doing so is fairly simple. Because environmental and circumstantial factors seem most signally to distinguish Canada, a so-called liberal democracy from the global North, from the broader universe of truth commission countries, these would appear to be the most important considerations for a comparative enterprise such as this to address. At the same time, situating Canada within this family of so-called dissimilar comparators does speak to the prescriptive task of learning from the experiences of others in order to think more fruitfully about the difficulties facing the Canadian commission.

Thus, drawing on the major emphases of previous empirical transitional justice research,¹⁰ this article focuses on three overall groups of truth commission-shaping factors: 1) the socio-political context surrounding the commission; 2) the nature of the injustices that it addresses; and 3) the nature of the commission mandate itself. Each cluster of factors is in turn comprised of a number of more specific bases of comparison, which I will introduce in the course of treating each of the overall clusters of factors. Throughout, the main consideration is how different outcomes on different bases of comparison are likely to affect a truth commission's capacity to do what a truth commission is, at the broadest level, supposed to do: inquire robustly into the relevant patterns of abuses and produce an official report addressing the "responsibility of the state and its various institutions."¹¹ In the interests of promoting cultures of justice and accountability, it is also desirable, although not always practicable, for truth commissions to identify the individual perpetrators, commanders, and "high-placed intellectual authors" of the abuses.¹²

To explain the considerations and judgments involved, each section of the article begins heuristically by discussing two possible polar

outcomes associated with the relevant bases of comparison; that is, it asks ideal-typically in each case what sorts of results can be expected from the absolute presence or absence of the factor under consideration. I then flesh out and supplement these section introductions with examples taken from the universe of truth commission cases. Finally, each of the three sections concludes by treating the relevant aspects of the Canadian case in light of its preceding analyses and illustrations.

1. THE POLITICAL CONTEXT SURROUNDING THE COMMISSION

The most important questions to ask about the impact of political context appear to be the following:

(a) is the regime, that is, the system of government in place during the commission's tenure, the same as or different from that associated with the relevant injustices?

(b) does the prevailing balance of societal and political power tend to favour the victims or the perpetrators of the injustices?

To consider the possibilities, let us ask about the most seemingly optimistic scenario, one maximally favourable to a robust, accountability-promoting inquiry into gross injustices that goes on to exert a strong and positive impact on state and society. That is, what could be expected from a truth commission under a new governmental regime whose predecessor system has been decisively defeated and where there are powerful victims and weak perpetrators? Here, we might anticipate a commission that attracts relatively high levels of government and societal support, enabling it vigorously to pursue questions of both institutional and personal responsibility for profound violations of human rights.

The reasons supporting this judgment are as follows. Under conditions of systemic change, the new authorities would likely have little to hide or fear from a vigorous inquiry into the wrongdoings of their predecessors, of which they may even have been longstanding critics or foes.¹³ Furthermore, with a favourable power balance, victims pressing for accountability and justice against gravely or even mortally weakened perpetrator groups would be well-placed to press for a strong inquiry into their past suffering and oppression.¹⁴ Thus, we can expect that a robust truth commission that inquires thoroughly into the relevant abuses might be associated, first, with the col-

lapse of an old regime (or at least with the dramatic arrival of a strongly reform-minded new government) and, second, with a power balance favouring victims (as gauged by such factors as the presence or absence of fear of threat, demographic and economic clout, and societal identification and sympathy).

Conversely, consider the opposite scenario: a truth commission under the same system of government that committed the injustices and with a power balance favouring perpetrator groups. At the extreme, were an actual government bearing more or less direct political responsibility for the relevant injustices to sponsor a truth commission, its main rationale for doing so might be to pacify domestic or international critics with a distraction exercise designed to have minimal investigative reach and impact; a government presiding over such an inquiry might also find ways of stonewalling or diverting the commission's investigations. Furthermore, in such extreme cases of regime continuity, commissioners might be exceedingly circumspect in their inquiries and victims might be too intimidated to come forward.

A power balance favouring perpetrator groups might intensify these basic dynamics. Politically marginalized victims might face pervasive disbelief or scepticism surrounding their stories, while powerful antagonists could find it easy to dismiss the relevance or truthfulness of their complaints. Perpetrator groups could use various sorts of threat to either derail the work of the commission or otherwise to stymie it from the outset. A commission seen as unduly attentive to the needs of a disrespected or demonized group could also become a lightning rod for societal criticism and attack. In short, under these sorts of conditions, we might expect a weak commission hemmed in by an unsympathetic government, treading carefully around threats of violence or other forms of perpetrator retaliation, and facing an indifferent or even hostile public—hardly an optimal situation for promoting truth and accountability in the wake of gross human rights violations.

How might actual past truth commissions lend support or illustration to any of these hypotheses? The Argentine National Commission on the Disappearance of Persons (1983), which addressed the extrajudicial kidnappings and killings carried out during that country's so-called "dirty war," stands out as a vigorous and in many ways quite successful truth commission. Although there were certainly difficulties and disappointments, the commission issued a bestselling report,

made thorough findings of institutional responsibility, in some cases identifying individual perpetrators and senior planners of abuses, and became seen as a major step moving its country beyond an authoritarian past.¹⁵ The commission operated in what was in many ways a supportive political environment. Although powerful allies of the dictatorship continued to hold various official posts and the army remained a strong political force, the military had been gravely weakened by the disastrous Falklands War. A new, change-oriented civilian government was also in place.

Considerations of power relations also tended to favour victim groups. The victims came from the country's dominant ethnocultural majority; a landmark advocacy movement led by the mothers of the "disappeared" enjoyed widespread societal sympathy; and key actors in civil society, including leftist politicians, parties, intellectuals, and trade unions, stood firmly behind the families of the disappeared.¹⁶

The South African Truth and Reconciliation Commission (1995) certainly benefited from regime change: the government that presided over its creation came from the very liberation movement that had just defeated the vicious apartheid system. Victim groups were also strengthened by key features of the political balance of power, namely the Black majority's basic demographic weight and the heroic aura surrounding both the African National Congress and many of the individual activists and victims testifying before the commission. At the same time, however, white economic clout and the continued presence of apartheid-era figures in the army, judiciary, and security services were strong countervailing factors.

The South African commission undoubtedly benefited from public and governmental support. Televised hearings addressing the injustices of a vanquished and despised regime, and featuring testimony from respected heroes of the anti-apartheid struggle, attracted widespread societal interest.¹⁷ There is even some limited evidence to suggest that the commission made headway in forcing the white minority to confront and re-evaluate racist patterns of thought and belief.¹⁸ With the support of the new African National Congress government, the commission also developed an ingenious program which offered perpetrators amnesty from prosecution in exchange for providing a satisfactory accounting of their misdeeds. The commission certainly attracted criticism; some denounced the failure effectively to pursue criminal prosecutions of perpetrators, while others argued that the individualized guilt-and-confession focus of the commission proceed-

ings occluded a more systemic focus on black-white power relations.¹⁹ These important considerations notwithstanding, the amnesty procedure helped the commission to compile a detailed record of the abuses and to delineate clearly the institutional and personal responsibility surrounding many of the gravest injustices of the apartheid years.²⁰

At the same time however, ongoing threats of white violence and capital flight meant that power relations considerations also operated as significant constraints. Most obviously, the outgoing apartheid regime was able successfully to insist in the negotiated regime transition that the commission refrain from any kind of prosecutorial or retributive actions.²¹ The ongoing realities of white economic control also induced the commission to take the relatively novel, and, to some, morally objectionable, step of placing reconciliation on an equal footing alongside truth in its name and goals.²² Certainly, the amnesty provisions and reconciliation emphasis were trade-offs compromising the goal of accountability for tyrants and tormentors.

Notwithstanding the much greater scale of apartheid's injustices, what were in some ways tougher truth-commission circumstances faced Chile's 1990 National Commission for Truth and Reconciliation into the thousands of murders committed by the US-backed Pinochet military dictatorship. Although a new civilian government was in place, key figures from the dictatorship had a continued presence in government. Indeed, the maintenance of constitutional provisions granting political power and standing to the military meant that the commission occurred in a context of partial regime change at best.

Partial regime continuity also had implications for the balance of power. Although most of the victims came from the country's dominant ethnocultural majority and the new government had at least mild sympathies for the socialist cause, the commission contended with real dangers of renewed repression and violence. Thus, the military's continued political power and threats of retaliation forced the commission to operate on an extremely circumscribed timeline and mandate, which included a blanket amnesty for perpetrators and a ban on naming individual wrongdoer names in the final report.²³ These conditions were reflected in the stress on reconciliation in the Chilean commission's mandate and title, an emphasis which, until the new century, it shared with South Africa's alone. However, the Rettig Report made detailed findings of institutional responsibility and gathered copious evidence of wrongdoing that was later used to support international prosecutions of high-level perpetrators.²⁴ The government

of Patricio Aylwin also circumvented the amnesty condition in part by creating a procedure that allowed legal findings of guilt to be made without actual prosecution or criminal sanction.²⁵

Other truth commissions have faced even more adverse circumstances. For example, the 1993 Commission on the Truth for El Salvador, which examined atrocities committed against leftists and Indigenous peoples during the country's brutal twelve-year civil war, was held under the same right-wing government that had committed the bulk of the atrocities. While the commission's basic status as the product of a UN-brokered truce—it was staffed entirely by foreigners and operated under international protection—certainly made it vigorous and independent, the commission operated, to say the least, without state support.²⁶

Victims also faced a largely unfavourable balance of power, given the government's basic ideological hostility and ongoing threats of violence from the military and security forces. But victims did enjoy considerable societal backing; the left's own military efforts had been sufficient to force the autocratic government to the peace table; and international attention and involvement created an at least temporary change in power relations congenial to victims. The commission delivered a detailed report which outlined clearly the overall pattern of abuse, blamed the army for the preponderance of the injustices, and named the names of perpetrators, of whom approximately forty were senior military and judicial figures.²⁷ The ARENA government responded with fierce denunciatory rhetoric and a blanket amnesty for perpetrators. Indeed, the continued strength of rightist forces in the ensuing years also precluded sanctions for perpetrators and reparations for victims.

The 1974 Commission of Inquiry into the Disappearance of People in Uganda surely sets the standard for truth commission adversity. The commission was held under the military dictatorship of President Idi Amin, who summoned an inquiry into his own government's outrages, including summary executions and torture, in a bid to defuse international criticism. The victims, many of whom came from the country's demonized Asian minority, were also relatively powerless, given the omnipresent threat of state terror. Against all odds, the commission attempted diligently to inquire into the abuses. However, the government ignored its recommendations and ensured that commission members were fired from their state jobs; one was even framed for murder and executed.²⁸

How might the Canadian case compare? Although the constitutional changes of 1982 entrenching treaty and other Aboriginal rights are significant regime modifications,²⁹ the same governmental system under which the injustices were perpetrated continues. In particular, the key political foundations on which the residential schools policy developed—the Indian Act, the reservation system, and the basic status of Aboriginal communities as constitutionally subordinated jurisdictions controlled by a government primarily accountable to outsiders—are all in place today.³⁰ The balance of power in Canada is also largely unfavourable to victims. While not facing the kind of systematic, state-directed violence that pertained in, say, 1980s El Salvador, Indigenous and Inuit peoples in Canada are colonized, disrespected, and largely poor minorities.

The link between regime change and robust commissions that make detailed findings of institutional and personal responsibility can scarcely be understated. For example, while the South African and Argentine commissions were relatively vigorous in this regard, the Chilean commission was constrained by a political context in which regime change was more protracted and ambiguous. Protracted and ambiguous regime change may also pose problems in Canada; it seems reasonable to conclude that Ottawa's ongoing colonial power over Indigenous communities creates incentives against self-examination and criticism that may hamper the work of the commission. As will be discussed later, the impact of these incentives also appears to have constrained the Canadian commission's mandate.

Power relations pose an at least equally severe problem. Dominated demographically, politically, and economically by the country's 95% settler majority, Indigenous and Métis communities in Canada have not been well placed to win battles over questions pertaining to the vigour of the commission's inquiries and potential findings; this again is a point to which I will return in discussing the question of mandate. Further, the basic ethnocultural distance between residential schools survivors and the country's majority population, to say nothing of colonial racism, suggest that the sort of societal interest and support that lent vigour to, say, the South African commission, may not be forthcoming. On this point there is a broad analogy to be made between the past role of the Chilean military and the potential role of Canadian society in their respective countries' truth commission processes. Just as the threat of angry soldiers leaving their barracks served as a constant constraint on the Rettig commission, so the self-

interest, sensibilities, and prejudices of the federal government and the main Christian churches appear to have served as a powerful constraint on the Canadian commission, whose mandate appears to justify its lack of subpoena and name-naming powers by claiming an "urgent and compelling desire to put the events of the past behind us."³¹

2. THE NATURE OF THE INJUSTICES THE TRUTH COMMISSION ADDRESSES

The most important questions to ask about the impact of the nature of the injustices addressed by a truth commission appear to be the following:

- (a) is societal complicity in the injustices fairly minimal or widespread?
- (b) did the injustices occur over a short or a long period of time?
- (c) were the victims targeted primarily on the basis of ideology or group membership?

Concerning these possibilities, the scenario most favourable to a robust, accountability-promoting inquiry would involve wrongs of the following type: abuses in which the majority society was only minimally complicit; which took place during a fairly circumscribed period of time; and whose victims were targeted for reasons of ideology rather than identity.

The relevant reasons are as follows. First, because a non-licit citizenry would have little to fear from its workings, a commission addressing injustices committed by a narrowly confined group of identifiable perpetrators might face relatively little public opposition and might even elicit significant societal support.³² Second, a commission addressing injustices that took place over a fairly short and sharply delimited period of time might expect a similarly congenial atmosphere; the relevant injustices would be relatively unlikely to raise tough questions about the basic nature and character of the country.³³ Finally, similar insulating dynamics can be expected in cases involving ideological conflicts that have dissipated or somehow run their course. Identity-related injustices, by contrast, do not appear to lose their political salience so readily.³⁴

The more difficult injustices scenario involves a truth commission investigating abuses in which there was widespread societal complicity; a prolonged period of occurrence; and victims targeted on the

basis of group membership. The reasoning in support of this judgment is as follows. First, widespread societal complicity can provide key social sectors with powerful reasons either for opposing a commission or for subsequently ignoring or minimizing its findings.³⁵ Second, injustices taking place over an extended time frame pose a similar problem; a truth commission addressing them might be seen as an unwelcome exercise targeting not just particular, temporally-confined acts but instead the very nature of the country itself. Finally, commissions investigating injustices suffered by ethnically or religiously targeted victims may face difficult controversies running along the same basic fault lines.³⁶

How might the experiences of past truth commissions help us to assess these suggestions and hypotheses? Priscilla Hayner suggests that Latin American and African truth commissions have tended to diverge on the two aforementioned, polar sets of injustice possibilities.³⁷ For their part, several Latin American truth commissions benefited from the conditions outlined in the first, more optimistic scenario. Because the relevant injustices tended to be the deeds of military dictatorships insulated from public pressure and acting in the interests of a narrow elite, the overall scale of societal complicity tended to be fairly low. The injustices also took place over fairly short time periods (typically roughly a decade) and tended to target victims for ideological rather than identity-related reasons.

Even in the cases of Guatemala,³⁸ El Salvador,³⁹ and Peru,⁴⁰ where many victims were Indigenous, the Cold War setting of the conflicts, right-wing campaigns targeting leftists from the ethnocultural majority, and a prevailing tendency to euphemize settler-Indigenous difference all worked to downplay the colonial and ethnocultural dimensions of the injustices.⁴¹ The point is not that Indigenous victims somehow benefited from these factors; on the contrary, the Guatemalan and Peruvian commissions, for instance, were saddled with mandates that ignored key Indigenous concerns.⁴² Rather, it is simply to suggest that Latin American commissions have tended to operate in contexts that, however unreasonably or unfairly, have served to dampen the potentially inflammatory dangers of having to address ethnocultural and colonial factors more directly.

Furthermore, societal majorities in many of the Latin American cases viewed truth commissions as welcome inquiries into their own victimization and suffering rather than as hostile probings of their guilt; it was at least partly for this reason that the Argentine and

Chilean commissions galvanized such intense citizen interest and support. In some cases, relatively short injustice time frames also allowed commissions to frame their potentially explosive inquiries as cathartic exorcisms of temporary “periods of madness”; the Chilean and El Salvadoran commissions relied extensively on this alchemical formulation.⁴³ And in many of the Latin American cases, a diminution or cessation of ideological conflict provided contexts of at least relative serenity in which formerly unthinkable examinations of past events became possible.⁴⁴

By contrast, some African truth commissions have faced obstacles associated with the second, less optimistic injustices scenario. For example, Burundi’s International Commission of Inquiry (1996) and Zimbabwe’s Commission of Inquiry (1985) examined atrocities corresponding to ongoing conflicts carrying strong ethnocultural overtones and features. These commissions faced intense controversies over their legitimacy and mandates as well as hostility and avoidance from key population groups. In fact, the UN-sponsored commission in Burundi elected not to make public its report for fear of inciting more violence;⁴⁵ a domestic Burundian truth commission was abandoned under similar circumstances in 2004.⁴⁶ The Zimbabwean government also cited fears of inter-ethnic violence as its reason for refusing to release its 1985 commission report.⁴⁷

While factors of overall wealth and an absence of recent experiences of catastrophic mass violence clearly distinguish the Canadian case from many of its African counterparts, there are also broadly suggestive similarities: namely, there was widespread societal complicity in the injustices and the victims were singled out on the basis of group membership. Concerning societal complicity, the residential schools were a policy choice of successive elected governments acting in the interests of Canada’s settler majority. In fact, the involvement of the main Christian denominations in running the schools, denominations representing the religious affiliation of over 60% of the contemporary Canadian population, constitutes a form of ongoing intergenerational complicity that implicates some of the citizenry’s most deeply personal affiliations. The century-long existence of the schools also raises questions about Canada’s basic identity and political character; sanitizing, post facto explanations of “temporary madness” will not be available to the Canadian commission.

The point is not that a Canadian truth commission raises the spectres of violence and civil war. Rather, it is that a thorough inquiry

into the abuses, the chains of responsibility, and the daily operational workings of the schools would call deeply into question the political behaviour and indeed self-identity of the majority society. Such an inquiry might directly threaten the legitimacy of key Canadian institutions, including not only the main Christian churches and the Department of Indian Affairs, but also—given concerns about coerced sterilizations and abortions, consistent failures to treat or even comfort the gravely ill, falsification of death certificates, and improper burials of the deceased—the RCMP, the federal Health Ministry, the Canadian medical profession, and various provincial police forces and coroners' services.⁴⁸ Thus far, the Canadian Truth and Reconciliation Commission has not seemed inclined to confront these institutions. Should it attempt to do so, it may face sophisticated campaigns of legal threat and attempted media delegitimization. Similarly, a strong focus on societal complicity and on the culpability of individuals engaging in their workaday routines is likely to meet with widespread wilful blindness and stubborn denial. In short, the nature and duration of the injustices suggest that the levels of societal support necessary for a robust, accountability-promoting, high-impact inquiry are not forthcoming.

3. THE NATURE OF THE TRUTH COMMISSION'S MANDATE

The most important questions to ask about the impact of the truth commission's mandate appear to be the following:

- (a) does the commission have a strong focus on fault-finding and name-naming or is it relatively constrained in these respects?
- (b) is it empowered to address a wide or only a comparatively narrow range of injustices?
- (c) does it have access to ample or meagre resources?

With respect to mandate, the scenario most favourable to a robust, accountability-promoting inquiry would appear to run as follows. The commission would be empowered to explore in detail specific questions of institutional responsibility; to identify architects, commanders, and perpetrators of the injustices; to address a relatively wide range of injustices; and to draw upon the necessary financial and personnel resources to conduct a vigorous inquiry.

These judgments notwithstanding, legal scholar Theresa Godwin Phelps questions what she sees as an undue emphasis in some truth commissions on matters of fault-finding as opposed to a more nar-

rative-inspired concern with victim voices and experiences.⁴⁹ Noting that gross injustices tend to deny social voice to victims by systematically smothering their aspirations and perspectives, Phelps argues that serving justice requires providing victims with an authoritative forum in which to make social meaning of their experiences. I do not dispute this argument. However, Phelps's major point is that some truth commissions, notably, on her account, the Chilean one, have erred by underestimating the importance of victim-focused and narrative considerations. She does not argue that fault-finding or name-naming ought somehow to be sacrificed or neglected.

Now consider what I would take to be the opposite, rather undesirable mandate scenario: a commission unable to make findings of fault or blame; allowed to consider only an unreasonably specific type or narrow range of injustices; and having access to relatively meagre resources. Notwithstanding Phelps's point about the dangers of allowing fault-finding to crowd out victim narratives, a commission unable to make findings of fact and blame would seem gravely hampered in its potential to promote accountability and change.⁵⁰ The matters of mandate and resources are even more straightforward. Restrictive mandates that confine commissions to an unreasonably narrow range of injustices, or that deny them access to adequate financial and staff resources, are associated with pervasive investigative and accountability failures, to say nothing of victim dissatisfaction.⁵¹

How might actual past truth commissions lend support or illustration to any of these arguments and hypotheses? It has been difficult to draw conclusive links between the extent to which truth commissions identify the guilty, on the one hand, and promote successful transitions from periods of gross abuse, on the other.⁵² However, human rights organizations and experts insist that accountability, human rights, and the rule of law are best promoted by making thorough findings about fault and responsibility, which includes identifying the architects, commanders, and perpetrators of injustice.⁵³ Furthermore, the countervailing consideration is not that anonymity and impunity are somehow desirable; it is rather that circumstances of profound political turmoil may make naming perpetrator names infeasible or imprudent. What seems certain is that the truth commissions most widely praised for their contributions—perhaps most notably the Argentine, Chilean, and South African ones—have made detailed findings of institutional blame and have either named or at least led to the identification of architects, commanders, and perpetrators.

Perhaps the main controversy surrounding the work of these and several other relatively effective truth commissions has been over the issue of amnesty. Particularly common in the case of negotiated transitions, amnesty provisions in countries such as Chile, El Salvador, South Africa, Uruguay, Guatemala, and Haiti have resulted either from muscle-flexing by wrongdoers or from the decrees of hard-pressed or complicit governments.⁵⁴ But noting these amnesty controversies is really another way of highlighting the importance of fault-finding and name-naming; the frequency and prominence of such controversies serves only to underscore the far greater disappointment of commission mandates that preclude fault-finding and name-naming altogether.

The available lessons about the scope of injustices considered by and the resources available to truth commissions seem fairly straightforward. The Chilean commission is widely cited as an indicator of problems relating to investigative scope. Under imminent threat of military violence, the Chilean commission operated on an extremely circumscribed timeline, an exigency that the commission addressed by focusing only on the most extreme abuses, which it defined as disappearance or death. The point is not necessarily to blame the Chilean commission for making tough choices, but simply to note that limited mandates bring grave difficulties; the failure to address the frequency of torture and rape under the Pinochet dictatorship angered thousands of victims and led to widespread concerns about perpetrator impunity.⁵⁵ Finally, while Africa has been home to several inadequately resourced commissions, the Sierra Leone Truth and Reconciliation Commission (2002) offers an extreme example of the problems associated with inadequate resourcing: because it had no motor vehicles with which to travel, the commission spent a full year in which it conducted no investigations; only emergency international donations later remedied the problem.⁵⁶

On these questions of mandate, the Canadian case seems mixed. The commission mandate states that “The Commission shall prepare a budget within the first three months of its mandate and submit it to the Minister of Indian Residential Schools Resolution Canada for approval”;⁵⁷ by October 2008 a budget of \$60 million over five years had been approved.⁵⁸ While the commission’s protracted beginning makes it too early to comment conclusively on the matter of resources, it seems significant that the federal government has refused the request of Executive Director Tom McMahon to extend the Commission’s mandate, which McMahon argued was necessary in light of the slow

start occasioned by the resignation and replacement of the first set of commissioners.⁵⁹ In this sense, then, the Canadian commission may yet prove to have been inadequately resourced.

Concerning the scope of the injustices to be addressed, the mandate appears robust. The commission is empowered to “create as complete an historical record as possible of the IRS system and legacy.”⁶⁰ More specifically, it is responsible for creating a report addressing matters including but not limited to “the history, purpose, operation, and supervision of the IRS system, the effects and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools.”⁶¹ The commission has also established a Working Group on Missing Children and Unmarked Burials in response to longstanding community pressure. This relatively extensive injustices mandate may yet help to broaden what has thus far been a relatively narrow Canadian focus on the sexual and direct physical abuse associated with the schools.

Broadening Canadian understandings of injustice is important, because the dominant focus on sexual and direct physical abuse has tended to frustrate and obscure a more politically challenging concern, stressed perhaps most notably by the researcher Roland Chrisjohn and his collaborators, with understanding the schools as institutionalized expressions of attempted genocide.⁶² Thus, the Canadian commission is not analogous to Uruguay’s Investigative Commission on the Situation of Disappeared People and its Causes (1985), whose rather disingenuous mandate ignored the country’s more widespread injustices of illegal imprisonment and murder.⁶³ In short, on the question of the range of injustices to be addressed, the commission mandate seems strong.

However, when it comes to the matter of fault-finding there are significant grounds for concern. The commission is expressly prohibited both from naming the names of any individuals who have not already been convicted of crimes in a court of law and from inquiring into questions of either individual or chain-of-command responsibility.⁶⁴ Further, the commission lacks subpoena powers⁶⁵ and is not allowed to “hold formal hearings, nor act as a formal inquiry.”⁶⁶ It also appears to have forsaken any consideration of a mechanism comparable to South Africa’s amnesty-for-truth device which might induce perpetrators, commanders, or architects to come forward. Indeed, the commission mandate seems expressly designed to ensure that no per-

petrator or commander identification emerges from its hearings or investigations by either direct or subsequent indirect means. Any victim testimony that involves name-naming will immediately become in camera testimony, that is, privately given and publicly undisclosable.⁶⁷ The commission is also both prohibited from recording said names (unless the relevant party has already been convicted of a specific directly related crime) and from passing names or any other potential identifying information to any other party or proceeding without express legal order.⁶⁸

These legalistic limitations and due-process obsessions contrast sharply with what Teitel identifies as the basic spirit of transitional justice: using context-bound innovation and temporary departures from pure legalism to serve democracy and human rights-related goals.⁶⁹ Given that the terms governing the commission emerged from a formal legal agreement requiring the express assent of lawyers representing the Canadian federal government and the relevant Christian denominations, these mandate restrictions would appear at least in part to reflect self-interested muscle-flexing on the part of the entities responsible for the schools. Perhaps this apparently preemptory and proscriptive approach on the part of authorities is what the mandate preamble euphemistically calls an “urgent and compelling desire to put the events of the past behind us.”⁷⁰

Certainly, other commissions have placed “Reconciliation” on an official plane equivalent to truth. However, to take the two most noteworthy cases, reconciliation was of arguably greater importance in the South African and Chilean contexts; massive economic exigencies in South Africa and the continued political standing of the military in Chile made it imperative in both countries to tread carefully around perpetrator concerns. By contrast, there are no similar economic or military threats operative in Canada. Here, instead, the relevant obstacle appears simply to be the desire of a powerful settler society and some of its lead institutions to avoid reckoning with the depths, modalities, and details of their transgressions. Thus, the challenge facing the Canadian commission is that of operating in a political context that, in its own special ways, is just as inhospitable to accountability as one where restive soldiers threaten to leave their barracks. In this sense, the Canadian settler society could say that “the army is us.”

CONCLUSION

The results of this exercise in defamiliarizing comparison are troubling. The commission takes place in a political context involving the basic, long-term continuity of the perpetrator regime. The victims are politically marginalized. The injustices involve deep societal complicity and a remarkably long time frame of occurrence. They invoke the most difficult political fault lines of ethnocultural difference, colonialism, and racism. The commission’s mandate will prevent it from identifying, let alone sanctioning, architects, commanders, and perpetrators.

Considering the matters of political context, power relations, and societal fault lines helps us to understand the difficult context in which the commission operates. The broader societal majority has strong self-interested incentives to ignore the commission and its workings. The commission’s mandate precludes it from becoming a vigorous forum of investigation and accountability. The commission has no mechanism for inducing perpetrators, commanders, architects, or even bystanders, to come forward.

Thus, the ethical problem with Canada’s Truth and Reconciliation Commission is twofold. The first problem has to do with the remarkable blanket prohibition on fault-finding and name-naming in its mandate and the concomitant absence of any mechanisms that might induce non-Indigenous personnel, participants, and bystanders to somehow assist or participate in its inquiries. Certainly, truth commissions operating amidst threats of renewed violence or intensified repression have been forced to make compromises, typically involving immunity or other kinds of protection for perpetrators and a generalized tendency to emphasize “reconciliation,” often at high costs.⁷¹ Perhaps it is only to be expected that a Canadian truth commission might have to make similar compromises as well. But the ethical difficulty is that these compromises seem to lack any corresponding moral or prudential justification: Canada has sufficient resources to afford a probing look at its injustices; there is no threat of civil war or military takeover that would make a more thorough process of reckoning and introspection somehow dangerous or otherwise undesirable.

The second ethical problem is more straightforward still. While there may be sound arguments against this article's strongly forensic emphasis on truth and accountability, in the Canadian context these arguments do not have to be made. There have been no interventions from Parliament, the mainstream news media, leading think-tanks, or other public interest institutions suggesting that the issues raised here even exist as questions to be asked or dilemmas to be confronted.

Given these pessimistic conclusions, it may be useful to note such causes for optimism as can be found. Indigenous and Métis communities affected by the residential schools have demonstrated considerable ingenuity and strength in struggling against the obstacles in their paths. The constitutional changes of 1982 indicate that at least partial regime change can happen. The government does not violently intimidate its critics and opponents. The military is under civilian control. The commission has on its staff numerous figures of intelligence and integrity. Its mandate recognizes a reasonably broad range of relevant harms. Change is always possible.

NOTES

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