The Truth and Reconciliation Commission of Canada: Genesis and Design[1]

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Abstract

How and why did Canada end up with a Truth and Reconciliation Commission (TRC) rather than a judicially based public inquiry in response to Indian Residential Schools? Using a constructivist-interpretivist approach with interview research with twenty-three key actors, this article traces the path toward the Indian Residential Schools Settlement Agreement. It examines in particular the shift from calls for public inquiry to truth and reconciliation. In sourcing the idea of a TRC, it gauges the balance between transnational influences and homegrown elements and suggests that two different approaches to a truth commission were merged during the settlement negotiations. One approach, associated with the Assembly of First Nations, focuses on accountability and public record, and the other, associated with survivor and Protestant organizations, is more grassroots and community-focused. This article looks at hybridity and gaps in the TRC's design, suggesting that the two visions of a truth commission continue to exist in tension.

Keywords: Indian Residential Schools Settlement Agreement, Truth and Reconciliation Commission of Canada, truth commissions, transitional justice, constructivist-interpretivist research

Résumé

Comment et pourquoi le Canada a-t-il abouti avec une Commission de vérité et réconciliation (CVR) plutôt que de mettre en place une enquête publique judiciaire sur le système de pensionnats indiens ? À l'aide d'une approche constructiviste-interprétative et de travaux de recherche effectués au moyen d'entrevues avec vingt-trois principaux acteurs, cet article trace le parcours vers la Convention de règlement relative aux pensionnats indiens. Il examine notamment le passage des demandes d'une enquête publique vers des demandes de vérité et réconciliation. Examinant le concept d'une CVR, ce texte mesure le juste équilibre

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entre les influences transnationales et les éléments canadiens et suggère que deux différentes approches d'une commission de vérité ont été combinées lors des négociations menées en vue du règlement. L'une des approches, associée à l'Assemblée des Premières Nations, est centrée sur la responsabilisation et le domaine public, tandis que l'autre, associée aux organisations protestantes et de survivants, est davantage centrée sur des idées populaires et communautaires. Cet article examine l'hybridité ainsi que les lacunes dans la conception de la CVR et suggère que les deux visions d'une commission de vérité continuent d'exister en tension.

Mots clés : Convention de règlement relative aux pensionnats indiens, Commission de vérité et réconciliation du Canada, commissions de vérité, justice transitionnelle, recherche constructiviste-interprétative

At least forty truth commissions have been created worldwide, and almost all of these are in the global South, in developing, post-conflict societies. The establishment of a Truth and Reconciliation Commission (TRC) in a stable, Western democracy such as Canada is an unusual occurrence. The TRC is one component of the Indian Residential Schools Settlement Agreement (IRSSA), the largest out-of-court settlement agreement in Canadian history. Agreed to in principle in 2006 and finalized in 2007, the IRSSA provides approximately $5 billion for compensation, commemoration, healing, and the establishment of the TRC. This article asks how and why Canada ended up with a TRC rather than its default investigative body, a judicially-based public inquiry. This question is particularly intriguing given that there were broad-based calls for a public inquiry as late as 2004. As Kim Stanton notes, a truth commission might be considered a specialized form of public inquiry insofar as both are independent, investigative bodies aimed at promoting accountability. However, a public inquiry is a judicial body with powers of investigation, whereas a truth commission is a non-judicial body that may or may not have investigative powers. In turn, whereas public education and shifting social attitudes *might* be part of a public inquiry's role, these are explicit features of a truth commission.[2]

Through interview research, this article traces the shift from public inquiry to a TRC, arguing that there is an inside story that goes beyond the weight of the lawsuits and the worldwide popularity of truth commissions. Using a constructivist-interpretivist approach, I investigate what kind of truth commission was envisioned and mandated in Canada, and how and why this occurred. I find that two different approaches to a truth commission were brought together during the settlement negotiations. The first approach, associated with the Assembly of First Nations (AFN), has a more legalistic focus on accountability and public record, and the other, associated with the TRC Roundtable (comprised of survivor, Indigenous, and Protestant organizations), is more grassroots and community-focused. These two visions are merged in the TRC mandate, forming what one

[2] Kim Stanton, "Reinventing the Public Inquiry: Truth Commissions in Established Democracies" (paper presented at International Studies Association, San Diego, CA, April 2, 2012).

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respondent aptly called a "hybrid" model.[3] Today, these two visions of a truth commission continue to exist somewhat in tension, with the grassroots vision being rather overshadowed.

Part of this analysis gauges the balance between international influences and home-grown elements in the genesis of the TRC. While I do not make a strong causal argument, I suggest that it is possible to identify a connection between these two visions of a truth commission and differing degrees of policy transfer from elsewhere. That is, the AFN had higher levels of comparative study and consultation with international transitional justice experts than did the proponents of the grassroots vision. In comparison, leaders of the Roundtable understood their approach to be grounded in Indigenous teachings and in the face-to-face emotional and spiritual dynamics of various processes that eventually led to the IRSSA. Thus, while there is overlap—I do not wish to suggest that the two visions were diametrically opposed—we can also trace the origins of the truth commission to very different sources.

What we learn from this is that the adoption of the truth commission model can be more complex and nuanced than is often reflected in the literature. As Jelena Subotić writes, as the field of transitional justice expands its reach through increased normalization, judicialization, and professionalization, we consequently see increased "templatization and the convergence of available models."[4] There are many cautions about the limits of one-size-fits-all models that are poorly suited to local contexts or community processes. James Cavallaro and Sebastián Abulja suggest that the "dominant script" for truth commissions prevails as a result of "top-down" acculturation and behavioural processes of socialization.[5] However, this research shows that while there was international influence, the adoption of the truth commission model in Canada is also deeply rooted in internal dynamics, needs, and history.

Little has been written in any detail about how the very process of adopting a TRC affects its design, or why Canadian domestic actors formulated the kind of truth commission that they did. In responding to this dearth of information, my analysis also helps to shed light more generally on the local/international dynamics in the expansion of transitional justice to non-paradigmatic contexts. In section one below, I theoretically frame these dynamics and explain my methodology. Section two provides an overview of the path toward the IRSSA, highlighting spiritual and emotional steps in the struggle for redress. Section three addresses how actors understood and sourced the idea of a TRC and analyses hybridity and gaps in the TRC design. In the concluding section, I briefly reflect on the proliferation of the truth commission model and how truth and reconciliation might work in the Canadian context.

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3 Rev. James Scott, United Church General Council Officer for Residential Schools, personal interview, April 24, 2013, Montreal.

4 Jelena Subotić, "The Transformation of International Transitional Justice Advocacy," *International Journal of Transitional Justice* 6, no. 1 (2012): 106–25, 114.

5 James L. Cavallaro and Sebastián Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford and Portland: Hart, 2008), 124.

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1. Framework of Analysis and Methodology

The variability among truth commissions can be far-ranging in terms of mandate and resources, powers of search, seizure, and "naming names," scope of investigation and public engagement, and the environment in which they operate. Nevertheless, truth commissions are united by a set of core objectives: acknowledging past abuses, addressing the needs of victims, delivering a measure of accountability, outlining institutional responsibility and recommending reforms, and promoting reconciliation.[6] The spread of this model across borders, as Franklin Oduro has persuasively argued, can be understood as the result of transnational learning and policy transfer between states, aided by domestic and international NGOs.[7] While in some cases the establishment of a TRC is the result of international conditionality or direct imposition,[8] often it is the *idea* of a truth commission, as typified by the South African TRC, which provides inspiration for actors seeking to deal with legacies of human rights abuse.[9]

This understanding of policy transfer is informed by constructivism, a theoretical framework that views human interactions as being shaped by norms, ideas, and social interactions, and not simply by material factors and structural constraints.[10] Applying the constructivist frame in the Canadian situation, I argue that the switch from public inquiry to truth commission was a dynamic, evolving, and dialectical process that shaped the very mandate of the TRC and visions of what it might do. This argument relies on interpretivist methodology, which privileges the situated knowledge and the "sense-making" of respondents who were immersed in the actual events under study.[11] This approach allows us to understand how domestic actors understood the purpose of the truth commission over the course of their interactions with one another, and in the context of both international and domestic structures and ideas. Moreover, this approach aligns with ethical precepts for doing research with Indigenous peoples: acknowledging respondents as having agency (they are neither "subjects" nor "objects" of research); understanding research as a dialogical process, not a harvesting of information; avoiding positivistic or reductionist analysis; and recognizing culturally distinct knowledge and ways of knowing.[12]

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6 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011), 20.

7 Franklin Oduro, "Transitional Societies, Democratic Accountability and Policy Responses: The Formulation of the Truth Commission Approach to a Transitional Justice Policy (South Africa, Nigeria, Ghana)" (doctoral dissertation, Carleton University, 2012).

8 See Megan MacKenzie and Mohamed Sesay, "No Amnesty from/for the International: The Production and Promotion of TRCs as an International Norm in Sierra Leone," *International Studies Perspectives* 13 (2012): 146–63.

9 Franklin Oduro and Rosemary Nagy, "What's in an Idea?: Truth Commission Policy Transfer in Ghana and Canada," *Journal of Human Rights* 13, no. 1 (2014): 85–102.

10 Martha Finnemore and Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics," *Annual Review of Political Science* 4, no. 1 (2001): 391, 393.

11 Peregrine Schwartz-Shea and Dvora Yanow, *Interpretive Research Design* (New York: Routledge, 2012), 79.

12 See Marlene Brant Castellano, "Ethics of Aboriginal Research," *Journal of Aboriginal Health* 1, no. 1 (2004): 98–114.The Nipissing University Research Ethics Board approves this research (file # 09-06-10RVR2).

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Using semistructured interviews with twenty-three persons involved in the IRSSA and TRC, I asked, "Why do you think a truth commission ended up being part of the settlement agreement?" and "To what extent is this a 'home-grown' commission and to what extent has there been policy transfer from elsewhere?" Through purposive and snowball sampling, interviews were conducted with key representatives from the Federal Government, the Assembly of First Nations (AFN), the Indian Residential Schools Survivor Society (IRSSS), the United Church of Canada, the Corporation of Catholic Church Entities Party to the IRSSA, the Presbyterian Church of Canada, the Anglican Church of Canada, the Aboriginal Healing Foundation (AHF), the International Centre for Transitional Justice, and the Truth and Reconciliation Commission. Interview length was generally sixty minutes, although several respondents spent much more time with me through repeat interviews.[13] Interviewing was an ongoing process of cumulative inquiry that sought to "locate and trace points of connection."[14] Because data gathering is a circular process of learning where to look for answers and what questions to ask, the process required flexibility and recursive checking of analytical frames against contextualized responses.[15]

The picture presented below provides to some degree a composite account of the genesis of the TRC. In laying this out, I build on Matt James's observation that there is a particular "sociology of knowledge underlying the TRC" that is the "product of dispersed processes of political interaction and social governance."[16] Through triangulation across interviews, saturation is reached for some aspects of the story. Secondary sources and other primary sources also assist in the interpretive process. Where there are multiple and differing perspectives among respondents, I understand contested interpretations themselves to be full of meaning, and they should be "puzzled out" in light of the specific context.[17] "Falsifiability" is not the goal of contructivist-intrepretivist research: "[R]esearchers can do no more than contrast interpretations against other interpretations . . . debate over alternative interpretations is the basis for scholarly dialogue."[18]

The trustworthiness of the research is rooted in the representativeness of my interviews, which include a number of pivotal players across relevant organizations (chief negotiators, executive directors, special advisors, truth commissioners, a former deputy minister and minister). While ultimately, as researcher, I make my own findings and argumentation in the write-up, all respondents were

13 These include Rev. James Scott, Sharon Thira, Jane Brewin Morley, Q.C., and Mike DeGagné. I would especially like to acknowledge Maggie Hodgson, an Indigenous leader in healing who has long been involved with IRS resolution, who spent over twenty hours with me. I am greatly indebted to her for teaching me to think about the spiritual/emotional impact of various processes along the way to settlement.

14 Marjorie L. Devault and Liza McCoy, "Institutional Ethnography: Using Interviews to Investigate Ruling Relations," in *Handbook of Interview Research: Context & Method*, ed. James A. Holstein and Jaber F. Gubrium, 751–76 (Thousand Oaks, CA: Sage Publications, 2002).

15 Schwartz-Shea and Yanow, *Interpretive Research Design*.

16 Matt James, "A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission," *International Journal of Transitional Justice* (2012): 1–23, 18.

17 Schwartz-Shea and Yanow, *Interpretive Research Design*, 41.

18 Audie Klotz and Cecelia Lynch, *Strategies for Research in Constructivist International Relations* (Armonk, NY: M. E. Sharpe, 2007), 107.

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provided with draft, redacted copies of this article for comment and approval of my interpretation of their words. In some cases, during late-stage follow-up interviews, I also sounded out my intuitions with respondents for their comment and discussion. In the end, however, this paper lays no claim to singular, objective "rightness" or "truth" about "what really happened" during negotiations. Rather, it seeks to analyze the self-understandings of domestic actors as they engaged with the globalized idea of a truth commission in the context of a twenty-year-long struggle for redress that culminated in the IRSSA.

2. The Path toward the IRSSA

Although Indigenous people have raised concerns about and resisted the residential school system from its inception, I date the beginning of the progression toward the IRSSA to 1990, when the issue gained widespread mainstream attention. In November of that year, Phil Fontaine, then Grand Chief of the Manitoba Assembly of Chiefs, spoke on national television about the abuse that he and his classmates suffered in residential school. Although others had previously spoken out and there had been a spate of prosecution in the late 1980s, Fontaine was the first leader of national stature to speak publicly and personally. His revelations stunned ordinary Canadians and resulted in additional survivors coming forward. Fontaine articulated the need for three things that were to become a common theme in subsequent years: (1) a disclosure process that may or may not take the form of public inquiry, (2) a healing process to "make our people whole" that must be integral to the disclosure process, and (3) an assurance that whatever is disclosed becomes part of public history for all Canadians.[19]

The government of the day quickly rejected demands for a public inquiry, saying that it was unnecessary "to find out that governments didn't, 20 or 30 or 40 years ago, do things the right way."[20] Several individual lawsuits were launched and survivor groups started to form. This occurred against the backdrop of earlier revelations of sexual and physical abuse at the Catholic-run Mount Cashel orphanage for boys in Newfoundland, which *did* result in a 1989 provincial Royal Commission of Inquiry.

As all this was happening, the Royal Commission on Aboriginal Peoples (RCAP) was formed in response to the 1990 "Oka Crisis." RCAP, mandated to cover the 500-year relationship between Aboriginal and non-Aboriginal peoples in its entirety, found that "no segment of our research aroused more outrage and shame than the story of the residential schools."[21] Through public hearings and a dedicated chapter on residential schools in its 1996 report, RCAP made clear the extensive, systematic nature of IRS violence. It called for a separate public inquiry into residential schools.

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19 Phil Fontaine, interview by Michael Enright and Alan Maitland, *As it Happens*, CBC Radio, November 5, 1990, http://www.cbc.ca/archives/categories/politics/parties-leaders/phil-fontaine-native-diplomat-and-dealmaker/abused-to-abuser.html (accessed August 15, 2012).

20 Then-Minister of Indian Affairs Tom Siddon quoted in Joan Bryden, "Siddon refuses 'witch hunt' into Indian schools," *The Windsor Star*, November 1, 1990.

21 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), 601–2.

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The federal government responded to RCAP in 1998 with a policy document, *Gathering Strength*, and a statement of reconciliation. Then-Minister of Indian Affairs Jane Stewart acknowledged the federal government's role in the development and administration of the schools and apologized to the victims of sexual and physical abuse. But the apology failed to acknowledge the violence of the IRS system as a whole, and the call for public inquiry was refused. The government also set up the AHF and earmarked $350 million for community-based healing initiatives, but these initiatives were focused on sexual and physical abuse rather than language and culture. In short, the government's approach was to isolate the crime of residential schools as specific acts of abuse rather than a colonial project of assimilation.

Litigation

While Jane Stewart's statement of reconciliation may have opened space at the highest levels of government for dealing with the legacy of residential schools, survivors nevertheless increasingly turned to the courts out of frustration with the government's slow and inadequate response to RCAP, including its refusal to hold a judicial commission of inquiry.[22] Litigation was not an ideal approach for anyone, however. Several churches faced bankruptcy, and plaintiffs experienced trauma and humiliation in an adversarial process where their stories were not believed. Maggie Hodgson recalls with pain that she warned the government that victim-support services needed to be established for plaintiffs. Her advice was ignored until after one of the plaintiffs committed suicide during the *Blackwater* trial.[23]

The narrow conception of harm embedded in tort law considered only sexual and physical abuse to be actionable and therefore excluded loss of culture and language or systemic neglect. Using immoral legal tactics, the government sought to distance itself from the actions of "corrupt" individuals, which it had "erred" in hiring, while also successfully arguing that mere attendance at the schools was the cause of plaintiffs' trauma. The government's strategy succeeded in achieving an unusually low assessment of damages in *Blackwater*, but in the long run, it opened the door for the wider harms of residential schools to be legally actionable.[24] Notably, the *Cloud* class action, filed by survivors of the Mohawk Institute in 1997, invoked systemic neglect as cause of action and loss of culture as common issue. While the court generally expected that loss of culture would ultimately fail, *Cloud* was finally certified in 2004.[25] This certification paved the way for the *Baxter* class action, which represented some 80,000 direct and intergenerational survivors and ultimately claimed $100 billion in damages.

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22 See Kim Stanton, "Canada's Truth and Reconciliation Commission: Settling the Past?," *International Indigenous Policy Journal* 2, no. 3 (2011).

23 Maggie Hodgson, telephone interview, May 24, 2012. Hodgson worked for the federal government on interchange from Native Counseling Services of Alberta at this time.

24 Leslie Thielen-Wilson, "White Terror, Canada's Indian Residential Schools, and the Colonial Present: From Law Towards a Pedagogy of Recognition" (doctoral dissertation, Ontario Institute for Studies in Education, University of Toronto, 2012), ch. 5.

25 Ibid.

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As several of my respondents noted, the threat of *Baxter*'s possible certification was undoubtedly a factor in the government's agreement to settle out of court, as was the pressure of thousands of lawsuits. By the time of the IRSSA, there were almost 15,000 individual claims against the government and churches, 5,000 Alternative Dispute Resolution (ADR) cases (more on this below), and 11 class action lawsuits. However, *realpolitik* explanations based on the threat of litigation cannot fully explain the settlement agreement and the turn to a truth commission. My research suggests that there is also an inside story about a slow, uneven, and fraught transformation in attitudes and relationships.

For example, Rev. James Scott of the United Church of Canada notes that "[the litigation] got our attention. It shattered the silence and left many wondering why we did not know more about our own history. It was a major blow to our self-perception as a church that is active in social justice." The church's initial resistance, incomprehension, and fears "fed the impulse to resist and to find a way out." But the church "began to regain [its] sense of balance" when it "listened deeply to the stories of survivors, through the *Blackwater* court case and through the Exploratory Dialogues." It shifted its perspective from "viewing the lawsuits purely as a 'legal problem to be dealt with' to seeing them as signs of a 'broken relationship that needs mending.'"[26] Similarly, Rev. Stephen Kendall of the Presbyterian Church of Canada says that the litigation "rattled" the church toward a new journey and a new way of thinking. While litigation at the time initially produced fear and anxiety, in retrospect, healing and reconciliation efforts in the church might not have started otherwise.[27]

Exploratory Dialogues

The 1998 Exploratory Dialogues brought together over 400 people—survivors, Indigenous healers and leaders, legal counsel, church leaders, and government officials—to explore alternative modes to litigation for resolving claims in a more humane and expeditious way.[28] However, people often just came to talk, sometimes for the first time ever, about what had happened to them in the schools. The dialogues were difficult, sad, and sometimes painful, and there was much distrust between Indigenous people, government, and churches. Yet it was also a transformative learning process for non-Aboriginals, including lawyers and high-level bureaucrats, who had no personal experience of the schools.

Maggie Hodgson identifies the Exploratory Dialogues as the beginning of a slow process of relationship building between plaintiffs and defendants that paved the way for the IRSSA. To be sure, it was an imperfect, unbalanced relationship marked by acts of recolonization. But, Hodgson explains, the Exploratory

[26] Rev. James Scott, "The Residential Schools Litigation Process" (panel discussion at "Assessing Canada's Indian Residential Schools Litigation and Settlement Process," University of Toronto Faculty of Law, Toronto, January 18, 2013). On file with author.

[27] Rev. Stephen Kendall, Principal Clerk of the General Assembly of the Presbyterian Church of Canada, personal interview, April 26, 2013, Montreal.

[28] Canada. Indian Affairs and Northern Development (DIAND), *Reconciliation and Healing: Alternative Resolution Strategies for Dealing with Residential Schools Claims* (Ottawa: Minister of Indian Affairs and Northern Development, 2000), http://www.glennsigurdson.com/wp-content/uploads/2010/09/Reconciliation_healing.pdf (February 24, 2012).

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Dialogues were the first time that all stakeholders came together in a non-combative manner in an effort of "collaborative justice" to establish a framework for resolution. People had to shed their roles as lawyers or bureaucrats and "come here as human beings and be a party to the process." This, Hodgson states, resulted in a "little bit more warmth" and trust between all stakeholders. [29]

Chief Robert Joseph of the Indian Residential Schools Survivor Society corroborates: "People cursed, people cried, people wept. People were totally changed. People began to be more respectful, they began to hug each other, there were tears. Sometimes there were even words of apology and forgiveness."[30] Although mistrust was still identified as a problem at the end of the Exploratory Dialogues, participants also felt as though things were moving forward.[31] All groups committed to going ahead with the pilot ADR projects. The ADR process, for all its failings (as addressed below), at times also promoted a different way of doing things. Maggie Hodgson says, "[T]he implementation of the ADR again was continuing that journey of people standing in a circle praying and holding hands. Because it's a little bit more difficult to lose your cool and treat the other people in the group with total disrespect after holding hands and praying."[32]

Participants in the Exploratory Dialogues identified a set of guiding principles for the ADR process. The guiding principles included: building relationships through mutual respect and understanding; the equal and mutual involvement of survivors in the ADR design; inclusivity; community involvement; the provision of health supports during the process; and sensitivity to past trauma in questioning of claimants. Moreover, the guiding principles stated that the process needed to engage intergenerational impacts such as loss of parenting skills and loss of language and culture, and to recognize the systemic racism and power imbalances that underlay the schools.[33]

Alternative Dispute Resolution Program

Despite progress made during the Exploratory Dialogues, the national ADR program established in 2002 simply did not fulfill these principles. The government unilaterally created the program, and it pertained only to sexual and physical abuse. Claimants remained subject to humiliating and traumatizing cross-examination, and compensation was meagre. Although ADR was supposed to be more reconciliatory than trials, as Kathleen Mahoney, law professor at the University of Calgary and chief negotiator for the AFN, observes, the smallness of government attitudes was epitomized in the directive that fractions of numbers in the calculation of compensation were to be rounded down.[34]

Kathleen Mahoney, who had originally been hired by the late Dennis Fontaine (Phil Fontaine's brother) to look into why he had not received his ADR compensation, began conversations with the federal department Indian Residential Schools

29 Hodgson, telephone interview, June 21, 2011.
30 Personal interview, June 18, 2010.
31 DIAND, *Healing and Reconciliation*, 104–5.
32 Hodgson, telephone interview, June 21, 2011.
33 DIAND, *Reconciliation and Healing*, 110.
34 Kathleen Mahoney, telephone interview, September 20, 2011.

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Resolution Canada (IRSRC). Mahoney subsequently organized a joint AFN-University of Calgary conference in March 2004. Participants included elders, survivors, Indigenous leaders, church and government officials, and academics. By the end of the conference, the "unanimous result," relates Mahoney, was that ADR could not achieve reconciliation and was shameful in its treatment of survivors.[35] Participants were also acutely aware that elderly survivors did not have time to waste, and that it would take over fifty years to resolve all cases at the current pace. It was a "no brainer," then-IRSRC Deputy Minister Mario Dion recalls, "[W]e had to do things differently." Three dollars were spent on every dollar given to victims, and hearings too often consisted of interrogating people in their sixties and seventies to confirm how they had been raped.[36]

On the last day of the Calgary conference, Chief Phil Fontaine approached Mario Dion, saying he could assemble a team to work toward resolution if Dion would fund it. With IRSRC funding, Kathleen Mahoney assembled a research team, and in November 2004, the AFN launched its *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. Several research respondents credit Mario Dion with setting up the report as "hard evidence" to manoeuvre bureaucratic channels among departments unfamiliar with IRS, in particular the Treasury Board. The AFN report was deeply critical of the ADR process and called for lump-sum payments and a "truth-sharing and reconciliation process." The Canadian Bar Association issued its own report shortly thereafter with similar findings and recommendations.

Although the government had agreed in Calgary to further dialogue with the AFN, it was not committed to change the program. As Paulette Regan writes, "dynamics of symbolic violence" were especially apparent in the February 2005 hearings held by the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on the effectiveness of the ADR program.[37] In these hearings, survivors provided heart-wrenching testimony about the indignities of the ADR program. Then-Deputy Prime Minister Anne McLellan took a defensive stance before the Standing Committee, where she argued that although the "groundbreaking" program was not perfect, "*this alternative process was not devised by us*. It was devised on the basis of exploratory discussions, pilot projects, and experience both in this country and globally."[38] The bipartisan committee, in contrast, concluded that the ADR program was "strikingly disconnected from the so-called pilot projects that preceded it."[39] Drawing in particular on the AFN and Canadian Bar Association reports, the Standing Committee strongly condemned the ADR program and called for its immediate termination. It further called for

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35 Ibid.
36 Mario Dion, personal interview, October 6, 2011.
37 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010), 124–41.
38 Ibid., emphasis added.
39 Standing Committee on Aboriginal Affairs and Northern Development, *Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, 38th Parliament, 1st Session, (House of Commons: Ottawa, 2005) (hereafter cited as AAND Standing Committee, *Study on the Effectiveness of ADR*).

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court-supervised negotiation for settlement with former students and the opportunity for a national truth and reconciliation process.[40]

"And then the Pope died . . . "

Despite Anne McLellan's terrible disconnect from the realities of ADR in front of the Standing Committee, the government had been engaging in bilateral talks with the AFN since January 2005.[41] Phil Fontaine notes that the AFN was meeting "stiff resistance, especially from Justice officials," until after he was invited by Prime Minister Paul Martin to join a delegation to attend the pope's funeral on April 7, 2005. During the trip to Rome, the topic of Indian Residential Schools was raised at a group dinner; at some point in the conversation, the prime minister personally vowed to Phil Fontaine that "we'll get this done." As Fontaine tells the story, a common phrase in the hallways of the Department of Justice after that trip was, "And then the Pope died." There was a "sea-change" in the department, with officials becoming "more open, more accommodating," and willing to talk seriously.[42]

Moreover, there was a budget surplus that year, which meant money was available to cover the $2 billion in compensation.[43] Thus, in May 2005, political agreement to commence negotiations was reached. The government appointed the former Supreme Court Justice Frank Iaccobucci to be its chief negotiator. The AFN, finding it was going to be shut out of negotiations, launched its own class action lawsuit in August 2005 to become a party at the table. There were, at times, up to seventy lawyers at the table negotiating compensation; almost everyone was non-Indigenous. A second table was established for negotiating the TRC, and it included a greater proportion of non-lawyers and Indigenous peoples than the main table. The negotiations were rapid-fire, contentious, and very intense. An agreement-in-principle was signed on November 20, 2005 at 11:59 p.m. It basically contained everything that was in the AFN report: a commitment to a holistic response that included lump-sum payments, commemoration, and truth and reconciliation. The parties concluded the Indian Residential Schools Settlement Agreement on May 8, 2006; the courts implemented it on September 19, 2007.

3. Sourcing the TRC

As seen above, the idea of truth and reconciliation was effectively a pre-set agenda item for the settlement negotiations. But where did the idea of a truth commission come from? In August 2003, Georges Erasmus, the former co-chair of RCAP, challenged the United Church at its General Council to pressure the government to implement a public inquiry as RCAP had recommended or, if not, to hold a people's public inquiry. Consequently, in February 2004, the United Church facilitated a Public Inquiry Roundtable, which included the IRSSS and the National Residential Schools

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40 AAND Standing Committee, *Study on the Effectiveness of ADR*.

41 Mahoney, telephone interview, September 20, 2011.

42 Phil Fontaine (presentation at "Assessing Canada's Indian Residential Schools Litigation and Settlement Process," University of Toronto Faculty of Law, Toronto, January 18, 2013), http://mediacast.ic.utoronto.ca/20130118-LAW-1/index.htm# (accessed July 2, 2013).

43 Mario Dion, personal interview, October 6, 2011, Ottawa.

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Survivor Society (NRSSS), Indigenous organizations such as the AFN, Métis National Council, and the AHF, and the churches, the Law Commission of Canada, and the federal government. The Roundtable was eventually co-chaired by Chief Joseph and Sharon Thira of the IRSSS.[44] Within the year, however, this informal group began a shift in language from "public inquiry" to "national community inquiry" to "a People's Commission for Truth, Hope and Reconciliation."

What changed, and why? Recognizing that "it was probably going to be a long difficult road ahead to get a public inquiry and that too many survivors were elderly," the Roundtable determined, instead, that it would organize its own truth-sharing, healing, and reconciliation process using a community-based approach.[45] As one member explains, the more they talked about what a people's inquiry would look like, "the more the image of South Africa and a truth and reconciliation kind of process came out. So before too long we started to call [ourselves] the Truth and Reconciliation Roundtable."[46] They planned to raise $25 million, had communications and process strategies in place, and even advertised for an executive director.[47] During the same time that the Roundtable was organizing, Kathleen Mahoney was researching and writing up the AFN report on the ADR. Consequently, the Roundtable process was preempted by the announcement of the settlement negotiations.

The Roundtable discussions and the AFN's political efforts can be understood as two parallel processes that sometimes converged in the sharing of information, but ultimately, as negotiations got underway, the AFN took charge. However, Phil Fontaine, who chaired the second table for negotiating the TRC mandate, was amenable to the United Church's suggestion to include survivor organizations. Thus, Sharon Thira and Chief Joseph were there in part to bring the history of the Roundtable process to the negotiations; the Protestant churches were also there and they had gone through the Roundtable process.[48]

Bob Watts, a member of the AFN negotiating team (and later, the interim executive director of the TRC), recalls that

> even as the Settlement Agreement was being negotiated there was work being done by a community-based movement with some of the survivors' organizations and some of the churches. Some of those players became part of [the second table] to provide advice on how to tell the story of residential schools. We at the AFN were already determined that the truth had to be told . . . we were already focused on a truth commission."[49]

However, whereas the AFN went into negotiations seeking powers of subpoena and naming names, the IRSSS and Protestant churches did not stand with

44 Attendance of some groups, like the Catholic Church, government, and AFN, was more sporadic. Reverend Scott, United Church General Council Officer for Residential Schools, personal interview, August 12, 2010, Ottawa.
45 Chief Robert Joseph, personal interview, June 18, 2010, Winnipeg.
46 Reverend Scott, personal interview, August 12, 2010, Ottawa.
47 Chief Joseph, personal interview, June 18, 2010, Winnipeg. See also Roundtable draft discussion papers (January and February 2005). On file with author.
48 Reverend Scott, personal interview, April 24, 2013, Montreal.
49 Bob Watts, AFN negotiating team, TRC interim executive director, telephone interview, November 10, 2010.

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the AFN in its push for the TRC to have these quasi-judicial powers.[50] This difference reflects variations in their approaches to truth and reconciliation. Several respondents characterized Kathleen Mahoney's approach as having a more legalistic emphasis on truth in terms of public accountability and public record. In comparison, the Roundtable's approach focused on restorative justice, healing, and reconciliation. Reverend Scott of the United Church explains: "[I]t's not really in the spirit of restorative justice to force people to do things [i.e., to use subpoena powers]. You want to create an environment in which people will voluntarily participate because it's the right thing to do."[51]

The government and Catholic entities also did not want these powers, but for strategically defensive reasons. As Mike DeGagné, the former executive director of the AHF, puts it, "throughout the negotiations, the government was obsessive about ensuring that the TRC process could not name names." This aligned with the Catholic entities' legal strategy, and together they sought to ensure that "a blame-free structure was put in place."[52] The AFN, for its part, soon realized that such powers would hold up the truth and reconciliation process and lead to more litigation. Drawing parallels with Ireland's dispute resolution for Industrial School Survivors, the AFN chief negotiator notes in particular how Ireland's Commission to Inquire into Child Abuse had been held up for two years by the Catholic Church contesting subpoenas in court.[53] Some Canadian Catholic entities indicated that they would take the same approach as their Irish counterparts. Ironically, however, as Kathleen Mahoney notes, "there wasn't a huge desire to name names in the community that we could discern . . . 'We want to heal.' That was the main message we kept hearing over and over again."[54]

International Influences and "Home-grown" Elements

What kinds of international influences existed in the Canadian process of adopting the truth commission model? My research, in asking about the inspiration and lessons offered by other countries, as well as about the role played by transnational actors such as the International Center for Transitional Justice (ICTJ), did not unearth evidence of a strongly causal or directive role. I nonetheless suggest that the initial gap between the AFN and the Roundtable understandings of truth and reconciliation may reflect subtle differences in the dynamics of the "transfer" of the idea of a truth commission from elsewhere. Certainly, Roundtable participants explicitly understood the AFN approach as being modeled after the experience of truth commissions in a number of other countries, in contrast to their own approach.[55]

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50 Sharon Thira, former executive director of Indian Residential School Survivors Society, telephone interviews, October 13, 2010 and January 26, 2012.

51 Reverend Scott, personal interview, August 12, 2010, Ottawa.

52 Mike DeGagné, former executive director of the Aboriginal Healing Foundation, personal interview, July 2, 2013, North Bay.

53 Mahoney, telephone interview, September 20, 2011.

54 Ibid.

55 Minutes of the 6th Roundtable for Truth Sharing, Healing, and Reconciliation (THR) Process. October 4, 2005. On file with author.

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As already alluded to above, the aspirational influence of the South African TRC is obvious in terms of what we might call "brand-name" recognition for truth and reconciliation. However, most respondents felt that the Canadian situation was unique and that there were limits as to what could be drawn from elsewhere. While the image of the South African TRC loomed large in everybody's consciousness, as Kathleen Mahoney puts it, people were well aware that the South African TRC "was not the be-all and end-all of truth commissions."[56]

The 2004 AFN report that served to shape the specific settlement was based on research of truth commissions across the world,[57] and its task force of experts included specialists in international justice and truth commissions. Beyond the report, and in negotiations, the AFN also consulted with the ICTJ, perhaps the leading NGO in the field providing "technical expertise and knowledge" of comparative experiences worldwide.[58] Jelena Subotić, in her study of international transitional justice advocacy, characterizes ICTJ as having adopted a "more 'packaged' approach, which focuses on trials just as much as alternative strategies," thereby reflecting "the dominant legalist approach to human rights."[59]

Eduardo González, director of the Truth and Memory program at ICTJ, states that the AFN wanted "to check their perceptions of truth commissions with the actual facts of how truth commissions work around the world." He says, "[W]e were pretty close to the AFN during the negotiations."[60] When asked about ICTJ's influence, Kathleen Mahoney responded: "[T]hey had some influence. I think they were very helpful in providing us with literature, giving us guideposts."[61] Bob Watts, although he specified the Chilean TRC as a model for dealing with Indigenous peoples and the Greensboro TRC as a model for community-based reconciliation, concluded overall that "it's difficult to really say how much any particular TRC influenced ours because there was already a lot of synthesis of that [international] experience gone through the international centre [ICTJ]."[62]

There were both positive and negative perceptions of ICTJ, although most respondents generally agreed that its role was limited due to the uniqueness of the Canadian situation. One well-placed respondent who wishes to remain unnamed was highly critical of ICTJ for providing decontextualized technical advice (a claim I relate to Bob Watts's reference to "synthesis") that deflected from the relationship-building aspects of the truth-telling process. This respondent felt that ICTJ emphasized producing truth as a measurable outcome, which influenced or reinforced the AFN's initial desire for a more legalistic process and detracted from a grassroots, community-based process that would have been "more in keeping with the Aboriginal governance model."[63] However, at least one respondent outside ICTJ saw this as an unfair characterization of ICTJ's role.

56 Mahoney, telephone interview, September 20, 2011.
57 Ibid.
58 See "About Us" on ICTJ's website, http://ictj.org/about (accessed January 25, 2014).
59 Subotić, "Transformation of International TJ Advocacy," 120.
60 Eduardo González, personal interview, June 15, 2010, Winnipeg.
61 Mahoney, telephone interview, September 20, 2011.
62 Watts, telephone interview, November 10, 2010.
63 Unattributable interview, December 1, 2010.

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What I glean from these conflicting perspectives is a connection between levels of transnational consultation and different groups' understandings of the purpose of a truth commission. Certainly, the Roundtable's approach to truth and reconciliation does not have the same levels of external-actor involvement or comparative study as the AFN's. For example, Chief Joseph, the co-chair of the Roundtable, states that "the essence of the [Roundtable] process came directly from survivors, from fellow survivors." When asked whether they had looked at other countries' experiences, he replied, "[N]o, we never did," due to the unique nature of IRS oppression.[64] Moreover, Chief Joseph explains that

> Aboriginal people, throughout time, have known and practiced reconciliation, long before the experts ever came, long before the truth commissions were ever set up. Through the millennia we have had ceremonies and rituals that attempt to bring about that reconciliation. It might be just reconciling the elements, it might be reconciling with the spirit world. We don't understand it, feel it or touch it or anything, but we know it's there because that is what's the essence of this great circle of life . . . We always had this notion that we are connected, [and] because we're connected, that those things need to be balanced. We always view that the harm of one would eventually impact and affect all, and could result in the harm of all . . . that's fundamental to all of the teachings that we have. And so reconciliation is not new.[65]

These deeply spiritual, cultural elements of reconciliation come, as Chief Joseph puts it, from a "practitioner" perspective within "a people-based movement."[66] This strongly resonates with the dialogical, collaborative justice aspects of the path to settlement that Maggie Hodgson identified in the Exploratory Dialogues and the ADR process, which had "a strong engagement [with] spirituality and [was] relationship changing."[67] For these respondents, these home-grown dimensions carried far more weight and relevance than any international truth commission model.

TRC Design: Hybridity and Gaps

Whereas I have proposed a gap between differing visions of the TRC, in reaching its final mandate, the two approaches come together to form a hybrid model. Indeed, these approaches were never diametrically opposed, and the juridical model was never the entirety of the AFN's approach. For example, the manager of the AFN Residential Schools Unit, Charlene Belleau, was instrumental in her nation's community-healing process in the 1980s as then-chief of Lake Alkali. As documented in the film *The Honour of All,* Lake Alkali had its own version of a truth commission, understood then as a community-based inquiry, where members shared their stories and supported one another. Speaking at a 2011 conference about how community events were critical for her personally during the

[64] Chief Joseph, personal interview, June 18, 2010, Winnipeg.
[65] Ibid.
[66] Ibid.
[67] Hodgson, telephone interview, June 21, 2011.

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negotiations, Charlene Belleau stated: "The things that are happening today, we were doing already."[68] The Roundtable explicitly drew guidance from Lake Alkali's experience.[69]

However, at a Roundtable meeting in October 2005 (in the midst of negotiations), Roundtable participants clearly understood the two approaches as different and questioned the degree to which they could or should be integrated. The AFN model was seen as "more formal and investigative with full access to all the facts and records," whereas the Roundtable envisioned a bottom-up process with 500 to 700 community-designed events with national witnesses.[70] Much of the contention during negotiations had to do with how to fit all these things together and which to give priority. Mario Dion, the former IRSRC deputy minister, describes Kathleen Mahoney as "the main architect of the whole thing," pointing to her expertise in international human rights law and truth commissions.[71] However, the presence of survivors and church persons involved in the Roundtable process undoubtedly helped to shape the final mandate. Indeed, Sharon Thira reflects that the government and Catholic entities "latched onto" the community-based approach as "the less harmful straw man in their response to the AFN call for a potentially more damaging and expensive public inquiry."[72]

The main elements of the hybrid model outlined in Schedule N of the IRSSA can be articulated as follows:

- Central to both approaches: statement-taking/truth-sharing, national events, and a report for public education with recommendations;
- Central to the Roundtable approach: community events and a Survivor Committee;
- Central to the AFN approach: an agreement for the provision of documents and the creation of a National Research Centre.

Chief Joseph wrote the preamble at the end of the process (on a napkin in an airplane!) in order to infuse the dry legal document with some spirit. The principles from the Exploratory Dialogues, which the Roundtable identified as its guiding principles, were also brought into the mandate. Non-AFN negotiators inserted the provision for a Survivor Committee at the last minute. In outlining the rationale for the Survivor Committee, Sharon Thira explained the concern dating from the time that survivors had been displaced in the negotiation process; the government and churches found it easier to deal with the AFN as a single entity, and plaintiffs' lawyers acquiesced to the AFN serving as chief negotiator.[73] Lastly, the inclusion of community-designed, community-based events follows the basic gist of the Roundtable

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68 Charlene Belleau, remarks at the TRC's National Research Centre Forum, March 1–3, 2011, Vancouver.

69 Roundtable minutes, April 14, 2004 and February 21, 2005. On file with author.

70 Minutes of the 6th Roundtable for Truth Sharing, Healing, and Reconciliation (THR) Process. October 4, 2005; United Church of Canada,,"Addressing the Legacy of Canada's Residential School System: Truth-Sharing Circle" (discussion paper prepared for the Public Inquiry Roundtable, February 2005). On file with author.

71 Mario Dion, former deputy minister of the IRSRC, personal interview, October 6, 2011, Ottawa.

72 Thira, email communication, June 22, 2013.

73 Thira, telephone interview, October 13, 2010.

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vision, although in far less detailed terms; the core criteria and values for community events were left to the TRC to design in consultation with the Survivor Committee.

The government inserted section 2 into the mandate, which largely affirms, in the negative, what the truth commission is *not*: it is not a public inquiry, it does not have powers of subpoena, and it shall not name names unless the person has been already convicted.[74] The eventual trade-off regarding these powers was that the defendant parties would make their documents and people available except where individual privacy interests would be at stake (see article 11). This "voluntary," "best efforts" provision ensured that the TRC process would not be "overly legal or court-like."[75] But the clause is not without legal muscle, as evidenced in the recent court ruling in the TRC's favour, following more than a year of increasing acrimony, that the Government of Canada and churches must provide all relevant archival documents.

Schedule N is a strong vision document. But the $60 million budget allocated to the TRC seems to have been determined rather haphazardly. The Roundtable Steering Committee submitted a $42 million draft budget to Justice Iaccobucci for the community and national events.[76] Apparently, this was then merged with the AFN's proposed budget of $25 million for document collection, national events, and the establishment of a National Research Centre.[77] Administrative overlap between the two meant some expected reduction in costs, so the negotiators went with a final number of $60 million. The TRC has since been very clear that it faces "ongoing financial challenges" as it tries to meet its "vast" mandate.[78] This has necessitated ongoing choices about which elements to prioritize.

While implementation of the mandate is beyond the scope of this paper, I will end with a few observations on how the TRC must balance multiple tasks that arise from the merging of different visions for a truth commission. The Roundtable urged that a significant portion (60%) of the $60 million go toward community events.[79] Participants subsequently expressed concern when the TRC allocated the amount of $800,000.[80] Believing that "community events offer better means and opportunity for reconciliation," Roundtable participants called on the TRC and staff to "recommit to the original vision" and to increase survivor input in shaping the TRC agenda.[81] Yet there has been limited success in getting communities to

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74 Unattributable, telephone interview, April 29, 2013.

75 Watts, telephone interview, November 10, 2010; Mahoney, telephone interview, September 20, 2011).

76 This figure included 500 community processes, at 3 days for each process with 300 in attendance at a cost of $52,500, and 200 events in urban areas with 10–100 people. Minutes of the 6th Roundtable for Truth Sharing, Healing, and Reconciliation (THR) Process. October 4, 2005. On file with author.

77 Unattributed interview.

78 TRC of Canada, "Report on Plans and Priorities, 2011–2012," p. 3, http://www.tbs-sct.gc.ca/rpp/2011-2012/inst/irs/irs-eng.pdf (accessed May 8, 2013).

79 Roundtable minutes, January 22–23, 2008, Winnipeg; Summary Report, Roundtable meeting, April 20–21, 2011. On file with author.

80 Summary Report, Roundtable meeting, April 20–21, 2011. On file with author.

81 Ibid. and "Priorities as Agreed Upon by the IRS/TRC Roundtable Meeting," April 20–21, 2011, Ottawa. On file with author.

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hold events. Justice Murray Sinclair, the TRC chair, points to the limited funding and the mandate's "passive design," whereby communities must apply to host TRC-funded events, which then often end up becoming add-ons to existing gatherings.[82] In light of these challenges for community events, and given the recent focus on taking the government to court over archival document collection and the need, still, to establish the National Research Centre, it would seem that the grassroots, community vision has, indeed, been outweighed by other parts of the mandate.

4. Concluding Reflections

In the international transitional justice context, these findings indicate that there was no simple "top-down" or "bottom-up" creation of a TRC in Canada. The constructivist-interpretivist approach shows that the adoption of the truth commission model involved dialectical interactions between the local and the international, and between structural constraints and intersubjective agency. The constraints informing actors' responses to Indian Residential Schools were, for survivors and other Indigenous organizations, the government's steadfast refusal to hold a public inquiry and, for the government and churches, the impending weight of civil liability. However, *realpolitik* explanations alone cannot account for the eventual mutual turn toward the truth commission; this was also facilitated by the fraught and uneven shift in attitudes, understandings, and relationships on the part of some actors that was brought about by the litigation itself, the Exploratory Dialogues, and the ADR process.

At the same time, competing interests and priorities continued to shape the visions and design of the truth commission. The government's consistent denial of responsibility and public inquiry helped to fuel the AFN's vision of an accountability model of a truth commission—a vision that arguably reflects and was influenced by international transitional justice norms against impunity. In comparison, the Roundtable shifted away from powers of inquiry to embrace a community-based process that was self-consciously identified as home-grown and indigenous, rather than an internationalized, legalistic approach. It is equally important to recognize the role of the government and Catholic entities, which, as the AFN moved away from its initial desire for investigative powers, strategically advanced the community model for a mandate that is characterized by one respondent as "largely toothless by design."[83]

The two visions of the truth commission were not dichotomous but overlapping, with differences in emphasis. Hence the formulation of a hybrid model that reflected, at least on paper, the goals of each. While the tensions and gaps that exist in the hybrid mandate largely arise out of domestic politics, including those regarding resource constraints, these tensions are not atypical internationally. That is, truth may be relatively easily measured in the number of documents collected, statements gathered, and so forth. Reconciliation, in contrast, is far more

[82] Justice Murray Sinclair, TRC chair, personal interview, March 28, 2012, Ottawa.
[83] DeGagné, personal interview, July 2, 2013, North Bay.

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nebulous. Thus it is also possible to read these tensions as a story about the inherent contradiction between truth and reconciliation, a dilemma that has long challenged the theory and practice of transitional justice.

Yet the spiritual and emotional underpinnings of the path toward the IRSSA show how truth and reconciliation might work in the Canadian context. Through the transformative dynamics of hashing things out "as human beings," as Maggie Hodgson puts it, we might undertake the difficult process of learning to walk together through the "muskeg of history."[84] This dialogical process can occur through either national or community events, although the latter probably lend themselves more readily to difficult dialogue over time. When the TRC's mandate ends in 2015, the work of truth and reconciliation will carry on. Research regarding the impact of and relations between national and community processes, and how to spark and support community processes, can help to shed light on how to continue that dialogical work in productive and meaningful ways.

84 Hodgson, telephone interview, May 21, 2013.

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