

# **Monitoring Progress On the Road to Reconciliation**

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## **Introduction**

The Truth and Reconciliation Commission could be a decisive turning point in moving towards relations with Indigenous peoples in Canada that are just and beneficial for all Canadians. I have suggested elsewhere<sup>1</sup> that TRC could be the basis for a third Confederation – the first being the Treaty of Niagara in 1764 establishing peaceful relations between First Nations and the British Crown, and the second being the 1867 creation of a federal colonial state imposing its rule on Aboriginal peoples.

But TRC could also be yet another betrayal – another occasion on which first Great Britain and then its settler successor state Canada, made commitments to Indigenous peoples that it failed to live up to. Whether it is just one more broken promise depends on whether the Truth and Reconciliation Commission's 94 "calls for action" are implemented. At this point, over a year after the Commission submitted its report to the country, and the Government of Canada committed itself to the policies and program of action entailed in those calls, I think there is a good chance that it will be another broken promise.

I hear an awful lot of reconciliation talk but very little interest in "walking the walk" or even finding out what actions were called for by the Commission. Reconciliation is in danger of being reduced to a big hug, with non-Aboriginal Canada saying to Aboriginal peoples, "Gosh, we sure did some bad stuff to you in the past. We're sorry. We hope we can now just move on with you guys and let by-gones be by-gones." The Government of Canada has acted on none of the calls that provide the foundation stones for moving ahead with TRC's proposed action plan, and seems to be under little public pressure to fulfil its commitment.

Implementation of TRC's proposed program of action is not easily monitored. Its 94 calls cover many different fields of action and are addressed to a wide array of governments and civil society organizations. It may seem that #43 calling on federal, provincial, territorial, and municipal governments "to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation" adds much more to the 94 calls. But this is not so, because most of the Declaration's 46 articles, as I will explain, complement rather than add to the actions called for by TRC.

The TRC calls for action constitute a large and complex but thorough reconciliation action plan. Additional actions not included in its 94 calls may well be needed for dealing with the legacy of past injustices and building a just relationship in the future. Those who

identify such gaps, after carefully examining what is included, should point them out and draw attention to them. The TRC plan is also, in a constitutional sense, doable: it does not call for any amendment of Canada's written Constitution. Although it does call for a number of important changes in the practices and principles that are part of Canada's informal constitution – so called constitutional conventions. The plan's biggest requirements are threefold: 1) the will of governments 2) the *informed* support of the public, and 3) a significant increase in funds and resources available to Aboriginal governments for services to their peoples.

The TRC Commissioners knew that monitoring implementation would be required. For that purpose their call #53 calls on the Parliament of Canada in consultation and collaboration with Aboriginal peoples to establish a National Council for Reconciliation. One of the National Council's tasks would be to “monitor, evaluate, and report annually on the Government of Canada's post-apology progress on reconciliation to ensure ... government accountability for reconciling the relationship...” If the Council were established and operating there would be no need for the CPSA Reconciliation Committee's monitoring project. But there is still no sign of the proposed Council being established. The CPSA Committee, with the approval of the CPSA Board, plans to do the monitoring work until the National Council is in place.

My aim in this paper is to set out a scheme for organizing and implementing the CPSA Reconciliation Committee's monitoring work. I will first suggest a way of organizing the TRC calls that will facilitate a more effective way of researching and reporting progress (or lack of progress) on the TRC's action plan than simply a serial listing of 94 recommendations. In the second part of the paper I will sketch a tentative plan for the monitoring and reporting work that CPSA should undertake.

### **Part I : A Five Part Categorization of the TRC Calls**

My analysis of the 94 calls suggests that they can be divided into five distinct parts. First and foremost are what I refer to as Foundational First Steps. These are actions, mainly by the federal government, that are necessary to launch and maintain the reconciliation process. They are found in the middle of the TRC's calls, under the heading Reconciliation, #43 to #47, and #53 to #56. The second category of calls, also found in the middle of the document, #51 to #53 and #57, are directed at ensuring that Aboriginal peoples and their law have equity in Canada's legal system. They call for a fundamental change in the way Indigenous peoples' ownership of traditional lands is recognized. A third category are the first 42 calls under the heading Legacy. These are calls for action in five areas of public policy necessary to deal with the practical consequences, of the injustices of the past. The five areas are child welfare, education, language and culture, health and justice. A fourth category of calls, (#48 and #49, and #58 to #61) are addressed to the churches that played a major role in the residential school program. The remaining calls I categorize as concerned with civic education. They address the need for Canadians' collective memory to include a firm place for understanding the tragedy of

the residential schools, and for Indigenous peoples' contribution to Canadian life to be a living part of Canadian identity. Let me map out a little of the actions called for in each of these five parts of the TRC's action plan.

### **1. Foundational First Steps**

**a) Royal Proclamation:** In call #45, the Commission envisages the issuing of a Royal Proclamation of Reconciliation as the essential launching vehicle for its program of action. The Proclamation would “build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown...” The proclamation is to be developed with the Aboriginal peoples. Although it is a royal proclamation, it is to be issued “on behalf of all Canadians”. Reference to the Crown is to the family head Aboriginal people share with all Canadians. Reference to the Treaty of Niagara is to the 1764 meeting of representatives of twenty-four Aboriginal nations with Sir William Johnson, George III's special envoy, at which wampums were exchanged indicating agreement on a relationship of mutual respect and sharing of country.

**b) UN Declaration Action Plan:** #43 calls on all levels of government “to fully adopt and implement” the UN Declaration of Indigenous Peoples Rights, and #44 calls on the federal government to develop “a national action plan” for achieving the Declaration's goals. This call is also one of the specific commitments included in the Royal Proclamation.

Most of the Declaration's 46 articles relate to the two intertwined principles of land and self-government that underlay the agreement reached at Niagara in 1764 – the right and responsibility of Indigenous peoples to govern their own societies' affairs and to look after the lands and waters that sustain those societies. For instance, article 3 recognizes that Indigenous peoples “have the right to self-determination” and article 4 spells out that self-determination requires the “means for financing their autonomous functions.” Article 26 states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” And article #28 adds the right of restitution when possible, and otherwise, “just, fair and equitable compensation” for traditionally owned land that has been confiscated, used or damaged “without their (ie the traditional owners) free, prior and informed consent.”

The UN Declaration states a principled rationale for Canada's Indigenous peoples rights to self-government and control of traditional lands in universally applicable terms and contemporary language. It also fleshes out what those fundamental rights should be. An important monitoring task is measuring the gap between Canada's existing self-government and land claims laws and policies and those called for in the UN Declaration. By dropping the qualifications which Canada (under a Conservative government) attached to its acceptance of the Declaration, the Government of Canada has now accepted the Declaration as the measure of what the country should be striving to achieve in this area.<sup>2</sup>

**c) Sovereignty:** Call #53 seeks a repudiation of “concepts used to justify European sovereignty over Indigenous peoples and lands such as the Doctrine of Discovery and terra nullius, and to reform laws, government policies, and litigation strategies that continue to rely on such concepts.” Although this call is addressed to all levels of government, including municipalities, it is one on which the Government of Canada must take the lead. It is foundational because sovereignty concerns raised by federal government lawyers may be a barrier to moving forward with the TRC action plan.

Sovereignty is not mentioned in the Constitution of Canada. The 46<sup>th</sup> and final article of the UN Declaration states that “nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally, or in part, the territorial integrity or political unity of sovereign and independent States.” The sovereignty referred to here is to counter any claims by Indigenous peoples to separate from the country within whose borders they now exist. It is a sovereignty claim that all UN member states, including Canada, insist upon. Although this sovereignty claim is a limit on the political freedom of Indigenous peoples, it is one that is acceptable to representatives of Indigenous peoples around the world who developed and approved the Declaration. In no way does it depend on the Doctrine of Discovery that European states used to justify their right to control newly discovered lands because they regarded their inhabitants as sub-human.

It is important to note that the sovereignty recognized in the UN Declaration is not a sovereignty entitling any government in Canada to prevent an Indigenous people to enjoy its rights as they are set out in the Declaration, including the right to control their internal affairs and their traditional lands. The Declaration goes further than the Supreme Court of Canada in recognizing an Indigenous people’s right to control their traditional lands. In *Tsilhqot’in*, the Court’s most recent and most liberal interpretation of “native title”, although the Court affirms that native owners have priority in deciding how their lands should be used and developed, it would justify an infringement of the native owners’ title in “circumstances that from both an Aboriginal perspective and that of the general public make a compelling case for infringement.”<sup>33</sup> The Government of Canada should be less equivocal in recognizing an Indigenous people’s right to control what happens on land recognized by Canada to be owned by them.

**d) National Council for Reconciliation:** The National Council for Reconciliation has two tasks (#53 and #54). One is monitoring, evaluating and reporting to Parliament and the people of Canada progress on post-apology reconciliation, including the implementation of the TRC’s calls for action. Its second task is to develop and implement a multi-year plan for research and public education programs on reconciliation. The Prime Minister of Canada is called upon to respond to the Council’s work by issuing an annual “State of the Aboriginal Peoples” report (#56).

It is the first of the Reconciliation Council's tasks that the CPSA committee would undertake to carry out. As the TRC notes, this work is essential for ensuring government accountability.

**e) National Centre for Truth and Reconciliation:** The Centre is all about children. It's mandate is two fold: to collect data and report on the progress being made in ensuring that the well-being and opportunities of Indigenous children compare well with those of other Canadian children (#55) and to be a repository for data about the Indigenous children who did not survive the residential schools( #77). TRC calls for funding of the Centre that will enable communities to research and produce accounts of their own residential school experience (#78).

## **2. Equity for Aboriginal Peoples in the Legal System**

The first of the three calls in this category aims at educational equity for Aboriginal legal systems by calling on the federal government to collaborate with Aboriginal organizations to create Indigenous law institutes for the development, use and understanding of Indigenous legal systems (#50). More demanding are #51 and #52. that call on the federal, provincial and territorial governments, and the courts to shift the burden of proof in recognizing native title and responding to land "claims". The governing principle should be that "once the Aboriginal claimant has established occupancy over a particular territory at a particular point of time" the burden of proving any limitations on that title shifts to the party asserting such a limitation." The aim of #51 is to ensure that the federal government proceeds on this basis by requiring it to publish the legal opinions on which it intends to act in dealing with native title claimants.

Reversing the burden of proof in recognizing Indigenous ownership of homeland amounts to an extremely important change in Canada's relations with Indigenous peoples. While governments cannot direct the courts to comply with this call, the federal government must take the lead in announcing a change in its present land claims policy. To do so, it will need to determine what "established occupancy at a particular time" means. Making such a determination unilaterally rather than in collaboration with Indigenous leaders would not seem in keeping with the spirit and purpose of reconciliation.

## **3) Legacy Calls**

These are calls for remedial action in five key areas of public policy in which colonialist policies have discriminated against and harmed Canadians with an Aboriginal heritage:

- child welfare
- education
- language and culture
- health
- justice

The actions include federal legislation, such as an Aboriginal Child Welfare Act and an Aboriginal Language Act, as well as increased funding, primarily by the federal government, to reduce the gap in the education and health services available to Aboriginal people and those available to other Canadians. While the federal government is the primary target of the calls for legislation and funding increases, many call for policy actions by provincial and territorial governments, and several are also addressed to municipal governments. A number of others are addressed to universities and colleges, and professional organizations like the Federation of Law Societies.

#### **4) Calls to Churches and Faith Groups**

This group of calls reflects the central role that Christian churches played in the residential school program. The church parties to the Settlement Agreement and other faith groups and social justice groups are called upon to formally adopt the principles set out in the UN Declaration and state what they will do to implement those principles ( #47 and #48). A deadline of March 31, 2016 was set for such a statement.

Churches are called upon to educate their congregations about the role the churches played in colonization, to develop curricula for the training of clergy that respects Indigenous spirituality, and to fund and work with Aboriginal organizations in establishing community healing projects (#59 to #61). Call # 58 is addressed directly to the Pope, asking for an apology for the abuse of First Nation, Métis and Inuit children in Catholic-run schools.

#### **5) Civic Education Calls**

The TRC calls for a broad program of public education about both the tragedy of residential schools, as well as the historic and contemporary contributions of Indigenous peoples to the country. Coverage of this history should be a mandatory part of the elementary and secondary school education (#62 to #64). SSHRC should have multi-year funding to advance understanding of reconciliation (#65). This kind of education should not be confined to school children. Civil servants at all levels of government who deal with Indigenous peoples need to be educated about Indigenous peoples' historic experience, their treaties and rights and the UN Declaration. They will also require skill-based training in intercultural competence (#57). A number of calls address museums and archives calling on them to comply with the UN Declaration's principles on respecting Indigenous peoples' history (#67 to #70). Perhaps the most fundamental calls in this category address the education of newcomers to the country, calling for revising the information kit given to new Canadians to better inform them about Aboriginal peoples, including their diversity, the residential schools and their rights and treaties. The Oath of Citizenship is to include Treaties with Indigenous Peoples in the laws that new citizens are obliged to faithfully observe (#93 and #94).

Another cluster of calls address sectors of civil society – youth groups (#66), the media (#84 to #86), sports organizations #87 to #91, and the corporate business community

(#92) – calling on them to incorporate respect for Indigenous peoples and knowledge of their rights into their activities.

Finally, there are calls for commemorative actions, including the retrieval of information about the children who died as a result of the residential school program and where they are buried (#71 to #76). Another set of calls aims at ensuring remembrance of the tragedy of the residential schools in more tangible ways, including a highly visible monument in Ottawa, monuments in the capital cities of the provinces and territories, and establishing a statutory National Day for Truth and Reconciliation honouring the survivors and their families (#79 to #83).

## **Part II – How CPSA Might Do the Monitoring**

Let me emphasize that the methodology I suggest here for doing the monitoring is very tentative. It is a very challenging task that we are taking on – one for which there is really no precedent. What I set out below is only a preliminary first cut at suggesting how we might carry out the monitoring project. I urge members of the Reconciliation Committee and other CPSA colleagues to suggest improvements and raise issues that I have not addressed.

### **Collecting relevant information**

The collecting of information about what has been done in response to the TRC’s calls for action can be the political science departmental reconciliation representatives that the heads of departments have agreed to identify in each of their departments. These representatives will also be the main resource for implementing the project on strengthening the Indigenous content of the political science curriculum. Indeed the work on one project may complement the other. For instance, a course on Aboriginal peoples or policy may assign for course work the collection and assessment of information on what is being done with respect to some of the 94 calls.

Parcelling out the collection of information should be facilitated by the division of the calls into different categories. One political science department, or several in the same city or region, might, for example, take responsibility for collecting all the information relating to health policy calls, or those relating to museums and archives, or those relating to churches and faith groups, and so on. The one set of calls that might remain the responsibility of the CPSA Reconciliation Committee itself, are those that I have identified as “Foundational First Steps”, including the establishment of the National Council for Reconciliation that is supposed to be doing the monitoring that we plan to do. Collecting information on these calls is basically a matter of making contact with Indian and Northern Affairs Canada and finding out what the government is planning to do on these essential first steps. The contact here should be with the Minister or a senior ADM and would probably be most effectively made by the committee co-chairs.

## **Reporting the information for editing and dissemination**

The information collected by members of political science departments across the country should be sent to one site where it can be edited and presented on a website or in some other highly accessible way.

The editing would be mostly a matter of maintaining consistent formatting. However material that is submitted may go beyond reporting and assessing progress and include commentary. My view is that the monitoring reports should not include commentary, critical or laudatory – even if the lack of progress reported is outrageous. The site where the monitoring information is posted will be a CPSA site not anyone's personal site. Political scientists who are critical about lack of progress in responding to the TRC calls and wish to draw public attention to it should do so through their personal contributions to public debate and discussion. The media, the public and parliamentarians (including the Aboriginal caucus) should be made aware of the availability of the monitoring information which might provoke them to be make critical comments.

As co-chair of the Reconciliation Committee, I am willing to receive and edit some of the submissions from political science departmental representatives. But I cannot do it alone and will need one or more other members of the committee to participate in this part of the process.

## **Posting the Information on the Internet**

Those of us who receive and edit the input from departments should not be responsible for posting it on the internet. This stage of the process must be the responsibility of a person with the requisite technical skills. Determining who should be responsible for posting the information relates to deciding what kind of internet site is appropriate for reporting the monitoring information. Could it become part of the CPSA news bulletin? Or is a special website the appropriate site? If so, who will design and manage the website? What will this cost and who will pay? I doubt very much that this responsibility can just be added to the workload of the CPSA office. SSHRC funding has been mentioned as a possibility. But after spending a good deal of time on the SSHRC website I could not find any existing generic funds available for research on reconciliation.

So there are some tough questions to be answered about this part of the process – and answering them is essential if the CPSA monitoring project is to go forward.

## **Consultation on the Monitoring Plan**

The next step in developing this part of our action plan is to discuss this paper at the Reconciliation Committee's teleconference meeting on Friday, 24 March at 1pm (eastern). This discussion will likely help answer questions about how the project is to be carried out. Once the committee and the CPSA Executive approve the plan, it would be a



good idea to consult with Senator Murray Sinclair and perhaps some of those who worked with him on the TRC about the CPSA plan. Finally, the monitoring plan will be one of the items discussed at the CPSA Plenary Workshop on 31 May at Congress 2017.

### **Timing**

After Congress 2017, the departmental reconciliation representatives should be asked to select the calls for which they will do the monitoring research and report back to the Reconciliation Committee by the beginning of September. The representatives would be asked to get their first round of research done by the end of 2017.

By then, who knows? Maybe the Government of Council, prodded by our work, will begin setting up the National Council for Reconciliation, and put us out of business.

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<sup>1</sup> See Peter H. Russell, “Can Canada Retrieve the Principles of its First Confederation?” in Kiera Kadner et al, eds. *Surviving Canada*, Manawipawin, University of Manitoba, forthcoming 2017.

<sup>2</sup> Gloria Galloway, “Canada drops objections to UN Indigenous declaration,” *Globe & Mail*. 10 May, 2016, p.A8.

<sup>3</sup> *Tsilhqot’in Nation v British Columbia*, (2014) 2 SCR 257.