

RECONCILIATION & INDIGENOUS JUSTICE

A Search for Ways Forward

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THE LEGACY OF RESIDENTIAL SCHOOLS

The horrors of the Indian residential schools are by now well-known historical facts, and they have certainly found purchase in the Canadian consciousness in recent years. Growing awareness of the fall-out of the residential schools eventually prompted the following apology from then prime minister Stephen Harper in 2008: “Today, we recognize that this policy of assimilation was wrong, has caused great harm and has no place in our country. The government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly. We are sorry.”¹

The apology, plus lawsuits from the survivors of the residential schools,² contributed to the formation of the Truth and Reconciliation Commission (TRC) of Canada in 2008. In its interim report, the TRC provided a detailed and vivid description of the horrors perpetrated within the schools. Children had their traditional clothing and ceremonial items taken away and their braided hair (which reflects sacred beliefs) forcibly cut on arrival. Staff frequently beat students for the most innocuous of actions, for speaking their traditional languages, or for observing their traditional cultures. Many staff members also frequently subjected the children to sexual abuse.³

The survivors also made it clear that there were repercussions far beyond their own immediate attendance at the schools, resulting in a phenomenon known as intergenerational trauma. Indigenous children who attended the residential schools were left without the skills or qualifications to pursue livelihoods, with low self-esteem as Indigenous persons, in an angry and traumatized state of being, and vulnerable to substance abuse, violence, and other behavioural issues. Those children would take out their pain and problems on those nearest to them, their own family members. The next generation of children would be subjected to physical and sexual violence in abusive home environments

and therefore develop the same issues as the previous generation. And so the seeds planted by the residential schools pass on trauma from one generation to the next.⁴ In 2015, the TRC released its final reports, which detailed and chronicled the harms inflicted by the residential schools as well as exploring ways to address the social fallouts that have been left behind. The TRC also made it clear that Canada as a nation-state has an ongoing responsibility to try to redress those fallouts.⁵

One of those fallouts is the persistent crisis of Indigenous over-incarceration in Canada. Estimates as of 2016 are that Indigenous inmates amount to 27 percent of provincial and territorial inmates and 28 percent of federal inmates, despite Indigenous Peoples amounting to only 3 percent of the overall population.⁶ The focus of this book will be on the ongoing ties between the enduring traumas caused by the residential schools and Indigenous over-incarceration.

Residential schools and intergenerational trauma are certainly not the only contributors to Indigenous over-incarceration. There is, for example, “racial profiling,” the practice of assigning to particular racial groups negative stereotypes that infer increased propensity toward criminal behaviour so as to justify increased surveillance. The practice is by now well known.⁷ Official public inquiries have confirmed that Canadian police forces have engaged in discriminatory practices against Indigenous Peoples, including increased surveillance on the basis of race.⁸ A 2008 study by Carol LaPrairie found that Indigenous persons are seven times more likely than non-Indigenous persons to be identified as offenders by the police,⁹ demonstrating a culture that countenances a lack of respect for Indigenous Peoples.

Residential schools are also part of the larger picture of Canadian colonialism against Indigenous Peoples. Other colonial processes included military conquest¹⁰ or the acquisition of Indigenous land bases through treaties.¹¹ These processes have led to economic dispossession, which has contributed to Indigenous poverty, and that in turn contributes to Indigenous over-incarceration. Another colonial process has been the disproportionate apprehension of Indigenous children from their families by child welfare authorities, which may also contribute in turn to Indigenous over-incarceration.

The residential school system may not be the only harmful process of colonization that fuels Indigenous over-incarceration — but it has been and continues to be a critical cause behind Indigenous incarcera-

tion and is arguably the most critical factor of all. It is likely that for almost every Indigenous person who ends up incarcerated, residential schools will form an important part of their background, even for those who did not themselves attend the schools. The harm that the schools have caused and continue to generate provides vivid and crucial links between Canadian colonialism and Indigenous over-incarceration. The TRC made numerous recommendations, termed Calls to Action, and several of those were specifically directed toward remedying Indigenous over-incarceration (as we will see in Chapter 5). Several years have passed since the TRC final reports were issued — yet we have seen little progress with either implementing the Calls to Action or addressing Indigenous social conditions.

The other reason for focusing on residential schools is that they are a subject over which mainstream Canadians continue to exhibit denial and a refusal to acknowledge responsibility. The extent to which Canadians understand intergenerational trauma suffered by Indigenous Peoples, and the degree to which they are willing to support reconciliation, remains unclear even years after the release of the final reports. One survey report suggested that many Canadians are quite supportive of reconciliation,¹² while another suggested that support was stronger in the central and eastern provinces while weaker in the western provinces, where problems such as Indigenous over-incarceration are especially acute.¹³

And yet there remains cause for concern that least a substantial portion of the Canadian population may dismiss residential schools as a thing of the past for which present-day Canadians have no responsibility. For example, former senator Lynn Beyak has publicly defended the residential schools as “well-intentioned” and having had positive impacts that have been overshadowed by the negative depictions of the TRC. She even went as far as publishing over a hundred letters supportive of her viewpoints on her official website, with many of those letters espousing frankly racist descriptions of Indigenous Peoples as freeloaders trying to milk their traditional cultures and political correctness for even more handouts.¹⁴ Her son, a city councillor named Nick, went as far as to say that his mother’s viewpoints were supported by the majority of Canadians.¹⁵

An Angus Reid poll in 2018 indicated that 53 percent of the 2,500 Canadians it surveyed felt that Canada spends too much time apologiz-

ing for residential schools, and 53 percent felt that Indigenous Peoples should fully integrate into mainstream Canadian society without any special legal considerations or status.¹⁶

In a Facebook chatroom for RCMP members only, several blatantly racist comments were found. These included: “There comes a time when someone needs to stand up to these spoiled children and tell them to just f— off” and “There comes a time when we have apologized more than enough and compensated enough.” In response to a First Nation in British Columbia refusing to evacuate during wildfires, there were comments like “what an ignorant bunch of clowns,” “You can’t fix stupid” and “You can ... just let the fire do its thing.” When a female Indigenous RCMP officer indicated that residential schools were not just a thing of the past as she herself had been a student at one, she heard back in reply: “Does an end date exist? Or are my great-grandchildren expected to continue to reconcile?”¹⁷

It is perhaps telling that the former head of the TRC, Murray Sinclair, felt the need to explain why Indigenous Peoples simply cannot “get over it” with respect to residential schools. He indicated that just as Americans cannot forget 9/11 so easily, or how Western democracies celebrate the sacrifices of war veterans during Remembrance Day, Indigenous Peoples similarly cannot simply be expected to forget about the schools.¹⁸

Chapter 2 of the book builds on these themes, but with reference to very different ways of viewing crime. One view is that crime is simply a moral choice by an offender to do wrong, and the state is therefore justified in punishing the offender. It turns out that many, if not most, Canadians seem to ascribe to this viewpoint — which in turn fuels law-and-order policies that justify mass incarceration, with an inordinately harsh effect on disadvantaged minorities such as Indigenous Peoples. Reducing crime to moral choices implicitly also allows a denial of past injustices by the Canadian state, such as the residential schools, as having any role in Indigenous over-incarceration.

An alternate viewpoint sees crime as a reaction by the offender to adverse personal and social circumstances that law-abiding persons may not have to worry about. This viewpoint may demand viewing an offender in a more compassionate and sympathetic light, demanding that we search for alternatives to incarceration in addressing harmful behaviour. Prison abolition is an emerging school of thought that explores fundamental questions about the organization of society and how so-

ciety responds to harmful behaviour by its own members. A common thread throughout prison abolition approaches is a striving for the very nearly complete abandonment of incarceration as a criminal sanction. Its theories are based on the conclusion that the vast majority of crimes are better explained as reactions to personal and social stresses than as isolated moral choices. Prison abolition as a concept was developed by Black American scholars who focused on the over-incarceration of Blacks in the United States.¹⁹

A key endeavour of this book is to adapt notions of prison abolition in ways that are distinctive to the circumstances and needs of Indigenous Peoples in Canada. Indigenous over-incarceration describes incarcerating Indigenous people at rates that are disproportionate to their representation in the overall Canadian population. The term itself may hold out the unfortunate suggestion that incarcerating Indigenous Peoples at rates comparable to non-Indigenous Canadians is reasonable. But I want to go further than that. I envision a future where incarceration becomes almost completely unnecessary for Indigenous Peoples. And that means an extensive search for alternatives to incarceration, including preventative programming, Indigenous approaches to justice that resemble restorative justice, and improving correctional programming.

There is no question that residential schools have left behind a dreadful social legacy. Empirical evidence is mounting to prove that the schools have left multiple generations of Indigenous Peoples in poorer overall health,²⁰ with poorer mental health and increased depressive symptoms,²¹ and more likely to contemplate or commit suicide.²²

A key part of this book in Chapters 3 and 4 is to disprove the skeptics and establish strong connections between the residential schools and the ongoing problem of Indigenous over-incarceration. Numerous empirical studies prove that certain social conditions — like poverty, exposure to child welfare apprehension, and growing up in an abusive or unstable home environment — will increase crime and recidivism in communities, Indigenous or non-Indigenous. Residential schools, through their physical and sexual abuse of students and by neglecting student education and thus contributing to Indigenous poverty, have ensured that deplorable social conditions conducive to crime have persisted in Indigenous communities generation after generation. Many reported decisions from the Canadian legal system see judges confirming that these factors can be tied back to the residential schools and that

they played a strong role in Indigenous accused getting charged with Canadian criminal offences. Residential schools may not be the only causal factor behind Indigenous over-incarceration, but there is no mistaking that the problem would not be anywhere near the magnitude it is today, if at all, but for the schools.

Chapter 5 explores what is meant by *reconciliation*, a term that itself has been subject to significant debate. The understanding of reconciliation that will be advanced here is that Canada must accept responsibility for the social problems left behind by residential schools, with concrete actions and policies that go far beyond any verbal apologies. This book envisions two stages of reconciliation. First is a transitory phase in which Canada must accept responsibility by acting in genuine partnership with Indigenous Peoples themselves in pursuing a comprehensive set of actions and policies that will undo the harmful social legacy of residential schools. The transitory phase occurs largely within a state-administered framework. The hope here is that the transitory phase can eventually give way to revitalized Indigenous legal orders that can administer themselves with a substantial independence from the Canadian state. Note that the transitory phase may be necessary to begin, as full Indigenous self-determination can never be an immediate overnight realization. The transitory phase envisions Indigenous Peoples growing their capacity and ability to administer over time, to the point that they can manage their own Indigenous legal orders.

Chapter 6 explores the current legal and political status quo, concluding that it comes nowhere close to what is needed for reconciliation. Civil compensation for the students of the residential schools does nothing to address the ongoing destructive social forces that the residential schools set in motion. There have been efforts to address the harms caused by residential schools through social programming. But these initiatives tend to be inadequate and are subject to oscillating priorities, especially as governments change after elections. The Aboriginal Healing Foundation, for example, operated for a little over twelve years before being forced to close its doors.

The Canadian criminal justice system remains fundamentally committed to deterrence and retribution through incarceration. Its actors, such as judges or lawyers, frequently acknowledge the influence of residential schools in bringing Indigenous accused into its courts. There are now in fact legal principles that require judges and lawyers to account

for the circumstances of Indigenous accused and to seriously consider alternatives to prison for Indigenous Peoples. But the judges typically end up falling back on deterrence and retribution to justify incarceration, as the fundamental orientation of the justice system obliges them to do so. Prison abolition advocates have criticized American law-and-order policies as accomplishing a new form of segregation through incarceration, punishing Black people for being Black. That condemnation strikes a chord for the discussions in this book as well. The routine operation of the Canadian criminal justice system becomes an exercise in incarcerating Indigenous Peoples for being Indigenous. It places the blame squarely on Indigenous Peoples, with little if any interrogation into the Canadian state's culpability in Indigenous over-incarceration.

Even if Indigenous Peoples obtain self-determination, the next natural question is what to do with it. Chapters 7 to 11 consider in detail what kind of initiatives are necessary for true reconciliation. A comprehensive resolution is one that attempts to address Indigenous over-incarceration at all possible points in time that can lead to Indigenous persons being subjected to imprisonment. Chapter 7 explores a greater investment in preventative and social programming that will build and mould healthier Indigenous communities so as to minimize to the maximum possible extent the need for any "after the fact" responses in the criminal justice system.

Chapter 8 canvasses arguments in favour of Indigenous justice initiatives that parallel restorative justice. Chapter 9 explores arguments that raise concerns about the ability of restorative justice to realize its objectives, such as the potential for power abuses, questions of whether it actually lowers crime in comparison to the standard justice system, and whether restorative justice can truly motivate offenders to accept responsibility and reform behaviour.

Chapter 10 explores paths forward for Indigenous justice, specifically in ways that respond to the critiques raised in Chapter 9. Procedural protections can be designed into restorative justice initiatives to prevent power abuses, although the efficacy of restorative justice programming may depend on the willingness to invest real resources into such frameworks, as a form of justice reinvestment. I also explore methods of accountability that are rooted in Indigenous cultures. The transitory phase certainly implies expanding the reach of restorative justice beyond the minimal range of less serious offences to which the state can comforta-

bly apply restorative justice. If we can move beyond the transitory phase to fully realized Indigenous legal orders, those legal systems have their ways of instilling accountability and responsibility that are different from Western reliance on incarceration. Indigenous legal orders can then use Indigenous approaches to justice for an even greater range of behaviours than those expected during the transitory phase of state partnership. I argue that it is possible to mould mainstream public opinion to become more supportive of alternatives to incarceration, thereby avoiding concerns that Indigenous justice initiatives would only amount to co-opted appendages of the state.

Chapter 11 starts by recognizing that, even while trying to minimize the need for incarceration, there may be a select few offences that are so serious (e.g., murder) or a select few offenders who are so dangerous that Indigenous communities themselves may not see any reasonable alternative to prison. Furthermore, the transitory phase suggests that lessening reliance on incarceration will itself be a long-term project that can take years or even decades. The chapter therefore examines the development of culturally appropriate correctional programs that will facilitate parole and reintegration for Indigenous inmates, as well as Indigenous-specific risk assessment instruments that will increase Indigenous inmates' access to needed programs and services. We now begin the discussions by examining different ways of viewing crime.

Notes

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 - 9 Carol LaPrairie, “The Neighbourhood Context of Urban Aboriginal Crime,” *Canadian Journal of Corrections* 50, 5 (2008).
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 - 11 For a historical overview of the numbered treaties in the western provinces, see J.R. Miller, *Skyscrapers Hide the Heavens*, 216–24; Dickason, *A Concise History of Canada’s First Nations*, 173–87.
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EXCERPT