

Compelling evidence: The Truth and Reconciliation Commission versus the Harper Conservatives

A LONG-AWAITED REPORT

On June 2, 2015, the Truth and Reconciliation Commission of Canada (TRC) released its long-awaited findings on Indian residential schools. In addition to a series of private ceremonies and public events, media coverage was extensive and highlighted the efforts of the TRC to expose the inter-generational trauma that Indigenous survivors and their families have experienced as a result of the residential school system. This was arguably one of the first times that Canadian media have acknowledged Indigenous issues and injustice with fervour and respect.

While the work of the TRC culminated in a few days of concentrated media attention, the years leading up to that point were complex and hard-fought. The three commissioners—the Honourable Justice Murray Sinclair, Dr. Marie Wilson, and Chief Wilson Littlechild—faced many challenges during their tenure on the TRC. Perhaps most notable was the multi-year battle by the TRC to access government records on residential schools. The *Indian Residential Schools Settlement Agreement* was finalized in 2006 and mandated the creation of the TRC. The settlement also laid out the TRC’s objectives, specifically an investigation into residential schools and recommendations for healing and reconciliation for survivors and their families. Further, the federal government and implicated churches were required to provide all “relevant documents in their possession or control” (*Indian Residential Schools Settlement Agreement*, Schedule N, s. 11) to the TRC. However, the TRC spent years trying to obtain this evidence from the federal government, putting at risk the TRC’s ability to fulfill its mandate. The result was a lawsuit, for which the TRC’s fac-

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tum stated: “If the parties, through incompetence, delays or deliberate stonewalling (or a combination thereof) sabotage the work of the commission, then Canadians are certain to forget (and never fully learn) what has happened” (Canadian Press 2012). The primary purpose of the court action was to obtain clarification on the government’s obligations to provide evidence on residential schools, including what constituted “relevant” documents for disclosure.

GOVERNMENT RECALCITRANCE

The case highlights the years of struggle endured by the TRC to obtain required evidence from the Harper government. Affidavits filed in relation to the case showed that the federal government started to provide the requested evidence in April 2010, but only 38,000 documents were provided at that time. It was not until November 2011 that the government delivered most of one million documents, but that amount still constituted only a portion of the records necessary for the TRC to set up the National Centre for Truth and Reconciliation with a complete permanent archive. As of 2012, the TRC had not received the majority of the documents needed for the archive, and consequently

filed a request for direction with the Ontario Superior Court of Justice (Perkel 2012). Indigenous communities also experienced the negative impacts of government recalcitrance: the Government of Canada’s resistance to the TRC’s mandate was contrary to the objectives of the settlement, the dignity of survivors and wider objectives of reconciliation (*Niigaan* 2013).

The 2013 *Fontaine* ruling, delivered by Justice Stephen Goudge, highlighted the mandate of the TRC as outlined in the *Indian Residential Schools Settlement Agreement*:

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation. (*Fontaine* 2013, para. 17)

In this context of reconciliation, Justice Goudge maintained the significance of the TRC’s responsibilities to record and preserve the public history of IRS, and thus the TRC must have access to all relevant evidence as part of its “legacy mandate” (para. 22). Yet, in addition to preventing access to evidence on Indian residential schools, the federal govern-

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ment also fought against the TRC's legal capacity and standing to seek direction on access to such evidence (paras. 38–40). Such actions contradict the spirit of the government's "official apology" on residential schools, issued only a few years prior in June 2008.

Contrary to the Government of Canada's legal arguments, Justice Goudge emphasized the role and objectives of the TRC as follows:

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit ... a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools. (Fontaine 2013, para. 59)


WHAT CONSTITUTES RELEVANT EVIDENCE?

Consequently, access to relevant evidence was "obviously a critical precondition for the TRC to discharge ... its mandate" (para. 61). Moreover, as included in the *Indian Residential Schools Settlement Agreement*, "[i]n order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide *all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission*" (emphasis in original).

However, what constitutes "relevant" evidence? According to the same ruling, relevant documents do not mean exhaustive or complete document production, but rather, documents "that are *reasonably* required to assist the TRC to discharge its mandate" (Fontaine 2013, para. 80; emphasis added).

"Suffice it to say that Canada's obligation ... is to provide the documents in its possession or control that are reasonably required to assist the TRC to tell the story of the legacy of Indian residential schools" (para. 86).

One year later, a second judicial ruling at the Ontario Superior Court of Justice was delivered by Justice Paul Perell in response to the TRC's request to compel the Canadian government to produce relevant documents connected to a criminal investigation involving a residential school in Ontario. While some relevant documents were in the records of the Ontario Provincial Police, it is notable that the Government of Canada once again fought against the efforts of the TRC (Fontaine 2014). Rather than contribute to the arduous task of creating an accurate legacy to teach Canadians and the public about the atrocities of Indian residential schools, the Government of Canada once again stonewalled the TRC's quest for evidence. Indeed, the ruling held that the government had failed in its obligations to provide relevant evidence to the TRC (CBC News 2014; Wawatay News 2013). Since then, survivors have been seeking full disclosure and compensation because the Canadian government only provided heavily redacted versions of the court-compelled documents (CBC News 2015).

During these court proceedings, the TRC lost money needed for its work and spent unnecessary time compelling the government to provide documents. While the government was not able to keep evidence hidden, some commentary indicated that the Harper Conservatives did not respond adequately to the TRC's report and recommendations either (Kennedy 2015). Ultimately, these actions have been questionable at best and irresponsible at worst. 

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