Reconciling Truths

Contents

Acknowledgments / ix

List of Abbreviations / xi

Introduction: Setting the Context / 3

1 Inquiries in Canada / 12

2 The Mackenzie Valley Pipeline Inquiry / 40

3 Inquiries and Residential Schools / 61

4 Canada's Truth and Reconciliation Commission / 93

5 Inquiries and the Crisis of Missing and Murdered Indigenous Women and Girls / 139

Conclusion / 194

Epilogue / 207

Appendix: Chronological List of Referenced Canadian Commissions / 212

Notes / 214

Selected Bibliography / 293

Index / 298

Introduction

SETTING THE CONTEXT

One of the most difficult conversations that I have had as a lawyer occurred during my last year as Legal Director of the Women's Legal Education and Action Fund (LEAF) in 2017. It was a call from Meg Cywink, an Anishinaabe woman and advocate for missing and murdered Indigenous women and their families, whose sister, Sonya Nadine Mae Cywink, was murdered in 1994. No one has ever been charged with Sonya's murder. Meg and her family have worked in various ways ever since to address the failings of Canadian law that her family, and well over a thousand other First Nations, Métis, and Inuit families in Canada, have faced.[1]

Meg knew that I had been among the many voices over the years that had advocated for the establishment of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG),[2] an inquiry that was not shaping up to be the process that we had sought. She and a large group of MMIW families had signed a letter to the Chief Commissioner calling for significant changes to how the inquiry was being run.[3] Meg was calling me to ask whether civil society organizations such as LEAF would support the families like hers that wanted the inquiry to be reset.

During that conversation, which lasted about an hour, I realized that I had never felt so acutely like a *Canadian* lawyer in my life. I had called for a public inquiry with the belief that this mechanism, this Canadian legal mechanism, would be able to identify, name, and address the structural violence that underpins the disproportionate disappearances and deaths of Indigenous girls and women in Canada. I believed that a well-run

national inquiry could also engage the wider non-Indigenous public in a way that would ultimately help to shift the narrative in this country away from self-congratulation about Canada's new relationship with Indigenous peoples and our rhetoric about reconciliation and toward a reckoning with our own deeply entrenched systemic racism and sexism that have created and continued this horror in our midst. My academic work on the institutional design of a public inquiry informed my view that such a legal mechanism could work fundamentally to address societal harm and prevent its recurrence.[4] However, the National Inquiry into MMIWG was not turning out to be what many had called for with such fervour and certainty. It appeared instead to be a painful disappointment, in danger of causing further harm to those most affected by the process.

Meg, who had suffered the violent death of her sister without ever seeing any justice done, wanted to know whether I was still prepared to support the inquiry. I said that I thought the inquiry could still be useful, but given the way that it was unfolding, its utility likely would not materialize for a long time. I also told her that even then, it might not help her and her family in any tangible way. In that conversation, I felt every inch a white settler in this country with my three degrees in the colonizer's law and my "expertise" about public inquiries.

My conversation with Meg brought into sharp relief the contrast between my academic understanding of the public inquiry as a legal mechanism and my realization that this mechanism – which I had believed could prompt Canada to address the crisis of violence against Indigenous women and girls – was in danger of failing in its task. Meg told me that she thought the inquiry was just an exercise for academics that was simply retraumatizing families and unlikely to produce anything useful. She wondered what good the inquiry would really do for Indigenous women and girls.

On Becoming a Canadian Lawyer

As a younger woman, I planned to become an international human rights lawyer. Before law school, I worked with Professor Kathleen Mahoney when she was one of the counsel to Bosnia Herzegovina in its genocide case against Serbia Montenegro before the International Court of Justice.[5] I

built and coordinated a team to gather affidavits from Bosnian Muslim survivors of human rights violations in Serbian camps during the war in the former Yugoslavia who came as refugees to Canada. The team also sought to gather the evidence to make the case to have rape declared a war crime. During law school, I interned at the United Nations Relief and Works Agency for Palestine Refugees in the Near East in the Gaza Strip, documenting violations of international human rights law by both Israelis and Palestinians. After a couple of years of practising law in Canada, I went to Ghana in West Africa to work with the Center for Democratic Development, funded by a Transitional Justice Fellowship from the Notre Dame Center for Civil and Human Rights. I was an official observer of Ghana's National Reconciliation Commission hearings in 2002–03 on behalf of a civil society coalition that sought to support the work of that truth commission.

These experiences piqued my interest in transitional justice mechanisms: that is, methods for moving countries from autocratic to democratic rule or from war to peace. I returned to Canada with the intention to go to graduate school and write about the truth commission mechanism before returning to international work. During the couple of years between returning to Canada and starting graduate studies, I began to practise Aboriginal law.[6] I had already been struck during my times working overseas by the importance of having local knowledge and insight in order to do effective legal work. I frequently thought that I had gained much more than I had given during my overseas stints, and I often felt distinctly uncomfortable coming to "do good" in Gaza and Ghana from a country that inflicted grave human rights abuses on Indigenous peoples without much self-awareness or acknowledgment of doing so.

Practising Aboriginal law in British Columbia provided me with insights from historical documentation, including by Commissioners appointed to assign territories to Indian bands in the early 1900s.[7] These assignments were made in order to remove the Indigenous peoples from fertile areas on the assumption that white settlers could turn the lands into profitable farms and ranches. The Commissioners' decisions confined the original inhabitants to lands that generally appeared to be rocky outcroppings without water, too small for a viable life of hunting, fishing, and

gathering, forcing them to become dependent on social welfare from the state. Their children were forcibly removed to residential schools. Their languages and cultures were diminished or lost. I had known some of the history, but it was eye opening to see it in black and white in the archival documents kept by those who wished to transfer as much land as possible to white settlers. I began to feel much more acutely the hypocrisy of my desire to return to international human rights work when my home context was so fraught with historical and modern human rights violations.

When I began my graduate studies, the massive class action lawsuits against the churches and the government brought by survivors of the residential schools had been under way for years.[8] Provision for a truth and reconciliation commission was part of the settlement agreement being negotiated. When trying to settle on a topic for my doctoral dissertation, I had a serendipitous lunch with retired Senator, first woman Moderator of the United Church of Canada, and first woman President of the World Council of Churches, The Very Reverend, the Honourable Lois Wilson. She pointedly (but not unkindly) told me that, if I wanted to have any credibility as an international human rights lawyer, I had better focus on my own backyard. With Canada's dismal record of human rights violations against Indigenous peoples in mind, I took this advice and wrote my dissertation about the use of truth commissions in established democracies,[9] with a focus on the Canadian Truth and Reconciliation Commission on Indian Residential Schools (TRC) then being negotiated. I pondered what makes a truth commission different from a commission of inquiry and why in Canada we have had hundreds of public inquiries but only one truth commission – and then only because we were forced to include the TRC in a settlement agreement when class action lawsuits were calculated to be too expensive to continue to fight in court. In considering these questions, I repeatedly thought of the Mackenzie Valley Pipeline Inquiry, led by then Justice Thomas Berger. My research on that inquiry led me to conclude that a truth commission is simply a form of public inquiry, and indeed I came to view the Berger Inquiry as Canada's first truth commission. Reaching that conclusion required some unpacking of the terms "truth commission" and "public inquiry."

Commissioning Truth or Merely Inquiring?

In much the same way that I felt hypocritical about seeking to address human rights violations overseas rather than addressing those at home, it seemed to me that my country had the same difficulty. Canada resisted establishing a truth commission to address its practice of removing Indigenous children from their families for over a century in furtherance of its colonial policies, but we in Canada expected that other countries (i.e., African and Latin American countries) should address their own histories of mass human rights violations with truth commissions. What is it about Canadians that makes us think we are somehow exceptional? Our smug self-assurance that we have never been guilty of mass human rights violations seems to be part of the answer.

The symbolism of the legal mechanism's title holds some power. A truth commission and a public inquiry might in fact be similar in operation, but the acknowledgment and intention telegraphed to the world by establishing a truth commission are different from those sent for a commission of inquiry. Why have a commission to tell us the truth when we can have a commission merely to inquire into whether such a truth might exist? Although our narrative of ourselves as "the good guys" in the global sphere persists, a commission of inquiry seems to be a genteel solution for a "civilized" country that does not wish to admit on a global stage to the dirty hands of genocide. Over time, though, the cumulative effect of multiple commissions that present findings about Canada's human rights abuses against Indigenous peoples will chip away at this narrative. After all, we have now been told publicly by the National Inquiry into MMIWG that our country is guilty of ongoing genocide.

For now, it appears that, despite having had the TRC in Canada, we will continue to be much more open to holding commissions of inquiry than we will be to holding truth commissions. We are more likely to continue to inquire into whether there is a truth to be found than to declare that there is a truth that must be addressed. Regardless of what we name a commission, the Canadian public inquiry mechanism, particularly since Berger revolutionized it in the 1970s, is capable of determining the truths that we might wish to ignore. It is a legal mechanism of considerable

usefulness and potential, but its utility and promise hinge on key decisions made at the outset.

My work on the Berger Inquiry and the TRC convinced me that the public inquiry mechanism could be used to address fractious issues in our society. I believed that, in the right hands, a truly public inquiry could function as a truth commission to establish an accurate historical record and assist us in preventing future human rights violations. That is why I wholeheartedly joined those who advocated for a national public inquiry to address violence against Indigenous women and girls. However, the potential of a public inquiry to be transformative in society is not easily realized. So much depends on the choices made by those setting up the inquiry – particularly on the people chosen to lead it and the processes chosen to run it. Getting it wrong can revictimize those who have already paid too dearly. As lawyers, as Canadians, we can wring our hands and say "what a shame that the National Inquiry into MMIWG did not go according to plan," but for at least some family members whose questions about their missing and murdered loved ones remain unanswered, going through a $92 million inquiry process that did not run effectively was retraumatizing.[10]

To illustrate how the commission of inquiry mechanism can fulfill or fail to reach its potential, I consider a number of inquiries that have focused on Indigenous people in what is now Canada. The arc of this story follows the evolution of inquiries over time. They began as administrative mechanisms by colonial powers that lacked control on the ground and used Commissioners as *ad hoc* civil servants to assist them in creating and enacting policies on the peoples inhabiting the territories that later became Canada. Berger showed that inquiries could be much more than perfunctory. People in established democracies might cleave to the nomenclature of a truth commission as an exceptional mechanism that addresses mass human rights violations in faraway places, but the public inquiry form has the flexibility to hold a mirror up to the face of our own complicity in such abuses. In the hands of a skilful team, a public inquiry can diagnose the causes of societal ruptures and prescribe appropriate treatments. The inquiry form is adaptable. Over the past few decades, Canadians have seen that an inquiry can be more than a routine handling of a political hot

potato. If there is an appetite to hold up that mirror at the start of an inquiry, then it can be run such that it accrues the necessary political will at the finish line for the recommendations to be implemented.

I will enumerate aspects of the institutional design of an inquiry that can lay the groundwork for achieving the implementation of recommendations, but holding up the mirror to our complicity in societal harms will continue to be a challenge. The expectation with a truth commission is that it will create an incontrovertible historical record that can help to put to rest an erroneous narrative about a country perpetuated by its dominant storytellers. This process is not instantaneous. The strong and immediate rejection among white Canadian commentators of the genocide finding in the 2019 report of the National Inquiry into MMIWG[11] illustrates the need to design the public inquiry so as to shift the narrative during its process, thus bringing about the social change necessary to create the path for acceptance of such a conclusion.[12]

This book is an exploration of the Canadian legal mechanism of the public inquiry and its potential to be a transformative means of addressing persistent colonial harms. It is about the ability of this mechanism to shift the dominant Canadian narrative over time and the risks inherent in its use. I have no doubt that the public inquiry mechanism will continue to be employed in Canada as a way to address deep societal challenges, so I seek here to identify how it can be done better.

I begin by providing some history of the origin of the commission of inquiry as a tool of the British government to address contentious issues in its settler colonies before focusing on its use since the 1800s to address "the Indian problem" in what is now Canada. I discuss some similarities and differences between the public inquiry and the truth commission (which is becoming more familiar to us all). I then take the reader to the beginning of the modern commission of inquiry with a chapter recounting the story of the Mackenzie Valley Pipeline Inquiry and its profound impact on the Canadian legal landscape. I trace a trajectory from this inquiry, led by then Justice Thomas Berger in the mid-1970s, which considered whether a pipeline should be built through unceded Indigenous territory, through a number of commissions that have addressed Indigenous issues in the past half century. I touch on various provincial inquiries, many of

which have focused on the deaths of Indigenous people such as Helen Betty Osborne and J.J. Harper (the Manitoba Aboriginal Justice Inquiry, 1991), Neil Stonechild (the Stonechild Inquiry in Saskatchewan, 2004), Frank Joseph Paul (the Paul Inquiry in British Columbia, 2007), and Dudley George (the Ipperwash Inquiry in Ontario, 2007). I will also consider national commissions such as the Royal Commission on Aboriginal Peoples (RCAP, 1996) and the TRC (2015).

I provide a history of the residential schools and the search for redress by survivors of those schools and Canada's responses to that search, including the TRC. I include an overview of the negotiations that produced the TRC as well as the other aspects of the Indian Residential Schools Settlement Agreement. I review the mandate and structure of the TRC in comparison to other forms of commission of inquiry in Canada. Having set out the institutional design characteristics that will enable an inquiry or commission to be successful, I analyze the effectiveness of those elements in the TRC. I emphasize that the question of leadership is critical to a truth commission's success, and I consider the challenges that the TRC experienced on that front. I explore how the TRC engaged or failed to engage the public in its task, which I claim was essential to its ability to fulfill its mandate. I also consider comparative information from international examples of truth commission processes.

Although the Canadian context is my main focus, I note that established democracies frequently support truth commissions in transitional states but do not favour them as a mechanism for addressing their own sullied human rights histories. These states prefer instead to appoint commissions of inquiry, which do not begin by acknowledging that a difficult truth must be addressed by society. Rather, they begin by stating that there is a situation that simply requires investigation. I explore the unusual genesis of the Canadian TRC in a legal settlement agreement and conclude that a truth commission is in fact a specialized form of public inquiry. I also explore the potential for public inquiries to perform the function of truth commissions under the right circumstances.

With this background, I then assess the more recent Canadian commissions that have addressed disproportionate levels of violence against Indigenous women: the 2012 Missing Women Inquiry in British Columbia

and the 2019 National Inquiry into MMIWG that conflated the public inquiry with the truth commission. The primary work of the book is to analyze the effect that two factors – choice of leadership and process – have on the ability of an inquiry to achieve its mandate and, ideally, have its recommendations adopted. Although I focus here on the Canadian inquiries that have engaged with Indigenous issues, the analysis of how to design an effective public inquiry is intended to be more broadly applicable.

Other books have identified the important day-to-day processes and requirements for running a public inquiry under Canadian law.[13] My focus in this book is on the need for a public inquiry to be well led and properly run if it is to be effective and not perpetuate harm. I provide examples and an in-depth analysis of what this combination of leadership and process must look like for a public inquiry to do more than have its recommendations gather dust on the proverbial shelf.

1

Inquiries in Canada

For many years, colonial governments have favoured establishing commissions of inquiry to formally investigate and address challenging societal problems. Since before Confederation, the public inquiry has been utilized as a legal mechanism to address difficult issues arising from the colonial relationship with Indigenous peoples in what is now Canada. However, the inquiry mechanism has often allowed non-Indigenous governments and their citizens to appear to have paid serious attention to an issue without necessarily taking responsibility for their role in creating the issue in the first place or for preventing its recurrence. Indeed, with some exceptions, the recommendations of numerous investigative and public policy inquiries have gone unimplemented. Why is this? Can it be remedied? Can the public inquiry mechanism contribute to the processes of reconciliation between Indigenous and non-Indigenous peoples now ostensibly under way in Canada? To answer these questions, I consider the particular context of using this colonial mechanism to address the Canadian relationship with Indigenous peoples.

Why Use Public Inquiries?

There can be considerable debate about the utility of any one commission of inquiry. However, in theory, public inquiries are useful for gathering wide-ranging information through their broad investigative abilities in order to provide a comprehensive picture of the facts surrounding an issue or event.[1] They can be an effective mechanism for tackling large and pressing concerns

of institutional and policy reform. Their independence from governments and other parties enables them to assess credibly the evidence and report on their conclusions.

An additional trait, one at the heart of my work on public inquiries, makes them a critical legal mechanism for addressing pressing social issues. Former Supreme Court of Canada (SCC) Justice Gerald Le Dain's influential discussion of public inquiries articulates the part that they play in shaping societal attitudes:

> In an inquiry of this kind a commission becomes very much aware of its relationship to the social process. It has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour ... The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.[2]

This potential for social influence makes the public inquiry an appealing mechanism for politicians and advocates alike. Echoing Le Dain's social function thesis, Robert Centa and Patrick Macklem note the investigatory, informative, educational, and social functions of commissions of inquiry. They state that the independent and non-partisan nature of commissions enables them to consider social causes and conditions in a broader fashion than is available to judicial or legislative bodies, thus performing a valuable function in terms of defining public policy. These attributes promote government accountability to the citizenry and help to explain why the public inquiry remains part of the legal order.[3] As Le Dain noted, although an inquiry is accountable to the government, it is ultimately accountable to the public and must speak to the public in its report to the government.[4] Thus, a public inquiry can be an instrument of democracy, or at least it has that potential.

This ability to promote accountability is an important aspect of the commission of inquiry's social function.[5] Unlike a legislative or courtroom process, the public inquiry is not driven by interested parties. Through its hearings and investigative activities, the public inquiry process can precipitate changes in attitudes. The public can become aware of officially recognized problems and begin to seek solutions to them. The inquiry can

create pressure on individuals and organizations to account for their acts or omissions, even if they are not legally obliged to do so. "This form of accountability is especially important because it can affect perceptions and behaviour long after the inquiry has ended."[6] Public inquiries can engage in organizational reform through their "greater capacity to engage in quasi-legislative activity by openly articulating new standards of proper conduct and applying them to past events."[7]

These attributes sometimes provoke criticism. A common critique of public inquiries is that they are used as a means of deferring a political problem, given that it can take years to hold public hearings, conduct research, and complete a report.[8] In addition, an inquiry's recommendations are merely proposals for which there is no guarantee of implementation by the government. Commissions of inquiry have no powers to sanction actions of the past, unlike courts, which can issue orders against wrongdoers for their actions.

Another political concern related to commissions of inquiry is that, whereas a government might be able to distance itself from an issue by referring it to a commission, that government can equally refrain from creating a commission. The existence of a commission depends on a government decision to establish it in the first place. Although public inquiries are independent of governments once established, they are dependent on governments for their existence. This means that they are at the mercy of the exercise of political discretion in one crucial sense.[9] Indeed, some commentators have voiced concerns that governments appear to be increasingly reluctant to establish commissions of inquiry when a public crisis might demand it[10] or to grapple with major policy changes that require more time and focus than can be afforded by politicians concerned about election cycles.[11]

A further significant concern about commissions of inquiry relates to procedural fairness, particularly with respect to the coercive powers accorded to some inquiries in their operations (e.g., power of subpoena or power to require testimony under oath). That is, even if a Commissioner might wish to run an inquiry in a manner less adversarial than a court, the parties to the inquiry might feel obliged to participate with an eye on the possible legal consequences for them of the inquiry's findings.[12] An

inquiry's investigations or proceedings can unearth information or hear unproven evidence that can harm a party's reputation or provide fodder for future criminal or civil proceedings. Sometimes inquiries have overstepped the bounds of their mandates and become court-like in their processes without ensuring the due process protections available in a courtroom.[13] However, in general, policy-oriented inquiries raise few of the due process concerns of the more investigative inquiry.[14]

All commissions of inquiry, whether investigative or policy oriented, can give rise to criticisms of their costs. The Krever Inquiry into the contamination of the national blood supply with hepatitis C and HIV is often used as an example of the problems with public inquiries.[15] The Inquiry ran over time (it was supposed to take one year and took almost five) and over budget (instead of the $2.5 million initially assigned, it spent $17.5 million),[16] embattled by strenuous legal challenges from those who worried that its conclusions would expose them to massive damages in negligence actions. Justice Krever did not report until the last of the challenges to the Supreme Court of Canada had run its course. The government decided to make changes to the blood system before the release of the report because of the urgency of the matter,[17] rendering the report of questionable value.

Although the financial costs should be an important consideration, it is also vital to ask what the social costs would be of *not* fixing and ensuring the safety of our blood system, of *not* ensuring the safety of a community's drinking water,[18] or of *not* investigating the government's complicity in the denial of fundamental human rights.[19] As noted by Justice John Gomery, "[t]he criticism that commissions cost too much is valid if one takes the position that a price can be put upon the search for truth and justice."[20]

Despite the criticisms outlined above, I still view the public inquiry as a *potentially* useful mechanism. Even if its recommendations are initially ignored, the process of holding a public inquiry opens the possibility for dialogue about issues of public importance and prepares the way for attitudinal change and policy development.[21] As previously noted, a public inquiry has important features, including the ability to consider an issue in its larger context, to use broad investigative powers to assemble a comprehensive factual portrait, and to use its position as an independent, nonpartisan body. Along with their educational potential and their ability to

promote accountability, public inquiries can be a valuable public policy tool. However, the utility of an inquiry is tied to the effectiveness of its leadership and to the process used by Commissioners to fulfill their mandate.

Commissions of Inquiry: Some History

The public inquiry mechanism has its roots in the royal commission, which referred to the royal warrant or letters patent issued under the authority of the monarch.[22] Royal commissions can be traced back to at least the Domesday Book of 1086,[23] whereas commissions of inquiry date back to at least the twelfth century, with the exercise of the royal prerogative to appoint citizens to perform duties on behalf of the Crown.[24]

Federal public inquiries in Canada are governed by the *Inquiries Act,* which authorizes the cabinet to "cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."[25] According to Nicholas d'Ombrain, both royal commissions and commissions of inquiry are established identically as public inquiries under Part I of the *Inquiries Act,* with the same powers and privileges. The decision to call one a royal commission and the other a public inquiry is based on the subject matter of the inquiry.[26] "The Canadian practice has been to reserve the title 'royal' for commissions that are inquiring into matters of policy, loosely defined."[27] Leonard Hallett distinguishes royal commissions of inquiry from other government-appointed advisory bodies because they cease to exist when they make their reports.[28]

The public inquiry mechanism is used in Canada frequently. In his review of the history of Canadian public inquiries, d'Ombrain states that most of the (then) over 350 public inquiries since Confederation have focused on narrow issues, although between the 1930s and the 1960s governments appointed inquiries to gain advice on significant issues of public policy such as dominion-provincial relations and the establishment of the Bank of Canada.[29] The Diefenbaker and Pearson governments brought another round of important national policy inquiries, including those on health, bilingualism, and the status of women, but since then, d'Ombrain asserts, there have been few significant policy inquiries. He

comments that "[t]he one major policy inquiry launched by the Mulroney administration, the Dussault-Erasmus commission on aboriginal peoples [i.e., the Royal Commission on Aboriginal Peoples], was more a gesture of puzzled goodwill than a clear-sighted initiative."[30] He states that the Chrétien government "received the report of the commission on aboriginal peoples but with little evident enthusiasm for the ideas contained therein."[31] Although the government's enthusiasm for significant policy inquiries might have declined since the 1960s, the public inquiry is still a prominent tool for investigating incidents that create public concerns.[32]

The Development of the Truth Commission

It is the ability of the commission of inquiry to search for truth and justice that made it suitable for adaptation to the human rights context. The commission of inquiry form has valuable qualities for a truth-seeking commission as well: independence, openness and visibility, the opportunity for the creative framing of issues, a flexible political dynamic through the appointment of Commissioners, the focus on social causes and conditions, and the "social function."[33] The ideas suggested in Le Dain's account of the social function of the public inquiry in Canada in the 1970s likely influenced how some public inquiries were subsequently conducted in Canada. These inquiries began to incorporate elements that mirror features of the truth commissions that arose in the decade that followed. Indeed, the evolution of the commission of inquiry form seen in Canada in the 1970s appears to be prescient when one considers the subsequent development of the truth commission.

The international phenomenon of the truth commission arose largely in the 1980s, and certainly by the 1990s it had become a significant new mechanism in the law's search for accountability for past human rights abuses. A truth commission's very purpose is to have an effect on perceptions, attitudes, and behaviours – it is meant not merely to shed light on a dark period in the country's history but also to help ensure that the mistakes of the past are not repeated. It does so by making recommendations for institutional or structural change and by educating the public about the abuses that occurred. In this way, social influence is the raison d'être of the truth commission. This aspect is akin to the social function of commissions

of inquiry, as described above, yet many commentators discuss the truth commission without explicitly connecting it to the commission of inquiry. Commentators who do make the connection try to distinguish the truth commission as a unique mechanism.[34] However, the truth commission is better understood as a specific type of commission of inquiry – it arises in a specific context of addressing human rights violations, and both its process and its goals manifest its social function.

Why did this type of commission of inquiry, the truth commission, arise? Following the Second World War, international law moved toward the development of international human rights law and a focus on individual criminal accountability for violations of the laws of war. Human rights advocates created new ways to address human rights violations. Initially, their innovations took the form of the International Military Tribunal trials in Nuremberg and Tokyo,[35] the formation of the United Nations, and the creation of non-governmental organizations such as Amnesty International.[36] The difficulty in securing accountability for more than a few people and the cumbersome nature of war crimes prosecutions, among other factors, gradually led to a search for other mechanisms that could address past human rights abuses more broadly. The field of transitional justice developed within this legal discourse.

Transitional justice refers broadly to legal mechanisms that address past crimes or abuses in states moving from authoritarian to democratic rule and/or from conflict to post-conflict. That is, the commonly understood notion of transitional justice relates to the desire to resist impunity for human rights violations in countries experiencing profound political upheavals.[37] The later twentieth century saw a debate about the desirability and practicality of accountability in societies recovering from regimes that inflicted massive human rights violations.[38] The discussion of non-prosecutorial options for addressing gross human rights violations arose because of the "political and practical challenges to employing prosecutorial mechanisms."[39] These non-prosecutorial options included a new form of commission – the truth commission – that shifted the focus from punitive justice to "achieving accountability through truth and acknowledgement."[40]

The 1970s saw a wave of nascent democracies arising out of authoritarian rule. These emerging democracies had to decide how to deal with the human rights violations of the past.[41] A desire by new governments to achieve legitimacy and a growing movement to support the rule of law and the dignity of victims combined to create a situation in which governments could not simply ignore the past. The search for politically viable responses and the increasing tendency to seek accountability became the focus of the transitional justice field.[42] Although punishment was still a major focus for many commentators and policy makers in the field of transitional justice, the truth commission model was beginning to gain ground as a valid mechanism for dealing with the past. How a government uses law to frame questions about past injustices shapes how a society formulates its responses to the shadows of its past. According to Martha Minow,

> [a]s a public instrument dealing with the past, law affords lessons about what produces memories for a community or a nation. Legal actors and those who influence them determine what past harms should give rise to a claim and what past violations should constitute a crime.[43]

The truth commission became a viable option because of its less punitive approach to achieving accountability for historical human rights abuses. Whereas many would prefer that human rights violators be prosecuted and punished, the weakness of incoming democratic regimes (e.g., post-Pinochet Chile) often did not allow for a Nuremberg-like response. Another legal mechanism was required to ensure that the search for accountability did not sacrifice the new democracy.[44] When political conditions made trials impossible, truth commissions began to be chosen over prosecutorial responses. It was the overall context, then, rather than "the result of a detached comparison of the merits of one institutional structure against another,"[45] that resulted in the choice of the truth commission.

At first, prosecutorial and truth commission mechanisms were viewed as an either/or proposition, but increasingly they came to be seen as complementary.[46] Truth commissions did often reflect a compromise between

punishment and impunity,[47] but as they gained credibility it was argued that they could be a "complex and principled compromise between justice and unity in which central elements of both values are retained."[48] Furthermore, such commissions can provide a "more useful truth" than a trial court,[49] in the sense that the picture might be more complete because of an examination of the larger historical context rather than a focus on guilt or innocence in an individual case. Truth commissions can serve many of the same purposes as prosecutions in countries with histories of massive human rights abuses, including "providing a mandate and authority for an official investigation of past abuses" and establishing a basis for compensation of victims or punishment of perpetrators.[50] Such commissions are viewed as being more adept than trials at advancing restorative justice goals such as acknowledging the suffering of victims.[51]

In countries with limited resources and legal systems that might be in disarray, commissions can carry out their mandates relatively quickly in comparison to the criminal justice system.[52] Although a truth commission is ultimately not viewed as a substitute for the criminal trial for "a true judicial determination of responsibility,"[53] it does enable states to benefit from a detailed historical account of past abuses and recommendations for how institutions can be restructured to avoid such abuses in the future. According to Neil Kritz, "[e]stablishing a full, official accounting of the past is increasingly seen as an important element to a successful democratic transition."[54]

Another reason for the rise of the truth commission was the sheer scale of the human rights violations in many emerging democracies. Prosecutions of all perpetrators would have crippled the legal systems of countries that often lacked the resources to fund their police, court, and penal systems adequately. Ruti Teitel comments on the "advent of the so-called truth commissions" as useful when the scale of the abuses is overwhelming to the criminal justice system:

> The commission of inquiry thus emerges as the leading mechanism elaborated to cope with the evil of the modern repressive state, since bureaucratic murder calls for its institutional counterpart, a response that can capture massive and systemic persecution policy.[55]

Thus, the commission of inquiry became adapted to the context of mass human rights violations in the latter half of the twentieth century, and the developing mechanism became known as the truth commission.

The first historical inquiry referred to as a truth commission occurred in Uganda in 1974.[56] Idi Amin established it under that country's public inquiries legislation with an eye on warding off international criticism of human rights abuses under his rule. The report was not published and its recommendations were not implemented. Despite this inauspicious start for truth commissions, later commissions began to have more in common with what we now think of as truth commissions, including increased transparency and effectiveness. The next truth commissions appeared in the 1980s as a wave of democratization passed through Central and South America. There were truth commissions in Bolivia in 1982, Argentina in 1983, and Uruguay in 1985. Commissions in Chile in 1990 and El Salvador in 1992 followed. A second truth commission occurred in Uganda as well as commissions in Chad and Zimbabwe in the 1980s and into the 1990s.

It was not until the mid-1990s that the use of truth commissions came to significant international attention with the South African Truth and Reconciliation Commission, chaired by Bishop Desmond Tutu. The South African TRC is the best known example of a truth commission to date, created as part of the transition from apartheid to democracy. In 1994, South Africa held its first multiracial elections. The African National Congress candidate, Nelson Mandela, was elected President. South Africa's Interim Constitution called for reconciliation and amnesty, and Parliament passed the *Promotion of National Unity and Reconciliation Act* in response.[57] The South African TRC began operations in 1995 with the aim of producing a report that would document the human rights violations that occurred between 1960 and 1994. The TRC had three divisions: the Human Rights Violations Committee (responsible for collecting statements from victims and witnesses and recording the violations), the Reparations and Rehabilitation Committee (to design a reparations program), and the Amnesty Committee (to process and decide amnesty applications). Controversial and wrenching, the South African TRC brought the truth commission mechanism onto the world stage.[58]

In the 1990s, truth commissions became much more common: "Between March 1992 and late 1993, six truth commissions were established."[59] Transitional justice as a field of legal study also gained traction during the 1990s.[60] Particularly with the South African TRC, the truth commission became accepted as an appropriate possibility for transitional states that seek to address a history of abuses. Although a desire for retributive justice for the most heinous crimes can still create a preference for prosecution instead of truth commissions in some cases,[61] by the end of the 1990s truth commissions had found a place among the array of accountability mechanisms available to emerging democracies.[62]

Transitions toward the end of the twentieth century differed from those in earlier decades partly because of the influence of the human rights movement and the concomitant growth of human rights organizations. Not only was there increased pressure to demonstrate accountability for past abuses, but also the methods used were increasingly scrutinized for their accord with international human rights instruments.[63] The international community has largely accepted that past abuses must be addressed by at least one of a variety of mechanisms, and now "the challenge is to fine-tune and better coordinate the options."[64] There has also been a trend toward universal jurisdiction for human rights violations and thus an expansion of accountability to the international arena: "The drive to curb impunity for massive abuses of human rights has manifested itself not only within countries in transition, but internationally as well."[65]

Increased attention to dealing with historical injustices in the past few decades has given rise to a new variation of the commission of inquiry. The truth commission shares attributes of the public inquiry, such as the ability to look at the larger context and promote social accountability for an issue. However, it also has a symbolic quality that aligns with its explicit social function of public education about human rights violations. I discuss in the next section how the truth commission is an innovation of the old legal mechanism of the public inquiry.

Truth Commissions and Public Inquiries

At a June 2007 conference on the then upcoming Canadian Truth and Reconciliation Commission, National Chief of the Assembly of First

Nations Phil Fontaine adamantly stated that the Canadian commission was not modelled on the South African Truth and Reconciliation Commission. He also insisted that the Canadian commission was not a public inquiry.[66] Executive Director of the Ghana Center for Democratic Development Emmanuel Gyimah-Boadi, speaking about Ghana's National Reconciliation Commission, stated that it did not realize at first that it was not a public inquiry.[67] In Dr. Gyimah-Boadi's opinion, things improved for the commission once it began to act like a truth commission.

The comments by Fontaine and Gyimah-Boadi suggest that there is something qualitatively different about a truth commission compared with a public inquiry. This is because, when a truth commission is sought, something more is wanted than the investigation of the facts and recommendations for future policy that a public inquiry does in its basic form. Establishing a truth commission gives rise to an expectation that historical injustices will be acknowledged and redressed. For those who seek redress, the truth commission cannot simply be a legal exercise; it must be a societal reckoning.

In arguing that a truth commission is actually a form of public inquiry, in no way do I seek to diminish the impulse toward a more expansive role for a truth commission. Rather, I seek to enlarge our understanding of what a public inquiry can do in an established democracy.[68] My point is simply that both mechanisms can perform the social function of acknowledging historical injustices and educating the public to prevent their reoccurrence. The difference is that a truth commission is explicitly expected to perform this function, whereas the public inquiry has the latent possibility to do so.

The desire to distinguish between the two mechanisms stems from a perception of the public inquiry as a formal legal mechanism,[69] which fails to fulfill a social function, a function critical in the context of addressing historical injustices. However, I argue that the truth commission is really a commission of inquiry with certain distinguishing features and objectives. In particular, a truth commission is a specialized form of public inquiry, distinguished by its symbolic acknowledgment of historical injustices and its explicit social function of public education about those injustices.

The scholarly definitions of the two mechanisms suggest important similarities. Consider this definition of a truth commission:

> A truth commission is an *ad hoc,* autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their correction and future prevention.[70]

Compare that definition to this definition of a public inquiry:

> [A public] inquiry is any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations.[71]

Both conduct reviews of an incident or incidents in a nation's past and contribute to policy solutions for the country's future. Both are temporary bodies that investigate, hear, and report. Both are intended to create historically accurate public records of their topics, and both are expected to make recommendations for remedies of the wrongs investigated in order to ensure that these wrongs are not repeated in the future. However, though they are alike, the two mechanisms can be distinguished by the explicit social function assigned to the truth commission.

Some scholars endeavour to characterize the truth commission as a unique mechanism. Mark Freeman attempts to distinguish truth commissions from various commissions of inquiry.[72] Although he acknowledges that "the Commonwealth commission of inquiry is the closest functional equivalent to a truth commission, and may sometimes be characterized as one even if it is not so titled,"[73] he continues that "there are many significant differences between a truth commission and a typical Commonwealth commission of inquiry." In particular, Freeman notes that truth commissions are victim centred, whereas commissions of inquiry

adopt a "more lawyer-driven approach." Commissions of inquiry focus on a specific event or theme, whereas truth commissions often address "thousands of individual cases committed over broad expanses of time and geography."[74]

However, the factors that Freeman lists as distinguishing truth commissions from public inquiries (less lawyer driven, deal with acute violence in the recent past, and focus on victims) do not necessarily sustain his argument. Some truth commissions have had significant legal involvement,[75] some have dealt with historical abuses,[76] and some cannot be said to have been victim centred.[77] Priscilla Hayner contrasts truth commissions to other official inquiries into past human rights abuses that she calls "historical truth commissions."[78] Such commissions investigate abuses that occurred many years earlier in order to clarify historical truths and pay respect to previously unrecognized victims or their descendants. Hayner states that such a government-sponsored inquiry is usually established to investigate practices that affected a minority group about which the wider population was unaware. Thus, such commissions can "have a powerful impact despite the years that have passed."[79] Hayner lists as examples the Australian Human Rights and Equal Opportunity Commission's inquiry into the state's assimilatory practices against Indigenous people, culminating in the 1997 *Bringing Them Home* report, the US Advisory Committee on Human Radiation Experiments, and the US Commission on War-Time Relocation and Internment of Citizens in 1982.[80] She identifies the Royal Commission on Aboriginal Peoples (RCAP) in Canada as a historical truth commission.[81]

This overlap suggests that, rather than trying to draw a sharp distinction between truth commissions and public inquiries, it might be more useful to think of the truth commission as a specialized form of the commission of inquiry, thus recognizing that it has some distinctive features. The most consistent distinguishing features of truth commissions are that they are only struck in the context of addressing human rights violations, and typically they focus on a pattern of human rights abuses over a number of years in the past rather than an isolated and more recent incident.[82] Although some commissions of inquiry can have these features, all truth commissions are expected to have them.[83]

Other features associated with some truth commissions might be shared by commissions of inquiry, depending on how the inquiries are run.[84] For example, a truth commission might be expected to focus on victims rather than perpetrators. Such a focus reinforces the objective of finding a less punitive way to achieve accountability than a criminal law mechanism that focuses on the individual accountability of perpetrators. A truth commission has the prerogative to hear from victims, not for the primary purpose of determining the guilt or innocence of a perpetrator, but as a method of acknowledging the victim's experience. Commissions of inquiry can also choose to hear from victims in order to assist the Commissioners with assembling a public picture of a tragedy.[85] Another feature often associated with truth commissions is that they are frequently led by multiple Commissioners, whereas a sole Commissioner (often a judge) usually – though not always – heads a public inquiry.[86] The appointment of multiple Commissioners provides an opportunity for the representation of different perspectives or, in some cases, societal factions on the panel.

Two main features distinguish truth commissions from other commissions of inquiry. The first feature is that truth commissions involve a state or society trying to repair itself in some way; they "seek to provide an overarching narrative of the historical periods under consideration."[87] Their objectives include encouragement of societal reconciliation and consideration of commemoration and reparation. The objective of encouraging societal reconciliation is not commonly within the ambit of a public inquiry. Promoting reconciliation in a society is a complex process; although both commissions of inquiry and truth commissions can provide acknowledgment of past harms that can sow the seeds of future reconciliation, usually only truth commissions are mandated to promote this goal.[88]

The second feature of a truth commission that distinguishes it from a public inquiry is that the inauguration of a truth commission has a symbolic value. That is, calling a commission a truth commission is an explicit acknowledgment that an injustice has occurred within the state and that the commission's task is to explore and then educate the public about the extent of that injustice. The very existence of a truth commission suggests that there is a truth to be discovered or at least one that needs to be voiced

aloud. A commission of inquiry is called only when a government is faced with a problem that needs to be addressed independently. Still, calling a commission a commission of inquiry acknowledges an issue – not necessarily an injustice – and suggests only that it be investigated.

We signal something different by naming a commission a truth commission rather than a commission of inquiry. A truth commission has an explicit social function: education of the public about historical injustice in order to prevent its reoccurrence. A commission of inquiry might well fulfill this social function, and Le Dain's discussion of the social influence of a public inquiry is frequently cited by commentators.[89] However, as with the Mackenzie Valley Pipeline Inquiry, whether a commission of inquiry emphasizes this social function depends greatly on two key factors: the person leading it and the process used to achieve its mandate. A commission of inquiry might proceed with the conscious determination to fulfill a social function, but this intention will become apparent only once the commission is under way. A truth commission signals from its inception to the populace an intention to acknowledge and redress past injustices. Similarly, calling a body a truth commission suggests a more weighty concern about the issues before it as well as the possibility that the truth has somehow been obscured in the past, deliberately or otherwise.[90] It is this symbolic role that can distinguish truth commissions from most public inquiries. However, like a public inquiry, whether a truth commission succeeds in fulfilling its social function will depend on its leadership and its process.

The conceptual framework that I propose here is to recast the truth commission not as a mechanism unique to the transitional justice setting but as a specialized form of a familiar mechanism, the commission of inquiry. Established democracies might be more amenable to addressing historical injustices that continue to divide their populations if they can utilize a mechanism that does not suggest, by its very invocation, that they are human rights pariahs. The truth commission is expected to do explicitly what a commission of inquiry is capable of doing but is not obliged to do: to acknowledge the existence of the historical injustices and to embark on a process that educates the public about those injustices in order to prevent their reoccurrence. My argument is that, whichever form is used, both are capable of fulfilling this social function.

Truth Commissions in Established Democracies

Most commentators address the use of truth commissions "at a transition point in a society" emerging from autocratic rule.[91] Truth commissions in these circumstances are viewed as demonstrating a new era of respect for human rights, national reconciliation, or new political legitimacy,[92] symbolizing a new regime's commitment to the rule of law. But what of truth commissions in established democracies? Despite histories of slavery, colonialism, racism, and other injustices, established democracies have not generally chosen to name the truth commission as the mechanism to address the human rights violations in their pasts. Perhaps established democracies resist using the truth commission since it adverts to the possibility that their democratic stability might have come at a cost to oppressed peoples in their midst and suggests an unwelcome commonality with acknowledged oppressive regimes.[93]

As is evident from the German, Irish, and Australian examples discussed below, the institutions typically created in established democracies to address injustices are human rights commissions and *ad hoc* investigations such as royal commissions or public inquiries. In the American context, Sanford Levinson notes that, though Americans do not have bodies called "truth commissions," their "functional equivalent can be found in investigatory hearings held by certain administrative agencies" and in congressional investigations.[94] Thus, though "truth commissions ... have their counterparts in societies that are both stable and democratic,"[95] it appears that there is a general reluctance in established democracies to call these counterparts truth commissions.[96]

Nonetheless, truth commissions – or bodies that look much like truth commissions – have begun to appear in established democracies. Rather than set up mechanisms explicitly called truth commissions, in recent years Germany, Ireland, and Australia framed commissions of inquiry that, in their operations, acknowledged periods of historical injustice and educated the public about these dark periods. After the reunification of Germany, the German Parliament created the Commission of Inquiry for the Assessment of History and Consequences of the SED [Socialist Unity Party] Dictatorship in Germany, in operation from 1992 to 1994. It was mandated to investigate and document human rights violations under the

East German government between 1949 and 1989. The Commission held public hearings at which testimony was received from selected witnesses and research papers were presented. The papers were included in the 1994 report, which many saw as more of an academic report than one intended to engage the public.[97] Prosecutions were also carried out against former East German officials. Furthermore, as part of the transition to a unified German state, the Gauck Commission, also known as the Gauck Authority, was created. Parliamentarian and former dissident Joachim Gauck was named the Director of the Federal Authority on the Records of the Former Ministry for State Security of the German Democratic Republic. From 1990 to 1993, this commission managed access to the massive archive of surveillance records that the Stasi had kept on citizens and enabled citizens to learn who had informed on them.

Ireland has had two truth commission–like processes, the Independent Commission on Policing for Northern Ireland and the Commission to Inquire into Child Abuse. The Independent Commission on Policing commenced in June 1998, having arisen from the April 1998 "Good Friday Agreement" reached in the multi-party negotiations among the government of the United Kingdom, the government of Ireland, and numerous parties representing the communities of Northern Ireland.[98] Its task after broad consultations was to make recommendations for future policing arrangements in Northern Ireland. The Commission to Inquire into Child Abuse was mandated in 2000 to inquire into the abuse of children in industrial schools. It was to hear from the victims of abuse in the schools, to investigate the abuse, and to make a report to the public, which it did in 2009.[99]

Australia mandated a Human Rights and Equal Opportunity Commission to investigate the removal of Indigenous children from their families. As had Canada's, Australia's policy had been in place from the late 1800s to the latter half of the 1900s. The mandate of the commission was to examine past laws, practices, and policies that led to the forced removal of Indigenous children (known as the Stolen Generation) from their families and to examine current laws, practices, and policies that needed to change to prevent such separations.[100] Established in 1995, the commission held hearings in major cities and smaller communities. Its 1997 report recommended various measures for redressing the harms

suffered because of the state's policy of removal. The government of John Howard, elected in 1996, largely rejected the approach recommended by the commission.[101]

These examples show that processes with features associated with the truth commission model have found some expression in established democracies. What might be the reasons for seeking such features for a commission in an established democracy? Perhaps the human rights culture of the past few decades has moved some states to address historical injustices more openly than in the past.[102] The social function of a truth commission holds promise: the tasks of creating an incontrovertible historical record and engaging in public education are intended to help prevent future abuses.[103] Levinson states that the circumstance that generates a truth commission is "the presence within a given social order of deep divisions over basic political questions."[104] If there are societal issues stemming from past injustices, then it might be desirable to find a way to put the past to rest in order to improve relations in the present. This process underscores the distinguishing feature of a truth commission mentioned above: the explicit mandate of reconciliation.

Truth commission–like features might be sought in an established democracy if other legal mechanisms have been inadequate for the task of addressing historical injustices. Levinson notes that "the key question is surely whether *local* institutions, judicial or otherwise, prove willing to address the kinds of issues that are the staple of truth commissions."[105] In Canada, the government repeatedly avoided a public inquiry into the Indian residential schools (IRS).[106] There have been numerous IRS lawsuits in Canada, but the scale of the claims, the cumbersome nature of judicial proceedings, inconsistent rulings, and the awkward fit of the IRS claims with common law doctrines made the court system inadequate for addressing the complex and multi-generational nature of the harms resulting from the IRS experience.[107]

In addition to the inadequacy of conventional legal mechanisms, there is another reason that Indigenous people sought a truth commission to address the IRS legacy. Generally, truth commissions are created in states where the citizenry has a well-founded distrust of the past regime's ability to conduct a fact-finding endeavour with transparency, honesty, and

legitimacy.[108] Canada has a history of unfulfilled promises made to Indigenous peoples. There is widespread ignorance among non-Indigenous Canadians about the IRS system and its profound effects on former students and their families.[109] A truth commission's educational aspect can have "unintended secondary effects that result in positive benefits for victims" by increasing public awareness and understanding of the trauma suffered by the victims of human rights abuses.[110] With respect to the Canadian TRC, one of the main objectives set out in the mandate was to "[p]romote awareness and public education of Canadians about the IRS system and its impacts."[111] This mandate tied in with the idea that the truth commission has an explicit social function.

The Canadian TRC, then, was formally called a truth commission and sought in an established democracy. Although I have described the reasons that a process with features associated with a truth commission might be sought in an established democracy, it is rare that such a democracy seeks a body *called* a truth commission. The desire by IRS survivors for a process that explicitly addressed the historical injustice of the IRS system resulted in the TRC. However, it is the commission of inquiry, rather than the truth commission, that typically has been used in Canada to address issues related to Indigenous people.

Commissions of Inquiry and "the Indian Problem"

Where does the story of the public inquiry in Canada begin? Canada is a settler colonial country; thus, the story is a colonial story. After a decline in the use of inquiries in Britain and colonies such as Australia from the late seventeenth century to the end of the eighteenth century, their use was revived during the reign of Queen Victoria.[112] Indeed, the commission of inquiry was a favoured tool of settler societies in the Victorian era.[113] As noted by Miranda Johnson,

> commissions of inquiry were originally used in early modern England to punish opponents of the monarchy. They came into their modern form as inquisitorial aids to policy makers in the [nineteenth century], frequently to investigate the violence perpetrated against colonized peoples in British colonies. In colonial contexts including Jamaica and

> South Africa as well as Australia and Canada, scholars have argued that these institutions were used to legitimate the state in moments of profound social conflict.[114]

In Canada, there is a long history of using commissions of inquiry to address issues regarding Indigenous people. In British North America, between 1828 and 1858, six commissions of inquiry – all conducted in response to what was becoming known as "the Indian problem" – laid the foundation for policy on Indigenous peoples before Confederation:

> The first report was somewhat rushed and rudimentary and was prepared in 1828 by Major General Darling, military secretary to the governor general, Lord Dalhousie. It covered both Upper and Lower Canada and led to the establishment of the reserve system as official policy. The second was prepared by a committee of the Lower Canada Executive Council in 1837 and essentially followed the recommendations of the earlier Darling report. In 1839, the third report was prepared by Justice James Macauley and dealt with conditions in Upper Canada. It too generally supported the reserve and civilization policies of the time. A committee of the Upper Canada Legislative Assembly prepared the fourth report in response to Lord Durham's report on conditions in the two Canadas, arriving at conclusions similar to those of the preceding report by Justice Macauley. The fifth, and by far the most important, was the 1844 report of Governor General Sir Charles Bagot, which covered both Upper and Lower Canada. Its recommendations gave a direction to Canadian Indian policy that has endured in many respects right up to the present. A sixth report was prepared in 1858 by Richard Pennefather, civil secretary to the governor general. It too covered both Canadas and was the most thorough report on Indian conditions to that point.[115]

As described by Thomas Lockwood,

> During the early post-Confederation period, the government faced many new difficulties, and to help formulate policies to remedy these situations,

> they employed Royal Commissions. Opening and settling of the North-West brought serious problems, [and] one of the most vexing was the treatment of the half-breeds. When open revolt broke out in 1869 the government delegated authority to a commissioner, Donald Smith (later Lord Strathcona). His report did much to put the events which had occurred in that remote area in the proper perspective.[116]

Lockwood adds that "[t]he second Riel Rebellion in 1885 resulted in the issuing of another Commission to attempt to untangle the confused situation."[117] However, according to John Leslie,

> [the six pre-Confederation commission reports] were the main instruments of an early Indian policy review process which saw a programme for Indian civilization and advancement devised, evaluated, modified, and reiterated in the four decades prior to Confederation. The philosophical principles and practices enunciated by these six inquiries were adopted by the new Dominion government and applied to Native peoples in other regions of Canada. The legacy of these reports for Canadian Indian policy has been so enduring that, only recently, has the Federal government attempted to break from the long-standing view of Native peoples and society established before Confederation.[118]

Commissions of inquiry continued to be used by federal and provincial governments to address various aspects of "the Indian problem." For example, a dispute between British Columbia and the federal government over the allocation to settlers of reserve lands was referred to a joint federal-provincial commission in 1876, but little progress was made. In 1912, a further joint federal-provincial commission, the McKenna McBride Royal Commission, was appointed to review the issue, with similarly disappointing results for Indigenous peoples.[119] The commission reviewed reserve lands throughout British Columbia and was empowered to increase or decrease the sizes of reserves or eliminate them altogether. The commission's recommendations had significant impacts on reserve lands. Although various recommended reductions in Railway Belt reserves were

disallowed by the federal government, and some reserves were added, the commission's recommendations resulted in the cut-off of valuable reserve lands and an overall reduced value of the lands allocated to reserves in the province.[120] The proceeds of lands sold off were to be split between the two governments.[121]

The degree to which the recommendations of the long list of inquiries have been implemented has varied, but governments have continued to resort to the public inquiry mechanism when faced with difficult issues related to Indigenous peoples. Each recent decade has brought at least one major inquiry addressing some aspect of the troubled relationship between Indigenous and non-Indigenous people in Canada. The largest in scope and breadth was the Royal Commission on Aboriginal Peoples, which provided a comprehensive picture of Canada's relationship with Indigenous peoples, including the IRS system.[122]

The five-volume, 3,500-page RCAP report covers 500 years of history between non-Indigenous and Indigenous people in what is now Canada. The Commissioners made 440 recommendations calling for comprehensive changes in the relationship between Canada's Indigenous and non-Indigenous people. The central recommendation called for a complete restructuring of that relationship. There were major recommendations on treaties, governance, the restructuring of federal institutions, and the substantive areas of lands and resources, family, health, healing, housing, education, arts, and culture. The fifth volume of the report laid out a twenty-year plan for renewing the relationship between Indigenous and non-Indigenous people in Canada.[123]

Several provincially appointed inquiries revealed racism as a pervasive factor in Indigenous and non-Indigenous relations. In 1989, the Royal Commission on the Donald Marshall, Jr., Prosecution, created in response to the wrongful conviction of a Mi'kmaq man for murder in 1971, made eighty-two recommendations aimed at improving the administration of justice in Nova Scotia, particularly with respect to racialized communities.[124] The adoption of some key recommendations has begun to change the landscape in Nova Scotia. The Black and Mi'kmaq program at Dalhousie Law School has increased the number of Black and Mi'kmaq lawyers representing Black and Mi'kmaq clients, which in turn

will eventually increase the diversity of the bench. These changes are slow in coming but over time can contribute to a more just society in Nova Scotia. The Marshall report prevents anyone in Nova Scotia from honestly saying that racism is not a systemic problem in the province's legal system. Marshall helped to shift the narrative in that province; although the failure to adopt many of the recommendations was itself an indication of how far there is to go, without the Royal Commission findings, there would be much further to go.

The Aboriginal Justice Inquiry of Manitoba provided a historical, cultural, and legal review of the relationship between the Manitoba justice system and the Indigenous peoples of that province in its 1991 report.[125] This was one of the few inquiries that has centred on an Indigenous woman. The Inquiry was appointed to investigate, report on, and make recommendations respecting the relationship between the administration of justice and Indigenous people in Manitoba. In particular, the Inquiry was created to investigate all aspects of the deaths of male Indigenous leader J.J. Harper and Helen Betty Osborne, a young Indigenous woman brutally murdered in 1971 in The Pas by four non-Indigenous men. It was not until 1987 that anyone was tried criminally for her death. At that trial, only two men were tried despite the identities of all four having been widely known in the community within months of the murder sixteen years earlier. J.J. Harper, the Executive Director of the Island Lake Tribal Council, died following an encounter with a Winnipeg police officer. In the manner all too familiar by now, the officer was immediately exonerated by a police department internal investigation. Both incidents had prompted calls for a judicial inquiry into how Manitoba's justice system was failing Indigenous people. The Inquiry reported in 1991, providing a thorough discussion of Indigenous concepts of justice, a history of Indigenous contact with non-Indigenous law, and a discussion of treaty rights. The Inquiry also reviewed Indigenous over-representation in the criminal justice system, a discussion of the court system, Indigenous justice systems, court reform, juries, jails, alternatives to jail, parole, and policing. In the course of its hearings, the Inquiry heard testimony from many Indigenous people about their IRS experiences and wrote about the far-reaching effects of the schools in its report.[126]

In 2000, two young Indigenous men, Lawrence Wegner and Rodney Naistus, froze to death on the outskirts of Saskatoon. Inquests into the deaths of the two men had failed to determine how they had ended up in fields without adequate clothing or shoes in the depths of winter, but that winter, another young Indigenous man named Darrell Night survived after being driven by police to the same area and left there to die. His subsequent allegations of what the police had done sparked a public outcry.[127] The Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform was mandated in 2001 to address concerns raised about the treatment of First Nations and Métis people by the justice system, in particular by police services.[128] The commission partnered with the federal government, the provincial government, the Federation of Saskatchewan Indian Nations (FSIN), and the Métis Nation Saskatchewan and was made up of five Commissioners, two nominated by the FSIN, two by the province, and one from the Saskatchewan Métis community.[129] Submitted on 21 June 2004, the final report identified racism among provincial police forces as a major reason for Indigenous mistrust of the justice system.

Operating at the same time and also reporting in 2004, the Neil Stonechild Inquiry focused on the Saskatoon police practice of dropping off young Indigenous men on the outskirts of the city in the middle of winter and leaving them there to freeze to death. Known as "starlight tours,"[130] the practice continued for more than a decade after Stonechild's body was found in a field outside Saskatoon in 1990, as laid bare by the deaths of Wegner and Naistus. It likely was not just men and boys who were taken on starlight tours, and the practice had been going on for much longer than a decade: in 2003, the new Chief of the Saskatoon Police Service admitted that an officer had been disciplined in 1976 for taking an Indigenous woman to the outskirts of the city and abandoning her there.[131] In any event, Night's survival prompted an investigation into Stonechild's death after a caller to the Saskatoon *StarPhoenix* suggested that reporters check the archives for a March 1991 story about a woman who said that the police had failed to investigate properly her son's freezing death.[132] Although the inquiry formally revealed and documented the reality of the starlight tours, the racism ingrained in the police force that allowed such a horror to become a practice was not adequately addressed. The two police

officers linked to seventeen-year-old Stonechild's death were fired, although not for criminal negligence or manslaughter.[133] They were not tried in court for their roles in Stonechild's death.

The BC government appointed a commission of inquiry in 2007 to examine the circumstances surrounding the death in Vancouver of Frank Joseph Paul, a Mi'kmaq man from New Brunswick. In the evening of 5 December 1998, a police officer dragged Paul from a Vancouver Police Department lockup and left him in a nearby alley, where his body was found the next morning. An autopsy concluded that Paul had died from hypothermia because of exposure and alcohol intoxication. The Commissioner, former BC Supreme Court Justice William H. Davies, issued his final report, *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul,* on 19 May 2011.[134] Justice Davies strongly criticized the Vancouver Police Department both for its conduct and for the conflict of interest inherent in having investigated its own actions. He recommended the creation of a civilian oversight body to conduct investigations of professional standards. In response, British Columbia created an Independent Investigations Office to investigate cases of serious harm or death in which police are involved.

In Ontario, the Ipperwash Inquiry investigated the death of Dudley George, shot by Ontario Provincial Police (OPP) while he participated in a protest by Indigenous people about a land dispute.[135] During the course of the inquiry, testimony implicated not only members of the OPP but also then Premier Mike Harris in the widespread racism that characterizes police-Indigenous relations in Ontario. Harris was famously quoted as calling on the OPP to "get those fucking Indians out of the park."[136] The Ipperwash Inquiry led to significant recommendations for restructuring provincial government relations with Indigenous peoples in Ontario, including the separation of the provincial ministries of Natural Resources and Indigenous Affairs.[137] The creation of an Indigenous Justice unit of the provincial Ministry of Attorney General as well as the implementation of various recommendations to address police treatment of Indigenous protesters and Indigenous people more generally also emanated from the report.

Of these inquiries, several have managed to have some of their recommendations adopted, whereas others have been less successful. What

accounts for the differences? The answers lie in a mixture of factors, including the leadership of the Commissioner(s), the processes used, and the timing – politically – of the reports. For example, several factors might account for the fact that the Ipperwash Inquiry had a number of its recommendations adopted. Commissioner Sidney Linden was well respected in government circles and completed his report in a timely manner. The inquiry had engaged the public and raised awareness of overt racism toward Indigenous peoples by the police and politicians. The family of Dudley George was represented by counsel and garnered sympathy in its search for justice. The political winds had changed by the time the inquiry reported. A Liberal government had replaced the Conservative one that had been involved in the Ipperwash debacle and was eager to contrast itself to its predecessor. Kathleen Wynne was appointed Minister of Aboriginal Affairs and had a keen interest in improving Crown-Indigenous relations, an interest that she carried through to her time as Premier of Ontario.

When I began to think about the role of public inquiries in the Canadian legal order, my thoughts repeatedly turned to the landmark Mackenzie Valley Pipeline Inquiry conducted by then Justice Thomas Berger in the mid-1970s in Canada's North (the Berger Inquiry). Berger had addressed a question of public importance by visiting affected communities, commissioning independent research, communicating the issues to the wider Canadian public, and making bold recommendations to the government. Although not envisioned as such by the government of the day, the Berger Inquiry explored a deep and abiding societal divide between Indigenous peoples of the North and non-Indigenous Canadians of the South. Berger conducted his process in Indigenous communities in a manner considered respectful, and he showed how the process itself could educate the wider public and create positive change. By the time of his report, the inquiry had engendered in Canada a national consciousness-raising process about Indigenous peoples of the Mackenzie Valley and their northern homeland.

In the next chapter, I will discuss the question of which factors make for a successful commission of inquiry (and the question of what success means), beginning with an excursion back in time to the early 1970s in Canada when a fear of running out of oil was top of mind for the federal

government and a controversial pipeline was the proposed solution. The federal government had not contemplated the implications of appointing a former Indigenous rights lawyer to lead a commission in a region of the country where Indigenous people formed a majority of the population. What transpired reshaped the legal landscape of Canada.

Library and Archives Canada Cataloguing in Publication

Title: Reconciling truths : reimagining public inquiries in Canada / Kim Stanton.
Names: Stanton, Kim (Kim P.), author.

Series: Law and society series (Vancouver, B.C.)
Description: Series statement: Law and society | Includes bibliographical references and index.

Identifiers: Canadiana (print) 20210272597 | Canadiana (ebook) 20210288019 | ISBN 9780774866651 (hardcover) | ISBN 9780774866675 (PDF) | ISBN 9780774866682 (EPUB)

Subjects: LCSH: Governmental investigations – Canada. | LCSH: Truth commissions – Canada.

Classification: LCC KE4765 .S73 2021 | LCC KF5422 .S73 2021 kfmod | DDC 353.4/630971 – dc23

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in UniversCondensed and Minion by Artegraphica Design Co. Ltd.
Copy editor: Dallas Harrison
Proofreader: Alison Strobel
Indexer: Noeline Bridge
Cover designer: Martyn Schmoll

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
www.ubcpress.ca