“Eight Recommendations for the National Council on Reconciliation – Bill C-29”
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Biographical Details:

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I am strongly in favour of a Council being established and strongly approve of the work the TRC has done, including their Calls to Action. I support the federal government in passing this Bill. However, there are ways this Council can be stronger. My recommendations are simple: the Council needs more money, more power, a larger scope, enhanced monitoring capacity, and the potential to expand and evolve understandings of reconciliation.

Recommendation 1: Increase Funding: Create Viable and Long Term Funding for the Council, potentially using the Aboriginal Healing Foundation model as a guide for best practice

The funding proposed by the federal government of $126.5 million will be insufficient for the tasks required. Having to seek external funds will reduce the standing and legitimacy of the Council and impede its work. As TRC Commissioner Marie Wilson pointed out: “an intention without certainty of resources focuses all early efforts simply on trying to find the means to function.”[i] Karla Buffalo (CEO Athabasca Tribal Council) urges a clearer funding model given the requirements for “a large staff, including investigators.”[ii] Two members of the National Council for Reconciliation Transitional Committee have also expressed concerns. Mitch Case notes “that the budget won't be big enough to do all of the things it's being asked to do ...” [iii] Michael DeGagné puts it: “[I]t will not be an adequate amount of money over the course of time, but it is initially sufficient ...”[iv]

I recommend allocating at least $450 million ($600 million is probably a more viable figure but the Indigenous watchdog says interim council wanted $1 billion) to the Council so that it can be independent and generate its own revenue. This complements the Aboriginal Healing Foundation funding model. The AHF operated from 1998 to 2007 with an initial fund of $350 million, to which was added $40 million in 2005 and $125 million in 2007, for a total of $515 million. Due to careful management of the funds, the AHF noted on conclusion of its mandate: “we gave more to communities than we received from government, as a result of the interest generated by investments.”[v] The Council will require funds to collect data, bring in witnesses, and maintain a staff of researchers and community engaged scholars. The Council could also fund projects at the community level to promote reconciliation. Funds could also be put into dedicated monitoring mechanisms.

The Council should be future proofed and insulated from the need to be constantly fundraising for its regular operations. The option of housing the Council at a university may be inevitable but can be problematic as university funding is controlled by provinces and can be imperiled by cuts. Funding from churches can also be problematic as the Council still needs to collect historic information (records and other archival material) which may put the Council and churches (and associated entities) in an adversarial arrangement.

Recommendation 2: Increase Judicial Powers: Provide the Council with a status similar to that of an Inquiry under the Inquiries Act

Minister Miller has outlined a role for the Council in "monitoring and evaluating the government's progress" on the TRC Calls, articulating the necessity for "access to the relevant information on how governments are fulfilling their own commitments." Part of his strategy is to "develop a protocol for disclosing Government of Canada information."[vi] Yet there is no good blueprint for how this can be done. Recall that the TRC was not provided with information from the federal government in a timely way and needed to take the government to court. [vii] The TRC was not able to get access to all church records, with the Catholic entities presenting a particular challenge in truth gathering. While Minister Miller may be committed to disclosing pertinent documents, this is no guarantee of federal government cooperation and compliance in future years.

The Council should be granted the powers of an Inquiry with member of the Council having the powers of commissioners, including the ability to subpoena witnesses and call for documents and other information to be surrendered. I recommend the Council be granted the powers of a "Public Inquiry" under the Inquiries Act. This would include the ability 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." [viii]

Members of the Council could have the same power under the Act as do commissioners regarding evidence, ie: "the power of summoning before them any witnesses, and of requiring them to (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine." This could and should include "power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases."[ix]

Unlike these Inquiries, the Council must have permanent status as a Tribunal. My argument for judicial powers is consistent with what other witnesses have advocated. Karla Buffalo has argued for an amendment "to give the national council the power to subpoena." [x] Cassidy Caron (President of the Métis National Council) advocates for mechanisms "such as a subpoena power, to ensure that this government or subsequent governments into the future cannot shield or refuse to provide full access to reports or data required to meet its mandate."[xi]

The Council should reflect the reality of ongoing genocide and must have the powers needed to hold orders of government, bureaucracies, and institutions to account. Justice Gomery noted of the *Sponsorship Inquiry* that "the three functions of an inquiry, to investigate, to educate and to inform, are of benefit to Canadian society." This assists the government in "remedial action," while similarly acting to "restore public confidence."[xii] A large proportion of Canadians feel the government is not doing all it can. A 2021 Environics survey suggests, regarding progress on reconciliation: "the proportion saying the biggest obstacle is the policies of Canadian governments has risen by 11 points, to 37 percent."[xiii]

This would not be the first permanent Tribunal devoted to Indigenous justice. Another example (although one with some problems) is the Waitangi Tribunal in Aotearoa New Zealand, whose "inquiry process contributes to the resolution of Treaty claims and, in that way, to the reconciliation of outstanding issues between Māori and Pakeha."[xiv] The focus is on documenting violations of Indigenous rights (both historically and in relation to key themes), and promoting settlements / redress. This is not perfect given the lack of subpoena power and its close reliance on government for funding. But aspects of the Tribunal could serve as a model.[xv]

There are no shortcuts to compel orders of government to provide data or surrender evidence. There is only the binding power of the law. Clearly judicial teeth are needed. Various Christian churches and other institutions and entities involved in the creation and perpetuation of the IRS system have been reticent to provide and disclose information. Orders of government and religious organizations have demonstrated both bad and good faith in their dealings with the TRC. Without judicial power, the Council risks not being able to fulfil its mandate and thus losing its legitimacy before it even begins operations.

Recommendation 3: Expand the Purview of the Council to Include All Orders of Government in Canada, Given that the Crown is more than the federal government

The federal government is one embodiment of Crown government in Canada but not the only one. The focus needs to be on accountability at all levels of government. Right now only one level needs to respond – and this must change. Copies of the report should be presented to the provincial and territorial governments, municipal governments, and representatives of the Crown including the Governor General and the Lieutenant Governors, and Commissioners representing the federal government in the three territories. Distinct and different reports need not be presented unless there are specific thematic reports focused on an area within the jurisdiction of only one order of government.

Under ss. 92, 92(A) and 93 of the Constitution Acts, 1867 to 1982, provinces have powers over key aspects related to reconciliation, inter alia: "Management/Sale of Public Lands belonging to Province, Prisons, Hospitals, Municipalities, Administration of Civil/Criminal Justice, Education, Natural Resources."[xvi] Since local governments are the responsibility of provincial governments who are constitutionally part of the Crown and they are administered by the provinces (through for example the Municipal Act, 2001 in Ontario), these governments also represent the Crown and should be responsible for generating responses to the Council reports. Under local governments are also an array of "local and special-purpose bodies, such as school boards, health units, library boards and conservation authorities, with responsibility for public services at the community or regional level."[xvii] The scope of the Council should also include them.

Protocols for the timely and fulsome release of information should be created with all orders of government as part of the Council's Action Plan. All orders of government should be expected to deliver written reports via press releases and on their own websites on how they will deal with the Council reports. This should be done with a timeline comparable to the federal government.

Amend the Preamble to include the additional **bolded** wording: "Whereas the Government of Canada recognizes … in all sectors of Canadian society and by all governments in Canada **who represent the crown directly or through delegation: federal, provincial, territorial, and municipal,** in order to …"

Change the following sections (recommended changes in **bold**):

Report of Council
17 (1) add **(c) The Council must, at the same time or within a week of the report to the Minister, send out copies of the report to provincial, territorial, and local orders of government. If relevant, tailored recommendations reflecting violations of Indigenous rights within these subnational jurisdictions should be made.**
Add **(d) Copies of the report must be sent to Crown representatives: the Governor General, the Lieutenant Governors of all provinces, and the Commissioners of all territories.**

Tabling in Parliament**, Provincial, and Territorial Legislatures**
(3) Relevant Ministers in provinces and territories must lay a copy of the report before their legislatures.

Orders of Government response
(3) Within 60 days after the day on which the report under subsection**s** (2) **and (3)** is laid, the Prime Minister must …
(4) Premiers of provinces and territories are encouraged to provide a comparable report to the above, responding to the status of Indigenous peoples in the territory under their jurisdiction, together with an action plan if applicable.

Recommendation 4: Expand Scope and Definition: Ensure that An Evolving Definition and Understanding of Reconciliation is Adopted beyond the TRC

In the Functions (7) section, item **(b.2)** should be added: **The Council will be empowered to evolve their understandings of reconciliation based on Council research and the work of post-TRC institutions, including the Calls to Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and the recommendations of the Office of the Independent Special Interlocutor.**

The Council will need to go beyond the 94 Calls to Action, given the many recommendations after 2015. The Calls can and should be a benchmark but they cannot be a static and unchanging standard. There must be a mechanism for new Calls to be included as they arise. As well, monitoring the status of the National Inquiry's 231 Calls to Justice must be included in the Council's mandate. The Action Plan related to the National Inquiry should not be incidental. Additionally, recommendations by the Office of the Independent Special Interlocutor must also be folded into the monitoring process. Given that UNDRIP is now incorporated into Canadian law, adherence to this must also be monitored.

During the HoC hearings, Liberal MP Michael McLeod questioned to what extent issues other than reconciliation should fall under the purview of the Council. He put it: "There are truth and reconciliation recommendations, possibly UNDRIP, the sixties scoop and murdered and missing indigenous women and girls." He described this as potentially "overwhelming for one body to look at."[xviii] These are realistic concerns *only* if the funding model is inadequate. A siloed and piecemeal analysis ignores the clear overlap and intersectionality involved with all of these issues. A Council must be comprehensive, weaving together ongoing aspects of settler colonialism without their focus becoming siloed and too narrowly focused.

The TRC Calls to Action are not the end of the story. A clear example of the need for expanded and more fluid goals is the recent statement of the Office of the Independent Special Interlocutor to the 2022 submission to the UN Expert Mechanism on the Rights of Indigenous Peoples. Here four examples of lack of alignment between Canadian law and the UN Declaration were outlined.[xix] Their four examples are not Calls to Action *per se* although they might be subsumed under the Calls 43 and 44. As more work is done to promote Indigenous justice and self-determination more will be required of the government than the initial 94 Calls. A core goal of the Council must therefore be to collect data on what crimes and harms are not included in the Calls and to suggest new benchmarks for reconciliation as the Council progresses.

Recommendation 5: Expand The Council's Scope to include the Christian Churches and other Institutions involved in the IRS system and ongoing settler colonialism

Mainline Christian Churches and institutions were involved in creating and perpetuating the IRS system. Many of the unmarked graves and burial sites were tied to Christian church-administered residential schools. Churches have been and are involved in other aspects of historic and ongoing colonization. These activities too must be monitored by the Council. There have been apologies from the Anglican, United, and Presbyterian churches. Catholic Pope Francis delivered an apology in 2022, which did not assume Vatican liability for the genocide of Indigenous peoples. The Catholic entities were able to avoid a large proportion of their financial responsibility for their crimes in the IRS system.[xx]

José Francisco Cali Tzay, UN Special Rapporteur on the Rights of Indigenous Peoples correctly observed: "The full resolution of Indian Residential School claims is necessary to achieve true reconciliation, including for Catholic church-run institutions and residential schools established by provinces."[xxi] Both the Churches and provinces must be held accountable for reconciliation. This will include providing documents on request so that the Council can fulfil its mandate.

In partnership with the crown, churches helped create the IRS system and kept it going. Many of the genocidal crimes (including horrors of abuse) committed against Indigenous children were undertaken by clergy or other employees of Christian churches. Churches have sometimes, but not always been forthcoming with records. I recommend that the Council should identify clear mechanisms by which they can recommend that the Canada Revenue Agency suspend charitable status for churches and other institutions who abuse their charitable status by withholding

information about past crimes for which they may be accountable. This should be a last resort, but must be understood within the context of the role of these churches in genocide.

Recommendation 6: Recognize Genocide so that the Council is Genocide-Aware and Trauma Informed in its operations

Given that the federal government has recognized cultural genocide (2015) and race-based ongoing genocide against Indigenous peoples in Canada (2019), and that the House of Commons has recognized genocide in violation of the 1948 UNGC in the IRS system (2022), [xxii] this Council must be genocide-informed and must ensure that recognition of genocide be at the forefront of its deliberations. Part of this recognition will assume that orders of government have sought the destruction of Indigenous orders of government and laws.

I support the findings of the National Family and Survivors Circle in their contribution to the 2021 Action Plan: "Understanding violence and genocide is critical to a decolonizing approach. It must be recognized that violence is inherent to the colonial state, past and present." The NFSC has also articulated: "The efforts to end the genocide, to repair the harm caused and heal individually and collectively, must now match, and exceed, the intentions and actions that fueled the genocide."[xxiii] I support this standard of accountability and urge the Senate to recognize the validity of this standard and create a Council able to deal effectively with this challenge.

The Council should operate openly under the reality that Canada remains a settler colonial state, and recognize that the Council must not be tasked with just making colonization more palatable to Indigenous peoples.

I recommend that the preamble include genocide recognition, moving beyond the soft language of "assimilation" that elides many of the ongoing crimes of colonization.

The Preamble should include these **bolded** terms: "Whereas, since the arrival of settlers and colonization, Indigenous peoples have experienced **policies including genocide**, which must be addressed through reconciliation **and Indigenous self-determination**."

The need to address genocide, whether historical legacies or ongoing crimes, must form a key part of the Council's mandate. Central to this is for the Council not see orders of government as politically neutral or necessarily in favour of Indigenous rights. At some level an inquisitorial and at times adversarial approach may be necessary to find information, and to be institutionally and judicially prepared when there is demonstrable backsliding in the progress of reconciliation.

Recommendation 7: That the Council Report to International Institutions like the United Nations

Natan Obed (Inuit Tapiriit Kanatami) signals that the Council is "mainly focused on reporting and awareness raising" but lacks the ability to "provide meaningful redress for the ongoing impacts of colonization." He has proposed an "Indigenous Peoples human rights tribunal" organized

through the UNDRIP.[xxiv] While the contours of what this would look like are unclear, reporting to the United Nations is a good idea. I strongly recommend that the Council make full use of the United Nations to file regular reports on the status of Indigenous Peoples and their rights in what is now Canada. The Canadian crown and orders of government within Canada (from the federal government down to local governments) must be held accountable at the United Nations level. The Council should file its report with the Special Rapporteur, with the UN Expert Mechanism and at the UN Permanent Forum. Under the UNDRIP, Indigenous Peoples have the right to express their self determination through full participation in international organizations. These can help to ensure that state parties live up to their obligations.[xxv]

Recommendation 8: Develop Protocols for AI: Develop Protocols for the Use of AI related to Indigenous peoples

Artificial Intelligence brings with it a host of challenges and opportunities, many unanticipated. The future Council must ensure harm and risk reduction for Indigenous peoples, take a strong stand against the use of AI surveillance and algorithms, and protect Indigenous privacy and data sovereignty. At the same time the Council should investigate the potential of AI to monitor both progress and backsliding on reconciliation.

In terms of AI, Indigenous peoples may be particularly targeted due to algorithms which seek to predict future problems without paying heed to structural racism and bias. Cormack and Kukutai highlight "myriad possibilities for monitoring individuals and groups in ways that deepen power asymmetries and perpetuate harm."[xxvi] Similarly, AI can attenuate problems for Indigenous peoples: "at the same time as settler colonial states have been making more public calls for 'reconciliation', Indigenous peoples have been simultaneously impacted by increased state powers of surveillance. … to police and manage Indigenous peoples, albeit with new and expanded technologies at play."[xxvii]

However, AI can also perform a useful role in encouraging dialogue and deliberation between Indigenous peoples and communities about best practices for self-determination and wellbeing. I support the recommendations of the *Indigenous AI working group* that Indigenous peoples "engage with this latest technological paradigm shift as early and vigorously as possible to influence its development in directions that are advantageous to us."[xxviii] Some have called this ''Two-Eyed AI," which as Bourgeois-Doyle explains, encourages "interaction between NGOs, non-profits, and Indigenous groups and AI researchers and technical experts to identify opportunities and develop tools."[xxix]

AI can be used to monitor and track government policies at all levels in Canadian society from local (like school boards and police) to municipal, territorial, provincial, and national, and can be used to track the responsiveness of institutions such as the RCMP, the Christian churches, which have continued to commit violence against Indigenous peoples. AI can also be used to aggregate polling and other public opinion data. It could be used to survey comments on media articles and provide qualitative and quantitative analysis of the mood of Canadians and their receptivity towards reconciliation in general but also according to specific categories. Given the proliferation

of such technology, the Council should set aside funds to generate expertise and capacity to ensure that AI is not harmful to Indigenous peoples. The Council should take time to explore the ways this rapidly emerging technology can facilitate the monitoring of all levels of the state to document its failure to implement Calls to Action and Calls to Justice, breaches of Treaty rights, Section 35 of the Constitution, and international legal instruments such as the UN Declaration. It will be important that the Council also monitor to what extent Indigenous peoples can access the Internet, to ensure that any inequalities in terms of Indigenous access be remedied so Indigenous peoples can be full and active participants and shapers of these new technologies.

References

[i] Standing Committee on Indigenous and Northern Affairs: Evidence, October 27, 2022 https://www.ourcommons.ca/DocumentViewer/en/44-1/INAN/meeting-36/evidence

[ii] Karla Buffalo Evidence (24 October, 2022) https://openparliament.ca/committees/indigenous-affairs/44-1/35/karla-buffalo-1/

[iii] Standing Committee on Indigenous and Northern Affairs: Evidence, October 31, 2022 https://www.ourcommons.ca/DocumentViewer/en/44-1/INAN/meeting-37/evidence

[iv] Ibid.

[v] *2014 Annual Report of the Aboriginal Healing Foundation* (Ottawa) www.ahf.ca/files/2014-annual-report-19-sept-2014

[vi] "Hansard – 99" (September 21, 2022) https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-99/hansard#11805757

[vii] https://www.cbc.ca/news/politics/ottawa-ordered-to-provide-all-residential-schools-documents-1.1345892

[viii] "Inquiries Act" (R.S.C., 1985, c. I-11) https://laws-lois.justice.gc.ca/eng/acts/i-11/page-1.html

[ix] Ibid.

[x] Buffalo (2022)

[xi] Cassidy Caron Evidence, Indigenous and Northern Affairs Committee, 17 October, 2022 https://openparliament.ca/committees/indigenous-affairs/44-1/33/cassidy-caron-1/

[xii] John Gomery, "The Pros and Cons of Commissions of Inquiry," 2006 51-4 *McGill Law Journal* 783, 2006 CanLIIDocs 87, <https://canlii.ca/t/2b54>

[xiii] Environics, "Canadian public opinion about Indigenous Peoples and reconciliation" (2021) https://www.environicsinstitute.org/projects/project-details/canadian-public-opinion-about-indigenous-peoples-and-reconciliation

[xiv] Geoffrey Melvin, "The Claims Process of the Waitangi Tribunal," (Wellington: Waitangi Tribunal 2001) https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-The-claims-process-of-the-Waitangi-Tribunal.pdf

[xv] "Treaty of Waitangi Act 1975" https://www.legislation.govt.nz/act/public/1975/0114/latest/whole.html

[xvi] Government of Canada, "The constitutional distribution of legislative powers," https://www.canada.ca/en/intergovernmental-affairs/services/federation/distribution-legislative-powers.html

[xvii] Government of Ontario, "The Ontario municipal councillor's guide," https://www.ontario.ca/document/ontario-municipal-councillors-guide/4-municipal-government
[xviii] Standing Committee: EVIDENCE, October 31, 2022.
[xix] "Submission to the UN Expert Mechanism on the Rights of Indigenous Peoples Call for Inputs" Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites (Canada) March 3, 2023.
[xx] Stephanie Taylor, "Canada agreed to 'forever discharge' Catholic entities from raising $25M for residential school survivors," *CBC News* (20 August, 2022) https://www.cbc.ca/news/politics/canada-deal-catholic-church-fundraising-1.6557533
[xxi] UNOHCR, "Canada: UN expert decries "appalling" legacy of Residential Schools, calls for meaningful reconciliation" (10 March 2023) https://www.ohchr.org/en/press-releases/2023/03/canada-un-expert-decries-appalling-legacy-residential-schools-calls
[xxii] ISI submission to EMRIP (2023)
[xxiii] Missing and Murdered Indigenous Women, Girls, and 2SLGBTQQIA+ People National Action Plan (3 June, 2021)
[xxiv] https://openparliament.ca/bills/44-1/C-29/?tab=mentions&singlepage=1
[xxv] Anaya, S.J. (2009) 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', in Charters, C. and Stavenhagen, R. (eds) *Making The Declaration Work* Copenhagen, DK: International Work Group for Indigenous Affairs.
[xxvi] Donna Cormack and Tahu Kukutai, "Indigenous Peoples, Data, and the Coloniality of Surveillance," in Andreas Hepp, et al (eds). *New Perspectives in Critical Data Studies* (Palgrave, 2022).
[xxvii] Ibid.
[xxviii] Lewis, Jason Edward, ed. 2020. "Indigenous Protocol and Artificial Intelligence Position Paper." Honolulu: The Initiative for Indigenous Futures and the Canadian Institute for Advanced Research (CIFAR). DOI: 10.11573/spectrum.library.concordia.ca.00986506
[xxix] Dick Bourgeois-Doyle, ''Two-Eyed AI: A Reflection on Artificial Intelligence'', *Canadian Commission for UNESCO's IdeaLab*, March 2019.