Aboriginal Genocide in Canada and Achieving Transitional Justice

Supervisor: Anders Melin
Abstract

The indigenous peoples of Canada have been severely mistreated since the period of European colonization and the founding of the country up to the end of the last century, resulting in serious human rights disparity. Aboriginal leaders, some politicians and members of the public are calling past actions, genocide. Principally a philosophical thesis, this paper deals with the question of the Government of Canada recognizing that their historical treatment of the indigenous peoples of Canada was genocide and whether, in light of the facts that have come to view in the past twenty years, it is the just response from the government; which I contend would result in aiding the nation to heal and move forward. The component parts for understanding this issue – the Aboriginals, history of the Indian Residential School System, genocide and culture, and transitional justice - are viewed through a conceptual analysis of these contexts, with post-colonial discourse narrative. In this way, one can judge based on merit the validity of the argument. I conclude with a philosophical analysis in normative ethics, that transitional justice and equitable rights fulfillment cannot move forward for all Canadians, if the label of genocide is not acknowledged as applicable to the era of the Indian Residential Schools.

Word Count: 15,619

Key words: aboriginal, genocide, indigenous, transitional justice, Canada, cultural genocide, human rights
Abbreviations:

AANDC - Aboriginal Affairs and Northern Development Canada
Et al. - and others
ICTR - International Criminal Tribunal for Rwanda
ICTY - International Criminal Tribunal for the former Yugoslavia
IRS - Indian Residential Schools
IRSSA - Indian Residential Schools Settlement Agreement
RCMP - Royal Canadian Mounted Police
TRC - Truth and Reconciliation Commission of Canada
UN - United Nations
UNESCO - United Nations Educational, Scientific and Cultural Organization
UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples
Table of Contents

Abstract 2
Abbreviations 3
Chapter 1: Introduction 5
  1.1 Introduction and Relevance to the Field of Human Rights 5
  1.2 Aim 7
  1.3 Delimitations 9
  1.4 Theoretical Overview 9
  1.5 Previous Research 11
  1.6 Chapter Outline 15

Chapter 2: Aboriginal Peoples of Canada 16
  2.1 Who is an Aboriginal? 16
  2.2 The Nature of the Aboriginal of Canada 17
  2.3 History of the Colonized Aboriginal 18
  2.4 The Indian Residential School System 20

Chapter 3: Genocide 26
  3.1 Definition and Interpretation 26
  3.2 ‘Culture’ in Genocide 30
  3.3 Genocide and Group Rights 36

Chapter 4: Transitional Justice – making the connection to genocide 41
  4.1 What is Transitional Justice? 41
  4.2 Transitional Justice Timeline 42
  4.3 Philosophical Reasoning 47

Chapter 5: Conclusion 52
References: 55
Chapter 1: Introduction

1.1 Introduction and Relevance to the Field of Human Rights

The history of the indigenous peoples of Canada, since the land was colonized by the Europeans; is plagued with an ugly past. Subjected to policies of deliberate starvation, unaddressed disease, forced removal of children from their homes and their segregation to ‘residential schools’, late into the 20th century; Canada has something to answer for. How far does a state or society have to go in terms of reparations for such a past especially when it continues to cripple present generations?

Tragically, there is a striking disparity between the indigenous population of Canada and the society at large, seen in broad human rights terms including distressing socioeconomic conditions, among others. The Canadian, non-Aboriginal majority, has been deceived and misinformed in the education they received about the history of Canada and the role of European colonialism. Educated in Canada from the age of five, not only was I not told about this part of Canadian history, I was subtly taught to minimize, disregard and disenfranchise the Aboriginal. There were no Aboriginal children in my schools. In turn, the Aboriginal people have for seven generations, been marginalized, and made to feel subaltern and undeserving of socio-economic rights by state institution and policy.

Since 1883, when the first Indian Residential Schools were established by the Canadian government for the indigenous peoples, until 1996 when the last school was closed, the Aboriginal peoples of Canada suffered immeasurable loss of self and as collective groups. In 2009, The Truth and Reconciliation Commission of Canada was established with a mandate to right those wrongs. In the words of Honorable Justice Murray Sinclair, chairman of the Commission,

“The essence of what people need to know is this: For the longest time, aboriginal people have been mistreated by this country. In terms of their rights, but also in terms of their ability to function as human beings.... Not just because of a lack of
resources, but also a social experience which has taught them that they are incapable of managing their own affairs or taking care of themselves.”

“Non-Aboriginal people (Canadians) have been raised in an educational environment both in the schools and public to believe in the superiority of European societies, peoples and cultures and that Aboriginal people are inherently inferior because of that.”

After a formal apology to the Aboriginal peoples in 2008 from the Government of Canada and the eventual ratification in 2010 of the UN Declaration on the Rights of Indigenous People there appeared to be some concrete movement towards justice. The rhetoric both in state and in society appeared to be changing, as awareness of past and present injustices and prejudice were revealed. On October 14, 2013, a collection of prominent, Aboriginal leaders, members of the business community and other spiritual leaders, presented the United Nations Special Rapporteur for Indigenous Peoples, with a letter stating their deeply held conviction, that the history of Canada with the Aboriginals was not just ugly and brutal but rather, that “Canadian policy over more than 100 years” could be defined as genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948). They claim,

“The fact that Canada’s Aboriginal peoples have not been wiped out, and are indeed growing in numbers, is not proof that genocide never occurred, as some would have us believe. The historical and psychological reality of genocide among our Aboriginal communities is very much alive and a part of living memory. The sooner we recognize this truth, the sooner both Aboriginal and non-Aboriginal Canadians will be able to heal from our shared traumas.”

It is of interest whether the present conditions of transitional justice and the Truth and Reconciliation Commission will be enough to bring meaningful human rights fulfillment to the Aboriginal peoples of Canada.

---

1 Justice Murray Sinclair, from: Kennedy, M., Ottawa Citizen, Canadians need ‘conversation’ about residential schools: Murray Sinclair, April 15, 2015
2 Justice Murray Sinclair, from: Kerr, M., Queen’s gazette, Reconciliation through education, Queen’s University, March 30, 2015
3 The Globe and Mail, Phil Fontaine and Bernie Farber, What Canada committed against First Nations was genocide. The UN should recognize it, October 14, 2013
4 The Globe and Mail, Fontaine and Farber, 2013
1.2 Aim

I will argue that in keeping with the spirit of healing and the goals of reconciliation of transitional justice; the use of the label of *genocide* by the Government of Canada in acknowledging the events of what happened to the Aboriginals of Canada, is the veritable *just response*, encompassing what the Canadian government has merely called the ‘policy of assimilation’ of the Indian Residential Schools era.

In my discussion I will look to answer whether it is reasonable to label the events as *genocide*, given the interpretations of genocide in the legal community and in genocide discourse, plus normative ethics of such actions and interpretations. In principle, a just response should allow for healing where there was none and be a vital part of justice and human rights attainment for the Aboriginal peoples of Canada.

While this may or may not, have legal footing based on the definition in the Genocide Convention (1948), it could be the morally correct position for Canada to take in terms of human rights, justice and healing.

In 1996, rights philosopher Will Kymlicka spoke of the problem of; the finding of a balance with individual and group rights not lying in the refusal of indigenous peoples to accept external review (of their internal rights practices), but actually being the refusal of the larger society, as represented by its state government, to accept restrictions on the state’s sovereignty. This is a problem of power distribution, justice and rights claims. This is a problem of bringing the future generations of Aboriginals out of a subaltern condition because, quite possibly, if the Government of Canada concedes ‘too much’ in its acknowledgement of the past actions towards Aboriginals, then it may find itself in a position of diminished power and weakened territorial rights. For what is a State without its territory?; it could mean a whole restructuring of Canada. Too many concessions could take the government down a legal path of previously uncharted waters. This is the power struggle between justice for the group and the state itself, as can be interpreted from Kymlicka’s idea above.

In June of 2008, after an order from the Royal Commission on Aboriginal Peoples (1996), the Prime Minister of Canada, Stephen Harper, apologized in front of the House.

---

of Commons, to the indigenous people of Canada. He did not however apologize for genocide but for “this policy of assimilation”\(^\text{6}\) concerning Canada’s policy that removed an estimated 150,000 Aboriginal children from both their families and their communities.\(^\text{7}\) This failure to acknowledge genocide has left a sour taste and a gap in the subsequently formed Truth and Reconciliation Commission. There is a growing rhetoric within the indigenous people and without, for public awareness of the truth of the past. Perhaps genocide, as a label for the actions, is the truth that can heal, perhaps not. Prime Minister Harper himself referred to the infamous statement “to kill the Indian in the child”\(^\text{8}\) and this policy has not been forgotten in the indigenous community.

After a historical discursive narrative of the history of the Aboriginal, focusing on the period of the Indian Residential School System; and a review of genocide, both in academic and legal contexts, I will argue philosophically on the basis of whether or not it would be appropriate for the Government of Canada to follow this growing rhetoric and use genocide to describe the events that took place.

Internationally, at this time within the genocide rhetoric, during this 100\(^{\text{th}}\) anniversary of the mass killing of Armenians in Turkey; four additional states – the Vatican, Germany, Russia and Austria - have joined the ranks acknowledging the slaughter as genocide. Pope Francis said at the start of his mass on April 12\(^{\text{th}}\) of this year “concealing or denying evil is like allowing a wound to keep bleeding without bandaging it”\(^\text{9}\). Germany’s Norbert Roettgen, member of Chancellor Angela Merkel’s Christian Democratic Union, said “We can’t condone that with silence. Even 100 years later isn’t too late. This is overdue.”\(^\text{10}\) The statement from Austria read that it (as a former ally of the Ottoman Empire) “had a duty to recognize these horrific events as genocide”\(^\text{11}\)... it is

---

\(^\text{6}\)Aboriginal Affairs and Northern Development Canada (AANDC), Statement of Apology of 2008, June 11, 2008
\(^\text{8}\)AANDC, Statement of Apology 2008
\(^\text{9}\)The Associated Press, CBC News, Pope Francis calls Armenian slaughter ‘first genocide of the 20th century’, April 12, 2015
\(^\text{10}\)Brian Parkin, Bloomberg, Germany Recognizes Armenian Killings in 1915 as Genocide, April 23, 2015
\(^\text{11}\)Siranush Ghazanchyan, Public Radio of Armenia, Turkey recalled its ambassador to Austria over Armenian Genocide recognition, April 30, 2015
also Turkey’s duty to face honestly dark and painful chapters of its history”\textsuperscript{12}. At present, no such discourse is evident outside the indigenous circle with regards to the events in Canada.

1.3 Delimitations

The use of the word ‘Aboriginal’ people will be synonymous with and interchangeable with ‘indigenous’ people but will be clarified within the thesis with the proper identification of the different groups of indigenous people of Canada.

This exploration of whether or not there is a valid justification for the use of the term \textit{genocide} as part of transitional justice for events which transpired in the last 400 years to the Aboriginals of Canada, will be kept strictly to events surrounding the Indian Residential School System (Residential School System) although other events occurring as part of European colonialism and settler colonization will be touched on for historical reference only.

Also considered outside of the scope of this paper will be the involvement of the church in the Residential School System with regard to any duty, liability or other obligation arising from its role in history with the Aboriginal.

Furthermore, I will not be determining whether the events that took place could actually constitute genocide as per legal instruments and legal process, but simply as possible recognition within the genocide discourse of scholars, the judiciary and international community.

1.4 Theoretical Overview

As this is principally a philosophical paper I will not be using a specific method, but rather, a discussion on merit, interspersed with discourse, surrounding the problematization. I will approach the aim through conceptual analysis\textsuperscript{13} of what I view as the component parts necessary for understanding the argument in its fullest sense. Thus I will breakdown, define and analyze from different angles, the key concepts of \textit{genocide}, \textit{indigenous peoples} and \textit{transitional justice} to format a new, conceptual understanding of

\textsuperscript{12} AlJazeera, \textit{Turkey recalls envoy to Austria as ‘genocide’ condemned}

the problematization and of how these concepts should best be viewed in a normatively ethical stance.

However, in showing the history of the Aboriginal in Canada and specifically the era of the Residential School System, I will be using a post-colonial discourse narrative. Philosopher Frantz Fanon’s work on the power of colonial discourses and the aim of colonizing the minds of those involved is essentially what occurred with the European influence and power dominance over the Aboriginal in North America. Accordingly, it is also valid for analysis of disputes and conflicts within a country such as with indigenous groups over rights. Nevertheless, for the former students of the Residential Schools, it is rather a ‘postcolonial’ perspective that I take up. Contemporary theorists believe that ‘postcolonialism’ is a modern approach, indicating that post-colonial influences linger and have continuity, as well as discontinuities with colonialism. It is with this postcolonialism that the story of the Aboriginal is told.

Humanities professor, Homi Bhabha, echoes Fanon but shows us that the Aboriginal of the 21st century is not that same post-colonial Aboriginal but, having been subjected to the colonial discourses and actions, has morphed into a ‘hybrid identity’ somewhere between the past and the present. The efforts of the colonizer to ‘kill the Indian in the child’ have not resulted as such, but in postcolonial effects, have actually continued to cause anxiety for the paternalistic state in its effort to govern and exert power. As per Bhabha’s work in the theory of ‘hybridity’ the influences of colonialism have opened new directions of history, identity and politics. It is this clash between the old and the new in both the colonizer and the Aboriginal that lays the groundwork for the discussion of using the label of ‘genocide’ to identify the actions of the past; as a more finite form of justice in transition, for the Aboriginal of Canada.

The above notwithstanding, it is also of merit to consider the aspect of subaltern studies in post-colonialism. Subaltern studies come from studying the most subordinate, least liked groups in a society; namely studies emanating from sub-continental India and

15 Sylvester in Baylis (eds): 2011, p. 192
16 Sylvester in Baylis (eds): 2011, p. 191
Gramscian philosophy. This involves starting from the lowest point and looking up from that perspective – the subaltern point of view. Although perhaps not politically correct, one could argue that some groups of Aboriginals fall into the subaltern category; not always represented even as themselves but through the discourse of their privileged few and leaders - for these are the majority of voices heard speaking on behalf of the indigenous of Canada. Hence, it would be wise to consider the lowest common point of view when considering the strategies for transitional justice and the attainment of those goals consisting of fair, unbiased rights attainment for every single Canadian. A valid philosophical discussion should also consider this subaltern viewpoint, along with that of the State when discussing the merits and pitfalls of using genocide rhetoric as the Government of Canada is seeking forgiveness for actions of the past and the Aboriginal is seeking rights fulfillment and justice. This is to be additionally borne in mind when considering the philosophical discussion.

1.5 Previous Research

Previous research consisted of many journals and books on the subject of genocide, sociology of law in genocide, aboriginal studies and colonization and, the history of Aboriginals in Canada. Furthermore, it consisted of studies on transitional justice and the philosophy therein plus, philosophical materials in concepts of normative ethics and justice.

In genocide studies, a principle contributor is the creator of the definition and concept of genocide as a term to describe the sum of specific crimes designed to bring about the destruction of a group, Raphael Lemkin. Two of his significant works reviewed were Genocide as a Crime Under International Law (1947) and Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress (1944). His conceptualization, included “the deprivation of life” and “the prevention of life”, plus methods that markedly endanger life and health. He observed that the victims were

---

17 Sylvester in Baylis (eds): 2011, p. 187
19 Lemkin, in Lattimer (ed), 2007: p. 5
chosen specifically because they belonged to a certain group of people. Mass murder itself is not consistent enough with genocide because it does not account for losses to civilization constituted by cultural benefaction, which can only come from a group; given its specific national, racial or cultural characteristics. Of course, the history of the process within the United Nations for the drafting and finalizing (Travaux Preparatoires) of the exact contents of the Genocide Convention is relevant to understanding the intentions of this legislation and this was covered quite adequately in various texts.

With Lemkin’s ideas as the starting point, contemporary genocide scholars such as Helen Fein and Dirk Moses argue his conceptualization of the crime of genocide as something slightly different. Lemkin saw both the physical and cultural elements of life as interdependent and indivisible structures; consequently a ‘nation’ - recognized sovereignty notwithstanding - could be destroyed by the process of destruction of any one of these two elements. While Fein insists that physical destruction is central to genocide, although it may be achieved indirectly; Moses suggests that most scholars are trying to ‘tell’ Lemkin that genocide is something other than what he suggested and rather, as consisting mostly of mass murder; that Lemkin himself, did not understand what genocide was. Another view, that of Martin Shaw, is that genocide should not be viewed as destruction of a group, per se, but that the destruction is of ‘civilians’, the commonality to all victims, and that factor is what could enable the distinction between outright destruction of a people (a crime) and that of a war (lawful targeting of combatants). However, in sociologist Damien Short’s view this does not adequately allow for the distinction between crimes against humanity and genocide. Moreover, internationally respected genocide and human rights law expert, William A. Schabas compares the sphere of cultural genocide with ethnocide and ‘ethnic cleansing’ (arising

---

20 Lemkin, in Lattimer (ed), 2007: p. 5
26 Short, 2010
out of Yugoslavia and Kosovo in 1981). In this light he reminds us that neither cultural genocide nor ethnocide\(^{25}\) are specifically punishable under any international instrument and ethnic cleansing is a product of the International Criminal Tribunal for the Former Yugoslavia (ICTY)^{26}, mentioned only in the two Security Council Resolutions^{27} in the formation of the Tribunal but not clearly defined or mentioned in the ICTY Statute itself.\(^{28}\) Consequently the difficulty sometimes lies in the definitions and exact wordings or lack thereof in the statutes.

Damien Short takes the issues of genocide into the indigenous perspective and concludes\(^{29}\) that key sociologists have ignored the ‘culture’ aspect of genocide. Using interdisciplinary observations he supports a connection of the physical and cultural or ‘social’ destruction as indivisible genocide and furthermore, the direct connection to land; as is also an indivisible part of indigenous culture.\(^{30}\) Upon investigating the destructive experiences of Aboriginals, criminology and genocide scholar, Andrew Woolford, posits that the ‘modernist contrivance’ of a difference between ‘cultural’ and ‘physical’ genocide, can be shown to collapse.\(^{31}\) He examines genocide by a portrayal from the view of how destruction is experienced and made sense of, by the Aboriginal group(s) who define their own worlds within a culturally specific meaning. Woolford believes that the Genocide Convention, usually read from a modernist viewpoint, does not adequately capture the essence of Canadian Aboriginals as ‘notions of being’ because of the clear contrast between nature and culture, unlike their very essence of being. He argues that in fairness, rather than being considered as a group, they could be considered as ‘nations’ for the purpose of the Genocide Convention.\(^{32}\) Scholar Patrick Wolfe, attempts to create an understanding of the connections between settler colonialism and genocide and the

\(^{25}\) “Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether individually or collectively”- UNESCO Latin-American Conference, Declaration of San Jose, 11 December 1981 in William A. Schabas, *Genocide in International Law*, University Press, Cambridge, 2000, p.189

\(^{26}\) UN Security Council, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, (ICTY), September 2009


\(^{28}\) Schabas, 2000: pp. 151-205

\(^{29}\) Short, 2010

\(^{30}\) Short, 2010


\(^{32}\) Woolford, 2009: p. 88 - 91
beginnings of ‘assimilation’ by the deconstruction of the aboriginal groups through the causal factors of the breakdown of indigenous societies as in removal of their homes, land, birthrights and their ‘tribes’, essentially, which he argues is the same as death. He pushes for ‘structural genocide’, which he claims would avoid comparisons - or degrees of genocide – and would allow us to recognize “concrete empirical relationships between spatial removal, mass killings and biocultural assimilation”33. 34

Much of the research on transitional justice surrounds recovery from twenty-first century violent conflicts and the emerging norm of the use of truth and reconciliation commissions for democratization processes within the state, healing of the nation and peacebuilding.35 Professor Teitel, exposes the genealogy of transitional justice from its origins in World War I, to the present model of the rule of law.36 Comparatively, Catherine Turner looks at the new normative framework of it; as justice in transition, measured as on how much justice is actually delivered through the lens of international law, human rights law, and actions. A model in which peace is based on justice and new limits are imposed, by way of political reform, in a more democratic composition for nation states and its citizens.37

1.6 Chapter Outline

Chapter 2 consists of an introduction and exploration of who exactly are the indigenous peoples of Canada and an account of the connection between culture and the Aboriginal as to the nature of their being. Following that is a brief history, since

34 Wolfe, 2006
35 Michal Ben-Josef Hirsch, Megan MacKensie and Mohamed Sesay, Measuring the impacts of truth and reconciliation commissions: Placing the global ‘success’ of TRCs in local perspective, Cooperation and Conflict, 47(3), 2012, pp. 386-403
European colonization and the formation of ‘Canada’. To this, the final section addresses the specific period of time and actions during the Indian Residential School System – the subject of genocidal context.

Chapter 3 explores the subject matter of genocide; what it is under the law in Canada and internationally, plus its component parts and formation thereof. This is followed by a deeper assessment of the conceptualization of genocide and the indivisible role of culture and physiology as constituting ‘groups’ and necessary to fully understanding genocide. The final section of this chapter addresses the matter of group rights- rights held by the group itself – and the relation between affirming such rights and the crime of genocide.

Chapter 4 deals with explaining transitional justice and how this process connects to healing of people and policy changes within a state. Furthermore there is a timeline of the situation within Canada, through the lens of judicial action and discourse. Finally, a normative philosophical reasoning on the merits of having the Canadian government use the label of genocide to identify the policies and events of the Indian Residential School System – arguing that the use of such a label is the just response to the past.

Chapter 5 consists of a summary of this thesis with the idea that knowing the facts and understanding the concepts of culture, group rights, genocide, and justice one can observe the possible best course of action for the government of Canada to achieve healing and reconciliation for all; the Aboriginal, non-Aboriginal and the state itself in an effort, with the benefit of hindsight, to move all Canadians forward to on par justice and human rights.

Chapter 2: Aboriginal Peoples of Canada

In this section I will explore the concepts of the constitution of the Aboriginals, the nature and breadth of the culture and what it means to be Aboriginal in Canada. This
is followed by the history of the indigenous people of Canada relative to the European colonizer. Finally I will address the Indian Residential School System in depth to illustrate the injustices committed upon the Aboriginal children and their families, and the affects upon their physical person, their culture, group and essentially their very essence of being. From this can be drawn a conceptual understanding of what it may feel like to be Aboriginal in Canada today and what just actions may be necessary to right these wrongs, and in doing so enable forward progression of equitable rights for all Canadians.

2.1 Who is an Aboriginal?

‘Aboriginal peoples’ is a name for the collective of the original peoples inhabiting North America and their descendants. The Constitution of Canada\textsuperscript{38} recognizes that there are three groups of Aboriginal peoples: First Nations (formerly North American Indian), Métis (mixed First Nation and European ancestry) and Inuit (Northern Canada, Eskimo-Aleut speaking). Each of these distinct peoples has unique histories, spiritual beliefs, languages and cultural practices with communities located from remote locations of Canada, to rural and also urban - within large metropolitan areas. Those identifying as Aboriginal people accounted for 3.8% of the enumerated population of Canada; that is roughly 1.4 million people in 2011. Of this group, roughly 60% identify as First Nations, 32% as Métis and 4% as Inuit. Because First Nations consist of over 600 First Nations/Indian bands, they report over 60 Aboriginal languages indicating their own diversity.\textsuperscript{39} In order to better understand exactly what happened to the Aboriginal and the ways in which colonization may have impacted them, as is a dimension of this thesis, it is important to know something more of who they are, as a people, and the nature of their culture which I will address in the next section.

2.2 The Nature of the Aboriginal of Canada

Inherent in the nature of the Aboriginal is the connection to land. As George Poitras of the Mikisew Cree First Nation recently stated “If we don’t have land and we don’t have anywhere to carry out our traditional lifestyles, we lose who we are as a

\textsuperscript{38} Constitution Act 1982, Canadian Charter of Rights and Freedoms, Section 35
\textsuperscript{39} Statistics Canada, \textit{Aboriginal Peoples in Canada: First Nations People, Métis and Inuit}
people. So, if there’s no land, then it is equivalent in our estimation to genocide of the people.” While this connection to land is outside the scope of this thesis, it is however one vital component of the Aboriginal person and that piece needs to be included in a basic understanding of the nature of Aboriginals.

North American Aboriginal societies were dynamic, successful and comprehensive in nature. They consisted of their own languages – from twelve distinct language families – over sixty still spoken today, which is an expression of their identity and nationhood. Language and oral tradition such as song, dance and storytelling were the basic tools for transmitting the histories of their generations’ past, values and, spiritual and traditional beliefs. There was no written language prior to European arrival in North America. An Ojibwe elder, Mary Lou Fox, has said in relation to this “One Elder has said, ‘Without the language, we are warm bodies without a spirit’.” Elders were the keepers and teachers of knowledge: some stories were meant to be told during certain seasons, or in particular places or even time of day and this passing from generation to generation kept the social order intact.

Understandably, these societies depended upon this cultural legacy for survival and security, as the ceremonies, teachings and daily activities were mixed seamlessly in daily living with no real separation between the secular and the spiritual. Their culture encompassed an interconnected world, which accounted for the creation of animals, human beings and the physical universe; the role of supernatural beings notwithstanding – an interplay of humans, animals and the landscape. Children learned through the storytelling and participated in tasks, playing a vital role in the survival of the community itself and coming-of-age ceremonies. Clearly one can deduce that removing the children from this type of environment for generations would destroy the fabric of the Aboriginal.

41 University of British Columbia (UBC), Indigenous Foundations, Culture
42 Alice Huang, UBC, Indigenous Foundations, Languages
43 UBC, Indigenous Foundations, Languages
44 UBC, Indigenous Foundations, Languages, Culture
45 J.A. MacDonald from Harold Daly fonds, C-006513: Truth and Reconciliation Commission of Canada, They Came for the Children, Canada, Aboriginal Peoples, and Residential Schools, Library and Archives Canada, 2012, p. 8
“Canadians need to understand that *Aboriginal peoples are nations*. That is, they are political and cultural groups with values and lifeways distinct from those of other Canadians. They lived as nations … for thousands of years before the arrival of the Europeans. … Aboriginal people’s sense of confidence and well-being as individuals remains tied to the strength of their nations. Only as members of restored nations can they reach their potential in the twenty-first century.”

2.3 **History of the Colonized Aboriginal**

It is generally accepted knowledge that all aboriginal groups whether in Australia, New Zealand, Canada or the United States have experienced some level of physical destruction through settlement, attempted assimilation, disease and some sort of residential schools. In Canada today, Aboriginals are commonly describing their experience as genocide. I will give a brief account of how this conclusion has come about in relation to the process of colonization before moving to a detailed account of the most notorious Indian Residential School System.

The relationship between the Aboriginal of Canada and the European ‘discovery’ of North America began in the mid sixteenth century with, true colonization and colonialism coming later, under British rule after the Royal Proclamation of 1763 (after formalized agreements with France and Spain in the Treaty of Paris [1763] ). This agreement gave control of the ‘New World’ to Britain; formalizing its agreement to protect Roman Catholicism therein, and establishing the framework for the negotiation of treaties with the Aboriginals.

The efforts to ‘save the souls’ of Aboriginals were carried out in different ways depending on the church - Presbytarian, Congrationalist, Methodist, Roman Catholic, Anglican, United - some by simply proselytization and others by assimilation to the European ways through schools. By the mid nineteenth century, this method was used by

---

46 AANDC, The Royal Commission on Aboriginal Peoples, ARCHIVED - Highlights from the Report of the Royal Commission on Aboriginal Peoples, *A Word From Commissioners*
49 The Canadian Encyclopedia, Royal Proclamation of 1763
the Canadian government to culturally absorb Aboriginals into the Canadian mainstream (via residential schools).\textsuperscript{50}

Settler colonization devastated the indigenous populations and left vast tracts of land ‘available’ and virtually uninhabited through the spread of disease along trade routes, such as with small pox infected blankets and a deliberate government starvation policy; leaving well over half of the Aboriginal population dead by the end of the nineteenth century.\textsuperscript{51}

In terms of treaty negotiations, while the Aboriginal viewed such documents as ‘living’, to be changed depending on conditions, the non-Aboriginal treated them as an opportunity to put the Aboriginals in reserves and gain access to vital land and resources. Still in other cases, such as in the Province of British Columbia, Aboriginals were simply denied treaties and placed in the smallest reserves in the country. To this day First Nations are still seeking treaties that will grant them the inherent right to self-government and their basic Aboriginal rights.\textsuperscript{52}

In 1867, the Indian Act codified who was an Indian and who was not. While still regulating many dimensions of the lives of First Nations and their communities today, UN Special Rapporteur on the rights of indigenous peoples, James Anaya, says of this legislation, “A rigidly paternalistic law at its inception, it continues to structure important aspects of Canada’s relationship with First Nations today, although efforts at reform have slowly taken place.”\textsuperscript{53} He observes “notable episodes and patterns of devastating human rights violations”\textsuperscript{54} coming from this Act including the banning of religious ceremony and expressions of indigenous culture, exclusions from jury duty and voting, no access to courts for land rights claims, enforced governance institutions and forced assimilation policies through residential schools policy with forced removal of children, from their communities. Of notable mention is the ‘enfranchisement’ – Act for the Gradual Civilization of the Indian Tribes in the Canadas 1857 - which would remove their Aboriginal identity and membership in their ‘group’ and would not actually give them a

\textsuperscript{50} Woolford, 2009: p. 83
\textsuperscript{51} Woolford, 2009: p. 83
\textsuperscript{52} Woolford, 2009: p. 84
\textsuperscript{54} A/HRC/27/52/Add.2, p. 4, sec. II 4
vote.\textsuperscript{55} In fact, the Canadian government, in seeking control of Aboriginal land, took over land without making treaties, signed treaties it would not respect and unilaterally passed laws such as these and others, effectively controlling every aspect of Aboriginal life.

\textbf{2.4 The Indian Residential School System}

Frustrated by the refusal of Aboriginal people to accept this ‘enfranchisement’ policy on a whole scale, the Government of Canada turned to assimilation policies through residential schooling. The term residential school refers to the school system itself that was set up by the Canadian government and run by churches. The Prime Minister of Canada, Sir John A. Macdonald said in 1883

“When the school is on the reserve, the child lives with his parents who are savages; he is surrounded by savages, and though he may learn to read and write, his habits and training and mode of thought are Indian. He is simply a savage who can read and write”. \textsuperscript{56} Similarly, Hector Langevin, Public Works Minister of Canada said in 1883 “In order to educate the children properly we must separate them from their families. Some people may say that this is hard but if we want to civilize them we must do that.”\textsuperscript{57}

The prime objectives as noted within the context of the above two statements was not to truly educate the Aboriginal children but to indoctrinate them into the ways of the Euro-Canadian and Christian value system. In 1879, a federally appointed lawyer, Nicholas Flood Davis investigated the boarding school system being used in the United States of America. His recommendation for the Canadian government to work jointly with the churches was based on two premises: firstly, that the type of education being advocated would erode the Aboriginals’ existing cultural and spiritual beliefs and therefore it would be wrong “without supplying a better”\textsuperscript{58} faith – Christianity: secondly, dedicated religious men and women would work for substandard pay. Residential schools were subsequently established all across Canada starting in the 1880s. Indian

\begin{footnotesize}

\textsuperscript{55} Gradual Civilization Act, 1867
\textsuperscript{56} Truth and Reconciliation Commission, 2012: p. 6
\textsuperscript{57} Truth and Reconciliation Commission, 2012: p. i
\textsuperscript{58} Truth and Reconciliation Commission, 2012: p. 10
\end{footnotesize}
Affairs school inspector, J.A. Macrae said in 1886 “It is unlikely that any Tribe or tribes would give trouble of a serious nature to the Government whose members had children completely under Government control”\textsuperscript{59}. The Archbishop of St. Boniface wrote (1912) that it was necessary to place the children in these schools from the age of just six because they should be “caught young to be saved from what is on the whole the degenerating influence of their home environment”.\textsuperscript{60} Consequently, under the \textit{Indian Act}, it became mandatory in 1920, for every Indian child, between seven and fifteen years of age, to attend a residential boarding or day school (on the reservation); any other schooling was considered illegal.\textsuperscript{61}

It was common practice to remove the child to a school distant from their home community in order to alienate them from their families and surroundings, destroy their culture, their language and even their names.\textsuperscript{62} The children were forbidden and severely punished if the strict rules were broken. Angela Sidney, an \textit{Inuit}, said as she got to Choutla school in the northern Canadian, Yukon Territory, “…we couldn’t talk to our brothers! We got punished if we did. And we weren’t supposed to talk Indian, \textit{Tlingit}”.\textsuperscript{63} “We weren’t allowed to speak \textit{Cree}, only French and English, and for disobeying this, I was pushed into a small closet with no windows or light, and locked in for what seemed like hours”\textsuperscript{64} - Métis writer, Maria Campbell (7 years old).

There were truant officers - Royal Canadian Mounted Police (RCMP), priests, ministers and Indian Agents – who sought court injunctions, prescribed fines or imprisonment at times, to force the parents to take the children to school. The truant officers could, under the Indian Act, “take into custody a child whom [they believe] on reasonable grounds to be absent from school contrary to this Act and may convey the

\textsuperscript{59} Truth and Reconciliation Commission, 2012: p. 12
\textsuperscript{60} Truth and Reconciliation Commission, 2012: p. 10-11
\textsuperscript{61} Erin Hanson, UBC, Indigenous Foundation, \textit{The Residential School System}
\textsuperscript{62} A/HRC/27/52/Add.2, p. 4, sec. II 5
\textsuperscript{64} Maria Campbell, \textit{Halfbreed}, Toronto, McClelland and Stewart Ltd., 1973, p. 44 in Truth and Reconciliation Commission, 2012: p. 69
child to school, using as much force as circumstances require”.

Despite the government being aware that the schools were not working as planned, they continued and, of particular significance was the ‘sixties scoop’ (which lasted into the seventies) when large numbers of indigenous were taken into foster care and adopted into non-Aboriginal families, including outside of Canada. Due also to insufficient funding the schools were further unable to provide adequate conditions; poorly trained teachers providing inadequate education only up to the fifth grade and only for manual agricultural labour, light industry and domestic house work. There were very poor living conditions, and inadequate healthcare with rampant disease such as tuberculosis and cases of blindness, small-pox, dysentery and influenza plus cases of nutritional experiments on the malnourished children during the 1940s and 1950s where the children were kept on starvation-level diets and given or denied supplements, minerals and certain foods.

George Manuel (founder of the National Indian Brotherhood and the World Council of Indigenous Peoples) wrote about his experience “Hunger is both the first and the last thing I can remember about that school…Every Indian student smelled of hunger”. Isabelle Knockwood, of Shubenacadie school in the Province of Nova Scotia recalled “every Sunday when Mom and Dad came to see us and brought us food – mostly homemade blueberry pies – we’d get to be a family for an hour”. The dietary problems were confirmed in the 1940s by the Red Cross, as true.

Furthermore former students have spoken of widespread gross incidences of physical, sexual and emotional abuse at the hands of staff.

“Sister Marie Baptiste had a supply of sticks as long as pool cues. When she heard me speak my language, she’d lift up her hands and bring the stick down on me. I’ve still got bumps and scars on my hands. I tried very hard not to cry when

---

65 David B. MacDonald, Genocide in the Indian Residential Schools, Canadian History through the Lens of the UN Genocide Convention, pp. 306-324, in A. Woolford, J. Benvenuto, A.L. Hinton, (eds), 2014: p. 313
67 UBC, Indigenous Foundation, The Residential School System
68 CBC (Canadian Broadcasting Corporation) News, Aboriginal nutritional experiments had Ottawa’s approval, July 30, 2013
70 Isabel Knockwood, Out of the Depths: The Experiences of Mi’kmaw Children at the Indian Residential School at Shubenacadie, Roseway, Nova Scotia, Fernwood, 2001, p. 80
71 UBC, Indigenous Foundation, The Residential School System
I was being beaten and I can still just turn off my feelings…And I’m lucky. Many of the men my age, they either didn’t make it, committed suicide or died violent deaths, or alcohol got them. And it wasn’t just my generation. My grandmother, who’s in her late nineties, to this day it’s too painful for her to talk about what happened to her at the school.”  

Musqueam Nation former chief, George Guerin, Kuper Island School). Thousands did not survive these institutions; many times children were sent home to die or simply the families never heard from them again.

The Aboriginal’s purpose in life was very often shattered due to the fact that children were separated from their parents, which meant, effectively losing them; conversely, parents losing their children and consequently parents and grandparents having their responsibility stripped away. Sarah-Jane Essau of Moosehide in the Yukon Territory speaking of when the children did return ‘home’ “they won’t have anything to do with us; they want to be with white people; they grow away from us”. Another, Marius Tungilik, said he was taught “to hate our own people, basically, our own kind … you begin to think and see your own people in a different light. You see them eating with their hands. You think, ‘Okay, primitive.’ ” This disastrous impact on the Aboriginal was inevitable, from day one. As time passed the elders and healers died, the distinct cultures faded and generations of Aboriginals had fewer and fewer resources from a culture that was almost destroyed – belief systems, laws, economies and social organizations. Generations of survivors have grown up estranged from their cultures and languages, unable to maintain their Aboriginal identity and also unable to ‘fit in’ with the non-Aboriginal Canadian. These problems became apparent early on; as Edward

---


75 Truth and Reconciliation Commission, 2012: p. 77
Ahenakew (1885- 1961) who attended the Emmanuel College in Prince Albert (Province of Saskatchewan) observed, (a student was)

“in a totally false position. He does not fit into the Indian life, nor does he find that he can associate with the whites. He is forced to act a part. He is now one thing, now another, and that alone can brand him as an erratic and unreliable fellow”.

76 The legacy the schools left behind was family violence, joblessness, poverty, drug and alcohol abuse, family breakdown, sexual abuse, homelessness, prostitution, high incarceration rates and early death.

77 In the 1960s the churches began to explore their history with the Aboriginal and embarked on movements in support of Aboriginal rights. The system itself started to wind down in the late 1980s when residential school survivors began taking the churches and the government to court for damages. The first apology came in 1986 from the United Church of Canada for imposing ‘European culture and values’ on the Aboriginals. What followed were more apologies from churches specifically with regards to the operations of the schools and the mistreatment of the students – Roman Catholic Oblate Conference of Canada (1991), Anglican Church of Canada (1993), Presbyterian Church in Canada (1994), United Church (1998).

78 In April 2009 the Vatican issued a statement, after a meeting with Phil Fontaine, Grand Chief of the Assembly of First Nations of Canada, “the Holy Father expresses his sorrow at the anguish caused by the deplorable conduct of some members of the Church and he offered his sympathy and prayerful solidarity”.

80 Approximately 150,000 children were put through this residential school system and its 125 schools, the last of which closed in 1996. Today there are roughly seventy-five thousand survivors who are still seeking justice. As Theodore Fontaine, who is an

77 J.R. Miller, Shingwauk’s Vision: A History of Native Residential Schools, Toronto, University of Toronto Press, 1996, p. 103
78 UBC, Indigenous Foundation, The Residential School System
79 Truth & Reconciliation Commission, 2012: p. 81
80 Vatican, Communiqué of the Holy See Press Office, Canada, April 29, 2009
Anishinaabe of the Ojibway Nation - residential school attendee from the age of seven (1948-1958), and survivor said

“We lost our understanding of who we were, where we came from, and where we were going…. It was pounded into us repeatedly that Indians are no good, evil, savages, with heathen languages, no intelligence, no culture, no caring families, and no reason for existence…. It was not until much later, in my intense discomfort with being an Indian, that I understood that the government and its agents, the churches, had in fact been intent on killing me as an Indian person.”

As a result of The Royal Commission on Aboriginal Peoples (1996) - a formal public inquiry - the Government of Canada offered its first apology, and so began a process of transitional justice. Notably, to this day, the Canadian government has made no mention of ‘genocide’ for its actions in the past.

Chapter 3: Genocide

In this section I will illustrate a broader conceptualization of the unlawful act of genocide beginning with the strict legal sense of this crime, and moving forward through ontological considerations of culture – essence and character - and groups; behind the conception of the law. Additionally, this will be juxtaposed with Canadian law and Canadian policy pertaining to the Residential Schools and their purpose. Since culture does not feature prominently in the Genocide Convention but it was a large consideration in the development of the concept of genocide as distinguished from Crimes Against

81 Theodore Fontaine, Forward viii, in Woolford, Benvenuto, Hinton eds.: 2014
82 Aboriginal Affairs and Northern Development Canada (AANDC), Highlights from the Report of the Royal Commission on Aboriginal People, 1996
Humanity or War Crimes; I do focus on culture due to its indivisible connection to the nature and survival of a group, which will be explored. Lastly will be a discussion on collective group rights with the connection to international human rights law and how this directly fits with obtaining justice from genocide recognition.

3.1 Definition and Interpretation

In 1944, jurist Raphael Lemkin, a Polish Jew, wrote about his work concerning a destructive process he observed since 1933 after Hitler came to power in Germany. He characterized two notions: that of ‘barbarity’ which he later envisaged as killing members of a group – physical genocide - and that of ‘vandalism’ which became the undermining of those lives through destruction of cultural heritage (ie. science, arts, literature) – cultural genocide. In his book, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government Proposals for Redress*, Lemkin proposed this concept of ‘genocide’ taken from Greek *genos*, meaning tribe or race, and from the Latin *cide*, meaning killing or killer. As a result of his contributions, On 11 December 1946, in UN General Assembly Resolution 96(1), state members agreed to the following

“Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”

From here members undertook to formulate a convention for the prevention and punishment of the crime of genocide.

Canada recognizes genocide as per the Rome Statute of the International Criminal Court, to which it is a party. Genocide is also recognized in its national, Crimes Against Humanity and War Crimes Act (S.C.2000, c. 24). Although not in the title, genocide is

---

85 Merriam Webster Dictionary – genos, cide
itself listed under Section 4 (1)(a) for the crime committed within the country and Section 6(1)(a) for the crime committed outside of the country. Canada also acknowledges that these are crimes according to international customary law and attaches (subsection 2(1)) provisions of the Rome Statute, Article 6 with the following definition of genocide:

“For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.”

In addition to the inclusion of the Rome Statute definition within the Canadian Act it also includes following

““genocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

A quick look at this definition could lead one to believe that in the situation of the Residential School System, genocide could possibly be determined to have occurred. At least insofar as Article 6 (e), if not also (b) and (c). Furthermore, the First Nations, Inuit and Métis have each clearly been designated as an ‘identifiable group of persons’.

87 (Canada) Crimes Against Humanity and War Crimes Act S.C.2000, c.24
89 author’s emphasis
90 Crimes Against Humanity and War Crimes Act, Section 4(3) ‘genocide’
However, when looking at the Canadian case, it also becomes obvious where the definition of genocide—91— the same as from the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (hereinafter known as the Genocide Convention)—is inadequate in the most just sense. There is a specific lack of representation of culture as part of the foundational makeup of a ‘group’ per the statute, and where destruction of that foundation, can lead to genocide. The group distinctions have been interpreted as: ‘national’ being “a collection of people who are perceived to share a legal bond based on common citizenship coupled with reciprocity of rights and duties” 92; ‘ethnical’ being “a group whose members share a common language or culture” 93 or “a group which distinguishes itself, as such (self identification); or a group identified as such by others, including perpetrators of the crimes (identification by others)” 94; ‘racial’ group being “based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors” 95; and ‘religious’ group which is “one whose members share the same religion, denomination or mode of worship” 96 and “…sharing common beliefs.” 97 Observing the Trial Chamber of the Akayesu case in the International Criminal Tribunal for Rwanda (ICTR) it deemed that according to the travaux preparatoires, of the Genocide Convention, the drafters intended “to protect any stable and permanent group” 98, and that the “common criterion (is) that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner” 99. However, the Rutaganda Trial Chamber also said that each group should “be assessed in the light of a particular political, social

---

93 ICTR, Akayesu, 1998, para. 513, in HRW, 2004
94 ICTR, Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98, in HRW, 2004
95 ICTR, Akayesu, 1998, para. 514, in HRW, 2004 and concurred by Kayishema and Ruzindana, (Trial Chamber), May 21, 1999
96 ICTR, Akayesu, 1998, para. 515, in HRW, 2004
97 ICTR, Kayishema and Ruzindana, 1999, para. 98, in HRW, 2004
and cultural context,” given that “there are no generally and internationally accepted precise definitions” and consequently that determination of a protected group should be assessed on case-by-case basis. While this determination of groups by the Trial Chambers is welcome, the specific wording of the Genocide Convention itself is still very restricted in the sense of destruction of culture, and the connection of culture to a group.

Additionally, considering the origins of genocide, the emphasis on intent, as per the Genocide Convention definition, should not cause us to disregard the outcome of genocidal polices even if the purpose was not so avowed. Considering the often repeated “to kill the Indian in the child” - one’s culture - leaves nothing for interpretation as to the true intent of that statement and furthermore, government policy left little to the imagination. In 1920 Duncan Campbell Scott, the deputy minister of Indian Affairs said “I want to get rid of the Indian problem…Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department.”

Perhaps his arrogance is most notable in a previous statement in 1915 describing his ideas to the Ministry of Indian Affairs

“The happiest future for the Indian Race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.”

The government saw the Residential Schools as a solution not only to the ‘Indian problem’ after the decimation they suffered through disease, starvation after the extinction of the buffalo and government policy on food restriction, as well as conflict, but also, to finding a balance between the French-English divide in this nascent country. Since the fifteenth century, over 95% of the indigenous population had died and there was only an estimated 100,000 to 125,000 people left, thus the ‘Indian problem’.

---

100 ICTR, Rutaganda, (Trial Chamber), December 6, 1999, para. 56, in HRW, 2004
101 ICTR, Rutaganda, 1999, para. 56, in HRW, 2004
102 ICTR, Rutaganda, 1999, Musema (Trial Chamber), 27 January 2000, Semanza (Trial Chamber, May 15, 2003, in HRW, 2004
103 David B. MacDonald, in Woolford, Benvenuto, and Hinton, (eds.), 2014: p. 313
104 MacDonald in Woolford, Benvenuto, Hinton (eds.), 2014, p. 312
105 author’s emphasis
Consequently, the intent to kill the Indian, appears to be quite clear. However, the stigma of ‘genocide’ as the ‘crime of crimes’ is likely not the label that Canada wants attached to those actions, events and circumstances that took place - whether by specific intent or as an accomplice (with the Churches) through negligence - during the Residential School era of Canadian history.

3.2 ‘Culture’ in Genocide

In *The Clash of Civilizations?*, Samuel P. Huntington, eloquently posits, “The great divisions among humankind and the dominant source of conflict will be cultural”.\(^{107}\)

Why should one speak of culture when speaking of genocide? Sociologist Reza Banakar holds that culture is

“the process of reproduction of beliefs and attitudes that people hold about the social world ...(which) help the individual to interpret, create and recreate the social reality within his/her own universe of meaning”,\(^{108}\) and cultural patterns are formed through the community’s shared values. The relevance of culture to this whole argument is that in the Indian Residential School System, it wasn’t simply about the rather straightforwardness of ‘forcibly transferring children of the group to another group’ (per the statute), but rather, the consequences of those actions upon the group; both as the collective group and singularly, as individual members of the group. Hence, the most just statutory definition of genocide would include culture very specifically as had originally been advanced. Consequently, the resultant ramifications to the Aboriginals are visible not only in the stories and records of those who perished, but also in the surviving generations. The cultural difference between the indigenous peoples and the settler colonials was the common denominator in the conflict between the parties. Accordingly, Lemkin described the process of genocide in two phases,

“one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may

---

106 MacDonald in Woolford, Benvenuto, Hinton (eds.), 2014, p. 308
be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor’s own nationals”\textsuperscript{109}.

This process of genocide can be seen in the ‘assimilation’ of the Aboriginal peoples of Canada through cultural destruction. Largely, the first Canadian Prime Minister, John A. MacDonald and some ministers are criticized for the policies in the creation of the residential schools. In 1879 federally appointed lawyer, Nicholas Davin, whose report made recommendations on the establishment of the schools and separation of the children from their families, said that “[the children would be] gradually prepared to meet the necessities of the not distant future; to welcome and facilitate, it may be hoped, the settlement of the country”\textsuperscript{110}. Deputy Minister of Indian Affairs, Lawrence Vankoughnet, in 1887 said to the Prime Minister, while justifying government expenditures in the new residential schools; the Aboriginal children who attended regular day schools “followed the terrible example set them by their parents”\textsuperscript{111} therefore, they had to be removed to the residential schools. Simply put, the pattern with the Residential Schools was as follows: the children were removed from the group, the children were socialized into a different culture (different group), the adults of victim group die off and the way of life dies with them. Thus you have the cultural destruction of a group even if no one was physically killed. Of course, in the actual events, not everyone died off and some of the culture was recovered however, it fits the pattern of Lemkin’s model.

There is a myriad of literature on the process of the drafting of the Genocide Convention especially when it comes to whom the protected groups were and, the inclusion or exclusion of culture and concepts inclusive of culture; beginning with the term’s creator Raphael Lemkin, who played a key role in the forming of the Convention. He said that “by “genocide” we mean the destruction of a nation or of an ethnic group”\textsuperscript{112}

\textsuperscript{109} Lemkin, 1944, pp. xi, 79-80, in Stone, (ed), 2008 : p. 11
\textsuperscript{110} Nicholas Flood Davin, Report on Industrial Schools for Indian and Half-Breeds, Ottawa, 14 March 1879, p. 10 in Truth and Reconciliation Commission, 2012, p. 10
\textsuperscript{111} Indian and Northern Affairs Canada, File 1/25-1 Volume 15, L. Vankoughnet to Sir John A. Macdonald, 26 August 1887, in Truth and Reconciliation Commission, 2012, p. 10
\textsuperscript{112} Lemkin, 1944, p. 79 in Schabas, 2000: p. 104
At times he mentioned ‘minority groups’ and at others groups as “the entity that deserved protection from the emerging law of genocide”\textsuperscript{113}.

Genocide scholar William A. Schabas argues that Article 6(e) (Rome Statute) “forcibly transferring children”\textsuperscript{114} does actually contemplate a form of cultural genocide despite those exact words being excluded from The Convention\textsuperscript{115}. This would be due to the conceived idea of what would be the result of a perpetrator’s action when transferring the children out of the victim group and into another - a cultural genocide of that group. During a discussion in the Preparatory Commission of the International Criminal Court, the word ‘forcible’ within the definition was analyzed, and it was deemed as “not restricted to direct acts of physical force and may include, but is not necessarily restricted to, threats or intimidation”\textsuperscript{116}. This is a fairly broad interpretation that would however suit many of the cases of the children taken to the Residential Schools. During Genocide Convention draft discussions, the Venezuelan delegate pointed out that

“the relocation of adolescents into environments where they will be instilled with alien customs, languages, religions, and values was considered tantamount to the eradication of the next generation”\textsuperscript{117}

and that the forced transfer of children had the natural consequence of prevention of births; thus there can be a correlation between Article (d) (imposing measures intended to prevent births within the group) and (e) (forcibly transferring children of the group to another group). In the case of the indigenous children of Australia, the Human Rights and Equal Opportunities Commission, in 1997, concluded that the forcible transfer of children to non-indigenous institutions violated the Genocide Convention (Art. II (e) ) and that

\textsuperscript{113} Lemkin, 1944, p. 91 in Schabas, 2000: p. 106
\textsuperscript{114} Rome Statute, 1998
\textsuperscript{115} Schabas, 2000: p. 245
“… their unique cultural values and ethnic identities would disappear, giving way to models of Western culture…Removal of children with this objective in mind is genocidal because it aims to destroy the “cultural unit” which the Convention is concerned to preserve.”

This falls in line with Lemkin’s assertion that culture is what integrates societies and losing it, is catastrophic. Culture and physiological needs are coexistent thus the group exists by virtue of its common culture.

“If the culture of a group is violently undermined, the group itself disintegrates and its members must either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction …the destruction of cultural symbols is genocide…”

It is this sort of degeneration of the group and its members, that is still visible in the Aboriginal societies today as confirmed by the 2014 Human Rights Council report on The situation on the indigenous peoples in Canada, which commences with observing that

“The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the past several years;… overall there appear to be high levels of distrust among indigenous peoples towards the government at both the federal and provincial levels.”

The final definition and classification of ‘groups’ was largely the result of Lemkin’s exhaustive work and significantly, the balance of political power between state parties. After all, it was important to have a consensus that all states could sign onto, but cultural genocide was one of the most contentious issues. Of the three principle drafts of the Convention, the Secretariat Draft included Article I, 3.

---

118 Australian Human Rights and Equal Opportunities Commission, conclusions received by the Federal Court of Australia, Nuyarimma v. Thompson, [1999], FCA 1192, paras. 5-11 (per Wilcox J.) in Schabas, 2000: p. 178
119 Short, 2010
121 A/HRC/27/52/Add.2, p. 1
122 Short, 2010
“Destroying the specific characteristics of the group by: (a) forcible transfer of children to another human group; or (b) forced and systematic exile of individuals representing culture of a group;…”

This was one of the failed attempts at bringing culture directly into the wording of the Convention. Secondly, the Ad Hoc Committee draft was more specific; reading

“Article III [Cultural genocide] In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:…”

There was much debate between the states as to the inclusion of the concept of cultural genocide as Lemkin wanted; given that he viewed physical and cultural genocide as one “interdependent and indivisible” process which could be achieved through a variety of methods such as: separation of families, physical massacre, sterilization, destruction of cultural centers, desecration of cultural symbols - to name a few. Although many states did in fact want the inclusion of cultural genocide, they felt that the Ad Hoc Committee draft was too broad and it became clear that some states were concerned about their own internal policies and situations with minority groups, such as with immigrants and indigenous peoples. As an example, Brazil protested that, “some minorities might have used it as an excuse for opposing perfectly normal assimilation in new countries”.

Concerns also emerged that even the United Nations may open itself up to charges of cultural genocide. Canada was not sitting on the sidelines and during this debate took the position that it would be forced to make reservations: this issue of cultural genocide being “the single most important issue for the Canadian government”.

---

123 Schabas, 2000: p. 554
124 Schabas, 2000: p. 560
125 Short, 2010: p. 838
127 Schabas, 2000: pp. 182-183: Pakistan, Venezuela, Philippines, Egypt, China, Lebanon, Poland, Soviet Union
129 Schabas, 2000: p. 184, New Zealand
130 Schabas, 2000: p. 184, footnote 215
against the whole convention if need be. In the end, the Canadian representative was very satisfied with his role in the fight to remove cultural genocide from the Convention and that “he took a leading part in the debate on this point and succeeded in having his viewpoints accepted by the Committee”\(^\text{131}\). From this point forward, Canada had no more concerns with the Convention and any final articles needing to be settled.\(^\text{132}\)

In the meantime, the Government of Canada was busy back home administering the Indian Residential Schools and their “policy of assimilation”. It was later in 1951 that the government finally rescinded the outlaw (since 1884) of Aboriginal cultural ceremonies such as potlatches\(^\text{133}\), ‘give-away ceremonies’ of the \textit{Prairie First Nations}, the ‘Thirst Dance’ of the \textit{Saulteaux} and \textit{Cree} and the \textit{Blackfoot} ‘Sun Dance’.\(^\text{134}\) The loss of Aboriginal language through the policy of forbidding the speaking of the native tongues and forced adoption of either English or French in the schools was also a significant blow to culture. As \textit{Cree First Nation} historian Doug Cuthand\(^\text{135}\) writes, “the oral history in the mother tongue disappears, the grandparents can no longer speak to their children, and the descriptive nuances and sense of humour change”\(^\text{136}\). The children were taught that their languages were archaic and even if they spoke the language during their visits home, the result was an incomplete and imperfect knowledge of the language. In 2011, Statistics Canada reported that only 14.5\% of Aboriginals reported as having a native mother tongue. Additionally, although there is a reported increase of Aboriginals learning their native language ‘as a second language’, a decreasing number of people are able to hold a conversation, just 17.2\% of the Aboriginals, down from 21\% in 2006 and 26\% in 1996.\(^\text{137}\) Banakar writes that a common language is imperative to cultural processes. That there exists an interdependence between the two and the creation of


\(^{132}\) Schabas, 2000: p. 184 footnote 215

\(^{133}\) potlatch: at traditional gathering by Pacific Coast aboriginals, usually to bear witness to a significant occurrence, such as marriage, coming of age, etc., Government of British Columbia, Archives

\(^{134}\) MacDonald, in Woolford, Benvenuto, Hinton, (eds.), 2014, p. 314

\(^{135}\) the name ‘Cuthand’ was his grandfather’s baby name and referred to frostbite on his hands when he was a baby: Doug Cuthand, ‘Askiwina’, p. 59


\(^{137}\) Statistics Canada, \textit{Aboriginal Languages and Selected Vitality Indicators in 2011}
cultural identities without which, a cultural group cannot be formed. It follows that as a result of the Residential School System, even today, Aboriginal languages are still in danger of extinction and with them a piece of what it is, to be First Nations, Métis or Inuit and a reduction of the group’s existence.

3.3 Genocide and Group Rights

History, including the acknowledged genocides of the past century, has established that minorities are quite vulnerable to human rights violations. In this section my aim is not to discuss all the standard human rights and how they too apply to people who are of a minority in addition to those who are not of a minority – termed Universal Rights Applied to Minorities (URAMs). Nor is it my aim to discuss what James W. Nickel calls “Minority Rights” meaning those rights designed to meet the special needs of minority members due to vulnerabilities arising from being part of that minority. Rather, my aim here is to discuss “Group Rights”. These are rights, which are held by the group itself - not individuals singularly – where the group is the rightholder, thus rights of peoples. Similarly to Nickel, philosopher Will Kymlicka also concerns himself with distinctions within group rights and, for the problematization of this thesis; what is relevant is rights claims of indigenous people from the broader society, which he calls “external protections”. The idea is that these external protections are what is necessary to put the group on equal footing with the rest of its surrounding society. The polarity of the difficulty however is that the sovereign state may take some of these rights as restrictions upon its self-determination and thus there are conflicting interests.

Group Rights include such rights as to; recognition as being a distinct group, to not have genocide committed upon that group, to not be subjected to forced assimilation, to having its own language recognized, to self-determination and, against ethnic

---

138 Banakar, 2008; p. 49
140 Nickel, 2007: pp. 155
141 Nickel, 2007: p. 155
142 Kymlicka, 1996: p. 448
cleansing; just to name a few and therefore, encompassing both positive and negative rights. Granted, some of these group rights such as those of autonomy and political control are more controversial than others; but those others, are less related to states and power and more closely related to the family of non-derogable rights – torture, slavery, genocide. In view of non-discrimination and rights equality, it bears mentioning that the Universal Declaration of Human Rights preamble opens

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”

Furthermore, Articles 1 and 2 therein provide that “all beings are born free and equal” and

“everyone is entitled to all the rights and freedoms […] without distinction of any kind, such as race, colour, sex, language, religion, political or opinion, national or social origin, property, birth or other status.”

In further recognition of human rights, as to indigenous groups specifically, is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP 2007), which reaffirms in Article 1 that

“indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

Therefore, reaffirming that ‘international human rights law’ is applicable to these groups; and, Article 7(2), “Indigenous peoples have the collective right to live in freedom,

---

144 Nickel, 2007: p. 22-26
145 UTERM, non-derogable right
146 UNGA, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), preamble
147 UDHR 1948: Article 1
148 UDHR 1948: Article 2
149 author’s emphasis
151 author’s emphasis
peace and security as distinct peoples…”¹⁵² Hence, there are guarantees in international human rights law expressing enjoyment of rights without discrimination and additionally, in rights as individual members of groups and, of the groups themselves (collective rights). As mentioned in the beginning of this paper, Canada ratified the UNDRIP in 2010 with specific caveats as to its actual validity as law¹⁵³, possibly as an effort to minimize any control that this document and its obligations may attempt to convey upon the Government of Canada; such as with land claims and natural resources. On the upside, the endorsement of the Declaration was a positive move for the government towards reconciliation with the Aboriginals of Canada, albeit three years after initially opposing the Declaration. First Nations National Chief Shawn Atleo spoke favourably of the move in November of 2010; that it marked an important shift in the relationship with the government and, that from this point forward, real work could begin to bring fairness and justice to the First Nations.¹⁵⁴

One very specific group right is that of protection from genocide as per the Genocide Convention. Group rights are used to protect the cultural, ethnic, national or other identity of the group; what constitutes the make-up of that group. People can feel so strongly about their group and identity that it can be argued that the removal of such rights and a consequent reduced level of survival of that group is tantamount to a reduction in the survival of the individual member and visa versa.¹⁵⁵ Nickel observes¹⁵⁶ in his works on group rights that often in cases of survivors of genocide, the individuals left behind do not often flourish but rather, fall into addiction, suicide and depression; which conditions are also reported by Special Rapporteur Anaya about the Aboriginals.¹⁵⁷ Additionally he reports that

¹⁵² UN Declaration on the Rights of Indigenous Peoples, Article 7(2)
¹⁵³ AANDC, Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, 2010
¹⁵⁴ CBC News, Canada endorses indigenous rights declaration, November 12, 2010
¹⁵⁵ Nickel, 2007: p. 165
¹⁵⁶ Nickel, 2007: p. 165
“The residential school period continues to cast a long shadow of despair on indigenous communities, and many of the dire social and economic problems faced by aboriginal peoples are linked to that experience.”

Although there is a longstanding debate among scholars about the issue of the collectivity of group rights versus the individuality of rights themselves - including those of persons in minority groups - the issue of group rights, especially within indigenous peoples seems to be enduring as greater global awareness and consensus is achieved. This can work, if these rights are respected by both the external society and the judiciary; providing that the group itself is also functioning in a coherent and analogous fashion. Interestingly, the prohibition of genocide is not actually a ‘human right’ as it is not specifically mentioned as such in the Genocide Convention. Specifically it is referred to as a crime under international law. However, this legislation is for the protection of groups as being groups, as discussed above, requiring states and other agencies to not destroy groups, largely a negative duty, while positively enacting national legislations prohibiting and punishing such crimes. Whether labeled a human right or crime, clearly freedom from genocide is guaranteed under human rights law and international criminal law.

Interestingly, there was a significant first attempt to use the Genocide Convention via a petition to the UN Secretariat, entitled *We Charge Genocide* (1951), from African Americans who were seeking redress. While apparently a very compelling document; the General Assembly however, did not adopt it. When Raphael Lemkin was asked about this case, he took issue with it citing that these were concerns of discrimination and individual problems. He believed that human rights problems of this nature were strictly within the context of the Universal Declaration of Human Rights thus, outside the scope of the Genocide Convention, which was for ‘group rights’ and he did not want these two documents confused.

---

159 Genocide Convention, 1948
160 Nickel, 2007: p. 157
161 lead by the Civil Rights Congress, for lynching and other assaults on African Americans from 1945 to 1951, a ‘reign of terror’ was conducted on blacks. Stone, (ed), 2008: p. 16
162 Stone, (ed), 2008: p. 16-19
163 Stone, (ed), 2008: p. 20
The question one has to ask is does a right have a diminished value in the eyes of the rightholder; where there is a failure on the part of the duty bearer to vindicate the group for past violations, through proper acknowledgement of wrongs – particularly in the case of genocide? Could this contribute to social and economic problems within the group, such as those noted by Special Rapporteur Anaya? As a result of the sanitized content of the Prime Minister’s apology to the Aboriginals, for the government’s role in the Residential School System, we will not likely have the opportunity to see anything to the contrary; unless the Government of Canada changes its rhetoric and acknowledges the history as constituting genocide for the Aboriginals. In a 2013 row between the Southern Chiefs Organization and the Canadian Museum for Human Rights (a Crown corporation) over their decision to change a label from the originally planned “Settler Colonial Genocide” to simply, “Indian Residential Schools”; Chief Clearsky responded to this move by saying “Sanitizing this will only make a festering wound more endemic and will only ensure racism will be allowed to grow.” The museum spokesperson responded “We’re not declaring it as genocide. We’re not declaring it as not genocide”. The Ministry of Aboriginal Affairs remained silent on the matter.

164 AANDC, Statement of Apology of 2008
165 Southern Chiefs Organization, http://www.scoinc.mb.ca/
166 Chief Clearsky, Southern Chiefs Organization, National Post Canada, Jake Edmiston, ‘Indian Residential Schools’ or ‘Settler Colonial Genocide’? Native group slams human rights museum over exhibit wording, August 6, 2013
167 Ms Fitzhenry, National Post Canada, August 6, 2013
Chapter: 4 Transitional Justice - making the connection to genocide

In this chapter I will outline some basic ideas of what constitutes transitional justice, as what is essentially ‘justice in transition’ moving affected peoples or groups from a tragic situation through to reconciliation and peace for self and for the group, including one’s nation as a whole. Following this I will in a discursive manner, describe the timeline of transitional justice events in the Canadian context, of the Aboriginals and the Residential Schools. Finally I will show the normative philosophical reasoning for justification of the use of the label of genocide by Canada, as a just response to its history.

4.1 What is Transitional Justice?

Transitional justice is connected to times of political change and legal responses to address wrongdoings by previous systems of rule.\textsuperscript{168} In this case, the political change is actually still in the works and future legal responses for parity of human rights between non-Aboriginal and the Aboriginal, too; recalling the statement by the UN Special Rapporteur that, the Indian Act (1985) while rigidly paternalistic early on, still controls important aspects of First Nations.\textsuperscript{169} The contradiction of transitional justice is that it seeks to expiate failings of the past law and replacing them with new law or implementation of laws, such as in enabling rights fulfillment. Transitional justice scholar, Catherine Turner posits that transitional justice now constitutes a normative framework which can be used for political resolutions with the central premise of international human rights law and, that it can be used to exert social change. In use, there is usually a clear distinction between the victim group and the perpetrator of injustice seeking to rectify matters.\textsuperscript{170} In achieving justice in transition one can observe that both law and politics juxtaposition through the process and it is about finding the right

\textsuperscript{169} A/HRC/27/52/Add.2, p.4, Sec. II 4
\textsuperscript{170} Turner, 2013: p. 194
balance, whereby the law allows for the victims to take necessary steps and assists when appropriate; however, while law is a framework, it is not itself justice.\textsuperscript{171}

As we observe justice in transition such as with a Truth and Reconciliation Commission in Canada we begin to see the emergence of a postcolonial discourse; that of using \textit{genocide} to acknowledge the whole of events of the past, so in described. This discourse reflects a new level of security for the individuals and groups, that is emerging from this framework of transitional justice and the power obtained from just actions and recognition. With the introduction of international human rights law into this process - the greater the push for justice recognition in the eyes of the international community - the stronger the thrust against partisan politics within the country. An example of such in use is the letter written to \textit{UN Special Rapporteur on the rights of indigenous peoples, James Anaya}, urging the United Nations to declare Canada’s treatment of the Aboriginals, as genocide.\textsuperscript{172}

\textbf{4.2 Transitional Justice Timeline}

The normative process towards justice for Aboriginals began as a result of the court cases with the churches and then the public inquiry commencing in 1991, which formalized as, The Royal Commission on Aboriginal Peoples in 1996 in an effort to “restore justice to the relationship between Aboriginal and non-Aboriginal people in Canada”\textsuperscript{173}. The Commissioners stated that,

“there cannot be peace or harmony unless there is justice… policies pursued over the decades have undermined – almost erased - Aboriginal cultures and identities…. This is assimilation. It is denial of the principles of peace, harmony and justice for which this country stands…. Aboriginal people have the secret of cultural survival. They have … the right to cultural continuity.”\textsuperscript{174} In terms of moving forward the \textit{Iroquois Confederacy} expressed,

\begin{flushleft}
\footnotesize
\textsuperscript{171} Turner, 2013: p. 195
\textsuperscript{172} The Globe and Mail, October 14, 2013
\textsuperscript{173} AANDC, The Royal Commission on Aboriginal Peoples, \textit{A Word From Commissioners}
\textsuperscript{174} The Royal Commission on Aboriginal Peoples, \textit{A Word From Commissioners; There can be no peace or harmony unless there is justice}, 2010
\end{flushleft}
“Silver is sturdy and does not easily break. It does not rust and deteriorate with time. However, it does become tarnished. So when we come together, we must polish the chain, time and again, to restore our friendship to its original brightness.”

Following this, the first apology from the Canadian government came in the form of a *Statement of Reconciliation*, in January of 1998. This was a meager atonement in which the government said it could not take pride in its historical treatment of Aboriginal peoples and that “attitudes of racial and cultural superiority” had suppressed the culture and values of Aboriginals. The government acknowledged the “role it played in the development and administration of these schools…” but in what read rather patronizingly continued, “we wish to emphasize that what you experienced was not your fault and should never have happened… we are deeply sorry.”

Other discourse of the time, referring to the plight of Aboriginals, specifically the *Innu First Nations*, was an editorial in a national newspaper which asked “Does it make sense, in the year 2000, for people to be living a marginal existence in such a remote place?.... Isn’t it time they joined the modern world?” The idea within this editorial is very reminiscent of the ideas and language, which lead to the establishment of the Residential School System and the ‘policy of assimilation’, more than 100 years ago. Evolution from such discourse has been slow moving but there is movement away from this kind of cryptic malevolence as Canadians become aware of their history.

In 2007, as part of a landmark negotiated settlement, the *Indian Residential School Settlement Agreement*, between victims of residential schools and the Government of Canada and the churches; the Truth and Reconciliation Commission of Canada (TRC) was created so that the voices of the victims would not be forgotten. Reconciliation, a social act, can be defined as “to render no longer in opposition”; the TRC’s mandate is

175 Chief Jacob E. Thomas, Cayuga First Nation, Haudenosaunee (Iroquois) Confederacy, The Royal Commission on Aboriginal Peoples, A Word From Commissioners, 2010
177 Statement of Reconciliation, 1998
178 Statement of Reconciliation, 1998
to report to the Canadian public on what happened in the Indian Residential Schools; to provide those affected with an opportunity to be heard in a dignified and culturally appropriate manner and to promote awareness and education about the Residential School System and “its impacts on the human dignity of former students”\textsuperscript{181}, and communities so that this legacy of Canadian history will be immortalized in perpetuity. Amongst this, is the goal to encourage reconciliation from all parties of interest, including former students, their families, communities, religious entities, \textit{government}\textsuperscript{182} and the people of Canada.\textsuperscript{183} The settlement agreement itself also included compensatory payments to victims (to which the government was responsible for 76\% and the churches 24\%)\textsuperscript{184}, Commemoration Activities and measures to support healing such as an Aboriginal Healing Foundation endowment.\textsuperscript{185}

During this same year, on the international front, Canada, having been against the Draft Declaration on the Rights of Indigenous Peoples (1994)\textsuperscript{186} from the start, became one of four states (USA, Australia, New Zealand), which voted against the Declaration on the Rights of Indigenous Peoples (the Declaration).

Back at home in 2008, the government issued a formal apology, given by Prime Minister Steven Harper in the presence of residential school survivors, and Aboriginal leaders, inside the House of Commons. While this apology acknowledged wrongdoings - such as some described here in this paper - committed against the Aboriginal people and, contained many instances of ‘we apologize for…’, the rhetoric never moved to the area of genocide. However he did also affirm that,

“Two primary objectives of the Residential Schools were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to

\textsuperscript{181} Indian and Northern Affairs Canada, \textit{Indian Residential Schools Settlement Agreement (IRSSA)}, 2007, p. 11
\textsuperscript{182} author’s emphasis
\textsuperscript{183} IRSSA, 2007, p. 11
\textsuperscript{184} CBC News Canada, \textit{A timeline of residential schools the Truth and Reconciliation Commission}, May 16, 2008
\textsuperscript{185} IRSSA, 2007
assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal."\textsuperscript{187}

In response, the Chair of the Nisga’a Lisims Government, Kevin McKay said “we feel that the acceptability of the apology is very much a personal decision of residential school survivors. The Nisga’a Nation will consider the sincerity of the Prime Minister’s apology on the basis of the policies and actions of the government in the days and years to come. Only history will determine the degree of its sincerity.”\textsuperscript{188}

Gradually, whether by impetus of goodwill or of court order, Canada has had a slow change of heart. After internal political backlash, and public outcry the government did finally ratify the Declaration on the Rights of Indigenous Peoples, in November 2010 although openly stating the Declaration as: non legally-binding, not reflecting customary international law, nor capable of changing Canadian law\textsuperscript{189}. However, by endorsing the Declaration, Canada reaffirmed,

“its commitment to build a positive and productive relationship with First Nations, Inuit and Métis peoples to improve the well-being of Aboriginal Canadians, based on our shared history, respect and a desire to move forward together.”\textsuperscript{190}

In contradiction to this paternalistic glossy rhetoric, Justice Murray Sinclair, chair of the Truth and Reconciliation Commission, said in 2012,

“That word is ‘genocide’. That word, in fact, is what Aboriginal people, elders and Survivors generally (use to) talk about the fact that, for many generations, they and their ancestors were subject to significant oppression at the hand of the government, and the hands of the Churches, and at the hands of society.”\textsuperscript{191}

The conundrum in statehood rhetoric begins to appear, as the word ‘genocide’ is inconspicuously absent in the series of apologies, neither in any court documents nor in

\textsuperscript{187} Government of Canada, \textit{Statement of Apology - to former students of Indian Residential Schools}, June 11, 2008
\textsuperscript{188} UBC, Indigenous Foundation, \textit{The Residential School System}
\textsuperscript{189} AANDC, \textit{Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples}, November 12, 2010
\textsuperscript{190} Government of Canada: November 12, 2010
\textsuperscript{191} Woolford, Benvenuto, Hinton (eds), 2014: p. 1
the TRC; however it is being heard outside of official policy in terms of this aspect of Canadian history.

In stark contrast, to the Prime Minister’s apology of five years earlier, on April 26, 2013, former Canadian Prime Minister (2003-2006), Paul Martin speaking at Truth and Reconciliation Commission hearings said

“Let us understand that what happened at the residential schools was the use of education for cultural genocide, and that the fact of the matter is …yes, it really was, lets call a spade a spade…”\(^{192}\) and “this fight on behalf of fairness and human rights has only begun, and Canadians I know if they understood the issues they would support what is being said here today”.\(^ {193}\)

Martin is an Honorary Witness\(^ {194}\) of the Commission whose job it is to witness this historical event and be charged with passing the knowledge along.

The final report on achievements in the mandate of the TRC and further recommendations are due out at the end of May 2015 however, on January 30, 2013, the Ontario Superior Court of Justice gave an advisory opinion that the legacy mandate of the TRC does not extend to evaluate the “adequacy or inadequacy of the policy responses of the government of Canada”\(^ {195}\) or “Canada’s responses to the Indian Residential School experience”.\(^ {196}\) Consequently, it is expected that the TRC will not comment of any use of the label of ‘genocide’ for what took place.

Thus here we have transitional justice in action but it bids the question: Is this enough? Hence, my questions of whether using the label of genocide would be a reasonable and just response by the government given the circumstances of the events, the discourse and legal context of genocide. Perhaps this is an element of transitional justice that is missing in this Canadian context, which I hope to explore further. It can be easy to dismiss the use of this label because using the genocide label carries great responsibility and the history and burden of the tragedies of all persons who have been wronged in such a manner. Furthermore, there are always the underlying if not overt

\(^{192}\) CBC News, video clip, *Paul Martin accuses residential schools of cultural genocide*, 26 April 2013
\(^{193}\) Paul Martin, CBC News, video clip, 2013
\(^{194}\) Truth and Reconciliation Commission, *Honorary Witness*
\(^{195}\) *Fontaine v. Canada* (Attorney General), 2013, ONSC 684, Court File No. CV-00-192059 and CV-12-447891, p. 35
\(^{196}\) *Fontaine v. Canada*, p. 36
connections of any acknowledged genocide, to the holocaust. Understandably, it must not be used lightly both in respect for those who are long gone and, in respect of the responsibility that it bears for survivors and their legacy and; correspondingly for the weight it can put upon legal institutions and states. Conversely, it should be used where it is both due and just; hence has a practical value so that victims and families and the collective group can not only heal but also grow and experience a re-birth where the destruction of the group was so significant.

In retrospect, *UN Special Rapporteur on the rights of indigenous peoples, Anaya*, highlighted, in 2014, human rights concerns for the indigenous peoples of Canada stating that they had “reached crisis proportions in many respects”\(^{197}\) and the paradox of reconciling this with Canada’s “well-developed legal framework and general prosperity”\(^{198}\). In keeping with goals of affirmation of rights attainment, an ideal conceptualization of transitional justice process is where, the whole group of Aboriginal peoples, the sub-groups: *First Nations, Métis* and *Inuit* and finally the whole of Canadians are vindicated, reconcile any differences and move forward in a positive direction of on par human rights attainment.

### 4.3 Philosophical Reasoning

The argument is that putting the label of *genocide* to characterize the summary of the acts committed upon the Aboriginal peoples over the last 150 years, namely the Indian Residential School era, is the just response by the government and in doing so, Aboriginal Canadians will feel an affirmation of their rights and thus all Canadians can heal.

Harvard University Professor of Law Mark J. Osiel has observed that if genocide is not acknowledged and condemned, the result is a prolongation of the cycle of anger, resentment and dehumanization of victims.\(^{199}\) Professor Matthew Lippman reminds us that genocide is a crime committed upon a group – a collective crime. As a result, justice

---

\(^{197}\) A/HRC/27/52/Add.2, p. 6, sec. IV 14  
\(^{198}\) A/HRC/27/52/Add.2, p. 6, sec. IV 14  
too can be difficult, painful and often, if due care is not taken, it can be incomplete. In Canada, as the TRC wraps up, the stage could be set for such an occurrence. Such a case is illustrated in Former National Chief of the Assembly of First Nations, Phil Fontaine’s (et al.) letter to the UN Special Rapporteur in 2013, “We hold that until Canada as represented by its government…come(s) to grip with the fact that we engaged in a deliberate policy of genocide both cultural and physical; we will never heal”.

Acknowledgment of genocide, as noted earlier can be a powerful political tool for the government or the reverse can also be true. However, this is not about the government, who was also the perpetrator, this is about the victims. Recognizing genocide tells everyone that there are victims, that there were victimizers and also bystanders. As to morally responsible bystanders, Canadians cannot all claim that they did not know, as the German people did of the concentration camps in their back yards and, the idea that ‘intentions were benevolent though misguided’ as has been heard in discourse does not wipe the past clean. Recognition tells us in no uncertain terms that there is a moral imperative to do the very best; that existing policies and laws must be reviewed against further rights violations and inequities, and changed - justice in transition.

An explanation for the evolution of the discourse of using genocide to define the past events, and showing good reason for its use, can be drawn from the work of Thomas Pogge, and access to rights, wherein depicting the duties of the government “not to impose unjust social institutions on its members”. By this logic, to have access to rights, the government must not interfere and may also have to perform duties (by changing unfair policies and so forth) so that one can have just access to ones rights. Thus, Aboriginals have the right, to claim their rights under international law (the Genocide Convention) and the government should: first, not interfere and second, facilitate access. Since it is the state that holds the power to ‘decide’ whether or not to use the label genocide, the state should, under these principles, simply do it so that the Aboriginals and all of Canadians have access to this right. Pogge also correctly reflects

---

200 Matthew Lippman, pp. 415-514 in Lattimer (ed), 2007
201 Globe and Mail, Fontaine and Farber, 2013
on human rights violations being everyone’s concern and that we, as members of society, feel shame and responsibility for injustices our governments commit due to the collective responsibility of the composite of our society. Consequently we see the genocide discourse coming from different members of Canadian society. One must not forget that government is composed of individuals and those individuals should feel this same responsibility, however the difficulty is in the realpolitik often seen in government and still seen in the behaviour of the Canadian federal government.

Accountability is also an important aspect for the feeling of the attainment of justice for the victims, and is actually absent in this particular case. After the class-action lawsuit that culminated in 2007, there was a fulfillment of compensatory justice, which was in itself extremely welcome and financially beneficial to the claimants. However, what can never happen in this instance is a form of retributive justice where victims or their families get some sort of satisfaction and feeling that something just has occurred, by knowing that the perpetrators of the crimes have been adequately punished. Retributive justice assists with creating a more finite end to the injustices thereby starting a possibility of mourning losses and moving forward through alternative solutions. Besides the truth seeking from the TRC, there will be no retribution; no one will be criminally prosecuted.

While it is true that, for criminal prosecution under the Genocide Convention the scope is fairly narrow especially when it comes to aspects involving cultural genocide, this does not preclude the legal instrument and that there must be accountability for justice to be effective and innately just. This is especially true for a nation that is attempting to redress its past colonial injustices and to maintain respect among Canadians, as a democratic government rather than the paternalistic realpolitik of its past. John Stuart Mill’s position on power and therefore government would be that it is only justified for power to be exercised over a person against his/her own will for the prevention of harm to others. Yet the government has been imposing its will

---

203 Pogge, in Hayden (ed), 2001: p. 194
204 Stanford Encyclopedia of Philosophy, Retributive Justice, June 18, 2014
205 Borneman, in Lattimer, 2007: p. 559-560
(paternalistic laws and the residential schools) on the Aboriginals, when no harm was being done to others. We know by what happened that the government was not protecting the non-Aboriginal from anything - quite the contrary - and simply using their power over society to beget more power, which Mill warns us about. One could also argue that Mill’s ethical theory of utilitarianism could justify the use of the label of genocide as the just response by the government. Using his ‘greatest happiness principle’; an action is right in proportion to its promotion of happiness (or absence of pain) and, wrong as it produces the opposite. Furthermore, the discourse towards using genocide would show that these people are voicing what they believe is their moral right to have the ‘assimilation’ (to use the government’s word) acknowledged as genocide and according to Mill, withholding a moral right is an injustice. It follows that “Justice implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.” Mill speaks of rights as a “valid claim on society to protect him in the possession of it”, and given that we have international human rights instruments to which Canada has agreed to the contents and obligations therein, it would seem that as former Prime Minister Martin said “yes it really was (genocide)…lets call a spade a spade”, then Mill’s answer to ‘greatest happiness’ – certainly for a proportionately greater number of people - would be for the government to call it genocide.

Genocide scholar, Israel Charny writes about different types of denial of genocide. Of note is the trivialization and the dulling of the tragedy. With desensitization of past events it is predictable how some officials in government can ignore the validity of calling the tragedies of the Residential School System as genocide. Furthermore, there are denials based on a rationalization that the events ‘didn’t quite fit’, based on relativization, or some other deconstruction of the meaning of genocide. One

---

209 Mill, in Hayden (ed), 2001: p. 139
211 Mill, in Hayden (ed), 2001: p. 142
212 Paul Martin, CBC New, video clip, 2013
214 Charney, in Lattimer (ed), 2007
such denier active in this Canadian issue is psychology professor Joseph P. Gone who is uneasy with the connection between the Holocaust and use of the label *genocide*, but we must recall that this is not how Lemkin envisioned it. According to Gone, “Genocide without killing, is like murder without death”\textsuperscript{215} and furthermore, the issues with the indigenous people should consequently be looked at in terms of racism rather than as genocide. On the other hand, Andrew Woolford thinks “What matters in genocide is not that it’s a lot of killing…What matters is that it’s an assault against a group, on their ability to persist as a group”.\textsuperscript{216} In my estimation, Gone’s views are a form of denial as genocide encompasses far more than killing, as discussed in the chapter on genocide. It is observable how this kind of denial whether outspoken or implied through inaction can be damaging to victims of genocide. The Truth and Reconciliation Commission has reported many accounts of residential school survivors who characterized the whole system as genocidal.\textsuperscript{217} One such is Fred Kelly, who attended a residential school where the children were subjected to the nutritional experimentation, and he most eloquently said that, “Whether people recognize it is genocide officially or unofficially, I know that it is”.\textsuperscript{218}

In contrast to these arguments sits John Rawls’ idea of an ultra minimal list of human rights and his concern that with too many rights (too “liberal, democratic and egalitarian”\textsuperscript{219}), some will not be respected and thus more conflicts are created. Therefore, Rawls believes that rulers must govern sensibly and look to the common good, but still have political hierarchy over international human rights. Canada could argue that it maintains a fairly high level of human rights, on a global scale, and with the transitional justice process in place for repairing past injustices; it has done enough and using *genocide* is not warranted and would give too much power to the people, by the act of such an acknowledgement thereby losing its political hierarchy.

\textsuperscript{216} Jessica Burtnick, *Did Canada Commit Genocide Against First Nations*, Winnipeg Free Press, August 5, 2014
\textsuperscript{219} Nickel, 2007: pp. 98-103, p. 99
However, according to ethnic conflict theorist Ervin Staub, the consensus of victims seems to be that “Survivors (of genocide) desperately want to have the truth of what was done to them be established and their suffering acknowledged. Acknowledgement, especially when it is emphatic, is healing”.\textsuperscript{220} An emphatic acknowledgment would be for the government to acknowledge \textit{genocide} from the Indian Residential School System.

\textbf{Chapter 5: Conclusion}

In describing the story of the indigenous peoples of Canada, in particular with their own words; about Canada’s ‘policy of assimilation’ and of ‘killing the Indian in the child’; it is my hope that a fuller, more conceptualized understanding of the events surrounding the ‘forced removal of children’ and the Indian Residential Schools, has been achieved. This, I supplemented with a view of genocide which includes not just the hard law such as the Genocide Convention itself but also the justice behind the idea of what genocide, in its conception was meant to entail - culture - and who it is actually supposed to protect. From these concepts, one can take a position, on whether these events constituted genocide or something else. Deciding that, it is possible to move on to the question of justice and whether it would be a just response for the victims, to have the government of Canada recognize this as one of six genocides in history.

The above notwithstanding, this history is not now questioned in Canada. That the Indian Residential School System virtually eliminated the ‘Aboriginal’ within the Aboriginal is not questioned. That thousands of children died or were subjected to gross injustices and violations of self - is not questioned. That there was an assimilation policy in place - is not questioned. That the Indian Residential School System, established and funded by the federal government of Canada and administered by the Churches, left a legacy that nearly elimination what was left of the \textit{First Nations, Metis} and \textit{Inuit} peoples

\textsuperscript{220} Ervin Staub (2008), in MacDonald, in Woolford, Benvenuto, Hinton (eds), 2014, p. 317
- is not questioned. That the Aboriginals of Canada, as a group or groups, are greatly traumatized as a result - is not questioned. That the acts and intentions perpetrated by the government in the form of the Indian Residential School System should be labeled genocide; is what is questioned. The Canadian government remains silent on the matter while Aboriginal leaders, scholars, some members of the Canadian public and non-partisan politicians, push for recognition of genocide as the just response. Moreover, using the label of genocide is a valid, important and necessary part of the completion of a transitional justice process, which the Canadian government is still ignoring.

It’s not a matter of the state prosecuting itself. This, if possible, would likely bring more pain to the victims. Transitional justice in Canada, for this ugly legacy, has been steady and progressive but without genocide recognition, could remain unfulfilled and stall the process of healing for Aboriginals and non-Aboriginals. This label does carry a certain power; one, which the State may be afraid of, and conversely, one, which may be the hand of healing for future generations. It could also be seen as an effort to move away from paternalistic policies, such as the Indian Act, and be the proverbial olive branch handed to the ‘new partner’, the Aboriginal, in what scholar David MacDonald envisions as a new bi-national society\textsuperscript{221} with two treaty founders of the country. Canadians generally consider themselves a benevolent nation as part of an identity of being, and internationally on the level of statehood Canada has been recognized for its valuable contributions in both World Wars and as a peacekeeper, but the actions of the past with the Residential Schools were severely misguided and Canada cannot hide behind its good deeds while allowing the bad ones to fester, throughout the nation. Canada recognizes five genocides, the Holodomor, the Holocaust, and the genocides of Armenia, Rwanda and Srebrenica.\textsuperscript{222} In the end, Aboriginal leaders and human rights experts may still pursue recognition from the federal government or the United Nations itself. Notably, despite the connotations behind being recognized as one of the countries in the world that has engaged in genocide, it can still be something that a nation can move forward from as we have seen in Germany for instance – setting of the horrendous crimes


\textsuperscript{222} Woolford, Benvenuto, Hinton, (eds), 2014: p. 7
which inspired Lemkin to bring *genocide* into international law. As Woolford said recently, “For survivors, recognition is important. From a more general perspective, my angle is that thinking about ourselves as a nation born out of genocide gives us a point to reinvent ourselves, to think about how we can decolonize Canada and be a different nation.”

As May 2015 comes to an end, and so too, the culmination of the findings and recommendations of the Truth and Reconciliation Commission; that chapter of history is finally being exposed in its fullest, to all Canadians and the international community. Justice could well be served, with exposure of the whole truth and recognition thereof through a determination of *genocide* from the government. At this time of its closing, Commissioner Dr. Marie Wilson has put the future most succinctly,

“... The goodness of Canadians is what will determine what becomes of all of this … people have a very deep sense of wanting to believe in good values within our country, it is the reputation that we’ve taken into the world about ourselves and now it is our home challenge to live up to that in our own country.”

Reconciliation is about how does Canadian society have to heal itself …from our own collective ignorance about the history of our own country as regards our relationship with indigenous peoples and what do we have to do to make sure that we never slide back into that way of not knowing and that we use our new understanding in positive ways.”

As for words from the Canadian government, only time will tell.

---

223 Andrew Woolford in Larry Krotz, ‘A Canadian Genocide?’, Ucobserver, March 2014
References

Primary Sources:


A/HRC/27/52/Add.2


Constitution Act 1982, Canadian Charter of Rights and Freedoms, Section 35

Crimes Against Humanity and War Crimes Act S.C.2000, c.24


*Fontaine v. Canada* (Attorney General), 2013, ONSC 684, Court File No. CV-00-192059 and CV-12-447891

Gradual Civilization Act, 1867


UN Security Council, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, (ICTY), September 2009


**Secondary Sources:**

Aboriginal Affairs and Northern Development Canada, *Aboriginal Peoples and Communities*  
<https://www.aadnc-aandc.gc.ca/eng/1100100013785/1304467449155>


Aboriginal Affairs and Northern Development Canada, *Terminology*  
<https://www.aadnc-aandc.gc.ca/eng/1100100014642/1100100014643>


Bayefsky, UN Human Rights Treaties, *Canada*,  
<http://www.bayefsky.com/bycategory.php/state/31>


Goldstein, Donald M., Shafritz, Jay M., and Williams, Phil (eds), *Classic Readings and Contemporary Debates in International Relations*, 3rd Ed., Wadsworth, Cengage Learning, Boston 2006, pp. 581-600


Southern Chiefs Organization <http://www.scoinc.mb.ca/>


Truth and Reconciliation Commission Canada

Truth and Reconciliation Commission Canada, Honorary Witness


UN, Office of the High Commissioner for Human Rights, Canada,
<http://www.ohchr.org/EN/countries/LACRegion/Pages/CAIndex.aspx>

UN, Office for High Commissioner for Human Rights, International Decades of World’s Indigenous People

University of British Columbia (UBC), Indigenous Foundations, Culture

<http://www1.umn.edu/humanrts/iachr/declar-indig-art22.html>

UNTERM, non-derogable right

Vasak, Karel, The International Dimensions of Human Rights, Philip Alston (ed. in English), Greenwood Press, Unesco, France, 1982


Media:
All Jazeera, *Turkey recalls envoy to Austria as ‘genocide’ condemned*  


Kerr, Mark, Queen’s Gazette, *Reconciliation through education*, March 30, 2015  
<http://www.queensu.ca/gazette/stories/reconciliation-through-education?fb_action_ids=10152918600429332&fb_action_types=og.shares&fb_source=other_multiline&action_object_map=%5B5B573352646101525%5D&action_type_map=%5B%22og.shares%22%5D&action_ref_map=%5B%5D> Accessed April 30, 2015


The Globe and Mail, Phil Fontaine and Bernie Farber, *What Canada committed against First Nations was genocide. The UN should recognize it*. October 14, 2013
<http://www.theglobeandmail.com/globe-debate/what-canada-committed-against-first-nations-was-genocide-the-un-should-recognize-it/article14853747/> Accessed April 10, 2015

UCobserver, Krotz, Larry, *A Canadian Genocide?*, March 2014