

Revitalizing Indigenous law: Truth, reconciliation, and access to justice

Until recently, Canadian law was used by Canada to suppress truth and deter reconciliation. Parliament's creation of assimilative laws and regulations facilitated the oppression of Aboriginal cultures and enabled the residential school system. In addition, Canada's laws and associated legal principles fostered an atmosphere of secrecy and concealment. When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequences of horrific truths. Decisions not to charge or prosecute abusers allowed people to escape the harmful consequences of their actions. In addition, the right of Aboriginal communities and leaders to function in accordance with their own customs, traditions, laws, and cultures was taken away by law. Those who continued to act in accordance with those cultures could be, and were, prosecuted. Aboriginal people came to see law as a tool of government oppression.

To this point, the country's civil laws continued to overlook the truth that the extinguishment of peoples' languages and cultures is a personal and social injury of the deepest kind. It is difficult to understand why the forced assimilation of children through removal from their families and communities—to be placed with people of another race for the purpose of destroying the race and culture from which the children come—can be deemed an act of genocide under Article 2(e) of the UN's Convention on Genocide, but is not a civil wrong.

Failure to recognize such truths hinders reconciliation. Many Aboriginal people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests. Not only has Canadian law generally not protected Aboriginal land rights, resources, and governmental authority, despite court judgments, but it has also allowed, and continues to allow, the removal of Aboriginal children through a child-welfare system that cuts them off from their culture. As a result, law has been, and continues to be, a significant obstacle to reconciliation. This is the case despite the recognition that courts have begun to show that justice has historically been denied and that such denial should not continue. Given these circumstances, it should come as no surprise that formal Canadian law and Canada's legal institutions are still viewed with suspicion within many Aboriginal communities.

Yet, that is changing. Court decisions since the repatriation of Canada's Constitution in 1982 have given hope to Aboriginal people that the recognition and affirmation of their existing Treaty and Aboriginal rights in Section 35 of the *Constitution Act, 1982* may be an important vehicle for change. However, the view of many Aboriginal people is that the utilization of the Government of Canada's court is fraught with danger. Aboriginal leaders and communities turn to Canada's courts literally because there is no other legal mechanism.