

## Other Areas of Practice

## Do attitudes that inspired residential schools still prevail in Canada? | Stephen O'Neill

By **Stephen O'Neill**



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"Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some thought, as it was infamously said, 'to kill the Indian in the child.' Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country. ...There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again."

June 11, 2008 — Prime Minister Stephen Harper, House of Commons apology

I thought about these words when, like countless other Canadians, I first learned of the recent discovery of the remains of 215 children buried on the site of what used to be Canada's largest Residential School.

That these children lie here, is a direct result of long-held Canadian attitudes and policies that Indigenous cultures and spiritual beliefs are inferior to those of the dominant culture.

But there are two sides to the Canadian apology coin. Stated simply, as long as concepts used to justify European sovereignty over Indigenous lands and peoples remain in law and are not repudiated, then the hard fact remains that the attitudes that built and inspired the Indian Residential Schools system continue to prevail in Canada.

What do I mean by this? Put simply, while Canada's Indigenous peoples were never conquered, claims of sovereignty over and title to lands in Canada are largely based on legal doctrines similar to the assumptions upon which the residential schools system itself was based.

The Report of the Royal Commission on Aboriginal Peoples, 1996, put it this way:

"Europeans arriving in North America attempted to justify their assumption of political sovereignty over Aboriginal nations and title to their lands on the basis of a re-interpretation of prevailing norms in international law at the time, in particular the doctrine of discovery.

"Upon the 'discovery' of the North American continent by Europeans, according to this doctrine, the newcomers were immediately vested with full sovereign ownership of the discovered lands and everything on them. When faced with the fact that the lands were inhabited by Aboriginal peoples, European commentators, such as the preacher Gray, popularized the notion that Aboriginal peoples were merely in possession of such lands, since they could not possibly have the civilized and Christian attributes that would enable them to assert sovereign ownership to them. Over time, these ethnocentric notions gained currency and were given legitimacy by certain court decisions."

The royal commission authors made several recommendations, including the following:

"*Terra Nullius* and the Doctrine of Discovery 1.16.2

Federal, provincial and territorial governments further the process of renewal by ... (a) acknowledging that concepts such as terra nullius and the doctrine of discovery are factually, legally and morally wrong;"

Fast forward from 1996 to 2015, when the Final Report of the Truth and Reconciliation Commission of Canada was filed. In the intervening 19 years, Canada had not taken the required and necessary steps to repudiate the racist attitudes that both inspired the residential schools system and the Doctrine of Discovery. Accordingly, the Truth and Reconciliation Commission made three of its 94 Calls to Action as follows:

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.
45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:
  - i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.
  - ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.
  - iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
  - iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

And now fast forward to 2021. Do the attitudes that inspired the residential schools system and the Doctrine of Discovery (Indigenous cultures and spiritual beliefs are inferior and unequal) still prevail in Canada? Look no further than Bill C-15, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*. It is presently undergoing third reading in the House of Commons.

If passed, this legislation will provide that the government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples and must prepare and implement an action plan to achieve the objectives of the declaration.

The preamble to this proposed legislation contains 22 whereas clauses. Clauses 1 and 9 state:

"Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith;

Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and terra nullius, are racist, scientifically false, legally invalid, morally condemnable and socially unjust;"

To give truth and justice to the 2008 prime ministerial apology, to repudiate the attitudes that inspired the Indian Residential Schools system, to ensure that there is no place in Canada for these

attitudes to ever prevail again, but most importantly, to remember and honour all Indian Residential Schools children who lie buried across this country, including those 215 children who lie buried on the site of the former Kamloops Indian Residential School, Bill C-15 must be passed into law. The hard truth can be no clearer than this.

*Stephen O'Neill was appointed a judge of the Ontario Superior Court of Justice in 1999, retiring in 2015. Before his appointment as a judge, he practised law out of Sudbury, focusing on Indigenous legal and justice issues. He has travelled extensively throughout northeastern Ontario and he has written and spoken extensively on Indigenous and Crown /Aboriginal issues. He recommenced the practice of law in 2016 with the firm Nahwegahbow, Corbiere and his practice is devoted solely to First Nations issues. In 2009, Justice O'Neill determined to paddle across Canada, following the historic Route of the Voyageurs. He has reached Yellowknife and will undertake the final phase to Tuktoyaktuk and the Arctic Ocean in 2022.*

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