

## *What conversation is the TCPS in?*

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Thank you for this opportunity to offer these comments on the proposed revisions to the Tricouncil Policy Statement, and notably to Chapter nine on research involving Aboriginal Peoples.

The comments I offer are based on some 25 years of engagement: as a citizen of Canada; as a researcher; as a Faculty member of Dalhousie University's Social Science and Humanities Research Ethics Board; as a research interlocutor with many First Nations Peoples across Canada including Piikani Blackfoot, Kwakwaka'wakw, Secwepemc, Cree, Mi'kmaq, Anishnaabeg Peoples; as a political and legal anthropologist striving to understand and faithfully represent how Canada's laws operate in relation to Indigenous Peoples and what our obligations to Indigenous Peoples are therefore; as a scholar engaging histories where somehow, bizarrely enough, the dominant story of Canada has developed such that policies can be developed by State-supported agencies suggesting that *our* laws – rather than those of the Peoples whose lands we are fortunate enough to share – should govern the conduct of Canadians in their relations with First Peoples.

The current proposals toward addressing the matter of ethical conduct of research by, with, for and about Aboriginal peoples represent an enormous amount of thoughtful and engaged work. They are potentially a step in the right direction, that is if they are understood as steps toward a more encompassing conversation. I know that many Aboriginal and non-Aboriginal individuals and organizations, have struggled and are still struggling to achieve this movement. In addition to marking some movement, these tentative steps, as or more importantly, suggest how very much more the Tricouncil, the PRE, and Canada ought to be striving to achieve.

In a recent presentation at Dalhousie University's Schulich Law School<sup>1</sup>, the Hon. Justice Murray Sinclair, Chair of the Indian Residential School Truth and Reconciliation Commission, raised a highly pointed question to all who are addressing the history of knowledge, socio-cultural, educational, economic, legal and political relations involving Indigenous Peoples in their relations with Canada. Justice Sinclair's question was simple:

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<sup>1</sup> Remarks of Honourable Justice Murray Sinclair, Schulich School of Law, Dalhousie University, Halifax NS, January 21, 2010.

*“What is the conversation we are in?”*

Indeed, what is the conversation, or rather conversations, we are in? What are their underlying principles? And once we understand these points, what then is the conversation that the TCPS is in?

As I understand Justice Sinclair, he is referring to the fact that in whatever area or lands of Canada we find ourselves, the histories of the relations with Indigenous Peoples need to be taken fully into account. As he noted, the issues are diverse across Canada. There are different principles in each area across the country. There are differences between, for instance, Canada’s engagement with Mohawk Peoples, vs. those with Prairie First Nations, versus those with B.C. First Nations, vs. those with northern Peoples such as the Dene or the Inuit, and so on. All of this is because of the nature of the evolution of each of these relationships in each of these territories and their respective Indigenous Peoples. In some areas, there remain still-in-force Land-sharing Treaties that guide the kind of legal-political relations we should follow, the kind of conversation we are in. In other areas, such as the Maritime Provinces, there remain Peace and Friendship Treaties that guide the sort of conversation we are in. In other areas, such as British Columbia, there have been no historic Treaties, where strong claims to different interacting orders of jurisdiction should prevail. All of this should guide the various conversations we are in, including those by which Chapter 9 of the TCPS should be guided.

But there are other authorities, in addition to Justice Sinclair, who have given guidance about the conversations we are in, within the context of Canadian rule of law: most notably the Canadian Constitution and the Supreme Court of Canada.

Based on guidance from s.35(1) of the *Constitution Act, 1982*, and subsequent decisions of the Supreme Court of Canada, the underlying principle in Canada’s engagement — its conversation — with Aboriginal Peoples is the principle of reconciliation. We should understand this principle as the *reconciliation between Canada’s generations of settler citizenry with the many, diverse First Peoples upon whose territories Canada and its delimited claim to authority has been built*. Chief Justice Beverly McLachlin in the Supreme Court’s *Van der Peet* decision and the earlier *Sparrow* decision, noted that one of “the two fundamental purposes of s.35(1) was the achievement of a just and lasting settlement of Aboriginal claims”.<sup>2</sup> Chief Justice McLaughlin went on to suggest that this just and lasting settlement, this reconciliation requires, a conversation, and a perpetual one at that, but one that should achieve real, effective just consequences. It requires and obliges recognition of the rights of Aboriginal Peoples, including their existing rights to govern their lands. It requires that those rights be fully acknowledged. Such rights cannot be unilaterally imposed by the Crown or any of its agencies. Nor can the contours of reconciliation be established without the consent of the various Aboriginal Peoples themselves — to do so would be contradict the very principle of reconciliation, of a conversation between Peoples.<sup>3</sup>

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<sup>2</sup> *R v Van der Peet*, [1996] SCJ 77 at para 310 per McLachlin J in dissent

<sup>3</sup> For additional comments on the principle of reconciliation at the Supreme Court of Canada, see C. MacIntosh (forthcoming), “The Reconciliation Doctrine in Chief Justice McLachlin’s Court: From a “final legal remedy” to a “just and lasting” process.”

Ultimately then, these are conversations about reconciling a key set of facts: the fact of Crown sovereignty as it is claimed, with the fact of the prior occupation of the territories now constituting Canada by Aboriginal Peoples. As Justice Sinclair suggested in regard to First Peoples, the claims to be acknowledged by Canadians are those made by the many different First Peoples when they say “we are a People.... who have the right to be recognized as a People”. And just as First Peoples recognize Canadians’ right to exist, so Canadians are obliged to recognize First Peoples right to exist as Peoples, and this would have to be worked out in every part of the country, with each People, and with regard to the particular Political obligations in each traditional territory, rather than through some generalizing category of “Aboriginal people”. That is my understanding of Justice Sinclair’s words. And it is what Chapter nine of the TCPS ought to be seeking to support.

In short then, it is these conversations — the conversations and realization of reconciliation of many First Peoples right to exist as Peoples — and the obligations that flow from this, that those governing the Tricouncil and the Panel on Research Ethics need to consider most deeply and sincerely in the ongoing evolution of Ethics review in Canada as it pertains to First Peoples. They are conversations about understanding the obligations that Canadians and Canada have to fulfill in their relations with the many Aboriginal Peoples on whose traditional territories the nation of Canada has developed. It is, in its deepest sense, the most fundamentally ethical of conversations, ethics being a dimension of these encompassing Inter-Political conversations.

Has the Tricouncil achieved these conversations in the terms of the current revisions to the TCPS?

From where I stand, the new chapter of the TCPS as presented in the current draft might represent a tentative and transitional move toward the possibility of reconciliation, but it is still a long way from the full-fledged conversations to which, as I understand it, Justice Sinclair has been pointing. What it sets out are some gestures toward setting up conditions for more respectful inter-researcher conversations, inter-cultural conversations, inter-knowledge conversations. That’s a beginning. One hopes that they may, in due course, help stage a proper practice of inter-Peoples conversations toward reconciliation: for those are the conversations, even we look only to Canadian law, to which the TCPS, and Canada are obliged to contribute.

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As a further point, the Tricouncil and the PRE have missed a vital issue in their work here, though one hopes that it is something that will be addressed as a necessary follow-up to this process: that is, building the capacity of those who review ethics submission to undertake this work in the most capable, and therefore ethical manner demanded of the entire process. A corollary to any such exercise needs to be capacity enhancement, in both tangible and intangible terms. First Nations and Indigenous Peoples collectives seeking to oversee ethics review need the human and non-human resources to undertake such tasks. The Ethics review boards of Institutions across Canada also need material support and development to move through the transition to reconciliation. We need education about what reconciliation means, and how to move all Ethics review practices in line with reconciliation.

To only speak of ideals will do little to ensure we are actually doing the right thing. Rather, we all need the structures and resources to extend and continue the conversations we are in, in support of a just and lasting settlement, a settlement based in a just and lasting conversation between Peoples.

Thank you for the opportunity to share these comments.

Brian Noble