Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who *Can* and *Should* do What?

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This paper examines the Calls to Action outlined in the Truth and Reconciliation Commission on Residential Schools from the perspective of the current institutions of Canadian federalism. The first objective is to map out "who is being asked *to do what" in the Canada state, and to see how this corresponds to the actual division of powers — "who* can *actually do what." To illustrate the complexity of this intersection between the Calls to Action and division of powers in the Canadian state, we explore three policy areas in greater detail: child welfare, health care, and education. Canadian federalism was clearly imposed on Indigenous peoples, in addition to 'Crown sovereignty.' Neither has served them well. Our objective is not to contribute to this 'divide and conquer' approach. It is, rather, in a spirit of restorative justice and reconciliation, to outline how all orders of government must respond, whether they are explicitly identified in the Calls to Action or not. In conclusion, we explore the possibility that the realities of a constitutionally divided Crown — which is a rupture with history for Indigenous Peoples — might generate a constitutional duty to cooperate.*

Cet article analyse les Appels à l'action lancés par la Commission de vérité et réconciliation relative aux pensionnats destinés aux enfants autochtones à travers le prisme des institutions actuelles du fédéralisme canadien. Sans justifier le statu quo, le premier objectif est d'établir « à qui on demande *de faire quoi » et d'évaluer la correspondance entre ces revendications et « qui* peut *faire quoi » en vertu de l'interprétation dominante de la répartition des compétences au sein de la fédération canadienne. Afin d'illustrer la complexité de cette intersection entre les Appels à l'action et le partage des compétences, trois domaines de politiques publiques sont explorés : la protection de la jeunesse, les soins de santé, et l'éducation. Manifestement, tant le fédéralisme canadien que la « souveraineté de la Couronne » ont été imposés aux peuples autochtones : aucun ne les a bien servis. Cet article ne vise aucunement à renforcer une conception constitutionnelle qui « divise pour mieux régner ». Dans un esprit de justice réparatrice et de réconciliation, il s'agit plutôt de démontrer comment tous les ordres de gouvernement, qu'ils aient été identifiés explicitement ou non par la Commission, se doivent de répondre aux Appels à l'action. En conclusion, les autrices suggèrent que les conséquences découlant de la divisibilité de la Couronne dans le régime fédéral canadien — un phénomène en rupture avec l'histoire pour les peuples autochtones — peuvent générer une obligation constitutionnelle de coopérer dans le chef de tous les ordres de gouvernement.*

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Introduction

The Truth and Reconciliation Commission on Residential Schools in Canada (the "TRC" or the "Commission") issued its Final Report, including ninety-four "Calls to Action" in December 2015.[1] The TRC was established pursuant to the *Indian Residential Schools Settlement Agreement* (the "Settlement"), as a partial response to class actions by Indigenous peoples against the federal government.[2] The Commission's mandate included the preparation of a report and recommendations in order to work toward the renewal of the relationship between the parties involved in the settlement, that is, the federal Crown and religious institutions.[3] Given the context in which they were elaborated as well as their tone, the ninety-four Calls to Action are more than the 'recommendations' that often accompany official inquiries. They are imbued with moral density and political urgency.

Unveiling the history of residential schools revealed a complex network of actors. The forward-looking Reconciliation segment of the Report, including the Calls to Action, offers a form of curative prescription. Here, actors who were not part of the Settlement, including provincial, territorial, municipal, and Indigenous communities, nations, and governments[4] are also called upon to take

1 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 319-37, online (pdf): *TRC* <www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [perma.cc/P3HK-R86Z] [*TRC Report*]. For the French version of the Calls to Action, see Commission de verité et réconciliation du Canada, *Commission de verite et reconciliation du Canada: Appels à l'action* (Winnipeg: Commission de verité et reconciliation du Canada, 2012), online (pdf): *TRC* <trc.ca/assets/pdf/Calls_to_Action_French.pdf> [perma.cc/W6ZL-8JAX] [*Appels à l'action*].

2 *Indian Residential Schools Settlement Agreement* (2006), art 7, online: *Residential School Settlement* <www.residentialschoolsettlement.ca/settlement.html> [perma.cc/8QJR-H8UK] [Settlement Agreement]. In *Baxter v Canada (AG)*, 83 OR (3d) 481, 2006 CanLII 41673 (SC), the Court certified the class action and approved the settlement in Ontario. Similar decisions were rendered in eight other Canadian provinces or territories, see Tabitha Marshall, "Indian Residential Schools Settlement Agreement" (11 July 2013), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement/> [perma.cc/V2EW-QMVW]. In the "Definitions" section of the Settlement Agreement, "Canada" or "Government" means the Government of Canada. As will appear in this paper, in the *TRC Report*, the term "government" is also used to refer to provinces, territories, and "Aboriginal governments."

3 See Settlement Agreement, *supra* note 2, Schedule N, s 1(f).

4 The TRC refers to "Aboriginal" groups in most instances, but also occasionally uses the term "Indigenous." Since the Report was issued in 2015, the term "Aboriginal" has largely, but not entirely, been replaced by "Indigenous" in Canadian scholarship, leaving "Aboriginal" mostly to describe Canadian law with regards to Indigenous peoples, as used in section 35 of the *Constitution Act, 1982*, s 35, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. "Indigenous" is, of course, the term used in the *United Nations Declaration of the Rights of Indigenous Peoples*, UNGA, 61st Sess, 295th Mtg, UN Doc A/RES/61/295 (2007) [*UNDRIP*]. We

action and pave the road to reconciliation.[5] The Commission does not address an amorphous and indistinct 'Canada.' The Calls to Action generally identify specific actors and enjoin them to take action, by themselves or in collaboration.

In so doing, the Commission seems to take stock of the federal and multi-level nature of the Canadian state, without, however, endorsing its structure, the division of powers, or its exclusion of Indigenous legal orders. This is no accident. The Commission could have avoided the multi-headed hydra that is the Canadian polity by addressing all its Calls to "Canada" or "the Crown," and letting different orders of government sort out how this translates in the Canadian constitutional order. This might have been a strategic or symbolically charged way of *not* legitimizing a federal system which was imposed on Indigenous peoples, without giving them an active role in it. However, not officially recognizing the federal character of Canada might have deprived the Calls to Action of their wide resonance. We may assume that the Commission chose to recognize, in a pragmatic manner, the plurality of government(s) to which 80% of its Calls to Action are directed in order to seek concrete and rapid responses.

Yet, while not ignoring them, the Calls to Action do not systematically align with 'official' state structures, which brings layers of complication, blame-shifting, and responsibility-avoidance by the holders of public power in Canada. The Commission's purpose was neither to decipher the Canadian federal regime, nor to clarify the actual distribution of constitutional powers, legal obligations, or political imperatives that befall members of the Canadian federation.

In other words, the TRC's mandate was not *prima facie* of a constitutional nature. It sought to outline 'who did what' and to identify 'who should do what' in the context of restorative justice. It did not seek to elucidate 'who *can* do what' pursuant to current Canadian constitutional law, nor to demonstrate whether — and if so, how — Canadian public authorities may have a constitutional *obligation* to act. It did not explicitly advocate for reforms of the

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use both terms, depending on context. We note that in French, in international and domestic law, the term "autochtone" is used as the equivalent to both "Aboriginal" and "Indigenous." Finally, the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] uses the outdated word "Indians".

5 The expression "reconciliation" notably flows from case law by the Supreme Court of Canada, see e.g. *R v Van der Peet* [1996] 2 SCR 507 at para 50, 137 DLR (4th) 289 [*Van der Peet*], and is obviously used in the very name of the Commission which gave rise to the *TRC Report*. The term — and what it stands for — is controversial, since it is meant to reconcile Indigenous autonomy with "Crown" or "State" sovereignty: a typically non-Indigenous-centered vision. In this paper, we use "reconcile" and "reconciliation" as the Commission uses them. For the TRC, "reconciliation" refers to "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples" in Canada, see *TRC Report*, *supra* note 1 at 6.

Canadian federation or propose a blueprint of a more inclusive form of federalism. It did not outline alternative conceptions of the relation or imbrication of Indigenous and non-Indigenous sovereignties.[6] This is not a failing. It was simply not part of the TRC's already daunting mandate. This said, the TRC's recommendations are far-reaching and are compatible with a profoundly revised relationship between 'Canada' and 'Indigenous peoples'.

In this paper, we read the Calls to Action through the lens of federalism, as understood under existing Canadian law; not through Indigenous perspectives, nor those of institutional architects who could — and should — imagine a more inclusive form of federalism than what has been termed the "provincial federation."[7] We mean to understand the Calls to Action in the context of the current Canadian federal system, in which the state — sometimes designated as "the government" or "the Crown" — comprises distinct orders, each with their own powers and responsibilities. We do note, of course, when and how the Calls to Action evoke Indigenous peoples, whether it is through their communities, nations, or governments. However, our analysis is mostly directed at 'traditional actors' of the Canadian federation: the federal order, the provinces, and the territories. The aim is partly to see how a reader — say a civil servant in a provincial administration — may take the Calls to Action and ponder how its government ought to react, given the current division of powers. Or how judges, taking the Calls to Action seriously, may partly palliate the impact of existing federal structures and interpretative doctrines on Indigenous peoples. Put simply, we choose to read the Calls to Action through the lens of current — official and dominant — federal structures, while acknowledging the way in which they negate Indigenous legal orders. We hope this exercise might be useful in light of the increasing overlapping jurisdiction between orders of government, as well as a staggering number of grey zones, which explain, but do not justify, the haze which surrounds the identification of who can actually act.

In part I, we scrutinize 'who is being called to do what' in the Calls to Action, the focus being on the *who*, as opposed to the *what*. In part II, we then attempt to sketch in broad strokes which order(s) of government *can* respond to

6 Contrast with Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communications Group, 1996) [*RCAP*], which endorses an 'organic' conception of a federation composed of three orders of government, in which Indigenous orders would have wider jurisdiction than anticipated in the Charlottetown Accord, "Draft Legal Text" (9 October 1992), s 29, online: *Electronic Frontier Canada* <www.efc.ca/pages/law/cons/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html> [perma.cc/5PCL-G4T5].

7 James [Sa'ke'j] Youngblood Henderson, "*UN Declaration on the Rights of Indigenous Peoples* and Treaty Federalism in Canada," (2019) 24:1 Rev Const Stud 17 at 25.

the Calls to Action pursuant to the current and evolving interpretation of the division of powers in the Canadian federation. Part III explores in greater detail 'who is being asked to do what' and 'who can do what' in three policy areas targeted by the TRC: child welfare, healthcare, and education. The purpose here is to identify when the Calls 'match' the formal boundaries of Canadian constitutional law, and when they apparently do not.[8] As we analyze the Calls to Action, we also tentatively reflect on what the (mis)match might reveal about the TRC's conception of the Canadian federation.

This mostly descriptive exercise also has a limited prescriptive horizon. Decoding which order of government has the constitutional authority to act leads to the inescapable and arguably banal conclusion that, in most cases, only cooperative action will yield effective results. Hence, in conclusion, we tentatively explore the potential that Canadian federalism may impose legal obligations to cooperate on the part of the various governments, specifically in the context of implementing the Calls to Action and generally in all matters relating to the interests of Indigenous peoples.

Before launching this 'forensic' analysis of the Calls to Action, however, we underline what this paper does not purport to do. By focusing on the 'traditional actors' of the Canadian federation — federal order, provinces, and territories — we do not suggest that these are, or should be, the only relevant actors. We do not defend the current federal organization of Canada and its impact on Indigenous peoples. We readily acknowledge that Canadian federalism is part of the persistent legacy of the Canadian colonial project. We certainly do not condone the presumption of Crown sovereignty which still grounds Canadian caselaw.[9] Nor does this paper directly challenge the very concept and project of 'reconciliation,' despite criticisms it has generated.[10] In other words, our reading of the Calls to Action through the lens of the current federal arrangement is not meant to deny the imperative of the reimagining and designing of a more inclusive and decolonized (con)federal landscape in which Indigenous peoples would be fully equal partners.

8 We limit ourselves to three domains. A similar exercise would be just as revealing regarding other policy sectors identified in the Calls to Action such as justice, sports, the erection of memorials, corrections of registries to reinstate victims' names that were changed in residential schools, etc.

9 See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Van der Peet*, *supra* note 5 at para 36. For critiques of this jurisprudential presumption, see several of the contributions in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws Special Report* (Waterloo, Ont: Centre for International Governance Innovation, 2017) [*UNDRIP Implementation*].

10 See Michael Coyle, "The Transformative Potential of the Truth and Reconciliation Commission: A Skeptic's Perspective" (2017) 95:3 Can Bar Rev 767.

Our main and more modest objective is to clarify the intergovernmental implications of the Truth and Reconciliation Commission's Calls to Action. The paper takes the TRC's mandate and report at face value and analyzes the Calls to Action, as drafted, through current Canadian constitutional structures. In doing so, we do not deny that those structures are grounded in hierarchical colonial assumptions that are in need of deep reconsideration. However, we believe there is some virtue in shedding light on the legal context which will likely affect how a critically important text may be understood by 'traditional actors.' This, in turn, may affect the implementation of the Calls to Action in the short term. We hope that by uncovering who is being *asked* to do what, and who *can* do what under current Canadian law, we can underscore the need for new forms of inclusive intergovernmental cooperation. Again, this choice does not deny the existence or significance of Indigenous self-government structures, nor the fact that Canadian federalism could be understood to already, at least partly, include a third order of government.

In other words, trying to decipher how current Canadian federal structures and jurisprudence can and should respond to the TRC's Calls to Action is not a defense of the *status quo*. Nor does it deny that an authentic recognition of Indigenous peoples' right to self-determination, as notably underlined by *UNDRIP*, necessarily entails foundational revisions of the deep-seated unequal power relations between Indigenous and non-Indigenous peoples. While we read them through the lens of current federal structures, the TRC's Calls to Action are far-reaching and are compatible with a profoundly revised relationship between 'Canada' — however it is structured and composed — and 'Indigenous peoples' — in all their diversity.

Part I: Who is Being Called to Act?

The *TRC Report* makes ninety-four Calls to Action which urge various actors to redress the relationship between Canada and Indigenous peoples. A number of non-governmental actors are called upon, including church parties to the Settlement Agreement, the Pope, post-secondary institutions, and the corporate sector. While we do not wish to underplay their role in Canada's "cultural genocide,"[11] nor in the reconciliation process, this paper focuses on Calls to

11 *TRC Report*, *supra* note 1 at 1; The Right Honourable Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" (Annual Pluralism Lecture for the Global Centre for Pluralism delivered at the Aga Khan Museum, 28 May 2015) at 7, online (pdf): *Global Centre for Pluralism* <www.pluralism.ca/wp-content/uploads/2017/10/APL2015_BeverleyMcLachlin_Lecture.pdf> [perma.cc/US9C-KZZE]; Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?" (2016) 62:1 McGill LJ 243.

Action to governmental parties whose actions are bounded by the structure of the Canadian Constitution.

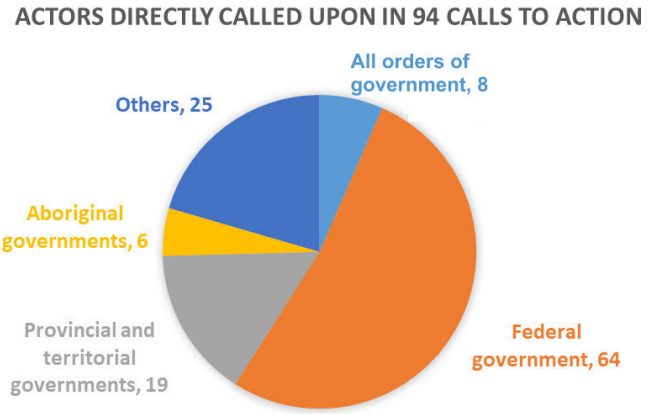

Figure 1: *The "federal government" includes the Government of Canada, Parliament, the Prime Minister, and the parties to the Settlement. Provincial and territorial governments include the Council of Ministers of Education, Canada (CMEC). "Others" include municipal governments and a number of public and private actors. The chart includes more than 94 instances because Calls to Action which are addressed to more than one actor were counted separately. For example "we call upon the federal and provincial governments" are counted once in "federal" and once in "provincial" categories.*

Out of the ninety-four Calls to Action, seventy-six — over 80% — are exclusively or partially addressed to formal Canadian 'governmental entities,' that is, the federal, provincial, territorial, or municipal governments. Forty-nine Calls to Action — more than 50% — target solely the federal order. Provinces and territories are also called upon, but are, with one exception, always *in addition* to the federal order. A number of Calls to Action also mention Aboriginal/Indigenous "groups," "communities," and "people(s)." Six of them are specifically directed at "Aboriginal governments."

The following subsections seek to decipher several terms and expressions used to refer to those various governmental entities. We start with a brief incursion into the TRC's fluid use of the term "government," which is not to be taken in a technical sense.

I.1 Executive versus Legislative Branches

In the Canadian legal and political tradition, the term "government" is a polysemous and ambiguous one. It can refer to the executive branch. It can also refer, more globally, to public authorities that enjoy constitutional recognition and power. In the absence of a fully developed theory of the State,[12] in Canadian legal writing, the term "government" is often used as a synonym of the state or l'État.[13] To complicate things further, in a federal regime such as Canada's, the term "government" or "l'État" always needs to be qualified, since there are 14 executive branches, 14 legislative branches and, to a certain extent, 14 judicial branches.[14] In other words, there are, within Canada, multiple governments, and thus, multiple 'States.'

With a few exceptions, which we identify below, the Calls to Action do not distinguish between the two meanings of the term "government." In the French version, the term "État" generally corresponds to "the government," hence pointing to all branches. Moreover, some Calls to Action are addressed to "governments," in a way that is clearly or implicitly aimed at the *legislative*, rather than the executive branches. For instance, the "*Government* of Canada" is asked to amend existing legislation and to enact new laws.[15] The "federal, provincial and territorial *governments*" are also asked to "review and amend their respective statutes of limitation."[16] Moreover, several Calls to Action addressed to "governments" are likely to require some legislative action. For instance, a number of them call for the implementation of international law instruments, such as *UNDRIP*. In many cases, implementation into domestic law requires legislative action,[17] although this is not made explicit by the Calls to Action.[18]

In short, the TRC was not particularly concerned with the official *separation* of powers between branches of government.[19] Basically, it is for each order

12 See Cheryl Saunders, "The Concept of the Crown" (2015) 38:3 Melbourne UL Rev 873 at 876.

13 This is also often the case of the term "Crown," see I.2, below. In their Glossary, Patrick J Monahan, Byron Shaw & Padraic Ryan attribute both meanings to "the Crown," see *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 531.

14 This count is only accurate if we exclude Indigenous governments or legal orders.

15 See e.g. *TRC Report*, *supra* note 1, CTA 6, 34 [emphasis added].

16 *Ibid*, CTA 26 [emphasis added].

17 See Hugo Cyr & Armand de Mestral, "International Treaty-Making and Treaty Implementation" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 595; Oonagh Fitzgerald & Risa Schwartz, "Introduction" in *UNDRIP Implementation*, *supra* note 9, 1 at 1-2.

18 See *TRC Report*, *supra* note 1, CTA 43, which uses the term "governments" with regards to the implementation of *UNDRIP*.

19 See e.g. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 44 [*Mikisew Cree*]: "[i]t is of little import to Aboriginal peoples whether it is the executive or Parliament

of government to assess which of its institutions needs to act according to principles of Canadian law, regardless of the term used in the TRC.

I.2 The 'Crown'

The 'Crown' is one of the most intractable concepts in Canadian constitutional law.[20] It has a number of meanings that depend on context and evolve over time.[21] It can refer to the executive branch, in contrast to the legislative one. The term is also often used interchangeably with 'the government' as a synonym of 'the State' in other, mostly Western, legal traditions. In French, the 'Crown' is increasingly, but not systematically, rendered by "l'État" rather than "la Couronne."[22] In fact, the term used for "the Crown" in the French version of the Calls to Action is "*l'État*."[23]

'The Crown' carries important historical and symbolic values in the context of relations between Indigenous peoples and British — then Canadian — authorities. On the one hand, references to the Crown may invoke nation-to-nation relationships as originally conceived when the British sovereign concluded treaties with self-governing Indigenous peoples. On the other hand, it conveys undeniable markings of subordination, particularly when it is assumed, as current case law does, that 'the Crown' has asserted its sovereignty over the Canadian territory irrespective of (pre)existing Indigenous sovereignties. The 1763 *Royal Proclamation*, which is both an expression of European

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which acts in a way that may adversely affect their rights."

20 See Marcella Firmini & Jennifer Smith, "The Crown in Canada" in Oliver, Macklem & Des Rosiers, *supra* note 17, 129; David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995); Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich, 2015).

21 See Saunders, *supra* note 12 at 882-84.

22 Even in federal legislation, the term "Crown" in English is generally — but not systematically — rendered by the term "État" in French. See e.g. *Crown Liability and Proceedings Act*, RSC, 1985 c C-50, which becomes *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

23 See *Appels à l'action*, *supra* note 1, CTA 27, 28, 45, 53, 86, 92. This may arguably be a 'translation' slip. While this is a matter of speculation, it is plausible that in this context, the term "Couronne" would have been preferred by Indigenous peoples, and possibly also the Commissioners. Given the historical and constitutional relationship with the Sovereign, Indigenous peoples have generally insisted that the term "Couronne" be maintained in the context of their relationship between Canada. For instance, it appeared that when the new Department of Crown-Indigenous Relations was created, the jurilinguists' recommendation was that it be called "Ministère des relations entre l'État et les peuples autochtones." This was refused and "Couronne" appears in the name of the Department. On the importance of the term "Crown," see Mark D Walters, "'*Your Sovereign* and *Our Father*': The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett & Ian Hunter, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (New York: Palgrave Macmillan, 2010) 91.

supremacy and sometimes assimilated to an "Indigenous Bill of rights," reflects this tension and ambiguity.[24]

The term "Crown" is used nine times in the Calls to Action, generally in the expression "Aboriginal-Crown relations." The "Crown" itself is never explicitly targeted, with one exception:

> 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*.[25]

This proclamation "would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown," and would seek to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation."[26] Call to Action 45 thus points to a conception of the Crown in its most 'majestic' *and* constitutional form: a legal and political entity with whom Indigenous peoples are on an equal footing.

In this context, the TRC conveys an image of 'the Crown' as a unified entity, unaffected by the federal structure of Canada.[27] The choice is perfectly understandable considering the nation-to-nation conception of Crown-Indigenous relations and the historical promises made by 'the Crown' to Indigenous populations. What matters is that, for *non-Indigenous* authorities, references to the Crown cannot be solely — and automatically — equated with the federal order of government. The Crown — *qua* 'government' or 'State' — is divided under current federal structures and specific action may or must be taken by the federal and/or provincial and territorial public institutions.[28] For

24 See JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 66-76; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto University Press, 2002) at 124-27; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access to Just 17 at 22; Eva Mackey, "Unsettling Expectations: (Un)certainty, Settler State of Feeling, Law, and Decolonization" (2014) 29:2 CJLS 235 at 243.

25 *TRC Report*, *supra* note 1, CTA 45 [emphasis added]. The French version of this Call to Action is just as ambiguous: "Nous demandons au *gouvernement du Canada* d'élaborer, en son nom et au nom de tous les Canadiens, et de concert avec les peuples autochtones, une proclamation royale de réconciliation *qui sera publiée par l'État*," see *Appels à l'action*, *supra* note 1, CTA 45 [emphasis added].

26 *TRC Report*, *supra* note 1, CTA 45.

27 See Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1.

28 See *ibid*; Anne Twomey, "Responsible Government and the Divisibility of the Crown" (2008) Public L 742 at 749; Smith, *supra* note 20 at 156-73; Warren J Newman, "Some Observations on the Queen, the Crown, the Constitution, and the Courts" (2017) 22:1 Rev Const Stud 55 at 60-61.

example, the principle of the Honour of the Crown applies equally to the federal order and to provinces.[29] In short, the TRC occasionally uses "the Crown" to refer to 'Canada' in a nation-to-nation confederal relationship. It is then for those within the 'Canadian' side of the equation to decipher what the federal division of powers, and the divisibility of the Crown that ensues, implies. The TRC does not always do it for them.

I.3 Incarnations of the Federal Order

Calls to Action use heterogeneous and fluid terminology to refer to federal authorities. The expression "federal government" occurs thirty-eight times, "government of Canada" on eight occasions, and "Canadian government" once.[30] The federal order is also called upon to act through the Social Science and Humanities Research Council, Library and Archives Canada, and the Canadian Arts Council. The Prime Minister is called upon once, while no Call to Action is directed at provincial and territorial premiers. Similarly, only Call to Action 53 is expressly addressed to the federal Parliament, while none directly target provincial or territorial legislative assemblies.

Call to Action 46 calls upon Parties to the Settlement Agreement to sign a "Covenant of Reconciliation" that identifies "principles for working collaboratively to advance reconciliation in Canadian society." The federal government was the only governmental party to the class action and the ensuing Settlement. Provinces and territories, which were not, are *not* expressly invited to join in this Covenant. This exclusion may be challenging given, for instance, the purpose of the Covenant, which includes the implementation of *UNDRIP*, the rejection of colonial doctrines such as *terra nullius*, and the renewal of Treaty relationships.[31] In Canadian law, implementation of international commitments, international treaty-making, and property law undeniably involve both federal, and provincial and territorial orders.[32]

29 See *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 50 [*Grassy Narrows*].

30 The expression "Canadian *governments*" in the plural is used once to designate federal, provincial, territorial, and municipal orders, see title preceding CTA 43, *TRC Report*, *supra* note 1 at 325.

31 See John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701.

32 See Cyr & de Mestral, *supra* note 17; Fitzgerald & Schwartz, *supra* note 17. At the time of writing, the House of Commons adopted a federal Bill, but it failed to obtain the assent of Senate, see Bill C-262, *An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2019, online: *Open Parliament* <openparliament.ca/bills/42-1/C-262> [perma.cc/4DTE-TEFD]. British Columbia is the first province to have legislated to implement *UNDRIP*, see *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

I.4 Provinces and Territories

Provinces and territories are occasionally called upon in the TRC, but, with one exception, always in conjunction with the federal order.[33] Yet, as we shall see in part II, through jurisprudential interpretation as well as federal action and omission, a wide range of policy areas affecting Indigenous peoples are now also under provincial jurisdiction. The result is a complex — and sometimes unpredictable — jurisdictional overlap. At this stage, however, it suffices to note that several Calls to Action are directed at provinces and territories as well as to Ottawa.

Territories differ from provinces to the extent that their autonomy derives from delegating legislation passed by the federal Parliament.[34] They nevertheless enjoy a form of *de facto* constitutional status.[35] The systems of governance of these northern regions differ from the rest of the country, especially with the prevalence of self-government powers and land claim settlements.[36] While territorial institutions might play a critical role in the context of reconciliation, the distinction between provinces and territories does not appear relevant for present purposes. Provinces are never called upon to act by the TRC without the territories also being convened, and vice versa.

I.5 "All levels of government" or Multiple Orders of Government

The *TRC Report* specifically call upon "all levels of government" to "enable residential school survivors and their families to reclaim names changed by the residential school systems,"[37] to increase and retain Indigenous health-care providers,[38] and to provide annual reports to the National Council for Reconciliation that is to be created by the federal Parliament, "in collaboration with Aboriginal peoples."[39] Similarly, "all levels of government" which fund denominational schools are asked to include segments on Indigenous spiritual beliefs and practices in their curriculum.[40]

33 See *TRC Report*, *supra* note 1, CTA 82, which asks provinces and territories to install monuments in their respective capital cities. CTA 81 requests the same from Ottawa.

34 See *Nunavut Act*, SC 1993, c 28; *Yukon Act*, SC 2002, c 7; *Northwest Territories Act*, SC 2014, c 2, s 2.

35 See Yukon Legislative Assembly, "Information Sheet No 7: The Differences between Provinces and Territories" (17 September 2012), online (pdf): *Yukon Assembly* <yukonassembly.ca/sites/default/files/inline-files/info-sheet-differences-province-territories.pdf> [perma.cc/HPS4-FB7E]

36 See Doug McArthur, "The Changing Architecture of Governance in Yukon and the Northwest Territories" in Frances Abele et al, eds, *Northern Exposure: Peoples, Powers and Prospects in Canada's North* (Montréal: McGill-Queen's University Press, 2009) 187 at 189-90.

37 *TRC Report*, *supra* note 1, CTA 17.

38 *Ibid*, CTA 23.

39 *Ibid*, CTA 55.

40 *Ibid*, CTA 64.

Other Calls to Action are more explicitly directed at "federal, provincial, and territorial governments"[41] or the "Government of Canada, provincial and territorial governments and the courts,"[42] while others also include "municipal governments."[43] Some Calls to Action explicitly request intergovernmental cooperation, with the federal government presumably in the lead. For example, Call to Action 75 calls on the "federal government to work with provincial, territorial, and municipal governments" and other parties to address a number of issues related to burial grounds associated with residential schools.[44]

I.6 Intergovernmental Bodies

Call to Action 63 is specifically directed at an intergovernmental body. The Council of Ministers of Education, Canada (CMEC) is called upon to "maintain an annual commitment to Aboriginal education issues." The TRC chose to ask this executive cooperative organ composed of every provincial and territorial minister of education[45] to take action rather than to call upon the provincial governments themselves. Interestingly, the choice to address this Call to the CMEC excludes the federal government, which is not a member of this cooperative body, from the Call to Action. The Call is thus aimed at a structural form of purely horizontal cooperation.[46]

Noteworthy, in the context of a reflection on the intergovernmental impact of the TRC, no Call to Action even mentions the Council of the Federation. Meanwhile, Call to Action 53 advocates the creation of a "National Council for Reconciliation" through federal legislation, "in collaboration and consultation with Aboriginal peoples," but without any mention of provinces or territories.

I.7 Indigenous Peoples, Organizations, Communities, and Governments

A number of Calls to Action designate Indigenous peoples, communities, and organizations as actors with which the other orders of government should consult, work, or collaborate. Hence, several Calls to Action require action on

41 *Ibid*, CTA 26.

42 *Ibid*, CTA 52.

43 *Ibid*, CTA 43, 47, 57.

44 See also *ibid*, CTA 2 (statistics on children in care) and 90(i) (funding of sports programs).

45 See Council of Ministers of Education, Canada, "What is CMEC," online: *CMEC* <www.cmec.ca/11/About_Us.html> [perma.cc/ZW3W-FRHS].

46 On horizontal versus vertical cooperation, see Johanne Poirier & Cheryl Saunders, "Conclusion: Comparative Experience of Intergovernmental Relations in Federal Systems" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Toronto: Oxford University Press, 2015) 440.

the part of official government parties, in collaboration or consultation with "Aboriginal peoples"[47] or "Aboriginal organizations,"[48] Governments are also directly called "to work with "Aboriginal communities,"[49] while the federal government is requested to appoint an Aboriginal Languages Commissioner, in consultation with Aboriginal groups.[50]

A limited number of Calls to Action are also expressly directed at Aboriginal *governments*, particularly when proactive initiative, as compared with consultation, is required. For instance, "Aboriginal governments" are asked, together with federal, provincial, and territorial ones, to reduce "the number of Aboriginal children in care,"[51] "develop culturally appropriate parenting programmes,"[52] or "early childhood education programmes,"[53] as well as to commit to eliminating overrepresentation of Aboriginal youth in custody.[54] This reflects the fact that responsibilities over certain aspects of social policy and education are currently assumed by Indigenous nations pursuant to treaties, major land-claims settlements, or other forms of intergovernmental arrangements.[55]

This distinction between Aboriginal "groups" or "organizations" and "governments" raises the question of whether or not the expression "all orders of government" might include Indigenous governments, even when they are not expressly mentioned.[56] Hence, when Aboriginal people(s) are mentioned in conjunction with "all levels of government,"[57] could this suggest that Aboriginal governments are also invited to collaborate with Aboriginal peoples? In other words, may the Calls to Action also be read as prescribing some actions within

47 See e.g. *TRC Report*, *supra* note 1, CTA 19, 87.

48 See e.g. *ibid*, CTA 41, 53.

49 *Ibid*, CTA 36.

50 See *ibid*, CTA 15. The office of the Commissioner has since been created pursuant to the *Indigenous Languages Act*, SC 2019, c 23, though the relevant provisions are not, at the time of writing, in effect.

51 *TRC Report*, *supra* note 1, CTA 1.

52 *Ibid*, CTA 5.

53 *Ibid*, CTA 12.

54 *Ibid*, CTA 38.

55 See Martin Papillon, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2011) 42: 2 *Publius: J Federalism* 289 at 301; Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 JL & Soc Pol'y 132.

56 Interestingly, the *Final Report of the National Enquiry into Missing and Murdered Indigenous Women and Girls* addresses its recommendations to "all governments," which include "federal, provincial, territorial, municipal, and Indigenous governments," see *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (2019) at 176, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf> [perma.cc/8P3K-LPJM].

57 See e.g. *TRC Report*, *supra* note 1, CTA 40: "all levels of government, in collaboration with Aboriginal people."

Indigenous communities, such as between members, traditional leadership, and Band Councils?[58]

This said, even when comprehensive self-government agreements are in place, "Aboriginal governments" may not be the appropriate actor to respond to a specific objective. For example, Call to Action 3 asks "*all levels of government* to fully implement Jordan's Principle," a request addressed to governments involved in jurisdictional disputes regarding funding for child services.[59] The principle dictates that the first governmental body contacted to provide services to a First Nations child should pay for these services. It can then seek reimbursement from another department or order of government if appropriate.[60] *A priori*, this Call does not include Aboriginal governments.

There are of course a number of ways to conceive Indigenous societies and polities in Canada: communities, nations, sovereign peoples, self-governing entities, and others. There are also a number of ways of conceiving the place which Indigenous peoples occupy in the Canadian federation: as a form of delegated municipal order;[61] as a third-order of government;[62] through the lens of "adapted federalism," which requires the creation of a new public government such as Nunavut or of a yet to be invented polity representing all

58 John Borrows raised this possibility in a public lecture, "From Principle to Implementation: Indigenous Rights, the Constitution and UNDRIP in Canada" (Indigenous Law Association lecture delivered at the Faculty of Law, McGill University, 21 September 2017) [unpublished].

59 *TRC Report*, *supra* note 1, CTA 3 [emphasis added]; Anne Blumenthal & Vandna Sinha, "No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle" (2015) 6:1 Intl Indigenous Policy J 1 at 3.

60 The need for Jordan's Principle became manifest when Jordan River Anderson spent two years in a hospital until he passed away at the age of five in 2005 instead of being cared for at home, due to a disagreement between federal and provincial authorities on who should cover the cost of his home care, see *First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 88 [*FN Caring Society*]; Cindy Blackstock, "Jordan's Principle: Canada's Broken Promise to First Nations Children?" (2012) 17:7 Pediatrics & Child Health 368. In January 2016, the Canadian Human Rights Tribunal ordered the federal government to broaden its definition of Jordan's Principle, to properly implement it, and reiterated the urgency of this requirement three months later, see *First Nations Child and Family Caring Society of Canada et al v Canada (AG) (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10. Four months later, the federal government responded that it had done so, see email from Jonathan DN Tarlton to Dragisa Adzic (10 May 2016), online: *Document Cloud* <s3.documentcloud.org/documents/2829073/Fed-Govt-Response-to-CHRT.pdf> [perma.cc/9F5S-EGLE].

61 See Frances Abele & Michael J Prince, "Four Pathways to Aboriginal Self-Government in Canada" (2006) 36:4 American Rev Can Stud 568 at 572-74.

62 See *Ibid* at 576-79; Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multi-Level Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed (Don Mills, Ont: Oxford University Press, 2012) 291. See also *RCAP*, *supra* note 6 at 205-07.

Indigenous peoples; or as co-equal with the overall Canadian polity pursuant to a treaty-federalism.[63]

It is difficult to assess the TRC's conception(s) of the place which Indigenous peoples and governments are meant to occupy in the Canadian federation. For example, Call to Action 45 asks the Canadian government to "reaffirm the nation-to-nation relationship between Aboriginal Peoples and the Crown," as well as to "renew or establish Treaty relationships" and "ensure that Aboriginal Peoples are full partners in Confederation." This could be understood as endorsing both a Treaty-Federalism conception — a form of confederalism — or a third order of government, as included actors in the federation. Several conceptions likely co-exist or are implied in the *TRC Report*, each with a potentially distinct impact on intergovernmental relations. An analysis of these underlying visions is, however, beyond the scope and objective of this paper.

At a minimum, we can posit that the more Indigenous groups are characterized as governmental or self-governing entities, the greater the possibility of their formal integration into intergovernmental decision-making as members of the federation or in partnership with it. This would stand in contrast to the present situation where Indigenous groups are to be 'consulted,' and asked to 'collaborate' with the formal holders of power.

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The purpose of part I is to identify the government actors specifically "called to act" in a process of reconciliation. While the federal order is clearly the main target, other components of the current federal regime are also requested to take action. Moreover, a detailed reading of the Calls to Action creates an intuitive impression that provinces and territories are sometimes — deliberately or not — not explicitly called upon, when under Canada's current constitutional framework they should be. This led us to seek to capture who, under the current federal structures and jurisprudential interpretation of powers, has constitutional capacity to respond to the Calls to Action, whether or not they have been explicitly identified by the Commission.

63 See Youngblood Henderson, *supra* note 7; Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2nd ed (Peterborough, Ont: Broadview, 2003) 167.

Part II: Who *Can* Do What? The Calls to Action and the Constitutional Division of Powers

The Calls to Action deal with a wide variety of policy areas, ranging from child welfare to language protection, from monuments of commemoration to health care, from improvement to the justice system to the implementation of *UNDRIP*, from the training of public servants through means of promoting reconciliation through sports, business, and even immigration. Part II offers general observations on the division of powers, and the jurisdiction of the federal order regarding Indigenous peoples and lands. It then evokes the impact of the *Indian Act* and the resulting reality of overlapping jurisdiction federal and provincial jurisdiction.[64] It finally attempts to chart the correspondence between 'who is being called to do what' and 'who can, from a current constitutional perspective, do what'.

II.1 The Federal Division of Powers: 'Completeness,' Exclusivity, and Concurrency

The *Constitution Act, 1867* distributes legislative competences between the federal and provincial orders. Under 'orthodox' Canadian law, this division of powers is largely based on a principle of exhaustiveness.[65] Hence, every issue, every matter, every policy, every problem, and every solution is presumed to come within the purview of either federal or provincial authority. No matter should fall between the cracks of constitutional powers.

Of course, this is undeniably a 'Canadian-state-centered' interpretation of the federal division of powers. The idea that legal authority is only and entirely divided between these orders of government is challenged by an acknowledgement of Indigenous peoples' right of self-determination and sovereignty.[66] Again, our aim is not to endorse this dominant conception, which negates Indigenous legal traditions and orders in the current constitutional framework. The objective of this section is only to clarify how legislative and executive authority is divided from the perspective of current Canadian positive law.

64 We by no means pretend to do justice to the highly complex — and evolving — area of constitutional law. For greater detail, see Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thompson Reuters, 2016).

65 See *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 34; *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 44 [*Long-Gun Registry*]. In *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*], this "completeness" was reasserted in the context of Aboriginal title in a way that denies the existence of inherent Indigenous jurisdiction: see Michael McCrossan & Kiera L Ladner, "Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power" (2016) 49:3 Can J Political Science 411.

66 See McCrossan & Ladner, *supra* note 65.

In addition to this presumption of exhaustivity, the division of powers also largely rests on a principle of *exclusivity*. The *Constitution Act, 1867* enumerates competences in parallel lists of explicitly 'exclusive' federal powers in section 91, provincial ones in sections 92 and 93, as well as a limited number of concurrent ones in sections 94A to 95 and certain aspects of section 92A. Over the years, as a result of increased state action in a vast number of policy areas, interwoven action has become commonplace, and courts have resorted to a number of interpretive doctrines to allow — and even encourage — actual overlap between the jurisdictions of the two orders of government. Under the label of "cooperative federalism," this had led to a number of areas of *de facto* concurrency, in addition to the limited number of *de jure* ones.[67]

This fluid interpretation of jurisdiction can generate uncertainty and conflict. Each order of government may seek to be actively involved over a particular issue — a highly visible one from an electoral perspective, perhaps — as has long been the case of different aspects of social protection.[68] Conversely, conflict can arise when both orders of government refuse to act on the ground that they neither have the constitutional power nor an obligation to intervene. This has often been the case with regard to the provision of services to Indigenous peoples and communities.[69]

It bears pointing out that the presumed 'complete' distribution of jurisdiction between the federal and provincial orders does not imply that the power to legislate involves an obligation to do so,[70] at least not from a federalism perspective. Any obligation that may exist — to legislate, regulate, consult, or honour treaties, for example — has its foundations elsewhere: in Aboriginal rights recognized by section 35 of the *Constitution Act, 1982*, the *Charter*, treaty rights, the Honour of the Crown, and many others. In other words, under Canada's existing federal regime, the power to legislate implies the power to do nothing. This, of course, can have dire effects on service delivery. The jurisprudential

67 See Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism" in Oliver, Macklem & Des Rosiers, *supra* note 17, 391 at 393-98; Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 RDUS 47 at 52-80; Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Oliver, Macklem & Des Rosiers, *supra* note 17, 415.

68 See Johanne Poirier, "Federalism, Social Policy and Competing Visions of the Canadian Social Union" (2002) 13 NJCL 355 [Poirier, "Social Union"].

69 See Blumenthal & Sinha, *supra* note 59; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 13 [*Daniels*].

70 See *Daniels, supra* note 69 at para 15.

trend toward *de facto* overlap partly aims at facilitating public action: if one order does not act, another may.

II.2 Federal Jurisdiction Regarding Indigenous Peoples and Lands

Jurisdiction regarding Indigenous peoples is particularly labyrinthine, evolving, and contentious. This paper cannot purport to do justice to this complexity.[71] What matters for our purposes is that regardless of the original intentions of the framers, or of Indigenous peoples' understanding of their relationship with the Crown, under the current federal regime, federal, provincial, and territorial orders of government have jurisdiction over matters that affect them. This results from increased public intervention in social or environmental protection for instance, which were very limited in 1867, and of the judicial interpretation of the division of powers.

In 1867, the federal Parliament was granted exclusive jurisdiction over "Indians and Land Reserved for the Indians."[72] In a way, this was a simple transfer of 'Crown' responsibility from the British to Ottawa.[73] This federal power partook of the colonial project of the 'Canadian' government, which sought to expand unto Western territories. Ottawa originally took responsibility for services provided to "Indians," and mostly for controlling most aspects of their lives, notably through the *Indian Act* first adopted in 1876.[74]

While the constitutional meaning of "Indian" in section 91(24) includes First Nations, Métis, and Inuit people,[75] the *Indian Act*'s definition applies only to a subset of those individuals, namely 'status Indians' who meet criteria outlined in the *Act*.[76] Around 45% of Indigenous Peoples fall within the purview of the *Indian Act*.[77] In other words, while the federal order has constitutional jurisdiction relative to all Indigenous peoples pursuant to section 91(24) of the

71 For greater details, see Isaac, *supra* note 64; Jean Leclair & Michel Morin, "Fascicule 15: Peuples autochtones et droit constitutionnel" at no 113, in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, JCQ *Droit public — Droit constitutionnel*.

72 *Constitution Act, 1867,* s 91(24).

73 See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 245-46.

74 See John F Leslie, "The Indian Act: An Historical Perspective" (2002) 25:2 Can Parliamentary Rev 23 at 25.

75 See *Daniels*, *supra* note 69 (for non-status Indians and Métis people); *Reference as to Whether the Term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104, 2 DLR 417 (for Inuit people).

76 See *Indian Act*, RSC 1985, c I-5, ss 5-7.

77 In 2016, Statistics Canada reported 1,673,780 Indigenous persons in Canada, including 587,545 Métis, 65,025 Inuit and 977,235 members of First Nations. Around 76% of the latter have "registered" status, see Statistics Canada, "Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Canada, 2016" (18 April 2019), online: *Statistics Canada* <www12.statcan.

Constitution Act, 1867, its main legislative instrument applies to less than half of them.[78] The *Indian Act* represents, despite its many shortcomings, a partial recognition of responsibility toward status Indians by the federal order, which, at the same time delegates some of its responsibilities to provinces, as is discussed in the following section.

II.3 Ambiguity Arising from Section 88 of the *Indian Act*

An added complication comes from the ambiguous impact of section 88 of the *Indian Act*, through which the federal Parliament incorporates "by reference" provincial "laws of general application," except those relating to land.[79] This legislative incorporation only applies to Indigenous peoples 'covered' by the *Indian Act*, that is, 'status Indians.'

The scope and impact of section 88 are highly controversial.[80] Traditionally, it was understood that provincial laws of "general application" could apply to Indigenous peoples unless they affected the "core of Indianness." That core — dealing with status, for instance — was thus shielded from any provincial laws, pursuant to the constitutional doctrine of interjurisdictional immunity. Arguably, if section 88 only targeted provincial legislation that does not affect the core of the federal jurisdiction over Indians, it would be redundant, since provincial laws can "incidentally" affect federal powers.[81]

An alternative view is that section 88 actually expands provincial jurisdiction by allowing the application of provincial laws that would not otherwise be applicable to status Indians, due to the doctrine of interjurisdictional immunity. Whether the latter actually still applies to section 91(24) — and if so, to

gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-eng.cfm?Lang=Eng&GK=CAN&GC=01&TOPIC=9> [perma.cc/WJ9M-MUQJ].

78 Indigenous peoples who have signed 'modern treaties' are also excluded from the application of the *Act*, such as the Cree in Québec and the Nisga'a in British Columbia.

79 Leclair & Morin, *supra,* note 71, no 123 [translated by author].

80 See e.g. Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34:1 UBC L Rev 159 [McNeil, "Aboriginal Title"].

81 The SCC, however, may allow this redundancy, see e.g. *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 71, in which the concurring reasons states that "a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio* vigore and by virtue of s. 88 of the *Indian Act* … *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians" [emphasis in original]. This interpretation would thus allow provincial laws to apply both by their own force and through section 88. The majority opinion does not discuss this issue.

what extent — is uncertain.[82] Assuming there remains a 'core' that provincial laws may not touch, section 88 may have the effect of lifting this shield, at least with regards to some Indigenous peoples.[83]

Officially, the enactment of section 88 "does not diminish [the federal government's] constitutional responsibilities," it only partly delegates its exercise.[84] Nevertheless, for John Borrows, this incorporation "allows the federal government to almost completely abandon its section 91(24) constitutional responsibility" in favour of provinces.[85]

II.4 Overlapping Federal and Provincial/Territorial Jurisdiction

The expansion of social services to all Canadians in the post-war welfare state era led to more provincial involvement in social policy and intergovernment conflict and interaction, including with regards to Indigenous peoples.[86] The elaboration and delivery of social services for Indigenous peoples could thus *a priori* fall within the purview of either order of government, either *proprio vigore*, or through the effect of the *Indian Act*. Often, neither government wants to bear the financial burden associated with the provision of these services, depriving Indigenous communities of essential services provided to other Canadians. Even in instances where both orders of government work cooperatively, each can nonetheless claim that the core responsibility rests on the other.[87]

Natural resource extraction, management, and protection is another area of recurrent jurisdictional tension, since provinces have ownership and legislative authority over public lands, while Ottawa has jurisdiction over land "re-

82 See *ibid*; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 [*Kitkatla Band*]; *Tsilhqot'in*, *supra* note 65.

83 See Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2015) at 28-18; Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J Anthony Long & Menno Boldt, eds, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 175 at 182; McNeil, "Aboriginal Title," *supra* note 80 at 177. This said, provincial laws could only apply to the extent that they are not 'inconsistent' with other federal legislation, pursuant to the doctrine of federal paramountcy.

84 *FN Caring Society*, *supra* note 60 at para 83.

85 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 168.

86 See T Kue Young, "Indian Health Services in Canada: A Sociohistorical Perspective" (1984) 18:3 Soc Science & Medicine 257 at 260; Grammond, *supra* note 55 and cases cited.

87 See Frances Abele, "Intergovernmentalism and the Well-Being of First Nations" in Ghislain Otis & Martin Papillon, eds, *Féderalisme et Governance Autochtone/Federalism and Aboriginal Governance* (Québec: Presses de L'Université Laval, 2013) 167.

served for the Indians."[88] Even as it recognized Aboriginal title for the very first time in 2014, the Supreme Court ruled that provincial laws may also apply to territory over which Indigenous nations have the greatest property entitlement under Canadian law.[89] Here again, the presumption is that legislative power is either federal or provincial, or both. It may be limited by Aboriginal rights. But power itself is not shared or limited by inherent Indigenous sovereignty.

II.5 So, Who Can Do What in the End?

In brief, 'who can do what' in matters which relate to Indigenous peoples depends on which Indigenous groups are concerned. The federal order always has jurisdiction, the provinces sometimes do, overlap is frequent, and it may be that provincial legislative authority is even greater with regards to 'status Indians' through the action of section 88 of the *Indian Act*. This sketch, to repeat, is grounded on the questionable presumption that legislative powers are exhaustively divided between the federal and provincial orders, leaving no room, in Canadian law, for inherent jurisdiction derived from Indigenous legal traditions or orders.[90]

To summarize the foregoing, according to the conventional understanding of the division of powers:

- The federal order can always legislate with regards to Indigenous peoples and the lands 'reserved' for them.
- Provincial laws of *general application* may apply *proprio vigore* to all Indigenous peoples. In principle, such laws may not affect the 'core' of the federal jurisdiction. However, they may directly address Indigenous interests, at least to the extent that they have an ameliorative or protecting purpose.
- Provincial laws of *general application* may also apply *proprio vigore* to Indigenous territory, including Aboriginal title lands.
- Arguably, some provincial legislation which cannot constitutionally apply to Indigenous peoples — if they affect the "core of Indianness" — may nevertheless apply to status Indians pursuant to section 88 of the *Indian Act*.

88 See Webber, *supra* note 73 at 244. See e.g. *Kitkatla Band*, *supra* note 82; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

89 See *Tsilhqot'in*, *supra* note 65. Arguably, one limit to this increasing provincial reach may be that provincial laws should *not* unduly *restrict* Indigenous interests, but in fact aim at promoting and protecting them, see Leclair & Morin, *supra* note 71 at nos 126-27.

90 See McCrossan & Ladner, *supra* note 65.

- Overlap is thus not only possible but frequent, particularly in several areas of social policy which lie at the heart of the Calls to Action.
- Provincial laws must not be inconsistent with federal legislation. There is no notion that, absent federal legislation, Indigenous legal norms ought to apply, rather than provincial ones.
- Federal and provincial jurisdiction is equally 'burdened' by Aboriginal and treaty rights pursuant to section 35 of the *Constitution Act, 1982*.

With this sketch in mind, we may now examine in greater detail how some Calls to Action 'match' — or not — the division of powers in the Canadian Constitution and attempt to see the strategy behind the identification of government authorities called to action.

Part III: The Calls to Action Regarding Child Welfare, Health, and Education: A Vision of Canadian Federalism?

A detailed exploration of the 'match' between actors targeted by all Calls to Action and the distribution of powers would be a daunting — if revealing — exercise. In what follows, we attempt to do so with three domains: child welfare, health care, and education. While done in an inevitably summary fashion, the objective is simply to point to the challenge — or inadequacy — of 'fitting' requests for action into the evolving, fluid, and often controversial interpretation of the division of powers between federal and provincial orders. We also aim to offer some tentative explanations for the choices operated by the TRC in this context.

III.1 Child Welfare

In practice, on-reserve services regarding child welfare are provided cooperatively by the federal and provincial governments.[91] Either federally-mandated agencies through First Nations Child and Family program or provinces deliver on-reserve child and family services funded by Indigenous Services Canada (ISC).[92] There is significant asymmetry in the ways in which services are conceived and delivered across the country.[93]

91 See *FN Caring Society*, *supra* note 60 at para 66; Blumenthal & Sinha, *supra* note 59 at 3.

92 Formerly "Aboriginal Affairs and Northern Development Canada" (AANDC), which has now been split into Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), see "Indigenous Services Canada/Crown-Indigenous Relations and Northern Affairs Canada," online: *Government of Canada* <www.aadnc-aandc.gc.ca> [perma.cc/UVY4-7Q3D]

93 See Grammond, *supra* note 55.

Oddly, given this intertwined delivery, as recently as 2016, Ottawa argued before the Human Rights Tribunal that child welfare services were exclusively an area of provincial jurisdiction.[94] If this were the case, federal funding would be entirely discretionary, and made pursuant to the federal spending power. The Tribunal disagreed and held the federal government responsible for the quality of services offered to Indigenous children on reserves.[95] While Ottawa did not challenge the ruling, it failed to comply.[96] In 2019, the Tribunal ruled on compensation for "victims/survivors of Canada's discriminatory practices."[97]

In essence, courts and tribunals have singled out the federal order as the main actor responsible for the provision of on-reserve child welfare services. In contrast, there is no clear delineation of jurisdiction for remaining Indigenous individuals and groups. The TRC roughly follows this logic. All five Calls to Action related to child welfare require the federal government to act, but four of those also target provincial and territorial governments. The sole exception relates to Call to Action 4, which requests that the federal government "enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody case."

In 2019, in partial response to the Calls to Action, the federal Parliament passed *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*.[98] It goes further than establishing national standards: it affirms that the inherent right of self-government of Indigenous peoples, recognized and affirmed by section 35 of the *Constitution Act, 1982*, includes legislative authority in relation to child and family services.[99] The *Act* then offers two avenues to Indigenous groups wishing to exercise this legislative authority. Note that in both of these schemes, Indigenous law would not apply if it would be contrary to the best interests of the child.[100] Moreover, in case of conflict between two

94 See *FN Caring Society*, *supra* note 60 at para 78.

95 See *Ibid* at paras 83-86.

96 See Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285 at 324. So far, eight non-compliance orders have been issued under the style of cause *First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian and Northern Affairs Canada)*, see 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 7; 2017 CHRT 14; 2017 CHRT 35; 2018 CHRT 4; 2019 CHRT 7; 2019 CHRT 39 [*FN Caring Society 2019*].

97 *FN Caring Society 2019*, *supra* note 96 at para 12. Ottawa is seeking judicial review of this decision. Its motion for a stay pending application was denied, see *Canada (AG) v First Nation Child and Family Caring Society of Canada*, 2019 FC 1529.

98 *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24 [*ICYF Act*].

99 *Ibid*, Preamble and s 18(1).

100 *Ibid*, s 23.

Indigenous laws, the law of the group, community, or people with which the child has stronger ties will apply.[101]

The first scenario envisages that an Indigenous group may simply "give notice" of its intention "to exercise its legislative authority" to the federal and relevant provincial orders.[102] The *ICYF Act* says nothing about rules to resolve conflicts between Indigenous law and federal or provincial law in this context. In case of conflict with federal law, it seems that the latter will prevail. The intersection with provincial law, for its part, is rather blurry, and whether provincial or Indigenous law would prevail is uncertain. Given Parliament's silence on this issue, and the fact that it cannot alter jurisdiction by legislation, it appears that normal rules of interpretation would apply.[103]

Pursuant to the second option, an Indigenous governing body may request that the federal and provincial governments enter into a tripartite coordination agreement with it in relation to the exercise of its legislative authority.[104] If such an agreement is reached within one year of the initial request, Indigenous law concerning child welfare will apply.[105] But, and this is a notable innovation, Indigenous law will also apply if an agreement is *not* reached within a year of the initial request, despite the Indigenous governing body's "reasonable efforts" to negotiate one.[106]

In that second context, the *ICYF Act* confers the relevant Indigenous law "force of law as federal law."[107] It also anticipates potential conflicts between Indigenous law on the one hand, and federal or provincial law on the other.[108] In the event of conflict or inconsistency between Indigenous law and other federal law — except certain provisions of the Act itself and the *Canadian Human Rights Act* — the Indigenous law will prevail.[109] In other words, the federal order is 'vacating' jurisdictional space in favour of Indigenous authorities, while simultaneously asserting inherent Indigenous jurisdiction. It affirms

101 *Ibid*, s 24.
102 *Ibid,* s 20(1).
103 Including, we presume, the limited interjurisdictional immunity derived from *Tsilhqot'in*, *supra* note 65. The impact of section 88 of the *Indian Act* in this context is also rather uncertain. Our point is not to detail all the possible solutions but to flag the uncertainty regarding these three 'uncoordinated' sources of law.
104 *ICYF Act*, *supra* note 98, s 20(2).
105 *Ibid*, s 20(3)(a).
106 *Ibid*, s 20(3)(b).
107 *Ibid*, s 21(1).
108 *Ibid*, s 24.
109 *Ibid,* s 22(1).

that in case of conflict, with limited exceptions, Indigenous law will have paramountcy over federal law.

In this second scenario, the *ICYF Act* also imposes cooperation unto provinces. Indeed, if a coordination agreement is reached, or if one is not reached within one year despite an Indigenous group's reasonable efforts to do so, relevant Indigenous law is to prevail over any conflicting provision in a provincial act or regulation.[110] It thus seems that the federal Parliament is delegating the exercise of its own paramountcy over conflicting provincial law to Indigenous legislators. And while this is somewhat speculative, Ottawa is apparently choosing not to legislate beyond the *Act* itself. It leaves provincial or Indigenous law to regulate this policy area and, through a legislative provision, aims to gives priority to the latter in case of conflict. However, if no coordination agreement is reached, the paramountcy of Indigenous law will only apply if the Indigenous community has shown "reasonable efforts" to reach such an agreement.[111]

This is a complex constitutional strategy. It can be read as moving away from a conception of the division of powers between federal and provincial governments being 'exhaustive,' and toward a recognition of Indigenous governments as federal partners, in some way *on par* with provinces. Or it can be understood as a revocable 'delegation' of authority by Ottawa of part of its legislative powers to Indigenous communities, including a delegation of federal paramountcy over provincial law to Indigenous communities. The Québec government is challenging the *ICYF Act*'s constitutionality through a reference procedure before its Court of Appeal. While it shares the objective of increasing Indigenous autonomy in this area, it argues that setting aside provincial powers by the federal Parliament is unconstitutional.[112]

Clearly, child welfare remains a jurisdictional battlefield. The TRC called upon all orders of government to take action. But it strategically targeted the federal order to legislate in a way that may yield an innovative restructuring of the current division of powers. While not ignoring provinces and territories, it

110 *Ibid*, s 22(3).

111 *Ibid*, s 20(3)(b).

112 See Laurence Niosi, "Enfants autochtones: le gouvernement Legault conteste l'autorité d'Ottawa," *Radio-Canada* (19 December 2019), online: <ici.radio-canada.ca/espaces-autochtones/1442013/enfants-autochtones-renvoi-cour-appel-quebec> [perma.cc/HH2L-W4QA]; "Reference in Relation with the Act Respecting First Nations, Inuit and Métis Children, Youth and Families" (16 January 2020), online: *Québec Court of Appeal* <courdappelduquebec.ca/en/news/details/reference-in-relation-with-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-fam-1/> [perma.cc/PJX6-72XF].

simultaneously — and implicitly — seems to have paved the way for a concrete, gradual, and pragmatic implementation of a third order of government.

III.2 Health Care and Services

Health services with regards to Indigenous peoples is another area where both *de jure* and *de facto* jurisdiction is unclear and contested.[113] While on-reserve services are provided by the federal government through the *Indian Act* and *Indian Health Regulations*,[114] provinces have broad jurisdiction over health given their responsibilities for hospitals in section 92(7), property and civil rights in section 92(13), and matters of a local or private nature in section 92(16) of the *Constitution Act, 1867*.[115] Indigenous individuals and groups often find themselves in the midst of jurisdictional tugs-of-war.[116]

Seven Calls to Action — 18 to 24 — relate to healthcare. Two of these require the federal, provincial, and territorial governments to act. First, Call to Action 18 requests an acknowledgement by all of them "that the current state of Aboriginal health … is a direct result of previous Canadian government policies … and to recognize and implement the health-care rights of Aboriginal people." Therefore, even if the situation is due to the "Canadian government," the other orders of government are also asked to act. Similarly, the TRC asks "all levels of government" to increase the number of Indigenous healthcare professionals.[117]

By contrast, Calls to Action 19 and 21 respectively ask the federal government "to establish measurable goals to identify and close the gaps in health outcomes between Aboriginal and non-Aboriginal communities" and "to provide sustainable funding for existing and new Aboriginal healing centres." The exclusion of provincial governments from these Calls to Action is striking given the predominant provincial responsibility over health care.

Of particular interest is Call to Action 20, which deplores "the jurisdictional disputes concerning Aboriginal people who do not reside on reserves" but only requests the federal government "to recognize, respect, and address

113 See Grammond, *supra* note 55.

114 See Martha Jackman, "Constitutional Jurisdiction over Health in Canada" (2000) 8 Health LJ 95 at 106.

115 See *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 68 ("[t]he provincial health power is broad and extensive"). See also Hogg, *supra* note 83 at 33-15; Poirier, "Social Union," *supra* note 68.

116 See Jackman, *supra* note 114 at 106, 111.

117 *TRC Report*, *supra* note 1, CTA 23.

the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples." The exclusion of provinces from this Call appears deliberate, given their inclusion in other related Calls to Action. Through this omission, the TRC may be taking another stance on the federal-provincial battlefield and asserting that Ottawa cannot elude its responsibilities for the health care services of non-status Indians.[118]

III.3 Education

Jurisdiction over education is exclusively provincial per section 93 of the *Constitution Act, 1867*. However, Parliament has also legislated in the matter pursuant to section 91(24).[119] This was, of course, the main source of federal authority for establishing residential schools. The federal cabinet may also authorize the Minister to conclude agreements with a province or territory about education.[120] Intergovernmental cooperation has yielded several tripartite memorandums of understandings between federal, provincial, and Indigenous authorities aimed at improving educational outcomes for Indigenous students.[121]

Eleven Calls to Action concern education. Calls to Action 6, 8, and 65 only address the federal government, while one targets the interprovincial body CMEC, which excludes the federal government. Some Calls to Action target both federal as well as provincial and territorial orders, while "Aboriginal governments" are also called upon with regards to develop "culturally appropriate" early childhood education programs.[122]

As in the case of healthcare, some Calls to Action only point to the federal order in policy areas over which provinces also likely have jurisdiction under the double aspect doctrine. For example, Call to Action 7 requires the federal government to eliminate gaps in educational and employment between Indigenous and non-Indigenous "Canadians." The exclusion of provinces is again noteworthy, as the elimination of such gaps is a stated objective of the inter-provincial CMEC.[123]

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118 The *TRC Report* was issued before *Daniels, supra* note 69, which ruled that the federal order has jurisdiction, pursuant to section 91(24) of the *Constitution Act, 1867, supra* note 4, over 'non-status' Indians and Métis people.

119 See *Indian Act*, *supra* note 76, s 114(2).

120 See *ibid*, s 114(1).

121 See Indigenous Services Canada, "First Nation Education Partnerships and Agreements" (28 May 2018), online: *Indigenous Services Canada* <www.sac-isc.gc.ca/eng/1308840098023/153140011558> [perma.cc/39HL-2SMQ].

122 *TRC Report*, *supra* note 1, CTA 12.

123 See Council of Ministers of Education, Canada, "Learn Canada 2020: Joint Declaration Provincial and Territorial Ministers of Education" (2020), online (pdf): *CMEC* <cmec.ca/Publications/Lists/

III.4 Overall Coherence Behind the Specific Calls to Action

The foregoing illustrates that while some Calls to Action match constitutional authority under current Canadian law, others do not. The federal order is almost inevitably called upon. This reflects its broad jurisdiction in matters relating to Indigenous peoples. Explicit identification of other orders of government does occur, however. It is neither systematic nor always connected to their constitutional jurisdiction.

Why are the provinces asked to act with regard to certain aspects of health care and not others? Why are all orders of governments asked to cooperate to reduce the number of Indigenous children in care, while only Ottawa is requested to legislate to that effect? Why is the federal order, without the express cooperation of provinces, asked to adopt a new "Aboriginal education legislation," when the provinces are the main providers of educational services? Why are Indigenous governments sometimes associated with other addressees, and sometimes not? Why an almost exclusive focus on the federal order in some cases, and a Call to other governmental — or non-governmental — actors in others? In other words, what logic, purpose, and strategic thinking grounded the TRC's identification of governmental 'targets'? Clearly, a detailed reading of the Calls to Action raises as many questions as it answers. Attempting to decode the TRC's motivation remains a matter of conjecture.[124] We nevertheless offer two tentative explanations.

First, just as the federal order plays a lead role in the Truth section of the Report, it appears in virtually every segment of the Reconciliation section. In the Reconciliation dimension of its work, the Commission directed Calls to Action at governmental actors in addition to the federal one, in a way that appears more pragmatic than ideological. Directing requests for action to actual actors rather than to an abstract 'Crown' or 'Canada' might have been understood to be more effective. The point was not necessarily to "get it right" from a current Canadian legal and constitutional perspective, but rather to ensure that public and other authorities felt compelled to take stock of the Calls to Action.

Categories of Calls to Action concerning child welfare, healthcare, and education nearly always target federal, provincial, and territorial orders, as

Publications/Attachments/187/CMEC-2020-DECLARATION.en.pdf> [perma.cc/8ZX2-4XBF].

124 Pursuing this further would require a distinct methodological approach than the one used in this paper. It would notably involve more systematic and structured interviews. This said, it is likely that answers would not be univocal regarding specific motivations, or on the drafting method chosen in specific Calls to Action.

well as, occasionally, Indigenous governments. Taken 'globally,' this breakdown also corresponds to the jurisdictional overlap that results from constitutional interpretation. In other words, the Commission always calls all the relevant actors within each category of Calls to Action, even if it does not always do so in individual Calls. Taking stock of this jurisdictional overlap underscores the need for all public actors to take all of the Commission's Calls to Action seriously. In other words, 'traditional' actors of the Canadian federation must heed the Calls, even when they are not directly targeted by a specific Call to Action.

Second, despite the pragmatic acknowledgment of Canada's existing federal system, the TRC also singles out the federal order in areas where shared jurisdiction is likely. In so doing, the CRT may have strategically sought to counter Ottawa's attempts to elude its constitutional responsibility toward Indigenous peoples. It may also creatively facilitate 'third order of government' solutions introduced by Ottawa, in a way that does not negate provinces, but somewhat shrinks their jurisdiction in favour of Indigenous legal orders, in gradual and asymmetrical fashions.

Conclusions: A Moral, Political, and Constitutional Duty to Cooperate

Reconciling Indigenous voices, interests, strategies, priorities, political aspirations is — and will remain — a major challenge facing Indigenous peoples. Adequately responding to the Calls to Action also presents challenges to the 'traditional' actors of the Canadian federation. Implementing the *TRC Report* has undeniable and profound intergovernmental implications.

The vast majority of the ninety-four Calls to Action are directed at Canadian public authorities and institutions. With one exception, various iterations of federal authorities are always identified. Provinces and territories are also requested to take action, almost always in conjunction with the federal order. Several Calls to Action are also directed at Indigenous governments. The TRC chose not to address its Calls to an indistinct 'Canada' or 'Crown.' In so doing, it somewhat acknowledged the federal structure of Canada, even if it does not necessarily endorse it. This was likely a strategic choice. It could have evoked a 'unified' Crown, thus emphasizing more historical models of nation-to-nation relationships. It sometimes did, as in the Call for a new Royal Proclamation in Call to Action 45. In most cases, however, the TRC petitioned specific actors, more likely to elicit a direct, rapid, and less elusive response.

This said, one may wonder why certain Calls to Action are addressed to specific public authorities, while very closely related ones are not. This puzzlement led us to attempt to decipher the Calls to Action in order to partially sketch not only '*who* is being asked to do what' by the TRC but also 'who *can* do what' pursuant to current Canadian constitutional law. Sometimes we find a 'match,' and sometimes not quite. Underscoring this lack of precise correspondence is not meant as a criticism: the Commission's mandate was not constitutional and its choice of 'addressees' may not be faulted for not fitting with a constantly evolving, complex, often nebulous division of powers which Indigenous peoples have neither chosen nor endorsed. Nonetheless, when taken globally, as opposed to individually, the various Calls to Action relative to specific policy areas — such as child welfare, health services, and education — clearly highlight that all orders of government in the current federal regime have some constitutional competence and are rightly called upon to take action by the Commission.

Under Canadian public law, the mere existence of an order of government's legislative power in a specific policy area does not generate any legal obligation to actually legislate or otherwise take action.[125] A power to act is not an obligation to do so. Moreover, while intergovernmental collaboration is facilitated and encouraged by the Supreme Court of Canada,[126] judges have shied away from finding any constitutional obligation to cooperate on the parts of the 'official' actors of the federation.[127] In other words, whether the federal, provincial, and territorial orders actually legislate in their respective spheres of jurisdiction is, under Canadian law, considered to be a policy or political decision. This is also the case of their eventual choice to cooperate with other members of the federation. Given the increasing overlapping and intertwining jurisdiction in all matters — including in policy areas targeted by the TRC — this can generate inaction and/or uncoordinated action in silos.

125 See *Daniels*, *supra* note 69 at para 25. Limited 'positive' constitutional rights provide an exception to this rule.

126 See *Canadian Western Bank v Alberta*, 2007 SCC 22; *Reference re Securities Act*, 2011 SCC 66 at para 133; Gaudreault-DesBiens & Poirier, *supra* note 67.

127 See Gaudreault-DesBiens & Poirier, *supra* note 67; *Long-Gun Registry*, *supra* note 65 at para 19; Johanne Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020) 94:2 SCLR (2d) 85 at 90-91; Jan Raeimon Nato, "Development of Duties of Federal Loyalty: Lessons to be Learned, Conversations to be Had" (Winner of Baxter Family Competition on Federalism, 2019), online (pdf): <www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf> [perma.cc/L9PN-J4WJ]; Noura Karazivan, "Cooperative Federalism v Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments and Governments" in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montréal: McGill-Queen's University Press, 2020) 307-309.

The TRC did not explicitly call for a reconceptualization of the current federal regime to fully encompass 'Treaty-federalism' or 'Third-order of government federalism,' although some endorsement seems implicit in certain Calls to Action. Those models should be kept on the radar and refined in order to challenge a hierarchical vision of Crown sovereignty. In the short(er) term, and in parallel, however, we believe that responses to the divide-and-conquer — or ignore-and-conquer — attitude of the 'traditional' actors of the federation could be found even within the confines of existing Canadian public law. Hence, in conclusion, we briefly evoke two ways that might alleviate the negative consequences of the formal division of powers in Canada on the implementation of the Calls to Action.

The first would be the broadening of Jordan's Principle, which "all levels of government" are being called upon to "fully implement."[128] As mentioned above, the principle was developed in the context of on-reserve healthcare services for First Nations children.[129] It enjoins the first government requested to offer or pay for a service to do so, postponing and displacing intergovernmental wrangles.[130]

In *FN Caring Society*, the Canadian Human Rights Tribunal ruled that the federal order retains a *duty* to provide appropriate financing, even if its jurisdiction over 'Indians' could be interpreted as giving it the power to do nothing at all. Legal and constitutional prohibition against discrimination — between Indigenous and non-Indigenous people — entails positive *duties* on formal state actors. In this context, having jurisdiction does *not* entail the power to do nothing with it.[131] Furthermore, existing federal-provincial cooperation in the provision of on-reserve child and family services does not diminish Ottawa's constitutional responsibilities.[132] Action is required, not by the federal division of powers, but because inaction, or ineffective action, may violate rules of substantive equality.

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128 *TRC Report*, *supra* note 1, CTA 3.

129 See text corresponding to *supra* note 60.

130 Parliament endorsed a private motion to "immediately adopt a child-first principle" in 2007. Subsequent legislative attempts to adopt Jordan's Principle failed. Non-legislative initiatives led to agreements with Manitoba and Saskatchewan. These implementations of the principle were narrower than the definition adopted in the 2007 motion and were denounced for that reason by First Nations groups, see Blumenthal & Sinha, *supra* note 59 at 6-8.

131 For Colleen Sheppard, Jordan's Principle has had significant legal impact, even as a non-binding parliamentary motion. Sheppard argues that Jordan's Principle also calls for greater participation by Indigenous communities in policy determination and service delivery, thus to notable recognition of Indigenous autonomy and self-determination, see "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 27:1 Const Forum Const 3.

132 See *FN Caring Society*, *supra* note 60 at para 83.

Understood through the lens of federalism, an expanded conception of Jordan's Principle would require effective coordination between orders of government with the power to act. Given the intermingling of competences that the contemporary federal regime has generated, our submission is that Jordan's Principle not only imposes a duty to act, but also a duty to act in a collaborative fashion to alleviate the tug-of-war that results from Canada's federal structure and jurisprudence.

The second means through which current Canadian law could be adapted to alleviate the negative impact of the current division of powers on the implementation of the Calls to Action is a still exploratory constitutional duty to cooperate on the parts of a 'divided' Crown.

As mentioned, over the last two decades, Canadian courts have enthusiastically promoted a certain vision of 'cooperative federalism,' in a way that has increased jurisdictional overlap. However, notably in view of the principle of parliamentary sovereignty, judges have rejected the idea that the 'traditional' actors of the federation have an obligation to act in good faith and/or cooperatively.[133] In other words, in 'regular' intergovernmental dealings, cooperation is facilitated, but not constitutionally mandated. However, we submit that in their interaction with Indigenous peoples, or in any action which affects Indigenous peoples, the 'traditional' members of the federation may be under a constitutional imperative to cooperate. This obligation would serve to partly counter-balance the highly complicating impact of the division of powers in current Canadian law for Indigenous peoples.[134]

The principle of the Honour of the Crown generates a number of positive obligations on the part of every order of government.[135] Our hypothesis is that public authorities which exercise the 'governmental' functions of the

133 See sources cited *supra* note 127.

134 See *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, where the majority of the Court "d[id] not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights" (para 49). See also the dissenting opinion's acknowledgment that prior occupation by Indigenous peoples must be reconciled with federalism (paras 209-13). While the case does not deal with constitutionally-mandated cooperation, both sets of reasons call for mitigating the negative impact of the current federal architecture for Indigenous claims that straddle provincial borders. Our submission is based upon a similar conviction that the promise of section 35 may only be fulfilled by a reconceptualization of the members of the federation's constitutional duties.

135 See *Grassy Narrows*, *supra* note 29 at para 35; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 73; *Mikisew Cree*, *supra* note 19 at para 42; Craig Scott, "Consultation, Cooperation and Consent in the Commons' Court: 'Manner and Form' after Mikisew Cree II" (2020) 94:2 SCLR (2d) 155.

Crown must also coordinate their action, lest the federal division of powers create a vacuum and/or jurisdictional battles and blame-shifting, which are anything but 'honourable.' Our suggestion is, in a sense, robustly 'procedural.' It is not that equality rights or the Honour of the Crown requires that laws and policies should be uniform across Canada. It is, rather, that in policy development and delivery, members of the Canadian federation must consult, cooperate, engage, and act in good faith. Not only in their respective dealings with Indigenous peoples but also in a *multilateral* fashion that involves all orders of government, including Indigenous ones. There is, of course, a political obligation to do this. Our submission is that it may *also* be constitutionally mandated. In short, in the federal system, a divided Crown must act cooperatively if it is to act honourably. The principles of federalism and of the Honour of the Crown(s) — in the plural — ought to be interpreted in symbiosis.[136]

This modulation of the scope of federal and provincial, and eventually Indigenous, jurisdiction to recognize constitutionally-mandated cooperation could fruitfully draw inspiration from Indigenous legal traditions,[137] including the concepts of relationality,[138] 'respect,'[139] 'love,'[140] and 'good faith.'[141] These concepts could be mobilized to challenge jurisdictional turf wars and encourage constructive interdependence in a spirit of "humility."[142] A proper implementation of the TRC's Calls to Action requires no less.

136 The authors are working on a distinct paper on this constitutional obligation to cooperate and the notion of the Honour of the Crown(s). On the interaction between constitutional principles, see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49-82, 161 DLR (4th) 385.

137 John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153 at 165-66.

138 See e.g. Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817.

139 Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law" (2016) 61:4 McGill LJ 939.

140 John Borrows, "Indigenous Love, Law, and Land in Canada's Constitution" in Steven Lecce, Neil McArthur & Arthur Schafer, eds, *Fragile Freedoms: The Global Struggle for Human Rights* (Oxford: Oxford University Press, 2017) 123.

141 Sarah Morales, "(Re)Defining 'Good Faith' through *Snuw'uyulh*" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 277 at 291-302.

142 Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.