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Agency, Participation, and Self-Determination for Indigenous Peoples in Canada: Foundational, Structural, and Epistemic Injustices

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ABSTRACT

In this paper, I discuss accounts of agency, participation, and self-determination by David Crocker and Stacy Kosko because they acknowledge that relationships of power can determine who gets to participate and when. Kosko usefully applies the concept of agency vulnerability to the case of the self-determination of indigenous peoples. I examine the specific context of Canada's history as a settler nation, a history that reflects attempts to denigrate, dismiss and erase Indigenous laws, practices, languages, and traditions. I argue that this history displays epistemic injustice in that the dominant collective interpretative resources of non-Indigenous Canadians have allowed the dismissal of the collective interpretative resources of Canada's Indigenous peoples. This gap in collective interpretative resources can explain that Canada's constitution, institutions, laws, and structures reflect the dominant collective interpretative resources of a colonizing nation, ones that have delineated and restricted the agency, participation, and self-determination of Indigenous Canadians. One important outcome of Canada's Truth and Reconciliation Commission and of its National Inquiry into Murdered and Missing Indigenous Women and Girls is bringing the rich history of Indigenous collective interpretative resources and the networks of relationships shaped by them to light. By discussing examples from these reports, I give substance to the argument that foundational and structural injustices in settler nations are at bottom epistemic injustices, ones that have implications for accounts of agency, participation, and self-determination.

Keywords: agency; self-determination; epistemic injustice; Canada's Truth and Reconciliation Commission; Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls

RESUME

Dans cet article, je discute des concepts d'agencéité, de participation et d'autodétermination présentés chez David Crocker et Stacy Kosko, car ils reconnaissent que les relations de pouvoir peuvent déterminer qui peut participer et à quel moment. Kosko applique utilement le concept de vulnérabilité d'agencéité au cas de l'autodétermination des peuples autochtones. J'examine le contexte particulier de l'histoire du Canada en tant que nation colonisatrice, une histoire qui reflète les tentatives de dénigrement, de rejet et d'effacement des lois, pratiques, langues et traditions autochtones. Je soutiens que cette histoire montre une injustice épistémique en ce que les ressources interprétatives collectives dominantes des Canadiens non autochtones ont permis le rejet des ressources interprétatives collectives des peuples autochtones du Canada. Cette lacune dans les ressources interprétatives collectives peut expliquer que la constitution, les institutions, les lois et les structures du Canada reflètent les ressources interprétatives collectives dominantes d'un pays colonisateur, lesquelles ont défini et restreint l'agencéité, la participation et l'autodétermination des Canadiens autochtones. L'un des résultats importants de la Commission vérité et réconciliation du Canada et de son enquête nationale sur les femmes et les filles autochtones assassinées ou disparues est la mise en lumière de la riche histoire des ressources interprétatives collectives autochtones et des réseaux de relations qu'elles ont créés. En discutant des exemples de ces rapports, je donne corps à l'argument selon lequel les injustices fondamentales et structurelles dans les pays colonisateurs sont une injustice épistémique fondamentale, des conséquences qui ont une incidence sur les concepts d'agencéité, de participation et d'autodétermination.

Mots-clés : agencéité, auto-détermination, justice épistémique, Commission vérité et réconciliation Canada, Enquête nationale sur les femmes et filles disparues et tuées.

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1. INTRODUCTION

In this paper, I explore injustices that are foundational, structural, and epistemic and I do so in the context of histories and relationships that have shaped Canada as a settler nation. My exploration begins by discussing two accounts of agency and participation that I take to reach deep into identifying foundational and structural injustices, but I will argue that they are not deep enough. On foundational issues, I critically examine David Crocker on agency and participation and his skilful manoeuvring through Amartya Sen and Martha Nussbaum to show where he agrees and disagrees with each. I side with Crocker against both—especially on the role that agency and participation can play at foundational levels of shaping and reshaping constitutions themselves. On structural issues, I turn to Stacy Kosko's extension of Crocker's account of the importance of agency and defend her use of the concept "agency vulnerability" as better able to capture the idea that where people are situated in relationships of power makes agency more or less possible for them.

Kosko, rightly I think, argues that a good deal of attention has been given to the *substantive* aspect of defending normative principles underlying constitutions, institutions, structures, and the rule of law. Crocker's project fits the substantive aspect, but he leaves room for fair and inclusive participation in deliberations that can challenge and change these. Kosko's project is to tease out the *process* aspects of how and when participation in decision-making processes can happen and she does so in the context of examining the issue of the self-determination of indigenous peoples. I take her account of agency vulnerability to be an important contribution to assessing participation possibilities for indigenous peoples. Yet, while Kosko is clear about why agency matters and how it can be thwarted or weakened, agency and participation cannot but happen in the context of the foundations of constitutions, institutions, and the rule of law already in place in settler nations. In other words, examining the process aspect opens up possibilities for assessing the thickness of participation and the points of entry for decision-making and helps in understanding whether indigenous peoples participate, but it does so in terms that *show* the limitations of what they can examine, challenge, or change. It matters to accounts of fair and inclusive participation that constitutions, institutions, and the rule of law are already in place in settler nations and form the foundations and structures against which indigenous peoples can exercise their (vulnerable) agency and participate meaningfully.

With Crocker and Kosko, I want to argue that the best accounts of agency and participation, ones that reveal where and how foundational and structural injustices can arise, take foundations and structures to be fluid rather than fixed and thus open to challenge and change. However, devising criteria for enhancing agency and participation is particularly difficult in contexts of colonizing/settler nations. In contexts where foundations and structures are already in place, a deeper probe into the epistemic injustices that underlie substantive and process aspects is in order. To show this, I make use of Miranda Fricker's account of hermeneutical injustice (what I will refer to as epistemic injustice more generally) as *structural* in form because it "occurs at a prior stage when a gap in *collective interpretative resources* puts someone at an unfair disadvantage" (2007, 1, my emphasis). Departing somewhat from Fricker's account, I understand the gap to be about the powerful creating and controlling the dominant collective interpretative resources so that the collective interpretative resources of the less powerful are explicitly or implicitly ignored, dismissed, marginalized, or silenced (Pohlhaus 2012; Medina 2012).

In the context of settler nations, the dominant collective interpretative resources of colonizers have had and continue to have the effect of ignoring, silencing, and marginalizing what indigenous peoples say and know about their histories, laws, practices, traditions, and ways of life. Claims to know that emerge from failures to credit indigenous peoples' collective interpretative resources, evidenced by laws and structures that have the effect of denigrating, dismissing, or erasing that which is perceived to be inferior, mean that epistemic injustices lie at the heart of the foundations, structures, and processes that liberal theorists have worked to justify and defend.

Like Kosko, I take up the case of indigenous peoples, for whom concepts of agency and participation are seriously tested. But I differ from Kosko in taking context to be of utmost significance in the shaping of the histories and legacies of colonialism. A key part of my argument is that relationships between Indigenous and non-Indigenous Canadians have been shaped and continue to be shaped by a history of colonialism and the injustices and gross violations of human rights emerging from the past and continuing into the present. Settler nation histories call for a broad and deep account of relationships that shape Indigenous lives and communities, non-Indigenous lives and communities, the interactions of Indigenous and non-Indigenous peoples and communities and the relationships of all of these to and through the state.

Indigenous collective interpretative resources understand Canada's history to emerge from and be shaped by early relationships between the colony settlers and Indigenous peoples who negotiated treaties. This history of relationships was examined in and through Canada's Royal Commission on Aboriginal Peoples mandated to "investigate the evolution of the relationship among aboriginal peoples, the Canadian government and Canadian society as a whole" (1996 *Final Report*, 11). These relationships shaped the backdrop to the negotiations that set up the Indian Residential Schools Settlement Agreement (IRSSA) in 2006; that gave voice to Indigenous experiences in and through the Indian Residential Schools Truth and Reconciliation Commission (IRSS TRC) with its final report issued in June 2015; and that culminated in the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) that named Canada's history one of genocide in its final report issued in June 2019. These commissions and reports reflect Indigenous perspectives on Canada's history and continue to shape and reshape relationships in Canada as a settler nation. In this paper, I focus on some of the complex manifestations of foundational, structural, and epistemic injustices in and through some of the lessons learned from Canada's TRC and the MMIWG National Inquiry.

Before I proceed a few disclaimers are in order. This paper barely scratches the surface of what Crocker covers in his appropriately complex conceptual analyses of agency, participation, and democratic deliberation or of what Canada's TRC and MMIWG Inquiry have produced. I concentrate on parts of Crocker's *Ethics of Global Development*; parts of Volume 6 of the Final Report of the Truth and Reconciliation Commission of Canada with the title, *Canada's Residential Schools: Reconciliation* (hereafter cited as TRC *Final Report*); and parts of the *Executive Summary of the Final Report* of the National Inquiry into Missing and Murdered Indigenous Women and Girls (hereafter cited as MMIWG National Inquiry). The upshot is that an examination of epistemic injustice can highlight important insights in each of the Crocker, Kosko, TRC, and MMIWG works, but only if a broad and full account of relationships as shaped by history, laws, practices, and traditions is kept in the

foreground. These relationships have set the terms and processes under which the agency and participation of Indigenous Canadians is understood and permitted.

A final and important claim is that my position is that of a white, privileged woman who does not claim to speak for Indigenous Canadians but takes on the smaller task of attempting to glean insights about Canada's history as a settler nation from the TRC *Final Report* and from the MMIWG National Inquiry. This implies three things. First, I limit my analysis to a small part of the processes and results and do not claim to cover the work of indigenous scholars critical of the TRC or of the MMIWG National Inquiry. I acknowledge, however, that these critiques (also of the report of the Royal Commission on Aboriginal Peoples) are important pieces in acquiring a better understanding of relationships between and among Indigenous and non-Indigenous Canadians and a more accurate and comprehensive account of Canada's history. Second, my analysis reflects my own attempt to do what the TRC, in particular, is asking of non-Indigenous Canadians, which is to participate in processes of reconciliation by relearning Canada's history as a colonizing settler nation. Understood this way, reconciliation already expands accounts of agency and participation as involving non-Indigenous Canadians in the very processes of what the TRC set out to do and what it has produced. Third, what I have gleaned from the relearning of Canada's history through its TRC cannot be neatly mapped onto the histories of other settler nations. The setting up of and results from Canada's TRC and the MMIWG National Inquiry fits into its own history of injustices emerging from past and ongoing relationships and of what to do going forward.

2. CROCKER ON AGENCY, DELIBERATIVE PARTICIPATION, AND THE ROLE OF CONSTITUTIONS

In *Ethics of Global Development*, Crocker describes agency as “a normative ideal that affirms the importance of the individual and group freedom to deliberate, be architects of their own lives, and act to make a difference in the world” (19). Crocker also tells us that “his agency-oriented perspective is an effort to build on, make explicit, and strengthen Sen's recent turn to the ideals of public discussion and democratic participation as integral to freedom-enhancing development” (2). That Crocker takes “citizen participation and democratic decision-making” to be central to an account of agency (19) is important for understanding why Crocker sides with Sen and against Nussbaum on the fundamental role of democratic participation and deliberation for engaging agents in shaping policies, laws, and constitutions themselves.

Public participation and deliberation are also important to Nussbaum, but her focus is on the context of deliberating about the content of the list of capabilities itself. For Nussbaum, the list is meant to “provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations” (Nussbaum 2000, 5, 51, 116). Crocker argues that Nussbaum fails to fully consider the deliberative process of constitution-making itself or the role that citizens and their representatives can and should play in this process. In other words, because Nussbaum, against Sen, focuses on the need for a list, her emphasis is on nations having the list reflected in constitutions and not on democratic processes and citizen participation in the making of and revisions to constitutions. Crocker points out that “It is important to observe that fine philosophical theories of justice and splendid constitutions do not—by themselves—

guarantee that a society is just or law-abiding. Asymmetries of power can be just as inimical to the rule of philosophers or the rule of law as it is to rule by the people” (357). Crocker, in other words, pays attention to the fact that some people and groups can be excluded or marginalized in the very projects of creating lists, devising constitutions, or formulating policies. In my view, this places the emphasis where it needs to be—agents deliberating about injustices and how to address them in the messiness of real-world disagreement, conflict, and relationships of power.

Recognizing the effects of relationships of power calls for accounts of participation and deliberation that are fair and inclusive. Against Sen, Crocker recognizes that more is needed to have those who are excluded and marginalized heard in ways that can shape public policy. This is why Crocker sets out to delineate principles that are meant to regulate and enable deliberative participation. These principles are: *reciprocity* (“each member can make proposals and offer justification in terms others can understand and could accept”); *publicity* (“each member be free to engage (directly or by representation) in the deliberative process, that the process be transparent to all ... and that each know that to which she is agreeing or disagreeing”); and *accountability* (“each group member is accountable to all (and not to himself or herself alone) in the sense of giving acceptable reasons to the others”) (2008, 312-3). Crocker ties these features of democratic deliberation back to agency: “I argue that respecting people’s dignity and agency requires not only, as Nussbaum contends, that they be free as individuals to form their own conception of the good life; it also requires that people have the right and responsibility to form collective values and decide practical policies together” (209).

Crocker also argues that the effectiveness of these principles for addressing existing inequalities or for including those who are marginalized in decision-making processes require background conditions of equal political liberty, equality before the law, economic justice, and procedural fairness (317-8). While Crocker sets out conditions for fair and inclusive deliberation, for him constitutions that specify conditions of equal political liberty, equality before the law, and procedural fairness are not ideals in the sense that how they are employed or understood is fixed. Against Nussbaum, Crocker argues that there are at least three ways in which participation and deliberation should happen in the very shaping and reshaping of constitutions and institutional structures. First, Crocker notes that citizens and group members—acting directly or through their representatives—should deliberate about, decide on, and ratify their own constitution. Second, principles of reciprocity, publicity, and accountability that allow fair and inclusive deliberation are likely to generate a constitution that provides guarantees that protect everyone, that everyone would accept, and that would be subject to revision following public deliberation. And third, a democratic and just constitution would itself establish and encourage multiple venues for participatory and deliberative democracy (203).

Crocker goes beyond Nussbaum in delineating a role for participatory and deliberative democracy both prior to and after constitutions are set. He can be said to recognize that agency is compromised when relationships of power in real world contexts thwart fair and inclusive participation and deliberation. But can Crocker’s explicit attention to formulating principles and conditions for democratic deliberation address the marginalization and exclusion of some people and groups or succeed in giving voice to those excluded from

exercising political agency? More specifically, can Crocker's account address vexing questions about agency and participation in the case of indigenous peoples in settler nations?

Devising strategies for ensuring fair and inclusive participation in public discussion is important, but we may need to know more to unpack how participation for some is undermined and restricted in ways that make it difficult for them to challenge let alone reshape public policy that can address the inequalities of the "most marginalized and least empowered" (Weir 2005, 311). In the case before us of Canada's history as a settler nation, this will involve digging deep into real world injustices by uncovering norms underlying dominant collective interpretative resources. These norms highlight injustices at the epistemic level of who claims to know and what they claim to know and they work to dismiss, ignore, and marginalize the voices of the most marginalized and least empowered. Indigenous Canadians have not been treated as architects of their own lives or as genuine participants in public discussion and deliberation about their lives and what matters to them. The real question, then, is whether conditions for enhancing agency through participation in decision-making processes can happen when a constitution with its institutions, structures, and processes is already in place—fixed or not. Does decision-making in these contexts end up enhancing agency and participation for some by reflecting the collective interpretive resources of European colonizers? Indigenous peoples embedded in histories of colonialism will need special attention if agency and participation are to be real and effective. I turn next to Kosko's important contribution to and application of accounts of agency and participation in the case of the self-determination of indigenous peoples.

3. KOSKO ON AGENCY VULNERABILITY, PARTICIPATION, AND SELF-DETERMINATION

In "Agency Vulnerability, Participation, and the Self-Determination of Indigenous Peoples," Kosko weaves her way through insights by Denis Goulet and Crocker to map an account of when and how agents can meaningfully participate in structuring institutions and processes that affect their lives. She asks two questions that shape the argument of her paper. First, "ought not the meaning of 'participation' for indigenous people reflect their cultural traditions of governance, for instance the value they may or may not place on consensus or on the role of elders?" (Kosko 2013, 3). Her answer to this is that indigenous peoples "have reason to value participatory processes that privilege *thicker* forms of participation, that begin *earlier* in the decision-making process, that seek consensus, and that include mechanisms for the exercise of real power by all involved" (3, my emphasis). Her second question asks, "is not the whole point of self-determination to ensure for indigenous peoples (at least some degree of) self-rule, rather than simply the generic right to participation that minorities, and all members of society, (ought to) enjoy?" (3). Kosko has a two-part answer to this question, the second of which is that "self-determination, far from an all or nothing condition, is in practice a jigsaw of overlapping jurisdictions in which the degree of self-rule can vary from absolute to equally shared, provided that the areas of shared rule are consensually shared" (4).

I agree with Kosko that self-determination need not be all or nothing, but focus instead on her account of thicker forms of participation that can be thwarted by "what we might call *agency vulnerability*—the risk of being limited in our ability to control social and economic

forces that affect us.” It is a risk that “can remain, perhaps acutely so, even as physical or economic vulnerability is greatly reduced” (5). Like Crocker, Kosko takes individual as well as group participation to be important for enhancing agency in the very processes of decision-making that affect them. In the case of Indigenous peoples, agency vulnerability “is intimately connected to an historic loss (that continues today) of sovereignty, and, often traditional territory” (7). Kosko then turns to creating a framework that can identify and assess when and how in processes of participation the agency of indigenous peoples is most vulnerable. While this move may seem to by-pass the issue of self-determination itself, Kosko argues that effective participation does not need to be perceived as in tension with self-determination in the sense she defends of it being a scalar concept and not all or nothing.

To show that self-determination in its process aspect of the *how* of participating is as important as its substantive aspect of the *what* of normative principles that underlie constitutions, institutions, processes, or the rule of law, Kosko turns to Crocker’s account of seven modes of participation (nominal, passive, consultative, petitionary, participatory, bargaining, and deliberative) on the road to defending what she takes to be a thicker mode. Crocker rightly rejects these modes of participation understood as mere membership in a group (nominal), or as passively listening to decisions made by others (passive), or as providing information that is then evaluated by others (consultative), or as petitioning to make decisions that are ultimately evaluated and decided by others (petitionary), or as enacting decisions made by others (participatory), or as bargaining with those who make the decisions (bargaining). Deliberative participation, on his account, requires “sifting proposals and reasons to forge agreements on policies that at least a majority can accept” (Crocker 2008, 342-344).

The central point in Kosko’s use of Crocker is that one can evaluate participation in decision-making processes from its thinnest at the nominal level to its thickest at the deliberative level. Kosko departs from but also builds on Crocker by introducing factors that enable an assessment of *when* groups enter the process. For this she uses Goulet’s account of seven entry-points from earliest to latest (diagnosing the problem, listing possible responses, selecting the course of action, organizing/preparing to implement the chosen course, taking specific implementation steps, correcting/evaluating the course of implementation, debating the merits of further mobilization/organization). As Goulet puts it, “if one wishes to judge whether participation is authentic empowerment of the masses or merely a manipulation of them, it matters greatly when, in the overall sequence of steps, the participation begins” (Goulet 1989, 167). Kosko works with both scales to argue that together they offer a way to evaluate aspects of agency vulnerability in terms of when participants engage in decision-making processes and what sort of participation is enabled by those processes: “the key is that any process that does not score well on both scales is flawed in some important way and its quality as a whole is substantially compromised” (14).

Kosko then applies the scales of entry points and modes of participation to an evaluation of indigenous self-determination. She argues that her framework offers one way to evaluate the process aspects of agency and participation “by identifying the points at which indigenous peoples enter into the decision-making process with the governments of their respective states or other indigenous or non-indigenous populations and the modes of participation through which they engage” (14). I think, however, that there cannot but be a tension in the conclusions Kosko draws. On the one hand, she rightly argues that the real-world situation of

the substantive aspect of constitutions, institutions, and laws being grounded in principles and already in place means that “all indigenous peoples, no matter how extensive their rights of self-rule, must continue to engage in various forms of ‘shared rule’ with the larger society” (14). This cannot but mean late entry into participatory processes for indigenous peoples. On the other hand, she acknowledges the difficulty of using her framework in this real-world situation: “the equal weight it gives to entry-points speaks directly to the requirement that indigenous people be involved in the very establishment of the governing order under which they live” (14).

There is no going back in history to recreate an early entry-point of thick participation for indigenous peoples in settler nations. This means that the only source and context for evaluating possibilities for the agency and participation of indigenous peoples is the here and now of the substantive (liberal) aspects of constitutions, structures, and institutions already in place. Kosko’s evaluative framework of the process aspects can only happen in the aftermath of the colonialization of indigenous peoples, from which an account of agency vulnerability and of a lack of meaningful participation thereby emerges. In other words, Kosko’s scales of when and how can only be meaningfully used to evaluate the strength of shared rule: “if (any level of) state jurisdiction over indigenous peoples is to be legitimate, then the people must consent to these areas of shared rule, which therefore requires early participation in the identification of those areas” (14). For now, I will note something I return to later: in the case of indigenous peoples in Canada, as learned through the TRC and its aftermath, there *were* early entry points, ones in which Indigenous and non-Indigenous Canadians participated in establishing treaties.

To be clear, I am not objecting to Kosko’s challenge to the idea of self-determination as all or nothing. The value of viewing self-determination as a scalar concept is that it allows the kind of evaluation that is important for revealing agency vulnerability in participatory decision-making processes for indigenous peoples. Kosko usefully contributes to an understanding that “in those areas where shared decision-making remains between indigenous peoples and states ... we can more easily put the onus on governments to demonstrate that a thick concept of ‘quality’ participation is at work in their protection and promotion of the wider ‘right of self-determination’” (15). I also agree that “with attention to both the entry-point and the mode of participation, governments will better live up to their normative and legal obligations toward indigenous people, and those peoples might better hope to reduce both their societal and individual agency vulnerabilities” (15). Questions remain, however. What is needed to have “governments live up to their normative and legal obligations toward indigenous people”? How can governments shaped by and emerging from colonial histories come to understand the ongoing threats to agency and participation of indigenous peoples? What are the implications for accounts of the agency and participation of colonizing peoples themselves? How has Canada’s history as a settler nation shaped past and ongoing relationships and how can these relationships be reshaped going forward?

Adding to and building from Kosko, I am suggesting two things. First, epistemic injustice (explained earlier as a gap in collective interpretative resources) is already at work and embedded in the foundational and structural injustices that concern both Crocker and Kosko. That gap needs to be unpacked to fully grasp what is missing in accounts of agency and participation at work in contexts where constitutions and institutions are already in place—especially in colonizing/settler nations. Second, I agree that foundations and structures (for

both substantive and process aspects) should be seen as fluid (rather than fixed and upheld as ideals) and subject to challenge and change. However, I suggest that attention to specific contexts, particularly with respect to indigenous peoples, can reveal epistemic injustices that emerge from histories shaped by relationships between and among indigenous and non-indigenous peoples within particular settler nations. To grasp what I mean by these two things, I turn to a discussion of the setting up of Canada's TRC and parts of Volume 6 of its *Final Report* with the subtitle *Reconciliation*. There is a lot to learn about the ongoing foundational and structural aspects of epistemic injustice in Canada's history of the forced assimilation of Indigenous peoples. While the TRC does not use the term "epistemic injustice," these ongoing aspects affect what colonizers have ignored/dismissed/erased and what can be heard/understood/learned through the TRC accounts of the richness and diversity of Indigenous Canadians' collective interpretative resources.

The point is *not* that Indigenous peoples cannot make sense of their experiences. Rather the collective interpretative resources they call on make little sense and are of no value to non-Indigenous Canadians. Their collective interpretative resources were not deemed to be *resources* and were openly targeted for erasure through the Indian Residential Schools systems. Their collective interpretative resources have had to be remembered, retrieved, and recorded by the many people in communities of Indigenous peoples across Canada in an ongoing project of recording Indigenous histories, laws, and practices and the shaping and reshaping of these through relationships between Indigenous and non-Indigenous Canadians and between Indigenous people and the state. Being aware of these factors as revealing injustices of an epistemic sort can shed new light on accounts of self-determination, agency, and participation in Canada's history as a colonizing country. To be clear, I do not reject Crocker's attempt to deepen accounts of agency and participation by opening up possibilities for changing and challenging the foundations and structures themselves. Nor do I reject Kosko's contribution that highlights how fraught agency and participation are with respect to the self-determination of indigenous peoples. Instead, I am interested in unpacking the range and depth of epistemic injustices from the perspective of indigenous peoples—specifically the perspectives of Indigenous Canadians as recorded in parts of Canada's TRC and the MMIWG National Inquiry.

4. CANADA'S HISTORY AS A SETTLER NATION

Though many non-Indigenous Canadians are aware of the facts that shape the context within which Canada's Truth and Reconciliation Commission emerged from the Indian Residential Schools Settlement, interpretations of the facts show fundamental differences in the collective interpretative resources of Indigenous and non-Indigenous Canadians. A strong message emerging from the *Final Report* of the TRC is that for reconciliation to be possible at all, non-Indigenous Canadians need to be re-educated about Canada's history—to unlearn what is taught in the official accounts of its history and to learn about the histories of indigenous laws, languages, practices, and traditions as told by Indigenous Canadians. Who gets to tell/record the "history of Canada" shapes the collective interpretative resources that are taken to be legitimate and these, in turn, have shaped and continue to shape the relationships between Indigenous and non-Indigenous Canadians. Processes of learning and being re-educated about relationships shaped by a colonial past suggest that accounts of

agency and participation can be understood to involve the active engagement of all Canadians in these processes.

While this unlearning and relearning was also called for in the multivolume *Final Report* of the Royal Commission on Aboriginal Peoples (1996), that the Government of Canada endorsed the uncovering and reporting of the horrors experienced in Indian Residential Schools brought these historic and ongoing injustices to public consciousness. The *Indian Act* of 1876 contained a number of clauses that allowed the federal government to establish Indian Residential Schools. The result was that, at last count, one hundred and thirty-nine federally-supported schools were set up in most provinces across Canada and functioned for well over a century. Most schools operated as joint ventures with Anglican, Catholic entities, Presbyterian, or United Churches. Indian Residential Schools separated over 150,000 Indigenous children from their families and communities and had the explicit objective of removing and isolating children from the influence of homes, families, traditions, laws, languages, and cultures in order to assimilate them into the dominant culture. The last of the residential schools closed only in 1996.

On May 10, 2006, the Government of Canada announced approval of the Indian Residential Schools Settlement Agreement (IRSSA) drawn up with legal representatives of former students of Indian Residential Schools, legal representatives of the Churches involved in running those schools, the Assembly of First Nations, and other Indigenous organizations. The settlement, approved by the Courts and put into effect on September 19, 2007, set out five main components: a Common Experience Payment (CEP) for all eligible former students of Indian Residential Schools; an Independent Assessment Process (IAP) for claims of sexual or serious physical abuse; measures to support healing; commemorative activities; and, the establishment of a Truth and Reconciliation Commission (TRC). It is the TRC component that is discussed in this paper.

On June 11, 2008, Prime Minister Stephen Harper, and leaders of the other federal political parties, formally apologized in the House of Commons for the harms caused by the residential school systems. The TRC part of the settlement began its work in 2008, with hearings across Canada that included testimonies from residential school survivors and many others who participated in their national events and community hearings. More than six years of research culminated in the TRC's closing ceremonies in Ottawa in June 2015 and a final six volume report that outlines the history and legacy of residential schools and puts forward ninety-four "Calls to action" identifying concrete steps to be taken on the path toward reconciliation. All this to say that the TRC itself can be said to have adopted a broad mandate of recording epistemic injustices by gathering the collective interpretative resources contained in the histories, laws, practices, and traditions of a diverse range of Indigenous communities across Canada.

The broad mandate also means that Canada's TRC did not shy away from examining the *legacy* of residential schools, a legacy that emerges from and is reflected in a history shaped by a colonial past and colonizing processes, laws, and institutions. The broad relational approach that explains the attempted erasure of Indigenous histories, laws, traditions, languages, and ways of life and that connects these harms with those in the present goes beyond the mandate of what TRCs more generally have been taken to provide. In *Our Faithfulness to the Past*, Sue Campbell identifies several features of what makes Canada's TRC unique: 1) "*Canada is a stable democracy, thus not the kind of country in which most*

people would expect a TRC.” (most TRCs happen in societies transitioning to democracy); 2) The IRS TRC emerged “*as a part of a comprehensive negotiated settlement among Aboriginal peoples, the government of Canada, and church leadership entities.*” (most are initiated by governments and often in the face of public pressure); 3) The IRS TRC deals “*with a long period in Canada’s history.*” (most TRCs deal with a shorter time period); 4) “*Many of the kinds of violence and violation at issue in the IRS TRC are unique in the contexts of TRCs.*” (specific kinds of harms to identity and culture that characterized the intent of Indian Residential Schooling); 5) “*The direct victims of the harm were children.*” (142-143).

On Campbell’s account, Canada’s TRC stands as a rejection of the notion that the past can be put in the past. The broad mandate allowed Canada’s TRC to provide a deep understanding of ongoing injustices shaped in and through relationships emerging from the dominant collective interpretative resources of colonizers. I take this to be an important point about the purpose of Canada’s TRC process and aftermath. Mohawk scholar Taiaiake Alfred writes:

In a global era of apology and reconciliation, Canadians, like their counterparts in other settler nations, face a moral and ethical dilemma that stems from an unsavoury colonial past. Canadians grew up believing that the history of their country is a story of the cooperative venture between people who came from elsewhere to make a better life and those who were already here, who welcomed and embraced them, aside from a few bad white men. (Regan 2010, ix)

The myth of the benevolent peacemaker dominates Canada’s history and continues to be the prevailing mindset of non-Indigenous Canadians. What is missed in the dominant framework is the deeper relational point that we are *all* shaped by a history of residential schools that had the stated objective, as noted in former Prime Minister Harper’s apology, “to kill the Indian in the child” (Government of Canada, 2008). On my account, this means that possibilities for agency and self-determination need to be understood against the backdrop of their being shaped and reshaped by a colonizing/settler history.

5. HISTORY, RELATIONSHIPS, AND RECONCILIATION: INSIGHTS FROM THE TRC FINAL REPORT AND THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS

An overarching message in the TRC *Final Report* is that the process did not *end* the work that needs doing. Given the history of these historic injustices, the path to reconciliation is necessarily long, difficult, and ongoing:

Reconciliation must become a way of life. It will take many years to repair damaged trust and relationships in Aboriginal communities and between Aboriginal and non-Aboriginal peoples. Not only does reconciliation require apologies, reparations, the relearning of Canada’s national history, and public commemoration, but it also needs real social, political, and economic change. Ongoing public education and dialogue are essential to reconciliation. (20)

There is much more to the TRC's account of reconciliation than can be covered in this paper. For now, I will highlight two points important to explaining that failures to participate in the TRC call for learning about Indigenous collective interpretative resources as *resources* points to epistemic injustices emerging from the violent imposition of the collective interpretative resources of colonizers. First is the argument that repairing relationships and achieving reconciliation is hampered by the "settler within" (Regan 2010). The myth of the benevolent peacemaker has shaped Canada's history and its relationships with Indigenous peoples. The myth continues to be a fundamental part of the identities and beliefs of non-Indigenous Canadians. Confronting and owning it as a myth should be part of the process of reconciliation. The call to unsettle "the settler within" makes space for the second point: the breadth and depth of the TRC's understanding of "damaged trust and relationships" moves well beyond understanding reconciliation as moving toward a justice respecting society by apology alone or by looking back merely to identify perpetrators and make them accountable for injustices.

The 2019 Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls adds further breadth and depth to an account of damaged trust and relationships that emerged from colonial structures and policies evident in the *Indian Act*, the Sixties Scoop, residential schools, and breaches of human and Inuit, Métis and First Nations rights:

Colonial violence, as well as racism, sexism, homophobia, and transphobia against Indigenous women, girls, and 2SLGBTQIA [two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual] people, has become embedded in everyday life—whether this is through interpersonal forms of violence, through institutions like the health care system and the justice system, or in the laws, policies and structures of Canadian society. The result has been that many Indigenous people have grown up normalized to violence, while Canadian society shows an appalling apathy to addressing the issue. (4)

These brief discussions of the TRC *Final Report* and the MMIWG National Inquiry show that the *official* story of Canada's history begins with the *Indian Act* of 1876. However, that official story does not give credence to the complex relationships between Indigenous peoples and government officials in Canada prior to the *Indian Act*. As noted in the TRC *Final Report* these relationships were nested in those between Canada and Britain that established treaties, treaties that acknowledged and incorporated laws practiced by various Indigenous peoples and nations across Canada before settlers arrived. The relationships that established treaties are missing in textbooks about Canada's history: "Indigenous peoples have kept the history and ongoing relevance of the Treaties alive in their own oral histories and legal traditions. Without their perspectives on the history of Treaty making Canadians know only one side of this country's history. The story cannot simply be told as the story of how Crown officials unilaterally imposed Treaties on Aboriginal peoples: they were active participants in Treaty negotiations" (TRC, Volume 6, 34).

This point about Treaties is not about idealising or freezing them in history. Instead the point is that the TRC validates these as collective interpretative *resources* that have shaped and continue to shape relationships in Indigenous communities and between Indigenous and non-Indigenous peoples. Recognizing these as collective interpretative resources suggests that all

Canadians have a responsibility as agents “who act to make a difference in the world” (Crocker, 19) to participate in collective processes of learning from Indigenous communities’ remembering and re-remembering of the past. As Sue Campbell argues, memory is about “the many kinds of activities involved in remembering, and about the responsibilities of those with whom memory is shared, especially the memory of harm. How we participate in and respond to others’ remembering will be part of the context that affects how and what people can remember—the significance they are able to give to their past for their present and future” (Campbell 2014, 141). Campbell’s account of *activities* of remembering that incorporate ceremonies, traditions, and practices in which stories are told and retold is an important feature of the TRC itself—a process of recovering, remembering, and recording that which has shaped relationships within Indigenous communities as well as those between Indigenous and non-Indigenous people. This process of recovering and remembering is also evident in the truth-gathering process of the MMIWG National Inquiry in which the report notes: “The fact that this National Inquiry is happening now does not mean that Indigenous peoples waited this long to speak up; it means it took this long for Canada to listen” (MMIWG National Inquiry 2019, 1).

Listening means learning from these reports that include accounts of “Indigenous peoples’ worldviews, oral history traditions, and practices [that] have much to teach us about how to establish respectful relationships among peoples and with the land and all living things. Learning how to live together in a good way happens through sharing stories and practising reconciliation in our everyday lives” (13). Living “together in a good way” is about remembering the significance of the past for the present and future. Moreover, these features of a broad account of relationships that encompass all living things are evident in the many examples of laws, practices, and traditions of various Indigenous peoples; from the Cree, to the Inuit, to the Mi’kmaq, to the Métis, to the Anishinaabe, to the Gitksan, and so on (TRC, Volume 6, 54-74).

Below is a brief description of only one of these examples. The TRC describes the legal traditions, principles, and practices of Anishinaabe peoples and the continued relevance of these to the broader goal of reconciliation:

Powerful changes would flow into the reconciliation process if wisdom, love, respect, courage, humility, honesty, and truth were regarded as forming the country’s guiding principles. If the Seven Grandfather and Grandmother Teachings were applied, Canada would renew a foundational set of aspirations to guide its actions beyond the broad principles currently outlined in the Canadian Charter of Rights and Freedoms and other constitutional traditions. These teachings would help Canadians to build their country in accordance with its formative Treaty relationships, which flowed from Anishinaabe and other Indigenous perspectives, where peace, friendship, and respect stood at the heart of kin-based ties that encouraged the adoption of every newcomer to this land as a brother of sisters. (67)

It is important to add that Anishinaabe peoples incorporate and enact the seven principles and teachings into their traditions and ceremonies—including in the context of leaders applying them to their own residential school experiences. These ceremonies engage the

body and the mind in important activities of recounting past harms, apologizing for wrongdoing, and working toward reconciliation.

Anishinaabe tradition and ceremony play a role that is reminiscent of Campbell's account of memory activities as important for determining the significance of the past for the present and future. Moreover, active engagement with others in these activities is meant to repair and reshape relationships damaged by harm to self, others, and community. As the TRC points out, "if those who have suffered can apologize for their actions in relation to residential schools, this might serve as an example for other people throughout this country who have not suffered as gravely, and who want to improve their broader relationships" (69). The TRC provides other examples of longstanding Indigenous laws and institutions that could inform discussions of sovereignty, self-determination, justice claims, and reconciliation and claims that "all Canadians need Indigenous law to help us cope with the devastating colonial legacy we continue to experience as a nation, of which the residential schools are but one prominent part" (61).

The report of the MMIWG also makes this point about Indigenous law in the context of centering relationships as the framework for its National Inquiry:

Indigenous laws include principles that come from Indigenous ways of understanding the world. Relationships are the foundation of Indigenous law, which includes rights and responsibilities among people and between people and the world around us. Indigenous laws are linked to inherent rights, in that they are not Western-based or state-centric. This means that they can't lawfully be taken away by provinces and territories, by the government of Canada, or by the United Nations—inherent Indigenous law belongs to all Indigenous communities and Nations, and should be respected by all governments including settler and Indigenous governments. (13)

The central point emerging from the examples is that collective interpretative resources that make sense of the lives, histories, traditions, and practices of Indigenous peoples have survived a history of colonizing processes and institutions that have attempted to erase, denigrate, and dismiss them.

Closing the gap between Indigenous interpretative resources and the dominant collective interpretative resources that reflect the history, laws, and practices of the colonizer means giving credibility to Indigenous interpretative resources *as* resources that have shaped and continue to shape Indigenous relationships, lives, and communities. An important point made in the TRC discussion of Anishinaabe principles and ceremonial activities is that these collective interpretative resources are relevant to the goal of reconciliation: they can help build relationships of mutual respect and move toward "a shared future with a measure of trust" (TRC, Volume 6, 91). To ignore, denigrate, or reject Indigenous collective interpretative resources displays epistemic injustices that reach to the core of settler nation histories. If silenced or not heard, Indigenous interpretative resources are all too easy to ignore in assumptions that constitutions, institutions, structures, and the rule of law are foundational and represent the histories and experiences of all Canadians.

The TRC understanding of reconciliation calls for treating Indigenous peoples as agents active in and responsible for the shaping of their own lives—in the past, present, and into the

future: “Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This undertaking is necessary to facilitate truth and reconciliation within Aboriginal societies” (TRC, Volume 6, 51). I take this to be the kind of self-determination that Kosko defends when she calls on governments to “demonstrate that a thick concept of ‘quality’ participation is at work in their protection and promotion of the wider ‘right of self-determination’” (15). Correcting for epistemic injustice means treating Indigenous Canadians as agents and giving credibility to the collective interpretative resources of survivors of colonial processes and institutions.

The perspectival aspect of collective interpretative resources explains the epistemic gap in terms of what the dominant perceive/know and fail to perceive/know. Indigenous Canadians are now filling the epistemic gaps between what Indigenous Canadians know about their own lives and what non-Indigenous Canadians claim to know from the perspective of dominant collective interpretative resources. The final reports of the TRC and MMIWG National Inquiry can be read as understanding agency and participation in terms of Indigenous peoples remembering, recording, and enacting collective interpretative resources that can give meaning to a right to self-determination. The final reports also ask non-Indigenous Canadians to engage in a collective project of sharing, recording, and acquiring a more accurate account of Canada’s history as a settler nation and the damaged trust and relationships emerging from this history.

6. LESSONS LEARNED ABOUT FOUNDATIONAL, STRUCTURAL, AND EPISTEMIC INJUSTICES

Indigenous laws, languages, traditions, and practices have been dismissed as having no value or credibility—as is abundantly clear in the attempted erasure of Indigeneity through residential schools. Many of the ninety-four calls to action recommended by the TRC are about giving authority and voice to Indigenous peoples—by changing existing government, legal, and public education institutions as well as the media, sports, and business sectors so as to reflect Indigenous histories, laws, practices, languages, and traditions; by increasing access to and participation in economic, social, and political spheres in ways that respect Indigenous peoples and their lands and resources; and by providing education at all levels and for all Canadians about the history of Indigenous peoples, the legacy of residential schools, treaties, Indigenous rights and laws, and Indigenous communities’ relations with the state.

Both the TRC and the MMIWG National Inquiry point out that Canada’s constitution, laws, structures, and institutions emerge from the *Indian Act* of 1876 that determined the treatment of Indigenous peoples and thereby restricted possibilities for self-determination, agency, and participation: 1) The Act determined what counted as “Indian status” and denied status to many Indigenous women (“a denial of home, but also a denial of connection to culture, family, community, and their attendant supports. ...the intergenerational and multigenerational effects of the *Indian Act* have erected barriers to their cultural and physical safety” (24)); and, 2) The Act set up residential schools across Canada. These two aspects of the effects of the *Indian Act* on Indigenous women and girls and of residential schools intersect in that residential schools enforced the unlearning of Indigenous histories, laws,

traditions, and practices and thereby resulted in intergenerational trauma and damage to relationships in families and communities. These relationships, in turn, shaped and continue to shape relationships between Indigenous and non-Indigenous peoples. This can explain why both the TRC and the MMIWG National Inquiry took on the broad mandate of examining all aspects of the effects and aftermath of the *Indian Act* in the lives of women and girls and in residential schools by also retrieving and recording the histories of Indigenous laws, practices, languages, and traditions.

One can have ideals of how constitutions, institutions, and processes for enhancing participation in the construction and reconstruction of these are vital for respecting agency, but actual laws as set out by colonizing settlers have the effect of shaping what *counts* as legitimate and lawful actions, practices, structures, and institutions as well as what *counts* as justifiable moral reasons and constraints on agency itself. I have suggested that Crocker's accounts of agency and participation usefully challenge what is assumed or taken as given with respect to the role of constitutions, institutions, structures, and the rule of law. I have also suggested the important contribution that Kosko makes in her account of agency made vulnerable in the late entry points for meaningful participation in the case of indigenous peoples. I have argued that these accounts of self-determination, agency, and participation are challenged and stretched further in a settler context such as Canada.

The TRC *Final Report* reveals gaps in making sense of collective interpretative resources when the focus is on the state and its constitution, institutions, and laws. These gaps, I argue, reveal the places where epistemic injustices are embedded in the kinds of relationships that shape the very individuals and collective interpretative resources of the more and the less powerful and the relationships between them. These factors add a deeper relational analysis to Kosko's account of agency vulnerability and of assessments of the when and how of indigenous self-determination and participation. I have argued that foundational and structural injustices in settler nations are at bottom epistemic injustices, ones that reach to the foundations and structures of a colonizing/settler nation and have implications for accounts of agency, participation, and self-determination.

Ami Harbin captures what underlies the tension in Kosko's account of entry points for assessing the participation of indigenous people in settler nations when she writes, "the destruction of indigenous lands, knowledge, families, and sovereignty cannot ever be fully rectified, because people, knowledge traditions, languages, the health of lands, and the original possibility of trusting, respectful treaty relationships have all been lost and cannot be recovered intact" (Harbin 2016, 141). One of the goals of Canada's state sanctioned TRC process as well as of the MMIWG National Inquiry is the attempt to recover these histories—not intact, but with a renewed call and commitment for all Canadians to take up the challenge and responsibility of participating in a process of learning and relearning Canada's settler history of state imposed attempts to dismiss and erase indigeneity and what all of this means for how to go on.

The TRC process and the MMIWG National Inquiry have permitted Indigenous peoples and nations to retrieve, hear, participate in, and learn about the histories, laws, practices, and institutions that have shaped their worldviews and their communities. I would add that this is especially important as societies and countries learn more about histories and contexts that have failed to acknowledge past injustices or to learn about how these injustices shape and continue to shape relationships of inequality and power. The positive part of what the final

reports of the TRC and MMIWG National Inquiry have achieved in remembering, retrieving, and recording is ongoing—in Indigenous nations across Canada, in Indigenous communities learning and relearning laws, languages, histories, and practices, and in centers and universities set up to collect this research. It is also ongoing in its call to Indigenous and non-Indigenous Canadians to participate in projects of understanding, relearning, and rewriting Canada’s history. The MMIWG National Inquiry identifies some 100 “Calls for Justice for All Governments” (62-104) that identify ways in which Indigenous self-determination can be strengthened by engaging in various initiatives at all levels of international, national, provincial, public service and law sectors, educational and health institutions, and Indigenous communities. Self-determination for Indigenous Canadians means that “Indigenous understandings of culture are deeply rooted in their own identities, languages, stories, and way of life—including their own lands—and these ways of knowing must be recentred and embraced as ways to move forward” (25). I take this to give substance to Crocker’s account of agency as “individual and group freedom to deliberate, be architects of their own lives, and act to make a difference in the world” (19) and to Kosko’s account of the self-determination of Indigenous people.

Harbin writes, “for settlers in anti-colonial social movements, the goal is not only supporting indigenous resurgence but decolonizing our own ways of thinking about nationalism, history, property, resources, state governments, immigration, and so on. Settlers might be called to challenge our own colonial thinking on many levels, all of which can require ongoing reminding and re-correcting” (141-2). Such a call to action for settlers expands an understanding of agency and self-determination, and of the processes and conditions that could lead to fair and inclusive public deliberation. Elsewhere I have argued for an expanded account of agency, one that shows agency to be shaped interdependently and as needing to make use of emotional, relational, and rational capacities in participatory processes of responding to our own lives and the lives and needs of others (Koggel 2019). The implications of this expanded account of agency can be applied to the case before us. It is an account that ties agency to participation by affirming the importance of Indigenous *and* non-Indigenous agents acting interdependently “to make a difference in the world” (Crocker, 19). I take the MMIWG National Inquiry and the TRC to envision ongoing processes of Indigenous and non-Indigenous Canadians working interdependently in participatory processes of drawing on agential capacities of emotionality, relationality, and rationality in an ongoing effort to “be architects of their own lives” (Crocker, 19).

I conclude by returning to the National Inquiry into Missing and Murdered Indigenous Women and Girls centering relationships as its framework and focal point for what can be done going forward:

a key teaching repeated throughout the Truth-Gathering Process is about the power and responsibility of relationships. As those who shared their truths with the National Inquiry emphasized, understanding what happens in relationships is the starting point to both understanding and ending the violence against Indigenous girls, women, and 2SLGBTQIA people. ... family members insisted that to understand and honour those whose lives were violently cut short requires a careful accounting of all the relationships that shaped their loved one’s life and that their loved one, in turn, played a part in shaping. (10)

This call for understanding how past and ongoing relationships have shaped and continue to shape lives and communities is directly connected with how the National Inquiry understands self-determination: “women and 2SLGBTQQIA people themselves should be able to actively construct solutions that work for them, according to their own experiences. Self-determination also means fundamentally reconsidering how to frame relationships that embrace the full enjoyment of rights across all aspects of community and individual life, and within First Nations, Métis, and Inuit and settler governments” (11).

Falling back on a defence of the normative principles underlying the structures, institutions, and processes imposed and now place in settler nations is not enough in the face of the huge challenges presented by a call for a way of life committed to repairing relationships in and among Indigenous communities and between Indigenous and non-Indigenous Canadians: “finding justice for those victims and preventing violence for the future rest in a fundamental reorientation of relationships among Indigenous women, girls, and 2SLGBTQQIA people, society, and the institutions designed to protect them” (MMIWG National Inquiry, 40).

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