Reconciliation and the Limits of Cultural Competence

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Pooja Parmar, Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence, 97 **Can. Bar Rev.** 526 (2020).

Lawyers need to be competent. No one would disagree with this simple fact. More contentious is the question of *how* to ensure that lawyers are, in fact, competent. On the pre-entry side of things, controversies have frequently erupted over law school curricula and bar exams. In the area of post-entry competence, recent years have seen lively discussions about how best to measure and ensure good lawyering. Within this dynamic context, Pooja Parmar's recent article *Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence* is an important contribution to the growing scholarly literature on what it means to be a competent lawyer in the 21st century.

The focus of Parmar's article is the Canadian legal profession's response to the Calls to Action by the Truth and Reconciliation Commission of Canada ("TRC"). More specifically, Parmar focuses on the "particularly noticeable" attention given "to cultural competence or skills generally associated with the idea." (P. 532.) For example, in response to the TRC Calls to Action, the Law Society of Alberta and the Law Society of British Columbia have both now instituted *mandatory* Indigenous cultural competence training for all lawyers.

Parmar's thesis is two-fold. First, Parmar contends that "an uncritical embrace of cultural competence, as currently understood, is inadequate and might even prove to be counterproductive despite best intentions." (P. 526.) Second, she suggests that a change of focus is required and that the TRC Calls to Action should be viewed "most fundamentally as a call to rethink legal education and ongoing lawyer training" grounded in a broader conversation about accountability.

For readers unfamiliar with TRC and its Calls to Action, I'll pause to offer a little background. The TRC was established in 2008 pursuant to a settlement agreement arising from a class action initiated by survivors of Canada's residential school system for Indigenous peoples. The class action involved was the largest in Canada's history, reflecting the magnitude of its subject matter:

For over 150 years, residential schools operated in Canada. Over 150,000 children attended these schools. Many never returned. Often underfunded and overcrowded, these schools were used as a tool of assimilation by the Canadian state and churches. Thousands of students suffered physical and sexual abuse. All suffered from loneliness and a longing to be home with their families. The damages inflicted by these schools continues to this day.[1]

The TRC travelled across Canada for six years and heard from more than 6,000 witnesses.[2] In 2015, it published its final report, along with 94 Calls to Action. As explained in the final report "[u]ltimately, the [TRC's] focus on truth determination was intended to lay the foundation for the important question of reconciliation. Now that we know about residential schools and their legacy, what do we do about it?"[3] The TRC's Calls to Action exist within this forward-looking framework and were made by the TRC with a view to "redress[ing] the legacy of residential schools and advanc[ing] the process of Canadian reconciliation."[4]

Calls to Action 27 and 28 speak specifically to lawyer regulators and legal educators. Call to Action 27 calls upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, while Call to Action 28 calls upon law schools in Canada to require all law students to take a course in Aboriginal people and the law. Both of these Calls reference the need for "skills-based training in intercultural competency, conflict resolution,

human rights, and anti-racism."[5]

As Parmar observes, "[t]hese Calls unmistakably convey the need to rethink the essential knowledge base and skillsets for all legal professionals in Canada." (P. 530.) However, notwithstanding the Calls' references to "cultural competency training" and "intercultural competency", Parmar cautions the legal profession against adopting a narrow and uncritical focus on cultural competence in responding to the Calls. In making this argument, she not only draws on previous scholarly work critiquing the concept of "cultural competence" but also draws out the ways in which the reconciliation context poses unique challenges.

Parmar notes that cultural competence initiatives often seek to provide skills to professionals to allow them to "be able to work more effectively with clients perceived as culturally different, or those seen as different based on gender, sexuality, religion, ability, or language." (P. 533.) While such skills are important for lawyers, Parmar cautions that it is also important that lawyers "also learn to recognize that reconciliation is not a diversity initiative." (P. 535.) What is required in the context of TRC Calls to Action and the broader context of reconciliation is something much more profound: "acknowledgement of the foundational violence of colonialism that has shaped Canada, Canadian law, and Canadians," as well as "explicit acknowledgement of Indigenous peoples as the first peoples of Canada, whose rights are specifically recognized in the Canadian Constitution." (P. 535.) Parmar observes that "[r]ecognition of this difference and knowledge of the legacies of Canada's colonial history has to be part of appropriate training required for lawyers in the context of reconciliation." (P. 536.) In other words, in this context, lawyer competence cannot simply entail having a requisite knowledge of Canadian law along with the communication skills necessary to transmit this knowledge to Indigenous peoples. Something more is required.

Parmar observes that "[c]onversations about cultural competence for lawyers are attentive to cultural differences between lawyers and clients but imagine a single legal world" and that this reductive perspective generates a tension given the reality that "Indigenous laws are alive in Canada." The risk here is that cultural competence efforts will disregard Indigenous laws by characterizing the lawyer-client "encounter only as one between 'law' and 'culture'":

This is the violence that is often enabled by the very law the lawyer is expected to translate an Indigenous client's claim into. A lawyer who recognizes this violence and takes reconciliation seriously will also see the encounters between lawyers and clients as encounters between different legal worlds. (P. 546.)

One of the most significant parts of Parmar's article are her efforts to chart a path towards a broader conversation about accountability in the context of competence and ethical practice of law in Canada through presenting two forward-looking ideas.

The first idea presented is for "all [Canadian] lawyers [to] be trained to understand the relevance of Indigenous laws and epistemology not only to substantive legal claims Indigenous people pursue, but also to the professional relationships between legal professionals and Indigenous peoples and to the ethical practice of law more broadly." (P. 528.) She observes that "[t]he legal profession can only be enriched by seeking out ways in which Indigenous epistemologies might inform the ethical practice of law and ideas of professionalism," noting, for example, that "by drawing on multiple legal traditions we may reconceptualise effective, competent representation, the lawyer-client relationship, conceptions of confidentiality, and even ideas of who one's client is (an issue that comes up for lawyers working with communities) in ways that enable, rather than hinder, access to justice." (Pp. 550-51.)

Second, Parmar suggests that lawyers must "take seriously their role as translators across legal worlds and train to be ethical translators." She notes that access to justice for Indigenous peoples requires recognition of

> . . . the mistranslation of their claims, sometimes by well-intentioned lawyers and judges who may otherwise be committed to ensuring justice. It is important to understand however, that the issue of mistranslation is not only one of linguistics and cross-cultural communication emphasized in the cultural competence approach, but also of failures in conceptual translation across legal systems. (Pp. 554-55.)

Underlying both of these proposals is a commitment to accountability. The focus is shifted away a notion of competence rooted in learning about others and towards a fundamental re-assessment of dominant notions about ethical practice and the lawyering role, and their historical and ongoing connections to colonialism.

In sum, in "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence," Parmar presents readers with a deeply thoughtful and engaging critique of the Canadian legal profession's turn to cultural competence in response to the TRC's Calls to Action. For Canadian lawyers, law societies and legal educators, Parmar's article is essential reading. As Senator Murray Sinclair, who served as Chief Commissioner of the TRC, has written, "lawmakers, judges and lawyers are the gatekeepers to the justice system. Until they understand the truth of our history and their role in making change, our country will not be able to move forward." For those outside of Canada, this article introduces important insights about the limits of cultural competence, including the complexities attendant in evoking cultural difference and the dangers of individualist approaches to it, which all lawyers who confront questions about ethical lawyering in contexts imbued with historical, and ongoing, colonialism and systemic racism ought to think about.

1. National Centre for Truth and Reconciliation, About the National Centre for Truth and Reconciliation (last visited Jan. 5, 2021).
2. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).
3. *Id.* at vi.
4. Truth and Reconciliation Commission of Canada, Calls to Action 1 (2015).
5. *Id.* at 3.

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