The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History

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Introduction

This paper is written from the experience of the writer as the chief negotiator for the Assembly of First Nations in the settling of the historic Indian Residential Schools Settlement Agreement (IRSSA).[1] It will explain how conventional legal and theoretical frameworks – be they in the civil law of tort, criminal law, or international human rights law – could never have achieved the reparations contained in the Indian Residential School Settlement Agreement. The paper argues that these legal tools are inadequate to fully comprehend state violations such as those perpetrated against indigenous peoples and the harms they caused, especially when the violations were motivated by cultural genocide. The paper further asserts that the lawyers that operate within the formal justice system are ill prepared to comprehend or correct the relationship between the oppressed indigenous peoples and their oppressors. Lawyers' lack of training in indigenous law or legal traditions[2] makes it difficult if not impossible to achieve justice or access to justice for the harms colonial oppression inflicts.

The example used in this paper, the IRSSA, examines how state-imposed violations and harms, both collective and individual, ranging from loss of language and culture, loss of family and community life, spiritual harms, intergenerational dysfunction, and sexual, physical and psychological injuries, to loss of opportunity

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[1] For the Official Court Website of the Indian Residential Schools Settlement Agreement, see Canada, *Indian Residential Schools Settlement Agreement,* (8 May 2006), online: <http://www.residentialschoolsettlement.ca/settlement.html> [*IRSSA*].

[2] This is beginning to change as some law schools now offer courses in Indigenous Legal Traditions. The University of Victoria is leading the way in mainstreaming Indigenous Law into their curricula. offering Canada's first joint program in Indigenous law and common law in September 2018 with an ambitious aim of developing a third legal order in Canada, while also producing lawyers for industry, government, First Nations and international work. See Sean Fine, "University of Victoria to launch first-of-its-kind Indigenous law program", *The Globe and Mail* (21 March 2018), online: <https://www.theglobeandmail.com/canada/article-university-of-victoria-to-launch-first-of-its-kind-indigenous-law/>.

and loss of income were viewed through the lens of indigenous legal principles. With reconciliation being the desired goal of both victims and perpetrators,[3] it was necessary to apply procedures and principles far different than those rooted in traditional legal methods. Applying principles of indigenous feminist theory, indigenous legal theory, and indigenous legal traditions, negotiators were able to contemplate a wider range of harms, design a broader range of reparations, empower victims to articulate what they wanted, justify culturally unique reparations, and lay the groundwork for a better relationship with Canada.

The paper concludes by arguing that the IRSSA proves that in post-colonial societies, traditional, mainstream legal approaches to injuries and harms motivated by systemic discrimination and cultural genocide fall short of achieving justice. In the future, legal processes and remedies must be reconsidered to allow for indigenous perspectives and theories of law to inform them. Law schools, bar societies, the judiciary, and continuing professional education programs must adapt.

Historical context

From the late 1800s to 1996, the Government of Canada implemented a Canada-wide policy under which it compelled indigenous children to leave their homes and attend church-run schools at some 130 locations across every province and territory except for New Brunswick and Prince Edward Island.[4] The policy was designed to assimilate indigenous peoples into European culture by forcing them to abandon their language, culture, religion, and indigenous ways of life.[5] Deliberate and often brutal strategies were used to destroy family and community bonds. While attending the boarding schools, children were denied any meaningful contact with their parents, sometimes for their entire childhoods. About one in three children were abused physically, sexually, and emotionally,[6] and the damage they suffered adversely

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[3] Government of Canada, "Statement of Apology – to former students of Indian Residential Schools", by The Right Honorable Stephen Harper, Prime Minister of Canada (Ottawa: 11 June 2008), online: <www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> [Apology]. See also the reply to the apology by Phil Fontaine, the National Chief of the Assembly of First Nations.

[4] Canada, *Report on Industrial Schools for Indians and Half-Breeds*, by Nicholas Flood Davin (Ottawa: 14 March 1879). See also Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1, part 1 (Montreal & Kingston: McGill-Queen's University Press, 2015) at 56-57, online: <http://www.trc.ca/websites/trcinstitution/index.php?p=890 > [TRC Final Report].

[5] Library and Archives Canada, RG 10, vol. 6810, file 470-2-3, vol. 7, Evidence of D.C. Scott to the Special Committee of the House of Commons Investigating the Indian Act amendments of 1920, (L-2)(N3). Also cited in TRC Final Report, *ibid* at 3.

[6] Indigenous and Northern Affairs Canada, *Statistics on the Implementation of the Indian Residential Schools Settlement Agreement*, (Ottawa: modified 22 February 2018), online: https://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192 [*Statistics*] sets out the numbers of applications received under the Individual Claims Process (IAP) and the numbers which were successfully completed with compensation awarded. The IAP process is designed to compensate individuals for physical, sexual and psychological abuse and of the 80,000 living survivors, the statistics indicate about one third we compensated for claims under the IAP.

affected generations of Aboriginal peoples thereafter. Children were subjected to unconsented to medical studies,[7] forced labor without pay,[8] and inferior health care, nutrition,[9] and education.[10] The Truth Commission's research into deaths in residential schools found that some 3,201 deaths could be documented.[11] The Commission points out that the number could be much higher but cannot be proven due to the government's policy of destroying health records of those attending the residential schools.[12] Many of the children who died in the schools were buried on school sites, sometimes in unmarked graves.[13] Often no notice was given and their bodies were never returned to their families and communities. The forced assimilation policy was implemented with the view that the government "could not kill the Indian but it could kill the Indian in the child."[14] These gross human rights violations were committed against at least 150,000 indigenous children, their families and communities over a period of 150 years. Impoverishment, illiteracy, limited employment opportunities and lost income, [15] addictions, psychological disorders, physical injuries and deformities, sexual dysfunction, and numerous other problems[16] affecting hundreds of thousands of Aboriginal people over generations continue to this day.

Many survivors attempted to find recourse for their harms in mainstream court proceedings. Some attempted to use international law, or filed criminal complaints

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[7] TRC Final Report, *supra* note 4, Part II at 227–30.

[8] *Ibid* at Part I, chapter 14.

[9] *Ibid* at Part II, chapter 36.

[10] *Ibid* at Part II, chapter 33.

[11] Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Montreal & Kingston: McGill-Queen's University Press, 2015) at 92, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Summary Report].

[12] *Ibid* at 90: "[b]etween 1936 and 1944, 200,000 Indian Affairs files were destroyed."

[13] Library and Archives Canada, RG10, volume 6016, file 1-1-12, part 1, "Burial Expenses" J.D. McLean, no date [PAR-008816]

[14] The term "kill the Indian in the child" has been referenced in virtually every contemporary account of the IRS, including in the TRC Final Report. None of these accounts offer a convincing citation for its origin but it is most often attributed to Duncan Campbell Scott. Some critics say it originated in the US military.. Regardless of its indeterminate origin, the phrase captures the essence of the IRS intent, to eradicate Indianness, thereby assimilating the indigenous population into what Campbell Scott called the "body politic." See Mark Abley, *Conversations with a Dead Man: The Legacy of Duncan Campbell Scott* (Madeira Park, BC: Douglas and McIntyre, 2013) [Abley, *Conversations with a Dead Man*].

[15] The Settlement Agreement provides for loss of opportunity described as one of chronic inability to obtain employment; chronic inability to retain employment, periodic inability to obtain or retain employment, inability to undertake or complete education or training resulting in underemployment and/or unemployment, or diminished work capacity. Claims can alternatively be made for actual income loss. See *IRSSA*, *supra* note 1.

[16] Some of the harms listed as compensable in the compensation model are loss of self-esteem, pregnancy, forced abortions, forced adoptions, psychotic disorganization, PTSD, self-injury, sexual dysfunction, inability to form or retain relationships, eating disorders, severe anxiety, guilt or self-blame, lack of trust in others, addictions, nightmares, aggression, hypervigilance, anger, retaliatory rage, and humiliation.

against their abusers. Others pursued individual tort actions or participated in class action lawsuits. Ultimately, the vast majority of residential school claims were brought into the IRSSA.[17] What follows is a discussion of these alternatives, their shortcomings and the reasons why the cases were most often unsuccessful while the settlement agreement was able to successfully address and satisfy claimants' needs.

1. Reparations in International Law

The obligation to provide reparations for human right abuses, especially gross violations of human rights, has been recognized under international treaty and customary law, decisions of international bodies such as the United Nations Human Rights Committee and Inter-American Court of Human Rights, in national law and practices, and in municipal courts and tribunals.[18] In 1989, renowned human rights expert Theo van Boven was commissioned by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare a report on reparations for victims of gross violations of human rights. After extensive research into international jurisprudence and relevant human rights norms, he set out the duties of states to make reparations when the international law of human rights has been breached. In his report, he states:

> Every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions […]
>
> Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[19]

The violations perpetrated against the indigenous peoples through the residential schools policy are serious violations of international human rights law set out in a number of international conventions Canada has ratified. They include violations of

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[17] *IRSSA*, *supra* note 1.

[18] See Diane F Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" (1994) 26 Students in Transnational Legal Policy 425 at 425–426; Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals,* 3rd ed (New York: Oxford University Press, 2008); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

[19] Theo van Boven, Special Rapporteur, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" (E/CN.4/Sub.2/1993/8, 2 July 1993)

civil and political rights,[20] the rights to non-discrimination,[21] the right to life, the right of children to be free from sexual violation,[22] and the right not to be tortured or endure cruel, inhuman or degrading treatment.[23] These rights, when violated, give rise to the right to "adequate, effective, [and] prompt reparations".[24] In addition to the international human rights covenants, a basic rule of international customary law is that any breach of an international obligation by states or organs of the state constitutes an international tort, which carries with it the obligation to make reparations.[25]

Even in the face of the international jurisprudence relating to the duty to make reparations for gross human rights violations, van Boven found that many states disregard it.[26] He comments:

> It is clear from the present study that only scarce or marginal attention is given to the issue of redress and reparation to the victims […] In spite of the existence of relevant international standards […] the perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon.

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[20] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 art 2(3)(a) (entered into force 23 March 1976, accession by Canada 19 May 1976): "Each State Party […] undertakes to ensure that any person whose rights or freedoms as herein are violated shall have an effective remedy" [*ICCPR*].

[21] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195 art 6 (entered into force 4 January 1969, accession by Canada 14 October 1970): "States Parties shall assure to everyone within their jurisdiction effective protection and remedies […] as well as the rights to seek just and adequate reparation or satisfaction".

[22] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 art 39 (entered into force 2 September 1990, accession by Canada 13 December 1991): "States Parties shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of […] cruel, inhuman or degrading treatment or punishment".

[23] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 art 14 (entered into force 26 June 1987, accession by Canada 24 June 1987): "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." [*CTOCIDTP*]

[24] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, UNGAOR, 2006 at 4 [Basic Principles]. See also *ICCPR*, *supra* note 20, and *ibid* on state responsibility to provide redress and reparations to victims.

[25] For example, see the *Velasquez Rodriguez Case* (*Venezuela v Peru*) (1989), Judgment, Inter-Am Ct Hr (Ser C) No 7 at para 25; *American Convention on Human Rights, "Pact of San Jose, Costa Rica",* 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 63(1); *Factory at Chorzow (Germany-Poland),* Judgment, [1927] ICJ Rep 4; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Second Phase Advisory Opinion, [1950] ICJ Rep 228.

[26] For example, in Chile, after the 17 years of the Pinochet regime, many Chileans experienced gross violations of human rights including arbitrary arrest, torture, killings and disappearances. The National Commission for Truth and Reconciliation, which was created to provide reparations, restricted their investigations to cases resulting in death, ignoring the high number of gross violations and failing to make offenders accountable. The Argentina example is similar. There, the military dictatorship of 1976 to 1983 was investigated for gross human rights violations but the new government granted blanket amnesties and pardons making reparations unattainable for victims.

> Therefore, it cannot be stressed enough that more systematic attention has to be given, at national and international levels, to the implementation of the right to reparation for victims of gross violations of human rights.[27]

In December 2005, following van Boven's lead, the United Nations adopted and proclaimed the Basic Principles and Guidelines to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law.[28] The Basic Principles and Guidelines provide a reparations framework as follows:

a) Compensation to provide victims with monetary and nonmonetary damages to pay for the losses they have experienced;
b) Rehabilitation to repair the lasting damage of human rights violations through provision of medical, psychological, legal, and social services;
c) Restitution to restore the condition lost by the victim due to gross violations of human rights, such as the restoration of liberty, citizenship, employment, or property.
d) Satisfaction to cease continuing violations, disclose the truth, search for the disappeared or the remains of those killed, officially declare and apologize to restore the dignity, reputation, and rights of the victim, impose sanctions against perpetrators, and create commemorations and tributes to the victims.
e) Guarantee non-repetition by initiating reforms to ensure independence of the judiciary, human rights education, mechanisms for preventing and monitoring conflicts, and reviewing and reforming laws and policies that contribute to gross violations of human rights.

The Inter-American Commission on Human Rights (IACHR) has taken a similar comprehensive approach to ordering reparations. Depending on the circumstances of the underlying violation, the IACHR has ordered compensation, restitution, and just satisfaction. The various purposes that reparation may serve include compensating the victim and his or her family for the wrong committed, bringing the victim back to the position he or she was in prior to the wrong, establishing truth and justice, and ensuring non-repetition of the underlying wrong. The goals that reparations may advance include the importance of just satisfaction. This signals to states that, in the case of especially egregious behaviors, traditional damages alone are not sufficient. Instead, there needs to be additional acknowledgement of the state's wrong, which just satisfaction may provide.[29]

In principle, then, reparations in international law for mass human rights abuses are comprehensive. The problem for victims is accessing these remedies in domestic proceedings. The reality is that states, including Canada, are not interested in admitting to or coming to terms with their own gross violations of human rights at

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[27] Van Boven, *supra* note 19.

[28] Basic Principles, *supra* note 24.

[29] Jo M Pasqualucci, "Victim Reparations in the Inter-American Human Rights System: A Criticial Assessment of Current Practice and Procedure" (1996) 18:1 Mich J Intl L 1. See also Aloeboetoe et al. v Suriname (1991), Inter-Am Ct HR (Ser C) No 11 at paras 2–6.

home. The sharp divergence between generally accepted understandings of wrongdoing articulated in international law and their application in domestic law becomes most obvious when survivors seek reparations for gross violations of their human rights against their own states.

Another problem is the fundamental principle of international law that says in order to access remedies in international law, the injured parties must first exhaust domestic remedies.[30] This means access to an international organ will only be available as a last resort after the domestic remedies have been exhausted. Theoretically, domestic remedies are normally quicker, cheaper, and more effective than international ones but in reality, exhausting local remedies to the highest level of court will be beyond the financial reach of most disadvantaged groups seeking reparations for human rights abuses. But even if domestic remedies are exhausted and a hearing is obtained before a relevant UN committee and succeeds, there are no mechanisms to enforce any reparations ordered other than persuasion, shame, or diplomacy.

In Canada, political leaders are very aware of this weakness. They have been recorded reassuring constituents that seemingly intrusive international norms such as environmental standards, are not genuinely enforceable. In the context of the debate about Canada's ratification of the Kyoto Protocol, for example, then Deputy Prime Minister John Manley was quoted in the press as saying that "Canada should take its Kyoto obligations seriously if the pact is ratified, but added that the accord is not a legally enforceable contract." [31] Judges too seem to question international law's efficacy. Justice Louis LeBel of the Supreme Court of Canada observed that "[a]s international law is generally non-binding or without effective control mechanisms, it does not suffice to simply state that international law requires a certain outcome."[32] It must also be understood that the reparation guidelines themselves are not legally binding. They are in the form of a resolution adopted by the General Assembly,[33] a non-legally binding instrument.

Some argue that the residential school policy was a genocidal one.[34] Even if it was, it is highly unlikely any reparations would be possible under international law.

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[30] Multilateral human rights treaties require exhaustion of local remedies for individual claims. Art. 46 (1) (a) *American Convention on Human Rights (1969)* requires that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law". Art. 41 (1) (c) *International Covenant on Civil and Political Rights (1966)* is on similar lines, again referring to exhaustion of local remedies 'in conformity with the generally recognized principles of international law'. All three texts refer to the local remedies rule or principle as generally recognized under international law.

[31] Patrick Brethour, Steven Chase and Jill Mahoney, "Kyoto not binding, Manley says", *The Globe and Mail* (14 November 2002, updated 17 April 2018), online: <https://www.theglobeandmail.com>.

[32] See Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?: Recent Developments and Challenges in Internalizing International Law" (2002) 16 SCLR (2d) 23 at 57.

[33] Basic Principles, *supra* note 24.

[34] See David B MacDonald and Graham Hudson, "The Genocide Question and Indian Residential Schools in Canada" (2012) 45:2 Can J of Political Science 427; Agnes Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg: Pemmican Publications Inc, 1996); and Andrew, Woolford, "Nodal repair

The *Convention on the Prevention and Punishment for the Crime of Genocide*[35] has been ratified by Canada, but Canada's incorporation of the *Convention* into domestic law simply prohibits advocacy of genocide, a much narrower concept of genocide than is set out in the *Convention*. The definition is limited to advocating killing members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.[36] The facts of the residential school era do not support this narrow definition, even though the schools have been identified as sites of negligence causing death.[37] Dr. Peter Henderson Bryce, a former Chief Medical Officer for the federal government and persistent advocate for the health of indigenous children living in residential schools, spoke out as early as 1907 about the unacceptable conditions and deaths of children in the schools, stating that the churches and the federal government had the means to save many lives but failed to take adequate action.[38] In his report, Dr. Bryce found the following: "[i]t suffices for us to know [...] that of a total of 1,537 pupils reported upon nearly 25 per cent are dead, of one school with an absolutely accurate statement, 69 per cent of ex-pupils are dead, and that everywhere the almost invariable cause of death given is tuberculosis."[39] Further evidence from Dr. Bryce's inspections suggests that the numbers of student deaths over time were much higher when taking into account that many children died shortly after leaving the schools.[40]

While elements of the *Genocide Convention's* definition would seem to be met by these facts, the required additional element of specific intent of the perpetrator to destroy the group is not. The leading case on the meaning of "intent to destroy" says that the claimants must prove that the perpetrators clearly and specifically sought to

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and networks of destruction: residential schools, colonial genocide, and redress in Canada" (2013) 3:1 Settler Colonial Studies 65.

[35] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951, accession by Canada 3 September 1952) [*CPPCG*]. Genocide, which is an attempt to destroy a people, in whole or part, is a crime under international law. Pursuant to article II, the definition of genocide in the Convention is (a) killing members of the group; (b) causing serious bodily harm or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births in the group; (e) forcibly transferring children from the group to another group.

[36] *Criminal Code*, RSC 1985, c C-46, s 318(2) [*Criminal Code*].

[37] TRC Final Report, *supra* note 4 at Part 1, vol 1 at 404. See also PH Bryce, *The Story of a National Crime: An Appeal for Justice to the Indians of Canada* (Ottawa: James Hope & Sons, Limited, 1922).

[38] *Ibid*, quoting PH Bryce, *Report on the Indian Schools of Manitoba and the Northwest Territories* (Ottawa: Government Printing Bureau, 1907) [Bryce, *Report*] Also cited by Jocelyn Wattam, "Dr. Peter Henderson Bryce: A story of Courage" (July 2016), *First Nations Child & Family Caring Society of Canada* (blog), online:
<https://fncaringsociety.com/sites/default/files/Dr.%20Peter%20Henderson%20Bryce%20Information%20Sheet.pdf>.

[39] *Ibid* at 18.

[40] John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to1986* (Winnipeg: University of Manitoba Press, 1999).

produce the destruction of the group in whole or in part.[41] The crime here was not the advocacy of genocide, but rather the implementation of a brutally enforced assimilation policy. This is not covered by the definition of genocide, but happened to have genocidal effects. The violations have been labelled “cultural genocide” or “attempted cultural genocide” by many, including the Chief Justice McLachlin (as she then was) and the former Prime Minister of Canada, Paul Martin. While this is an important acknowledgement of wrongdoing from very credible sources, cultural genocide is not a recognized international or a domestic crime.[42]

Early drafts of the *Genocide Convention* included cultural genocide in the genocide definition. Specifically, Article 3 of the first draft included cultural genocide in the definition.[43] But the term was removed after strong opposition from Canada, the US and other Western nations – probably because it would have put them in breach of the convention they were about to sign.[44] This would certainly seem to be the reason Canada was so opposed to including a cultural genocide article.[45] Not only had residential schools been well underway for more than 60 years at the time of the drafting, they were understood to be for the purpose of “destroying the Indian in the child.” [46]

When asked by claimants to make findings of genocide in residential school claims, Canadian courts have refused. This has been for a variety of reasons, including: the offences were committed before the *Convention* came into force,[47] the definition

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[41] *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) at para 498 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <www.ictr.org>.

[42] *CPPCG, supra* note 35, adopted in 1948 does not use the phrase “cultural genocide,” but says genocide may include causing serious mental harm to a group. Supreme Court Chief Justice Beverley McLachlin (as she then was) said Canada attempted to commit “cultural genocide” against aboriginal peoples in a speech May 28, 2015 at the Global Center for Pluralism. See Sean Fine, “Chief Justice says Canada attempted ‘cultural genocide’ on aboriginals”, *The Globe and Mail* (28 May 2015), online: <https://www.theglobeandmail.com>. Former Liberal Prime Minister Paul Martin used the term cultural genocide in 2013 when he testified before the Truth and Reconciliation Commission.

[43] See First Draft of the Genocide Convention, Convention on the Prevention and Punishment of the Crime of Genocide – Secretariat Draft, prepared by the UN Secretariat, UN Doc E/447 (May 1947), online: <http://www.preventgenocide.org/law/convention/drafts>. The earlier definition of genocide reads:

> (a) forcible transfer of children to another human group; or
> (b) forced and systematic exile of individuals representing the culture of a group; or
> (c) prohibition of the use of the national language even in private intercourse; or
> (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
> (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historic, artistic or religious value and of objects used in religious worship.

[44] Ben Kiernan, *Blood and Soil: A World History of Genocide Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007) at 10–11.

[45] Canada’s representative at the negotiations was the Minister of Foreign Affairs, Lester B. Pearson, who subsequently became Prime Minister of Canada and was awarded the Nobel Peace Prize.

[46] Abley, *Conversations with a Dead Man, supra* note 14.

[47] *Malboeuf v Saskatchewan,* 2005 SKQB 543 at para 12, 273 Sask R 265.

in the *Criminal Code* doesn't cover offences committed in residential schools,[48] lack of jurisdiction,[49] the view that the genocide convention is political and not legal in nature,[50] indigenous nations are not states so they cannot take Canada to the International Court of Justice,[51] claimants cannot petition the Security Council for the same reason,[52] and that cultural genocide was deliberately omitted from the definition of genocide and is therefore not an international crime.[53]

In summary, international law does not provide a clear path where victims can bring the Canadian government before international bodies for violations of human rights conventions, the crime of genocide or cultural genocide.[54] Nor does it offer a path in domestic courts to found claims for gross violations of human rights.[55] Alpana Roy, as one voice of many post-colonial theorists, says that Canadian jurisprudence shows that organizations such as the United Nations and domestic Canadian courts, which are intended to promote equality, inclusivity and diversity, remain largely "'Eurocentric enterprise[s]'" controlled by Western legal principles.[56] This allows them to pass over the "other" when determining what rights are worth protecting based on the belief that their laws are superior to traditional legal systems that have existed for thousands of years,[57] such as the indigenous legal systems in Canada.

2. Reparations in Domestic Criminal Law

Domestic criminal law can address individual claims of sexual and physical abuse as well as kidnapping and torture, but it is not designed to provide reparations for victims. The role played by victims in the criminal justice system is witness to the crime, not recipient of reparations. Thus, criminal law provides very little, if any, satisfaction other than official recognition that a crime was committed. One study in 2005 involving 22 victims of sexual assault and domestic violence found that victims' vision

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[48] *Re Residential Schools* 2000 CanLII 28275 (ABQB).

[49] *Ibid*.

[50] *Indian Residential Schools, Re* (2000), [2000] 9 WWR 437 at paras 69–73, [2000] AJ No 638 (QB).

[51] *Ibid*.

[52] *Ibid*.

[53] See discussion *supra* at note 42. Arguments have been made by some experts that the forcible transfer of children to another human group could found a case for genocide for residential school survivors as well as causing serious mental harm to members of the group. See for example, Fontaine, Dan and Farber, "A Canadian Genocide in Search of a Name", *Toronto Star* (19 July 2013), online: <https://www.thestar.com/opinion/commentary/2013/07/19/a_canadian_genocide_in_search_of_a_name.html>.

[54] For well-developed arguments on this topic, see MacDonald and Hudson, *supra* note 34.

[55] *Ibid.*

[56] Alpana Roy, "Postcolonial Theory and Law: A Critical Introduction" (2008) 29 Adel L Rev 315 at 316.

[57] *Ibid* at 330.

of justice is not represented at all in the conventional justice system. One key finding was that their priority was preventing the offender from committing future crimes rather than punishing them for crimes already committed. It was also found that their vision of justice contained both retributive and restorative elements.[58] In some criminal cases, courts make awards of restitution applicable to property or money. But restitution to restore the losses of residential school victims, such as their liberty, identity, dignity, bodily integrity, citizenship, or employment, are not available in a criminal proceeding. Even if criminal proceedings were a desired method of achieving redress through retribution, the high burden of proof to secure a conviction, beyond a reasonable doubt, would make it very difficult, if not impossible, to succeed, especially when the offences committed in residential schools occurred decades ago. Notwithstanding these difficulties, several persons have been prosecuted and convicted for abusing residential school students.[59]

The only provisions that specifically address mass violations of human rights in Canadian law other than in the *Criminal Code*, discussed above,[60] are in the *Crimes Against Humanity and War Crimes Act.*[61] The *Act* expressly implements the *Rome Statute of the International Criminal Court* [62] and broadens the definition of genocide to include all of the elements of the international definition.[63] It authorizes the Attorney General to criminally prosecute citizens and non-citizens for crimes against humanity either at home or abroad. However, while it allows prosecution of all offences committed outside Canada either before or after the coming into effect of the statute, it expressly requires that any genocidal crime committed inside Canada can only be prosecuted if it occurred after the *Rome Statute* came into effect on July 17, 1998. This clearly indicates that the intent of the legislators was to bar the prosecution of any offences committed prior to July 17, 1998. The last residential school closed in 1996. This statutory bar would preclude any residential school claimant from making a claim against Canada under the *Act* for the abuses inflicted under the residential school policy.

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[58] Judith Lewis Herman, "Justice from the Victim's Perspective" (2005) 11:5 Violence Against Women 571.

[59] See TRC Summary Report, *supra* note 11 at 365–368. The Report describes 30 offenders, the schools where they were employed, and the sentences they received. The data in the TRC Report documents convictions between 1960 and 2003 but because of difficulties in accessing information, this number is likely lower than the actual number of convictions.

[60] *Criminal Code*, *supra* note 36 at s. 318(2).

[61] *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

[62] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002, ratification by Canada 7 July 2000) [*Rome Statute*].

[63] *Ibid* at art 6.

3. Civil litigation reparations for residential school survivors: theory and practice

In light of the analysis above, it is clear why the only remaining litigation path for victims of the residential schools is civil litigation. The legal theory underlying civil remedies available for injuries negligently or deliberately inflicted is that of corrective justice. The corrective justice theory goes back to the time of Aristotle,[64] who posited that when one party has committed a wrong towards another and by so doing realizes a gain and the other a corresponding loss, justice requires that the party who is deprived must be restored to his original position by the party who gained. A loss need not be one for which the wrongdoer is morally to blame, it need only be a loss incident to the violation of the victim's right – a right correlative to the wrongdoer's duty not to inflict the loss on the victim. Corrective justice seeks to repair the injury of the victim by putting the victim back in the position he or she was in prior to the injury taking place.[65] Corrective justice remedies almost always take the form of compensation in the form of money. The law of torts is the primary legal vehicle meant to apply the theory, especially when the harms are physical or psychological.

A problem with the theory and the law of torts is that it is often not possible for a wrongdoer to repair the injury inflicted with money. When a victim suffers a serious bodily injury, it may be possible for the wrongdoer to pay the victim's medical bills or compensate for lost wages, but the physical damage the victim suffered may be beyond repair. The problem is all the more striking when the wrong involves a serious affront to the victim's dignity. For example, it is doubtful that a sexual abuser of a child could repair the "loss" suffered by his victim, regardless of the amount of compensation paid. In cases such as these, corrective justice merely corrects the expressive significance of the wrong. The victims cannot be restored to the position they were in before the wrong, but their sexual abuse can still be treated as a wrong, and victims can thereby reassert their rights not to be violated. If corrective justice can offer no more than money and an assertion of rights, it is an unsuitable form of redress when harms are multiple and diverse, such as violations of the kind students were forced to endure while they attended Indian residential schools. Philosopher Margaret Urban Walker points out that that while corrective justice as reflected in tort law sets out a moral baseline for acceptable conduct, it is not a suitable approach to correct historic acts or forms of injustice[66] such as those found to have occurred in the residential schools. Where there has been relentless enforcement of degraded moral status of individuals, and especially where "systemic conditions […] persist over extended periods of time" based on group membership, corrective justice remedies are incapable of comprehending or correcting the relationship between the oppressed and the oppressors.[67] In addition to the limitations of the corrective justice theory, the court

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[64] Aristotle, *The Nicomachean Ethics* (Kitchener: Batoche Books, 1999) at 73–81.

[65] Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52:4 UTLJ at 349.

[66] Margaret Urban Walker, "Restorative Justice and Reparations" (2006) 37:3 J Social Philosophy 377 at 379.

[67] *Ibid* at 378–379.

processes that enforce it are difficult and cumbersome and achieving successful outcomes is rare, especially for historic claims.

Class action lawsuits are the favoured avenue for lawyers seeking reparations from mass harms through the law of torts. The remedial principle underlying a class action is the same as in an individual tort action, namely, that wrongs causing injury give the victim the right to be placed in the position they would have been in but for the wrong. From an efficiency perspective, class actions are very useful: one or more persons can bring a claim to court representing others who have suffered a similar harm at the hands of the same party. They are also economical because they can provide access to the courts in situations where the case would have been too expensive or too complex for one person to sue on his or her own. Class actions also fulfill the goal of deterrence by making defendants pay large sums for harm they cause to multiple individuals. Many survivors of the Indian residential schools were represented in class actions.[68]

Whether through class actions or individual actions, residential school survivors who went to courts had to deal with enormous legal hurdles often resulting in re-victimization and denial of their claims. In civil actions, the claimant had the burden of proving, on a balance of probabilities, that the wrongful act happened to them, that the harms they experienced were caused by the act, and that the defendant had the legal responsibility to prevent the acts and harms from happening. Adding to this difficulty were examinations for discovery, which required claimants to provide detailed descriptions about the abuse that occurred many years before. This often caused prolonged cultural and personal humiliation and embarrassment. Moreover, the level of detail required to meet the burden of proof was often impossible to relate because of the psychological consequences of the harms victims had suffered. Delay further exacerbated these problems – cases took several years to wind their way to trial, appeal and the Supreme Court. Finally, even if some were successful at trial, enforcing their judgments against the perpetrators was often futile because the perpetrators were either dead or they had insufficient assets to pay judgments. Consequently, most survivors who went to court chose to sue the Government of Canada and the churches under the principle of vicarious liability. The vicarious liability option solved some problems, but created others. Even though vicarious liability has broadened with respect to child abuse,[69] the courts require claimants to show the abuser's employment has a "strong connection" to the facilitation of the abuse.[70] Using this rationale, the Supreme Court of Canada in *EB v Order of the*

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[68] For a full discussion, see Katie Melnick, "In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms" (2008) 22:3 St. John's Journal of Legal Commentary 755.

[69] *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45 [*Bazley*].

[70] *Jacobi v Griffiths*, [1999] 2 SCR 570 at para 42, 174 DLR (4th) 71. In this companion case to *Bazley*, the non-profit organization that hired a sex abuser as a Program Director for the children at the club was not vicariously liable because the Court said there was not a sufficiently clear connection between the job-created power and the sexual assaults.

Oblates of Mary Immaculate (British Columbia)[71] denied a residential school sexual abuse claim because an abuser was employed as a baker, boat driver, and odd jobs man and not a child care worker. The Court found the sexual assault was not compensable because there was not a "strong connection" between the abuser's employment and the sexual assault of the child.[72] This result was legally possible even though the abuser had regular contact with children, who themselves were forced to live in a residential school far away from the protection of family and community.[73] Even if a claimant meets the "sufficient connection" test, the case could still fail if the sexual or physical abuse claim falls within a time period where Crown immunity legislation is in effect for liability claims for intentional acts.[74] A large number of the IRS claims' events occurred between 1940 and 1953, the period where most Crown immunity still exists.[75] Other legal barriers were the expiration of limitation periods and the defense of the charitable exemption. On the positive side, recent adjustments to the law of limitations[76] make it easier for claimants to succeed if sexual abuse is claimed[77] and churches (now unsuccessfully) seek to escape liability by using the charitable immunity defense.[78] Joint and several liability legislation, making co-defendants liable for the full amount of tort claims, has helped claimants, especially in cases with multiple defendants.[79] It enables them to collect the full amount of their claims from the Government of Canada even though the churches shared liability. Despite these improvements, claims from IRS victims, other than those alleging physical, sexual, and psychological harms, fall outside of tort parameters, denying victims the ability to claim remedies for the harms they say are the most egregious. The acts they want addressed include recognition of the destruction of their family life, languages, cultures and dignity; recognition of those who had died; and intergenerational devastation. None of these harms were actionable under the common law of torts or the class action law suits their lawyers were pursuing. Most of all survivors wanted to

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[71] 2005 SCC 60, [2005] 3 SCR 45 [*EB*].

[72] *Ibid* at para 58.

[73] Luckily, by the time this case was decided at the Supreme Court, vicarious liability had already been negotiated by the parties to include all employees on the premises whether they were hired to have contact with children or not. This was a very important term of the agreement because unless employers could be held vicariously liable for the acts of all of their employees, most victims would not have met the legal requirements for compensation.

[74] *Crown Liability and Proceedings Act*, RSC 1985, c C-50 s 1; 1990, c.8 s. 21(3)(b)(i).

[75] Crown immunity still exists for intentional torts committed prior to 1949 in BC and for policy decisions as opposed to operational ones. See *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689. In Manitoba, the immunity is available for intentional torts committed prior to 1953.

[76] *M(K) v M(H*), [1992] 3 SCR 6, 96 DLR (4th) 289.

[77] *See Blackwater v Plint*, 2005 SCC 58, [2005] 3 SCR 3 [*Blackwater*]*; Re Winding-up of the Christian Brothers of Ireland in Canada* (2000) SCCA No.277 (QL). Sexual assault claims were not statute-barred but other assaults were.

[78] *Blackwater, supra* note 77 at para 44.

[79] *Ibid* at paras 44, 73, the churches were found to be 25% liable and the court ruled that they could not claim charitable immunity. To be reimbursed, the Crown entered into indemnity agreements with the church defendants.

tell their stories about residential schools and to be believed.[80] Despite the barriers and limitations, however, the residential school litigation – both individual cases and class action lawsuits – proceeded down the narrow tort path.

A flood of litigation by former students began in 1990, shortly after Phil Fontaine, Grand Chief of the Assembly of Manitoba Chiefs (as he then was), became the first aboriginal leader to speak out about the abuses he and the thousands of other indigenous children endured at the 150 residential schools across Canada.[81] This was the first time the facts of residential schools were brought to national attention by an indigenous leader, with Fontaine calling for an inquiry and an opportunity for survivors to relate their experiences to the Canadian public. The thousands of survivors that came forward, both individually and in class actions, filed tort actions in the courts. In Alberta, gridlock ensued when 1,479 actions involving 4,000 plaintiffs were filed, prompting one judge to comment that it would take 53 years of litigation to clear the dockets.[82] In the midst of this flood of litigation, the Ontario Court of Appeal certified a class action for one residential school,[83] creating the risk that general liability could follow across the country and that courts would provide compensation as the only remedy.

4. The Indigenous legal and theoretical intervention

The Assembly of First Nations (AFN) under the leadership of Phil Fontaine, who had become the National Chief in 1997, saw the Indian Residential School litigation crisis as an opening to chart a different course.[84] The AFN negotiating team realized that unless the AFN was a part of the solution, the historic opportunity to properly and authentically deal with the residential school tragedy would be left solely to non-indigenous lawyers and judges working within a seriously limited and biased legal system unable take their interests into account.[85] Consequently, the AFN issued a comprehensive letter[86] followed by the detailed *Report on Canada's Dispute*

[80] The author experienced this many times during the course of the settlement negotiations at meetings held with thousands of survivors in various locations across the country.

[81] See CBC, "Phil Fontaine's shocking testimony of sexual abuse" (30 October 1990), online CBC <http://www.cbc.ca/archives/entry/phil-fontaines-shocking-testimony-of-sexual-abuse>.

[82] Terrance McMahon, Remarks, University of Toronto conference 18 January 2013 cited by Mayo Moran, "Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools" (2014) 64 UTLJ 529 at 540, n 25.

[83] *Cloud v Canada* (2004), 247 DLR (4th) 667, 73 OR (3d) 401 (CA).

[84] For a full discussion of the history of the AFN's involvement, see Kathleen Mahoney, "The Settlement Process: A Personal Reflection" (2014) 64:4 UTLJ 505.

[85] Many scholars have written on this topic. One of the best sources is John Borrows' book, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[86] See Phil Fontaine, "Letter to Mario Dion" (3 October 2003), Kathleen Mahoney (blog), online: <https://kathleenmahoney.wordpress.com/documents-2/>. The recommendations were initially ignored. This response and its implications are discussed in greater detail in Mahoney, *supra* note 84.

Resolution Plan to Compensate for Abuses in Indian Residential Schools,[87] which analyzed and critiqued the government's approach. The *Report* set out in detail how the government's approach was discriminatory, sexist, under inclusive, devoid of indigenous legal traditions and cultural awareness, as well as being miserly[88] and totally based on narrow, tort law principles. After the publication of the *Report* in November 2004, intensive bilateral negotiations between the government and the AFN culminated in a political accord. It reads as follows:

> 1) Canada recognizes the need to continue to involve the Assembly of First Nations in a key and central way for the purpose of achieving a lasting resolution of the IRS [Indian Residential Schools] legacy, and commits to do so. The Government of Canada and the Assembly of First Nations firmly believe that reconciliation will only be achieved if they continue to work together;
> 2) that they are committed to achieving a just and fair resolution of the Indian Residential School legacy;
> 3) that the main element of a broad reconciliation package will be a payment to former students along the lines referred to in the AFN Report [the AFN report on the ADR process];
> 4) that the proportion of any settlement allocated for legal fees will be restricted;
> 5) that the Federal Representative will have the flexibility to explore collective and programmatic elements to a broad reconciliation package as recommended by the AFN;
> 6) that the Federal Representative will ensure that the sick and elderly receive their payments as soon as possible; and
> 7) that the Federal Representative will work and consult with the AFN to ensure the acceptability of the comprehensive resolution, to develop truth and reconciliation processes, commemoration and healing elements and to look at improvements to the Alternative Dispute Resolution Process.[89]

Canada also secured the appointment of The Honorable Frank Iacobucci as the government representative.[90] On the same date, Deputy Prime Minister Anne

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[87] Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, online: <http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf> [*Plan to Compensate*].

[88] In her research in preparing the AFN Report, the author visited the Republic of Ireland to examine the approach taken to paying reparations for institutional abuse of school children. Advice received from Tom Boland, the principal architect of the redress scheme in Ireland, was for Canada to "be generous." He thought the Canadian ADR plan was being given grudgingly and was *de minimus*. See Kathleen Mahoney, "Report on a Fact-Finding Mission to Ireland Regarding Compensation Scheme and Related Benefits for Industrial School Survivors in Ireland" *Kathleen Mahoney* (blog), Getting to Agreement, online: <https://kathleenmahoney.files.wordpress.com/2015/11/irish-report.pdf>.

[89] The Political Accord is cited in the TRC Final Report, *supra* note 4, Part 2 at 571.

[90] Political Agreement between the Assembly of First Nations and Her Majesty the Queen in Right of Canada (represented by Deputy Prime Minister Anne McLellan) dated May 30, 2005. Online: <https://web.archive.org/web/20070319141417/http://www.afn.ca/cmslib/general/IRS-Accord.pdf> (accessed 3 Nov 2014). See also United Church of Canada, "Residential Schools Update 2005" (March 2005) *United Church of Canada* (blog) online: <https://commons.united-

McLellan wrote a letter to the National Chief confirming that the government was adopting the new comprehensive approach using the AFN *Report* as a foundation for a settlement.[91] To ensure its recommendations would be key and central to the negotiations (as was promised in the political accord and the Deputy Prime Minister's letter), and to secure a place at the negotiating table, the AFN filed a class action in the courts on behalf of survivors while also opening up channels of discussion at the political level. This was with the intention of using the legal action to lever the parties into settlement negotiations favorable to and consistent with indigenous traditions and principles.[92] Unlike the statements of claim of the other class action, the AFN claimed for damage to spiritual, linguistic, cultural and social harms, not just to the living survivors, but also to deceased survivors, families of survivors and all aboriginal peoples.[93] An out-of-court settlement quickly became the preferred option; both the federal government, concerned about the gridlock in the courts and its uncertain liability on the one hand, and the claimants, concerned about delay, cost, the legal challenges, high risk of litigation, and aging and impoverished survivors, had good reason to consider it. Fontaine was well positioned to open discussions at the highest level, especially given his position as National Chief, the commitments secured in the Political Agreement, and his close relationships with senior government officials and Ministers.[94]

Once formal settlement negotiations started, the AFN clearly took the lead. Their negotiating team was comprised of a majority of indigenous representatives and non-traditional lawyers. It included the National Chief, residential school survivors[95] an intergenerational survivor,[96] an elder advisor,[97] a law professor with human rights expertise,[98] and two non-indigenous, non-traditional lawyers.[99] The other legal teams

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church.ca/Documents/Communications,%20Publications%20and%20Media/Publications/Residential%20 Schools%20Update/Residential%20Schools%20Update%20-%202005%20Archive.pdf> at 4.

[91] The letter is found at https://kathleenmahoney.wordpress.com.

[92] Several class actions had been filed in the courts but none had indigenous survivors on their negotiating teams.

[93] *Fontaine et al v Canada (Attorney General)* (5 August 2005), Toronto 05-CV-294716 CP (ONSC) (Statement of Claim), online: <https://kathleenmahoney.files.wordpress.com/2018/04/afn-issued-statement-of-claim_2005.pdf> [Fontaine, Statement of Claim].

[94] See Mia Rabson, "Fontaine Recalls When Former PM Martin Agreed to Address Residential Schools Legacy", *Winnipeg Free Press* (2 June 2015), online: <https://www.winnipegfreepress.com/special/trc/Fontaine-recalls-when-former-PM-Martin-agreed-to-address-residential-schools-legacy-305901261.html>.

[95] Ken Young, Charlene Belleau and the National Chief were survivors, the National Chief having attended residential schools for 10 years.

[96] Bob Watts was the son of residential school survivors and a former Deputy Minister.

[97] Fred Kelly, the elder advising the team was also a residential school survivor.

[98] Kathleen Mahoney, a lawyer and professor of international human rights and humanitarian law, feminist legal theory, torts and tort theory.

[99] Aaron Renert, a non-practising lawyer, educator and mathematician; John Kingman Philips, a practising class action lawyer with extensive experience seeking social justice for marginalized groups.

were comprised almost exclusively of white, male civil litigators from large urban law firms[100] who were focused exclusively on the tort model of corrective justice. Other than compensation, there was no recognition in their pleadings or their settlement proposals of the remedies survivors desperately wanted.

The apparent failing on the part of the lawyers to properly serve their clients' needs can perhaps be explained by their legal education and the content of law school curricula. Other than the occasional elective course in feminist theory or critical race theory available at some law schools, the predominant theory taught in mainstream, compulsory courses is liberal positivism – the colonial artifact that underpins the Western legal system. It assumes objectivity, equality, and neutrality for the colonizers without considering the values of the colonized.[101] The deeply embedded assumption that colonial law was and is superior to the pre-existing indigenous legal traditions is the overwhelming perspective that lawyers trained in the British legal traditions accept. Even though this approach is obviously biased to the benefit of colonizer interests, judges and lawyers unquestioningly adopt it.[102] Even those whose argue that tort law is inadequate to address collective wrongs fall short of recommending that the focus must be on indigenous legal principles. Elizabeth Adjin-Tettey, for example, argues that a contextualized approach which takes historical realities into account in tort claims could be a realistic option for indigenous claimants to obtain a "therapeutic" form of justice.[103] The problem with this argument is that a contextualized claim without indigenous legal principles as its foundation could lead to yet another form of colonial interpretation of the needs of the claimant. Similarly, following the UN reparations principles or other formulae for restorative justice is not enough. The reparations must originate from the victims themselves, addressing their needs as they see them.

The hesitancy on the part of claimants' lawyers to discuss alternatives to the corrective justice model in the negotiations – a truth commission, intergenerational harms or other restorative remedies rooted in indigenous legal principles – demonstrated their lack of knowledge of, and comfort with, indigenous priorities and values, and the post-colonial critique of settler institutions, laws and economies. The truth and reconciliation proposal by the AFN, for example, which everyone in the first

[100] The class action practice in Canada is dominated by large law firms and their treatment of the IRS case followed well established patterns of class action litigation developed in non-indigenous contexts.

[101] Since the TRC Report and the 94 Calls to Action in 2015, there has been some movement towards "indigenization" of post-secondary education and through law schools. Elective courses on indigenous legal traditions in various law faculties across the country now exist; see *supra* note 2.

[102] *Blackwater, supra* note 77 is a good example where the judge accepted the "crumbling skull" argument where the Government successfully escaped liability by arguing that the residential school students who were abused in the school would have suffered the harms anyway because their education was inferior and the parenting they received (from former residential school students) was so poor. For a thorough analysis see Kent Roach, "Blaming the Victim: Canadian Law, Causation and Residential Schools" (2014) 64:4 UTLJ 566.

[103] Elizabeth Adjin-Tettey, "Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses" (2007) 25:1 Windsor Yearbook of Access to Justice 95 at 105.

nations community wanted, attracted no participation by any claimants' lawyers other than the AFN team. Similarly, negotiations for commemoration, healing, memorialization, and apologies were negotiated solely by the AFN on the plaintiffs' side, even though there were more than 80 lawyers representing various class and individual actions in the room. It was not until the Assembly of First Nations filed their class action statement of claim that the relevance and importance of indigenous traditions and values was made clear. At that point, the AFN, in no uncertain terms, signaled that indigenous legal principles would be the centerpiece of their negotiating strategy.

Just prior to the commencement of the negotiations, the National Chief (who is Ojibway) organized a special event to consecrate the negotiation process. In Ojibway tradition, ceremonies are performed to communicate to the Creator, and to acknowledge before others, how one's duties and responsibilities have or are being performed.[104] Dancing, singing, and feasting sometimes accompany these rituals as a way to ratify legal relationships.[105] The government representative, the Honourable Frank Iacobucci, along with other government officials, church representatives, and members of the AFN negotiating team, were invited to attend a special ceremony in the traditional round house on Pow Wow Island in the First Nation. The ceremony was performed by Ojibway elder Fred Kelly. During the ceremony, in keeping with solemn tradition, Frank Iacobucci was carried through the round house on the shoulders of women. An ancient, ceremonial pipe from the Treaty 3 area[106] was shared first by Frank Iacobucci, then by men and women elders from the treaty three territory. This was followed by singing, dancing, and praying for a successful outcome. After the event, the group travelled to the Sagkeeng First Nation, the National Chief's birthplace, where a community meeting was held to hear testimony from residential school survivors about their experiences, to answer their questions and hear their suggestions about the negotiating process. This was an important step because Anishinabek law focuses on the process and principles that guide actions, rather than on the specific outcomes. Accountability is closely connected to those to whom duties are owed, how those duties should be exercised, and the consequences that flow from such exercise.[107] By having the special consecration ceremony in the Roundhouse, attended by community members followed by the public meeting of the community at the Sakeeng First Nation, the National Chief followed Anishinabek legal principles, foreshadowing what was to follow during the negotiations with respect to culturally appropriate processes, substance and reparation outcomes.

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[104] See generally Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976). See also stories and histories that shaped the Omushkego Crees in Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives and Dreams,* (Montreal & Kingston: McGill-Queen's University Press, 2007) which stories describe similar ceremonies and traditions.

[105] Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Hayward: Indian Country Communications, 1988)

[106] This ancient, ceremonial pipe was smoked at peacemaking, treaty negotiations and events such as the consecration ceremony.

[107] Borrows, *supra* note 85 at 333.

During the negotiations, the AFN adhered to processes of deliberation, consultation and consensus in the decision-making process. This was necessary because Indigenous peoples are diverse and their laws come from many sources, including sacred law, natural law, deliberative law, positivistic law and customary law, with many of these sources interacting with each other.[108] Deliberative law, however, is a source of law many indigenous tribes share.[109] In Mi'kmaq legal traditions, for example, while a certain degree of concentrated authority is important to their legal order, they also aspire to give everyone an opportunity to participate in decision-making. To accomplish this, a Grand Council is periodically formed to facilitate deliberations, build consensus and strengthen relationships.[110] Ojibway tradition also requires people to talk to one another, using persuasion, deliberation, council, and discussion. [111] In the Cree legal traditions, consultation and deliberation are used to create and maintain good relationships in order to maintain peace between different people with different perspectives.[112]

The contrast between the process adopted by other negotiating parties and that of the AFN was obvious. Where class action lawyers decided amongst themselves what the best legal and remedial strategies for the residential school settlement should be, the AFN legal team, consistent with indigenous legal traditions, reached out to thousands of survivors, elders, community members and intergenerational survivors from coast to coast to ascertain what they wanted from the process and under what terms.[113] Use of this tradition ensured that cooperative processes involved not just the persons injured, but intergenerational survivors, first nation leaders, and community members. Some examples of the statements made during the deliberations are follows:

> Not everyone wants courts and litigation – some just want to heal. […] Survivors need validation – have their experience accepted as real; […] Money never equals healing. Need accountability, redress, closure, resolution and rebuilding relationships.[114]

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[108] *Ibid at* 24–55.

[109] *Ibid* at 35.

[110] James Sakej Youngblood Henderson, "First Nations Legal Inheritances: The Mikmaq Model" (1995) 23 Man LJ 1.

[111] *Ibid*. See also Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018).

[112] Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2013) cited in Borrows, *supra* note 85 at 85.

[113] The AFN scheduled meetings across the country where hundreds if not thousands of survivors would show up and line up at the microphones to have their say about what they wanted the AFN to do. The most common request was to have an opportunity to tell their stories and to be believed. This was consistent with an earlier set of dialogues held across the country. For a record of the outreach dialogues, see Glenn Sigurdson, *Reconciliation and Healing: Alternative Resolution Strategies for Dealing with Residential School Claims* (Ottawa, Minister of Indian Affairs and Northern Development, 2000), online: <http://www.glennsigurdson.com/wp content/uploads/2016/06/Reconciliation_healing2.pdf>.

[114] *Ibid* at 7.

> […] Experience of victims has to be central – have to understand what actually happened to them to be able to react – need to understand scope and extent of trauma. Need to respect those with the courage to speak – don't just listen – believe them.[115]
> Give victims choices, lawsuit, settlement, healing, nothing. Government needs to give up some power and believe in power of aboriginal people to do it in their own way.[116]
> Need to work to develop a culture of resolution […] Must deal with culture and intergenerational impacts.[117]
> Need apology, including individual apology, extended to family if victim wants. Need televised apologies from Prime Minister and Department of Indian Affairs and Northern Development minister.[118]
> Apologies are at the heart of reconciliation. It must go beyond words to action.[119]
> Compensation must be accessible, fair and just and supported by financial and vocational counselling.[120]
> Need to tell the story and have it memorialized in a public way […] including the means to commemorate those who have died.[121]
> We want to learn how to be Indians again – to get back language […] Must restore culture and dignity […] must address loss of culture and language and parenting skills […][122]

As well as taking the advice from individuals through the Dialogues,[123]the AFN was guided by a set of broad, general indigenous values that emerged from the consultation process. These were as follows:

> a) To be inclusive, fair, accessible and transparent;
> b) To offer a holistic and comprehensive response recognizing and addressing all the harms committed in and resulting from residential schools;
> c) To respect human dignity and racial and gender equality;
> d) To contribute towards reconciliation and healing;
> e) To do no harm to survivors and their families.[124]

The ultimate goal of the AFN team's strategy in the negotiations was for the settlement agreement to encompass a wide range of reparations that would be

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[115] *Ibid* at 16

[116] *Ibid* at 17.

[117] *Ibid* at 19.

[118] *Ibid*.

[119] *Ibid* at 21.

[120] *Ibid* at 22.

[121] *Ibid*.

[122] *Ibid* at 34.

[123] Sigurdson, *supra* note 113.

[124] *Ibid*. This was a summary of many ideas that were recorded. See examples at 21, 33 and 37.

transformative for people, relationships and communities. Fair and just compensation was essential, but other elements, such as the truth and reconciliation commission, healing funds, commemorative events, advance payments for the elderly, an education fund for intergenerational survivors, and the fund for loss of language, culture and family life were as important to achieving the goal. Through engaging with indigenous legal traditions, thereby empowering survivors to express their feelings and influence the outcome of the negotiations of the settlement agreement itself, the AFN team followed both ancient teachings and modern understandings of human rights, due process, gender equality, and economic considerations. Harmonizing the indigenous legal traditions with contemporary standards was necessary to arrive at a settlement agreement that could bring both the government and the churches together to an agreed-upon solution, as well as other plaintiffs' counsel. As John Borrows writes, "…since deliberative indigenous laws draw upon historical and current legal ideas, they can also more explicitly take account of (and even incorporate where appropriate) legal standards from other legal systems."[125]

The indigenous values of healing, inclusivity, transparency, reconciliation and do no harm[126] led to consideration of a much wider range of reparations. Those reparations addressed a diversity of needs and were broader than those reparations defined by corrective justice, which were sought by the majority of the lawyers around the negotiating table. The indigenous legal traditions emphasized reparations that would repair the harm caused by the residential schools and support a process whereby those primarily affected could come together to share their feelings, describe how they were affected and develop a plan to repair the harms and prevent a re-occurrence.[127]

The UN principles that call for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition supported indigenous remedies of community-based healing projects, commemorative events, ceremonies, memorials, and truth telling sessions. The indigenous interpretation of the right to rehabilitation was understood to extend from directly injured individuals to third parties. Tort law, however, uses the legal device of foreseeability to limit a tortfeasor's liability to those whom the wrongdoer can foresee would be affected by the acts or omission in question. In most cases, injuries to third parties are considered to be too remote.[128] In the residential school tragedy, the need for rehabilitation and healing from the loss of family life, language, and culture went beyond individual survivors. It extended to their families and future generations for past, present and future intergenerational harms. Many survivors of residential schools explained that their trauma and dislocation negatively affected their parenting skills and relationships, and that their

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[125] Borrows, *supra* note 85 at 35–36.

[126] For a compendium of indigenous legal principles, see Coyle, Michael, "Indigenous Legal Orders in Canada - a literature review" (2017) Law Publications. 92, online: <http://ir.lib.uwo.ca/lawpub/92>

[127] The structure of the TRC was designed to achieve this goal by having small community hearings and reconciliation events as well as the larger national events designed to bring in non-Aboriginal participants.

[128] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1966] 2 All ER 709, [1967]1 AC 617.

children and grandchildren were harmed as a result.[129] These intergenerational harms are recognized in the international principles but remedies for them are non-existent domestically.

What is also missing in both the UN principles and in tort law is purposeful and explicit reference to gender. Indigenous feminist theory helps to fill in this gap. The AFN negotiating team was able to use this theory as a philosophical and political tool to conceptualize the oppression underlying the residential school policy. When dealing with gross human rights violations to Indigenous peoples, gender, race, and the effects of colonialism become central to the task of understanding appropriate reparations and processes to acquire them. Indigenous feminist theorists assert that gender is not only a necessary part of the ongoing work on Indigenous law, but that it must be a central consideration.[130] Patricia Monture, a Mohawk woman, writes that "[o]ne of the most devastating impacts of colonialism has been directed at the women" and that "colonialism has left a large ugly footprint over my own people's gender knowledge" whereas "gender is not constructed among my people in a way that is oppressive. Gender is not a hierarchical distribution of power, where men have more and women less."[131] Joyce Green[132] however, argues that sexism in indigenous communities is not solely the result of colonialism. She claims that Aboriginal feminism combines two critiques – feminism and anti-colonialism – to illustrate how Aboriginal women are particularly affected by colonialism and patriarchy both inside and outside their communities. She proposes that racism and sexism fuse when brought to bear on Aboriginal women; while colonial oppression is identified, so too is the oppression of Aboriginal women by Indigenous men[133] and indigenous governance practices.[134] Indigenous feminist legal theory seeks an Aboriginal

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[129] Sigurdson, *supra* note 113. For examples, see 26, 27 33, 37, and 40.

[130] See Joyce Green's chapter "Taking Account of Aboriginal Feminism" in Joyce Green, ed, *Making Space Indigenous Feminism*, 2d ed (Blackpoint: Fernwood Publishing, 2017); Emily Snyder, "Gender and Indigenous Law: A Report prepared for the University of Victoria Indigenous Law Unit, The Indigenous Bar Association and the Truth and Reconciliation Commission" (2013), online: <http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/Gender-and-Indigenous-Law-report-March-31-2013-ESnyder1.pdf>.

[131] Patricia A Monture, "Women's Words: Power, Identity, and Indigenous Sovereignty" (2008) 26:3–4 Can Woman Studies 153 at 158.

[132] Joyce Green is Associate Professor of political science at the University of Regina. Green's work focuses on the politics of decolonization in Canada, on identity, human rights and citizenship, and on the way in which sexism, racism and race privilege is encoded in Canadian political culture. She is of English, Ktunaxa and Cree-Scots Métis descent.

[133] Val Napoleon also agrees with this observation in her article "Thinking About Indigenous Legal Orders" in Rene Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2013) at 243.

[134] Green, *supra* note 130 at 23. See also Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 American Quarterly 259 and Val Napoleon, "Aboriginal Discourse: Gender, Identity and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) at 233; Emma LaRocque, "The Colonization of a Native Woman Scholar" in Christine Miller & Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom and Strength* (Winnipeg: The University of Manitoba Press, 1996) at 11.

liberation that includes marginalized and excluded women, especially those excluded and made invisible by colonial legislation and socio-historical forces. In this way, Aboriginal feminism engages with history and politics *and* contemporary social, economic, cultural and political ideas.[135] Similarly, indigenous scholar Val Napoleon[136] points out that for indigenous law and legal traditions to be vital and relevant, they must evolve with society's norms and practices.[137]

The power of Indigenous feminist theory forced the AFN team to consider the political and social conditions from a different perspective than the mainstream lawyers did, and to articulate different solutions.[138] It certainly helped the AFN team to ask the right questions and understand the intersection of racial, colonial and gendered acts of violence and harms suffered by girls and women in the residential schools. There were questions such as: how did the gender dynamics in the residential schools shape the ways in which women and girls were treated? How are those dynamics reflected in the reparations strategy? Was the violence against girls in the residential schools perpetuated by social norms in which the degradation of Indigenous women and girls was treated as normal? Did the abusive acts and their resulting harms impact Indigenous women and men differently? How did the violence in the residential schools affect indigenous women's experience of domestic violence in their adult lives? In their participation in the work force? In their child bearing and child rearing experiences? In their participation in community decision-making? Do the responses and proposals for reparations include indigenous women's experiences and knowledge?[139]

Indigenous feminist theory informed reparations for compensation for individual sexual and physical abuse claims, psychological injuries, claims for loss of culture and loss of family life, the mandate and structure of the Truth and Reconciliation Commission, healing funds, memorialization, consideration for the elderly, and intergenerational harms. It also illuminated the colonialist, gender discriminatory and culturally inappropriate attempt by Canada to resolve the residential school claims through the imposition of the ADR process.[140] As an example of the ADR model's gender blindness, only harms experienced by males were listed as compensable. In cases of sexual abuse, no mention was made of unique harms

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[135] Green, *supra* note 130 at 25.

[136] Val Napoleon is the Foundation Professor of Aboriginal Justice and Governance at the Faculty of Law, University of Victoria. She is a member of Saulteau First Nation.

[137] Napoleon, *supra* note 133.

[138] For a fuller discussion, see Green, *supra* note 130 at 30.

[139] See the analytical approach outlined by Snyder, *supra* note 130 at 7.

[140] For a full discussion of the inappropriateness of the ADR solution imposed by Canada, see Mahoney, *supra* note 84. An example of how gender blind the ADR model imposed by the government was, only harms experienced by males were listed as compensable. In the sexual abuse category, no mention was made of unique harms experienced by girls such as pregnancy, abortion or adoption of a child born as a result of rape.

experienced by girls through sexual abuse, such as pregnancy, abortion or adoption of a child born as a result of rape.[141]

Once the AFN's dominant and vital presence at the negotiating table was acknowledged and accepted,[142] the formal negotiations proceeded very quickly with the larger group of lawyers and bureaucrats. In a short period of 6 months, the comprehensive and holistic Agreement in Principle was reached. The Agreement encompassed all of the class actions and individual actions as well as all future actions.[143]

The Settlement Agreement

In 2005, 105,000 living survivors and their extended families settled their claims with the Government of Canada and various church entities in the largest and most holistic class action settlement agreement in Canadian history that is also unique to the world.[144] The agreement was comprised of both individual and collective reparations. Compensation was only one part of a much larger range of reparations, but it also addressed individual harms.

1. Compensation

The right of survivors to receive compensation took the form of a multi-billion -dollar fund payable to survivors in several parts.

(a) The Common Experience Payment (CEP)

All former residents of the schools shared a fund of $1.9 billion for the loss of language and culture and the loss of family life, otherwise known as the common experience payment or the CEP.[145] Many commentators and journalists make the

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[141] For a discussion of the inequities in the ADR solution imposed by Canada, see *Plan to Compensate*, *supra* note 87.

[142] The AFN's central role was set out in the Political Accord, *supra*, discussion at note 90.

[143] Canada, "Agreement in Principle", *Indian Residential Schools Settlement Agreement* (20 November, 2005), online: <http://www.residentialschoolsettlement.ca/aip.pdf>.

[144] If success can be measured by the number of people who opted into the agreement, 98% of the survivors made this choice rather than proceeding through the courts; 77% of 105,530 applicants for the common experience payment received payment; more than 59% of the 38,099 individual assessment process claims were successful with the average payout being $111,758.00. The TRC activities included 155,000 visits to national events; regional events held 238 days of local hearings in 77 communities across Canada. The Commission received over 6,750 statements from survivors and their families. See *Statistics*, *supra* note 6 for more statistics.

[145] The Government insisted on labelling this portion of the fund as the "common experience payment" as they did not want to face the prospect of legal actions in the future for language and cultural and family life losses. While commentators such as Maegan Hough criticise the settlement agreement for its failure to recognize loss of culture and family and community life, the CEP was clearly designed to do recognize such

mistake of thinking the total value of the settlement agreement was 1.9 billion dollars.[146] This is not correct. The CEP alone comprised that amount. The Government insisted on labelling this portion of the fund as the "common experience payment" as they most likely did not want to face the prospect of legal actions in the future for language, cultural, and family life losses. While commentators such as Maegan Hough criticise the settlement agreement for its failure to expressly recognize loss of culture, family, and community life, the CEP was clearly designed to do just that. The AFN, consistent with the direction from survivors, proposed this fund in both the Dialogues[147] in their statement of claim,[148] and in their own consultations in public meetings with survivors. They consistently referred to it as a fund to recognize loss of language, culture and loss of family life. It was to be easily accessible for survivors, requiring only that they establish that they resided at a residential school. That Canada insisted in calling it the common experience payment was considered to be a small concession compared to the 1.9 billion dollar fund the AFN was able to secure for every person who resided at a residential school to share. This fund, proposed by the AFN, was to allow every student alive on May 30, 2005 to receive $10,000 for the first year or portion of a year of residency, and $3,000 for each subsequent year without proving anything other than their attendance. The agreement required the government to provide relevant school attendance records. Elders over 65 received an early payment of $8,000 to be later topped up, depending on the number of years of attendance. The fund had a very good response rate – 79,309 eligible former students made successful applications, averaging $28,000 each of the 80,000 projected eligible claimants.[149]

(b) The Educational Fund

The unspent balance of the common experience fund of over $350 million was divided into two categories of education funding. The first invited individual survivors to apply for $3,000 worth of education credits that could be used at any approved educational institution or program by those survivors or members of their family. Over 30,000 people applied for the education credits and $57M was disbursed.[150] The second branch of the fund was an educational trust fund for intergenerational survivors. This fund was available to First Nation and Métis

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[146] See Maegan Hough, "Personal Recollections and Civic Responsibilities: Dispute Resolution and the Indian Residential Schools Legacy" (2014) University of Victoria Thesis, online: <https://dspace.library.uvic.ca/bitstream/handle/1828/5878/Hough_Maegan_LLM_2015.pdf?sequence=4&isAllowed=y> at 111.

[147] Sigurdson, *supra* note 113.

[148] Fontaine, Statement of Claim *supra* note 93.

[149] For statistics up to February 2018, see *Statistics*, *supra* note 6.

[150] *Ibid.*

individuals, governments, and organizations through a competitive application process specific to groups and/or individuals. It was administered by an indigenous board of trustees who dispensed funds for scholarships and other educational projects and initiatives. The purpose of the fund was to support "education programs aimed at healing, reconciliation and knowledge building."[151] Some of the success stories on the NIB website indicate that the intergenerational survivors are benefiting from the fund:

> "The NIB Trust Fund helped me become a crane/heavy equipment operator. Without the funding, I would not have been able to cover the tuition. I am so grateful that I was selected for funding. I want people to know that there are more ways other than the traditional routes to get funded. Without this training I would not have gotten my present employment."
>
> "I was very happy, because being a student can be very stressful financially. It helped me bring myself closer to my education dream of becoming a teacher. I truly believe that when a student receives help financially, it makes them feel good inside. I am very thankful for receiving the scholarship."
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> "Receiving the NIB Trust Fund was a huge blessing in my life. I am now enrolled full time in the Master of Social Work program at UVIC in Indigenous Specialization. How I live my live every day is a reflection of and tribute to all our residential school survivors and ancestors. Receiving this gift from the NIB Trust in this manner was a beautiful reminder of these relationships past, present, and future."
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> "As an intergenerational survivor of the residential school, this scholarship has tremendous personal significance as I reflect on the residential school survivors in my family and community. A business education will allow me to make a meaningful contribution to the economic development in my First Nation community as well as allow me to fulfil my desire to discover new collaborative relationships in the domain of social enterprise to advance the aspirations of indigenous sovereignty, nationhood, and reconciliation."[152]

(c) The Individual Assessment Fund (IAP)

The fund for individual claims of sexual, physical and psychological abuse is the largest fund in the settlement agreement. It is based on a tort model, but with important exceptions reflective of indigenous legal principles and the guidance received from the survivors during the Dialogues and other meetings across the country. For example, after survivors fill out an application form for individual redress, if it is accepted, a non-adversarial out-of-court process follows, overseen by an adjudicator trained in child abuse matters. Survivors have the option of opting into

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[151] See "Home", *National Indian Brotherhood Trust Fund*, online: < http://nibtrust.ca>.

[152] *Ibid* at "Individual Success Stories".

a hearing before a court if their loss of income claim exceeded $250,000, yet still realize all of the other benefits of the settlement agreement[153] such as a 15% contribution towards legal fees, a lower standard of proof for causation, survivor's choice of location of hearing, culturally appropriate ceremony at the hearing at the survivor's option, and health supports before, after and during hearings provided by indigenous health support professionals. Individual apologies are provided by senior government officials if the claimant wishes to have one.

To date, over $3.1 billion has been paid out to approximately 38,000 survivors, the average payout being $111,000[154] and the highest payment being $2.7 million.[155] The categories eligible for compensation were proven wrongful acts of sexual, psychological, and physical abuse, and a category of "other wrongful acts."[156] A wide array of harms can be claimed, including psychological, physical, emotional, sexual, and social harms caused by the acts, aggravated harms, loss of opportunity or loss of income, and future care.[157] For this process, the level of proof to determine causation of harm was lowered to a standard of plausible link instead of the civil standard of balance of probability. In the five years since this process has been open, over 38,000 claims have been made and approximately 83% were successful.[158]

2. The Truth and Reconciliation Commission

The right to satisfaction, accountability, and truth telling recognizes that in cases of mass human rights violations over a long period of time, the absence of judicial or political accountability should be repaired. In the residential schools, the lack of resolution about the fate of the missing children, the burial of students who died in the schools in unmarked graves,[159] the stigmatization of their race as inferior and unworthy, and the government policy of cultural genocide, entitles survivors to the remedy of satisfaction, accountability and truth telling over and above compensation. In keeping with this right, the AFN negotiated a Truth and Reconciliation Commission (TRC) with the government of Canada and the church entities. To respect the wishes of survivors and in keeping with the overall goal of the agreement, the AFN insisted that the TRC be a non-adversarial, co-operative, and transformative process led and informed by indigenous legal traditions. The introductory mandate statement for the TRC reads as follows:

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[153] *Fontaine v Canada (Attorney General)*, 2013 MBQB 272, [2014] 3 WWR 367.

[154] Statistics, *supra* note 6

[155] *Kelly et al v Canada (Attorney General) et al.* 2017 MBQB 21.

[156] See Canada, "Schedule D: Independent Assessment Process for Continuing Indian Residential School Abuse Claims", *Indian Residential Schools Settlement Agreement* (May 2006), online: <http://www.residentialschoolsettlement.ca/schedule_d-iap.pdf>.

[157] *Ibid.*

[158] *Statistics, supra* note 6.

[159] TRC Summary Report, *supra* note 11 at 90–101.

> There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic response to the Indian Residential school legacy is a sincere indication and acknowledgment of the injustices and harms experienced by the Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.[160]

The Truth Commission had a six-year mandate and was comprised of three commissioners and a secretariat. Two of the commissioners, including the Chair, were indigenous, with one being a residential school survivor. The third commissioner was the spouse of a survivor. The TRC received a fund of $60 million to hold seven major national events, as well as smaller events in first nation communities where survivors and others stakeholders were heard, and their stories witnessed and recorded. The Commission was also required to recommend commemoration activities for funding from the federal government. Another part of their mandate included setting up a research center to permanently house the Commission's records and documents. More than 155,000 people attended the national events,[161] both indigenous and non-indigenous. The Commission "received over 6,750 statements from Survivors […], members of their families and other individuals".[162] The Commission issued an interim and a final report which was received by the Prime Minister of Canada in October 2015. The Final Report detailed findings gathered over 6 years of hearings, the center piece of which were 94 Calls to Action. The Calls to Action were designed to address systemic discrimination by reforming policies and programs at all levels of government – federal, provincial, municipal and aboriginal – in a concerted effort to repair the harm caused by residential schools. 42 calls to action addressed institutions of child welfare, education, language and culture, health, and justice for systemic change; they recognized that reconciliation required structural change in Canadian society, including specific recommendations for law societies and law schools to incorporate cultural knowledge, indigenous law and skills based training into their educational programs.[163] The AFN team felt that notwithstanding the large amounts of

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[160] Canada, "Schedule N: Mandate for the Truth and Reconciliation Commission", *Indian Residential Schools Settlement Agreement* (May 2006), online: <http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf> [Schedule N].

[161] TRC Summary Report, *supra* note 11 at 25.

[162] *Ibid.*

[163] See Truth and Reconciliation Commission of Canada, *Calls to Action*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015). Call to Action 27 states: "We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. Call to Action 28 states: We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous

financial compensation available under the settlement and other reparations, the lasting transformative legacy of the agreement would be the TRC. This has proven to be the case. The Calls to Action have been undertaken by the Government with promises to fulfill all of them.[164] Canada has committed to passing indigenous language legislation,[165] incorporating the United Nations Declaration on the Rights of Indigenous Peoples into domestic law[166] and provincial governments are making significant strides in changing the curricula of educational institutions across Canada.[167] The Canadian Bar Association has made commitments to fulfill the Calls to Action relevant to the bar[168] and many universities are changing their admission and hiring practices as well as curriculum changes to adhere to the Calls to Action.[169]

3. Research Center

As noted, the IRSSA requires the Truth and Reconciliation Commission to establish a National Research Centre that will ensure the preservation of the Commission's archives. The Centre is required to "be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula."[170] Anyone affected by the IRS legacy will be permitted to file a personal statement in the research center with no time limitation. The AFN's intent in negotiating the Research Center was to ensure that the National Research Centre would carry on the work and spirit of Truth and Reconciliation long after the Commission closed its doors in 2014. The National Research Centre now houses the thousands of video and audio-recorded statements that the Commission gathered from

law, and Aboriginal–Crown relations. It will require skills-based training in intercultural competency, conflict resolution, human rights, and anti- racism."

[164] Elizabeth McSheffrey, "Trudeau promises full federal action on final TRC report", *Canada's National Observer* (15 December 2015), online: <www.nationalobserver.com/>.

[165] Betty Harnum, "Justin Trudeau's proposed Indigenous languages act will need teeth to succeed", *CBC News* (16 December 2016), online: <www.cbc.ca/news>.

[166] John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration found", *CBC News* (21 November 2017), online: <www.cbc.ca/news>.

[167] See KAIROS, "Winds of Change: Read the Report Card" (October 2015), *Kairos Canada* (blog), online: <https://www.kairoscanada.org/what-we-do/indigenous-rights/windsofchange-report-cards>. See also Saskatchewan School Boards Association, "Executive Summary", Saskatchewan School Boards Association, online: <https://saskschoolboards.ca/wp-content/uploads/SSBA-Position-Paper-Mandatory-Curriculum-FNM.pdf> for their cross Canada survey on compliance with the 94 TRC Calls to Action.

[168] The Canadian Bar Association, "Responding to the Truth and Reconciliation Commission's *Calls to Action*" (March 2016), *The Canadian Bar Association* (blog), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=73c612c4-41d6-4a39-b2a6-db9e72b7100d>.

[169] Sheila Cote-Meek, "Supporting the TRC's calls to action" (30 October 2017), *University Affairs* (blog), online: <https://www.universityaffairs.ca/opinion/from-the-admin-chair/supporting-trcs-calls-action/>; "Building Reconciliation: Universities Answering the TRC's calls to action at the U of S" (Final Report of the Building Reconciliation National Forum, 18–19 November 2015) [unpublished], online: <https://aboriginal.usask.ca/documents/University%20of%20Saskatchewan%20Building%20Reconciliation%20National%20Forum%20Report.pdf>.

[170] Schedule N, *supra* note 160 at 11.

survivors and others affected by the schools and their legacy, millions of digitized archival documents and photographs from the Government of Canada and Canadian church entities, works of art, artifacts and "expressions of reconciliation" presented at TRC events, all of the research and records collected and prepared by the Commission over the life of its mandate, and any additional material that the Centre will collect in future years.[171]

4. Apologies

The National Chief and the negotiating team was of the view that the settlement agreement would not be complete until the defendants, both Government and churches, were made officially accountable, that they take responsibility for their actions during the residential school era and undertake to ensure the would never happen again.[172]

(a) The Federal Government Apology

An apology was negotiated with the federal government to have all of the ceremony and respect befitting such an historic occasion. After experiencing some reluctance on the part of the Government to offer a fulsome apology, the National Chief published a letter to the editor of the Toronto Star setting out what the survivors expected to see in an apology. If one compares the National Chief's letter to the formal apology offered by then Prime Minister Stephen Harper, it is evident that it was taken very seriously.[173] For the first time in Canadian history, indigenous peoples were welcomed onto the floor of the House of Commons where their leaders, including National Chief Fontaine, heard the Prime Minister and all of the opposition leaders take full responsibility and apologize for the residential school tragedy.[174] The apologies were received and accepted on the floor of the House of Commons by indigenous leaders, led by the National Chief.[175]

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[171] Truth and Reconciliation Commission of Canada, "The National Research Centre on Indian Residential Schools", *Truth and Reconciliation Commission of Canada,* online: <http://www.trc.ca/websites/trcinstitution/index.php?p=815>.

[172] See Phil Fontaine discuss the importance of apologies and forgiveness at YouTube, "ForGive" (1 September 2011), online: YouTube <https://www.youtube.com/watch?v=7MGvFVpW3Pc>.

[173] See the letter at Phil Fontaine, "Apology to native people must end 'denial of truth'", *The Toronto Star* (22 April 2008), online: <https://www.thestar.com/opinion/columnists/2008/04/22/apology_to_native_people_must_end_denial_of_truth.html>.

[174] See CPAC, "Canada apologizes for residential school system" (12 June 2008), online: YouTube <https://www.youtube.com/watch?v=-ryC74bbrEE>, Aaron Wherry, "The Commons: The Apology", *Macleans* (12 June 2008), online: <http://www.macleans.ca/uncategorized/the-commons-the-apology/>, and Apology, *supra* note 3.

[175] See the National Chief's acceptance of the apology at CPAC, "CANADA APOLOGIZES-05" (12 June 2008), online: <https://www.youtube.com/watch?v=MyXjnGeBDNY> [Acceptance].

(b) The Apology of Pope Benedict XVI

One year after the Canadian Government's apology, the AFN negotiated an apology from the Roman Catholic Church, which was delivered by the Pope to a private audience at the Vatican.[176] An official delegation comprised of survivors, leaders, and their representatives traveled to Rome for the occasion and a private audience was held where the apology was received. Some criticized the apology as not being fulsome enough, failing to take responsibility for all of the harms caused to the children who were abused in the Catholic residential schools.

(c) Other apologies

Four other religious organizations, the Anglican Church of Canada, the Missionary Oblates of Mary Immaculate, the Presbyterian Church of Canada, and the United Church of Canada all formally apologized to Aboriginal people for their role in the Indian residential schools. In addition to the apology in the House of Commons, individual apologies from the Government of Canada were made to each survivor who received compensation in an abuse claim under the individual assessment process and who wished to receive one. Several other apologies were made by organizations such as the RCMP, universities, and provincial and municipal governments.

5. Healing

In the dialogues held with survivors across the country and in other consultative meetings, the AFN negotiating team was told that healing was a top priority for the survivors and that they needed financial support for healing projects and initiatives in their communities. The AFN then negotiated $125 million from Canada to support and augment pre-existing Healing Foundation funding for holistic and community-based healing to address needs of individuals, families and communities.[177] It was understood that a healing strategy to address the healing needs of Aboriginal People affected by the legacy of Indian residential schools, including the intergenerational impacts, would be negotiated with the communities through the Aboriginal Healing Foundation. The following measures were recognized means for the Healing Foundation to fulfill the objective:

> (a) promotion of linkages to other federal/provincial/territorial/ aboriginal government health and social services programs;

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[176] Staff, "Pope expresses sorrow for residential school abuse" (29 April 2009), *Anglican Journal* (blog), online: <https://www.anglicanjournal.com/articles/pope-expresses-sorrow-for-residential-school-abuse-8487/> and Staff, "Pope apologizes for abuse at native schools" (29 April 2009, updated 19 May 2012), *CTV News*, online: <https://www.ctvnews.ca/pope-apologizes-for-abuse-at-native-schools-1.39391>.

[177] Canada, "Schedule M: Funding Agreement between the Aboriginal Healing Foundation and Canada", *Indian Residential Schools Settlement Agreement* (2006), online: <http://www.residentialschoolsettlement.ca/Schedule_M.pdf> art 3.03. [Settlement Agreement].

(b) focus on early detection and prevention of the intergenerational impacts of physical and sexual abuse;
(c) recognition of special needs, including those of the elderly, youth and women; and
(d) promotion of capacity-building for communities to address their long-term healing needs.

6. Commemoration and Memorialization

As the National Chief said in his acceptance of the Government's apology – it was the generations that proceeded the present one that suffered the most, but they never heard the apology or received any compensation.[178] He felt very strongly that the settlement agreement would not have been complete without commemoration and memorialization. Consequently, the team negotiated $20 million from Canada to pay for both national commemorative and community-based commemorative projects.[179] The objectives of the commemoration and memorialization part of the settlement agreement were to honour and validate the ancestors who attended residential schools but were never recognized, to provide support for families to support one another and to take pride in their strength, resiliency, courage, and achievements, to promote aboriginal languages, cultures, and traditional and spiritual values, and to ensure that the residential school experience will never be forgotten and will never happen again. Numerous community-based projects were developed across the country, ranging from school reunions, conferences, feasts, construction of memorials, and publications. One of the most visible permanent memorials is the stained glass window in the center block of Parliament commemorating the residential school history, the former students, and their families and communities. The window was designed by an indigenous artist and the selection committee was comprised of former students and indigenous art experts.[180]

Conclusion

The Indian Residential Schools Settlement Agreement stands as a very important example of how claims for mass human rights violations and crimes against humanity can and should be remedied in the future. The most important elements of the settlement were beyond any court's jurisdiction to award in a trial. Had the claims proceeded to a trial, there may have been some compensation for personal injuries and future care but these would have been difficult to prove and achieved at great emotional and financial cost to individual survivors. It is clear from the IRSSA that tort remedies on their own are insufficient. Simply applying tort law and providing damages for mass harms are likely to be counter-productive and even re-victimizing.

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[178] Acceptance, *supra* note 175

[179] See Settlement Agreement, *supra* note 177, Schedule J.

[180] A photograph of the window is found at: https://www.aadnc-aandc.gc.ca/eng/1332859355145/1332859433503.

For example, if tort damages are paid for certain harms but there is no opportunity for the victims to tell their stories and have them recorded, the payments may be perceived as an effort to buy victims' silence. This could allow perpetrators to deny their wrongdoing, commit similar abuses in the future and make a mockery of the initiative to repair the wrong. Likewise, a reparations program that fails to ensure that perpetrators are held accountable effectively asks victims to trade away their right to justice in order to receive an amount of money.

Without indigenous principles forming the foundation of the IRSSA, there would have been no relaxation of proof and limitation requirements, no adjudicated hearings, no healing funds, no Truth and Reconciliation Commission, no 94 Calls to Action, no $1.9B payment for loss of language and culture and loss of family life, no advance payment for the elderly, no reparations to commemorate deceased survivors, no intergenerational reparations for education and community development, no research center and no public apologies from Canada or the churches. The process would have been governed by British common law rules and precedent with no meaningful indigenous participation, ceremonies or culturally appropriate health support.

The IRRSA process and level of engagement with indigenous legal traditions from lawyers, other than those representing the AFN, demonstrated how difficult it is for lawyers, even with indigenous clients, to challenge western legal conceptions of what wrongs or injustices are, and to think outside of their own experience. It also raised questions about the role of the legal profession, law, and legal processes in the pursuit of justice, reconciliation, and restoration of victims of mass harm. Centuries of colonialism and forced assimilation requires a rethinking of fundamental conceptions of individualism, justice and justiciable wrongs. The IRRSA claims for loss of language, loss of culture, and intergenerational harms, as well as the remedies like a common experience payment, truth commission, healing funds, commemoration, research center, and apologies raise important jurisprudential questions concerning what causes of action and remedies claims can and should be recognized by judges and courts, and how future claims should be designed – either by lawyers with the full participations of their indigenous clients or by the indigenous clients themselves.

Until the law and legal processes change to accommodate indigenous legal principles and traditions, any attempt to address mass human rights violations against indigenous peoples should be resolved by way of settlements with full and meaningful participation of the survivors and their communities. Reparations properly done have the potential to build trust and restore dignity. They also serve to provide a measure of justice directly to victims, offering them a future that may alleviate, to some extent, the suffering they have endured and provide some form of reconciliation. Without a direct focus on victims' needs, along with clear acknowledgment and recognition of the wrongs committed and their impacts on their communities, laudable objectives of reconciliation and healing will likely fail. As Professor Carrie Menkle-Meadow points out, "old methods of lawsuits, trials, and affixing […] of blame may not be adequate

to repair the harms that have been done in the past".[181]

Coming to terms with the limitations of the traditional forms of law and legal remedies is upon us.[182] With the expansion of standing requirements in modern human rights law,[183] indigenous groups and other minority groups around the world are now more than ever before bringing claims involving property and other cultural and resource expropriation on behalf of themselves, their peoples, and their land in international, national, regional, local, and even private and quasi-private tribunals. In this regard, the IRSSA should stand as an example for the future.

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[181] Carrie Menkel-Meadow, "Unsettling The Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice" (2014) 64 UTLJ 620 at 623.

[182] See, for example, Lisa Chartrand, "Accommodating Indigenous Legal Traditions" (2005) Indigenous Bar Association 1, online: <http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>.

[183] See for example, Christopher A Whytock, "Some Cautionary Notes on the 'Chevronization' of Transnational Litigation" (2013) 1 Stan J of Complex Litigation 467.