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

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1. 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 School Settlement Agreement.¹ It will be explained how the settlement could never have been achieved using conventional legal and theoretical frameworks – be they in the civil law of tort, criminal law or international human rights law. The paper argues that these legal tools are not sufficiently equipped to deal with state violations such as those perpetrated against Indigenous peoples causing mass harms, especially when the violations were motivated by cultural genocide.

The paper will argue that the formal justice system and the lawyers that operate within it are ill prepared to comprehend or correct the relationship between the oppressed indigenous peoples and their oppressors in relation to the rule of law. Their lack of training in indigenous law or legal traditions² so

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¹ Indian Residential School Settlement Agreement found at http://www.residentschoolsettlement.ca/settlement.html

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. See infra at note
vital to crafting appropriate reparations for the wrongs of colonial practices and prejudices makes it impossible to achieve justice or access to justice for the harms they have caused.

The example used in this paper, the Indian Residential School Settlement Agreement, examines the state imposed collective and individual harms to indigenous peoples through the residential school system. The harms ranged from loss of language and culture, loss of family and community life, spiritual harms, intergenerational dysfunction, sexual, physical and psychological injuries, to loss of opportunity and loss of income.

When reconciliation is the desired goal of the reparations, the procedures and principles required to achieve it require solutions far beyond those rooted in traditional legal methods and principles inherited from Canada’s colonial masters. Instead, it is the principles of indigenous feminist theory, indigenous legal theory and indigenous legal traditions that recognize the wide range of harms colonialism causes and that can empower the victims to articulate what they want, justify individual and collective reparations and lay the groundwork for new relationships with Canada and the churches that operationalized the residential school system.

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

2. Historical context

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3 Prime Minister Harper’s apology on behalf of the Government of Canada
www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649
From the late 1800’s to 1996, the Government of Canada implemented a policy under which it compelled indigenous children to leave their homes and attend Indian Residential Schools (hereafter IRS) that were supervised by Canada and run by various churches. There were 130 schools located in all the provinces and territories of Canada except New Brunswick and Prince Edward Island. The policy was designed to assimilate Aboriginal people into European ways of life by forcing them to abandon their language, culture and indigenous ways of life and adopt the language, culture and religions of other non-indigenous Canadians. Deliberate, often brutal strategies were adopted 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 child in three was abused physically, sexually and emotionally and the damage they suffered adversely affected generations of Aboriginal peoples. Children were subjected to medical experiments, forced labor without pay, and inferior nutrition and education. The Truth Commission’s research into deaths in residential schools found that some 3,201 deaths could be documented. The Commission points out that the number could be much higher but cannot be proven because of the government’s policy of destroying health records of the

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7 Supra, note 2.

8 Supra, note 2 TRC Final Report at p.92.
residential schools. Many of the children who died in the schools were buried on school sites sometimes buried in unmarked graves. Often no notice was given to their families 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.” These gross human rights violations were committed against at least 150,000 indigenous children, their families and communities over a period of 150 years. Their effects in turn, caused hundreds of thousands of Aboriginal people over generations to become impoverished and illiterate with limited occupation opportunities and lost income, addictions, psychological disorders, physical injuries and deformities, sexual dysfunction and numerous other problems. These harms continue to this day.

Many survivors attempted to find recourse for their harms in court proceedings. Some attempted to use international law, while others filed criminal complaints against their abusers. Still others pursued individual tort actions or participated in class action law suits. Ultimately, the vast majority of residential school

9 Between 1936 and 1944, 200,000 Indian Affairs files were destroyed. Supra note 2 at p. 91.
10 Library and Archives Canada, RG10, volume 6016, file 1-1-12, part 1, “Burial Expenses” J.D. McLean, no date [PAR-008816]
11 The term has been attributed to Duncan Campbell Scott but more accurately it originated in the US military. See TRC Report, supra.
12 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. For the settlement agreement, see http://www.residentialschoolsettlement.ca/english_index.html
13 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.
claims were brought into the Indian residential school settlement agreement.\textsuperscript{14} 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.

**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, national law and practices and municipal courts and tribunals.\textsuperscript{15} 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 concluded that every State has a legal duty to make reparations when the international law of human rights has been breached. In his report he states:

\begin{displayquote}
In accordance with international law, states have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution,
\end{displayquote}

\textsuperscript{14} Indian Residential Schools Settlement – Official Court Website  
\texttt{www.residentialschoolsettlement.ca/english.html}

compensation, rehabilitation, satisfaction and guarantees of non-repetition.\textsuperscript{16}

The violations experienced by the indigenous peoples of Canada as a result of the residential schools policy are recognized in international human rights law as serious violations,\textsuperscript{17} including violations of civil and political rights,\textsuperscript{18} the rights to non-discrimination,\textsuperscript{19} the right to life, the right of children to be free from sexual violation,\textsuperscript{20} and the right not to be tortured or endure cruel, inhuman or degrading treatment.\textsuperscript{21} These violations give rise to the right to prompt, adequate and effective reparations.\textsuperscript{22} In addition to the international


\textsuperscript{17} See Takhmina Karimova, "What Amounts to a Serious Violation of International Human Rights Law?" Geneva Academy of International Humanitarian Law and Human Rights, August, 2014 ISBN 978-2-9700866-2-8

https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf


\textsuperscript{19} International Convention on the Elimination of All forms of Racial Discrimination, Article 6: 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…” 660 U.N.T.S. 195, entered into force Jan. 4 1969.


\textsuperscript{21} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 14, 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.”, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/44/49 (1989).

\textsuperscript{22} See 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, adopted by General Assembly Resolution 60/147 of Dec. 16, 2005, http://www2.ohchr.org/english/law/ remedy.htm. See also the International Covenant on Civil and Political Rights, art. 2(3), and the Convention Against Torture and
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.\textsuperscript{23}

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.\textsuperscript{24} He comments:

\textit{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. 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.}\textsuperscript{25}

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

\begin{itemize}
\item Other Cruel, Inhumane, or Degrading Treatment or Punishment, art. 14(1), on state responsibility to provide redress and reparations to victims.
\item 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.
\item Supra, note 14, van Boven p. 36-37.
\end{itemize}
Law and International Humanitarian Law. 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.26

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.27

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


27ibid.
importance of just satisfaction as a means to signal to states that, with 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.28

In principle then, reparations in international law for mass human rights abuses are comprehensive and would appear to address many of the reparations required for survivors of residential schools. The problem for Canadian victims is accessing these remedies in domestic proceedings and having them recognized and incorporated into local law. Gross violations of human rights are not the kind of violations states are interested in admitting to or coming to terms with, and are largely unattainable, especially in Canada. The international/domestic law relationship is key to understanding why the right to reparations in international law are not implemented. The sharp divergence between generally accepted understandings of moral 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.

A fundamental principle of international law says in order to access international law, the injured parties must first exhaust domestic remedies.29 The object of the rule is to enable the respondent State the first opportunity to correct the harm and to make redress. The rule requires that access to an international organ should be available, but only as a last resort, after the domestic remedies have been exhausted. Theoretically, domestic remedies are normally quicker, cheaper and more effective than the international ones.

See also Aloboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 2-6 (1993).
If no domestic remedies are available or there is unreasonable delay on the part of national courts in granting a remedy, a person should have recourse to international remedies. 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 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,“ although Canada should take its Kyoto obligations seriously if the pact is ratified.... the accord is not a legally enforceable contract.”30 Judges too, seem to question international law’s efficacy. Justice Louis LeBel of the Canadian Supreme Court 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.”31 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,32 a non- legally binding instrument.

Conventions that are legally binding in Canada such as the Convention Against all forms of Racial Discrimination or the Convention Against Torture refer only generally and vaguely to the obligations on states to provide remedies for mass violations of human rights. Some argue that the residential school policy


32 Supra, note 5.
was a genocidal one.\textsuperscript{33} The \textit{Convention on the Prevention and Punishment for the Crime of Genocide}\textsuperscript{34} has been ratified by Canada,\textsuperscript{35} but Canada’s incorporation of the convention into domestic law simply prohibits advocacy of genocide, covering a much narrower definition 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.\textsuperscript{36} The facts of the residential school era do not support this narrow definition of physical destruction, even though they had been identified as cites of neglect causing death.\textsuperscript{37} Dr. James Bryce, the 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 saying the churches and the federal government and had the means to save many lives but failed to take adequate action.\textsuperscript{38} In his report, Dr. Bryce


\textsuperscript{34} Genocide is an attempt to destroy a people, in whole or part – is a crime under international law. 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.

\textsuperscript{35} 9 December 1948, 78 UNTS 277 [entered into force on 12 January 1951.

\textsuperscript{36} \textit{Criminal Code}, RSC, c C-46, ss318(2) [\textit{Criminal Code}]

\textsuperscript{37} P. H. Bryce, \textit{The Story of a National Crime An Appeal for Justice to the Indians of Canada} James Hope and Sons pub. Ottawa 1922.

states the following: “It 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. Further evidence from Dr. Bryce’s inspections suggested that the numbers of student deaths over time were much higher, when taking into account that many children died shortly after leaving the schools. While the 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 produce the destruction of the group in whole or in part. Furthermore, the crime was not the advocacy of genocide, it was the implementation of a brutally enforced assimilation policy which is not covered by the definition of genocide but which happened to have genocidal effects. The violations have been labelled “cultural genocide” or “attempted cultural genocide” by many including by the Chief Justice of Canada (as she then was) and the former Prime Minister of Canada. While this was an important acknowledgement of wrongdoing from very credible sources, cultural genocide is not a recognized international or a domestic crime.

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41 Prosecutor v Jean-Paul Akayesu Trial Judgment, Case No.ICTR-96-4-T, 2 September, 1998, para 498

42 The United Nations’ Convention on the Prevention and Punishment of the Crime of Genocide, 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 said Canada attempted to commit "cultural genocide" against aboriginal peoples in a speech May 28, 2015. Former Liberal prime minister Paul Martin used the term cultural
Early drafts of the Genocide Convention included cultural genocide in the definition but it was removed after strong opposition from Canada, the US and other Western nations probably because it would put them in breach of the convention they were about to sign. This would certainly seem to be the reason Canada was so opposed to including cultural genocide article. 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.”

Article 3 of the first draft included cultural genocide in the definition of genocide as follows:

(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.

Canadian Courts when asked by claimants to make findings of genocide in residential school claims, have refused. This has been for a variety of reasons including that the offences were committed before the convention came into force; that the definition in the Criminal Code that doesn’t cover offences

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44 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 *Malboeuf v Saskatchewan* 273 Sask. R 265.
committed in residential schools; lack of jurisdiction; and the view that the genocide convention is political, not legal in nature.\textsuperscript{47} Other reasons that have been cited are the fact that indigenous nations are not states so they cannot take Canada to the International Court of Justice; claimants cannot petition the Security Council for the same reason; and that cultural genocide was deliberately omitted from the definition of genocide and is therefore not an international crime.\textsuperscript{48}

In summary, international law does not provide a clear path to take the Canadian government before international bodies for violations of human rights conventions, the crime of genocide or cultural genocide\textsuperscript{49} or a path in domestic courts to found claims for gross violations of human rights.\textsuperscript{50} Post-colonial theorists such as Alpana Roy say all of this shows that organizations such as the United Nations and domestic Canadian courts, which are intended to promote equality, inclusivity and diversity, remain largely “Eurocentric enterprises” controlled by Western legal principles.\textsuperscript{51} 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,\textsuperscript{52} such as the indigenous legal systems in Canada.

3. Reparations in Domestic Criminal Law

\textsuperscript{47} In Re Residential Schools [2000]A.J.no. 638 (Alta QB)
\textsuperscript{48} 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.
\textsuperscript{49} For well-developed arguments on this topic, see D.B. MacDonald, G. Hudson, The Genocide Question and Indian Residential Schools in Canada. Canadian Journal of Political Science, June 2012
\textsuperscript{50} Ibid
\textsuperscript{52} Ibid p. 330.
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 of victims of crime in the criminal justice system is as witnesses to the crime, not as a 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 with 22 victims of sexual assault and domestic violence found that victims’ vision 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. In some criminal cases, courts make awards of restitution applicable to property or money. But restitution to restore the condition lost by residential school victims due to gross violations of human rights, 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, that of 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.

The only provisions to specifically addressing mass violations of human rights in Canadian law other than in the Criminal Code discussed above, are in the

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54 See Final Report on the Truth and Reconciliation Commission of Canada, Appendix 3, p. 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.
55 Criminal Code, RSC, c C-46, at ss. 318(2).
Crimes Against Humanity and War Crimes Act.\textsuperscript{56} The Act expressly implements the Rome Statute of the International Criminal Court \textsuperscript{57} and broadens the definition of genocide to include all of the elements of the international definition.\textsuperscript{58} 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 Indian Residential School closed in 1996. This statutory bar would eliminate any chance of residential school claimants making a claim against Canada under the Act for the abuses inflicted under the Indian Residential School policy.

4. 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 was civil litigation. \textsuperscript{58} The legal theory underlying civil remedies available for injuries negligently or deliberately

\textsuperscript{56} Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.
\textsuperscript{57} http://legal.un.org/icc/statute/romefra.htm

https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
inflicted is the theory of corrective justice. The corrective justice theory goes back to the time of Aristotle, 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 took it. 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. 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 tort 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 thereby reassert their rights not to be violated. If corrective justice can offer no more than money and an

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59 Aristotle, Nicomachean Ethics, Book V, 2-5, 1130a14-1133b28.
assertion of rights, it is an unsuitable form of redress when harms are multiple and diverse such as violations of the kind committed students who attended Indian residential schools were forced to endure. 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\textsuperscript{61} such as those found to have occurred in the residential schools. Where enforcement of degraded moral status of individuals has relentlessly occurred, 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.\textsuperscript{62}

In addition to the limitations of the theory of corrective justice, the court processes that enforce it are very difficult and cumbersome and achieving successful outcomes are rare, especially for historic claims.

Class action law suits are the favored area of law for lawyers to seek reparations from mass harms through the law of tort. The remedial principle underlying a class action is the same as in an individual tort lawsuit, 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 because 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 useful economically because they can provide access to the courts in situations where the case would be 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


\textsuperscript{62} Ibid
represented in class actions.\textsuperscript{63}

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 has the burden of proving, on balance of probabilities, that the wrongful act happened to them, that harms they experienced were caused by the act and that the defendant had the legal responsibility to prevent the acts and harms from happening. Added to this difficulty, examinations for discovery requiring claimants to provide detailed descriptions about the abuse that occurred many years before 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 very psychological consequences of the harms they had suffered. Delay further exacerbated these problems - cases taking several years to wend their way to trial, appeal and the Supreme Court. Even if some were successful at trial, enforcing their judgments against the perpetrators was often futile because they 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,\textsuperscript{64} the courts require claimants to show the abuser’s employment has a “strong connection” to the facilitation of the abuse.\textsuperscript{65} Using this rationale the Supreme


\textsuperscript{64} Bazley v Curry [1999] 2SCR 534.

\textsuperscript{65} Jacobi v Griffiths.[1999]2 SCR 570. In this companion case to Bazley v Curry Ibid, the non-profit organization that hired the sex abuser as a Program Director for the children at
Court of Canada in *E.B. v Oblates of Mary Immaculate*\(^{66}\) 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 “sufficient connection” between his employment and the sexual assault of the child. This result was legally possible even though the abuser had regular contact with children who were forced to live in a residential school far away from the protection of family and community.\(^{67}\) Even if a claimant could meet the “sufficient connection” test, the case could still fail if the sexual or physical abuse claim fell within a time period where Crown immunity legislation is in effect for liability claims for intentional acts.\(^{68}\) A large number of the IRS claims occurred in the time period from 1940 – 1953, the period where most Crown immunity still exists.\(^{69}\) 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\(^{70}\) made it easier for claimants to succeed if sexual abuse was claimed\(^{71}\) and churches unsuccessfully sought to escape liability by using the charitable immunity defense.\(^{72}\) Joint and severable liability legislation making co-defendants liable for the full amount of tort

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\(^{67}\) Luckily, by the time this case was decided in 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.

\(^{68}\) *Crown Liability and Proceedings Act*, RSC 1985, c C-50 s1; 1990, c.8 s. 21(3) (b)(i).

\(^{69}\) Crown immunity still exists for intentional torts committed prior to 1949 in BC and for policy decision as opposed to operational ones. See *Just v BC* [1989] 2 SCR 1228. In Manitoba, the immunity is available for intentional torts committed prior to 1953.

\(^{70}\) *M(K) v M(H)* [1992] 3 SCR 6.

\(^{71}\) See *Blackwater v Plint* 2005 SCC 58; *Re Winding –up of the Christian Brothers of Ireland in Canada* (2000) SCCA No.277 (QL)

\(^{72}\) *Ibid para 61 in Blackwater.*
claims helped claimants, especially in cases with multiple defendants.\textsuperscript{73} It enabled them to collect the full amount of their claims from the Government of Canada even though the churches shared liability. Even with these improvements, claims of the IRS victims other than physical, sexual and psychological harms, fell outside of tort parameters denying them the ability to claim remedies for the harms they said were the most egregious. The acts they wanted addressed included recognition of the destruction of their family life, their languages and cultures and their dignity; recognition of those who had died; and intergenerational devastation - all unattainable under the common law of torts and the class action law suits their lawyers were pursuing. Most of all survivors wanted to tell their stories about residential schools and be believed.\textsuperscript{74} 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.\textsuperscript{75} 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,

\textsuperscript{73} In the Blackwater decision, ibid, 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.

\textsuperscript{74} The author experienced this many times during the course of the settlement negotiations at meetings held with thousands of survivors in various locations around the country..

\textsuperscript{75} See “Phil Fontaine's shocking testimony of sexual abuse” ... - CBC Archives www.cbc.ca/archives(entry/phil-fontaines-shocking-testimony-of-sexual-abuse.
prompting one judge to comment that it would take 53 years of litigation to clear the dockets. In the midst of this flood of litigation, the Court of Appeal of Ontario certified a class action for one residential school, creating the risk that general liability could follow across the country and that courts would provide compensation as the only remedy.

5. 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. 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 to take their interests into account. Consequently, the AFN issued a comprehensive letter followed by a detailed Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools analyzing and

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76 Terrance McMahon, Remarks, University of Toronto conference 18 January 2013 cited by Mayo Moran in the Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools, (2014) 64 UTLJ 529.
77 Cloud v Canada (2004) 73 OR 93rd 0 401.
78 For a full discussion of the history of the AFN’s involvement see Mahoney, K., The Settlement Process: A Personal Reflection in University of Toronto Law Journal 64(4):505-528 · May 2014
79 Many scholars have written on this topic. One of the best sources is John Borrow’s book, Canada’s Indigenous Constitution University of Toronto Press, 2011-2012
80 See October 3, 2003 letter from National Chief Phil Fontaine to Deputy Minister Mario Dion at https://kathleenmahoney.wordpress.com, the suggestions of which were initially ignored except for the symbolic gesture to round up awards to the nearest dollar the awards should be rounded up instead of rounding down. These events are discussed in greater detail in Kathleen Mahoney, The Settlement Process: A Personal Reflection (2014) 64 UTLJ 505.
81 Assembly of First Nations, Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools found at at http://www3.telus.net/kmahoney/ and also at
critiquing 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 and totally based on narrow, tort law principles. After the publication of the AFN Report in November 2004, intensive bi-lateral negotiations with the government and the AFN culminated in a political agreement between the AFN and Canada, where Canada agreed to a blueprint for the settlement agreement which was holistic, comprehensive and consistent with indigenous values and legal traditions and secured the appointment of The Hon. Frank Iacobucci as the government representative. On the same date, Deputy Prime Minister, Anne McLellan wrote a letter to the National Chief confirming that the government was adopting the new comprehensive approach using the AFN Report as foundation for a settlement. 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


82 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 at https://kathleenmahoney.wordpress.com

83 See Political Agreement at https://kathleenmahoney.wordpress.com


84 The letter is found at https://kathleenmahoney.wordpress.com
opening up channels of discussion at the political level with the intention of using the legal action to lever the parties into settlement negotiations favorable to and consistent with indigenous traditions and principles. 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 the deceased survivors, families of survivors and all aboriginal peoples. An out-of-court settlement quickly became the preferred option because 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 and high risk of litigation, aging and impoverished survivors on the other, had good reason to consider it. Fontaine was well positioned to open discussions at the highest level given his position as National Chief, the commitments secured in the Political Agreement and his close relationships with senior government officials and Ministers.

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 an intergenerational survivor, an elder advisor, a law professor with human rights expertise, and two non-

85 Several class actions had been filed in the courts but none had indigenous survivors on their negotiating teams.
86 The AFN statement of claim can be found at at IRSSA Foundational Documents https://kathleenmahoney.wordpress.com
88 Ken Young, Charlene Belleau and the National Chief were survivors, the National Chief having attended residential schools for 10 years.
89 Bob Watts was the son of residential school survivors and a former Deputy Minister.
90 Fred Kelly, the elder advising the team was also a residential school survivor.
91 Kathleen Mahoney, a lawyer and professor of international human rights and humanitarian law, feminist legal theory, torts and tort theory.
indigenous, non-traditional lawyers. The other legal teams were comprised almost exclusively of white, male civil litigators from large urban law firms 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 explanation for this apparent failing on the part of the lawyers to properly serve their client’s needs can perhaps be explained by their legal education and the content of law school curricula. Other than occasional elective courses 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. 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.

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92 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.

93 For a fuller discussion of the lawyers’ approach see Kathleen Mahoney, supra, note 76.

94 Since the TRC’s 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. The University of Victoria has advanced more than other law faculties in the country, 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, Globe and Mail, March 21, 2018 found at https://www.theglobeandmail.com/canada/article-university-of-victoria-to-launch-first-of-its-kind-indigenous-law/

95 Blackwater v Plint supra, note 45 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
Even those that argue the law of tort is inadequate to address collective wrongs fall short of recommending that the focus must be on indigenous legal principles. Elizabeth Adjiin-Tettey, for example argues\(^\text{96}\) that a contextualized approach taking historical realities into account in tort claims could be a realistic option for indigenous claimants to obtain a “therapeutic” form of justice. The problem with this line of argument is that a contextualized claims without indigenous legal principles as a foundation could lead to yet another form of colonial interpretation of the needs of the claimants. 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 claimant’s 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 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 plaintiff’s side even though there were more than 80 lawyers representing various class and individual actions in the room. Not until the Assembly of First Nations filed

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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 UTLJ 566-585.


https://ssrn.com/abstract=1816464
their class action statement of claim was 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 or Anishinabek 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.97 Dancing, singing and feasting sometimes accompany these rituals as a way to ratify legal relationships.98 The government representative, the Hon. Frank Iacobucci, 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 performed by Ojibway elder Fred Kelly. In this ceremony, Frank Iacobucci, in keeping with solemn tradition, was carried through the round house on the shoulders of women. An ancient, ceremonial pipe from the Treaty 3 area99 was shared first by Frank Iacobucci then by men and women elders from the treaty three territory followed by singing, dancing and praying for a successful outcome. Following this 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 and to answer their questions and hear their suggestions about the negotiating process. This was an

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99 This ancient, ceremonial pipe was smoked at peacemaking, treaty negotiations and events such as the consecration ceremony.
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 they should be exercised, and the consequences that flow from such exercise. 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.

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. Deliberative law, however, is a source of law many indigenous tribes share. 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. Ojibway tradition also requires people to talk to one another, using persuasion, deliberation, council and discussion. In the Cree legal traditions, consultation and deliberation are

101 Supra, Borrows, note 83, p.24-55.
102 Ibid at p. 35.
used to create and maintain good relationships in order to maintain peace between different people with different perspectives.\textsuperscript{105}

The contrast between the process adopted by other negotiating parties and 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 coast to ascertain what they wanted from the process and under what terms.\textsuperscript{106} 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:

\begin{quote}
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.\textsuperscript{107}
\end{quote}

\begin{quote}
...Experience of victims has to be central – have to understand what actually happened to them to be able to react – need to understand scope
\end{quote}

\textsuperscript{105} 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, 2000.) Cited in Borrows, supra, note 83 at p. 85.

\textsuperscript{106} 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 so. The most common request was to have an opportunity to tell their stories and to be believed. This was consistent with and earlier set of dialogues held across the country. For a record of the outreach dialogues, see G. Sigurdson, \textit{Reconciliation and Healing: Alternative Resolution Strategies}\texttt{http://www.glennsigurdson.com/wp-content/uploads/2016/06/Reconciliation_healing2.pdf}

\textsuperscript{107} Ibid, Kamloops British Columbia Dialogue at p. 7.
and extent of trauma. Need to respect those with the courage to speak – don’t just listen – believe them.\textsuperscript{108}

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.\textsuperscript{109}

Need to work to develop a culture of resolution...Must deal with culture and intergenerational impacts.\textsuperscript{110}

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.\textsuperscript{111}

Apologies are at the heart of reconciliation. It must go beyond words to action.\textsuperscript{112}

Compensation must be accessible, fair and just and supported by financial and vocational counselling.\textsuperscript{113}

Need to tell the story and have it memorialized in a public way...including the means to commemorate those who have died.\textsuperscript{114}

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..\textsuperscript{115}

\textsuperscript{108} Ibid, Nakoda Lodge, Alberta Dialogue at p. 16
\textsuperscript{109} Ibid at p. 17.
\textsuperscript{110} Ibid at p. 19
\textsuperscript{111} Ibid
\textsuperscript{112} Ibid at p. 21.
\textsuperscript{113} Ibid at p. 22.
\textsuperscript{114} Ibid.
\textsuperscript{115} Regina, Saskatchewan Dialogue at p. 34.
As well as taking the advice from individuals through the Dialogues, the AFN was guided by a set of broad, general indigenous values that emerged from the consultation process which were:

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.

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 transformative - to transform 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. By engaging with indigenous legal traditions by 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

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116 Infra at notes 90-98.
117 Supra, Sigurdson, note 85.
account of (and even incorporate where appropriate) legal standards from other legal systems. 118

The indigenous values of healing, inclusivity, transparency, reconciliation and do no harm,119 led to consideration of a much wider range of reparations addressing a diversity of needs than the reparations defined by corrective justice 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 to 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. 120

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 uses the legal device of foreseeability to limit liability to only those 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. 121 In the residential school tragedy, the need for rehabilitation and healing from the loss of family life and loss of language and culture went beyond individual survivors 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

118 Supra, Borrows, note 83, p. 35-36.
119 For a compendium of indigenous legal principles, see
120 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.
parenting skills, relationships, and ability to form relationships and that their children and grandchildren were harmed as a result. 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 the element of purposeful and explicit reference to gender. Indigenous feminist theory helps to fill in this gap and the AFN negotiating team was able to use it 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 say gender is not only a necessary part of the ongoing work on Indigenous law, it must be a central consideration. Patricia Monture, a Mohawk woman writes, “One of the most devastating impacts of colonialism has been directed at the women… as colonialism has left a large ugly footprint over my own people’s gender knowledge because 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.” Joyce Green however, argues that sexism in indigenous communities is not solely the result of colonialism. She says Aboriginal feminism combines two critiques – feminism and anti-colonialism, showing how Aboriginal women are particularly affected by colonialism and patriarchy both inside and outside their communities. She says racism and

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122 Supra, Sigurdson, note 85.
124 Patricia A. Monture, Women’s Words, Power, Identity, and Indigenous Sovereignty in Canadian Women Studies p. 158.
sexism fuse when brought to bear on Aboriginal women and while colonial oppression is identified, so too is the oppression of Aboriginal women by Indigenous men\textsuperscript{125} and indigenous governance practices.\textsuperscript{126} Indigenous feminist legal theory seeks an Aboriginal liberation that includes marginal 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 as well as with contemporary social, economic, cultural and political ideas.\textsuperscript{127} Napoleon points out that for indigenous law and legal traditions to be vital and relevant, they must evolve with society’s norms and practices.\textsuperscript{128}

The power of Indigenous feminist theory allowed the AFN team to both consider political and social conditions differently than the mainstream lawyers did, and to articulate different solutions.\textsuperscript{129} It certainly helped the AFN team 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. 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?


\textsuperscript{127} Ibid Green at p. 25.

\textsuperscript{128} Supra, Napoleon, note 119.

\textsuperscript{129} For a fuller discussion, see Green, Ibid at p. 30.
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?¹³⁰

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, sex discriminatory and culturally inappropriate attempt by Canada to resolve the residential school claims through the imposition of the ADR process.¹³¹ 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 through sexual abuse such as pregnancy, abortion or adoption of a child born as a result of rape.¹³²

Once the AFN’s dominant and vital presence at the negotiating table was acknowledged and accepted,¹³³ the formal negotiations proceeded very quickly

¹³⁰ See the analytical approach outlined by Snyder, supra, note 98 at p. 7.
¹³¹ For a full discussion of the inappropriateness of the ADR solution imposed by Canada, see Mahoney, supra, note 78. 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.
¹³² For a discussion of the inequities in the ADR solution imposed by Canada see AFN Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools
¹³³ The AFN’s key and central role was set out in the Political Accord, supra, note 53.
with the larger group of lawyers and bureaucrats. In the short period of 6 months, the comprehensive and holistic Agreement in Principal was reached which encompassed all of the class actions and individual actions as well as all future actions.\(^{134}\)

6. 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 unique in the world.\(^{135}\) 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 both 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

\(^{134}\) "Agreement in Principle" online: Indian Residential Schools Settlement - Official Court Website <http://www.residentialschoolsettlement.ca/aip.pdf>.

\(^{135}\) If success can be measured by the numbers 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 https://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192 for more statistics.
common experience payment or the CEP\textsuperscript{136} Many commentators and journalists make the mistake of thinking the total value of the settlement agreement is 1.9 billion dollars.\textsuperscript{137} 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 and cultural and family life losses. While commentators such as Maegan Hough\textsuperscript{138} criticise the settlement agreement for its failure to expressly recognize loss of culture and family and community life, the CEP was clearly designed to do just that. The AFN, consistent with the direction form survivors in both the Dialogues\textsuperscript{139} in their statement of claim,\textsuperscript{140} and in their own consultations in public meetings with survivors\textsuperscript{141} proposed this fund, consistently referring to it as a fund to recognize loss of language and culture and loss of family life that would be easily accessible by 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

\textsuperscript{136} 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 just that. The AFN proposed this fund, consistently referring to it as a fund to recognize loss of language and culture and loss of family life that would be easily accessible by 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.


\textsuperscript{138} Ibid, Maegan Hough, CBC News http://www.cbc.ca/news/canada/residential-school-payout-a-symbolic-apology-fontaine-1.660065,

\textsuperscript{139} Supra, note
\textsuperscript{140} supra, note 86 AFN Statement of Claim
\textsuperscript{141}
at a residential school to share. This fund, proposed by the AFN was to allow very 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 with 79,309 eligible former students making successful applications averaging $28,000 each of the 80,000 projected eligible claimants.142

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 survivors or members of their families. Over 30,000 people applied for the education credits and $57M was disbursed.143 The second branch of the fund is an educational trust fund for intergenerational survivors. This fund is available to First Nation and Métis individuals, governments and organizations through a competitive application process specific to groups and/or individuals, administered by an indigenous board of trustees who dispense funds for scholarships and other educational projects and initiatives. The purpose of the fund is support education programs aimed at healing, reconciliation and knowledge building.144 Some of the success stories on the NIB website indicate that the intergenerational survivors are benefiting from the fund.145

142 Statistics up to December 2017 found at http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192
143 Ibid,
144 See Indian Brotherhood Trust found at http://nibtrust.ca
145 Ibid
“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.”

“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 life every day is a reflection of and tribute to all our residential school survivors and ancestors. Receiving this gift from NIB Trust in this manner was a beautiful reminder of these relationships past, present and future.”

“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 fulfill my desire to discover new collaborative relationships in the domain of social enterprise to advance the aspirations of Indigenous sovereignty, nationhood, and reconciliation.”

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 import 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 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\textsuperscript{146} 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 and the highest payment being $2.3 million.\textsuperscript{147} The categories eligible for compensation were proven wrongful acts of sexual, psychological and physical abuse as well as a category of “other wrongful acts.” 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.\textsuperscript{148} In 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 this process was open, over 38,000 claims were made and approximately 83\% were successful.\textsuperscript{149}

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 the students who died in the schools and were buried in unmarked graves,\textsuperscript{150}

\textsuperscript{146} Fontaine et al. v. Canada (Attorney General) et al. 2013 MBQB 272.
\textsuperscript{147} Kelly et al. v. Canada (Attorney General) et al. 2017 MBQB 21.
\textsuperscript{148} See the Independent Assessment Process described at \url{http://www.residentialschoolsettlement.ca/schedule_d-iap.pdf}

\textsuperscript{149} Statistics on the Implementation of the Indian Residential School Settlement Agreement \url{www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192}

\textsuperscript{150} TRC Final Report, supra, note 1 at p. 90-100.
and the stigmatization of their race as inferior and unworthy, the cultural genocide as a government policy, would entitle them to the remedy of satisfaction, accountability and truth telling over and above compensation. Consistent with this right, the AFN negotiated a Truth and Reconciliation Commission (TRC) with the government of Canada and the church entities. Respecting 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, transformative process led and informed by indigenous legal traditions. The introductory mandate statement for the TRC reads as follows:

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.  

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, 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 was to set up a research center to permanently house the Commission’s records and documents. More than

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155,000 people attended the national events, both indigenous and non-indigenous. The Commission heard testimony or received statements from over 6,750 survivors, members of their families and other individuals. 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 are designed to address systemic discrimination by reforming policies and programs at all levels of government – federal, provincial, municipal and aboriginal – to work together to change policies and programs in a concerted effort to repair the harm caused by residential schools. Forty-two calls to action addressed institutions of child welfare, education, language and culture, health, and justice for systemic change recognizing 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. The AFN team felt that notwithstanding the large amounts of financial compensation available under the settlement and other

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153 Ibid at p. 25.

154 The Calls to Action state: “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.

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 law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.”
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. Canada has committed to passing indigenous language legislation, incorporating the United Nations Declaration on the Rights of Indigenous Peoples into domestic law and provincial governments are making significant strides in changing the curricula of educational institutions across Canada. The Canadian Bar Association has made commitments to fulfill the Calls to Action relevant to the bar and many universities are changing their admission and hiring practices as well as curriculum changes to adhere to the Calls to Action.

3. Research Center


159 Canadian Bar Association, *Responding to the Truth and Reconciliation Commission’s Calls to Action* found at [https://www.cba.org/CMSPages/GetFile.aspx?guid=73c612c4-41d6-4a39-b2a6-db9e72b7100d](https://www.cba.org/CMSPages/GetFile.aspx?guid=73c612c4-41d6-4a39-b2a6-db9e72b7100d)

The Indian Residential Schools Settlement Agreement 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.”

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 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.

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.

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161 Supra note 81, schedule N, s. 12.
162 Truth and Reconciliation Commission of Canada

163 See Phil Fontaine discuss the importance of apologies and forgiveness.
https://www.youtube.com/watch?v=7MGvFVpW3Pc
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. 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 the Prime Minister, it is evident that it was taken very seriously.\textsuperscript{164} 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 words of the Prime Minister and all of the opposition leaders, take full responsibility and apologize for the residential school tragedy.\textsuperscript{165} The apologies were received and accepted on the floor of the House of Commons by indigenous leaders, led by the National Chief.\textsuperscript{166}

b) The Apology of Pope Benedict XVI

A year after the Canadian Government apology, the AFN negotiated an apology from the Roman Catholic church delivered by the Pope in a private audience at the Vatican.\textsuperscript{167} An official delegation comprised of survivors,  

\textsuperscript{164} See the letter at https://www.thestar.com/opinion/columnists/2008/04/22/apology_to_native_people_must_end_denial_of_truth.html

\textsuperscript{165} https://www.youtube.com/watch?v=ryC74bbrEE  
http://www.macleans.ca/uncategorized/the-commons-the-apology/  
http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649

\textsuperscript{166} See the National Chief’s acceptance of the apology at https://www.youtube.com/watch?v=MyXjnGeBDNY

\textsuperscript{167} https://www.anglicanjournal.com/articles/pope-expresses-sorrow-for-residential-school-abuse-8487/  
https://www.ctvnews.ca/pope-apologizes-for-abuse-at-native-schools-1.393911
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 a 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 to support and augment pre-existing funding for holistic and community-based healing to address needs of individuals, families and communities.\textsuperscript{168} 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

\textsuperscript{168} Supra, note 81, Indian Residential School Settlement Agreement, schedule M.
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;

(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 ones that suffered the most but they never heard the apology or received any compensation. He felt very strongly that the settlement agreement would not have been complete without commemoration and memorialization. Consequently the team negotiated $20 million for both national commemorative and community-based commemorative projects. The objectives of the commemoration and memorialization part of the settlement agreement were to honor 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.

169 Supra, note 89.
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.170

Conclusion
The Indian Residential School 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 Indian Residential School Settlement Agreement 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. 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 wrong doing, 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.

170 A photograph of the window s found at https://www.aadnc-aandc.gc.ca/eng/1332859355145/1332859433503
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 for 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 of 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 injustice consist of 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 re-thinking 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 of a common experience payment, truth commission, healing funds, commemoration, research center, apologies and the like\textsuperscript{171} raise important jurisprudential questions about what new causes of actions 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 process change to accommodate indigenous legal

\textsuperscript{171} ibid, Court Judgments
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 blame are clearly not enough to repair the harms of past systemic injustices to indigenous peoples.\(^{172}\)

Coming to terms with the limitations of the traditional forms of law and legal remedies is upon us.\(^{173}\) With the expansion of standing requirements in modern human rights law,\(^{174}\) indigenous groups and other minority groups around the world are now more than ever before, taking cases forward on behalf of themselves, their peoples, and their land in international, national, regional, local, and even private and quasi-private tribunals for claims involving property and other cultural and resource expropriation.\(^{175}\) In this regard the IRSSA, should stand as an example for the future.

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\(^{174}\) See for example, Christopher Whytock, “Some Cautionary Notes on the Chevronization of Transnational Litigation” (2013) 1 Stanford LJ of Complex Litigation 467.

\(^{175}\) Supra, note 29.