

Personal Recollections and Civic Responsibilities: Dispute Resolution and the Indian
Residential Schools Legacy

by

Maegan Hough
LL.B./B.C.L., McGill University, 2007
B.A. hons, York University, 2004

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of the Requirements for the Degree of

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Supervisory Committee

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Jeremy Webber, Faculty of Law
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Abstract

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The author attended Independent Assessment Process (IAP) hearings as part of the Indian Residential Schools Settlement Agreement. Her experience in IAP hearings raised questions about our approach, as Canadians, to historical wrongs, especially those, like loss of language and culture, which fall outside of the purview of criminal and tort-law. This thesis explores the legal, social, and political dispute resolution mechanisms available in Canada to address harms as they have been applied to the Indian Residential Schools Legacy. It finds that the approach to date has been limited by the assumptions inherent in those institutions. The author proposes that Canadians, as a society, need to reframe and restart our discussion about harms and reparations using a framework of “responsibility”, and provides some possible mechanisms to begin that discussion.

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Dedication

To my father, who inspired my love of all things Canadian.

To all the Claimants, Claimant's Counsel, Adjudicators and colleagues who allowed me to share in their stories.

Prologue

In what follows¹ I describe my experience acting as “Canada’s Representative” in Independent Assessment Process hearings and the questions that experience led me to ask. I apply reflexive auto-ethnography in my methodology and narrative in order to share with you the confusion and curiosity that inspired my studies. I use my own unsettling experience of acting as Canada’s Representative to “bend back” on the Euro-Canadian legal system and look more deeply at how it treats the “other” with regards to the harms stemming from the Indian Residential Schools legacy² in order to better understand the dominant legal structures and culture, and my responsibility within it.³ I ask your forgiveness for any vanity on my part in the exercise.

Before beginning in earnest I must also ask you to stop and consider your own thoughts, knowledge, experiences, and strength. What follows, particularly in the first two chapters, was hard to write, where it involved my own experience, and hard to repeat, where it involved the experience of others. You will find it hard to read. Not all of it, I hope, but parts of it, I am certain. I do not wish to cause pain or re-traumatize any of my readers but I do wish to draw you out of your complacency and to engage you in the questions I was forced to ask myself and which I attempt to answer here. For “[i]t is in the sharing that we heal, in the vulnerability that we become strong, in laughter that we learn, and the more the merrier!”⁴

¹ An early draft of the Prologue and Chapter 1 were submitted as part of the course requirements for LAW

² Heewon Chang, *Autoethnography as Method* (Walnut Creek, Calif.: Left Coast Press, 2008) at 33.

³ *Ibid* at 34.

⁴ Christine S. Davis & Carolyn Ellis, “Emergent Methods in Autoethnographic Research: Autoethnographic Narrative and the Multiethnographic Turn” in Sharlene Nagy Hesse-Biber & Patricia Leavy eds, *Handbook of Emergent Methods* (New York: Guilford Press, 2008) 283 at 300.

Chapter One: Being Canada

I call on all Canadians – elders and youth, Aboriginal or not – to commit to reconciliation and breaking down the wall of indifference. This is not just a dream, it is a collective responsibility. – Rt. Hon. Michaëlle Jean, former Governor General of Canada, Truth and Reconciliation Commission of Canada Honorary Witness.⁵

Day One

This day has unfolded as expected: Introductions, questions, answers. A story told in feelings. Memories of loss, of pain, of confusion, of abuse, and of loneliness. Kind words, harsh words, scared words. Tense faces, calm faces, a nervous face. Business. Then a moment; a conclusion, an apology. Unexpected tears and sudden terror. I didn't understand that was what they meant. I didn't know those words would be said. I didn't realize that is what we are supposed to do. I am an observer at this hearing, of this moment. Soon I will be called upon to say those words. Words that will need to mean something to the Claimant – the survivor.⁶ The words will need to be appropriate, legally sound, but also true. I will have to speak for me, because I will be the speaker, and for Canada, who I will be representing. Weight. My colleague's words felt like the weight of my country, a country I have been proud of my entire life and with whom my identity is inextricably intertwined, pressing onto my shoulders.

Breathe.

You wanted this job. You wanted to work for your country because you believe in it. You were certain this process would help it and so wanted to be a part of it. You were selfish. You wanted to be a part of history, to say you “did good” and fixed the problems

⁵ Quoted in Truth and Reconciliation Commission of Canada, *British Columbia National Event Program* (18-21 September 2013) at 35.

⁶ In this work I use the term “Claimant” to indicate a participant in the Independent Assessment Process and “survivor” to indicate former Indian Residential Schools students generally.

*of the past. You were naive. You are not qualified to speak on behalf of your country.
What can you say that will be meaningful to the Claimant?*

Empathy and Otherness

My initial shock is over.

Another day. Another story. This Claimant⁷ must sit to the left of the Adjudicator. Her left ear is bad. She lost her hearing 40 years ago. Hit on the head because her bed was not made in the morning when the supervisor came to inspect it. She recounts the thud, a pop, a ringing sound and a dull ache that lasted for days. Blood on her pillow that she washed off early in the morning, afraid of another slap if the supervisor saw. She will be compensated for the slap: the Acts Proven, and for the loss of her hearing: the Consequential Harm, but she will not be compensated for being made to make her bed, with military precision, by a woman who is not her mother.

The next day. Another case of hearing loss. This time because the Claimant tried to speak to his cousin, a new student, who knew little English, in the hallway. He was trying to explain the rules. To help keep his cousin out of trouble. But he got in trouble and was punished instead. His hearing loss will be compensated. The racist act, the prohibition of his first language, will also be compensated. It is an Aggravating Factor that will increase the points awarded for the Acts Proven and the Consequential Harms by 5 to 15%. One supervisor's racism is acknowledged but the other's isn't. If these two Claimants ever meet, if they ever see me in the street and ask why they were not compensated equally for the same abuse, what can I tell them? Was the harm one

⁷ These accounts are fictionalized. While I have taken care to accurately represent the type of claim and the atmosphere of the IAP hearings I attended, no one Claimant, Claimant's Counsel, or Adjudicator is represented here.

Claimant suffered really greater than the harm the other suffered? Does the overtness of one act of racism out-count, undermine, the recognition of the other?

What is my responsibility to these two Claimants? My duty of loyalty to the government as a public servant and my duty to represent my client as a lawyer don't seem to envisage this situation. To whom am I responsible when I address the Adjudicator and give submissions about where in the Model these Acts and Harms fall? To represent the government, of course, and to "uphold the integrity of the Model". But it feels like something more is expected of me here. Unfulfilled expectations haunt me at the end of the day, not the stories.

Thursday's claim is simple. The Claimant is well into his healing journey. He states the facts of the abuse matter-of-factly and with little emotion. He recovered well. He had a supportive family who welcomed him home. They were patient with him. They encouraged him. They did not push him to talk or push him away. But he was still too ashamed to tell them. He is successful today, a respected Elder, a long-standing member of his Band Council. For almost three decades he hid his experience from his loved ones. He was afraid to put himself forward in case doing so put him in the sights of someone like him, like the man who encouraged him, who gave him treats for knowing the right answer, who groomed him for months before abusing him for years. Where on the Opportunity Loss grid does he fit? He claims his lack of education held him back. But today he makes more money than I do, and I'm a lawyer. But "now" is not relevant. What could he have done if he had been cared for and had not been given a reason to doubt himself or fear his teachers?

Yet another hearing. Four this week. I know what is coming. This Application is detailed. I have heard this story before. I have heard this abuser's name. He was a cook and dorm supervisor. I know when he worked and where he worked. I know what he looked like. I can picture him doing what she says he did to her. I have pictured it before. I know what he wore. I know what he said and what he did and how he did it. But I cry still. Not because of the description of abuse but because of the ache in her voice. She loves her father as I loved mine. Mine was taken from me by disease. Hers lives still but has been taken from her in every other sense. At the end of her ten years away she no longer spoke his language or understood his ways. She loves him and wants to be close to him, like she was when she was little, but they are separated by a barrier as real to her as the veil between this world and the next is to me.

Her tears and mine. Our sadness. I can't say anything that will solve her grief any more than I can solve my own. There is no script for what Canada's Representative is supposed to say. Saying what I have heard older, more experienced colleagues say - that she is strong, has a long life yet to live, has done well despite her experience - seems condescending somehow, coming from my mouth. Hollow, considering my age and inexperience. But maybe I can reach out to her. I can promise her that it won't happen to any other little girl, or any other father. I can do that. I can say that and mean it. A genuine promise. A realistic goal for a career in public service. I can say that, young, green, and scared and mean it. Still selfish maybe, to speak of myself after hearing a story of another's life; raw, emotional, condensed. But it is all I can say. I now carry the weight of my country. Broad shoulders. Deep breaths. The weekend is almost here.

A Sense of Obligation

Very little about these stories or this process shocks me now. I have found a role for myself within this process. I am comfortable in my clothes, in the room, in front of the Adjudicator and in front of the Claimant.

But the battle is far from over.

The Claimants, I have been told, are scared of me. Not of “me” but of the institutions I represent. The same institutions that removed them from their families, imprisoned them as adults, and removed their own children. Some are angry at me. Again, not at me, but at what I represent, and so I am the face of the villain in their story. Some ignore me, some avoid me, some confront me. This is their story. It is their moment to rage. It comes with the job and I accept it.

But I will not allow Claimant’s counsel to paint me as the villain, to set up an imaginary confrontation. I work ever harder to present an image of Canada in keeping with my ideals. I want the Claimant to see a different face of Canada. I was given this responsibility to represent Canada to the Claimant, if only for these few hours. I can’t control anything else. Anyone else. I accept that too.

But I cannot accept the ambivalence of colleagues who do not work in the IAP. Or the disdain of others who do not see its value. We have taken on this process, as a government, and are responsible for completing it. I don’t deny that the Model is imperfect, that the tone and success of hearings is subject to the personalities in the room, but something had to be done. Or don’t you agree?

I will not let you, a stranger passing by, tell me that this process is a joke, a cheque-writing exercise to get rid of a lawsuit. I know you weren’t running the schools.

I know you aren't to blame. But neither am I. Do your research before you put me down for wanting to be involved.

To that stranger passing by, I say that you have a responsibility to look beyond the surface of the process to see its purpose. Shame on you for your ignorance. Shame on me for letting you pass by without correcting you.

There is something here that is important. Something that affects me not because it affects my person but because it affects my knowledge, my language(s), my country, my values, my identity. Our identity. I am touched by it and so are you – stranger passing by – though you may not know it. How do I tell you? How will you understand if you do not experience it for yourself? How can you understand my experience if I still do not? How can I tell you to sit, quietly, and listen to a story that caused me pain, hope that it will pain you too, and ask you to suffer the crisis I suffer?⁸ I feel responsible for you when I face a Claimant. I feel responsible to you when I carry out my responsibilities on your behalf. I want you to enter the discussion but I am paralyzed.

In the face of your comments, your disdain, and your distrust I have withdrawn myself from your gaze, while shooting daggers with my own. I moved away from the people and the work, but still I feel exposed and defensive.

Canada's Representative

In early 2009 I attended my first Independent Assessment Process (IAP) hearing as an observer. The week before I had been trained on Schedule D of the Indian

⁸ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010) at 12.

Residential Schools Settlement Agreement (IRSSA),⁹ and Canada's positions. I was 26 years old and a new lawyer.¹⁰ I had just started a job with Justice Canada in Whitehorse, Yukon, where part of my duties would be to act as Canada's Representative at IAP hearings.¹¹ I knew about the IRSSA but I didn't know the details; only that it existed. My training had prepared me to hear specific things. Words I had never spoken in public before had been discussed in detail: What is the difference between fondling and masturbation? How can you tell if one 14 year old was assaulting another or if it was "sexual exploration"? Is anal rape "repeated and persistent" if it occurred 4 times in one day or must it have happened over a period of months? Is it "intercourse" if the claimant was too young to ejaculate, or just "masturbation"? Uncomfortable but desensitized and somewhat prepared, I could steel myself for the descriptions of abuse. I told myself that this is why I am here. To listen. To bear witness.

I was not prepared to hear, at the end of that first hearing, the closing words that my colleague gave as Canada's Representative. I knew that we were to give an "acknowledgment" to the Claimant but I didn't understand, until I heard one given, the effect that hearing, and eventually saying, those words would have on me. That day the acknowledgement was long, personal, and for me, unsettling. I realized that my role was to represent my country in a larger way than a lawyer normally represents a client. While I acted as Canada's lawyer in these hearings, in that moment I interpreted my role as being more analogous to that of ambassador than legal advisor. How to speak within the

⁹ *Indian Residential Schools Settlement Agreement* (8 May 2006) online: Indian Residential Schools Settlement – Official Court Website <<http://www.residentialschoolsettlement.ca>> [IRSSA].

¹⁰ Called to the Law Society of Upper Canada in June 2008; the Law Society of Yukon in March 2009.

¹¹ The Author worked for Justice Canada from August-December 2008 and February 2009-September 2012. The Author is currently counsel for the Military Police Complaints Commission. The views and opinions expressed in this Thesis are entirely those of the author and do not reflect those of the Military Police Complaints Commission, the Department of Justice, or the Government of Canada.

boundaries of what a legal representative should say and also speak as a citizen, a patriot, a believer in the idea of Canada, while in full knowledge of the violations of human dignity that my country allowed to happen to the person sitting in front of me was a task I had never contemplated. The emotion of that moment, and of many moments afterwards, was unsettling. I am unsettled.¹² That is why I am here.

Challenging Process

What was this IAP I threw myself into? The IAP is an alternative dispute resolution process that provides monetary compensation to former students who suffered sexual and severe physical abuse while resident at an Indian Residential School (IRS). The “Acts” that may be compensated in the IAP are specific incidents of sexual and severe physical abuse listed in Schedule D of the IRSSA. The “Consequential Harms” that can be compensated in the IAP, likewise listed in Schedule D, are somewhat broader and include harms like broken bones, nightmares, guilt, pregnancy resulting from assault, psychiatric disorders, post-traumatic stress disorder, difficulties with interpersonal relationships, and sexual dysfunction. But the consequences that resonated most and that, to me, seemed to be the most pressing to many Claimants was the loss of childhood, of language, of family ties, and of traditional knowledge.¹³ These items were not always directly linked to the “Acts” suffered and were therefore not compensable in the IAP.

To be clear, I did not experience this discordance at every hearing and I do not wish to attribute these concerns to every Claimant whose hearing I attended, or to every survivor. Nonetheless it is the element that stayed with me well after the hearings were

¹² Paulette Regan has written about her own experience doing similar work as putting “a human face on colonial violence”, *supra* note 8 at 13.

¹³ See generally Zoe Oxaal, “Removing that which was Indian from the plaintiff”: tort recovery for loss of culture and language in residential schools litigation” (2005) 68:2 Saskatchewan Law Review 367.

over. If the Claimant's current suffering was because of a harm that was not being recognized by the IAP, what use was the process? Was compensation for the sexual abuse also enough to remedy the underlying racism that led to the policy that put the Claimant in a position where s/he was vulnerable to sexual abuse?¹⁴ Why is it that harms resulting from abuse are compensable but harms resulting from the racism that drove the IRS policy are not? Why did the settlement provide monetary compensation for abuse when the harm I heard most clearly was not the abuse but the loss of family, of language, of connection to one's history? Why should I care about that omission when all the parties negotiated and agreed to the IAP as it is?

The beginning of an answer might be found by examining the disconnect I felt between the legal and emotional purposes of the IAP. The emotional connection I felt with many Claimants emanated from my own life. My father died not two years before my first IAP hearing. While my mother is very much alive, I struggle to maintain my ties to her Franco-Ontarian roots. My *memère* had died three months before my father. As I learned when arguing to maintain French-language courses at my Anglophone high school, even official minority languages are in a tenuous position. While not on the same scale as the forced separation from family or the prohibition of speaking Indigenous languages experienced by survivors, these personal experiences allowed me a glimpse into their IRS experience. Enough to create empathy, which, along with the weight of those unfulfilled expectations, haunted me during the long Yukon winters.

A second piece of that answer may be the fact that I began working in the IAP in isolation from the other parts of the IRSSA. I looked at the IAP as the only remedy. I

¹⁴ Oxaal discusses whether aggravated damages for sexual assault can fill this need but notes that this argument has been rejected to date in *ibid* at 373.

had jumped in without stopping to look at the big picture. The result was that while I slowly became comfortable with the technical elements of the IAP and my role as Canada's Representative, I could not shake a discomfort about the process as a whole.

The Insider as Outsider

During IAP hearings I wore the mantle of Canada's Representative proudly, knowing that I could, or at least that I was trying to, work as a team with the Adjudicator and Claimant's Counsel to create a safe space for the Claimant and to demonstrate through my demeanour and words, respect for the people in the room and the process we were undertaking together. I could justify any flaws in the IAP by "doing good" in that moment, for that individual.

But I constantly felt a need to justify my commitment to IAP work to colleagues who were not involved in IAP hearings, or were not affected by them in the same way I was. And I actively avoided the subject with everyone else. It was just too much to explain, too hard to get people to understand. It was daunting. And it bred resentment.

I didn't want to speak unless I knew that I could convince every person in my life that what I was doing was important and that it was important to them. This is the crux of my reaction to the many people who passed through my life, whether family, friends, co-workers, classmates, teammates, or strangers. On this topic they all felt to me like my fictional "stranger passing by". He wasn't interested in these issues that I knew affected him and I started to see him, and everyone else around me, as irresponsible citizens.

I decided that this was not the best topic for a first date.

So I stepped away. I applied to the University of Victoria's Law and Society graduate program, and wrote the opening passages of this Chapter.

Justifying the Personal: Reflexive Auto-ethnography

Methodological choices are sometimes made deliberately after rigorous debate or trial and error. Sometimes they are made to satisfy the practical necessities of time or resources. Sometimes a student stumbles upon a methodology, not recognizing at first what it is or how it could be used. She resorts to it “as a means of getting across intangible and complex feelings and experiences that somehow can’t be told in conventional ways, or because the literature they are reading is not telling [her] story”.¹⁵ She knows only that it is right, emotionally, and that it is hard-wired into herself and her project. Or so I tell myself.

My methodology began as a journaling of what I wanted to express and why – of my personal experience and its lasting effects on me. As I progressed in my notes I realized that the narrative form suited the subject matter as a description (the IAP is a story-telling forum) as well as my need to share my experiences and to bring them to life.¹⁶ But what value does my personal narrative, even as an actor within the processes I study, have for the advancement of the law or of society? I readily admit that self-reflection alone does not a thesis make, but I could not suppress my need to make sense of my experiences to the academic archetype. So I transformed my journal into a personal narrative and began a study in auto-ethnography.

As a methodology “auto-ethnography shares the story-telling feature with other genres of self-narrative but transcends mere narration of self to engage in cultural analysis and interpretation.”¹⁷ The purpose of a narrative within auto-ethnography is not

¹⁵ Tessa Muncey, *Creating Auto-ethnography* (London: Sage, 2010) at 2.

¹⁶ Patricia Ewick & Susan S. Silbey. “Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative” (1995) 29:2 *Law & Society Review* 197 at 201.

¹⁷ Chang, *supra* note 2 at 43.

merely to tell a story but “to engage in a critical reflection on one’s relationship with others, as circumscribed by institutional practices and by history”.¹⁸ My narrative of the IAP is the lens through which I observe the social and legal concepts of harm and responsibility in an intergenerational polity.¹⁹ While auto-ethnography is more commonly used as a means to subvert the dominant account,²⁰ my auto-ethnography is not meant to be a subversive account so much as to show how my own account, which was the dominant, was subverted through exposure to a dominant institution that did not work “as advertised”. I hope that auto-ethnography will help me understand my role as a member of a dominant legal culture and as a person stepping away from it, recognizing that my observations and concerns sometimes place me at odds with co-workers and friends: “What is certain is that the practice of doing auto-ethnography at home invites reflexivity, as it becomes obvious that what separates us from those we study is not some essential and impermeable identity but, rather, our intellectual preoccupations.”²¹

The story I tell has emerged “out of the juxtaposition of [my] own experience and outside influences, and the interaction between the two.”²² Or, more precisely, from witnessing “the disjunctions that occur between one’s own experience and the official narratives set out to explain it”.²³ Auto-ethnography is, I hope, a reader-friendly narrative form, able to enhance cultural understanding of self and others, and potentially to transform the self, the researcher, and others and to motivate them for change.²⁴ For my

¹⁸ Anne Meneley & Donna J. Young, “Introduction” in Anne Meneley & Donna J. Young, eds, *Auto-ethnographies: the anthropology of academic practices* (Peterborough, ON: Broadview Press, 2005) 1 at 7.

¹⁹ Ewick & Silbey, *supra* note 16 at 203.

²⁰ Muncey, *supra* note 15 at 31.

²¹ Meneley & Young, *supra* note 18 at 7.

²² Muncey, *supra* note 15 at 10.

²³ *Ibid.*

²⁴ Chang, *supra* note 1 at 52.

purposes that change would be a conversation about what harms stemmed from the IRS system and who bears the responsibility for recognizing them.

Finally, as a methodology, auto-ethnography reflects, in part, a search for narrative continuity, a way to make sense of our past experiences and how it aligns with both the present we are living and the future we predict as a result.²⁵ And so the fit to my experience and subsequent preoccupations is obvious, though not without complications.

The Limits of Narrative

The use of experiential knowledge and narrative operates on a micro-level of analysis that is closest to the individual and most likely to be framed in terms of day-to-day life.²⁶ While this pinpoint of the IAP provides a necessary window into the emotion of the questions I seek to address, it also poses difficulties. First, my truth claims, my observation that Claimants experience harms outside of those addressed by the IAP, are not objective or infallible.²⁷ My own life and losses may have served to accentuate one type of harm above others. My take on the problem may distort the issue or ignore its complexity. For example, I may not have understood the Claimants' Indigenous concept of harm, and I may not have a complete understanding of the complexities of the IRSSA either in its design or implementation. I am also aware that I often combine my personal and professional interests when they might be best kept separate.

Finally, I must recognize that while I am using a methodology that can be used to subvert the dominant narrative, it may also be used to reinforce it, a particular concern

²⁵Carolyn Ellis & Arthur P. Bochner, "Autoethnography, Personal Narrative, Reflexivity: Researcher as Subject" in Norman K. Denzin & Yvonna S. Lincoln, eds, *Collecting and interpreting qualitative materials* (Thousand Oaks, Calif.: Sage Publications, 2008) 199 at 220.

²⁶ Colleen Sheppard, *Inclusive equality: the relational dimensions of systemic discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 66.

²⁷ *Ibid* at 69.

given my position as a member of the dominant social and legal culture.²⁸ In fact, as a litigator, I am trained to prepare arguments as narrative to better convince the judge why my interpretation of the law is superior.²⁹ In this instance, however, my use of narrative is unexpected because the context dictates that the Indigenous survivors are the story-tellers, both culturally and institutionally. The role of the non-Indigenous actors is to remain respectfully silent and listen. To bear witness. I respect this convention in the first instance – the initial story-telling – but challenge the perception that bearing witness is a passive exercise.

My narrative does not seek to overturn the legal establishment but it does seek to penetrate the minds of the readers and make them question the rules of participation in dispute resolution processes³⁰ and specifically the role that each member of a polity plays in creating, and maintaining, just institutions within society.³¹ I recognize that the narrative I write comes from the dominant culture and therefore risks adding to the hegemony,³² but my inquiry into the harms caused by the IRS legacy exists in the space where my existing hegemonic narrative of acts and harms failed in interpreting the situation in which I found myself. Acting as Canada's Representative forced me to put my own assumptions on the line.³³ It, in part, de-colonized my consciousness. It made me realize that the institution in which I was trained, and within which the Claimant and I are located,³⁴ did not adequately address our common history³⁵ regarding the IRS policy. In the search for order that ensued, that continues through this study, I guard against a

²⁸ *Ibid.*

²⁹ Also noted by Ewick & Silbey, *supra* note 16 at 206.

³⁰ *Ibid* at 208.

³¹ Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011) at 121.

³² Ewick & Silbey, *supra* note 16 at 212.

³³ *Ibid* at 214.

³⁴ *Ibid* at 220.

³⁵ *Ibid* at 213.

return to hegemony by using the narrative form which brings me back to the subverting moment, described in the narrative passages above, where it all fell apart.

And so despite these genuine concerns I adopt the position that the contingencies of human experience are not something the researcher must protect herself and her work from but a reality to explore and embrace.³⁶ Instead, personal reflection breathes life into the historical research on the history of the IRS policy and the literature on the recognition of harm that I explore in this thesis.

Expanding the Horizons

That said, my personal experience with the IRS legacy is limited to my experience working within the IAP. This fact is both the inspiration for this project and its weakness. Because I did not experience life in a residential school, and did not play a role in the negotiation of the IRS settlement as a whole, or any of the legal processes or political lobbying leading up to it, I cannot match my experience to the scope of my project. Rather, my auto-ethnography allows me to pose my foundational question in a manner that, hopefully, draws my readers into my experience allowing them to draw parallels to their own lives and engage with the question in a way that a simple statement of facts could not.

I begin the main body of this project by drawing out the array of harms caused by the IRS policy independent of any legal framework for their recognition through a review of the literature published by historians and survivors. The accounts I have selected mirror the accounts I bore witness to in IAP hearings, but are drawn only from public documents. I do not pretend to have compiled a complete list. My goal is rather to

³⁶ Ellis & Bochner, *supra* note 25 at 222.

provide my reader with a sense of the broadest possible range of harms that I was presented with during IAP hearings and which caused my personal confusion between the goals of the IAP and the harms experienced by Claimants. In order to present my reader with as authentic a list as possible I surveyed published accounts of survivors found in the historical records of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission of Canada (TRC), accounts collected by historians like John Milloy and Celia Haig-Brown, and the unfiltered publications of survivors themselves, like Theodore Fontaine and Alice Blondin-Perrin. Accounts were purposely chosen from across the country to demonstrate the similarity in experience of survivors from all regions of the country. I present the harms as lived experience from the arrival of the student at an IRS to the effects survivors currently identify in their lives.

Once the full range of harms has been established I explore the array of responses available to address those harms and how they have been applied to date. Again I cast a wide net and look at well-established legal responses like criminal prosecutions and recently popularized political responses like apologies. Just as there are harms that are not easily recognized in legal forums, there are responses to harm that are not well known and not as eagerly applied as, for instance, criminal prosecutions. My sources are published materials on the development of legal institutions, scholarly research on law, transitional justice, and the development of the Indian Residential Schools Settlement Agreement.

I then evaluate those responses for their effectiveness in addressing some or all of the harms I identified at the outset. I will argue that the narrow focus of many responses has meant that multiple responses have been required, whether applied independently or

in conjunction, in order to recognize the full range of harms I have identified. While largely implicit, my small contribution to the de-colonial project is my assertion that we must not fit the experience of survivors into our European-Canadian responses. Instead we must be alive to the actual harms caused and seek to combine, adjust, or reinvent our approach to be responsive to those harms. In order to develop this mindset I argue that we must shift our thinking from the current emphasis on institutions to a deeper and broader concept of responsibility for harm. This shift will allow Canadians, as a society, to understand how our institutions can be applied to effectively address the harms of the IRS policy.

While it could not be my complete methodology, I return often to auto-ethnography to test my assessment of the responses that have been applied to the harms of the IRS policy. That was my challenge in IAP hearings: how, as a lawyer representing a client, to perform an official function that was sometimes incompatible with the personal desire to be responsive to the survivor/Claimant sitting across from me. Constant reflection on that challenge is what grounds my current assessment of the available responses.

The Canadian Experience

The contingencies of human experience I explore operate in a Canada which included (at least) French, English and First Nations languages, (at least) Catholic, Anglican, Protestant and First Nation religions, and a variety of economies. The IRS system existed, and the responses to its legacy now exist, in the continuation of that cross-cultural context. This is what Australian philosopher Janna Thompson defines as a *polity*: “a political society that persists through time and across generations: an organized

entity capable of acting as an agent and taking responsibility for its actions.”³⁷ Put another way, Canada as a political society is a partnership between those who are living, those who are dead, and those yet to be born.³⁸

I developed out of a tradition too. In poetic terms:

I am someone’s son or daughter, someone else’s cousin or uncle... I belong to this claim, that tribe, this nation. Hence what is good for me has to be good for one who inhabits these roles. As such I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.³⁹

Because I cherish my joint Anglo-French heritage, I honour my forebears by speaking their languages and maintaining many of their traditions, though some traditions, regular Sunday mass, for example, have fallen away over the years.⁴⁰ I have reaped the benefits of existing in a bilingual and multicultural space that was created for me by generations of genealogical and political ancestors. “Canada” as a polity allows me to unite my Anglo- and Franco-Ontarian halves into a single unit “Canada”, when I might otherwise be required to divide my loyalties. I locate myself not so much in the “present” but at a point on the continuum my ancestors started and that will continue after I am dead. In this simple, personal way I have accepted a responsibility to my two cultures. I also accept, both as a practical reality of modern life, and as a choice I have made, to tie myself to the Canadian polity which, on a larger scale made commitments to my

³⁷ Janna Thompson, *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity* (New York: Routledge, 2009) at 1 [Thompson, *Intergenerational Justice*].

³⁸ Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Cambridge: Polity Press, 2002) at 148 quoting Edmund Burke, *Reflections on the Revolution in France* [Thompson, *Taking Responsibility*].

³⁹ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 2 ed (London: Duckworth, 1981) cited in Thompson, *Taking Responsibility*, *supra* note 38 at 11.

⁴⁰ Thompson, *Intergenerational Justice*, *supra* note 37 at 67: we have a duty to be true to their memories and intentions but are able to make our own decisions based on better reasoning, or at least our own updated reasoning. For example, I don’t attend church, as both my grandmothers did, but believe I am still a moral person without the guidance of a church leader or belief in God.

forebears and to me⁴¹ from which I benefit and intend to defend and carry forward for subsequent generations of Canadians whether they are my direct descendants or members of the polity generally. My identity is tied to my membership in Canadian society.

What flows from this membership? I have already expounded on the virtues and benefits of membership in the Canadian polity but are there corollary responsibilities or obligations? Yes.⁴² Thompson, in discussing Alasdair MacIntyre's "moral starting point" links the individual to her community's past and future:

The self, he says, has a history that stretches back before birth. And he contrasts this 'narrative view of the self' with the viewpoint of modern individualism which detaches the self from all social relationships and denies that a person can be held responsible for 'what his father did or for what his country does or has done'. The modern individualist is likely to deny historical obligations, but those with a narrative view of themselves cannot.⁴³

MacIntyre's [account] presents a 'strong' account of collective responsibilities in the sense that he makes them follow from an identity with, or commitments to, a community. It claims that we have a relation to our community that entails special responsibilities, including historical obligations.⁴⁴

Following this framework, if my polity has failed to uphold a commitment, or has caused a harm, I am responsible for the consequences. The fact that I played no part in the harmful act is irrelevant.⁴⁵ This is why I feel responsible for the IRS legacy. I just couldn't, in early 2009 in that first IAP hearing, put that feeling into words.

What I felt was a dual responsibility. The first, and the more selfish, was a growing sense that my antecedents, in their stewardship of the Canadian polity, had not upheld their obligation to me: That I had been thrown into those hearing rooms and was

⁴¹ See, for example, section 23 re language rights, and section 15 re equality rights for women enshrined in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

⁴² Thompson, *Intergenerational Justice*, *supra* note 37 at 79.

⁴³ Thompson, *Taking Responsibility*, *supra* note 38 at 11 (citations omitted).

⁴⁴ Thompson, *Ibid.*

⁴⁵ Thompson, *Intergenerational Justice*, *supra* note 37 at 79-80.

experiencing so much confusion because of decisions that should have been decided differently. I was angry not on behalf of the abused Claimant, but for myself. The respectful intergenerational relationship the Claimant and I were meant to have had was damaged. So much so that I created her as a separate entity in this Thesis instead of looking at us both as members of the same polity who were both harmed (though not equally) by the IRS policy.

The second was what my reader likely expects me to have felt: that my polity had breached its obligations to the polity of the Claimant. The treaty that included a school for children on the reserve had been transformed into a statutory requirement to be taken to a boarding school where harm was done to the intergenerational interests of the survivor.⁴⁶ Children across the country had not been treated with the dignity and respect due to them as human beings. I recognize this. But I struggle with taking the blame for those acts. I am not liable for the IRS policy. I resist, still, any shame or guilt. I don't want it and I don't believe I deserve it. I didn't create, carry out, or want the IRS policy. I hadn't even become aware of the policy before it was cancelled. I needed a different language, a different framework, for thinking about my role, both personally and professionally, before I could take responsibility for the IRS policy. Others have made this distinction and proposed a conceptual solution:

Individuals can be blamed or found guilty only on the basis of what they have done; the moral and legal concern the self in that personal sense. Political responsibility, on the other hand, concerns how things stand in the world. Whatever the cause of sufferings, they are our responsibility to notice and address. Or, the sins of our fathers have continuing effects, and inasmuch as we belong to a political community continuous with theirs, we have responsibility for them.⁴⁷

⁴⁶ Thompson, *Ibid* at 81.

⁴⁷ Young, *supra* note 31 at 78.

In her work, Iris Marion Young puts forward a public and shared concept of responsibility to engage members of a society who are not personally to blame for harm in the resolution of harm. I pair Young's concept of responsibility with Thompson's concept of intergenerational politics to create the "responsibility" that I apply to the reparations for the IRS policy in the rest of this piece.

The Ethics of Auto-ethnography

My training as a lawyer, and my work within the IAP and as a public servant, mean that I approach the question of harm and of the institutions we have constructed to address them from an insider's perspective of the law, as opposed to a theoretician's or a lay-participant's view. While I will draw from theories of harm, justice, and responsibility, I do not propose to develop a theory specific to this project. Instead, I use what is already in the public sphere to question the assumptions underlying the dispute resolution mechanisms we have chosen to apply to the IRS legacy. While I was drawn to the questions of harms and reparations because of my limited interactions with IRS survivors, I am not able, and do not pretend, to approach these questions from the perspective of a survivor. My perspective is first and foremost that of a Canadian, one who is also a lawyer and a public servant.

My narrative account collapses the evolution in my thinking about my role as Canada's Representative into a series of vignettes set in and around a set of fictional IAP hearings. While each reflects my IAP experience, they are not archives. I have chosen the narrative form as the best means to "convey the meaning" that I attach to my

experience. Doing so allows the facts to fall away and take second place to empathy,⁴⁸ in order to convince my reader to take a journey with me.⁴⁹

In so doing I also hope to protect the privacy of the Claimants, lawyers, adjudicators and co-workers of whom I write while conveying the intimacy of an IAP hearing and the frustrations I felt outside the hearing room.⁵⁰ My small workplace and small pool of Claimant's counsel and adjudicators with whom I worked means there is a risk of identification that I have sought to minimize in the composite narratives.⁵¹

Whose story is it anyway?

I have had misgivings about my research: that I might be trampling on the lives, experiences, and stories of others - that I had no right and no ability to tell the story of the residential schools because I am not Indigenous and have never experienced abuse. I was comforted and encouraged by several authors who each wrote of similar anxieties and their conclusion that they should continue their work. As historian John Milloy has written, this is not an Indigenous story. The history of IRS system is a Canadian story that can, and should, be explored by all Canadians:

The residential school system was conceived, designed, and managed by non-Aboriginal people. It represents in bricks and lumber, classroom and curriculum, the intolerance, presumption, and pride that lay at the heart of Victorian Christianity and democracy, that passed itself off as caring social policy and persisted, in the twentieth century, as thoughtless insensitivity. The system is not someone else's history, nor is it just a footnote or a paragraph, a preface or chapter, in Canadian history. It is *our* history, *our* shaping of the "New World"; it is *our* swallowing of the land and its First Nations peoples and spitting them out

⁴⁸ Ellis & Bochner, *supra* note 25 at 228.

⁴⁹ As per *ibid* at 232.

⁵⁰ I signed, prior to each IAP hearing, a confidentiality agreement. I am also bound by solicitor-client privilege, and by my duty of loyalty to my employer as a member of the public service.

⁵¹ Chang, *supra* note 2 at 55-56, 68.

as cities and farms and hydroelectric projects and as strangers in their own land and communities.⁵²

In this understanding I ground my use of autoethnography.

Milloy is joined in his belief by the Commissioners of the Truth and Reconciliation Commission of Canada who have also written about the IRS legacy as a joint story in which all Canadians are a part:

This is our story and Canada's story.

In talking about residential schools and their legacy, we are not talking about an Aboriginal problem, but a Canadian problem. It is not simply a dark chapter from our past. It was integral to the making of Canada. Although the schools are no longer in operation, the last ones did not close until the 1990s. The colonial framework of which they were a central element has not been dismantled.⁵³

...

This story is not over.

The history recounted in this book will cause many Canadians to see their country differently. It is painful to discover that, as a nation, we have not always lived up to our ideals or the image we seek to project on the international stage. That does not mean we should abandon our ideals. We cannot change the past, but the future is in our hands. We are called to undertake the ongoing work of reconciliation: to right the relationship between Aboriginal and non-Aboriginal Canada. This is no easy or straightforward task. We need to revive old visions in which these communities came together in a spirit of sharing and mutual exchange.⁵⁴

I take hope from their hope, as I join them in this process of witnessing and sharing.

What Follows

In keeping with the understanding that the IRS legacy is a *Canadian* story, I have an intensely personal goal for this project: to weave together the strands of my duties acting as Canada's Representative, my identity as a Canadian, and my relationships with the people I meet in daily life. While examined through the prism of the law and my

⁵² John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at xviii (emphasis in original).

⁵³ Truth and Reconciliation Commission of Canada. *They Came for the Children: Canada, Aboriginal Peoples, and Residential Schools* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 3 [TRC, *Children*].

⁵⁴ *Ibid.*

lawyer's brain, the IRS legacy is inherently social and political. It involves a range of actors in Canadian society in the past and the present.

Partly because of the space allotted for an LLM thesis and partly because of my decision to focus on the concepts of harm and responsibility some relevant concepts will be omitted or treated only lightly in this project. Notably, I do not engage in a deep discussion of theories of justice. This study also makes an artificial extraction of the IRS policy from the broader context of colonialism. The IRS system was put in place as part of the colonial endeavour but there is only room in this work to address the one example of colonialism. I also largely exclude any discussion of the responsibility of church entities or other bodies who administered the schools, focusing on the Canadian state and citizens as the bearers of the responsibility for reparations. This selection also allows me to stay close to my personal experience of acting as Canada's Representative.

Building on the warnings and wishes in the **Prologue** and the methodological explanation in **Chapter One**, in **Chapter Two** I provide a history of the IRS system that draws out the broad range of harms experienced by survivors and intended by policy makers, including those that have been recognized in the courts and those that have not. I will then set up the lens through which Canadians have, to date, viewed the harms caused by the IRS policy in **Chapter Three**, which concludes with a discussion of the limitation of that present framework of responses and suggest other possible lenses. In **Chapter Four** I describe thirteen dispute resolution mechanisms that have been applied to the IRS legacy and draw out the concepts of harm and responsibility that underlie them. Finally, in **Chapter Five** I pull down from the available theoretical framework and the responses

applied to date to describe the consequences of our approach to reparations and suggest ways to refocus our efforts to engage Canadians in our responsibility for the IRS legacy.

Chapter Two: History and Harms

“Harms” can be described in many ways: individual, cultural, torts, crimes, personal, property-based, historical, continuing, intergenerational, intentional or unintentional, to name a few options. But these descriptions are more than just synonyms; they are classifications that have repercussions for the legal and political recognition of harm. For example, only certain harms are recognized by the current Canadian justice system. This Chapter seeks to identify all of the harms that have been linked to the IRS policy, whether recognized at law or not. In keeping with the narrative style of the previous Chapter, I draw from first-person accounts of both the creation of the policy and life at the schools to paint a picture of the experience. I then regroup these descriptions into categories that align roughly with the institutions we have available to recognize harm.

Defining Harm

In looking at the history of the IRS policy it becomes evident that there were intended harms, and unintended harms. It is important to this analysis that the sexual and severe physical abuse of students was unintended. The intended harms are less widely recognized. They are found in the historical records of parliamentary debates, letters to and from Indian Agents and the Department of Indian Affairs, and the school administrations about the IRS policy. I begin with those records.

The Intended Harms

While I cannot address the entire story of colonialism in this project I cannot ignore the fact that it is the genesis of the IRS policy. I have excised the IRS policy from

this broader context as both an instrument and an effect of colonialism that can be tackled with discrete measures. I leave it to another day to determine if those measures and analysis can be applied to the other instruments and effects of colonialism in Canada or to colonialism in its entirety.

Civilization and Christianization had been the policy of church organizations in Canada since the Recollet missionaries opened the first mission school in 1620.⁵⁵ As the colony and later Dominion of Canada developed, this mission was folded into the process of nation building. An 1847 report commissioned by the Province of Canada demonstrates that the government saw education as a means of controlling and assimilating the Indigenous⁵⁶ population. The report expressed the need to “...raise them [the Indians] to the level of the whites”.⁵⁷ And further that their “education must consist not merely of the training of the mind, but of a weaning from the habits and feelings of their ancestors, and the acquirements of the language, arts and customs of civilized life.”⁵⁸ As stated by the Royal Commission on Aboriginal Peoples, “Selfless Christian duty and self-interested statecraft were the foundations of the residential school system”.⁵⁹

Civilization, Christianisation and assimilation through schooling became official policy of the Dominion government in 1883 following a report by MP Nicholas Flood

⁵⁵ J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: U of T Press, 1996) at 39 [Miller, *Shingwauk*].

⁵⁶ **NB:** When discussing Indigenous peoples I use their First Nation, where known, or “Indigenous” or “First Nations” as an umbrella term, but use the term “Indian” where it is a defined term in legal or policy documents, and the Parliamentary record.

⁵⁷ Alison L. Prentice & Susan E. Houston *Family, School and Society in Nineteenth-Century Canada* (Toronto: Oxford University Press, 1975) quoted in Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Arsenal Pulp Press, 1988) at 29.

⁵⁸ *Ibid.*

⁵⁹ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 335 [RCAP, “Report, vol 1”].

Davin⁶⁰ into the use of residential schools in the United States where they had been used to further the US policy of “Aggressive Assimilation”. The goal of the Canadian policy was to ensure the rapid assimilation of First Nations children into the body politic and to create a “class of labourers and domestic workers to support the emerging agricultural and commercial economy of Western Canada.”⁶¹ What is understood today to be part of the racist colonial project was seen then as a necessary adjunct to nation building.

Attendance at an IRS was made compulsory in 1886 through *The Indian Act*.⁶² Subsection 137(2) allowed for the arrest, conveyance and detention of children at the school and a fine or imprisonment for parents who did not send their children to school. Subsection 138(2) gave the Governor General the power to establish industrial and boarding schools and to commit students under the age of sixteen to such institutions. Mandatory attendance was enforced through amendments to the *Indian Act* in 1894⁶³ and in 1920 the *Indian Act* was amended to allow the police to enforce the attendance provisions.⁶⁴

The Department of Indian Affairs (DIA) mandated standards for washing, clothing, meals and health care to ensure a safe, healthy, nutritious, and home-like environment for the residents. Government reports also stated that corporal punishment was to be resorted to only “in extreme cases” and never so “severely that bodily harm

⁶⁰ Nicholas Flood Davin, *Report on Industrial Schools for Indians and Half-Breeds* (Ottawa, 14 March 1879) To the Right Honourable Minister of the Interior (J.A. Macdonald) online: Early Canadiana Online < <http://eco.canadiana.ca.ezproxy.library.uvic.ca/view/oocihm.03651/3?r=0&s=1>>.

⁶¹ Richard A. Enns, “But What is the Object of Educating These Children If It Costs Their Lives to Educate Them?": Federal Indian Education Policy in Western Canada in The Late 1800s” (2009) 43:3 *Journal of Canadian Studies* 101 at 117.

⁶² RSC 1886, c43, s 137.

⁶³ SC 1894, c 32, s 11.

⁶⁴ SC 1919-20, c 50, s 1. Copies of all these amendments are collected in Sharon Venne, *Indian Acts and Amendments, 1868-1975: an indexed collection* (Saskatoon: University of Saskatchewan, Native Law Centre, 1981).

might ensue”.⁶⁵ These regulations and ideals were undercut by inadequate funding and lack of inspection by the government.⁶⁶ J.R. Miller describes the tension between maintaining standards and containing costs:

Wherever they were located residential schools operated approximately in the same way and with much the same results. The Department of Indian Affairs authorized the creation of the schools, established the maximum number of students for which it would pay grants, and regularly negotiated the amount of its per capita subsidy. The churches staffed the schools, supplemented the government's always insufficient funding, and operated the institutions from day to day. Nominally, Ottawa exercised oversight through inspectors, but their visits were infrequent and their influence minimal. Until the second half of the 1950s residential schools operated on the half-day system Students spent half their time in class and half in work around the schools.⁶⁷

The half-day system, first used to provide an industrial skills education, became a convenient and necessary method of reducing the costs of running the schools.⁶⁸ Despite the Department's regulations, the RCAP detailed several incidents where contemporary authorities knew of severe physical punishment and abuses and the Government decided to ignore the claims of the students.⁶⁹

From the Davin Report it is clear that the schools were meant to encourage students (once civilized) to become part of Canadian society. For example, recommendation 12 stated:

Where boys or girls, whether Indians or half-breed, show special aptitudes or exceptional general quickness, special advantages should be offered them, and they should be trained to become teachers and clerks in connection with the Department, as well as fitted to launch out on commercial and professional careers.

⁶⁵ Milloy, *supra* note 52 at 138, but see RCAP, *Report*, vol 1, *supra* note 59 at 366-67 which stated that physical punishment was normal for the time and expected to be used.

⁶⁶ Milloy, *supra* note 52 at 42 see also RCAP, *Report*, vol 1, *supra* note 59 at 353 ff and especially 369 re principals being left to police themselves, and TRC, *They Came for the Children*, *supra* note 53 at 18.

⁶⁷ J.R. Miller, *Lethal Legacy: Current Native Controversies in Canada* (Toronto: McClelland and Stewart, 2004) at 245-46 [J.R. Miller, *Lethal Legacy*].

⁶⁸ Milloy, *supra* note 52 at 169.

⁶⁹ RCAP, *supra* note 59 at 371.

Further, the schools were to be properly supplied and staffed as per recommendation 13: “The salary of a teacher must be such as will induce good men to offer themselves. The teacher should be paid according to his qualifications.” Unfortunately the inadequacy of the education received at residential schools was evident from an early stage of the policy. M. Benson, an Indian Agent assigned to the Blood Reserve in 1903, wrote to the Superintendent General of Indian Affairs: “Any lad who has never left the reserve, is at the age of 18, far better off than a lad who has been in school for years, and what is more is very much more self-reliant and able to make his living as easy again as any of these school lads.”⁷⁰

Even if the schools had maintained the highest standards of sanitation, nutrition and education, it must be remembered that the underlying goal was to “civilize” the children. This civilizing mission is evident in various letters and addresses. For example, Chief Superintendent of Indian Affairs Philip Vankoughnet wrote to Prime Minister John A. Macdonald in August 1887 describing the common wisdom of the day:

Give me the children and you may have the parents, or words to that effect, were uttered by a zealous divine in his anxiety to add to the number of whom his Church called her children. And the principle laid down by that astute reasoner is an excellent one on which to act in working out that most difficult problem - the intellectual emancipation of the Indian, and its natural sequel, his elevation to a status equal to that of his white brother. This can only be done through education....⁷¹

Or, as was stated in the 1895 DIA Annual Report:

If it were possible to gather in all the Indian children and retain them for a certain period, there would be produced a generation of English-speaking Indians, accustomed to the ways of civilized life, which might then be the dominant body among themselves, capable of holding its own with its white neighbours; and thus

⁷⁰ Quoted in Milloy, *supra* note 52 at 159.

⁷¹ Quoted in Milloy, *supra* note 52 at 7.

would be brought about a rapidly decreasing expenditure until the same should forever cease, and the Indian problem would have been solved.⁷²

This sentiment was echoed by Frank Oliver, Minister of Indian Affairs in 1908 who, while critical of the IRS system, continued to support education for First Nations children as it would “elevate the Indian from his condition of savagery” and make “him a self-supporting member of the State, and eventually a citizen in good standing.”⁷³

Segregation was the key to civilizing the children. In his 1879 report Davin had recommended residential schools above day schools as the US experiment had found that “the day school did not work because the influence of the wigwam was stronger than the influence of the school”.⁷⁴ This finding was echoed in the 1889 DIA Annual Report in which the Superintendent General of Indian Affairs stated the residential school to have two advantages: “[It] dissociates the Indian child from the deleterious home influences to which he would otherwise be subjected. It reclaims him from the uncivilized state in which he has been brought up.”⁷⁵ The same sentiment was found in parliamentary debates when, for example, Hector Langevin, Minister of Public Works stated:

[I]f you wish to educate these children you must separate them from their parents during the time that they are being educated. If you leave them in the family they may know how to read and write, but they still remain savages, whereas by separating them in the way proposed, they acquire the habits and tastes—it is to be hoped only the good tastes—of civilized people.⁷⁶

Along with influence of their home communities, language was a barrier in the mission to civilize. Consequently the 1896 DIA Programme of Studies for residential schools stated: “Every effort must be made to induce pupils to speak English and to teach

⁷² Dominion of Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895*, online: Library and Archives Canada <www.collectionscanada.gc.ca> at xxiii.

⁷³ Milloy, *supra* note 52 at 3, see also Davin, *supra* note 60.

⁷⁴ Davin, *supra* note 60.

⁷⁵ 1889 Department of Indian Affairs Annual Report at xi, cited in Elizabeth Furniss, *Victims of Benevolence: The Dark Legacy of the Williams Lake Residential School* (Vancouver: Arsenal Pulp Press, 1995) at 27.

⁷⁶ Quoted in Enns, *supra* note 61 at 108.

them to understand it; unless they do, the whole work of the teacher is likely to be wasted.”⁷⁷ and further stating in the DIA Annual Report of 1895 that: “So long as he keeps his native tongue, so long will he remain a community apart.”⁷⁸

As John Milloy wrote in his work, *A National Crime*:

That the Department and churches understood consciously that culture or, more particularly, that the task of overturning one ontology in favour of another was the challenge they faced is seen in their identification of language as the critical issue in the circle. It was through language that the child gained its ontological inheritance from its parents and community. The word bore the burden of the culture from one generation to the next. It was the vital connection. The civilizers knew it must be cut if any progress were to be made.⁷⁹

Language is the doorway into a culture, as I well know from my Franco-Ontarian roots.

The Indian Residential School system carried on. At its height in 1931 there were 80 institutions in operation.⁸⁰ It is estimated that 150,000⁸¹ students attended one of more than 130 schools.⁸² The policy contains a stark contrast between the noble and charitable desire to lift First Nations children out of their primitive state and into the Christian world and the racism underlying the concept of Christianization itself. In a speech to the House of Commons in 1920, in support of an amendment to the Indian Act to make school attendance mandatory for all Indian children between the ages of 7 and 15, Duncan Campbell Scott made clear the government’s narrow vision of the IRS policy:

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there

⁷⁷ 1896 Department of Indian Affairs Annual Report at 398-99 quoted in Milloy, *supra* note 52.

⁷⁸ 1895 Department of Indian Affairs Annual Report at xxii-xxiii quoted in *ibid* at 38.

⁷⁹ *Ibid.*

⁸⁰ Milloy, *supra* note 52 at 102, see also TRC, *They Came for the Children*, *supra* note 53 at 18.

⁸¹ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada Interim Report*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 1 [TRC, *Interim Report*].

⁸² These are the schools that are recognized in Schedules E and F of the IRSSA, *supra* note 9.

is no Indian question, and no Indian department and that is the whole object of this Bill.⁸³

As was famously said, the goal of the IRS policy was “to kill the Indian in the child”.⁸⁴

This was attempted through segregation from family and instruction in English or French only, causing harm to the students’ family units, language skills, traditional knowledge and religion. While other harms occurred at the IRS, these are the harms that were expressly intended by the system and the policy. As stated by the TRC: “When put into practice, these noble-sounding ambitions translated into an assault on Aboriginal culture, language, spiritual beliefs, and practices.”⁸⁵ These were the intended harms.

The Unintended Harms

The experience of IRS students was not exactly what the government officials intended. Alice Blondin-Perrin clearly remembers her first impression upon seeing the building at the St Joseph’s Catholic Mission School in Fort Resolution, NWT:

The place I’d come to was the biggest building I had ever seen. The residence was huge when I arrived here in 1952. At the mission entrance, there was a parlour with frosted windows all around. Three strangers met us, dressed very strangely. One was a priest. The other two were Grey Nuns. The priest was dressed in a black cassock, the nuns in dark tan habits with a still, black, heart-shaped lace around their faces, and black material covering their heads. They looked alien to me. I was scared, even though they smiled. They talked to us in a strange language.⁸⁶

A former student of St Marc-de-Figuery residential school in Amos, Quebec “felt stripped of her identity” upon entering the school: “I was number one hundred and

⁸³ Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the administration of Indian affairs in Canada* (Vancouver: UBC Press, 1988) at 50.

⁸⁴ House of Commons Debates, 39th Parl, 2nd Sess, No 110 (11 June 2008) at 1515 ff (Right Hon. Stephen Harper (Prime Minister)) online: Parliament of Canada <http://www.parl.gc.ca/HousePublications.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3568890> [2008 Apology].

⁸⁵ TRC, *They Came for the Children*, *supra* note 53 at 10.

⁸⁶ Alice Blondin-Perrin, *My Heart Shook Like a Drum: What I Learned at the Indian Mission Schools, Northwest Territories* (Ottawa: Borealis Press, 2009) at 11.

sixteen. I was trying to find myself; I was lost. I felt like I had been placed in a black garbage bag that was sealed. Everything was black, completely black to my eyes and I wondered if I was the only one to feel that way.”⁸⁷ A Salteaux survivor from Duck Lake found the routine of the school left him “feeling lonely all the time”.⁸⁸ At the schools students experienced widespread racism, serious overwork in some cases, lack of emotional support, being “only a number”, and “living by bells”, and lack of affection or positive reinforcement.⁸⁹

The use of corporal punishment was common at residential schools. Though severe punishments were prohibited by policy, many students were subject to the “arbitrary and unpredictable use of physical violence in the guise of discipline and correction”.⁹⁰ Pauline Arnouse, a survivor of Kamloops IRS remembered: “When we couldn’t get our additions and subtractions right, I remember her using the whip on our knuckles. I remember my knuckles being black and blue and sore.”⁹¹

Racism was embedded in many common IRS practices. Martha, a survivor of Kamloops IRS, recalled:

At the Indian residential school, we were not allowed to speak our language; we weren't allowed to dance, sing because they told us it was evil. It was evil for us to practice any of our cultural ways....

Some of the girls would get some Indian food....They'd take it away from us and just to be mean they'd destroy it right in front of us.⁹²

Students were punished for speaking their language. As one survivor explained, “I was punished quite a bit because I spoke my language....I was put in a corner and punished

⁸⁷ TRC, *They Came for the Children*, *supra* note 53 at 23.

⁸⁸ J.R. Miller, *Shingwauk*, *supra* note 55 at 337-38.

⁸⁹ *Ibid* at 339.

⁹⁰ *Ibid* at 324.

⁹¹ TRC, *They Came for the Children*, *supra* note 53 at 26.

⁹² Haig-Brown, *supra* note 57 at 58.

and sometimes, I was just given bread and water....Or they'd try to embarrass us and they'd put us in front of the whole class.”⁹³ A Salteaux survivor of St Philip's school was told that her language “belonged to the Devil”: “They told us that our parents, our grandparents, all our people, out there whenever they have these things going, they were chanting to the devil.” The result of this de-valuing of her traditional practices was that the survivor “became ashamed of being Indian” and learned to hate her race and herself.⁹⁴

When students were able to adapt to life at the schools some questioned their parent’s love:

In time they come; you got used to it, [the school]....You were tore in-between....I know I blamed my parents for putting me there because I felt they didn't want me. And I blamed the sisters and fathers that they were trying to take something away from me...I felt I was beginning to have hate....I was beginning to have resentment against my mother and my dad because I felt it....that they didn't love me, that they just put me in there and threw me to the wolves.⁹⁵

Theodore Fontaine, a survivor of the Fort Alexander and Assiniboia IRSs described the abandonment he felt upon being taken to the IRS and its effects on his life:

I learned years later, in a session with a therapist, that this abandonment not only had a huge effect on my personality and how I'd lived to that point, but also gave rise to a reaction in me - guilt and guilt transfer -- that had affected everyone I knew, particularly people I love. You feel guilt for the most insignificant things, even when it doesn't make the slightest sense. Almost always the guilt becomes blame, and when it's turned inward, you feel you've done something wrong. My first reaction to most situations is to become defensive and aggressive as I think: “What did I do wrong?”⁹⁶

Many students were also victims of sexual assault. A well-known case of abuse at an IRS is that of Willie Blackwater. His abuser, Arthur Plint was convicted in 1995.

In *Stolen from our Embrace* Mr. Blackwater describes the abuse:

⁹³ *Ibid* at 82.

⁹⁴ J.R. Miller, *Shingwauk*, *supra* note 55 at 205.

⁹⁵ Haig-Brown, *supra* note 57 at 86.

⁹⁶ Theodore Fontaine, *Broken Circle: The Dark Legacy of Indian Residential Schools, A Memoire* (Victoria: Heritage House, 2010) at 33.

Arthur Henry Plint was the dorm supervisor for the younger boys, boys my age. My first week there he woke me up in the middle of the night. He told me to come into his office because there was an emergency phone call from my father. I got up immediately and went into the office. The phone was off the hook all right, but when he came in he hung it up and said there was no phone call, he just needed to talk to me. He said that he'd noticed me and taken a liking to me. He said boys like me could be treated special if they cooperated. I kept telling him that I wanted to go back to bed.

He had a door from his office right into his bedroom. He took me there and dropped his robe, and faced me, naked. I tried to run. He pushed me onto the bed and told me to shut up or I'd be in deep trouble. He told me to take my pyjamas off and started to masturbate me, then he put his mouth on my penis and made me do the same to him, until he ejaculated in my mouth. I started to get sick and tried to puke. He laughed and told me if I puked on his bed I'd get hurt.

When I left that first time he said to me, now when I wake you up I want you to come quietly or I'll hurt you pretty bad in front of everybody, and then everyone will know what I'm doing to you. The next time he got me in the night, about a month later, it was the same thing, fondling and everything, only this time he turned me over on my stomach and he penetrated me. It was so painful I tried to scream, but he grabbed a pillow and told me to bite on it. He said if anybody heard me cry out I'd be pretty sorry. After that Plint raped me anally about once a month for the next three years.⁹⁷

Other students suffered similar abuses. One former resident of Kamloops IRS, who had previously attended, and been abused by fellow students at the Williams Lake Mission School, described how he was abused by a supervisor:

Then the supervisor told me to go into his room, he had to talk to me. It was fall time and it was dark outside already. I remember going into his little room. He had this bed in there and he had a desk, then he closed the door, that fucking asshole I'll never forget that. He told me he would protect me, he said, "I'm the only protection you're going to have here because you're an outsider." He said, "If you don't listen to what I tell you to do then I'm going to let those guys do whatever they want to do with you." He said, "I'll tell them to beat up on you everyday, I'll tell them to hurt you, if you don't do what I ask you to do." So I asked him. "What do you want me to do?" Started that shit all over again just like the Mission. But this time it was somebody that was supposed to be in a trusting position. Somebody that was suppose [sic] to have been looking out for our

⁹⁷ Suzanne Fournier & Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre, 1998) at 66-67.

welfare, this guy abused me. Every time he got drunk I got dragged into his room, I hated it here, this guy was one of our own people.⁹⁸

Sexual abuse occurred in all parts of the schools, residences, grounds, and churches. As Rose-Anna, an Anishinabek student from Pikogan recalled:

I had a very low self-esteem because I had been abused by the priest. The priest would say to me in the confessional, “Come here, come closer, I can’t hear you.” And then he would touch me. Whenever the children came out of the confessional crying, I knew what was going on. For me, everything related to sex repulsed me. And I felt guilty, I was ashamed of it. I felt dirty. I understood those who were subjected to the same types of things.⁹⁹

Like my fictional Claimant in Chapter 1, and William, an Anishinabek student of Saint-Marc-de-Figuery IRS in Amos, Quebec, many students, once they returned home, found that there was a gulf between themselves and their family:

Whenever my brothers left for the residential school, they would disappear for several months at a time and I didn’t know where they were off to. However, in addition to the separation, the thing I found the hardest to deal with was after three or four years our mother would say to us, “I don’t recognize you anymore.” There was a deep and genuine rupture – between us and within us.¹⁰⁰

Survivors have linked a variety of personal, family, and community problems to the experience of the Residential Schools:

[A]ll the suicides, the alcoholism, the very low self-esteem of our people, the sexual abuse, the loss of our language and culture, the family breakdown, the dependency on others, the loss of pride, the loss of parental skills, and all the other social problems that have plagued our people can be traced directly back to the schools.¹⁰¹

Some survivors pinpoint the harms they suffer to incidents of sexual abuse but others blame the atmosphere of the schools generally:

⁹⁸ Agnes Jack, ed, *Behind Closed Doors: Stories from the Kamloops Indian Residential School* (Penticton: Theytus Books, 2006) at 176.

⁹⁹ Marie-Thérèse Dumont, *Collection of life stories of the survivors of the Quebec Indian Residential Schools*, translated by Wendatraductions (Wendake, Quebec: First Nations of Quebec and Labrador Health and Social Services Commission, 2010) at 70.

¹⁰⁰ *Ibid* at 81.

¹⁰¹ Bev Sellers quoted in Furniss, *supra* note 75 at 125.

Living without love for so many years left its mark on me, and often the negative repercussions are passed on from generation to generation. Some residential school students looked for love in the wrong places, some used the violence they learned, some abused alcohol to numb themselves from the past, and some broke the law and went to prison, feeling comfortable in institutions. Many could not survive without order, and constantly being told what to do. Most of us did not know how to look for permanent jobs, cook, or raise children. We didn't have the tools to break the cycle of abuse, myself included. Even now I moan and cry out loud when I am sleeping. I grind my teeth every night, so badly that some of my teeth are out of alignment. Much as I want to, I cannot stop these bad habits.¹⁰²

Many former students came away from the schools naive or confused about sex and their own sexual identities. Some became submissive or withdrawn: "I believed sex was a sin so I couldn't enjoy the act, but I learned to be submissive, as I thought that's what I should be doing."¹⁰³ Others became promiscuous, "thinking this was the only way they could feel close to another person."¹⁰⁴

The impact of the Residential Schools is also felt by survivors' family and friends. Survivor Elise Charland described her relationship with her children as abusive: "My children were growing up with my abusive behaviour of slapping, whipping, and screaming at them for everything they did. I loved them in a very sick way."¹⁰⁵ An anonymous survivor described how she parented her children without affection:

I don't even know how to hug my kids. They come and hug me sometimes and I hug them, but then I just step right away, because I don't know. I want to work on it but I don't know how. ... It is like bringing my kids up, I brought them up the same way I was brought up in the residential school. They had to kneel in a corner, they had to stand in a corner. If they didn't finish their food they had to go stand in a corner or kneel in a corner or do their chores. I brought them up the same way I was brought up at the residential school.¹⁰⁶

¹⁰² Blondin-Perrin, *supra* note 86 at 168

¹⁰³ TRC, *They Came for the Children*, *supra* note 53 at 80.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* at 79.

¹⁰⁶ Jack, *supra* note 98 at 52.

The IRS experience also affected survivors' ability to operate in a wage economy. Randy Fred wrote of attempting to work with his father, a skipper, on a fishing trip. His father was frustrated that he did not know how to work on the boat but Fred had not had the opportunity to learn, having been away at an IRS. According to Fred "These experiences pushed my father and me further apart. My great hatred of the residential school springs from this: it took away the opportunity for me to grow up with my father."¹⁰⁷ Theodore Fontaine also made the link between his alcohol abuse and his employment record:

Some mornings I'd wake up with an incredible hangover and try to remember where I'd been. I would vaguely recall arguing at a bar with people I worked with. Sometimes I didn't even return to my workplace and just moved on. Eventually, I began to analyze why my record of employment was so horrendous. Employers were appalled when I finally stopped hiding the long list of places I'd worked at and the reasons I'd left. I'd been subconsciously challenging employers to hire me in spite of my heritage and then fire me because of it.¹⁰⁸

John Tootoosis, a Cree survivor from Saskatchewan, described the overall effect of the IRS education:

When an Indian comes out of these places it is like being put between two walls in a room and left hanging in the middle. On one side are all the things he learned from his people and their way of life that was being wiped out, and on the other side are the whiteman's ways which he could never fully understand since he never had the right amount of education and could not be part of it. There he is, hanging, in the middle of two cultures and he is not a whiteman and he is not an Indian.¹⁰⁹

The IRS system did have some successful graduates including a generation of First Nation leaders, Phil Fontaine, former Chief of the Assembly of First Nations, for example, and Chief Wilton Littlechild, co-chair of the TRC, for another. Other successful graduates became lawyers, teachers, businesspeople, or priests. Of course a

¹⁰⁷ Haig-Brown, *supra* note 57 at 20.

¹⁰⁸ Fontaine, *supra* note 96 at 154.

¹⁰⁹ J.R. Miller, *Shingwauk*, *supra* note 55 at 385-86.

successful education did not always culminate in the assimilation the government and churches were expecting: Dan Kennedy, a graduate of Lebret IRS who went on to complete his studies at St Boniface college, used his knowledge and skills to lead a campaign against the government's attempt to restrict cultural practices,¹¹⁰ as did many others. In the AFN report *Breaking the Silence* Phil Fontaine, then Grand Chief of the Assembly of Manitoba Chiefs addressed this dual experience:

Some people think that residential school was the best thing they could have had, because it taught them to work, it taught them discipline, and it helped establish friendships. For those people, I think residential school represented an important part of their lives and one shouldn't take that away from them...¹¹¹

but Fontaine also recognized that other former students remembered the schools as “hell-holes” and that neither experience should be diminished.¹¹²

Categorizing Harms

The intended and unintended harms set out above are diverse in both cause and effect. One can be forgiven for seeing some, like sexual abuse, more clearly than others, like the change from a traditional diet to porridge and boiled vegetables. In order to make sense of the harms, without losing sight of any, I regroup them into six loose categories recognizing that in the lived experience of survivors these categories might overlap. I will use these categories in the following Chapters to fit the harms I have described within the purview of various legal and political institutions.

¹¹⁰ *Ibid* at 160.

¹¹¹ Assembly of First Nations, *Breaking the Silence: an interpretive study of residential school impact and healing as illustrated by the stories of First Nation individuals* (Ottawa: Assembly of First Nations, 1994) at 115 quoting from P. Fontaine, “We are all born innocent. An interview” in L. Jaine, ed. *Residential school: The school years* (Saskatoon: University Extension Press, University of Saskatchewan, 1993) at 51-68.

¹¹² *Ibid*.

1) Sexual Abuse: Sexual abuse like that experienced by Willie Blackwater is perhaps the most obvious harm stemming from the IRS policy. While not every student was abused nearly 38,000 have made a claim in the IAP.¹¹³ This amounts to nearly half of the estimated 80,000 living survivors, demonstrating how strongly the harms are felt by survivors.

2) Physical Abuse: Similarly well-known is the physical abuse that occurred, though it took several forms. Bruising and broken bones suffered as a result of either beatings or unsupervised play are among the claims made in the IAP and were not uncommon. Corporal punishment like that described by the survivor from Kamloops IRS is a more controversial claim considering its use in schools was common through the 1970s¹¹⁴ and that corporal punishment of children by parents has been allowed by the SCC.¹¹⁵ Also included in this category could be overwork in industrial schools.

3) Inadequate Care: As documented in the Byce Report, many IRSs provided inadequate care, nutrition, and sanitation.¹¹⁶

4) Emotional Abuse: Many survivors suffered emotional harm from the sudden change in discipline and as a result of the racism of many teachers and supervisors like being called a “dumb Indian”. Just the change in environment made many students like Alice Blondin-Perrin scared, and made others, like the anonymous survivor from St Marc-de-Figuery IRS feel lost and alone.

¹¹³ Indian Residential Schools Adjudication Secretariat, *Adjudication Secretariat Statistics: from September 19, 2007 to January 31, 2014*, online: Indian Residential Schools Secretariat <<http://www.iap-pei.ca/information/stats-eng.php>> [IAP Stats to Jan 2014].

¹¹⁴ “Banning the Strap: The End of Corporal Punishment in Canadian Schools”, online: The Canadian Education Association <<http://www.cea-ace.ca/education-canada/article/banning-strap-end-corporal-punishment-canadian-schools>>.

¹¹⁵ See *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76.

¹¹⁶ See RCAP, *Report, vol 1, supra* note 59 at 356ff re the 1907 Bryce Report on sanitation at the schools.

5) Cultural Harm: Included in this category is the prohibition of the use of native languages, and the confiscation of traditional clothing and food. Students were not allowed to practice their religions or any cultural traditions. Because students were separated from family for long periods of time many lost the ability to speak their languages and also lost, or were not initiated into, their religious or cultural practices. The separation from family also resulted in feelings of abandonment and general weakening of family ties. Survivors did not receive training in how to be children or siblings, or how to be parents. Broken into parts cultural harm is meant to capture non-corporeal damage such as loss of language, loss of family ties, inability to maintain traditions and culture, and the secondary effects of those losses such as a lack of parenting skills, lack of social and support structure, confusion as to identity, and a lack of knowledge of the surrounding world required to survive in either Indigenous or non-Indigenous settings.

6) Inadequate Education: Finally, many students did not receive an education adequate to prepare them for life in the Canadian economy and were simultaneously deprived of the education that would have been provided by their communities. The result was often unemployment or underemployment.

As stated above, these categories are loose and fluid. Individual acts might be placed in several categories simultaneously, for example where sexual abuse is accompanied by or facilitated by emotional abuse or racist language, and is kept hidden through bribes of fresh fruit or candy to a starving student.

Conclusion

This is not a history I learned in school. By meeting survivors in IAP hearings while acting as Canada's Representative I met my history, face-to-face, and wasn't sure what to think about it. The phrase that rings most true that I have since heard is that "history changes who we were, not only who we are",¹¹⁷ and that reckoning is not easy. The Law Commission of Canada (LCC), in its report on institutional child abuse in Canada noted that

[a]s a society, we cannot simply accept without question and comment the choices made in the past, and leave it to those who suffered to get on with their lives as best they can. We must confront the consequences of those choices and do what is necessary to rectify the wrongs that were done to innocent children – our children.¹¹⁸

We made choices, as a country, and those choices had consequences. The measure of our country is, I hope, how we deal with our mistakes.

Armed with the knowledge of the intended and unintended consequences of the IRS policy and of the broad categories of harm set out in this Chapter, the next two Chapters detail the theories behind the institutions used in Canadian law and society to address harm generally, in the case of Chapter 3, and specifically with regards to the IRS legacy, in Chapter 4.

¹¹⁷Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000) at x [Barkan, *Guilt*].

¹¹⁸Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Law Commission of Canada, 2000) at 3 [LCC, *Report*].

Chapter Three: Legal Theory and Responsibility

Following from the discussion of the history of Indian Residential Schools and the broad range of harms stemming from their operation in the previous Chapters, I turn to the theories and mechanisms available in Canada to address those harms.

This discussion is divided into three parts. The first part analyses the standard euro-Canadian criminal and civil law mechanisms along with some alternative mechanisms. These mechanisms are premised upon certain assumptions about harms and responsibility of wrongdoers that prevent them from adequately theorizing and responding to the harms of the IRS policy. The second part considers the application of “transitional justice” mechanisms to the IRS legacy. Transitional justice broadly theorizes and connects several juridical and non-juridical mechanisms that are used to address large-scale human rights abuses.¹¹⁹ Transitional justice mechanisms are both flexible and context specific, making their importation to Canada interesting but problematic. The third and final part of this Chapter proposes a way to fill the gaps left by both traditional and transitional justice mechanisms by refocusing, instead of reinventing, our dispute resolution mechanisms on the responsibilities of the actors within them. This change in focus forces us to look anew at how we determine, assign, and accept responsibility for harm.

¹¹⁹ “What is Transitional Justice?”, online: International Center for Transitional Justice <<http://ictj.org/about/transitional-justice>>.

1. Institutional Reliance

Unfortunately child abuse has occurred at institutions across Canada quite apart from the IRS policy. In March 2000, on request of the Minister of Justice,¹²⁰ the Law Commission of Canada (LCC) published an “inventory and comparative assessment of approaches available”¹²¹ to address institutional child abuse. The LCC was asked to identify “What types of processes would best address wrongdoing, while affording appropriate remedies, and promoting reconciliation, fairness and healing.”¹²² The LCC looked at three categories of abuse: physical, sexual, and “other” types (a category that included emotional, psychological, spiritual, racial, and cultural abuse). Physical and sexual abuse were at the centre of the Minister’s reference “because these are categories of abuse which are unquestionably a basis for legal liability, whether civil or criminal”.¹²³ The “other” types of abuse, according to the LCC, “are less clearly compensable in legal proceedings, particularly if they are not tied to instances of either physical or sexual abuse.”¹²⁴

The LCC examined several mechanisms including the criminal justice process, civil actions, criminal injuries compensation programs, *ex gratia* payments, Ombudsperson Offices, children’s advocates and commissions, public inquiries, truth commissions, community initiatives, and redress programs. The LCC’s work was thorough and informative and I rely on it, with some necessary updates, in writing this Chapter, in particular for the LCC’s concise statements of legal principles.

¹²⁰ Pursuant to s. 5(1)(b) of the *Law Commission of Canada Act*, SC 1996, c 9.

¹²¹ LCC, *Report*, *supra* note 118 at 426, Appendix A.

¹²² *Ibid* at 2.

¹²³ *Ibid* at 41.

¹²⁴ *Ibid*.

In the rest of this first part I draw out the constituent elements of Canadian criminal, civil, and alternative dispute resolution (ADR) mechanisms and discuss their benefits and limitations when applied to the IRS policy. Specifically, I will draw out the concept of harm that triggers each mechanism and the concept of responsibility that animates it. In order to focus on these two concepts I have omitted other aspects of the mechanisms, notably any detailed discussion of evidentiary matters or specific remedies.

a) *Criminal Law*

The criminal law is the pre-eminent mechanism for dealing with serious harms like assault. It is “[t]he body of law defining offences against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders”.¹²⁵ Now found entirely in statute, the criminal law initially developed through judges’ view of what acts caused harm to society and were morally reprehensible based, at least in part, on ecclesiastical offences.¹²⁶ While the criminal law is now secularized, it remains steeped in the concepts of “moral blameworthiness and social harm”.¹²⁷ The criminal law today is concerned with those acts that society has deemed to be so dangerous that their commission warrants the intervention of the state to define, punish, and prevent.

In their Report the LCC succinctly summarized the history and purpose of the criminal law:

The primary goal of the Canadian criminal justice system is to provide a public forum for the recognition and punishment of wrongful conduct defined by Parliament as a crime. Its processes are designed to ensure a fair trial, to minimise

¹²⁵ Bryan A. Garner, ed. *Black’s Law Dictionary* (St. Paul, Minnesota: Thomson/West, 2004) at 403.

¹²⁶ Morris Manning & Peter Sankoff, *Criminal Law* (Markham, ON: LexisNexis, 2009) at 23.

¹²⁷ *Ibid* at 23.

the chances of an unjust conviction, and to impose an appropriate punishment upon individuals who have been convicted.

Historically, the criminal justice system was developed to forestall blood feuds and private retribution. Today, the criminal law is also viewed as a statement of society's core values. The State takes on the role of prosecutor and is responsible for proving that the accused has committed a crime.¹²⁸

Within these definitions are two key assumptions: i) that there is an objective, societally agreed-upon definition of crime (harm),¹²⁹ and ii) that there is an individual, identified perpetrator, who is directly responsible for the harm. This structure has specific consequences for the capacity of the criminal law to respond to the IRS legacy.

i. Defining Crime

The criminal law is a mechanism to enforce societal values, and to recognize and punish wrongful conduct as defined by parliamentarians. In defining “crime” Parliament indicates the limits of acceptable behaviour and pledges itself to enforce those standards through the prosecution of offenders. There is a long-standing debate in legal theory about the proper foundation of the criminal law with some concept of “harm” being applied.¹³⁰ The Supreme Court of Canada (SCC) recognized in *Butler* that “[t]o ground criminal responsibility, the harm must be one which society formally recognizes as incompatible with its proper functioning”.¹³¹ In 2005 the SCC held that whatever the standard, it must be objective: “The requirement of formal societal recognition makes the test objective. The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has

¹²⁸ LCC, *Report*, *supra* note 118 at 115.

¹²⁹ Manning & Sankoff, *supra* note 126 at 24-25.

¹³⁰ For a discussion of this debate see *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571.

¹³¹ *R v Butler*, [1992] 1 SCR 452 at 485.

recognized as essential.”¹³² While always “objective” the definition of specific crimes will shift with changes in society.

The ability to define conduct gives the criminal law a particular place in society as the forum in which behaviour is regulated, on the basis of harms caused to others, that are “objectively” found to be contrary to foundational societal values. This regulation occurs in full view of the public with the intent to enforce standards and create a public record. Its purposes are “to adjudicate individual responsibility and to establish the truth about an event in controversy.”¹³³

A consequence of the public nature of the criminal act is that a crime is a *public wrong*.¹³⁴ The inference is that this harm warrants attention by the broader community in contrast to a civil proceeding where only private individuals are involved. This is because the harm is understood as being done to the community, not to the individual.¹³⁵ According to one author, the imposition of a criminal sanction “demonstrates the community’s outrage over the act, and serves to make a statement denouncing it.”¹³⁶ Because of this greater importance, the state takes over the prosecution and victims are termed “complainants”; witnesses who might provide evidence in the case against the accused but who are not themselves parties to the process.¹³⁷

The public re-enforcement of social norms can provide a great benefit to victims of crime by meting out punishment to wrongdoers and by validating the victim’s position in society thereby restoring him/her to a position of dignity. According to one study

¹³² *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 at para 33.

¹³³ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000) at 72.

¹³⁴ Manning & Sankoff, *supra* note 126 at 27.

¹³⁵ *Ibid* at 29.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* at 28.

published in 2005, victims of sexual abuse sought this validation and restoration from the criminal process:

Beyond acknowledgment, what survivors sought most frequently was vindication. They wanted their communities to take a clear and unequivocal stand in condemnation of the offense. Community denunciation of the crime was of great importance to the survivors because it affirmed the solidarity of the community with the victim and transferred the burden of disgrace from victim to offender. The survivors were keenly aware that the crimes were intended to dishonor and isolate them; they sought, therefore, the restoration of their own honor and the reestablishment of their own connections with the community.¹³⁸

The public nature of the criminal law, and third party adjudication, provides this relief.

Some of the harms of the IRS policy, specifically the severe physical and sexual abuse suffered by survivors, are recognized in the Criminal Code of Canada as the offences of Assault¹³⁹ and Sexual Assault¹⁴⁰ respectively.¹⁴¹ However, there are no criminal offences that capture other harms, such as emotional abuse, cultural loss, or loss of educational opportunity. For example, however undeniable a harm, the Salteaux survivor from Duck Lake would find no relief or denunciation available to him under the Criminal Code for the great loneliness endured in the IRS, nor is it a criminal offence for school administrators to refer to students by a number.

¹³⁸ Judith Lewis Herman, "Justice from the Victim's Perspective" (2005) 11:5 *Violence Against Women* 571 at 585.

¹³⁹ *Criminal Code of Canada*, RSC 1985, c C-46, ss 265-268

¹⁴⁰ *Ibid* ss 150-162, 271-273 especially ss 151-159.

¹⁴¹ Note that crimes are defined in and by the times creating some anachronisms in terminology. For example male-on-male rape was not included in the definition of "rape" in the criminal code until 1983 so male-on-male rape that occurred prior to 1983 but prosecuted afterwards must be done under other sections/terms, notably "buggery", which was removed from the Criminal Code in the 1970s as homosexuality became widely accepted in Canadian society: LCC, *Report, supra* note 118 at 116.

ii. The Existence of a Criminal

A second important goal of defining crime is to provide clarity in the law for offenders.¹⁴² The criminal, not the victim, is the epicentre of the criminal process. It is s/he who has contravened society's norms and is responsible for the harm caused. The goal of a criminal code is to create a standard of conduct and to ensure that punishment does not befall any person who did not intentionally breach the law.

As such, criminal procedure is as much about protecting the rights of the accused and ensuring against wrongful conviction as it is about addressing harm. As the SCC has stated:

The requirement of formal endorsement ensures that people will not be convicted and imprisoned for transgressing the rules and beliefs of particular individuals or groups. To incur the ultimate criminal sanction, they must have violated values which Canadian society as a whole has formally endorsed.¹⁴³

As the LCC stated “the criminal justice process is well-suited to identifying individual perpetrators and holding them liable. It is less well-suited to uncovering any systemic problems that may have allowed the abuse to occur or to continue for a lengthy period.”¹⁴⁴ When applied to the IRS legacy the criminal law can only punish individual perpetrators of abuse. It cannot address government policies. That said, one of the purposes of punishment is to restore order and trust between the state and its citizens.

iii. Criminal Misgivings

This focus on the perpetrator causes some difficulty in applying the criminal law to the harms of the IRS policy. The police lay charges and prosecutors prosecute offenders as a public duty. They are responsible to society at large. They are not the

¹⁴² Don Stuart, *Canadian Criminal Law: a treatise* 6th ed (Scarborough: Carswell, 2011) at 128.

¹⁴³ *Labaye*, *supra* note 132 at para 35.

¹⁴⁴ *Ibid* at 122.

victim's advocates.¹⁴⁵ Prosecutors are afforded the discretion to prosecute an offender for a particular offence based on their assessment of the public interest in pursuing the prosecution.¹⁴⁶

Other procedural aspects, like the need for evidence, pose barriers to the criminal law being an effective response to harm stemming from the IRS policy. For example, in cases of historical abuse like those that occurred at an IRS, evidence may have been lost or destroyed, and witnesses may have died or may be in advanced stages of memory loss, making their evidence unreliable in court.¹⁴⁷ The need to cross-examine victims may also be a barrier as s/he may not be willing to submit to the vigorous and potentially re-traumatizing cross-examination by the accused's counsel.¹⁴⁸ Finally, the criminal law cannot be engaged when the accused has died or cannot be identified, making it unavailable in many cases of historical abuse.

The criminal law is an important tool. By setting standards of behaviour through the law and then enforcing those standards, society guides its members towards acceptable behaviour and protects the vulnerable. When laws are broken it supports and vindicates the victim by publicly identifying and denouncing the perpetrator and meting out punishment thereby deterring further harmful behaviour. In the IRS context, the criminal law is a useful tool for recognizing and prosecuting specific acts of physical and sexual abuse by wrongdoers at an IRS.

That said, the criminal law has several in-built assumptions: that there is an individual, identified perpetrator who is solely responsible for the act and that only the

¹⁴⁵ LCC, *Report, supra* note 118 at 1115 and 1117.

¹⁴⁶ *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras 46-47; see also *R v Anderson*, 2014 SCC 41.

¹⁴⁷ LCC, *Report, supra* note 118 at 119.

¹⁴⁸ *Ibid* at 120.

specific harms that are clearly accepted by society and written in statute are punishable. These assumptions prevent the criminal law from addressing the full range of harm caused by the IRS policy.

b) Tort Law

The second standard mechanism for the recognition of harm in Canadian society is the civil justice system. The civil law broadly is any matter that is not criminal in nature including contract, fiduciary duties,¹⁴⁹ statutory duties,¹⁵⁰ and, most relevant to this study, the “civil wrong” known in the common law provinces as “torts”, and as “civil liability” in the Quebec civil law tradition.¹⁵¹ Again, the LCC accurately and succinctly described the basic principles of tort law:

The basic premise of a civil action is that people are responsible for the injuries they cause to others. Under both the common law and the civil law of Quebec, a plaintiff must prove three basic elements in order to succeed: the fault of the defendant, the injury to the victim, and a causal connection between the fault and the injury. Physical, psychological or sexual violence constitutes a civil wrong. Quebec civil law does not distinguish between different categories of wrongful conduct. The principles of liability are the same regardless of the type of fault alleged. ...¹⁵²

The tort process is a victim/plaintiff¹⁵³ driven and financed process. The victim has more control over the process than in the criminal law but also bears the burden (and cost) of proving the claims.

¹⁴⁹ Claims of fiduciary duties have been made against the Crown in the IRS context, notably in *Blackwater v Plint*, 2005 SCC 58, [2003] 3 SCR 3 at para 56 ff, but to date the courts have not found a fiduciary duty to students in residential schools (Indian or otherwise) generally, unless the children were wards of the government: see *Reference re Broome v Prince Edward Island*, 2010 SCC 11, [2010] 1 SCR 360 at para 66-67. But see *Canada (Attorney General) v Anderson*, 2011 NLCA 82 at 63 where the Newfoundland and Labrador Court of Appeal did not close the door to a fiduciary duty claim at the certification stage of a class action. For a discussion of fiduciary duties owed by government to children in care see *KLB v British Columbia*, 2003 SCC 51, [2003] 2 SCR 403 at para 38 ff.

¹⁵⁰ See for example *Blackwater*, *ibid* at para 45.

¹⁵¹ For the purposes of this thesis I will use the term “tort law” to describe both the civil and common law concepts as the majority of IRS lawsuits in Canada are framed in the common law jurisdictions as torts.

¹⁵² LCC, *Report*, *supra* note 118 at 145-46 (references omitted).

Like the criminal law, tort law makes assumptions about harm and the responsibility of wrongdoers that prevent it from addressing the IRS legacy. Standards of behaviour must again be defined, here through a confluence of judicial opinion instead of in legislation. The end goal in this instance is assumed to be compensation of the victim in a cold transaction of either goods or money.

i. The Wrongs of Tort¹⁵⁴

Like the criminal law, tort law is based upon a societal consensus of appropriate behaviour of individuals towards one another. While this consensus is arrived at by Parliament in the case of the criminal law, in tort law, it is arrived at through the process of following and building upon juridical precedent (*stare decisis*) as society has evolved. This process is slow but does allow the law to evolve to tackle the problems of modern life.¹⁵⁵ In the civilian tradition, civil liability is found in article 1457 of the *Civil Code of Quebec*¹⁵⁶ and has been elaborated through judicial decisions.

Some modes of litigation, like class actions procedures, can be tools to force a settlement¹⁵⁷ (by sheer force of numbers) and in the course of negotiating a settlement the parties might be able to take into account harms that do not strictly fall within the tort-law paradigm and judge-ordered remedies.¹⁵⁸

¹⁵³ LCC, *Report, supra* note 118 at 147 and footnotes; This project direct victims of the IRS policy but tort actions may lie for indirect victims like family members in certain situations.

¹⁵⁴ A cheeky title I borrow from Joanne Conaghan & Wade Mansell, *The Wrongs of Tort* (London: Pluto Press, 1993).

¹⁵⁵ A prominent example is the shift that occurred in *Donoghue v Stevenson*, 1932 HL UK where liability was extended to third party manufacturers for defects in their products that affect the end consumer who otherwise has no relationship to the manufacturer.

¹⁵⁶ *Civil Code of Québec*, LRQ, c C-1991.

¹⁵⁷ Emily Unrau, “Using Class Actions to Redress Historical Wrongs Committed by the Government” (2013) 8:2 *Canadian Class Action Review* 339 at 362.

¹⁵⁸ *Ibid* at 355.

Torts that might apply to the harms caused by the IRS policy are assault and battery, in the case of physical and sexual abuse, intentional infliction of emotional suffering, in the case of many of the emotional harms, and negligence, in the cases of inadequate nutrition and care.

ii. A Duty to Care

The standard form of liability in tort is the direct fault of a wrongdoer. In order to succeed in court the plaintiff must prove that s/he suffered damage; that the damage was caused by the actions of a defendant who was in a relationship of proximity to the plaintiff such that it was reasonably foreseeable that his/her actions would cause harm to the plaintiff (a duty of care);¹⁵⁹ and that the standard of care was breached. Finally there must be no policy reasons why liability should not accrue such as remoteness of damages.¹⁶⁰ A further analysis is required when considering liability of a government entity, as the Crown is immune from liability for policy decisions.¹⁶¹

The categories of relationships are not closed and do evolve.¹⁶² For example, civil courts now recognize indirect liability, like the vicarious liability of employers for the tortious acts of their employees under specific conditions. Those conditions are that the nature of the employee's job created or enhanced a risk that abuse would occur.¹⁶³ Vicarious liability is recognized in article 1463 of the *Civil Code of Quebec*. Instead of proving "fault", vicarious liability under article 1463 requires proof the wrongdoing occurred "in performance of his/her duties". Through these tools plaintiffs are able to

¹⁵⁹ *Donoghue v Stevenson*, 1932 HL UK as discussed by the SCC in *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 at paras 22-39.

¹⁶⁰ *Kamloops v Neilsen*, [1984] 2 SCR 2 at 10-1.

¹⁶¹ Oxaal, *supra* note 13 at 390.

¹⁶² *Cooper v Hobart*, *supra* note 159 at para 23.

¹⁶³ *Bazley v Curry*, [1998] 2 SCR 534 at para 42; *Blackwater v Plint*, *supra* note 149 at para 20.

draw governments and institutional actors into lawsuits where it would not have been possible before, or in the criminal law process.

A second evolution of traditional litigation is the class action. While class actions have the same requirements as other actions in the standards and burdens of proof, causation, and fault, they allow plaintiffs to combine their financial resources and act as one against a defendant.¹⁶⁴ The claimants must form a “class” and be certified by the court using the criteria set out in the relevant class action legislation.¹⁶⁵ Briefly, the claimants must prove that they have a cause of action, that there are two or more members of the class that have common issues, that the class action is the preferable procedure for resolving the claim, and that there is a class representative who has a plan for advancing the case.¹⁶⁶ By having a representative act for the class many survivors are spared the burden of testifying and the claims are resolved simultaneously instead of one by one, speeding up the process considerably.¹⁶⁷

Legal scholar Jennifer Llewellyn has analyzed the ability of the tort law system to respond to IRS abuse. Among the advantages she points out are the legitimacy and authority of a court proceeding, including the public recognition of wrongdoing and the perpetrator receiving his/her “desert” in the finding of liability and order of damages.¹⁶⁸

Llewellyn writes that victims receive satisfaction in the sense of vindication and

¹⁶⁴ *Western Shopping Centres v Dutton*, 2001 SCC 46, [2001] 2 SCR 534; *Class Proceedings Act*, RSBC 1996, c 50.

¹⁶⁵ See for example the *Class Proceedings Act, 1992*, SO 1992, c 6, s 5. In jurisdictions that do not have class action legislation the process for “representative actions” is proscribed by the “Dutton Test” set out by the SCC in *Western Shopping Centres v Dutton*, *ibid.*

¹⁶⁶ *Class Proceedings Act*, RSBC 1996, c 50, s 4.

¹⁶⁷ For a detailed discussion of the appropriateness of class actions to historical wrongs like the IRS policy see Unrau, *supra* note 157.

¹⁶⁸ Jennifer Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice” (2002) 52:3 UTLJ 253 at 266 [Llewellyn, “Dealing with the Legacy”].

acknowledgement of their rights and the harms done to them in the trial process.¹⁶⁹ She notes that the court process and rules of civil procedure protect, to some extent, vulnerable parties.¹⁷⁰ The public nature of the process and judgment allow the wrongdoers and harms to enter into the broader Canadian consciousness. Precedents are established through the decisions leading to a consistent statement from the courts that the abuses occurring in the IRS and, perhaps, the IRS system itself, did not conform to society's values.¹⁷¹ Finally, the civil trial process is known and familiar to victims so they can prepare themselves for the stresses of a trial.¹⁷² The LCC echoed many of these advantages in its Report.¹⁷³

iii. Incivility in the Process

While the civil trial process recognizes a broader range of harms, and of wrongdoers, than the criminal law, Llewellyn and others have also identified many disadvantages of pursuing a civil claim. Chief among them are the high financial cost to individuals and the exorbitant contingency fees charged by some lawyers.¹⁷⁴ The arduous and protracted process has the potential to re-victimize survivors particularly because, like the criminal law, it is not geared towards telling their entire story, only those parts required to prove the elements of the cause of action,¹⁷⁵ specifically the liability of the defendant. The adversarial nature of the process does not account for the complex relationships between survivors and the state, as the civil trial assumes the matter is a

¹⁶⁹ *Ibid* at 266. This point was echoed by Elizabeth Adjin-Tettey, "Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses" (2007) 25:1 Windsor Yearbook of Access to Justice 95 at 110, 116.

¹⁷⁰ Llewellyn, *supra* note 168 at 266.

¹⁷¹ *Ibid* at 267.

¹⁷² *Ibid* at 268.

¹⁷³ LCC, *Report, supra* note 118 at 161.

¹⁷⁴ Llewellyn, *supra* note 168 at 268.

¹⁷⁵ *Ibid* at 269; LCC, *Report, supra* note 118 at 161.

private one ignoring the substantial public element in harms that stemmed from state policy,¹⁷⁶ as in the case of the IRS legacy. Tort law also contains a narrow concept of harm that is limited to the substance of previous torts and conceives of plaintiffs and victims as individuals, not as a community or a family.¹⁷⁷ The assumption of adverse interests hardens the parties in their positions and ignores the fact that they may have significant common goals and interests, limiting the ability of the parties to compromise.¹⁷⁸ Finally, the corrective justice theory on which tort law is based assumes compensation and, to a limited extent, punishment to be the end goals, ignoring other remedies survivors seek like reconciliation and emotional healing¹⁷⁹ and narrowing responsibility for the harm to the tortfeasor, letting all others who might have contributed to the circumstances leading to the harm off the hook.

There are still more barriers. The difficulties of proof are great: until the IRSSA no survivor had proven a civil claim for vicarious liability where the abuser/employee had not already been convicted.¹⁸⁰ Prescription periods limit the time frame for bringing civil claims.¹⁸¹ For example in Yukon¹⁸² and Ontario¹⁸³ claims of physical assault must be brought within two years of the event. That said, most jurisdictions in Canada have removed the limitations period for sexual assault at least in cases where the victim was a minor or otherwise under the control of the perpetrator.¹⁸⁴

¹⁷⁶ Llewellyn, *supra* note 168 at 270-71.

¹⁷⁷ *Ibid* at 271.

¹⁷⁸ *Ibid* at 271-72.

¹⁷⁹ *Ibid* at 274-75.

¹⁸⁰ Bruce Feldhusen, "Civil Liability for Sexual Assault in Aboriginal Residential School: The Baker Did It" (2007) 22:1 Canadian Journal of Law and Society 61 at 89.

¹⁸¹ Adjin-Tettey, *supra* note 169 at 130 ff. See for example *Blackwater v Plint*, *supra* note 149 at para 4.

¹⁸² *Limitation of Actions Act*, RSY 2002, c 13 section 2(1)(d).

¹⁸³ *Limitations Act*, 2002, SO 2002, c 24, s 4

¹⁸⁴ *Limitation Act*, SBC 2012, c 13, s 3(1)(i); *Limitations Act*, 2002, SO 2002, c 24, s 10(3); *Limitation of Actions Act*, RSY 2002, c 13, s 2(3).

The framing of IRS harms in tort is also problematic. The main causes of action against the government have been claims of fiduciary duties, non-delegable statutory duties, and vicarious liability for the negligent operation of the schools.¹⁸⁵ Survivors' and their descendants' claims for further harms like "cultural genocide" have not, to date, been recognized as a cause of action.¹⁸⁶ Some authors have questioned the ability of tort law to address harms that are not individual, or that are not exclusively caused by or experienced by individuals, like loss of language or culture.¹⁸⁷ Others have argued that cultural loss could be included under current torts, specifically intentional infliction of emotional suffering,¹⁸⁸ but there has been no successful case to date.¹⁸⁹

c) Civil Alternatives

In part in order to address some of these barriers to dispute resolution the tort law system has developed "alternative" dispute resolution (ADR) mechanisms that, while based on the principles of tort law, operate as modified processes that have benefitted victims of harm including IRS survivors. ADR has the potential to eliminate some of the financial and time burdens of the current civil litigation process and to allow survivors to resolve their claims in a culturally sensitive manner.

i. Resolving the Issues (or Skirting Them?)

ADR, including settlement of tort claims, and can be conducted within the framework of a court action or prior to its commencement.¹⁹⁰ ADR allows disputants to

¹⁸⁵ See for example *Blackwater v Plint*, *supra* note 149 at para 46: the SCC held there was no non-delegable statutory duty on Canada under the *Indian Act* and that fiduciary duties had not been made out in that claim.

¹⁸⁶ See for example *Indian Residential Schools, (Re)*, (2000) 268 AR 42; [2000] 9 WWR 437 (QB) at paras 68-73.

¹⁸⁷ Oxaal, *supra* note 13 at 370; see also Llewellyn, *supra* note 205.

¹⁸⁸ Oxaal, *ibid* at 390 ff.

¹⁸⁹ Oxaal, *ibid* at 371, and 377 citing *Blackwater v Plint*, *supra* note 149.

¹⁹⁰ Llewellyn, *supra* note 168 at 276.

focus on their goals and tailor a process to their needs, though this assumes that settlement is appropriate,¹⁹¹ and most often still occurs within the tort-law framework: the parties are taking a flexible approach to resolving the dispute but have not redefined the underlying claim to break free from the tort-law framework.¹⁹² Simple settlement, Llewellyn notes, may not be appropriate within a paradigm that does not engage with all of the parties and more specifically with the relationship between them,¹⁹³ or with the deeper issues that are not already part of the legal framework of the dispute framed in tort.¹⁹⁴ ADR processes are also private and do not “offer a public accounting” of the events and wrongdoings the way court processes do.¹⁹⁵ This is not to say that ADR mechanisms cannot be crafted to accomplish the goals of the parties, but that they must be scrutinized for the same assumptions and flaws as tort litigation.

For her part, Llewellyn advocates for the infusion of restorative justice principles in ADR as a means to avoid the pitfalls of litigation and serve the needs of victims.¹⁹⁶ Broadly, restorative justice programs seek “to establish or re-establish social equality in relationships” between individual wrongdoers and victims but also groups and communities, and to look beyond isolated disputes to the underlying conflict and context of the wrongdoing.¹⁹⁷ Restorative justice principles have been integrated into some traditional justice institutions, most notably the criminal law where sentencing circles and victim impact statements are now integrated into the process.¹⁹⁸

¹⁹¹ *Ibid* at 279 and 281.

¹⁹² *Ibid* at 280.

¹⁹³ *Ibid* at 281.

¹⁹⁴ *Ibid* at 284.

¹⁹⁵ *Ibid* at 286.

¹⁹⁶ *Ibid* at 289-90.

¹⁹⁷ *Ibid* at 290.

¹⁹⁸ *Criminal Code of Canada*, *supra* note 139 ss 717(1) and 722(1) for alternatives to sentencing and victim impact statements respectively.

The strength and the challenge of creating restorative justice programs is that to be successful they must be firmly rooted in the context of the harms and the needs of the specific parties involved whether they are individuals or entire communities.¹⁹⁹ Instead of proposing a single design Llewellyn provides hallmarks for a genuine restorative justice program: it must “involve all parties with a stake in the resolution of the conflict”; it must “recognize and seek to address all the harms resulting from the events”; participation must be voluntary; the process must be premised upon truth-telling with an admission of responsibility by the wrongdoer being a precondition for the process; space for encounter between the victim, wrongdoer, and greater community must be made; and the rights of both victims and wrongdoers must be protected so as to prevent a power imbalance within the process. Finally, a restorative justice program must include a plan for the future and reintegration of wrongdoers back into the community.²⁰⁰

ii. Alternative Tools

The LCC identified several specific ADR mechanisms in its Report. Those most valuable in the context of the IRS policy are *ex gratia* payments, public inquiries, and redress programs.

Ex gratia payments

Ex gratia payments are voluntary payments made under a state’s prerogative power to compensate victims for harms suffered.²⁰¹ The state does so when it judges the payments to be in the public interest, and may or may not be pursuant to a clear legal

¹⁹⁹ Llewellyn, *supra* note 168 at 292.

²⁰⁰ *Ibid* at 293.

²⁰¹ For details of the process in Canada please see Treasury Board of Canada Secretariat, Directive on Claims and Ex Gratia Payments (1 October 2009), online: Treasury Board of Canada Secretariat < <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=15782§ion=text>>.

obligation.²⁰² Examples include redress payments for Japanese internment during the Second World War²⁰³ and for persons who received HIV-infected blood.²⁰⁴

Ex gratia payments are an interesting alternative to litigation as there are no formal guidelines or legal obligation and the payments are entirely at the discretion of the government. However, some markers do exist. As noted by the LCC, in every case the victims were blameless and while the government was not, or had not yet been found, legally liable for their harms, “there was a nexus between some policy, action or inaction by a public body or publically supported authority and the harm being compensated”,²⁰⁵ that justified the government shouldering the burden of a reparation. The Common Experience Payment is an example of *ex gratia* payments used in the IRS context as discussed in the next Chapter.

Public Inquiries

Public inquiries are “established to investigate and make recommendations concerning a broad area of public policy” or “to investigate specific events, to make findings about them, and usually to make recommendations about how future occurrences may be prevented.”²⁰⁶ Public inquiries regarding federal activities can be instituted under the *Inquiries Act*,²⁰⁷ which allows for the Governor-in-Council to “cause inquiry to be made into and concerning any matter connected with the good government of Canada or

²⁰² LCC, *supra* note 118 at 207.

²⁰³ *Japanese Canadians Ex Gratia Payments Order Authorising the Making of an Ex Gratia Payment to Certain Eligible Persons of Japanese Ancestry as Redress for Injustice suffered during and after World War II*, P.C. 1988-2552 (5 November 1988). See also LCC, *Report*, *supra* note 118 at 207.

²⁰⁴ *HIV Infected Persons and Thalidomide Victims’ Association Orders which Provide for the Making of Ex-Gratia Payments to Individuals who Received HIV-Infected Blood Products and to Individuals whose Mothers Administered Kevadon or Falimol (Thalidomide) and Consequently Suffered Physical Deformities*, P.C. 1990-4/872 (10 May 1990), as am. By PC 1991-7/2543 (16 December 1991). See also LCC, *supra* note 118 at 207.

²⁰⁵ LCC, *Report*, *supra* note 118 at 208.

²⁰⁶ *Ibid* at 249.

²⁰⁷ RSC, 1985, c. I-11.

the conduct of any part of the public business thereof.”²⁰⁸ Examples include the Royal Commission on Aboriginal Peoples, which will be discussed in detail in the next Chapter, and inquiries into wrongful convictions.

Public inquiries, while operating under a statutory framework, are not tasked with finding legal liability or guilt, or with compensating victims. Their powers are constrained by the *Inquiries Act* and while their terms of reference may be broad, any inquiry will operate under time and budget constraints that might further limit the scope of its inquiries.²⁰⁹ But public inquiries can, through the process of fact finding which often includes public hearings and media coverage, raise awareness of harms that do not neatly fit into, or span, categories of legal liability. As with *ex gratia* payments, in opting to create a public inquiry, the government has decided to take on the responsibility of investigating the harm, though not necessarily responsibility for the harm itself.

Redress Programs

Redress programs are another mechanism that might be offered by a government proactively, or as part of a settlement agreement.²¹⁰ Redress programs provide financial compensation to victims through an *ex gratia* payment and, like *ex gratia* payments, the programs do not require a basis in criminal or tort law though they are often conceived of within the context of litigation. In a redress program victims undergo a validation process to prove they suffered harm and to justify the amount of compensation.²¹¹ The program will be specific to the context of the abuse and to the individual’s own experience of harm. Redress programs have the capacity to be both comprehensive and

²⁰⁸ *Ibid* at s 2.

²⁰⁹ LCC, *Report*, *supra* note 118 at 250.

²¹⁰ *Ibid* at 303.

²¹¹ *Ibid* at 316.

flexible in responding to victims' needs, but this flexibility is often exercised cautiously leading to only those harms likely to be proven in court being recognized.²¹²

Redress programs are often negotiated with victims to ensure their acceptance but can also be presented as a take-it-or-leave-it alternative to litigation.²¹³ The scope of a redress program is specific to the events as well as the willingness of the perpetrator to accept, and the willingness of the victim to settle specific claims.²¹⁴ The redress itself might also include financial counselling, sponsored therapy, educational counselling or vocational training, and apologies and memorials as well as a simple cash payment.²¹⁵ Redress programs are a tacit recognition that the state has a responsibility to respond to the event and the resulting harms whether it was directly involved or not.

Several redress programs have been crafted to address the IRS legacy including the Independent Assessment Process as will be discussed in Chapter 4.

iii. Assessing the Alternatives

What all these “alternatives” have in common is that they live on the edge of the pre-existing criminal and civil law theories and institutions. Some are directly drawn from those institutions and are simply variations on a theme and others can be seen as a means to avoid litigation. The LCC considered whether modifications²¹⁶ to the civil and criminal justice systems could be made to make them responsive to victims' needs but concluded, as have I, that

²¹² *Ibid* at 304.

²¹³ *Ibid* at 305. An example is the Jericho Hill School for the Deaf and Blind redress program, which was created after negotiation with some community members but was contested by some victims' of abuse at the school and eventually made its way to the Supreme Court of Canada where the program, was rejected because its limited scope made litigation the preferable procedure for a fair and efficient resolution of the issues: *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184 at paras 35-39.

²¹⁴ *Ibid* at 310

²¹⁵ *Ibid* at 311-13.

²¹⁶ For the LCC's suggested modifications see their Recommendations in *ibid* at 403-411.

however much these systems are adjusted, the root assumptions upon which they have been developed over the centuries and the constitutional values that have been incorporated into their structure and functioning preclude the kind of comprehensive redesign that would be necessary to respond to survivors' full range of needs.²¹⁷

ADR and other amendments to traditional criminal and civil law responses to harm have been beneficial to many IRS survivors but those mechanisms do not challenge the fundamental principles of individual responsibility found in traditional responses. The traditional and alternative mechanisms have also failed to incorporate the full range of harms stemming from the IRS policy. In particular none have tackled, in a systematic way, the existence of cultural harm as identified in Chapter 2.

d) Minding the Gaps

Several conclusions can be drawn from the discussion of the criminal, tort law and ADR mechanisms described above. The first is that they serve different but complementary purposes. Criminal law focuses on state regulation, and punishment, of harmful behaviour by individuals so as to maintain peace and order within society. Tort law and ADR provide forums for individuals and institutions to challenge the harmful actions of others and to seek compensation from them. ADR further allows the parties to tailor processes to context and culture. One way of understanding the difference between the criminal and civil processes is that the criminal law seeks to prevent the commission of crime and denounce the wrongdoer while the civil law seeks to compensate the victim.²¹⁸ Tort law has also evolved to capture a broader range of harms, and a broader range of wrongdoers, than the criminal law, but it is still limited by certain assumptions that prevent it from recognizing the entire range of harms experienced by IRS survivors

²¹⁷ *Ibid* at 389.

²¹⁸ Manning & Sankoff, *supra* note 126 at 29.

and, perhaps more importantly, of drawing society at large into the process. The use of one process does not preclude the operation of the other: an individual can be found liable by a civil court for an act for which she has been found not guilty in criminal court and vice versa.²¹⁹

All these mechanisms are legitimate and useful tools but are limited by their internal assumptions. Two assumptions are particularly problematic when attempting to address the list of harms set out in Chapter 2. First, these mechanisms, with the possible exception of some negotiated ADR processes, start from the assumption that an individual has committed an act that has caused harm to another individual. In the case of the criminal law the response is to punish the individual. Tort law and ADR have a greater capacity to recognize institutional wrongdoers and multiple levels of responsibility through vicarious liability. However neither of these responses captures me, a non-indigenous Canadian who had no role in the IRS policy but nonetheless lives in tandem with survivors, their families, and the consequences of the policy, as a responsible party. As the LCC stated:

Civil, and especially criminal, trials are well-suited to dealing with wrongdoings between individuals. Abuse in institutions is, however, rarely just a matter of a single act or the acts of a single person. Even where only one person is alleged to have committed offences, there are usually a number of victims. Where one or more perpetrators have operated within an institution over a period of years, justice usually requires bringing to account not only the actual perpetrator(s), but also those who may have had knowledge of the abuse and could have reported, or put an end to it. In these cases, justice for survivors involves coming to an understanding of the systemic causes of abuse, or the factors that made possible its commission.²²⁰

²¹⁹ LCC, *Report, supra* note 118 at 145 – This is because, for example, the criminal standards of proof are generally higher in order to prevent wrongful convictions and infringement of the liberty of the accused.

²²⁰ *Ibid* at 388.

Taken one step further, it is not possible in either criminal law or tort law to adjudicate an entire society that allowed a harmful policy to be created and continue. Nor is it possible for either mechanism to draw me, my family and friends, and the strangers I meet into the process of addressing harm.

The second assumption involves the limit on the recognition of harm. In the words of the LCC there are limits to how well both criminal and civil trials can address the needs of victims of institutional child abuse:

Both are adjudicative processes intended to handle all kinds of claims, but their internal procedures make it much easier to pursue certain types of claims. In some cases, these same features may make the process a re-victimising experience for those who have already suffered.²²¹

As I have noted throughout this discussion, criminal and tort law are able to recognize the sexual, physical, and some instances of emotional abuse. But they have not, to date, recognized the cultural harms, like loss of language and family ties that touched me so deeply during IAP hearings.

In its Report the LCC identified the importance of these harms to victims:

In any situation, an imposed prohibition against children speaking their mother tongue can be destructive to their sense of identity. Such a prohibition is particularly damaging, however, in oral cultures. Language is the basic medium through which culture is expressed. It helps create and sustain a world view. Removing children from their families, preventing them from speaking their mother tongue and denying them occasions to express their culture through language and associated rituals is a powerful attack on the personal and cultural identity of members of an Aboriginal community.²²²

Social and political theorist Rajeev Bhargava gives a poetic and comprehensive description of the importance of culture and the harm it is subject to:

Being a system of meanings, culture is reflected in our conceptual framework, and in our language. Since culture is also a system of evaluation concerning our own

²²¹ *Ibid* at 387

²²² *Ibid* at 61.

life and the lives of others, our action and that of others, an inextricable link exists between culture and ethics. Since religion and ethics are frequently tied to one another and culture is the overarching structure of all meanings, culture is also tied to religion. Thus culture is embodied in the collective memories and future visions of a group, in the group's myths, rituals, rules, norms, and customs. Since all of these - conceptual framework, language, collective memory, future visions, rules, norms and customs, myths and rituals, morality and religion, provide a sense of who we are and our self-worth, culture is inextricably linked to individual and collective identity. Given its importance, every group must have access to its own systems of meanings, interpretations and values, to its tradition and heritage, to its cultures. If members of a group are denied access to their own culture then they suffer cultural injustice.²²³

Cultural harm is an important concept because it challenges the understanding of harm currently accepted in the Canadian legal system.²²⁴ Claims of cultural harm have been made but to date have not been recognized by the courts and the government has stated that "no basis exists at law to found a cause of action for the loss or a diminution of aboriginal language or culture arising from or connected to the operation of an [IRS]."²²⁵

In the final analysis, criminal prosecutions and tort litigation are important mechanisms to set and enforce standards of behaviour and to publicly denounce wrongdoers and vindicate victims/survivors. But they are not able to address collective causes or effects of cultural harm. Other solutions are necessary.

2. Drawing on the Transition

Societal conflicts not unlike the IRS policy have occurred in other countries where comparable criminal and tort law systems have similarly been found wanting. In order to solve the limitations of the criminal and tort law responses to harm a series of

²²³ Rajeev Bhargava, "How Should We Respond to the Cultural Injustices of Colonialism?" in Jon Miller & Rahul Kumar, eds, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford university Press, 2007) 215 at 217-18.

²²⁴ Oxaal, *supra* note 13 at 369.

²²⁵ *Canada (Minister Responsible for Indian Residential Schools Resolution) v The Presbyterian Church in Canada [Settlement Agreement]* (13 February 2003) at para. 6.2, online: Indian Residential Schools Resolution Canada <<http://www.irsr-rqpi.gc.ca/english/pdf/Presbyterian-FINAL-agreement.pdf>>, [emphasis added] cited in Oxaal, *supra* note 13 at 369.

mechanisms loosely labelled “transitional justice” has developed. As its name suggests, transitional justice is most typically applied in states that are in transition, often from an authoritarian regime to a liberal democratic state following a period of large-scale and inter-cultural conflict. Transitional justice is thought of as a means by which a society in conflict can establish the rule of law and legitimacy of a government²²⁶ with the effect of returning or establishing for individuals the status of citizens recognizing them as human beings with inherent value.²²⁷ Transitional justice is therefore complex, operates on a national scale, and is highly particular to the culture and history of a particular conflict.

(a) A Canadian Application

While the Canadian government had not been overthrown at the time of writing, these transitional justice mechanisms have obvious value in that they are designed to investigate, recognize, and attempt to address historical and recent harms perpetrated by a state against a minority. The IRS policy is exactly this type of harm. There is a further dimension to transitional justice that is applicable to Canada: the idea that transitional justice and reparations are part of a broader political project. As “Canada” nears 150 years, we must realize that as a nation spanning “from coast-to-coast-to-coast” we are still in the process of nation building in that Indigenous and non-Indigenous Canadians have not achieved political or social harmony. Consequently we are still in the process, as are countries in transition, of organizing ourselves internally, and defining ourselves to the rest of the world.

²²⁶ Jeremy Webber, “Forms of Transitional Justice” in Melissa S. Williams, Rosemary Nagy, & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 98 at 111. For a general discussion of the evolution of transitional justice from WW2 to the present see Ruti Teitel “Transitional Justice Genealogy” (2003) 16 Harv. Hum. Rts. J. 69 [Teitel, “Genealogy”].

²²⁷ Pablo de Greiff, “Justice and Reparations” in Miller, Jon & Rahul Kumar, eds, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007) 53 at 160-61 [de Greiff, “Justice and Reparations”].

There are two major reasons to consider applying transitional justice as part of this broader political agenda. The first is that the norms of standard legal institutions assume that norm-breaking and the resulting harms are rare and exceptional.²²⁸ They are not designed to address harms that are “massive and systemic”.²²⁹ The second is that looking at harm through a political instead of a legal lens allows the participants to pursue ends that are not envisioned by the legal system – ends “that [go] beyond the satisfaction of individual claims, and that involves recognition, civic trust, and social solidarity.”²³⁰ And so continue our unfinished process of nation building.

(b) New(ish) Tools

Transitional justice makes use of existing legal, political and social mechanisms but tailors them to the specific events, culture(s) and needs of victims and perpetrators. The most common mechanisms, successor trials, truth commissions, political apologies, compensation, commemoration, and institutional reform are briefly introduced below.

i) Successor Trials

Criminal justice and the trials of deposed rulers are the original tools of transitional justice.²³¹ Successor trials allow the new democratic political order to delegitimize the previous regime. The trial of King Louis XVI of France, and the Nuremberg trials of Nazi leaders are examples of both foundational political acts and retribution for criminal wrongdoing.²³² In transitional societies the need to establish

²²⁸ *Ibid* at 454.

²²⁹ *Ibid*.

²³⁰ *Ibid* at 454-55.

²³¹ Teitel, *Transitional Justice*, *supra* note 133 at 27.

²³² *Ibid* at 29.

order and the desire for retribution and individual accountability must be balanced with the need for legal and cultural renewal, and consideration of collective responsibility.²³³

Successor trials must address the problem of holding individuals to account for the crimes of many. The Nuremberg trials set the stage for individual responsibility for mass harms in the aftermath of World War II by eliminating defences based on “acts of state” or “superior orders”²³⁴ but more recent conflicts, the several regime changes in South America and communist Europe in the middle of the 20th century, for example, did not allow for as clear a demarcation between individual criminal acts or orders and the complicity of entire structures within the society. In these countries the “feasibility of pursuing [criminal] justice and its ability to contribute to transitional rule of law depended upon the scale of prior wrongdoings, as well as the extent to which they were systemic or state-sponsored”.²³⁵ Select individuals might still be prosecuted in exemplary trials to demonstrate that retributive justice is being done, but this selectivity risks threatening the rule-of-law instead of strengthening it.²³⁶

The questions asked in recent years highlight a shift in the purpose of transitional justice from the desire to hold a predecessor accountable for harm to the desire to “heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation”.²³⁷ Consequently successor trials have been overshadowed by other mechanisms such as truth commissions.

²³³ *Ibid* at 27.

²³⁴ *Ibid* at 34.

²³⁵ Teitel, “Genealogy”, *supra* note 226 at 76.

²³⁶ Teitel, *Transitional Justice*, *supra* note 133 at 40.

²³⁷ Teitel, “Genealogy”, *supra* note 226 at 77.

ii) Truth Commissions

The current flagship mechanism of transitional justice is the truth commission. Truth commissions are a form of public inquiry and like public inquiries they vary greatly in scope, purpose, and powers. The mandate of a truth commission may be simply to collect, record, and report on events while others are tasked with gathering evidence to support prosecution and still others are created with the expectation of effecting “reconciliation” between victims and perpetrators. The structure will be geared to the purpose(s). The LCC looked briefly at truth commissions in its report:

A truth commission process reflects a conscious renunciation of, and a complete break from, a past when those in authority tolerated, encouraged and even committed massive human rights violations. Its fundamental purpose is to discover the truth and to assemble an accurate and verifiable record of it. Recognising and validating the pain and suffering of survivors and their families becomes a vehicle to promote a collective understanding of past abuse. Together this validation and understanding is seen as the starting point for reconciliation.²³⁸

These multiple goals are not easy to accomplish. In her study of truth commissions world wide Priscilla Hayner emphasised the difficulties in attempting to “reach and fairly represent the stories of thousands upon thousands of victims” as well as the role of potentially large numbers of perpetrators:

[T]ruth commission are of a fundamentally different nature from courtroom trial, and function with different goals in mind. It is also clear that many methodological questions that are central to truth commissions cannot be answered by turning to any established legal norms or general principles, nor can they be well addressed by universal guidelines. Instead, these questions require a consideration of the specific needs and context of each country.²³⁹

Among these methodological choices are whether to subpoena witnesses or attempt to engage survivors and perpetrators on a strictly voluntary basis,²⁴⁰ whether to collect

²³⁸ LCC, *Report, supra* note 118 at 268.

²³⁹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2d ed (New York: Routledge, 2011) at 5 [Hayner, *Unspeakable Truths*].

²⁴⁰ LCC, *Report, supra* note 118 at 271.

evidence for prosecution or to grant amnesty,²⁴¹ whether to hold public hearings, and whether to name wrongdoers.²⁴² These choices are sometimes explicit in the commission's mandate or are arrived at due to pressures of time and budgets.²⁴³

These methodological choices have consequences for the commissions' perceived success or failure. In particular, questions of amnesty have led some commentators to argue that truth commissions trade "truth" for "justice",²⁴⁴ and are a lesser alternative to prosecution only resorted to because of the difficulties in finding the courtrooms, witnesses, lawyers, and time to carry out prosecutions of all the offenders.²⁴⁵ Other commentators have noted that truth, as provided by a truth commission, is a necessary precursor to prosecutions and compensation.²⁴⁶ Still others have argued that truth commissions are well suited to the non-retributive needs of victims including overcoming official denials, record-building, promoting reconciliation, and promoting psychological healing.²⁴⁷

Nevertheless, and importantly for this project, a truth commission has the power to unearth and publicise historical events, their causes, and contemporary consequences. It is able to "reestablish a baseline of right and wrong, to humanize the perpetrators, and to obtain and disclose previously hidden information about what had happened".²⁴⁸ The

²⁴¹ For a survey of the types of truth commissions see Hayner, *supra* note 239.

²⁴² *Ibid* at 5.

²⁴³ *Ibid* at 76.

²⁴⁴ See for example Amy Gutmann & Dennis Thompson, "The Moral Foundation of Truth Commissions" in Robert I. Rotberg & Dennis Thompson, eds, *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000) 22 at 22.

²⁴⁵ Martha Minow, "The Hope for Healing: What can Truth Commissions Do?" in Robert I. Rotberg & Dennis Thompson, eds, *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000) 235 at 237.

²⁴⁶ David A Crocker, "Truth Commissions, Transitional Justice, and Civil Society" in Robert I. Rotberg & Dennis Thompson, eds, *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000) 99 at 100-101.

²⁴⁷ Minow, "Hope for Healing", *supra* note 245 at 253.

²⁴⁸ *Ibid* at 249-50.

use of a truth commission and the allocation of public funds to address harms is also a signal to all citizens that the subject is national in scope²⁴⁹ and should engage their attention regardless of their role in the events.²⁵⁰

In Canada the Truth and Reconciliation Commission of Canada is preparing a report into the legacy of the Indian Residential Schools policy. Its mandate and activities will be discussed in more detail in the following Chapter.

iii) Political Apologies

Apologies are common tools of transitional justice, though they have been applied more frequently in litigation in recent years.²⁵¹ A political apology is “an official apology given by a representative of a state, corporation, or other organized group to victims, or descendants of victims, for injustices committed by the group’s officials or members.”²⁵² The political apology is “a mark of respect in the sense that it acknowledges responsibility for a wrong and addresses this acknowledgment to the wronged individual or community.”²⁵³ Importantly it is a *public* acceptance of responsibility by the state that is seen as a prerequisite for future harmony in society.²⁵⁴ The major goal of an apology is to re-establish a relationship of respect between the parties.²⁵⁵ Importantly, the “parties” to an apology can include large numbers of people

²⁴⁹ Llewellyn, *supra* note 168 at 296.

²⁵⁰ *Ibid* at 297.

²⁵¹ See for example the promotion of apologies in the British Columbia *Apology Act*, SBC 2006, c 19.

²⁵² Janna Thompson, “Apology, Justice, and Respect: A Critical Defense of Political Apology” in Mark Gibney, et al, eds *The Age of Apology: Facing Up to the Past* (Philadelphia: University of Pennsylvania Press, 2008) 31 at 31 [Thompson, “Apology”].

²⁵³ Thompson, *Intergenerational Justice*, *supra* note 37 at 83.

²⁵⁴ John Torpey with Rosa Sevy, “Commemoration, Redress, and Reconciliation: The Cases of Japanese-Americans and Japanese-Canadians” in Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Cambridge, Mass: Harvard University Press, 2006) 78 at 83 [Torpey, *Making Whole*].

²⁵⁵ Thompson, *Intergenerational Justice*, *supra* note 37 at 83.

being represented by the speaker and receiver, recognizing both collective responsibility and collectively experienced harms.

Apologies vary in scope and formality and are not without controversy. In the case of historical wrongdoing, not all politicians or citizens feel guilt or shame about the events and consequently they may see no need for an apology.²⁵⁶ Others see apologies as a way for the state to by-pass the justice system and the victims' demands for restitution.²⁵⁷ Between individuals apologies often serve to correct a power imbalance, a correction that is not possible between a vulnerable group and a state.²⁵⁸ Apologies also carry different weight and require different formalities in different cultures raising questions about their applicability in a cross-cultural context.²⁵⁹ But many authors resist this skepticism and focus on the potential benefits of a properly conceived and delivered political apology.²⁶⁰ Political scientist Matt James has identified eight criteria for an authentic political apology:

An authentic political apology: (1) is recorded officially in writing; (2) names the wrongs in questions; (3) accepts responsibility; (4) states regret; (5) promises nonrepetition; (6) does not demand forgiveness; (7) is not hypocritical or arbitrary; and (8) undertakes-through measures of publicity, ceremony, and concrete reparation-both to engage morally those in whose name the apology is made and to assure the wronged group that the apology is sincere.²⁶¹

Political apologies have been employed in non-transitional societies to address (some of) the effects of colonization including by President Clinton to native

²⁵⁶ Janna Thompson, "Apology" *supra* note 252 at 34.

²⁵⁷ Alison Dundes Rentlen, "Apologies: A Cross-Cultural Analysis" in Mark Gibney et al, eds, *The Age of Apology: Facing Up to the Past* (Philadelphia, Pennsylvania State University Press, 2008) 61 at 72-73.

²⁵⁸ *Ibid* at 70.

²⁵⁹ See *ibid* at 64 ff.

²⁶⁰ See for example Thompson, "Apology", *supra* note 252.

²⁶¹ Matt James, "Wrestling with the Past" in Mark Gibney et al, eds, *The Age of Apology: Facing Up to the Past* (Philadelphia: University of Pennsylvania Press, 2008) 137 at 139.

Hawaiians,²⁶² by Prime Minister Howard to Indigenous Australians and Torres Strait Islanders,²⁶³ and by Queen Elizabeth II to the Maori people.²⁶⁴ The Canadian government has made two formal apologies for the Indian Residential Schools policy, the first in 1996 and a second in 2008. The content and reception of each will be discussed in the following Chapter.

iv) Compensation

Compensation might take the form of specific restitution like the return of artwork looted by the Nazis,²⁶⁵ monetary payments, as were provided by the German Federation to survivors of political persecution by the Nazi government,²⁶⁶ or the provision of resources like the 40 acres of land that were ordered to be provided to freed slaves after the American Civil War.²⁶⁷

Compensation, especially monetary payments, can be controversial. As Torpey has written: “Money matters in these contexts, but it is not always clear in what way”.²⁶⁸ Viewed cynically they are a way for wealthy perpetrators to pay off victims, particularly when the power and wealth imbalance in the country remains after the conflict is over.²⁶⁹

Compensation for historical events also falls prey to arguments that current taxpayers

²⁶² HRJ Res 19, *To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii*, 103rd Cong, 1993.

²⁶³ Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (13 February 2008) at 167 (Mr Rudd, Prime Minister).

²⁶⁴ *Waikato Raupatu Claims Settlement Act 1995* (NZ), 1995/58 s 6.

²⁶⁵ See for example “3 Nazi-looted Artworks returned in France” (11 March 2014) CBC News, online: CBC News <<http://www.cbc.ca/news/arts/3-nazi-looted-artworks-returned-in-france-1.2568335>>.

²⁶⁶ United States Department of Justice Foreign Claims Settlement Commission, “German Compensation for National Socialist Crimes” (6 March 1996) reprinted in Roy L. Brooks, ed, *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York: New York University Press, 1999) 61 at 61.

²⁶⁷ Special Field Order No. 15 issued by Major-General W.T. Sherman 16 January 1865 reprinted in Brooks, *supra* note 266 365 at 365.

²⁶⁸ Torpey with Sevy, *supra* note 254 at 92.

²⁶⁹ Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007) at 234.

should not pay for past wrongs or that some of the intended recipients of, for example, restitution for slavery are actually far better off than some of the taxpayers who would contribute to the compensation fund.²⁷⁰

In order to alleviate some of these concerns, proponents of monetary compensation for harms must decide whether to provide compensation to individuals through *ex gratia* payments or redress programs or to instead put that compensation towards programs or institutions that will benefit the victims as a group. The debate over type of compensation is especially common in cases of historical injustices like slavery where no direct victims are alive.²⁷¹

The Canadian government has provided compensation for the IRS policy both to individuals through the Common Experience Payment and collectively through the creation and funding of the Aboriginal Healing Foundation as described in the following Chapter.

v) Commemoration

Commemoration can take many forms from poetry and ballet performances to parades and monuments, and can be personal, community-based, or national.

Commemorative acts or monuments “are among the ways people confront the challenge of responding to trauma”²⁷² in the past and the present. The process of commemoration is important: “It is not simply a case of whether grieving should be private or national,

²⁷⁰ Think of Oprah Winfrey or Jay-Z. For a point-counter-point on this concern see David Horowitz, “Ten reasons Why Reparations for Blacks is a Bad Idea for Blacks - and Racist Too”, (3 January 2001) FrontPageMagazine, online: <<http://archive.frontpagemag.com/readArticle.aspx?ARTID=24317>> and Earl Ofari Hutchinson, “Ten Reasons Why Considering Reparations is a Good Idea for Americans, and Horowitz Too” (30 March 2011), online: <<http://www.mdcbowen.org/p2/rap/ofari.htm>>.

²⁷¹ Darrell L. Pugh, “Collective Rehabilitation” in Roy L. Brooks, ed, *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York: New York University Press, 1999) 372 at 372.

²⁷² Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge: Cambridge University Press, 2003) at 57.

and *whose* story should be told, but a question of how to negotiate the necessary relationship between them.”²⁷³ The harm recognized and the person(s) recognized as victims or perpetrators are negotiated with the development of each act of commemoration. For example, memorials “can name those who were killed; they can depict those who resisted and those who rescued. They can accord honor and confer heroic status; they can express shame, remorse, warning, shock.”²⁷⁴ The key to meaningful commemoration is the willingness of those involved to enter into deliberations with survivors about what harms need to be recognized and with ourselves about what role we played then, and can play now, in the commemoration.

Examples of commemoration include a minute of silence on Remembrance Day, war memorials, and museums that seek to interpret events and to educate future generations about conflict and its aftermath. While those large endeavours are often created by a state or through the work of organizations, other acts of commemoration begin as deeply personal expressions of harm. Poems like “In Flanders Fields” written by John McCrae about the scenes he saw as a field surgeon in Belgium during WWI offer us insight into the personal experience of harm that we can then connect to our own lives.²⁷⁵ But commemoration is not necessarily a tangible object like a statue or a published poem. Australia’s “Sorry Day” began as a public reaction to the failure of the Australian government to apologize to the “stolen generations” of indigenous peoples following the recommendation of the 1997 *Bringing Them Home* Report, which

²⁷³ *Ibid* at 94 (emphasis in the original).

²⁷⁴ Minow, *supra* note 245 at 138.

²⁷⁵ Edkins, *supra* note 272 at 57-58.

documented the forced removal of indigenous children from their families.²⁷⁶ Today the National Sorry Day Committee is a partnership of indigenous and non-indigenous Australians and continues to build public awareness of the stolen generations.²⁷⁷ This mix of formal and informal, personal and national, means that acts of commemoration can include any type of harm, can recognize any type of responsibility, and can engage anyone willing to look or listen.

As will be discussed in the following Chapter, commemoration for the IRS policy is just beginning to take shape in Canada with, for example, the National Research Centre on Residential Schools and a stained glass window in the parliament buildings.

vi) Institutional Reform

A final relevant mechanism of transitional justice is the promise of institutional reform. Reforms are motivated by the “goals of re-legitimizing the State and preventing the recurrence of violence” and are seen as putting words, like apologies, into action to re-establish trust between the state and citizens.²⁷⁸ As such, reform is not necessarily a taking-up of responsibility for harm, but a promise of nonrepetition.

Institutional reform might take the form of minority representation in political structures, purges of corrupt officials from government, the judiciary, and the security services, changes to the land tenure system of the country, or the assurance of economic opportunities for the minority.²⁷⁹ The state education system might also be targeted for reform both to remove racist lessons and to “help young people think critically and

²⁷⁶ “Sorry Day and the Stolen Generations” (Updated 22 October 2009) online: Australian Government <<http://australia.gov.au/about-australia/australian-story/sorry-day-stolen-generations>>.

²⁷⁷ “The History of NSDC” online: National Sorry Day Committee Inc. <<http://www.nsdcc.org.au/about-us/the-history-of-nsdc>>.

²⁷⁸ Pablo de Greiff, “Apologies in National Reconciliation Processes” in Mark Gibney et al, eds, *The Age of Apology: Facing Up to the Past* (Philadelphia: University of Pennsylvania Press, 2008) 120 at 133.

²⁷⁹ International Centre for Transitional Justice, “Institutional Reform”, online: ICTJ <http://ictj.org/our-work/transitional-justice-issues/institutional-reform>.

independently” about harmful events.²⁸⁰ The goal of all of these structural changes “should be that all persons, regardless of race, ethnicity, or inherited wealth, should have opportunities to participate politically and live minimally decent lives”²⁸¹ and avoid recreation of the structures that led to the harms.

In Canada, institutional reform occurred with the end of the IRS policy itself and the closure of the last school in 1996. Other types of reform, like the requirement to include age-appropriate lessons about the IRS policy in school curriculum, are being considered, as will be discussed in the following Chapter.

(c) Transitional Barriers

As mentioned above, these mechanisms are not either/or choices for a country in transition to make but a set of tools to be used in combination to meet the needs of the specific events and communities involved. Looking at transitional justice mechanisms philosopher, activist, and author Pablo de Greiff noted that there is no conflict between different measures whether they are symbolic or material, individual or collective, when they share the purpose of reconstituting a political community,²⁸² so long as the reparations are internally and externally coherent, and do not reproduce or perpetuate unjust social structures.²⁸³

That is the challenge. Some authors have noted that transitional justice mechanisms may be transitional in name only, falling prey to the dominant concepts of corrective justice and the status quo of relationships in society. Legal concepts of punishment and compensation can pervade the design of ADR and transitional justice

²⁸⁰ Minow, *supra* note 245 at 144.

²⁸¹ Crocker, *supra* note 246 at 107.

²⁸² de Greiff, “Justice and Reparations”, *supra* note 227 at 470.

²⁸³ *Ibid* at 471.

mechanisms with pernicious consequences that ignore other needs like recognition of harm and social solidarity.²⁸⁴ For example, restrictions placed on truth commissions in naming perpetrators may be seen as an attempt to promote or maintain the political and legal stability of the previous regime.²⁸⁵

But as tools, wielded properly, these institutions are well placed to address a broad range of harms, including cultural harm, because they exist outside of the constraints of legal theory. That said, these mechanisms suffer from the same challenges of completeness and comprehensiveness²⁸⁶ as the criminal and tort law. Nevertheless, transitional justice offers a means to work through the full range of harms of the IRS policy by avoiding the restrictions criminal and tort law, while in partnership with them. Through its recognition of a broad range of harms and its goal of pulling together victims and perpetrators, transitional justice provides a means by which Canadians, me, survivors, strangers, can engage with the IRS policy and the roles we all play in its legacy.

But applying one or several of these mechanisms does not guarantee a satisfactory outcome. I participated in IAP hearings where all participants treated the process as a purely tort-based process and others where the atmosphere and goals were palpably restorative or transitional. Both types of hearings succeeded in reaching a settlement and compensation package but the latter type was far more satisfying to me and, I believe, to everyone else involved. My experience has lead me to the conclusion that the success or

²⁸⁴ *Ibid* at 154.

²⁸⁵ Jeff Corntassel & Cindy Holder, “Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru” (2008) 9:4 Human Rights Review 465 at 465-66.

²⁸⁶ For a discussion of these challenges see Pablo de Greiff, “Introduction”, in Pablo de Greiff ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006) 1 at 6-10 [de Greiff, “Introduction”].

failure of any dispute resolution mechanism has less to do with the mechanisms themselves than with how we, as individuals and as a society, choose to apply them. I believe those choices are driven by how we understand responsibility for harm.

3. Locating Responsibility

I have already described how I tie my identity to my grandparents' and parents' choices and how I feel a responsibility to carry on their traditions. But in order to understand my role as Canada's Representative I needed to extrapolate that personal call into a civic one. To do so I drew on what I now understand to be theories of responsibility.

There are two branches to the literature on responsibility for large-scale injustices. The first tries to understand responsibility for systemic social injustices like poverty (Young), and the second discusses whether and how to hold present persons responsible for historic injustices like slavery (Torpey, Thompson). Both branches are relevant to the discussion of Indian Residential Schools. The work published to date on historical injustice often focuses on the drive to justify reparations for historic wrongs. I bypass that discussion by virtue of the fact that reparations have, in fact, been provided allowing me to focus not on *why* reparations should be provided but on *who* should be engaged in the process. I argue here that the mechanisms we have deployed have not engaged citizens with their responsibility to respond to the IRS legacy. This threatens both the legitimacy of the reparations and the possibility of reconciliation.

(a) Systemic Responsibility: There Will Be Days Like This

One barrier to engaging Canadians in the IRS legacy is the perceived divide between public and personal responsibility for harm. Political Scientist Iris Marion Young provides a way of conceiving of civic responsibility for structural injustices, like poverty, that explicitly addresses this problematic division. Young begins with Hannah Arendt's division of moral, or private responsibility, and political responsibility, which is inherently public and spurs collective action to respond to "historic" events.²⁸⁷ Young adopts Arendt's distinction between individual guilt or legal liability and political responsibility but argues that being born into Arendt's "historical continuum" is an insufficient basis to share in the political responsibility of a community.²⁸⁸

To summarize, guilt should be attributed to persons who commit crimes or wrongs, or directly contribute by their actions to crimes or wrongs. Being responsible, but not guilty, is a designation that belongs to persons whose active or passive support for governments, institutions, and practices enables culprits to commit crimes and wrongs. As I read it, this distinction is a matter not of degree but of kind.²⁸⁹ ...

This responsibility falls on members of a society by virtue of the fact that they are aware moral agents who ought not to be indifferent to the fate of others and the danger that states and other organized institutions often pose to some people. This responsibility is largely unavoidable in the modern world, because we participate in and usually benefit from the operation of these institutions.²⁹⁰

To Young, the standard mode of legal responsibility, the liability model, cannot be extended or adapted to suit structural injustices, but should be reserved for those instances where a causal connection can be made out.²⁹¹ Young reviews but rejects the possibility of extending the concept of complicity (like aiding and abetting a criminal) to

²⁸⁷ Young, *Responsibility*, *supra* note 31 at 89.

²⁸⁸ *Ibid* at 80.

²⁸⁹ *Ibid* at 91-92.

²⁹⁰ *Ibid* at 92.

²⁹¹ *Ibid* at 98.

cover members of society who are complicit in structural injustice (like pollution) arguing that it creates a weaker form of liability and that instead we should create a new, strong, concept of responsibility.²⁹² She argues for a taking up of responsibility based instead on our “participation in the diverse institutional processes” that make up a nation and sometimes produce harm. A responsibility based not merely on membership, but on participation within the polity; an acceptance of the rights and benefits, and responsibilities of citizenship. Because responsibility in this model is created by collective actions, it can only be discharged through collective action.²⁹³

Young further comments on how the liability model is not only inappropriate but also detrimental in correcting structural injustices:

A blame language can be inappropriate and unproductive in the context of issues of structural injustice because it tends to divide people between powerful wrongdoers and those who are innocent, whether as victims or as bystanders. This often oversimplifies the causes of injustice, and renders most people passive or comparatively unable to help remedy the problem. A rhetoric of blame in politics often seeks to identify one or more particularly powerful actors who have caused the problems, often some public officials.²⁹⁴

... but if we seek a few powerful actors to blame, we will let many ordinary actors doing their jobs off the hook. A public discourse of blame then oversimplifies, failing to develop a public understanding of the actions and practices whose consequences produce injustice.²⁹⁵

Young also notes that the language of blame is likely to produce defensiveness in the population, further paralysing efforts to address the injustice in a forward-looking way.²⁹⁶

As philosopher Martha Nussbaum described:

[Young] argues that we ought to distinguish guilt from responsibility. When we apply the concept of guilt to someone, we are blaming them for something that

²⁹² *Ibid* at 104.

²⁹³ *Ibid* at 105.

²⁹⁴ *Ibid* at 116.

²⁹⁵ *Ibid* at 117.

²⁹⁶ *Ibid*.

they have done in the past. The function of guilt is to locate fault, to single out for either moral or legal blame, it is usually not appropriate to ascribe guilt to a group as such, unless we have some reason to conceive of the group as a collective agent (as in the guilt ascribed to corporations, for example). Responsibility, by contrast, is a forward-looking concept. To ascribe responsibility to a person is to say that they have a job to do. We can hold either individuals or groups responsible, and responsibility for social ills is typically shared among many agents. People can be responsible without being guilty.²⁹⁷

Finding a distinction between guilt and responsibility was the key to my ability to process my emotional and analytical responses to my role as Canada's Representative – to prevent me from being paralyzed by what I heard and what was expected of me. I felt ashamed, when listening to Claimant's evidence of what government agents had done, but not for myself, and I did not feel guilty. I felt that the Claimant and I were on the same side against the often long-dead abuser and maybe against history itself. In reality my title, "Canada's Representative", was often taken to imply opposition to the Claimant's application. Understanding that I could take on *responsibility* for past Canadians, to be their representative, without also taking on their *guilt* allowed me to find meaning in the work beyond technical submissions or as penance for my ancestors' wrongdoings.

A second point I find crucial to take away from Young's writing is that the state is not a far away mythical being. As a public servant I am a cog in the wheel of government. More than that, I help guide our public decision makers through my votes. Political responsibility is our shared public responsibility as members of a collective. The state is often thought of as a dangerous or omnipotent entity when really it is the reflection of its citizens. As Young writes: "we ought to view the coercive and bureaucratic institutions of government as mediated instruments for the coordinated

²⁹⁷ Martha Nussbaum, "Foreword" in Young, *supra* note 31, at xv.

action of those who share responsibility for structures, rather than as distant actors independent of us.”²⁹⁸ The state and its citizens alternately lead and push each other through history and neither can take the entirety of the blame or credit for any policy, event, or program. We vote for our government. We, Canadians, *are* the state and it is untenable for us to continually deny our responsibility for harm and reparations by reassigning that responsibility to the state without recognizing that it was *our* inaction or reactions that caused the state to act. We are not honest with ourselves until we engage with our own responsibility as the drivers of government action, including the IRS policy.

(b) Responsibility for the Past: Just Another Bit Of History Repeating

The combined consequence of not properly acknowledging individuals’ connections with the actions of his/her government and of treating past events as not touching the present, leads to apathy and a denial of responsibility among present persons which is facilitated by the narrow focus of many of our institutions. Nevertheless, Young applied her concept of responsibility to historical injustices without any conceptual difficulty. As have others. Thompson makes the extension from “ancient history” to the present quite simple by stating it as given:

Another reason why it is a mistake to marginalize relationships between the generations is that they are not marginal for most people. Citizens commonly locate themselves in a history that concerns itself with the deeds of past citizens. They take pride in their nation’s achievements and feel shame for its failures or misdeeds. They regard themselves as inheritors of a valued political tradition that they want to maintain for their successors.²⁹⁹

Thompson declares that a polity, as an intergenerational agent, as well as acknowledging and carrying on its accomplishments, “is also supposed to take responsibility for

²⁹⁸ Young, *supra*, note 31 at 112.

²⁹⁹ Thompson, *Intergenerational Justice*, *supra* note 37 at 4.

injustices of the past: for breaking agreements, committing aggression or for violating the rights of citizens or foreigners.”³⁰⁰ The responsibility to correct past injustices is inherited along with the society created by our predecessors.³⁰¹ Thompson attempts to override the ‘legalistic’ approach to reparations for historical injustices, which often results in their denial, by calling for a balancing of moral obligations to fulfil past promises and, for example, to ensure an equitable society in the present³⁰² making the fact that no one living in the current polity was directly responsible for the harm caused irrelevant.³⁰³

This approach is not universal. Political theorist David Miller, in critiquing Thompson’s definition of a nation as a body with a continuing set of institutions, prefers the notion of an inherited responsibility. A nation, which Miller describes loosely as a society outside of its institutions,³⁰⁴ inherits responsibility for the wrongs of its forebears through its national inheritance: the benefits they enjoy from the “physical, human, and cultural capital accumulated by previous generations.”³⁰⁵

However conceived, national identity plays a role in understanding the causes of harm and potential reparations. Political scientist Danielle Celermajer, writing about Australia, points to the political culture of a nation as a pre-condition to harms in settler societies: “The pervasive racism against Aboriginal people, the political imperative of delegitimizing Aboriginal people as competent citizens and beyond this the denial of legitimate Aboriginal law and sovereignty were all conditions of possibility for the

³⁰⁰ *Ibid* at 74.

³⁰¹ *Ibid* at 77-78.

³⁰² Thompson, *Taking Responsibility*, *supra* note 38 at xi.

³⁰³ Thompson, *Intergenerational Justice*, *supra* note 37 at 79.

³⁰⁴ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007) at 143 [D. Miller, *National Responsibility*].

³⁰⁵ *Ibid* at 160.

specific acts.”³⁰⁶ Similarly, in its Report the LCC stated: “It bears repeating that a culture of abuse requires an enabling environment within which to flourish.”³⁰⁷ While the LCC was speaking about specific institutions, it is also true that without general acceptance of the view that Aboriginal peoples were inferior the Canadian IRS policy would not have been instituted or continued.

Celermajer, echoing Young, identifies the classical liberal fear of collapsing the individual into the collective through this equating of societal responsibility with specific politically authorized acts³⁰⁸ as one barrier to accepting responsibility. She proposes that through a discourse theory in which national culture and the nation “mutually construct and constrain” one another the problem can be resolved:

The members of the collective are thus not implicated as they would be were a linear causal model at work, moving from people’s ideas or consciousness via their actions to breaches of the law – a model that forms the basis for criminal guilt. Rather, people, along with a range of institutions, are the source *and* the site of the political culture within which it is possible for the wrongful actions to occur. ... They cannot be abstracted and blamed; but nor are they automata, merely passive recipients of institutionalized norms.³⁰⁹

This conception brings the responsibility for harm out of the individual’s guilt and recognizes the underlying communal culture that lead to the wrong: “By linking the members of the nation to shame and responsibility via political culture and the production of the conditions for the original political action (removal), one produces a justification for political action (the apology).”³¹⁰

³⁰⁶ Danielle Celermajer, “The Apology in Australia: Re-covenanting the National Imaginary” in Elazar Barkan & Alexander Karn eds. *Taking Wrongs Seriously: Apologies & Reconciliation* (Stanford: Stanford University Press, 2006) 153 at 162.

³⁰⁷ LCC, *Report*, *supra* note 118 at 14.

³⁰⁸ Celermajer, *supra* note 306 at 167.

³⁰⁹ *Ibid* at 169.

³¹⁰ *Ibid* at 172; see also Elazar Barkan, “Introduction: Reparation: A Moral and Political Dilemma” in Jon Miller & Rahul Kumar, eds, *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007) 1 at 3.

Unfortunately this move from individual to collective shame does not dismantle the linguistic barrier to taking up responsibility for harms. To counter this difficulty political scientist John Torpey proposes a shift in language from *perpetrators* to *beneficiaries*: claims are not being made by the victim against the wrongdoer, but by and to their descendants.³¹¹ Building on Torpey's proposal, Paulette Regan looks beyond a shift in terminology to propose a shift in our understanding of our national myths. She looks to incorporate the effects of the harms Indigenous Canadians experienced on non-Indigenous Canadians' national identity. To Regan, the current failure to understand and accept a *shared* responsibility as beneficiaries of historical injustice is a "violent innocence" whereby the current generation is made a victim of the past policies and practices enacted for his/her benefit and therefore separates his/herself from both survivors and political ancestors.³¹²

Dealing with legal claims based on the actions of individuals is a matter of criminal or civil justice. But when the benefits, privileges, and wealth that colonizers have reaped from Indigenous lands and resources are factored in, the stakes become significantly higher. It is this "link between conquest and dispossession, between racialized power and racialized privilege, *between perpetrator and beneficiary*," that must be made more visible and taken into account.³¹³

For both Regan and Torpey the shift from perpetrator to beneficiary spans the long gap between historical injustice and the present day consequences of colonialism. This is the struggle I experienced while trying to place myself within the IRS legacy.

In making this analysis the extraction of the IRS policy from the broader process of colonialism is revealed to be artificial. How did I benefit from the IRS policy? In

³¹¹ John Torpey, "Introduction" in John Torpey, ed, *Politics and the Past: On Repairing Historical Injustices* (Lanham, MD: Rowman and Littlefield, 2003) at 18 [Torpey, "Introduction"].

³¹² Regan, *supra* note 8 at 34-36.

³¹³ *Ibid* at 36-37 (emphasis in original, citations omitted).

hindsight the policy benefitted very few Canadians, Indigenous or non-Indigenous, as the discussion of harms in the second Chapter makes clear. But it was intended to benefit all Canadians by creating a homogenous population that would participate in the growing Canadian economy. It is as a tool of colonialism that the IRS policy was meant to benefit the country and its citizens into the future. I am one of those future citizens who was born on and live on this territory because of the fact of colonialism. The benefit to me is the place of my birth, my childhood, and my home. As is yours.

But even once this status as a beneficiary is acknowledged, the difficulty remains that because no individual perpetrator is alive to take the blame, individuals within a polity are likely to accept that *someone* should do *something*, without engaging with their own role in either the harm or the reparation. We expect the state to step in but are not interested in sacrificing our own privileges or benefits to complete the task. This is the same space Young addressed when looking at structural injustices that are contributed to by individuals diligently following the law³¹⁴ - when our actions are morally blameless but nonetheless result in harm. To help avoid this paralysis Young cautions against reducing the concept of collective action to “government action”:

Politics in this sense often includes government action but is not reducible to it. Contemporary theories of justice, along with much popular opinion, tend to assume that remedy for injustice is the responsibility of a particular agent, the state, and that the responsibility of citizens is to make claims upon government to bring about justice. It is often true that the best or only way for social actors to organize collective action to redress injustice is by means of state institutions. However, we ought to view the coercive and bureaucratic institutions of government as mediated instruments for the coordinated action of those who share responsibility for structures, rather than as distinct actors independent of us. Government policy to promote social justice usually requires the active support of communities to be effective.³¹⁵

³¹⁴ See her example of “Sandy” in Young, *supra* note 31 at 46ff.

³¹⁵ *Ibid* at 112 (references omitted).

While the state might be best placed to provide reparations for harms, particularly harms that were experienced by a large portion of the population, we must be careful that the intention behind the reparations is not undermined by a polity foisting responsibility onto its government without engaging with it individually.

(c) Summary: This is Where it Ends

Thompson, Young, Torpey, and others have put forward concepts of responsibility that are premised upon intergenerational or collective awareness. The process of taking up responsibility removes many of the barriers to recognizing obligations for acts that were not committed by present individuals, by you or me. They have addressed my own distress and confusion when acting as Canada's Representative. I had jumped into the IAP, into the reparations for the IRS legacy, without considering the foundation of the IAP or the IRS policy, and was unprepared for the result.

As I stated above, it was a shift in thinking – from criminal guilt and tort liability that I could not agree to take on, to a generalized responsibility as a citizen to recognize and participate in the IRS legacy – that allowed me to engage with Claimants as Canada's Representative instead of acting as an aloof lawyer or being overwhelmed by an assumption of guilt.

That said, each hearing was different. Each contained a different combination of individuals, a different setting, a different story, though some people, notably Claimant's Counsel and Adjudicators, became familiar, as did many stories. My personal understanding of my responsibility as Canada's Representative and a Canadian citizen required me to respond differently to each Claimant depending on their experience of harm, their expectations of me, and their expectations of the process. I didn't always get

it right. Remembering this variety of experiences makes me hesitant to declare that one author or one concept of responsibility applies perfectly to the IRS legacy and how Canadians should address it. While I know which concepts allowed me to maintain my sense of self and integrity during hearing, my approach was not the approach every Claimant needed to see or hear. And my approach would overwhelm some of those who act as Canada's Representative the same as their approach risked overwhelming me. The one aspect I do believe can be generalized is the move Young advocates, and Torpey and Regan name, from guilt and blame in individuals to a broad assumption of responsibility for harm based on our status, as Canadians, as beneficiaries of the process of colonialism of which the IRS was one piece. As that piece caused significant harms, it is our responsibility as beneficiaries to respond, as best possible, to those harms.

Conclusion

Consequently elements of restorative justice, transitional justice, social justice, intergenerational responsibilities and collective responsibility as well as criminal and tort law mechanisms all apply to the IRS legacy. Individual abusers who are still living should face criminal prosecution and punishment for the harms they caused. School administrators, church groups and government agencies should be made to compensate victims for their negligence. But we have not discharged our responsibility to each other as citizens until we have recognized the full range of harms stemming from the IRS policy. So while Canada is not a country in transition as usually understood, the mechanisms of responsibility developed in transitional justice to recognize historical injustice and mass harm do apply. But even these mechanisms for engagement and reparation will not assist us in achieving reconciliation or even simple reparation if we do

not turn our minds to our responsibility as Canadians to recognize harms and select and design our mechanisms accordingly. We must do so for both political and moral reasons: “because [we] recognize that the historical injustices continue to impact not only the well-being and identity of the victims but also on [our] own identity as perpetrators”, as beneficiaries of the harmful policies.³¹⁶

To date, criminal law, tort law, and transitional justice mechanisms have been applied to the harms stemming from the IRS policy. These reparations have been met with varying degrees of approval and criticism. The following Chapter sets out thirteen reparations for the IRS policy provided by the Canadian government. In describing each I draw out the harm that was recognized and the type of responsibility undertaken in order to assess whether all the harms set out in Chapter 2 have been captured and how well the reparations have engaged Canadians in the IRS legacy.

³¹⁶ Barkan, *Guilt*, *supra* note 117 at XXX.

Chapter Four: Mechanisms of Responsibility

This Chapter³¹⁷ will outline thirteen responses that have been applied to the IRS legacy to date by the Canadian government. These thirteen responses each recognize a different type of harm and a different concept of responsibility.

A Long List

These reparations are: i) criminal prosecutions, ii) the settlement of civil litigation, iii) Chapter Ten of the Report of the Royal Commission on Aboriginal Peoples, iv) the creation of the Aboriginal Healing Foundation, v) the 1998 Statement of Reconciliation, vi) the 12 Indian Residential Schools Resolution pilot projects, vii) the Alternative Dispute Resolution Program, viii) funding for commemoration, ix) funding for healing, x) the Common Experience Payment, xi) the Independent Assessment Process, xii) the Truth and Reconciliation Commission of Canada, and xiii) the 2008 Apology. Each is described below.

i. Criminal Prosecutions

Victims of sexual abuse at IRSs have made complaints to the police and several perpetrators have been prosecuted. While the prosecution of sexual offenders would not gather steam until the 1980s when a group of survivors from Yukon and British Columbia took action setting off a chain of police investigations and prosecutions,³¹⁸ there were investigations as early as the 1940s. Among the few reported and investigated

³¹⁷ An early draft of this Chapter was submitted as part of the course requirements for POLI 533 Themes in Contemporary Politics: The Politics of Historical Injustice and Memory in winter 2013.

³¹⁸ RCAP, *Report, vol 1, supra* note 59 at 378.

incidents are those at Carcross IRS in Yukon in 1943³¹⁹ and 1958,³²⁰ at Gordon IRS in Saskatchewan in 1947,³²¹ and an investigation at the Williams Lake IRS in the interior of British Columbia which uncovered evidence of widespread abuse.³²²

Several priests and employees subsequently pleaded guilty to charges of sexual abuse at institutions across the province, being held to the most rigorous standard of individual responsibility.³²³ For example, in 1995 Arthur Plint pleaded guilty to 18 counts of indecent assault during his employment at Port Alberni IRS and was sentenced to eleven years in prison.³²⁴ That same year a former employee of several residential schools, Jerzy George Maczynski, was convicted and sentenced to 16 years in prison on several counts of indecent assault, buggery and gross indecency occurring while he was employed at Lower Post IRS.³²⁵ Prosecutions continue to be pursued by victims and police today.³²⁶

It is important to remember that no single actor operates the criminal justice system. While the legislature defines crime, and prosecutors prosecute offenders, the initial step in a prosecution is a police investigation. In 2011, in recognition of its role in the IRS system, both in taking children to the schools and in failing to discover and investigate incidents of sexual abuse, the Royal Canadian Mounted Police published a

³¹⁹ Marce-Eugène LeBeuf, *The Role of the Royal Canadian Mounted Police During the Indian Residential School System* (Ottawa: Royal Canadian Mounted Police, 2011) at 412.

³²⁰ *Ibid* at 415.

³²¹ *Ibid* at 428-429.

³²² J.R. Miller, *Shingwauk*, *supra* note 55 at 329.

³²³ Fournier & Crey, *supra* note 97 at 73. *R v Plint* [1995] BCJ No 3060 (BCSC) (QL), *R v Maczynski*, 1997 CanLII 2491 (BC CA).

³²⁴ *R v Plint*, *ibid*.

³²⁵ *R v Maczynski*, *supra* note 323.

³²⁶ See for example “Former Indian residential school employee charged with abusing boys”, *CBC News Saskatchewan* (28 September 2011) online: CBC News <<http://www.cbc.ca/news/canada/saskatchewan/former-indian-residential-school-employee-charged-with-abusing-boys-1.976893>>.

study of its role in the IRS policy. The study found that, prior to the 1990s, there were very few police investigations of sexual abuse at residential schools.³²⁷

ii. Civil Litigation and Settlement

The civil justice system has been an important driver in the movement for reparations. As Regan noted, the 1998 Statement came just after a set of civil suits was filed by 200 survivors.³²⁸ Despite the difficulties in proving claims and the high costs, many survivors choose to seek redress through tort law because of the perceived legitimacy of the judicial system and its public nature, which ensures that the harms of the IRS policy are widely recognized.³²⁹ The rules of procedure in civil courts also help even the power imbalance between survivors and the government and churches.³³⁰

Litigation spurred the government to enter into negotiations for a settlement: the IRSSA. The IRSSA can be interpreted cynically as the government adopting a settlement to avoid a potentially much larger order for damages, but it can also be seen as an acceptance of responsibility for both the IRS policy, and the need for a reparations program. An agreement-in-principle was signed in November 2005 and a final agreement in June 2006. In order to capture all IRS survivors the parties to the political agreement agreed to seek certification as a national class action lawsuit folding in all outstanding actions by survivors of federally funded schools. In order to do so approval and certification of the class actions was required, and obtained, by courts in 9

³²⁷ LeBeuf, *supra* note 319 at 3. NB: the RCMP was not the police force of jurisdiction in every part of the country at all times in the IRS policy's history.

³²⁸ Regan, *supra* note 8 at 171.

³²⁹ Llewellyn, *supra* note 168 at 266; Unrau, *supra* note 157 at 355.

³³⁰ Llewellyn, *ibid* at 266.

jurisdictions across Canada.³³¹ The individual elements of the settlement will be addressed later in this Chapter.

iii. The Royal Commission on Aboriginal Peoples

The Royal Commission on Aboriginal Peoples (RCAP) was the first comprehensive study of the relationship between Canada and its Indigenous peoples.

Established by Order-in-Council,³³² the RCAP was given a mandate to:

...investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada...³³³

The RCAP held hearings across the country before making its final report and recommendations in 1996. In Chapter Ten of Volume 1 of its five-volume *Report* the Commissioners put a spotlight on the abuses suffered by survivors and the broader injustices of the IRS policy such as its failure to provide an adequate education while simultaneously depriving students of a traditional education.³³⁴ Chapter Ten set out in detailed and blunt language the policy of assimilation that fuelled the IRS policy,³³⁵ the inadequacy of the education provided,³³⁶ the systemic neglect of children caused by

³³¹ *Fontaine et al v Canada et al*, 2006 YKSC 63 at para 5, *Northwest v Canada (Attorney General)*, 2006 ABQB 902, *Quatell v Attorney General of Canada*, 2006 BCSC 1840, *Semple et al v The Attorney General of Canada et al*, 2006 MBQB 285, *Kuptana v Attorney Gen. of Canada*, 2007 NWTSC 01, *Ammaq et al v Canada (Attorney General)*, 2006 NUCJ 24, *Baxter v Canada (Attorney General)*, 83 OR (3d) 481, *Bosum v Canada (Attorney General)*, 2006 QCCS 5794, *Sparvier v Canada (Attorney General)*, 2006 SKQB 533.

³³² *Schedule 1, Order directing that a Commission under the Great Seal of Canada do issue appointing the following persons to conduct an inquiry and report upon the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government and Canadian society, which inquiry shall be known as the ROYAL COMMISSION ON ABORIGINAL PEOPLES*, PC 1991-1597 (26 August 1991).

³³³ *Ibid* at Schedule I.

³³⁴ See for example RCAP, *Report, vol 1, supra* note 59 at 341 and 375.

³³⁵ *Ibid* at 333-37.

³³⁶ *Ibid* at 344 ff.

financial and administrative shortcomings of the schools³³⁷ including the history of disease,³³⁸ shortages of nutritious food,³³⁹ harsh discipline,³⁴⁰ and the sexual abuse of students and the knowledge of that abuse.³⁴¹ By naming harms beyond specific incidents of sexual abuse, the RCAP generated a broader knowledge of the harms caused by the IRS system and had the potential to spur a transformation of the Crown-Aboriginal relationship in Canada.

Because the RCAP's mandate was broad - to cover all aspects of the Canada-First Nations relationship – it did not fully address the IRS policy.³⁴² Chapter Ten ended with recommendations that the government establish a public inquiry to investigate the origins of the IRS policy and its effects, conduct public hearings, identify and investigate abuse at the schools and recommend remedial actions including apologies, compensation, and funding for treatment of those affected.³⁴³ A second recommendation was to fund a national repository of records related to the IRS policy in order to facilitate access to the information, fund the collection of further testimony about the schools, work with educators to design curriculum about the schools and conduct public education programming about the schools.³⁴⁴

The government issued a reply to the *Report* in 1997 entitled *Gathering Strength – Canada's Aboriginal Action Plan*. *Gathering Strength* opened with a “Statement of

³³⁷ *Ibid* 353 ff.

³³⁸ *Ibid* at 357.

³³⁹ *Ibid* at 360

³⁴⁰ *Ibid* at 365 ff.

³⁴¹ *Ibid* at 371-72, 377-78.

³⁴² *Ibid* at 384.

³⁴³ Kim Stanton, “Canada's Truth and Reconciliation Commission: Settling the Past?” (2011) 2:3 International Indigenous Policy Journal 2 at 2 [Stanton, “Settling the Past?”]. See also *ibid* at 385.

³⁴⁴ RCAP, *Report, vol 1, supra* note 59 at 386: recommendation 1.10.3.

Reconciliation” and plans for an Aboriginal Health Institute, both will be discussed in detail below.

iv. The 1998 Statement of Reconciliation

On 7 January 1998, at a lunch-time meeting with five First Nations leaders, preceded by performances by Aboriginal singers and dancers,³⁴⁵ then Indian Affairs Minister Jane Stewart delivered the previously published *Statement of Reconciliation* which included a specific apology for the IRS legacy:

One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School system. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in Aboriginal communities to this day. Tragically, some children were the victims of physical and sexual abuse.

The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.

*In dealing with the legacies of the Residential School system, the Government of Canada proposes to work with First Nations, Inuit and Métis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history.*³⁴⁶

While the *Statement* acknowledged a broad range of harms including separation of children and families, prevention of retention of language and culture, and also

³⁴⁵ James, *supra* note 261 at 140.

³⁴⁶ Minister of Indian Affairs and Northern Development Canada, “Statement of Reconciliation” in Indian Affairs and Northern Development Canada, *Gathering Strength: Canada’s Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) at 4-5.

acknowledged the government's responsibility for the IRS system, it emphasized the sexual and physical abuse of children. The apology contained at the end of the second paragraph is specifically directed at the sexual and physical abuse suffered. In so doing the text of the *Statement* identified the primary harm caused by the IRS policy as the sexual and physical abuse suffered.³⁴⁷ Through its wording the *Statement* limited the government's involvement as a wrongdoer to "the development and administration of these schools". It did not recognize the policy of assimilation that was the root of the harms stemming from the IRS system. Nevertheless, by issuing the *Statement* the government was taking some responsibility for the present needs of survivors for recognition of their harms.

The *Statement* was criticized on substantive and procedural grounds. Political scientist Jeff Corntassel and philosopher Cindy Holder note that the *Statement* was carefully worded in "nondescript and guarded language" and sought to "close the book" on the IRS policy for example by the wording "...to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today" which does not name specific decisions or consequences.³⁴⁸ Matt James termed the *Statement* a "quasi-apology" because of its vagueness, improper ceremony in its delivery, and the inadequacy of the reparations attached to it. Specifically, James noted that the *Statement* was delivered at a lunch-time ceremony by a minister without the Prime Minister in attendance, that it does not form part of the state's parliamentary or legal record, and that while it was offered "on behalf of all Canadians", it did not describe the wrongful acts or

³⁴⁷ Corntassel & Holder, *supra* note 285 at 473.

³⁴⁸ *Ibid* at 473.

identify what institutions or policies were responsible for the harms.³⁴⁹ James also commented on the limited apology, being only for sexual and physical abuse, and the exclusion of the assimilationist goals of the IRS policy or its lasting affects.³⁵⁰ Paulette Regan took up the importance of ceremony in her criticism, noting the importance of ceremony, on the part of both parties, in setting the tone for the future relationship between Canadians and First Nations. Regan considered the *Statement* to have failed in meeting both Western and Indigenous criteria.³⁵¹ In the end, the *Statement* was a superficial acceptance of responsibility that “did not succeed in transforming existing colonial relationships with indigenous peoples”.³⁵²

v. The Aboriginal Healing Foundation

In *Gathering Strength* the Government proposed the creation of what became the Aboriginal Healing Foundation (AHF):

An Aboriginal Health Institute

Better knowledge and understanding are needed about how best to address health and social problems among the Aboriginal population. By building upon existing capacities and programs, Aboriginal people themselves will identify the strategies that will work for them. One way in which this can be achieved is through the creation of an Aboriginal Health Institute which will benefit Aboriginal people both on and off reserves. This institute could, for example, gather and disseminate information on culturally appropriate medicines and treatments, support basic and advanced training of Aboriginal health workers, and serve as a support system for health workers in Aboriginal Communities.³⁵³

The AHF was created in 1998 “for the purpose of funding Eligible Recipients for Eligible Projects to address the healing needs of Aboriginal People affected by the Legacy of

³⁴⁹ James, *supra* note 261 at 140.

³⁵⁰ *Ibid* at 141.

³⁵¹ Regan, *supra* note 8 at 182-83.

³⁵² Cornthassel & Holder, *supra* note 285 at 486.

³⁵³ Indian Affairs and Northern Development Canada, *Gathering Strength*, *supra* note 346 at 25.

Physical and Sexual Abuse in Residential Schools, including the intergenerational impacts.”³⁵⁴ It was provided with an initial endowment of \$350 million³⁵⁵ and an 11-year mandate (to March 2009). Through its funding of the AHF the government again accepted some responsibility for the reparation of harms stemming from the IRS policy, though not necessarily for the commission of the harms themselves.

The AHF interpreted its mandate broadly to include all effects of the policy beyond the sexual and physical abuse of students:

Our vision is of all who are affected by the legacy of physical, sexual, mental, cultural, and spiritual abuses in the Indian residential schools having addressed, in a comprehensive and meaningful way, unresolved trauma, putting to an end the intergenerational cycles of abuse, achieving reconciliation in the full range of relationships, and enhancing their capacity as individuals, families, communities, nations, and peoples to sustain their well being.

Our mission is to provide resources which will promote reconciliation and encourage and support Aboriginal people and their communities in building and reinforcing sustainable healing processes that address the legacy of physical, sexual, mental, cultural, and spiritual abuses in the residential school system, including intergenerational impacts.

We see our role as facilitators in the healing process by helping Aboriginal people and their communities help themselves, by providing resources for healing initiatives, by promoting awareness of healing issues and needs, and by nurturing a broad, supportive public environment. We help Survivors in telling the truth of their experiences and being heard. We also work to engage Canadians in this healing process by encouraging them to walk with us on the path of reconciliation.

Ours is a holistic approach. Our goal is to help create, reinforce and sustain conditions conducive to healing, reconciliation, and self-determination. We are committed to addressing the legacy of abuse in all its forms and manifestations, direct, indirect and intergenerational, by building on the strengths and resilience of Aboriginal peoples.³⁵⁶

³⁵⁴ *Funding Agreement between the Aboriginal Healing Foundation and Her Majesty the Queen of Canada as represented by the Minister of Indian Affairs and Northern Development* (31 March 1998) online: <<http://www.ahf.ca/downloads/98-funding-agreement.pdf>>.

³⁵⁵ Corntassel and Holder, *supra* note 285 at 473.

³⁵⁶ “Vision, Mission, Values: The Aboriginal Healing Foundation”, online: The Aboriginal Healing Foundation <<http://www.ahf.ca/about-us/mission>>.

The AHF was a body that sought to restore the integrity and health of individuals, and through them, communities. The AHF focused on the therapeutic response, so while non-indigenous scholars and citizens offered research, opinions, and writing to its work, their contributions were largely focussed on the victims' needs, not their own responsibilities.³⁵⁷

From 1997 to 2012 the AHF provided 1,345 grants totalling \$523 million, including funding to twelve regional healing centres.³⁵⁸ Its funds, including further endowments received in 2005 (\$40 million) and 2007 (\$125 million), have been allocated.³⁵⁹ The AHF's funds are exhausted. The AHF continued to operate in order to administer and monitor funding and projects until September 2014.³⁶⁰

Over the course of its lifetime the AHF published more than 20 volumes/studies in its "Research Series" as well as compendiums of its research and a three-volume Final Report. The publications included quantitative research on the impacts of the Common Experience Payment on recipients, domestic violence, elder abuse and suicide in First Nations communities, as well as several volumes of essays on the process of reconciliation in Canada.³⁶¹ The AHF also funded and published projects about decolonization, cultural diversity, and reconciliation that, while linked, were not limited

³⁵⁷ There are some exceptions like Peter Harrison, "Dispelling Ignorance of Residential Schools" in Gregory Younging et al eds, *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Ottawa, The Aboriginal Healing Foundation, 2009) 149.

³⁵⁸ "Funded Projects", online: Aboriginal Healing Foundation <<http://www.ahf.ca/funded-projects>>.

³⁵⁹ "FAQs", online: Aboriginal Healing Foundation <<http://www.ahf.ca/faqs>>.

³⁶⁰ Aboriginal Healing Foundation, *The 2013 Annual Report of the Aboriginal Healing Foundation: Helping Aboriginal People Heal Themselves From the Legacy of Residential Schools* (Ottawa, The Aboriginal Healing Foundation, 2013), online: The Aboriginal Healing Foundation <<http://www.ahf.ca/downloads/2013-ahf-annual-report-english.pdf>> at 4.

³⁶¹ A list can be found at: "Research Series", online: The Aboriginal Healing Foundation <<http://www.ahf.ca/publications/research-series>>.

to sexual abuse.³⁶² In doing so it assisted in bringing to light a broader range of harms that might be linked to the IRS policy. The essays included in these volumes were written by Indigenous and non-Indigenous authors from a range of professions opening the discussion of harm and responsibility to members of the Canadian polity at large.

The decision to end the AHF's funding was not well received³⁶³ and no new funding has been announced or is expected despite the recommendation in the TRC's Interim Report that the government restore funding within the year (meaning 2013).³⁶⁴

vi. The Pilot Projects

As a further response to the RCAP *Report*, and to the increase in litigation by survivors, a series of eight exploratory dialogues on alternative dispute resolution was carried out in 1998-99. The result was a set of guiding principles for up to 12 dispute resolution pilot projects.³⁶⁵ 27 projects were eventually authorized though most did not move forward.³⁶⁶ The principles included concern for the participants: that their participation be inclusive, safe, involve the community, and be based on mutual respect; for the process itself: that it be fair, holistic, voluntary and consensus based; and for the

³⁶² A full list of AHF publications can be found at: "Publication", online: The Aboriginal Healing Foundation <<http://www.ahf.ca/publications>>.

³⁶³ See for example Bryn Weese & Christina Spencer, "Native Leaders slam closing of Healing Foundation", *Winnipeg Sun* (29 March 2009) online: Winnipeg Sun <<http://www.winnipegsun.com/news/canada/2010/03/29/13402886.html>>.

³⁶⁴ TRC, *Interim Report*, *supra* note 81 Recommendation 16 at 10 & 29.

³⁶⁵ Regan, *supra* note 8 at 121.

³⁶⁶ Kaufman, Thomas & Associates, *Review of Indian Residential Schools Dispute Resolution Projects: Executive Summary* (Toronto: Indian Residential Schools Resolution Canada, 11 October 2002), online: Library and Archives Canada <<http://www.collectionscanada.gc.ca/webarchives/20071115042939/http://www.irsr-rqpi.gc.ca/english/review.html>>_at (ii) [Kaufman, "Executive Summary"].

outcome: that it produce fair results, appropriate remedies and make appropriate linkages with other programs.³⁶⁷

Ten pilot projects were eventually carried out across the country. They are listed in Schedule K of the IRSSA. These projects varied greatly from community to community³⁶⁸ but each involved a type of validation process for claims determined through negotiation. The pilot projects are imperfectly documented in the public record. Kaufman, Thomas & Associates was commissioned to write a report about the projects in 2002 but their results were only preliminary as none of the projects was complete at the time.³⁶⁹ In their report they state the purpose and design of the pilot projects as follows:

In the end, however, the projects are geared toward discharging legal liability for abuse claims, albeit through a less formal and legalistic process than litigation. Thus, while there is scope for creativity with respect to process and settlement design, claims must ultimately be validated and compensation is only payable where, in the view of Crown legal counsel, liability has been established. In addition, because they are required to achieve legal closure, settlements must release the Crown (and the relevant church organization if it is participating in the settlement) from any future actions related to survivors' residential schools experience.³⁷⁰

Among the non-discretionary elements of the pilot projects was the non-compensation for loss of language and culture.³⁷¹

One project, the Hazelton apology feast, is documented in Paulette Regan's book *Unsettling the Settler Within* in which she details her involvement in the Hazelton pilot

³⁶⁷ Glenn Sigurdson, *Reconciliation and Healing: Alternative Resolution Strategies for Dealing with Residential Schools Claims* (Ottawa: Minister of Indian Affairs and Northern Development, 2000) online: Glenn Sigurdson <http://www.glennsigurdson.com/wp-content/uploads/2010/09/Reconciliation_healing.pdf> at 106 ff.

³⁶⁸ Regan, *supra* note 8 at 122.

³⁶⁹ Kaufman, "Executive Summary", *supra* note 366 at (iii).

³⁷⁰ *Ibid* at (ii).

³⁷¹ Kaufman, Thomas & Associates, *Review of Indian Residential Schools Dispute Resolution Projects: Final Report* (Toronto: Indian Residential Schools Resolution Canada, 11 October 2002), online: Library and Archives Canada <http://www.collectionscanada.gc.ca/webarchives/20071115054819/http://www.irs-rqpi.gc.ca/english/pdf/final_report_october_11.pdf> at 39 [Kaufman, "Final Report"].

project. At the time Regan became involved 25 individuals had worked through their legal claim but felt the process was not complete and so requested a feast be held.³⁷²

Regan described the apology feast as “an act of moral imagination”:

That is, the Gitksan connected the cultural loss experienced by IRS survivors to a powerful reclaiming of history, culture, family, community, and nation in a way that also brought Canada and the United Church into the feast hall – as hosts, with particular responsibilities to fulfill.³⁷³

A feast was chosen because it “provides a legal and political mechanism for addressing acts of wrongdoing by making public restitution and apology before all those assembled”.³⁷⁴ While not herself a member of the Gitksan community, Regan came to understand through her participation “how such highly structured ritual performances provide a safe environment for participants to process difficult feelings while also attending to future relations by creating mutual and ongoing social obligations”.³⁷⁵

All aspects of the Hazelton feast, especially the deviations from standard Gitksan protocols, were negotiated,³⁷⁶ a process that required a high level of involvement of all parties and of their acceptance of both the process itself and of their responsibilities within it. Prior to the feast the hosts, Regan included, apologized to the elders of each participating Gitksan community and asked permission to host a feast as part of the invitation to the feast ceremony.³⁷⁷ During the feast specific apologies were made and became part of Gitksan oral history.³⁷⁸ In its apology the government accepted

³⁷² Regan, *supra* note 8 at 202.

³⁷³ *Ibid* at 198.

³⁷⁴ *Ibid* at 199.

³⁷⁵ *Ibid* at 200.

³⁷⁶ *Ibid* at 200.

³⁷⁷ *Ibid* at 203-04.

³⁷⁸ *Ibid* at 206.

responsibility for the IRS policy including “the harmful impacts of past assimilationist policies” and also made a commitment to end racism.³⁷⁹

But while the feast became part of Gitxsan oral history, it might not have become part of Canadian history had Regan herself not chosen to write about it. It took her desire to take on the responsibility, as a beneficiary of government policies, and to act as an “ally”, to bring the feast to the public’s attention.

As Regan noted, the pilot projects were limited by the litigation and tort-based approach,³⁸⁰ but also provided “the scope necessary for developing innovative, creative non-monetary compensation”.³⁸¹ Kaufman, Thomas & Associates also commented on the limited scope of the projects noting that the “inability to provide a meaningful response to language and culture loss has created a significant impediment to progress in the projects.”³⁸² Ultimately the government implemented a different mechanism to resolve claims that bore little resemblance to the pilot projects.³⁸³

vii. The Alternative Dispute Resolution Program

The Alternative Dispute Resolution Program (ADRP) was created by the federal government in 2002 and offered to survivors as an alternative to litigation.³⁸⁴ It could be modified unilaterally at any time by the government.³⁸⁵ The ADRP was managed by an

³⁷⁹ *Ibid* at 208.

³⁸⁰ *Ibid* at 121.

³⁸¹ *Ibid* at 122.

³⁸² Kaufman, “Executive Summary”, *supra* note 366 at (xx).

³⁸³ Standing Committee on Aboriginal Affairs and Northern Development, “Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims” 24 March 2005 online: Parliament of Canada <
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1707109> >.

³⁸⁴ Regan, *supra* note 8 at 123.

³⁸⁵ Ken Halvorson, *Indian Residential School Abuse Claims: A Lawyer’s Guide to the Adjudicative Process* (Toronto: Thomson Canada, 2005) at 2.

Adjudication Secretariat and an independent Chief Adjudicator.³⁸⁶ The ADRP was a tort-based approach to harms: individual survivors who suffered sexual abuse at the hands of an employee of an IRS were eligible for compensation after a hearing with an Adjudicator who determined an award.³⁸⁷ Cultural loss was not included in the program³⁸⁸ nor was loss of income, though loss of opportunity was included to recognize un- or under employment stemming from the abuse.³⁸⁹ The major benefit of the ADRP was that liability was “taken as admitted” relieving the Claimants of the burden of establishing a duty of care and breach of the standard of care by the government and churches³⁹⁰ once they had established damage and causation.

The ADRP had two streams, Process A, which is described below and Process B, a simplified process for claims of physical abuse or forcible confinement.³⁹¹ In Process A the compensable Acts Proven, Consequential Harms, and Consequential Loss of Opportunity were set out in a grid with points assigned to different levels within the categories. The Acts, Harms, and Loss of Opportunity had to be proven on a balance of probabilities but the causal link between the Acts and the Harms and Loss of Opportunity required only a plausible link. The Claimant bore the burden of proof using relaxed rules of evidence.³⁹² The points awarded for the Acts and Harms could be increased by 5-15% due to Aggravating Factors. The Adjudicator awarded points based on the evidence of the Claimant at the hearing. S/he then added up the points, which correlated to a dollar amount. Finally, an additional \$10,000 could be awarded for Future Care (or up to

³⁸⁶ *Ibid* at 2.

³⁸⁷ Regan, *supra* note 8 at 123.

³⁸⁸ *Ibid* at 123.

³⁸⁹ Halvorson, *supra* note 385 at 9.

³⁹⁰ *Ibid* at 8.

³⁹¹ *Ibid* at 41.

³⁹² *Ibid* at 17-18.

\$15,000 for psychiatric treatment) upon presentation of a Future Care Plan. The award became a contract between the parties that released the government from civil liability for the claim. The ADRP hearing would end with a “general apology” from the government representative that acknowledged the suffering caused by the IRS system generally.³⁹³

The Alleged Perpetrator was contacted and was given the opportunity to submit a witness statement and have a hearing with the Adjudicator to respond to the claim. The Alleged Perpetrator was not a party to the ADRP and no finding of guilt or liability could be made against an Alleged Perpetrator.³⁹⁴

Chief Adjudicator Ted Hughes stated the key to the ADRP was its non-adversarial nature and the ability of adjudicators to question the Claimant in a sensitive and relaxed manner. He noted that adjudicators held hearings in hospitals, on reserve, and in public facilities in order to allow the Claimant to feel as relaxed as possible when telling a painful story.³⁹⁵ According to Regan, the ADRP was intended to be a “less adversarial, more cost-effective, and faster approach to resolving residential schools claims than litigation that would also support reconciliation”.³⁹⁶

While it was recognized as being better than litigation, the ADRP was heavily criticized.³⁹⁷ The Canadian Bar Association and the Assembly of First Nations (AFN) both provided detailed reports on the process that were studied by the House of Commons Standing Committee on Aboriginal Affairs and Northern Development. The AFN noted that while “[n]umerous, cumulative and complex harms” were caused by the

³⁹³ *Ibid* at 61.

³⁹⁴ *Ibid* at 69-73, 104.

³⁹⁵ Quoted in Regan, *supra* note 8 at 131.

³⁹⁶ *Ibid* at 124.

³⁹⁷ *Ibid* at 124 quoting from Assembly of First Nations, “Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools” (2004) [AFN, *Report*].

IRS policy, Canada only acknowledged responsibility “for a narrow band of personal injuries” in the ADRP.³⁹⁸ The legal concept of responsibility – liability, fault and causation included – featured prominently in the AFN’s recommendations on how to modify the ADRP. Specifically the AFN recommended that a new process include a presumption of fault and causation (once the Claimant has proven the Acts and Harms).³⁹⁹

The ADRP, and the IAP discussed below, can be seen in two lights. In the first, the government sought to limit its liability to a narrow set of harms and created a process entirely for that purpose. In the second interpretation, while only a subset of the harms caused by the IRS policy were recognized, the government took on the responsibility of recognizing that harm had been caused and to provide reparations to the survivors. In the end, the ADRP was a replication of “colonial power relations” in which the government controlled the scope of the claims accepted and the design of the process.⁴⁰⁰ As Regan wrote “the broad systemic injustices and harms created by the residential school policy and system demanded a deeper moral response from Canadian society than the program could deliver”,⁴⁰¹ or, based on my analysis, than the tort law paradigm through which the ADRP was conceived could comprehend.

After hearing testimony from survivors the Committee recommended that the program be terminated and that the government undertake negotiations with survivors for a court-approved and court-supervised settlement of claims stemming from the IRS

³⁹⁸ AFN, *Report*, *ibid* at 13.

³⁹⁹ *Ibid*, Recommendations 12 and 13 at 26-27.

⁴⁰⁰ Regan, *supra* note 8 at 134.

⁴⁰¹ *Ibid* at 125.

policy.⁴⁰² In May 2005 the government entered into an agreement with the AFN to appoint former Supreme Court of Canada Justice Frank Iacobucci to consult with all parties and recommend a new settlement package for survivors.⁴⁰³ The ADRP was subsequently phased out. The resulting process, the 1.9 billion dollar Indian Residential Schools Settlement Agreement (IRSSA), has five components: funding for healing, funding for commemoration, the Common Experience Payment, the Independent Assessment Process and the Truth and Reconciliation Commission of Canada. Each is discussed in turn below.

viii. The IRSSA: Funding for Healing

The IRSSA provided a further \$125 million endowment to the AHF⁴⁰⁴ for healing purposes, effectively extending the AHF's mandate to September 2014. The stated purpose of the funding was to “facilitate access to healing programmes”⁴⁰⁵.

3.02 Healing Funding

On the Implementation Date Canada will transfer one hundred and twenty-five million dollars (\$125,000,000.00) as an endowment for a five year period to the Aboriginal Healing Foundation in accordance with Article Eight (8) of this Agreement. After the Implementation Date the only obligations and liabilities of Canada with respect to healing funding are those set out in this Agreement.

The funding was provided on the same terms as the original endowment.

While the funding agreement, Schedule M of the IRSSA, explicitly recognizes that the IRS policy caused intergenerational harms, it pinpoints “early detection and prevention of the intergenerational impacts of physical and sexual abuse” as one means

⁴⁰² Standing Committee on Aboriginal Affairs and Northern Development, *supra* note 383.

⁴⁰³ Halvorson, *supra* note 385 at 6.

⁴⁰⁴ IRSSA, *supra* note 9 Article 3.02.

⁴⁰⁵ *Ibid* at Article 8.01 (1).

by which the AHF is to fulfil its mandate.⁴⁰⁶ While not limiting the AHF's activities to healing for physical and sexual abuse, the enumeration of abuse and the absence of any other specific examples of harm in the funding agreement indicates that these specific abuses are still understood to be the predominant harms of the IRS policy for which the government has taken responsibility to repair. But, as noted above, the AHF's activities include opportunities for Indigenous and non-Indigenous Canadians to research, write about, and engage with the IRS legacy broadly.

The IRSSA also contained a provision for a review of the effectiveness of the AHF, which would determine whether funding should be continued beyond the five-year mandate.⁴⁰⁷ As noted above, no further government funds have been provided and the AHF has wound down its operations.

ix. The IRSSA: Funding for Commemoration

\$20,000,000 was provided in the IRSSA for “commemoration funding”:⁴⁰⁸

3.04 Commemoration Funding

The funding for commemoration will be twenty million dollars (\$20,000,000.00) for both national commemorative and community-based commemorative projects. The funding will be available in accordance with the Commemoration Policy Directive, attached as Schedule “J”. For greater certainty, funding under this Section 3.04 includes funding previously authorized in the amount of ten million dollars (\$10,000,000) for commemoration events. This previously authorized amount of ten million dollars (\$10,000,000) will not be available until after the Implementation Date. After the Implementation Date the only obligations and liabilities of Canada with respect to commemoration funding are those set out in this Agreement.

The funding is geared towards “honouring, educating, remembering, memorializing, and/or paying respects to residential school former students, their families and their

⁴⁰⁶ *Ibid* at Schedule M, Preamble – page 4 of the funding agreement.

⁴⁰⁷ *Ibid* at Article 8.01 (2).

⁴⁰⁸ *Ibid* at Article 3.04, Schedule “J”.

communities, and acknowledging their experiences and the broad systemic impacts of the residential school system.”⁴⁰⁹ The commemoration funding is administered by the TRC, which accepts and evaluates proposals from “all former students, their families, communities and groups” and can include both regional and national projects and projects geared towards both intra-family/intra-community and Indigenous-non-Indigenous relationships.⁴¹⁰ Applicants are required to have a former IRS student or immediate family member involved in order to qualify for funding.⁴¹¹ Projects funded to date include film festivals, workshops, art installations and exhibits, parks, monuments, story collection, and a ballet performance.⁴¹²

The funding framework recognizes a broad range of harms. The Commemoration Policy Directive, Schedule J of the IRSSA, states the program objectives as including assisting “in honouring and validating the healing and reconciliation of former students and their families”, a contribution to “a sense of identity, unity and belonging”, and promoting “Aboriginal languages, cultures, and traditional spiritual values” without any specific mention of abuse or other limiting statement as to the harms being commemorated. While the government provided the funding, the responsibility to engage in commemorative practices, through the fund, lies with survivors.

The government has, however, undertaken its own act of commemoration by commissioning a stained glass window commemorating the IRS Legacy and the

⁴⁰⁹ *Ibid* at Commemoration Policy Directive, Schedule “J”.

⁴¹⁰ *Ibid*.

⁴¹¹ *Ibid* at 2.

⁴¹² “Commemoration 2011-2012 - Project Descriptions”, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1370974213551/1370974338097>>; “Commemoration 2012-2013 - Project Descriptions”, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1370974253896/1370974471675>>.

government's apology. It was unveiled in November 2012 and now sits above the west entrance to the Centre Block of the Parliament buildings.⁴¹³

x. The IRSSA: The Common Experience Payment

The CEP was a one-time payment to all IRS survivors based on years of attendance. Each applicant received \$10,000 for the first year or part thereof s/he attended an IRS and \$3,000 for every year or part thereof s/he attended thereafter.⁴¹⁴

The CEP was administered through a trust fund called the Designated Amount Fund of 1.9 billion dollars established through Schedule I of the IRSSA.⁴¹⁵ As the excess in the Designated Amount Fund is over \$40,000,000, it is being distributed *pro rata* to all recipients as education credits up to the amount of \$3,000.⁴¹⁶ Any excess funds after education credits have been distributed will be given to the National Indian Brotherhood Trust Fund and to the Inuvialuit Education Foundation to be used for education programs.⁴¹⁷

The deadline to apply for the CEP was 19 September 2011 with late applications being accepted up to 19 September 2012. Applications relating to a specific school may be accepted past the deadline should a new school be added to the IRSSA. As of 31

⁴¹³ Aboriginal Affairs and Northern Development Canada, "Stained Glass Window in Parliament Commemorating the Legacy of Indian Residential Schools", online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1354805080035/1354805131174>>.

⁴¹⁴ *IRSSA*, *supra* note 9 at Article 5.02.

⁴¹⁵ *Ibid* at 12.

⁴¹⁶ Residential Schools Official Court Notice, "Personal Credits", online: Indian Residential Schools Settlement – Official Court Website <http://www.classactionservices.ca/irs/Personal_Credits/PCA-Home.htm>.

⁴¹⁷ *Ibid* at Article 5.07 (1) and (2).

December 2013, 105,542 applications had been received and 102,993 had been processed with an average payment of \$19,412.⁴¹⁸

The IRSSA is silent on the purpose of the CEP. However, the AFN, prior to the negotiation of the IRSSA, proposed a monetary payment to compensate survivors for loss of language and culture regardless of whether the survivor had suffered further abuses.⁴¹⁹

The strength of the wording of the report, the fact that the AFN was involved in the negotiations, and the fact that the CEP payments are structured exactly like the AFN proposal, imply that the purpose of the CEP is to recognize the cultural harms that the IRS policy caused to all survivors. A study of the CEP conducted for the AHF also stated that the compensation was “for the general loss of culture and language that resulted from a system that separated children from their families and communities and that operated under policies of civilization and assimilation”.⁴²⁰

Without any indication in the negotiated documents it cannot be said whether the government sees the harm being recognized as the broader cultural injustice, or is merely recognizing that the applicants were put at risk for the torts recognized in Canadian law. That said, the CEP is, like the rest of the IRSSA, an acceptance of some responsibility on the part of the government to address the IRS “experience” whether as a potential civil liability or as a social responsibility. This ambiguity is interesting for the purposes of this project as it avoids a direct admission of the broader harms of the IRS by the government in the context of a civil lawsuit, but also allows the CEP to be interpreted as

⁴¹⁸ Aboriginal Affairs and Northern Development Canada, “Statistics on the Implementation of the Indian Residential Schools Settlement Agreement” (20 January 2014) online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192>>.

⁴¹⁹ AFN, *Report*, *supra* note 397 at 3, 18-19.

⁴²⁰ Gwen Reimer (Praxis Research Associates), *The Indian Residential Schools Settlement Agreement’s Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Ottawa: The Aboriginal Healing Foundation, 2010) at 5.

compensation for, for example, loss of language, outside a courtroom. I will return to this ambiguity in my concluding Chapter.

The AHF funded a study of the impacts of the CEP on recipients, which concluded that the CEP had both positive and negative impacts on recipients but that while more positive impacts were related than negative, the negative impacts were of a greater magnitude.⁴²¹ Specifically, recipients found the process to be confusing, particularly the exclusion of certain schools, and emotionally challenging.⁴²² The administrative burden of the process shifted responsibility to obtain the reparation to the survivors. The study also found the effects of the payments to be destructive on the recipient and community.⁴²³ These experiences affected the recipients' decision to enter into the IAP and to participate in the TRC,⁴²⁴ a decision which could impact the effectiveness of both of those processes.

xi. The IRSSA: The Independent Assessment Process

The IAP is an adjudicative process administered by a Chief Adjudicator and Adjudication Secretariat with input from an Oversight Committee composed of representatives from all the parties to the IRSSA. The IAP is based on the ADRP but was modified through negotiation before inclusion in the IRSSA.⁴²⁵

The IAP uses substantially the same model as the ADRP of categories of Acts Proven, Consequential Harms, and Opportunity Loss linked to a point scale but it

⁴²¹ *Ibid* at 44.

⁴²² *Ibid* at xiii.

⁴²³ *Ibid* at 44 ff.

⁴²⁴ *Ibid* at xiii (NB: this was only 10% of recipients in the study).

⁴²⁵ For a detailed account of the recommendations of the AFN see AFN, *Report, supra* note 397.

recognizes a broader range of acts and harms⁴²⁶ as well as compensating for physical abuses caused by fellow students.⁴²⁷ The IAP contains a “standard track”, where most claims are resolved, and a “complex track” for claims of Actual Income Loss and Other Wrongful Acts. The burden of proof in both tracks lies with the Claimant. In both tracks the Acts Proven, Consequential Harms, and Opportunity Loss (Actual Income Loss in the Complex Track) must be proven on a balance of probabilities.⁴²⁸ Causation is proven on the lesser “plausible link” standard in the Standard Track⁴²⁹ and on the more stringent “balance of probabilities” in the Complex Track.⁴³⁰ Only the Harms and Opportunity Loss that are linked to the Acts either by the Claimant’s evidence or expert evidence are compensable in the IAP.⁴³¹ The points awarded for Acts and Harms may be increased by 5-15% for Aggravating Factors and a further \$10,000 or \$15,000 may be awarded for counselling or psychiatric treatment based on the Claimant’s Future Care Plan.

The conduct of an IAP hearing is essentially the same as an ADRP hearing including provisions for the Alleged Perpetrator to provide a statement and have a hearing. While not written in the model, the IAP also includes an “acknowledgment” where the individual acting as Canada’s Representative at each hearing acknowledges the Claimant’s courage in participating in the process and the harmful effects of the IRS policy on the survivor. The Claimant is also offered a personalized letter of apology from the government to be mailed with the final paperwork.

⁴²⁶ *IRSSA*, *supra* note 9 Schedule D at 3-6.

⁴²⁷ *Ibid* Schedule D at 2.

⁴²⁸ *Ibid* Schedule D at 12.

⁴²⁹ *Ibid* Schedule D at 34 and 35.

⁴³⁰ *Ibid* Schedule D at 34.

⁴³¹ *Ibid* Schedule D at 35.

The IAP, like the ADRP, is based on the tort-law system of individual victims and perpetrators. As in the ADRP, the vicarious liability of the government is taken as a given though not expressly stated in Schedule D. The harms recognized must all be connected to a category of sexual or severe physical abuses. Any Consequential Harms that cannot be linked to those Compensable Acts, even if linked to the experience of attending an IRS, are not compensable. The process itself takes restorative justice concerns into account through the culturally sensitive “inquisitorial” method of eliciting evidence, the flexibility in hearing location, availability of health support, and in the acknowledgement, which addresses the relationship between the Claimant and Canada.

As of 20 January 2014, 37,919 applications had been received and 28,044 (67%)⁴³² had been resolved with an average payout of \$115,250 (including legal fees).⁴³³ Responsibility in the IAP is first and foremost the legal liability stemming from vicarious liability for the actions of IRS employees. But my own experience was that the individuals acting within the IAP could reframe the process, ever so slightly, to address a deeper responsibility between citizens not found in the Model. Whether acting as Canada’s Representative, Adjudicator, or Claimant’s Counsel, participants chose to avoid adversarial conduct, focussed throughout the hearing on the wellbeing of the Claimant, and ended the day with expressions of both official and personal acknowledgement of the Claimant’s experience, harm, and strengths, and well as hope for a shared future.

⁴³² Aboriginal Affairs and Northern Development Canada, “Statistics on the Implementation of the Indian Residential Schools Settlement Agreement” (20 January 2014) online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192>>.

⁴³³ *Ibid.*

xii. The IRSSA: The Truth and Reconciliation Commission of Canada

The Truth and Reconciliation Commission of Canada (TRC) is the only truth commission to date to be the product of a court process.⁴³⁴ The TRC has a five-year mandate and a budget of \$60,000,000⁴³⁵ to address the “IRS legacy”, as set out in Schedule N of the IRSSA:

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 and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by 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.⁴³⁶

Specific goals were set out in the mandate including to “Acknowledge Residential School experiences, impacts and consequences”,⁴³⁷ “Promote awareness and public education of Canadians about the IRS system and its impacts”,⁴³⁸ and to produce a report with recommendations “concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS ... and the ongoing legacy of the residential schools.”⁴³⁹ The subject matter of the mandate is broad, and while it is not limited to specific harms, the TRC remains the product of a legal settlement, which was based on the tort-law approach to personal injury.⁴⁴⁰ Notably, its mandate focuses on the IRS legacy, and is not meant to engage in

⁴³⁴ Kim Stanton, “Settling the Past?”, *supra* note 343 at 4.

⁴³⁵ *IRSSA*, *supra* note 9 art 3.03 (1).

⁴³⁶ *Ibid* Schedule “N”: Mandate for the Truth and Reconciliation Commission.

⁴³⁷ *Ibid* 8 Schedule N 1. (a) at 1.

⁴³⁸ *Ibid* Schedule N 1. (d) at 2.

⁴³⁹ *Ibid* Schedule N 1. (f) at 2.

⁴⁴⁰ Kim Stanton, “Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry” (2012) 27:1 *Canadian Journal of Law and Society* 81 at 95, 97 [Stanton, “Pipeline”] at 88.

the broader issues of colonialism,⁴⁴¹ nor is it able to evaluate the government's response to the IRS legacy.⁴⁴² Nevertheless, the conduct of the TRC to date suggests that it takes a broad view of the harms caused by the IRS policy.

The TRC is composed of three Commissioners, Chair Justice Murray Sinclair, and Commissioners Dr. Marie Wilson and Chief Wilton Littlechild as well as a Secretariat, Executive Director and a staff of administrators, historians, and researchers. To date the TRC has produced an Interim Report,⁴⁴³ a historical document entitled "They Came for the Children",⁴⁴⁴ and has held 7 national events (Winnipeg, Halifax, Inuvik, Saskatoon, Montreal, Vancouver, and Edmonton),⁴⁴⁵ as well as smaller community events across the country.⁴⁴⁶

Participation in the TRC is voluntary. The TRC does not have the ability to act as a public inquiry and does not possess subpoena powers.⁴⁴⁷ It cannot make recommendations about the criminal or civil liability of any person or organization⁴⁴⁸ or duplicate any legal proceedings or the IAP.⁴⁴⁹ One of its main tasks is to combat "widespread ignorance" of the IRS policy and legacy amongst non-Indigenous Canadians through public hearings and the creation of "an incontrovertible historical record".⁴⁵⁰

⁴⁴¹ Rosemary Nagy, "The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission" (2012) *International Journal of Transitional Justice* 1 at 13.

⁴⁴² *Fontaine v (Canada) Attorney General*, 2013 ONSC 684 at paras 97-99.

⁴⁴³ TRC, *Interim Report*, *supra* note 81.

⁴⁴⁴ TRC, *They Came for the Children*, *supra* note 53.

⁴⁴⁵ "National Events", online: Truth and Reconciliation Commission of Canada, <<http://www.trc.ca/websites/trcinstitution/index.php?p=92>>.

⁴⁴⁶ "Community Events", online: Truth and Reconciliation Commission of Canada <<http://www.trc.ca/websites/trcinstitution/index.php?p=103>>.

⁴⁴⁷ *IRSSA*, *supra* note 9 Schedule N 2. (b), (d) at 3.

⁴⁴⁸ *IRSSA*, *supra* note 9 Schedule N 2. (f) at 3.

⁴⁴⁹ *IRSSA*, *supra* note 9 Schedule N 4. at 5.

⁴⁵⁰ Stanton, "Settling the Past?", *supra* note 343 at 6.

The TRC has experienced several difficulties including a false start when its three original commissioners resigned⁴⁵¹ and a court battle with the government over the production of documents.⁴⁵² The TRC has stated in court documents that the delay in document production has jeopardized its ability to fulfill its mandate on time and within budget.⁴⁵³ In his resignation letter, original TRC Chair Justice Henry LaForme identified a difference in opinion between himself and the original two Commissioners as his primary reason for resigning. In his words:

The reason is that they and their supporters see the TRC as primarily a truth commission. Unlike mine, theirs is a view that leaves much of the work of reconciliation for another day. It is a view that does not recognize the need for uncovering and recording the truths of the IRS past and legacy as but a part, however important, of the greater whole of reconciliation.⁴⁵⁴

The two Commissioners did not comment on Justice LaForme's comments in their joint resignation letter⁴⁵⁵ but the event highlights the challenges in framing a truth commission.

As an institution with a national mandate the TRC has the potential to engage large swaths of Canadians with the IRS legacy. The TRC spread the seven required national events across the country and held many smaller regional events so that large numbers of survivors and Canadians could participate easily. The TRC has not, however,

⁴⁵¹ "Remaining 2 members resign from residential schools commission", *CBC News* (30 January 2009) online: CBC News <<http://www.cbc.ca/news/canada/remaining-2-members-resign-from-residential-schools-commission-1.781852>>.

⁴⁵² "TRC ready to again take residential school document fight with Ottawa to court", *APTN* (30 April 2013) online: APTN <<http://aptn.ca/pages/news/2013/04/30/trc-ready-to-again-take-residential-school-document-fight-with-ottawa-to-court/>>; *Fontaine v Canada (Attorney General)*, 2013 ONSC 684.

⁴⁵³ Truth and Reconciliation Commission of Canada, *Amended Notice of Application* before the Ontario Superior Court of Justice Court File No. CV-12-447891 (19 October 2012) at para 9.

⁴⁵⁴ Letter from Justice Harry Laforme to the Honourable Chuck Strahl, Minister of Indian Affairs and Northern Development (20 October 2008) online: Caledonia Wake Up Call <<http://www.caledoniawakeupcall.com/updates/081020trcletter.html>>.

⁴⁵⁵ Truth and Reconciliation Commission of Canada, News Release, "Joint Statement of Truth and Reconciliation Commissioners Claudette Dumont-Smith and Jane Morley" (30 January 2009) online: Truth and Reconciliation Commission of Canada <http://www.trc-cvr.ca/09_01_09_s.html>.

captured the public imagination in the same way that other truth commissions have.⁴⁵⁶

News coverage is sporadic and limited to reports of the court battles or immediately surrounding the national events. The TRC has not achieved a broad engagement of the non-indigenous population in its activities, which is a key element in transitional justice.⁴⁵⁷ It has been criticized for focussing too much on truth and not enough on reconciliation,⁴⁵⁸ echoing the concerns of Justice LaForme, possibly limiting its ability to improve relationships between Canadians generally and survivors.

Whether these criticisms are valid or not cannot be confirmed until well after the TRC's mandate comes to an end and its report is issued and digested by Canadians. As of the fall of 2014 the TRC had concluded its National Events and was completing documentary research. The content of the report is not yet known but even knowledge of the TRC's findings will not reveal the effect of the TRC on survivors or Canada. It will take some years, possibly some generations, for Canadians of all origins to digest the report and assimilate it into our lives and our institutions.

xiii. The 2008 Statement of Apology

The final response to date was the 2008 Statement of Apology. In contrast to the small and informal gathering in 1998 for the *Statement of Reconciliation*, hundreds of Aboriginal people travelled to Ottawa on 11 June 2008 to watch the Apology on a large screen on Parliament Hill. There was a significant lead-up in the media and the Apology was televised live. Prime Minister Stephen Harper

⁴⁵⁶ Stanton, "Settling the past?", *supra* note 343 at 8.

⁴⁵⁷ Stanton, "Pipeline", *supra* note 440 at 95, 97.

⁴⁵⁸ Marc A. Flisfeder, "A Bridge to Reconciliation: A critique of the Indian Residential School Truth Commission" (2010) 1:1 *The International Indigenous Policy Journal* 3 at 1.

delivered the Apology in the House of Commons with five First Nation leaders and six survivors in attendance.⁴⁵⁹

The Apology specifically stated that the policy of assimilation underlying the IRS system was wrong, recognizing that the policy itself caused harm and therefore the government that instituted it was a wrongdoer:

Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country. ...

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. ...

*We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. ...*⁴⁶⁰

In a significant break from protocol the guests, including Phil Fontaine, then Chief of the Assembly of First Nations, were permitted to address Parliament from the floor of the House of Commons.⁴⁶¹

While the 2008 Apology was better received than the 1998 Statement of Reconciliation, it has not been universally accepted. Eva Mackey criticizes the omission of the words treaty, territory, and land⁴⁶² from the text and for minimizing the extent of the wrongdoing to Aboriginal peoples.⁴⁶³ The Apology was an apology for the IRS policy

⁴⁵⁹ Eva Mackey, "The Apologizers' Apology" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: U of T Press, 2013) 47 at 47.

⁴⁶⁰ 2008 Apology, *supra* note 84.

⁴⁶¹ Mackey, *supra* note 459 at 47.

⁴⁶² *Ibid* at 53.

⁴⁶³ *Ibid* at 54.

only, not for colonisation. Mackey also criticizes the Apology for being unilateral, instead of dialogical, and Parliament and the media for assuming that the Apology would be accepted by First Nations leaders.⁴⁶⁴ First Nations leaders, including those present, in commenting on the apology acknowledged it and listened to it but did not necessarily accept it. Many stated that they were waiting for action on a range of issues before accepting the apology.⁴⁶⁵ Nevertheless, in stating, “we apologize for having done this” the government accepted, in the clearest terms to date, responsibility for the acts that led to the harms of the IRS policy.

More recently, the breadth of the Apology has come into question in light of the findings of the TRC that medical⁴⁶⁶ and nutritional⁴⁶⁷ experiments were carried out on residents. While some have called for an apology specific to the experiments⁴⁶⁸ the government has stated that the Apology covers everything that happened at the schools and will not issue a further apology.⁴⁶⁹ Subsequently there have been calls through statements, websites and gatherings for the government to “Honour the Apology”.⁴⁷⁰

⁴⁶⁴ *Ibid* at 55-56.

⁴⁶⁵ *Ibid* at 57-58.

⁴⁶⁶ “Aboriginal children used in medical tests, Commissioner says”, *CBC News* (31 July 2013) online: CBC News <<http://www.cbc.ca/news/politics/aboriginal-children-used-in-medical-tests-commissioner-says-1.1318150>>.

⁴⁶⁷ “Hungry aboriginal people used in bureaucrats’ experiments” *The Canadian Press* (16 July 2013) online: CBC News <<http://www.cbc.ca/news/canada/manitoba/hungry-aboriginal-people-used-in-bureaucrats-experiments-1.1317051>>.

⁴⁶⁸ Michael Woods, “Tories called to honour Indian residential schools apology”, *Postmedia News* (23 July 2013), online: Canada.com <<http://o.canada.com/news/tories-called-to-honour-indian-residential-schools-apology-amid-aboriginal-nutritional-experiments-controversy/>>.

⁴⁶⁹ Jody Porter, “No new apology for residential school experiments”, *CBC News* (9 August 2013), CBC News Thunder Bay <<http://www.cbc.ca/news/canada/thunder-bay/no-new-apology-for-residential-school-experiments-1.1343989>>.

⁴⁷⁰ See for example: Shawn A-in-chut Atleo, National Chief, Assembly of First Nations, “Honour the Apology to Residential School Survivors” (25 July 2013) online: The Assembly of First Nations <<http://www.afn.ca/index.php/en/news-media/latest-news/honour-the-apology-to-residential-school-survivors-july-25-2013>>; “150 attend interfaith Honour the Apology rally”, *CBC News* (25 July 2013) online: CBC News <<http://www.cbc.ca/news/canada/manitoba/150-attend-interfaith-honour-the-apology-rally-1.1313302>>; Wab Kinew, “Honour the Apology: Fasting for My Father, a Residential School Survivor” *The*

Conclusion

This Chapter presented a survey of the government's efforts to address the harms of the IRS policy. Beginning with criminal prosecutions and moving through a series of ADR and transitional justice mechanisms culminating in the 2008 Apology, the Canadian government has sought to do justice, discharge its liability, and take responsibility for the harms. These many attempts have been alternately criticized and praised for their authenticity and effectiveness. As noted at the outset, each of these reparations is the product of a particular way of thinking about harms and about responsibility.

In the next, and final, Chapter I analyze the ability of these thirteen responses to address the full range of harms stemming from the IRS policy and their ability to engage Canadians in their responsibility as beneficiaries of the colonial endeavour that gave rise to the IRS policy.

Chapter 5: Responsibility for Canada

The Recent Past

I would like to start this final Chapter with a comment about the IAP, where my inquiry began. I struggled with my role within the IAP because the stated goals of the process did not correspond to what I understood to be the needs of survivors or of my own needs to connect with survivors and others about how the IRS legacy has affected all Canadians. But in the end this thesis is not about the IAP, or even about recognizing harm. It is about how Canadians, individually and as a society, understand our history and our place within it.

My initial intention for this project was to propose a remedy for the cultural harm that I felt was being ignored within the IAP. This goal shifted as I gained a deeper knowledge of the many dispute resolution mechanisms already available and the potential of each to incorporate the range of harms stemming from the IRS policy. I had initially intended to propose a new process, or modifications to an existing one, to accomplish what I considered to be a necessary task of recognizing an incommensurable loss. But I now think that the problem lies not with our institutions but with our society, specifically with the perception of many non-Indigenous Canadians of the IRS policy and the reparations for it. If every person I had met outside or inside of the IAP had approved of the process I might have accepted the limitations of its tort-law approach. But instead I faced conflict from people who felt like the IAP was too much of a remedy as well as from people who felt it was too little. The lack of a consistent understanding of the process led me to wonder if my concerns with the IAP were due less to the structures of the institution or the remedy it provided than with our understanding, or our lack of a

collective understanding, of not only what harm was being remedied but of why it should be remedied at all. This is because we have not, as a society, engaged in a discussion of what the IRS policy means to Canada.

Because of this shift in focus this thesis does not address the provision of remedies or make any pronouncement as to what remedy will be sufficient to compensate victims. Some losses simply cannot be repaired – there is no way to resurrect a lost language – and financial compensation, of any amount, will never erase the memory of being raped. At the same time, for Canada to continue as a country, there must be some finality to the reparations (in whatever form) provided. My goal in this Chapter is to outline the conversation I believe is a necessary precondition to the discussion of what remedy or remedies will be adequate and their finality.

A Recapitulation

Before I come to that conclusion let me recap my research thus far. In Chapter 1 I described my experience acting as Canada's Representative at IAP hearings. The goal of that Chapter was to elucidate my research question by putting into words my emotional response to bearing witness to the life stories of IRS survivors and the crisis of conscience I experienced as a result. In order to understand my reaction, and to continue to perform my job, I needed to understand my role in the IRS legacy as a Canadian. This necessitated opening myself up to, while not a complete rewrite, certainly an adjustment to my understanding of Canadian history. It was a deeply personal process that I was best able to express in an auto-ethnographic narrative.

Chapter 2 described the IRS policy both as it was intended to unfold by the officials and policy makers who created the IRS system and as it was experienced by the

students who attended the schools. The goal of that Chapter was to explore the harms intended and incidental to the IRS policy as it occurred, without restricting the harms being recognized to the categories of criminal and civil liability that often dominate the discussion. When conceived of as lived experiences it becomes apparent that more harms were caused by the IRS policy than have been recognized by our legal and political institutions.

Chapter 3 set out those mechanisms for accountability that we, as a society, have superimposed on the IRS policy to enable us to analyse the actions of individual and institutional wrongdoers, and to assess and compensate harms. Chapter 3 described how a narrow framing of harms and responsibility in the design of our dispute resolution mechanisms restricted the recognition of many of the harms intended by policy-makers and experienced by IRS survivors. This is true of the criminal and civil law process but also of those alternative dispute resolution mechanisms that were developed to attempt to correct many of the deficiencies of these established processes. In order to address the unrecognized harms, Chapter 3 discussed concepts of responsibility outside of legal traditions in order to draw out analytical tools, in particular the concept of intergenerationality and a reframing of the concept of “perpetrator” to include “beneficiaries”, that can be used to facilitate recognition of harm.

Chapter 4 set out thirteen reparations that Canada, as a polity, has provided for the IRS policy. The goal of that Chapter was to demonstrate how the variety of dispute resolution mechanisms we have applied to the IRS legacy categorize harms and assign responsibility for wrongdoing. Moreover that study demonstrated that many of the harms arising from the IRS policy are not captured by any mechanism. These responses were

presented as a progression, as they were, from the most common legal responses of criminal and tort-law, to alternative formats of adjudicating the same torts, to transitional justice mechanisms meant to respond to large-scale and cross-cultural conflicts, and hybrid measures in between. Each subsequent measure was driven by the recognition that its predecessor could not adequately address the harms caused by the IRS policy.

The task of this Chapter is to state my conclusion as to why these measures have, in the aggregate, failed to adequately name, recognize, and respond to the full range of harms caused by the IRS policy and to propose a way to achieve the necessary recognition of harms. My conclusion is that the responses to date have not succeeded in recognizing the full range of harms because they too often accept the limitations of the existing institutions, which have failed to develop a category of responsibility beyond those of criminal and tortfeasor that would draw non-Indigenous Canadians into the discussion of the IRS policy and allow us to recognize our own place in that legacy. Presently our responses do not aim to draw in Canadians as a category. Even the TRC, which has the stated goal of “reconciliation” writ large, to date, has focussed its efforts on engaging survivors and their families and communities. Absent that shift from bystander to beneficiary there is no reason for most Canadians to delve into the idea that they might bear some responsibility for the harms. Without recognition of the responsibilities at the core of the IRS policy Canadians will be content to rely on established Euro-Canadian legal categories of harm that fail to acknowledge the racism inherent in the IRS policy and the full range of harms it caused.

(a) Restatement of Harms

At the end of Chapter 2 I summarized the harms I heard expressed by Claimants in IAP hearings and spoken or written by survivors in public documents/forums as belonging to six categories: sexual abuse, physical abuse, inadequate care, emotional abuse, cultural harm, and inadequate education.

My inquiry is inspired specifically by the descriptions of “cultural harm” I heard during IAP hearings that reflected so pointedly back onto my own life. These points of empathy opened up a space for me to explore my relationship with the Claimants as Canada’s Representative and as a Canadian. Considering those harms within the IAP, a process steeped in the principles of tort litigation, left me questioning the validity of an institution that ignored (at least formally) the harms I felt most urgently. It seemed to me that the failure to recognize cultural harm stemmed not from ignorance or dismissal of the experiences of survivors but from the inherent and largely unquestioned limitations of tort-law. Because the legal framework in which I was working required the existence of an individual wrongdoer with a causal link to the harms, the harms that affected me so deeply could not be recognized. Those harms were not caused by an individual but by a policy put in place by a government acting on the mistaken, and racist, presumptions that the First Nations were an inferior and dying race – presumptions that were widely held by Canadians who either actively supported, or passively allowed, the IRS system to exist for a century and a half. There is no single individual responsible for the loss of a language.

Stepping back from the IAP and looking at the responses more broadly I began to see a patchwork approach to recognizing harms that was, yes, based on criminal and tort

law but also on transitional justice and restorative justice principles. I now consider the IAP to be a fair and responsive process though located within the tort-law framework. This limitation is acceptable because it is not the sole response to the IRS legacy. As Chapter 4 demonstrated, many other measures have also been undertaken: Criminal trials have convicted abusers and vindicated victims; Civil trials have taken school administrators to task for their failures to protect students and have awarded compensation to victims; The AHF provided survivors and their families with resources to overcome the effects of abuse, including intergenerational effects; the RCAP published an account of the IRS system detailing many of the different shortcomings of the care children received in the schools; Two separate apologies acknowledged that the IRS system was founded on a racist policy. My desire for a single institution or process to handle all elements of the IRS legacy was unrealistic. There were and still are too many players within the IRS system, and too wide a variety of harms stemming from it, for a single process to adequately address every wrongdoer and every harm simultaneously.

But just because one size cannot fit all does not mean that Canadians should limit our response to the harms of the IRS policy to those easily addressed by our most common dispute resolution mechanisms. The inexistence of a tort of cultural harm means that civil courts are not the appropriate mechanism to recognize loss of language. It does not mean that the harm does not exist or that we should not address it. Our failure to do so perpetuates the harm and does disservice to our own interests as Canadians to recognize and address the effects of past policies.

(b) Restatement of Responsibilities

The responsibility to do so extends more widely and is built on different foundations than the responsibility found in the criminal and tort law. Great harm was done through the IRS policy but not all that harm has been recognized because we have inadequately theorized the concept of our responsibility as members of an intergenerational polity, as Canadians. This is because Canadians have not yet been given a reason – have not yet been forced – to consider their own responsibilities for the IRS legacy despite the proliferation of responses to date. In this sense we have put the cart before the horse; we have applied our standard institutions with their limited definitions of harm and their focus on individual and institutional perpetrators before considering whether they are capable of addressing the totality of the IRS legacy. When it became apparent that, for example, large-scale civil litigation would re-victimize survivors we attempted a succession of alternative dispute resolution processes that resolved some of the technical and cultural limitations of the civil trial but did not alter the framing of the harms as torts. We have largely accepted the limitations of these institutions because we have not been presented with a reason not to.

At the end of Chapter 3 I articulated such a reason. I drew from several authors, notably Iris Marion Young, Paulette Regan, and Janna Thomson to employ their engagement with the responsibility of citizens in the social, legal, and political structures of a society. From Young I drew first that no one person is to blame for structural injustices but also that not being legally liable should not absolve any citizen from contributing to an injurious structure. I follow Young in her subsequent argument that the language of “blame” is, in and of itself, a barrier to the recognition and acceptance of

responsibility by citizens of injustices that exist within their polity. Regan (drawing from Torpey and others) pulls this line of thought into focus by re-naming the parties as descendants and beneficiaries, instead of victims and perpetrators. In these terms those within a polity who did not cause or carry-out a harmful policy or program are not absent from the scene but are integral to it, as the intended beneficiaries of the policy. Thompson conveys this point, that the existence of an intergenerational polity necessarily leads to intergenerational responsibilities, most forcefully. For Thompson, the legitimacy and continued survival of a polity is found in its acceptance of the responsibility to carry on the good projects of its forebears and to establish such projects for its descendants. Likewise, if a previous generation failed, either in conception or execution, to uphold the values the current generation espouses, it is up to the present generation to address those failures. This concept of a polity answers Young's observation that the unresponsiveness of citizens to structural injustices is directly related to citizens' lack of responsibility – not in the sense of criminal guilt or legal liability – but in the sense of civic duty.

This is the crux of my argument. As Thompson argues, if we are to consider ourselves to be the legitimate inheritors of our polity's achievements, to be proud Canadians, we must also inherit their failures and with those failures a responsibility to rectify, as best we can, the harm done by our predecessors. Even with the best of intentions no response to the IRS legacy will be adequate until we first consider why we, as current Canadians, should respond. We are members of an intergenerational polity, one that has benefitted from a policy – specifically the IRS policy within the broader colonial endeavour – that caused corresponding harm to some of our fellow citizens. It is

from this basis that we must start the analysis of the need for reparations for the IRS policy.

(c) Responding Reflexively

Beginning from an analysis of our responsibility as Canadians to each other for the IRS policy allows us to engage in a discussion of reparations stripped from any institutional assumptions (even the beneficial ones). We are instead forced to start from a common understanding of our shared history – even if that means we need to write that history first. Because we will write this history together it will include recognition of the harms experienced by survivors and their families as well as an understanding of the motives behind the IRS policy. The statement of motives becomes a tool to explain responsibility to Canadians (whether uninformed or misinformed adults, children, or new immigrants) while the statement of harms forms the basis for a discussion of the needs of survivors and appropriate reparations.

The mechanisms applied to date have been framed largely through the legal theories of criminal guilt and civil liability. Abusers are punished and those institutions in charge of their supervision (or lack thereof) are fined or forced to pay compensation. Both are shamed publicly for their wrongdoing. These reparations are adequate if the harms stemming from the IRS policy are the physical and sexual abuse of students and a selection of consequential harms and loss of opportunity stemming from them. This approach is not wrong. But my experience listening to Claimants describe the harms they experienced makes me certain that this approach is incomplete. I have inherited, either through the accident of my birth in small-town Northern Ontario, or through my active participation in social life, all the benefits of Canadian citizenship, from the right to vote,

to access to health care and education, to the ability to live and work anywhere I choose. I have also inherited responsibilities for the harmful consequences of my government's decisions. My rights and freedoms stem from the same source as others' oppression. That fact requires recognition. Starting the discussion from an understanding of, and a desire to carry-out, our responsibilities as members of an intergenerational polity helps focus our discussion on the historical events and the harms caused. Only then can we understand how to craft an appropriate response.

Consequently I do not advocate reshaping our legal institutions to incorporate a broader range of harms (though the common law may arrive at that conclusion someday). That project assumes that criminal prosecutions and civil liability are the best ways to recognize harm and assign responsibility. That analysis, while helpful in that it is willing to recognize broader harms, continues to assume that "responsibility" is confined to the concepts of guilt and liability while potentially, as Young argued, watering-down the effectiveness of the criminal and civil processes when they are applied in those situations to which they are best-suited.

The approach I advocate requires us to allow for the possibility that we are all perpetrators through our status of beneficiaries of the policies and actions of our political and social ancestors. Taking up the concept of responsibility means that we look at the facts set out in Chapter Two with no preconceived notion of what categories of Canadians are victims or perpetrators. Just as we must re-write the history from a blank slate in order to recognize the full range of harms caused by the IRS policy we must allow for the full range of Canadians to bear some portion of the responsibility for responding to those harms. In doing this we do away with any hierarchy among dispute

resolution mechanisms and look at all of the mechanisms described in the previous Chapters as equally legitimate tools to respond to the variety of harms.

The possibility did exist within our present responses. The ambiguous purpose of the CEP, for example, can be held out as recognizing broader harms than those recognized in tort-law and as a vindication of survivor's rights to maintain their language and culture. The decision to not provide an explicit statement of what "common experience" is being compensated meant an opportunity was lost to expand recognized categories of harm and further the public debate over what the IRS "experience" represents to survivors and to Canadians generally. The TRC, while it has adopted a broader concept of harm, has not, to date, broken the mould of legal proceedings in its treatment of perpetrators. By focussing on the stories of survivors and the needs of survivors, their families, and communities the TRC has missed the opportunity to draw all Canadians into the discussion. While recognizing that the TRC's report has not yet been issued and its effects are not yet known, I can bemoan the lack of media coverage apart from the national events and the court challenges over document disclosure that perpetuate the survivor-versus-government model of victim and institutional perpetrator. The TRC made some efforts to reach out to schools and to provide interpretive displays during its national events but these measures fell far short of engaging Canadians in a discussion of how they fit in the IRS legacy and what responsibility they may have to participate in the reparations.

Bearing witness to stories of harms outside of the narrow legal framework of euro-Canadian legal theory and institutions forced me to consider responsibility differently, to rethink early Canadian history and to place myself within that legacy. But

most Canadians have not had a similarly unsettling experience. And among those who have, each individual has reacted slightly differently. Consequently no clear sense of how the history of contact, colonialism, and residential schooling connect to our present rights and responsibilities as Canadians. Achieving that clarity is a prerequisite to understanding how to recognize and address our history including the IRS policy. That is what I hope to achieve in the final pages of this project; there are, I argue, ways to harness our existing legal, political, and social institutions to engage all Canadians with both our history and our future as a polity. From that engagement a framework for our responsibilities should emerge and with it recognition of all the harms caused by the IRS policy.

Engaging Canadians

So what to do about that stranger who so often passed by me and made snide remarks, or ignored me on my soapbox, leaving me in alternating fits of guilt and rage? He, as much as the Claimants' stories or the title of Canada's Representative, was the catalyst for this project. How do we engage him in his responsibilities as a Canadian and as an intended beneficiary of the IRS policy? I conclude this project with my suggestions for how we, as Canadians, might engage in our responsibility for the IRS legacy. These suggestions might be remedies for harms in and of themselves but my intention is to suggest that these measures will lay the groundwork for a genuine pan-Canadian discussion of Indigenous-non-Indigenous relations and of the root causes and intergenerational effects of the IRS policy on our country. From that conversation we will, I hope, reach a common understanding of how to repair the harms, recognizing that

some damage cannot be undone and can only be remedied through acknowledgement and compensation.

a) Apologies

There have been two state apologies in Canada and while both have been criticized, as discussed in Chapter 4, they do acknowledge and accept responsibility for the IRS harms on behalf of the Canadian people. But many Canadians, survivors included, are not aware of their contents. There are a few ways to make the 2008 Apology part of the public consciousness and spur further discussion. One would be to follow the TRC's recommendation to provide a framed copy of the apology to all schools in the country to be displayed prominently and taught as part of the curriculum. In this way the Apology would become part of the general knowledge of students as they mature into decision-makers in the Canadian polity. The second way for an apology to become part of the public discourse would be for Canadians to rally around it as a social movement as Australians did in 1998 when they began the tradition of "Sorry Day". In combination these two measures would target young and adult Canadians alike and potentially kick-start an immediate conversation without waiting for our children to take the reins from the current generation of decision-makers.

b) Commemoration

The funding for commemoration found within the IRSSA could potentially transform the Canadian landscape with the addition of plaques and monuments on the

sites of former residential schools⁴⁷¹ and fill our radios with documentaries about survivors.⁴⁷² But the majority of the projects funded to date are focussed internally to specific communities or schools and the families of survivors. They are not geared to creating awareness and involving non-indigenous Canadians. While these community-focussed commemorations are important, limiting commemoration to inward-looking projects risks missing an opportunity to engage non-Indigenous Canadians.

Commemoration, as a tool, could have a second (or concurrent) phase, one that focuses on the non-Indigenous community to promote awareness, create empathy, and engage us in our responsibilities as citizens for our polity's history. Projects could be large or small, general or aimed at a specific community of Canadians (for example immigrants, or Northerners) and use any method (plaques, ballet, graphic novels, theatre). The more opportunities for involvement, the more likely Canadians will come across a survivor, a story, an image, a fact, that draws them into the IRS history the way Claimants' stories of lost family members did for me and make them question their role within the IRS legacy.

c) Education

Education can be part of both institutional reform and commemoration. Education is an important tool to affect the switch from guilt to responsibility. Learning about the IRS policy, without added interpretation, might allow Canadians to view the policy as the problem of past people for which they are not to blame and should bear no responsibility. Education about the IRS legacy must be crafted in a way that allows us to

⁴⁷¹ "AFN/AHF Commemoration Proposal" (Assembly of First Nations and Aboriginal Healing Foundation) in Aboriginal Affairs and Northern Development Canada, "Commemoration 2012-2013 - Project Descriptions", *supra* note 412.

⁴⁷² "Restoring Reconciliation" (National Capital Radio Association), *ibid.*

learn not just about the IRS legacy, but from it.⁴⁷³ Educators have this opportunity to engage their students in their responsibilities as Canadians for the IRS legacy without alienating them with the concepts of guilt and liability but they must be given the tools with which to do it.

In its Interim Report the TRC recommended both public awareness campaigns and specific school curricula to educate Canadians about the IRS legacy.⁴⁷⁴ To carry out its own recommendation, the TRC has built “education days” into its national events during which schools are invited to participate in a series of age-appropriate workshops about the history of the Residential Schools and Canadian history generally. A National Research Centre on Indian Residential Schools is being created and will be housed at the University of Manitoba in Winnipeg.⁴⁷⁵ Several jurisdictions are developing mandatory programming on the IRS legacy notably the Northwest Territories and Nunavut, which incorporated units on the IRS legacy into their high school curriculum in 2012⁴⁷⁶ and Alberta where curriculum will be developed for all grades from Kindergarten to Grade 12.⁴⁷⁷

⁴⁷³ Roger I Simon, “Towards a Hopeful Practice of Worrying: The Problematics of Listening and the Educative Responsibilities of Canada’s Truth and Reconciliation Commission” in Jennifer Henderson & Pauline Wakeham, eds *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: U of T Press, 2013) 129 at 136.

⁴⁷⁴ TRC, “Interim Report”, *supra* note 81 at 33.

⁴⁷⁵ “National Research Centre on Indian Residential Schools”, online: The Truth and Reconciliation Commission of Canada <<http://www.trc.ca/websites/trcinstitution/index.php?p=815>>.

⁴⁷⁶ “N.W.T., Nunavut launch residential school curriculum”, *CBC News* (2 October 2012), online: CBC News <<http://www.cbc.ca/news/canada/north/n-w-t-nunavut-launch-residential-school-curriculum-1.1183964>>.

⁴⁷⁷ John Cotter, “Alberta students to be taught legacy of Indian residential schools”, *The Canadian Press* (28 March 2014), online: CTV News <<http://www.ctvnews.ca/canada/alberta-students-to-be-taught-legacy-of-indian-residential-schools-1.1750176>>.

d) Storytelling

Storytelling can occur in formal and informal settings and is an important tool for creating a joint narrative.⁴⁷⁸ The idea of storytelling as a mechanism of engagement and responsibility hits home with my experience in the IAP. The IAP, and the TRC, are essentially storytelling forums. The Claimant's "story" is the evidence upon which an IAP settlement is based. Through the TRC a public record of experiences of IRS survivors (and others) is being created. I am telling a story through this thesis of my own experience as a Canadian trying to come to terms with my country's history and my role within it. Storytelling has the potential, more than any of the formal mechanisms, to engage individuals on a large scale.

In her exploration of storytelling in *Shattered Voices: Language, Violence, and the Work of Truth Commissions*, Teresa Godwin Phelps argues that storytelling can provide "justice" to victims and to the social fabric of a country. Writing of benefits to the victims she states "making stories of our lives is what we humans *do*. It is the fundamental means by which we assert and describe our humanity."⁴⁷⁹ It is also a means by which we can retrieve our humanity by exploring our roles in a racist policy. Storytelling as a mechanism for engagement "is an essentially human act that enables all of us to make sense of our lives and to feel integrated as members of a community".⁴⁸⁰ By encouraging both survivors and perpetrators – or descendants and beneficiaries – to come forward and tell stories

the country itself benefits from having better citizens, and the stories help bridge the chasm between the past, in which people were enemies to each other, and the

⁴⁷⁸ Teresa Godwin Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (Philadelphia: University of Philadelphia Press, 2004) at 55.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

present, in which former adversaries coexist as fellow citizens: the country before and the new country that is forever changed by the events of the past.⁴⁸¹

Stories can break through the hegemony and “capture and transmit common human emotions such as pain, loss, separation, desperation”,⁴⁸² creating empathy and drawing members of the dominant community into the story and into the process of revising it. Finding spaces for storytelling honours survivors and draws us together in the act of telling, listening, and co-authoring Canada’s next chapter.

e) Canada’s Representatives

It must also be remembered that while many of the IRS reparations, like the IAP, happened in private they were attended or carried out by people – individual lawyers, caseworkers, assistants, public servants, adjudicators, health support workers, etc. For many of us the experience was transformative, and these experiences will stay with us through the rest of our professional and personal lives and inform our interactions with a wide range of people and issues. As a university friend and colleague recently noted, “the work is not costless” – it can cause or aggravate trauma, lead us to question our knowledge and values, and create conflict in our personal and professional lives – but nor, I would add, has it been without reward.

While each of us will do so in accordance with our own beliefs and strengths, it is incumbent upon us to honour our experiences interacting with the IRS reparations by interpreting them, as best we can, to our family, friends, and community. Through this process we might eventually reach all the strangers who otherwise avoid engaging with the IRS legacy.

⁴⁸¹ *Ibid* at 59.

⁴⁸² *Ibid* at 69-70.

Conclusion: Where do we go from here?

As I conclude my analysis I must admit that I do not know how we, as Canadians, can repair the damage done to IRS survivors, their parents, children, and communities. I don't know how to describe – or where to draw a line under – how the IRS policy has harmed Canada and all Canadians.

The reparations we have made to date have not captured the full range of harms stemming from the IRS policy. This is because we have used institutions that only imperfectly recognize the harms caused and largely fail to recognize the broader context of colonialism that led to the IRS policy and through which all Canadians benefitted. I believe that our integrity, and therefore our success, as a polity is dependent upon how we engage with our shared history and whether we are willing to take responsibility for both the good and the bad we find within it.

To do so we must start not from an analysis of our available institutions or even of the harms, but from the origins of the harms themselves – the racism underlying the IRS policy and our responsibility as members of the intergenerational Canadian polity to recognize the wrongs of our predecessors. Our institutions then become simply tools to be selected and applied as appropriate to recognize the harms experienced and expressed by survivors. The types of harms recognized and the scope of the reparations provided can then be discussed and negotiated on an honest footing. We can make this change by looking at the harms caused by the IRS policy through the lens of our responsibility as members of an intergenerational community instead of as the actions of past individuals or governments. We are responsible for the consequences of their actions. We are responsible to each other.

Epilogue

Through my work I was honoured to bear witness and now bear a responsibility to those Claimants who trusted me with their stories. I cannot share their stories. But I have a story. Not about the things I have heard, but about my reaction to their words, experiences, pain, sorrow, anger and life. Not what I heard but what I felt upon hearing it. How it changed me. So while I apologized at the beginning of this thesis for any vanity in writing so much about myself, I do not regret the exercise. Narrative can be moral work and an ethical practice.⁴⁸³ The moments I have tried to capture and convey to you were essential to my understanding of these issues. Without them I would not have asked the questions that led me here.⁴⁸⁴ I offer these reflections and proposals as part of my responsibility of bearing witness to the stories I have heard.

⁴⁸³ Ellis & Bochner, *supra* note 25 at 222.

⁴⁸⁴ Regan, *supra* note 8 at 31.

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