# GOVERNMENT RESPONSES TO THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT IN CANADA: IMPLICATIONS FOR AUSTRALIA

Bradford W Morse*

*[T]he single most harmful, disgraceful and racist act in our history.*[1]

## I Introduction

Canada is a country that is truly blessed with extraordinary richness in human and natural resources, replete with majestic landscapes, now largely populated by talented immigrants from around the world who have relocated in recent years or in generations past in search of better lives for themselves and their families. Over 95 per cent of Canadians trace their origins to other lands,[2] and benefit from Canada's wealth with almost no regard to its illegitimate and immoral foundation as a nation. Canada is also home today to over 630 Indian First Nations[3] whose sovereign independence was originally recognised but later ignored. The Inuit have existed across the Arctic for thousands of years with most of their territory untouched by any Crown representatives until the 20th century. Through intermarriage, generally of European men with Indian and Inuit women, the third branch of the 'Aboriginal peoples of Canada'[4] – the Métis peoples – came into existence as cultural polities distinct from their ancestors. The traditional territories of all three Indigenous peoples in Canada – the Indian, Inuit and Métis peoples – were often improperly usurped by Crown representatives through force of circumstance, though never by conquest. Over time, the First Nations, Inuit communities and Métis peoples have been largely colonised, politically disenfranchised, dispossessed of most of their traditional lands, economically marginalised, and administratively oppressed by governmental officials relying upon Canadian law or bureaucratic edict for their authority. After a century of largely peaceful coexistence, beneficial trade and mutual respect between the British colonists and the Indigenous peoples, the experience of colonisation, disenfranchisement and dispossession began to take root on the east coast of what is now Atlantic Canada in the early 1700s and then spread westward and northward over the next three centuries. Indigenous peoples in Canada have thus encountered a largely similar phenomenon regardless of where they have resided, although the level of external control and its duration have been much greater in the more heavily populated southern regions than in the north – as it has also been along the southern coastline of Australia.

The Government of Canada sought to eliminate all of the Indigenous cultures, languages, religions, stories, histories, laws, governments, values and ways of living to facilitate non-Aboriginal settlement and to promote Indigenous assimilation so that Indigenous peoples would cease to exist as separate nations in their homeland.[5] One of the key methods chosen in the late 19th century, given the failure of most previous strategies to completely destroy the prospects for Indigenous societies to survive, was to concentrate assimilative efforts upon the children. It was widely believed that the parents and elders were a lost cause, as they were thought to be too set in their ways and beliefs to be willing to relinquish their traditions in favour of European values. It was assumed, however, that removing all of the children from their home communities at an early age – usually when the children were five years old, when they had not become fully inculcated within their traditions – and relocating them far enough away to drastically minimise family and community contact so that they could be transformed, or brainwashed, into becoming pliable members of the dominant society, was destined for success. It was expected that this strategy would ensure that the First Nations would simply die out as distinct political entities when their older members passed on, while the children would grow up within white society unconnected to their territories, families, traditional economies and cultures. Making it even worse, this plan

opted for institutionalising the children in religious schools rather than favouring the use of non-Aboriginal families in a child welfare system approach in which love and nurturing might sometimes have occurred.

It has been suggested from some quarters that residential schools were created out of the best of intentions to share European education and technology, believed to be essential for survival in the 19th and 20th century economies. Analogies were even drawn with elite residential schools like Eton in the United Kingdom or Upper Canada College in Toronto to support this model of education. Others have argued that the Crown had little choice but to place Indigenous children in residential schools once public education became commonplace and then compulsory. Further, it has been asserted that the Federal Government was compelled to provide schooling as it had been expressly negotiated as a specified federal obligation in some treaties after Confederation in 1867. It is, however, extraordinarily hard to substantiate any of these rationales in light of what actually happened in the school system put in place.

This paper seeks to highlight the key nature of the Indian residential schools in Canada and their tragic, ongoing impact upon survivors as well as their intergenerational effects. The paper summarises the efforts to bring school officials who committed acts of sexual and other forms of physical abuse to the attention of the criminal justice system as well as moves to obtain compensation through civil litigation. It then provides a backdrop for the momentum to achieve a global settlement for all survivors, as well as detailing the contents of the resulting settlement and the current efforts to achieve reconciliation between Aboriginal peoples and the rest of Canada.

Potential implications for Australia from this Canadian experience will also be briefly touched upon throughout this paper. While the Indian residential schools saga occurred on a much larger scale (involving perhaps over 150 000 children)[6] and for a far longer time (primarily from 1879 to 1986)[7] than was the case with the Stolen Generations in Australia, and while the residential school system was directed towards capturing virtually all Indian children (rather than primarily those of mixed ancestry, as in Australia), there are frighteningly similar parallels between the residential schools system and the horrendous Stolen Generations story.[8] However, unlike Australia, Canada has been far less willing to place such a clear, honest label on what effectively constituted the kidnapping of young children and their relocation great distances from their families. Instead, the concentration of discussion on 'residential schools' has kept the reality of what was intended, and that did in fact occur, in the Indian residential schools system masked under a far more benign façade of education. Canada is only now as a country really beginning to see the horrors that occurred for what they were and starting to speak words that had been unspeakable before.

It must be acknowledged that this short paper can only skim the surface of all of these elements, and interested readers are encouraged to seek further, more detailed information, which is readily available elsewhere.[9]

## II An Overview of the Residential School System

Canada emerged as a new country on 1 July 1867 with a constitution allotting exclusive legislative authority to the Federal Parliament over 'Indians, and Lands reserved for the Indians.'[10] No Indian Nations were asked if they wanted to be under federal control or even whether they wanted to have their territory included within this new settler state. The first Prime Minister of Canada, Sir John A Macdonald, declared to Parliament that it would be Canada's goal 'to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion.'[11] The new Dominion Government moved swiftly to use its legislative jurisdiction and enacted the *Gradual Enfranchisement Act*, SC 1869, c 6, the *Indian Act*, SC 1876, c 18, the *Indian Act*, SC 1880, c 28, and the *Indian Advancement Act*, SC 1884, c 28,[12] to assert its control over every aspect of daily life of First Nations, including intruding upon community control of their own identity by the imposition of a scheme for determining who qualified as an 'Indian' for the purposes of any statute.

While the Aboriginal peoples of Canada today clearly include First Nations, Métis and Inuit peoples, the Federal Government did not recognise the Inuit as coming within its constitutional authority over 'Indians' until a Supreme Court decision in 1939.[13] Even this grudging acceptance of jurisdiction was forced upon the Government of Canada by the Quebec Government, which was, in the time of the Great Depression (a time simultaneously accompanied by a dramatic decline in available game to hunt), pushing hard for a resolution regarding fiscal responsibility for the cost of providing essential food and services through a reference to the highest court in the land. The federal resistance did

not disappear with this judicial interpretation, as the Federal Government largely did nothing beyond pay for survival rations, and then later decided explicitly to exempt the Inuit from the *Indian Act* in 1951.[14] The Métis were consistently excluded from federal concern after the second Métis uprising in 1885 in Saskatchewan, called the Riel Rebellion, was crushed.[15]

While litigation and federal policies in the 1960s and 1970s began to raise the importance of First Nations in the national psyche, this situation was altered dramatically for the Métis in 1980 and 1981. During this time, Prime Minister Trudeau was desperately seeking support from all quarters for his proposals for constitutional change and was willing to make a deal to expressly recognise the Métis within the *Constitution*. Despite the constitutional changes formally proclaimed on 17 April 1982, there still remains an outstanding legal question (due to federal resistance) as to whether the Métis are 'Indians', constitutionally speaking, as the Inuit were determined to be in 1939,[16] for the purpose of s 91(24) such that the Parliament of Canada has the sole legislative capacity to enact Métis specific laws to the exclusion of provincial authority.[17] Regardless of the legislative definitions that existed in the past, children in distinct First Nations, Inuit and Métis communities were all completely vulnerable to forced removal and institutionalisation to expedite the goal of assimilation. As such, the term '*Indian* residential schools' is a bit of a misnomer, because, although the vast majority of the children warehoused in these schools were from First Nations, Inuit and Métis children were often also included.

Establishing separate schools at which First Nation children would live for most of the year away from their families began in the 1600s in the French colonies at the instigation of different Catholic missionaries. By 1680, it was clear that this approach was not popular with Indian Nations and sufficiently costly that it was abandoned.[18] Protestant and Catholic denominations both tried again in the early 19th century as a preferred approach to promote conversion to Christianity. These Anglican, Methodist and Catholic operated schools would later become the feeder schools for government-run institutions or were converted to the government-financed model.[19] The various churches (with the United Church later born from a merger of the Methodist Church with most of the Presbyterian congregations) remained active as the primary administrators and operators of the residential schools, but

> behind every school principal, matron, teacher, and staff member who worked in the school system, and behind each participating denomination, stood the Canadian government and the Department of Indian Affairs.[20]

Imposing mandatory education upon children gained sway as an important method to improve the employability of the general population in the latter half of the 19th century. Ontario was the first Canadian province to introduce compulsory school attendance for non-Aboriginal children in 1871.[21] As Philip Oreopoulos notes, '[p]arents were obliged by threat of fine to have children attend school for at least four months a year between the ages of seven and twelve.'[22] This initiative, coupled with treaty promises, spurred the Federal Government to accept that primary level education had to be provided to First Nations in some manner.

The separate Indian school system included both day and boarding options for children between the ages of five and 16 years. The boarding school model was strongly favoured by the Government as being far more effective at reducing the 'influence of the wigwam',[23] as day schools permitted children to return home to the influence of their families at the close of each school day and to remain there every weekend. Not only was removal from the home regarded as an essential element to smooth the conversion from 'savage' to 'civilised' but it was felt that '[t]he more remote from the Institution and distant from each other are the points from which the pupils are collected, the better for their success.'[24] Where complete isolation from the Indigenous community was not possible, then the prospect of parental or family visits was regarded as disruptive and was to be vigorously discouraged.[25] Any return home for holidays also posed a risk to the objective of effective assimilation.

> It was not until 1920 that the Department [of Indian Affairs] felt that it had sufficient control over parents to ensure that children would be returned to the school that it approved … a standard two-month summer vacation.[26]

One method selected to provide this level of confidence in 1920 was to make it a summary conviction offence punishable by fines or imprisonment for Indian parents not to compel their children to attend a residential school.[27]

The residential school curriculum was designed in light of the prevailing standards of the province in which the school was located; however, it was only followed for half of each

school day. The remaining time was allocated to industrial training and the development of 'practical' skills, including

> for the boys, agriculture, carpentry, shoemaking, blacksmithing, tinsmithing and printing and, for the girls, sewing, shirt making, knitting, cooking, laundry, dairying, ironing and general household duties.[28]

Limited mastery of English or French was regarded as the primary impediment to successfully assimilating the young student and as such most of the basic in-class education emphasised language skills. The Department of Indian Affairs declared in 1895 that the inability to use English effectively meant that, 'the Aboriginal person is "permanently disabled" and beyond the pale of assimilation for, "So long as he keeps his native tongue, so long will he remain a community apart."'[29] The attempt to obliterate Indigenous languages has had long-lasting effects. According to the United Nations Educational, Scientific and Cultural Organization, 'Canada's Aboriginal languages are among the most endangered in the world'.[30] Only three of the over 50 Indigenous languages still remaining today have decent prospects of long-term survival.[31] Discipline was the method of choice for 'teaching' the English or French language, with corporal punishment imposed on children who failed to learn the prescribed language of the school or who were caught speaking any Aboriginal languages.[32]

The reality of the residential school system bore little resemblance to the values of higher or even basic education espoused by its administrators. In fact, the schools were seriously understaffed, and usually filled with inadequately qualified personnel. As late as 1950 it was reported that more than 40 per cent of the teaching staff had no professional training and some did not even have a high school diploma.[33] Chronically under-funded, the schools fell into disrepair and, far worse, suffered from persistent food shortages that left the students weakened and more susceptible to tuberculosis and other contagious diseases for which they possessed no natural immunities. These diseases decimated many of the schools' populations. It has been reported that 'fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein.'[34] The extraordinarily high death rate within the Indian residential school system was well known, both within government and publicly, as early as 1907. An official Government report by the Chief Medical Officer of Canada, known as the *Bryce Report*, surveyed 1537 children at 15 schools and found the death rate to be 24 per cent, and speculated that 'this figure might have risen to 42 per cent if the children had been tracked for three years after they returned to their reserves.'[35] Publicly, a national magazine issued a scathing editorial, which dramatically declared that 'even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards.'[36]

At the system's peak there were over 80 Indian residential schools, with the last federally funded school closed in 1996.[37] Attendance and residency were mandatory for the children under provincial standards, which were reflected in a federal statutory requirement to attend school within the *Indian Act*, RSC 1952, c 140, s 115, where it remains today.[38] Despite the number of schools across the country, in every province save for Newfoundland,[39] New Brunswick and Prince Edward Island,[40] many of the stories from the 80 000 or so survivors who are left today are remarkably similar and, most shamefully, have been well known among government and church officials for decades. Neglect and violence were staples within the residential school system; punishments were frequent and severe, including lashes to the face and the forced feeding of spoiled meat.[41] Most children who fled on foot were forcibly returned to the institutions, while some were found dead from exposure trying to make their way home. Other children tried to escape by taking their own lives, and a few were successful.[42] Horrific claims of physical and sexual abuse have characterised approximately 90 per cent of the individual court actions filed against the churches and Government during the last two decades.[43] Nevertheless, it is as if a cone of silence had been placed over these horrendous events, as the official files and records of the residential school system appear to make no explicit reference to the insidious sexual abuses that took place. Similarly, none of the major reports that had previously dealt 'critically with almost every aspect of the system mentioned the issue'[44] of sexual abuse at all.

## III Ripping Off the Covers

The release of the Final Report[45] of the Royal Commission on Aboriginal Peoples ('RCAP') in November 1996 shattered any delusions that the abuse suffered by children within the walls of the residential schools at the hands of church officials and employees was rare and limited to a handful of victims abused by isolated perpetrators. The extensive chapter on this topic within the Report described in searing detail the intentional, systematic and widespread physical, emotional

and psychological abuse to such a degree that, with sufficient media attention, it became undeniable.

RCAP was unable to benefit from the work then underway in Australia through the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('*Bringing Them Home* Inquiry') launched by the Human Rights and Equal Opportunity Commission. Perhaps due to the massive breadth of the mandate given to RCAP and the fact that its community hearings were sufficiently wide open that participants could speak on any issue that was critical to them and which they felt was relevant to the work of the Commissioners, RCAP did not have the kind of concentrated attention on residential schools that the *Brining Them Home* Inquiry did on the Stolen Generations, nor did RCAP gather the stories of survivors in a consistent manner. The *Bringing Them Home* Report[46] was released the year after the RCAP Final Report and really constitutes the first effort in any country in the world to hear the stories of people who had been effectively stolen from their parents as children by the state.

Prior to the RCAP Final Report, however, bringing the horrors of the residential schools to light was left to the bravery of individual survivors who told their stories and faced not only their abusers but also vigorous institutional opposition and the doubts of most Canadians, who could not believe that Christian churches and their employees would ever be so cruel to children. The RCAP Final Report chapter on the residential schools helped significantly by outlining some of the harms done by residential schools, yet it did not capture how widespread the pattern of abuse was or how extensive the pain inflicted, which continued to generate ongoing suffering. This aspect of the RCAP Final Report was also lost to some degree within its five volumes of 3500 pages, so that the overwhelming majority of non-Aboriginal Canadians could and did remain ignorant of this travesty of justice. It was instead left to the courtrooms of the nation, in which human stories of unspeakable acts could be told by pained voices, to reveal the whole truth of the residential school system. The litigation experience in Canada has been two-fold: criminal and civil. The criminal cases have resulted in guilty verdicts, but for relatively few of the worst perpetrators of the abuse, as death has freed most abusers from their day of reckoning – at least on this earth. The civil cases have concentrated upon issues concerning establishing the liability of the churches and Federal Government for their roles in the commission of abuses.

## IV Criminal Cases

The effect of the early criminal charges brought against abusers in 'validating the general critique of the system' was profound.[47] One of the first criminal cases against an employee of an Indian residential school went to trial in 1990. Claude Frappier, a child care worker at Coudert Hall, which was a residential school in the Yukon, was sentenced to five years in prison after pleading guilty to 13 counts of indecent assault against a number of boys aged eight to 11 years.[48] Although Frappier's sentence was finally imposed in 1990, the accusations of sexual assault had been investigated by the Department of Indian and Northern Affairs some 19 years earlier. The Government chose to dismiss Frappier in 1971 and informed neither the police nor the parents of the young victims of their findings.[49] In the sentencing decision delivered by the Territorial Court judge, it was noted that there had been no 'efforts made to support or counsel the victims'.[50]

Hubert O'Connor, a Catholic priest who had been the principal of the Cariboo Indian Residential School in the 1960s, was convicted of one count of rape and one count of indecent assault in 1996.[51] Four former students and an 18 year old Indian woman employee alleged that Father O'Connor had committed actions constituting indecent assault and rape. Events from only four of the victims actually went to trial, where the judge held that the testimony of one of the victims was insufficiently reliable and that there was no indecency in one of the assaults, but proceeded to convict on the other two counts.[52] On appeal, an acquittal was entered on the indecent assault conviction and a new trial was ordered on the charge of sexual assault.[53] After a preliminary inquiry, two trials and two rounds of appeal, including one to the Supreme Court of Canada, and given the Crown's plan to appeal again to the Supreme Court and if need be go back for a third trial, the complainants were naturally discouraged as well as weary from the lengthy court process. One of the victims declared that she was tired of 'being victimized by the courts' as '[t]hey can be cold and calculating.'[54] A healing circle, which is intended to give the victims, their families and the accused an opportunity to confront each other in order to seek an appropriate resolution, was held in which 38 people participated and at the end the now Bishop O'Connor finally apologised to his victims.[55]

In sharp contrast to the O'Connor public apology is the case of Maczynski, a former supervisor of a British Columbia Indian residential school on two occasions during a 13

year period from 1952–67, who vehemently denied any wrongdoing. Maczynski was convicted on 29 of 30 counts of gross indecency, indecent assault and buggery offences for which he received a total of 117.5 years, but with many of them to be served concurrently. He was ultimately sentenced to serve 16 years in prison by a court in British Columbia. He also received sentences of seven years in the Yukon to be served concurrent to any other sentences, and four years in the Northwest Territories, which was to be served consecutive to any other sentence.[56] All of these sentences arose out of acts of sexual abuse often committed under 'threats of punishment, or accompanied by punishment' against the students at the Indian residential school.[57] The lengthy periods of incarceration were no doubt influenced by the fact that 'the offender exhibited no remorse and no understanding of the horrific nature of his offences.'[58] The lack of remorse was later cited by a court in considering the sentence of another offender in connection with sexual abuses committed at an Indian residential school.[59]

In 1998, Leroux, a former supervisor at an Indian residential school operated by the Roman Catholic Church, was sentenced to 10 years imprisonment for various sexual offences committed against 14 young men in their teens.[60] In the sentencing decision, the judge noted the lasting impact on the victims:

> even though these incidents occurred over 20 years ago, and in some cases almost 30 years ago, many of them still bear significant psychological wounds. Some of them have had serious difficulties in their own lives, and now are trying to make sense of their past.[61]

Leroux did admit his conduct was wrong and did not try to shift responsibility to the victims.[62]

These criminal trials, along with a number of others, were a very significant vehicle for bringing the individual perpetrators to justice, as well as in demonstrating that acts of physical and sexual abuse were in fact committed by residential school staff upon helpless children. These cases, especially that of Bishop O'Connor as it involved such a high-ranking figure within the Roman Catholic Church in Canada, raised public awareness and sympathy. On the other hand, the very nature of these charges occurring in individual criminal proceedings frames the horrific actions as ones carried out by a handful of individuals. This generated no compulsion on the part of the Federal Government or the various churches to take any ownership whatsoever over the frequency of the sexual and physical abuse, or for the very removal of children from their homes, the deprivation of the children's languages and cultures, and the exposure to substandard, if not deplorable, living conditions. The civil cases brought against the Federal Government and various religious orders attempted to address the institutionalised and state-sanctioned neglect and mistreatment of Aboriginal children writ large, and also sought to provide some tangible compensation for the injuries suffered.

## V Civil Cases

By March of 2001, over 7200 individuals had filed civil suits against the government of Canada, a figure that did not include individual members of class actions.[63] In 1999, a person known as 'FSM' successfully sued the Anglican Church of Canada, the Anglican Diocese of Cariboo and the Government of Canada for

> negligence, breach of fiduciary duty, and vicarious liability arising from the parental role undertaken within St George's Indian Residential School for the care of the plaintiff during his residency.[64]

FSM was sexually abused by Derek Clarke, who had been a supervisor at the school in question. The Court held that the Federal Government and the Anglican Church were both liable and would share liability at 40 per cent and 60 per cent respectively.[65] FSM unsuccessfully appealed the decision's reasons (as opposed to the judgment itself), as the trial judge had found that, while a fiduciary duty was owed by the Crown in such circumstances, there was no breach of that duty in this case.[66] Although FSM was successful in winning a damage award, this case still demonstrates the ultimately unsatisfactory experience that many Indian residential school survivors have with the litigation process itself, not to mention its cost and slow pace. As Julie Cassidy has noted:

> To require persons who are in many cases already suffering severe psychological disorders to prove their claims in the adversarial context of examination in chief and cross-examination cannot be the appropriate model for redress.[67]

The breakthrough decision in the *Blackwater* case took seven years after the initial trial judgment before a final determination was made by the Supreme Court of Canada.[68]

The plaintiffs in the *Blackwater* case were all former students of an Indian residential school who were sexually assaulted by Plint, the school's dormitory supervisor. Plint had been previously convicted and sentenced to 12 years imprisonment for a number of sexual assaults.[69] At issue in this civil action was the vicarious liability of both the United Church and the Federal Government for Plint's unauthorised actions. At trial, the Court held that the school was a joint venture between the United Church and the Government of Canada, and, as such, they were both 'vicariously liable for the sexual assaults committed against the plaintiffs by Plint.'[70] The Supreme Court of Canada in 2005 issued a unanimous decision in which it took notice of the broader social context of the specific legal claims pled in this particular case, observing that:

> A more general issue lurks beneath the surface of a number of the specific legal issues. It concerns how claims such as this, which reach back many years, should be proved, and the role of historic and social science evidence in proving issues of liability and damages. … I conclude that general policies and practices may provide relevant context for assessing claims for damages in cases such as this. However, government policy by itself does not create a legally actionable wrong. For that, the law requires specific wrongful acts causally connected to damage suffered.[71]

The Court apportioned liability in the amount of 75 per cent to the Federal Government and 25 per cent to the United Church[72] and then rejected the defence argument that the United Church was exempt from liability on the basis of the doctrine of charitable immunity.[73] Only the damages for the sexual assaults were permitted; damages sought for other harms were dismissed since the limitation periods had lapsed.[74]

The matter of statutes of limitation is another unsavoury aspect of seeking redress in the court system today for the commission of historic injuries sponsored by the state. In 2001, Williamson J observed:

> While a court may take into account the circumstances in which those [sexual] assaults took place when considering the quantum of damages, or in relation to aggravated or punitive damages ... I am not here assessing damages for the cultural destruction suffered by native peoples as a result of the residential school system, as just or deserving as such compensation might be. I am limited, as a court must be, to assessing damages for the wrongdoings which the *Limitation Act* recognizes as permitted causes of action at this time.[75]

Far too many of the stories of survivors have only come to light decades after the physical and emotional harms were first committed. With the Government of Canada and the four churches having consciously concealed so many of the abuses committed over the years in the Indian residential school system for so very long, it is a harsh form of justice indeed that permits them to now benefit from the time it has taken for the victims to gain access to a legal system for redress and for Canadians to learn of these brutalities. It is particularly inappropriate when the defendant government is in the enviable position to be able to control the terms of the limitations periods so as to permit trials on the merits to occur or to prevent them. Suing individuals and their church employers for abuse in tort has also been a tortuous path with only mixed success.[76]

The Australian experience of both criminal proceedings and civil litigation for abuses committed upon Aboriginal and Torres Strait Islander children when in the 'care' of the state is far more limited than in Canada. More importantly, none of the efforts to sue the Commonwealth Government have been successful.[77] The Australian courts have refused to follow the approach of their Canadian counterparts regarding the applicability of the doctrine of fiduciary duties to the government's relationship with Indigenous peoples,[78] and the Commonwealth has even denied that any children were removed without parental consent.[79] The only noteworthy success has been in the *Trevorrow* case,[80] which was decided last year. However, this was in a suit against the South Australian Government, which has sought to appeal the decision (though not the $775 000 award of damages).[81] The recent tragic death of Mr Trevorrow renders the status of this appeal uncertain. While the change in federal government may suggest that a less aggressively oppositional position will be taken in any future litigation than occurred during the Howard years, such that fewer procedural and evidentiary obstacles are strewn in the path of plaintiffs seeking justice, the refusal to countenance any compensatory scheme by Prime Minister Rudd[82] suggests that further litigation may be inevitable if Stolen Generations survivors wish to obtain financial recompense from the Commonwealth for what was imposed upon them.

One of the striking differences between the Australian and Canadian experiences is the provincial/State government

dimension. Although a few provincial governments were involved in mandating residential schools for Inuit and Métis students, it was the national government that was the dominant player in Canada, such that it has been the only government to be sued in this regard and was the leading player in the Settlement Agreement ultimately reached (discussed below). The Stolen Generations history in Australia is the reverse, as the Commonwealth was constitutionally prohibited from being directly involved with Aboriginal issues outside of the Territories until the 1967 amendment. As the *Trevorrow* decision demonstrates, it may be that the focus of litigation will be far more fruitfully pursued against the State governments. The recent $5 million compensation package announced by the Tasmanian Government may signal an appreciation of this fact, coupled with an appreciation that it is really up to the States, who have all apologised to the Stolen Generations, to back up this recognition with financial redress.

## VI Growing Momentum for Profound Action

In Canada, as public awareness grew about the physical, sexual, psychological and cultural harms suffered by so many Aboriginal children and their families, so too did political and spiritual pressure intensify upon the churches and the Federal Government to respond. In 1991, the Missionary Oblates of Mary Immaculate issued an apology to the First Nations people of Canada.[83] Two years later the Anglican Church issued their apology, followed one year later by a confession from the Presbyterian Church.[84] The RCAP in its Final Report made several recommendations specific to residential schools, including: the commissioning of a public inquiry, the issuing of apologies by those responsible in conjunction with compensation and treatment, and the establishment and funding of a repository of records related to residential schools from which the dissemination of the records would be facilitated.[85] The Federal Government issued a formal statement that was overshadowed in the public eye by a terrible ice storm that knocked out heat and electricity for several million people in central Canada in January 1998. Its response to the RCAP Final Report, released 14 months after the RCAP Final Report was delivered, was entitled *Gathering Strength: Canada's Aboriginal Action Plan*.[86] The Plan covered a wide variety of matters, and articulated a four-fold approach to address Indian residential school issues, which consisted of: an expression of regret, the creation of the Aboriginal Healing Foundation with $325 million to aid in individual and community healing, new alternative strategies to litigation, and the establishment of an alternative dispute resolution framework.[87] The Government's carefully crafted and limited acknowledgement of immense injury inflicted over the years, which did not admit any direct responsibility for the abuses suffered by children at the residential schools, was contained within another document released simultaneously called the *Statement of Reconciliation*[88] addressed to all Aboriginal peoples.

The first alternative dispute resolution project was launched in 1999 in an effort to divert litigants away from the court system in favour of what was professed to be a faster and more humane approach in which to consider claims for compensation. Relatively few survivors pursued this option for fear that it was too heavily controlled by the Federal Government. Twenty-eight former students of a residential school in the Northwest Territories reached settlements with the Government of Canada, the Territorial Government and the Catholic Diocese.[89] A second judicially supervised effort occurred in Manitoba. A new major initiative was launched in 2004 through the creation by the Federal Government of a voluntary mechanism to attract survivors to waive their rights to litigation in favour of pursuing an improved and somewhat more credible alternative dispute resolution mechanism. This scheme gave priority for claims to residential school survivors 65 years of age and older or in failing health with a promise of far speedier settlement than normal lawsuits would likely deliver.[90] Approximately 3000 claims were settled through this process,[91] despite frequent criticism focusing upon its secret nature, the lack of clarity regarding compensation calculations, and the fact that all of the adjudicators were handpicked by the federal agency responsible for representing the Government and paying the awards allotted.

## VII The New Opportunity Provided by Class Actions

In addition to the individual and joined civil cases, over 12 000 individual litigants were identified as involved in pursuing class action claims against the Federal Government and various church groups.[92] The Ontario Court of Appeal certified the Cloud Class in 2004, which included students who attended the Mohawk Institute Residential School between 1922 and 1969 and their family members.[93] The Cloud Class was the only successfully certified class action, in relation to Indian residential school claims, that was not

certified in connection with the comprehensive Settlement Agreement ultimately negotiated. Four subsequent proposed classes were initiated but did not complete the certification process prior to the global agreement.[94] Getting a class action certified means in Canadian law that it can be proceed to trial on the basis that the case, and its outcome, can benefit all people who could come within the terms of the class as defined by the lead litigant due to sufficiently similar factual situations without each individual having to sue. Thus, the class action could cover thousands of people without many of them ever participating or even knowing about the case. The certification then ensures a sufficient scale to the litigation so that legal counsel, who usually operate on a contingency fee or percentage of settlement basis, can afford to carry the sizeable costs of the litigation in circumstances where the likely settlement or judicial award would be too low to justify the expense of the proceedings. Once the Cloud Class was certified, the Federal Government and the churches knew they were facing a potentially massive judgment and became more eager to pursue an out-of-court settlement.

A former justice of the Supreme Court of Canada, the Honourable Frank Iacobucci, was instrumental in achieving this compromise amongst all the parties after his appointment by the then Prime Minister, Paul Martin, in May of 2005 as the federal representative assigned to seek a holistic resolution. An Agreement in Principle ('AIP')[95] was achieved in November 2005 before the minority Federal Government fell in December and was defeated at the polls in January 2006. The new Conservative Government, led by current Prime Minister Stephen Harper, reaffirmed the AIP.[96] In May 2006, the Indian Residential Schools Settlement Agreement ('the Agreement') was signed by the Government of Canada, the Assembly of First Nations, regional Inuit representatives, the three Protestant churches and 44 Roman Catholic dioceses and religious orders who once administered the different residential schools, along with the many lawyers involved in the negotiations on behalf of their thousands of individual clients.[97] The Agreement is intended to encompass all of the certified and proposed class actions as well as all individual lawsuits that aspired to come within it.

One aspect of the AIP to which the parties agreed to proceed by way of pre-settlement implementation involved making advance payments available from 10 May 2006 to 31 December 2006 to ageing, eligible former residential school survivors.[98] Those 65 years or older (as at the date negotiations were formally initiated on 30 May 2005) could receive CDN $8000 upon application as an interim form of compensation, which would subsequently be deducted from any future Common Experience Payments.[99] Family members were not eligible to receive these interim payments on behalf of deceased former residential school students unless the former student was alive as of 30 May 2005.[100]

The Agreement also required the unanimous approval of the superior courts in nine provinces and territories in which class actions had been filed: Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon.[101] Following an unprecedented meeting among the judges responsible for the litigation in these nine jurisdictions, the courts individually considered the settlement and issued separate decisions in December 2006 and January 2007, all of which approved the settlement and certified a national class of Indian residential school survivors.[102] In considering the settlement, the Supreme Court of the Yukon Territory quoted a First Nation woman who had spoken in court and asked:

> Have you ever heard a whole village cry? … It captures in one sentence the horror and pain experienced by the parents and children in aboriginal communities when government and church representatives appeared in cars, trucks, vans and planes, to take the children away to institutions. It is not possible to do justice to the stories of 79 000 aboriginal people in this judgment.[103]

Yet the Court went on to recognise that the Agreement 'is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement.'[104]

Despite the approval by all of the courts, the final determination as to whether the Agreement would stand rested with the individual survivors, who could have opted out of the Agreement. The opt-out period, which expired on 20 August 2007, allowed the Federal Government under clause 4.14 of the Agreement to treat the settlement as void had more than 5000 survivors decided to reject the compromise.[105] Far less than 1000 survivors elected to exercise this right.[106]

There are, however, still many critics of the Agreement who feel that the levels of compensation provided are woefully below that which individuals would receive in

false imprisonment and other tort actions, and that the compensation does not adequately reflect the magnitude of the suffering. Others complain that certain residential schools that operated under provincial and colonial government auspices (for some Métis in the Prairies and for the Inuit in Labrador) are not included. Many descendants of former residential school students who died prior to the commencement of negotiations in May 2005, as well as the children of eligible survivors, are upset that they receive no benefit despite suffering from the residential schools' intergenerational effects. It is possible, therefore, that further litigation of a class action nature may yet be attempted in the future.

The absence of unconditional public apologies has also been a major source of dissatisfaction for not only the survivors but also for their communities. While the Protestant denominations involved have from the 1980s come forward to make amends,[107] the Catholic Church has yet to fully acknowledge its role in the Indian residential school system, even though it is a party to the Agreement through its many constituent bodies.

Finally, on 11 June 2008, on behalf of the Government of Canada, the Prime Minister offered an unequivocal formal apology to former students of Indian residential schools and noted that:

> 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.[108]

He went on to deliver the following key messages:

> The government recognizes that the absence of an apology has been an impediment to healing and reconciliation. Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this chamber so central to our life as a country, to apologize to aboriginal peoples for Canada's role in the Indian residential schools system.
>
> To the approximately 80 000 living former students and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes, and we apologize for having done this.
>
> 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.
>
> We now recognize that in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this.
>
> We now recognize that far too often these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you.
>
> Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.
>
> The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government, and as a country. There is no place in Canada for the attitudes that inspired the Indian residential schools system to ever again prevail.
>
> You have been working on recovering from this experience for a long time, and in a very real sense we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly.
>
> We are sorry.
>
> *Nimitataynan. Niminchinowesamin. Mamiattugut.*[109]

## VIII Settlement Compensation

The Agreement provides for a Common Experience Payment ('CEP'), which is issued upon application[110] to every eligible individual including all former First Nations, Inuit, Inuvialuit, and Métis residential school students who attended one of the specified residential schools. CEPs are in the amount of CDN $10 000 for the first year or part thereof when in attendance at a residential school and an additional CDN $3000 for each subsequent year or part thereof while at any such school.[111] A trust fund was established under clause 5 of the Agreement consisting of CDN $1.9 billion deposited in an interest bearing account (thereby generating initially at least CDN $60 million

per annum) that can only be used to provide CEP funds. This amount can be increased in the future under clause 5.06 if it proves to be inadequate to cover all valid claims. Any surplus in this trust fund at the end of the CEP process, under which applications must be filed by 19 September 2011, will be transferred to the National Indian Brotherhood Trust and the Inuvialuit Education Foundation.[112]

Although initial estimates suggested only 80 000 survivors remained alive (a figure still being repeatedly used, as evident in the apology from Prime Minister Harper), as of 14 July 2008 a total of 94 230 CEP applications had been received and 84 227 had been processed.[113] There have been 17 732 applications that were rejected as ineligible for payment based upon a review by federal officials or for providing inadequate information to prove attendance.[114] While federal employees and contractors have reportedly scoured government archives for all relevant documentation on the different residential schools, there are still many instances where records have been destroyed, either by fire, flood, or intentionally, over the many years such that it can be hard to demonstrate eligibility in some circumstances. Placing the onus on the government to refute a statement by an applicant as to his or her attendance at a school would be a fairer approach that any Australian compensation scheme might wish to follow.

Distinct from the CEP is a second category of compensation that may be paid as a result of an Independent Assessment Process ('IAP'). This component allows former residential school students who suffered sexual, physical or other abuses that may have resulted in serious psychological impairment to apply to receive a further payment of between CDN $5000 and CDN $275 000 in compensation, depending upon their individual circumstances.[115] If an individual can show loss of income as a result of the abuse suffered, then additional payments of up to CDN $250 000 may be granted.[116] The actual cost of meeting all successful IAP claims is unknown, although many expect it to total in excess of CDN $2 billion.

The IAP is based on a points system for the various abuses and their resulting harm, with more points generating a greater payment. This part of the overall compensation package does place a clear onus on the survivor to specify particular abuses, to demonstrate that they occurred and to prove the magnitude of the injuries suffered to date from the abuse inflicted decades ago, all to the satisfaction of adjudicators recruited and paid by the Federal Government.[117] As this aspect of the overall settlement is just beginning, and the decisions are not publicly released, it is unclear how fair the process of making applications, the conduct of the hearings and the final outcomes will be. What is already apparent is that certain individuals will be at a distinct disadvantage, particularly those who do not have: ready access to key documents, witnesses that can confirm their story, or sufficient funds to be able to hire professionals able to testify to the extent to which the lingering impact of residential schools has affected employment opportunities or inflicted further emotional trauma. Individuals who approach legal aid services for help with their applications are encountering an inability to obtain full assistance in this regard.

The Agreement also provides for an increase of CDN $125 million to the endowment of the Aboriginal Healing Foundation, established as part of the *Statement of Reconciliation* in 1998, for the purpose of continuing support for the previous initiatives designed to help survivors and their families.[118] This is an important aspect of the Agreement given that many family members, who were not residential school students themselves, have been excluded as direct beneficiaries of the Agreement, despite withstanding significant emotional impacts from having siblings, parents and other close relations who have been scarred by the devastating experience and who often then became abusers or self-destructive. The children of abusive or suicidal parents frequently and erroneously blame their own behaviour for triggering their parents' harmful conduct. Often too these children carry great anger for the treatment they received from their parents, and may need counselling assistance to overcome their negative feelings and to try and avoid repeating the same conduct as their parents.

## IX The Truth and Reconciliation Commission

A further vital element of the overall settlement involves the creation of a three-member Truth and Reconciliation Commission ('TRC'), chaired by Justice Harry S LaForme (of the Ontario Court of Appeal and Mississaugas of New Credit First Nation) with Commissioners Claudette Dumont-Smith (a health professional from Kitigan Zibi First Nation of Quebec) and Jane Morley (a lawyer specialising in family mediation from British Columbia), with a CDN $60 million operating budget.[119] The five year mandate of the TRC is premised on a cathartic model that is grounded in the belief that the way forward can only be achieved through building upon openness to the recognition of past experiences and abuses, their impacts and their continuing consequences.[120]

The TRC is not intended to act as a public inquiry, with enforceable inquisitory powers, but rather is tasked first and foremost with the creation of an accurate and comprehensive historical record by receiving 'statements and documents from former students, their families, community and all other interested participants.'[121] The church and government parties to the Agreement are bound by the court orders confirming it as a full and final settlement in which they undertook to produce all relevant documents and provide access to their archives.[122] Under clause 7.02 and Schedule J of the Agreement, a further CDN $20 million has been set aside for commemoration projects to provide permanent acknowledgements of what occurred.[123]

The oral presentations to the TRC and all documents collected will then be preserved and made accessible to the public, while maintaining confidentiality and the privacy of individuals, through a National Research Centre to be created by the TRC as part of its permanent legacy.[124] The TRC will seek to engage all residential school survivors, even if they have chosen to opt out of the Agreement, or had previously resolved their claims through litigation or one of the ADR processes.[125] Original research will also be undertaken on behalf of the TRC, with one major project investigating the high death rate amongst students in these schools already launched by the Interim Executive Director of the TRC. Under the supervision of Professor John Milloy, the TRC is attempting to document the magnitude of this tragic loss of life,[126] why little remedial action was pursued at the time and what happened to the human remains, and to identify wherever possible the precise names of those who died, the cause of death and where they are buried.

The three Commissioners will be advised by an Indian Residential School Survivor Committee ('the Committee') and will have regional liaison representatives.[127] The Committee is to be composed of 10 representatives, the majority of whom will be residential school survivors.[128] The TRC will also be responsible for hosting seven national and regional events, as well as assisting communities to hold local ones, where survivors and their families will have the opportunity to share experiences and educate the public in a culturally sensitive manner with the support of health personnel and counsellors.[129] All of these events provide an occasion for non-Aboriginal Canadians, and especially those who worked in the residential schools, to discuss their memories and opinions. It is hoped that some former employees, as well as officials of government and churches who oversaw the operations from a distance, will seize the chance to seek forgiveness and reconciliation with the survivors and their families. Regardless of the five year mandate of the TRC, 'anyone affected by the IRS [Indian residential school] legacy will be permitted to file a personal statement in the research centre with no time limitation',[130] so that the National Research Centre's collection will continue to grow in the future.

It is hoped by all parties that the TRC, which is inspired by the experience of over 20 truth commissions that have occurred to date elsewhere in the world,[131] will have a profoundly cathartic effect for residential school survivors and their families through the telling of their personal stories. It is fully expected that the Canadian TRC will continue to learn from the successes and failures of all of the other truth and reconciliation commissions while recognising that the Canadian TRC constitutes only the second such commission to be convened in an economically wealthy country and the first to be launched other than in the context of major national upheaval, civil war or change in governmental system. It is also the first such commission to be mandated to investigate events so many years after their occurrence. Advocates for the adoption of the truth and reconciliation commission model hope that the hearing of these stories by average Canadians may dramatically aid in building new understandings that can themselves generate far more positive relationships between Aboriginal and non-Aboriginal peoples in Canada. Thus, the TRC is to help advance the 'reconciliation' aspect of this national exercise in soul-searching, as well as documenting the 'truth' of the horrendous abuses inflicted on First Nations, Inuit and Métis peoples so that it can never be disputed again. Achieving true, enduring reconciliation will not be reached in a mere five years. Nevertheless, it is possible that significant progress can be made towards this ultimate goal if a genuine effort is made by all parties to the Agreement as well as by many of the 30 million other Canadians.

## X Implementation of Settlement to Date

Well over CDN $1 billion has been distributed to date to survivors under the CEP component, while the IAP is only beginning to get rolling.[132] The largest and allegedly most expensive public advertising campaign in Canadian history was undertaken to inform survivors about the terms of the Agreement and their right to opt out if they so chose in 2007. Included in the campaign were highly visible and

memorable television commercials screened during the heavily watched national ice hockey playoffs.[133] Once the Agreement was able to be confirmed after the expiry of the opt-out period, candidates for a post as Commissioner were solicited openly, resulting in 300 applicants that were assessed by an independent screening committee created to interview the most promising candidates and develop a short list for consideration by the Assembly of First Nations and the Canadian Government. The National Chief of the Assembly of First Nations, Phil Fontaine, who had been the driving force in pushing the residential schools issue forward for over a decade, met with the Prime Minister to provide his final input on who the Commissioners should be early in 2008. This exercise finally resulted in the TRC as it stands today, which was officially established and became fully operational on 1 June 2008.[134] The Commissioners were formally received by a traditional ceremony on 11 June, three hours after the Prime Minister's apology was delivered. A larger ceremonial event to honour their appointment and formally launch the TRC in a very public way will occur in the near future.

While the House of Commons in May 2007 passed a motion apologising for the horrific consequences of residential schools and their continuing legacy,[135] repeated calls for a formal statement of apology on behalf of all non-Indigenous Canadians by the Prime Minister went unheeded for months. This missing but essential element of the Agreement was fulfilled on 11 June 2008. The Prime Minister spoke for the country when he declared that it was wrong to separate children from their communities; that 'this policy has had a lasting and damaging impact on aboriginal culture, heritage and language';[136] that the Government had failed to protect children from abuse; that the harm has been passed on to subsequent generations; and that forgiveness is sought.

## XI How is the Canadian Experience Relevant to Australia?

It is truly for Indigenous and non-Indigenous Australians to answer the question that I have posed. Nevertheless, it does seem to me that the disastrous history of Indian residential schools strikes strong parallels with the similarly tragic experience of the Stolen Generations. The work of the Commonwealth's Human Rights and Equal Opportunity Commission in the groundbreaking *Bringing Them Home* Report attempted on a small scale (due to limited resources) to bring the stories of the victims of this misuse of child protection powers to public attention while identifying strategies for redress. The Canadian TRC plans to look carefully at *Bringing Them Home* to learn as much as possible from its messages and its aftermath. For Australia, it may be worthwhile to consider the attractiveness of using a full scale truth and reconciliation commission as a vehicle to pursue a far more extensive, publicised effort to document the personal experiences both of the Stolen Generations and the state and mission officials involved more fully all across Australia in the months and years ahead. Such consideration may be enhanced by what transpires in Canada.

In the aftermath of the carefully crafted historic statement of apology issued by Prime Minister Kevin Rudd in Parliament on 13 February 2008,[137] which was endorsed by all members, new doors are now open to explore what measures should be taken to provide tangible redress to surviving victims of the Stolen Generations travesty of justice. The Canadian Agreement, which will likely provide at least CDN $4 billion in compensation to school survivors at the end of the day,[138] will presumably be pointed to with some frequency in the years ahead by advocates for compensation as a yardstick by which to compare the actions of Australian State and Commonwealth measures. The Stolen Generation Compensation Bill 2008 (Cth) proposed on several occasions by Democrat Senator Andrew Bartlett, which was most recently explored and rejected by the Senate Standing Committee on Legal and Constitutional Affairs on 16 June 2008,[139] was obviously heavily influenced by the Canadian Agreement. It clearly sought to overcome the lack of success in the Australian courts and some of the criticism levelled at the Canadian government-operated dispute resolution schemes through the creation of a Stolen Generations Tribunal. It also proposed ex gratia payments at a level in keeping with the Canadian model. Similarly, the Standing Committee's recommendations for a National Indigenous Healing Fund may owe some inspiration to the Aboriginal Healing Foundation in Canada.[140] In light of the massive socio-economic and health gulf that exists between Indigenous and non-Indigenous Australians, efforts geared towards 'closing the gap' are obviously desperately needed. The same is also true in Canada, albeit to a somewhat lesser degree as the chasm is not so wide. Seeking to close the gap for a particular group within the society, however, has nothing to do with compensating individuals for wrongs done to them by the state. This would be like suggesting to low income students seriously injured by a collapsed ceiling in a state school that they should be compensated for their

lost limbs by being given scholarships. The common law system, through the law of torts, has for centuries recognised the entitlement for victims of physical and mental injuries to be compensated for their pain and suffering as well as for any direct financial losses. Money usually is the only form of remedy that can be offered. The nation saying sorry through Prime Minister Rudd was a vital and historic step, yet this does not discharge governments from their moral and legal obligations to compensate for harms inflicted on children.

Perhaps a more significant effect of the Canadian experience for Australia will be the degree to which we Canadians are genuinely successful in bringing about a sincere reconciliation between the descendants of the original sovereign owners of the lands we now call Canada and the waves of settlers that have arrived over the past four centuries – and whether it sets us on a path for the new millennium based upon mutual respect, recognition and renewal. One can only hope that we in Canada will have sufficient success such that others may wish to emulate our efforts at repairing historic injustice.

## XII Conclusion

This paper can only close with the voice of the National Chief of the Assembly of First Nations, Phil Fontaine, himself a survivor who came forward years ago as one of the first to expose the sexual abuse he had suffered in order to give courage to others to share their pain. He spoke so eloquently, and with remarkable emotional restraint, from the floor of the House of Commons on national television in response to the statements of the Prime Minister and the three opposition party leaders. He reached out to all residential school survivors, to other Aboriginal peoples, and to all Canadians, with these words:

> for our parents, our grandparents, great grandparents, indeed for all of the generations which have preceded us, this day testifies to nothing less than the achievement of the impossible …
>
> Therefore, the significance of this day is not just about what has been but, equally important, what is to come. Never again will this House consider us the Indian problem just for being who we are.
>
> We heard the Government of Canada take full responsibility for this dreadful chapter in our shared history. We heard the Prime Minister declare that this will never happen again. Finally, we heard Canada say it is sorry. …
>
> What happened today signifies a new dawn in the relationship between us and the rest of Canada. We are and always have been an indispensable part of the Canadian identity.
>
> Our peoples, our history, and our present being are the essence of Canada. The attempts to erase our identities hurt us deeply, but it also hurt all Canadians and impoverished the character of this nation.
>
> We must not falter in our duty now. Emboldened by this spectacle of history, it is possible to end our racial nightmare together. The memories of residential schools sometimes cut like merciless knives at our souls. This day will help us to put that pain behind us.
>
> But it signifies something even more important: a respectful and, therefore, liberating relationship between us and the rest of Canada.
>
> Together we can achieve the greatness our country deserves. The apology today is founded upon, more than anything else, the recognition that we all own our own lives and destinies, the only true foundation for a society where peoples can flourish.
>
> We must now capture a new spirit and vision to meet the challenges of the future.
>
> As a great statesman once said, we are all part of one 'garment of destiny'. The differences between us are not blood or colour and 'the ties that bind us are deeper than those that separate us'. The 'common road of hope' will bring us to reconciliation more than any words, laws or legal claims ever could.
>
> We still have to struggle, but now we are in this together.
>
> I reach out to all Canadians today in this spirit of reconciliation.
>
> *Meegwetch*.[141]

* Professor of Law, University of Ottawa, Canada. I would like to acknowledge my debt to University of Ottawa law student Louise-Michelle Tansey for her excellent research help in the preparation of this article, as well as subsequent assistance from Kirsten Hudak with referencing. However, any errors are my responsibility. I would also like to thank my friend Bob Watts, Interim Executive Director for the Indian Residential School Truth and Reconciliation Commission, in particular for the many opportunities over the past year to discuss the initial workings of the Commission and to create an intensive course in partnership with his office on what the experiences of truth commissions globally might offer as guidance to this unique Canadian endeavour.

1 Canadian Justice Minister Irwin Cotler describing the decision to have Indian children attend church-run residential schools: see Irwin Cotler quoted in 'School Abuse Victims Getting $1.9B', *CBC News*, 23 November 2005 <http://www.cbc.ca/canada/story/2005/11/23/residential-package051123.html> at 20 July 2008.

2 Statistics Canada, *Ethnic Origin, Single and Multiple Ethnic Origin Responses and Sex for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census – 20% Sample Data* (2008) <http://www12.statcan.ca/english/census06/data/topics/RetrieveProductTable.cfm?TPL=RETR&ALEVEL=3&APATH=3&CATNO=&DETAIL=0&DIM=&DS=99&FL=0&FREE=0&GAL=0&GC=99&GK=NA&GRP=1&IPS=&METH=0&ORDER=1&PID=92333&PTYPE=88971&RL=0&S=1&ShowAll=No&StartRow=1&SUB=801&Temporal=2006&Theme=80&VID=0&VNAMEE=&VNAMEF=> at 20 June 2008.

3 Assembly of First Nations, *Description of the AFN* <http://www.afn.ca/article.asp?id=58> at 20 June 2008.

4 Section 35 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, formally recognises the 'aboriginal peoples of Canada' as possessing unique 'aboriginal and treaty rights' in sub-s (1) and defines them as including 'the Indian, Inuit and Métis peoples' in sub-s (2).

5 For further information on the history of colonisation in Canada and its effects, see the landmark book by the leading Métis scholar Olive Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (3rd ed, 2002).

6 See Canada, Royal Commission on Aboriginal Peoples ('RCAP'), *Report of the Royal Commission on Aboriginal Peoples* (1996) vol 1, ch 10, note 15 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008: 'It is impossible to determine the number of Aboriginal children who attended the schools over the life of the system. … In fact, the extant school records for the system as a whole are not complete enough to allow useful calculations to be made.'

7 Ibid, vol 1, ch 10, 3, 23 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

8 The seminal reflection of this story is, of course, in the landmark report of 1997 prepared under the auspices of the Human Rights and Equal Opportunity Commission, *Bringing Them Home*: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('*Bringing Them Home* Inquiry'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997) <http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf> at 20 July 2008 ('*Bringing Them Home* Report').

9 The Aboriginal Healing Foundation has published numerous books, research papers and videos that are generally available without cost through their website: Aboriginal Healing Foundation <http://www.ahf.ca/>. Their most recent publication is Marlene Brant Castellano, Linda Archibald and Mike DeGagné (eds), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (2008), which contains chapters by Debra Hocking and John Bond from Australia as well as a contribution by me.

10 *Constitution Act 1867*, 30 & 31 Vict, c 3, s 91(24).

11 Sir John A Macdonald quoted in Malcolm Montgomery, 'The Six Nations Indians and the Macdonald Franchise' (1965) 57 *Ontario History* 13, cited in RCAP, above n 6, vol 1, ch 6, 49 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg6_e.pdf> at 20 July 2008.

12 RCAP, above n 6, vol 1, ch 6, 49–50 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg6_e.pdf> at 20 July 2008.

13 *Re Eskimos* [1939] SCR 104. The Inuit at that time were widely called 'Eskimos' in English and 'Esquimaux' in French, based upon a somewhat derogatory reference to them in the Algonquin language.

14 *Indian Act*, SC 1951, c 29.

15 For a general overview of Métis history and identity, see Donald Purich, *The Métis* (1988).

16 *Re Eskimos* [1939] SCR 104. For a recent discussion of both this case and the lingering debate affecting the Métis, see Bradford W Morse, 'Are the Métis in 91(24) of the Constitution Act, 1867? A Seemingly Never-ending Issue Caught in a Time-warp' in M Mallet and F Wilson (eds), *Rights, Identity, Jurisdiction and Governance: Current Issues in Métis-Government Relations* (2008) forthcoming.

17 *Constitution Act 1867*, 30 & 31 Vict, c 3, s 91(24).

18 See Aboriginal Healing Foundation, *A Condensed Timeline of Residential-School Related Events* <http://www.ahf.ca/publications/residential-schools-resources> at 20 July 2008; CBC News, *A Timeline of Residential Schools* <http://www.cbc.ca/canada/story/2008/05/16/f-timeline-residential-schools.html> at

20 July 2008.

19 See ibid. See also RCAP, above n 6, vol 1 ch 10 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

20 John S Milloy, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* (1999) xiii.

21 British Columbia followed in 1873, Prince Edward Island in 1877, and most other provinces had compulsory attendance by 1916 with only Quebec and Newfoundland and Labrador not following suit until 1943 and 1942 respectively. See Philip Oreopoulos, *Canadian Compulsory School Laws and their Impact on Educational Attainment and Future Earnings*, Analytical Studies Branch Research Paper No 251, Statistics Canada (2005) <http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2005251.pdf> at 20 July 2008.

22 Ibid 8.

23 RCAP, above n 6, vol 1, ch 10, 2, 8, 19 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

24 H Reed, 'Suggestions for the Government of Indian Schools', 27 January 1890, National Archives of Canada, RG 10, Vol 3836, File 68557, MR C102, cited in Milloy, above n 20, 30.

25 At the Qu'Appelle Residential School, threats of police action were issued by the Superintendent General of Indian Affairs should the school principal not be able to keep visitors off school premises: see Milloy, above n 20, 30. Prime Minister Harper, in his statement of apology on 11 June 2008, noted that:

> In the 1870s, the federal government, partly in order to meet its obligations to educate aboriginal children, began to play a role in the development and administration of these schools.
>
> Two primary objectives of the residential school 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 that aboriginal cultures and spiritual beliefs were inferior and unequal.
>
> Indeed, some sought, as was infamously said, 'to kill the Indian in the child'.

Canada, *Parliamentary Debates*, House of Commons, 11 June 2008 (Stephen Harper, Prime Minister) [1515] <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3568890#Int-2527580> at 20 July 2008.

26 Memo for Minister, Compulsory Education January 1920, National Archives Canada RG 10, Vol 6032, File 150–40A, MR C 8149, as cited in Milloy, above n 20, 31.

27 Milloy, above n 20, 71.

28 RCAP, above n 6, vol 1, ch 10, 9 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 June 2008.

29 Ibid, vol 1, ch 10, 11 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

30 Stephen A Wurm (ed) and Theo Baumann (cartographer), *Atlas of the World's Languages in Danger of Disappearing* (1996) 23.

31 The Atlas of Canada, *Aboriginal Languages* <http://atlas.nrcan.gc.ca/site/english/maps/peopleandsociety/lang/aboriginallanguages/1> at 20 July 2008.

32 RCAP, above n 6, vol 1, ch 10, 12 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

33 Ibid, vol 1, ch 10, 16 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

34 D C Scott, quoted in Milloy, above n 20, 51.

35 RCAP, above n 6, vol 1, ch 10, 31 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

36 Ibid. The editorial was in *Saturday Night* on 23 November 1907.

37 It should be noted that the last band operated school closed in 1998. See Aboriginal Healing Foundation, *A Condensed Timeline of Residential-School Related Events*, above n 18.

38 The *Indian Act* is now RSC 1970, c I-5.

39 The Moravian Church opened residential schools for Inuit children in the British colony of Labrador in 1780. The language of instruction was Inuktitut. See Labrador Virtual Museum, *The Moravian Church* <http://www.labradorvirtualmuseum.ca/wem/Moravian.html> at 20 July 2008.

40 As Milloy has noted, '[i]n many communities, the population was so sparse "that the number of children of an age to attend school on each Reserve, would not justify the expense necessary to establish a school"'. Milloy, above n 20, 24.

41 RCAP, above n 6, vol 1, ch 10, 59 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

42 Ibid, vol 1, ch 10, 63 <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg10_e.pdf> at 20 July 2008.

43 This information was previously made available through the IRSRC website, which has recently been terminated along with the IRSRC itself. The website of the new agency, Indian and Northern Affairs Canada Resolution Sector, is currently under construction.

44 Milloy, above n 20, 298.

45 RCAP, above n 6 <http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html> at 20 July 2008.

46 *Bringing Them Home* Inquiry, above n 8.

47 Milloy, above n 20, 298.

48 *R v Frappier* [1990] YJ No 163 (Territorial Court) ('*Frappier*').

49 See Faulkner J's reasoning in *Frappier* [1990] YJ No 163 (Territorial Court).

50 Ibid.

51 *R v O'Connor* [1996] BCJ No 1663 (Supreme Court).

52 Ibid.

53 *R v O'Connor* [1998] BCJ No 649 (Court of Appeal).

54 Douglas Todd, 'O'Connor Appeal Dropped After Healing Circle', *Vancouver Sun* (Vancouver), 18 June 1998 <http://sisis.nativeweb.org/resschool/jun1898acri.html> at 20 July 2008.

55 See the text of O'Connor's apology at ibid.

56 *R v Maczynski* [1997] BCJ No 2623 (Court of Appeal). All of these sentences are discussed by the British Columbia Court of Appeal in this judgment. However, all three of the trial judgements are unreported.

57 Ibid [5].

58 Ibid [6].

59 *R v Leroux* [1998] NWTJ No 141.

60 Ibid.

61 Ibid [6].

62 Ibid [19].

63 Julie Cassidy, 'The Canadian Response to Indian/Aboriginal Residential Schools: Lessons for Australia and the United States?' (Paper presented at the School of Law, University of Colorado, April 2007) (unpublished, copy on file with author).

64 *FSM v Clarke* [1999] BCJ No 1973 (Supreme Court) [2].

65 Ibid [184].

66 *FSM v Clarke* [2000] BCCA 432.

67 Cassidy, 'The Canadian Response to Indian/Aboriginal Residential Schools', above n 63.

68 *Blackwater v Plint (No 1)* (1998), 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Blackwater v Plint (No 3)* (2003) 235 DLR (4th) 60; *Blackwater v Plint (No 4)* [2005] 3 SCR 3.

69 *R v Plint* [1995] BCJ No 3060.

70 *Blackwater v Plint* (1998) 52 BCLR (3d) 18, [151].

71 *Blackwater v Plint* [2005] 3 SCR 3, [9].

72 Ibid [73].

73 Ibid [44]. 'Charitable immunity' is defined as 'the immunity of a charitable organization from tort liability': Bryan A Garner (ed), *Black's Law Dictionary* (8th ed, 2004) 766.

74 In British Columbia, where this action was commenced, sexual assaults are excluded from any existing or previously applicable limitations period: see *Limitations Act*, RSBC 1996, c 266, s 3(4)(k)(i). Most of the Canadian provinces and territories have eliminated limitation periods for sexual offences. However, limitations periods remain relevant for virtually all other tort, contract and other civil causes of action: see *Blackwater v Plint* [2005] 3 SCR 3, [85].

75 *A (TWN) v Clarke* (2001) 92 BCLR (3d) 250, [305].

76 For a detailed and insightful analysis of all of the reported cases in tort emanating from residential schools, see Bruce Feldthusen, 'Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It' (2007) 22(1) *Canadian Journal of Law and Society* 61.

77 See, eg, *Kruger v The Commonwealth* (1997) 190 CLR 1, 36; *Williams v The Minister, Aboriginal Land Rights Act 1983 (No 1)* (1994) 35 NSWLR 497; *Williams v The Minister, Aboriginal Land Rights Act 1983 (No 2)* [1999] NSWSC 843 (Unreported, Abadee J, 26 August 1999); *Cubillo v Commonwealth* (2000) 103 FCR 1.

78 Julie Cassidy, 'The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian Approaches to Fiduciary Duties' (2003) 34(2) *Ottawa Law Review* 175. See also Julie Cassidy, 'In the Best Interests of the Child? The Stolen Generations in Canada and Australia' (2006) 15(1) *Griffith Law Review* 111.

79 *Cubillo v Commonwealth* (2000) 103 FCR 1.

80 *Trevorrow v South Australia* [2007] SASC 285.

81 See Government of South Australia, 'Findings to be Tested in Trevorrow Appeal' (Press Release, 28 February 2008) <http://www.ministers.sa.gov.au/news.php?id=2838> at 20 July 2008.

82 See, eg, Siobhan Ryan, 'Top Lawyers Argue for Publicly Funded Payouts', *The Australian* (Sydney), 12 February 2008 <http://www.theaustralian.news.com.au/story/0,25197,23198706-501387 1,00.html> at 20 July 2008.

83 Aboriginal Healing Foundation, *A Condensed Timeline of Residential-School Related Events*, above n 18.

84 Ibid.

85 RCAP, above n 6, vol 5, Appendix A <http://www.ainc-inac.gc.ca/ch/rcap/sg/cka5a_e.pdf> at 20 July 2008.

86 Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (1998) <http://dsp-psd.pwgsc.gc.ca/Collection/R32-192-2000E.pdf> at 20 July 2008.

87 Ibid.

88 Government of Canada, *Statement of Reconciliation: Learning From the Past* (1998), in (1998) 28(1) *Saskatchewan Indian* 8 <http://www.sicc.sk.ca/saskindian/a98spr08.htm> at 20 July 2008.

89 IRSRC, 'Government of Canada, NWT, and the Catholic Church Settle with Abuse Victims' (Press Release, 5 May 2002) <http://www.ainc-inac.gc.ca/rqpi/i1-eng.asp?action=news-may-05-2002> at 20 July 2008.

90 IRSRC, *Statistics – Litigation and ADR – as of September 17, 2007* <http://www.ainc-inac.gc.ca/rqpi/a10-eng.asp?action=Decision#adrdecisions> at 20 July 2008.

91 Ibid. For a legal handbook that helped provide guidance on this opaque process, see Ken R Halvorson, *Indian Residential School Abuse Claims: A Lawyer's Guide to the Adjudicative Process* (2005).

92 IRSRC, *Statistics – Litigation and ADR – as of September 17, 2007*, above n 90: 'The total number of claims is 13 504. The total number of claimants in litigation includes all individuals who have filed a claim in litigation and all individuals who were participants in a pilot project.'

93 Assembly of First Nations, 'Assembly of First Nations National Chief Supports Supreme Court Decision on Cloud Class Action Case' (Press Release, 13 May 2005) <http://www.afn.ca/article.asp?id=1100> at 20 July 2008.

94 These were the Baxter Class, a national class launched in Ontario; the Dieter Class, formed on behalf of all transported to and confined in residential schools in western provinces; the Pauchay Class, a national class of all who attended Indian residential schools between 1940 and 1989; and the Straightnose Class representing Saskatchewan Indian residential school attendees between 1920 and 1996. For more information, see Assembly of First Nations, *Notice of Class Actions* <http://www.afn.ca/residentialschools/PDF/Notice_of_Class_Actions.pdf> at 20 July 2008.

95 See Assembly of First Nations, *Agreement in Principle* (2005) <http://www.afn.ca/residentialschools/PDF/AIP_English.pdf> at 20 July 2008.

96 Assembly of First Nations, 'AFN Residential School Survivors Communication' (Press Release, 16 March 2006) <http://www.afn.ca/residentialschools/PDF/06-03-16_AFN_IRS_Survivors_Update_on_Status-FINAL.pdf> at 20 July 2008. Harper's Government's support of the AIP stands in marked contrast to his total rejection of an agreement also reached in November 2005 among all federal, provincial and territorial first ministers with the five national Aboriginal political organisations known as the 'Kelowna Accord'. The Accord promised a multi-billion dollar increase in funding along with far greater cooperation amongst all governments and Aboriginal peoples on a broad array of critical quality of life issues (eg, health care, housing, employment training, social support, education, etc). Similarly, Prime Minister Harper fundamentally reversed Canada's position on the United Nations *Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, GA Res 61/295, UN Doc A/RES/47/1 (2007) from active supporter to vigorous opponent.

97 For further information and the full text of the Agreement, see Residential Schools Settlement, *Indian Residential Schools Settlement Agreement* (2006) <http://www.residentialschoolsettlement.ca/Settlement.pdf> at 20 July 2008.

98 Assembly of First Nations, *Key Elements of the Indian Residential Schools Settlement Agreement* (2006) <http://www.afn.ca/residentialschools/PDF/06-06-29_IRS_SettlementAgreementHighlights_Final.pdf> at 20 July 2008.

99 Ibid.

100 Residential Schools Settlement, above n 97, 12.

101 Assembly of First Nations, *Key Elements of the Indian Residential Schools Settlement Agreement*, above n 98.

102 The decisions were as follows: Alberta (*Northwest v Canada (Attorney General)* (2006) ABQB 902, decided on 15 December 2006); British Columbia (*Quatell v Canada (Attorney General)* [2006] BCSC 1840, decided on 15 December 2006); Manitoba (*Semple v Canada (Attorney General)* (2006) MBQB 285, decided on 15 December 2006); Northwest Territories (*Kuptana v Canada (Attorney General)* [2007] NWTSC 1, decided on 15 January 2007); Nunavut (*Ammaq v Canada (Attorney General)* [2006] NUCJ 24, decided on 19 December 2006); Ontario (*Baxter v Canada (Attorney General)* (2006) OJ 4968, decided on 15 December 2006); Quebec (*Bosum v Canada (Attorney General)* (2006) CarswellQue 10673, decided on 15 December 2006); Saskatchewan (*Sparvier v Canada (Attorney General)* [2007] SKCA 37, decided on 15 December 2006); and, Yukon (*Fontaine v Canada (Attorney General)* [2006] YKSC 63, decided on 15 December 2006).

103 *Fontaine v Canada (Attorney General)* [2006] YKSC 63, [6].

104 Ibid [8].

105 Residential Schools Settlement, above n 97, 42.

106 In a telephone conversation with an official from the Office of the Deputy Minister for Indian and Northern Affairs Canada, the author's research assistant, Kirsten Hudak, was told that a total of 321 individual students chose to opt out of the Agreement: Interview with the Office of the Deputy Minister for Indian and Northern Affairs (Telephone interview, 22 June 2008). However, the former website for the Indian Residential Schools Agreement (<www.irsr-rqpi.gc.ca>, no longer active at 20 July 2008) previously indicated that 340 survivors had opted out of the Agreement, and some believe the final number was somewhat higher.

107 Aboriginal Healing Foundation, *A Condensed Timeline of Residential-School Related Events*, above n 18.

108 Canada, *Parliamentary Debates*, above n 25, [1515].

109 Ibid [1520].

110 Application forms have been available since 20 August 2007, after the opt-out period expired.

111 Residential Schools Settlement, above n 97, cl 5.02.

112 Ibid, cl 5.07.

113 IRSRC, *Common Experience Payment: Statistics – July 14 2008* <http://www.ainc-inac.gc.ca/rqpi/a4-eng.asp?action=Stats> at 20 July 2008.

114 Ibid.

115 IRSRC, *Schedule 'D': Independent Assessment Process (IAP) for Continuing Indian Residential School Abuse Claims* (2006) 6 <http://www.ainc-inac.gc.ca/rqpi/content/pdf/english/IRSSA%20Settlement%20Agreement/Schedule_D-IAP.pdf> at 20 July 2008.

116 Ibid.

117 For further information, see Cassidy, 'The Canadian Response to Indian/Aboriginal Residential Schools', above n 63; Castellano, Archibald and DeGagné, above n 9; and Bradford W Morse, 'Reparations for Indigenous Peoples in Canada' in Federico

Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives*( 2008) 271.

118 Residential Schools Settlement, above n 97, 23.

119 The specific mandate for the Truth and Reconciliation Commission is contained in Schedule N of the Agreement: IRSRC, *Schedule 'N': Mandate for the Truth and Reconciliation Commission* <http://www.ainc-inac.gc.ca/rqpi/content/pdf/english/IRSSA%20Settlement%20Agreement/SCHEDULE_N.pdf> at 20 July 2008.

120 Ibid.

121 Ibid [2(a)].

122 Ibid [11].

123 IRSRC, *Schedule 'J': Commemoration Policy Directive* <http://www.ainc-inac.gc.ca/rqpi/content/pdf/english/IRSSA%20Settlement%20Agreement/Schedule_J-CommemorationPolicyDirective.pdf> at 20 July 2008.

124 IRSRC, above n 119, [3], [9], [10(C)], [12], [13].

125 Ibid.

126 Bob Watts, the Interim Executive Director of the TRC, established a working group, headed by the historian who had worked for the RCAP on this topic and who authored *A National Crime* (above n 20), John Milloy. Milloy is to unearth historical records for the TRC on the children who went missing in the residential school system, how many died, where they were buried and what investigative process will be required to augment the documents available to provide as complete a story as possible. The project is intended to help people find the remains of their ancestors and to discover what happened to those ancestors wherever this can be achieved. See, eg, Joan Delaney, 'Move to Investigate Residential School Deaths Intensifies', *The Epoch Times* (online), 14 February 2008 <http://en.epochtimes.com/news/8-2-14/65938.html> at 20 July 2008.

127 IRSRC, above n 119, [6(d)].

128 Ibid [7(a)].

129 Ibid [10(A)].

130 Ibid [10(C)].

131 See Mark Freeman, *Truth Commissions and Procedural Fairness* (2006) for an excellent and detailed discussion of the experience of individual truth and reconciliation commissions around the world.

132 IRSRC, above n 113.

133 While this assessment of the expense involved is widely acknowledged, repeated efforts by the author to ascertain the actual cost from federal officials have been unsuccessful.

134 Indian Residential Schools Truth and Reconciliation Commission, *Overview* <http://www.trc-cvr.ca/historicalintroen.html> at 20 July 2008.

135 Canada, *Parliamentary Debates*, House of Commons, 1 May 2007 (Gary Merasty) [1015] <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2890888#SOBQ-2042759> at 20 July 2007.

136 Canada, *Parliamentary Debates*, above n 25, [1515].

137 Commonwealth, *Parliamentary Debates*, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister).

138 See Minister of Indian and Northern Affairs, *Indian Residential Schools Resolution Canada: 2007–2008 Estimates: Report on Plans and Priorities* (2007) <http://www.tbs-sct.gc.ca/rpp/0708/oirs-brqpa/oirs-brqpa_e.pdf> at 20 July 2008. In addition to the CEP and IAP aspects of compensation, the estimate of $4 billion includes legal fees, and funding to the Aboriginal Healing Foundation, the TRC and other elements.

139 See Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report: Stolen Generation Compensation Bill 2008* (2008) [3.129].

140 Ibid [3.126], [3.131].

141 Canada, *Parliamentary Debates*, above n 25, [1604]–[1605].