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> *After all, I'm a storyteller. You can have it if you want ... Do with it what you will ... Just don't say in the years to come that you would have lived your life differently if only you had heard this story. You've heard it now.*
>
> – Thomas King, "Afterwords: Private Stories"

> *It is hard to re-build or restart relationships. It starts with seeing each other. It starts with acknowledging what needs to be repaired.*
>
> – Shawn Atleo and Heather Atleo[1]

That Indigenous people in Canada were victimized for well over a century by the residential schools system for Aboriginal children is not in question.[2] The system, which amounted to an "assault on child and culture," was designed to "kill the Indian in the child."[3] Whether the legal system – purporting to provide some form of compensation in the context of claims by survivors and their families – has provided justice is a much more open question. The costs – financial, social, health, time, and so on – associated with pursuing the resolution of residential schools claims through the justice system have been enormous. These costs feed skepticism about the commitment of the justice system to the process of truth and create immense barriers to progress towards reconciliation.

The point of this chapter, part of the body of Costs of Justice research,[4] is primarily to call out some of the problematic steps in the various residential schools claims processes that have resulted in and allowed for those costs,[5] and to situate those processes and costs in current ongoing truth and reconciliation efforts in Canada. In addition to the residential schools litigation, I will briefly mention several other problematic cases and contexts to make the point that, when thinking about access to justice, the residential schools litigation is not

an isolated incident but rather part of a continuum that many see as costly, unequal, and alienating justice in Canada.[6]

Residential Schools

Because the Truth and Reconciliation Commission so carefully and importantly documented the dark and tragic truth of the residential schools program in its 2015 report, I will not try to provide any kind of meaningful analysis of that shameful history here.[7] Put very simply, for over a century, Aboriginal families and communities were ripped apart as their children were taken from them and forced into residential schools. It is well documented that the experience of Aboriginal children was characterized by "violent" and "traumatic" treatment.[8] Taking children from their families and communities was part of a purposeful strategy designed "to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will."[9] Canada's residential schools program amounted to a system of "cultural genocide."[10] It is a program that the federal government has since acknowledged is "a sad chapter in our history," "was wrong," and "caused great harm."[11]

Dispute Resolution Process

In response to the tragedies inflicted by the residential schools program, thousands of survivors brought claims against the government and church organizations that were involved in running the program.[12] As of 2006, approximately 15,000 claims were ongoing, involving an estimated 80,000 people.[13] Many of the claims were being brought as individual civil litigation claims,[14] a number were being advanced through class actions,[15] and the balance were brought forward through the dispute resolution process initially set up by the federal government pursuant to the 2003 National Resolution Framework.[16] Given the challenges in bringing multiple claims individually, by class action, and also through the dispute resolution framework,[17] an effort was made to develop a process by which all outstanding claims could be resolved. An agreement in principle was reached in November 2005,[18] and a national settlement was approved by nine courts across Canada in December 2006.[19] The settlement regime included a common experience payment (CEP) (amounting to at least $1.9 billion), funds for an individual assessment process (IAP) (which could exceed the CEP), the creation of a Truth and Reconciliation Commission (TRC), resources for commemorative events and healing processes (funds for these three initiatives amounted to $205 million), funds and in-kind services from various church organizations for victims and family initiatives, and a legal fees agreement.[20]

Problems and Costs Associated with Adversarial Claim Resolution

Notwithstanding the comprehensive procedural framework that was established to resolve all outstanding claims as efficiently and fairly as possible, many claimants experienced heavy-handed, unfair, and costly treatment from all sides in the context of trying to access the system and resolve their claims. If the government, religious organizations, and even legal regulators knew (or acknowledged) then what they know now, much cost, pain, and revictimization experienced through the dispute resolution process and justice system could have been avoided or at least minimized. Because I have documented many examples of problematic behaviour elsewhere,[21] I will only briefly discuss several examples in this chapter.

Problematic Defendant-Side Conduct

First, on the defendant side, it is clear that the government and church organizations generally took culturally disconnected and adversarial – as opposed to healing or reconciling – approaches in the context of the survivors and their claims. There was a general refusal on the part of the government and the church organizations to apologize or take responsibility for their involvement in the residential schools program.[22] Even though apologies came later,[23] although not by all,[24] a failure to take responsibility early in the process has been acknowledged as a mistake on the part of the institutional organizations.[25] Further, the initial federal government alternative dispute resolution process was condemned as culturally disconnected, costly, slow, arbitrary, disrespectful, and humiliating.[26] At the same time, the more adversarial, tort-based approach to resolving individual and class claims through the civil justice system was disconnected from any notion of restoration, cultural sensitivity, or reconciliation.[27]

As for specific problematic strategies and conduct, limitation periods were raised by the government and church organizations as shields against potential direct and vicarious tort liability claims in cases where causes of action often involved historic abuse and sexual abuse claims.[28] In addition to limitation defences, several different adversarial strategies for limiting liability and damages – for example, the "thin skull" or "crumbling skull" rules – were raised by the government and church defendants. Defendants would make the argument that – based on pre-existing conditions – they should not be responsible for making a plaintiff better off than he or she originally was.[29] The irony is that various pre-existing conditions – anxiety, alcoholism, lack of higher education, and others – were caused at least in part by the very residential school programs and experiences at issue in the litigation.[30]

In addition to "blame-the-victim" strategies, the government and church organizations also used "blame-each-other" strategies in order to limit or deny responsibility for any residential school–related damage.[31] The institutional defendants also actively sought to contest amounts, forms, and bases of liability and damage. This included defences against punitive damages,[32] arguments that abuse by a lay employee could not form the basis of vicarious liability claims,[33] and efforts to insulate church defendants from damage claims based on charitable status.[34]

Finally, institutional defendants also raised a number of evidentiary and other procedural challenges to limit or avoid liability. In terms of evidentiary challenges, for example, social science evidence regarding the effect of government approaches to educating Aboriginal children was called into question in the context of individual claims.[35] Individual claimant credibility was also regularly challenged by church and government defendants.[36] Further, institutional defendants sought to limit the definitional scope of "residential schools" in order to limit potential coverage and liability.[37] The federal government also sought to strike out affidavits and resist document production.[38] As for procedural challenges, for example, the adequacy of pleadings was questioned by requesting particulars (which, while not in theory problematic on its face, in this context raises the potential of revictimization).[39] In the context of class actions, certification was vigorously resisted by church and government defendants.[40]

Problematic Plaintiff-Side Lawyer Conduct

Problematic conduct was not limited to the defence of these cases. The legal representation of survivor claimants also involved problematic and unprofessional behaviour. For example, counsel for numbers of IAP claimants purported to provide their clients with loans that were never received, often with unreasonably high interest rates.[41] Other cases, as I have documented elsewhere,[42] involved insensitive and at times misleading client solicitations;[43] exaggerated promises of success;[44] improper disclosure to consulting non-lawyers of confidential information;[45] the unauthorized practice of law;[46] failure to properly prepare and meet with clients;[47] conflicts of interest;[48] unacceptable correspondence, arrangements, and termination letters;[49] failure to press for full compensation amounts;[50] disregard for important terms of the alternative dispute resolution (ADR) settlement process;[51] and misleading, incorrect, and falsely completed IAP forms.[52] Overall, according to one judge, "claimants were ... treated not as individual people who had in many cases suffered traumatic personal experiences ... but rather as claims, requiring little lawyer interaction,"[53] or more directly, "claims became abstracted from claimants."[54]

Costs

The costs associated with the litigation and dispute resolution processes, on all sides, have been massive. Court administration costs alone have amounted to "huge sums" of government money.[55] On the defendant side, the government and church organizations have spent millions on legal and related expert, research, and archival fees.[56] For example, in 1999 alone, it was estimated that the total legal fees paid by church organizations in connection with residential schools litigation totalled approximately $10 million.[57] The time and money spent by government lawyers supported by their experts, researchers, and consultants litigating these cases has also been massive, not to mention the agreement to pay a portion of the plaintiff-side lawyer fees under the settlement process. Much of this money could have been saved – and redirected towards more restorative initiatives – if the many aggressive and ultimately unsuccessful adversarial government and church positions had not been advanced.

Costs on the plaintiff side were also often extremely high – sometimes outweighing any meaningful benefit from the litigation or settlements.[58] In some cases, contingency fees were above the allowable rates provided for in the settlement agreement;[59] in others – particularly early in the process – half of recovered amounts reportedly went to lawyers.[60] It is important to acknowledge that not all cases and not all lawyers' billing arrangements involved problematic fees.[61] However, the examples documented above and elsewhere[62] are certainly not unique or isolated incidents. According to one report, the fees paid to some lawyers were seen as "unethical practices or greed" and "nothing short of gouging," and amounted to "revictimization" and "taking advantage of the wounded and the weakest."[63]

In addition to financial costs, all of the adversarial strategies and conduct discussed above, including the use of appeals to resist or limit claims, resulted in other psychological and emotional costs. For example, the appeal by the Anglican Church in the *F.S.M.* case damaged the survivor claimant's healing process. According to the survivor, "The healing and closure that the trial judgment provided ... was threatened by the Anglican appeal" and made the survivor feel "abused all over again."[64] Similar revictimization concerns arose in the context of other procedural challenges raised by institutional defendants,[65] as well as the unprofessional conduct of plaintiff-side lawyers. According to one victim plaintiff, her lawyer's conduct resulted in the return of "traumatic feelings she had experienced earlier in her life," which also led to a feeling of "shame."[66] Overall, as summarized in the Truth and Reconciliation Commission's report (the *TRC Report*), the residential schools litigation was "especially difficult for the Survivors, many of whom were revictimized through explicit questioning and adversarial treatment by the Government of Canada, the churches, and

even their own lawyers."[67] Taken together, the "arduous" process of adversarial litigation had significant negative impacts on litigant survivors.[68]

None of these costs, of course, take into account the failure of the Canadian legal system to address non-abuse claims, including individual and collective loss of language, family relationships, and culture, among others, not just for survivors but for their parents, children, and communities.[69] These costs also do not take into account the further damage caused by the residential schools litigation and settlement process to the already broken institutional and social relationships between Indigenous people and the federal government, religious organizations, and, generally, the rest of Canada.

In the end, significant sums of money have been paid out in connection with residential schools claims. The TRC successfully completed its mandate, some apologies have been made, and important truth and reconciliation work has begun. However, the costs associated with the damage claims and overall settlement arrangements – through early litigation and class actions, through the initial ADR process, and even under the final settlement agreement – have been extremely high, and in some cases so high as to amount to the victimization of surviving claimants all over again.[70]

Ongoing Challenges

In addition to the problematic legacy of the various residential schools dispute resolution processes, there have been and continue to be other problematic cases and events involving Canada's Indigenous communities and its justice system. Although not the primary focus of this chapter, they – like the residential schools dispute resolution legacy – form part of the overall and ongoing problematic and costly treatment that Indigenous people and their communities often face through Canada's justice system when pursuing claims for violations of basic human rights.

For example, the "Sixties Scoop" – the systematic government-initiated removal of thousands of Indigenous children from their families and their placement in non-Indigenous families (in the period between approximately 1965 and 1984)[71] – continues to resonate negatively in Indigenous families, communities, and the overall Canadian public, and in the child protection system in particular.[72] As recognized by the Divisional Court in *Brown v Attorney General of Canada,* the fallout from this government program involved claims that "these children were deprived of their culture, customs, traditions, language and spirituality," which "led them to experience loss of self-esteem, identity crisis and trauma in trying to re-claim their lost culture and traditions."[73] Although another example of costly and failed attempts procedurally to dispose of Indigenous claims prior to trial in an adversarial fashion,[74] these harms and

these claims – and in particular the government's responsibility for these harms – have been recognized by the courts.[75] The settlements of the claims – specifically including the legal fees – have not been favoured by all. For example, according to one class member, who described some of the lawyers involved as "cultural vultures," the settlement in his case "exploits Indigenous Peoples and enriches the lawyers."[76] Further, the overall initiative has now been acknowledged by the federal government as a "dark and painful chapter in Canada's history."[77]

In many cases related to or because of the residential schools and the Sixties Scoop, there continues to be an overwhelming number of Indigenous children and young people in child welfare and protection programs across Canada. According to a 2011 Statistics Canada survey, 3.6 percent of all First Nations children under fifteen years old were in foster care (compared with 0.3 percent of non-Aboriginal children), and almost half of all children under fifteen years old in foster care were Aboriginal children.[78] In 2017, Jane Philpott, the federal government's former Minister of Indigenous Services, described the ongoing and vastly disproportionate number of Indigenous children in the system as a "humanitarian crisis."[79] While significant challenges exist for Indigenous parents[80] – many of which developed as a result of experiences they suffered as part of the residential schools and the Sixties Scoop[81] – there is no doubt that the vast overrepresentation of Indigenous children in the child welfare system stems in large part from systemic unfairness, bias, ignorance, inadequate education, poverty, discrimination, and racism.[82] The resulting costs, in terms of broken individuals, families, and lost relationships, are tragic and significant.[83]

Unfortunately, although this chapter largely focuses on civil justice, we know that very similar problems exist in the criminal justice system. First, it is well known that Aboriginal men, women, and young people are vastly overrepresented in Canada's prisons and youth custody facilities.[84] For example, in 2015–16, according to Statistics Canada, 26 percent of adults admitted to provincial and territorial correctional services were Aboriginal, although Aboriginal people represented only 3 percent of the Canadian adult population.[85] The same is true for young people. According to Shawn Atleo, former National Chief of the Assembly of First Nations, Aboriginal children "are more likely to end up in jail than to graduate from high school."[86] For example, in 2015–16, Aboriginal youth represented 35 percent of admissions to correctional services, while Aboriginal youth between the ages of twelve and seventeen made up approximately 7 percent of the youth population in reporting jurisdictions.[87] Further, 43 percent of all female youth admitted into correctional services were Aboriginal.[88]

Former Supreme Court of Canada Justice Frank Iacobucci, also noting the overrepresentation of First Nations people in prison populations, reported that "the justice system generally as applied to First Nations peoples ... is quite frankly in a crisis."[89] In addition to problematic issues of overincarceration, Iacobucci reported a serious lack of representation by Aboriginal people in all aspects of the justice system: "Overrepresented in the prison population, First Nations peoples are significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as court officials, prosecutors, defence counsel, or judges."[90] This lack of representation has added to an overall sense of exclusion and distrust by First Nations people when it comes to all aspects of the justice system.[91]

High-profile acquittals in murder cases involving the deaths of Indigenous young people[92] have only served to further alienate members of Indigenous communities.[93] Particularly where juries have been selected to include only white jurors (purposely excluding potential Indigenous jurors),[94] significant concerns about the fairness of justice have been raised by a range of Indigenous and non-Indigenous communities and voices in this country,[95] including by the Prime Minister and former Justice Minister.[96] All of these points of alienation and distrust, coupled with the challenges faced by and findings of the National Inquiry into Missing and Murdered Indigenous Women and Girls,[97] lead to a serious and very troubling erosion in the trust and confidence that all people – particularly members of Indigenous communities – have in Canada's justice system. According to the mother of Colton Boushie, a young Aboriginal murder victim, "This racism is dividing us ... I already knew it was a kangaroo court."[98] As former Chief Justice of Canada Beverley McLachlin stated, "If people are excluded from the system, if they conclude it exists only to serve the interests of the elites, they will turn away. Respect for the rule of law will diminish, and our society will be the poorer."[99] The costs of distrust and alienation should not be underestimated.

Signs of Change?

The *TRC Report* included a number of important justice-related Calls to Action.[100] While several specifically addressed governments, some focused on other actors in the justice sector, including lawyers and law schools.[101] Although much work remains to be done in the justice system to acknowledge and understand the tragedy of the residential schools and their legacy, and to start the transformational healing work of reconciliation (contemplated by the Calls to Action), signs of positive change are emerging across the justice sector.

For example, starting with the federal government, a new "Rights Framework" was announced by the Prime Minister in February 2018.[102] According to the

government, it "will include new legislation and policy that will make the recognition and implementation of rights the basis for all relations between Indigenous Peoples and the federal government going forward."[103] It will also support the "rebuilding" of Indigenous governments and nations and advance self-determination.[104] According to the Prime Minister, recognizing and implementing Indigenous rights "will chart a new way forward ... and undo decades of mistrust, poverty, broken promises, and injustices."[105] The federal government has also promised to "fully implement" all Calls to Action in the *TRC Report*[106] and to reduce the incarceration rate of Indigenous people, who are overrepresented in Canada's prisons.[107] Some of these commitments can be seen, for example, in budgetary allocations contained in the 2018 Federal Budget.[108] Others can be seen, for example, in new legislative proposals introduced to eliminate the use of discriminatory peremptory jury challenges.[109] Provincial ministries are also actively looking at ways to respond to the *TRC Report* and reframe how governments acknowledge destructive past practices, as well as at how governments can move forward to promote and champion a culture of reconciliation and reform.[110]

As for law societies and bar associations, the Law Society of Ontario (LSO), for example, approved its *Indigenous Framework,*[111] which is designed to guide the LSO's work to realize Call to Action 27, particularly in an effort to promote access to justice and equity.[112] Other organizations have also responded positively to the Calls to Action.[113]

Law schools have also been actively taking up the invitation in Call to Action 28 to reflect on and reform their curricular approaches, offerings, and programs as they relate to Aboriginal law and Indigenous people.[114] For example, the University of Victoria created a joint Canadian common law and Indigenous Legal Orders JD/JID degree.[115] Other law schools are also looking at significant ways of embracing indigenization of their programs, both in and out of the formal classroom.[116] For example, in addition to its Anishinaabe Law Camp,[117] Osgoode Hall Law School recently added an Indigenous and Aboriginal Law Requirement to its JD program.[118]

Courts and judges are also looking at ways of positively addressing the TRC's Calls to Action and related issues involving Aboriginal law and Indigenous legal traditions. According to Chief Justice of Canada Richard Wagner, "We have begun the process of reconciliation with our indigenous co-citizens, with the goal of building a new relationship. The process is difficult, as it has to be; the scars run deep. We cannot change the past, but we can recommit ourselves each day to right the wrongs that we can. It will take time. But we will do the work. We are committed."[119] As for specific initiatives, the National Judicial Institute continues to provide judicial training on issues related to Aboriginal

law and cultural context.[120] The Federal Court–Aboriginal Law Bar Liaison Committee developed specific practice guidelines for litigation involving Aboriginal Peoples.[121] The Federal Court has also started to issue some rulings in Cree and Dene.[122]

Judges themselves are also taking up the issues in individual cases. For example, in a case involving a young Aboriginal woman without a criminal record who pleaded guilty to drug smuggling charges, Justice Hill of the Ontario Superior Court of Justice was asked to consider the constitutionality of a minimum two-year sentence for such drug-related offences. When describing the accused, he commented that she "is very much the face of many Aboriginal offenders whose background has played a real role ... in their presence before the criminal courts in this country."[123] In finding the minimum sentence to be a "grossly disproportionate punishment"[124] and in ordering a sentence of less than two years, Justice Hill specifically highlighted that the "Supreme Court of Canada, the TRC, and numerous other resources have recognized, in respect of Canada's Indigenous peoples, the state's contribution to cultural genocide, the intergenerational effects of colonialism, discrimination, unfulfilled promises, and a 'tragic history' of the treatment of Aboriginal peoples within the Canadian criminal justice system."[125] Further, he acknowledged that the "courts are not isolated from the ongoing process of reconciliation and meaningful nation-to-nation dialogue involving Canada's Aboriginal peoples."[126]

Conclusion

Whether or not Canadians previously knew about the depth and breadth of the residential schools tragedy, we certainly know about it now – thanks in particular to the transformative work of the TRC. The same can be said about the justice system's challenged, often problematic, and typically very costly (financial and otherwise) handling of the residential schools claims: we have "heard [about] it now."[127] Documenting some of the problems and related costs of the residential schools claims in this chapter is part of the process of "acknowledging what needs to be repaired" in an effort to start "seeing each other."[128]

The justice-related Calls to Action in the *TRC Report* are clear. Much needs to be done in all parts of the justice system, there appears to be significant good will, and at this stage, positive signs of change are emerging. As the Chief Justice of Canada stated, the process will be difficult,[129] but reforming the justice system in line with the TRC's Calls to Action must be done. As the TRC itself made clear, the "continued failure of the justice system denies Aboriginal people the safety and opportunities that most Canadians take for granted."[130] The cost of doing nothing is far too high. As former Supreme Court Justice Frank Iacobucci commented in the context of his recommendations for jury reform,

"I realize that many of my recommendations will involve costs, but ... when principles of justice and fairness for thousands of people are involved, the financial aspects of the matter should not trump those fundamental principles ... Moreover, the costs of doing nothing will likely be more than the costs of implementing these recommendations."[131] As recent return on investment and social return on investment research confirms,[132] not only is investing in justice the right thing to do, it also makes significant economic and social sense as well – for Indigenous communities, for the justice system, and for all Canadians.

Notes

1 Shawn Atleo and Heather Atleo, "After 154 Years, a New Narrative for the Tsilhqot'in and Canada," *Globe and Mail* (26 March 2018) at A13, recalling the words of Shawn Atleo's late grandmother, who, having just listened to former Prime Minister Stephen Harper express an apology on behalf of Canada in 2008 to her and all who were impacted by residential schools, said: "They are just beginning to see us."

2 See generally Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), online: TRC <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>.

3 *Ibid.*

4 For a general description of this body of research, see Canadian Forum on Civil Justice, "Cost of Justice," online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/cost-of-justice>.

5 Several of the issues discussed in this chapter were raised in an earlier article: Trevor C.W. Farrow, "Residential Schools Litigation and the Legal Profession" (2014) 64 UTLJ 596 ["Residential Schools Litigation"].

6 See Trevor C.W. Farrow, "What Is Access to Justice?" (2014) 51 Osgoode Hall LJ 957.

7 See generally Truth and Reconciliation Commission, *supra* note 2. See also J.R. Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66 Sask L Rev 357.

8 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Government of Canada, October 1996), vol 1, *Looking Forward, Looking Back,* s 10.3 ("Residential Schools") at 349, online: Government of Canada <http://data2.archives.ca/e/e448/e011188230-01.pdf>. For an earlier discussion, see Farrow, "Residential Schools Litigation," *supra* note 5 at 596–97. See further Jennifer J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52 UTLJ 253; Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions – Executive Summary* (Ottawa: Minister of Public Works and Government Services, 2000), online: Government of Canada <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-7-2000-1E.pdf>.

9 Truth and Reconciliation Commission, *supra* note 2 at 3.

10 *Ibid.* The residential schools program is part of what the Honourable Frank Iacobucci called the "tragic history of Aboriginal peoples" – part of a long history of "mistreatment, lack of respect, [and] unsound policies" experienced by First Nations people. Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (February 2013) at para 5, online: Ontario

Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/pdf/First_Nations_Representation_Ontario_Juries.pdf>.

11 Rt. Hon. Stephen Harper, PC, MP, "Statement of Apology to Former Students of Indian Residential Schools" (11 June 2008), online: Government of Canada <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>.

12 For an earlier discussion, see Farrow, "Residential Schools Litigation," *supra* note 5 at 592–93.

13 *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 at paras 4, 13 [*Baxter*].

14 See, e.g., *Blackwater v Plint,* [2005] 3 SCR 3 [*Blackwater SCC*].

15 See, e.g., *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), leave to appeal to SCC refused, [2005] SCCA No 50 [*Cloud*]; *Baxter*, *supra* note 13; *Richard v British Columbia,* 2009 BCCA 185 (and related cases). See earlier *Re Indian Residential Schools,* 1999 ABQB 823.

16 See, e.g., Indian Residential Schools Resolution Canada, *National Resolution Framework* (2003).

17 See, e.g., House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, 38th Parl, 1st Sess, 4th report (adopted by the Committee on 24 March 2005, presented to the House on 7 April 2005, concurred in by the House on 12 April 2005) (Chair: Nancy Karetak-Lindell), which describes the ADR process as an "excessively costly and inappropriately applied failure." See further Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: Assembly of First Nations, 2004) at 11, online: <http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf>. For a discussion of the shortcomings of the dispute resolution framework, see Kathleen Mahoney, "The Settlement Process: A Personal Reflection" (2014) 64:4 UTLJ 505. See further Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors* (Ottawa: Canadian Bar Association, 2005).

18 *Agreement in Principle* (20 November 2005), online: Indian Residential Schools Settlement – Official Court Website <http://www.residentialschoolsettlement.ca/aip.pdf>.

19 See *Baxter, supra* note 13; *Northwest v Canada (Attorney General),* 2006 ABQB 902 [*Northwest*]. See further *Fontaine v Canada (Attorney General),* 2012 BCSC 839 at para 2 [*Fontaine BCSC 2012*]; *Law Society of Manitoba v Tennenhouse,* 2011 MBQB 279 at para 10 [*Tennenhouse II*].

20 See *Northwest, supra* note 19 at paras 15–16; *Baxter, supra* note 13 at paras 53–55 (specifically regarding legal fees). For a further summary, see *Canada (Attorney General) v Fontaine,* [2017] 2 SCR 205 at paras 5–11 [*Fontaine SCC*]; *J.W. v Canada (Attorney General),* 2019 SCC 20 [*J.W.*]. See further Government of Canada, "Indian Residential Schools" (21 February 2019), online: Government of Canada <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074#sect1>. For information on the status of claims, payments, and funding under the Residential Schools agreement, see Government of Canada, "Statistics on the Implementation of the Indian Residential Schools Settlement Agreement" (19 February 2019), online: Government of Canada <https://www.rcaanc-cirnac.gc.ca/eng/1315320539682/1571590489978> (and now see the recently created Indigenous Services Canada, online: Government of Canada <https://www.canada.ca/en/indigenous-services-canada.html>).

21 Farrow, "Residential Schools Litigation," *supra* note 5 at 599–611.

22 *Ibid* at 602–3.

23 See, e.g., Harper, *supra* note 11. See further subsequent apology to former students of residential schools in Newfoundland and Labrador: Rt. Hon. Justin Trudeau, PC, MP, "Remarks by Prime Minister Justin Trudeau to Apologize on Behalf of the Government of Canada to Former Students of the Newfoundland and Labrador Residential Schools" (24 November 2017), online: Justin Trudeau, Prime Minister of Canada <https://pm.gc.ca/eng/news/2017/11/24/remarks-prime-minister-justin-trudeau-apologize-behalf-government-canada-former>.

24 The Pope continues to resist the opportunity to provide an apology, notwithstanding a call to do so in Call to Action 58 in Truth and Reconciliation Commission, *supra* note 2. For the Pope's position, see Lionel Gendron, President of the Canadian Conference of Catholic Bishops, "Letter of the CCCB President to the Indigenous Peoples of Canada" (27 March 2018), online: CCCB <http://www.cccb.ca/site/images/stories/pdf/Letter_to_Indigenous_Peoples_-_27_March_2018_-_en.pdf>.

25 See, e.g., comments from Reverend James Scott, United Church of Canada, cited in Farrow, "Residential Schools Litigation," *supra* note 5 at 602, n 30.

26 See, e.g., House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *supra* note 17; Assembly of First Nations, *supra* note 17 at 11; Canadian Bar Association, *supra* note 17, pt 11.

27 See Farrow, "Residential Schools Litigation," *supra* note 5 at 601. See generally Mayo Moran, "The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools" (2014) 64:4 UTLJ 529; Kent Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64:4 UTLJ 566 ["Blaming the Victim"].

28 See, e.g., *Blackwater SCC, supra* note 14 at para 82; *MM v Roman Catholic Church,* 2001 MBCA 148, leave to appeal to SCC refused, [2002] SCCA No 8. See also *Cloud, supra* note 15 at para 61. See further Truth and Reconciliation Commission, *supra* note 2 at 167. See generally Farrow, "Residential Schools," *supra* note 5 at 603–4.

29 For a discussion of the "crumbling skull" rule, see, e.g., *Athey v Leonati,* [1996] 3 SCR 458 at para 34, cited in *TWNA v Clarke,* 2003 BCCA 670 at para 27 [*TWNA*]. See further *Blackwater SCC, supra* note 14 at paras 74–87; *MA v Canada (Attorney General),* 2001 SKQB 504, var'd 2003 SKCA 2, leave to appeal to SCC refused, [2003] SCCA No 151. See further Farrow, "Residential Schools Litigation," *supra* note 5 at 604–6; Roach, "Blaming the Victim," *supra* note 27 at 572.

30 See, e.g., *Blackwater v Plint,* 2001 BCSC 997 at para 376, var'd [2003] BCJ No 2783 (CA), aff'd *Blackwater SCC, supra* note 14.

31 See, e.g., *Blackwater v Plint,* [1998] BCJ No 1320 at paras 16–18 (*sub nom WRB v Plint*), var'd [2003] BCJ No 2783 (CA), aff'd *Blackwater SCC,* supra note 14; *F.S.M., Sr v Anglican Church of Canada,* 2004 BCCA 23 [*F.S.M.*].

32 See, e.g., *TWNA, supra* note 29 at paras 103–30.

33 See, e.g., *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia,* [2005] 2 SCR 45.

34 See, e.g., *Blackwater SCC, supra* note 14 at paras 39–44. See further Farrow, "Residential Schools Litigation," *supra* note 5 at 607; Moran, *supra* note 27 at 536–39.

35 See, e.g., *Blackwater SCC, supra* note 14 at para 9.

36 See, e.g., *FH v McDougall,* [2008] 3 SCR 41. See further Roach, "Blaming the Victim," *supra* note 27, pts II–III.

37 See, e.g., *Fontaine v Canada (Attorney General)*, 2012 BCSC 313; *Fontaine v Canada (Attorney General),* 2013 BCSC 756. See further Farrow, "Residential Schools Litigation," *supra* note 5 at 608.

38 See, e.g., *Fontaine v Canada (Attorney General),* 2013 ONSC 684; *Fontaine v Canada (Attorney General),* 2014 ONSC 283.
39 See, e.g., *Re Indian Residential Schools, supra* note 15.
40 See, e.g., *Cloud*, *supra* note 15.
41 See, e.g., *Fontaine BCSC 2012, supra* note 19 at paras 17, 48–54, 59, 77–78, 164. See further Paul Barnsley and Kathleen Martens, "Judge Punishes Lawyer for 'Loan Scheme' Targeting Residential Schools Survivors," *Aboriginal Peoples Television Network* (6 June 2012), online: <http://aptnnews.ca/2012/06/06/judge-punishes-lawyer-for-loan-scheme-targeting-residential-school-survivors/>; Farrow, "Residential Schools Litigation," *supra* note 5 at 609.
42 Farrow, "Residential Schools Litigation," *supra* note 5 at 609–11.
43 See, e.g., *Fontaine BCSC 2012, supra* note 19 at paras 15–16, 55–58, 79; *Law Society of Saskatchewan v Merchant,* [2000] LSDD No 24 at paras 24, 53 [*Merchant I*], aff'd 2002 SKCA 60 [*Merchant II*]. For commentary on the *Merchant* cases, see Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation,* 3d ed (Toronto: LexisNexis, 2017) at 156–63.
44 See, e.g., *Merchant I, supra* note 43 at para 47.
45 *Fontaine BCSC 2012, supra* note 19 at paras 18, 75.
46 *Law Society of Manitoba v Tennenhouse* (21 February 2012) Case 11-09 (Discipline Panel) [*Tennenhouse III*].
47 *Fontaine BCSC 2012, supra* note 19 at para 76.
48 *Tennenhouse v Law Society of Manitoba,* 2011 MBQB 73 at para 10 [*Tennenhouse I*].
49 *Fontaine BCSC 2012, supra* note 19 at para 22.
50 For a report of this practice, see Gloria Galloway, "Few Survivors Succeed with Full Claims," *Globe and Mail* (30 November 2017) at A6.
51 *Fontaine BCSC 2012, supra* note 19 at paras 146–49.
52 *Ibid* at paras 62–68. See also *Merchant I, supra* note 43 at paras 88, 92, 94.
53 *Fontaine BCSC 2012, supra* note 19 at para 163.
54 *Ibid* at para 161.
55 Llewellyn, *supra* note 8 at 263.
56 *Ibid.*
57 *Ibid* at 263–64, n 44 (citation omitted).
58 *Ibid* at 268–76.
59 For example, according to several reports, the Merchant Law Group expected to receive somewhere between $28 million and $100 million for work done on residential schools files. For initial concerns about these arrangements, see, e.g., Jonathan Gatehouse, "White Man's Windfall," *Maclean's* (11 September 2006), online: <https://archive.macleans.ca/article/2006/9/11/white-mans-windfall>; Geoff Kirbyson, "The Big Picture," *Canadian Lawyer* (7 August 2007), online: <http://www.canadianlawyermag.com/author/na/the-big-picture-114/>. See further *Baxter, supra* note 13 at paras 53–78. More recently, see *Canada (Attorney General) v Merchant Law Group LLP,* 2017 SKCA 62, leave to appeal to SCC refused, [2017] SCCA No 394. See further *Tennenhouse I, supra* note 48 at para 10; *Tennenhouse II, supra* note 19 at paras 17, 35, 42, 47; *Tennenhouse III, supra* note 46; *Fontaine BCSC 2012, supra* note 19 at para 171; *Merchant II,* supra note 43 at paras 132–33; Erin Anderssen, "Lawyers Swoop to Cash In on Native Claims," *Globe and Mail* (10 July 1999) A1.
60 Llewellyn, *supra* note 8 at 269. See further Farrow, "Residential Schools Litigation," *supra* note 5 at 610–11.

61 Farrow, "Residential Schools Litigation," *supra* note 5 at 611.
62 *Ibid* at 610–11.
63 See Gloria Galloway, "Lawyers Accused of 'Greed' in Fees from Residential-School Victims," *Globe and Mail* (23 October 2017) A1 at A1 and A7. See further *Merchant I, supra* note 43 at paras 28, 88, 92, 94; Anderssen, *supra* note 59 at A1, A7.
64 *F.S.M., supra* note 31 at para 7. See also *Fontaine Estate v Canada (Attorney General),* 2017 MBCA 54, appeal to SCC granted, 2019 SCC 20. See further Farrow, "Residential Schools Litigation," *supra* note 5 at 601, 606–7.
65 See, e.g., *Re Indian Residential Schools*, *supra* note 15 (raising pleading inadequacy concerns); *Fontaine BCSC 2012, supra* note 19 at para 96.
66 *Merchant I, supra* note 43 at para 28.
67 Truth and Reconciliation Commission, *supra* note 2 at 167.
68 Llewellyn, *supra* note 8 at 269. For a general discussion of financial and non-financial costs connected with legal problems, see Trevor C.W. Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016), online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files//Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.
69 Truth and Reconciliation Commission, *supra* note 2 at 166.
70 See, e.g., *supra* notes 39 and 65–66 and surrounding text. For further recent cases that continue to deal with issues under the settlement process, see *Fontaine v Canada (Attorney General),* 2018 BCSC 63; *Fontaine v Canada (Attorney General),* 2018 ONSC 103; *Fontaine v Canada (Attorney General),* 2018 ONSC 357; *Fontaine v Canada (Attorney General),* 2018 ONSC 24.
71 See Truth and Reconciliation Commission, *supra* note 2 at 138. For a brief background description, see, e.g., Indigenous and Northern Affairs Canada, "Sixties Scoop Agreement in Principle: Backgrounder" (7 November 2017), online: Government of Canada <https://www.canada.ca/en/indigenous-northern-affairs/news/2017/10/sixties_scoop_agreementinprinciple.html>.
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75 See *Brown v Canada (Attorney General),* 2017 ONSC 251 at para 86; *Brown v Canada (Attorney General),* 2018 ONSC 3429. See further *Riddle v Canada,* 2018 FC 641; *Thompson v Manitoba (Minister of Justice of Manitoba),* 2017 MBCA 71; *Native Child and Family Services of Toronto v C.R.*, 2017 ONCJ 440.
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Canada <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.pdf>, cited in Truth and Reconciliation Commission, *supra* note 2 at 138.

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80 Truth and Reconciliation Commission, *supra* note 2 at 139.

81 *Ibid* at 135–36.

82 *Ibid* at 137–40. See also Iacobucci, *supra* note 10 at paras 27, 214.

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84 *Ibid* at 170.

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86 Shawn Atleo, "There Is an Election On, Isn't It Time We Talked?" *CBC News* (13 April 2011), online: <http://www.cbc.ca/news/canada/there-is-an-election-on-isn-t-it-time-we-talked-1.1071765>, cited in Jeffrey Paul Ansloos, *The Medicine of Peace: Indigenous Youth Decolonizing Healing and Resisting Violence* (Halifax and Winnipeg: Fernwood Publishing, 2017) at 4.

87 Jamil Malakieh, *Youth Correctional Statistics in Canada, 2015/2016* (Ottawa: Minister of Industry, 2017), online: Statistics Canada <https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.htm>. See also Truth and Reconciliation Commission, *supra* note 2 at 177.

88 See further Truth and Reconciliation Commission, *supra* note 2 at 177.

89 Iacobucci, *supra* note 10 at paras 4, 14.

90 *Ibid* at para 14.

91 See, e.g., *ibid* at paras 27–28, 209, 211, 214–15.

92 For example, Gerald Stanley, a non-Indigenous man, was charged with the murder of Colten Boushie, a young Aboriginal man. Stanley was acquitted of all charges by an all-white jury. For one of several applications in the matter, see *R v Stanley,* 2018 SKQB 27. For comments on a different case, see Hon. Carolyn Bennett, quoted in Cameron MacLean, "Jury Finds Raymond Cormier Not Guilty in Death of Tina Fontaine," *CBC News* (22 February 2018), online: <http://www.cbc.ca/news/canada/manitoba/raymond-cormier-trial-verdict-tina-fontaine-1.4542319>. See generally Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal and Kingston: McGill-Queen's University Press, 2019).

93 See, e.g., Paul Seesequasis, "A Made-in-Saskatchewan Crisis," *Globe and Mail* (13 February 2018) A17; Carrie Tait, "Alberta Calls on Ottawa to Amend Justice System," *Globe and Mail* (3 March 2018) A6.

94 Peremptory challenges are available under the *Criminal Code*. See *Criminal Code,* RSC 1985, c C-46, s 634. In the Stanley case, however, it appeared that the only consistent basis for the challenges was the fact of a prospective juror's Indigenous appearance. For comments on the jury selection process in the Stanley case, see, e.g., Joe Friesen & Sean Fine, "The Ins and Outs of Juries, Challenges and Potential Reforms," *Globe and Mail* (13 February 2018) A12. In his report, Iacobucci recommended that powers of peremptory challenge be reviewed in order to prevent their use to discriminate against First Nations people serving on juries. Iacobucci, *supra* note 10, recommendation 15. Some limits already exist with respect to jury selection (particularly in respect of the Crown). See, e.g., *R v Gayle* (2001), 54 OR (3d) 36 (CA), leave to appeal to SCC refused, [2001] SCCA No 359. Now

see Canada, Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* 1st Sess, 42nd Parl, 2019, ss 271–72 (assented to 21 June 2019) [Bill C-75].

95 See, e.g., Alex McKeen, "Thousands Gather to Protest Verdict," *Toronto Star* (11 February 2018) A4.

96 Rt. Hon. Justin Trudeau, PC, MP, reported in John Ibbitson, "You and I Can Question the Stanley Verdict – Politicians Should Not," *Globe and Mail* (13 February 2018) A13; Hon. Jody Wilson-Raybould, PC, MP, reported in Ibbitson, *ibid.*

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98 Debbie Baptiste in Joe Friesen, "Boushie Family Moves from Anger to Action in Wake of Acquittal," *Globe and Mail* (12 February 2018) A1 at A6.

99 Rt. Hon. Beverley McLachlin, PC, former Chief Justice of Canada, "Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference" (Ottawa, 11 August 2016), online: Supreme Court of Canada <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-08-11-eng.aspx>.

100 See Truth and Reconciliation Commission, *supra* note 2, Calls to Action 25–42.

101 *Ibid,* Calls to Action 27–28.

102 Government of Canada, News Release, "Government of Canada to Create Recognition and Implementation of Rights Framework" (14 February 2018), online: Government of Canada <https://pm.gc.ca/en/news/news-releases/2018/02/14/government-canada-create-recognition-and-implementation-rights>.

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