Upholding Sacred Obligations

Reparations for Missing and Disappeared Indigenous Children and Unmarked Burials in Canada

Volume 1

INDEPENDENT SPECIAL
INTERLOCUTOR

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Volume 1

Office of the Independent Special Interlocutor for
Missing Children and Unmarked Graves and Burial Sites
associated with Indian Residential Schools

2024

Office of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools

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Office of the Independent Special Interlocutor
for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools

Bureau de l'interlocutrice spéciale indépendante
pour les enfants disparus et les tombes et les sépultures anonymes en lien avec les pensionnats indiens

October 29, 2024

The Honourable Arif Virani
Minister of Justice and Attorney General of Canada
Department of Justice Canada
284 Wellington Street
Ottawa, ON, K1A 0H8

Dear Minister Virani:

As the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools, appointed by Order-in-Council PC Numbers 2022–0636 and 2024–0601, and in accordance with the mandate assigned to me, I am pleased to transmit to you my Final Report, which includes the following:

1. *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada*, a historical report which was released for download in pre-publication format on July 3, 2024.
2. *Upholding Sacred Obligations: Reparations for Missing and Disappeared Indigenous Children and Unmarked Burials in Canada*, a two-volume report that, as directed by the mandate, "takes into account the wishes and traditions of the respective communities and families" and is based upon and includes information received through six National Gatherings, meetings, submissions, and attending at search sites and in communities, as well as research and analysis that was carried out over the last two years. It concludes by identifying the obligations that must be met for implementing an Indigenous-led Reparations Framework for Truth, Accountability, Justice, and Reconciliation.
3. *Executive Summary of the Final Report on the Missing and Disappeared Indigenous Children and Unmarked Burials in Canada*.

Kindly note that these Reports are being delivered concurrently to you as the Minister of Justice, and to First Nations, Inuit, and Métis Survivors, families, leaders, and communities, and to the public along with relevant United Nations processes and entities.

Nyá:wen
Kimberly R. Murray
Independent Special Interlocutor

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The information in this report may be upsetting for some because it contains content, including images, relating to the deaths and forced disappearances of children at former Indian Residential Schools and other institutions. If you require immediate support, please contact the following: the Indian Residential School Survivors Society's 24/7 Crisis Support Line: 1-800-721-0066 or the 24-hour National Indian Residential School Crisis Line: 1-866-925-4419.

Burning Medicine in a smudge bowl (Office of the Independent Special Interlocutor).

Preface

Kimberly Murray delivering remarks at the announcement of her appointment on June 8, 2022 (Office of the Independent Special Interlocutor, Department of Justice).

I am humbled to have served as the Independent Special Interlocutor and as a voice for the missing and disappeared children for more than two years. I have been honoured to meet with Survivors, Elders, Knowledge Holders, Indigenous families, and communities across Turtle Island who have generously shared their wisdom, knowledge, and experiences with me as they lead the Sacred work of searching for the children who were disappeared from, or died at, Indian Residential Schools and other associated genocidal institutions. These institutions, which were once places of silence, suffering, brutal violence, and death, are now sites of conscience that hold truths about the past and memories of injustice that must be exposed, acknowledged, remembered, shared, and learned from to ensure these crimes against humanity never happen again.

I am grateful to the many communities who invited me into their territories to see first-hand how they are searching these sites of truth and conscience for the unmarked burials of the children, using multiple sources of information, including testimonies and accounts from Survivors and their families, archival records, and an array of ground search technologies.

I thank all those who participated at the six National Gatherings held in Edmonton, Winnipeg, Vancouver, Toronto, Montreal, and Iqaluit. Hearing directly from Survivors, search and recovery teams, community researchers, and various other experts affirms why an Indigenous-led reparations process is essential to supporting this Sacred work in ways that uphold Indigenous rights and laws, promote justice and accountability, support healing, and foster reconciliation.

With heartfelt gratitude, I acknowledge the Survivors who have never forgotten the missing and disappeared children and have been speaking for decades about the need to find them. They have done so despite Canada's long resistance to admitting the full scope and ongoing harms of this grievous historical injustice that systematically devalued Indigenous children both in life and in death. Survivors' courage and willingness to bear the heavy burden and responsibility of sharing their knowledge about what happened to the little ones and where they are buried is at the heart of truth-finding. Although they must relive their own traumatic experiences to do this difficult and emotional work, they continue to demonstrate their unwavering determination to restore human dignity to the missing and disappeared children and demand accountability and justice from Canada and the churches. The importance of Survivors' first-hand accounts cannot be overstated—they are the living witnesses who are creating an irreplaceable oral history record of the children for Indigenous families and communities and for Canada as a whole.

The search and recovery work being done across the country is a complex truth-finding process, both individual and collective. For individuals, families, and communities, it fulfills

a highly personal yet universal human need—to know what happened to their deceased loved ones and to mourn, bury, and memorialize them according to the laws, spiritual beliefs, and practices of one's own culture. Collectively, for Indigenous Nations and the State, the truth-finding process is part of the evidentiary record of how Canada normalized the disappearances, deaths, and unmarked burials of Indigenous children for well over a century on a scale that is indefensible.

In my Interim Report,[1] I said that Canadians cannot take pride in a country that permits the burials of children to be violently disrespected, allows shovels to dig into the bones of ancestors, and hides from the truth. I said that Canada can no longer be a bystander to reconciliation. I am encouraged that a growing number of Canadians, including political leaders and senior church officials, now acknowledge that Indian Residential Schools were colonial institutions of genocide.

Yet despite the well-documented historical reality that thousands of children died and were buried in cemeteries or unmarked graves at Indian Residential Schools, or at other institutions to which they were forcibly transferred, many Canadians still find it hard to accept that Canada committed such atrocities against children. Reluctant to identify Canadians as colonizers and perpetrators of violence, they minimize the substantive harm that has been done. Proud of Canada's international reputation as a global peacemaker, they resist including Canada in the long list of countries where genocide and mass human rights violations against Indigenous Peoples have occurred.

Unfortunately, a small but vocal group of denialists have gone so far as to attack the credibility of Survivors, Indigenous families, and communities, claiming that there are no missing and disappeared children and no unmarked burials. They use media and manipulate historical evidence to influence bystanders and sway public opinion. They tell Canadians what many still want to hear—that Indigenous Peoples, with a few unfortunate exceptions, have benefited from colonialism, that Canada's history is unblemished by colonial violence and genocide, and that Canada's human rights record is unimpeachable.

While it may be tempting for Canadians to believe this mythical and idealized version of national history, denying the painful truths of Survivors and the missing and disappeared children is a barrier to making reparations that advance reconciliation based on accountability and justice. A mature and healthy democracy is strengthened by its willingness and ability to confront the political, legal, and moral failures of its own past and change accordingly. This is a pivotal moment for Canada to demonstrate not just in words but also in actions that "every child matters." Every child matters—in life and in death. This commitment to demonstrating that every child matters requires that each of us work together to support Survivors,

Indigenous families, and communities leading search and recovery investigations until they are satisfied that these efforts are complete.

I express my deepest respect to each family who allowed me to accompany them, when after so many years of searching, they were finally able to visit the burial place of their missing or disappeared loved one. I was so honoured to walk with you, to join you in offering prayers, and to stand quietly beside you as you lay Sacred items and flowers on Mother Earth where your little ones are buried, letting them know that you never forgot about them. May their Spirits now rest in peace with the ancestors, knowing that they are loved and remembered.

1 Office of the Independent Special Interlocutor (OSI), *Sacred Responsibility: Searching for the Missing Children and Unmarked Burials,* Interim Report, June 2023, https://osi-bis.ca/wp-content/uploads/2023/07/Interim-Report_ENG_WEB_July11.pdf.

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Introduction

WHY WAS AN INDEPENDENT SPECIAL INTERLOCUTOR NEEDED IN CANADA?

interlocutor, noun (in-ter-loc-u-tor)

Definition: one who takes part in dialogue or conversation. Etymology: The word interlocutor traces back to the Latin word *Interloqui*, meaning "to speak between."

— Merriam-Webster Dictionary

The role of the Independent Special Interlocutor is to take part in conversations with Survivors, Indigenous families, and communities who are leading the Sacred work of recovering the missing and disappeared children and unmarked burials. It involves speaking directly with those leading search and recovery work and with governments, churches, and other individuals and organizations to help identify and remove existing barriers. Listening, hearing, and considering all input provided is required to inform recommendations about how to support Survivors, Indigenous families, and communities moving forward.

The horrific truths about the missing and disappeared children and unmarked burials associated with Indian Residential Schools are well known within Indigenous families and communities. Starting in the 1960s, Survivors, Indigenous families, and communities in various parts of Canada have been working to locate, recover, and commemorate the missing and disappeared children and their unmarked burials. In the absence of the much-needed funding and other supports, Survivors, Indigenous families, and communities have shouldered this Sacred work on their own.

In 2015, the Truth and Reconciliation Commission of Canada (TRC) published volume 4 of its Final Report, which focuses on missing children and unmarked burials at Indian Residential Schools. Although the federal government denied the TRC's request for funding to support this work, the TRC completed the first systematic investigation into children's deaths and burials at these institutions. In volume 4, the TRC identified specific actions required from governments, churches, and other organizations to support the search for and recovery of the missing children and unmarked burials:

71. We call upon all chief coroners and provincial vital statistics agencies that have not provided to the Truth and Reconciliation Commission of Canada their records on the deaths of Aboriginal children in the care of residential school authorities to make these documents available to the National Centre for Truth and Reconciliation.

72. We call upon the federal government to allocate sufficient resources to the National Centre for Truth and Reconciliation to allow it to develop and maintain the National Residential School Student Death Register established by the Truth and Reconciliation Commission of Canada.

73. We call upon the federal government to work with churches, Aboriginal communities, and former residential school students to establish and maintain an online registry of residential school cemeteries, including, where possible, plot maps showing the location of deceased residential school children.

74. We call upon the federal government to work with the churches and Aboriginal community leaders to inform the families of children who died at residential schools of the child's burial location, and to respond to families' wishes for appropriate commemoration ceremonies and markers, and reburial in home communities where requested.

75. We call upon the federal government to work with provincial, territorial, and municipal governments, churches, Aboriginal communities, former residential school students, and current landowners to develop and implement strategies and procedures for the ongoing identification, documentation, maintenance, commemoration, and protection of residential school cemeteries or other sites at which residential school children were buried. This is to include the provision of appropriate memorial ceremonies and commemorative markers to honour the deceased children.

76. We call upon the parties engaged in the work of documenting, maintaining, commemorating, and protecting residential school cemeteries to adopt strategies in accordance with the following principles:

    i. The Aboriginal community most affected shall lead the development of such strategies.

    ii. Information shall be sought from residential school Survivors and other Knowledge Keepers in the development of such strategies.

    iii. Aboriginal protocols shall be respected before any potentially invasive technical inspection and investigation of a cemetery site.[1]

These Calls to Action require collaborative efforts by governments, church entities, and other organizations to gather and release records; to research the location of the burials of the missing and disappeared children, both in Indian Residential School cemeteries and in other locations; to inform families of what happened to their children and of the location of their burials; to support commemorations and ceremonies to honour these children; and to respect Indigenous protocols in site investigations. Implicit in these Calls to Action is a requirement for sufficient funding for Indigenous communities to lead this work.

The TRC's findings and Calls to Action received little public attention or response prior to the solemn announcement by the Tk'emlúps te Secwépemc in British Columbia in May 2021 confirming that unmarked burials may have been found at the site of the former Kamloops Indian Residential School. This was quickly followed by similar statements by several other First Nations across Canada. These public confirmations brought national and international attention to Canada's lack of progress and failure to prioritize identifying the missing and disappeared children and locating the unmarked burials. This global attention served as a catalyst for demonstrable action to implement Calls to Action 71–76.

As hundreds of Indigenous communities across Canada lead search and recovery efforts, it has revealed the complexity and lengthy time frame required to complete this Sacred work. Conducting search and recovery efforts on the scale that is required is unprecedented in Canada. The Canadian legal framework is currently not equipped to provide adequate legal protections to these sites of truth before, during, and after searches and investigations as it was never designed to address these atrocities. All of this pointed to the need for a new legal framework and process to support search and recovery efforts and advance reconciliation in Canada.

The minister of justice and Attorney General of Canada engaged with Indigenous leaders across the country, who emphasized that this work must be Indigenous-led. In June 2022, I was appointed as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites Associated with Indian Residential Schools for a two-year term. This initial term was extended for an additional six months.

WHAT WAS THE MANDATE?

The Mandate aimed to ensure that the First Nations, Inuit, and Métis children whose graves and burial sites are now being recovered are recognized and treated with respect, honour, and dignity. The Mandate included **all burials of children who died while attending Indian Residential Schools**. This is described in several different ways:

- The phrase "**associated** with" former Indian Residential Schools makes clear that **all** graves and burial sites of children who died while in the care of the State and churches that operated Indian Residential Schools were within scope. This included the children that died after being transferred from an Indian Residential School to another institution. All sites where Indigenous children are buried, including at the Indian Residential Schools and Federal Hostels (whether recognized or not recognized under the *Indian Residential School Settlement Agreement* [*IRSSA*]) as well as cemeteries, hospitals (including psychiatric hospitals and sanatoria), Indian hospitals, reformatories, and industrial schools and other locations were therefore included.[2]

- I was to, "include consideration of Indigenous children **who were buried on sites other than those at and associated with former residential**

school lands, and of those whose remains cannot be found."[3] This includes hidden and clandestine burials as well as any cremated remains of the missing and disappeared children.

- Finally, the Mandate made clear that the phrase, "unmarked graves and burial sites" under the Terms of Reference, "includes the burial sites of children associated with Indian Residential Schools **whether or not those sites are physically marked or documented in any way**."[4] In addition to unmarked burials, the graves of children that are located and documented in registered cemeteries, including municipal, church, and private cemeteries, were in scope.

Independence and Transparency

The Mandate stated that I was to function **independently and impartially in a non-partisan and transparent manner**. Further clarity on each of these requirements is described below:

- **Independence**: I was to function independently according to my own skill and judgment, without influence from the federal government about the conclusions reached or the recommendations made. I was also to function in a non-partisan manner.
- **Impartiality**: I was to consider all information provided to me through meetings, submissions, attending in communities, at search sites, or otherwise, along with research and analysis in formulating my recommendations. This included input provided by Survivors, Indigenous families, communities, and leadership; federal, provincial, territorial, and municipal governments; other entities, such as churches and universities; and various domestic and international experts.
- **Transparency**: All reports and recommendations I make were to be simultaneously delivered to the federal government; Indigenous leadership, communities, and families; relevant international experts and bodies (such as the United Nations (UN) Special Rapporteur on the Rights of Indigenous Peoples); and the public.

Dialogue, Engagement, and Facilitating Action

I was mandated to **begin a dialogue** with Survivors, Indigenous families, and communities as well as with the federal, provincial, and territorial governments, church entities, and other institutions and record holders. The aim was to create, "a collective approach and develop a path forward to address the legacy of unmarked graves and burial sites."[5] The Mandate implicitly recognized the need for a collective and coordinated approach because laws, regulations, policies, and practices that are needed may fall within federal, provincial, and/or territorial jurisdictions.

My **priority** was to engage with Survivors, affected First Nations, Inuit, and Métis governments, representative organizations, communities, and families to discuss concerns around the identification, location, recovery, and protection of unmarked graves and burial sites, including the potential repatriation of the children's remains. I was asked to listen to them and facilitate actions in a manner that was, "culturally informed, trauma-informed, appropriate and respectful, and based on Indigenous customs, decision and consensus-building practices."[6]

I was also responsible for liaising with relevant governments and organizations to **assist Survivors, Indigenous families, and communities** to address barriers and navigate federal, provincial, territorial, and municipal systems to support their search for and recovery of the missing and disappeared children and to assist communities to obtain and preserve relevant information and records from the federal, provincial, and territorial governments, church entities, and other record holders.

Recommendations for a New Legal Framework

A central focus of the Mandate was to work collaboratively, "**to identify needed measures and recommend a new federal framework** to ensure the respectful and culturally appropriate treatment of unmarked graves and burial sites of children associated with 'former [Indian] [R]esidential [S]chools.'"[7] In developing recommendations for a new legal framework, I was mandated to:

- Develop a description of the current legal framework, including identifying gaps, inconsistencies, and barriers;
- Consider applicable international instruments and legal principles, including the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*);[8]

- Contribute to the implementation of the *UN Declaration*, in accordance with section 35 of the *Canadian Charter of Rights and Freedoms* and the Canadian constitutional framework[9] to, "address injustices, prejudice, discrimination and violence that First Nations, Inuit and Métis have suffered and continue to suffer";[10]
- Ensure the legal framework accords with Indigenous laws, legal orders, and protocols and respects the wishes of Indigenous families and communities;
- Support the advancement of the implementation of the TRC's Calls to Action;
- Propose pathways to acknowledge and provide methods of returning First Nations, Inuit, and Métis lands that were assigned or expropriated for churches, Indian Residential School sites, and associated lands;
- Make any other recommendations relating to Indian Residential School sites and associated unmarked graves and burial sites arising from engagement with First Nation, Inuit, and Métis families and communities; and
- Report the recommendations to Survivors, Indigenous communities, and families and to the federal government.

Limitations

There were two limitations outlined in the Mandate, which I will discuss in turn. First, I was **not to interfere with criminal investigations, prosecutions, or civil proceedings**. Both the mandates of the TRC and the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry) contained similar provisions that stated that neither was to "jeopardize" a legal proceeding.[11] It is notable that:

- The TRC participated in various legal proceedings through a, "request for directions pursuant to the *IRSSA*;[12] and
- The National Inquiry intervened in the 2019 Supreme Court of Canada's case of *R. v. Barton*.[13] The court allowed the intervention on the basis that the National Inquiry had a unique perspective and knowledge that it could provide to the court on the issues central to that case.

The courts agreed that these actions by the TRC and the National Inquiry did not jeopardize any legal proceedings. Similarly, I was careful to respect this limitation in my Mandate and did not interfere in any legal proceedings. I did seek leave to intervene in one case and was granted conservatory intervenor status by the Superior Court of Quebec to provide relevant contextual information, knowledge, and expertise that could be helpful.[14]

The second limitation was that I **did not have the ability to compel the production of information or documents from record holders**. Although some may see this as a significant limitation, the ability to compel the production of documents would not have had the desired outcome that Survivors wanted. Although it would have enabled me to review documents, federal privacy and access to information legislation would have limited my ability to share these documents with communities. For this reason, I worked to facilitate broader, more timely access to records for those leading search and recovery work so that the records would be in their possession and control.

Reporting Requirements

The Mandate required that I report on the progress of my work, which I did by delivering the following reports:

1. A November 2022 **Progress Update Report**,[15] which described the work done in the first several months of the Mandate and outlined my plan for completing the Mandate's commitments; and
2. A June 2023 **Interim Report**,[16] which described the work and progress made in the first year of the Mandate.

I was also tasked with issuing this Final Report and providing recommendations for a new legal framework to support search and recovery work moving forward.

HOW DID I APPROACH THE MANDATE?

Throughout the Mandate, I have carried in my heart all the children who were forcibly taken from their parents and communities by the Canadian State and placed in Indian Residential Schools and other associated institutions. I have been guided by all the Survivors—those still with us and those that have already returned to the Spirit World. I have done my best to honour all the children whose Spirits have not yet had the opportunity to journey home

to rest with their ancestors. I have shared the anger and hurt of those families who were left wondering what happened to their children, who searched and searched for them, and whose questions went unanswered.

Process and Approach

When I accepted this appointment in June 2022, it was very important to me to seek guidance from Survivors, Elders, and Knowledge Holders about how to complete my work. I benefited from their wise counsel and learned from them that the **process of searching for and recovering the missing and disappeared children is as important as the end result itself**. While Survivors, Indigenous families, and communities have been leading their searches for the children, I heard directly how many have been searching for decades. I was humbled to have been invited to attend ceremonies alongside the many who finally found their missing and disappeared loved ones, and I stood in solidarity with those moving forward with this Sacred work.

Elders and Survivors also directed me **to be a voice for the children**. I have insisted on upholding the rights of the missing and disappeared children to ensure their Spirits and bodies are treated with honour, respect, and dignity. This required that I consider various mechanisms of accountability and justice for the children, Survivors, Indigenous families, and communities. Being a voice for the children also meant that, at times, I had to deliver hard messages to governments, churches, and other institutions, challenging them to do better. The following principles guided my work:

- The bodies and Spirits of missing and disappeared Indigenous children must be treated with honour, respect, and dignity. This is important as we know the children were not treated with honour, respect, and dignity when they were taken from their families and communities and placed in the institutions. We also know that the children were not treated with honour, respect, and dignity when they died—often being buried, sometimes in mass graves, far from their families and communities and not according to their Indigenous customs and protocols.

- Survivors must be honoured and acknowledged for raising public awareness about the truths of unmarked burials of children who died at Indian Residential Schools and other institutions. Survivors have spoken for decades of the need to find the children, yet the federal government, the churches, and Canadians did not heed their calls for assistance.

- Indigenous families and communities have the right to know what happened to their children who died while in the care of the State and churches. This right to know is an internationally recognized right to the truth for victims of mass human rights atrocities.
- Searches and investigations must follow the truth. This requires tracing the movement of each child using records and Survivor testimonies from when a child was first taken to an Indian Residential School through to any other institution or location to which they were sent.
- The search for unmarked burials and the recovery of missing and disappeared Indigenous children must be governed by Indigenous laws, the *UN Declaration*, and the *UN Convention on the Rights of the Child*.[17]

The **engagement plan and processes** were designed to be respectful of Indigenous protocols, transparent, honest, and open. Mechanisms to report back to Survivors, Indigenous leadership, families, and communities were implemented that included the distribution of Summary Reports that reflected their input.

Elder Darrell Boissoneau, sharing Teachings at the Dan Pine Healing Lodge, in Ketegaunseebee Garden River First Nation on February 28, 2023 (Office of the Independent Special Interlocutor).

I had the honour of meeting with many Indigenous communities leading search and recovery work over the course of the last two years. With humility and respect, and only when invited, I attended at the sites of truth where searches were occurring. I walked the grounds alongside Survivors as they pointed to the areas where unmarked burials exist. I met with search teams, who were deploying non-invasive search technologies to locate potential unmarked burials. I met with research teams who were meticulously, line by line and word by word, reviewing the archival records that, in many cases, they fought hard to obtain access to. I met with Indigenous leadership and communities who were preparing themselves for, or recovering from, public announcements of their ground search results. I also attended tearful and touching commemorative gatherings and ceremonies to honour the missing and disappeared children.

I hosted the following **six National Gatherings on Unmarked Burials** to listen to, and learn from, Survivors, Indigenous families, communities, search teams, and forensic and legal experts to inform this Final Report:

- National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 12–14, 2022. Over three hundred participants attended in person, with over one hundred more joining the livestream. A Summary Report is available for this Gathering.[18]
- National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 28–23, 2022. Over four hundred participants attended in person, and hundreds more joined the livestream. A Summary Report is available for this Gathering.[19]
- National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 16–18, 2023. Over four hundred participants attended in person, with almost one thousand more joining by livestream each day. A Summary Report is available for this Gathering.[20]
- National Gathering on Unmarked Burials: Upholding Indigenous Law, Toronto, Ontario, March 27–29, 2023. Over 420 participants attended in person, with 2,700 joining by livestream on the second day and over 720 joining by livestream on the final day. A Summary Report is available for this Gathering.[21]

- National Gathering on Unmarked Burials Supporting the Search and Recovery of Missing Children, Montreal, Quebec, September 6–8, 2023. Over 450 participants attended in person, with more than one thousand viewers joining by livestream. A Summary Report is available for this Gathering.[22]
- National Gathering on Unmarked Burials: Northern Voices, Iqaluit, Nunavut, January 30–February 1, 2024. Over 150 participants attended in person, with more than 1,400 viewers joining by livestream on the first day of programming and 1,550 viewers on the final day. A Summary Report is available for this Gathering.[23]

I engaged with the National Centre for Truth and Reconciliation, the National Advisory Committee on Missing Children and Unmarked Burials, provincial governments, territorial governments, municipalities, church entities, experts, academics, and international bodies where appropriate to meet the Mandate. I have taken a **broad approach** to reflect the importance and expansive scope of the Mandate. I focused on describing the **systemic nature of the harm** that has been perpetrated on the missing and disappeared children and their families and communities. In doing so, I have considered the conditions and realities that led to the death of so many Indigenous children while in the care and custody of the Canadian State and that impacted the location, circumstances, and nature of their burials. Consistent with the TRC's findings, my inquiry revealed frequent forced transfers from one institution to another. As such, and in accordance with the Mandate, I interpreted the term "**missing children**" to include any child who was never returned home from a government or church-run institution, including those who are buried in unmarked graves in registered cemeteries. These children are aptly characterized as "missing" in circumstances where their families and communities were never notified of the location of their burial. There are also children who were "**disappeared**" as per the definition of this term under international law.

MOVING TOWARDS AN INDIGENOUS-LED, HOLISTIC APPROACH TO REPARATIONS

Due to the systemic and egregious nature of the harm and atrocities perpetrated, I propose a **holistic approach to reparations**. To be effective, reparations measures must uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity, and security. They must provide redress for the systemic patterns of genocide in settler colonial countries, including the violence, oppression, land dispossession, and forced

assimilation that Indigenous people and communities have endured and resisted. Understanding this broader context is essential when considering the elements required for a new Reparations Framework in relation to finding and protecting the missing and disappeared children and their unmarked burials. This requires collective action, across all levels of society, to target the underlying attitudes, policies, and practices that supported the operation of the Indian Residential School System and failed to provide accountability and justice for Survivors and the missing and disappeared children, their families, and communities.

Research Strategy

The multidisciplinary research strategy was designed to achieve the objectives of my Mandate. I used the following approaches and methods to analyze the existing research and input gathered:

- **Indigenous-centred**: I have taken care to centre the experiences of the missing and disappeared children, Survivors, Indigenous families, and communities. I have prioritized incorporating Indigenous scholarship and reports and submissions written by Indigenous organizations, leadership, and community members.
- **Indigenous law and sovereignty based**: I considered approaches that uphold Indigenous laws, honour Indigenous protocols, and the inherent sovereignty of Indigenous Peoples.
- **Anti-colonial**: I considered how settler colonialism has manifested and continues to be perpetuated in the context of the missing and disappeared children and unmarked burials. I examined how colonialism contributed to the horrific conditions for Indigenous children in Indian Residential Schools and associated institutions that led to the very high death rates. I also examined how the current legal framework fails to provide sufficient protections for sites before, during, and after searches and investigations occur.
- **Rights based**: A rights-based approach includes the legal rights of First Nations, Inuit, and Métis Peoples within Canada. It requires consideration of the inherent rights of Indigenous Peoples, constitutionally protected Aboriginal and Treaty rights, rights protected under the *Canadian Charter of Rights and Freedoms* and internationally recognized human rights under various UN Conventions and Declarations.

- **Trauma informed**: The search for and recovery of the missing and disappeared children and their unmarked burials is traumatic. In my work, I have taken care to minimize harm to Survivors, their families, and communities and to the Spirits of the children.
- **Culturally distinct**: I took care to respect the diversity of Indigenous Peoples across Canada and how that diversity—culturally, territorially, and historically—has differently impacted First Nations, Inuit, and Métis communities in the context of the missing and disappeared children and unmarked burials. I considered this in relation to how and from where children were forcibly taken and how this diversity shapes different approaches to search and recovery efforts.
- **Gender-specific and intersectional approach**: Where possible, I analyzed the different and distinct experiences of Indigenous girls that increased the likelihood of death at Indian Residential Schools and associated institutions. I also considered the different circumstances for children with intersecting identities, such as physical or intellectual disabilities. During the Mandate, some records, particularly health records, were difficult to access for the purposes of this review.

Commemorative markers for Nora, Isobel, and Betsey Osborne, placed next to their mother's resting place in Pimicikamak First Nation (Office of the Independent Special Interlocutor).[24]

The information gathered from Survivors, search and recovery teams, community researchers, and various other experts has been considered. Information provided from government, churches, and other institutional officials has been analyzed in conjunction with several commissioned reports. A comprehensive review of relevant international law, Canadian legislation, and published literature on reparations was also conducted.

Key case studies and summaries provide concrete examples of existing legal, policy, and research barriers. I highlight emerging First

Nations, Inuit, and Métis sovereignty-based models of search and recovery work, illustrating how communities are exercising their rights of self-determination and applying Indigenous laws. Some examples of government, church, police, coroner's offices, archives, and other institutions adopting an anti-colonial approach to establishing constructive collaborations with Indigenous communities are also documented.

This Final Report sets out the elements of an Indigenous-led Reparations Framework to support the search for and recovery of the missing and disappeared children and unmarked burials. The Reparations Framework is not a one-size fits all model; it is an inclusive, flexible framework that can be adapted and tailored to meet the specific needs of the Survivors, Indigenous families, and communities in diverse Indigenous Nations across the country.

1 TRC, *Truth and Reconciliation Commission of Canada: Calls to Action* (Ottawa: TRC, 2015), 8-9, Calls to Action 71-76.

2 *Indian Residential Schools Settlement Agreement*, Schedule N, May 8, 2006, reprinted in TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,* (Montreal and Kingston: McGill-Queen's University Press, 2015), Appendix 1 (*IRSSA*).

3 Government of Canada, Department of Justice, "Mandate and Terms of Reference," Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools, Last Updated June 4, 2024, https://www.justice.gc.ca/eng/interlocutor-interlocuteur/mtr-mcr.html.

4 Department of Justice, "Mandate and Terms of Reference," Additional notes.

5 Department of Justice, "Mandate and Terms of Reference."

6 Department of Justice, "Mandate and Terms of Reference."

7 Department of Justice, "Mandate and Terms of Reference."

8 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Resolution 61/295, UNGAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007 (*UN Declaration*).

9 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

10 Department of Justice, "Mandate and Terms of Reference."

11 The TRC's Mandate states at s. 2(k) that the Commissioners, "shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding" [Schedule N of the *IRSSA*]. The National Inquiry into Missing and Murdered Indigenous Women and Girls' Terms of Reference required the Commissioners, "to perform their duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing criminal investigation or criminal proceeding." National Inquiry into Missing and Murdered Indigenous Women and Girls, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019), Terms of Reference, ss. (q).

12 See, for example, *Canada (Attorney General) v. Fontaine*, 2017 SCC 47.

13 *R. v. Barton*, 2019 SCC 33.

14 *Kahentinetha, Kawenaa, Karennatha, Karakwine, Kwetiio, Otsitsataken, Karionhiate v. Société Québécoise des Infrastructures, Royal Victoria Hospital, McGill University Health Centre, McGill University, Ville de Montréal, Stantec Inc. & Attorney General of Canada*, October 27, 2022, Montreal, 500-17-120468-221 (Superior Court of Quebec).

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23 OSI, *National Gathering on Unmarked Burials: Northern* Voices, Summary Report, January–February 2024, https://osi-bis.ca/wp-content/uploads/2024/06/OSI_SummaryReport_Iqaluit2024.pdf.

24 For a detailed summary of the Osborne family's search for their disappeared loved ones, see OSI, *Sacred Responsibility*.

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PART ONE

Activating and Enforcing International Obligations

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CHAPTER 1

Creating an Indigenous-Led Reparations Framework

WHY DOES CANADA NEED AN INDIGENOUS-LED REPARATIONS FRAMEWORK TO LOCATE, PROTECT, AND COMMEMORATE THE MISSING AND DISAPPEARED CHILDREN AND UNMARKED BURIALS?

Over the past two years, I have met many Survivors, Indigenous families, and communities who are still searching for truth. They want to know what happened to their children who went missing or were forcibly disappeared into the Indian Residential School System and never came home again. How did they die? Where did they die? Where are they buried? Were they buried at the former site of an Indian Residential School or at one of the many other institutions that the children were transferred to by government and church officials? Are they thousands of kilometres away in another province? Is their grave marked with their name in a well-tended cemetery, or do they lie anonymously in a long-forgotten burial site?

Like all parents, grandparents, and family members, they deserve answers to their questions. Indigenous children, who were treated with callous and dehumanizing cruelty in life at Indian Residential Schools, deserve respect and human dignity in death. Their burial sites must be located, protected, and commemorated so that families can go there to grieve and remember, to offer prayers, to put down tobacco, and to lay flowers to honour the memories of their children who died while in the care and custody of the State.

Of the many human rights violations inflicted on Indigenous children and their families through the Indian Residential School System, the disappearances and deaths of thousands

of Indigenous children is the ultimate act of injustice. Under international law, Survivors, Indigenous families, and communities, who are victims of genocide, crimes against humanity, and mass human rights violations, have the right to know the truth about these atrocities and the right to reparations for these egregious harms. Truth-finding is a necessary first step towards justice that requires political, legal, and social accountability from the State on individual, collective, and structural levels.[1]

In Canada, where partial reparations have been made for the abuses inflicted on Indigenous children in the Indian Residential School System, I note that, under international legal norms and standards:

> Reparations are not substitutes for trials or truth recovery mechanisms, and vice versa, as accountability and access to justice are key forms of reparation. Victims accepting reparations does not discharge the State's obligation to investigate, prosecute, and punish those responsible for violations, neither does it extinguish victims' right to truth and justice.[2]

Canada must be fully accountable for what happened to these children—little ones who were vulnerable to the violence, abuse, disease, starvation, and neglect at Indian Residential Schools, which were institutions run by the government and churches for over a century—institutions where the mistreatment of Indigenous children was well known by government after government and the churches, yet where officials did nothing to protect them.

Reparations measures must uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity, and security. These measures must provide redress for the structural and systemic patterns of genocide manifested in the violence, oppression, land dispossession, and forced assimilation that Indigenous Peoples within Canada have endured and resisted. Understanding and accounting for this broader context of historical and ongoing injustice is essential when creating a comprehensive approach to reparations.

Reparations in the Context of Settler Colonialism and Genocide in Canada

The circumstances leading to the need to locate and identify the missing and disappeared children and unmarked burials cannot be understood in isolation. They are evidence of one of the most horrific elements of genocide—the systematic and violent targeting of Indigenous

children in settler colonial Canada as part of the colonization process. The levels of violence directed at Indigenous children in the Indian Residential School System should not be underestimated. In 1996, the *Final Report of the Royal Commission on Aboriginal Peoples* concluded that:

> At the heart of the vision of residential education—a vision of the school as home and sanctuary of motherly care—there was a dark contradiction, an inherent element of savagery in the mechanics of civilizing the children. The very language in which the vision was couched revealed what would have to be the essentially violent nature of the school system in its assault on child and culture. The basic premise of resocialization, of the great transformation from "savage" to "civilized," was violent. To "kill the Indian in the child," the department aimed at severing the artery of culture that ran between the generations and was the profound connection between parent and child sustaining family and community.
>
> In the end, at the point of final assimilation, "all the Indian there is in the race should be dead." This was more than a rhetorical flourish as it took on a traumatic reality in the life of each child separated from parents and community and isolated in a world hostile to identity, traditional belief, and language. The system of transformation was suffused with a similar latent savagery—punishment.... In the vision of residential school education, discipline was the curriculum and punishment an essential pedagogical technique.[3]

The Indian Residential Schools were part of a "System" of settler colonialism aimed at eliminating Indigenous Peoples. This System operated through a complex institutional maze of government departments, various church entities, law enforcement agencies, universities, hospitals, medical and child welfare organizations, and the people who worked within them. Given the structural nature of this System, a key focus of this Final Report is to build on the Truth and Reconciliation Commission of Canada's (TRC) findings to further document how these various settler colonial institutions functioned together to forcibly transfer the missing and disappeared children from place to place, often without the knowledge or consent of their parents.

The Violence of Assimilation

Canada's Indian Residential School policy, along with many other policies and laws targeting Indigenous Peoples, have been described as "policies of assimilation." While "assimilation" may sound benign, this language masks the violent and destructive intentions and impacts of these policies and laws on Indigenous children, families, and communities. As Mi'kmaq legal scholar Pamela Palmater explains:

> Although historians often describe government policies of the day as well-intended assimilatory policies, the reality presents a much darker picture. The ultimate objective of early Indian policy was to access Indigenous lands and resources and, at the same time, to reduce the government's financial obligations to Indigenous peoples, and their methods were far from benign. From scalping laws to forced sterilizations, to residential schools and now the *Indian Act*'s registration provisions, the methods chosen to achieve those policy objectives have focused more on eliminating Indians than assimilating them.[4]

As Palmater makes clear, the terminology of assimilation was in fact used by governments and churches to justify extreme forms of violence, including the physical, sexual, spiritual, emotional, and cultural abuse of Indigenous children.

What Is Settler Colonialism?

Settler colonialism is a distinct form of colonization that is a global phenomenon.[5] Colonialism is the general term to describe the expansion of European empires into other countries around the world to establish colonies. After the Second World War, many European colonies where small groups of colonizers ruled over Indigenous majority populations underwent a process of decolonization. The colonizers left, and these colonies became independent sovereign States. In settler colonial countries, such as Canada, the United States, Australia, and New Zealand, Indigenous populations became minority populations, and the settler colonizers, as historian Patrick Wolfe notes, "have come to stay."[6] In settler colonial countries, therefore, decolonization has not occurred. Rather, settler colonial governments have only decolonized to the extent that they have achieved independence from European States. They have not fully decolonized because they continue to assume and assert sovereignty over Indigenous Peoples and lands.[7]

Settler colonial sovereignty relies on removing or undermining the sovereignty of Indigenous Peoples and replacing it with colonial claims to the lands and waters. Emma Battell Lowman and Adam J. Barker, scholars in sociology and history and in human geography, explain that:

> What the Settler society desires is not necessarily the death of Indigenous peoples *per se* (although this has been all too common); settler colonialism requires the death of Indigenous peoples *as such*. Indigenous sovereignty, which cannot be assimilated into and under settler colonial sovereignty, cannot survive. Indigenous relationships to the land cannot be allowed to pre-empt and undermine colonial claims to the land....This goes beyond cultural genocide or genocide by forced assimilation because it does not stop at the elimination of Indigenous peoples, nations, and identities, in the present. The ultimate goal is to remove Indigenous connections to the land from history as well. It is not enough that Indigenous peoples no longer exist to challenge Settler sovereignty; Indigenous peoples have to disappear in the past as well as the present or Settler societies like Canada would be exposed as illegal and unjust.[8]

The taking of Indigenous lands was justified and made legal in settler eyes by the doctrines of discovery and *terra nullius* (a Latin term meaning "empty land"). The Doctrine of Discovery was part of international law that was created solely by European colonizing nations to determine disputes about who may claim "discovered" lands outside their own nation-state. Indigenous Peoples were not part of the decisions about these Eurocentric legal frameworks that were imposed in a self-serving manner to expand the land base of European empires.

These doctrines, along with the writings of various European political thinkers, reinforced the widely held belief that Europeans were politically, culturally, spiritually, and morally superior to Indigenous Peoples and that Western civilization was the vanguard of historical progress.[9] This founding myth feeds into a celebratory national historical narrative that describes how European people "discovered" a new land, made it their own, and created a country by taming the vast wilderness and "civilizing Indians." Part of this myth recounts how, unlike our more violent American neighbours, Canada's colonizing relationship with Indigenous Peoples was peaceful, generous, and benevolent.[10] Yet history told from Indigenous Peoples' viewpoints reveals just the opposite; it documents a history of violence, oppression, and unjust laws and policies inflicted by successive colonial and Canadian governments. It reveals that the Canadian State has violated, and continues to violate, Treaties based on peace, friendship, and respect with Indigenous Peoples to justify the violent taking of Indigenous lands in order to

claim sovereignty. Where Treaties were signed, Indigenous Nations agreed to share their lands with settlers, and where no Treaties exist, they have never ceded their sovereignty over their homelands. In either case, they have never relinquished their right of self-determination to the Canadian State.[11]

Settler Colonialism and Settler Supremacy

Settler colonialism is premised on settler supremacy and positions settler and Indigenous interests as conflicting. As Anishinaabe legal scholar Aaron Mills explains:

> Colonialism is a relationship defined by the principle of settler supremacy, which mandates that the interests of settler persons and peoples are to be given priority over the interests of [I]ndigenous persons and peoples.... It presumes that settler and [I]ndigenous interests are necessarily in conflict and thus that the one must be pursued as against the other. In consequence, settlers strive either to use [I]ndigenous peoples and territories to further their own ends, or to remove them from their inconvenient position in the way. Yet both projects are always imperfect. Albeit too often bloodied and broken, [I]ndigenous peoples have widely refused the respective consequences of annihilation and assimilation. That we not only survive, but survive as [I]ndigenous peoples serves as both a reminder and a condemnation of colonialism.[12]

Defining Genocide

> Genocide is not always necessarily a one-time event; it is, in the case of "Indians of Canada," an attrition process happening over an extended time.
>
> **— Dr. Edmund Metatawabin, Survivor[13]**

At the outset, it is important to define genocide, including the conceptual nuances of "cultural genocide" and "colonial genocide," to explain how these concepts inform the findings and recommendations of this Final Report. International and domestic law has failed Indigenous Peoples by interpreting genocide in excessively narrow Eurocentric legal terms that exclude (1) cultural and colonial aspects of genocide that specifically target Indigenous

Peoples and (2) Indigenous perspectives on genocide.[14] Some genocide studies scholars argue that understanding how genocide occurs in settler colonial societies requires decolonizing how it is defined and interpreted in international law. This would provide a more solid foundation for reconciliation between Canada and Indigenous Peoples by ensuring that the, "ongoing patterns of colonial genocide in North America might be brought to a halt."[15]

Unlike mass killings of a targeted population over a short period of time, which are most often associated with the Holocaust or genocides in Rwanda, Cambodia, or Bosnia, for example, genocide in settler colonial countries occurs somewhat differently. In addition to specific events such as mass killings, settler colonies commit genocide by establishing laws and policies of elimination that are enforced by the inter-related institutions that they establish. The long-term goal is to destroy Indigenous Peoples' cultures and group identities as distinct sovereign Nations.[16] This includes attacking and destroying their connections to their ancestral territories by displacing and forcibly relocating Indigenous Peoples to facilitate White settlement.[17]

Why Did the TRC Categorize Genocide in Canada as Cultural Genocide?

The TRC's Final Report documented a history of systemic violence, widespread abuse, chronic neglect, poor living conditions, and disease in the Indian Residential School System that all too often led to disappearances and deaths of children. The Commission concluded that:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of the policy, which can best be described as "cultural genocide."[18]

Former TRC Chair, Senator, and Justice Murray Sinclair confirmed that the only reason that the Commission did not make a finding of genocide rather than "cultural genocide" was because its terms of reference prohibited making findings of legal culpability.[19] Cultural genocide is not recognized as a crime in international law or in Canada's domestic legislation under the *Criminal Code*[20] and the *Crimes Against Humanity and War Crimes Act*.[21] By characterizing Canada's laws and policies regarding Indigenous Peoples as "cultural genocide," the TRC avoided exceeding its legal authority while also making clear that the Indian Residential School System was genocidal.

Justice Sinclair also observed that, even long before the TRC was established, Indigenous Peoples used the word "genocide" to describe the systemic violence and oppression they experience at the hands of government, churches, and Canadian society.[22] During TRC's National Events and Community Hearings, many Survivors said that what Canada, aided by the churches, perpetrated against them, their families, communities, and Nations was clearly genocidal. In Justice Sinclair's view, "it is important to acknowledge the residential school legacy as genocide because, first and foremost, Survivors themselves raised the issue. For many of them, recognition of colonial malevolence is necessary for the process of reconciliation to move forward."[23] To do otherwise becomes a barrier to reconciliation and reinforces a culture of impunity and denialism in Canada.

Inquiry into Missing and Murdered Indigenous Women and Girls: Naming Colonial Genocide

In 2019, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) concluded that the systematic violence perpetrated against Indigenous Peoples within Canada constitutes colonial genocide:

> The violence the National Inquiry heard about amounts to a race-based genocide of Indigenous Peoples, including First Nations, Inuit and Métis, which especially targets women, girls, and 2SLGBTQQIA people. This genocide has been empowered by colonial structures, evidenced notably by the *Indian Act*, the Sixties Scoop, residential schools and breaches of human and Indigenous rights, leading directly to the current increased rates of violence, death, and suicide in Indigenous populations.[24]

The colonial structures identified by the MMIWG Inquiry are characteristic of settler colonial societies. The Indian Residential School System was part of a much broader government legal and policy agenda to accomplish what Cree legal scholar Kiera Ladner describes as, "killing [Indigenous] Nations through legislation." She notes that:

> It is important to draw the legacy of residential school into this discussion of political genocide in order to fully understand the magnitude of the genocide that occurred. While the *Indian Act* in and of itself is an act of political genocide such that it legislated the destruction and annihilation of Indigenous nationhood, sovereignty, and political systems while

> imposing the institutions of the oppressor.... [R]esidential schools (and arguably day schools) destroyed political culture, knowledge, and practices in individuals by means of an individualized attempt at cultural extermination.[25]

In this way, systemic patterns of colonial genocide enacted by successive governments through assimilationist laws and policies aim to destroy Indigenous societies on both individual and collective levels.

Any Form of Genocide Is Genocide

The reports from the TRC and the MMIWG Inquiry identified the immense onslaught of genocidal laws and policies of elimination that Indigenous Peoples have endured, resisted, and survived.[26] Importantly, both interpreted genocide through a decolonial lens that shows how it has manifested in Canada. The MMIWG Inquiry's legal analysis of the United Nations (UN) *Convention on the Prevention and Punishment of the Crime of Genocide* (*Convention on Genocide*) pays particular attention to how international and domestic genocide laws fail to provide remedies for Indigenous Peoples within Canada.[27]

Canada enacted assimilationist laws and policies that systematically seized Indigenous lands and resources, forced relocations of Indigenous communities, disrupted traditional governance and legal systems, broke family bonds between parents and children, and banned languages and cultural and spiritual ceremonies and practices.[28] Successive federal, provincial, and territorial governments in Canada committed this slow form of genocide over time through the seemingly innocuous bureaucratic practices of government departments and officials tasked with implementing laws, policies, and programs targeting Indigenous Peoples.[29] As the TRC's description of cultural genocide highlights:

> States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly, to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things.[30]

Colonial genocide involves destroying Indigenous Nations by attacking the essential elements of group life, including political systems, governance structures, laws, languages, spirituality, economies, social roles, relationships with territories, and family relationships. As the MMIWG Inquiry observed:

> Colonialism is a unique form of violence that does not fit easily in the international legal definition of the crime of genocide. The way in which the legal requirements have been developed and applied to establish individual responsibility, rather than State responsibility, partly explain why the traditional, legal understanding of genocide has often been considered incompatible with colonial genocide.[31]

Canada's genocidal policies and laws resulted in the collective loss of culture, language, family, and identity. Sociologist Andrew Woolford points out that:

> Cultural genocide ... is not a separate type of genocide but rather a descriptor for those actions within genocidal processes that target the cultural bonds that allow a group to re-create itself on a day-to-day basis.... [I]t involves not only techniques of physical (e.g., murder) and biological (e.g., sterilization) destruction, but also techniques of cultural destruction, since culture ... bond(s) group members to one another and maintain(s) their group identity over time.[32]

This description is consistent with the MMIWG Inquiry's view that, "the debate around 'cultural genocide' versus 'real' genocide is misleading ... [because] Indigenous Peoples have to work with norms of international law decided by 'sovereign states' who wilfully excluded their perspectives to serve their own interests."[33]

It is hardly surprising that the Canadian government took proactive steps to ensure that cultural forms of genocide were excluded from the *Convention on Genocide*, as explained in Chapter 5 of this Final Report. To do otherwise would have meant that Canada could risk being held accountable under international law for devising the Indian Residential School System as part of a broader settler colonial strategy to eliminate Indigenous Peoples as distinct sovereign Nations. Situating the existence of the missing and disappeared children and unmarked burials associated with Indian Residential Schools in this broader context reveals historical and ongoing patterns of genocide in settler colonial Canada. As non-judicial bodies, neither the TRC nor the MMIWG Inquiry were mandated to determine Canada's legal liability for genocide. However, both concluded that Canada's intentions and actions

towards Indigenous Peoples were and are genocidal; the TRC described this as "cultural genocide," while the MMIWG Inquiry called it "colonial genocide." Regardless of the qualifier used before the word "genocide," all forms of genocide are genocide.

In considering how genocide manifested in relation to the missing and disappeared children and unmarked burials, eight overarching systemic and interrelated patterns of genocide have been identified and are described throughout this Final Report:

1. *Destroying Indigenous group identity, family structures, and connections to ancestral territories*: imposing child removal laws and policies that attack the right of family integrity by forcibly removing children from their families, communities, and Nations;

2. *Mistreatment, neglect, and abuse of Indigenous children*: operating institutions with substandard living conditions that endanger the health, safety, security, and well-being of Indigenous children, including rampant sexual, physical, emotional, and spiritual abuse, harsh punishment, and severe neglect;

3. *Systemic lack of adequate health care and ethical medical practices:* failing to prevent disease and malnutrition and subjecting children to medical experimentation, which contributed to unacceptably high death rates;

4. *Forced transfers of children*: forcibly transferring children to Indian Residential Schools and other institutions such as sanatoria, Indian hospitals, reformatories, industrial schools, psychiatric hospitals, and many other associated institutions, often without parental knowledge or consent;

5. *Dehumanizing and devaluing Indigenous children during their lives and after death*: systematically dehumanizing and devaluing Indigenous children throughout their lives through various racist, discriminatory practices, including:

    - taking away their family names and assigning them institutional numbers; and

    - failing to treat them with human dignity and respect after their deaths as evidenced by the lack of care in documenting their deaths, informing their families, and marking their burial places;

6. *Colonizing death through institutional spiritual violence*, including:
    - the forceful imposition of Christian beliefs about death and funerary practices; and
    - laws and policies prohibiting Indigenous funerary and ceremonial practices associated with burials and the memorialization of the dead;
7. *Purposeful silencing and omitting the history of genocide in Canada*: systemic failure to document the historical and ongoing genocide of Indigenous Peoples within Canada, including the failure to educate Canadians about this aspect of Canada's national history. This systemic failure continues to create conditions where denialism can flourish; and
8. *Systemic lack of accountability and justice*, including:
    - the devaluation and breach of Indigenous laws;
    - the complicity of State and church institutions, including police failure to investigate and lack of criminal prosecutions of individual perpetrators (de facto amnesty), lack of internal church investigations, and failure to provide records of persons of interest;
    - the purposeful use of legal and political strategies by governments, churches, police, and other institutions to deny, minimize, or only partially acknowledge wrongdoing, creating a culture of impunity that effectively grants de facto amnesty;
    - the failure to repatriate the missing and disappeared children to their families and communities and the failure to rematriate lands associated with cemeteries and unmarked burial sites through expropriation and other measures; and
    - the lack of educational and punitive measures (such as implementing hate crime provisions in the *Criminal Code*) to counter denialism.

The persistence of the federal government's ongoing lack of accountability for the deaths of thousands of Indigenous children at Indian Residential Schools and other associated institutions can be traced over time through these systemic patterns of genocide. *Sites of Truth,*

Sites of Conscience documents how the operation of the cemeteries and the administrative and burial practices associated with the Indian Residential School System are evidence of its genocidal goals and processes. To trace the missing and disappeared children and unmarked burials connected to the Indian Residential School System and associated institutions is to trace genocide.

While there has been some accountability and reparations made for the abuse of children in Indian Residential Schools through various settlement agreements, Survivors, Indigenous families, and communities are still seeking full accountability, justice, and reparations for the enforced disappearances, deaths, and burials of thousands of Indigenous children in these institutions. Therefore, it is necessary to evaluate Canada's reparations record in light of its international legal obligations to Indigenous Peoples.

REPARATIONS IN THE INTERNATIONAL CONTEXT

States that have violated their international legal obligations, resulting in substantive harms, have a political, legal, and ethical duty to make reparations. Studies have shown that reparations are most effective when they include both material and symbolic measures. Material measures may include monetary compensation, funding for healing or community projects, and the return of land. Symbolic measures may include apologies, commemoration, public education, and the rewriting of national history. The public must recognize and acknowledge that the State has violated the human rights and dignity of the victims and support reparations measures. Finally, reparations are most effective when the process itself has direct input from victims and communities who have experienced human rights violations.[34]

Reparations must involve truth-finding because, under international law, the families of missing and disappeared persons have a right to know the truth about the circumstances of their loved one's death and where they are buried. Unless truth is determined, families will continue to suffer, and public denial can flourish. Without legislative and institutional reform, apologies and promises that similar violations will not be repeated ring hollow to victims and communities that have suffered State-sanctioned violence. If perpetrators are not held to account, victims and communities may feel pressured to compromise their right to justice to gain access to the supports they require and are entitled to receive.[35]

Studies of reparations case law, legislation, programs, and processes across the globe affirm that substantive measures are needed to support healing, accountability, and justice for

individual and collective victims whose rights have been violated by the State. In a 2020 study on the international human rights framework in relation to the rights of Indigenous women, girls, and gender-diverse persons, the Native Women's Association of Canada (NWAC) noted that:

> The international legal basis for the right to an effective remedy and reparation is deeply anchored in international law and has multiple sources, including international conventional and customary law as well as judicial and quasi-judicial decisions at the international, regional and national level. This right is found in an array of international human rights hard-law instruments, including:
>
> - Article 8 of the *Universal Declaration of Human Rights*;
> - Article 2 of the *International Covenant on Civil and Political Rights*;
> - Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*;
> - Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and
> - Article 39 of the *Convention on the Rights of the Child*.
>
> Canada has either endorsed or ratified all of these instruments. Moreover, the right to an effective remedy and reparation is found in several key instruments as yet not ratified by Canada, including Article 24 of the *International Convention for the Protection of All Persons from Enforced Disappearance* and Article 25 of the *American Convention on Human Rights*.[36]

NWAC noted that Canada can gain important insights from drawing on international human rights laws and principles. I concur and support NWAC's finding that, "the inclusion of women, girls, and gender-diverse persons as well as their communities in the conception, design, and implementation of reparation programs is imperative."[37] A gender-diverse lens must be considered during all stages of implementing the Reparations Framework in the coming years. Children should also be able to participate in the reparations process where it is appropriate and safe for them to do so.

International Reparations Principles: Foundations of Accountability and Justice

The right to individual and collective reparations for gross human rights violations is recognized under international law and in decisions of the UN Commission on Human Rights and the Inter-American Court of Human Rights. States have a duty to provide reparations for violations that are set out in several international conventions that Canada, like most countries, has ratified.[38] The international community has also established and endorsed soft law[39] principles and guidelines for reparations with which States must comply. The 2005 UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* outlines five types of reparations:

1. *Restitution*: restoration of liberty, enjoyment of human rights, identity,[40] family life and citizenship, return to one's place of residence, restoration of employment, and return of property;

2. *Compensation*: for physical or mental harm; lost opportunities, including employment, education, and social benefits; loss of earnings; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services;

3. *Rehabilitation*: medical and psychological care as well as legal and social services;

4. *Satisfaction*:

    - Effective measures to cease continuing violations;
    - Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten safety;
    - Search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of the bodies in accordance with the expressed or presumed wish of the victims or the cultural practices of the families and communities;

- An official declaration or a judicial decision restoring the dignity, the reputation, and the rights of the victim and of persons closely connected with the victim;
- A public apology, including acknowledgement of the facts and acceptance of responsibility;
- Judicial and administrative sanctions against persons liable for the violations;
- Commemorations and tributes to the victims; and
- Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

5. *Guarantees of non-repetition*:

- Ensuring effective civilian control of military and security forces;
- Ensuring that all civilian and military proceedings abide by international standards of due process, fairness, and impartiality;
- Strengthening the independence of the judiciary;
- Protecting persons in the legal, medical, and health-care professions, the media and other related professions, and human rights defenders;
- Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service, and military personnel as well as by economic enterprises;
- Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and

- Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[41]

Drawing on these international principles and guidelines, the TRC called for several forms of reparations because a:

> just reconciliation requires more than simply talking about the need to heal the deep wounds of history. Words of apology alone are insufficient; concrete action on both symbolic and material fronts are required. Reparations for historical injustices must include not only apology, financial redress, legal reform, and policy change but the rewriting of national history and public commemoration.[42]

In the context of reparations relating to the missing and disappeared children and unmarked burials, in addition to monetary compensation, the following forms of material and symbolic reparations are essential:

- Repatriation of children, where desired;
- Return of lands;
- Reclamation and revitalization of Indigenous cultures, languages, spirituality, laws, and governance systems;
- Apology;
- Rewriting national history;
- Public education;
- Commemoration and memorialization; and
- Legal and policy reform.

WHAT HAVE SURVIVORS, INDIGENOUS FAMILIES, COMMUNITIES, AND LEADERSHIP SAID ABOUT REPARATIONS?

While international law and principles on reparations provide critical insight into what is required for an Indigenous-led Reparations Framework, it is equally important to draw on the expertise of Survivors, Indigenous families, communities, and Indigenous leadership and organizations. Throughout my Mandate, I sought input from Survivors, Indigenous

families, communities, Indigenous leadership and organizations, and other experts as to what reparations are required and about the reparations process itself. This information was received at six National Gatherings, at meetings with Survivors and communities, and in written submissions to the Office of the Independent Special Interlocutor (OSI). I express my sincere gratitude to all those who shared their wisdom, insights, and recommendations. The following representative examples and excerpts from the written submissions highlight the importance of truth, accountability, justice, and Indigenous laws in the reparations and reconciliation process.

The Empty Chair at the sixth National Gathering in Iqaluit, January 30, 2024 (Office of the Independent Special Interlocutor).

Truth, Accountability, Justice, and Reparations for the Missing and Disappeared Children

Koren Lightning-Earle (Blue Thunderbird Woman, Samson Cree Nation) and Hadley Friedland, from the Wahkohtowin Law and Governance Lodge at the University of Alberta, facilitated an interactive session on justice and accountability for the missing and disappeared children at the Toronto National Gathering on Upholding Indigenous Laws.[43] Working in

small groups, participants from diverse Indigenous Nations generated responses to the question: "What do you see for justice and reparations for missing children?" Ideas emerged across six thematic categories:

1. *Truth-telling*: truth—deep, complete, and comprehensive—is an essential prerequisite of justice, reparations, and, eventually, reconciliation. Participants emphasized the importance of widespread public education about the missing and disappeared children and their unmarked burials. This needs to include school curricula and a truly national education and healing plan. Truth is rooted in listening to Survivors.

2. *Pathways to truth*: truths about who the missing and disappeared children are and where they are located must be determined through the integration of scientific evidence, written records, and oral histories. As one participant put it, "through oral history we knew the children disappeared, and written history is how we are investigating it." Truth must be gathered through community-led research and consultations that respect distinctive Indigenous laws, approaches, and decisions. All the unmarked graves must be identified. All the children must be found.

3. *Evergreen funding*: search and recovery work cannot be sustained through funding that is constrained by time limits and government-imposed conditions. Participants called for core funds for investigations and healing to be provided by the federal government but stressed that these investigations must be accountable to Indigenous authorities and laws. While those who have lost relations may never be made whole, governments should also provide families and communities with material compensation, both financially and through the return of lands.

4. *Cultural pathways to healing*: Indigenous healing must be led by Indigenous knowledge, experts, and laws. Healing includes ceremonies, intergenerational reconnections, land-based activities, access to Indigenous counsellors and health professionals, and opportunities to relearn and tell family histories that embrace, uphold, and commemorate the missing and disappeared children.

5. *Respecting natural laws*: participants chose to use "natural laws" instead of "Indigenous laws" to recognize the teachings of Elders that locate the source and authority of laws in the land. Natural laws include natural consequences

that, depending on the circumstances, can be harsh but are never arbitrary. Indigenous Nations are responsible for making decisions and controlling processes according to their own distinctive laws and legal relationships with territory, kin, and other beings. Non-Indigenous governments and people are responsible for understanding, accepting, and following these laws as they may apply to them.

6. *Accountability and acknowledgement of the truth*: participants discussed what is required for accountability for the harm and legacy of the Indian Residential School System under Indigenous, Canadian, and international laws. Under all these legal frameworks, what happened to the children is deeply wrong and unlawful. Participants called upon the federal government to admit its responsibility for genocide and to criminally charge and prosecute all individuals responsible. This may include seeking the arrest and extradition of those who are no longer in Canada. Organizations must also be held accountable. Participants wondered if international legal institutions, such as the International Criminal Court, or international human rights tools could be used to pursue accountability for governments or churches that refuse to accept responsibility.

> If there's one thing about the resilience of Indigenous Peoples, it's [that] we have kept our cultures and our language and our communities as strong as we possibly can, but there is still much more work to do, and this work is hopefully going to bring a very clear picture on how these atrocities and how these human rights abuses happened.
>
> **— Natan Obed, president of Inuit Tapiriit Kanatami**[44]

> If we are talking about upholding our law, we have to remind Canada to uphold their own law.... If they are expecting us to uphold our laws, we are going to hold them accountable to uphold their own ... there's a lot of reckoning, a lot of accountability.
>
> **— Participant**[45]

Reconciliation also demands accountability. It demands that perpetrators be brought to justice. It demands that those responsible for the deaths of these thousands of children feel the full weight of the law.

— Participant[46]

Justice means prosecuting with all due vigor those people who committed these acts, and if those people have passed on, then the institutions that fostered the murdering of those children.... It's not simply returning the children to their ancestral homelands and to the embrace of their families. It actually means justice as we define justice.

— Doug George-Kanentiio, Survivor[47]

One day I came home, and I said to [the Elders], after ceremony, "what is it that you really want me to try and accomplish at the United Nations? Because it's now been going for years." And they said "all we want is three things: recognition, respect, and justice. That's all we want."

— Dr. Chief Wilton Littlechild, Survivor, former TRC Commissioner and former member of the UN Expert Mechanism on the Rights of Indigenous Peoples[48]

Written Submissions to the OSI

The OSI issued an open call for submissions, and many individuals, Indigenous communities, and organizations provided information and insights on challenges and barriers to search and recovery work. The following representative excerpts focus specifically on issues relating to accountability and justice.

Anishinabek Nation, Union of Ontario Indians

> The religious entities have been encouraged to release the names and pastoral assignments of known abusers. The Catholic Church, in particular, continues attempts to conceal and protect those known abusers in IRS [Indian Residential Schools], this is deplorable and

> contradicts their commitment to healing.... Although apologies have been issued, many religious entities have not truly taken full accountability for their role in attempted assimilation.[49]

Medicines being placed on the Empty Chair at the first National Gathering in Edmonton to honour the Spirits of the missing and disappeared children, September 14, 2022 (Office of the Independent Special Interlocutor).

Assembly of First Nations

> In July 2021, the First Nations-in-Assembly passed Assembly of First Nations (AFN) Resolution 01/2021, Demanding Justice and Accountability for the Missing and Unidentified Children, which called for the establishment of a guardianship structure that respects First Nations laws in the discovery of unmarked burials of children and that protects human remains from erosion, destruction, manipulation, or disturbance in accordance with international and humanitarian standards.... The relationship between First Nations and the RCMP [Royal Canadian Mounted Police] is filled with mistrust and strained by an abuse of power. First Nations across Canada expressed the importance of having an independent arm investigate the RCMP and the

Government of Canada for their crimes against First Nations children and families while residential schools were in operation. Canada cannot investigate itself; to guarantee a proper investigation, First Nations must ensure that the government cannot act within its interest.[50]

British Columbia Assembly of First Nations

- Independent Oversight: establish independent oversight bodies to monitor and review investigations related to missing Indigenous children and burial sites. This can help ensure transparency and accountability.
- Utilizing the principles of the TRC Calls to Action, MMIWG+ Calls for Justice: governments should actively engage in truth and reconciliation processes, acknowledging historical injustices and taking concrete steps to address the legacies of colonization and assimilation policies.
- Community-driven justice: involve Indigenous communities in decision-making or arbitration processes around applicable justice and restitution in these matters, allowing them to promote the healing that best meets their needs and priorities.[51]

Métis Nation British Columbia

To advance reconciliation with Métis Survivors, the Métis Nation British Columbia recommends the following actions:

- An Admission of Guilt and Terms of Restitution by the federal government to Métis Survivors for the harms of residential schools;
- An Admission of Guilt includes naming the institutions and policies that directly and indirectly harmed Métis, including but not limited to involuntary adoptions/removal of children from their families, hospitals/sanitoriums, the dispersal of Métis communities, cultural genocide via language loss and cultural practices, etc.

- The Admission of Guilt should also include present-day colonial harms that continue to affect the Métis community, including Missing and Murdered Métis Women, Girls, and 2SLGBTQIA+, displacement that has led to disproportionate amount of houseless Métis, the opioid epidemic that continues to plague Métis communities, and so on.
- Terms of Restitution must include the outward support of Métis rights as well as Métis traditional laws, culture, languages, ceremonies, songs, stories, medicines, spirituality, and practices on the land.
- Restitution should also include the compensation of lands lost due to the colonial scrip system and displacement of Métis communities since the nineteenth century.[52]

'Namgis First Nation

> Canada cannot be policing itself. The Government of Canada and its institutions cannot be policing itself.... An independent body must be appointed to ensure the RCMP and police are not investigating themselves in any criminal proceedings.[53]

Native Women's Association of Canada

- All sites of former Indian Residential Schools immediately be declared crime scenes.
- Investigations be conducted to determine how each and every Indigenous child buried at those sites died and who is responsible for their deaths.
- Charges be laid against people still living who are found to be responsible for these crimes, including the members of the religious orders that ran the institutions as well as the governments and the churches that were complicit.[54]

Nisoonag Partnership (Serpent River First Nation, Mississaugi First Nation, Sagamok Anishnawbek, Spanish Boys and Girls School)

> In the journey to uncover the truth and to seek true justice for those who have been wronged, it is essential for colonial governments to acknowledge and accept that the Canadian legal framework is not the only framework of relevance here. Acknowledging the inherent sovereignty of Indigenous Peoples in Canada (and around the world) places us in a context of international law.
>
> Each Indigenous Nation here understands and upholds their own sacred laws. Within the Nisoonag Partnership's Anishnawbek Nations of Serpent River First Nation, Mississauga First Nation, and Sagamok Anishnawbek, the teachings and proclamations of Manito Aki Anaaknigewinan (MAA) are literally the laws of the land. Expression of the MAA, and having its authority recognized by other jurisdictions within Canada, is a protected right under the United Nations *Declaration on the Rights of Indigenous Peoples* Article 18.[55]

Southern Chiefs Organization

> Seek an independent investigative entity (that is, United Nations) to conduct a full and effective investigation of former residential and day school sites according to the *Crimes Against Humanity and War Crimes Act*.[56]

Stó:lō Nation Chiefs' Council

> The Stó:lō Nation Chiefs' Council is concerned that valuable information related to the investigation of missing children and unmarked burials—and other truths about residential school histories—is going to be permanently lost after September 19, 2027, with the destruction of Claimant Records from the Alternative Dispute Resolution (ADR) and Independent Assessment Process (IAP) programs, which were designed to compensate former students for abuses suffered in these institutions.... The Government of Canada and its institutions cannot be policing itself ... the Supreme Court of Canada (SCC) cannot be making decisions about the IAP records, as

> these records hold information about people who have committed crimes. The destruction of these records will also destroy evidence of crimes against children that resulted in genocide. Could international courts be used so the Canadian government is not policing itself?[57]

These examples and excerpts from the National Gatherings and written submissions to the OSI identify key elements of reparations that Survivors, Indigenous communities, and organizations have identified. They emphasize the importance of Indigenous Peoples determining the criteria for truth, accountability, justice, healing, and reconciliation, and they identify the following key elements:

- Knowing the truth about how these atrocities and human rights abuses happened, who the children are, and where they are buried;
- Respecting Indigenous self-determination, including Indigenous sovereignty, laws, decision-making powers, and dispute resolution processes;
- Organizing Indigenous-led investigations based on Survivors' testimonies, records, and forensic methods to identify the children and locate unmarked burials;
- Preserving and disclosing records that may contain information about the missing and disappeared children and their unmarked burials;
- Insisting that Canada provide sufficient and sustainable funding for search and recovery work;
- Creating an independent investigation of the RCMP, churches, and governments because Canada cannot investigate itself;
- Holding individual and institutional perpetrators accountable and naming them, including government, churches, and police;
- Demanding an admission by the Canadian federal government of responsibility for genocide, including an acknowledgement, apology, and admission of guilt for historical injustices coupled with substantive action;
- Recognizing Métis communities and Survivors and making reparations;
- Commemorating the missing and disappeared children;
- Developing a national healing plan for Survivors, Indigenous families, and communities;

- Establishing public education about the missing and disappeared children and unmarked burials; and
- Compensating for, and returning, lands.

I heard these same messages from Survivors, Indigenous families, and communities across Turtle Island. Including all of these key elements will ensure that the Reparations Framework is structured and implemented in ways that uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity, and security. Broadly speaking, reparations measures must support search-and-recovery processes and outcomes over the long term. They must be governed by Indigenous laws and the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*).[58] What Survivors, Indigenous families, and communities told me about reparations confirms that Canada's current approach is highly problematic.

CANADA'S CURRENT APPROACH TO REPARATIONS IS INADEQUATE

Canada's current approach to reparations relating to the Indian Residential School System is flawed by some of the same shortcomings that international experts have identified in other States across the globe:

> Reparation programmes can be misused by governments to avoid victims bringing further legal claims to national courts, regional or international human rights bodies.... Reparation programmes are sometimes conflated with development programmes, diminishing the right to remedy and appropriate measures for victims. Staff and institutional cultural practices within reparation programmes can also suffer from bias or discrimination, leading to secondary victimisation that further marginalises those who come before it.[59]

As the subsequent chapters in this Final Report demonstrate, Canada's legal and political response to Survivors' demands for truth, accountability, and justice is inadequate. Canada's ad hoc or reactive, incremental approach to rectifying the harms of the Indian Residential School System is consistent with a long-standing pattern of evading accountability by first denying responsibility and then forcing Survivors into litigation to limit liability. When Canada sought to resolve thousands of Indian Residential School lawsuits out-of-court in a timelier, more cost-effective process, it unilaterally developed an alternative dispute resolution

(ADR) program that subsequently failed. In the negotiations of the 2006 *Indian Residential Schools Settlement Agreement* (*IRSSA*), Canada excluded certain groups of Survivors who were then compelled to file new litigation in the courts.[60] This pattern is reinforced through deeply embedded organizational cultures of impunity and underlying racism that persist in the public service, churches, and police bureaucracies where anti-colonial change is a slow and difficult process.

To better understand challenges and barriers of implementing State reparations measures, it is instructive to examine how reparations programs and processes have been implemented in other countries. This broader comparative perspective can inform the creation of an Indigenous-led Reparations Framework in Canada.

REPARATIONS: EXAMPLES OF STATE-LED INITIATIVES

In various countries, truth and reconciliation commissions and public inquiries have made findings and recommendations on reparations that may or may not be adopted by governments. They have made recommendations to the State on various forms of material and symbolic reparations to which Survivors and victims are entitled. They have had varying powers to compel witnesses to testify, some of whom may have agreed to do so if they were given amnesty in exchange for their testimony. States typically have not adopted all of the recommendations; rather, they have focused on one or two forms of reparation. South American countries are considered leaders internationally in developing reparations initiatives to respond to mass human rights violations and enforced disappearances. As a result, State-led reparations initiatives from Guatemala, Peru, and Colombia are included in this section.

A comparative analysis of State reparations programs in Guatemala, Peru, Colombia, Australia, New Zealand, Ireland, and the United States provides insights as to why reparations for Indigenous Peoples must be Indigenous-led. The efficacy of reparations programs may be assessed by looking at their compliance with international standards and concepts of justice and by considering the opinions of relevant organizations, internal monitors, and, most importantly, Survivors, victims, and their families. The States considered in this comparative analysis are operating within very different contexts and timelines. Some States, like Peru, have been working on reparations for decades and have neared the completion of their national reparation programs, while others, like the United States, have only recently begun to do preliminary investigative work that may eventually lead to reparations.

Each of the States examined in this section has enforced discriminatory laws and policies and committed harmful acts that led to the disappearances and deaths of thousands of people. In many cases, the victims were either deliberately or disproportionately Indigenous. State harm frequently results in the displacement, death, and disappearance of Indigenous people along with the disruption of their governance and legal systems, languages, cultures, and ways of life. No one State provides a "perfect" comparison to the situation in Canada. Although they share certain commonalities relating to the need to provide reparations for mass human rights violations, the actions of each State are distinctly shaped by their different political and historical contexts. The summaries below provide a brief overview of the political and historical contexts of the conflicts and the human rights violations committed by various States as well as a description of their reparation initiatives.

Guatemala

Guatemala's armed conflict between the State and various insurgent groups lasted for 36 years—from 1960 to 1996—and resulted in the disappearances and deaths of more than two hundred thousand people and the displacement of another 1.5 million.[61] While Indigenous Mayan people were not the only target of violence by the State, much of the government's anti-insurgent campaign took place on Indigenous lands, and Maya were singled out and subjected to disproportionate harm. As many as 83 percent of victims were Maya.[62] Through the course of this violence, 440 Indigenous villages were destroyed, and children were often made targets of violence as "children of guerrillas"[63]—18 percent of the human rights violations were committed against children. In addition, the State deliberately used tactics designed to devalue and inflict terror upon Indigenous communities; part of this strategy was the enforced disappearance of as many as forty thousand people, many of whom have not yet been recovered.[64] The unprecedented killing, disappearance, torture, and rape of Indigenous people in Guatemala was deemed a genocide by a UN-sponsored commission.[65]

In Guatemala, the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico [CEH]) was sponsored by the UN after the internal armed conflict ended with the signing of peace accords. During its years of operation, the CEH collected the testimonies of eleven thousand victims. Notably, it found that the Guatemalan State had committed genocide against the Maya peoples and recommended that a national program for reparations be established and implemented. The CEH recommended that reparations include reform of the State's legal and military systems, investigations into enforced disappearances and the culpability of perpetrators, a policy to oversee the recovery of victims' remains, compliance with human rights law, monetary compensation, and commemorative measures. It also called for greater Indigenous participation in politics.[66]

Peru

Peru's internal armed conflict between the State and various insurgent and guerrilla groups has been ongoing since 1980. The Peruvian government authorized the use of inhumane tactics by Peruvian armed forces against rebels and civilians alike, leading to the deaths and disappearances of as many as seventy thousand people.[67] Many of those harmed during the conflict were Indigenous—75 percent of the victims spoke Quechua or another Indigenous language as their mother tongue.[68] The harms experienced by victims include torture and other inhumane acts; in some instances, the populations of entire villages were massacred by the armed forces.[69]

The Peruvian Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación [CVR]) was mandated to investigate and document the human rights violations of victims of the internal armed conflict and to make recommendations on reparations. The CVR collected seventeen thousand testimonies from victims. The reparations program recommended by the CVR was robust and complied with international legal principles and standards of transitional justice.[70] It recommended that perpetrators be brought to justice to facilitate reconciliation and that no perpetrator be given amnesty.[71] It recommended material and symbolic reparations, including the development of health-care programs and educational grants to meet the needs of those whose lives were disrupted by the violence; societal reparations including changes to the legal status of missing and disappeared individuals to enable family members to settle their affairs properly; and the reissuing of identification to those whose documents were destroyed. It also recommended monetary reparations for individual victims and families and collective financial reparations for Indigenous communities to restore infrastructure. Finally, it recommended ongoing funding for an exhumation program to recover victims, provide evidence for legal proceedings, and return victims' remains to their families and communities. Based on these recommendations, the government established the Comprehensive Reparations Plan.

Colombia

In Colombia, conflict between the State forces, paramilitary and guerrilla groups, and crime syndicates has been ongoing since the 1960s.[72] This conflict has resulted in the deaths of over 177,000 civilians and the displacement of five million more.[73] Of these victims who were killed, as many as forty-five thousand were children.[74] While Indigenous people were not specifically targeted as a group over other civilians in this conflict (approximately 2 percent of victims were Indigenous),[75] the devastating impacts of the armed conflict have been experienced most severely by marginalized populations, including Afro-Colombian and Indigenous people.[76]

Colombia, unlike other countries, did not initiate its reparations program based on the recommendations of a truth commission or following the signing of a peace accord. Instead, Colombia began implementing transitional justice mechanisms in the early 2000s during ongoing conflict. However, the lack of a truth commission at the outset of the country's progress towards reparations has had ramifications for how its programs have proceeded in the country. In 2018, Colombia established the Commission for the Clarification of Truth, Coexistence, and Non-repetition, which was mandated to document the impacts of the armed conflict on different populations and make recommendations on reparations. The Commission made recommendations regarding the resolution of conflict, the guarantee of basic needs and fundamental rights, and the strengthening of democracy, amongst others. It also called for the State, armed parties, and institutions to assume responsibility for their actions.[77] However, some experts argue that it may have been more beneficial had it been established earlier:

> A truth commission, like the one that began operating in 2018, would have produced a state-sanctioned narrative of the conflict that could have become the basis of a social consensus on the past and eligibility criteria for reparations. The persistence of the conflict despite repeated attempts at demobilisation adds new victims daily. Thus, not only did the redress process begin without a shared understanding of the nature of victimisation, the causes of the violence, and basic eligibility criteria for redress, but also the number of potential beneficiaries changed throughout the process as attacks from violent actors did not abate.[78]

Australia

In Australia, thousands of Indigenous children were forcibly removed from their families by churches, governments, and child welfare organizations and were either placed in one of almost five hundred institutions, adopted, or fostered by settlers. The laws and policies that enabled these actions by the State were in place for approximately 100 years, beginning in 1869 and ending in every State and territory by 1969. While the exact number of children taken during this period is unknown, it is estimated that between one in three and one in ten Indigenous children were removed from their families depending on the area.[79] The children taken, who are often referred to as the Stolen Children or the Stolen Generations, experienced disproportionate abuse and neglect from those responsible for their care, and the legacies of these harms are ongoing. The policies that enabled these unjust removals targeted children

of mixed descent, who were derogatively referred to as half-caste, for assimilation into White society, while also segregating "full-blooded" Indigenous children away from settler society.[80] The broader historical context that led to forced child removals can be traced back to the time of first contact between settlers and Indigenous people in 1788 and was explicitly genocidal. The State's goal was to eliminate Indigenous Peoples as politically, legally, and culturally distinct peoples.[81]

The Federal Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families commenced its work in 1996. The final report, *Bringing Them Home*, significantly contributed to public education on the Stolen Generations and found that Australia's actions to intentionally assimilate and thereby destroy Aboriginal culture were genocidal and that "the forcible removal of Indigenous children was a gross violation of human rights. It was racially discriminatory and continued after Australia, as a member of the United Nations, from 1945, committed itself to abolish racial discrimination."[82] The National Inquiry concluded that these forced removals were genocidal even if the government officials who developed and implemented the policy had benign motives.[83] Referencing international criminal and humanitarian law and principles, the inquiry determined that, "States breach their obligations when they fail to prevent human rights violations by others as well as when human rights are violated by State action. In either event the victims have a right to reparation."[84] The inquiry's recommendations for a reparation framework called for acknowledgement and apology, land, culture, and language restitution, commemoration, education, and monetary compensation.[85]

The inquiry recommended that Australia make reparations in accordance with principles of international law (premised on the right to compensation, a need for acknowledgement and apology, guarantees against repetition, measures of restitution, and measures of rehabilitation). Although the inquiry's finding of genocide was politically controversial, some of its recommendations were implemented—for example, the establishment of a national Healing Foundation. At the provincial level, whether a government established a public inquiry varies widely. Tasmania, for example, established a reparations program in the absence of a public inquiry. Victoria only recently established a reparations program in 2020. Of particular interest is the fact that it accepted the Stolen Generations Reparations Steering Committee's recommendation that, "fund[s] be established to cover the costs of a plaque for unmarked graves, exhumation, repatriation, and burials ... for family of deceased Stolen Generations persons removed in Victoria."[86] However, at the time of writing this Final Report, no dedicated funding for exhumation, repatriation, or memorialization has yet been specified by the Victorian government.

Aotearoa New Zealand

In Aotearoa New Zealand, the colonial order established by settlers in 1769 subjected Māori Peoples to oppression, racism, and discrimination associated with White supremacy, the effects of which are still ongoing today.[87] Despite the Crown's signing of the Treaty of Waitangi, which assured Māori of their sovereignty over their lands and possessions, their ability to care for and raise future generations, and other rights,[88] Māori were subjected to decades of land alienation, disenfranchisement, impoverishment, and war.[89] During this time, the number of Māori in New Zealand fell by almost half (from eighty thousand to forty thousand), and the impacts of war, diseases introduced by settlers, inadequate housing, and malnutrition on Māori ways of life were devastating.[90] Māori land was confiscated, purchased, or otherwise acquired; by 2000, Māori held as little as 4 percent of the land on New Zealand's North Island.[91] Māori children were targeted as a means of alienating culture and breaking the spirits of Māori people. For example, Survivors have described how, during wartimes, British soldiers targeted and committed atrocities on unprotected residential villages housing children, women, and the elderly.[92]

The Royal Commission of Inquiry into Abuse in Care issued an interim report in 2021 with several recommendations on how the New Zealand government should make reparations to Survivors of abuse in institutional care. The reparations program is to be based on Māori values, consistent with the obligations set out in the Treaty of Waitangi and be led by Māori and other Survivors. It is to be independent of the Crown and the faith-based institutions who committed the abuses. The government is to provide monetary compensation in meaningful sums, provide cultural, health, and other supports, facilitate apologies, and enable families of deceased Survivors to make claims for compensation. Various legislative, policy, and educational reforms are also recommended.[93] The Commission of Inquiry released its final report in July 2024, and found that the process followed to design a new reparations program by the government of New Zealand was inconsistent with the Commission's Interim Report recommendations, failed to be Māori-led, and was not universal—limiting access for some Survivors.[94]

Ireland

Ireland worked with the Catholic church to establish and operate homes for unmarried, pregnant women known as Magdalene Laundries and Mother and Baby Homes. These homes operated between 1922 and 1996 and were used to forcibly house pregnant women and women deemed to be vulnerable or at risk of delinquency.[95] As many as thirty-five thousand

women were forced to live in these homes, and an estimated six thousand babies died while in institutional care.[96] Both children and mothers experienced inhumane treatment in these institutions. Mothers were made to do unpaid labour and kept from their children, while babies were taken from their mothers, adopted without parental consent, and subject to vaccine trials and poor living conditions, including overcrowding and malnutrition.[97] In 2014, the remains of eight hundred babies were located at the site of the Bon Secours Mother and Baby Home in Tuam, County Galway.[98]

In Ireland, the Commission of Investigation into Mother and Baby Homes was established in 2015 following the publication of reports on the eight hundred babies buried in unmarked graves at the Bon Secours Mother and Baby Home. The Commission was tasked with investigating the actions of State and church institutions that led to these deaths, and it delivered its final report in 2021.[99] The report recommended further investigations to find more information about the burials and reparations for Survivors and victims, including monetary compensation and enhanced health services such as medical care and counselling.[100]

United States

From 1860 to 1978, the United States operated various missions and boarding schools that aimed to convert Indigenous people to Christianity. Similar to the Indian Residential School System in Canada,[101] these institutions forcibly removed Indigenous children—American Indian, Alaskan Native, and Native Hawaiian children—from their families, communities, and cultures and subjected them to forced assimilation, harsh punishment, inhumane treatment, and poor living conditions.[102] Many of the children at these institutions experienced neglect, disease, and abuse and harm, and, unfortunately, as was the case in Canada, many also died. Survivors' organizations and academics have been documenting the history of the Federal Indian Boarding Schools for many years.[103]

In the United States, the government has only recently begun a nationwide investigation into Federal Indian Boarding Schools, including the cemeteries and unmarked burials on the former sites of these institutions. In June 2021, Secretary of the Interior Deb Haaland, who is Native American from the Laguna Pueblo Tribe and whose grandparents were removed to Federal Indian Boarding Schools, announced the Federal Indian Boarding School Initiative.[104] The first report was released in May 2022,[105] and, among the initial findings, Haaland noted that, of the 408 Indian Boarding Schools across 37 States, 53 contain marked or unmarked burials. The initiative also reported that over five hundred children died at least 19

different institutions, that the boarding system deliberately employed assimilative and "militarized" methodologies, that children were forced to do manual labour and subjected to poor conditions, and that corporal punishment was used to prevent children from speaking their languages or engaging with their culture and beliefs.[106] The report recommended that there be further investigations to produce a second report. It also made recommendations on identifying and documenting the experiences of Indian Boarding School Survivors, collecting records relating to the institutions from all Federal Agencies and establishing a federal records repository to house them, and making changes to the *Native American Graves Protection and Repatriation Act*, and a federal memorial to honour and commemorate all Indigenous children who experienced the Federal Indian Boarding School System.[107] In September 2023, as part of the Federal Boarding School Initiative, the US Department of Interior announced funding for the launch of a national oral history project by the National Native American Boarding School Healing Coalition (NABS) to document the experiences of Indian Boarding School Survivors, and noted that a second report would be forthcoming.[108] This second and final investigative report of the Federal Indian Boarding School Initiative was released on July 30, 2024.[109] The report noted that 973 deaths of Indigenous children at the Indian Boarding Schools were identified, along with 74 burial sites. Of these burial sites, 21 are unmarked. The report recommended several reparation measures, including the issuance of an apology, the creation of a national memorial to commemorate the children that died at the institutions and education for the general public, the revitalization of Indigenous languages, and an increase in investments to research and healing programs to address the legacy of intergeneration trauma. A bill to establish the Truth and Healing Commission on Indian Boarding School Policies Act is currently before the US Senate.[110]

A Comparative Analysis of State Approaches to Reparations

Of the States discussed above, Australia, Ireland, and the United States operated institutions that directly led to the harm and death of children. In Guatemala, Peru, and Colombia, people—particularly, Indigenous people—were harmed, killed, and disappeared by the State or because of conflict between the State and other parties. While all these States have acknowledged the existence of unmarked burials associated with wrongdoing, none have prioritized exhumation, repatriation, or reburial in their reparation programs. This is the case even where the existence of clandestine burials and unmarked graves is a significant reason why the State has been required to provide reparations.[111] In some countries, such as the United States, these forensic investigations are just beginning. In Australia, there is growing public awareness of the existence of potential unmarked burials as Survivors continue to speak out.[112]

While the circumstances leading to a need for reparations vary widely across countries, and the approaches taken by States differ significantly, three common approaches are evident in State-led reparations. First, States have taken a reactionary, incremental, or "ad hoc" approach to reparations. Second, progress on reparations depends on the political will and legal and economic priorities of the government in power. Third, reparations programs are designed with government interests in mind, and these take precedence over the rights and needs of Survivors.

Amnesty

Findings of genocide are always controversial, and some States have changed their position on accepting these findings depending on the government in power. For example, Guatemala has not consistently acknowledged the finding that their actions were genocidal—in fact, being a victim of genocide is not considered under the State's national reparations program as grounds for seeking reparation.[113] Likewise, Aotearoa New Zealand's public discourse on reparations rarely includes any dialogue about genocide, despite the fact that the State's actions have led to the widespread loss of life and culture of Māori Peoples.

Amnesties[114] can serve to protect State individual and institutional perpetrators, taking precedence over victims' right to justice. Recently, Guatemalan politics have shifted to favour amnesty for perpetrators of human rights violations and genocide during the armed conflict. There is currently political will to revise the national policy on reconciliation to allow greater amnesty for those who have committed human rights violations during the armed conflict.[115] This change is the result of vigorous lobbying by the economic elite, former military leaders, and others who would benefit from an amnesty.[116] Generally, the power imbalances and inequalities brought to the fore by the internal armed conflict persist in Guatemala despite the reparations program and are maintained through the granting of amnesty to State actors:

> The structural problems that gave rise to the armed conflict persist: racism, inequality, political participation and violence. The vast majority of victims continue to live in extreme poverty and face great obstacles to access to justice, reparation and citizen participation. In addition, victims are constantly harassed and stigmatized by former military, former civilian patrolmen and conservative groups interested in imposing a policy of forgiveness, oblivion and impunity. These groups systematically deny the facts of the past, present amnesty initiatives to evade justice...and accuse victims of seeking money through reparation.[117]

While these inequalities and power imbalances persist and while the government prioritizes the political and legal interests of the elite over the rights of victims, substantive reparations that foster reconciliation are not possible.

States Take an Ad Hoc Approach

Rather than formulating a comprehensive reparations program based on the needs expressed by Survivors, States frequently have taken an ad hoc approach—that is, they have reacted incrementally to Survivors' demands for truth, justice, and accountability and have responded to the resulting political and legal pressures only as they arise. In many cases, governments only have responded when there is widespread criticism in the media or by the public. For example, in Ireland, the minister of health did not respond to reports of infants and babies being buried at the site of the Bon Secours Mother and Baby Home or initiated any reparations until the press reported the finding of a mass grave of children's remains.[118]

States often have implemented partial reparations that address only certain aspects of an injustice. A government may prioritize one-time monetary compensation over other forms of reparations, such as commemoration or legal reforms. In Guatemala, for example, despite calls by Survivors, families, courts, and international bodies for the State to fund initiatives that symbolically recognize victims, construct monuments, establish days of recognition, or strengthen laws that support and protect victims, the State's reparation scheme has focused on providing small one-time payments to victims and families.[119]

It is also common for States to implement reparation measures inconsistently or sporadically. In Australia, reparations to the Survivors of the Stolen Generations were enacted regionally, with the timeline, nature, and extent of reparations offered by each Australian province and territory varying widely. The State's role in the Stolen Generations and the associated disproportionate harm towards Indigenous Peoples has been recognized by the State since the late 1990s, yet some regions still have not implemented reparations programs.[120] The earliest reparation scheme was created in Tasmania in 2006 and offered only monetary compensation as a form of restitution. Most recently, in March 2022, following a report from the Reparations Steering Committee,[121] the province of Victoria began accepting applications for its Stolen Generation Reparations Package.[122] Generally, across provinces and territories, whether the reparations scheme acknowledges the disproportionate harm experienced by Indigenous children in institutions, and whether it extends beyond one-time monetary compensation to include other forms of reparation, is inconsistent.

Progress Depends on Governments' Political Will

State-led reparations programs are subject to the government's political, legal, and economic agenda and priorities and driven by the political will (or lack thereof) of current State leaders. They are, therefore, subject to change. Consider, for example, the situation in Peru:

> The Peruvian government has taken significant steps to address the severe and massive human rights violations committed during the country's internal armed conflict from 1980 to 2000.... However, efforts to hold perpetrators accountable and satisfy the right of victims to reparations have experienced less progress, with initial commitments hampered by insufficient political will from successive administrations.[123]

Notably, in 2013, the Peruvian government made efforts to lower the financial commitment made by previous administrations to Survivors.[124] Likewise, in Guatemala, the work of the national reparations program has historically depended on political will. Under one government, the program briefly funded burials for victims, including funds for interment, food for people participating in the burial, and psychological support for families ahead of the ceremonies.[125] However, the government has changed, and this is no longer common practice; rather, the program currently prioritizes individual restitution as a form of reparation. Funding for the national reparations program has also fluctuated between administrations, impacting the scope of reparations available to victims.

In Australia, the government repealed its assimilative policies and moved towards reparations in response to changes in public opinion following years of Indigenous-led advocacy. This demonstrates how States may make improvements to their reparations approach when it is politically desirable.[126] Progress on reparations may also be impacted by who holds leadership positions within government. In the United States, for example, where the recent efforts to document the history of Federal Indian Boarding Schools is being advanced largely due to the efforts of Secretary of the Interior Deb Haaland.[127] As these examples demonstrate, the political interests and goals of government leaders in power directly influence the State's approach to reparations or, indeed, whether reparations are provided at all.

Commitments to Apologies May Change over Time

Apologies are one form of reparation that are frequently issued by States for victims that have been harmed by government's laws, policies, and actions. The timing of an apology varies; they are often in response to the recommendations of a commission or public inquiry but may also be given beforehand or as part of a settlement agreement. Leaders of Guatemala,

Australia, New Zealand, and Ireland have apologized for the State's role in the harms experienced by victims. Depending on the State, apologies may be made one time or on an ongoing basis. In Australia in 2008, the prime minister at the time apologized on behalf of Parliament and noted the need for a, "comprehensive reparations scheme" and "more than a mere apology."[128] In Ireland, Head of State Micheál Martin issued a statement and apology for the harms suffered by victims at mother and baby homes.[129] New Zealand has issued apologies to various communities based on recommendations of the Waitangi Tribunal. In each of these cases, the apologies were only issued after commissions or public inquiries determined that the State was at fault.

Apologies given by a government in power may sometimes be dismissed as unnecessary by political leaders who succeed them. For example, in Guatemala, in 1999, President Álvaro Arzú apologized for the government's actions during the internal armed conflict. However, subsequent leaders have denied that genocide occurred and downplayed the apology.[130] In the view of many victims, these States have still not told the truth or accepted responsibility for the atrocities and human rights violations committed against them that constitute genocide and crimes against humanity.

State Interests Are Prioritized over Survivors' Rights

Despite the legal and ethical obligations of States to provide reparations for human rights violations, States frequently prioritize their own interests over the rights and interests of Survivors. First, States are generally interested in limiting their legal and financial liability for wrongdoing. To this end, States may provide amnesty for perpetrators—in some cases, to hide government culpability for genocide, crimes against humanity, and mass human rights violations. This lack of accountability compromises justice for victims and Survivors. When Survivors and victims pursue litigation successfully in the courts, States may view settlement agreements that include some reparations as a timelier and less costly option. Second, as previously noted, when States develop and implement reparations programs, they frequently ignore the knowledge and experiences of Survivors and victims, particularly those of Indigenous Peoples, including women and children, in terms of what reparations measures are required.

Limiting Legal and Financial Liability

In examining State-led reparations programs, States use several strategies to limit their legal and financial liability, including negotiating reparations out of the courts, restricting eligibility criteria and limiting monetary compensation, and marginalizing Survivors and victims through a lack of accessibility and inclusivity. Each of these strategies is discussed in more detail below.

Negotiating Reparations out of the Courts

It is common for States to limit their legal and financial liabilities through national or regional reparation programs but also by minimizing their financial obligations to victims. This includes the defunding or underfunding of reparations programs and the funnelling of Survivors' legal claims away from the courts (where they may be awarded damages in high amounts) towards reparations programs that offer comparatively lower amounts of compensation. In Australia, after a landmark legal case awarded an individual plaintiff hundreds of thousands of dollars in damages, a parliamentary committee recommended establishing a reparations fund for the Stolen Generation that would be less expensive for the government rather than resolving matters in court.[131] National reparations programs also give the State direct control over what reparations measures are offered.

Although litigation may result in higher damage awards, barriers exist within legal systems that make litigation a difficult avenue for claimants. For example, in Australia, individual Stolen Generations litigants have historically faced challenges in the courts, including statutes of limitations, the inaccessibility of witnesses and records,[132] court concerns over "opening floodgates," and other technical legal barriers.[133] In many cases, the law is not structured to the victims' advantage, as evidenced by the fact that numerous commissions have cited a need for the strengthening or creation of laws to better protect and support victims.[134]

In countries where victims more commonly seek reparations through judgments of the court, problems arise when there are inadequate enforcement mechanisms to hold the State accountable for the reparations they are ordered to provide. In Guatemala, for example, several significant judgments have been made in the domestic courts, awarding groups of Mayan Survivors various forms of compensation. In one case, the court ordered the Guatemalan State to do the following: create a national registry of victims of enforced disappearance; comply with all recommended reparation measures; guarantee the safety of the subjects of proceedings; establish a law supporting the search for disappeared persons; create a documentary about the case; translate the sentence that perpetrators were given into Mayan languages; create relevant scholarships; create a military decoration bearing the name of one of the victims for army officials; offer rewards to those who provided information about the location of clandestine cemeteries or unmarked burial locations; create a day in remembrance of the disappeared children; and build monuments in commemoration of victims. These orders have largely been ignored, and three convicted perpetrators of rape and enforced disappearance were recently released by the courts.[135] Instead, the State has preferred to pay financial compensation to victims and families; in response to some of these rulings, millions of dollars have been paid to various communities.[136]

Restricting Eligibility Criteria and Limiting Monetary Compensation

States have also established criteria restricting eligibility for reparations to a small proportion of Survivors. In Ireland, the State's redress program, based on recommendations of the *Final Report of the Commission of Investigation into Mother and Baby Homes*[137] has been criticized for establishing criteria for eligibility that enables only thirty-four thousand Survivors to seek compensation (while more than sixty-eight thousand people are believed to have been held at the State's mother and baby homes).[138] Likewise, in Guatemala, only approximately thirty-two thousand of the two hundred thousand victims of the armed conflict have been compensated through the national reparations program. Those who have been compensated frequently receive compensation in extremely low amounts—sometimes as little as US $500.[139]

When States make material reparations to victims and/or their families in the form of monetary compensation, it may be individual or collective and may or may not be accompanied by other forms of reparation. The payment of funds, particularly through one-time payments to individuals, is commonly preferred by States. In Guatemala, the national reparations program provides one-time monetary payment as compensation for human rights violations committed by the State during the armed conflict. Of those who have received compensation through the program so far, the amount is frequently as low as approximately US $500 for the loss of a loved one and up to a maximum of US $2,000–3,000, regardless of the severity of the harms suffered.[140] Victims can also access reparations through a judgment by the Guatemalan courts. However, as noted previously, while this sometimes results in the payment of monetary compensation in compliance with the orders of the court, in many cases, those ordered to pay do not comply, and there may be limited enforcement of the court orders.[141]

Colombia has one of the largest reparations programs in the world and strongly emphasizes economic measures. The State provides reparations largely through the *Victims' and Land Restitution Law*,[142] legislation created to consolidate reparation efforts.[143] The law functions in part to pay victims of serious human rights violations individual amounts based on the nature of the harm suffered. Between 2009 and 2016, approximately US $4.6 billion in compensation was paid to more than 580,000 victims.[144] Another US $25.1 million was distributed to 4,000 victims through rulings of the State's courts.[145] The program includes other measures such as land restitution, humanitarian assistance for victims' immediate needs, funeral expenses, exemptions from mandatory military service, and guarantees that child victims will receive health care and education. However, these forms of compensation function less as distinct reparations measures because they focus on services that the State is already obligated (and failing) to provide. Despite being one of the largest programs in the

world in terms of how many people it aims to include, the program has been criticized for using exclusionary criteria that bars many victims from access.[146]

In Australia, particularly at the provincial and territorial level, governments have provided individual, one-time payments to Survivors. While the amounts awarded vary according to region, Survivors have been awarded or promised between AUS $20,000 and $100,000, with some jurisdictions offering additional funds for funeral expenses. Generally, no symbolic reparations are included in these programs. At the federal level, victims of child abuse in State-run institutions may currently apply for payments of up to AUS $150,000. The National Redress Scheme, which is not directed specifically towards Indigenous Survivors, also includes counselling/psychological care and an optional personal apology or response from a, "senior representative of the institution responsible."[147]

In Aotearoa New Zealand, while the Royal Commission of Inquiry into Abuse in Care has recently issued recommendations on reparations to the government, the reparations program was designed contrary to the Commission's recommendations that it be Māori-led and accessible to all Survivors. For Māori, broader collective material and symbolic reparations for land dispossession have been made through the Waitangi Tribunal. Because the tribunal found that the State had breached its treaty obligations to Māori, the government has administered billions of dollars in restitution and made apologies to different Māori iwi (tribes) across Aotearoa New Zealand.[148] A small percentage of land has also been returned to Māori; however, the percentage of land returned has been often very low (sometimes as low as 1 percent of what was taken).[149]

In Ireland, the State recently passed the *Mother and Baby Institutions Payment Scheme Act* into law.[150] This program sets aside €800 million for Survivors of mother and baby homes. Thus far, in addition to the apology issued by the prime minister, Ireland's reparations are largely limited to this redress scheme and the ongoing investigations into mother and baby homes. The State has been strongly criticized for this approach by Survivors and human rights scholars, who have noted problems such as that the redress program requires Survivors to waive legal rights in order to access payment; that it excludes many Survivors through restrictive criteria, and that it fails to recognize the harms associated with the abuse of family separation. The State has been called on to broaden the scope of its reparations to include such measures as enabling access for Survivors to their personal data and records, funding record-holding institutions to increase the speed with which Survivors can receive their personal information, improving access to the Mother and Baby Homes Commission of Investigation's archives, and creating a dedicated exhumation, identification, and reinterment program for the remains of infants buried on institutional grounds.[151]

Peru, by comparison, is an example of a reparations program that emphasizes non-monetary aspects of reparations. The Comprehensive Reparations Plan consists of programs for collective reparation, individual economic reparations, educational and health reparations, housing access programs, symbolic reparations programs, and a program for citizen's rights to restitution.[152] These programs were created with a holistic view towards reparation based on the understanding that taking a more ad hoc approach that fails to meet Survivors' needs renders partial reparations ineffective. A partial reparations approach is seen by Survivors as empty gestures.[153] Therefore, these programs include symbolic, material, collective, and individual reparations. However, the government has been criticized for failing to consult various advisory bodies before establishing an individual monetary compensation framework that has only awarded small one-time payments to Survivors and families.[154]

As these comparative examples indicate, no reparations program is perfect. Focusing only on individual monetary compensation does not address the collective harms that Survivors have experienced. Conversely, providing only collective monetary compensation fails to acknowledge the suffering of individuals and families. Finally, monetary compensation alone cannot provide restitution for intergenerational harms such as loss of language, land, and culture. The partial reparations that derive from taking an ad hoc or reactive incremental approach to reparations are therefore problematic. A more holistic and comprehensive approach is required—one that respects and upholds Survivors' rights and meets their needs.

Marginalizing Survivors and Victims: Additional Barriers and Lack of Accessibility and Inclusivity

When States develop and implement reparations programs, they frequently do so unilaterally, failing to consider the input of Survivors and victims, including Indigenous people. In Guatemala, for example, the national reparations program was initially led by a team of representatives, half of whom were victims. However, following disagreements about how the program should operate, the leadership structure of the program was changed to be made up entirely of Guatemalan public officials.[155] In contrast, in Aotearoa New Zealand, State reparations are based on the recommendations of the Waitangi Tribunal. Currently, half of the tribunal members are Māori. Reparations proposed by the tribunal have been described as, "restorative rather than compensatory" and as a compromise between what is owed and what is economical for the Crown.[156] Other reparation programs fail to acknowledge the distinctive circumstances and needs of groups who have been marginalized. In Australia, for example, the recently established National Redress Scheme for those who experienced child

sexual abuse in a State-run institution does not distinguish between Indigenous and non-Indigenous applicants, even though Indigenous people were disproportionately placed in, and harmed at, these institutions.[157]

State-led reparations frequently include measures that are culturally inappropriate and warrant criticism. New Zealand, for example, has made collective reparations to groups of Māori in ways that ignore historic divisions between subtribal groups, thereby homogenizing communities.[158] In Guatemala, Survivors' unique linguistic, location-based, and cultural needs have been ignored. The government has minimized the importance of humanitarian forensics by leaving exhumation, repatriation, dignification, and appropriate reburial to civil society organizations led largely by Indigenous Peoples, which are discussed later in this chapter.

As noted previously, Survivors and families are frequently prevented from accessing reparation measures because of barriers created by the State. In addition to establishing restrictive criteria for eligibility, States may require records that are difficult or impossible for claimants to obtain. In Guatemala, for example, to access the national reparations program, family members must provide certificates of death for their lost loved one. However, because they were victims of enforced disappearances perpetrated by the State, many people do not have proof that their loved one has died. In Ireland, the criteria of the State's reparation program have been criticized by Survivors as being too restrictive because they exclude a number of groups of people, including, "boarded-out survivors that endured abuse [and] the children who spent less than six months in the institutions."[159]

In other cases, important information is unavailable in Indigenous languages, and the offices where paperwork must be submitted in person are inaccessible.[160] By comparison, programs where Survivors can submit documentation in person, by mail, or electronically are more accessible.[161] The existence of overlapping, inconsistent, or short-lived programs may also be confusing. In Australia, for example, the federal reparations program exists alongside the provincial and territorial programs, some of which have long since closed and others that are still in development.

SURVIVORS AND FAMILIES TURN TO INTERNATIONAL BODIES AND COURTS

Guatemala, Peru, and Colombia all rely on domestic courts to settle some matters of reparation. This may create unique barriers for Indigenous Peoples. In Guatemala, for example, it can be, "virtually impossible [for Indigenous victims] to participate in the criminal

process because the judicial system is monolingual, slow and bureaucratic. In addition, the victims live in distant places and need the help of a lawyer."[162] In some cases, Survivors and victims have been able to turn to international bodies to monitor States' progress through the establishment of internal oversight organizations[163] or through rulings of international courts.

There is now a substantive body of international criminal case law from the Inter-American Court of Human Rights (IACtHR) dealing with collective reparations for Indigenous communities. In a series of decisions, the IACtHR, "has granted ground-breaking reparations" that include not only, "orders to investigate and punish those responsible for human rights violations," as reparations of truth, accountability, and justice, but also other forms of reparations such as creating, "a genetic information system to permit identification for family reunification, the identification of victim's bodies so that the bodies could be properly buried" as well as law reform, education, commemoration measures, and apologies.[164] Of particular interest, "in a number of cases of violations against [I]ndigenous peoples, the IACtHR has requested States to take into account their traditions and customs in those public acts and to translate the judgments into the relevant [I]ndigenous language."[165]

While the IACtHR has issued rulings that broaden the scope of reparations, States may be unwilling to comply with the court's orders, particularly if the court's authority is not recognized by the State. Governments may also lack the financial means or political will to adopt the reparations measures recommended by the court.[166] In Guatemala, for example, "victims have accessed the Inter-American system with the hope of attaining justice and ensuring that the State assume responsibility for the crimes, but the State apparently does not consider it important and does not comply with its international commitments."[167] In contrast, by complying with the court's ruling, Peru, "gave an important signal of political will and respect for the international obligations of the State, including reparations."[168]

Although this section has critiqued the various reparations programs in several countries, the intent is not to detract from the importance of reparations. For those who have received reparations in various forms, the most important criteria for measuring their success are whether Survivors, victims, and their families are satisfied with the results. Viewed through a critical lens, important lessons about barriers and best practices can be used to inform the creation of an Indigenous-led Reparations Framework in the context of the missing and disappeared children and unmarked burials in Canada.

A Holistic Approach: The Impact of Indigenous and Family Advocacy in Reparations Processes in Guatemala and Colombia

Two examples of Indigenous-led, trauma-informed, Survivor- and victim-centred reparations processes are highlighted here. While the contexts in which they function are very different, they provide valuable insights and practical experience relating to the search and recovery work that is occurring across Turtle Island. Both demonstrate anti-colonial approaches and emerging practices based on Indigenous criteria for the process of searching for, recovering, and commemorating loved ones who were victims of enforced disappearances.

The Forensic Anthropology Foundation of Guatemala (FAFG)

The FAFG is a restorative justice foundation that applies forensic techniques to investigate, identify, and exhume victims of Guatemala's armed conflict.[169] This involves searching for clandestine burials and using forensic techniques and genetic testing to recover and identify the people buried there. The FAFG has operated since 1997 to reunite families with their lost loved ones and to contribute to the evidentiary record of the crimes committed by the State.[170] As of 2023, it has recovered more than eight thousand bodies and identified more than thirty-eight hundred victims. At one site, the FAFG found 558 bones in four graves, and about 16 percent of the remains were of children. Many showed evidence of torture and execution.[171]

A major part of the FAFG's work is to help recover murdered and disappeared family members of Mayan communities, and the organization has close ties with victims' groups and advocates. As a result, the FAFG's practices and methodology are deeply informed by Mayan teachings and beliefs. According to the FAFG's director, Fredy Peccerelli, "the Maya Cosmovision is respected throughout all the forensic processes, as required by the family and the community."[172] This includes ceremonies prior to any forensic action being initiated, recognition of how digging into the earth transforms landscapes and impacts *Madre Tierra* (Mother Earth), ceremonies to express gratitude towards Madre Tierra, appropriate offerings, and

the meaningful integration of Mayan ways of knowing, including evidence shared in dreams. The dignification of victims is another important aspect of the FAFG's work:

> Each identification creates new opportunities for justice and reparations based on the decision of the family. The impact is most felt by the family when the FAFG returns the skeletal remains of an identified person to their family. An FAFG expert carefully assembles the bones anatomically in the casket, often in new clothing and alongside offerings for their loved one, so they can give them a dignified burial according to their cultural rites and practices.[173]

The FAFG's work also involves the collection and preservation of life history interviews from Survivors, which document the entire life of Survivors and contribute to public education, historical memory, memorialization, and Mayan identity.[174] The San Juan Comalapa Memorial for Victims of Enforced Disappearance, for example, involved the dignified reburial of recovered victims in graves that were consistent with Mayan ceremonial practice and also enabled the FAFG team to continue their forensic investigation. The memorial is considered "living" in the sense that the FAFG's ongoing work to investigate the disappeared interred there transforms it by adding to the known history.[175] This kind of collaboration between investigators and communities is key to reparation as truth, accountability, and justice, "In a context of lasting impunity, forensic processes are most successful when they are inclusive and responsive to the families' needs for truth and justice. Although it is a forensic, criminal investigation, the families should always identify with and feel included in the process."[176]

The identification of victims done by the FAFG, and the associated closure brought to families, is an important aspect of reparation as Survivors have reiterated that monetary compensation is only one part of the State's obligation to victims and their families. The creation of an accurate history, as well as accountability and acknowledgement by the State, is necessary.[177] Knowing the whereabouts of disappeared loved ones is considered a critical aspect of the right to truth. It should be noted that the Guatemalan government is not responsible for these exhumations. The work being done by the FAFG is being conducted independently.[178] The FAFG's

work is a powerful tool for justice, and its effectiveness lies in its strong ties to the Mayan communities with whom the FAFG has earned trust over many years. This has shaped the FAFG's methodology and practices as it works with families and communities to restore human dignity to their relatives by guiding forensic investigations and conducting ceremonies according to Mayan laws and customary funerary beliefs and practices.

The Committee for the Rights of the Victims of Bojayá, Colombia

In 2002 in Colombia, 119 civilians were killed as casualties of the internal armed conflict in an act now known as the Bojayá massacre. Many of the victims of this massacre, who were mainly Afro-Colombian and Indigenous, were not buried properly because Survivors had to flee the ongoing conflict. Survivors were unable to properly mourn their loved ones without the completion of important ceremonies and burial practices. The Committee for the Rights of the Victims of Bojayá is led by the family members of those who were killed in the Bojayá massacre. The committee has worked to identify, care for, and properly bury their killed loved ones. After years of lobbying the Colombian State and communicating with international justice organizations, the committee has developed and implemented an approach towards exhumation and reburial that combines ancestral knowledge, cultural autonomy, and forensic investigation. In doing so, the committee has demonstrated how Indigenous-led processes can incorporate their own cultural values and spiritual beliefs into the reparations process.[179]

The forensic process in Bojayá involved the recovery of the remains of 102 people and excavations across multiple sites. In addition to working to secure a commitment from the Colombian government for forensic investigation to occur, the committee listened to Elders and Knowledge Holders from both the Afro-Colombian and Indigenous communities and then developed a process for integrating forensic procedures with traditional spiritual and ceremonial practices for caring for the dead. They established respectful methods for recording the process and for memorialization. Elders and Knowledge Holders instructed scientists in cultural funerary practices, rituals were conducted throughout the forensic process, and the work of the forensic experts was accompanied by prayers and song. The committee also worked to identify and restore the dignity and personhood of the loved one who had died by recalling the names of the death

through rituals, creating life histories of victims by interviewing family members, and collecting records, including through storytelling sessions.[180]

Pilar Riano Alcalá, a Colombian Canadian scholar who worked with the communities, has explained that the process of recovering, reburying, and memorializing those lost in the Bojayá massacre is significant. She notes that it is the first process in Colombia to, "incorporate the recognition of the cultural and political autonomy and self-determination of Black and Indigenous communities in exhumation, identification and burial processes that seek to respond to communities' standards of comprehensive reparation and restitution of dignity, their ancestral knowledges and practices to care for the dead."[181] Survivors worldwide have emphasized the recovery of the dead as an important aspect of reparations. Yet forensic investigative procedures and practices are distinctly Western and frequently do not honour communities' beliefs and desires relating to death, exhumation, and burial.[182] The work of the committee to combine cultural and ancestral knowledge with science is significant as it demonstrates how the process of forensic investigation, when guided by Indigenous and Black Peoples' wisdom, can be an anti-colonial act of resistance and reclamation. Alcalá describes this process as a combination of scientific and cultural knowledge:

> The process is evidence of work to decolonize transitional policies through enrichment of forensic and judicial protocols with local ways of dealing with death and spirits.... Scientific knowledge and mortuary knowledge met in a creative and sometimes conflictive tension that managed to promote measures of satisfaction for the survivors and relatives while transforming the logics of participation by actively involving the extended family, cantadoras, rezanderos [those leading the prayers for the dead during funerary and rituals], midwives, traditional Emberá doctors, as well as local leaders and authorities. The story is one of the living restoring the identity and memory of their loved ones and memorializing their presence as an integral component of a scientific, reparative and truth-seeking process."[183]

Both the FAFG's work with Mayan families and communities in Guatemala and the Committee for the Rights of the Victims of Bojayá's work in Colombia demonstrate how Indigenous and community-based laws, processes, and protocols can be respected and included within reparations processes.

THE NEED FOR A NEW APPROACH TO REPARATIONS FOR INDIGENOUS PEOPLES WITHIN CANADA

It is important to remember that Survivors, Indigenous families, and communities are not only victims of human rights violations but also holders of inherent, Treaty, constitutional, and human rights. They must have decision-making powers in the development and implementation of the Reparations Framework for locating, recovering, and commemorating the missing and disappeared children and unmarked burials. The Reparations Framework must be governed by the *UN Declaration* and Indigenous laws. For this reason, the work of the UN Expert Mechanism on the Rights of Indigenous Peoples and the TRC are particularly instructive.

UN Expert Mechanism on the Rights of Indigenous Peoples: Recognition, Reparations, and Reconciliation

In a 2019 study focusing on how the concepts of recognition, reparations, and reconciliation should be linked to the implementation of the *UN Declaration*, the UN Expert Mechanism on the Rights of Indigenous Peoples made three overarching conclusions and recommendations:

1. The *United Nations Declaration on the Rights of Indigenous Peoples* should be the main framework for recognition, reparation and reconciliation. Recognition of [I]ndigenous [P]eoples, as well as reparation and reconciliation relating to past and current injustices, are essential elements for the effective implementation of the Declaration. Likewise, the Declaration itself is an instrument to pursue recognition, reparations and reconciliation.

2. Any process of reparation and reconciliation must be approached from an [I]ndigenous perspective, taking into account cultural specificities, including the spiritual connection of [I]ndigenous [P]eoples to their lands, their traditions related to identifying and healing injuries and their right to participate fully and effectively in decision-making.

3. Indigenous [P]eoples view recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of the right of [I]ndigenous [P]eoples to self-determination (including free, prior and informed consent), their rights to autonomy and political participation, their claims to their lands and the recognition of [I]ndigenous juridical systems

> and customary laws should be considered an essential part of recognition, reparation and reconciliation.[184]

The report also emphasized that, "in devising, implementing and evaluating reparation and reconciliation initiatives, [I]ndigenous [P]eoples and States should bear in mind that the process is as important as the outcome."[185] In addition, "a crucial factor in the success of reconciliation and reparation initiatives is the incorporation of [I]ndigenous perspectives at all stages and the full and effective participation of [I]ndigenous [P]eoples, which is essential if these processes are to have a successful, legitimate outcome."[186]

Two other report findings are particularly relevant to the search and recovery work underway here in Canada:

> From an [I]ndigenous [P]eoples' perspective, given their spiritual connections with their lands and territories, monetary reparation may not, on its own, provide sufficient redress and reconciliation. The limits of monetary payment are of course readily apparent when it comes to injuries such as genocide or the removal of children, for which no amount of money could ever compensate.[187]

Survivors, Indigenous families, and communities have made this same point many times. This is why other forms of reparations, including accountability and access to justice, which may be an outcome of the truth-finding process, are so essential.

Finally, the UN Expert Mechanism on the Rights of Indigenous Peoples found that:

> The question of reparations can be particularly controversial.... [Therefore] it is ... of paramount importance to address [I]ndigenous concepts of recognition, reparation and reconciliation. These are often based on [I]ndigenous [P]eoples' understanding of harm and trust and have individual and collective dimensions.[188]

Survivors, Indigenous families, and communities may hold different views about the appropriate form of reparations, including decisions relating to the exhumation and repatriation of the children. Indigenous communities across Turtle Island are now having these difficult conversations, relying on their own laws, ceremonies, and healing practices to care for each other as they search for truth. Conversations between and within communities is the most effective way to determine the appropriate path forward, including what form of reparations are required to support the truth-finding process and search and recovery work.

What Did the TRC Say About the Need for Reparations and Reconciliation Based on Indigenous Laws and Indigenous Rights?

Prior to the *IRSSA*, which established the TRC, Survivors had already identified the need for Indigenous forms of reparations and reconciliation. This was evident in the litigation leading up to negotiating the *IRSSA*. Legal scholar Kathleen Mahoney, who was also the chief negotiator for the AFN during the *IRSSA* negotiations, notes that principles of Indigenous laws informed the reparations measures that were included:

> Without [I]ndigenous principles forming the foundation of the *IRSSA*, there would have been no relaxation of proof and limitation requirements, no adjudicated hearings, no healing funds, no Truth and Reconciliation Commission, no 94 Calls to Action, no $1.9B payment for loss of language and culture and loss of family life, no advance payment for the elderly, no reparations to commemorate deceased survivors, no intergenerational reparations for education and community development, no research center and no public apologies from Canada or the churches. The process would have been governed by British common law rules and precedent with no meaningful [I]ndigenous participation, ceremonies, or culturally appropriate health support.[189]

As a result, Indigenous laws were also integral to the TRC's Mandate, directing the Commission to use both Western social sciences and Indigenous oral methodologies in gathering statements and conducting research; to recognize the significance of Indigenous oral and legal traditions in exercising its duties; to honour the Indigenous legal principle of witnessing in its activities; and to conduct the ceremonial transfer of knowledge at the TRC's national and community events.[190] The TRC made Indigenous laws central to its work, observing that:

> Sacred ceremony has always been at the heart of Indigenous cultures, law, and political life. When ceremonies were outlawed by the federal government, they were hidden away until the law was repealed. Historically, and to a certain degree, even at present, Indigenous ceremonies that create community bonds, sanctify laws, and ratify Treaty making have been misunderstood, disrespected, and disregarded by Canada. These ceremonies must now be recognized and honoured as an integral, vital, and ongoing dimension of the truth and reconciliation

> process.... The Commission intentionally made ceremonies the spiritual and ethical framework of our public education work, creating a safe space for sharing life stories and bearing testimonial witness to the past for the future.[191]

The TRC made Indigenous laws, which have been recognized by the Supreme Court of Canada, central to the reconciliation framework, concluding that, "reconciliation will be difficult to achieve until Indigenous peoples' own traditions for uncovering truth and enhancing reconciliation are embraced as an essential part of the ongoing process of truth determination, dispute resolution, and reconciliation."[192]

The TRC investigated the systemic and intergenerational abuse in the Indian Residential School System as mass human rights violations that must be remedied in ways that protect and uphold Indigenous Peoples' rights and legal systems. In 2015, the Commission called for Canada to fully adopt and implement the *UN Declaration* as the framework for reconciliation. The TRC issued 94 Calls to Action that make achieving reconciliation contingent on implementing Indigenous Peoples' rights of self-determination. Seen as a bold move to address the ongoing legacy of colonialism, Anishnaabe scholar Sheryl Lightfoot, the current Chair of the UN Expert Mechanism on the Rights of Indigenous Peoples, said that basing reconciliation on the recognition and implementation of Indigenous rights sets a new international benchmark for, "any society seeking reconciliation with Indigenous Peoples through truth and reconciliation processes."[193]

Three Articles of the *UN Declaration* That Relate to the Right to Reparations for Mass Human Rights Violations in Accordance with Indigenous Laws

Article 8:

1. Indigenous [P]eoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture;

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote racial or ethnic discrimination against them.

Article 11:

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with [I]ndigenous [P]eoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 40:

Indigenous [P]eoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other Parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the [I]ndigenous peoples concerned and international human rights.

The TRC emphasized the importance of reparations not only to reconciliation but also to repairing the relationship between Indigenous Peoples and Canadians:

> The Commission defines *reconciliation* as an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.[194]

Relying solely on Western law and reparative models of truth-finding, accountability, and justice is inadequate for Indigenous Peoples; these models fail to uphold Indigenous legal principles and criteria for determining truths, repairing harms, restoring well-being, and creating respectful, peaceful relationships. As Cree legal scholar Val Napoleon notes:

> Indigenous law ... is a fundamental aspect of being collectively and individually self-determining as peoples. Indigenous law is about building citizenship, responsibility in governance, challenging internal and external oppressions, safety and protection, lands and resources, and external political relations with other Indigenous peoples and the State.[195]

Indigenous laws are compatible with international reparations principles of taking responsibility, acknowledging wrongdoing, repairing harms, restoring relationships between individuals, families, and communities, and preventing further harm.

The TRC's approach confirms a long-known truth: Indigenous Peoples are in the best place to determine, in accordance with their laws and protocols, what is appropriate for truth-finding, accountability, and justice and the best way to honour the missing and disappeared children and protect the unmarked burials. Indigenous laws must therefore inform new Canadian legislation, policies, and regulations to accomplish this goal.

INDIGENOUS LAWS, PRINCIPLES, AND PRACTICES OF REPARATION: ACKNOWLEDGING HARMS, REPAIRING TRUST, AND MAKING RESTITUTION

There can be no pan-Indigenous approach to reparations because every Indigenous Nation has, "its own culturally-specific laws that are enacted, validated, and enforced through protocols and ceremonies that are uniquely their own."[196] The TRC's Final Report highlights some representative examples of Indigenous laws of the Haudenosaunee, Cree, Inuit, Mi'kmaq, Métis, Tlingit, Anishinaabe, Hul'q'umi'num, and Gitxsan Peoples and framed its discussion of reparations in the language of reconciliation.[197] Indigenous laws and principles of relationality can inform the reparations process relating to the missing and disappeared children and unmarked burials. The examples in the section below are by no means full accounts of these complex legal systems. Rather, they provide insight into, "the breadth, scope, and richness of Indigenous law and its potential for justice, healing, and reconciliation" to inform how reparations can effectively be designed in accordance with Indigenous criteria.[198]

Cree political scientist Kiera Ladner rejects settler-centred cultural and legal concepts that frame apology and reconciliation as an endpoint rather than as an ongoing process of acknowledging harms, repairing damaged trust, and making restitution to establish mutually respectful relationships. She points out that, "reconciliation begins, not ends, with acknowledging the past and 'saying I'm sorry.' It extends beyond the act of forgiveness. It is an ongoing national project.... It is a political project. It is a social project. It is a legal project. It is a historical project. It is a language project."[199] Drawing on Niitsitapi (Blackfoot Confederacy), Anishinaabe, and Haudenosaunee stories of transformative reconciliation, she notes that, "the stories all demonstrate that reconciliation is set in motion by humans working to transform their nations and their relations with 'other.' Human agency is key to effecting reconciliation."[200]

For over three decades, Survivors and Indigenous leaders have advocated for accountability and justice for the atrocities and human rights violations associated with the Indian Residential School System. Following the criteria of their own laws, ceremonies, and protocols, Indigenous Peoples continue to advocate for more robust forms of apology, reparation, and reconciliation from governments, churches, and other institutions complicit in acts of settler colonial violence and genocide. The TRC found that Canada has much to learn from Indigenous Peoples about how to apologize and make restitution for harms according to Indigenous legal criteria but that it must also respect that, "the decision to use Indigenous laws, protocols, and ceremonies to pursue reconciliation *must* rest with each Indigenous nation as self-determining peoples."[201]

At its heart, the reparations process in settler colonial contexts is relational. As Cree-Saulteaux scholar Gina Starblanket and Ojibwe scholar Heidi Kiiwetinepinesiik Stark point out, "attention to relationality enables us to see how colonialism is always in relationship. It is not some abstract logic that operates outside of people. It is structural, but it is also a process that is dynamic, interactive, and fluid."[202] As explained later, in Chapter 6, the legal systems of many different Indigenous Nations emphasize the reciprocal nature and interdependence of relationships between humans and other entities and life forms. The principle of taking responsibility for wrongdoing, acknowledging harms, making apologies, and providing restitution is central to many Indigenous legal systems and is worth repeating and expanding on here, drawing on the findings of the TRC's Final Report:

- Mi'kmaq legal principles include taking responsibility for harmful actions, providing restitution to those harmed and developing empathy towards victims.[203] Under Mi'kmaq laws, "the most serious cases of harm are dealt with by the Kji Keptin [Grand Captain] and/or the Grand Council.... Before the terms of a formal apology can be developed, extensive discussions must

take place with respected leaders and Elders to reach decisions about how best to respond to a harm that has occurred.... Although remedial actions have to take place at a national level between governments, institutions and Aboriginal peoples, reconciliation must also move through communities and families for it to be most effective."[204]

- Cree legal principles include acknowledging responsibility for harms caused. This acknowledgement requires corresponding action, such as making restitution or paying compensation to the person harmed or their family,[205] "When actions must be taken to facilitate reconciliation, Cree people often gather in circles to conduct such business.... [C]ircles are critically important in working towards reconciliation within Cree law ... including prayer circles, talking circles, and healing circles [that] can be activated when someone is unbalanced and does something harmful. These circles provide a place where such people can discuss the causes and consequences of their actions with family members, Cree Elders, leaders, and medicine people in an attempt to restore balance in their lives and within their communities."[206]

- Anishinaabe Peoples have laws relating to apology, restitution, and reconciliation, including the Seven Grandfather and Grandmother Teachings: "These laws encourage Anishinaabe peoples to live in accordance with *nibwaakaawin* (wisdom), *zaagi'idiwin* (love), *mnaadendiwin* (respect), *aakwaadiziwin* (courage), *dbaadendiziwin* (humility), *gwekwaadiziwin* (honesty), and *debwewin* (truth).... [These] Teachings are highlighted when people gather in ceremonies ... *Asemaa* (tobacco) is a sacred plant offered at the beginning of such events as an expression of gratitude, modesty, humility, and meekness.... [I]t could be instructive to regard apologies as having a constitutional dimension—constituting who we are as human beings and who we are as a nation-state ... they are an important part of Anishinaabe reconciliation in many settings.... When tobacco is offered and a pipe is used in its transmission, the tobacco becomes a vehicle for reconciliation between those who participate, as occurred in Treaties."[207]

- In Inuit societies, there are processes for a gathering, which may include a feast where everyone expresses their view on what went wrong and what should be done to resolve the problem. The person who caused the harm is confronted with the harm done to others through their decisions and

actions: "People cannot apologize, nor can a community move towards reconciliation, until wrongdoers have both fully heard about and honestly confronted and acknowledged the harm they caused to others.... There is also an important place for feasting, singing, and recounting past harms, which can help the parties learn how to address past and present harms and avoid future wrongdoing.... In this light, Inuit law can serve as a significant resource in meeting present needs, particularly in relation to apologies, restitution, and reconciliation."[208]

- Métis law is based on legal principles that focus on reconciling relationships not through punitive measures but, rather, by having those whose actions have harmed others make amends to address these harms or losses to restore balance. Métis law is consensus based and "a forum must have the protocols in place to call on the learned, the keepers of wisdom concerning every aspect of life. This provides the civil order that has to be maintained. The knowledgeable people—"Ahneegay-kaashigakick"—come to give of their expertise. Then within the community forum people agree by consensus what the advice means in terms of community and family action.... In the broader context of reconciliation, Métis law, like other Indigenous legal traditions, can also inform a wide range of Aboriginal-Crown alternative dispute resolution and negotiation processes involving Treaty and Aboriginal rights, land claims and resource use conflicts."[209] Métis legal principles could be applied to an apology-making and reparation process with Canada and the churches to address harms and human rights violations relating to the Indian Residential School System.

- The Teslin Tlingit of the Yukon have enacted some of their laws and authority through legislation. As suggested in the TRC's Final Report, the legal principles that guide the *Peacemaker Court and Justice Council Act*,[210] could be interpreted to guide Canada's attempts to reconcile with the Tlingit and other Indigenous Peoples and could be applied to an apology for the harms associated with the Indian Residential School System:

> The Act as a whole suggests that the best forums for reconciliation are Indigenous-based. Thus the Canadian government might follow up on its formal apology by working with various Aboriginal groups to apologize in an Indigenous forum. Subsection (a) of the Act suggests that such apologies and other activities should 'be guided

> by the values of respect, integrity, honesty, and responsibility,' as interpreted by Aboriginal people.... Since all members of society—from Elders to adults, youth, and children—are valued, a harm that affects them all should be rectified in a way that involves as many of them as possible.[211]

Much like Canadian laws, Indigenous laws are living traditions that adapt to changing circumstances over time.[212] As Cree legal scholar Val Napoleon and Hadley Friedland point out, "Indigenous law ... is not just belief, behaviour, morality, or a way of being—rather, it is a public, reasoned and transparent process that people can actually use in real life."[213] For example, Michi Saagiig Nishnaabeg scholar, writer, and artist Leanne Betasamosake Simpson notes that, "from a Nishnaabeg theoretical and legal perspective, regeneration or restoration is at the core of re-balancing relationships." In practice, this requires wrongdoers to publicly accept full responsibility for their actions in the presence of those they have harmed. Simpson explains that:

> In the case of state-perpetuated residential schools, the tables would be turned in a Nishnaabeg legal system. The survivors would have agency, decision-making power, and the power to decide restorative measures.... Imagine government officials, church officials, nuns, priests and teachers from a particular residential school in a circle with the people that had survived their sexual, physical, emotional and spiritual abuse. This is a fundamentally different power relationship between perpetrators of violence and survivors of that violence, where the abusers must face the full impact of their actions ... [and] the community maintains the authority to make that individual accountable for future wrongs.[214]

Within Gitxsan laws, as part of an apology in a *haldim guutxws* (shame or cleansing feast) for wrongdoing,[215] Napoleon notes that there is a system of compensation known as *xsiisxw* whereby "one House relinquishes wealth, names, crests or territory to repay an offence committed against another House," which is intended more to address the "disquiet felt by the other party than to replace the lost value."[216] When a harm has been perpetrated, the combination of the feast and the *xsiisxw* serves to acknowledge the loss of the other party and show the taking of responsibility for it.[217]

In one instance, the Gitxsan applied their own laws to addressing the harms and ongoing impacts of the Indian Residential School System in a way that was Survivor centred and called Canada and the United Church publicly to account. In 2004, the federal government and United Church were supported by Gitxsan Elders, Survivors, and Hereditary Chiefs to host a

Welcome Home and Apology Feast for the Gitxsan Survivors of the Edmonton Indian Residential School:

> That two non-Indigenous institutions served as hosts for this feast demonstrates the applied and living nature of Indigenous law; the Gitxsan adapted their customary feasting protocols creatively to allow these institutions to apologize for their actions in running residential schools. These changes in protocol were carefully negotiated in advance to ensure that Canada and the United Church operated in accordance with Gitxsan law ... the apology became part of the oral history record of Gitxsan law.
>
> Those who attended the ceremony witnessed how Gitxsan law provided an opportunity to begin repairing the relationship between the Gitxsan peoples, the Crown, and the church. Government and church representatives worked directly with Survivors, Elders, and Hereditary Chiefs for many weeks to prepare for the feast and fulfill their responsibilities as hosts. Working together at the community level enabled all those involved to begin to develop a different kind of relationship—one based on mutual respect and empathy. The feast hall created a space where Survivors' experiences were acknowledged and where they were honoured and welcomed back into the community.[218]

Writing about the bah'lats (potlatch) of the Ned'u'ten (Lake Babine Nation in northern British Columbia), Ned'u'ten legal scholar June McCue describes how Canada would have to apologize and make reparations according to Ned'u'ten laws to restore the honour of the Crown:

> The Ned'u'ten have ways for bringing order and respect back to deeneza and dzakaza clan members and clans that have shamed their names through disrespectful conduct, violations of bah'lats protocols, Ned'u'ten law and customs.[219]... The purpose of the shaming bah'lats is to show regret and to apologize; to acknowledge wrongdoing and to make it right again. Payment is given in retribution for the wrongdoing. Through retribution, social relations are brought back into balance and will remain so because the wrongdoing is to be forgotten and never mentioned again.[220]
>
> Although Canada does not have a name in the bah'lats (potlatch) context, it has brought shame to its name through its conduct to oppress, colonize, and dispossess the Ned'u'ten.... To remedy this behaviour and

> to create respectful relations between Canada and the Ned'u'ten, the shaming bah'lats can be used.... In the bah'lats Canada's colonizing record would be heard by the Ned'u'ten. Canada would acknowledge this wrongdoing, make apologies, and be prepared to compensate or retribute the Ned'u'ten for such conduct with gifts. It may take a series of bah'lats for Canada to bring respect to its name.... With numerous bah'lats taking place, Canada will acquire an understanding of its workings. Canada and the Ned'u'ten will also feast together, sharing food from the land, thereby creating harmonious relations, as well as the language of the people. Once the Ned'u'ten are satisfied with the acknowledgment, apology, and gifts required to de-shame Canada's name ... the process will begin to "wipe Canada's name clean."[221]

In thinking about what Canada and the churches must make reparations for in relation to the missing and disappeared children and unmarked burials, it is important to consider how their actions of cultural and spiritual violence disrupted Indigenous laws, ceremonies, and protocols associated with the deaths, burials, and memorialization of family and community members. The Ned'u'ten, for example, hold funeral bah'lats like many other Indigenous Nations in British Columbia where, "the feasting and the potlatch system have been used for millennia as political and legal mechanisms for addressing harms in a way that enables people to obtain a measure of justice and that restores relationships."[222] As women's studies scholar Jo-Anne Fiske and Betty Patrick (former Chief of Lake Babine Nation) explain:

> Funeral feasts are central to the cultural identity of the Babine.... The clans gather with gifts and *cis* (down feathers) to "take the pain away." Feathers, "like a sympathy card," wipe their tears away by demonstrating shared sorrow and support.... Mourning rituals preceding and following the church funeral and balhats are also rooted in the past. The mourning period is described in phrases that convey the notion of "sitting at the grave" or "crying over the grave."... At a funeral balhats, all of the deceased's personal debts are cleared.... After debt payments are completed, money is then collected from the deceased's clan members. This money is redistributed to pay the funeral workers. It is the practice to bury all Babine according to the traditions of the balhats.... Community members who lived and died elsewhere are returned to the village. Even kin who were adopted out at childhood and who were not well known to the family are brought home to rest in the community's cemetery.... According to balhats traditions, mourning ended with a

> memorial balhats, at which the successor might raise a carved pole in honour of the dead. Today as in the past, the memorial balhats, now called the headstone balhats, frees the bereaved from their grief and prepares them to re-enter community life.... The headstone potlatch is the most elaborate of all balhats events. It signifies the transition in status of the deceased, the mourners, and the deceased's successor.[223]

The family and clan members of the missing and disappeared Ned'u'ten children who died in the Indian Residential School System and whose burial places are unknown have been unable to hold bah'lats for them. They have been unable to bring them home.

At several National Gatherings, Haudenosaunee Elders and Knowledge Keepers spoke about Haudenosaunee laws and the importance of the Condolence Ceremony. At the Toronto National Gathering in March 2023, Mohawk Elder and Knowledge Keeper Tom Porter offered an opening prayer using the metaphors of the Condolence Ceremony for those who are grieving for the missing and disappeared children. He said:

> In your village or community as in mine, we have lost our relatives, and we have to grieve them and mourn them. Sometimes when you carry that there are tears in your eye and grief in your mind and it gets heavy. Sometimes things get confused because the dust of death is on your mind.... In the big beautiful blue sky, I brush your ears and remove the dust of death from your ears. So tomorrow when you open your door you will hear the voices of your brothers and sisters again.... From the very beautiful blue sky we take the soft tear, like a beautiful deer's cotton ... I will take this and wipe the tears from your eyes.... From the beautiful blue sky, I will take the beautiful blue water and you will drink it and it will dislodge that grief and sadness, and now tomorrow when you open the door of your house, you will be able to talk without crying and you will be able to eat the food and it will go down and you will have life.[224]

The Haudenosaunee Peoples (Iroquois Confederacy or Six Nations) live in political alliance under the Great Law of Peace and have used the Condolence Ceremony in Treaty diplomacy for thousands of years. Their ongoing history of diplomacy and treaty making is recorded in Wampum Belts that are adapted over time to meet changing circumstances. The TRC noted:

> In the late twentieth century, *Hatahts'ikrehtha'* ("he makes the clouds descend"), Cayuga Chief Jacob ("Jake") Thomas changed the original metaphors within the [Condolence] ceremony to "metaphors

> reflecting the theft of Iroquois lands and broken promises and treaties. Recriminations intended for the non-Iroquois participants were added through new metaphors: removing the fog that prevents one from seeing the truth, removing dirt from one's ears so the story of the Iroquois people can be heard, and washing the blood of the Iroquois people from the White man's hands so that they may know the clasp of true friendship.[225]
>
> The Condolence Ceremony allows people who have been through traumatic experiences together—those who are healthy, those who are in mourning, and those who have caused harm—to work together to address losses. Through this ceremony, apologies and restitution are embodied in expressive performances as people are called upon to tell stories and acknowledge losses related to the harms they have suffered. The ceremony occurs in a precise sequence, employing vivid imagery, and can be used in many circumstances where trust and understanding have been broken because of a party's harmful actions.
>
> The requirements for a Condolence ceremony are certainly met by the residential school experience. The physical nature of the ceremony could help government, churches, and those who are harmed recognize that everything that happened at the residential schools had physical, spiritual, emotional, and metaphysical dimensions.... If a decision was ever made by the Haudenosaunee peoples to apply these practices and principles ... they would enable government and church officials to make apologies and restitution in accordance with the principles and protocols of Haudenosaunee law.[226]

As these short examples demonstrate, despite vast cultural, political, and geographical differences among Indigenous Nations, all have Indigenous laws, ceremonies, principles, protocols, and practices relating to both apologies and reparations and the mourning, burial, and memorialization of those who have died. These laws not only are important to individuals and families, but they are also integral aspects of Indigenous political and cultural identity. Not only did Canada and the churches deny families their right to grieve their missing and disappeared children in their own way, but they also struck at the very heart of Indigenous legal and governance systems. This is why establishing Indigenous-led, Nation-specific reparations processes to provide full redress for these harms and using Indigenous criteria to evaluate them is essential.

CONCLUSION

At the Edmonton National Gathering, Dr. Chief Wilton Littlechild, former TRC commissioner and former North American representative on the UN Expert Mechanism on the Rights of Indigenous Peoples, told participants that Articles 7–12 of the *UN Declaration* and Indigenous laws are a foundation for new legislation relating to the missing and disappeared children and unmarked burials. Together, they would uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity and security, and protection from genocide, violence, and forced assimilation. They would uphold the right to redress through the various forms of reparations from the State outlined in this chapter.

When creating an Indigenous-led Reparations Framework, material resources such as funding are essential but so too is the process of negotiating and implementing various reparations measures. There is growing consensus at the international level that Indigenous Peoples' individual and collective rights must be strengthened by truth and reconciliation commissions and other tribunals and inquiries designed to address human rights violations and historical injustices. Indigenous Peoples must be active participants, with a leadership role and decision-making powers in developing, implementing, and evaluating reparations measures and processes, not only as victims of colonization and violence but also as holders of rights that have been violated.[227]

While State-driven reparations programs across the globe have met with varying degrees of success, their limitations for Indigenous Peoples are evident. They fail to recognize Indigenous Peoples' rights or to incorporate Indigenous laws relating to reparations and reconciliation. Yet we have much to learn from the culturally distinct, community-driven, trauma-informed reparations processes developed in Guatemala and Colombia to learn the truth about what happened to disappeared persons, locate their burials, and allow them to decide for themselves how they wish to honour and remember their loved ones in ways that restore their human dignity.

Indigenous laws are already being practised in community-led search and recovery processes across the country. Elders and Knowledge Keepers have spoken about the importance of Indigenous laws in relation to burials and commemorating and preserving these burial sites. Every Nation has its own laws and protocols around burial rights—these include both rights and obligations under Indigenous laws. What is most painful to communities is that these little ones were buried without the proper ceremonies. The importance of ensuring that the difficult search and recovery process for the missing and disappeared children and unmarked burials is overseen and led by Indigenous Peoples at the community, regional, and national levels cannot be overstated. This will ensure that Indigenous criteria for truth, accountability,

and justice are met in ways that uphold Indigenous rights, support healing, reveal further truths, and advance reconciliation.

As Dr. Chief Littlechild points out, the tools for creating new legislation already exist. They are found in the *UN Declaration* and in the diverse Indigenous laws that have existed for millennia. The TRC established a national framework for reconciliation governed by Indigenous rights and Indigenous laws. This is a strong foundation for creating an Indigenous-led Reparations Framework to locate, recover, and commemorate the missing and disappeared children and unmarked burials. The remainder of this Final Report examines each of the elements required for this new framework in more detail. Obligations are identified for the new framework in the final chapter of this report and are intended to guide the implementation of an effective Indigenous-led Reparations Framework moving forward. While the right to reparations can get lost in political, legal, academic, and technical arguments, we must never lose sight of their primary purpose. We must keep the missing and disappeared children and the Survivors, Indigenous families, and communities who continue to search for them foremost in our hearts and minds. They are at the centre of this Reparations Framework.

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CHAPTER 2

The Enforced Disappearances of Children and Crimes Against Humanity

> In the journey to uncover the truth and to seek true justice for those who have been wronged, it is essential for colonial governments to acknowledge and accept that the Canadian legal framework is not the only framework of relevance here. Acknowledging the inherent sovereignty of Indigenous Peoples in Canada (and around the world) places us in a context of international law.
>
> — Nisoonag Partnership, leading the investigations at the Spanish Indian Residential School[1]

Some Indigenous communities leading search and recovery efforts to locate the missing children and unmarked and mass graves insist that the children have been disappeared by Canada.[2] Canadian politicians have also periodically referred to the children who were never returned home from Indian Residential Schools as "disappeared." For example, Jim Prentice, former minister of Indian Affairs and Northern Development, stated in 2007 that, "we will get to the bottom of the *disappeared children*."[3] Unfortunately, Canada has yet to do so.

Canadians are beginning to understand the reality that many of the children in the Indian Residential School System were disappeared by those who were responsible for and operated the institutions. Thousands of children were taken from their homes and communities, placed in the care of the State and churches, and never returned home.[4] With global attention on the missing children and unmarked burials in recent years, some have begun to draw connections between the offence of enforced disappearance and the fate of the children in the Indian Residential School System.[5] How is it possible that the families of the children and the

communities they were taken from have been left to wonder what happened to the children who were never returned home? How should we understand Canada's lack of action to investigate their deaths and to return the children to their families and communities?

The children did not just vanish. They were not disappeared by accident. The forced removal and transfer of Indigenous children was Canadian law and policy.[6] The State actively sought to break their sense of identity and belonging and their bonds to their families and communities. Those in charge of these institutions knew the children's chances of surviving were low.[7] They exposed the children to diseases that killed them, refused to provide them with enough food, and permitted non-consensual experiments to be conducted on them.[8] The conditions were so deadly that cemeteries were a regular part of the design of these institutions.[9]

After being taken from their families and communities to Indian Residential Schools, many of the children were then transferred across a maze of government- and church-controlled institutions. When the children died, the federal government routinely failed to properly investigate their deaths. It then ignored the pleas of families to be informed of what happened to their children and, where desired, to have their remains returned. Many of the children are buried in unmarked graves, which are hallmark indicators of clandestine activities, wrongful deaths, and well-organized efforts to cover up human rights violations. The actions and omissions of the federal government and its agents and officers disappeared many of the children. These children, their families, and their communities are the victims of enforced disappearances as defined under international human rights law. Their disappearance is an ongoing human rights violation and likely also constitutes a crime against humanity for which the Canadian State bears responsibility.

This chapter examines whether at least some of the deaths of children who were never returned home from Indian Residential Schools and associated institutions constitute enforced disappearances under international human rights law and international criminal law. Specifically, it includes a discussion of:

- How international law applies in Canada;
- Enforced disappearances under international human rights law, including the right to truth;
- Enforced disappearances as a crime against humanity under international criminal law; and
- The purposeful legal gap that the federal government has created in relation to enforced disappearances.

THE DIFFERENCE BETWEEN "MISSING" AND "DISAPPEARED" CHILDREN

> There was no specific mandate for [the Truth and Reconciliation Commission of Canada (TRC)] to look for missing children or to find them. And in fact we corresponded with the federal government on more than one occasion ... saying we are doing this work. Some of it had been begun by a working group before the Commission ever started. We could see the value of that work and mostly we could understand the importance of it. And it kept coming up. In the Statement Gathering, Survivors would tell us about children they knew who had died at the school or children who disappeared and they never knew what happened to them.
>
> — Marie Wilson, Former TRC Commissioner [10]

In volume 4 of the TRC's Final Report, entitled *Missing Children and Unmarked Burials*, the TRC began the important work of gathering information and investigating the deaths of Indigenous children to determine the identities of the children, the causes of their deaths, and how and where they were buried.[11] The TRC described the children as "missing" and explained what the term meant and who it covered:

> The term missing children in this context includes both those who died at school and those whose fate after enrolment was unknown, at least to their parents. This could include, for example, students who might have run away to urban centres and never contacted their home community again, students who never returned to their home communities after leaving school, students who became ill at school and were transferred to a hospital or sanatorium and died there (possibly several years later) without parents being informed, or students who were transferred to other institutions such as reformatories or foster homes and never returned home.[12]

Some children are not only missing. Since it was the State and its agents, including the church entities that were funded by the government to operate the institutions, that were responsible for the children's disappearances and deaths, many of the children and their families are the victims of enforced disappearances.

There is an important distinction between the terms "missing" and "disappeared." While both refer to the absence of a person, forensic archaeologist and anthropologist Derek Congram

clarifies that being disappeared specifically requires the absence to be, "a result of force against the will of a person."[13] Terms like "missing" or "vanished" may be accurate in a literal sense, and the term "missing" helpfully describes the longing of families for their loved ones.[14] These terms, however, fail to reflect the federal government's culpability and responsibility for the fact that children died and went missing not because of the children's choices or actions but because of purposeful State violence, action, and force. The terms "missing" or "vanished" likewise do not reflect the federal government's subsequent refusal to search for and return the children. By contrast, in accordance with international legal criteria, the "enforced disappearance" of children explicitly recognizes the State's responsibility for such disappearances as well as its obligation to ensure a full investigation into the deaths of the children, to notify families of the fate of the children, and to provide remedies to victims, including families and communities.

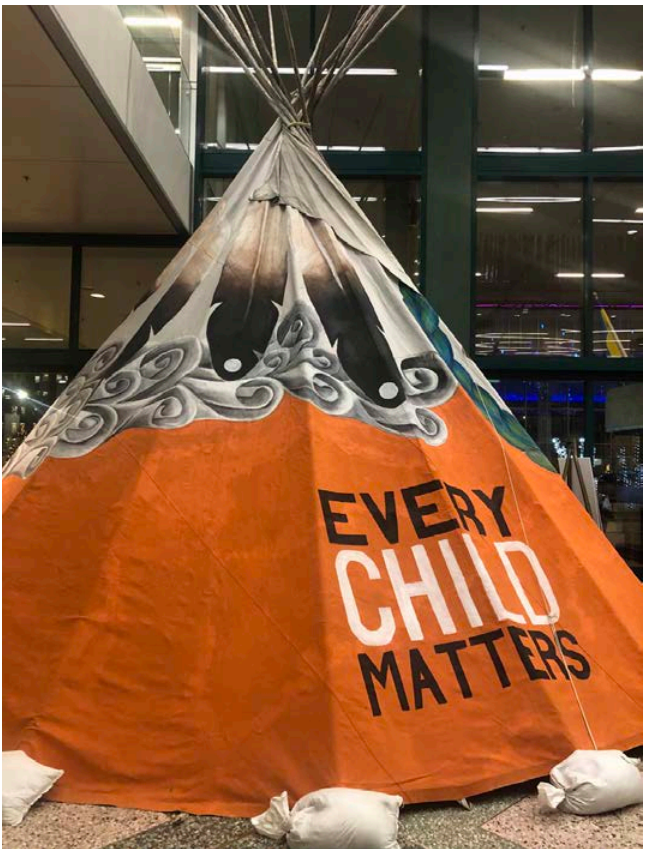
In its 2011 report on its mission to Mexico, the Working Group on Enforced or Involuntary Disappearances highlighted the link between a culture of impunity and a tendency on the part of States to use the term "missing" to soften its description of cases that in fact may constitute enforced disappearances:

> Due to the prevailing impunity [in Mexico], many cases which could come under the scope of the offence of enforced disappearance are reported and investigated as different offences, or are not even considered to be offences.... The Working Group received many reports of cases in which unlawful or arbitrary deprivation of liberty was classified as a different offence, such as abduction or abuse of authority, or persons were simply considered "missing" or "lost" (particularly groups such as women, children and migrants); proper investigations are not being conducted to rule out the possibility that such persons might be victims of enforced disappearance.[15]

To date, the federal government has also used the term "missing" to include the children who were disappeared at Indian Residential Schools and associated institutions.[16] Shifting towards the use of the term "disappeared" has significant impacts: it highlights the gravity of the human rights violations committed against the disappeared children and demands that Canada uphold its international legal obligations to the children, their families, and their communities.

It is important to note that not all children forced into Indian Residential Schools were victims of enforced disappearances. When children were forcibly taken to the institutions, families may have known where they were taken—at least initially. Parents were sometimes

able to visit their children. Some children returned to their communities during the winter and summer breaks before being taken back to the institution. If the children remained at the Indian Residential School to which they were initially taken, and parents knew where they were and could see their children periodically, these children were not—or not yet—disappeared. Similarly, children who were returned to their families and communities or who were in contact with their families after they left the institutions were also not the victims of enforced disappearance.



Every Child Matters Tipi, National Gathering on Unmarked Burials in Winnipeg, Manitoba, November 28, 2022 (Office of the Independent Special Interlocutor).

The only way to determine whether a child is the victim of an enforced disappearance is to conduct a full investigation. Certain legal criteria must be met to determine whether a person has been the victim of an enforced disappearance. As the analysis in this chapter demonstrates, these criteria are likely met in the context of many of the children who were never returned home from Indian Residential Schools.

THE APPLICABILITY OF INTERNATIONAL LAW IN CANADA

At the outset, it is important to understand how international law works and how it applies in Canada. Canada has a dualist legal system and approach to international law, including international human rights law.[17] For international human rights treaties and conventions to apply in Canada and therefore be justiciable in Canadian courts, they must be ratified and then incorporated into domestic law.[18] The exception to this general rule is where human rights obligations are considered to have the status of customary laws or norms accepted as binding

on all States. In such cases, States must comply with customary laws or norms, and derogation is not permitted. This means that Canada must comply with binding customary laws or norms even if it has not signed onto a treaty that contains these laws or norms.[19] Where international law is binding on Canada, "Canadian courts have an obligation to interpret domestic law in conformity with the relevant international norms, as far as this is possible."[20] Further, every treaty in force is binding upon the State parties to it and should be followed in good faith, even when it has not been legislated into domestic law.[21]

In addition, there is a broad presumption that domestic law should conform with international law.[22] If international laws have not been formally adopted into Canadian law and do not have the status of customary law, the international human rights treaties that Canada has signed onto can still shape the way in which courts understand Canada's obligations to people living within Canada. Unless implemented domestically, however, these international laws cannot be used as the basis to directly hold the State to account in Canadian courts.

The fact that Canada is a dualist State means that it is difficult to hold the federal government to account in Canadian courts for a breach of international human rights law unless those rights constitute customary international law or the federal government has enacted domestic legislation containing the same rights. This is so even if Canada has signed onto these international conventions and treaties. For example, even though Canada has signed onto the 1989 *Convention on the Rights of the Child*, it cannot be used in Canadian courts to hold Canada to account for human rights violations against children under the Convention.[23]

Canada uses its status as a dualist State to uphold the mythology of Canada as a benevolent peacemaker. It does so by demanding that other States abide by international human rights laws and standards, while not necessarily abiding by these standards in Canada, especially in relation to Indigenous Peoples.

Monist versus Dualist States

States are either monist or dualist in their acceptance and application of international law. In monist States, like Germany and France, international treaties that the State signs are automatically translated into domestic law and, therefore, enforceable. In dualist States, like Canada, there are two steps that must be followed for international law to apply in the State: (1) the State must sign onto an international treaty and (2) the State must enact legislation that incorporates the treaty's obligations into domestic law. It is only after both these steps are taken

that the international law is binding and, therefore, justiciable in domestic courts. Dualist States therefore choose which international laws they abide by domestically, except for norms that are considered customary international law and therefore apply regardless of a State's position on them. If domestic legislation is not enacted, there is no remedy in Canadian courts for people residing within Canada of breaches of the international human rights that Canada has accepted at the international level.

In Canada, the dualist approach, coupled with Canada's federalist structure of government (that is, the division of powers between the federal government and the provincial governments), adds a layer of complexity in adopting international legal obligations into Canadian law. The federal government cannot encroach on provincial jurisdiction, even to comply with international treaties.[24] Although the federal government has, "the sole authority to negotiate, sign and ratify international treaties," it consults with provincial governments before signing treaties that impact matters of provincial jurisdiction.[25]

In political scientist Brooke Jeffrey's view, the dualist approach in Canada has certain benefits as, "a thorough examination of existing legislation at both the federal and provincial levels becomes an essential element of the process of human rights treaty ratification and implementation in Canada."[26] It also has drawbacks, however, since Canada has regularly used the rationale of respecting federalism to avoid signing onto binding international human rights treaties.

Can International Law Be Applied Retroactively?

Under international law, some human rights laws and treaties signed and ratified by Canada generally do not apply to violations that occurred before their acceptance by the State. Even if a treaty was created earlier than a State signed on to it, it may not apply before the State's date of acceptance. For example, the *International Covenant on Economic, Social and Cultural Rights* came into force in 1967, but Canada only acceded to the covenant in 1976, meaning its obligations only began in 1976.[27]

In principle, applying human rights that were established through specific international treaties retroactively before the treaty's creation is not possible unless (1) the norms and principles constituted customary law prior to the treaty's creation or (2) there are exceptional circumstances. However, certain atrocities have justified the retroactive application of international law. In particular, the prosecution of Nazi crimes at Nuremberg following the Second World War relied on the retroactive application of individual criminal responsibility for the, "crime

against peace."[28] During the prosecution of Adolf Eichmann, a key perpetrator of the Holocaust, an Israeli court justified the retroactive application of international law, including crimes committed against the State of Israel that did not exist at the time the crimes were committed.[29] The retroactive application of international law, therefore, has been previously permitted to address egregious atrocities.

Some treaties were in effect and can apply directly to at least some of the harms committed against the children at Indian Residential Schools and associated institutions. The *Universal Declaration on Human Rights*, for example, would apply to violations committed after 1948.[30] Other human rights may also remain applicable in relation to harms committed prior to their articulation in treaties under international law, particularly if the human rights violations may be characterized as ongoing or continuing crimes.

Although, for the most part, international law cannot be applied retroactively, applying a human rights lens to the missing and disappeared children and unmarked burials offers insight into the kinds of violations and harms that the children, their families, and their communities experienced and continue to experience. This approach illustrates Canada's responsibility for these harms, not merely for the past but now and into the future. Articulating past violence in the language and logic of the human rights that were regularly, purposefully, and systematically denied Indigenous Peoples within Canada will also aid in decolonizing international law.

Decolonizing International Law

Many scholars have persuasively articulated the ways in which colonialism has informed the development of international law. Legal scholar Antony Anghie argues that, "colonialism was central to the constitution of international law."[31] He notes that the main dynamic that has animated the creation of international law has been the positioning of European colonial societies as "civilized" in contrast with non-European societies, which were positioned as "uncivilized."[32] Europeans therefore justified the "discovery" of territories outside their Nations' borders under the guise of "civilizing missions," which were aimed at, "redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe."[33]

During this time, theories were created to support the false premise that European cultures were more advanced on the evolutionary scale than Indigenous cultures.[34] The motivation to Christianize and Europeanize Indigenous Peoples was justified as necessary, generous, and benevolent. As political scientist James Tully argues, colonizers, "saw themselves as enlightened guardians who were preparing lower, childlike and pre-consensual peoples for a superior, modern life; in this way they could regard the destruction of other cultures with moral

approval."[35] By viewing Indigenous Peoples and their cultures as backwards and uncivilized, European powers could justify their violent and discriminatory treatment of Indigenous Peoples.

The dehumanization of Indigenous Peoples was also linked to the taking of Indigenous lands and territories. The claiming of "new lands" by European colonial powers needed justification because, at the time of colonization, international law did not allow for the claiming of lands occupied by other sovereign Nations.[36] European colonizers therefore created theories and legal regimes that supported the application of European laws in territories outside their Nations' borders,[37] such as the Doctrine of Discovery and *terra nullius*. The theories they created equated sovereignty and nationhood with civilization and deliberately positioned Indigenous Peoples outside this definition.[38] Many international legal scholars point to the reasons for the development of international law to resolve disputes amongst European colonial Nations in the context of claiming lands outside their borders in the name of their sovereignty.[39] This focus explicitly excludes consideration of the laws, rights, and interests of Indigenous Peoples in the creation of international law.

False and racist views have also shaped other colonial aspects of international law. There have been many appeals over the years in international fora for the recognition of Indigenous Peoples as sovereign Nations under the United Nations (UN) international legal system.[40] However, these appeals have routinely been denied. Anghie highlights the fact that the definition of sovereignty at international law was created to definitionally exclude non-European peoples.[41] Irene Watson, an Australian Indigenous scholar, makes a similar argument and adds that, more recently, the lack of recognition is based on the fear that it could compromise the territorial integrity of current nation-states.[42]

Given the colonial origin of international law, some may ask whether it is useful to consider international law in the context of the missing and disappeared children and unmarked burials. Like all systems of law, international law has the ability to support people's rights and freedoms as well as restrict them.[43] Legal scholar Sujith Xavier and Jeffery Hewitt, a Cree scholar, observe that:

> "Law," in its many iterations, has played an active role in the dispossession and disenfranchisement of colonized peoples. Law and its various institutions are the means by which colonial, imperial and settler colonial programs and policies continue to be reinforced and sustained. In the same vein, if conceptualized and deployed correctly, law may have the potential to "decolonize" our respective communities and societies.[44]

On the one hand, the possibility exists for the set of colonial structures that form the foundations of international law to, "continually repeat themselves."[45] On the other hand, international law has the potential to be extricated from its colonial underpinnings and become a useful mechanism to access justice for colonized people and communities across the world, including Indigenous Peoples within Canada.

Under international law, there are important mechanisms for recognition, remedies, and reparations for human rights violations committed by States against its citizens. These exist in various international treaties and in binding customary laws. The ratification of the *UN Declaration on the Rights of Indigenous Peoples* constitutes an important step forward in the process to decolonize international law.[46] It provides an important lens through which existing international human rights instruments can be interpreted and adapted to respect Indigenous sovereignty and self-determination and uphold Indigenous laws.

Throughout this Final Report, international law is analyzed through an Indigenous legal and anti-colonial lens. Even if the international laws are not technically applicable, the analysis draws on international legal concepts and case law to identify and illuminate the nature of the atrocities committed against Indigenous children in Canada. Even if Canada chooses not to be bound by international human rights law, naming the human rights violations that the State has perpetrated against Indigenous children, families, and communities serves as an important denunciation of Canada's conduct.

THE INTERNATIONAL HUMAN RIGHTS LAW OF ENFORCED DISAPPEARANCES

> During the time I spent in the sanatorium, I met Inuit friends there from Greenland, [from] Nunavut. They were my sisters; they were my friends. And they would disappear in the middle of the night, and I would ask the nurses: "where did my friend go?" And she would say: "well your friend went home last night." I said to myself: "wow that's good, she went home to her family." Today I don't know what happened to my friends, I grieve for them [voice breaks] because they were my friends.... [M]y friends disappeared. I don't know where they are today.... But I continue to search, daily, every day, every minute. I look around when I travel, and I travel a lot. I look around hoping to see a glimpse of my lost friends.... I have searched but without success, all I see are empty shadows.
>
> — Inuk Survivor[47]

"Mission Schooner GUY Leaving; The Children Are Bound for the Convent at Fort Resolution" (Charles A. Keefer / Charles A. Keefer fonds / Library and Archives Canada / e011779455).

Enforced disappearances are tragically common and continue to be perpetrated worldwide. The UN Working Group on Enforced and Involuntary Disappearances (Working Group on Enforced Disappearances) has documented tens of thousands of disappearances since its creation in 1980.[48] In the twentieth century, various States across the world perpetrated disappearances, "not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear."[49]

International laws on enforced disappearances developed in the decades following the end of the Second World War, during which the first-ever policy of enforced disappearance was put in place—the 1941 Nacht und Nebel ("Night and Fog") decree of the Nazis.[50] Enforced disappearances became more known from the 1960s to the 1980s in Latin and South America, where they were a tool of choice for repressive regimes. People deemed subversive, inconvenient, or a threat by State authorities were regularly disappeared on the orders of governments. Autocratic regimes and dictatorships in Argentina, Guatemala, Chile, and Colombia disappeared tens of thousands of dissidents, opposition figures, political activists, and others. Victims included children, students, members of the clergy, professors, and reporters. They were often abducted, held incommunicado, and tortured by clandestine security and intelligence forces loyal to fascist and military governments.

Many were killed. In many cases, their bodies were disposed of in unmarked graves, mass graves, or at sea.[51]

Families of the disappeared in Central and South America campaigned tirelessly for the return of their loved ones or, at the very least, to be informed of their fate and to be able to bury the remains of their children, husbands, wives, sisters, and brothers.[52] Some family members of disappeared persons also organized and initiated the first forensic human rights investigations, establishing teams that carry on their work to this day and are now revered among the most important forensic humanitarian organizations in the world.[53]

Unfortunately, States continue to perpetrate enforced disappearances. Belarus disappeared vocal opponents of the country's long-standing dictatorship, with at least one Belarusian State agent admitting to participating in such crimes.[54] The enforced disappearance of civilians has also been raised in the context of Russia's invasion of Ukraine, where children have been the targets of abduction and forcible transfers into Russia.[55] In 2021, human rights groups detailed the use of enforced disappearances of political opponents and activists by Myanmar's military junta.[56] Sadly, the disappearance of people, including children, continues to be a common phenomenon around the world.[57]

Enforced disappearances have been prohibited under international human rights law for a long time. In 1992, the UN General Assembly adopted the *Declaration on the Protection of All Persons from Enforced Disappearance* (*Declaration on Enforced Disappearance*).[58] In 2006, States negotiated the *International Convention for the Protection of All Persons from Enforced Disappearance* (*Convention on Enforced Disappearance*), a binding, international human rights treaty focused on the enforced disappearances of persons.[59] The treaty defines enforced disappearances as a combination of several acts (in bold):

> the arrest, detention, abduction or any other form of **deprivation of liberty** by agents of the State or by persons or groups of persons **acting with the authorization, support or acquiescence of the State,** followed by a **refusal to acknowledge the deprivation** of liberty or by **concealment of the fate or whereabouts of the disappeared person**, which **place such a person outside the protection of the law**.[60]

Importantly, the *Convention on Enforced Disappearance* notes that States cannot derogate from the prohibition on enforced disappearances, meaning that no public emergency, threat to national security, war, or any other exceptional circumstances can justify the disappearance of persons.[61] The human rights violation of enforced disappearance therefore consists of four elements:

- A deprivation of liberty;
- State authorization, support, or acquiescence to the deprivation;
- A refusal to acknowledge or concealment of the fate of the disappeared person; and
- The placement of a person outside the protection of the law.

The Inter-American System on Human Rights

International human rights law governs the duties and obligations of States to respect, protect, promote, and fulfill the human rights of individuals on their territory. Human rights are articulated in international treaties between States, in customary practices that indicate that certain norms are legally binding, and in decisions from international bodies and courts. Enforced disappearances are identified as a violation of human rights under international human rights law. Two key regional human rights mechanisms are the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACtHR). Both are set up to monitor compliance by the member States of the Organization of American States (OAS). Canada has been a member of the OAS since 1990.[62]

The IACHR has a mandate that stems from the *Charter of the Organization of American States* and is made up of seven independent experts who do not represent any country and are elected by the General Assembly of the OAS.[63] Petitions may be submitted to the IACHR by individuals, groups, or organizations that allege violations of the human rights guaranteed in the *American Declaration of the Rights and Duties of Man* (*American Declaration*), the *American Convention on Human Rights*, and other Inter-American human rights treaties.[64] These allegations may indicate that a State is responsible for human rights violations where

the State or its agents took action, acquiesced (gave tacit consent), or failed to take action when they should have done so. In response to petitions received, the IACHR may:

- Visit countries;
- Carry out thematic activities and initiatives;
- Prepare reports on the human rights situation in a certain country or on a particular thematic issue;
- Adopt precautionary measures or requests for provisional measures to the IACtHR; and
- Process and analyze individual petitions with a view to determining the international responsibility of States for human rights violations and issuing the recommendations it deems necessary.

The IACHR does not make findings of individual liability. Rather, it determines the international responsibility of the member State for violations of human rights.

The IACtHR was established in 1979 and issues judgments on cases interpreting and applying the *American Convention on Human Rights* and other Inter-American human rights treaties.[65] The court only has jurisdiction to hear cases in relation to States that have ratified the *American Convention on Human Rights* and have accepted the jurisdiction of the court generally or expressly for a specific case. Canada has not yet ratified the *American Convention on Human Rights* or accepted the jurisdiction of the IACtHR.

Applying the Four Elements of Enforced Disappearance

All four elements of the test for enforced disappearances under international human rights law are met in the context of the children who died while in the care of the State and churches at Indian Residential Schools and associated institutions.

A Deprivation of Liberty

Enforced disappearances constitute one of the most serious violations of the right to liberty.[66] The right to liberty is set out in several international human rights treaties,[67] including Article 9(1) of the *International Covenant on Civil and Political Rights*, which states that, "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest

or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[68] The UN Working Group on Arbitrary Detention has clarified that a deprivation of personal liberty occurs when a person is held without their consent and is unable to leave at will.[69] Where an individual is not free to leave a given location at will, it raises the question of whether a, "de facto deprivation of liberty" or "de facto detention" has occurred.[70] A de facto detention, "is when an individual is in theory free to leave an establishment but in practice is unable to do so."[71]

The right to liberty, "provides safeguards against ill-treatment of those detained."[72] Even if an arrest or detention is lawful (that is, done in accordance with State laws), the right to liberty may still be breached due to mistreatment that violates the rights of the person while they are in the State's care and custody. The right to liberty, therefore, seeks to ensure respect for the human dignity of those arrested or detained and prevents the arbitrary and unlawful abuse of State power.[73] In the context of enforced disappearances, there is no requirement that the deprivation of liberty be arbitrary or unlawful. Persons who have been lawfully arrested or detained, but then are subsequently disappeared, still fall within the definition of enforced disappearances. If a person has been deprived of their liberty, the first part of the test for enforced disappearances has been satisfied.

The children at Indian Residential Schools and associated institutions were deprived of their liberty. The TRC characterized Indian Residential Schools as "detention facilities" and documented how the institutions were used as punishment for delinquent behaviour and as an alternative to sending children to jail.[74] They were taken from their parents and brought to Indian Residential Schools and associated institutions—in many cases, without their parents' or guardian's consent.[75] In other instances, parents were coerced, through various means, including threats of imprisonment and the use of food deprivation and starvation, to send their children to the institutions.[76] Once at these institutions, children were not permitted to leave of their own volition. The TRC concluded:

> It was [federal] departmental policy that no child would be discharged without departmental approval—even if the parents had enrolled the child voluntarily. The government had no legislative basis for this policy. Instead, it relied on the admission form that parents were supposed to sign. (In some cases, school staff members signed these forms.) By 1892, the department required that all parents sign an admission form when they enrolled their children in a residential school. In signing this form, parents gave their consent that "the Principal or head teacher of the Institution for the time being shall be the guardian" of the child.

> In that year, the Department of Justice provided Indian Affairs with a legal opinion to the effect that "the fact of a parent having signed such an application is not sufficient to warrant the forcible arrest against the parents' will of a truant child who has been admitted to an Industrial School pursuant to the application." It was held that, without legislative authority, no form could provide school administrators with the power of arrest. Despite this warning, well into the twentieth century, Indian Affairs would continue to enforce policies regarding attendance for which it had no legal authority.[77]

Many Survivors liken their experiences at Indian Residential Schools to that of being held in a prison.[78] The TRC also documented the attempts by many children to escape Indian Residential Schools and the fact that when children ran away they were severely punished upon being returned[79] and were often captured by police.[80] Children were also put in segregation rooms, such as closets, for weeks at a time for infractions of Indian Residential School rules.[81] Those who escaped were deemed to be "problems," with some being sent to institutions further away from their home communities[82] as well as to reformatories or youth detention facilities.[83]

The lawfulness of the children's detention and arrests was also questionable and varied through the operation of Indian Residential Schools. As the TRC noted, there were some periods of time when attendance of children with "Indian status" was required by law and the legislation did not apply to all Indigenous children who were actually taken to Indian Residential Schools.[84] The TRC also documented instances where parents were jailed for taking their children out of Indian Residential School without permission.[85] As noted elsewhere in this Final Report, the violent structural conditions imposed on Indigenous families and communities, and the various forms of State coercion deployed against them, can be understood as having forced children away from their families and communities and into the Indian Residential School System.

Finally, the mistreatment of children detained at Indian Residential Schools and associated institutions included conditions of malnutrition, harsh discipline, and rampant mental, spiritual, physical, and sexual abuse by those entrusted with their care. This mistreatment also breached the children's rights to liberty.

State Authorization, Support, or Acquiescence to the Deprivation

Under the *Convention on Enforced Disappearance*, an enforced disappearance is a human rights violation for which the State bears responsibility when: (1) State officials are directly involved in the disappearance; (2) people or groups of people are authorized by the State to disappear persons; or (3) people or groups of people disappear persons with the acquiescence of the State. The federal government clearly authorized the detention of children in Indian Residential Schools. It was Canadian policy to take the children from their families and deprive them of their liberty. In many instances, it was State officials—Indian Agents—who took the children to the institutions. In other cases, Royal Canadian Mounted Police (RCMP) officers or religious figures working with Canada's authorization took the children from their families and communities and thus deprived them of their liberty. Canada acquiesced to the enforced disappearances of the children. Under international law, acquiescence, "takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection."[86] The federal government may not have actively and explicitly authorized the disappearance of all the children, but it did acquiesce by failing to investigate the deaths and failing to notify families of the children's fate.

The *Convention on Enforced Disappearance* makes clear that all accomplices or participants in an enforced disappearance should also be held accountable under State law where they commit, are an accomplice to, or participate in an enforced disappearance.[87] It is not only those directly responsible for enforced disappearances who are accountable; superiors may also be held accountable if they:

> (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
>
> (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
>
> (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.[88]

Canada perpetrated the enforced disappearances of the children and must be held responsible. The federal government, its agents, and church entities established and operated the Indian Residential School System for over 100 years. Over the course of their operation and

since, the State forcibly removed Indigenous children from their families, disappeared them, and concealed their fate. It acquiesced to the deaths and enforced disappearances of the children to further its settler colonial aims of assimilating Indigenous Peoples.

Concealing the Fate of the Disappeared Person and Refusing to Acknowledge

The federal government failed to investigate or notify families and communities about the fate of the missing and disappeared children. According to the TRC, thousands of children died in the institutions, with many others dying after being forcibly transferred to sanitoria, hospitals, or shortly after returning home.[89] The TRC concluded that, "parents were often uninformed of their sickness and death. Due to Canada's cost savings policies, the children were buried away from their families in long-neglected graves. No one took care to count how many died or to record where they were buried."[90] The TRC also indicated that further work was needed to identify all the missing and disappeared children and the location of their burials.

Despite Canada's knowledge about the high rates of deaths for Indigenous children at the institutions, the federal government and the police failed to effectively investigate the vast majority of the deaths of children at Indian Residential Schools.[91] This failure was so significant that the TRC titled a whole chapter on the legal system "A Denial of Justice."[92] The failure to ensure proper investigations were done into the deaths of children at these institutions meant that the federal government did not determine, and still has not determined, whether and which children may have been victims of enforced disappearances.

In failing to investigate the deaths, Canada has also effectively failed to acknowledge the enforced disappearances of the children and has participated both actively and through inaction in the concealment of their fate contrary to the law against enforced disappearances.

Placing the Person Outside the Protection of the Law

The Working Group on Enforced Disappearances has clarified that any act of enforced disappearance has the effect of placing the persons outside the protection of the law.[93] It states that, "while deprived of his/her liberty, [a forcibly disappeared] person is denied any right under the law, and is placed in a legal limbo, in a situation of total defencelessness."[94] This placement outside the law is linked with the breach of the person's right to recognition before the law.[95] There is no requirement of intent on the part of the perpetrator to place the person outside the protection of the law; rather, it is the consequence that follows naturally from an enforced disappearance.

The Working Group on Enforced or Involuntary Disappearances

The Working Group on Enforced or Involuntary Disappearances (Working Group on Enforced Disappearances) was created by the UN Human Rights Commission in 1980 to, "examine questions relevant to enforced or involuntary disappearances of persons."[96] It is comprised of five independent experts.[97] The main function of the working group is to assist families in determining the fate of their disappeared loved ones. As part of this work, the Working Group on Enforced Disappearances facilitates communication between families, supporting organizations and governments, and makes requests to governments to carry out investigations into missing persons.[98] Additionally, the Working Group on Enforced Disappearances is mandated to:

- Disseminate information and promote understanding of the *Convention on Enforced Disappearance*;
- Submit reports after each of its sessions and annually to the UN Human Rights Council[99];
- Present observations to the UN General Assembly on relevant issues[100];
- Conduct country visits and provide advice when requested;
- Monitor States' progress towards fulfilling their obligations under the *Convention on Enforced Disappearance*; and
- Provide assistance to governments, including making recommendations on the implementation of the *Convention on Enforced Disappearance*.[101]

To date, the Working Group on Enforced Disappearances has received more than sixty thousand cases relating to 112 countries and is actively considering over forty-seven thousand cases in 97 States.[102] The working group is also engaging with regional human rights mechanisms to strengthen regional and national policy and institutional frameworks to address enforced disappearances. In addition, it is cooperating with international accountability mechanisms, such as the International Criminal Court (ICC).[103]

The Working Group on Enforced Disappearances is part of the UN's "Special Procedures." It was the first special thematic procedure of the UN Human Rights System.[104] Under these Special Procedures, the working group may take action even

in States that have not signed on to its governing statute. Although Canada is not a signatory to the *Convention on Enforced Disappearance*, the Working Group on Enforced Disappearances may still exercise its mandate in advising, educating, and reviewing the actions of the federal government and request that it conduct investigations into disappeared persons.[105] The Working Group on Enforced Disappearances may work in any country where an enforced disappearance has occurred. Its investigations are initiated following reports of disappearance from a relative of the disappeared or by organizations acting on their behalf where the family consents.[106]

Duty to Investigate and Provide Remedies

At international law, the 2016 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (*Minnesota Protocol*) makes clear that States have a duty to investigate all potentially unlawful deaths and suspected enforced disappearances.[107] The duty to investigate enforced disappearances under international human rights law has been repeatedly confirmed in international courts. The IACtHR is the primary judicial body that determines State responsibility for human rights violations in the Americas. Crucially, it has found that the obligation to respect the rights contained in the *American Convention on Human Rights* requires States to investigate any human rights violations, including disappearances.[108]

In *Velásquez Rodríguez v. Honduras*, a landmark case that dealt with the disappearance of university student Manfredo Velásquez, the IACtHR emphasized that the State's obligation to investigate persists for as long as the fate of the victim is unknown:

> There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velásquez had been a victim of that practice.... *The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared.* Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, *the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains*.[109]

In this same case, the IACtHR dealt with State obligations to investigate human rights violations and disappearances, even when those individuals directly responsible for the violations were not State agents. The court found that when the State and its officials fail to take effective action to appropriately investigate or remedy a human rights violation, the State can be considered to have endorsed the violation, and the State's own inaction is, in and of itself, a human rights violation:

> The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.[110]

Since this decision, the IACtHR has issued many more decisions on enforced disappearances, confirming the obligation on States to investigate disappearances perpetrated in their territory.[111]

Regional Human Rights Bodies

There are three primary regional human rights systems worldwide—in Europe under the *European Convention of Human Rights*,[112] in Africa under the *African Charter on Human and Peoples' Rights*,[113] and in the Americas, primarily under the *American Convention on Human Rights*.[114] All of these treaties have their own corresponding regional human rights bodies to which complaints can be brought.

Owing to the prevalence of disappearances in Latin and South America, no system has contributed as significantly to the understanding and jurisprudence regarding enforced disappearances as the Inter-American human rights system. Many countries in the region are leading reparations efforts in the context of recovering and identifying the disappeared. In 1994, the OAS, which is made up of States in North America, Central America, and South America, created its own international treaty on the subject—the *Inter-American Convention on Forced Disappearance of Persons* (*Inter-American Convention on Forced Disappearance*).[115] As discussed in more detail below, Canada is not a member.

Canada has an obligation to investigate the deaths of the children to determine if any are the victims of enforced disappearances. As legal scholars Catherine Morris and Rebekah Smith note:

> Canadian authorities are obligated at international law to ensure prompt, thorough, and impartial investigations into all potentially unlawful deaths (including disappearances) in accordance with UN standards (the *Minnesota Protocol*). It does not matter how long ago the deaths or disappearances occurred. These international standards require that investigations be conducted with full respect for victims' relatives, who have the right to know the truth about what happened to their disappeared loved ones.[116]

The fate of the following children must be investigated to determine whether they meet the definition of enforced disappearances under international human rights law:

- Children buried in unmarked and mass graves at former Indian Residential Schools and associated sites;
- Children transferred to sanatoria, hospitals, and other associated institutions, who died and whose bodies were disposed of or buried;
- Children who ran away and were never found;
- Children who disappeared into urban centres, towns, and cities across the country and lost contact with their families;
- Babies who were disposed of in furnaces or incinerators by the staff or administrators of Indian Residential Schools or associated institutions; and
- Babies born to girls at these institutions, who were taken, in some cases out of the country, and may still be alive.[117]

The State, pursuant to international law, has the duty to investigate. However, in the context of the missing and disappeared children, Survivors, Indigenous families, and communities have stated that Canada cannot investigate its own wrongdoing.[118] Indigenous Nations within Canada, exercising their sovereignty, are best placed to lead these investigations. Canada's obligation, therefore, is to provide sufficient, long-term funding, resources, and support for Indigenous-led investigations into the deaths and disappearances of children at Indian Residential Schools and associated institutions. This would support efforts to decolonize international law. In addition, where those leading the investigations wish to engage with State-based police, forensic, coronial, or other services, all levels of government in Canada

must provide prioritized support for these investigations. Finally, if Survivors, Indigenous families, and communities decide not to lead the investigations themselves at any particular site or institution, they still have the right to choose who should lead the investigation, free from intimidation or coercion, and the government of Canada must support their choices.

Enforced Disappearances Are a Continuing Offence

The *Declaration on Enforced Disappearance* establishes that the human rights violation of an enforced disappearance is not fixed in time but constitutes an offence that continues as long as the disappearance is unresolved. Article 17.1 of the Declaration states that, "acts constituting enforced disappearance shall be considered a *continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons* who have disappeared and these facts remain unclarified."[119] International human rights courts have confirmed that, "enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole time that the crime is not complete, until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual."[120]

The continuing nature of the violation of enforced disappearances has significant legal consequences. Perpetrators are considered to still be committing the offence until they reveal the fate and whereabouts of the disappeared persons. The Working Group on Enforced Disappearances has clarified that perpetrators of enforced disappearances can be prosecuted criminally—by States or tribunals with jurisdiction—even when the disappearance began before the legal basis to prosecute was enacted.[121] This is supported by case law and by legal experts.[122]

The continuing nature of enforced disappearances also justifies the extension of victimhood to families and communities. If a violation is continuing under international human rights law, there must be a victim who can claim reparations and remedies. To the extent that direct family members are still alive, they would be entitled to do so. However, in many cases, in the context of the disappeared children, the disappeared child and their direct family members may no longer be alive. In addition, because the victims of these enforced disappearances were children, they may not have direct lineal descendants. As a result, victims must necessarily include the communities from which these children were taken. If victimhood was not extended to communities, it would benefit perpetrators who could just wait until all direct family members and lineal descendants died. This would lead to the denial of justice and a denial to the right to a remedy.

Given the above, the children who were forced into the Indian Residential School System whose fate remains unknown are disappeared. The Council of Europe's Commissioner for Human Rights has clarified that, even if there is evidence that a disappeared person has been

killed but their fate and whereabouts remain undetermined, it remains an enforced disappearance.[123] Therefore, even if the children have died or are presumed to be deceased, their deaths demand investigation, and their situation continues as an enforced disappearance unless and until their fate and whereabouts are established. Their disappearance is a continuing human rights violation that Canada can and must remedy by fully supporting independent investigations led by Indigenous communities and providing appropriate reparations.

The State Owes Remedies to Victims of Enforced Disappearances

The right to a remedy is enshrined in international human rights law[124] and requires that victims have access to competent institutions or judicial bodies that can investigate and remedy the human rights violations committed against them.[125] Without the right to a remedy, there would be no recourse for victims of human rights abuses, no way to hold violators to account, and little substantive value to human rights protections. According to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in 2005, States have a duty to investigate gross violations of human rights and, "if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."[126] The Guidelines note that:

> Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
>
> (a) Equal and effective access to justice;
>
> (b) Adequate, effective and prompt reparation for harm suffered; and
>
> (c) Access to relevant information concerning violations and reparation mechanisms.[127]

The Guidelines add that, "victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families."[128] Under its list of possible reparations, the Guidelines explicitly note the need to address enforced disappearances, stating that the satisfaction of victims' rights should include:

> The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance

> in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities.[129]

Victims of enforced disappearances, including their families and communities, have a right to an appropriate remedy. This necessarily starts with an investigation into what happened and why.

Under the *Convention on Enforced Disappearance*, States are required to, "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains" and to "ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."[130] As possible remedies, the *Convention on Enforced Disappearance* cites restitution, rehabilitation, and satisfaction,[131] including the restoration of dignity and reputation and guarantees of non-repetition.[132] The State also has an obligation to prevent and sanction anyone who frustrates the right to truth by not recording, withholding, or recording inaccurate information regarding the deprivation of liberty of any person.[133]

In the context of remedies, the return of remains is especially important when the direct victim of a disappearance subsequently dies or is killed. As Grażyna Baranowska, an international law expert, writes:

> The return of the remains becomes the key issue for the majority of families of disappeared persons, and frequently it is only the return of the remains that makes it possible to start the mourning and proper burial processes. Many families refuse to recognise the disappeared person as dead until his or her fate is fully established and the remains have been recovered.[134]

For families of the disappeared children, remedies and reparations include:

- A full investigation and disclosure of the fate of each child;
- An acknowledgement of the harm and trauma of those searching for and left to wonder what happened to their disappeared loved ones; and
- Measures to dignify the life of the disappeared person by finding out what happened to them and, where applicable, returning their remains to their families for a proper burial.

The right to an effective remedy under international human rights law is absolute. In Canada, the federal government must accept that it is responsible for these violations and provide effective remedies for the enforced disappearances of the children. To the extent that the fate and whereabouts of the children remain unknown, it compounds the harm that Canada is perpetrating on the disappeared children, their families, and their communities.

The Families and Communities of the Disappeared Person Are Also Victims of Enforced Disappearances

The *Declaration on Enforced Disappearance* includes a broad definition of victims of enforced disappearances. Article 24.1 defines victim as, "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."[135] This broad definition of victims recognizes the significant harm to families and communities caused by enforced disappearances. In many cases, the intention of the perpetrators is to torment not only the direct victim but also their wider circle of family and friends. As Baranowska explains:

> Enforced disappearances were chosen as a means of violence precisely because they affect not only the disappeared person. The perpetrators are aware that such a disappearance has a devastating effect on the family members of the disappeared, who are purposely kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty.[136]

Enforced disappearances shatter families. They constitute cruel and inhuman treatment for those who wait for the return of their loved ones.[137] The anguish they produce is felt through communities, across time, and from one generation to the next, creating, "a network of victims that extends far beyond the individuals that are directly subjected to this human rights violation."[138] The harm associated with a person's disappearance is more than the absence of a physical body. It is also the disappearance of kinship, a breaking of familial and community bonds, and a threat to the very memory of the disappeared person, whom they are unable to mourn and commemorate. There is a loss and a pain caused by disappearances that is difficult to articulate and that law cannot adequately address, but which is acknowledged by the extension of victimhood to the families and communities of the disappeared person. As Kamari Clarke, a professor at the University of Toronto in the Centre for Criminology and Sociolegal Studies and the Centre for Diaspora and Transnational Studies, explains:

> For the experience of the loss of the life of a loved one results in a visceral response that is felt and embodied with feeling and pain. The

> daily reminders of loss cannot be easily heard or felt or seen. The insistence on victim status for the family and loved ones of the disappeared provided a domain for the recognition of their loss. It also highlighted a way of thinking of the extension of the loved one's continuity of life.[139]

Enforced disappearances represent the appearance of a form of anguish and desperation to find the missing person, of "ambiguous loss," and of a gnawing, severe, and painful sense of unknowing.[140] Pauline Boss, an educator and researcher who pioneered the theory of ambiguous loss, explains, "you are stuck, immobilised, you feel guilty if you begin again because that would mean accepting the person is dead. Grieving is frozen, your decision-making is frozen, you can't work out the facts, can't answer the questions."[141] This ambiguous loss arises from not knowing whether your loved one is alive or dead, not knowing the nature of their fate and death, and not knowing where they are buried.

The Office of the UN High Commissioner for Human Rights notes that families are left, "ignorant of the fate of their loved ones, their emotions alternating between hope and despair, wondering and waiting, sometimes for years, for news that may never come."[142] This not knowing and often, endless searching about the fate of the disappeared children is yet another aspect of the ongoing, brutal legacy of the Indian Residential School System and settler colonialism.

This broad definition of victims under international human rights law recognizes that the obligations, reparations, and remedies are owed to the disappeared victim's family. In the context of the disappeared children from Indian Residential Schools and associated institutions, it also means that the communities from which the children were taken are also victims and therefore entitled to reparations and remedies as well.

Other Key Aspects of Enforced Disappearances

Under international human rights law, existing treaties and case law have clarified various additional aspects of enforced disappearances.

Enforced Disappearances Constitute Multiple Human Rights Violations

In 1992, the UN General Assembly adopted the *Declaration on Enforced Disappearance*.[143] In Article 1, the Declaration states that the enforced disappearance of persons strikes at the

very core of human rights and that disappearances exist at the intersection of multiple human rights violations:

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the *Charter of the United Nations* and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the *Universal Declaration of Human Rights* and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.[144]

The disappearance of persons is therefore both composed of multiple human rights violations and a human rights violation in and of itself.[145] Banu Bargu, a political theorist and professor of the history of consciousness at the University of California, observes that, "enforced disappearance is not a simple" human rights violation but instead "violates different rights both simultaneously and serially."[146] In addition to the right to life and liberty, it violates the human right to recognition before the law.[147] Other human rights violated by enforced disappearances include, but are not limited to, the right not to be subjected to torture or other cruel, inhuman or degrading treatment, the right to a fair trial, the right to education, the right to health, and the right to an adequate standard of living.[148]

The disappearances of the children who were forced into the Indian Residential School System were the product of a confluence of all the above human rights violations. The children were denied any recourse to law, while, at the same time, the mistreatment and harsh discipline committed against them was legally sanctioned.[149] The children enjoyed neither liberty nor security. Instead, many were victims of emotional, spiritual, physical, and sexual abuse, malnutrition and disease, and medical experiments, among other atrocities. The deaths of thousands of Indigenous children are evidence of their right to life being breached by the Canadian State.

The Enforced Disappearance of Children Is Particularly Egregious

The enforced disappearance of children is viewed as especially egregious under international human rights law.[150] As a result, children receive special emphasis in both the *Declaration on Enforced Disappearance* and the *Convention on Enforced Disappearance*.[151] Article 25 of the *Convention on Enforced Disappearance* requires States to take necessary measures to prevent and punish, by way of criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.[152]

The Convention adds that States should, "take the necessary measures to search for and identify the children ... and to return them to their families of origin."[153] The obligation to investigate the disappearance of children has been further clarified by the Working Group on Enforced Disappearances:

> States should pay particular attention to the expeditious resolution of cases involving child victims of enforced disappearance. Recognizing that an enforced disappearance is a continuous crime, acknowledging enforced disappearance as an extreme form of violence against children, and taking into account the special measures of protection that must be afforded to children, States have an obligation to conduct prompt and full investigations in order to determine the whereabouts of the child or of his or her parent or guardian. Because of children's dependence on adults, the impact of the family separation, and their potential vulnerability and threats to their development and life, States should conduct expeditious investigations of cases involving child victims of enforced disappearance. States must conduct the investigation of enforced disappearances of children in an effective and prompt manner so that it is done in a reasonable amount of time.... These investigations should be assumed as a State obligation, and should not be deemed the responsibility of the victim's family.[154]

The Working Group on Enforced Disappearances adds that the enforced disappearance of children is an extreme form of violence that cannot be justified under any circumstances and that, "all forms of enforced disappearances of children are preventable."[155] The Working Group on Enforced Disappearances further details the long-term harms that flow from the disappearances of children:

> The Working Group understands that the enforced disappearance of children and their separation from their parents or relatives harms in particularly grave ways the mental, physical and moral integrity of children. In all circumstances, as child victims of enforced disappearances or as relatives of a person who disappeared, they experience feelings of loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on the age and the specific circumstances of the child. The Working Group considers that the separation of children from their families has specific and especially serious effects on their personal integrity that have a lasting impact, and causes great physical and mental harm.[156]

As with other victims of enforced disappearances, the disappearance of children comprises multiple human rights violations.

The enforced disappearance of children also violates rights protected by the 1989 *Convention on the Rights of the Child*. Article 7 of the Convention provides that children, "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents*."[157] Further, children are guaranteed their right to an identity and its prompt recovery, if it is ever lost. According to Article 8 of the *Convention on the Rights of the Child*:

1. States Parties undertake to *respect the right of the child to preserve his or her identity*, including *nationality, name and family relations* as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall *provide appropriate assistance and protection*, with a view to *re-establishing speedily his or her identity*.[158]

This right to an identity cannot be taken away or lost, "It lasts for life. As an enabler for our other rights to function, it's the bedrock of a healthy and diverse society."[159]

Victims Who Were Disappeared as Children Cannot Age Out of Enforced Disappearances

Children who are victims of enforced disappearances cannot "age out" of the disappearance. Until and unless it is resolved, the human rights violation continues into adulthood. So too do State obligations to address and remedy the disappearance.[160] This has been shown in the context of Argentina's 1976–1983 military dictatorship, where the babies of disappeared women deemed subversive to the State were covertly transferred into the custody of members of the military for adoption. According to Jeremy Sarkin, a research professor of law at NOVA University in Lisbon, Portugal, and Elisenda Calvet Martinez, an associate professor of international law at the University of Barcelona, "children whose mothers were detained when they were born were removed to prevent them from becoming the next generation of 'subversives.'"[161] Many of those children have been required by the courts to provide DNA samples in order to ascertain their identity and, therefore, their relationship to the families of the disappeared women.[162]

This is important in the context of the search and recovery of the missing and disappeared children. During my Mandate, it became clear that some children who were taken to an Indian Residential School were then forcibly transferred to other associated institutions—sometimes multiple institutions—and remained in such institutions during the full course of their childhoods. They then became adults and died in the care and custody of the State.[163] Since children cannot age out of enforced disappearances due to the ongoing nature of the violation, the right to a full investigation and remedy continues to exist. Remedies include the right to have the remains of the disappeared person returned to their families and communities.

Enforced Disappearances and the Right to Truth

> Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.
>
> — Frank Haldemann and Thomas Unger, "The UN Anti-impunity Framework"[164]

In his report for the UN Commission on Human Rights, international legal expert Louis Joinet concluded that the right to truth is an inalienable right intricately linked to the non-repetition of human rights violations. It is difficult to imagine how a human rights violation can be remedied unless victims and the public know why and how such violations were perpetrated in the first place. Indeed, as international human rights scholars have argued, "fundamentally, the right to truth arises from a general international norm that places an obligation on the state to respect and safeguard human rights."[165]

The right to truth is explicitly mentioned in the *Convention on Enforced Disappearance*, which reaffirms in its preamble, "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end."[166] The Convention further explains the meaning of the right to truth in Article 24(2), "each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."[167]

All victims, including families and communities, have the right to know the truth about what happened to the victim of an enforced disappearance. Melanie Klinkner, a professor in international law at Bournemouth University, and Howard Davis, a reader in public law at Bournemouth University, note, "the need of families to know the truth is vital and sometimes has primacy over wanting justice; the desire for justice may be a secondary consequence of the primary desire to know the truth."[168]

The right to truth developed from jurisprudence on enforced disappearances, especially at the IACHR and the IACtHR. The first mention of the right arose in a 1997 case on enforced disappearances at the IACtHR.[169] Ever since, the court has been a leading institution developing and confirming the right to truth. So too has the IACHR; according to international lawyer Yasmin Naqvi, "the Inter-American Commission on Human Rights stands apart as having presented the right to know the truth as a *direct remedy* in itself, based on Article 9(1) of the *Inter-American Convention* [*on Human Rights*], which stipulates that 'a State party is obligated to guarantee the full and free exercise of the rights recognized by the Convention.'"[170] The right to truth, therefore, is both an extension of the obligation on States to investigate human rights violations and a remedy in its own right.

The right to truth under international law is also evolving. There is some debate among scholars and legal experts about whether the right is a stand-alone legal right or whether it must be attached to other obligations and rights, such as the State's obligation to respect and

investigate human rights violations or the right of victims to a remedy.[171] Dinah Shelton, a renowned and authoritative scholar on human rights remedies, emphasizes that appropriate remedies depend on the circumstances of the case but that the minimum standards in the context of international human rights violations include, "restitution where possible, compensation where not, and a *right to the truth for the benefit of the injured parties and society as a whole.*"[172]

Without recognizing a right to truth and, therefore, knowing the fate of a loved one, human rights cannot be fully and freely exercised. This is the case even though instruments like the *American Convention on Human Rights* make no explicit mention of the right to truth; the IACtHR has effectively read the right into the Convention through the State's obligation to investigate contentious facts regarding human rights violations and the right of victim's relatives to know the fate of their loved ones, including where the person was buried. Following the Inter-American human rights system, the inclusion of the right to truth is growing in other regional human rights systems, including Europe's.[173] Therefore, there is a globalizing and universalizing trend reinforcing the right to truth. In the context of enforced disappearances, Klinkner and Davis clarify that the right to truth requires:

1. Information about the events leading up to the human rights abuse;
2. In the case of death, return of the human remains for commemoration purposes but also to safeguard economic survival of family, including education and health needs;
3. Information about the identity of the victim and of survivors;
4. Information about the identity of perpetrators; and
5. Information about the whereabouts and fate of the disappeared person.[174]

In addition to the right to truth as a right that belongs to victims and their families, it extends to the public. According to the UN Special Rapporteur to the Human Rights Council on extrajudicial, summary or arbitrary executions:

> Positive identification of the dead at its core involves recognition of the anguish of families not knowing the fate of their loved ones. Without identification and legal recognition of death, families of the missing not only are denied dignity in their grief, they encounter often debilitating impediments to their exercise of inheritance rights. Identification is an acknowledgment that, for many reasons, broader society too must know the truth.[175]

The right to truth in cases of human rights violations such as enforced disappearances is therefore recognized as relevant to individuals and to the public more generally.[176]

Crucially, and as the IACtHR has repeatedly determined, the right to truth is not satisfied by the creation of non-judicial bodies like truth commissions:

> It is clear that truth commissions do not take the place of the non-delegable obligation of the State to investigate the violations committed subject to its jurisdiction, to identify the persons responsible, to impose sanctions on them, and to ensure adequate reparation for the victim, all within the imperative need to combat impunity.[177]

Nor is the right to truth satisfied by a State offering or providing reparations.[178] States cannot compensate their way out of the obligation to investigate and establish the truth in relation to human rights violations such as enforced disappearances. Eduardo Gonzalez Cueva, the director of the International Center for Transitional Justice's Truth and Memory Program, writes:

> The right to the truth is not subject to conditions or trade-offs. Victims cannot be forced to waive their right to pursue justice and reparations or to accept an apology in order to obtain the truth. On the contrary, the right to the truth is complementary to all other aspects of an effective transitional justice strategy, such as judicial action and reparations.[179]

The right to truth is increasingly recognized as an indispensable, core obligation of States in relation to human rights violations. Canada, however, has not only failed to fulfill this obligation, but it has also frustrated the right to truth in relation to the disappearances of Indigenous children.

Summary of International Human Rights Laws on Enforced Disappearances

Enforced disappearances under international human rights law are made up of four constitutive elements:

1. The deprivation of the person's liberty;
2. The direct or indirect (that is, by acquiescence) involvement of government agents or officials;

3. The refusal to disclose the fate and/or whereabouts of the person; and

4. The placement of the person outside the protection of the law.[180]

In addition to the above core elements, enforced disappearances are:

- Human rights violations in and of themselves and encompass a multitude of other human rights violations;
- Ongoing offences that continue until the person is returned or their fate is established;
- Offences against the person disappeared as well as their families and communities; and
- Particularly egregious when the disappeared person is a child.

States must investigate enforced disappearances and uphold the family's and society's right to truth. In addition, States must provide remedies including compensation; locating and releasing the direct victim of enforced disappearances; and recovering, identifying, and returning the remains of the disappeared person for reburial to families and communities, where desired.

Possible Ways to Hold Canada to Account under the International Human Rights System

There are several possible ways that Canada may be held accountable under the international human rights system. First, it may be possible to issue a complaint at the UN Human Rights Council. According to the Council, "any individual, group of individuals, or non-governmental organization can submit a complaint," and the complaint can be made against any UN member state, which includes Canada.[181] A complaint, which is confidential, can be made, "whether or not the country has ratified any particular treaty or made reservations under a particular instrument."[182] There are some admissibility criteria for a complaint, and these include the exhaustion of domestic remedies, "unless such remedies appear ineffective or unreasonably prolonged" and the "complaint must not already be under examination by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights."[183]

Second, a complaint can also be brought to the IACHR. According to the Commission:

> Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica," the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará."[184]

As a member of the OAS, Canada is subject to the *American Declaration*.[185] The complaint may therefore be brought forward on this basis.

Third, a complaint can be brought to the Working Group on Enforced Disappearances by relatives of disappeared persons or civil society organizations working on the behalf of, and with the consent of, those relatives.[186] Importantly, the Working Group, "accepts cases from any country in the world," and "it is not necessary to exhaust domestic remedies before submitting a case to the Group."[187] Information regarding who submitted the case is kept confidential. For complaints relating to cases that are older than three months, the Working Group on Enforced Disappearances reviews the case and may then, "authorize transmission to the government concerned, requesting investigations to be carried out and the results to be passed on."[188] As such, the Working Group on Enforced Disappearances works as a communications channel between families and communities and State representatives in an effort to establish the whereabouts and fate of disappeared persons. Cases that are not resolved are kept open, and the Working Group on Enforced Disappearances sends yearly reminders to the State to establish the fate and/or whereabouts of the disappeared person. In addition, the Working Group on Enforced Disappearances conducts two country visits per year and publishes periodic reports. At the time of writing this Final Report, the Working Group on Enforced Disappearances has not visited Canada.

ENFORCED DISAPPEARANCES UNDER INTERNATIONAL CRIMINAL LAW

> They told us this would be heavy. They told us that it was not going to be easy to have these conversations.... I want to bring forward language of "crimes against humanity." Other world crimes are called crimes against humanity: certain acts committed by a State or on behalf of a State as part of a widespread policy typically directed against civilians in times of war or peace. The violent nature of such acts is typically considered a severe breach of human rights.... We talk about truth and reconciliation, but we still haven't talked about all the truth. [T]his government—needs to be held accountable for crimes against humanity.
>
> — Participant of the National Gathering on Unmarked Burials[189]

In addition to remedies under international human rights treaties and mechanisms, there are avenues for accountability for offences that constitute international crimes under the separate body of international criminal law. International criminal law is the branch of international law that seeks to establish criminal responsibility for individuals who commit international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression.[190] The development of this area of law is, in large part, the result of efforts since the end of the Second World War, and, in particular, since the end of the Cold War, to investigate and prosecute those responsible for mass atrocities.

While many of the horrors committed in the Indian Residential School System precede the articulation of international criminal law, it remains useful to consider how past events may amount to international crimes. Doing so can provide victims and the public with a greater understanding of how systematic, organized, and purposeful these abuses were. It can also help to decolonize international law—law that was crafted by States, including Canada, with the express intention of excluding Indigenous Peoples and preserving impunity for those responsible for the atrocity crimes committed against Indigenous children, people, and communities. The analysis that follows demonstrates how the enforced disappearances of the children at Indian Residential Schools and other associated institutions amount to crimes against humanity. It also endeavours to contribute to the broader effort to imagine, "what international law could be if it had not itself been implicated historically in colonization."[191]

Crimes Against Humanity

Crimes against humanity are atrocities that violate not only direct victims but also all of humanity.[192] According to the *Rome Statute of the International Criminal Court* (*Rome Statute*), enforced disappearances constitute crimes against humanity if they are, "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[193] The crime can be committed by either State agents or political organizations.[194]

According to the ICC, crimes against humanity "are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world."[195]

What Are Chapeau Elements?

Chapeau elements, also referred to as "contextual elements," are the required aspects of the crime for it to be considered a crime against humanity under international law and which distinguish it from other criminal acts. Chapeau elements must be satisfied in conjunction with any other specific elements that are subsequently set out.

To constitute a crime against humanity, the "chapeau elements" of the international crime of the enforced disappearance of persons need to be satisfied:

- The enforced disappearance must be part of a widespread or systematic attack against the civilian population; and
- The attack must be committed by perpetrators who have knowledge of the attack.

The Crime Must Be Part of a Widespread or Systematic Attack against a Civilian Population

According to the ICC, an attack against a civilian population is one committed, "pursuant to or in furtherance of a State or organizational policy to commit such attack" and, "requires that the State or organization actively promote or encourage such an attack against a civilian

population."[196] An enforced disappearance as a crime against humanity can also be committed in the context of a widespread or systematic attack against a population where the emphasis is on additional crimes against humanity, such as murder and torture. The attack on a civilian population does not need to be an act of physical violence but can be the result of systemic discriminatory treatment such as apartheid.[197] While it can be both, the attack in which the enforced disappearance of a person or persons is committed does not need to be widespread and systematic, just one or the other.

A widespread attack is one of sufficiently large scale that targets a significant number of people.[198] It occurs when the attack is, "massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims."[199] The widespread nature of an attack can also be demonstrated, "by the geographical scope of the attack."[200] The International Criminal Tribunal for the former Yugoslavia (ICTY) outlined additional factors that can be considered when determining whether an attack is widespread or systematic, including the, "consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes."[201]

An attack is systematic if it is perpetrated as part of a pattern or policy. As the ICTY has found, "the adjective 'systematic' emphasizes the organised character of the acts of violence and the improbability of their random occurrence. Thus, it is in the 'patterns' of the crimes, in the sense of the deliberate, regular repetition of similar criminal conduct that one discerns their systematic character."[202] The existence of a plan or policy can be indicative of the systematic character of the attack, but it is not a distinct legal element.[203] Only the overall attack—not the specific acts of any particular perpetrator—must be systematic.[204]

The Crime Must Be Committed with Intent

To qualify as a crime against humanity, an attack must be committed with simple intent, meaning intent to commit the underlying offence. Intent does not require that the perpetrator knows all the details of what will follow when someone is detained or their liberty is deprived.[205] Rather, according to the ICC, intent is satisfied, "if the perpetrator intended to further ... an attack."[206] In the context of an enforced disappearance, the perpetrator need only be aware that, following the loss of liberty of the person,[207] a refusal to acknowledge the deprivation of liberty or to provide information about the whereabouts of the detained person has occurred or will occur. The perpetrator also needs to have intended to remove the person from the protection of the law for a prolonged period.[208]

The Crime Must Be Committed with Knowledge of the Systematic Attack

For an enforced disappearance to constitute a crime against humanity under the *Rome Statute*, the perpetrator must have known, "that the conduct was part of or [the perpetrator] intended the conduct to be part of a widespread or systematic attack directed against a civilian population"[209] and "that his acts comprise part of the attack, or at least [that he took] ... the risk that his act is part of the attack."[210] Having sufficient knowledge, therefore, "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization."[211] According to the International Criminal Tribunal for Rwanda, "it is sufficient that, through his acts or the function which he willingly accepted, he knowingly took the risk of participating in the implementation of that attack."[212]

The Elements of the Test for Enforced Disappearance as a Crime Against Humanity

In addition to proving the elements listed above, there is a specific test that must be met for the offence of enforced disappearance to be considered a crime against humanity. Under the *Rome Statute*, the definition of enforced disappearance of persons as a crime against humanity is:

> the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.[213]

The ICC has articulated the elements of the crime against humanity of enforced disappearance of a person, which provides helpful guidance on interpreting the various parts of this definition (see Appendix A). Based on this definition, however, a persuasive argument can be made that the disappeared children were victims of enforced disappearances and that it therefore meets the threshold of constituting a crime against humanity under international criminal law.

Applying the Test to the Deaths of Indigenous Children at Indian Residential Schools

To date, at the time of writing this Final Report, there is no case law from an international court with jurisdiction over international crimes on enforced disappearances because no one has been tried and convicted of perpetrating this specific crime against humanity.[214] Recently, however, Canadian legal scholars have argued that the disappearance of children forced into the Indian Residential School System constitutes an international crime. Morris and Smith, for example, have argued that:

> Canada's pattern of failure to ensure effective and timely remedies for disappearances of Indigenous persons may amount to acquiescence in international crimes of enforced disappearance.... All elements of the international crime of enforced disappearance may be present in the situation of children still missing from the IRS [Indian Residential School] system: Children were forcibly detained in IRS institutions. Government officials were directly responsible for IRS policies and oversight of the schools. The disappearances of many of the children are continuing, and government efforts to cooperate with First Nations to investigate and reveal missing children's fate and whereabouts have been at best dilatory [i.e., slow or delayed].[215]

The children were civilians, and their disappearances were systematic and widespread. It was not limited to one area or moment in time. It happened across the country and was perpetrated unabated across generations. The Indian Residential School System was put in place, along with numerous other State-controlled institutions that detained children, deprived them of their liberty, and failed to return thousands of them home safely to their families. It constituted what Pauline Wakeham, an associate professor in the Department of English and Writing Studies and the Indigenous Studies Program at Western University, has termed "slow violence" perpetrated as part of a persistent settler colonial invasion.[216] It constitutes an attack committed over a long period of time rather than a time-limited or instantaneous atrocity. While it does not need to be both to satisfy the requirements of a crime against humanity, the disappearances of the children were both systematic and widespread.

The Canadian State not only had knowledge of the attack, but it also designed and implemented the laws and policies that perpetrated violence on Indigenous children, their families, and communities. It is impossible to fully appreciate the disappearances of the children without understanding the broader context in which they occurred: the forcible transfer of

children—committed by Canadian officials or by its authorized agents (including the RCMP and church officials)—from their families and communities into Indian Residential Schools. These officials and agents detained and therefore deprived the liberty of the children for prolonged periods of time. The church officials of various denominations, who ran these institutions on Canada's behalf then buried the children, and, in many cases, neither State nor church officials ever informed the families or communities of the children's deaths. These acts were purposeful and intentional. The Canadian State had knowledge that the children's liberty would be deprived at these institutions, and it had knowledge of the broader genocidal context of the attack. Indeed, the forcible transfer of children from one group to another, with the intent to destroy the group in whole or in part, was an act of genocide.[217]

This forcible transfer of the children deprived Indigenous children of their liberty and placed them in institutions with conditions that caused high death rates that were known to the federal government. The fate of many of the children who were disappeared has remained unknown for decades. Many remain disappeared to this day. The genocidal violence that forced the children into the Indian Residential School System and the disappearances of these children had the same settler colonial goal: the attempted elimination of Indigenous Peoples as distinct legal, political, and cultural groups.[218]

In addition to meeting the "chapeau elements" of a crime against humanity, the disappearance of some of the children also likely meets the elements of the specific test for enforced disappearances under international criminal law. The first four elements are similar to those of enforced disappearances under international human rights law. For clarity, all the elements are considered in turn below, and additional considerations that are specific to international criminal law are highlighted.

The Arrest, Detention, or Abduction of Indigenous Children as a Deprivation of Liberty

The analysis above in relation to a deprivation of liberty is equally applicable in the context of international criminal law. In addition, under international criminal law, perpetrators must have, "arrested, detained or abducted one or more persons."[219] Under the *Rome Statute*, the deprivation of liberty need only be either the result of an arrest, detention, or abduction and a subsequent refusal, "to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons."[220] According to the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which was adopted by the UN General Assembly in 1988, there is a distinction between

people who have been arrested, have been imprisoned, or have been detained.[221] Specifically, "arrest" and "imprisonment" relate to the commission of a wrong. A person who is detained, however, is, "any person deprived of personal liberty except as a result of conviction for an offence."[222]

The ICC's *Elements of Crime* note that, "it is understood that under certain circumstances an arrest or detention may have been lawful."[223] An enforced disappearance may be deemed a crime even if the initial loss of liberty was legal. The lawfulness of the detention of a person in no way diminishes culpability for their enforced disappearance. As noted, the children were detained at the Indian Residential Schools. They broke no laws and committed no crimes. Their liberty was deprived not because of any wrongdoing but because they were Indigenous. That fact that some children may have been periodically allowed to leave the institutions to visit families does not mean that they were not otherwise detained. Many sought to leave and were punished, often brutally, for simply trying to go home. In some cases, children were also arrested.

In addition to children being arrested and detained, some children may have been abducted. In many instances, children were taken to the institutions without parental consent by police officers, Indian Agents, or church officials. Just as is known to have occurred at other institutions, babies born to girls at the Indian Residential Schools may have been taken and adopted out. There are also many testimonies that babies were thrown in furnaces and incinerated. All these instances may meet the definition of abduction.

The Direct or Indirect Support of the State

The federal government both directly and indirectly supported the disappearances of the children. The perpetrators—Canadian agents and those running the institutions on Canada's behalf—detained thousands of Indigenous children at Indian Residential Schools, depriving them of their freedom or liberty. They knew many of the children would not survive. Those who ran the institutions on behalf of the federal government, including religious entities, did so with the full support and authorization of the State. The perpetrators knew that their conduct was aimed at destroying Indigenous communities, breaking apart Indigenous families, and assimilating Indigenous children. They had knowledge that these institutions were part of a wider system and Canadian policy that identified Indigenous children as targets. The children were forced either by law or coercion into Indian Residential Schools. From there, for well over a century, hundreds, possibly thousands, of Indigenous children were systematically disappeared.

A Subsequent Refusal to Acknowledge and Provide Relevant Information Regarding the Person's Fate

The refusal to acknowledge or provide information about the fate and deaths of the children began the moment that the child died. In many cases, parents were not informed of their child's death. For decades even as the crimes committed in the Indian Residential School System came to light, Canadian authorities refused to acknowledge the deprivation of liberty and freedom or to provide information to families and communities about the fate and whereabouts of the children. In volume 4 of the TRC's Final Report, it concluded that the federal government failed to create or enforce a consistent policy to record the deaths of Indigenous children:

- For just under one-third of these deaths (32 percent), the government did not record the name of the child who died.
- For just under one-quarter of these deaths (23 percent), the government did not record the gender of the child who died.[224]

What could compel those running these institutions to not record the name or even the gender of hundreds of deceased children? The Indian Residential School System actively sought to attack the children's identities as well as their ties to their families, communities, and cultures. Children were given numbers. The State and those working on its behalf had such a systemic disregard for the children and their families that they failed to inform their families and communities about their deaths. Although the 2008 federal apology had one sentence acknowledging that children died at these institutions, the federal government has never formerly acknowledged that many of these children and their families are victims of enforced disappearances.

The Removal of the Disappeared Person from the Protection of the Law

The disappeared children were denied their rights under the law and placed in legal limbo.[225] The children did not benefit from the protection of the law; on the contrary, laws were put in place to force them into Indian Residential Schools, and laws were not enforced against perpetrators who mistreated, abused, and harmed the children.[226] Further, there were significant efforts by government to block access to the legal system or access to effective remedies. This lack of access to legal remedies was compounded by the fact that the government and those working with State authorization were themselves responsible for, or implicated in, these disappearances.

The TRC's findings in relation to the missing children also support the conclusion that the children were purposefully placed outside the protection of the law. Despite knowing that children were dying at high rates[227] and that there were significant issues of abuse by those entrusted with their care, the federal government continued to implement the Indian Residential School System. In addition, the government failed to put in place effective policies on recording the deaths of the children, including their causes of death.[228] The federal government often also failed to call police to investigate claims of mistreatment and abuse of children.[229] Over the long existence of the Indian Residential School System, only a tiny fraction of the abuses reported to authorities were ever investigated and prosecuted by the State.[230] Where children died, there was a lack of sufficient investigations into their deaths.[231] This all points to the lack of legal protections for the children who died at these institutions.

The Requirement of a Prolonged Disappearance

Although there is no case law indicating how long a person must be disappeared to satisfy the definition of "a prolonged disappearance," the enforced disappearance of children from Indian Residential Schools would satisfy any reasonable definition. Many spent years—some spent over a decade—at Indian Residential Schools or associated institutions and then were disappeared. Some have remained disappeared for generations as their families and communities continue to search for their whereabouts and the circumstances of their disappearance. Context must also inform what constitutes a "prolonged disappearance" under international criminal law. For example, a baby born at an Indian Residential School or associated institution who was subsequently killed shortly after birth would arguably be a victim of enforced disappearance for the entirety of their life, even if that was only a few hours or days.

The International Criminal Court

There are reasonable grounds to conclude that the disappearance of Indigenous children by Canada and its agents amounts to a crime against humanity. This does not mean that individual perpetrators can or will be held accountable in international tribunals. Many have died, and there may be legal roadblocks to prosecuting international crimes committed decades ago. The above analysis demonstrates, however, the depth and scope of the enforced disappearances of Indigenous children, directed by Canadian authorities, which have yet to be remedied or resolved.

To date, the federal government has refused to investigate itself and has only just begun to support Survivors, Indigenous families, and communities in their own investigations into the missing and disappeared children. Only after full investigations are complete can it

be determined which of the children are the victims of enforced disappearances. In refusing to ensure proper investigations have been completed, the federal government has not acknowledged that the children and their families may be victims of the crime of enforced disappearance, and it has not provided appropriate reparations. The fact that the federal government has not done so raises the possibility that the ICC may investigate and prosecute these crimes. Canada is a member State of the ICC, and, therefore, the Court has jurisdiction over alleged crimes committed in Canada.

The ICC does not hold States to account for international crimes. Rather, it focuses on individual responsibility for those who have committed the atrocity crimes enumerated under the *Rome Statute*. These crimes include crimes against humanity, war crimes, genocide, and the crime of aggression. The ICC also focuses on the role of those "most responsible" for these crimes as opposed to minor participants or so-called "foot soldiers." Therefore, any investigation by the ICC into the conduct of those responsible for and running the Indian Residential School System would emphasize the role of specific individuals deemed most responsible for the crimes against humanity.

The ICC is bound by the principle of complementarity, meaning that the Court can only investigate and prosecute where the relevant State is not doing so or is unable or unwilling to do so in a genuine manner.[232] This is not a test of the quality of a justice system. Rather, it is a test of whether the State is actually conducting investigations and whether it is doing so in a way that is genuine as opposed to frustrating the truth and/or protecting perpetrators. The federal government has been and remains unwilling to investigate and prosecute those responsible for the enforced disappearance of hundreds, perhaps thousands, of Indigenous children. There are also serious concerns about the ability of the federal government to independently and impartially investigate itself for the crimes committed by its agents against Indigenous children. The ICC's complementarity test is therefore presumptively met and should not represent a barrier to investigation.

To open an investigation, the ICC must also find that the relevant crimes referred to it are of sufficient gravity and that it is in the interests of justice to investigate them. Both gravity and the interests of justice have been used by the ICC Prosecutor not to investigate certain situations of mass atrocity. Nevertheless, it is evident that the atrocity crimes committed against the children and the suffering it has caused have sufficient gravity and that, without other realistic prospects for accountability, investigating such crimes ought to be seen as being in the interests of justice.

The most significant roadblock to an ICC investigation would be jurisdictional, specifically, whether the disappearance of the children falls outside of the temporal jurisdiction of

the Court. The *Rome Statute* limits what the Court can investigate to those international crimes committed after July 1, 2002. The disappearances—as well as the other atrocity crimes committed against the children—all occurred before that date. While it is not yet clear how the ICC would view the matter, and, as noted above, there is no case law from international criminal tribunals in relation to enforced disappearances as a crime against humanity, it is at least arguable that enforced disappearances should be considered a continuing international crime, one that is not resolved until the disappeared person is returned or their fate is established.[233] The ongoing nature of the crime of enforced disappearance of Indigenous children would therefore constitute a crime up until this day and extend into the temporal jurisdiction of the ICC.

An investigation by the ICC would be useful as it could therefore confirm whether crimes against humanity of enforced disappearances were committed against Indigenous children and their families and communities. Doing so would challenge settler amnesty and the culture of impunity that Canada has created for itself. It would also confirm what Survivors, Indigenous families, and communities have known for decades: that Canadian authorities have perpetrated mass atrocity crimes against Indigenous children, their families, and communities on a widespread and systematic scale.

The ICC's 2021 Refusal to Investigate

In June 2021, a group of Canadian lawyers sent a formal request to the Chief Prosecutor of the ICC to open a preliminary investigation about whether, "[the] deaths, mass unmarked graves and general treatment of the 215 deceased children [at Kamloops Indian Residential School] constitute crimes against humanity." The Chief Prosecutor declined the request, in part because, "they felt they were prevented [from doing so] as the deaths occurred before Canada ratified the crimes against humanity law."[234] Recourse to international criminal law nevertheless remains a worthwhile aim. Brian Finucane, a graduate of Yale Law School, stresses that, "prosecution of the offense is necessary in order to condemn the specific harms caused to the families of the missing by the continuing uncertainty regarding the fate of the missing."[235]

Unfortunately, the refusal letter did not provide any analysis of whether Canada's actions and omission constitute crimes at international law. It is notable that, even in cases where the Office of the Prosecutor has declined to open an investigation, it has offered comprehensive answers to requests to open such investigations and

accepted that relevant conduct did amount to international crimes.[236] For example, while the Prosecutor declined a request by an Australian parliamentarian to open an official investigation into abuses committed against migrants on Nauru and Manus Island, its response letter made clear that it did accept that the abuses constituted a crime against humanity.[237]

It may therefore be possible for a new submission regarding the enforced disappearances of children to request such an analysis and a finding of a *prima facie* case of crimes against humanity. Even if such an application was not successful in prompting the ICC to open an official investigation, it could provide important clarity on whether there is a case to be made that the crime against humanity of enforced disappearances was committed in Canada and whether the ICC contemplates enforced disappearances as a continuous international crime.

Characterizing the Enforced Disappearances of Indigenous Children as an Ongoing Crime under International Criminal Law

Similar to the analysis above in relation to international human rights law, it is possible to characterize the enforced disappearances of Indigenous children as an ongoing crime under international criminal law. The *Rome Statute* states that, in applying the law, the Court, "must be consistent with internationally recognized human rights."[238] As a result, scholars have argued that, "the crime of enforced disappearance as a crime against humanity embodied in the *Rome Statute* should be interpreted in the light of the enforced disappearances instruments and other human rights treaties, including those relating to children."[239]

In June 2021, the Working Group on Enforced Disappearances called on the Canadian federal government and the Holy See to investigate the unmarked and mass graves of Indigenous children and to, "conduct full-fledged investigations into the circumstances and responsibilities surrounding these deaths, including forensic examinations of the remains found, and to proceed to the identification and registration of the missing children."[240] It is notable that, according to the Working Group on Enforced Disappearances, "one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non retroactivity."[241] Given that the application of the *Rome Statute* should be consistent with internationally recognized human rights, the same analysis should apply, and the enforced disappearances of children before July 1, 2002, should be admissible for investigation. The disappeared children, their families, and communities deserve justice.[242]

If under international criminal law, enforced disappearances constitute a continuous crime, then the crime was perpetrated against Indigenous children both before and after July 1, 2002. They are still being perpetrated because the fate and whereabouts of the children are unknown. Given that these enforced disappearances have not been the subject of an investigation or prosecution by the federal government and remain unresolved, these crimes and their effects can be understood as ongoing. The widespread and systematic attack on the children, their families, and communities constitutes a crime against humanity that falls under the jurisdiction of the ICC.

Kamloops Indian Residential School Monument, Interlocutor's visit, August 31, 2022 (Office of the Independent Special Interlocutor).

ENFORCED DISAPPEARANCES: A PURPOSEFUL GAP IN THE LAW IN CANADA

Why has Canada never investigated or remedied the enforced disappearance of Indigenous children? Why has it not supported investigations led by Indigenous communities? Why has so little attention been paid to the children and their families as victims of enforced disappearances? Why is this the case when Canada has obligations under international law to ensure a prompt, thorough, and impartial investigation into potentially unlawful deaths, including disappearances?[243]

Why? Because the federal government has actively worked to preclude access to justice for enforced disappearances. Contrary to its purported record as a human rights leader, Canada has failed to address enforced disappearances as either a human rights violation or a crime against humanity. It has deliberately and repeatedly declined to adopt international treaties or join international courts that might investigate these violations and atrocity crimes and failed to enact domestic legislation relating to enforced disappearances.

Why? Because Canada's deliberate avoidance of obligations to redress enforced disappearances is consistent with its pattern of systemic denial and resistance to accountability efforts on the part of Indian Residential School Survivors, Indigenous families, and communities, including with respect to the deaths of children while in the care of the State and churches at these institutions.

Why? Because Canada has a long pattern of responding to calls for accountability by first denying, then minimizing, and then only admitting partial responsibility for wrongdoing. It also has a pattern of only doing so in response to litigation and political pressure. What follows demonstrates how this organized and purposeful denial of recourse to justice has operated in Canada in relation to the enforced disappearance of children at former Indian Residential Schools and associated institutions.

"Photograph of Reverend Fuller Leading a Funeral Procession at Shingwauk," Shingwauk Residential Schools Centre.

Canada's Decision Not to Include Enforced Disappearances in Its Crimes Against Humanity and War Crimes Act

When Canada ratified the *Rome Statute* and implemented the 2000 federal *Crimes Against Humanity and War Crimes Act*, it omitted an explicit mention of enforced disappearances.[244] This was despite the fact that the *Rome Statute* specifically mentions enforced disappearances as a crime against humanity. According to Fannie Lafontaine, a leading expert on the domestic application of international criminal law in Canada, "it is probably not a coincidence that Canada has also failed to ratify the international human rights conventions related to these grave violations."[245] She suggests Canada's mistreatment of Indigenous Peoples may underlie its refusal to include enforced disappearances in the *Crimes Against Humanity and War Crimes Act*.[246]

If Canada did include the crime against humanity of enforced disappearances in its domestic law, it is unlikely that it could prosecute individuals for these atrocity crimes as they did not constitute a crime at the time of the disappearance of Indigenous children taken to Indian Residential Schools. As well, pursuant to the *Crimes Against Humanity and War Crimes Act*, only the Attorney General of Canada can initiate such an investigation.[247] The fact that the Attorney General of Canada is the only one with authority to initiate this type of investigation against the federal government creates a conflict. Unfortunately, this continues to foster a culture of impunity and fails to provide an avenue for redress for the families and communities of the children who were and are victims of enforced disappearances.

Canada's Refusal to Be a Full Member of the Inter-American Human Rights System

Canada has been a member State of the OAS and the IACHR since 1990. The Canadian federal government provides political support and funding for both but has steadfastly refused to be a full participant in the Inter-American human rights system.[248] Specifically, Canada has neither signed nor ratified the *American Convention on Human Rights* or the *Inter-American Convention on Forced Disappearance*. It has also failed to accept the jurisdiction of the IACtHR. This has significant implications for all Canadians, as well as Indigenous communities, to seek justice for human rights violations and creates barriers to meaningful international legal and judicial avenues of redress for violations of international human rights law committed by the Canadian State.

In recent years, experts and researchers have repeatedly emphasized that, "for a country struggling to reconcile with ... Indigenous nations," Canada would benefit from becoming a "full player" in the Inter-American human rights system.[249] Sara Gold, a graduate of McGill University's law program, for example, has listed the benefits of doing so to forward justice for Indigenous Peoples within Canada, including that this system would:

- Grant supplementary avenues to protect Indigenous rights;
- Create opportunities to share lessons and strategies across Indigenous communities in the region;
- Increase Canada's credibility on Indigenous human rights; and
- Enrich legal protections for Indigenous communities across the Americas.[250]

Despite the important avenue for accountability that the Inter-American human rights system provides, Canada has failed to sign onto the *American Convention on Human Rights*, placing Indigenous people and communities outside the full purview of the system's rich human rights law and jurisprudence. It also ensures that Canada cannot be held to account under that system for failing to investigate these human rights violations and for not upholding the right to truth for Indigenous families and communities in the context of enforced disappearances.

Canadian officials, including former Minister of Foreign Affairs Lloyd Axworthy, have put forward several reasons why Canada has neither signed the *American Convention on Human Rights* nor accepted the jurisdiction of the IACtHR. One argument is that doing so would interfere with provincial jurisdiction.[251] It is notable that this is the same argument that Canada put forward when it initially opposed the *Universal Declaration of Human Rights* in 1948. In that instance, the claim that promoting human rights would interfere with provincial jurisdiction masked the federal government's more sinister motivations: that it did not want to accept binding human rights standards for people residing in the country. It is difficult not to conclude the same with respect to the *American Convention on Human Rights*. In the almost 55 years since this Convention was introduced, Canada has never provided details on the specific concerns that provinces have in relation to its ratification.[252]

Another argument is that some of the language in the Convention is problematic. One example that has been cited is the pronouncement in article 4 that the right to life "shall be protected by law and, in general, from the moment of conception."[253] As a country that legally permits abortion, some have raised concerns about this particular provision. However, Canada need not be bound by such proclamations. Under international law, the federal government can issue an interpretative declaration or enter a reservation upon signing the

treaty, making it clear that certain sections of the Convention will not apply in the country.[254] Minister Axworthy noted this possibility but stated, "in order to ratify the [*American Convention on Human Rights*] at present, a very large number of reservations and statements of understanding ... would be required. However, Canada's position with respect to reservations to human rights treaties is that reservations should be few and limited in scope."[255]

Minister Axworthy also stated that, "before Canada can ratify a human rights convention, we must ensure that we are in a position to live up to the commitments we would undertake by ratifying it."[256] As with the others noted above, this argument is not persuasive. Human rights law is aspirational, and in signing onto international instruments, States are committing to take steps to realize the rights articulated within them. Canada has signed onto other international instruments that make this clear. One example is the *International Covenant on Economic, Social and Cultural Rights*, which states clearly that those who accede to the Covenant, like Canada,[257] seek to achieve, "progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[258]

Despite Canada's resistance to becoming a full member, the Inter-American human rights system has nevertheless made important contributions and guidance on respecting human rights in Canada. For example, the IACHR has undertaken missions and written reports on the subject of missing and murdered Indigenous women and girls and did so before Canada set up the National Inquiry.[259] Margarette May Macaulay, the second vice-president of the IACHR, has stated that, "the Commission's work related to Canada clearly demonstrates that the country is not devoid of human rights violations and could benefit from the support and monitoring the IACHR offers."[260] Macaulay added that, if Canadians have not accessed the Inter-American system of human rights, it may be because, "most members of Canadian civil society organizations and its legal community are unaware of the existence of [the system] and of the Commission's various mechanisms."[261] Since Canada is a member of the OAS, individuals, groups, and organizations can submit a petition to the IACHR to investigate alleged human rights violations by the federal government.

No State has managed to create a society where human rights violations are entirely absent. That is the very reason human rights law exists: to guarantee and protect human rights now and into the future. Signing and ratifying international human rights instruments creates the conditions under which States can move towards respecting, protecting, promoting, and fulfilling human rights. Human rights instruments provide victims and Survivors with recourse to international mechanisms, courts, and tribunals to remedy human rights violations. Unfortunately, Canada's refusal to sign the *American Convention on Human Rights* denies this recourse to all Canadians.

Some federal government officials insist that ratifying the *American Convention on Human Rights* and accepting its jurisdiction would have little effect on Canadians because the *Canadian Charter of Rights and Freedoms* already exists.[262] Canada's Standing Senate Committee on Human Rights was critical of this argument and concluded:

> It cannot be said that people have so much protection that they do not need any more. In addition, ratification of international treaties and recognition of the jurisdiction of the bodies created to oversee their implementation give another level of protection not afforded by domestic courts, especially in Canada where the absence of legislation implementing international treaties seriously limits the possibility of invoking them before the courts.[263]

This criticism has been reiterated by experts on Canada's resistance to fully engage with the Inter-American human rights system. Bernard Duhaime, a professor of international law and political science at the University of Quebec, has concluded that:

> The great majority of commentators agree today that there is no serious valid legal concern that should prevent Canada from adhering to the [*American Convention on Human Rights*] and subjecting itself to the court. On the contrary, many argue that there are several important reasons in favor of such recognition. Indeed, this would first correspond to what a majority of Canadians want, and it would follow repeated recommendations formulated in this sense by commentators and by the Canadian Senate Committee on Human Rights in both its 2003 and 2005 reports. But more importantly, it would provide for a greater and broader international human rights protection for persons under the control of the Canadian state.[264]

The Standing Senate Committee on Human Rights dismissed all of the federal government's arguments against ratifying the *American Convention on Human Rights* and accepting the jurisdiction of the IACtHR. It concluded that there are, "no compelling reasons for Canada not to ratify the Convention"[265] and that, "few, if any, of the Government concerns seem to pose an insurmountable obstacle to Canadian ratification of the Convention."[266] In 2002 and 2003, the Standing Committee recommended that Canada, "take all necessary action to ratify the *American Convention on Human Rights*" and "recognize the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention" by 2008.[267] To date, Canada has ignored the recommendation. The

result is that the law and jurisprudence in relation to enforced disappearances available in the Inter-American system on human rights remain out of reach to Indigenous communities.

Canada's Failure to Ratify the Convention on Enforced Disappearance

There have been several calls for Canada to also ratify the *Convention on Enforced Disappearance*. Since 2018, the federal government has engaged in consultations regarding the possibility of signing and ratifying this Convention.[268] Canadian parliamentarians have introduced motions domestically calling on other States to ratify the Convention[269] and has recommended the same at the UN Human Rights Council.[270] Canada, however, has not signed or ratified the Convention. No federal government officials have offered concrete reasons as to why the State has refused to sign this Convention. According to a brief by Peace Bridges International, however, "speculation as to why Canada has not signed the Convention includes the enforced disappearance of Indigenous children through the residential school system."[271] This may be yet another decision by Canada to avoid being held accountable for the deaths of Indigenous children.

There are many reasons that Canada should ratify the *Convention on Enforced Disappearance*. First, it would provide an important avenue to Indigenous victims of the ongoing harm and crime of enforced disappearances to seek justice and accountability, including through access to the Committee on Enforced Disappearances.[272] Second, it would require Canada to include enforced disappearance as an offence in its domestic *Criminal Code*, including in relation to the specific crime of the, "wrongful removal of children who are subjected to enforced disappearance."[273] Unfortunately, without this ratification and implementation within Canadian law, there is no law prohibiting enforced disappearances as a specific criminal offence in Canada.

CONCLUSION: ADDRESSING THE ENFORCED DISAPPEARANCE OF INDIGENOUS CHILDREN

Because Canada has actively opposed the application of laws relating to enforced disappearances both at the domestic and international level, few have made the connection between the law of enforced disappearances and the disappearance of the children at Indian Residential Schools. Unmarked and mass graves, however, do not usually exist because someone has died under normal conditions. They are often evidence of wrongdoing and attempts to cover

something up. In many cases, they signal an attempt to disappear victims and conceal their fate as well as the wrongdoing that led to it. The fact that many of these children were disappeared decades ago does not matter; it does not mean that they are any less harmful, serious, or deserving of remedy.

Pursuant to international human rights law, many of the children who were never returned home by the State from Indian Residential Schools and other institutions may be victims of enforced disappearance. This is a human rights violation of each disappeared child as well as of their families and communities. These disappearances were knowingly committed by the State and its agents as part of a widespread or systematic attack against Indigenous Peoples; therefore, these enforced disappearances also constitute a crime against humanity under international criminal law. Enforced disappearances demand a genuine investigation by the State to fulfill the right to the truth for victims and their families. They are an ongoing and active human rights violation that demands remedy by Canada. They are an offence that continues until such time that the person is returned and/or their fate is established. These disappearances are ongoing violations that require both remedies and reparations.

The disappeared children have not been forgotten. Survivors, Indigenous families, and communities continue to fight for justice and accountability for the missing and disappeared children. They continue to lead investigations into what happened. In doing this, they are stepping back into their own trauma to bring dignity, honour, and respect to each one of the children. As the Right Honourable Governor General Mary Simon has said:

> This trauma burrows deep into our bones. Unending. Unyielding. For a long time this trauma was buried. Unheard. For years, the loss, fear and pleas from mothers, fathers, brothers, sisters, grandparents, uncles, aunts and communities went unrecognized. Children disappeared at residential schools and other institutions, buried in unmarked graves, forgotten and erased. But they were not forgotten by their families, by their communities, by their Peoples.[274]

Despite Canada's resistance to accountability for the enforced disappearances of children at these institutions, Survivors, families, and communities have demonstrated their strength and relentless dedication to recover the children and bring the truth of these mass human rights violations and crimes against humanity to light.

APPENDIX A

The International Criminal Court's Elements of Crime—Enforced Disappearances

Article 7(1)(i)

Crime against humanity of enforced disappearance of persons

Elements

1. The perpetrator:
   (a) Arrested, detained or abducted one or more persons; or
   (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
   (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[275]

1 Nisoonag Partnership (Serpent River First Nation, Mississaugi First Nation, Sagamok Anishnawbek), Submission to the Office of the Independent Special Interlocutor (OSI), August 31, 2023, 6.

2 Nancy Sandy, Secwépemc from Williams Lake First Nation, "Protecting and Accessing Indian Residential School Sites," panel presentation at the National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 12–14, 2022. Nancy Sandy is working as part of the team investigating the former site of the St. Joseph Indian Residential School and Onward Ranch for unmarked burials of "disappeared and deceased children."

3 Parliament of Canada, *House of Commons Debates*, 39th Parliament, 1st Session, no. 139, vol. 141, April 24, 2007, 8626, https://www.ourcommons.ca/Content/House/391/Debates/139/HAN139-E.PDF (emphasis added).

4 Truth and Reconciliation Commission of Canada (TRC), *Canada's Residential Schools: Missing Children and Unmarked Burials*, vol. 4 (Montreal and Kingston: McGill-Queen's University Press, 2016), 1.

5 See, for example, Catherine Morris and Rebekah Smith, "The Disappeared: Indigenous Peoples and the International Crime of Enforced Disappearance," *Slaw*, March 20, 2023, https://www.slaw.ca/2023/03/20/the-disappeared-indigenous-peoples-and-the-international-crime-of-enforced-disappearance/.

6 Harold Johnson, *Peace and Good Order: The Case for Indigenous Justice in Canada* (Toronto: McClelland & Stewart, 2019), 11.

7 See Daniel Schwartz, "Truth and Reconciliation Commission: By the Numbers," *CBC News*, June 2, 2015, https://www.cbc.ca/news/indigenous/truth-and-reconciliation-commission-by-the-numbers-1.3096185.

8 Ian Mosby, "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952," *Histoire sociale / Social History* 46, no. 1 (May 2013): 145–72.

9 There are several examples of site plans of Indian Residential Schools that include depictions of the cemetery or graveyard on the institution's property in OSI, *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* (OSI, 2024), 23–88.

10 Marie Wilson, "Keynote Address," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

11 TRC, *Missing Children*.

12 TRC, *Missing Children*, 5.

13 Derek Congram, *Missing Persons: Multidisciplinary Perspectives on the Disappeared* (Toronto: Canadian Scholars Press, 2016), 2.

14 Ian Austen, "How Thousands of Indigenous Children Vanished in Canada," *New York Times*, June 7, 2021, https://www.nytimes.com/2021/06/07/world/canada/mass-graves-residential-schools.html.

15 United Nations General Assembly (UNGA), *Report of the Working Group on Enforced or Involuntary Disappearances*, 19th Session, December 20, 2011, para. 18, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-58-Add2_en.pdf.

16 Most Canadians would not consider Canada to be a state that has participated in the enforced disappearances of its citizens. There has been some commentary at the international level, however, that has implicated Canada in enforced disappearances of Indigenous people. Just prior to the launch of the National Inquiry into Missing and Murdered Indigenous Women and Girls, the Committee on the Elimination of Discrimination against Women concluded that Canada committed grave violations of the rights of Indigenous women, "in particular those victims of murder and *disappearance* and their family members" under the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979, 1249 UNTS 13. Committee on the Elimination of Discrimination against Women (CEDAW), *Report of the Inquiry Concerning Canada of the Committee of the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Doc. CEDAW/C/OP.8/CAN/1, March 5, 2015, 47, para. 215, https://www.fafia-afai.org/wp-content/uploads/2015/03/CEDAW_C_OP-8_CAN_1_7643_E.pdf (emphasis added). Importantly, the Committee framed its analysis in the language of "disappearance." Notably, and in alignment with its settler amnesty approach (see chapter 5), the federal government refused to accept the Committee's finding that it has violated and continues to gravely violate the rights of Indigenous women. CEDAW, *Observations of the Committee on the Elimination of Discrimination against Women*, para. 6. Subsequently, the National Inquiry into Missing and Murdered Indigenous Women and

Girls detailed the systemic failures on the part of the Canadian State to investigate the disappearances and murders of Indigenous women and girls.

17 Brooke Jeffery, "The Evolution of Human Rights Protection in Canada," in *Human Rights: Current Issues and Controversies*, ed. Gordon DiGiacomo (Toronto: University of Toronto Press, 2016), 16. Other states, like the United States, are "monist," meaning that the international treaties they sign are automatically translated into domestic law.

18 Frédéric Mégret, "The Nature of Human Rights Obligations," in *International Human Rights Law*, ed. Daniel Moeckli et al., 4th ed. (Oxford: Oxford University Press, 2020). See discussion by Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 79.

19 In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 SCR 166, para. 86, the Supreme Court of Canada held that "customary international law is automatically adopted into domestic law without any need for legislative action." See also *R. v. Hape*, [2007] 2 SCR 292, paras. 36–39.

20 Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts," *Canadian Yearbook of International Law* 40, no. 3 (2002): 3.

21 *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, Article 26 ("pacta sunt servanda": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

22 See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 70; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3.

23 *Convention on the Rights of the Child*, November 20, 1989, 1577 UNTS 3 (*CRC*).

24 Laura Barnett, *Canada's Approach to the Treaty-Making Process* (Ottawa: Library of Parliament, 2021), 8, https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/2008-45-e.pdf.

25 Barnett, *Canada's Approach*, 8.

26 Jeffery, "Evolution of Human Rights Protection," 16.

27 *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3 (*ICESCR*).

28 As one account notes, "a question heatedly debated in connection with the Nuremberg trials was the alleged retroactive application of the rules, upon which the prosecution had based its charges.... Nuremberg is not a tale of glory and shining justice; historic occurrences are never free from at least some objectionable aspects. And, yet, Nuremberg opened up a new page of universal history, less than one month after the coming into force of the Charter of the United Nations." Christian Tomuschat, "The Legacy of Nuremberg," *Journal of International Criminal Justice* 4, no. 4 (September 2006): 837; see also Thomas Weigend, "'In General a Principle of Justice': The Debate on the 'Crime against Peace' in the Wake of the Nuremberg Judgment," *Journal of International Criminal Justice* 10, no. 1 (2012): 41–58.

29 *Attorney General v. Adolf Eichmann*, Criminal Case no. 40/61 (District Court of Jerusalem, December 11, 1961).

30 *Universal Declaration of Human Rights*, UNGA Resolution 217A (III), 3rd Session, Supplement no. 13, UN Doc. A/810, 1948 (*UDHR*).

31 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005), 3.

32 Anghie, *Imperialism*, 4.

33 Anghie, *Imperialism*, 3.

34 See Catherine Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 58; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995), 64. It is important to note that other racialized people were also placed lower on the scale of human evolution at this time.

35 Tully, *Strange Multiplicity*, 91.

36 Anghie, *Imperialism*, 53–54.

37 Anghie, *Imperialism*, 4.

38 Anghie, *Imperialism*, 4. For a more detailed discussion, see Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law," *McGill Law Journal* 61, no. 4 (2016): 957.

39 Julie Evans, "Where Lawlessness Is Law: The Settler-Colonial Frontier as a Legal Space of Violence," *Australian Feminist Law Journal* 30, no. 1 (2009): 4.

40 Anishnaabe scholar Darlene Johnson describes that long history of Haudenosaunee assertions of sovereignty in its relationships with European colonizers and through representations to the United Nations. See generally Darlene M. Johnston, "Quest of the Six Nations Confederacy for Self-Determination," *University of Toronto Faculty of Law Review* 44, no. 1 (Spring 1986): 1–2. Several news and academic articles have discussed Haudenosaunee efforts to be recognized as a sovereign State at the United Nations, including by highlighting the trip of Gayogo̱hó:nǫ' (Cayuga) Chief Deskaheh of the Haudenosaunee Confederacy to Geneva to petition to speak to the League of Nations in 1923, which was denied. See Ka'nhehsí:io Deer, "Haudenosaunee Mark 100th Anniversary of Deskaheh's Attempt to Speak to League of Nations," *CBC News*, July 24, 2023, https://www.cbc.ca/news/indigenous/deskaheh-100-haudenosaunee-geneva-1.6913959; see also generally Rarihokwats, *Historical Notes on the League of Nations Indians: A Four Arrows Historical Sketch*, October 19, 2001; James Anaya, "Keynote Address Indigenous Law and Its Contributions to Global Pluralism," *Indigenous Law Journal* 6 (2007): para. 4. A description of more recent efforts of Indigenous Peoples within Canada to gain recognition at international law is in James (Sa'ke'j) Youngblood Henderson, "The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States," in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, ed. John Borrows et al. (Waterloo, ON: Centre for International Governance Innovation, 2019), 13–14.

41 Anghie, *Imperialism*, 5–6.

42 Irene Watson, "Indigenous Peoples' Law-Ways: Survival against the Colonial State," *Australian Feminist Law Journal* 8, no. 1 (1997): 39, n. 9.

43 Nicholas K. Blomley, "Law, Property, and the Spaces of Violence: The Frontier, the Survey, and the Grid," *Annals of the Association of American Geographers* 93 (2003): 126. Here, Nicholas Blomley highlights the important distinction between "law-preserving violence," which maintains the status quo, and "law-making violence," which replaces an old legal order with a new one.

44 Sujith Xavier and Jeffery G. Hewitt, "Introduction: Decolonizing Law in the Global North and South: Expanding the Circle," in *Decolonizing Law: Indigenous, Third World and Settler Perspectives*, ed. Amar Bhatia et al. (New York: Routledge, 2021), 1.

45 Anghie, *Imperialism*, 3.

46 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Resolution 61/295, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007.

47 Inuk Survivor, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 30, 2022.

48 The United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) noted in 2022 that, "since its inception in 1980, the WGEID has transmitted a total of 59,600 cases to 112 States. The number of cases under active consideration that have not yet been clarified, closed or discontinued stands at 46,751 in a total of 97 States." See WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/51/31, August 12, 2022, para. 5.

49 *Velásquez Rodriguez v. Honduras*, para. 149 (IACtHR, July 29, 1988). IACtHR stands for the Inter-American Court of Human Rights.

50 The campaign, the result of a decree by the Nazi regime, targeted opposition and resistance figures with imprisonment, murder, and disappearance.

51 Alexa Hagerty, *Still Life with Bones: Genocide, Forensics, and What Remains* (New York: Crown, 2023), 87. In contexts like Argentina, some victims were also drugged and then thrown—unconscious but alive—off the back of airplanes into the seas surrounding the country; only some of their bodies were ever recovered.

52 The most famous example of this is the Mothers and Grandmothers of the Plaza de Mayo in Argentina.

53 Examples include family members of the disappeared in Argentina and Guatemala.

54 Marieke de Hoon, Andrei Vasilyeu, and Maria Kolesava-Hudzilina, *Crimes against Humanity in Belarus: Legal Analysis and Accountability Options*, Law and Democracy Center, July 2023, 55–57, https://ldc-jh.eu/wp-content/uploads/2023/07/Report-on-Crimes-against-humanity-.pdf; Julia Crawford, "Belarus 'Hit Squad' Member of Trial in Switzerland for Enforced Disappearances," *Justice Info*, September 19, 2023, https://www.justiceinfo.net/en/121898-belarus-hit-squad-member-trial-switzerland-enforced-disappearances.html.

55 "Russia: Forcible Disappearances of Ukrainian Civilians," *Human Rights Watch*, July 14, 2022, https://www.hrw.org/news/2022/07/14/russia-forcible-disappearances-ukrainian-civilians; Deborah Amos, "Russia Deports Thousands of

Ukraine Children. Investigators Say That's a War Crime," *National Public Radio*, February 14, 2023, https://www.npr.org/2023/02/14/1156500561/russia-ukraine-children-deportation-possible-war-crime-report.

56 "Myanmar: Hundreds Forcibly Disappeared," *Human Rights Watch*, April 2, 2021, https://www.hrw.org/news/2021/04/02/myanmar-hundreds-forcibly-disappeared.

57 For a recent overview, see Jeremy J. Sarkin and Elisenda Calvet Martinez, "The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases," *Catholic University Law Review* 71, no.1 (2022): 38–50. Over the past decade, migrants trying to reach safe haven in Europe and the United States, which regularly engage in efforts to push migrants back, have regularly disappeared and died, in what human rights scholars have persuasively argued amount to enforced disappearances, "Migrant deaths in unknown locations on land and at sea should be treated and redressed as breaches of the international laws that prohibit and protect against enforced disappearances." See Valentina Azarova, Amanda Danson Brown, and Itamar Mann, "The Enforced Disappearance of Migrants," *Boston University International Law Journal* 40, no. 1 (2022): 203.

58 *Declaration on the Protection of All Persons from Enforced Disappearance*, UNGA Resolution 47/133, December 18, 1992, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-enforced-disappearance.

59 *International Convention for the Protection of All Persons from Enforced Disappearance*, Doc. A/RES/61/177, December 20, 2006 (*ICPPED*).

60 *ICPPED*, Article 2 (emphasis added).

61 *ICPPED*, Article 1.

62 "Canada and the Organization of American States," Government of Canada, accessed January 4, 2024, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/oas-oea/index.aspx?lang=eng.

63 *Charter of the Organization of American States*, April 30, 1948, 1609 UNTS 48. This summary of the Inter-American Commission of Human Rights (IACtHR) is based on "Human Rights in the Inter-American System," Organization of American States (OAS), accessed January 4, 2024, 1–3, https://www.oas.org/ipsp/images/English%20FAQs.pdf.

64 *American Declaration of the Rights and Duties of Man*, Doc. E/CN.4/122, June 10, 1948; *American Convention on Human Rights*, November 21, 1969, 1144 UNTS 123.

65 This summary of the IACtHR is based on "Human Rights in the Inter-American System," 4–5.

66 Maryam Ishaku Gwangndi, "The Right to Liberty under International Human Rights Law: An Analysis," *Journal of Law, Policy and Globalization* 37 (2015): 217.

67 Working Group on Arbitrary Detention, "International Standards," Office of the High Commissioner of Human Rights (OHCHR), accessed January 4, 2024, https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/international-standards; Gwangndi, "Right to Liberty," 213.

68 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171 (*ICCPR*).

69 Working Group on Arbitrary Detention, "About Arbitrary Detention," OHCHR, accessed January 4, 2024, https://www.ohchr.org/en/about-arbitrary-detention. The Working Group on Arbitrary Detention is one of the special procedures of the Human Rights Council and was established in 1991 by the UN Commission on Human Rights to investigate cases of arbitrary deprivation of liberty. For more information on the Working Group, see generally Working Group on Arbitrary Detention, "Fact Sheet no. 26, Rev. 1," OHCHR, accessed January 4, 2024, https://www.ohchr.org/sites/default/files/documents/publications/Fact-sheet-26-WGAD.pdf.

70 Working Group on Arbitrary Detention, "Fact Sheet no. 26, Rev. 1," 10.

71 Working Group on Arbitrary Detention, "Fact Sheet no. 26, Rev. 1," 10, n. 7.

72 Gwangndi, "Right to Liberty," 219.

73 Gwangndi, "Right to Liberty," 219.

74 TRC, *Canada's Residential Schools: The History, Part 2: 1939–2000*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 153–54.

75 See, for example, TRC, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 28.

76 For a detailed discussion of the use of food deprivation and starvation to coerce parents to send their children to Indian Residential Schools, see chapter 4.

77 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 61–62.

78 TRC, *Survivors Speak*, 91, 167; TRC, *Honouring the Truth*, 104, 135.

79 TRC, *Canada's Residential Schools: The History, Part 1: Origins to 1939*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 524–25; TRC, *The History, Part 2*, 353.

80 TRC, *The History, Part 2*, 338–39, 341–44.

81 TRC, *The History, Part 1*, 146, 194, 505, 534, 538.

82 TRC, *The History, Part 1*, 526.

83 TRC, *The History, Part 1*, 194, 528, 582; TRC, *The History, Part 2*, 356. The TRC notes that in 1951 the *Indian Act* was amended to deem children who were expelled, suspended, or refused to attend school regularly, juvenile delinquents; under these provisions, children would be fined, placed in foster care, or sent to an industrial school or reformatory. TRC, *The History, Part 2*, 357; *Indian Act*, SC 1876, c. 18.

84 TRC, *Honouring the Truth*, 62.

85 TRC, *The History, Part 1*, 277.

86 I.C. MacGibbon, "The Scope of Acquiescence in International Law," *British Yearbook of International Law* 31 (1954): 143.

87 *ICPPED*, Article 6.1(a).

88 *ICPPED*, Article 6.1(b). Article 6.1(a) also indicates that, "signatories are required to prosecute, under criminal law, anyone who "commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."

89 TRC, *Missing Children*, 8–10.

90 TRC, *Missing Children*, 4.

91 TRC, *Missing Children*, 1–2, 15–33.

92 TRC, *Canada's Residential Schools: The Legacy*, vol. 5 (Montreal and Kingston: McGill-Queen's University Press, 2015), 185.

93 Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearance*, Doc. A/HRC/19/58/Rev.1, March 2, 2012, 10. The OHCHR has endorsed this interpretation. "Definition of Enforced Disappearances," OHCHR, accessed January 4, 2024, 2, https://legal.un.org/ilc/sessions/71/pdfs/english/cah_un_wg_disappearances.pdf.

94 Human Rights Council, *Report on Enforced Disappearance*, 10.

95 Human Rights Council, *Report on Enforced Disappearance*, 9.

96 "Resolution 20," OHCHR, 1980, https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf. The WGEID was originally mandated to operate for one year; however, the mandate is regularly renewed, and the WGEID is still in operation.

97 Bernard Duhaime, "Multilateral Human Rights in a Shifting Order: Perspectives from a UN Special Procedure Mandate," *Quebec Journal of International Law* 31, no. 2 (2018): para. 2.

98 WGEID, "About Enforced Disappearance," OHCHR, accessed January 4, 2024, https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance.

99 Duhaime, "Multilateral Human Rights in a Shifting Order," para. 3.

100 Duhaime, "Multilateral Human Rights in a Shifting Order," para. 3.

101 WGEID, "About the Mandate," OHCHR, accessed January 4, 2024, https://www.ohchr.org/en/special-procedures/wg-disappearances.

102 WGEID, "About Enforced Disappearance."

103 WGEID, "About Enforced Disappearance."

104 Duhaime, "Multilateral Human Rights in a Shifting Order," para. 1.

105 "OHCHR Handbook: VI. Special Procedures," OHCHR, accessed January 4, 2024, https://www.ohchr.org/sites/default/files/Documents/Publications/NgoHandbook/ngohandbook6.pdf.

106 "Reporting a Disappearance to the Working Group," OHCHR, accessed January 4, 2024, https://www.ohchr.org/en/special-procedures/wg-disappearances/reporting-disappearance-working-group.

107 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (New York: OHCHR, 2017), 1, https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf (*Minnesota Protocol*). The Minnesota Protocol is an updated version of the *UN Manual on the Effective Prevention of Extra-legal, Arbitrary and Summary Executions*, 1991. It is called the *Minnesota Protocol* since it was originally drafted through an expert process led by the Minnesota Lawyers International Human Rights Committee. See also the UN Basic Principles, which state that, "in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him." OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, December 15, 2005, Part III, Article 4, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation. See also Council of Europe and Commissioner for Human Rights, "Missing Persons and Victims of Enforced Disappearance in Europe," Issue Paper, 2016, 18; see also generally Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review* 78, no. 2 (March 1990): 449–513.

108 The obligation is covered in *Velásquez Rodriguez v. Honduras*.

109 *Velásquez Rodriguez v. Honduras*, at paras. 180–81 (emphasis added). This is also confirmed by the Council of Europe and Commissioner for Human Rights, "Missing Persons," 18.

110 *Velásquez Rodriguez v. Honduras*, at para. 182 (emphasis added).

111 See list of enforced disappearance cases at "Enforced Disappearance Legal Database," European Human Rights Advocacy Centre, accessed January 4, 2024, https://edld.ehrac.org.uk/jurisprudence-database/.

112 *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 UNTS 222.

113 *African Charter on Human and Peoples' Rights*, June 27, 1981, 1520 UNTS 217.

114 *American Convention on Human Rights*.

115 *Inter-American Convention on Forced Disappearance of Persons*, June 9, 1994, (1994) 33 ILM 1529 (*IACFDP*).

116 Morris and Smith, "The Disappeared."

117 WGEID, *General Comment on Children and Enforced Disappearances Adopted by the Working Group on Enforced or Involuntary Disappearances at Its Ninety-eighth Session*, Doc. A/HRC/WGEID/98/1, October 31 – November 9, 2012, para. 16; see also Melanie Klinkner and Howard Davis, *The Right to the Truth in International Law: Victims' Rights in Human Rights and International Criminal Law* (London: Routledge, 2020), 24.

118 This was repeated at numerous National Gatherings as well as in the Submissions to the OSI from the Stó:lō Nation Chiefs' Council (August 31, 2023, 11) and 'Namgis First Nation (August 31, 2023, 6).

119 *Declaration on Enforced Disappearance*, Article 17.1 (emphasis added).

120 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, Doc. A/HRC/16/48, January 26, 2011, 11.; see also *Velásquez Rodriguez v. Honduras*, at para. 155 ("the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee").

121 WGEID, *Report on Enforced or Involuntary Disappearances*, 12.

122 See, for example, Human Rights Committee, *Zilkija Selimović et al. v. Bosnia and Herzegovina*, Communication no. 2003/2010, UN Doc. CCPR/C/111/D/2003/2010, 2014; see also Danushka S. Medawatta, "The Vanishing Act: Punishing and Deterring Perpetrators through the Concurrent Application of Diverse Legal Regimes to Enforced the Concurrent Application of Diverse Legal Regimes to Enforced Disappearances," *Florida Journal of International Law* 29, no. 2 (August 2017): 230.

123 Council of Europe and Commissioner for Human Rights, "Missing Persons," 18.

124 This is also enshrined in domestically in section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Canadian Charter*) ("anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances").

125 *UDHR*, Article 8 (which states that, "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law").

126 OHCHR, *Basic Principles and Guidelines*, Part III, Article 4.

127 OHCHR, *Basic Principles and Guidelines*, Part VII, Article 11.

128 OHCHR, *Basic Principles and Guidelines*, Part VI, Article 10.

129 OHCHR, *Basic Principles and Guidelines*, Part IX, Article 22(c); see also Grażyna Baranowska, *Rights of Families of Disappeared Persons: How International Bodies Address the Needs of Families of Disappeared Persons in Europe* (Cambridge, UK: Intersentia, 2021), 13.

130 *ICPPED*, Articles 24.3, 24.4.

131 Satisfaction can include, among other things, a cessation of the relevant violations, an official and judicial finding of wrongdoing, a public apology for the violations, sanctions against the person(s) responsible for the violation, and commemoration and tributes to victims of the violation. See OHCHR, *Basic Principles and Guidelines*, para. 22.

132 *ICPPED*, Article 24.5(a)–(d).

133 *ICPPED*, Article 22.

134 Baranowska, *Rights of Families*, 9.

135 The *ICPPED* reiterates this inclusive notion by defining victim as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance." *ICPPED*, Article 24.1.

136 Baranowska, *Rights of Families*, 2.

137 As Melanie Klinkner and Howard Davis write, "the failure to provide information in this situation [of enforced disappearance] is an element of the crime itself and has been emphasised as cruel and inhuman treatment." See Klinkner and Davis, *Right to the Truth*, 23.

138 WGEID, *General Comment on Children*, para. 2.

139 Kamari Clarke, "Rendering the Absent Visible: Victimhood and the Irreconcilability of Violence," *Journal of the Royal Anthropological Institute* 28 (2022): 147; see also Baranowska, *Rights of Families*, 5.

140 Border Graves Reporting Team, "Revealed: More Than 1,000 Unmarked Graves Discovered along EU Migrant Routes," *The Guardian*, December 8, 2023, https://www.theguardian.com/world/ng-interactive/2023/dec/08/revealed-more-than-1000-unmarked-graves-discovered-along-eu-migration-routes.

141 Quoted in Border Graves Reporting Team, "Revealed."

142 OHCHR, *Enforced and Involuntary Disappearances*, Fact Sheet no. 6/Rev.3, March 31, 2023, 1.

143 *ICPPED*.

144 *Declaration on Enforced Disappearance*, Article 1. For a discussion, see Niklas Kyriakou, "The *International Convention for the Protection of All Persons from Enforced Disappearance* and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Renditions," *Melbourne Journal of International Law* 13 (2012): 17–18.

145 Baranowska, *Rights of Families*, 2.

146 Banu Bargu, "Sovereignty as Erasure: Rethinking Enforced Disappearances," in "Special Dossier: Rethinking Sovereignty and Capitalism," special issue, *Qui Parle* 23, no. 1 (Fall/Winter 2014): 43.

147 *UDHR*, Article 6 (which states that, "everyone has the right to recognition everywhere as a person before the law"). *ICCPR*, Article 16 (which reiterates the same, "everyone shall have the right to recognition everywhere as a person before the law").

148 OHCHR, *Enforced and Involuntary Disappearances*, 3–4.

149 TRC, *Legacy*, 66.

150 On the subject, see, for example, Sarkin and Martinez, "Global Practice."

151 *Declaration on Enforced Disappearance*, Article 20 (which focuses on "the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance").

152 *ICPPED*, Article 25.1(a), (b).

153 *ICPPED*, Article 25.2.

154 The WGEID adds that, "the result of the corresponding judicial investigations should be made publicly accessible in order for the society as a whole to know of the facts of the enforced disappearances of children, including those responsible for them." See WGEID, *General Comment on Children*, paras. 37, 38.

155 WGEID, *General Comment on Children*, para. 11.

156 WGEID, *General Comment on Children*, para. 6.

157 *CRC*, Article 7.1 (emphasis added).

158 *CRC*, Article 8 (emphasis added).

159 Nicky Parker, "Why We Have the Right to an Identity," Amnesty International UK, October 23, 2014, https://www.amnesty.org.uk/blogs/stories-and-rights/why-we-have-right-identity.

160 WGEID, *General Comment on Children*, para. 4.

161 Sarkin and Martinez, "Global Practice," 46.

162 This process has not been uncontentious. See, for example, Frédéric Mégret, "The Strange Case of the Victim Who Did Not Want Justice," *International Journal of Transitional Justice* 12, no. 3 (2018): 447–50.

163 See, for example, the life history of Percy Onabigon, which is included in chapter 12 and in OSI, *Sites of Truth, Sites of Conscience*, chapter 3.

164 On the right to truth, see Joinet/Orentlicher principles. Frank Haldemann and Thomas Unger, "The UN Anti-impunity Framework: A Critical Appraisal," *UN Today*, April 8, 2021, https://untoday.org/the-un-anti-impunity-framework-a-critical-appraisal/.

165 Klinkner and Davis, *Right to the Truth*, 35.

166 *ICPPED*, preamble.

167 *ICPPED*, Article 24.2 (emphasis added).

168 Klinkner and Davis, *Right to the Truth*, 9.

169 Castillo Páez Case, Judgement on the Preliminary Objections (IACtHR, January 30, 1996), https://www.refworld.org/cases,IACRTHR,3ae6b68518.html.

170 Yasmin Naqvi, "The Right to the Truth in International Law: Fact or Fiction?" *International Review of the Red Cross* 88, no. 862 (June 2006): 257 (emphasis added).

171 Klinkner and Davis note that, at the IACtHR, the right to truth, "has never been treated as a robust, stand-alone right on which a cause of action under the [American Convention on Human Rights] could be directly based, and the Court has resisted the Commission argument to that effect. The Court's response has been to subsume a state's duty to investigate and disclose the truth within particular express rights in the Convention. The right to truth may correspond to the state's duty to investigate alleged Convention breaches." Klinkner and Davis, *Right to the Truth*, 105.

172 Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2006), 19 (emphasis added).

173 Alice M. Panepinto, "The Right to the Truth in International Law: The Significance of Strasbourg's Contributions," *Legal Studies* 37, no. 4 (2017): 739–64.

174 Klinkner and Davis, *Right to the Truth*, 28–29. Klinkner and Davis add that, "the scope of the right to truth extends to an obligation on states to establish archives" (53). On the importance of archives to the right to truth, see also generally the UN report that focused on "practices relating to archives and records concerning gross violations of human rights, and programmes for the protection of witnesses and other persons involved in trials connected with such violations" as key aspects of the right to truth. UNGA, *Right to the Truth: Report of the Office of the High Commissioner for Human Rights, Summary*, UN Doc. A/HRC/12/19, August 21, 2009, https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/a-hrc-12-19.pdf.

175 UNGA, *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions Mass Graves, Highlighting the Multitude of Sites of Mass Killings and Unlawful Deaths across History and the World*, UN Doc. A/75/384, October 12, 2020, para. 28.

176 Klinkner and Davis, *Right to the Truth*, 66–75.

177 *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Case 11.481, Report no. 37/00, Doc. OEA/Ser.L/V/II.106 Doc. 3 rev., 1999, 671, para. 150; see also IACtHR, *Case of Almonacid-Arellano et al v. Chile,* (IACtHR, 2006), https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

178 Klinkner and Davis, *Right to the Truth*, 61.

179 Eduardo González Cueva, "Seeking Options for the Right to the Truth in Nepal," *International Centre for Transitional Justice*, November 2012, 2, https://www.ictj.org/sites/default/files/ICTJ-Briefing-Paper-Nepal-Ordinance-Dec-2012-ENG.pdf; see also Klinkner and Davis, *Right to the Truth*, 13. Transitional justice refers to,

"the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past conflict, repression, violations and abuses, in order to ensure accountability, serve justice and achieve reconciliation.... These processes may include both judicial and non-judicial mechanisms, including truth-seeking, prosecution initiatives, reparations, and various measures to prevent the recurrence of new violations, including: constitutional, legal and institutional reform, the strengthening of civil society, memorialization efforts, cultural initiatives, the preservation of archives, and the reform of history education. Transitional justice aims to provide recognition to victims, enhance the trust of individuals in State institutions, reinforce respect for human rights and promote the rule of law, as a step towards reconciliation and the prevention of new violations." See "OHCHR: Transitional Justice and Human Rights," OHCHR, November 12, 2021, https://www.ohchr.org/en/transitional-justice.

180 *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48/Add.3, 2010, para. 21.

181 "Human Rights Council Complaint Procedure," OHCHR, accessed January 28, 2024, https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index.

182 "Human Rights Council Complaint Procedure."

183 "Human Rights Council Complaint Procedure."

184 OAS, *Rules of Procedure of the Inter-American Commission on Human Rights*, 2009, Title II Procedure, Chapter I, Article 23.

185 See "The American Declaration of the Rights and Duties of Man," accessed January 30, 2024, https://humanrightscommitments.ca/wp-content/uploads/2018/10/American-Declaration-of-the-Rights-and-Duties-of-Man.pdf.

186 WGEID, "Reporting a Disappearance to the Working Group," OHCHR, accessed January 28, 2024, https://www.ohchr.org/en/special-procedures/wg-disappearances/reporting-disappearance-working-group.

187 WGEID, "Reporting a Disappearance."

188 WGEID, "Reporting a Disappearance."

189 "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

190 These four are considered the "core" international crimes and are reflected in the jurisdiction of the *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 9090, Article 5 (*Rome Statute*).

191 Frédéric Mégret, "The MMIWG Report: A Call for Decolonizing International Law Itself,'" *The Conversation*, June 9, 2019, https://theconversation.com/the-mmiwg-report-a-call-for-decolonizing-international-law-itself-118443.

192 For a thoughtful history of the term, see Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes against Humanity"* (New York: Vintage, 2017).

193 *Rome Statute*, Article 7.1(i).

194 Irena Giorgou, "State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute," *Journal of International Criminal Justice* 11, no. 5 (December 2013): 1001–21.

195 International Criminal Court (ICC), *Elements of Crimes* (The Hague, Netherlands: International Criminal Court, 2013), Article 7, introduction, para. 1.

196 ICC, *Elements of Crimes*, Article 7, Introduction, para. 3.

197 *Prosecutor v. Musema*, Judgment, ICTR-96-13-T, para. 205 (ICTR, January 27, 2000). ICTR refers to the International Criminal Tribunal for Rwanda.

198 *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23 & 23/1, para. 48 (ICTY, February 22, 2001). ICTY refers to the International Criminal Tribunal for the former Yugoslavia. See also *Prosecutor v. Augustin Ndindiliyimana et al.*, ICTR-00-56-T, para. 260 (ICTR, May 17, 2011) ("the term 'widespread' refers to the large scale nature of the attack and the number of victims").

199 *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber, ICC-01/09-01/11, para. 176 (ICC, January 23, 2012).

200 *Prosecutor v. William Samoei Ruto*.

201 *Prosecutor v. Kunarac et al.*, at para 47.

202 *Prosecutor v. Jadranko Prlić*, Judgment (Trial Chamber) IT-04-74-T, para. 41 (ICTY, May 29, 2013).

203 *Prosecutor v. Kunarac et al.*, at paras. 556–57.

204 *Prosecutor v. Kunarac et al.*, at para. 42.

205 See Baranowska, *Rights of Families*, 31.

206 ICC, *Elements of Crimes*, Article 7, introduction, para. 2.

207 ICC, *Elements of Crimes*, Article 7(1)(i), 3(a).

208 ICC, *Elements of Crimes*, Article 7(1)(i), 6.

209 ICC, *Elements of Crimes*, 7(1)(i), 8; see also *Prosecutor v. Augustin Ndindiliyimana et al.*, ICTR-00-56-AJudgment (Appeals Chamber), para. 260 (ICTR, February 11, 2014).

210 *Prosecutor v. Kunarac et al.*, at para. 434.

211 ICC, *Elements of Crimes*, Article 7, 2.

212 *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, para. 59 (ICTY, March 15, 2002).

213 *Rome Statute*, Article 7.2(i).

214 Baranowska, *Rights of Families*, 8.

215 Morris and Smith, "The Disappeared."

216 Pauline Wakeham, "The Slow Violence of Settler Colonialism: Genocide, Attrition, and the Long Emergence of Invasion," *Journal of Genocide Research* 24, no. 3 (2022): 337–56, https://www.tandfonline.com/doi/full/10.1080/14623528.2021.1885571.

217 *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 UNTS 277, Article 2(e).

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219 ICC, *Elements of Crimes*, Article 7(1)(i)(a).

220 ICC, *Elements of Crimes*, Article 7(1)(i) 1(b).

221 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UNGA Resolution 43/173, December 9, 1988.

222 See *Body of Principles for the Protection of All Persons*, Principles (a), (b), (c).

223 See ICC, *Elements of Crimes*, n. 26.

224 TRC, *Missing Children*, 1.

225 Human Rights Council, *Report on Enforced Disappearance*, 10.

226 TRC, *Legacy*, 189.

227 TRC, *Missing Children*, 1.

228 TRC, *Missing Children*, 1.

229 TRC, *The History, Part 1*, 560–64.

230 TRC, *Missing Children*, 1–2, 15–33.

231 TRC, *Missing Children*, 9.

232 *Rome Statute*; Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," *Criminal Law Forum* 21, no. 1 (2010): 1–37.

233 Clarke, "Rendering the Absent Visible," 138.

234 See also OSI, *Sacred Responsibility: Searching for the Missing Children and Unmarked Burials: Interim Report*, June 2023, 122, https://osi-bis.ca/wp-content/uploads/2023/06/OSI_InterimReport_June-2023_WEB.pdf.

235 Brian Finucane, "Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War," *Yale Journal of International Law* 35 (2010): 195.

236 Letter from Phakiso Mochochoko (Director, Jurisdiction, Complementarity and Cooperation Division, ICC) to Kate Allingham (Office of Andrew Wilkie, Member of Parliament), February 12, 2020, https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf.

237 Mochochoko to Allingham, February 12, 2020.

238 *Rome Statute*, Article 21.3.

239 Sarkin and Martinez, "Global Practice," 100.

240 "UN Experts Call on Canada, Holy See to Investigate Mass Grave at Indigenous School," OHCHR, June 4, 2021, https://www.ohchr.org/en/press-releases/2021/06/un-experts-call-canada-holy-see-investigate-mass-grave-indigenous-school?LangID=E&NewsID=27141.

241 WGEID, *General Comment on Children*, para. 5. There is some debate about how far back human rights bodies can investigate. See Grażyna Baranowska, "How Long Does the Past Endure? 'Continuing Violations' and the 'Very Distant Past' before the UN Human Rights Committee," *Netherlands Quarterly of Human Rights* 41, no. 2 (2023): 97–114.

242 As discussed above, enforced disappearances harm both the person disappeared as well as their families. Enforced disappearances are atrocities committed against a collective and not only individuals. It is arguable that, consistent with international human rights law, both the families and the disappeared are victims of enforced disappearance and should be recognized as victims under international criminal law.

243 Morris and Smith, "The Disappeared."

244 *Crimes against Humanity and War Crimes Act*, SC 2000, c. 24.

245 Fannie Lafontaine, *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012), 165.

246 See Lafontaine, *Prosecuting Genocide*, 165, n. 25.

247 *Crimes against Humanity and War Crimes Act*, section 9(3) (which states that only the Attorney General can conduct proceedings for international crimes committed in and outside of Canada, thereby giving the Attorney General the exclusive jurisdiction to prosecute).

248 Bernard Duhaime, "Canada and the Inter-American Human Rights System: Time to Become a Full Player," *International Journal* 67, no. 3 (Summer 2012): 639–59; Gordon Mace and Jean-Philippe Thérien, "Canada and the Americas: Making a Difference?" *International Journal: Canada's Journal of Global Policy Analysis* 67, no. 3 (2012): 644–47.

249 Duhaime, "Canada and the Inter-American System"; Daniel Cerqueira, "Indigenous Peoples' Rights and the Multicultural Approach: For a Twin-Track Dialogue between Canada and the Inter-American Human Rights System," *Quebec Journal of International Law* 35 (June 2022): 185–209; Pascale Fournier, "Actes du Colloque S'ouvrir aux Amériques pour mieux protéger les droits humains et s'engager dans la réconciliation au Canada," *Quebec Journal of International Law* 35 (June 2022): 1–4.

250 Sara Gold, "Somos Americanos? The Potential of the Inter-American Human Rights System for Indigenous Justice in Canada," *Quebec Journal of International Law* 35 (June 2022): 163–85.

251 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, May 2003, https://publications.gc.ca/collections/collection_2011/sen/yc32-0/YC32-0-372-4-eng.pdf.

252 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 39.

253 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 42–44.

254 According to the International Law Commission, an interpretative declaration, "means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions." International Law Commission, *Guide to Practice on Reservations to Treaties*, Doc. A/66/10, 2011, para. 75, 1.2.

255 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 6.

256 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 6.

257 Canada acceded to the *ICESCR* in 1976.

258 *ICESCR*, Article 2.

259 See IACHR, *Missing and Murdered Indigenous Women in British Columbia, Canada*, Doc. OEA/Ser.L/V/II. Doc.30.14, December 21, 2014.

260 Margarette May Macaulay, "Canada and the Inter-American Human Rights Sytem," special issue, *Revue québécoise de droit international* (June 2022): 19.

261 Macaulay, "Canada and the Inter-American Human Rights System," 19.

262 *Canadian Charter*. See comments by Elisabeth Eide in Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*.

263 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 40.

264 Duhaime, "Canada and the Inter-American System," 648–49 (emphasis added).

265 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 1.

266 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 58.

267 Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS*, 3.

268 Catherine Morris, "Unforgotten on the Day of the Disappeared: Missing Human Rights Advocates," *Slaw*, August 30, 2023, https://www.slaw.ca/2023/08/30/unforgotten-on-the-day-of-the-disappeared-missing-human-rights-advocates/.

269 See, for example, House of Commons, Canada, Members of Parliament, M-383 Baloch People, 41st Parliament, 2nd Session, October 16, 2013, https://www.ourcommons.ca/members/en/irwin-cotler(1785)/motions/6253145.

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271 Brent Patterson, "PBI Accompanies the International Day of the Victims of Enforced Disappearances," Peace Bridges International, August 31, 2022, https://pbicanada.org/2022/08/31/pbi-accompanies-the-international-day-of-the-victims-of-enforced-disappearances/.

272 It could also bolster efforts to address some cases of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people.

273 *Criminal Code*, RSC 1985, c. C-46; *ICPPED*, Article 25.1.

274 Her Excellency the Right Honourable Mary Simon, Governor General of Canada, Keynote Address, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Montreal, Quebec, September 8, 2023.

275 ICC, *Elements of Crimes*, 7–8.

CHAPTER 3

Unmarked Burials and Mass Graves

> It is true that so many in this country are facing something that has never been dealt with ... there was an actual genocide inflicted upon our precious children. Communities are facing a difficult decision about what happens once those children are found: Should they be exhumed? What happens after that? Is there a potential for criminal action?
>
> — Donald Worme, KC, Indigenous Peoples' Counsel[1]

Unmarked burials and mass graves are far from rare; they exist in every populated region of the world. In times of war and times of peace, history has borne witness to millions of victims who have gone missing and who were disappeared.[2] Families have waited, searched, and demanded to know what happened to their children, husbands and wives, fathers and mothers, as perpetrators deny their crimes and enjoy impunity and power. Unfortunately, many families and communities have been left without answers as to what happened to their missing or disappeared loved ones. The United Nations (UN) Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions stated:

> Ours is a history marred by massacres, in which, so often, perpetrators not only walk free, but, along with their descendants, also hold on to the reins of power—statues erected in their memory in front of court houses, government buildings and in public parks. Contrast this with the state of mass graves as evidence of these massacres from long ago

> and more recent, thousands of which are left uncovered, unprotected or unpreserved when not destroyed or desecrated.[3]

Canadians are accustomed to reading about secret and illegal, clandestine deaths as well as mass and unmarked graves in other countries. Many may be familiar with the mass graves at Srebrenica, where eight thousand Bosnian Muslim boys and men were murdered, buried, and later exhumed after the genocidal violence committed by the Bosnian Serb military in 1995.[4] Others will have learned, in recent years, of the recovery and investigation of a mass grave containing victims of the 1921 Tulsa race massacre in the United States.[5] In 2023, Canadian media covered the exhumation of mass graves in Izyum and Bucha, Ukraine, where hundreds of bodies were uncovered following the invasion and occupation of Ukrainian territory by Russian forces.[6] Canadians have also been exposed to all-too-regular accounts of the search for young people, including students, killed and left in mass graves in Mexico.[7]

These examples may seem distant as something that happens elsewhere but not in Canada. In recent years, however, Canadians have had to confront the atrocities perpetrated in Canada against Indigenous children and families. While Indigenous families, communities, and Survivors of Indian Residential Schools have long known about the existence of unmarked burials and mass graves of the missing and disappeared children, settler Canadians are now being confronted with the existence of unmarked burials and, potentially, mass graves existing in their provinces, cities, and towns. For many, the existence of these sites of truth and conscience only became known after the public confirmation of 215 potential unmarked burials at the Kamloops Indian Residential School in May 2021 and at dozens of other former Indian Residential School sites since then. Canadians must now accept this uncomfortable truth: investigations into the missing and disappeared children have started to reveal that unmarked burials and mass graves of Indigenous children exist in Canada, including inside registered cemeteries.

It is important to highlight that, wherever unmarked burials and mass graves are located, the victims most likely to be found buried in them are from marginalized or targeted political, racial, ethnic, and religious communities. People whose humanity and dignity are minimized in life are more likely to have their humanity and dignity disregarded in death. In countries with large Indigenous populations, Indigenous people and communities often face disproportionate levels of discrimination and violence, both in life and in death.[8] Unfortunately, this is also the case in Canada.

There is an urgency to recovering the missing and disappeared children, locating their graves, identifying them, learning and understanding their fate, and commemorating them. The country has maintained powerful national historical myths about how Canada was settled

peacefully. It is no surprise, therefore, that Canadian law has not been designed to provide access to, protect, and secure sites of these potential atrocities so that thorough investigations can be completed. This is why international law is so important to consider: it has developed frameworks, principles, and legal obligations for investigations of unmarked burials and mass graves that can be applied to support the development of a new legal framework in Canada. In accordance with the need to decolonize international law, this consideration must include the input of Survivors, Indigenous families and communities, and Indigenous laws throughout.

This chapter details international human rights standards and contemporary best practices regarding the exhumation of unmarked burials and mass graves and the treatment of the bodies of the missing and disappeared. The language and logic of international law is used throughout this chapter to analyze and deepen understandings regarding the unmarked burials and mass graves in Canada. It articulates the applicable standards and relevant international laws and their application to the specific context of the missing and disappeared children and their unmarked burials at former Indian Residential Schools and associated institutions. Throughout, this chapter places an emphasis on the need for Indigenous-led investigations to occur. Specifically, this chapter:

- Defines the terms "unmarked graves and burials," "mass graves," and "victims" under international human rights law;
- Examines the legal and ethical complexities relating to unmarked burials and mass graves and the treatment of the deceased by applying international human rights standards to four areas:
    (1) the causes of death of the children in unmarked burials and mass graves;
    (2) the treatment of the remains of those buried in the graves and the residual rights of the dead;
    (3) respecting and upholding the rights of families and communities whose members are missing and disappeared; and
    (4) the protection of sites where unmarked burials and mass graves are located; and
- Outlines key elements of Indigenous-led investigations into unmarked burials in Canada, including:
    - securing free, prior and informed consent;

- respecting the decision of whether or not to exhume;
- identifying the right people and organizations to investigate and lead exhumations; and
- providing full and sustainable funding to communities searching for and recovering the missing and disappeared children.

CLARIFYING DEFINITIONS: UNMARKED GRAVES AND BURIALS, MASS GRAVES, AND VICTIMS

After the public confirmations of potential unmarked burials that began in 2021, some individuals have criticized media coverage for reporting that mass graves were found at former Indian Residential School sites.[9] The public controversy over whether there are mass graves at these sites points to the need to clarify terminology.[10] This section therefore offers some clarity on what the terms "unmarked graves," "mass graves," and "victims" mean in this context.

Defining "Unmarked Graves" and "Unmarked Burials"

Unmarked graves do not have a marker—such as a headstone, plaque, or sign—designating the presence of the grave. Such graves may never have been marked, or they may have initially been designated as burial sites but are no longer marked due to neglect or natural or intentional human damage. The term "unmarked grave" is used in international human rights law. In Canada, the Truth and Reconciliation Commission of Canada (TRC), Survivors, and Indigenous communities and leaders have used the term "unmarked burials" to describe the burial sites at the former Indian Residential Schools as well as at other associated sites where children may be buried, such as the former Royal Victoria Hospital and the Allan Memorial Institute in Montreal, Quebec,[11] and the many other institutions that children were transferred to from Indian Residential Schools. The terms "unmarked graves" and "unmarked burials" are used interchangeably throughout this Final Report.

Defining "Mass Graves"

There is no universally accepted definition of a mass grave. Reflecting humanity's capacity for violence, mass graves come in a vast array of configurations; there is thus no consensus on exactly what features a mass grave must have. Some have been found in cemeteries, others in fields and wells, still others in hastily made trenches or ditches that victims were forced to dig under duress and threats. It is important to resist the urge to confine the definition of a mass

grave to the popular imagery of enormous, muddy pits containing thousands of tortured and tormented victims of mass murder. Limiting the definition in this way unduly and inappropriately curtails which sites constitute a mass grave. While more than one body is necessary for a grave to be considered a "mass grave," there is no agreement over how many bodies must be present for a site to qualify as such.[12] The definition of a mass grave from the *Bournemouth Protocol on Mass Grave Protection and Investigation*, endorsed by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, is helpful in articulating the parameters of mass graves.[13] According to the protocol, a mass grave can be defined as, "a site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonized, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness."[14]

Mass graves need not be the direct result of deliberate harms against people. Some, for example, were created for COVID-19 victims or victims of the 2010 earthquake in Haiti. In other words, not all mass graves must be the result of illegal activities, although the right to be buried in accordance with the deceased's cultural practices is likely to be violated whenever mass graves are created. It is therefore important to resist the automatic assumption that all mass graves are the result of criminal wrongdoing, just as it is important to accept that individual, sequential graves may be indicative of mass atrocity, including crimes against humanity and genocide. In places like Argentina and Spain, evidence of atrocities has emerged from individual burials just as it has in Canada.[15] Identifying mass graves does not therefore automatically mean that mass atrocities have been committed.[16]

Although all the deceased in a mass grave might not have died because of illegal activity, it may be that bodies of the wrongfully killed may be commingled (mixed together) with people who died of natural causes. Commingling is less likely to happen when bodies are buried in single burials, but when it does occur, it may be the result of perpetrators attempting to "hide" clandestine deaths among natural ones or because of disturbances—natural or otherwise—to burials. In addition, it is not necessary that those whose remains are buried in mass graves died from the same cause or at the same time; a grave or burial site can be repeatedly used over years with additional bodies added over time. Where this happens, some sites may become mass graves over time "even if not considered a mass grave initially."[17]

Investigating Mass Graves and Unmarked Burials

The assessment of whether a site constitutes a mass grave or an unmarked burial does not deflect or distract from the fact that the fate of the Indigenous children buried at these sites

deserves attention and care in the form of Indigenous-led investigations. Nor should a determination as to what to call a site lead to any conclusion that the fate of the children was less alarming or less deserving of justice than other historical atrocities. The circumstances and causes of every missing and disappeared child's death must therefore be investigated.

Where unmarked burials and mass graves exist, the circumstances that led to the death and/or the manner in which the body was treated or disposed of warrants an investigation to determine lawfulness. As international law experts, Melanie Klinkner, Ellie Smith, and Jonathan Whittle make clear, "in practice, in order for a mass grave to engage the international legal sphere and to warrant protection (like other war graves) and investigation, the potential impropriety and/or unlawfulness in either the circumstances surrounding the death of those in mass graves or the method in which the human remains were disposed of are key factors."[18] There is immense diversity in the manner in which bodies have been treated and disposed of in the aftermath of atrocities.[19] Some are buried in cemeteries. Some are buried in individual graves, and some are buried with other bodies in mass graves. Sometimes, the means and methods of perpetrators evolve over time and are reflected in the ways in which the bodies of victims are buried. When mass graves and unmarked burials exist amidst evidence of wrongdoing, they are often related to individuals who have gone missing or who were disappeared by the State, paramilitary groups, agents working on behalf of the State (such as the police), or non-State entities such as rebel or terrorist groups acting with the acquiescence of the State.

Viewed through the lens of international human rights law, UN experts—among them the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the UN Special Rapporteur on the Rights of Indigenous Peoples; and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment—have characterized the burial sites at the former Indian Residential Schools as "mass graves."[20] The Indian Residential School History and Dialogue Centre also concluded that, "international standards and protocols should inform terminology and dialogue. In this respect, the emerging international human rights and legal norm is to classify such sites as 'mass graves.'"[21] In addition, at least some of the burial sites of the missing and disappeared children fall within the *Bournemouth Protocol*'s definition of mass graves.

Defining "Victims"

In accordance with the definitions provided by various human rights protocols, studies, and international organizations, victims are understood in this Final Report to be the children whose remains are buried in the unmarked and mass graves as well as their families and

communities who suffer because of their disappearance or lack of identification.[22] The *Bournemouth's Protocol*'s definition of victims is instructive:

> Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in the state or as a result of acts which constitute gross violations of international human rights law or serious violations of international humanitarian law.[23]

This definition is broad and includes both individuals and collectives who have suffered harm as a result of international criminal wrongdoing and/or human rights violations. In the context of mass graves in international law, there is no question that the definition of "victims" includes the person who died or was killed and their family members.

Within the last several decades, there has been an evolving discussion about whether the definition of "victims" also includes the descendants of the person who died, thereby recognizing the intergenerational trauma and impacts caused by the wrongdoing and/or human rights violations.[24] In the context of the search and recovery of the missing and disappeared children and unmarked burials in Canada, the definition of victims must include the communities from which the children were taken. This is necessary because otherwise Canada could avoid accountability by merely waiting for all the direct family members or lineal descendants to die. It is also necessary given that the missing and disappeared are children, as in most cases they would not have had their own children, and, thus, no direct lineal descendants would exist. This expansive definition of victims also reflects the broader concept of family and kinship under Indigenous legal orders and reflects the collective responsibilities communities have to care for children. Based on this broader definition of victims, Indigenous families and communities are entitled to full reparations.

The Over-50-Year Search to Find Marieyvonne Alaka Ukaliannuk

In the early 1960s, Marieyvonne Alaka Ukaliannuk was only four years old when she was taken from her hometown of Igloolik and sent on a floatplane to the Sir Joseph Bernier Federal Day School located in Chesterfield Inlet, Nunavut. During her first year at Sir Joseph Bernier, Marieyvonne Alaka was injured; she hit her head while playing with friends in the playground. She was sent to a hospital in Churchill,

Sir Joseph Bernier Federal School, Turquetil Hall, Chesterfield Inlet, 2004 (Nick Newberry Collection, Nunavut Government Archives).

Manitoba, where she contracted tuberculosis. As a result, she was transferred to a larger hospital in Winnipeg, Manitoba, then to a tuberculosis sanatorium in Toronto, Ontario, and then to another hospital in Montreal, Quebec. At the hospital in Montreal, she contracted meningitis and developed quadriplegia. She was paralyzed in all four of her limbs. Her final transfer was to the Cecil Butters Memorial Hospital, a children's continuous care home in Austin, Quebec, where she died at eight years old.

Marieyvonne Alaka did not speak English, only Inuktitut. As she was transferred from one institution to another; she was sent on her own, without any family to hold her hand, comfort her, or make medical decisions on her behalf. She did not understand the languages being spoken to her. Marieyvonne Alaka's parents were never notified of her injury or of her transfers to the various institutions.[25]

During this period, the federal government would fly the children back to their homes from the Sir Joseph Bernier Federal Day School in Chesterfield Inlet for the summer. The float plane would land on the beach. That first summer after Marieyvonne Alaka was taken to Sir Joseph Bernier, her parents went down to meet the plane with all the other parents. Marieyvonne Alaka was the only child that did not get off the plane. Her parents immediately went to see the Catholic priest to find out where Marieyvonne Alaka was. From that moment on and

until his passing in 2007, Marieyvonne Alaka's father, Lucien Ukaliannuk, searched for her. He spent over 53 years trying to find out what happened to Marieyvonne Alaka. Marieyvonne Alaka's mother, Therese Ukaliannuk, felt that the search had died with her husband and that she would never know what happened to her daughter.

That is when Martha Maliiki, a family friend and community researcher from Igloolik living in Iqaluit, took over the search.[26] The search was made more difficult because the Catholic church had changed Marieyvonne Alaka's name. But Martha was able to find information using Marieyvonne Alaka's Eskimo identification number.[27] In addition to the decades that Lucien Ukaliannuk searched for Marieyvonne Alaka's burial, Martha's search took over 20 more years. Martha recounted, "As I was doing the research, it was really hard. There were times I was too angry to work on it.... It was Marieyvonne Alaka's mother's strength that kept me going." Marieyvonne Alaka is buried over two thousand kilometres from her home of Igloolik. Marieyvonne Alaka's final resting place is located on the grounds of a church in Magog, Quebec, where there is a burial area of the cemetery for "unclaimed" and orphaned children.

In July 2016, Therese, at age 76, travelled with Martha to visit Marieyvonne Alaka's burial. To make this trip, private donors paid for their plane tickets. Martha and Therese fundraised to cover the rest of their costs. Martha said, "When we were brought to the burial site, we were told she was in an unmarked grave with four other children." Therese took time to sit in several different areas of the cemetery since she did not know where in the graveyard Marieyvonne Alaka was actually buried. Martha and Therese asked both the Nunavut coroner and the Quebec coroner to have the graves exhumed so they could bring Marieyvonne Alaka home. They were told that an exhumation could not be done because further research had confirmed that many other children are buried alongside her in mass unmarked graves.

Martha Maliiki at the National Gathering in Edmonton describing her work to help find Marieyvonne Alaka Ukaliannuk, September 14, 2022 (Office of the Independent Special Interlocutor).

HUMAN RIGHTS AND THE TREATMENT OF BODIES

There is a direct connection between the discrimination that victims face in life and the disregard for their dignity after death. The lack of care, concern, and equality in the treatment of those who lie in mass graves is typically an extension of the lack of care, concern, and equality in the treatment that they received while they were alive.[28] According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions:

> Those who were marginalized in life—the poor, the persecuted and those subjected to discrimination—are also those at greatest risk of never being identified, of never having their remains returned to their families and of never receiving justice. Much of this pattern has its roots in inequalities among the living and in discriminatory differences in perceptions of the significance of death.[29]

Adam Rosenblatt, a scholar in peace, justice, and human rights, has described how those in unmarked and mass graves are twice victimized: first by the atrocities committed against them in life and then in death, "The violence against the bodies in mass graves reaches across the boundaries of life; it is committed first against living human beings and then against their dead bodies."[30]

Indigenous children's segregation into unmarked burials is linked to the ways in which they were mistreated, dehumanized, and segregated in life. This link between the mistreatment of the living and their mistreatment in death was noted by the TRC in relation to the Indigenous children who died while in the care of the State and churches at Indian Residential Schools, "Many, if not most, of the several thousand children who died in residential schools are likely to be buried in unmarked and untended graves. Subjected to institutionalized child neglect in life, they have been dishonoured in death."[31] Dental records are an apt, if far from unique, example of discriminatory and unequal treatment in life extending into death. In the context of searching and recovering missing and disappeared persons, a lack of dental records can thwart efforts to identify remains and return them to their families. While dental records can help identify individuals buried in unmarked and mass graves, this is only true for those who had access to, and could afford, dental care in life.[32] In this context, where dental care was not provided to children at Indian Residential Schools and other associated institutions,[33] or in cases where records of dental care are not being released, have been destroyed, or are not available,[34] it adds to the difficulty of identifying the children and returning these children to their families or communities for reburial, where it is desired.[35]

Survivors, Indigenous families, and communities whose loved ones and relatives are buried in unmarked or mass graves face constant reminders of the inhumanity that existed within the Indian Residentials School System and among the people who operated them.[36] Speaking at the National Gathering in Toronto in March 2023, one Survivor said:

> The only time that [truth and reconciliation] will really come to be is when the churches come forward and admit as to where our children are buried.... One of [the boys in my community who never came home] is [my mother-in-law's] brother. She's now 86 winters. I hope—I pray—that the church comes forward and tells us where they buried that child, because they know. So my mother-in-law can leave this world in peace knowing that her brother was found.[37]

The graves where the children are buried are not just any graves. They are the unmarked and mass graves of the missing and disappeared Indigenous children. They are the result of compounding and reverberating human rights violations, decades of neglect by the federal government, a refusal on the part of the Canadian State to protect the children and to adequately investigate their deaths, and a failure to provide families and communities with information regarding the fate of their precious children. This horrific reality calls for a human rights approach.

A Human Rights Approach to Missing and Disappeared Children and Unmarked and Mass Graves

A human rights lens that draws on international human rights laws and principles offers an important way to understand unmarked and mass graves and the missing and disappeared children. Although not all international human rights treaties are relevant to understanding and identifying the human rights violations committed against the children at former Indian Residential Schools and associated institutions, the following existed at the same time as many of the atrocities were being committed by Canada and the churches:

- 1948 *Universal Declaration of Human Rights* (*Universal Declaration*; ratified by Canada in 1948);[38]
- 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (ratified by Canada in 1952);[39]
- 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (acceded to by Canada in 1970);[40]

- 1966 *International Covenant on Civil and Political Rights* (*Covenant on Political Rights*; acceded to by Canada in 1976);[41] and
- 1966 *International Covenant on Economic, Social and Cultural Rights* (ratified by Canada in 1976).[42]

Although other international treaties were ratified by Canada later, their principles can still be applied because many were recognized by international law prior to the formal treaties being put into place. For example, the *Convention against Torture* was only ratified by Canada in 1984, but torture was already prohibited under international human rights law before the convention was adopted.[43] In addition, the UN *Convention on the Rights of the Child* (*Convention on the Child*) was only created in 1989 and ratified by Canada in 1991, but it is instructive in understanding the types of violations committed against the children in the Indian Residential School System.[44] Finally, the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) was fully adopted without objections by Canada in 2016 and contains important rights and principles that apply in the context of locating, protecting, and commemorating the unmarked burials and mass graves of Indigenous children today.[45] Unfortunately, and as elaborated in other chapters in this Final Report, Canada has not ratified the human rights instruments that could provide redress for the harms committed against Indigenous Peoples, including the children taken to former Indian Residential Schools and other associated institutions.[46] These instruments include the *American Convention on Human Rights*, which was adopted in 1969 and came into force in 1978, as well as the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*.[47]

It is critical to emphasize that human rights are inalienable—they cannot be given up or taken away.[48] Even when human rights are violated, individuals cannot and do not lose their rights as they are considered inherent to humanity. The *Universal Declaration* recognizes that, "the inherent dignity" and "the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[49] This has since been affirmed in other human rights treaties, including the *Covenant on Political Rights*, which Canada has ratified.[50] International law's clearest obligations regarding the treatment of the dead are stipulated in international humanitarian law, the legal regime that governs the conduct of armed conflict and that seeks to protect civilians from the consequences of war. However, experts have made clear that the requirement under international law that, "the dead be treated with respect and dignity" is applicable both in times of war and in times of peace.[51] In the context of disappeared persons, which would include many of the children forcibly transferred to Indian Residential Schools and other associated institutions, who subsequently died or were

never returned home, the UN Committee on Enforced Disappearances' Guiding Principles for the Search for Disappeared Persons states:

> The body or remains of a disappeared person should be handed over to the family members under decent conditions, in accordance with the cultural norms and customs of the victims, with respect at all times for the fact that they are the mortal remains of a person, and not objects. The return should also involve the means and procedures needed to ensure a dignified burial consistent with the wishes and cultural customs of the families and their communities. When necessary, and if family members so wish, States should cover the cost of transferring the body or remains to the place chosen by the family members for burial, even if the transfer is to or from another country.[52]

The requirement to repatriate the children to their families and communities is also affirmed in Article 12 of the *UN Declaration*:

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and **the right to the repatriation of their human remains.**
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with [I]ndigenous peoples concerned.[53]

Investigating the Causes of Death to Determine Whether Human Rights Violations or Unlawful Conduct Occurred

When they appear in the context of well-documented and known atrocities, unmarked and mass graves are often evidence of human rights violations and raise the presumption that the human rights of individuals located in these graves were violated in life. The most obvious violation of human rights for a person buried in an unmarked or mass grave is the right to life;[54] this right is protected in key human rights treaties and cannot be suspended or derogated from under any circumstances.[55] The Indian Residential School History and Dialogue

Centre notes that for children at former Indian Residential Schools, "the right to life of these children was violated. So were their 'last rights' such as those related to 'last rites,' and the religious, spiritual, and cultural rights that are core elements of human identity and experience. Further investigation may reveal at least some causes of death, that may be evidence of violence and criminal harms."[56]

Other human rights violations may also have been committed and deserve investigation, including freedom of religion and belief,[57] freedom of association[58] and expression,[59] the right to participate in cultural life,[60] the right to recognition as a person before the law,[61] and the right to be free from torture or other cruel and inhuman treatment.[62] If those left in unmarked and mass graves were victims of enforced disappearances, these rights, as well as the right to liberty and security of the person and the right to an identity, are also implicated.[63] The possible violation of these rights while the victims were alive, and which may have contributed to, or directly resulted in, their deaths, give rise to an obligation on the State to investigate. Canada therefore has an obligation to fully support investigations into the circumstances of their deaths and to ensure that their families and communities are informed of the findings.[64]

Under the *Universal Declaration*, "everyone has the right to recognition everywhere as a person before the law."[65] The *Convention on the Child* creates additional obligations on States to safeguard the right to an identity. Article 8 of the *Convention on the Child* directs that:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.[66]

This Convention further stipulates that "the education of the child shall be directed to ... [t]he development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own."[67] Individuals left in unmarked and mass graves are often victims of efforts to have their very identities erased. In fact, their burial in such sites may indicate, "suppression or even annihilation of individual, cultural or religious identity in death."[68] While the *Convention on the Child*

only came into existence in 1989, along with the 1948 *Universal Declaration*, it points to the central importance of the human right of identity and to that of children in particular. It is important to note that Indian Residential Schools were in operation after these conventions were adopted or signed by Canada—for almost 50 years after the *Universal Declaration* was adopted and for seven years after the *Convention on the Child* was signed.

Pursuant to international human rights law, Canada is not merely prohibited from interfering with people's enjoyment of their human rights; it has an obligation to protect people from having their rights infringed upon by others and, when violations do occur, to provide effective remedies.[69] Despite these obligations, the rights of the children to an identity were deliberately violated by the Canadian State and churches in the Indian Residential School System. Attempts to erase the children's identities were part of the system's design.[70] Children were stripped of their names and assigned numbers instead.[71] Their languages and their senses of self were attacked. Ties between the children and their families, communities, cultural practices, and ways of knowing were severed. These strategies to erase and eradicate identity have parallels with other mass atrocities and genocides.[72] The burial of the children in unmarked and mass graves is an extension of the denial of their rights to identity. Related to the attacks on their identity, and as described in detail in the previous chapter on enforced disappearances, the children did not simply go missing; some were also disappeared. Children were deprived of their liberty by agents working for the State and those running the institutions, and their whereabouts and fates were withheld from families. In these cases, the children, their families, and communities are the victims of enforced disappearances under international human rights law. The realities of unmarked burials and mass graves, coupled with the fact that many of the children have been disappeared, constitute serious human rights violations, which require full investigations as well as remedies and reparations.

Survivors, Indigenous families, and communities have made clear that Canada cannot investigate its own wrongdoing. Canada has regularly failed to address the settler colonial institutions that propagated decades of abuses and atrocities, as well as ongoing violence, against Indigenous Peoples. The risk of Canada investigating itself only to deflect responsibility, minimize its role in the atrocities, and then choose when to "turn the page" on what is often referred to as "this sad chapter of history" is simply too high. Indigenous communities are therefore best placed to lead these investigations. In alignment with Indigenous self-determination and sovereignty, the federal government must support the Survivors, Indigenous families, and communities who are leading or wish to lead, these investigations, without interference or intimidation.

Determining How the Children Were Treated after Death

Some scholars have argued that human rights continue to exist after death.[73] Others view the respectful treatment of the remains of those who have died as a form of reparations.[74] Still others emphasize that, "human rights responsibilities of States towards the body of a dead person arise when the body is found within the territory of the State."[75] Under Canadian law, deceased persons occupy a unique position: they are neither persons with full rights, nor are they mere "things." They are perhaps best described as bodies with certain residual rights, such as the right not to be trafficked or desecrated.[76] In some countries, the dead even enjoy some constitutional rights, including the right to dignity.[77] According to some communities, including many Indigenous communities around the world, the distinction between those who are alive and those who are dead is fluid. For many Indigenous Peoples, loved ones journey to the Spirit World after death but remain important members of the community deserving of acceptance and respect.[78] At every National Gathering, Survivors, Indigenous families, and communities explained that the living have important obligations towards those who have died, including the responsibility to ensure that they are buried and memorialized properly in accordance with the Indigenous laws, protocols, and ceremonies of their own communities.

While human rights generally only apply to the living, certain rights and obligations may extend to those who have died and include the treatment of their remains. International legal scholar Claire Moon suggests that while, "the dead cannot be rights claimers, and neither can they be bearers of responsibilities, ... they can be rights *holders* insofar as the living behave as if they have obligations towards the dead, treat them as if they have rights, and confer rights upon them in practice."[79] The Last Rights Project, an organized effort to establish a, "new framework of respect for the rights of missing and dead refugees and migrants and bereaved family members,"[80] found that numerous obligations extend to the body of a deceased person, including the requirements on States to:

- Search for missing persons;
- Respect the bodies of the deceased person;
- Issue death certificates;
- Locate and notify the relatives of those who have died and are missing;
- Facilitate the return of the remains of the deceased person to families on request;
- Treat and bury human remains in a dignified and respectful manner that is appropriate to religious and cultural traditions of the deceased and their family;

- Record the location of the burial as well as respect and maintain the gravesite; and
- Provide special protection for the remains of children.[81]

All of these rights—and their violation—are relevant to the deaths of the children and the inhumane disposal of their remains in unmarked and mass graves. For example, when the children died at Indian Residential Schools, they were typically not buried according to Indigenous laws, cultural norms, or funerary practices. Some children who are buried in unmarked graves were likely provided with no funerary ceremonies at all. Where funeral and burial services were conducted, they were most often held in the Christian tradition.[82] This attack on Indigenous cultural practices in relation to funerary and burial practices was a purposeful and common feature of settler colonialism. Professor of Anthropology Isaias Rojas-Perez notes:

> [T]he religious and political colonization of death constituted a cornerstone in the worldwide expansion of the European colonial project. The zeal of colonizers and missionaries particularly targeted native mortuary practices and beliefs that they considered to be not only savage and barbaric and, as such, intolerable, but also sources of idolatry and superstition as well as revolt and political resistance against the colonial project. The "Christianization of death" was a condition sine qua non for both the "conversion" of native peoples and the construction of the colonial order. This campaign involved not only eliminating pagan practices and capturing the [I]ndigenous imagination, but also reorganizing sacred space by removing and destroying natives' sites of worship and the remains of their ancestors.[83]

Canada systemically violated the rights of Indigenous children in life, in death, and through the generations that have since passed. If not remedied, this is a permanent denial of the inalienable human rights of the dead and disappeared. According to Rosenblatt, such action:

> has its own special horror. The violation of the dead can render them permanently "rightless" in a *definitional* sense—precisely the sense we cannot and should not use for the living. Gas chambers, atomic bombs, and cruder forms of violence can take things away from the dead that can never be put back: their identities, their places in the world, their bodies. The crucial element of the moral vision of human rights is that they are inalienable—that the untouchable, the concentration camp

> prisoner, the person locked in a squalid hotel room or the back of a van can still hold onto them as a claim, hope, and rebuke. The fact that the dead can be so clearly and utterly past any hope of restoring their rights means they never had human rights in the first place.[84]

Burying the children in unmarked and mass graves denied families and communities the opportunity to care for their loved ones after death. It continues to deny them the ability to uphold their obligations under Indigenous laws to care for the children and their burial sites. It places the children taken to Indian Residential Schools and other associated institutions, "beyond the reach of care."[85] This is not only a violation of the rights and dignity of the missing and disappeared children but also of their families and communities.

Respecting and Upholding the Rights of Families and Communities of the Missing and Disappeared Children

Burial and memorialization practices as well as ceremonies and rituals accorded to the dead have always existed among human cultures and communities.[86] There is great diversity in the personal, cultural, spiritual, and religious practices that families and communities have with respect to the treatment and burial of their loved ones after death. Regardless of these differences, a universal truth is that the denial of opportunity to care for those who have died causes great pain, anguish, and suffering to families and communities. Many suffer a sense of "ambiguous loss," caused by the uncertainty over the fate of a loved one, which can delay the mourning and grieving process.[87] The effects of this suffering should not be minimized. In the context of disappeared persons, it has been recognized that a lack of knowledge about whether a loved one is dead or alive, or how they perished and where their body lies, can constitute a form of torture for families.[88] According to the World Organisation Against Torture, "the level of anguish and suffering inflicted on family members has been repeatedly considered by the medical, psychological and legal community to be of sufficient severity to meet the threshold of the definition of torture."[89] Unfortunately, many Indigenous families whose children are missing or disappeared have suffered this kind of torture for generations.

Families also have an inalienable right to the truth;[90] it cannot be taken away. In the context of unmarked and mass graves, this includes the right to know what happened to their loved ones—both with respect to the circumstances of their death as well as the location of their death and burial. According to the United Nations:

> The right to the truth is often invoked in the context of gross violations of human rights.... The relatives of victims of summary executions,

> enforced disappearance, missing persons, abducted children, torture, require to know what happened to them. The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.[91]

This right must be satisfied by the State and therefore expresses itself in the obligation of States to investigate suspicious deaths that may have resulted from human rights violations. States have, "a procedural and moral obligation to investigate unlawful or suspicious deaths, whether the death occurs at the hands of State actors or private persons or persons unknown, and regardless of whether there is evidence of criminal action requiring investigation and prosecution under criminal law."[92] This obligation also exists irrespective of whether families have requested it, "An investigation is not dependent on a formal complaint or request from a next of kin, rather it should be automatically triggered."[93]

According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the obligation to investigate is coupled with an additional obligation to search and identify missing and disappeared persons, "International law requires all States (and parties to a conflict) to search and identify disappeared and missing persons, return any remains to the family, as well as any personal effects, or provide the families with access to the burial site. Such rights are recognized in times of armed conflict and internal violence, peacetime and in a post-disaster situation."[94] Importantly, the obligation to investigate is not outcome dependent; the investigation does not have to succeed in finding all of those who are dead, missing, or disappeared, or in identifying all causes of death. Indeed, in many cases, identifying every missing and disappeared person will not be possible. The obligation to investigate is therefore one of process: the investigation must be conducted in a genuine and good faith manner.[95]

In contexts where the State itself is implicated or directly responsible for the human rights violations and deaths, a conflict arises if the State leads the investigations into the violations and deaths. A key legal principle is that justice should not only be done, but it should also be seen to be done. It is difficult for this to occur, however, if victims and Survivors do not trust those who are leading the investigations. Through patterns, strategies, and practices of settler amnesty and a culture of impunity, Canada has a long history of denying or minimizing its responsibility for harms against Indigenous Peoples, deflecting calls for accountability, attempting to co-opt Indigenous-led processes like the TRC, and offering piecemeal and, ultimately, paltry commitments to justice.[96] There is ample evidence that the

Canadian government, or agents acting on its behalf and with its acquiescence, has breached the human rights of the missing and disappeared children and their families. Indigenous Peoples' trust in Canada's ability to conduct a credible, independent investigation is understandably low.[97] At National Gatherings, in meetings, and in submissions to the Office of the Independent Special Interlocutor, Survivors, Indigenous families, and communities have made it clear that Canada cannot investigate itself.[98] This is one of the many compelling reasons why search and recovery work to locate and identify the missing and disappeared children and unmarked burials must be led by Indigenous people; they are best placed to decide whether to investigate, how to investigate, and who should be involved in any investigation that takes place.

Protecting the Sites Where Unmarked Burials and Mass Graves Are Located

In addition to the obligation to investigate deaths associated with unmarked burials and mass graves and to satisfy the families' right to truth, States should protect, preserve, and, if families so choose, restore burial grounds.[99] This has important implications in the context of former Indian Residential School cemeteries. Many of these cemeteries have been neglected, damaged over time, or purposefully destroyed and desecrated.[100] The Canadian State, therefore, has an obligation to immediately protect, preserve, and restore these sites. Sites of unmarked burials and mass graves can become damaged or neglected over time, either by intentional human intervention or natural forces. What may first appear to be neglect, however, may in fact be purposeful. Leaving graves—whether marked or unmarked—exposed to damage from natural forces may benefit those responsible for the human rights violations and atrocities that resulted in the deaths of those buried in the graves. State officials and institutions often allow the degradation of grave sites as a method of indirectly covering up the atrocities.[101] This advances the interests of the State and those responsible for the atrocities who do not want the truth of the graves—and the reasons for their existence—to come to light.[102] This also signals that these graves, and those people who are buried within them, are unworthy of care and are ungrievable.[103]

Under international criminal law, the destruction of cultural property has been recognized by the Nuremberg Tribunal as a crime against humanity in and of itself, and by the International Criminal Tribunal for the former Yugoslavia as constituting persecution as a crime against humanity.[104] The desecration of cultural sites may also amount to an act of cultural genocide and signal genocidal intent by those involved in such destruction.[105] A State's obligation to protect mass graves and burial grounds is absolute and is particularly important where the sites may be vulnerable to desecration or destruction.[106]

According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, "under no circumstances should the existence of mass graves be denied or covered up."[107] In addition:

> Sites must not be damaged or destroyed, and those searching for or speaking of mass graves must not be imprisoned, threatened or silenced. Such acts amount to multiple human rights violations, including of the prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, the right to truth, the suppression or annihilation of individual identity, as well as of collective cultural, racial, ethnic, religious, political or other identity in death.[108]

Intentionally covering up and denying the existence of unmarked burials or mass graves produces human rights violations by, among other things, frustrating the right to the truth and prolonging the suffering of grieving families and communities.

Many burial grounds at or near former Indian Residential Schools and associated institutions were left unattended and unprotected because the federal government did not make plans for the ongoing maintenance and protection of these sites.[109] Despite the long-identified need for legal protections for these sites, no robust legal framework exists in Canada. The Indian Residential School History and Dialogue Centre notes:

> Nothing in provincial or federal law ... speaks to mass graves, or the specific circumstances of mass graves of Indigenous Peoples that were used in the 20th century as the result of atrocities at residential schools.... They are unmarked potential crime scenes that require rigorous processes of investigation and identification. They are sites of unfinished business and human rights violations where cultural and social burial practices and ceremony to honour the deceased were prevented from taking place.[110]

Instead, Indigenous burial sites at former Indian Residential Schools and associated institutions are treated, "as historic artifacts, under the authority of the provincial government rather than families and communities, and not treated like other human resting places. They are allowed to be disturbed, and in some instances even destroyed. Indigenous protocols and laws are marginalized."[111]

INDIGENOUS-LED, CULTURALLY RELEVANT, AND RESPECTFUL APPROACHES TO INVESTIGATING UNMARKED AND POTENTIAL MASS GRAVES

> During the tuberculosis epidemic of the 1940s to 1960s, the federal government took Inuit from our communities and placed Inuit in sanatoriums across Canada. Many times when Inuit died, their families were not notified. They were buried in unmarked graves, in mass graves, and families have been looking for those people who did not come home for the last 40 and 50 years.
>
> — President Natan Obed (Inuit Tapiriit Kanatami)[112]

It is a fundamental principle that search and recovery efforts must be Survivor and Indigenous-led. The efforts taking place across Canada are tailored to reflect the Indigenous laws, principles, protocols, and processes applicable within the territories where they are occurring. At every National Gathering, Survivors, Indigenous families, and communities leading this Sacred work made clear that each Nation has its own principles to guide search processes and help families and communities work through difficult decisions, including how to best honour, respect, and bring dignity to the missing and disappeared children. They also made clear that these investigations, to be respectful of cultural beliefs and values of affected families and communities, must be Indigenous-led. This aligns with forensic human rights approaches to investigations, which are focused on using rigorous forensic techniques to reveal the truth about what happened to the missing and disappeared person and respecting and involving the affected families and communities in the process:

> In its most immediate form, the forensics-based human rights movement's objectives are simple: to help families find, recover and rebury their missing loved ones, and to offer scientific certainties about what happened in moments of state terror, war and genocide. In a longer view, it also gives human rights activists the possibility of challenging dominant histories of violence by providing new truths that emerge alongside the technical work of recovering and identifying remains.[113]

When investigating unmarked burials and mass graves, there is a persistent tension between the treatment of the dead as evidence of past wrongdoing, on the one hand, and their treatment as the loved ones of family members and communities, on the other.[114] The former emphasizes gathering evidence to be used in legal proceedings, while the latter stresses the importance of treating the remains and graves with dignity, identifying loved ones who have

been recovered, returning their bodies to their families, and commemorating and protecting their burial sites. Criminal forensic processes often exclude family participation under the guise of maintaining the integrity of the investigation and crime scene. This contrasts with forensic human rights approaches, which have found important ways to include families. This tension has not always been well navigated by forensic investigation teams and may be particularly pronounced where cultural differences exist between the teams and the families and communities looking for their missing and disappeared loved ones.[115] In Canada, Indigenous-led investigations are already bridging this gap by including Indigenous laws, ceremonies, and protocols in the design of investigation processes.

While it remains an evolving area of knowledge and practice,[116] there is a growing appreciation among forensic scientists involved in human rights investigations and exhumations of the central importance of respecting families, cultures, and communities in all facets of the investigation into unmarked burials and mass graves. This importance is repeatedly emphasized in the *Minnesota Protocol on the Investigation of Potentially Unlawful Death*, which states that investigators, "should endeavour to respect the culture and customs of all persons affected by the investigation, as well as the wishes of family members, while still fulfilling their duty to conduct an effective investigation."[117] Specialists directly involved in such investigations have also highlighted the importance of not viewing remains only as evidence of violence and wrongdoing. As forensic anthropologist Alexa Hagerty emphasizes, "we remain ever-alert to the treatment of the dead, aware of the political and social contexts that create mass graves, and that we never forget that every set of remains is a missing person."[118] It is therefore critical for investigators and all those involved in the planning of exhumations to care for the bodies as both sources of evidence that can help to establish the cause of death and wrongdoing and as the children, brothers, fathers, mothers, aunties, uncles, friends, and community members of those who have been denied the knowledge of what happened to them and the opportunity to properly bury them.[119] Hagerty observes that both of these purposes must be fulfilled in order to properly and respectfully investigate these deaths, "If you can't understand the bones are people who are missed and loved, with a mother and father standing by the edge of the grave waiting, you can't do this work. If you can't understand the bones as evidence to be analyzed and examined, you can't do this work."[120]

This human rights lens and framework for unmarked and mass graves illustrates that the families and communities of the children who are missing and disappeared are themselves victims. The family's grief and need to understand what happened to their loved one is urgent, immediate, and deserves special care in the investigation process.[121] In Guatemala, for example, the Fundación de Antropología Forense de Guatemala (FAFG) emphasizes the importance of continuously informing the families about the investigation and its progress

and ensuring that they are able to participate in the truth-finding process itself. Affected families and communities must be at the forefront of forensic and human rights investigations. But how can this be actualized? There is no way to conduct investigations or exhumations that will satisfy everyone, everywhere, at all times. But the literature and practice of forensic human rights points to several key elements that can minimize unintended and unnecessary harms to families and communities. These include securing free, prior and informed consent; respecting the decision of whether or not to exhume; identifying the right experts and/or organizations to investigate and lead exhumations; and providing full and sustainable funding to communities looking for their missing and disappeared children.

Securing Free, Prior and Informed Consent

Any legal and policy framework regarding the investigation, treatment, and protection of unmarked burials and mass graves of the missing and disappeared children must respect Indigenous Peoples' sovereignty. Indigenous-led investigations provide this respect. In addition, where governments make decisions that could disturb or desecrate the unmarked burials and mass graves of Indigenous children, the principle of free, prior and informed consent becomes applicable. In the context of search and recovery work, free, prior and informed consent is relevant because many sites, or parts of sites, where unmarked burials and mass graves may exist are not in the control of Indigenous Nations but, instead, are controlled by governments or private landowners. The *UN Declaration* emphasizes the need for States to obtain the free, prior and informed consent of Indigenous Peoples by consulting and cooperating through their own representative institutions in good faith in a number of areas, including in relation to legislative or administrative measures (Article 19) and land development (Article 32).[122] The Canadian federal government has provided the following explanation about its interpretation of "free, prior and informed consent":

> References to "free, prior and informed consent" (FPIC) are found throughout the Declaration. They emphasize the importance of recognizing and upholding the rights of Indigenous peoples and ensuring that there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities and territories.
>
> More specifically, FPIC describes processes that are *free* from manipulation or coercion, *informed* by adequate and timely information, and occur sufficiently *prior* to a decision so that Indigenous rights and interests can be incorporated or addressed effectively as part

> of the decision making process—all as part of meaningfully aiming to secure the consent of affected Indigenous peoples.
>
> FPIC is about working together in partnership and respect. In many ways, it reflects the ideals behind the relationship with Indigenous peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests.[123]

Free, prior and informed consent therefore requires federal, provincial, and territorial governments to consult and cooperate with Indigenous Peoples within Canada whenever they contemplate a decision that might impact Indigenous Peoples' interests and rights.

Importantly, the need to consult with and obtain the free, prior and informed consent of all affected communities applies wherever unmarked burials and mass graves may exist. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions makes clear that:

> The standard of "*free, prior and informed consent*" has resonance for the active involvement of communities and their engagement in decisions relating to mass graves. Developed as a principle for protecting the rights of [I]ndigenous people, it requires "not merely informing and obtaining consent" from the affected communities, but their "effective and meaningful participation" in decision-making. There is "no one formula that can be copied and pasted into each community" dealing with the wrenching reality of mass graves. Instead, one must understand each community's individual "political, economic, social, environmental, and ... spiritual factors". The appropriate treatment for one mass grave is unlikely to be appropriate for all sites, and the treatment of even one site might change over time.[124]

Indigenous-led investigations, coupled with the principle of free, prior and informed consent, are the best way forward for Canada to uphold its obligations to respect distinct Indigenous laws and customs and to support investigations that are tailored to the local circumstances of each site being searched.

To date, those leading search and recovery efforts have encountered barriers in accessing and searching sites that demonstrate how governments are failing to act in accordance with free, prior and informed consent. Rather than seeking such consent for the development of sites, governments in some cases are joining corporate landowners in litigation against those who are working to access, protect, and search these sites.[125] In other cases, governments have insisted that those leading search and recovery work obtain government permits to access

sites.[126] In yet other cases, governments have been slow to intervene where access to sites is being blocked.[127] Securing the free, prior and informed consent of affected families and communities is a required necessity for investigations into the missing and disappeared children and unmarked burials. Without it, there is a significant risk of doing more harm. 'Do no harm' is the first overarching operating principle advanced by the *Bournemouth Protocol* with respect to the protection and investigation of mass graves.[128] According to this protocol, such investigations require, "a clear respect for and, where possible, adherence to cultural sensitivities and norms, and the known religious beliefs of victims or their families should be taken into consideration as far as possible."[129] In the context of search and recovery work in Canada, forensic investigations must also respect Indigenous sovereignty; comply with Indigenous laws, protocols, processes, and ceremonies; and be done with the free, prior and informed consent of those most affected—Survivors, Indigenous families, and communities.

Respecting the Decision of Whether to Exhume

The decision of whether to exhume the remains of loved ones can be complex and fraught. In other contexts of mass atrocity, some families and communities have chosen not to pursue exhumations. For example, certain Orthodox Jewish communities opposed exhumations in Jedwabne, Poland, as they did not want to disturb the remains of those massacred in the

Memorial for the children who were never returned home from Brandon Indian Residential School, October 22, 2022 (Office of the Independent Special Interlocutor).

town.[130] Following the end of the Second World War, many families decided to leave the remains of deceased soldiers overseas so that their resting places continued to be with the other soldiers that had fallen with them.[131] Similarly, in Spain, some families have voiced opposition to their loved ones being exhumed, arguing that their remains should stay with those killed alongside them.[132] In Argentina, some relatives have asked for the remains of their loved ones not to be exhumed to avoid creating a false sense of closure or a false impression that accountability has been delivered.[133] Each family and community has the right to choose whether or not to disturb their loved one's burial. This right to choose is worthy of respect, understanding, and acceptance and may be informed differently from one community to the next depending on their own customs and protocols and the outcome of the decision-making processes.

Many Indigenous Nations whose territories contain burial sites of the missing and disappeared children hold the Sacred and heavy responsibility of leading search and recovery efforts. Since children buried within one site may have been taken to Indian Residential Schools from, in some cases, over 50 Indigenous communities, different Indigenous laws will inevitably apply to the decisions that need to be made relating to investigations and exhumations. Some communities may have Indigenous laws prohibiting exhumations under all circumstances, while others may not. There may also be differing views within the community on exhumation and divergent opinions within families. In the context of mass graves, one family may want to exhume their loved one's remains, but the identities of the other children in the mass grave may be unknown so permission from the families and communities of those unknown children cannot be sought. Forensic pathologist, Dr. Kona Williams (Cree and Mohawk) explained some of the difficult decisions relating to exhumations and their impacts on communities:

> That's a whole other part of an investigation, exhuming any bodies that may be there, the examination of these bodies, the identification of them. And who do they belong to? Where is their home? Who are their families? It's going to require lots of cooperation, a lot of resources and a lot of time. If this is going to go into more of a criminal investigation, what are the ethics involved in collecting, you know, someone's DNA and bringing it and putting it in a system and testing it? ... How do we bring home these children that we do recover? What do we do with remains that we can't identify? Where do they go? ...
>
> I think in the very beginning when these burial sites were first discovered there was a push to do this quickly, and as quickly as possible. And given

> the information that I have about this process and what's involved, I've discovered that people sort of pull back a bit and they're like "let's do this right" you know, "the children deserve this, they deserve a certain amount of respect that they did not receive in life". There's a lot of pain. It's going to be very painful for people to do this. There's real physical evidence that's going to be revealed. And how are communities and families going to react to that? That's going to be huge. And the rest of Canada's going to have to, and the world, is going to have to come to terms with what really happened because now you have the physical evidence to show everybody, how devastating these schools really were.[134]

Indigenous Nations are actively working through these difficult questions,[135] and it is not appropriate for non-Indigenous governments, institutions, organizations, or people to be making these decisions.

A lack of respect for family and community decisions on whether to exhume remains denies them agency and self-determination and further entrenches discrimination, "Ignoring objections from the communities around mass graves is incompatible with the victim- and mourner-centric ethic embraced by most international forensic teams—regardless of the constitutional justifications or support they would have from the state."[136] Without proper care paid to the views and needs of affected families and communities, there is a risk that exhumations will perpetuate an inappropriate, overly forensic emphasis on individual identification while paying insufficient attention to the views, feelings, and beliefs and Indigenous legal obligations of the affected families and communities. This could result, for example, in pushing forward exhumations in situations where families and communities strongly believe that the mass graves should not be exhumed and that the children should be left undisturbed and buried together. In such instances, Rosenblatt stresses that forensic efforts may in fact be a colonial imposition and form of cultural imperialism rather than an act of respect for the human rights of the living victims (that is, the affected families and communities).[137] He adds that, in such instances:

> ideas about what constitutes an "identification" would also be reshaped around a particularly science-based and individualistic model associated with the industrialized West, one that may be alien to more collectivist cultures, where mourners may take more comfort in the fact that their dead are buried among their own people rather than from matching all the data points from one particular bone to the genetic markers in a DNA database.[138]

To respect the human rights of the missing and disappeared children as well as their families and communities, both the decision to exhume or not to exhume should be seen and treated as equally valid and worthy of respect. Indigenous Nations have, and are guided by, robust collective decision-making processes. Respecting the wishes of families and communities and securing free, prior and informed consent is the priority.

The field of forensic science must continue to evolve to fully respect the international human rights of victims. It raises many difficult questions, perhaps none more difficult than navigating between the desire to exhume and identify the dead and respecting the, at times, conflicting and competing views and needs of affected communities and the families of those buried in mass and unmarked graves. This is particularly the case as this emergent field of human rights forensic science moves from a focus of serving the legal system—that is, providing forensic evidence of criminal activity—to a focus on humanitarianism.[139] Around the world, families and communities whose loved ones have gone missing or have been disappeared and are buried in unmarked burials and mass graves have pushed to refocus forensic human rights towards humanitarian aims with respect to the treatment of burial sites, the exhumation of bodies, and the identification of victims.[140] In addition to respecting family and community participation, forensic human rights approaches also provide a mechanism for investigators to analyze the systemic patterns of mistreatment and human rights abuses in gathering the evidence of how victims were buried.[141]

Decisions to exhume are more likely if there is trust in the forensic teams and processes. They are also likely to increase if there are examples of culturally relevant and informed exhumations performed to the satisfaction of the families and communities. Respectfully conducted exhumations at one former Indian Residential School may inspire confidence in pursuing exhumations at other sites.

It is vital that families and communities be presented with detailed and honest information to make informed decisions about exhumation. Some may choose not to exhume after they are fully informed about the process of exhumation, the challenges of identification, and the probability of success. Any institutions or people—companies with commercial interests, experts and academics, and non-profit organizations—who have vested interest in exhumations must be transparent about the process of exhumation and the likelihood of finding and identifying the children. As Hagerty emphasizes, "forensic exhumation is carried out in service of justice and in service of the families of the disappeared."[142] Therefore, it is for those families and communities—for the mourners and not for the State or for forensic teams—to determine the best course of action in the searches and investigations of former Indian Residential Schools and associated institutions. Imposing decisions from outside the affected

Indigenous families and communities risks violating their rights of self-determination, rights that must be upheld.

Getting the Right Experts and Organizations to Investigate

Who should investigate unmarked and mass graves at former Indian Residential Schools and other associated institutions? The answer to this question requires an understanding that the Canadian State is ultimately responsible for the human rights violations and atrocities perpetrated against the children who died while at these institutions. The State has an important role and has clear obligations to support investigations and establish the truth. However, given the generations of harm that Canada has imposed through its genocidal policies, it cannot investigate its own wrongdoings. This is especially so as Canada continues to foster a climate of impunity for past atrocities.[143] Having Canada in charge of, or making decisions about, the investigations into the missing and disappeared children and unmarked burials would undermine Survivors, Indigenous families, and communities' trust in the independence and credibility of these investigations.

Although Indigenous communities should not have to bear the burden of leading searches and investigations, many have taken on this Sacred responsibility in accordance with their obligations pursuant to Indigenous laws and protocols. It is centrally important that Indigenous communities determine who should conduct the technical and forensic investigations in consultation with the experts from whom they choose to seek guidance. Given the involvement of the State in committing atrocities against the children, international organizations and experts can have an important role if families and communities wish to seek their assistance. International forensic organizations can also support this work, especially when the affected communities either do not want to develop, or have not yet developed, the skills and knowledge to conduct forensic investigations themselves. Not every country or community has the required knowledge and expertise to conduct forensic human rights investigations. International human rights experts and others may also have an important oversight and monitoring role when the State itself is responsible for both the atrocities and human rights violations that led to the deaths under investigation and for frustrating efforts to locate the missing and disappeared persons.

Indigenous communities within Canada have many experts and organizations to which they can turn, including expert forensic teams from Argentina,[144] Guatemala,[145] Spain,[146] Chile,[147] and Costa Rica[148] as well as from Turkey and Greece.[149] Some of these international teams have direct experience investigating the State-sponsored deaths of Indigenous people.[150] Any forensic specialists and teams involved in search and recovery work must be sensitive to the particular

context and history that has led to the unmarked burials and mass graves and understand the political dynamics and legal context within the country. In Canada, building trust with Indigenous families and communities necessitates a great deal of respect and care for Indigenous laws, protocols, processes, and beliefs relating to death and funerary practices of the affected families and communities. Where forensic specialists are part of the State or State-based agencies, like police services or coroners' offices, and are invited to contribute to search and recovery work, this is particularly important, especially since law enforcement and State authorities in Canada have been responsible for, and continue to perpetrate, structural discrimination, systemic racism, abuse of power, and outright violence against Indigenous people.

Numerous concerns were expressed to the UN Special Rapporteur on the Rights of Indigenous Peoples during his visit to Canada in March 2023 about how and why the federal government unilaterally hired international experts to assist with addressing unmarked burials at former Indian Residential Schools and associated sites.[151] In February 2023, the federal government signed a $2 million contract with the International Commission on Missing Persons (ICMP),[152] based in the Netherlands, which has historically received funding sources from Canada for its work in other countries.[153] While its credentials and work in identifying missing persons around the world are widely and rightly applauded, the contract between Canada and the ICMP, as well as the lack of transparency over its contents, raised concerns about its independence.[154] Canada's approach to the ICMP agreement is consistent with a pattern of making unilateral decisions on matters relating to Indigenous Peoples, making ad hoc attempts at reparations, and forging ahead without adequate consultation with Survivors, Indigenous families, and communities. Canada's unilateral decision violated the principles of free, prior and informed consent and of doing no harm. Aspects of the agreement also overlapped significantly with the mandates of several Indigenous-led bodies previously appointed by the federal government to provide guidance on the search and recovery of the missing and disappeared children and unmarked burials.

Concerns about this agreement were expressed in the Interim Report.[155] Several other Indigenous organizations and communities also expressed concerns. In February 2023, the National Centre for Truth and Reconciliation (NCTR) announced that it was, "deeply concerned that the federal government has given the responsibility of carrying out an extremely sensitive engagement process to an international agency with no prior knowledge of the residential school system, and no prior experience working with First Nations, Métis and Inuit Survivors."[156] Eugene Arcand, a member of the NCTR's Survivors Circle, added, "How many times do we need to repeat nothing about us, without us? We need a healing process, not something that further traumatizes Survivors, our families and our communities. I don't understand why the federal government would entrust such a sensitive process to an agency

that doesn't have the necessary cultural competency."[157] The National Advisory Committee on Residential Schools Missing Children and Unmarked Burials also issued a statement that it would not support or participate in the ICMP's national engagement process on DNA collection, stating that, "we remain deeply concerned that such an important and sensitive process has been entrusted to a non-Indigenous organization with no prior history of working with residential school Survivors."[158]

The behaviour of the federal government and the ICMP leaves the impression that it is Canada, rather than Survivors, Indigenous families, and communities, that is leading efforts to recover the missing and disappeared children and locate the unmarked burials. Canada's unilateral process contravenes the international standards on investigating unmarked and mass graves and missing or disappeared persons that guide forensic human rights work. The lack of consultation and transparency in the contract between Canada and the ICMP raises many questions, including:

- Will Canada make funding to Indigenous families and communities for DNA identification conditional on having such DNA testing done by the ICMP?
- Will Canada rely on the ICMP's recommendations on developing a national DNA identification strategy, even where the recommendations may not reflect the wishes, beliefs, laws, and constitutional status of Indigenous Peoples or may contradict the recommendations of Indigenous-led bodies in Canada?
- Who will govern the collection, retention, and use of DNA taken from Indigenous Peoples? Where will DNA samples be stored and processed? How will this be done in a way that respects Indigenous data sovereignty and Indigenous laws?
- How will the ICMP coordinate with other investigative experts and laboratories on identification efforts, recognizing that best practice in human identification employs multiple methods?
- Given the ICMP's relationship with Canada as a historic funder for their work, how will they guarantee independence and impartiality, especially if there is an investigation of criminal responsibility of Canada and its agents for the deaths at Indian Residential Schools and other institutions?

Crown Indigenous Relations and Northern Affairs Canada announced in November 2023 that, in response to the concerns raised by Indigenous leaders and communities, the federal government, "has paused and plans to rework" the ICMP contract.[159] As of July 2024, it remains unclear what a reworked contract will entail.

A comprehensive, cohesive approach is necessary to find and identify the missing and disappeared children in unmarked burials and mass graves across Canada. Ultimately, Survivors, Indigenous families, and communities have the right to decide for themselves how best to proceed, and those decisions must be respected. An Indigenous-led investigation process that reaffirms Indigenous sovereignty and self-determination is essential. When Indigenous communities are in charge of the decision to investigate and control the direction of investigations, many of the pitfalls associated with culturally inappropriate (even if well-meaning) investigation techniques can be avoided. This does not mean that everyone involved in the investigation needs to be Indigenous; many non-Indigenous experts such as archaeologists, forensic scientists, and historians are currently working effectively with communities. Rather, it means that Survivors, Indigenous families, and communities leading searches and investigations continue to make decisions in relation to all aspects of the search and recovery process, including about the scope of the archival research and forensic archaeological work required; when an investigation should proceed and when it should stop; the protocols for internal and external communications; the financial and human resources needed to conduct the work; and the many other decisions that must be made.

Consistent with their inherent, Treaty, constitutional, and human rights; Indigenous laws; the *UN Declaration*; and forensic human rights approaches, Indigenous Peoples have the right to lead these investigations without interference from the very State that is implicated in the disappearances of the children. Such interference is yet another form of settler colonial imposition. Indigenous-led investigations in Canada are emerging anti-colonial models of reclaiming and revitalizing Indigenous governance and legal systems in ways that support Indigenous rights-based processes of truth-finding, healing, reparations, and reconciliation. This is clearly the best way forward to find the missing and disappeared children and to bring them the dignity, honour, and respect that they deserve.

Providing Full and Sustainable Funding

The federal government, along with agents working on its behalf, is responsible for the crisis of unmarked burials of the missing and disappeared Indigenous children. It historically prioritized cost savings during the entire operation of the Indian Residential School System, which led to the neglect, mistreatment, and disrespect for the children in life and in death.[160] During

the TRC, the federal government failed to allocate adequate resources towards efforts to reveal the truth about the missing and disappeared children and locate the unmarked burials. The TRC requested $1.5 million to establish a full record of the missing and disappeared children, but the government under then–Prime Minister Stephen Harper refused to provide this funding.[161] After the Tk̓emlúps te Secwépemc's public announcement in May 2021 of its findings of up to 215 unmarked burials at the former site of the Kamloops Indian Residential School, the federal government, along with several provincial and territorial governments, began providing some of the necessary funding required to support those leading search and recovery work.

Now more than ever, it is essential for the Canadian State to provide long-term, sustainable, flexible funding to support Indigenous-led investigations. Doing so is not an act of generosity or benevolence; it is a legal obligation. Canada has a duty to investigate human rights violations, including the missing and disappeared children buried in unmarked and mass graves. However, and as noted above, Canada cannot independently or impartially investigate its own wrongdoing, especially in the context of the government's deeply ingrained culture of impunity for past and ongoing violence and human rights violations against Indigenous people. Rather, as participants at the National Gathering on Upholding Indigenous Laws made clear, Indigenous Nations are responsible for making decisions and controlling processes according to their own distinctive laws and legal relationships with their territories, kin, and other beings. Non-Indigenous governments and people are responsible for understanding, accepting, and following these laws as they apply to them, and this includes Canada.[162] The federal government must also be transparent and make clear how Indigenous communities can access funding for searches and investigations—funding that should be made available for as long as required.[163] This process will take years: forensic investigations, especially those on such a large scale, take time. Participants at every National Gathering cautioned that this Sacred work cannot be sustained through funding that is constrained by time limits and government-imposed conditions.[164] Funding must not be used to sow divisions between communities or to create a hierarchy of victims and affected communities. It should not be offered to some communities for their searches but not to others.

All Indigenous communities who wish to lead investigations to locate and identify the missing and disappeared children must be supported to search the grounds of all institutions where Indigenous children may be buried. The searches must include former sites of Indian Residential Schools, federal hostels, boarding schools, mission schools, Indian hospitals, sanitoria, and other institutions not recognized under the *Indian Residential Schools Settlement Agreement* (*IRSSA*), whether funded and operated by the federal, provincial, or territorial governments or church entities.[165] Funding must also be provided for searches

of all associated institutions where Indigenous children died, including hospitals, homes for unwed mothers, psychiatric institutions, orphanages, and institutions for children with disabilities. The right to the truth of the families and communities to know the fate of the missing and disappeared children must be acknowledged and fulfilled.

Survivors, Indigenous families, and communities have identified many different aspects of search and recovery work that require funding; these often go beyond what may have been initially contemplated at the outset. Understandably, those leading these searches and investigations are learning about what is needed as they move from one stage of investigation to the next. As a result, there is a need for funding that reflects the evolving nature of these processes. Due to the timeline required and the complexity of completing credible and thorough investigations, funding must not be unduly constrained and, instead, must be sufficiently flexible to support all aspects of the investigations and related reparations.

The failure to adequately fund searches and investigations, the protection and restoration of burial grounds, or the identification of human remains is a violation of the dignity and international human rights of the missing and disappeared children, their families, and communities. Should the federal government fail to provide sufficient, long-term, sustainable, and flexible funding, it would continue to perpetuate the same settler colonial harm that created the crisis of missing and disappeared Indigenous children in the first place. Full and sustainable funding for Survivors, Indigenous families, and communities leading these investigations is not only a legal obligation, it is an act of decency, dignity, and truth seeking. It is an act of accountability, justice, reparation, and reconciliation.

Minegoziibe Anishinabe's Search and Recovery for Missing Children and Unmarked Burials

At the National Gathering in Winnipeg, Niibin Makwa (Derek J. Nepinak), Chief of the Minegoziibe Anishinabe (Pine Creek First Nation), described the Indigenous-led approach his community is taking in accordance with Anishinabe law in relation to the former site of the Pine Creek Indian Residential School, which operated from 1890 to 1969. Chief Nepinak spoke about the care that was brought to establishing the search and recovery processes in Minegoziibe Anishinabe. He stressed that the whole community—including Survivors, spiritual leaders, Fire Keepers, grandmothers and grandfathers, and elected leadership—were involved in establishing the process and protocols, "Determining the parameters of our project was not a political process, it was a community

process.... We have only proceeded this far because we stand together and we commit to holding each other up." He explained the name of the Gego Mawiken Project, which means "Don't Cry" in Anishinaabemowin. It is meant to evoke and record what the church attempted to take away from the children:

> Students were always told they couldn't express emotions, couldn't cry. So we decided to entrench this message so that future generations wouldn't forget what we have survived.... We wanted to refer to the project in our own language because this project is about repatriation. It's about reclaiming our language, our culture and our unique connection to our ancestral lands. In this way we hope to promote the healing of self, our families and our community.

Chief Nepinak described how the community is taking care not to judge or push people away from engaging, regardless of their spiritual beliefs. They have included the local Catholic priest in engagement sessions, and they encourage everyone who attends to pray in the way they know how. He also indicated that they have traditional Medicines and mental health supports on-site for every meeting, engagement, and ground search update. These supports include Traditional Helpers as well as trained mental health and crisis intervention professionals.

While endorsing an approach that balances diverse needs, Chief Nepinak confirmed the central importance of Anishinaabe protocols and ceremonies:

> Difficult discussions need to happen within the safety of our ceremony ... each engagement, ground search and community update always involves these [Pipe, Water and Drum] Ceremonies.... We committed that a four-day Sacred Fire would be lit at the start of each phase of ground searches. This Sacred Fire is out of respect for the lost children who did not return home to their families.... [It] has created opportunities for community members to come to the Fire and share their thoughts and their feelings. The ceremonies set the stage for respectful discussion and ensure the safety of everyone involved. Not everyone participates, but all are respected.... As dark and difficult as these stories are, there's also a beauty to it. The beautiful way of the Anishnabeg is once again revealing itself. And it's making strong people once again.

Niibin Makwa, Chief of the Minegoziibe Anishinabe, at the National Gathering in Winnipeg, November 29, 2022 (Office of the Independent Special Interlocutor).

Monument at the site of Pine Creek Residential School (Office of the Independent Special Interlocutor).

CONCLUSION

A robust human rights approach to investigating the unmarked burials and mass graves associated with the Indian Residential School System is essential. Indigenous-led investigations are necessary to ensure that they are done in a manner that upholds, protects, and advances the human rights of Survivors, Indigenous families, and communities. Forensic human rights work can and should be family and community centred. It can achieve important forms of justice for mass human rights violations. Political Sociologist Nicole Iturriaga points out:

> The promise of forensics-based human rights, however, is not solely about identifying remains. It also encompasses more nuanced understandings of what justice means at the individual, family and societal levels. For many victims' families, this meant the chance to have a funeral for a lost father, to publicly grieve, to rewrite historical records, all of which can create lasting changes to historical memory. These new forms of justice can be particularly poignant in cases where victims do not have access to legal justice due to amnesty laws, the passing of time, or uninterested governments that benefit from silence. The forensics-based human rights movement offers the chance for other voices outside of the state, due to the perceived legitimacy of science, to become narrators of past violent histories.[166]

Equally important, Western-based approaches to forensics-based human rights can learn from Indigenous approaches to search and recovery work. Using an anti-colonial and human rights-based approach has the potential to be a critical first step in dismantling Canada's long-cultivated settler amnesty and its culture of impunity, silence, and denialism. As Survivors, Indigenous families, and communities lead these years-long processes, they also demonstrate how Indigenous Peoples are effectively applying Indigenous laws, protocols, and practices to locate, identify, recover, and commemorate the missing and disappeared children and unmarked burials. This, in turn, can inform and decolonize international human rights law and approaches to investigating atrocities and mass human rights violations involving Indigenous Peoples. All of this is necessary to move forward with truth, accountability, justice, reparations, and reconciliation in Canada.

1 Donald E. Worme, "Investigations: Differences between Community, Coroner and Police Processes," Panel Presentation, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

2 In Syria, for example, it has been estimated that more than 130,000 people are missing as a result of the civil war that began in 2011. See International Commission on Missing Persons (ICMP), "More Than 130,000 Missing from the Syrian Conflict with Numbers Still on the Rise," *ICMP*, accessed July 26, 2023, https://www.icmp.int/news/more-than-130000-missing-from-the-syrian-conflict-with-numbers-still-on-the-rise/.

3 United Nations General Assembly (UNGA), *Report of the Special Rapporteur of the Human Rights Council on Extra-judicial, Summary or Arbitrary Executions: Mass Graves, Highlighting the Multitude of Sites of Mass Killings and Unlawful Deaths across History and the World*, Doc. A/75/384, October 12, 2020, para. 82.

4 July 11 is Srebrenica Memorial Day across Canada. See Canadian Heritage, Government of Canada, *Statement by Minister Hussen on Srebrenica Memorial Day*, July 11, 2022, https://www.canada.ca/en/canadian-heritage/news/2022/07/statement-by-minister-hussen-on-srebrenica-memorial-day.html. Ongoing efforts to address the genocide at Srebrenica continue to receive attention in Canada. See "50 Newly Identified Victims Reburied in Bosnia on Anniversary of Srebrenica Massacre," *CBC News*, June 11, 2022, https://www.cbc.ca/news/world/bosnia-srebrenica-anniversary-1.6516645.

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14 Klinkner and Smith, *Bournemouth Protocol*, 4; see also UNGA, *Report on Extrajudicial Executions*, para. 18.

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23 Klinkner and Smith, *Bournemouth Protocol*, 6.

24 Fabián Salvioli, UN General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, Doc. A/76/180, July 19, 2021, 13–14.

25 Jane Sponagle, "After 50-year Search, Inuk Mother Finds Daughter's Grave 2,000 Km from Home," *CBC News*, July 17, 2016, https://www.cbc.ca/news/canada/north/mother-daughter-grave-search-1.3682042.

26 Spoken by Martha Maliiki at the National Gathering in Edmonton describing her work to help find Marieyvonne Alaka Ukaliannuk. Martha Maliiki, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

27 In the 1940s, the federal government, through the Royal Canadian Mounted Police, implemented the Eskimo Identification Number System for purposes of government administrative efficiency. As Pat Grygier describes, "every Inuit was given a number, which was imprinted on a plastic disc that was usually worn around the neck or on the arm, like an army 'dog tag.'" Pat Sandiford Grygier, *A Long Way from Home: The Tuberculosis Epidemic among the Inuit* (Montreal and Kingston: McGill-Queen University Press, 1994), 48–49.

28 Augustine S.J. Park, "Settler Colonialism and the Politics of Grief: Theorising a Decolonising Transitional Justice for Indian Residential Schools," *Human Rights Review* 16 (2015): 273–93, 284–86.

29 UNGA, *Report on Extrajudicial Executions*, para. 41.

30 Adam Rosenblatt, *Digging for the Disappeared: Forensic Science after Atrocity* (Stanford, CA: Stanford University Press, 2015), 164.

31 Truth and Reconciliation Commission of Canada (TRC), *Canada's Residential Schools: Missing Children and Unmarked Burials*, vol. 4 (Montreal and Kingston: McGill-Queen's University Press, 2016), 134.

32 Mark Skinner, Djordje Alempijevic, and Aleksandar Stanojevic, "In the Absence of Dental Records, Do We Need Forensic Odontologists at Mass Grave Sites?" *Forensic Science International* 201, nos. 1–3 (September 2010): 1–5, https://pubmed.ncbi.nlm.nih.gov/20362406.

33 On the poor state of the children's dental health, interdepartmental disputes over funding dental services, and the difficulty of finding dentists to work at Indian Residential Schools, see TRC, *Canada's Residential Schools: The History, Part 2: 1939–2000*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 212–16.

34 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 90. Here, the TRC reported that the Department of Indian Affairs destroyed two hundred thousand files between 1936 and 1944. The TRC also reported that health and dental records were regularly destroyed.

35 The deceased can also be identified with DNA, although this may also be difficult, especially for historic deaths where remains are degraded as well as if there is an absence of family members to compare DNA samples to. This points, once more, to the critical importance of the government and churches releasing all records as these can be indispensable in identifying the children.

36 UNGA, *Report on Extrajudicial Executions*, para. 82.

37 Survivor, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

38 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810, 1948 (*UDHR*).

39 *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 UNTS 277.

40 *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 UNTS 195 (*ICERD*).

41 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171 (*ICCPR*).

42 *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3 (*ICESCR*).

43 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, 1465 UNTS 85 (*Convention against Torture*).

44 *Convention on the Rights of the Child*, November 20, 1989, 1577 UNTS 3 (*CRC*).

45 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007 (*UN Declaration*).

46 For a complete list of human rights treaties that Canada has signed or ratified, see "Principal United Nations Human Rights Conventions and Covenants," Government of Canada, https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html#a1.

47 *American Convention on Human Rights*, November 21, 1969, 1144 UNTS 123; *International Convention for the Protection of All Persons from Enforced Disappearance*, Doc. A/RES/61/177, December 20, 2006 (*ICPPED*).

48 It should be noted that some human rights can be suspended or derogated from by States under emergency conditions that warrant doing so. Human rights treaties make clear which rights can be suspended or derogated ("derogable rights") and the consequence of their suspension. However, at no point do these rights stop being human rights.

49 *UDHR*, preamble.

50 *ICCPR*, preamble.

51 Last Rights Project, "The Dead, the Missing and the Bereaved at Europe's International Borders: Proposal for a Statement of the International Legal Obligations of States," OHCHR, May 2017, 2, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf (emphasis added).

52 *ICPPED*, Principle 2, para. 4.

53 *UN Declaration*, Article 12.

54 *UDHR*, Article 3; *ICCPR*, Article 6; *CRC*, Article 6.

55 This means that no circumstances—no public emergency, war, or threat to national security—can ever justify violating the right to life. See *ICCPR*, Article 6; see also Human Rights Committee, *General Comment no. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, Doc. CCPR/C/GC/36, 2018, which states, "It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies."

56 Indian Residential School History and Dialogue Centre, *Considering the Legal and Human Rights Framework for Addressing Mass Graves Connected to Indian Residential Schools*, June 9, 2021, 6, https://si-rshdc-2020.sites.olt.ubc.ca/files/2021/06/MassGravesFramework-TerminologyPaper-June-2021.pdf.

57 *UDHR*, Article 18; *ICCPR*, Article 18.

58 *UDHR*, Article 17; *ICCPR*, Article 22; *ICERD*, Article 5 (d)(v).

59 *UDHR*, Article 19; *ICCPR*, Article 19; *ICERD*, Article 5(d)(viii).

60 *UDHR*, Article 27; *ICESCR*, Article 15(a); *CEDAW*, Article 13(c).

61 *UDHR*, Article 6; *ICCPR*, Article 16.

62 *UDHR*, Article 5; *ICCPR*, Article 7; *Convention against Torture*.

63 See Office of the United Nations High Commissioner for Human Rights, *Enforced or Involuntary Disappearances*, Fact Sheet no.6/Rev.3, 2009.

64 "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him." See UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, December 15, 2005, para. 4.

65 *UDHR*, Article 6.

66 *CRC*, Article 8.

67 *CRC*, Article 29.1(c).

68 UNGA, *Report on Extrajudicial Executions*, para. 61.

69 African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication no. 155/96, May 27, 2002, para. 46. The right to a remedy exists in the *ICCPR*, Article 2.

70 TRC, *Honouring the Truth*, 145.

71 TRC, *Honouring the Truth*, 145.

72 Similar efforts were used against those who were detained, tortured, and disappeared by the authorities in Argentina and, perhaps most famously, against those deported to concentration and extermination camps in Nazi Germany, whose religious and ethnic identify were the target of extermination and who were dehumanized by being tattooed with and referred to solely using identifying numbers.

73 Claire Moon, "What Remains? Human Rights after Death," in *Ethical Approaches to Human Remains*, ed. Kirsty Squires, David Errickson, and Nicholas Márquez-Grant (New York: Springer, 2020), 39–58; see also Rosenblatt, *Digging for the Disappeared*, 153–57.

74 Rosenblatt, *Digging for the Disappeared*, 159.

75 Last Rights Project, *The Dead*, 3.

76 For example, the deceased still have the right not to have their personality misappropriated. See David Collins, "Age of the Living Dead: Personality Rights of Deceased Celebrities," *Alberta Law Review* 39, no. 4 (2002): 914. This problem also appears in civil law. For a thoughtful exploration, see Eric H. Reiter, "Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster," *Journal of Civil Law Studies* 1 (2008): 189–213.

77 See National Human Rights Commission, *Advisory for Upholding the Dignity and Protecting the Rights of the Dead*, May 14, 2021, https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf.

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79 Moon, "What Remains," 43 (emphasis in original).

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81 Last Rights Project, *The Dead*, 3.

82 TRC, *Missing Children*, 118.

83 Isaias Rojas-Perez, *Mourning Remains: State Atrocity, Exhumations, and Governing the Disappeared in Peru's Postwar Andes* (Stanford, CA: Stanford University Press, 2017), 28–29.

84 Rosenblatt, *Digging for the Disappeared*, 161.

85 Rosenblatt, *Digging for the Disappeared*, 164–65.

86 Elizabeth Yuko, "When Did Human Ancestors Start Burying Their Dead?" *History*, June 9, 2023, https://www.history.com/news/human-ancestors-bury-dead-graves.

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88 Melanie Klinkner and Howard Davis, *The Right to the Truth in International Law: Victim's Rights in Human Rights* (New York: Routledge, 2020), 23.

89 World Organisation against Torture, *Briefing Note: Urgent Need to Strengthen the Protection of Relatives of Disappeared Persons from Torture and Other Ill-Treatment*, December 2022, https://www.omct.org/site-resources/files/Relatives-of-disappeared-persons_Briefing-note_December-2022.pdf.

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93 UNGA, *Report on Extrajudicial Executions*, para. 54.

94 UNGA, *Report on Extrajudicial Executions*, para. 55.

95 "The state remains under a duty to ensure that an investigation is effective and undertaken in good faith motivated by a desire to get at the truth." Klinkner and Davis, *Right to the Truth*, 54.

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98 Stó:lō Nation Chiefs' Council, Submission to the Office of the Independent Special Interlocutor (OSI), August 31, 2023, 11; Namgis First Nation, Submission to the OSI, August 31, 2023, 6 (on file with the OSI).

99 UNGA, *Report on Extrajudicial Executions*, para. 62 ("governments and parties to a conflict should ensure that mass graves are preserved and protected until, based on an inclusive consultative process, decisions have been made as to their treatment and management").

100 See OSI, "Indian Residential School Cemeteries as Sites of Truth and Conscience," *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* (2024).

101 UNGA, *Report on Extrajudicial Executions*, para. 62 ("when mass graves are initially reported or uncovered, there are serious risks that they will be damaged either intentionally by State or non-State actors seeking to disguise their implications, or unintentionally by family members wishing to hold on to some evidence of their loved ones' remains. That damage can render impossible the fulfilment of the rights and obligations enumerated above. Governments therefore should take all measures necessary to immediately protect mass gravesites from erosion, destruction, manipulation and looting").

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103 Judith Butler, *Frames of War: When Is Life Grievable?* (London: Verso, 2016), 25–27, 31.

104 See Roger O'Keefe, "Protection of Cultural Property under International Criminal Law," *Melbourne Journal of International Law* 341 (2010): 42; Yaron Gottlieb, "Attacks against Cultural Heritage as a Crime against Humanity," *Case Western Reserve Journal of International Law* 52, no. 1 (2020): 319, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2574&context=jil.

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106 UNGA, *Report on Extrajudicial Executions*, para. 56.

107 UNGA, *Report on Extrajudicial Executions*, para. 61.

108 UNGA, *Report on Extrajudicial Executions*, para. 61.

109 TRC, *Missing Children*, 130.

110 Indian Residential School History and Dialogue Centre, *Considering the Legal and Human Rights Framework*, 6.

111 Indian Residential School History and Dialogue Centre, *Considering the Legal and Human Rights Framework*, 6.

112 Natan Obed, "Opening Remarks," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

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115 Sarah Wagner, "Identifying Srebrenica's Missing: The 'Shaky Balance' of Universalism and Particularism," in *Transitional Justice*, ed. Alexander Laban Hinton (Ithaca, NY: Rutgers University Press, 2011); Rosenblatt, *Digging for the Disappeared*, 179; Jaymelee Jane Kim, "They Made Us Unrecognizable to Each Other: Human Rights, Truth, and Reconciliation in Canada" (PhD diss., University of Tennessee, 2014), 24; Eric Stover and Rachel Shigekane, "The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?" *International Review of the Red Cross* 84 (2002): 845–66.

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117 *Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (New York: Office of the High Commissioner for Human Rights, 2017), 11, https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf.

118 Hagerty, *Still Life with Bones*, 65.

119 As Adam Rosenblatt writes, "the most basic right they have is the right to bury the bodies of their loved ones." Rosenblatt, *Digging for the Disappeared*, 112.

120 Hagerty, *Still Life with Bones*, 129.

121 Rosenblatt, *Digging for the Disappeared*, 56.

122 *UN Declaration*, Article 19.

123 Government of Canada, *Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act*, accessed February 20, 2024, 3, https://www.justice.gc.ca/eng/declaration/about-apropos.pdf (emphasis in original).

124 UNGA, *Report on Extrajudicial Executions*, para. 75, citing *International Labour Organization Convention no. 160 on Labour Statistics*, 1985, Section II: Basic Labour Statistics, Articles 7–15 (emphasis in original); *UN Declaration*, Articles 10, 11(2), 19, 28, 29(2), 30(2), 32(2); Agnes Portalewska, "Free Prior and Informed Consent: Protecting Indigenous Peoples' rights to self-determination, participation, and decision-making," *Cultural Survival*, November 7, 2012, https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous.

125 See, for example, *Kahentinetha, Karennatha, Karakwine, Kwetiio, Otsitsataken, Karionhiate v. Société Québécoise des Infrastructures, Royal Victoria Hospital, McGill University Health Centre, McGill University, Ville de Montréal, Stantec Inc., Attorney General of Canada*, 2023 QCCS 4436 (Quebec SC).

126 The Independent Special Interlocutor was contacted by a number of First Nations leading search and recovery work in northern Ontario after a municipality communicated that they were required to seek permits to use the municipal road to access the site being searched and threatening legal action.

127 See generally the years-long efforts of First Nations in Manitoba to gain access to and protect the unmarked burials of Indigenous children who died while attending the Brandon Indian Residential School, whose burials are located in the Turtle Crossing campground. Holly Caruk, "City of Brandon Should Buy Back Land Where Residential School Children Are Buried, Family Member Says," *CBC News*, June 1, 2021, https://www.cbc.ca/news/canada/manitoba/brandon-residental-school-burial-site-1.6048104; Chelsea Kemp, "Southwestern Manitoba First Nation Denied Access to Search for Unmarked Graves," *CBC News*, October 3, 2022, https://www.cbc.ca/news/canada/manitoba/sioux-valley-unmarked-graves-1.6603671; Dave Baxter, "First Nations Leaders Ask for Brandon Campground to Be Expropriated," *Winnipeg Sun*, October 16, 2023, https://winnipegsun.com/news/provincial/first-nations-leaders-ask-for-brandon-campground-to-be-expropriated.

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129 Klinkner and Smith, *Bournemouth Protocol*, 6.

130 Rosenblatt, *Digging for the Disappeared*, 126.

131 UNGA, *Report on Extrajudicial Executions*, para. 25.

132 Rosenblatt, *Digging for the Disappeared*, 68.

133 See Rosenblatt, *Digging for the Disappeared*, 83–124.

134 "Episode 5: Feeding the Dead," in *Kuper Island*, produced by CBC, podcast, June 14, 2022.

135 The TRC discusses the robust and diverse Indigenous legal decision-making processes that Indigenous Nations have developed to work collaboratively through difficult questions. See TRC, *Reconciliation*, 45–79.

136 Rosenblatt, *Digging for the Disappeared*, 129–30.

137 Rosenblatt, *Digging for the Disappeared*, 30.

138 Rosenblatt, *Digging for the Disappeared*, 30.

139 See Moon, "What Remains," 40. These humanitarian ideals are emphasized in the *Minnesota Protocol*.

140 As Claire Moon writes, "the idea that forensic work has humanitarian effects has, arguably, not been driven by forensic science itself, but by the conjunction of forensic science with activism by the families of the dead and disappeared." Moon, "What Remains," 41.

141 Derek Congram, Ambika Favel, and Kim Maeyama, "Ignorance Is Not Bliss: Evidence of Human Rights Violations from Civil War Spain," *Annals of Anthropological Practice* 38, no. 1 (2014): 45, 60–61; see also Fredy Peccerelli, "The Long Journey for the Truth in Guatemala: Multidisciplinary Forensics for Human Identification," Keynote Address, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

142 Hagerty, *Still Life with Bones*, 65.

143 See Chapter 5, Settler Amnesty, which has a detailed discussion of the culture of impunity and settler amnesty in Canada.

144 Equipo Argentino de Antropología Forense, https://eaaf.org.

145 Fundación de Antropología Forense de Guatemala, https://fafg.org.

146 Association for the Recovery of Historical Memory, https://memoriahistorica.org.es/who-are-we/; Aranzadi Society of Sciences in the Basque Country, https://www.aranzadi.eus.

147 Equipo Chileno de Antropología Forense y Derechos Humanos, https://www.echaf.cl.

148 Equipo Costarricense de Antropología y Arqueología Forense, https://www.facebook.com/people/Equipo-Costarricense-de-Antropología-y-Arqueología-Forense-ECAAF/100085365049707/.

149 Committee on Missing Persons in Cyprus, https://www.cmp-cyprus.org.

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151 UNGA, Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay*, Doc. A/HRC/54/31/Add.2, July 24, 2023, para. 29; see also Brett Forester, "International Commission Looks to Ease Fears over Unmarked Graves Contract," *CBC News*, March 15, 2023, https://www.cbc.ca/news/indigenous/icmp-un-concerns-unmarked-burials-1.6778594.

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CHAPTER 4

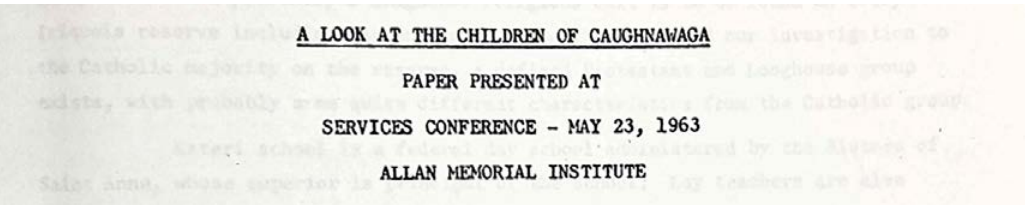
Experimentation and Other Atrocities Against Indigenous Children

> The first year I went ... was in 1960, I was hungry all the time. That's one of the things I remember: the constant hunger.
>
> — Vincent Daniels, Survivor of St. Michael's Indian Residential School, Saskatchewan[1]

Food deprivation and starvation were key strategies of settler colonialism used to attack Indigenous Peoples. At Indian Residential Schools, the lack of nourishment combined with other factors such as overcrowding, poor ventilation, and limited access to appropriate health care led to a high death rate of children at these institutions. Many of the children who died because of these conditions are the missing and disappeared children buried in unmarked burials.

In addition to food deprivation, the children also faced a form of medical colonialism. This occurred through the opportunistic and exploitative use of Indigenous children's bodies for social, medical, pharmaceutical, and nutritional experimental testing.[2] Hundreds of Indigenous children were subjected to experiments while being held at Indian Residential Schools. Racist, eugenicist, and assimilationist motivations were used to justify the experimentation. During the experiments, Indigenous children were dehumanized and treated as objects rather than as human beings worthy of love, care, and dignity. The experiments were performed without parental consent and continued even after children who were experimented on died.[3] As the following analysis reveals, this constituted torture and a breach of the children's human rights.

Knowledge and awareness of the experiments conducted on Indigenous children at Indian Residential Schools has grown significantly over the past decade as a result of the Truth and Reconciliation Commission of Canada's (TRC) Final Report[4] and the work of historian Ian Mosby, including his 2013 article "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952."[5] The subject is now regularly covered in academic research, media publications, as well as papers on medical ethics. In recent years, some medical institutions have acknowledged and apologized for their role in racist and colonial medical violence.[6] But there has yet to be any accountability or full reparations for the atrocities committed by medical and nutrition researchers and practitioners against Indigenous children.

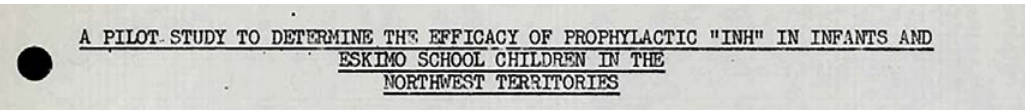

A LOOK AT THE CHILDREN OF CAUGHNAWAGA

PAPER PRESENTED AT

SERVICES CONFERENCE - MAY 23, 1963

ALLAN MEMORIAL INSTITUTE

Heading from a Study by Barbara Wainrib and Joan Rothman, under the supervision of H.B.M. Murphy. *A Look at the Children of Caughnawaga* [Kahnawake]. Paper presented at the Services Conference, May 23, 1963, Allan Memorial Institute (from Exhibit P-79, Mohawk Mothers Court Documents).


A PILOT STUDY TO DETERMINE THE EFFICACY OF PROPHYLACTIC "INH" IN INFANTS AND ESKIMO SCHOOL CHILDREN IN THE NORTHWEST TERRITORIES

Heading for "A Pilot Study to Determine the Efficacy of Prophylactic "INH" in Infants and Eskimo [Inuit] School Children in the Northwest Territories," Dr. Corrigan to the Regional Director of Medical Services, 1962, file 851-1-4, 4, vol. 2869, RG29, Library and Archives Canada (LAC).

This chapter builds on the important work of the TRC, Mosby, and other academics in considering how institutions and professionals can and should be held accountable for the experiments and medical atrocities they committed against Indigenous children at Indian Residential Schools and other institutions.[7] The first section focuses on the use of food deprivation and starvation as tools of settler colonialism, genocidal violence, and atrocity. It describes some of the ways in which Canada used food deprivation and the threat of starvation to coerce, and forcibly displace Indigenous Peoples from their territories. It also describes how the federal government's policies of assimilation and cost savings directly contributed to the crisis of missing and disappeared children and unmarked burials. This context is critical to understanding the cruelty of, and rationales used to justify, the experiments.

The second section of the chapter describes some of the experiments conducted on Indigenous children and the environment within which they were held. It highlights the ways in which the federal government, along with medical and nutrition researchers, exploited the children to advance their personal interests and the government's colonial agenda. It then analyzes the legal implications of the experiments through the application of international human rights law and international criminal law.

THE WEAPONIZATION OF FOOD

The use of food deprivation and starvation to control and coerce Indigenous communities was a common strategy of settler colonialism for the British and then the Canadian government. The TRC concluded that, by the 1880s, "the threat of starvation became an instrument of [Canadian] government policy."[8] Political scientist David B. MacDonald notes:

> The government used starvation to weaken and kill Indigenous peoples, to herd them onto reserves, and to threaten them, in some cases, to relinquish their children to the residential schools. A lack of nutritious food on reserves and in the schools increased risk factors for diseases such as influenza and tuberculosis. As traditional food supplies dwindled, and the lands were taken away by the government, starvation became a serious problem for Indigenous [P]eoples and an opportunity for the government to coerce them into compliance with policies that ran counter to their interests.[9]

Food deprivation and starvation have been consistent features of settler colonialism in Canada. Historian and health studies scholar James Daschuk documents how the Canadian government used tactics of coercion through starvation and famine beginning in the 1880s to support its development agenda of expansion across the West.[10] He terms this the "politics of famine"[11] and notes that, instead of distributing food to respond to the humanitarian crisis of food shortages and scarcity that Indigenous Nations were experiencing as a result of colonial settlement, the Canadian government chose to use food as a means to control Indigenous Peoples.[12]

There are many examples where the federal government used food deprivation and starvation to further its own political purposes and to control Indigenous Peoples, including:

- Refusing food and rations, in the words of then Prime Minister John A. Macdonald, "until the Indians were on the verge of starvation, to reduce the expense";[13]

- Pressuring First Nations to sign Treaties in exchange for food rations;[14]
- Forcibly relocating Indigenous Peoples to reserves to make way for the Canadian Pacific Railway[15] and to facilitate White settlement to farm the lands;[16]
- Forcing Cree leaders on the plains into submission to accept less desirable lands than they had chosen;[17]
- Depleting the animal kin of Indigenous Peoples, such as the buffalo on the plains, to the brink of extinction in order to, "destroy the foundation of plains Indigenous collectivity and their very lives";[18]
- Withholding rations to First Nations people on reserves to quell protest;[19] and
- Physically or sexually abusing and exploiting Indigenous women on reserves in exchange for rations.[20]

The politics of starvation was used by the government in an attempt to break the will of Indigenous Peoples, attack their capacity to resist, dismantle their community bonds and family structures, and forcibly displace them from their lands and territories.[21] It also significantly depleted the population of Indigenous people, which created crises within Indigenous communities and reduced the ability of Indigenous Peoples to resist colonial expansion.[22] As scholars Kristin Burnett, Travis Hay, and Lori Chambers assert, in the context of settler colonialism, "food operates as an extremely useful technology of power, serving literally ... to pacify and control" Indigenous people and further the civilization process.[23] Starvation and food deprivation advanced settler colonialism and genocide in creating the conditions to eliminate Indigenous Peoples, not solely through the "spectacular" violence of mass killings but through the slow violence of attrition.[24]

In Canada, food deprivation and starvation were tools of atrocity and genocide—methods by which governments sought to coerce, dominate, and exterminate Indigenous Peoples. These methods have shifted in form over time.[25] In the context of the Indian Residential School System, authorities withheld food rations from families, and the threat of starvation coerced parents to give their children to those who ran the institutions.[26] In addition, the government provided insufficient nutrition to the children held at the institutions and turned them into subjects of non-consensual medical experiments.

THE DEPRIVATION OF FOOD IS AN ACT OF GENOCIDE

The intentional deprivation of food to cause death and destruction of a group can be an act of genocide. The *Convention on the Prevention and Punishment of the Crime of Genocide* (*Convention on Genocide*) states that intentionally and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" constitutes genocide.[27] The International Criminal Tribunal for Rwanda found that this element of genocide can include the denial of adequate food and sustenance:

> The expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.... [T]he Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.[28]

This finding—that denying basic needs, including food—can be considered genocide was confirmed by the International Criminal Tribunal for the former Yugoslavia. It articulated a list of acts that could be used to create conditions intended to destroy a group, in whole or in part:

> Examples of such acts include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[29]

Genocide by attrition, the processes by which certain groups are denied basic needs as a means to slowly assure their destruction, has received greater attention in recent years.[30] The National Inquiry into Missing and Murdered Indigenous Women and Girls' *Supplementary Report on Genocide* (*MMIWG Supplementary Report*) provides an apt description of "colonial genocide," which is unique due to:

- **Its nature:** in Canada, genocide against Indigenous Peoples has been perpetrated both using lethal and non-lethal measures, the latter often involving

violent and coercive measures aimed at absorption and assimilation. It has also involved laws, policies, and actions aimed at destroying the cultural connections of Indigenous people;[31]

- **Its time frame and geographic scope:** in Canada, genocide has been perpetrated against Indigenous Peoples over centuries across Indigenous Nations whose territories cover all of what is now Canada. It has no clear start or end date and is therefore properly characterized as ongoing;[32] and
- **Its basis and rationale:** State policies and laws based on racist and colonial ideas have been aimed at the violent physical, cultural, structural, and legal destruction and erasure of Indigenous Peoples.[33]

The many tactics of the Canadian government to carry out genocide by attrition have been well documented by scholars.[34] This is also described as the "slow violence" of genocide, which has been, and continues to be, perpetrated by Canada against Indigenous Peoples.[35]

As noted above, food deprivation and starvation were some of Canada's tools of coercion and violence. The withholding of food to compel families and communities to give up their children satisfies the legal definition of "forcibly" in the *Convention on Genocide*'s articulation of, "forcibly transferring children of the group to another group."[36] The term "force" is understood in international law as not only physical force, but it also, "may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[37] The horrific conditions in the institutions, the policy of refusing to provide the children with sufficient food, and the experiments conducted on them were all part of the genocidal actions of the Canadian government against Indigenous Peoples. Unfortunately, it may no longer be possible to use international criminal law to investigate and prosecute individuals who used food deprivation as a tool of genocide since there are no international courts with jurisdiction to do so and because most of the individual perpetrators have died. It is therefore more appropriate to focus this analysis on State responsibility for the genocidal use of starvation and food deprivation in Canada.

Under international law, States, and not only individuals, can be held responsible for genocide.[38] As confirmed by the International Court of Justice in 2007, States are under the obligation not to commit genocide.[39] Canada's responsibility for the ongoing genocide of Indigenous Peoples was emphasized by the *MMIWG Supplementary Report*:

> Individual criminal accountability for international crimes is not a substitute for state responsibility. On the contrary, the two forms of

> responsibility are of a different nature and complement each other, particularly in situations of organized, systemic and coordinated violence, which is often inherent to genocide. The National Inquiry, without excluding the possibility that individuals could be held liable for genocide in Canada, and duly noting the acts and omissions of provinces within Canada, draws a conclusion on the responsibility of Canada as a state for genocide under international law....
>
> Legally speaking, this genocide consists of a composite wrongful act that triggers the responsibility of the Canadian state under international law. Canada has breached its international obligations through a series of actions and omissions taken as a whole, and this breach will persist as long as genocidal acts continue to occur and destructive policies are maintained. Under international law, Canada has a duty to redress the harm it caused and to provide restitution, compensation and satisfaction to Indigenous peoples. But first and foremost, Canada's violation of one of the most fundamental rules of international law necessitates an obligation of cessation: Canada must put an end to its perennial pattern of violence against and oppression of Indigenous peoples.[40]

Therefore, even if individual perpetrators of Canada's attempted extermination of Indigenous Peoples cannot be prosecuted, Canada remains responsible, as a State, for the genocide, under the 1948 *Convention on Genocide* and under customary international law.

Starvation and Food Deprivation Are Acts of Genocide

History is rife with examples of genocidal governments purposefully depriving people of the conditions necessary for life in attempts to subjugate and eradicate them. A well-known strategy within such contexts is the deprivation of food from those who are the targets of State-sponsored genocide. Some examples include:

- 1932–1933 Holodomor, which can be translated as "death by hunger," when the Soviet Union intentionally starved between 3 million and 6 million Ukrainians to death.[41]

- Second World War, when the Nazis used food deprivation and starvation as a central strategy in the Holocaust, including by:
    - Creating a hierarchy of ethnic groups and nationalities as reflected in their allocation of food rations to populations under their control: Germans received 100 percent of their daily needs; Polish people 70 percent; Greeks 30 percent; and Jewish people, the primary targets of the Nazis' genocidal zeal, received an unconscionable 20 percent.[42]
    - Denying adequate food to those living in ghettos prior to the horrific mass murders that took place at extermination camps like Auschwitz and Dachau.[43]
    - Developing a "Hunger Plan" that led to the starvation of an estimated 7 million people, including Soviet civilians and Jewish people.[44]
- More recently, the denial of adequate food was used as part of Sudan's genocide of the people of Darfur, Sudan.[45]

Starvation meets the definition of genocide under Article II(c) of, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction"[46] and has been characterized by Luis Moreno-Ocampo, the former prosecutor of the International Criminal Court, as, "the invisible Genocide weapon."[47]

The Deprivation of Food Is an Attack on Indigenous Identity

Food is central to the identity of all cultural groups around the world; it defines and distinguishes cultural groups from one another. Foods are often gathered from and reflect the territories and geographic locations of different cultural communities. Plant foods and animals available within certain regions are key staples of traditional diets. As Indigenous theorists make clear, food is highly valued as a means of sustenance, and the plants and animals are medicines, guides, teachers, and relatives.[48] Cree scholar Tasha Hubbard explains that understandings of kinship within Indigenous communities include "non-blood-relations and non-human beings."[49] Similarly, the Royal Commission on Aboriginal Peoples concluded that many Indigenous Peoples "accord respect to all members of the circle of life—to animals, plants, waters and unseen forces, as well as human beings."[50] Chickasaw poet Linda Hogan explains, "The human animal is a relatively new creation here; animal and plant presences

were here before us; and we are truly the younger sisters and brothers of the other animal species."[51] Indigenous Peoples therefore consider animals, plants, and trees, along with other non-human beings and entities, as wise teachers from whom lessons can be drawn about how to live in good relations with all other beings.[52]

Food is also medicine and can be a way to promote healing within Indigenous communities. The Métis Nation of British Columbia has emphasized that, "food, for Métis, is medicine ... [and] is valued in Métis culture as it brings people together, connecting family and community."[53] Sherry Mitchell, Métis intergenerational Survivor, noted that, "food is key to keeping a healthy mind, body, spirit, and soul."[54] Similarly, Athabaskan scholar Mary Kate Dennis and Swampy Cree scholar Tabitha Robin assert that there is a strong connection between food and well-being, "To eat well, to be well, we must eat food that is full of connections and interconnections.... Food contains spirit and gives spirit. The spirit in food is what helps to keep us well."[55]

The process and knowledge of gathering food is also central to Indigenous identity. The sharing of knowledge from one generation to the next about hunting, fishing, and gathering to sustain past, present, and future families and communities is vital to upholding Indigenous Nations and laws. Similarly, passing along the skills to clean and prepare animals and plants for food are important teachings that are infused with Indigenous languages and laws. Métis Survivor Barbara Rhoades said that, "learning the skills of her ancestors like berry picking, foraging, crafting, beading, how to hunt and fish, etc., would help the [Métis] Nation become whole and fill 'the spaces in our heart that are gone.'"[56] Barbara emphasized the importance of learning these skills to support healing and to uphold Métis identity.

Food is also central in many Indigenous ceremonies. Swampy Cree scholar Tamara Robin and academic colleagues Kristin Burnett, Barbara Parker, and Kelly Skinner describe the importance of food for Indigenous people:

> Traditional foods are critical to Indigenous cultures. Through the practice of hunting, gathering, fishing, and foraging, Indigenous peoples have the opportunity to not only practice their culture, but also invoke spirit. Indigenous relationships to the land see plants and animals as gifts, part of an interconnected system of all living things. Through ancestral responsibilities to the land, Indigenous peoples are upholding long-standing agreements with all of creation to live in harmony. Animals are not only food, but living forms of spirit in an Indigenous food system. Indigenous peoples maintain their responsibilities to animals through harvesting following Natural Law.... Many

> of the rituals surrounding traditional food harvests are ceremonial. These include offerings to the land and feasting. For some Indigenous cultures, there are ceremonies dating back hundreds of years that celebrate seasons and giving thanks to the plants and animals of each season. Many of these ceremonies continue today and they are integral to Indigenous food sovereignty. It is for these reasons and more that settler colonial states have used and continue to use traditional foods and food systems as means to control Indigenous populations and gain access to their territories and resources.[57]

Food deprivation and starvation by the settler colonial State has caused, and continues to cause, direct harm to Indigenous Peoples by attacking Indigenous identity and attempting to sever their ties with their territories and their kinship relations, both human and non-human. The deprivation of food is therefore an attack on Indigenous identity.

Indigenous Peoples' Right to Food under International Law

The right to food under international law has been recognized by the United Nations (UN).[58] Article 11 of the *International Covenant on Economic, Social and Cultural Rights* recognizes the right of all people to adequate food and the right to be free from hunger, among other rights.[59] Canada ratified this Covenant in 1976 during the operation of the Indian Residential Schools. This is binding international law and requires States to, "take appropriate steps to ensure the realization of this right."[60] The Food and Agriculture Organization of the UN indicates that:

> The right to food entitles every person to an economic, political, and social environment that will allow them to achieve food security in dignity through their own means. Individuals or groups who do not have the capacity to meet their food needs for reasons beyond their control, such as illness, discrimination, age, unemployment, economic downturn, or natural disaster, are entitled to be provided with food directly.[61]

The right to adequate food is an individual right, meaning that it is a right that individual people hold. It also constitutes a collective right of Indigenous Peoples under the *UN Declaration on the Rights of Indigenous Peoples*.[62] As the UN makes clear, food is one of the many rights, "which are indispensable for [Indigenous Peoples'] existence, well-being and integral development as peoples."[63] The right

to food implicates other internationally protected rights including rights to lands, territories, and resources as well as the right to culture and self-determination.[64] This means that the, "right to food may be violated in case of denial of access to land, fishing or hunting grounds, deprivation of access to adequate and culturally acceptable food and contamination of food sources."[65] This international obligation, however, is not currently enforceable against Canada since it has not yet incorporated the right to food into domestic law.

Food Deprivation at Indian Residential Schools

> Food was good when I was a kid on the trapline. That's why it was such a negative experience to be in the Residential School where they didn't feed you enough to sustain you.... So, a lot of the kids were walking around that place hungry all of the time.... And every so often somebody would get sent junk food. And they were popular. I remember a bunch of boys sitting around with one bag of potato chips and everybody getting a chip out of there.... It's kind of sad when I think about it. These kids starved there. There was kids who would cry at night because they didn't have anything in their stomach. And there were those of us who would guzzle a bunch of water just to fill our tummies.
>
> **— Frank Clinton, Survivor of Timber Bay Children's School, northern Saskatchewan[66]**

Thousands of children suffered and died at Indian Residential Schools due to the conditions they were placed in.[67] Children died of malnutrition, neglect, mistreatment, and diseases that they were exposed to at alarming and disproportionate rates.[68] They were housed in overcrowded, poorly constructed, insufficiently maintained, and unsanitary buildings.[69] They were fed a substandard diet.[70] Priests and nuns entrusted with their care harshly disciplined and abused the children with no consequences.[71] The TRC characterized the treatment of Indigenous children at Indian Residential Schools as, "at best, institutionalized child neglect."[72] As Mosby points out, "the reality is that the conditions in the Schools themselves were the leading contributor to the often-shocking death rates among the students."[73]

Prior to being taken to Indian Residential Schools, many children were well fed in their communities.[74] For these children, the conditions they were forced to live in at the institutions were in stark contrast to their home life. In other instances, parents were coerced into sending their children to Indian Residential Schools under the false promise that the children would be well fed once there.[75] While some institutions may have been better than others at providing

sufficient food, the TRC concluded that, for the vast majority of the years that Indian Residential Schools operated, children were not fed adequately.[76] Hunger was a "common companion" for the children at the institutions during their crucial growing years.[77] The most common complaint of the children related to the quality and quantity of food.[78] According to Survivor testimony and archival evidence, "children who attended Canada's Indian Residential Schools experienced chronic undernutrition characterised by insufficient caloric intake, minimal protein and fat, and limited access to fresh produce, often over a period of five to ten years."[79] Because the food was inadequate, children obtained food in secret,[80] stole from the institution's food stores or gardens,[81] or even bought food from the cooks.[82]

In some instances, the food provided to children was lethal. For example, evidence indicates that children at the Blue Quills Indian Residential School in Alberta were given tainted, unpasteurized milk to drink.[83] This made them vulnerable to contracting tuberculosis and led directly to some deaths of children, sometimes within just weeks of their arrival at the institution.[84] Children could be exposed to tuberculosis both from eating the meat and drinking milk from cows that had bovine tuberculosis.[85] The TRC found that, "in the mid-1920s, it was estimated that as many as half the cattle in Canada were infected with tuberculosis."[86] There is evidence that at least one Indian Residential School was knowingly providing children with milk from tubercular cattle and that the federal government was aware of this fact.[87] The crisis of tuberculosis at Indian Residential Schools was neither natural nor random. The TRC concluded, "The tuberculosis health crisis in the schools was part of a broader Aboriginal health crisis that was set in motion by colonial policies that separated Aboriginal people from their land, thereby disrupting their economies and their food supplies."[88] This crisis was well known to both those in government and those working at and administering the institutions.

"To Kill the Indian in the Child"

The Indian Residential School System was established to hasten the Canadian government's assimilation of Indigenous Peoples by separating children from their families, communities, and cultures. These institutions were built upon the false and racist ideas that White Europeans were more enlightened and civilized than Indigenous Peoples and that Indigenous people could be saved through Christianization and civilization. The purpose was described as "kill the Indian in the child" or, alternatively, as "killing the Indian and saving the child." The TRC explained:

> The model for these residential schools for Aboriginal children, both in Canada and the United States, did not come from the private boarding schools to which members of the economic elites in Britain

> and Canada sent their children. Instead, the model came from the reformatories and industrial schools that were being constructed in Europe and North America.[89]

This meant that a punitive environment of harsh discipline, mistreatment, and neglect of the children was built into the system at the outset.

The federal government proposed that the institutions would require initial start-up costs but that, afterwards, they would be self-sufficient. The TRC found that, "the government believed that between the forced labour of students and the poorly paid labour of missionaries, it could operate a residential school system on a nearly cost-free basis."[90] As a result, the funding provided by the government was never sufficient to operate the institutions or to provide adequate safety, care, and nutrition for the children. The TRC found that during the entire operation of the system, "the government never adequately responded to the belated discovery that the type of residential school system that officials had envisioned would cost far more than politicians were prepared to fund"[91] and that the funding was, "always lower than funding for comparable institutions in Canada and the United States that served the general population."[92]

Violent Cost-Saving Policies: Malnutrition by Design

The malnutrition at Indian Residential Schools was not a mere side effect of an otherwise well-intentioned program. This was yet another manifestation of Canada's imposition of various food deprivation and starvation policies targeting Indigenous people. The malnourishment of children in the institutions was the result of specific and intentional cost-saving policies. The TRC concluded:

> The federal government knowingly chose not to provide schools with enough money to ensure that kitchens and dining rooms were properly equipped, that cooks were properly trained, and, most significantly, that food was purchased in sufficient quantity and quality for growing children. It was a decision that left thousands of Aboriginal children vulnerable to disease.[93]

A lack of sufficient nutrition left children exposed to severe illnesses and diseases that, if not immediately fatal, led to significant suffering, developmental challenges, and various long-term ailments.[94] Data indicates that Indigenous children were far more likely to die from tuberculosis[95] and influenza[96] compared with non-Indigenous children.

This lack of sufficient food, in combination with other factors, increased the likelihood of children contracting deadly diseases. These other factors included overcrowding,[97] a lack of appropriate ventilation,[98] and a lack of access to sufficient health care.[99] According to Frederick O. Loft, Survivor of the Mohawk Institute, the children were, "housed in a congested state that [was] often unsanitary and comfortless."[100] He described the institutions as, "veritable death-traps."[101] Each of these factors was the direct consequence of the federal government's choice to underfund these institutions. Because the institutions were underfunded, those operating them accepted more children than was safe as they were funded on a per child basis.[102] More children meant more money. In 1908, Toronto lawyer Samuel Blake noted that, "the competition of getting in pupils to earn the government grant seems to blind the heads of these institutions and to render them quite callous to the shocking results which flow from this highly improper means of adding to the funds of their institutions."[103] This resulted in overcrowding.

The lack of ventilation and poor infrastructure of the buildings also created unsafe conditions for children. Added to this was the lack of health care and appropriate medical treatment for children suffering from malnutrition, illnesses, and diseases.[104] This included the inability to isolate sick children, which led to the rampant spread of diseases.[105]

Priests, nuns, administrators, and staff at the institutions also made choices that prioritized their own interests over the health and well-being of the children. Many Survivors recall that the food served to the staff was far superior to the food provided to the growing children. Survivor Inez Dieter noted that, "the staff used to eat like kings ... and queens."[106] Similarly, Survivor Gladys Prince recalled how, at the Indian Residential School in Sandy Bay, the, "priests ate the apples, we ate the peelings."[107] Cookie Esperance, Survivor of St. Michael's Indian Residential School in Saskatchewan, said that, "their [the priests' and nuns'] table was just overflowing with all the food we never had."[108] Several Survivors have shared that if they were assigned to work in the staff kitchen, they would have access to much better food; Survivor Frances Tait said that she thought she had, "died and gone to heaven 'cause even eating their leftovers were better than what we got. And anybody who got a job in there, their responsibility was to try and steal food and get it out to the other people."[109]

Those operating the institutions routinely sold food to raise money rather than allocating it to feed the children. Many institutions had vegetable gardens, fruit trees, and farms as part of their operations. Children were required to gather vegetables and fruit and milk the cows as part of their daily duties.[110] Many Survivors recall the cruelty of being punished for picking apples or trying to eat them after they had fallen to the ground. Roberta Hill, Survivor of the

Mohawk Institute recalled, "we weren't free to walk in that orchard. We weren't free to pick up any of those apples on the ground.... It just goes to show you how cruel this place was to not allow a child to at least go out in the orchard. Why couldn't we pick an apple without being punished?"[111] Survivors also recall being punished severely for stealing food, including being whipped, confined, and forced to kneel for hours.[112]

Food and the Punishment of Children

The TRC found that the quality of food at Indian Residential Schools was poor and that it was not uncommon for children to be served rotten, unsafe, and contaminated foods.[113] Children were punished when they refused to eat the rotten food given to them. Many Survivors spoke to the TRC about this cruel practice, including Survivor Victoria McIntosh, who recalled:

> There was an incident where I wouldn't eat porridge, and, the first time, and I looked down, and there was a bowl in front of me, and I noticed there was worms in it, and I wouldn't eat it, and the nun come behind me, and she told me, "Eat it," and I wouldn't eat it, just nope, and she ... slammed my face ... in the bowl, and picked me up by my arm, and ... she threw me up against the wall, and she started strapping me.[114]

In a coroner's investigation into the death of Duncan Sticks at St. Joseph's Mission in Williams Lake, the TRC indicated that several of the children interviewed spoke of being punished severely for refusing to eat food. Mary Sticks, Duncan's 11-year-old sister, said, "The [S]isters ... gave me bad food—the beef was rotten. I couldent [*sic*] eat it—they kept it over and gave it to me the next meal—they tied my hands and blindfolded me and gave me nothing to eat for a day. My hands were tied with a piece of rag behind my back."[115] Another child, Christine Haines, told the coroner that she was strapped and placed in solitary confinement for refusing to eat the food:

> I ran away twice from the school because the [S]isters dident [*sic*] treat me good—they gave me rotten food to eat and punished me for not eating it—the meat and soup were rotten and tasted so bad they made the girls sick sometimes—I have been sick from eating it—they shut me up in a room by myself for 3 days and gave me bread and water—the room was cold and dark—they beat me with a strap, sometimes on the face, and sometime took my clothes off and beat me. That's the reason I ran away.[116]

Many Survivors recounted how they were forced to eat rotten food and then their own vomit if they were not able to keep the food down. Survivor Stella Bone stated, "We were made to eat our food regardless what type or shape or in what condition it was. And if we didn't eat ... or if it made us sick, you're guaranteed to eat your sick and your food at the same time. Even if you're gagging ... you had to eat it."[117] Bernard Catcheway, Survivor of Pine Creek Indian Residential School in Manitoba, indicated that, in the 1960s, "we had to eat all our food even though we didn't like it. There was a lot of times there I seen other students that threw up and they were forced to eat their ... own vomit."[118]

Food deprivation was also used to punish the children. Dorothy Nolie, Survivor of the St. Michael's Indian Residential School in Alert Bay recalls being punished for speaking in her own language at the dinner table, "They put me in the middle of the floor, in front of everybody, and that was my punishment for speaking our language. I was hungry. I never ate nothing. [I] looked around, looked around, everybody eating. that's how mean they were to me, to all of us kids in there."[119] Children at the Cecilia Jeffrey Indian Residential School in Kenora, Ontario, were locked in a room with just a mattress on the floor, and they were put on a bread-and-milk diet as punishment for running away.[120] Ruth Miller was punished for running away from the Mohawk Institute by being imprisoned in a three foot by six foot cell on the third floor of the institution for three days and kept on a water diet.[121]

The Federal Government Knew Children Were Dying

The result of the lack of sufficient nutrition on the children's health was predictable and well known: suffering, illness, and death by way of compromised immune systems and exposure to disease.[122] This was not inevitable. Nor was Canada ignorant of this reality. The TRC documents that, in 1904, there was a proposal within the federal Department of Indian Affairs to close a large number of Indian Residential Schools and replace them with Indian Day Schools, particularly in areas where children could live with their families and attend school during the day.[123] There were many reasons to pursue this policy, including the delivery of Dr. Peter Bryce's report in 1907 (discussed in further detail below) during the period when this re-evaluation of the Indian Residential School System occurred. However, the federal government continued to maintain and operate the system as it always had.

In 1913, Deputy Superintendent of the Department of Indian Affairs Duncan Campbell Scott admitted, "Fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein."[124] Although Canada knew that its policies were fatal, it did nothing to change them. As Mosby concluded, "these chronically and intentionally underfunded institutions actually caused the high death rates among

students. What is also indisputable, based on the government's own records, is that generations of federal government officials and politicians knew that the subpar conditions in the schools were killing children and chose to do nothing."[125] Canada's decision to intentionally deprive children of sufficient sustenance, house them in overcrowded, poorly ventilated buildings and deny them access to health care was by choice. The decision to wilfully neglect the Indigenous children in their care was purposeful. It was not an accident nor was it an unintended consequence of an otherwise benevolent State or system. It was planned, and the deadly results were foreseeable and devastating.

Similarly, the churches that ran the institutions were well aware that the high rates of disease and death were due to the conditions that the children were exposed to when they arrived. The priests, nuns, and administrators running the institutions made intentional choices that put the lives of the children at risk. Despite the fact that the conditions causing the high death rates of children were known to both the federal government and the church administrators, they kept operating the system. This constitutes an atrocity. This atrocity was committed against generations of Indigenous children as well as their families and communities.

Whistle-Blowers Were Ignored and Discredited

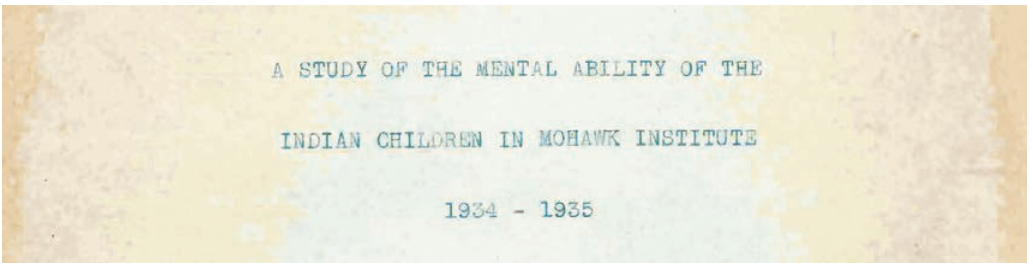
Throughout the history of the Indian Residential School System, those who reported the poor and deadly conditions at the institutions were ignored by authorities. These whistle-blowers included doctors and other health professionals. The TRC found that doctors and school inspectors repeatedly determined that the food provided in the institutions was insufficient.[126] An Indian Agent who inspected the Kamloops Indian Residential School in 1918 reported a, "suspicion that the vitality of the children is not sufficiently sustained from a lack of nutritious food, or enough of the same for vigorous growing children."[127] And when the economy was stressed, as it was during the 1930s depression, it was Indigenous children within these institutions, "who paid the price."[128] The poor conditions at Indian Residential Schools were never appropriately or adequately resolved. As Daschuk concludes, the, "establishment of the residential school system, now widely recognized as a national disgrace, ensconced TB [tuberculosis] infection, malnutrition, and abuse in an institutional setting that endured for most of the twentieth century."[129]

For whistle-blowers who dared to speak up about the suffering that the children were being subjected to, authorities responded with threats and punishments. Perhaps the most widely known example is the government's response to Dr. Peter Bryce, who warned that the conditions in the Indian Residential Schools were killing the children and that, without immediate changes to prevent further deaths, the government was, "within unpleasant nearness to the

charge of manslaughter."[130] Rather than improving the conditions at the institutions, authorities—including those responsible for public health—ostracized Dr. Bryce, impacting his medical career. In contrast, those conducting medical experiments benefited from the atrocities they were inflicting on the children.[131]

EXPERIMENTATION ON CHILDREN

Hundreds of Indigenous children were subjected to experimentation at Indian Residential Schools.[132] Experiments included nutritional experiments,[133] testing of vaccines,[134] pharmaceutical testing,[135] as well as other experiments related to testing extra-sensory perception,[136] bedwetting, fingerprints, hemoglobin blood counts,[137] and IQ testing.[138] Some Survivors have indicated that they were forced to ingest many different pills at Indian Residential Schools, sometimes for years, and they did not know what the pills were for, nor the long-term impacts of having taken them. Many Survivors also developed a distrust of doctors and medical interventions that continues to this day.[139]


A STUDY OF THE MENTAL ABILITY OF THE

INDIAN CHILDREN IN MOHAWK INSTITUTE

1934 - 1935

Heading for "A Study of the Mental Ability of the Indian Children in the Mohawk Institute 1934–1935," box 376, f1, Ethnology Documents Collection, Kenneth E. Kidd Fonds (III-I-185M), Canadian Museum of History Archives.

In the medical experiments that the TRC documented in its Final Report, it found no evidence of parental consent.[140] This was the case even though all but one experiment fell within the time frame when the Department of Indian Affairs and the churches were well aware that the institution's principals were not the legal guardians of the children and therefore could not provide consent to experimentation.[141] In one case, a principal granted permission to a researcher to conduct an experiment on children that involved drawing and testing the children's blood, without parental consent, even though he knew that such consent was required.[142]

The TRC concluded that in some cases the experiments conducted were poorly designed;[143] not implemented properly or consistently by the institutional staff or nurses;[144] were unnecessary; and, in at least one case, could be characterized as withholding care from the

children.[145] The TRC also noted that there were further areas of investigation needed in the context of experimentation on Indigenous children. According to then TRC Chair Murray Sinclair:

> We do know that there were research initiatives that were conducted with regard to medicines that were used ultimately to treat the Canadian population. Some of those medicines were tested in Aboriginal communities and residential schools before they were utilized publicly. Some of those medicines which we know were able to work in the general population, we also have discovered were withheld from children in residential schools, and we're trying to find the documents which explain that too.[146]

There are many unanswered questions about the experiments. What is clear is that they constituted yet another set of harms perpetrated on the children in addition to the abject living conditions, corporal punishment, extreme disciplinary tactics, and sexual, physical, mental, and spiritual abuse that the children endured.

The experiments on children were part of a larger pattern of conducting experiments on Indigenous people and were part of medical colonialism in Canada. Mosby documents that, between the 1940s and 1950s, government-sponsored nutrition experiments were being conducted on an "unprecedented" scale within First Nations communities and on Indigenous children at Indian Residential Schools.[147] The experimentation on Indigenous people reflects the racist hierarchy that falsely positioned White Europeans at the top of the scale of human evolution and positioned Indigenous people at lower stages of human development. The racism underlying these experiments illustrates the ways in which Indigenous children's bodies were seen as ungrievable, expendable, and disposable. Historian Mary-Ellen Kelm defines medical colonialism as the ways in which, "colonial governments appropriated medical power by encouraging the production of knowledge about Indigenous bodies that justified racial hierarchies."[148] Although most people consider the medical profession helpful to increasing health and well-being, Canada's history demonstrates that it has contributed to colonial violence, "The medical establishment has been an integral part of the colonial project since its inception.... [It] has not simply followed the lead of colonial governments but has proactively carried out their agenda."[149]

The experiments conducted on Indigenous children were done in the context of medical colonialism. These medical atrocities, from the State's perspective, were justified as an acceptable cost of "progress": the bodies of the children were objectified, and any harm was rationalized on the basis of scientific advancement and progress. The experiments

conducted on Indigenous children were done primarily for the social, economic, and health benefits of non-Indigenous people and institutions, including the experimenters themselves.

The "Eskimo Experiment": Social Experimentation on Inuit Children

> You used us unwittingly, you didn't ask our parents, you just took us and in official documents you employed us as experiments to determine how policy would be written about educating Inuit kids in Canada.
>
> **— Peter Ittinuar**[150]

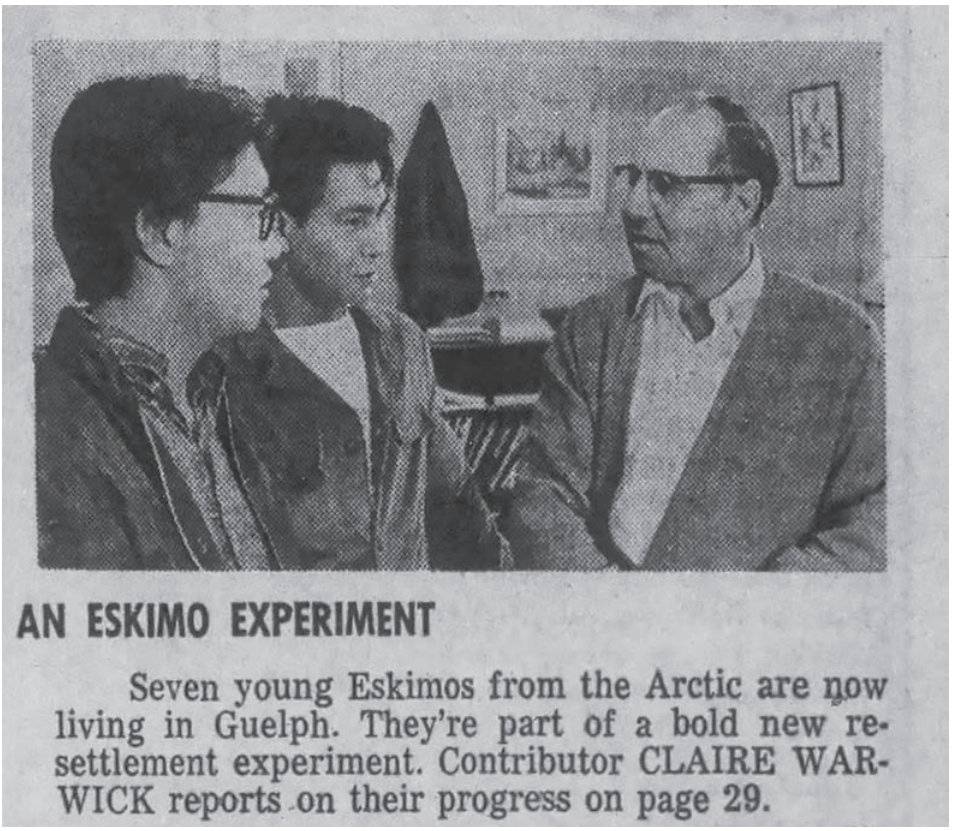
In the summer of 1962, Peter Ittinuar and Eric Tagoona, who were both 12 years old, were taken from their families and communities to Ottawa. Zebedee Nungak, who was also 12 years old, was also later brought to Ottawa in August.[151] The three boys spent six years away from their homes with little contact with their families and communities.[152] They were the first children used in a social experiment to determine if Inuit children were intelligent enough to be educated in southern Canada, to measure their cultural adaptability, and to create future Inuit leaders.[153] The Canadian government called it the "Eskimo Experiment."

Prior to being removed from their families, Zebedee, Peter, and Eric were bright lights in their communities of Puvirnituq, Chesterfield Inlet and Baker Lake. They loved to hunt, read, and spend time out on the land.[154] Peter recalled that his, "life was pretty full as an Inuk boy."[155] Their sense of self was deeply connected with their Inuit culture. The experiment was based on the false, racist beliefs of White settler supremacy and the cultural inferiority of Inuit. Zebedee reflected that, "there was a sense that the life we have been living up to then was somehow deficient. That Inuit living was somehow not a complete life that had to somehow be adjusted."[156] As Peter described, the experiment was, "to help [the government of Canada] determine new policies up north, whether to bring kids down south and to determine whether we were little savages or as good … as white kids."[157] He further noted:

> In 1960 there were still many, many people still … living out on the land at that time.… They were then starting to be herded into communities and … small one room schools were being built. The

> question for the government was how are we going to educate all the Inuit up north en-masse? You know they're isolated, they're way up there do we bring them down south? Do we build schools up there?[158]

The federal government knew the experiment would be harmful to the children and their families. In a departmental report, the government wrote, "It can be argued that such a directed educational program will disrupt northern native family ties, and will rapidly destroy native culture.... We must follow through with the natural consequences of that program."[159] Inuit communities did not want their children taken away to attend school; the Superintendent of Eastern Artic Patrol noted that, "those northerners the government had spoken to had all agreed it would be a grave mistake to transport native children of any distance from their home for education."[160] The government of Canada proceeded with the experiment anyways.



AN ESKIMO EXPERIMENT

Seven young Eskimos from the Arctic are now living in Guelph. They're part of a bold new resettlement experiment. Contributor CLAIRE WARWICK reports on their progress on page 29.

"An Eskimo Experiment," *Hamilton Spectator*, January 4, 1969.

Zebedee and Eric's parents were told that the boys would be sent to Ottawa for school but did not provide informed consent as they were not told that they were being sent as part of an experiment.[161] Peter's parents were not even told that he would be going, "My mother was away at a (tuberculosis) sanatorium.... My dad found out from a priest who had found out from a teacher who had found out from a government official and there were no consent forms signed ... it was planned ahead but there was no consent. They did what they wanted to do."[162] The time away from their families and communities had a significant impact on all of them. Some went on to be successful public figures. However, they experienced disconnection from their families and communities. Eric recalled that, "[I] lost how to talk to my parents because I lost my language within the first year. So I could no longer communicate with them in the way that I wanted to express myself. I was treated as a stranger—even now I am considered a foreigner."[163] Zebedee reflected that, "I have never been close to my family ever again—although I have four brothers and two sisters, all still living."[164]

Three years after the first phase of the Eskimo Experiment, in 1965, a second group of Inuk children were taken from their homes. Sarah Silou was taken from Baker Lake and relocated to a foster home in Edmonton, Alberta, to attend school. The following year, Jeannie Mike, Leesee Komoartok, and Rosie Joamie were taken from their families and communities in Pangnirtung to Petite Riviere, Nova Scotia, and placed in foster homes. The girls were all between seven and eight years old.[165] Their parents did not provide informed consent. Jeannie recalled that, "I asked my mom one time: how could you? How could you let me go? And she said, you know at the time, when Qallunaat (White people) ask for something there is no choice. There is no choice of refusal."[166] She heard more about this during her father's testimony at the TRC in 2012, "Dad talked about never being asked permission, never giving permission, either verbally or written."[167]

The children were treated like objects. Jeannie recalled that they were closely monitored and evaluated all the time when they were away but when they returned, there was no follow up:

> They might as well have sent me to the moon because the environment, the culture, everything was so different.... I am almost 50 years old and finding myself still trying to cope with something that happened ... more than 40 years ago.... Once I returned home, there was no follow-up, it was like the federal government sent kids to school and brought them back and you're home, they basically

> don't care how you are doing or how you are coping. There was … no aftercare, I never heard from anybody asking how we were reintegrating back into our community.[168]

Zebedee also said he was treated as a specimen, "Our experience was in the City of Ottawa, close to the headquarters and offices of the Department of Indian Affairs and Northern Development. We were trotted down occasionally to see, and be fawned over, by these officials in the Kent-Albert Building offices."[169] Like the three boys, the girls experienced negative impacts of being subjected to the experiment. Jeannie noted that, "the hardest part of it was reintegrating back into Inuit society because … when I came back … I had lost the taste for country food. I came back not speaking any more Inuktitut. I came back thinking I think more like a Qallunaat than an Inuk. People noticed that, and I remember being in my teens feeling very isolated because I did not feel Inuk amongst the Inuit and because I look Inuk, I was not accepted by the Qallunaat."[170]

At the National Gathering in Iqaluit, Jeannie said:

> I consider myself forgotten. In 2008, when the Prime Minister apologized to former Indian Residential School students, I didn't accept that apology. Because there are cases in Canada where Inuit children were taken that have not been resolved, and mine is one of them. I am always so happy when there are organizations and groups who have resolution and they can move beyond to healing, to processing. But … [my case has] not been resolved because of the federal government's stand of using the statute of limitations…. We have no closure…. I cannot find the reasons why I was sent for six years to Nova Scotia [to attend public school]…. I consider myself forgotten, and I will not accept the Prime Minister's apology to former [Indian Residential School] students because I didn't feel included. There are people who are still excluded.[171]

In January 2008, the victims of this experiment filed two lawsuits in the Nunavut Court of Justice. The claims seek compensation for breach of fiduciary duty and the negative impacts of the experiments as well as punitive, aggravated, or exemplary damages for the intentional loss of Inuit culture.[172] In its response, the government of Canada raised a limitation defence, which aims at having the claims dismissed on the basis that the claimants were out of time to sue the government. Peter, Zebedee, and Eric filed their lawsuit 11 years after they learned of the experiment.

According to Zebedee, they waited to file their claim in part because they did not want to publicize some of the negative impacts of the experiments on their lives. He said, "It took us years to sort of self-assess—what has it cost me? What has this cost me in my own individual personal life."[173] In her testimony at the Qikiqtani Truth Commission, Jeannie indicated that she only found out around 2006 that the federal government had taken her from her family and sent her to Nova Scotia:

> This is 40 years ago—40 years ago this year—that we were sent to school and it was only two years ago that I found out that us being sent to Nova Scotia was federally funded. I had always thought that the teacher [Helen] that we lived with, was solely responsible for us being there and ... she was good to us, there was no abuse, although we were in a culture that was very foreign to me.... So two years ago when I found out that the federal government had been responsible financially, I had never complained or talked about some of the effects or some of the issues that [long pause, crying] I had never said anything because I didn't want anyone, my family, my mother, my father, to think badly of Helen, because we all become fond of her. And finding out that it was the federal government who had sent us there made me very angry because I felt so betrayed. For having stayed silent all these years for Helen's sake when it had been the federal government who had sent us there. For Helen, it was worth staying silent. For the government of Canada, no. I think the last two years since I found out, I have been through a lot of searching for answers, searching for some peace within myself.[174]

The victims of these experiments are still waiting for accountability and justice and for their claims to be resolved.

Malnutrition as the Justification for Human Experimentation

The malnutrition of children at Indian Residential Schools was used to justify further atrocities against the children in the form of nutrition experiments. For these experiments, malnutrition was not a harm to be remedied but, rather, a "baseline" for research conducted to protect the White settler population.[175] Physician, professor, and social justice advocate Samir Shaheen-Hussain notes, "The knowledge that was gained through such experiments throughout most of the first half of the twentieth century benefited the Canadian government, medical researchers, and the settler population first and foremost."[176] At the Indian

Residential Schools, the remedy to protect the children from illness and death was both obvious and simple: adequately nourish the children.[177] No study was needed to correct this.

The purpose and motivation of the nutritional experiments between 1948 and 1952 was two-fold. First, they were aimed at protecting the White settler population from Indigenous "reservoirs" and "vectors" of disease like tuberculosis. This was, "language that became the central justification for the work of [the federal department of] Indian Health Services" during the 1940s and 1950s.[178] It reflected racist, harmful, and inaccurate beliefs that Indigenous people were more naturally susceptible to such diseases as opposed to acknowledging the conditions, such as malnutrition and overcrowding, imposed on Indigenous Peoples through settler colonialism.[179] Second, the nutritional experiments were aimed at furthering the assimilation of Indigenous Peoples into the Canadian population by building a base of scientific knowledge, including through nutrition and biomedical intervention, upon which to build a, "successful program of Indian integration" into settler society.[180] As Mosby explains, positioning nutrition and food as central to the federal government's policy of assimilation was also a matter of political strategy: it was a way for the previously underfunded Department of Nutrition to be allocated more money.[181]

Underlying the nutrition experiments were racist and false assumptions about the inferiority of Indigenous Peoples to White Europeans and the inadequacy of Indigenous diets.[182] Researchers ignored the fact that diets in Indigenous communities in many cases had been adequate long before interference from colonial settler forces[183] and falsely insisted that malnutrition among the children was the result of the move from their "traditional" diets to "modern" foods.[184] The poor health and malnutrition of Indigenous people, caused by the preventable food policies perpetrated on them as described above, provided apparent justification for the researchers to conduct their experiments.[185] The logic was cynical and cyclical: the State-sponsored malnutrition of the children at Indian Residential Schools was the justification for State-sponsored researchers to conduct experiments on them.

The experiments were conducted by Canadian researchers both within the federal government and at medical and academic institutions outside the government.[186] Some of the primary researchers of the nutrition experiments included:

- Dr. Lionel Pett, the head of the Nutrition Services Division of the federal government;[187]
- Dr. Frederick Tisdall, a physician at the SickKids Hospital in Toronto and director of the federal Nutritional Research Laboratory;

- Dr. Percy Moore, the superintendent of the Medical Services Branch of the federal Department of Indian Affairs;
- G.F. Ogilvie, researcher from the Nutrition Division, federal Department of National Health and Welfare; and
- Dr. Cameron Corrigan, resident physician for the federal Department of Indian Affairs in northern Manitoba.[188]

Prior to their work, the researchers had knowledge of the severe lack of nourishment in Indian Residential Schools. Pett and others fully understood that the food provided to the children was not remotely close to satisfying the emerging regulations on nutrition, which would eventually become Canada's Food Guide.[189] The federal government was also aware that, without an increase in funding for Indian Residential Schools, the nutrition deficits of the children could not be addressed.[190] These early studies are evidence of the researchers' knowledge of the children's suffering. According to Mosby, at the Indian Residential Schools:

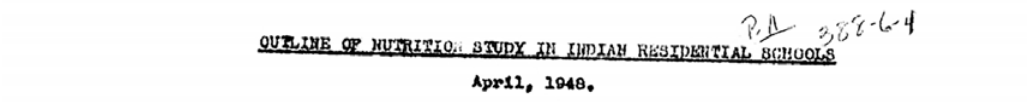
> The food provided typically failed to meet the government's own stated basic nutritional requirements. In many schools, items such as meat, milk, fruits, and vegetables were rare; schools often lacked a trained cooking staff; and many lacked even rudimentary appliances, refrigeration, or basic standards of sanitation. Even when kitchens were fully equipped, there were rarely sufficient funds to purchase the kinds of daily menus outlined in the Food Rules. It quickly became clear to investigators that this latter issue, in particular, was the heart of the problem.... [B]y 1947, Pett estimated that the per capita grant provided for food in most schools was often half of that required to maintain a balanced diet.[191]

Again, the solution should have been clear: increase funding for food and nutrition and then the health and well-being of the children would improve. Such clarity only makes sense, however, if the motivation was to care for the children and alleviate their suffering. It only makes sense if the subjects of the investigations—the children—were considered as equally human as the investigators themselves. Neither of these things were true, and so the cycle continued: rather than increasing the food grants to the institutions, Canada's response was to continue to allow and expand experiments on the children.[192] Mosby explains that bureaucrats, doctors, and scientists recognized the problems of hunger and malnutrition, yet increasingly came to view Indigenous bodies as "experimental materials" and Indian Residential Schools and Indigenous communities as kinds of "laboratories" that they could use to

pursue a number of different political and professional interests.[193] The TRC also described how some researchers actively opposed medical treatment for children on the basis that it could interfere with their experiments.[194]

The Nutrition Experiments

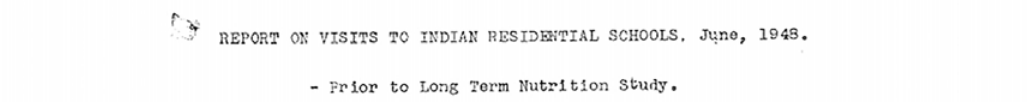
With the support of those who ran the institutions,[195] Pett and his colleagues ultimately designed nutrition experiments that were conducted over a five-year period, which sought to study the effects of nutrition interventions in the diets of children at six Indian Residential Schools. In 1948 and 1949, prior to the experiments, Pett, along with doctors and dentists, conducted medical examinations of all the children, which included the taking of blood samples.[196] The medical examinations were to create a baseline of the children's health and to assist Pett in making recommendations for dietary interventions that would be tested on the children at the six institutions. The federal government also requested that, "certain sodium fluoride dental treatments [and other preventative treatments] not be provided to the students attending the schools in the study."[197]


P.A 388-6-4

OUTLINE OF NUTRITION STUDY IN INDIAN RESIDENTIAL SCHOOLS

April, 1948.

Heading for the "Outline of Nutrition Study in Indian Residential Schools, April 1948," file 388-6-4, pt.1, 02/1948-071949, vol. 974, RG29, LAC.


REPORT ON VISITS TO INDIAN RESIDENTIAL SCHOOLS. June, 1948.

- Prior to Long Term Nutrition Study.

Heading of a "Report on Visits to Indian Residential Schools, June, 1948 – Prior to Long Term Nutrition Study," file 388-6-4, pt. 1, vol. 974, RG29, LAC.

The six nutritional experiments that Pett designed are as follows:

1. At the **Alberni Indian Residential School** in Port Alberni, British Columbia, children were found to be lacking in vitamins A, B, C, and iodine due to their shortage in the diet provided at the institution. Pett designed an experiment where milk consumption would increase from eight ounces to 24 ounces per day. Prior to increasing the milk rations, however, Pett kept the amount of milk provided to the children at eight ounces per day for a full two years to provide a baseline; this was less than half the amount recommended by Canada's Food Rules.[198] Pett's research identified a benefit for those who received an increase in milk rations.[199]

2. At the **Shubenacadie Indian Residential School** in Shubenacadie, Nova Scotia, the children were found to be deficient in vitamins A, B, C, iodine, and iron, and, during the winter months, they had low levels of ascorbic acid (vitamin C) in their blood along with high levels of gingivitis. Pett designed an experiment whereby children were placed into groups, one group received a daily tablet of 100 milligrams of ascorbic acid and the other group received a placebo.[200] There was no benefit or harm identified by providing the increased vitamin C to the children.[201]

3. At the **St. Mary's (Blood) Indian Residential School** in Cardston, Alberta, children were observed as having a thiamine deficiency. They were kept deficient for two years to create a "base-line" for research and then had their diets "supplemented with Canada-Approved Vitamin B Flour."[202] There were no reported results from this experiment.[203]

4. At the **St. Mary's Indian Residential School** in Kenora, Ontario, after many children were found to be deficient in riboflavin, they were given "Newfoundland Flour Mix." It contained added thiamine, riboflavin, niacin, and bonemeal and was not legal to sell outside of Newfoundland because of Canada's laws against food adulteration.[204] At the time that this experiment was done, Pett was of the view that studies had not demonstrated that consuming this flour mix was safe, and, therefore, he would not recommend its consumption by large groups of people.[205] Despite this, he tested this flour mix on Indigenous children. During the course of this experiment, the principal contacted Pett to see if it was okay to give the children iron tonic or vitamin pills. Pett opposed this, indicating that nothing additional should be given to the children until after the experiment was completed, which would be in another one to two years.[206] The TRC found that the principal discontinued serving the Newfoundland flour mix for a period of time during the experiment and had not informed Pett.[207] The results of the experiment were not conclusive.

5. At the **Cecilia Jeffrey Indian Residential School**, also in Kenora, children were given the option of consuming whole wheat bread and participating in an educational program offered by staff with the aim of studying, "the effects of educational procedures on choice of foods and nutrition status in a residential school."[208] The purpose of this experiment was to assess the effects of education on food choice and nutritional status.[209] Although

Pett reported a reduction in anemia, the TRC found that the study was implemented inconsistently and that there was a high turnover of cooks and likely inconsistent diets provided to the children during the period of the experiment.[210] As a result, it was difficult to determine whether Pett's experiment caused the changes in the anemia levels in the children or if other factors caused it.[211]

6. At the **St. Paul's Indian Residential School** near Cardston in Alberta, children were found to be deficient in critical vitamins and minerals, including vitamins A, B, C, iodine, and iron. These children were not provided with supplements. Instead, they were used as a "control" group for the experiments being conducted on children at other Indian Residential Schools.[212]

In his detailed historical analysis of these experiments, Mosby concluded that the horrific conditions at the Indian Residential Schools were a benefit for the researchers—they were laboratories of opportunity built upon the suffering of Indigenous children:

> The seemingly intractable situation in Canada's residential schools provided Pett with an unprecedented scientific and professional opportunity. Without necessary changes to the per capital funding formula for the schools, there was little likelihood that the students' nutritional status would improve in any meaningful way.... [T]he schools had become, through decades of neglect by Indian Affairs, a possible laboratory for studying human requirements for a range of nutrients as well as the effects of dietary interventions on a group of malnourished children.[213]

Sociologist Andrew Woolford similarly confirms that, "rather than treat [the children's] hunger as a problem that required immediate and drastic attention, health researchers viewed the schools as ready-made labs for the study of malnutrition."[214]

Lack of Consent

The TRC documented situations where parental consent was not sought in the medical treatment and vaccination of children at Indian Residential Schools over the course of their operations.[215] It found that it was not until the 1940s and onward that the Department of Indian Affairs began to seek parental consent, but only in certain situations, including for some transfers of children to tuberculosis sanatoria or for some to non-emergency surgeries.[216]

The TRC also found, however, that less care was taken in securing parental consent for vaccinations.[217] Although the transfer of guardianship to the principal of the institution did not eliminate the need for parental consent for medical treatment legally until after the 1960s, up until that point, in most cases, only the consent of the principal was sought.[218]

Not surprisingly, in the context of nutrition experiments, parental consent was also not sought.[219] The TRC concluded that "the decision not to seek consent is a reflection of one of the underlying failures of residential school thinking: the belief that the views of Aboriginal parents were, at best, irrelevant, and, at worst, a barrier to progress."[220] Most parents did not know that their children could be subjected to experiments and that the federal government considered the children to be wards of the State.[221] In addition, the ability of the children to consent, themselves, is questionable given their age and due to the coercion and deprivation that they faced within the institutions. As discussed further below, even if the children could consent legally, it would not have been possible for most, if not all, children to provide informed consent to powerful, intimidating doctors and researchers while they faced malnutrition and other forms of mistreatment, abuse, and violence.

Informed Consent

Informed consent means a person's agreement to allow something to happen that is based on a full disclosure of the facts needed to make the decision intelligently, including knowledge of the risks involved.[222] The information must be provided in plain language and consent must be given voluntarily with no undue influence, coercion, or duress.[223]

Some of the experiments caused direct harm to the children. Those whose health suffered as a result of the experiments—by developing anemia, cavities, and gingivitis as well as other ailments—were denied treatment on the basis that providing appropriate treatment would interfere with the results of the research.[224] The experiments also failed to improve the medical conditions of the children or alleviate their suffering. In some cases, the children who were supposed to "benefit" from the additional nutrition fared worse than the children placed in "control" groups.[225] The lack of nutrition has been linked to long-term health problems, "the development of diabetes and thyroid, neurologic, psychological, and immune system disfunction, as well as long term effects, including a greater risk of stillbirths, pre-term birth, neonatal death, complications with labor, and decreased offspring birth weight."[226]

The experiments were only possible because Indigenous children were seen as expendable. As medical practitioners have recently pointed out, what is especially striking about the experiments is that they, "were performed among individuals who were already marginalized and vulnerable. No one was looking out for the best interests of these research subjects. They had no voice."[227] The children were wards of the State entrusted in the care of church and government administrators. Despite their legal obligations to do so, neither were looking out for the interests of the children. Rather, the main beneficiaries of the experiments were the researchers who conducted them and the institutions they worked for. As Mosby points out, inconclusive or partial results of the experiments were simply used to justify more experiments,[228] while for, "children like those who developed anemia during the course of the study ... the risks to their own health often far outweighed any possible benefits they might have received."[229] The atrocities committed against Indigenous children at Indian Residential Schools, including medical and nutritional experiments, raise important questions about international law and the legal liability and obligations of the State and churches for perpetrating the harms.

International Legal Implications of Experiments on Indigenous Children

In its effort to address the Nazis' horrific medical experiments, the Nuremberg tribunal, in 1947, established rules to control medical experimentation on humans. However, during and after those rules were established, Canadian doctors and researchers violated them with abandon at Indian Residential Schools. Their conduct violated the human dignity of the children and can be understood as constituting torture under international law. Communities that are put into situations of marginalization are often the last to benefit from guidelines governing medical research. This is because researchers seek out vulnerable people who have less protection, might provide consent more easily, have less legal recourse, and are less likely to be seen with empathy by more privileged groups.[230] This was certainly the case for Indigenous children at Indian Residential Schools, who were particularly vulnerable, since they were purposefully separated from their parents and communities. As a result, those entrusted with their care—the Canadian State and the churches—were the only ones who could protect them from predatory medical experimentation. Instead, in some cases, federal representatives led and sponsored these experiments, and the principals of the institutions, who knew or should have known that parental consent was required, permitted these experiments to occur.

There are many examples of States relying on medical professionals to perpetrate genocide and other atrocities. Medical professionals, who are governed by principles that include refraining from participating in behaviours that may harm patients and society, instead have

often been active participants complicit in causing harm to members of targeted, marginalized, and vulnerable groups. According to Benjamin Mason Meier, a scholar specializing in global health policy:

> Society benefits from physicians who seek truth and healing for the good of humanity. Despite ethical admonishments to "do no harm," however, physicians have caused some of the most appalling human rights abuses of the twentieth century. Physicians, alone or in concert with the state, have willfully abused their medical knowledge and debauched their profession in furtherance of human rights violations. Compounding their crimes, physicians often have been complicit in following oppressive regimes in abusive practices against their citizens. Ironically, it is their knowledge of this healing art that allows physicians to take part in this injurious conduct; and it is this knowledge that states seek to harness in buttressing violative policies. In fact, for nations bent on violating human rights, it is "much easier for governments to adopt inherently evil and destructive policies if they are aided by the patina of legitimacy that physician participation provides."[231]

The medical experiments on Indigenous children at Indian Residential Schools across Canada did not occur in isolation. The experiments were fuelled by medical racism and colonialism in settler societies.[232] In Canada and elsewhere, these types of medical experiments were conducted in the broader context of State-sponsored researchers and doctors targeting communities that were placed, by the State, in conditions of severe vulnerability and with limited liberty. Individuals from these communities were dehumanized, and their bodies were considered expendable in the pursuit of "progress" and "scientific knowledge" and in serving those in power.

On too many occasions, medicine has been used by governments and doctors to further marginalize specific communities. Because of this and because of well-documented medical atrocities, specific rules, guidelines, and laws have been created to regulate and prohibit human rights violations and atrocities that have been conducted and justified in the name of science. Many are relevant to the experimentation conducted on the children at Indian Residential Schools, including international human rights law, international criminal law, and the articulation of standards for experimentation on human beings in the *Nuremberg Code*.[233]

International Human Rights Law

International human rights law governs the duties and obligations of States with respect to human rights. Governments sign and ratify international human rights treaties and must abide by customary laws that States accept as legally binding. These State obligations are clarified through judicial decisions by international courts. Together, these articulate the general principles of international human rights law and set out what States must do, and not do, to protect, respect, and fulfill human rights. The foundations of international human rights law were being established at the very same time that experiments were being conducted at the Indian Residential Schools. In response to the atrocities and horrors of the Second World War, States in the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (*UDHR*) in 1948.[234] While not binding, much of the *UDHR*'s content subsequently became key elements of international and domestic human rights law. According to the Special Rapporteur on human rights defenders, the *UDHR* "contains principles and rights that are based on human rights standards enshrined in other legally binding international instruments that are legally binding."[235]

Notably, when the *UDHR* was adopted in 1948, Canada was among the 48 States that voted in favour, while eight abstained. A number of rights articulated in the *UDHR,* as well as other human rights treaties, are of particular relevance to medical experimentation against children. Canada therefore knew that the experiments breached the children's basic human rights. Similarly, researchers and doctors who conducted these experiments knew or should have known that they were contravening international human rights standards. Both the Canadian State and the researchers knew or should have known that the medical experiments violated the rights of the children to be free of torture and cruel, inhuman or degrading treatment, their right to health, their right to life, their right to liberty, and their right to equality.

Canada Breached the Internationally Protected Human Right Not to Be Subjected to Torture

The experimentation against children can be understood as torture or cruel, inhuman or degrading treatment under international human rights law. Article 5 of the *UDHR* states that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment."[236] This means that, already in 1948, if not earlier, Canada accepted that torture and cruel, inhuman or degrading treatment were a violation of human rights. Although enacted more recently, both the 1984 UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*

or Punishment (*Convention against Torture*) and the Canadian *Criminal Code* provide helpful definitions of the crime of torture.[237] According to the *Convention against Torture*, ratified by Canada in 1987, torture is defined under international law as:

> any *act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person* for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or *for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[238]

The Canadian *Criminal Code* similarly defines torture as:

> any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
>
> (a) for a purpose including
>
> (i) obtaining from the person or from a third person information or a statement,
>
> (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
>
> (iii) intimidating or coercing the person or a third person, or
>
> (b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.[239]

As a peremptory norm (that is, a fundamental principle of international law that is accepted by the international community), the human rights violation of torture is never permissible and is never justified, globally or domestically. Under international human rights law, States cannot derogate from the prohibition against torture, meaning that no circumstances—war, national security threat, or public emergency—can ever justify a suspension of the human right not to be subjected to torture.[240] Importantly, the *Convention against Torture* applies

to all, including medical and health officials, and makes specific reference in noting that the training of medical professionals must include education and information regarding the prohibition of torture.[241]

Because medical experimentation has been used by States to perpetrate various atrocities, it has been considered explicitly in international human rights law. In 1966, with the support of Canada, the *International Covenant on Civil and Political Rights* (*ICCPR*) was adopted by the UN General Assembly.[242] Article 7 confirms that non-consensual medical and scientific experimentation is a method of torture, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[243] Scholars have identified food deprivation as a torture method.[244] Starvation has been used as torture in conflicts in many countries across the world.[245] As described above, it has been used by British and Canadian governments to force Indigenous Peoples into acquiescence with a view to dispossessing them of their lands.[246] The denial or withholding of food has also been a contributing factor in findings of torture in many cases before the Inter-American Court of Human Rights.[247]

Given the above, it could be argued that both the systematic policy of subjecting Indigenous children to malnourishment as well as the medical experimentation at Indian Residential Schools constitute a form of cruel, inhuman or degrading treatment and torture. The mental and physical pain and suffering caused by the experiments was the product of State-sanctioned discrimination against the children. The federal government did nothing to protect the children from these human rights violations; on the contrary, it created the policies and conditions that led to, encouraged, and permitted the torture of Indigenous children at these institutions.

Not all international human rights laws—including some of the conventions noted above—can apply to the medical atrocities and abuses committed against children at Indian Residential Schools. International law does not generally apply retroactively.[248] Nevertheless, some international human rights laws, such as the *UDHR*, existed while the experiments were being conducted. This indicates that Canada should have protected these children from abuses that were well known to be a violation of a person's human dignity. Even if it is not possible to bring forward legal cases at international courts or human rights bodies for the harms committed against Indigenous children at the former Indian Residential Schools, the language and logic of human rights provides an important lens through which to consider the atrocities committed against the children both through the deprivation of food and through medical experimentation. It is therefore important to call these experiments what they were: a form of torture and cruel, inhumane and degrading treatment of Indigenous children.

Unfortunately, this was consistent with the negligence, lack of care, mistreatment, and abuse of children that characterized the Indian Residential School System as a whole. Canada is ultimately responsible for this action. It must acknowledge and remedy these harms.

Canada Breached the Internationally Protected Human Right to Health

The human right to health is also of clear application to the experiments conducted against the children. Article 25 of the *UDHR* states:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[249]

According to the UN's Office of the High Commissioner for Human Rights, "the right to health contains freedoms. These freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment."[250] These rights and freedoms were clearly and repeatedly violated at the Indian Residential Schools. As described in detail above, the children purposefully did not receive adequate food, and it was this systemic lack of sustenance that both provided the "opportunity" for, and was used to "justify," the experiments. The children who were included in the control groups of the experiments were further deprived of adequate nutrition by design. They were also prohibited from receiving medical care, even when health problems—gingivitis, anemia, cavities—emerged as a direct consequence of the experiments. In addition, Canada may have violated the rights of children under the *International Convention on the Elimination of All Forms of Racial Discrimination*, which Canada signed in 1966 and ratified in 1970.[251] This convention notes that:

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...
>
> (iv) The right to public health, medical care, social security and social services.[252]

Under Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, Canada is also obligated to, "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[253] While these instruments of international human rights law may have come too late for the children who were experimented on at Indian Residential Schools, they should be applied to current manifestations of settler colonialism, including food insecurity, lack of access to appropriate health care, and culturally inappropriate and invasive child welfare interventions. The MMIWG Inquiry concluded that the crisis of child welfare interventions in Indigenous communities violates the internationally protected human rights of both children and families, including their rights to culture and identity.[254]

Enforced disappearances are serious human rights violations that are considered an ongoing violation until the fate of the disappeared person is resolved or a meaningful investigation on the part of the State is conducted. For the purposes of this analysis, it is important to stress that medical institutions themselves contributed to the disappearance of children, leaving families without knowledge of their fate. As Mosby observes:

> Similar to common practice in residential schools, hospital and sanatoria administrators were lax in informing families about the conditions of a child's death, where they were buried or, disturbingly, that the child patient had passed away at all. Many families still have no idea what happened to loved ones who left for these institutions and never returned.[255]

These disappearances—whether a consequence of the experiments, the systemic abuses at the Indian Residential Schools, or both—have been described as a form of torture because of how they have affected the families and loved ones.[256]

Canada Breached Other International Rights: The Right to Life, Right to Liberty, and Right to Equality

The above analysis is not exhaustive: in addition to violating the right to not be tortured as well as the right to health, the experiments also violated other human rights.

Right to Life

Where children died as a result of the experiments, their human right to life was violated. According to the High Commissioner of Human Rights:

> The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation. The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.[257]

This right is foundational in international human rights law: the right to life is the most precious of rights, without which others cannot be enjoyed.[258]

Right to Liberty

Canada and those acting on its behalf also breached the children's right to liberty. A deprivation of liberty occurs when a person is being held without their consent and is unable to leave at will.[259] The children were forced into the Indian Residential Schools and were not permitted to leave. In some cases, children were returned to the institutions against their parents' wishes.[260] In other instances, attempts by children to return home were responded to with severe punishments and violence, including being locked up and deprived of adequate food.[261]The right to liberty is protected under numerous international human rights instruments that Canada has signed, including the *UDHR* [262] and the *International Covenant on Civil and Political Rights* (*ICCPR*).[263] Article 9(1) of the *ICCPR* states, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[264]

Although the primary focus of most international cases relating to the deprivation of liberty is in the context of criminal arrest and detention, the United Nations Human Rights Committee and Working Group on Arbitrary Detention have made it clear that the right to liberty applies in all other contexts where deprivations of liberty occur.[265] This includes arbitrary detention for educational purposes.[266] Notably, the African Commission on Human and Peoples' Rights has held that, "arrests or detentions ... based on grounds of ethnic origin alone ... constitute arbitrary deprivation of liberty of an individual."[267]

In some instances, a deprivation of liberty may be justified under State and international laws: for example, in cases where a person is incarcerated after being found guilty of a criminal offence. However, deprivations of liberty are unlawful when a person is subject to arbitrary arrest or detention.[268] The United Nations Human Rights Committee's General Comment on Article 9 of the *ICCPR* notes that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality.[269] Even if a detention or arrest is done in accordance with State law, it can nevertheless be arbitrary. States cannot simply enact laws that deprive people of their liberty in violation of their basic human rights. Just because a State declares a detention legal does not make it so. If a person's rights are breached while being detained through mistreatment and lack of access to other legal rights, such as due process rights, the detention can be arbitrary.[270] This is important given that the TRC found that the apprehension of children was, at times, legislated under the *Indian Act*.[271] The TRC also found that the federal government had no legal authority to detain children beyond the legislated discharge ages or, at times, to arrest truant children.[272]

The children's detention in these institutions was arbitrary. They were detained for no other reason than the fact that they were Indigenous children. They were removed from legal protections and placed outside of the rule of law. The detention of the children in the Indian Residential School System was not appropriate, just, reasonable, necessary, or proportional. Rather, it was part of a larger settler colonial attack on the children, their families, and their communities.

Right to Equality

Given the disproportionate rates of malnutrition, illness, and mortality that the children faced because of the conditions they were put in and because of the experiments conducted against them, it can also be argued that the children's rights to equality and to be free from discrimination were also violated. Among other international treaties, equality is described in the *UDHR*:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and

> worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom ...
>
> Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[273]

Equality rights are reiterated in other international instruments that Canada has ratified, including the *ICCPR* [274] and the *International Covenant on Economic, Social and Cultural Rights*.[275] Again, evidence points to the fact that not only did the children face several horrors and atrocities at the Indian Residential Schools, including malnutrition, medical experimentation, and spiritual, physical, mental, and sexual abuse, but they were also targeted for their Indigeneity. This therefore constitutes discrimination and a violation of their right to equality under international law.

Canada's Obligations to Remedy Human Rights Violations under International Human Rights Law

There is a right to an effective remedy under international human rights law.[276] This means that human rights violations must be remedied by the States that commit them. Article 8 of the *UDHR* notes that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[277] The *ICCPR* adds:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[278]

In 2005, the UN General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which Canada supported.[279] In accordance with Article VII of these *Basic Principles and Guidelines*:

> Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
>
> (a) Equal and effective access to justice;
>
> (b) Adequate, effective and prompt reparation for harm suffered;
>
> (c) Access to relevant information concerning violations and reparation mechanisms.[280]

Canada's obligation to remedy the harms committed against children and their families is not optional. It exists in the very human rights treaties that Canada has helped create and that it has signed and ratified. The right to a remedy is the right of Indigenous victims and Survivors of Canada's human rights abuses and atrocities.

International Criminal Law

In addition to international human rights law and standards, international criminal law can help clarify the nature of the atrocity crimes committed against Indigenous children at Indian Residential Schools. International criminal law is the branch of international law that holds individuals, rather than States, accountable for the perpetration of international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression. The "birthplace" of international criminal law is typically associated with the Nuremberg trials and the trials of Japanese perpetrators of war crimes and crimes against humanity following the Second World War. International criminal law's development has also been influenced by international responses to mass atrocities perpetrated in contexts such as Rwanda, the former Yugoslavia, Cambodia, and Sierra Leone. But it was only with the establishment of the International Criminal Court (ICC) in 2002 that international criminal law applied to a greater number of States across the globe, including Canada.

The ICC has jurisdiction over war crimes, crimes against humanity, and genocide committed in States that have signed on to its founding treaty, the 1998 *Rome Statute of the International Criminal Court*.[281] Canada is a member State. However, the ICC can only investigate

and prosecute crimes committed under its jurisdiction after July 1, 2002, which is the date when the court became a functioning entity. A potential exception is if the crimes are ongoing, in which case the ICC has jurisdiction to hear the case. With the possible exception of enforced disappearances, which are considered ongoing crimes, international criminal law's emergence may have come too late to hold those criminally accountable for the experiments conducted on the children at Indian Residential Schools. Not only are bodies like the ICC unable to prosecute offences committed decades ago, but the primary perpetrators of the atrocity crimes committed in the institutions have likely all died in the intervening years. That does not mean, however, that international criminal law has no role. Even if the food deprivation at Indian Residential Schools and the experiments conducted on children largely fall out of the temporal jurisdiction and scope of contemporary international criminal law and even if no international tribunal is available to prosecute such atrocity crimes, there is power in naming these actions as crimes under international law. The widespread and systematic experimentation against the children has all the characteristics of a crime against humanity.

Experimentation on Indigenous Children Is a Crime Against Humanity

The subject of unlawful experimentation receives explicit attention in the *Rome Statute*,[282] which Canada signed, ratified, and largely incorporated into Canadian law in 2000.[283] Among the war crimes outlined in the *Rome Statute* are, "medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons."[284] Although Indigenous children in Canada were subjected to unjustified medical experiments, there was no armed conflict or war in the country during the time of the experiments, so war crimes provisions are not applicable.[285] That said, it should be stressed that it makes little sense to prohibit medical experiments during times of war but not in times of peace. As the analysis that follows concludes, the experimentation constituted torture or other attacks committed on a widespread and systematic scale; it can therefore be characterized as a crime against humanity.

Crimes against humanity are those that are so egregious that they are considered to be crimes committed not only against direct victims but also against all of humanity.[286] The *Rome Statute* defines crimes against humanity: they must be perpetrated as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, including murder; torture; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined; the enforced disappearance of persons; and other inhumane acts of a similar character intentionally causing

great suffering or serious injury to body or to mental or physical health.[287] An attack, per the *Rome Statute*, means a, "course of conduct involving the multiple commission of acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[288] To constitute a crime against humanity, an attack must be "systematic" or "widespread." Among other factors, a widespread attack is one of large scale, one that has targeted a significant number of people[289] or occurs over a large geographic area.[290] To be systematic, the attack must be part of a plan, pattern, or policy and, therefore, of an organized character.[291] It is important to emphasize that it is the attack itself and not the actions of any individual perpetrator involved in the attack that must be systematic.[292]

The threshold of a "widespread or systematic attack" appears to be satisfied in the context of the medical experiments on the children in Indian Residential Schools, and it is important to note that, to be a crime against humanity, an attack need not be systematic and widespread—just one or the other. The experiments were widespread—committed against hundreds of children across at least six Indian Residential Schools as well as an unknown number of associated institutions where children were forcibly transferred. These experiments were systematic and part of a well-planned and State-supported "research" program that was only made possible because of the federal government's policy to under-nourish the children. The experiments were clearly directed against civilians—the children—and committed by agents with full knowledge of the attack: not only those who led the experiments but also the relevant governments, funders, universities, and those operating the institutions who knew full well the harms the experiments caused. It is, at the very least, arguable that all the above crimes resulted from the experiments: torture, murder, persecution, enforced disappearances, and other inhumane acts.

Pursuant to international criminal law, torture is defined under the *Rome Statute* to include the following elements:

- The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
- Such person or persons were in the custody or under the control of the perpetrator;
- Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[293]

All of these conditions are satisfied in the context of the experiments against the children. Serious and long-term pain and suffering was inflicted on children in the care and custody of the institutions and by the researchers, whose work was supported by the State. The children were selected for these experiments. The torture was not the result of lawful punishments such as those allowing for the loss of liberty or imprisonment of criminal offenders, properly prosecuted.[294] As noted above, the harms were part of a widespread and systematic attack on the children and the conduct was well known and intended on the part of the researchers. As such, in addition to constituting torture in violation of international human rights, the experiments also constitute torture as a crime against humanity under international criminal law. These experiments were and remain abhorrent not just to those affected but also to all of humanity.

Some might argue that the researchers did not intend to hurt the children. As a matter of law, however, intention is not relevant to a finding of torture under international criminal law.[295] It is irrelevant whether those operating the Indian Residential Schools, or the researchers conducting the experiments, thought they were doing the right thing for the right reasons. With few exceptions,[296] it also does not matter whether they specifically targeted the children because they were Indigenous.[297] Where specific intent, although not motivation, becomes relevant is in the context of genocide.[298] In 2022, the House of Commons officially accepted that the Indian Residential School System was part of a genocide committed against Indigenous children, people, and communities.[299] So too did the Pope, in the wake of his visit to Canada in 2022.[300] According to Shaheen-Hussain's account, the violence perpetrated by the medical profession on Indigenous children is captured by all five elements of the *Convention on Genocide*.[301] The egregious harms committed against the children through food deprivation and the experiments conducted on them constitute part of the genocide committed against Indigenous Peoples within Canada.

The Nuremberg Code

As a result of the Nuremberg trials, the standards regarding medical experimentation on humans were developed. Many Canadians are familiar with the horrors committed by medical professionals in other countries pursuant to discriminatory and racist ideologies. The Second World War brought such atrocities to the fore. In addition to the prosecution of Adolf Hitler's inner circle of Nazi leaders at Nuremberg in 1946, there were 12 other trials of Nazi

officials, including one specifically related to doctors who conducted medical experiments on persons with disabilities, Jewish people, Polish people, Roma people, political prisoners, Soviet prisoners of war, "homosexuals," and Catholic priests.[302] In the "Medical Case," also called the "Doctors Trial," 23 physicians, scientists, and senior figures in Nazi Germany's medical administration and the military were prosecuted—including on charges of war crimes and crimes against humanity—for, "murders, tortures, and other atrocities committed in the name of medical science."[303] Seven medical officials were convicted and sentenced to death, nine received prison sentences, and seven were acquitted of the charges against them.[304] Some major perpetrators—chief among them the "Angel of Death," Josef Mengele, the notorious doctor who conducted brutal experiments on detainees at Auschwitz-Birkenau—escaped justice despite a decades-long manhunt.[305] In his opening statement, lead counsel and prosecutor Telford Taylor at the Doctors Trial, declared:

> The victims of these crimes are numbered in the hundreds of thousands.... [M]ost of these ... victims were slaughtered outright or died in the course of the tortures to which they were subjected. For the most part they are nameless dead. To their murderers, these ... people were not individuals at all. They ... were treated worse than animals.[306]

The trial covered the horrendous abuses, including torture, deliberate mutilation, sterilization, and murder,[307] committed by Nazi medical officers against detainees held in concentration camps.[308]

In its verdict at Nuremberg's 1947 "Medical Case," or "Doctors Trial," the tribunal was compelled to include its articulation of the *Nuremberg Code*, a set of ethical standards for research that includes human experimentation.[309] As Andrés Constantin, a scholar at the O'Neill Institute for National and Global Health Law, explains:

> Their trial led to the 1947 drafting of the *Nuremberg Code*, a set of guidelines governing research on humans, which included 10 principles focused on patient consent and autonomy. The *Nuremberg Code*, the first of its kind, was created to prevent a recurrence of the horrors committed in Nazi Germany, and it paved the way for the development of medical ethics and greatly influenced the evolution of human rights law.[310]

The *Nuremberg Code* came into existence before the nutrition experiments were conducted on children at the Indian Residential Schools and is a helpful guide in considering the utter lack of ethics in the experimentation against the children.

Nuremberg Code: Directives for Human Experimentation

1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion, and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made, and adequate facilities provided to protect the experimental subject against even remote possibilities of injury disability or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgement required by him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.[311]

The TRC considered the *Nuremberg Code* in its assessment of the non-consensual experiments committed on the children by Pett. It concluded that the voluntary consent provision of the *Nuremberg Code* was breached because:

- Pett did not disclose the potentials harms to the health of the children being experimented on, including that:
    - beneficial treatments would be denied to the children if it could impact the results of the study;
    - there was a lack of evidence of safety of some interventions; and
    - the parents' consent was not sought; rather, only the principal provided consent.[312]

More recently, researcher Kona Keast O'Donovan similarly concluded that the, "nutrition experiments were conducted at Residential Schools in clear violation of the *Nuremberg Code*."[313] The first principle of the *Nuremberg Code* emphasizes that, "the voluntary consent of the human subject is absolutely essential."[314] The Code likewise requires free and informed consent by people, "so situated as to be able to exercise free power of choice" without duress, fraud, or coercion.[315] In most cases, researchers did not receive consent from either the children or the parents.[316] Even in the instances where consent may have been given, the context in which it was received made it impossible for doctors and researchers to have obtained consent free of coercion.[317] Whatever consent was provided was largely vitiated (voided) on the basis that it was given in an environment of systemic suffering and coercive power relations. Principle 2 of the *Nuremberg Code* declares that any experiments should be done so, "as to yield fruitful results for the good of society, unprocurable by other methods or means of study."[318] If the experiments conducted at Indian Residential Schools yielded any beneficial results, it was not for the good of "society" because Indigenous children, families, and communities only suffered from the experiments. The racist, opportunistic, and exploitative research practices used were justified on the basis that the bodies of Indigenous children were ungrievable, disposable, and expendable and could be experimented on for the benefit of White settler society, including the doctors, researchers, and institutions that employed them. Principles 4 and 5 of the *Nuremberg Code*, respectively, provide that any, "experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury" and that, "no experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur."[319] The experiments blatantly disregarded these standards. The experiments did little to nothing to help the children and often furthered their suffering. Children subjected to nutritional experiments were kept malnourished for extended periods, some developed illnesses, and the studies continued even as children died.[320] A group of physicians wrote in 2014, "In these experiments, parents were not informed, nor were consents obtained. Even as children died, the experiments continued. Even after the recommendations from the Nuremberg trial, these experiments continued."[321]

Given the existence of the *Nuremberg Code* and knowledge of the Nazis' experiments, including those on children, during the Second World War and the Holocaust, the question arises: how could the experiments on Indigenous children at the Indian Residential Schools have been allowed to proceed? It has been suggested by scholars that Western scientists considered the *Nuremberg Code* as being relevant only to barbaric violence like that committed by Nazi Germany but not to "civilized physician investigators" in Western States like Canada.[322] Such dismissive attitudes ("standards apply elsewhere, but never to us") were relied on by doctors and medical researchers to rationalize and justify their medical experiments on Indigenous

children. While the *Nuremberg Code* set the standard for every subsequent attempt to regulate human experimentation, at the time, it was non-binding, offering guidelines that were not enforceable by any law or institution.[323] Federal health and medical officials as well as researchers were not legally obliged to follow the *Nuremberg Code*. Nor was there any clear mechanism by which to hold them accountable for their disregard of medical ethics. Only much later, in the 1970s, did Canada adopt more stringent requirements regarding experimentation involving humans.[324] Before that, physicians, researchers, and scientists were free to act on and perpetuate the racist ideologies of settler colonialism, and many saw little wrong with conducting experiments on Indigenous children without consent, especially if it benefited the White settler population.

Canadian researchers—Tisdall, Moore, Pett, Ogilvie, Corrigan and many others—flagrantly violated the principles that had been specifically articulated within the *Nuremberg Code*.[325] These atrocity crimes were motivated by a racist ideology, an intention to further the well-being of the White population at the expense of Indigenous children and an overwhelming sense that the bodies of these children could be dehumanized as they were deemed expendable and disposable. Any meaningful, even cursory, consideration of the *Nuremberg Code* by the Canadian State and the researchers would have precluded the experiments.

ACCOUNTABILITY FOR THE ATROCITIES COMMITTED

Western States have regularly overlooked or minimized atrocities resulting from medical experimentation on humans. This is often because experimentation benefits those in power. There are examples where States have not held those that perpetrated these atrocities to account, including:

- Japanese medical professionals involved in the notorious Unit 731, which conducted lethal experiments on Chinese civilians in the 1930s and 1940s, were never prosecuted for their atrocities at the International Military Tribunal for the Far East (effectively the cousin of the Nuremberg tribunal). Instead, the United States exchanged the Unit's scientific data on human experimentation for impunity for those involved, including the leadership of the Unit.[326]
- Between 1932 and 1972, the United States Public Health Service (USPHS) conducted the Tuskegee Study on Untreated Syphilis, which was a non-consensual study on approximately 600 Black men in a rural, impoverished part of Alabama to understand the natural course of syphilis when left

untreated.[327] Participants were told that they were being treated for "bad blood," which, at the time, was a term used to describe a number of ailments, including syphilis, anemia, and fatigue.[328] In 1973, the USPHS appointed an Ad Hoc Advisory Panel to produce a report on its findings relating to the study, which found that the study was "ethically unjustified."[329] When penicillin became available in the 1940s and 1950s and was known to be an effective treatment for syphilis, it was not provided to the men in the study, which "amplified the injustice."[330] Evidence was also uncovered that those running the study intervened to insist that those in the study receive no treatment from other doctors.[331] Although some reparations have taken place,[332] no one responsible for these experiments was ever prosecuted.

- More recently, allegations have been made that the Central Intelligence Agency in the United States breached the Nuremberg Code during its Torture Program in the 2000s.[333] No one responsible for these allegations has ever been put on trial.

In these cases, much like in the context of the medical experiments against Indigenous children, there is a common rationalization that States rely on to evade accountability for these atrocities: the experiments are necessary to support scientific and medical "progress." While doctors, nurses, medical researchers, medical institutions, and universities have perpetrated medical colonialism against Indigenous people and children, the individuals and institutions responsible for experimenting on Indigenous children in Canada have escaped accountability. When given the chance to accept responsibility, many either have defended their atrocities or minimized the hurt and harms they produced.[334] The TRC found that there is an urgent need to create historically literate citizens in Canada.[335] Part of this need is for settlers to recognize that much of colonialism's violence, and, indeed, much of genocidal violence, is perpetrated not by way of mass murder but, rather, by way of bureaucratic decision-making that inflicts upon Indigenous people conditions untenable for life.[336]

Sociologist Zygmunt Bauman has exclaimed that genocides are not the result of a system breaking down or uneducated and illiterate "monsters" deciding to exterminate another group. Rather, they require educated leaders armed with knowledge of science and technology and a ready-made bureaucracy of professionals capable of organizing and implementing genocidal violence to scale.[337] In his study of medical colonialism in Canada, Shaheen-Hussain concludes:

> The residential school system experience reveals not only the medical profession's failure to safeguard the health and well-being of

> Indigenous children but also its role in precipitating and hastening their deaths. This was not the work of a few rogue individuals, but rather a consequence of the *practices and policies that were implemented by administrators and bureaucrats, including physicians, and carried out by health care personnel* (as well as the clergy, nuns, and principals running the schools, and the teachers staffing them).[338]

Political philosopher Hannah Arendt notes that the face of those who perpetrate atrocities like genocide is not necessarily one of a grotesque demon but that of a boring bureaucrat.[339]

In line with this thinking, it should be recognized that atrocities against Indigenous children were perpetrated by scientifically trained government bureaucrats, researchers, and doctors. Cindy Blackstock, Gitxsan professor of social work and executive director of the First Nations Child and Family Caring Society, writes:

> Professionals are often viewed as safeguards to human rights abuses. Their high levels of education and training, and the ethics oaths they swear, all suggest that they hold a higher obligation to identify and address human rights violations. However, ... these professions are founded in colonial cultures and many were silent or actively involved in the perpetration of some of the worst colonial abuses in Canada.[340]

It is important to note that there has been some belated movement to acknowledge the harms of Canadian medical professionals and organizations, including a 2023 apology from the College of Physicians and Surgeons of Manitoba for its historical and ongoing role in providing or refusing to provide care due to the Indigenous-specific racism of their doctors and administrators.[341] Susan Zimmerman, Executive Director of Canada's Secretariat on Responsible Conduct of Research, noted that the nutrition experiments are the worst case of research abuse against Indigenous people that she knows of.[342] In 2018, a class action lawsuit was filed on behalf of Indigenous people who claimed that they were subject to medical experiments in Indian Residential Schools and sanatoria without their consent.[343]

More needs to be done, especially since the harms of colonialism continue in the medical system. Cree-Anishinaabe Dr. Marcia Anderson observes that, "the legacy of residential schools is not just in the intergenerational trauma and impacts on Indigenous families and communities—it is also in the health care system."[344] There continues to be significant and ongoing consequences on the health care and medical well-being of Indigenous people and communities. Studies indicate that being taken to these institutions, "had a lifelong impact on the health of children."[345] Medical racism and colonialism have created, more generally,

suspicions on the part of Indigenous people regarding the care provided by the health system, thereby acting as a barrier to greater care.[346] Around the globe, justice efforts emphasize the importance of truth-telling processes, achieving accountability with the prosecution of perpetrators, and repairing past harms through remedies and reparations. These are very important. However, what is often overlooked are the economic drivers of human rights violations, the financial incentives, and the systems and structures that make atrocities lucrative for those who perpetrate them.[347]

In the context of the experiments on the children at Indian Residential Schools, it was the researchers, their careers, and their backers that benefited at the expense of the children. As Mosby concludes:

> These studies did little to alter the structural conditions that led to malnutrition and hunger in the first place and, as a result, did more to bolster the career ambitions of the researchers than to improve the health of those identified as being malnourished.... [I]t was clear by the end of the study that its benefits were disproportionately skewed towards the professional interests of Pett and other researchers.[348]

Such experiments bolstered an industry of medical practice and study that not only turned its gaze away from the children who were the targets of this unethical human experimentation but also eagerly promoted and profited from the resulting research. This includes the government departments, the universities, the medical institutions, and the pharmaceutical companies involved. In addition, medical and scientific journals profited as they have, "proven more than willing to publish the results of experiments that put the life and health of human research subjects at risk without their consent or knowledge."[349]

Funding for the experiments and research on Indigenous communities came from powerful public and private sources, including Canadian universities, the Department of National Health and Welfare, the Department of Mines and Resources, and the Canadian Life Insurance Officers Association.[350] This is likely a partial list. Further investigations may reveal others who contributed funding to experimentation on Indigenous children at Indian Residential Schools and other institutions. Prior to the articulation of numerous regulations and guidelines on experiments involving human subjects, funders, universities, academic journals, and government bodies were instrumental in allowing such experiments to occur. None stood in the way of these atrocities.[351] Only the conscience of the researchers could limit their willingness to experiment on humans, and one might ask: given the incentives for profit, publication, and career advancement, how many would allow their conscience to

override their personal career ambitions and financial interests? If individual researchers were left to draw and enforce their own ethical boundaries in crafting studies and experiments, what chance did Indigenous communities and children have, given the insipid, systemic, and overt racism apparent in the medical health and research system? More likely, the medical researchers relied on tactics of denial and self-delusion to evade responsibility, deflect moral and ethical blame, and justify and rationalize the use of Indigenous children's bodies for their personal and political ends.[352]

According to public health scholar Ellen Amster, "Western medicine has begun a reckoning with its inconvenient pasts, from dethroning medical heroes to an increasing awareness of how doctors have treated colonized and enslaved populations."[353] Still, more is needed. During the TRC's mandate, several leading bioethicists, including Michael McDonald and Ronald Sugarman, called for a full investigation—with full access to records—into the nutrition experiments conducted on Indigenous children at Indian Residential Schools.[354] Both McDonald and Sugarman drew parallels with the notorious Tuskegee Study, particularly due to the lack of treatment for malnutrition of the children. McDonald noted that the nutritional experiments on Indigenous children at Indian Residential Schools were, "of a piece with Tuskegee and other infamous research."[355]

On March 2, 2023, the Tseshaht First Nation in British Columbia renewed the call for a full investigation by issuing their Call for Truth and Justice 19, which relates to the experimentation on Indigenous children at the Alberni Indian Residential School. Specifically, it called on all levels of government, the Royal Canadian Mounted Police, organizations, and churches to, "revisit the medical and nutrition experiments done on children of AIRS [Alberni Indian Residential School] and across Canada as uncovered by researcher Dr. Ian Mosby. Fully fund research, investigation/inquiry and other work as required to bring justice to this issue which has completely fallen off the government's radar."[356] As this Call for Truth and Justice makes clear, further inquiry and investigation is needed to reveal the full scale of the atrocities perpetrated against Indigenous children at the Alberni Indian Residential School and other institutions.

Only by revealing the full truth and holding individual perpetrators, medical and academic institutions, and governments accountable for their roles in the colonial violence targeted at Indigenous children through medical experimentation can justice be realized. Mosby and pharmacist and professor Jaris Swidrovich recently wrote:

> One of the, perhaps insurmountable, short-term problems that we face is that there has never been a reckoning for the legacy of medical

> experimentation and other abuses targeted at Indigenous Peoples within Canadian medical institutions. In the long term, an inquiry into the history of medical experimentation in Canada and reparations to the affected communities will be required.[357]

This Final Report echoes these calls. What is needed is an inquiry that can trace and ascertain which institutions and persons were involved in and benefited from these experiments and how. That involves naming them explicitly so that those individuals and organizations are held to account, rather than attributing colonial violence and atrocities to systems and structures. Political scientist Matt James argues that there is an urgent need to focus on the agency, power, and responsibility of wrongdoers and explicitly assign responsibility for the harm to Indigenous children.[358] Assigning responsibility and identifying the ways in which people, organizations, institutions, and governments benefited from the experiences will reveal just how much they gained from the atrocities they committed and the suffering of Indigenous children.

In addition, an investigation is needed into the medical or other experimentation done on Indigenous children at associated institutions, such as hospitals, Indian hospitals, tuberculosis sanitoria, children's homes, homes for unwed mothers, and other institutions to which children were sent from Indian Residential Schools and Federal Hostels. The important work of the TRC and Ian Mosby about the experiments on children at Indian Residential Schools must be considered in revealing the full extent of the atrocities committed against Indigenous children while in the care of the State and churches at these other institutions. While it may not be possible to hold accountable every individual perpetrator of medical colonialism, it should be possible to uncover how they and the institutions they worked for benefited from their atrocities. These ill-gotten gains were violently extracted from the suffering and torture of Indigenous children who never consented to their bodies being used as laboratory material. Those responsible for these atrocities should be held to account; the financial gains they made should be retrieved as reparations, not only for the Survivors of the experiments but also for those whose bodies were abused, mistreated, and neglected by a medical profession and system that has too often perpetrated violence on Indigenous people.

CONCLUSION

The use of food deprivation and starvation has been a consistent strategy of settler colonialism in Canada. For Indigenous children at Indian Residential Schools and other associated institutions, conditions of malnutrition, food scarcity, and hunger marked their day-to-day

lives. These conditions were also used to justify experiments on them. The TRC was highly critical of the nutrition and other experimentation on Indigenous children because, in most cases, the experiments provided little benefit to them and were done without parental consent. However, the TRC concluded that the "major scandal" was that the federal government failed to provide Indian Residential Schools with sufficient food and adequate living conditions for the children, failing to meet even its own recommended minimum standards.[359] The TRC found that:

> As in virtually every aspect of residential school life, [the federal government's] overriding concern with controlling costs usually meant that residential school diets would be substandard. Although many Indian Affairs officials would report on the inadequacy of the diet, the government was never prepared to provide the detailed direction needed to improve the diet—in large measure because officials were aware of the fact that few improvements could be made without a corresponding improvement in funding.[360]

Children were underfed, and many died. Despite knowing this, the federal government continued its policy of food deprivation unabated. In doing so, it perpetrated serious breaches of the children's internationally protected human rights and contributed to the ongoing crisis of missing and disappeared children and unmarked burials.

Through State-endorsed medical experimentation on Indigenous children, Canada violated the most fundamental human rights of the children, including, in many cases, their rights to life, liberty, health, and equality. The scale of the harms indicates that these abuses were not haphazard. Rather, they were widespread and systematic. They had the support of the State and its institutions. What happened to the children fits within current definitions of torture as a human rights violation and a crime against humanity under international law. If they happened more recently, they would be recognized and could be prosecuted as crimes against humanity. Even if this is not possible today, they should be understood and recognized as such by Canada, Canadians, and the international community.

1 "Season 2, Episode 4: Not a Place to Be," in *Stolen: Surviving St. Michael's*, produced by Gimlet Media, podcast, May 31, 2022.

2 Medical colonialism has occurred throughout Canada's history through non-consensual experimentation on Indigenous people and, unfortunately, continues to occur. For example, from the late 1960s to the early 1970s, Inuit, including children, were subjected to non-consensual medical experiments relating to skin grafts by researchers from the University of Alberta, the University of Manitoba, and McGill University. See Bob Weber, "'Other People's Skin:' Inuit Sue Government over Medical Experiments," *Globe and Mail*, June 21, 2019, https://www.theglobeandmail.com/canada/article-other-peoples-skin-inuit-sue-government-over-medical-experiments/. More recently, in 2017 and 2018, 59 members of Pictou Landing First Nation were subjected to non-consensual invasive MRI scans, and the results were presented by two radiologists, Robert Miller and Sharon Clarke, at a conference and reported on in an unpublished paper. Leo Sands, "Indigenous People Accuse Radiologists of Secretly Studying Their Organs," *Washington Post*, February 27, 2024, https://www.washingtonpost.com/world/2024/02/27/canada-indigenous-pictou-landing-lawsuit/.

3 Noni E. MacDonald, Richard Stanwick, and Andrew Lynk, "Canada's Shameful History of Nutrition Research on Residential School Children: The Need for Strong Medical Ethics in Aboriginal Health Research," *Paediatrics and Child Health* 19, no. 2 (February 2014): 64, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3941673.

4 Truth and Reconciliation Commission of Canada (TRC), *Canada's Residential Schools: The History, Part 2: 1939–2000*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 252–99.

5 Ian Mosby, "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952," *Histoire sociale/Social History* 46, no. 91 (May 2013): 145–72.

6 See, for example, College of Physicians and Surgeons of Manitoba, "Statement and Apology on Truth and Reconciliation and Indigenous-Specific Racism in Medical Practice," apology statement, January 31, 2023, https://cpsm.mb.ca/news/statement-and-apology-on-truth-and-reconciliation-and-indigenous-specific-racism-in-medical-practice; see also Sick Kids Hospital, "Reconciliation Statement on SickKids' History with Indigenous Peoples," apology statement, August 7, 2018, https://www.sickkids.ca/en/news/archive/2018/reconciliation-statement-on-sickkids-history-with-indigenous-peoples/.

7 Experiments were also conducted outside of the Indian Residential Schools and Federal Hostels, including in Inuit communities in the North, but the focus of this chapter is on those conducted in these institutions.

8 TRC, *Canada's Residential Schools: The History, Part 1: Origins to 1939*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 123.

9 David B. MacDonald, *The Sleeping Giant Awakens: Genocide, Residential Schools, and the Challenge of Conciliation* (Toronto: University of Toronto Press, 2019), 142.

10 James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life* (Regina: University of Regina Press, 2019), 100.

11 Daschuk, *Clearing the Plains*, xxxiii.

12 Daschuk, *Clearing the Plains*, xxxiii.

13 John A. MacDonald, Canada Parliament House of Commons, *Official Debates of the House of Commons of the Dominion of Canada*, 4th Parliament, 4th Session, vol. 12 (Ottawa: E. Cloutier, Queen's Printer and Controller of Stationery, 1882), 1186.

14 Daschuk, *Clearing the Plains*, 114.

15 Daschuk, *Clearing the Plains*, 123, 127.

16 Daschuk, *Clearing the Plains*, xxxv.

17 TRC, *The History, Part 1*, 124; see also Mary Ellen Kelm, quoted in Daschuk, *Clearing the Plains*, 201–2.

18 Tasha Hubbard, "The Call of the Buffalo: Exploring Kinship with the Buffalo in Indigenous Creative Expression" (PhD diss., University of Calgary, September 2016), 56.

19 Daschuk, *Clearing the Plains*, 133.

20 Daschuk, *Clearing the Plains*, 185.

21 See, for example, Terry Cannon, "Indigenous Peoples and Food Entitlement Losses under the Impact of Externally-Induced Change," *GeoJournal* 35, no. 2 (February 1995): 139.

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35 MMIWG Inquiry, *Legal Analysis of Genocide*, 10–11; Wakeham, "Slow Violence"; Dean Neu and Richard Therrien, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People* (Winnipeg: Fernwood Publishing, 2003).

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37 International Criminal Court (ICC), *Elements of Crimes* (The Hague: ICC, 2013), Article 6(e), https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf; *Prosecutor v. Jean-Paul Akayesu*, para. 509. For a detailed discussion of duress and coercion through the use of police or the threat of police, see Volume 2, Part 2, Chapter 7.

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49 Hubbard, "Call of the Buffalo," 27, citing Kiera Ladner, "When Buffalo Speaks: Creating an Alternative Understanding of Traditional Blackfoot Governance" (PhD diss., Carleton University, December 2000), 282–83.

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51 Linda Hogan, "First People," in *Intimate Nature: The Bond between Women and Animals*, ed. Linda Hogan, Deena Metzger, and Brenda Paterson (New York: Fawcett Columbine, 1998), 10.

52 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 28. For a detailed discussion of this in the context of Indigenous laws, see Volume 2, Part 3, Chapter 9.

53 Métis Nation British Columbia, Submission to the Office of the Independent Special Interlocutor (OSI), August 30, 2023, 19.

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57 Tabitha Robin et al., "Safe Food, Dangerous Lands? Traditional Foods and Indigenous Peoples in Canada," *Frontiers in Communication* 6 (December 2021): 3.

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67 The TRC identified 3,200 confirmed deaths through its examination of records during its mandate. TRC, *Missing Children*, 1. The numbers have since grown. see, for example, Ka'nhehsí:io Deer, "Why It's Difficult to Put a Number on How Many Children Died at Residential Schools," *CBC News*, September 29, 2021, https://www.cbc.ca/news/indigenous/residential-school-children-deaths-numbers-1.6182456.

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69 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 43.

70 TRC, *Honouring the Truth*, 43.

71 TRC, *Honouring the Truth*, 43.

72 TRC, *Honouring the Truth*, 43.

73 Mosby, "Canada's Residential Schools." For evidence that those running the schools and the government knew about the, "appalling death rate amongst the children" (letter from the Bishop of Moosonee); see also TRC, *The History, Part 1*, 229.

74 TRC, *The History, Part 1*, 488–89 (Kuper Island principal, noting that, "coastal First Nations did not suffer for want of food" and that First Nations families may stop sending their children to the school due to the poor diet); see also F.J. Paul Hackett, Sylvia Abonyi, and Roland F. Dyck, "Anthropometric Indices of First Nations Children and Youth on First Entry to Manitoba/Saskatchewan Residential Schools – 1919 to 1953," *International Journal of Circumpolar Health* 75 (2016): 307–34.

75 Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Winnipeg: University of Manitoba Press, 2015), 247.

76 TRC, *Honouring the Truth*, 88. The TRC noted that, in 1947, Dr. Lionel B. Pett, the head of the federal government's Nutrition Division concluded on that basis of the school inspections his staff had completed that, "no school was doing a good feeding job" (88). The TRC also found inspectors' reports as late as the 1970s for some Indian Residential Schools that reported an insufficient diet for the children.

77 TRC, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 71–77; TRC, *The History, Part 1*, 492; TRC, *Honouring the Truth*, 86; John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999), 112.

78 Woolford, *This Benevolent Experiment*, 247; Ian Mosby and Tracey Galloway, "'The Abiding Condition Was Hunger: Assessing the Long-Term Biological and Health Effects of Malnutrition and Hunger in Canada's Residential Schools," *British Journal of Canadian Studies* 30, no. 2 (2017): 147–62; Ellen Kelm, "A Scandalous Procession: Residential Schooling and the Shaping of Aboriginal Bodies," *Native Studies Review* 11, no. 2 (1996): 51–81; J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996).

79 Mosby and Galloway, "Abiding Condition," 147.

80 TRC, *The Survivors Speak*, 72.

81 TRC, *The Survivors Speak*, 71–72.

82 TRC, *The History, Part 1*, 509.

83 Stephen Cook, "Tainted Milk Led to Deaths of Alberta Residential School Children, Group Says," *CBC News*, January 24, 2023, https://www.cbc.ca/news/canada/edmonton/tainted-milk-led-to-deaths-of-alberta-residential-school-children-group-says-1.6724990. The TRC also found that children at the Mohawk Institute were served unpasteurized milk for many years due to the lack of funding provided by the Department of Indian Affairs to pasteurize it despite repeated requests (amounting to $2,400 per year at the time). TRC, *The History, Part 2*, 275.

84 Cook, "Tainted Milk."

85 TRC, *The History, Part 1*, 378–79.

86 TRC, *The History, Part 1*, 383.

87 TRC, *The History, Part 1*, 494.

88 TRC, *Honouring the Truth*, 93.

89 TRC, *Honouring the Truth*, 57.

90 TRC, *Honouring the Truth*, 59.

91 TRC, *Honouring the Truth*, 59.

92 TRC, *Honouring the Truth*, 59.

93 TRC, *Honouring the Truth*, 89–90.

94 Piotr Wilk, Alana Maltby, and Martin Cooke, "Residential Schools and the Effects on Indigenous Health and Well-Being in Canada: A Scoping Review," *Public Health Reviews* 38, no. 8 (2017): 1–23.

95 See Courtney Heffernan, Giovanni Ferrara, and Richard Long, "Reflecting on the Relationship between Residential Schools and TB in Canada," *International Journal of Tuberculosis and Lung Disease* 26, no. 9 (2022): 811–13.

96 Canadian Press, "At Least 3,000 Died in Residential Schools, Research Shows," *CBC News*, February 18, 2013, https://www.cbc.ca/news/canada/at-least-3-000-died-in-residential-schools-research-shows-1.1310894.

97 TRC, *Honouring the Truth*, 43, 72, 132.

98 TRC, *Honouring the Truth*, 3; TRC, *The History, Part 1*, 229.

99 TRC, *Honouring the Truth*, 159.

100 Frederick O. Loft, "The Indian and Education," *Saturday Night*, June 19, 1909, 12; Frederick O. Loft, "The Indian and Education," *Saturday Night*, July 17, 1909, 3, cited in TRC, *The History, Part 1*, 176.

101 Loft, "Indian and Education"; TRC, *The History, Part 1*, 176.

102 TRC, *The History, Part 1*, 227–29.

103 TRC, *The History, Part 1*, 229, citing Samuel Hume Blake, *Don't You Hear the Red Man Calling?* (Toronto: W. Tyrrell, 1908).

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105 TRC, *The History, Part 1*, 388–91.

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109 TRC, *The Survivors Speak*, 76–77, citing TRC, AVS, Frances Tait, Statement to the Truth and Reconciliation Commission of Canada, Victoria, British Columbia, Statement no. 2011–3974, April 13, 2012.

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113 TRC, *The History, Part 1*, 506–7, 534.

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127 TRC, *Honouring the Truth*, 86.

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135 TRC, *The History, Part 2*, 228–29 (the Amebicide study).

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137 TRC, *The History, Part 2*, 230–31.

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176 Shaheen-Hussain, *Fighting for a Hand to Hold*, 135.

177 MacDonald, Stanwick, and Lynk, "Canada's Shameful History," 64.

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182 Mosby, "Administering Colonial Science," 164.

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184 Mosby, "Administering Colonial Science," 164.

185 Mosby, "Administering Colonial Science," 153.

186 Researchers associated with various universities are known to have participated in experiments or studies of children at Indian Residential Schools, including, for example, G. Gordon Brown, University of Toronto (see Mosby, "Administering Colonial Science," 147); H.D. Kruse, John Hopkins University, Baltimore, MD (see P.E. Moore et al., "Medical Survey of Nutrition among the Northern Manitoba Indians," *Canadian Medical Association Journal* 54 (1946): 223–33); and M.W. Partington, Queen's University, Kingston, ON (see M.W. Partington and Norma Roberts, "The Heights and Weights of Indian and Eskimo School Children on James Bay and Hudson Bay," *Canadian Medical Association Journal* 190 (1969): 502–9). It is unknown how many other university researchers have participated in experiments on Indigenous children and Indigenous people.

187 Mosby, "Administering Colonial Science," 158.

188 TRC, *The History, Part 2*, 255–56. It is worth noting that many of these researchers co-authored academic articles on these experiments and presented on the results of these studies at conferences, gaining considerable reputational credibility. For example, Ogilvie and Pett co-authored five academic articles between the years of 1948 and 1955, which coincides with the time frame of these nutrition studies. Moore co-authored three academic articles with other researchers including Kruse, Tisdall, and Corrigan during this time period.

189 TRC, *The History, Part 1*, 258. Mosby adds that, "by 1947, Pett estimated that the per capita grant provided for food in most schools was often half that required to maintain a balanced diet. Once again, however, the official response was not to increase these grants immediately, but instead to launch further investigations." See Mosby, "Administering Colonial Science," 159. Mosby adds that Pett's eventual development of the Canada Food Guide was directly informed by his findings from the experiments he conducted on Indigenous children at Indian Residential Schools, "You can draw a direct line between the types of experiments that were being done in residential schools and these larger debates about how they should structure the food guide." See comments in Zoe Tennant, "The Dark History of Canada's Food Guide: How Experiments on Indigenous Children Shaped Nutrition Policy," *CBC News*, April 19, 2021, https://www.cbc.ca/radio/unreserved/how-food-in-canada-is-tied-to-land-language-community-and-colonization-1.5989764/the-dark-history-of-canada-s-food-guide-how-experiments-on-indigenous-children-shaped-nutrition-policy-1.5989785.

190 TRC, *The History, Part 2*, 259.

191 Mosby, "Administering Colonial Science," 159.

192 Mosby, "Administering Colonial Science," 159–60.

193 Mosby, "Administering Colonial Science," 148.

194 TRC, *The History, Part 2*, 260.

195 Mosby, "Administering Colonial Science," 163, citing the example of the Alberni school's principal A.E. Caldwell.

196 TRC, *The History, Part 2*, 260.

197 TRC, *The History, Part 2*, 260, 279–81.

198 Mosby, "Administering Colonial Science," 161; TRC, *The History, Part 2*, 263.

199 TRC, *The History, Part 2*, 287.

200 Mosby, "Administering Colonial Science," 162; TRC, *The History, Part 2*, 263.

201 TRC, *The History, Part 2*, 287.

202 Mosby, "Administering Colonial Science," 162. See also TRC, *The History, Part 2*, 263–67.

203 TRC, *The History, Part 2*, 287.

204 Mosby, "Administering Colonial Science," 162 See also TRC, *The History, Part 2*, 263–67, 277–79.

205 TRC, *The History, Part 2*, 286.

206 TRC, *The History, Part 2*, 284.

207 TRC, *The History, Part 2*, 288.

208 Mosby, "Administering Colonial Science," 162.

209 Mosby, "Administering Colonial Science," 162; TRC, *The History, Part 2*, 263.

210 TRC, *The History, Part 2*, 287.

211 TRC, *The History, Part 2*, 287.

212 TRC, *The History, Part 2*, 287.

213 Mosby, "Administering Colonial Science," 160.

214 Woolford, *This Benevolent Experiment*, 250.

215 See TRC, *The History, Part 2*, 220–27.

216 TRC, *The History, Part 2*, 221–22.

217 TRC, *The History, Part 2*, 222.

218 TRC, *The History, Part 2*, 222.

219 TRC, *The History, Part 2*, 260.

220 TRC, *The History, Part 2*, 289.

221 Mosby, "Administering Colonial Science," 165–66.

222 *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing, 1990), 779.

223 Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, "Chapter 3: The Consent Process," in *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, December 2022, https://ethics.gc.ca/eng/tcps2-eptc2_2022_chapter3-chapitre3.html.

224 Mosby, "Administering Colonial Science," 162.

225 Mosby, "Administering Colonial Science," 164.

226 Kona Keast O'Donovan, "Convicting the Clergy: Seeking Justice for Residential School Victims through Crimes against Humanity Prosecutions," *Manitoba Law Journal* 45, no. 4 (2022): 53.

227 MacDonald, Stanwick, and Lynk, "Canada's Shameful History," 64.

228 Mosby, "Administering Colonial Science," 165–66.

229 Mosby, "Administering Colonial Science," 164, 169.

230 Stefania Negri, "Unethical Human Experimentation in Developing Countries and International Criminal Law: Old Wine in New Bottles?" *International Criminal Law Review* 17, no. 6 (2017): 1022–48. Some examples include the forced implantation of intra-uterine devices by Danish doctors on Inuit women and girls in Greenland in the 1960s and 1970s (see Adrienne Murray, "Inuit Greenlanders Demand Answers over Danish Birth Control Scandal," *BBC*, September 30, 2022, https://www.bbc.com/news/world-europe-63049387); the theft and appropriation of the Henrietta Lacks cell line in 1951 (see Rebecca Skloot, *The Immortal Life of Henrietta Lacks* [New York: Random House, 2010]); and more recent predatory pharmaceutical atrocities, such as the opioid crisis fuelled by Purdue Pharma and others (see Patrick Radden Keefe, *Empire of Pain: The Secret History of the Sackler Dynasty* [New York: Doubleday, 2021]).

231 Benjamin Mason Meier, "International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal," *American Journal of Law and Medicine* 30, no. 4 (2004): 419–20.

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235 Special Rapporteur on Human Rights Defenders, "Declaration on Human Rights Defenders," *Office of the United Nations High Commissioner for Human Rights*, accessed July 17, 2024, https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders.

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237 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, 1465 UNTS 85 (*Convention against Torture*); *Criminal Code*, RSC 1985, c. C-46.

238 *Convention against Torture*, Article 1.

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241 *Convention against Torture*, Article 10.

242 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171, Article 7 (*ICCPR*).

243 *ICCPR*, Article 7.

244 Pau Pérez-Sales, "Hunger: Deprivation and Manipulation of Food as a Torture Method—State of the Art in Research and Ways Forward," *Torture Journal* 30, no. 3 (2021): 3-19. https://doi.org/10.7146/torture.v30i3.123318.

245 Pérez-Sales, "Hunger," 6, citing the use of starvation in the Second World War, in Kampuchea/Cambodia, Ireland, Armenia, Darfur, Yemen, Syria, Libya, Turmenistan, and other former Soviet republics.

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247 International Human Rights Legal Clinic, Berkeley Law, University of California "Non-typical Forms of Torture and Ill-Treatment: An Analysis of International Human Rights and International Criminal Jurisprudence," July 2018, 8, citing *Sendic v. Uruguay*, UN Doc. CCPR/C/14/D/63/1979 (October 20, 1981), 2.3, 2.4, 20 (holding that subjecting the victim to a "lack of food" while in detention was, in addition to other factors, a form of torture and ill-treatment); *Polay Campos v. Peru*, UN Doc. CCPR/C/61/D/577/1994 (November 6, 1997), 2.1, 8.7 (noting that, while the victim was detained, "the food [was] deficient" and that this contributed to a finding of torture and ill-treatment); *Danilo Dimitrijevic v. Serbia and Montenegro*, UN Doc. CAT/C/35/D/172/2000 (November 16, 2005), 2.2, 7.1 (finding that the victim was "denied food and water" and that this omission was found, along with other factors, to constitute torture); *Miguel Castro Castro Prison*, Case no. 160 (November 25, 2006), 37, 44, 103 (finding that inmates "did not receive food [or] ... water" during an attack on the prison where they were detained and that this contributed to a finding of torture); *Institute for Human Rights and Development in Africa v. Angola*, African Commission on Human and Peoples' Rights Communication no. 292/04 (May 22, 2008), 51, 53 (holding that as "food was not regularly provided" to victims in detention and was "insufficient," this contributed to a finding of torture); *Prosecutor v. Popovic*, Case no. IT-05-88-T (June 10, 2010), 844 (finding that victims "were detained in intolerable conditions of overcrowded facilities with no food" and that this contributed to a finding of ill-treatment); *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, African Commission on Human and Peoples' Rights Communication no. 368/09, November 5, 2013 (holding that the general conditions of detention, which included the deprivation of food, constituted ill-treatment); *Franck Kitenge Baruani v. Democratic Republic of Congo*, UN Doc. CCPR/C/110/D/1890/2009 (April 23, 2014), 2.4 (holding that the deprivation of "food and water" contributed to a finding of torture

and ill-treatment); *Abdulrahman Kabura v. Burundi*, UN Doc. CAT/C/59/D/549/2013 (November 11, 2016), 7.8 (noting that the victim was denied "water ... [and] food," which contributed to a finding of ill-treatment). See International Human Rights Law Clinic (IHRLC), "Non-Typical Forms of Torture and Ill-Treatment: An Analysis of International Human Rights and International Criminal Jurisprudence," IHRLC Working Paper Series no. 5, July 2018, https://www.law.berkeley.edu/wp-content/uploads/2018/07/Working-Paper-on-NonTraditional-Forms-of-Torture-final-July-2018.pdf.

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252 *Convention on Racial Discrimination*, Article 5.

253 *ICESCR*, Article 12.

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255 Mosby and Millions, "Canada's Residential Schools."

256 Alexa Hagerty, *Still Life with Bones: Genocide, Forensics, and What Remains* (New York: Crown, 2023), 113.

257 Office of the United Nations High Commissioner for Human Rights, *General Comment no. 36: Article 6 on Right to Life*, Doc. CCPR/C/GC/36, October 30, 2018, https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life.

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262 *UDHR*, Article 3.

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271 TRC, *Honouring the Truth*, 62.

272 TRC, *Honouring the Truth*, 61–62.

273 *UDHR*, preamble and Article 1.

274 *ICCPR*, Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

275 *ICESCR*, Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

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289 *Prosecutor v. Kunarac et al.*, Case no. IT-96-23 & 23/1 (February 22, 2001), para. 48 (trial judgment); see also *Prosecutor v. Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu*, Case no. ICTR-00-56-A (February 11, 2014), para. 260 ("the term 'widespread' refers to the large-scale nature of the attack and the number of victims").

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291 *Prosecutor v. Jadranko Prlić et al.*, Case no. IT-04-74-T (May 29, 2013), para. 41, https://www.icty.org/case/prlic/4.

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293 ICC, *Elements of Crimes*, Article 7(1)(f).

294 Case Matrix Network, "7. Such Pain or Suffering Did Not Arise Only from, and Was Not Inherent in or Incidental to, Lawful Sanctions," *Case Matrix Network*, accessed February 22, 2022, https://www.casematrixnetwork.org/cmn-knowledge-hub/proof-digest/art-7/7-1-f/7.

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296 The crime of persecution is an exception and requires discriminatory intent. For the elements of the crime against humanity of persecution, see ICC, *Elements of Crimes*, Article 7(1)(h)3.

297 Specific intent is irrelevant to a finding of crimes against humanity. Office on Genocide Prevention and the Responsibility to Protect, "Crimes against Humanity," United Nations (website), accessed April 12, 2024, https://www.un.org/en/genocide-prevention/definition. Note the crime against humanity of persecution includes a discriminatory element (that is, the intention to discriminate against a particular group or population).

298 Per the 1948 *Convention on Genocide*, genocide includes the acts enumerated under Article II when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

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310 Constantin, "Human Subject Research."

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312 TRC, *The History, Part 2*, 285–86.

313 Kona Keast O'Donovan, "Convicting the Clergy: Seeking Justice for Residential School Victims through Crimes against Humanity Prosecutions," *Manitoba Law Journal* 45, no. 4 (2022): 52–53.

314 "Nuremberg Code," Principle 1.

315 "Nuremberg Code," Principle 1.

316 Mosby, "Administering Colonial Science."

317 "Nuremberg Code." Consent under the principles has to be free of coercion ("the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision" [Principle 1]).

318 "Nuremberg Code," Principle 2.

319 "Nuremberg Code," Principles 4, 5.

320 MacDonald, Stanwick, and Lynk, "Canada's Shameful History," 64.

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324 Mosby, "Administering Colonial Science," 167.

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326 See Tsuneishi Keiichi, "Unit 731 and the Japanese Imperial Army's Biological Warfare Program," in *Japan's Wartime Medical Atrocities: Comparative Inquiries in Science*, ed. Jing Bao Nie, Nanyan Guo, Mark Selden, and Arthur Kleinman (London: Routledge, 2010), 23–31; see also Justin McCurry, "Unit 731: Japan Discloses Details of Notorious Chemical Warfare Division," *The Guardian*, April 17, 2018, https://www.theguardian.com/world/2018/apr/17/japan-unit-731-imperial-army-second-world-war.

327 See also Marcelia Alsan, Marianne Wanamaker, and Rachel R. Hardeman, "The Tuskegee Study of Untreated Syphilis: A Case Study in Peripheral Trauma with Implications for Health Professionals," *Journal of General Internal Medicine* 35, no. 1 (2019): 323, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6957600/pdf/11606_2019_Article_5309.pdfNational.

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329 US Department of Health, Education, and Welfare, *Final Report of the Tuskegee Syphilis Study Ad Hoc Advisory Panel* (Washington, DC: US Government Printing Office, 1973), 7, https://biotech.law.lsu.edu/cphl/history/reports/tuskegee/complete%20report.pdf. The Committee found that the study was ethically unjustified in 1932 on the basis that participants did not provide consent, were not informed of the risks (including of possible transmission of syphilis to others, such as family or friends) and that the study was "scientifically unsound and its results disproportionately meager compared with known risks to human subjects involved" (7–8).

330 US Department of Health, Education, and Welfare, *Final Report*, 11.

331 US Department of Health, Education, and Welfare, *Final Report*, 10.

332 After the study ended, the Tuskegee Health Benefit Program was established to provide medical care to the survivors of the study. Participants' wives and children were also added to the program as of 1975. In 1974, as a result of a class action lawsuit, a $10 million settlement was negotiated. In 1997, President Bill Clinton issued a formal Presidential Apology for the study. The last person who was part of this experiment died in 2005. See US Centers for Disease Control and Prevention, "Untreated Syphilis Study at Tuskegee Timeline."

333 Scott A. Allen and Sarah Dougherty, "Nuremberg Betrayed: Human Experimentation and the CIA Torture Program," Physicians for Human Rights, June 5, 2017, https://phr.org/our-work/resources/nuremberg-betrayed-human-experimentation-and-the-cia-torture-program/.

334 Mosby, "Administering Colonial Science," 165.

335 TRC, *Honouring the Truth*, 251.

336 See Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca, NY: Cornell University Press, 2002); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin Classics, 2006).

337 See Bauman, *Modernity and the Holocaust*.

338 Shaheen-Hussain, *Fighting for a Hand to Hold*, 125 (emphasis added).

339 See generally Arendt, *Eichmann in Jerusalem*.

340 Cindy Blackstock, "Foreword," in Shaheen-Hussain, *Fighting for a Hand to Hold*, xviii.

341 "Apology from the College of Physicians and Surgeons of Manitoba," press release, Manitoba Inuit Association, February 27, 2023, https://www.manitobainuit.ca/news/apology-from-the-college-of-physicians-surgeons-of-manitoba.

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343 See Katie Dangerfield, "Canada Subjected Indigenous People to 'Cruel' Medical Experiments, Lawsuit Claims," *Global News*, May 11, 2018, https://globalnews.ca/news/4202373/indigenous-people-medical-experiments-canada-class-action-lawsuit/; Ashifa Kassam, "Canada Sued over Years of Alleged Experimentation on Indigenous People," *The Guardian*, May 11, 2018, https://www.theguardian.com/world/2018/may/11/canada-indigenous-people-medical-experiments-lawsuit.

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345 Mosby and Galloway, "Abiding Condition," 148.

346 Shuchman, "Bioethicists Call for Investigation."

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348 Mosby, "Administering Colonial Science," 148, 169.

349 Mosby, "Administering Colonial Science," 166.

350 Mosby, "Administering Colonial Science," 154, citing R.P. Vivian and C. McMillan, "The Nutrition and Health of the James Bay Indian," *Canadian Medical Association Journal* 59, no. 6 (December 1948): 505.

351 David J. Rothman, *Strangers at the Bedside: A History of How Law and Bioethics Transformed Medical Decision Making* (New York: Basic Books, 1992), 69, cited in Mosby, "Administering Colonial Science," 167.

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353 Ellen J. Amster, "The Past, Present and Future of Race and Colonialism in Medicine," *Canadian Medical Association Journal* 194, no. 20 (May 2022): E708.

354 Shuchman, "Bioethicists Call for Investigation," 1201.

355 Shuchman, "Bioethicists Call for Investigation," 1201.

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357 Mosby and Swidrovich, "Medical Experimentation," E382.

358 Matt James, "The Structural Injustice Turn, the Historical Justice Dilemma and Assigning Responsibility with the Canadian TRC Report," *Canadian Journal of Political Science* 54 (2021): 374–96 (James calls this "retributive social accountability").

359 TRC, *The History, Part 2*, 289.

360 TRC, *The History, Part 1*, 487.

CHAPTER 5

Settler Amnesty and the Culture of Impunity in Canada

> There are also clear positions that we have taken about how [search and recovery] work should unfold, and it first goes to accountability. If there are people who were a part of these atrocities that are living or institutions that can be held to account, they must be brought to justice. And this process should not be shy for bringing accountability to a place where there has not been accountability for Indigenous children.
>
> — President Natan Obed, Inuit Tapiriit Kanatami[1]

Indian Residential Schools were neither created nor operated by abstract entities. The architects of the system and those that ran each institution and committed the well-documented atrocities and harms against the children were people. They had names, faces, and professions. They were clergy, priests, nuns, physicians, researchers, policy-makers, and politicians. They were proud of their work, and they defended their atrocities on racial, economic, social, religious, and political grounds; in many cases, their descendants still do.[2] Like perpetrators of genocide before and after them, they dehumanized Indigenous children, calling them "savages" in need of saving and salvation and insisting that they were somehow less human and less worthy of dignity than White settlers.[3] These individuals developed and made their careers off the suffering of Indigenous people and benefited professionally and financially.[4] They were able to do so because Canada granted them impunity and ensured that there were no avenues for adequate or comprehensive accountability for their atrocities.

These individuals—the people most responsible for the atrocities committed against Indigenous children and communities—have been protected by systemic impunity, which is described herein as **settler amnesty**.

What Is Amnesty?

An amnesty can be granted by a government to prevent criminal investigations and prosecutions of individuals, including officials in government and other institutions, responsible for serious human rights abuses and certain international crimes.

What Is Impunity?

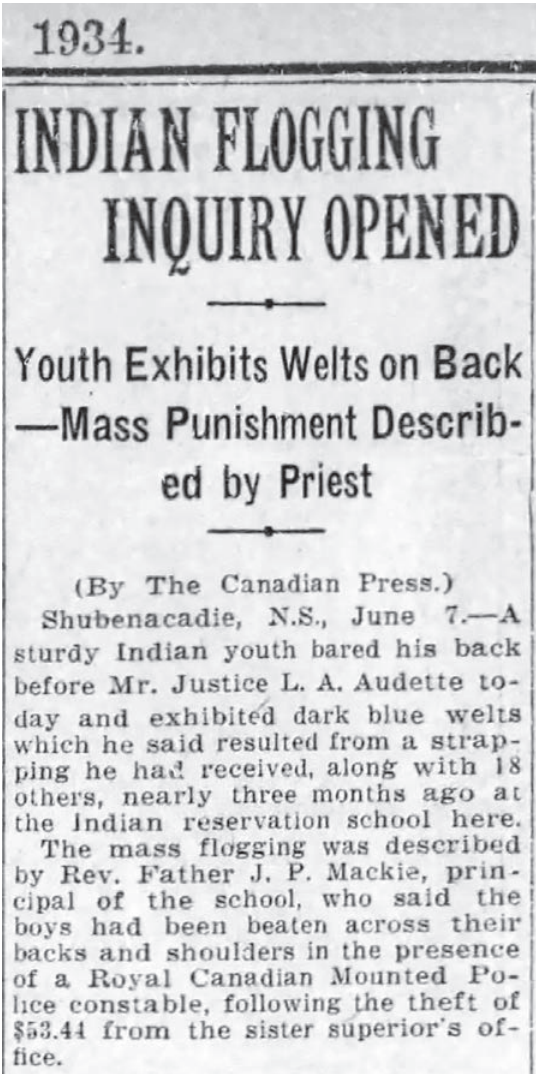
Impunity is freedom from facing any punishment or other consequences for harmful actions. A culture of impunity permits individuals and institutions to perpetrate harms knowing they will not be held accountable for their actions.

In the context of the Indian Residential School System, settler amnesty is an ongoing and unconditional refusal to investigate and prosecute those most responsible for the deaths, disease, and brutality inflicted on children in that system. It is a disguised form of amnesty that is neither formally legislated nor publicly acknowledged. It operates invisibly to preserve settler colonial systems, structures, and institutions. The result of this wholesale impunity is that perpetrators are proactively protected from prosecution and punishment for their crimes. They are shielded from criminal liability and not formally punished. Yet these people are known. Their names are known—to churches, government, and associated institutions. So too are their crimes.

To date, only a handful of those who committed crimes against Indigenous children at former Indian Residential Schools have been prosecuted and convicted for sexual and physical abuse,[5] while none of those people most responsible for the system have been held to account at either the domestic or international levels.[6] While many perpetrators died long ago, Survivors and communities demand that Canada, as a State, be held accountable for these past abuses against Indigenous children. Individual perpetrators have averted criminal responsibility. There was never a meaningful attempt to hold individual perpetrators to account when the perpetrators were alive and justice was possible. This emphatic endorsement of impunity by Canada is repeated throughout its history. Since the earliest evidence of the numerous atrocities committed against Indigenous children came to light—including exposing them to the risks of contracting deadly diseases,[7] subjecting them to sexual and physical abuse,[8]

and permitting medical experimentation on them[9]—Canada has adopted and propagated a policy of impunity, working harder to protect the perpetrators than their victims.

Much of the violence against Indigenous children has not been through a "spectacular" event such as with mass killings that many might associate with genocides. Rather, it was what Alyssa Couchie, a Nbisiing Anishinaabeg (Nipissing First Nation) scholar, identifies as an anti-Indigenous settler colonial process of "slow atrocity violence."[10] She argues that reframing, "the notion of genocide as a potentially slower process of destruction by attrition, in contrast to the dominant yet problematic framings of international crimes as committed exclusively amidst the chaos of war and crisis focuses our attention on the discriminatory processes that lead to the targeted destruction of a group, rather than solely on its outcome."[11] Sociologist Andrew Woolford describes this as "symbolic violence," noting that this form of violence often appears as humane when contrasted with more overt forms of physical, sexual, and cultural violence. He argues that, "kind teachers, caring superintendents, gifts, and other such niceties might reflect well on the compassionate qualities of specific individuals working in boarding schools, but they are nonetheless actions within a context intended to provoke a specific violent outcome: the elimination of Indigenous identities."[12]



1934.

INDIAN FLOGGING INQUIRY OPENED

Youth Exhibits Welts on Back —Mass Punishment Described by Priest

(By The Canadian Press.)

Shubenacadie, N.S., June 7.—A sturdy Indian youth bared his back before Mr. Justice L. A. Audette today and exhibited dark blue welts which he said resulted from a strapping he had received, along with 18 others, nearly three months ago at the Indian reservation school here.

The mass flogging was described by Rev. Father J. P. Mackie, principal of the school, who said the boys had been beaten across their backs and shoulders in the presence of a Royal Canadian Mounted Police constable, following the theft of $53.44 from the sister superior's office.

"Indian Flogging Inquiry Opened," *Montreal Gazette*, June 8, 1934.

Slow atrocity or symbolic forms of violence, framed as well-meaning acts, were the result of a combination of racist and discriminatory policies, institutions, regimes, laws, and systems that changed over time. The intent, however, remained constant: to assimilate Indigenous children and destroy their connection to their families, lands, cultures, and communities.[13] Like other mass atrocities where systematic human rights violations are committed, the

violence included a litany of crimes that have collectively been recognized in Canada as genocide by the Truth and Reconciliation Commission of Canada (TRC),[14] the National Inquiry into Missing and Murdered Indigenous Women and Girls,[15] the federal government,[16] the former chief justice of the Supreme Court of Canada,[17] and many others.[18] Despite these acknowledgements, Canada continues to resist accountability, deny truths, and refuses to shed light on all the atrocities it committed against Indigenous Peoples.

This State-sponsored culture of impunity is the result of an unconditional, de facto blanket amnesty granted, through actions and omissions by the State, to those most responsible for the harms committed. Understanding efforts on the part of the federal government to allow impunity for atrocities committed against Indigenous people and communities through the lens of amnesty illustrates how sophisticated, systematic, and structural the denial of justice is and has been. It highlights what might appear to be disparate decisions or omissions on the part of the State to ensure that accountability was, in fact, frustrated at every turn. Governments, ministries, and institutions have changed. Canada has changed. Yet impunity remains. An amnesty lens also emphasizes the harmful and prevailing effects that result from accountability avoidance. It challenges the historical myth that Canada had only good intentions towards Indigenous Peoples. It debunks the rationale that the harms committed in Indian Residential Schools and against Indigenous Peoples are the mere unintended consequences of state-building and territorial expansion. It calls into question the widely held belief that Canada, as a nation-state, abides by the rule of law. It demonstrates Canada's refusal to enforce its own rules and its own laws when they pertain to harms committed against Indigenous children.

There is nothing haphazard about this impunity. Canada's leaders, agents, and institutions carefully crafted policies to disappear Indigenous people and communities while avoiding accountability for their actions. As a State, Canada knew how horrendous and violent its policies and actions were. Yet a culture of, "settler amnesia and willful forgetting" has prevailed.[19] The question arises: why? Why has Canada been so reluctant to confront its brutality towards Indigenous Peoples, to remedy the harms it wrought upon them, and to allow for justice and accountability? Why has the State been actively obstructive towards holding those responsible for the atrocities to account? After all, many see Canada as a country that respects the dignity and human rights of its citizens. As Cree lawyer and writer Michelle Good explains, the history of a benevolent Canada with good intentions towards Indigenous communities is a myth.[20] Acts of violence perpetrated against Indigenous Peoples were intentional and purposeful. Yet this myth has been fostered, protected, and projected by the Canadian State both to its citizens and to the world. Truth and justice for

Indigenous Peoples disturbs that myth and calls for an authentic transition towards a different kind of State and a fundamentally new relationship between Canada and Indigenous Peoples. Good writes:

> Truth is more than fact. In Canada, truth must be unearthed from beneath the myth of Canadian history.... We must come to a place of understanding that the colonial history of Canada was genocidal in nature, functioning as an imperative embedded in the very heart of colonialism.... From those very early days, Canadians bought into the myth of Canada as the benevolent provider to Indigenous Peoples as opposed to the colonial oppressor determined to control the valuable resources on Indigenous lands. It is Indigenous Peoples who are, in fact, the benefactors of Canada. It is what was stolen from us that has sustained this country from day one.... But now that Canada has been forced to accept this truth, it's created a compelling opportunity to reconsider the true history of Canada. Yet, how heartbreaking that it took the deaths of these wee children (and decades of denial of their deaths) to make Canadians finally question their indoctrination. The need to recharacterize Canadian history is a prerequisite to reconciliation.[21]

Canada has resisted any meaningful social and political transition away from the very institutions that actively oppressed and sought to exterminate Indigenous Peoples. The observations of Joanna Quinn, a transitional justice scholar, in 2015 still hold true:

> [Canada] shows no signs, either inward or outward, of any kind of transition and whose politicians seem unaware that any kind of transition is needed.... The transition that is such a critical piece of change is missing. So, too, is evidence of change that might suggest the beginnings of a social transformation. It seems as though transformation is in many ways a litmus test for sincerity. The genuineness of the Government's activities to this point seems in question, since there do not appear to be any deeds to back up the commitments that have been made. The Canadian government has yet to "walk the talk."[22]

The existence of some tools of transitional justice, such as a TRC, cannot alone create such a transition. As a result, the abuses and atrocities against Indigenous Peoples are categorized as historical wrongs rather than crimes and human rights violations that demand accountability and reparation. According to Dene scholar Glen Coulthard, "in settler-colonial

contexts—where there is no period marking a clear or formal transition from an authoritarian past to a democratic present—State-sanctioned approaches to reconciliation must ideologically manufacture such a transition by allocating the abuses of settler colonization to the dustbins of history, and/or purposely disentangle processes of reconciliation from questions of settler-coloniality as such."[23] The governing and legal institutions, structural causes, and systemic forms of discrimination that justified the atrocities persist. Social work scholar Jennifer Matsunaga notes that, "there is no transition from a fragile to a secure state, since democracy is the mainstay of Canadian politics, transitional justice severs questions of how settler colonialism continues to cause harm in the present."[24]

In this context, Canada's settler amnesty operates to rebuff accountability, to stifle truth-telling, and to offer only palliative acknowledgement of wrongdoing to Indigenous Peoples in a colonial form of reconciliation that is meant to extinguish future remedies or responsibilities rather than produce justice. According to political scientist Liam Midzain-Gobin and global and international studies scholar Heather Smith:

> Where we do remember through apology, a temporal compartmentalization that places everything in the past and disconnected from the way present structures, policies, and ideological frameworks uphold a contemporary colonial order. Ultimately, this disconnection from the past and broader frameworks functions to obscure contemporary colonialism under the guise of what we identify as reconciliation lite.... [B]oth the myth and disrupting it matters because the myth denies peoples' lived experiences, marginalizes genocide, the tragedy of missing and murdered Indigenous girls and women, and reinforces rules and institutions that continue to discriminate against First Nations children in care. Indeed, if Canadians are to make meaningful steps toward fulfilling treaty obligations, and move past a lite version of reconciliation to realize the decolonized future many express a hope for, disrupting the myth by recognizing Canada's colonial present is necessary.[25]

This Final Report, like many that came before it, is a call for justice and accountability. To achieve it, however, the systematic and structural denial of accountability must be understood and acknowledged.

An amnesty lens provides important insight to understand Canadian attitudes towards the lack of accountability for atrocities against Indigenous Peoples and helps to shed light on decades of action and inaction that have embedded impunity in Canada's relationship with Indigenous Peoples. To create transformative change in contexts of violence, there is a need

to carefully examine and clarify history and to use it to inform the creation of a new relationship in the present and future.[26] Spanish education scholar Paloma Aguilar notes that, "when the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation's political life, forcing governments to face it, though not always under the most favourable conditions."[27] The truth of the atrocities against Indigenous people and communities must not be relegated to the past, and any attempt to do so both furthers genocidal violence towards Indigenous Peoples and risks further harm to all Canadians.

AMNESTIES: A BRIEF INTRODUCTION

There is no universally agreed upon definition of an amnesty. However, amnesties can be understood as measures taken by a State that prevent criminal investigations and prosecutions of individuals responsible for serious human rights abuses and certain international crimes.[28] There is great variation in the design of amnesties, and not all are necessarily nefarious or frustrate truth and justice processes.[29] As explored below, whether or not amnesties further acknowledgement and accountability of harms depends, among other things,[30] on whether they are legally passed (de jure) or whether they are granted conditionally or unconditionally (de facto), who grants them, and what crimes and persons they cover.[31]

Amnesties should be distinguished from pardons. Pardons generally require that someone be tried and convicted and then receive the legal leniency and benefit of not being punished or having their punishment reduced from what would otherwise be the case.[32] The conviction in such cases remains.[33] In the case of amnesties, there is no criminal prosecution involved; those who benefit from an amnesty are protected from prosecution and punishment. An amnesty also differs from a commutation, which consists of exchanging one legal penalty for another that is less severe, such as replacing a prison sentence with community service. Commutation, therefore, also requires prosecution and punishment. In contrast, those who benefit from amnesties are never held criminally liable or punished for their wrongdoing.

Amnesties have been and remain a favoured tool for negotiators seeking to peacefully resolve a period of armed conflict or civil war.[34] Their use in non-international armed conflicts is encouraged under certain international law provisions that govern the lawful conduct of war.[35] In some cases, they can help to encourage combatants to surrender and disarm or spur dictators and despots to relinquish power to democratic authorities.[36] In these contexts, parties at war or autocrats and dictators in control of a State would not agree to a peaceful or democratic transition in the absence of some guarantee that they would not be prosecuted

for their past crimes.[37] In such circumstances, the use of amnesties may be viewed as a "necessary evil" or the "least-worst option" available to societies having to make a choice between continued violence or an imperfect peace that includes protecting some perpetrators from prosecution.[38] It is important to emphasize that amnesties have therefore been justified in the context of securing a society's transition from war to peace or from authoritarian rule to democracy. In States where no such transition is occurring, such as in Canada, amnesties are more likely to foster impunity and frustrate justice than promote democracy, the rule of law, or peace.

It is broadly accepted that amnesties are lawful for certain crimes but not for others.[39] The United Nations (UN) has repeatedly stated that it does not recognize amnesties for serious international crimes such as war crimes, crimes against humanity, and genocide.[40] In a few contexts, amnesties that were implemented in order to secure transitions towards peace, stability, and democracy have later been annulled, thereby permitting prosecutions for international crimes and investigations into atrocities, including enforced disappearances, to proceed.[41] It is notable that States and societies have annulled amnesties when their confidence in confronting past atrocities and harms has been secured. Those States, including democracies, that maintain amnesties often suffer from an entrenched culture of impunity, resistance to truth-telling, and may simply lack the required courage, resolve, and determination to meaningfully pursue justice and accountability for victims and Survivors.

While amnesties preclude criminal investigation, prosecution, and punishment, they do not necessarily or invariably frustrate all justice and accountability efforts. The issuance of an amnesty does not undo the right of victims and Survivors of human rights violations to a remedy or reparations, nor does it absolve a State of its obligations to investigate such violations.[42] While amnesty may frustrate those who seek to achieve justice and accountability, amnesty does not and cannot undo the unalienable right of victims and Survivors to the truth—knowing the fate of their missing or disappeared loved ones and who was responsible for harming them.[43] Amnesties have distinguishing features and characteristics that reflect the contexts in which they are adopted. These features determine the extent to which any amnesty promotes the acknowledgement of past harms and furthers truth and reconciliation efforts or, instead, acts as a self-serving tool to promote impunity for powerful people and entities. The elements that define amnesties include whether they are granted by a government to itself (and its own agents), to whom the amnesty applies, whether it is conditional or unconditional, and whether it is a de jure (legal) or de facto amnesty.

Not All Amnesties Are the Same: A Typology of Amnesty

Who Grants an Amnesty?

An amnesty can be granted by governing authorities to its own members and/or to other individuals and groups. **Self-amnesties** are granted by State or military officials to its own members or to itself more generally, often as a condition for their departure from power and to protect a regime and its leaders from prosecution. In other cases, amnesties can be given during ongoing conflict or be the result of peace negotiations, such as those aimed at resolving a war through peaceful means or moving from one governing administration to another. These amnesties are generally given by State officials to other non-State people or entities such as rebelling factions as an incentive to end a conflict and encourage combatants to lay down their arms without fear of subsequent prosecution and punishment.

In some instances, an amnesty law can also be enacted through a democratic process, with civilian populations voting on whether or not to support or abolish it.[44] However, international human rights bodies have determined that democratic support for amnesty does not in and of itself make it compatible with international human rights law.[45] It should also be noted that, in referenda relating to justice and accountability efforts, there is a risk that the population least affected by the atrocities will vote in favour of maintaining an amnesty while those directly affected will push for the amnesty to be repealed.[46] When affected communities are in a minority, and those that are untouched or that benefit from the perpetration of crimes are in the majority, it makes little sense to subject amnesties laws to referenda, lest the result be a mere demonstration of the "dictatorship of the majority."

What Is Covered by an Amnesty?

Amnesties can be limited or blanket in nature. **Limited amnesties** only apply to certain types of crimes (for example, for theft but not for murder), specific people (for example, leaders versus rank-and-file officers), and for a specific period of time (such as the duration of a war but not afterwards).[47] Limited amnesties are tailored and may apply only to certain low-level crimes and lower-level perpetrators (for example, for child soldiers but not for senior military commanders). **Blanket amnesties** cover all individuals involved in atrocities, regardless of their role in the violence, their seniority and responsibility for the crimes, the nature and severity of the crimes committed, and other factors. Such blanket amnesties, "exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis."[48]

Is the Amnesty Conditional or Unconditional?

Amnesties may be either conditional or unconditional. **Conditional amnesties** require that individual perpetrators fulfill certain obligations to benefit from the immunity offered by an amnesty or to retain the amnesty once it has been granted. When appropriately designed, conditional amnesties can further peace, truth, and justice processes. Such amnesties are therefore, "legitimate where they are primarily designed to create institutional and security conditions for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability and reparations."[49] Examples of conditional amnesties include:

- The South African Truth and Reconciliation Commission granted amnesties to Apartheid-era perpetrators who testified genuinely during proceedings of the commission to their involvement in political offences, including serious human rights violations. In this way, South Africa's Truth and Reconciliation Commission privileged truth and reconciliation over criminal liability but created an opportunity in its transition for an authoritative accounting of past crimes.[50] Those who refused to provide testimony or who did not testify genuinely were left liable to prosecution.
- Gambia's Truth, Reconciliation and Reparations Commission could recommend what it called amnesties in exchange for the genuine testimony of alleged perpetrators of atrocities committed during the rule of former President Yahya Jammeh.[51]
- In Uganda, an amnesty was offered to rebel fighters—many of whom were child soldiers—if they surrendered to the military or governing authorities.[52] These amnesties were accompanied with resources to help reintegrate former combatants back into society.

In contrast, **unconditional amnesties** grant protection from prosecution without regard to the behaviour of the perpetrators, the existence of any justice, truth, or reparations process, or any demonstration on behalf of perpetrators of remorse. Such amnesties are a roadblock to the most essential component to any meaningful justice and accountability process: the acknowledgement of atrocities.[53] Such amnesties frustrate not only formal accountability processes but also result in news coverage, education curricula, and government programming that obscures or outright omits the history of such atrocities against vulnerable and marginalized communities. This reinforces a dominant account of the State's history that represents the views of those who perpetrated the atrocities and benefited with impunity.[54]

The most authoritative guidelines on the use of amnesties published to date describe unconditional amnesties as "illegitimate."[55] International law professor John Dugard has similarly concluded that, "there is no place for unconditional amnesty in the contemporary international legal order."[56]

Legal and De Facto Amnesty

Amnesties shield perpetrators from prosecution. They can be implemented either through legal processes (de jure) or operate in practice (de facto). According to the UN Office of the High Commissioner for Human Rights, amnesties are often adopted by executive decree or through parliamentary enactments into law (exceptions, like Canada, are discussed below).[57] An amnesty can be the result of, "an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group or class of persons and/or certain offences is prospectively or retroactively barred."[58] Such **de jure or legal amnesties** are therefore the creation of purposeful and transparent legislation or laws aimed at granting a specific group of individuals protection from prosecution. While legal amnesties protect individuals from prosecution, they are also implicit acknowledgements of wrongdoing. The State's passage of an amnesty law and the acceptance of an amnesty on the part of a perpetrator necessarily requires that the State and perpetrator acknowledge their crimes. After all, had no crime been committed, no amnesty would be necessary.[59] Put another way, "if an amnesty for a crime is issued, the crime must exist."[60]

This is not the case with **de facto amnesties**, which are neither explicitly nor directly enacted via parliamentary or executive decree. In some contexts, impunity may be the result of other laws, such as those that create strict statutes of limitations for atrocity crimes, such as genocide, crimes against humanity, and war crimes, which have the ultimate effect of precluding criminal prosecution.[61] Similarly, a State may adopt what some activists have called "disguised amnesties,"[62] such as those that, "exempt broad categories of serious human rights offenders from prosecution and/or civil liability without having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis."[63] For example, in the Central African Republic, where relevant peace agreements in the country do not contain amnesty provisions, it has been alleged that some perpetrators benefit from amnesty by extension of their appointment to senior government positions that protect them from prosecution.[64]

De facto amnesties can be the result of omissions: a systemic and State-endorsed refusal to address past crimes, especially of those most responsible, or to effectively investigate and prosecute those responsible for international crimes and human rights violations. The State

simply does nothing, and perpetrators benefit from the State's refusal to confront past atrocities and minimize past abuses. Such circumstances may also be accompanied by:

- Systemic State interest in sweeping past crimes under the proverbial rug—a popular insistence that investigating past harms is counterproductive and that victims and affected communities should "move on";
- The blaming of affected communities, victims, and Survivors for insisting on revisiting past harms and the adoption of popular and official histories that ignore, deny, or minimize atrocity crimes or that insist that they cannot be described as atrocities because of different ethical and moral standards at the time of their commission;
- An attempt to pretend that atrocities simply did not occur; and/or
- An insistence that the State is powerless to address past crimes because they happened too long ago or that there are more pressing issues to focus on.

Whether some or all of these are present, the result is the same: a lack of accountability for past harms, impunity for those responsible for human rights violations and mass atrocities, and a sense of systemic, strategic, and State-endorsed amnesia. All too often, atrocities are ignored as if they did not occur, and victims and Survivors are treated as if they do not exist. In such contexts, criminal accountability, recognition, acknowledgement, and reparations are all denied.

AMNESTY IN SETTLER COLONIAL CANADA

Amnesties are not entirely new to Canada. For example, Canada provided a legal amnesty to those involved in the 1837–1838 Rebellions, including the grandfather of future Prime Minister William Lyon Mackenzie King.[65] But what of the atrocities of settler colonialism committed by the State and its agents against Indigenous Peoples? Canada's settler amnesty is multifaceted. Canada adopted a self-amnesty, granted implicitly by the government to those most responsible for the crimes and human rights violations perpetrated against children in the Indian Residential School System. While there have been a few prosecutions of a handful of perpetrators, those most responsible for the Indian Residential School System and its abuses—including those who devised the system, ran the institutions, and abused and experimented on children—have benefited from both a blanket and unconditional amnesty. They have not had to tell their truths, accept responsibility, or participate in any truth, justice, or accountability forum. They did not even have to request protection from prosecution.

For those responsible for atrocities and human rights violations against Indigenous communities and children, Canada's settler amnesty is de facto. There was no legislative scheme or law passed that granted State officials, religious leaders, Indian Residential School employees, doctors, researchers, or police officers immunity from prosecution or other accountability measures for the atrocities committed. Without an amnesty law, there has been no implicit acknowledgement that these were atrocities for which the State or its agents wanted protection from prosecution. Its insidious benefits derive from the long-standing and active disinterest of the State in holding any of the people most responsible for the horrors in the Indian Residential School System to account. **Those involved in perpetrating human rights violations and atrocities against Indigenous children at Indian Residential Schools and other associated institutions are the beneficiaries of a de facto, unlimited, unconditional, blanket self-amnesty—the most egregious combination of amnesty elements possible.**

Canada's settler amnesty is disguised through the State's purposeful avoidance of investigations into the systematic harms that the children faced as well as its refusal to adopt laws or join human rights bodies that would have provided Indigenous victims and Survivors with meaningful avenues for accountability. Despite Survivors' ongoing dedication and commitment to speaking and seeking the truth, Canada's commitment to truth-telling and accountability fluctuates from non-existent to fragmented and piecemeal. It is worth emphasizing that the federal government knew about the horrors at Indian Residential Schools. It knew about the neglect, high rates of disease, and the physical and sexual violence. It knew about the starvation and malnutrition. It knew about the experiments. It knew about the deaths of children and the unmarked graves. It knew because it was responsible for it. These atrocities were the consequences of Canadian law and policy. Inspectors and investigators appointed by the federal government reported on the deplorable conditions in the Indian Residential School System and how the children suffered. Many of their reports and their recommendations to improve the conditions in the institutions were ignored.[66] As well, the children, their families, and some staff and doctors reported the neglect and abuse of the children, and their accounts were dismissed or ignored.[67]

Evading International and Domestic Legal Responsibility

> Canada has been careful to ensure its residential school policy was not "caught up" in the UN's definition ... but the reality is that to take children away and to place them with another group in society for the purpose of racial indoctrination was—and is—an act of genocide and it occurs all around the world.
>
> — TRC Chair Justice Murray Sinclair[68]

Despite attempting to maintain an international reputation as a champion of human rights, Canada has evaded responsibility by blocking avenues that Indigenous Peoples could access to pursue accountability through human rights mechanisms and international law. Although John Peters Humphrey, a respected Canadian lawyer, helped to draft the first major international human rights instrument—the 1948 *Universal Declaration on Human Rights* (*Universal Declaration*)—Canada initially abstained from voting for the adoption of the declaration.[69] The federal government attempted to rationalize offering a misleading justification—that it was concerned with infringing on provincial jurisdiction. However, archival research indicates that, "Canadian hesitation was principally due to discomfort in the Federal Cabinet with substantive norms enshrined in the Declaration ... [and] little more than a pretext for federal politicians who wanted to avoid international human rights undertakings and commitments."[70] Canada changed its position and voted in favour of the non-binding *Universal Declaration.* This was done only to avoid the embarrassment of being compared to States like the Soviet Union, which had also rejected the *Universal Declaration*. Notably, even when Canada eventually voted in favour of the *Universal Declaration*, it abstained on a vote concerning the right to cultural life under Article 27.[71] This likely reflected Canada's concerns about the implications of its long-standing assimilation policies that targeted Indigenous Peoples.

It is widely known that Canada had a significant role in ensuring that the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (*Convention on Genocide*) did not include cultural genocide.[72] It did so despite the fact that cultural genocide was viewed as an integral part of the definition of genocide by the term's creator, Raphael Lemkin, and was debated by States during the negotiations of the Convention.[73] Canada joined other States with significant Indigenous populations, such as the United States, Brazil, Australia, Sweden, and New Zealand, to ensure that cultural genocide was omitted from the final definition of genocide in the *Convention on Genocide*. It did so specifically because it would have left Canada vulnerable to accusations that its treatment of Indigenous children and communities constituted genocide.[74] According to law professor Payam Akhavan, "the reality was that the 'cultural heritage' of Canada's Indigenous peoples was deemed unworthy of protection."[75] Indeed, Canada's position was that, if the *Convention on Genocide* included reference to cultural genocide, it would vote against the treaty in its entirety.[76]

This colonization of the definition of genocide has meant that "cultural genocide" is not legally recognized as genocide under the *Convention on Genocide* and is therefore not a crime that can be prosecuted under international law. This helps explain why Canadian authorities, including prime ministers and a chief justice of the Supreme Court, could acknowledge, as they did in 2015, that cultural genocide had occurred but take no action because that recognition has no legal consequences.[77] As an extension of Canada's de facto amnesty and its role

in constraining the definition of genocide under international law by excluding its cultural elements, the use of the term "cultural genocide" allows Canada to appear to accept responsibility for its atrocities against Indigenous children while avoiding actual accountability.

The acknowledgement by various Canadian officials that the Indian Residential School System was "cultural genocide" is a rhetorical form of denial. In his study of the forms of denial that States employ to evade responsibility for wrongdoing, sociologist Stanley Cohen noted that:

> Powerful forms of interpretive denial come from the language of legality itself. Countries with democratic credentials sensitive to their international image now offer legalistic defenses, drawn from the accredited human rights discourse.... The type of legalism that appears to recognize the legitimacy of human rights concerns is more difficult to counter than crude literal denials.... Interpretive denials are not fully-fledged lies; they create an opaque moat between rhetoric and reality.[78]

In the place of an outright denial of genocide, Canada's acknowledgement of "cultural genocide" obscures the reality that such a declaration has no legal force. Despite the introduction of a bill in Parliament in 2018, Canada has yet to pass legislation to formally recognize that the Indian Residential School System was genocide,[79] let alone to take steps to hold perpetrators accountable. While other genocides such as the Holocaust, Holodomor, Rwanda, Srebrenica, Yazidi, and Rohingya have been recognized by Canada, political scientist David MacDonald notes that, "there are no bills related to the crimes of Western settler States; as a result, the genocides of Native Americans and of Australian Aborigines and Torres Strait Islanders are not recognized."[80]

Canada's efforts to dilute the *Convention on Genocide* do not end with its successful efforts to excise "cultural genocide" from the Convention. Article 2 of the Convention outlines the acts that constitute genocide:

Article II

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;

> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Canada ratified the *Convention on Genocide* in 1952 and later criminalized genocide under its *Criminal Code*, limiting its definition of genocide as follows:

> 318(2) In this section, *genocide* means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
>
> (a) killing members of the group; or
>
> (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.[81]

Notably, Canada did not include all of the acts enumerated under the *Convention on Genocide* in the *Criminal Code*, specifically omitting three: causing serious bodily or mental harm to members of the group; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.[82] Canada's rationale for not including the forcible transfer of children as genocide in the *Criminal Code* has been attributed, at times, to the view that, "mass transfers of children to another group are unknown in Canada."[83] This justification is unconvincing for several reasons. Most obviously, such transfers were far from unknown. It was official State policy, enforced through law and by government officials and agents, including the police, to physically remove children from their families and communities and transfer them to Indian Residential Schools. There can be little doubt that Canadian authorities understood that Canada breached the prohibition against forcibly transferring children enumerated in the *Convention on Genocide*. This raises the question: why would Canada specifically omit the part of the *Convention on Genocide* that directly applies to the situation of Indigenous children? The answer can only be to avoid accountability.

In line with an understanding of State-sponsored impunity and amnesty, it seems reasonable to conclude that Canada excluded the forcible transfer of children as an act of genocide in the *Criminal Code* specifically because it wanted to shield itself, its agents, and its policymakers from being held accountable. In other words, purposefully omitting specific provisions that would provide a mechanism for Indigenous Survivors, families, and communities to hold the State and individual perpetrators of atrocities accountable under the *Criminal*

Code fits well within the parameters of an unconditional, blanket, and de facto amnesty. This is reflected in the comments of Murray Sinclair, former TRC Chair and Canadian Senator:

> I'm pretty sure that [Canadian government] legal thinkers would have been well aware of the fact that if they simply had adopted the convention into Canadian law that everything they did after the convention would have rendered them culpable to a claim of genocide. Anything they did before that convention, they might have been able to free themselves and argue that they were not subject to the convention because it didn't exist in law before then.[84]

The practice of blocking legal avenues that might otherwise offer accountability for Indigenous children and communities continues unabated. For example, in the 1990s, Canada participated in the drafting of the *Rome Statute of the International Criminal Court* and the creation of the International Criminal Court (ICC), which became a functioning tribunal in 2002.[85] The ICC is mandated to investigate war crimes, genocide, the crime of aggression, as well as crimes against humanity, which include apartheid and enforced disappearances when committed in a systemic or widespread manner. However, in enacting domestic legislation incorporating these crimes into Canada's legal framework, the federal government decided not to include the international crimes of enforced disappearances or apartheid as crimes against humanity in its own *Crimes Against Humanity and War Crimes Act*.[86] This omission may be directly related to efforts on the part of Canadian authorities to protect themselves, churches, and other institutions from accountability over atrocities committed against Indigenous people and communities. According to international law professor Fannie Lafontaine:

> Some authors have carefully put forth that Canada's odd stance regarding the crime of apartheid may be explained by its "unease with the grievances of the Aboriginal population".... An educated guess could allow one to suggest, just as carefully, that the same could be true with respect to the crime of enforced disappearance.[87]

These legal carve-outs prevent concrete judicial action for victims and Survivors of these atrocities. They also contribute, as noted above, to deepening the prevailing myth of Canada as an enlightened, human rights–respecting, humanitarian State.

In addition, under the *Crimes Against Humanity and War Crimes Act*, only the Attorney General of Canada can authorize an investigation into war crimes, crimes against humanity, or genocide, and the Royal Canadian Mounted Police (RCMP) is in charge of leading such

investigations.[88] This means that the federal government and its national policing agency are the gatekeepers to investigations and potential prosecutions of crimes, a problematic feature given that both are primary perpetrators of atrocities in Canada. Since its enactment in 2000, the *Crimes Against Humanity and War Crimes Act* has been used exclusively in Canada as an instrument of international criminal law and, therefore, a means to prosecute those who committed war crimes and crimes against humanity outside of the country. Crimes committed outside of the country prior to 2000 can be investigated by Canadian authorities; those committed inside the country prior to 2000 cannot be prosecuted under the Act. As Lafontaine explains:

> The *Crimes Against Humanity and War Crimes Act* creates two categories of crimes according to whether they were committed in Canada or outside Canada.... Only the latter are subject to retrospective jurisdiction. Crimes committed in Canada prior to 23 October 2000 thus cannot be prosecuted under the *War Crimes Act*.[89]

Why the discrepancy between those crimes committed inside the country and those committed outside of the country? According to Lafontaine, this has been, "left to speculation," but "concerns about potential prosecutions for core crimes committed against Indigenous Peoples could serve to partly explain this otherwise unexplainable dichotomy."[90] This observation fits well within the paradigm of settler amnesty given the litany of atrocities committed against Indigenous children and communities prior to 2000. There has been a call by some scholars to amend the Act to conform with international law principles and allow for retrospective application for domestic crimes.[91] This amendment would also be in line with the *Canadian Charter of Rights and Freedoms* as, "the *Charter* explicitly permits the retroactive application of criminal laws if the relevant conduct was criminalized by international law at the time of its commission."[92] This amendment, however, has yet to be made.

Lack of Accountability: Criminal Investigations and Convictions in Canada

> Truth and reconciliation in Canada means changing Canada into something it never has been before: post genocidal. This means ending the genocide and bringing charges against those responsible for perpetrating genocide, national reformulation of government [and] making land reparations.
>
> **— Gary Miller, Artist, Survivor of the Mohawk Institute**[93]

For many Survivors, Indigenous families, and communities, the failure to hold individual offenders, such as teachers, principals, church officials and staff, and institutional perpetrators, including politicians, senior government bureaucrats, and church entities, to account remains problematic. This is particularly the case when it involves the disappearance or death of a child. Although the TRC began this work, it was limited by its lack of subpoena powers to compel the federal government or the church entities to produce documents, particularly for the post-war period. This would have enabled the TRC to examine the connections more fully between the actions of individuals working in the Indian Residential School System and higher-level political and policy decision-makers.[94] Further investigation into the records is needed to determine the identity of both individual offenders in the institutions and those individual wrongdoers within government and church organizations who may be culpable for misconduct and criminal wrongdoing.[95]

It is problematic to assign responsibility only in vague collective terms to "Canada" or the "churches," while individual wrongdoers within these institutions remain anonymous. Doing so makes everyone, and no one in particular, responsible for the harms. However, it is equally problematic to focus only on the past actions of individuals. Attributing responsibility for Indian Residential School abuse and neglect solely to a "few bad apples" absolves the federal government and church entities that perpetrated over 150 years of violence on Survivors, Indigenous families, and communities of any responsibility for the system itself.[96] This disregards structural and systemic patterns of settler colonialism and anti-Indigenous racism and feeds denialism in the broader Canadian public. Investigations that identify collective, institutional, and structural responsibility are essential to reveal the systemic patterns of genocide, crimes against humanity, and mass human rights violations that occurred.

Countering settler amnesty requires a systemic approach that identifies collective and individual accountability and holds entities, their institutional decision-makers, and perpetrators acting in their personal capacity responsible. To do otherwise runs the risk of continuing to perpetuate a culture of impunity across all levels of Canadian society. This lack of accountability makes it all too easy for today's political leaders, government officials, public servants, police, church officials, and citizens to evade accountability and avoid making the necessary systemic and structural changes needed to advance reconciliation.[97] Some argue that focusing on individuals is not a worthwhile endeavour when most of those that administered and operated the institutions are long dead. However, they can still be held morally and socially responsible for their actions. For example, highlighting the harmful actions of former Prime Minister Sir John A. Macdonald or Department of Indian Affairs official Duncan Campbell Scott or Chief Superintendent of Education for Upper Canada Egerton Ryerson, all of whom were deeply implicated in the Indian Residential School System, encourages public

education, reflection, and dialogue on Canada's history of colonialism.[98] It also makes us question, and, in some instances, correct, the ways in which we have celebrated these historical figures. Focusing on individual perpetrators is also important because the harms committed against Indigenous children at Indian Residential Schools are not ancient history. The last Indian Residential School only closed in the late 1990s,[99] and, as a result, many of those responsible for making decisions in this later time or those that caused direct harm to Indigenous children may still be alive.

The TRC found a systemic and ongoing failure to safeguard the health and well-being of the children and to protect them from neglect, mistreatment, sexual predators, and abusers in these institutions. It concluded that:

> The failure to establish and enforce adequate standards coupled with the failure to adequately fund the schools, resulted in unnecessarily high residential school death rates.... In short, both the regulatory regime in which schools operated and the level of compliance with that regime were inadequate to the task of protecting the health and safety of the students. Government, church, and school officials were well aware of these failures and their impacts on student health. ***If the question is, "Who knew what when?" the clear answer is "Everyone in authority at any point in the system's history was well aware of the health and safety conditions in the schools."***[100]

Even in instances where there has been some attempt at providing justice for the atrocities committed in the Indian Residential School System, the federal government has protected the perpetrators from criminal scrutiny. For example, political scientist Matt James observed that in negotiating the TRC's mandate, "the federal Department of Justice and the parties known as the Roman Catholic Entities were particularly adamant that the Commission be denied the power to issue subpoenas, make findings of law, name names, or accuse individuals of misconduct."[101] The TRC therefore focused primarily on systemic and structural causes rather than on individual perpetrators. The former are, of course, very important, but one can see how settler amnesty works in that even the names of those responsible for crimes committed against the children continue to be protected and kept hidden from the public.

The TRC reported that it was only:

> able to identify fewer than fifty convictions stemming from allegations of sexual abuse at residential schools. This figure is insignificant

> compared with the nearly thirty-eight thousand claims of sexual and serious physical abuse that were submitted as part of the Independent Assessment Process (IAP) set up under the *[Indian Residential Schools] Settlement Agreement*.[102]

The Commission noted that, "in some cases, the federal government actually compromised these investigations—and the independence of the RCMP—to defend its own position in civil cases brought against it by residential school Survivors."[103] Many Survivors reported physical and sexual abuse to officials, including Indian Agents and police. However, most complaints made to the authorities were never genuinely investigated or prosecuted; perpetrators were often transferred to another institution where they could prey on another group of children. The TRC found that sometimes, "perpetrators were dismissed, allowing them to avoid prosecution. The goal, it would appear, was not to protect children, since those who were dismissed were free to abuse other children in different settings. Instead, the goal was to avoid bringing the church's name into disrepute."[104] The TRC noted that:

> Paul Leroux, a supervisor at Grollier Hall, was convicted of a sexual assault in 1979 involving a student at Grollier Hall. The Commission has not found any documentation to suggest that an investigation was carried out at that time to determine if Leroux had assaulted any other students at either Grollier Hall or the Beauval, Saskatchewan, school where he had previously worked. Decades later, Leroux was convicted of additional assaults at both Grollier and Beauval.[105]

Gerald Moran was convicted for assaults at Kamloops and Mission in British Columbia, Glenn Doughty was convicted for assaults at Kuper Island and Williams Lake in British Columbia, and George Maczynski was convicted for assaults at Lower Post, British Columbia, and Grollier in the Northwest Territories.[106]

Analyzing the records of the Department of Indian Affairs, churches, and court documents, the TRC found that, "by 1940, no one in authority could claim that they were not aware that residential schools might attract sexual predators as employees. They were well aware of the opportunities they were creating for abuse."[107] The Commission concluded that the government and churches failed Indigenous children and their parents in the following ways:

- Failure to acknowledge the legitimacy of reports of abuse;
- Failure to take action to remove abusers from an Indian Residential School;
- Failure to investigate complaints impartially;

- Church failure to report abuse either to the Department of Indian Affairs or the police;
- Government failure to report abuse to the police;
- Failure on the part of the Department of Indian Affairs' field staff to report properly on the prosecution of Indian Residential School staff;
- Failure to screen effectively when hiring;
- Failure to protect children from abuse by other children; and
- Failure to assist victims.[108]

The Commission further noted that:

> The number of claims for compensation for abuse is equivalent to approximately 48% of the number of former students who were eligible to make such claims. The federal government and the churches failed in their responsibility to children. That failure was massive in size and scandalous in nature.... The police investigations that took place in the 1990s were almost invariably mounted in response to organized efforts on the part of former students themselves.[109]

The unwritten policy of impunity that characterizes settler amnesty underpins Canada's legal response to Indian Residential Schools litigation. Canada's strong resistance to admitting responsibility for the devastating impacts of the Indian Residential School System is part of a long pattern of first denying the validity of Survivors' claims and then engaging in what Cohen describes as, "legalistic games of truth.... Harm may be acknowledged, but its legal or common-sense meanings are denied, contested, or minimized."[110]

As co-defendants in the litigation, the churches engaged in this same pattern of conduct, deflecting and denying responsibility. The TRC found that, "despite the fact that many churches had apologized for their role in the residential school system, at the same time, those same churches defended their role ... and often employed aggressive legal tactics.[111]" These tactics included the federal government and churches routinely pleading limitation defences in cases where Survivors claimed that they had suffered abuse or other harms, such as loss of language, culture, and family relationships.[112] Limitation defences are technical defences that may result in the claim being dismissed without a hearing on the merits; in other words, the case can be dismissed without providing an opportunity for the truth of a claim to be determined in court.[113] A limitation defence is not automatic: a defendant—the government

and churches in these cases—must elect to plead it. Limitation defences disproportionately impact Indigenous people and communities because they are more likely to have historical claims, including land claims, breach of Treaties, and mistreatment and abuse at Indian Residential Schools and other associated institutions.[114] The TRC noted that, in the context of Indian Residential School litigation, these defences were often successful, resulting in a denial of justice for those who experienced abuse and other harms at these institutions.[115]

The TRC also noted that many of the justifications for pleading limitation defences were not relevant to the federal government in the context of Indian Residential School litigation. The Commission clarified that a common rationale for limitation defences—that a defendant may no longer have access to relevant evidence—does not necessarily apply to the federal government as, "it ... keeps records longer than most defendants because of their historical significance."[116] In addition, it noted that the federal government is different from other litigants in that it has deep pockets and can pay damages using public funds.[117] Indeed, successive federal governments have spent a significant amount of public funds litigating against Indigenous people and communities in recent years.[118] For example, between 2013 and 2020, the federal government incurred court costs of $3.2 million litigating against the Survivors of the St. Anne's Indian Residential School.[119]

Survivors sought accountability and justice from the federal government and the churches through Canada's criminal and civil courts for the many abuses they suffered at Indian Residential Schools. Yet Canada has worked harder to protect perpetrators than their victims. The TRC concluded, "The colonization and marginalization of Aboriginal peoples created a situation in which children were vulnerable to abuse, and civil authorities were distant, hostile, and skeptical of Aboriginal reports of abuse. As a result, there were very few prosecutions when the schools were in operation."[120] During its work, the TRC was only able to confirm 40 criminal convictions of Indian Residential School perpetrators. In 2012, Justice Murray Sinclair, the TRC's Chair, sent a letter to the federal government requesting, "copies of all records in Canada's possession or control for every criminal conviction relating to residential schools ... and the production of all documents related to these convictions. The government did not address this request."[121] The TRC noted that, although Canada claimed that, "it did not maintain a list of convictions ... [i]n the 2013 court proceedings that considered claims in relation to the St. Anne's [R]esidential [S]chool, ... it became apparent that Canada, does, in fact, maintain records relating to residential school convictions."[122]

There is also information on alleged abusers in court documents filed in litigation from the 1990s onward. For example, one Aboriginal People's Television Network's review of 146 court cases in Manitoba revealed the names of more than one hundred alleged abusers who

staffed the institutions.[123] The federal government also has data on alleged abusers that it began collecting back in 2005 when it contracted 17 private investigation firms (at a cost of over $1.5 million) to locate persons of interest named by Survivors. The purpose in doing so was not to determine if they should face criminal charges but, rather, to see if they would voluntarily participate in compensation hearings. By November 2015, 5,315 alleged abusers had been contacted, but only 708 had appeared at hearings.[124]

Church entities were also not forthcoming. Much like the federal government, church entities were more concerned with protecting the alleged perpetrators than their victims. There are likely hundreds of abusers who were never investigated or charged, some of whom may still be living.[125] While the Presbyterian, Anglican, and United Church churches were eventually more willing to disclose relevant documents to the TRC, the Catholic entities refused to produce many documents. Some Catholic records were instead transferred to the Vatican, as recently as within the last decade.[126] It was not until 2023, for example, that the Jesuits of Canada released a list of the names of 27 priests and brothers credibly accused of sexually abusing minors, 10 of whom were at an Indian Residential School.[127] In 2023, the Oblates of St. Mary Immaculate (OMI), the OMI Lacombe Canada, and the Oblates of the Province of France appointed Justice André Denis to lead the Oblate Safeguarding Commission, an independent review of historical allegations of sexual abuse against Johannes Rivoire who worked in present-day Nunavut from the 1960s to 1993.[128]

The Catholic church's position on this issue is not surprising; rather, it fits an overall pattern of denial and lack of accountability for child abuse that circles the globe. For this reason, legal scholar Heather McAdam argues that it is feasible for high-ranking officials of the Catholic church to be prosecuted for crimes against humanity before the ICC.[129] However, as recently as June 2021, when a group of Canadian lawyers requested that the ICC prosecutor conduct a preliminary examination to determine whether it would prosecute Canada and the Vatican for crimes against humanity, the Court declined to do so.[130] Nevertheless, scholar Kona Keast O'Donovan argues that:

> Thousands of unmarked graves reflect the gravity of crimes committed. The difficult process of linking the perpetrators to the crimes is a formidable task, but it is not an impossible one. Customary international law, Canadian jurisprudence, and amending Canada's Crimes Against Humanity and War Crimes Act would provide Canada with jurisdiction to prosecute culpable individuals for crimes committed as of 1975, if not earlier. Canada then has the power to approach the United Nations

> Security Council and propose the creation of a hybrid tribunal ... to locate, apprehend, and prosecute those responsible.[131]

The systemic pattern of Canada protecting itself from accountability for the harms it committed against Indigenous Peoples is apparent in Canada's decisions not to sign or join numerous international human rights bodies that could help investigate human rights abuses against Indigenous children. Despite multiple recommendations from the Canadian Senate that it do so, Canada has not signed or ratified the *American Convention on Human Rights* nor accepted the jurisdiction of the court that enforces it, the Inter-American Court of Human Rights (IACtHR).[132] Canada has also chosen not to sign and ratify the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance* (*Convention against Enforced Disappearance*), which includes specific obligations for States to investigate disappearances and explicitly recognizes the right to truth.[133]

The *American Convention on Human Rights*, the jurisprudence from the IACtHR, and the *Convention against Enforced Disappearance* all include critical elements that would otherwise support Indigenous communities within Canada pursuing accountability and justice. They could aid in addressing harms and crimes committed against the missing and disappeared children as they contain specific State obligations to investigate the right to truth and the right to meaningful reparations. These are all explored in further depth in other parts of this Final Report. The fact that Canada is not party to these conventions nor accepts the IACtHR's jurisdiction means that Indigenous victims, Survivors, and communities cannot access the potential justice and remedies that each offer. This is not a mistake or oversight. It should not be seen as an aberration but, rather, part of a generations-long effort to shield the federal government and the perpetrators that committed crimes in and when administering the Indian Residential School System from accountability. This pattern continued, for example, in Canada's initial opposition to adopting the UN *Declaration on the Rights of Indigenous Peoples*.[134]

At both the international and domestic level, Canada has ensured its own immunity from prosecution for genocide, crimes against humanity, and mass human rights violations. The federal government has purposefully evaded being held accountable for violations of Indigenous people's human rights by not signing onto international treaties and legislatively prohibiting Indigenous people and communities from suing the federal government for decades.[135] Canada has continued to take active measures to deny, minimize, and limit its legal liability. Establishing de facto or settler amnesty to avoid facing consequences creates and perpetuates a culture of impunity in government, churches, and other institutions. Canada's legal system was designed by settlers and for settlers to support the goals and aspirations

of a colonial society. The federal government's lack of accountability led to the deaths of thousands of Indigenous children at Indian Residential Schools and associated institutions and continues long after the children's deaths. While there has been some accountability and reparations made for abuses in Indian Residential Schools through the various settlement agreements, Indigenous Peoples are still seeking justice and accountability for the missing and disappeared children and unmarked burials.

Survivors' Call for Reparations: From Litigation to Settlement Agreements

Knowledge Keeper Brandon Thomas at the National Gathering on Unmarked Burials in Vancouver, British Columbia, January 18, 2023 (Office of the Independent Special Interlocutor).

Canada's position on reparations for the Indian Residential School System shifted over time as the federal government moved from denying any wrongdoing that would require redress, to acknowledging partial responsibility for some of the harms, to negotiating settlement agreements. Canada did not do this out of benevolence but, rather, in response to Indigenous actions on legal and political levels. In the 1970s, Survivors began publishing memoirs about their experiences in Indian Residential Schools. In the 1980s and 1990s, Survivors across the country established organizations to support each other and work with Indigenous political leadership to demand an investigation into the Indian Residential School System. Survivors held gatherings and conferences across the country where they could reveal their experiences,

share information, and develop strategies for moving forward.[136] The TRC found that, "many of these associations and their leaders played crucial roles in the various court cases that led to the *Indian Residential Schools Settlement Agreement*."[137]

In 1992, the Nuu-chah-nulth Tribal Council conducted a comprehensive study of the impacts that the Alberni Indian Residential School near Port Alberni, British Columbia, had on their children, families, and communities and made recommendations on how to address these harms.[138] In their interviews with Survivors, researchers found that Survivors wanted the government and churches to be held accountable. They wanted reparations for the harms they endured, including apologies, compensation, and resources for healing. Although they preferred this process to be conducted according to Nuu-chah-nulth law, many saw litigation as their only option for holding individual and State perpetrators to account:

> It is the Nuu-chah-nulth way to stand in support with our relatives and friends when they confront offending behaviour, to expose it publicly, to make amends, and to take steps to ensure that the offense is not repeated. The relatives and friends of the offender also stand and collectively share in the responsibility for correcting the wrong, so that the resolution is a community resolution. This contrasts with the mamalthni's [non-Indigenous] way in which the judicial system pits one individual against the other, proceedings may drag on for years, the usual outcome is a winner and a loser, and the result can turn on a technicality or the quality of legal representation. Today the Nuu-chah-nulth Tribal Council finds itself caught between the two systems.[139]

In 1994, the Assembly of First Nations (AFN) released its report *Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals.*[140] It concluded that, "the traumatic effects of residential school life, the regimentation, the separation and violence ... have had far-reaching impacts ... [and that] the healing must begin ... [and] the atrocities suffered by many in the residential school system must be addressed."[141]

The Royal Commission on Aboriginal Peoples

In 1996, the report of the Royal Commission on Aboriginal Peoples (RCAP) noted that, by 1992, demands for a public inquiry into the Indian Residential School System were coming not only from Indigenous people but also from several members of parliament. In response, Tom Siddon, then minister of Indian Affairs and Northern Development, told the House of

Commons that, "I am deeply disturbed by the recent disclosures of physical and sexual abuse in the residential schools. However, I do not believe that a public inquiry is the best approach at this time," adding that, "there would be no ministerial apology, no apology on behalf of Canadians, and there were no plans for compensation."[142] The RCAP's report concluded that:

> The strategy the government adopted was a simple one. Essentially, it tried to externalize the issue, throwing it back onto the shoulders of Aboriginal people themselves. Under the guise of being "strongly committed to the principles of self-government" ... the government would concentrate its efforts on "enabling First Nations to design and develop their own programs according to their needs.... The approach to legal issues, particularly the identification and prosecution of purported abusers, was equally diffusive. There was no consideration that the system itself constituted a "crime." Rather, the focus was placed on individual acts that violated the *Criminal Code.* Again, the government would not take the lead. There would be no internal inquiry, no search of departmental files. "DIAND will not without specific cause, initiate an investigation of all former student residence employees." It would be the task of those who had been abused to take action.[143]

The RCAP found the actions of government not only inadequate but also evasive regarding its own responsibility and culpability.[144] In the Royal Commission's view, the government's strategy of placing the onus on individual Survivors to seek prosecution of their abusers while failing to address the broader systemic harms and shielding alleged perpetrators from investigations was unconscionable.

The RCAP recommended that there be, "a full investigation into Canada's residential school system, in the form of a public inquiry established under Part 1 of the *Inquiries Act.*"[145] It envisioned a public inquiry:

> authorized to recommend whatever remedial action it believes necessary for government and churches to ameliorate the conditions created by the residential school experience. Where appropriate, such remedies should include apologies from those responsible, compensation on a collective basis to enable Aboriginal communities to design and administer programs that assist the healing process and rebuild community life, and funding for the treatment of affected people and their families.[146]

There were additional recommendations to establish a national repository of records related to Indian Residential Schools and public education on the history and impacts of the system. The call for a public inquiry was the first clear recognition by a government-appointed body that these institutions should be investigated and that both material and symbolic forms of individual and collective reparations are necessary to provide redress for their ongoing legacy of harms.[147]

In 1998, the federal government issued a response to the RCAP's recommendations in a new policy entitled *Gathering Strength: Canada's Aboriginal Action Plan*. The policy was announced in a "statement of reconciliation" issued by Jane Stewart, then minister of Indian Affairs and Northern Development, expressing "profound regret" for the physical and sexual abuse that former students (Survivors) experienced in the institutions. Rather than implementing the RCAP's recommendation for a full public inquiry to investigate all aspects of the Indian Residential School System, the federal government took a more cautious and incremental policy-based approach. The statement of reconciliation was highlighted as an apology, and funding was announced to establish the Aboriginal Healing Foundation and to preserve and protect Aboriginal languages. There was also a general commitment to negotiate rather than litigate using alternative dispute resolution (ADR) processes.[148]

While the policy was initially met with guarded optimism by some Survivors and Indigenous leadership, many considered the statement of reconciliation and the overall response inadequate, "Critics ... maintained that the action plan fell short and expressed concerns that the government was simply throwing money at pressing problems without having a good sense of what would actually work to resolve them."[149] Rather than thoroughly investigating the Indian Residential School System through a public inquiry that could make recommendations on a holistic legal and policy framework of reparations for specific harms, Canada's response was minimal and perfunctory. Survivors and Indigenous leadership thought that a political resolution now seemed highly unlikely.[150] Thousands of Survivors continued to turn to the courts instead.

Law Commission of Canada

In 1997, one year after the RCAP's report had recommended a public inquiry, Anne McLellan, then minister of justice, asked the Law Commission of Canada (LCC) to produce a report with various options and recommendations for providing redress for adult Survivors of physical and sexual abuse in government-run or State-sponsored institutions, including Indian Residential Schools.[151] In 2000, the LCC's report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, observed that the criminal justice system, "is still

essentially adversarial, reactive, and punitive" and that, while it could produce accountability, it was ill-suited to meet victims' needs for redress.[152] While the civil litigation process based on tort law could hold defendants accountable and provide financial compensation to victims, "it is an unlikely forum for the promotion of acknowledgment, apology, and reconciliation." When an ADR process is negotiated to settle claims outside the courts, "it is likely to be fair to all parties," but, "whether ... [it] achieves clear and public accountability depends on the terms of the agreement."[153] Although financial compensation may be less, an ADR process can also include provisions for acknowledgement and apology for wrongdoing, therapy and education, and prevention and public education programs.[154]

The report also found that, unlike investigations in the criminal justice system or tort-based civil law, public inquiries can, "investigate child abuse and examine the past without the restrictions placed on courts, they can commission their own research and listen to [S]urvivors in a non-adversarial setting,"[155] examine the broader systemic impacts of the abuse on families and communities, and, "be an effective vehicle for public education."[156] While public inquiries can be expensive and time-consuming, they can also, "hold organizations and governments (not individuals) accountable for abuse, and ... [raise] public awareness about abuse and its prevention."[157]

The LCC outlined the various forms of redress that Survivors identified as necessary, including financial compensation, acknowledgement of the harms and apologies, health supports, and access to education or training. Survivors also wanted those responsible to be held accountable for wrongdoing and measures to be implemented to prevent repetition, such as establishing a historical record, commemoration, and public education.[158] The LCC established five guiding principles that should apply to all redress programs for Survivors and the courts, governments, churches, and other institutions involved in their implementation:

- Former residents of institutions should have the information they need to make informed decisions about which redress options to participate in;
- Former residents need support through the course of any process;
- Those involved in conducting or administering different processes must have sufficient training to ensure that they understand the circumstances of Survivors of institutional child abuse;
- The response to institutional child abuse must be integrated, coordinated, and subject to ongoing assessment and improvement; and
- Every effort must be made to minimize the potential harm of redress processes themselves.[159]

The LCC referred specifically to the circumstances of the victims and Survivors of the Indian Residential School System, noting that both the individual and systemic harms they endured in what many viewed as genocidal must be addressed:

> The effect of residential schools on Aboriginal families and communities has been so pervasive that some believe the school system could only have been part of a larger campaign of genocide.... The Commission believes it is fundamentally important to redress the harms that were visited upon residential school students by this abuse. It also believes that the residential school system itself produced harm for these students, and that this harm flowed outwards to their family members and communities in which they live. This is one of the enduring legacies of the residential school system. Whatever approaches to redress are imagined, therefore, they must have the capacity to deal appropriately with this broader range of harms and this broader range of persons suffering these harms.[160]

The LCC recommended, "the creation of innovative redress programs ... that have certain affinities with truth and reconciliation commissions ... that ... seek to develop and provide forms of redress that promote healing and reconciliation ... these redress programs can be as expansive and innovative as the imagination and resources of their creators allow."[161]

LCC's Report on Amnesty and Truth Commissions

The LCC also considered the strengths and challenges of truth commissions as mechanisms of accountability, justice, and reparations. The report found that, while a truth commission can be an effective body for engaging Survivors and perpetrators and educating the public, its ability to act as a fact-finding body, "depends on the extent of power it is granted, the resources at its disposal and the cooperation it receives from those involved with the system under which abuses were committed."[162] In making its recommendation on the feasibility of a truth commission, the LCC said that, "a truth commission should have the power to compel production of government and institutional evidence. It must be capable of exploring the evidence left by the institutions in question, and relevant internal records."[163]

In the LCC's view, "the greatest strengths of a truth commission process are its ability to provide a forum for the truth to be told, and for serious human rights abuses to be publicly acknowledged and officially denounced."[164] However, Survivors may view a truth commission as unfair, "because perpetrators are able to admit to wrongdoing without being held liable."[165] The report noted that, "many victims and [S]urvivors ... believe that their right

to obtain justice has been sacrificed in exchange for the truth."[166] The report also outlined various types of amnesty adopted by previous truth commissions.[167] With respect to accountability, the LCC concluded that:

> The formal record of truth commissions identifies individual and institutional perpetrators of human rights abuses, describes the offences committed, exposes their motives and attitudes, and clearly denounces their conduct. It publicly declares that perpetrators, and the regimes that allowed them to commit abuses, are responsible for their actions, and also holds them accountable. Individual criminal or civic accountability is exchanged for this collective assignment of responsibility. Of course, complete accountability occurs only when offenders take personal responsibility for their actions and attempt some form of restitution or reparation.[168]

The LCC concluded that, "the goals of fact-finding and healing cannot be achieved without a generalized amnesty for wrongdoers," yet it provided little detail as to what this might entail in Canada.[169] In my view, however, those involved in perpetrating human rights violations and atrocities against Indigenous children, their families, and communities in the Indian Residential School System are already beneficiaries of a de facto amnesty that has never been formally legalized or publicly declared.

Although the LCC's report examined a wide range of potential avenues for victims of abuse in institutions, including truth commissions, the federal government's response to the report focused primarily on criminal law reform. It noted that the LCC's insights would, "help to inform the Government of Canada's ongoing work with [S]urvivors and the churches to find responsible, sensitive and fair ways to address the legacy of physical and sexual abuse in Indian residential schools."[170] The federal government also claimed that its efforts were already consistent with the LCC's recommendations, "Consistent with the Commission's recommendations, the Government is currently working with residential school [S]urvivors, and, where possible, co-defendant churches, to build models that can provide more appropriate responses to claims relating to abuse at residential schools."[171] This reference most likely referred to discussions about using ADR to settle Indian Residential School civil litigation out of court, as discussed in the next section.

Growing Civil Lawsuits and the Shift towards ADR

With few criminal convictions of perpetrators, Survivors filed civil lawsuits against the federal government and churches seeking compensation for sexual, physical, and psychological abuse

as well as loss of culture, language, and family. During this same time, several class action lawsuits were also launched across the country, claiming not only abuse but also cultural and spiritual harms and Treaty and Aboriginal rights violations:

> In October 1998, a group of Survivors of the Mohawk Institute in Brantford, Ontario, filed a statement of claim in the Ontario Superior Court on behalf of all students who attended the school between the years 1922 to 1969, as well as their families. The plaintiffs, who were led by Marlene Cloud, claimed $2.3 billion in damages from the federal government, the General Synod of the Anglican Church, the New England Company (the missionary society that operated the school), and the local Anglican diocese for the sustained, systematic program of physical, emotional, spiritual, and cultural abuse they suffered. Cloud and the other Survivors claimed damages for a breach of fiduciary duties, breaches of the *Family Law Act*, loss of culture and language, and breach of Treaty and Aboriginal rights.[172]

In 2000, a National Consortium of Residential School Survivors filed a class-action lawsuit in Ontario on behalf of all Survivors and their parents and children across the country:

> The plaintiffs in *Baxter v Canada* sought damages for harms, including physical, emotional, psychological, and sexual abuse; loss of language and culture; deprivation of love and guidance from their families; and inadequate education and living conditions.... The class action was certified, and the settlement of it was approved, with conditions, in 2006.[173]

However, as the TRC noted:

> The civil court system proved to be an extremely slow forum for redress for Survivors.... The cases were lengthened by ongoing legal disputes over who [the government or the churches] was legally—and therefore financially responsible for the abuse committed.... According to an AFN estimate, the 18,000 civil law suits outstanding would take fifty-three years to conclude at a cost of $2.3 billion, not including the value of any compensation awarded to Survivors.[174]

The federal government gave similar estimates, noting that the cost of legal and court fees in the civil litigation was three times as much as the amount of compensation paid to the Survivors.[175] By 2001, there were more than eighty-five hundred lawsuits. By 2005, that number had grown to more than eighteen thousand.[176]

Between 1997 and 2000, as Canada faced growing legal and financial risk from Indian Residential School litigation, federal representatives, in collaboration with the AFN, began to investigate the possibility of using ADR to settle individual cases and class actions out of court. In 1998–1999, they conducted a series of "exploratory dialogues" with Survivors, Indigenous leadership, government and church representatives, lawyers, academics, and advisors. Together, the parties established a set of guiding principles for an ADR process, and the government subsequently established a series of ADR pilot projects across the country as a precursor to establishing a national framework to resolve all claims.[177] In 2000, to coordinate and administer an ADR program on a national scale:

> The federal government had transferred political responsibility for the civil residential school cases to a newly created Office of Indian Residential Schools Resolution [Canada], under the direction of the deputy prime minister.... In November 2003, the ... Office ... launched its National Resolution Framework. A central element of this was a voluntary dispute resolution program ... for resolution of certain claims of sexual abuse, physical abuse, and forcible confinement, without having to go through the civil litigation process.[178]

The Alternative Dispute Resolution Program (ADRP) was a voluntary out-of-court settlement process that was meant to be a timelier, more cost-effective, and less adversarial way to resolve Indian Residential School claims. During this same time, Survivors also continued to pursue litigation. In 2002, the AFN signed a memorandum of understanding with a National Consortium of Residential School Survivors to launch a national class action lawsuit on behalf of all Survivors and their families. Survivors were growing increasingly frustrated with the lack of a political solution—for example:

> "The Assembly of First Nations Survivors Working Group takes the position that, although litigation is the least appealing option in the path to healing for those who suffered in these schools, litigation has become the only option as there is a complete absence of any political will by the federal government to properly deal with this issue which includes the issue of cultural genocide," said Vice Chief Ken Young.[179]

Survivors, Indigenous leadership, and their lawyers continued to pursue accountability and justice on two levels: through the legal system and at the political level.

In 2004, the AFN released a report by a blue-ribbon panel of experts concluding that, while the ADRP was better than litigation, it fell far short of what was needed and, "risked a

very real danger that new harms in the relationship between First Nations, non-Aboriginal peoples, and the government will be created ... [and] reconciliation will become impossible for the indefinite future."[180] The report recommended establishing a two-track approach. The first track would focus on compensation to individuals for sexual and physical abuse as well as a lump sum payment to all persons taken to an Indian Residential School for loss of language, culture, and family life and to recognize harms caused by neglect, inferior nutrition, health, and education, forced labour, and growing up in a hostile environment. The second track would be a truth-sharing and reconciliation process that would investigate the history of the Indian Residential School System and its ongoing legacy of not only individual but also collective harms.[181]

Much like the earlier reports of the RCAP and the LCC, the AFN's report recognized the need to address both individual and collective harms and to investigate the systemic patterns of colonial violence that underpinned the Indian Residential School System, "to ensure that another State-committed atrocity does not take place again."[182] The TRC observed that this would be, "a significant contrast to the relentlessly individualistic focus of the litigation that excluded compensation for students who had died and for the children of Survivors."[183] A subsequent report from the Canadian Bar Association (CBA) in 2005 drew similar conclusions, saying that the ADRP was based on, "blame and faultfinding, harm, wrongdoing, and compensation ... concepts that inform tort law ... [but] was not conducive to reconciliation."[184] The CBA summed the situation up succinctly, saying that, "there are legal arguments and there is justice. It is time for justice."[185]

In 2005, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development conducted a study of the ADRP and heard evidence from Survivors and their organizations. Chief Robert Joseph, wearing his ceremonial regalia and representing the Indian Residential School Survivors Society in British Columbia, spoke to the committee:

> There are times in our lives when we as men and women are called upon to do the extraordinary, times when we must do the honourable thing, times when we are compelled to rise above the accustomed simple solution and to struggle to reach for the hard, principled one. These are such times. We call upon you and Canada to do this with us.... ADR is indeed a better alternative to the courts. Beyond these, ADR falls far short in addressing the majority of [S]urvivor needs for comprehensive redress.... From a [W]estern and narrow legal perspective it could be said to be world class, but if it resolves little, it has little value.... [W]e need a broader response than the ADR can deliver. So here we must heed

> [S]urvivor voices. For the past ten years over 40,000 [S]urvivors ... have told us what that broader response should be: an apology, compensation, funding for healing, and future reconciliation.
>
> With respect to lump sum compensation, [S]urvivors are entitled to and want financial redress for the pain and suffering—loss of language and culture, loss of family and childhood, loss of self-esteem, addictions, depression, and suicide—we've endured.... By neglecting to address residential school [S]urvivors and forcing them through an onerous process like ADR, Canada accepts the risk of being accused of institutional racism yet again.... In its statement of reconciliation, the federal government recognized that reconciliation is an ongoing process. Survivors agree. We want reconciliation, reconciliation with ourselves, with our families, with our communities—and also with Canada. While we struggle with our pain, suffering, and loss, we know that our culture and traditions are embedded in the need for balance and harmony—reconciliation. One obvious reconciliatory process is of course a public inquiry.[186]

After hearing evidence from Survivors and taking into consideration the AFN's and CBA's reports, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development issued its own report on the ADRP, saying that, "the Committee is drawn to the inescapable conclusion that the ADR process is an excessively costly and inappropriately applied failure, for which the Minister and her officials are unable to raise a convincing defence."[187]

The House of Commons committee identified 14 ways in which the ADRP failed, noting that it was, "strikingly disconnected from the so-called pilot projects that preceded it ... [and that] the consultative mechanisms that informed its development did not include a sufficiently broad range of participation by former residential school students and other relevant professionals—legal, cultural, psychological and healing."[188] It found that, "the Minister's evidence was unapologetic and self-congratulatory with respect to both the underlying framework and the results of the ADR process. It disclosed her apparent disconnectedness from the experience of the [S]urvivor witnesses, for whom she has a particular duty of care and to whom she is not listening."[189] The House of Commons committee recommended that the ADRP be terminated and that the government should engage in court-supervised negotiations with Survivors to achieve a court-ordered, court-supervised settlement agreement.[190]

The Political Accord and Settlement Agreement Negotiations

In the wake of the damning reports of the AFN and the CBA, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, and the certification of the Cloud class action lawsuit, the federal government and the AFN began political negotiations on a potential settlement agreement that would include reparations measures. In May 2005, they signed a political accord to, "ensure the acceptability of a comprehensive resolution, to develop truth and reconciliation processes, commemoration and healing elements and to look at improvements to the Alternative Dispute Resolution Process."[191] Former Supreme Court Justice Frank Iacobucci was appointed by the federal government to negotiate an agreement on their behalf.[192] At the same time, the AFN continued to pursue legal avenues, launching the national class action lawsuit. National Chief Phil Fontaine explained that, "the Accord has provided a political vehicle to move forward, but a legal vehicle is required to finalize the process."[193] This would also be a strong incentive for the federal government and the churches to reach a negotiated settlement agreement with Survivors and their families. These events eventually led to the negotiation of the *Indian Residential Schools Settlement Agreement* (*IRSSA*) in 2006. The *IRSSA* had five components: an adjudicated IAP to determine and provide financial compensation for sexual and physical abuse; a common experience payment (CEP) to provide financial compensation based on verified residence and attendance at an Indian Residential School listed in the *IRSSA*; a health supports program; a commemoration program; and the establishment of a Truth and Reconciliation Commission.[194]

In addition to seeking accountability and justice in the courts for the sexual and physical abuses they suffered, Survivors also sought recognition and reparations for individual and collective loss of culture, language, and family life. Both the individual and class action lawsuits that were filed demonstrate that Survivors have been seeking reparations for these losses for decades. However, as the TRC pointed out, "the courts refused to hear claims regarding loss of culture, family, or language" on a legal technicality because this was not recognized by the courts as a permitted cause of action.[195] Kathleen Mahoney, the AFN's chief negotiator for the *IRSSA*, said that, in the litigation leading up to the *IRSSA* negotiations:

> Claims from IRS [Indian Residential School] victims, other than those alleging physical, sexual, and psychological harms, fall outside of tort parameters, denying victims the ability to claim remedies for the harms they say are the most egregious. The acts they want addressed include recognition of the destruction of their family life, languages, cultures and dignity; recognition of those who had died; and intergenerational devastation. None of these harms were actionable under the common law of torts or the class action law suits their lawyers were pursuing.[196]

During the negotiations, the AFN sought reparations for these losses. Mahoney explained that, from their perspective, what became known in the *IRSSA* as the CEP was, in fact, a reparations fund for loss of culture, language, and family, "the Government insisted on labelling this portion of the fund as the 'common experience payment' as they most likely did not want to face the prospect of legal actions in the future for language, cultural, and family life losses."[197] The inclusion of the CEP in the *IRSSA* provided some acknowledgement and compensation for these cultural harms that were not possible in civil litigation.[198]

Negotiating the TRC's Mandate

As noted earlier in this chapter, neither the federal government nor the churches, particularly the Catholic entities, wanted the TRC to have subpoena powers to compel perpetrators to appear before the Commission or legally require them to produce records that the Commission deemed relevant to its work. Without such powers, the defendants could withhold information from the TRC to limit legal risk and shield individual and institutional perpetrators from accountability and prosecution. However, neither did Survivors want the TRC to have subpoena powers, although for very different reasons. In the aftermath of the federal government's perfunctory response to the RCAP's comprehensive report and public indifference to implementing its recommendations, Survivors had little faith in the effectiveness of public inquiries that may also get bogged down in procedural delays and legal infighting.[199] Their litigation experiences had already demonstrated the unsuitability of the criminal and civil legal system for addressing much of what they wanted: recognition of harms not addressed in the courts and the ability to speak their truths freely without the procedural restrictions of the courtroom in a process that would be more aligned with Indigenous laws and protocols. The Nuu-chah-nulth Tribal Council and others had been saying this from at least the early 1990s onward.

Survivors wanted to incorporate the broader reparative elements that a truth and reconciliation commission provides.[200] Mahoney explained that:

> In negotiating the mandate of the TRC, the AFN's position was that the Truth Commission's mandate had to be built on the Statement of Reconciliation, and the principles developed by the Working Group on Truth and Reconciliation, and of the Exploratory Dialogues.... The [E]lders and [S]urvivors we consulted were adamant that the TRC had to be a co-operative venture amongst all the parties, not an adversarial one. ***There was no desire for retribution or punishment within the Truth Commission process. At the same time, however, there***

> ***was no call for amnesty provisions.*** Although some criticized the TRC design for its omission of subpoena, the AFN team was of the view that giving the TRC subpoena powers would be counter-productive and counter to the wishes of the Elders and Survivors.[201]

While Survivors did not want the TRC to be a judicial body with powers to determine guilt and punish perpetrators, neither did they want to grant Canada and the churches a general or conditional amnesty in exchange for their cooperation and participation. Rather, in the spirit of reconciliation, the defendants were to hold themselves accountable through voluntary participation in the TRC's hearings and disclosure of documents. Under Schedule N, section 11, of the *IRSSA*, the federal government and the churches were, "required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate." The lack of subpoena powers meant that the TRC had to rely on the cooperation and transparency of the perpetrators to produce these records. This proved to be a contentious task. The TRC was forced, "to seek court direction to resolve disputes with the parties about the handing over of documents. Once the Commission's document collection processes began, it became increasingly apparent that Canada would not produce numerous documents that appeared to be relevant to the Commission's work."[202] As noted earlier in this chapter, this included documents relating to criminal investigations and prosecutions of perpetrators.

Additional Settlement Agreements

While the *IRSSA* provided a more comprehensive response to Survivors' claims by including both material and symbolic forms of reparations measures, it also had some significant limitations. The TRC's Final Report outlined the shortcomings of the *IRSSA*, which was limited to institutions with both a residential and educational component. Métis Survivors, Day Scholars who returned to their homes or another church and government-run residential facility at night, children who attended Indian Day Schools and lived in private boarding homes or who were sent to sanatoria, and Survivors from mission-run schools in Newfoundland and Labrador were all excluded from the *IRSSA*.[203] This led to further litigation by these groups, illustrating once again the federal government's pattern of providing reparations only when Indigenous people and communities fight for their rights in court. The TRC did observe, however, that the, "*Indian Residential Schools Settlement Agreement*, with all its limitations, was a monumental achievement."[204] Reparations for some of those excluded from the 2006 *IRSSA* did not happen until the 2016 *Newfoundland and Labrador Settlement Agreement*,[205] the 2019 *Federal Indian Day Schools (or Federal Day Schools) Settlement Agreement*,[206] the 2021 *Day Scholars Settlement Agreement*,[207] and the most recent 2023 *Band*

Reparations Class Action Settlement Agreement (*Band Reparations Settlement Agreement*).[208] They demonstrate Survivors' ongoing resistance, resilience, and success.[209]

> Our Nations started this lawsuit because we saw the devastating impacts that residential schools had on our Nations as a whole. The residential school system decimated our languages, profoundly damaged our cultures, and left a legacy of social harms. The effects go beyond my generation. It will take many generations for us to heal. This settlement is about taking steps towards undoing the damage that was done to our Nations.
>
> **— Shane Gottfriedson, Former Chief of Tk'emlúps te Secwépemc, Representative Plaintiff, *Day Scholars Settlement Agreement***

> It has taken Canada far too long to own up to its history, own up to the genocide it committed and recognize the collective harm caused to our Nations by Residential Schools. It is time that Canada not only recognize this harm, but help undo it by walking with us. This settlement is a good first step.
>
> **—Garry Feschuk, Former Chief of Shíshálh, Representative Plaintiff, *Day Scholars Settlement Agreement***

A significant part of the *IRSSA* and subsequent settlement agreements was the inclusion of various reparations measures that had been previously denied to Survivors, Indigenous families, and communities. However, despite these hard-won successes, Survivors have been forced to continue to fight for these and other reparations. For example, further disputes between Canada and Indian Day School Survivors have arisen during the implementation period of the *Federal Indian Day School Settlement Agreement* that threaten to unravel any fragile progress that has been made on repairing these harms. On June 13, 2023, the media reported that, "Federal Court Justice Sébastien Grammond reserved his decision ... after a two-day hearing in Ottawa on whether to extend the claims deadline, given the impact of the COVID-19 pandemic and alleged deficiencies in the process."[210] The Department of Justice lawyers, on behalf of the federal government, argued against an extension, saying that, "the settlement must be interpreted strictly as a private contract, even though it references reconciliation as one of its goals."[211]

Speaking on behalf of plaintiff Indian Day School Survivors from Six Nations, Chief Mark Hill called the *Federal Indian Day Schools Settlement Agreement* a failure. Not only were Survivors given only 2.5 years to file a claim (unlike the *IRSSA*'s five-year IAP),[212] but, shortly after the agreement was signed, the pandemic occurred. This made it even more challenging for Survivors to file claims. He also said that, although the claims process was supposed to be culturally sensitive and trauma informed, it was not. These challenges made it difficult for Survivors to learn about the agreement and to file a claim within the designated time limits. Chief Hill pointed out:

> While the government assures us of their careful listening and acknowledges that reconciliation cannot be achieved through half-measures, the settlement agreement displays all the characteristics of performative reconciliation. It is the kind of promise my community has grown only too accustomed to: the empty one.... I ask, can anyone honestly say that justice has been achieved for a crime, if that crime's victims were not even made aware that a trial had occurred, that a verdict had been reached? Throughout this entire episode, class members and community leaders consistently informed the government that the process had failed, and urgently requested an extension. Unfortunately, these complaints and requests were ignored. Today, we are left with no choice but to exercise our last remaining option: to bring this matter before the ... Court.[213]

In August 2023, the Federal Court ruled that Indian Day School Survivors would not be given an extension.[214] However, in September 2023, Survivors were granted a four-month extension until January 4, 2024, to file a claim for compensation.[215]

The federal government's strategy of settler amnesty continues unabated and manifests in various ways to deny, minimize, partially acknowledge, and limit the government's liability for harms caused to Indigenous children. Here, the federal government has insisted on adherence to the negotiated timelines despite the understandable and well-known reality that the COVID pandemic would negatively impact the ability of Indian Day School Survivors to file their claims. This strategy doubly victimizes these Survivors: first, by excluding them from the scope of previous settlement agreements and, second, by using technical arguments to limit access to meaningful redress.

Despite these setbacks, Survivors continue to seek redress through the courts for reparations. The Band Reparations class action arose out of the *Gottfriedson v. Canada* class action, which claimed individual harms to Survivors and their descendants and collective harms to

Indigenous communities as a result of the Indian Residential School System.[216] In total, 325 First Nations participated in this class action, which was pursued by lead plaintiffs Tk̓emlúps te Secwépemc and Shíshálh Nation, with support from the Grand Council of the Crees (Eeyou Istchee). In their written submissions to the Federal Court, the plaintiffs stated:

> The [Indian Residential School] [S]ystem and policies caused grievous damage to all Indigenous cultures and has led to a catastrophic decline in all Indigenous languages over the past 100 years, in particular by disrupting or eliminating the intergenerational transmission of language and culture. Both Representative Plaintiff First Nations, and all Band Class members, suffered such losses to their respective communities.[217]

The *Band Reparations Settlement Agreement* was signed on January 18, 2023.[218] In the judgment approving it, Justice Ann Marie McDonald of the Federal Court described the litigation as "visionary" and noted that this was the first class proceeding to make a claim for collective harms caused by the Indian Residential School System.[219] The *Band Reparations Settlement Agreement* included reparation measures such as the establishment of a trust operating for 20 years, guided by the Four Pillar principles:

- Revival and protection of Indigenous languages;
- Revival and protection of Indigenous cultures;
- Wellness for Indigenous communities and their members; and
- Promotion and protection of heritage.

The Four Pillars Society, a not-for-profit organization, has been created to invest and distribute the settlement funds in accordance with the *Band Reparations Settlement Agreement*.[220] The *Band Reparations Settlement Agreement* included an explicit provision preserving the rights of Indigenous Peoples to pursue claims against religious entities. Specifically, section 27.04 of the settlement agreement notes that release in the settlement, "cannot be relied upon by any Third Party, including any religious organization that was involved in the creation and operation of Residential Schools."[221] In her decision approving the settlement, Justice McDonald identified the uniquely transformative nature of the agreement:

> Settlements are not often described as "monumental," "historic," and "transformational." Here, however, I agree that those words aptly describe this Settlement Agreement. The flexibility this structure affords

> to the Band Class members, to set their own priorities to work within the Four Pillars and thereby address needs unique to their Nations, is unprecedented.[222]

SURVIVORS' RESISTANCE, HISTORICAL INJUSTICES, AND REPARATIONS POLITICS IN CANADA

Investigating why States engage willingly in negotiations with victims to resolve historical injustices, historian Elazar Barkan argues that restitution is no longer only a moral question. It has also become a political and social solution for States wrestling with how to maintain their claims of sovereignty, legitimize their national history, and protect their international reputations as democratic nations in the face of Indigenous challenges to all of these. States aspire to redress the past in a way that, "transforms a traumatic national experience into a constructive political situation."[223] As "Indigenous demands for rights translated into a call for recognizing historical injustices and amending them, ... [this] present[ed] a major challenge to the contemporary nation-state's self-perception as a just society.... [M]any of these debates are conducted within the framework of negotiating restitution."[224] Cohen observes that, "most countries with a democratic image to maintain ... cannot indefinitely sustain strategies of ignoring allegations completely, crude denial, ideological justification or aggressive counter-attack. [Instead, they tell victims and the public] ... we welcome constructive criticism ... but the situation is difficult; things can't be changed overnight; you must be patient."[225]

Anishinaabe political scientist Sheryl Lightfoot argues that the structure and practice of global politics has been transformed by the Indigenous rights movement. For States, "these changes represent not only a fundamental threat but also present them with the moral dilemma of how to be world leaders in human rights while also resisting the changes the Indigenous rights regime calls for."[226] Canada guards its image and reputation as a champion of human rights (including Indigenous Peoples' constitutional and *Charter* rights) and peacekeeping both in the international arena and on the domestic level in Canadian society. Lightfoot points out that:

> States that wish to resist the implementation of Indigenous rights while also maintaining an aura of human rights legitimacy find that they must be careful, calculating, and subversively strategic in their resistance. Their resistance is a defensive struggle to preserve status quo power relations, in the face of the subtle revolution presented by global Indigenous politics.[227]

These careful political calculations are evident in Canada's interventions during the negotiations on the *Convention on Genocide*, the refusal to endorse and implement other international conventions, bodies, and legal mechanisms, and the initial refusal to endorse or ratify the *UN Declaration on the Rights of Indigenous Peoples*.

Against this global political backdrop, the federal government's domestic approach to addressing Indigenous Peoples' demands for recognition, equity, and justice for Indigenous children is remarkably consistent across the Indian Residential School System, the Sixties Scoop, foster care, and the child welfare systems. Examining this history, Cindy Blackstock, Gitxsan professor of social work and executive director of the First Nations Child and Family Caring Society,[228] concludes that:

> Justin Trudeau is often viewed as the most Aboriginal-friendly prime minister since Confederation.... [Yet] his response to federal government wrongdoing toward First Nations children is similar to responses offered by generations of politicians before him to protect the government and downplay the harm to children without making any commitment to take the action needed.... [This] political narrative is deeply embedded [in] the colonial "civilized" and "savage" dichotomy. The government invokes this dichotomy to create a refined colonial cloak of stereotypes, misinformation, and distraction that enables the systemic violation of Aboriginal people's rights in Canada, including their right to raise happy and healthy children. The cloak does not hide the discrimination per se. Rather, it mutes it in plain sight by making the government's conduct seem normal, even benevolent. It directs public discourse and government policy away from the government and onto First Nations "capacity building" and "accountability."[229]

This pattern of behaviour is evident in the federal government's response to Indian Residential Schools and other litigation. It is also evident in the political realm as policies relating to Indigenous health, education, and child welfare—services for which the government is already responsible—are reframed as measures designed to promote healing and reconciliation. Viewed in this way, reconciliation involves the careful weighing of national political interests and objectives and has resulted in Canada evading accountability to the detriment of Indigenous Peoples' legal and moral right to truth, accountability, and justice.

THE CULTURE OF IMPUNITY AND RESISTING CHANGE IN CANADA'S PUBLIC SERVICE BUREAUCRACY

While parliamentarians determine the political, legal, and policy agenda relating to Indigenous Peoples, the public service bureaucracy is tasked with advising, developing, and implementing this agenda regardless of which political party is in power. The TRC recognized that:

> Reconciliation requires political will, joint leadership, trust building, accountability, and transparency, as well as a substantial investment of resources ... [and that for] governments, building a respectful relationship involves dismantling a centuries-old political and bureaucratic culture in which, all too often, policies and programs are still based on failed notions of assimilation.[230]

To further this goal, the TRC issued Call to Action 57 for all levels of government to, "provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the *UNDRIP*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."[231]

In response, the Department of Justice Canada, in 2018, issued 10 overarching principles to guide the development and implementation of laws and policies.[232] As of March 2023, the federal government had also launched the Indigenous Learning Series in 2016, a dialogue series, and online resources on various topics, through the Canada School of Public Service to implement Call to Action 57.[233] Yet uptake on this organizational cultural change has been slow. By October 2022, only 18 percent of public servants had taken any of this training, which, as of July 2024, is still not mandatory despite the efforts of the Public Service Alliance Canada.[234] On leaving his position as Minister of Crown-Indigenous Relations and Northern Affairs Canada in September 2023, Marc Miller candidly said that, "my biggest battles, and fights, and challenges have been with our own institutional mechanisms" and that he "had many difficult conversations with people who dedicated their careers to public service, but whose institutional thinking had to change to allow Indigenous Peoples to reclaim the jurisdiction and power that was taken from them."[235]

Lack of Consistent Federal Ministerial Leadership on Responses to Missing and Disappeared Children and Unmarked Burials

> The recent cabinet shuffle at Prime Minister Justin Trudeau's direction has disrupted government leadership in addressing these matters. The SNCC [Stó:lō Nation Chiefs' Council] met directly with former Justice Minister David Lametti and CIRNA [Crown-Indigenous Relations and Northern Affairs] Minister Marc Miller in the last number of years, and on site at the former Coqualeetza residential school grounds, which allowed for meaningful dialogue and understanding of the issues facing our communities. Those relationships we have all been working on are now meaningless as a result of the cabinet shuffle, and represents a significant waste of energy and resources. The Prime Minister needs to demonstrate a true commitment to and understanding of the meaning of reconciliation by directly assuming the relationship with us that has been lost.
>
> **— Stó:lō Nation Chiefs' Council, Submission to the Office of the Independent Special Interlocutor**

Decolonizing and transforming the organizational culture of impunity that supports settler amnesty in government departments and other institutions will strengthen accountability and transparency across all levels of Canadian society. The history of Indian Residential School litigation, the failed ADRP, and the subsequent negotiations of settlement agreements is an example of how settler amnesty operates. The federal government has a pattern of first denying responsibility for what happened to Indigenous children in these institutions, forcing Survivors into litigation, and then making decisions about how best to resolve these injustices without sufficient consultation with Survivors, Indigenous families, and communities. When it became evident that litigation would overwhelm the courts for years and that Canada would spend millions of dollars defending itself in court, the federal government implemented the Western tort-based ADRP, which ultimately failed. While the federal government now does not deny the existence of the missing children and unmarked burials and the need to support Survivors, Indigenous families, and communities engaged in search and recovery work, this disturbing pattern of behaviour persists. One such example is the negotiation and signing of the *Technical Arrangement with the International Commission on Missing Persons* on February 1, 2023.[236]

Acknowledging the legitimacy of demands for reparations and negotiating their terms is inherently political. As pressure from Survivors to resolve Indian Residential School litigation grew, this provoked a political response from parliamentarians and senior government officials, developing policies on reparations that were implemented by public service bureaucrats. As Cindy Blackstock points out:

> [There is] a consistent pattern of recommendations to improve the safety and well-being of First Nations children and families.... Canada has repeatedly either not implemented the recommended reforms or has done so in a piecemeal fashion. The action nerve centre of the Canadian government has been impervious to repeated reports of the preventable deaths of children in the past and in the present linked to its inequitable treatment of First Nations children.... Canada is more apt to view evidence of government wrongdoing as a public relations challenge that warrants one or more of the following responses: (1) minimization of the problem; (2) reframing of the inequity to make government actions appear benevolent; (3) use of official procedures such as studies or alleged consultations to mask inaction; and (4) projection of responsibility for the problem onto others, including First Nations themselves.[237]

Survivors' resistance and their call for reparations is a call for truth, accountability, and justice. Canada's ad hoc or reactive incremental approach to reparations has created exclusionary gaps that remain barriers to reconciliation. Canada's approach to reparations is embedded in settler amnesty at the international and domestic levels. It is important to acknowledge that the federal government has made some progress on providing redress to Survivors, Indigenous families, and communities for the ongoing impacts of the Indian Residential School System. However, comprehensive and satisfactory reparations for genocide and mass human rights violations remain elusive. This is even more evident as Survivors, Indigenous families, and communities investigate the scope and magnitude of harms that led to the disappearances, deaths, and burials of thousands of Indigenous children across the country.

COUNTERING SETTLER AMNESTY

Settler amnesty has operated to limit Crown liability and protect wrongdoers from prosecution or public censure for the harms they have perpetrated on Indigenous children through the Indian Residential School System. This disguised form of amnesty is de facto; it is neither

formally legislated nor publicly acknowledged. It preserves settler colonial systems, structures, and institutions and is revealed in Canada's legal and political strategies to resist accountability. Throughout the history of Indian Residential School litigation, the federal government used aggressive litigation tactics until the sheer volume of cases became untenable, leading first to the ADRP and, subsequently, to the *IRSSA*. While the *IRSSA* broadened the scope of reparations available, it excluded whole groups of Survivors who were then forced back into the courts where the federal government once again aimed to limit its liability using colonial legal and technical arguments. The churches have also supported settler amnesty to limit accountability as their primary objective. Any reparations to Survivors, Indigenous families, and communities have been the result of the persistence and determination of Survivors to hold Canada to account.

Elder William Osborne at the National Gathering on Unmarked Burials in Winnipeg, Manitoba, November 29, 2022 (Office of the Independent Special Interlocutor).

Canada's de facto, unconditional amnesty has ensured that the individuals most responsible for the litany of atrocities committed through the Indian Residential School System have escaped justice. These individuals include politicians and bureaucrats at the highest levels as

well as individual perpetrators of inhumane and criminal acts within the Indian Residential Schools themselves. Most of these perpetrators, if not all, may now be dead. It is important to repeat that this impunity is not an aberration; it is by design—Canadian design. If there are no perpetrators to prosecute, it is not because "time has passed" but, rather, because Canada proactively disrupted the possibility of meaningful accountability, closing off effective avenues for justice, and shielded those responsible for the atrocities that have been committed against Indigenous children. This denial of justice is itself a violation of the rights of Indigenous victims and Survivors to remedy the human rights violations and atrocities committed against them. It is a denial of justice, both at the time the children experienced the harms and through the continual refusal to adequately address them.

Over several decades, multiple governments, and evolving institutions, Canada has persistently maintained an amnesty for those most responsible for the human rights abuses, crimes against humanity, and genocidal acts perpetrated—and continually perpetrated—against Indigenous people, including Indigenous children forced into the Indian Residential School System. Canada's amnesty has been almost entirely unlimited. Those involved in direct harms against children, those complicit in atrocities, and those who organized the very structures and policies that led to the children's suffering, deaths, disappearances, and undignified burials were all protected by Canada's refusal to investigate and prosecute these harms. Canada's amnesty is a blanket amnesty: it covers every person and type of official—clergy, physicians, government officers and agents, law enforcement—involved in the atrocities committed against Indigenous children.

The amnesty enjoyed by the perpetrators of Indian Residential School atrocities was and is unconditional: individual perpetrators have been shielded from prosecution without any requirement to provide testimony, acknowledge and apologize for their crimes, or offer reparations in exchange for protection from prosecution. They simply received amnesty. Through the *IRSSA* and official apologies, Canada has accepted a degree of State responsibility for the mistreatment of children at Indian Residential Schools. But a culture of impunity still pervades much of Canadian society. This is deepened by ongoing, practical barriers that the federal government has created that obstruct important avenues for accountability; these avenues both in Canadian courts and in international tribunals remain stubbornly unavailable because of Canada's decisions to preclude Indigenous people's access to them.

Exactly none—*none*—of the common justifications for an amnesty are in place in the Canadian context. There is no armed conflict to be negotiated or concluded. There is no public order that must be restored or post-conflict stability that must be maintained. There is no risk to Canada's democratic structures and institutions if justice were to be pursued and

accountability accomplished. And there is no current process of reconciliation or truth-telling that requires offering amnesty to the perpetrators in exchange for acknowledgement of wrongdoing.[238] Yet Canada continues to endorse—by its actions and omissions—a de facto settler amnesty for those agents, officers, and officials involved in perpetrating atrocities against Indigenous children. In addition to the direct harm that this causes to Indigenous people and communities, it simultaneously fosters a warped understanding of the experiences of Indigenous people among settlers. Canada's endorsement of impunity has had cyclical effects: by shielding those responsible for atrocities against Indigenous children and communities, and the amnesty has had an indelible impact on the public's understanding of Canadian history, which has consequently fueled resistance, disinterest, disinformation, and denialism among the settler population. It is time to break this cycle.

One final point should be echoed: the amnesty for those responsible for atrocities against children at Indian Residential Schools is ongoing. It continues to frustrate the right to truth of victims and Survivors. This contravenes international human rights law. Both case law from the IACtHR and academic studies conclude that an amnesty, "does not relieve the State of its obligations to find out the truth and inform the next of kin of the victims' fate and the location of the remains. The failure by State organs to provide information to a commission of inquiry can also constitute a violation of the right to truth."[239] The right to truth is a powerful potential antidote to the effect of Canada's unconditional, blanket de facto settler amnesty and the culture of impunity that Canada has actively created and cultivated.

It is time for Canada to shift from this culture of amnesty and impunity to a culture of accountability and justice. Rather than suppressing the truths of what happened to the missing and disappeared children, Canada must fully embrace and uphold Indigenous Peoples' right to truth, accountability, justice, and reconciliation.

1 Natan Obed, President of Inuit Tapiriit Kanatami, "Opening Words," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

2 See, for example, Andrew Livingstone, "Son Defends Scientist behind Aboriginal Nutrition Experiments," *Toronto Star*, July 24, 2013, https://www.thestar.com/news/canada/son-defends-scientist-behind-aboriginal-nutrition-experiments/article_522a22d1-cc41-59c8-bcb7-05a37fbf9b6d.html.

3 See "Genocide Begins with 'Dehumanization': No Single Country Is Immune from Risk, Warns UN Official," *United Nations (UN) News*, December 9, 2014, https://news.un.org/en/story/2014/12/485822; see also OSI, *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* (OSI, 2024), Introduction.

4 In the context of physicians and researchers who conducted nutrition experiments on Indigenous children, for example, see Ian Mosby, "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952," *Social History* 46, no. 91 (May 2013): 145–72.

5 Truth and Reconciliation Commission of Canada (TRC), *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), Appendix 3, 165–66.

6 No cases have been brought to international human rights tribunals, international criminal tribunals, or under the principle of universal jurisdiction, whereby States can prosecute certain international crimes perpetrated in another country.

7 TRC, *Canada's Residential Schools: The History, Part 1: Origins to 1939*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 402.

8 TRC, *The History, Part 1*, 162.

9 As Samir Shaheen-Hussain writes, "the lack of transparent and accountable oversight of the residential schools and the impunity with which authorities could act in Indigenous communities meant that children were vulnerable to the abuses of doctors and scientists." Samir Shaheen-Hussain, "Experimental Laboratories: Malnutrition, Starvation, and the BCG Vaccine," in *Fighting for a Hand to Hold: Confronting Medical Colonialism against Indigenous Children in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2020), 135–49; see also Mosby, "Administering Colonial Science."

10 Alyssa Couchie, "ReBraiding Frayed Sweetgrass for Niijaansinaanik: Understanding Canadian Indigenous Child Welfare Issues as International Atrocity Crimes," *Michigan Journal of International Law* 44, no. 3 (2023): 404–43; see also Pauline Wakeham, "The Slow Violence of Settler Colonialism: Genocide, Attrition, and the Long Emergence of Invasion," *Journal of Genocide Research* 24, no. 3 (2022): 337–56.

11 Couchie, "ReBraiding Frayed Sweetgrass," 415.

12 Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Winnipeg: University of Manitoba Press, 2015), 193–94.

13 Couchie, "ReBraiding Frayed Sweetgrass," 419; Wakeham, "Slow Violence."

14 TRC, *Honouring the Truth*, 1.

15 National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry), *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019), 15, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf.

16 Amy Smart, "Trudeau Accepts Finding of Genocide in MMIWG Report, But Says Focus Needs to Be on Response," *CTV News*, June 4, 2019, https://www.ctvnews.ca/politics/trudeau-accepts-finding-of-genocide-in-mmiwg-report-but-says-focus-needs-to-be-on-response-1.4451245.

17 See "Canada's Top Judge Says Country Committed 'Cultural Genocide' against Indigenous Peoples," *APTN National News*, May 29, 2015, https://www.aptnnews.ca/national-news/canadas-top-judge-says-country-committed-cultural-genocide-indigenous-peoples/; Sean Fine, "Chief Justice Says Canada Attempted 'Cultural Genocide on Aboriginals," *Globe and Mail*, May 28, 2015.

18 MMIWG Inquiry, *Legal Analysis of Genocide*, 9–10, 24–25.

19 David B. MacDonald, *The Sleeping Giant Awakens: Genocide, Residential Schools, and the Challenge of Conciliation* (Toronto: University of Toronto Press, 2019), 146.

20 Michelle Good, *Truth Telling: Seven Conversations About Indigenous Life in Canada* (New York: Harper Collins, 2022).

21 Good, *Truth Telling*, 2–3, 52–53.

22 Joanna Quinn, "Whiter the Transition of Transitional Justice," *Interdisciplinary Journal of Human Rights Law* 8, no. 1 (2014): 78.

23 Glen S. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 108; Jennifer Matsunaga, "Two Faces of Transitional Justice: Theorizing the Incommensurability of Transitional Justice and Decolonization in Canada," *Decolonization: Indigeneity, Education and Society* 5, no. 1 (2016): 28–29.

24 Matsunaga, "Two Faces of Transitional Justice," 29.

25 Liam Midzain-Gobin and Heather A. Smith, "Debunking the Myth of Canada as a Non-Colonial Power," *American Review of Canadian Studies* 50, no. 4 (2020): 491–92.

26 Kirsten Manley-Casimir, "Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach" (PhD diss., University of British Columbia, January 2016), 334.

27 Paloma Aguilar, "Transitional Justice in the Spanish, Argentinian and Chilean Case, Study Workshop 10: Alternative Approaches to Dealing with the Past," *Crisis Management Initiative*, June 2007, 22.

28 This definition draws on numerous sources on amnesty laws and, in particular, the work of Louise Mallinder, *Amnesty, Human Rights, and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008).

29 The *Belfast Guidelines on Amnesty and Accountability* (Belfast: Transitional Justice Institute at the University of Ulster, 2013), 9–10, https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf.

30 Amnesties may also be differentiated on the basis of whether they preclude both criminal and civil liability or only the former.

31 The work of Louise Mallinder has been especially helpful in distinguishing and articulating differences in amnesty types. See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (London: Bloomsbury, 2008).

32 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge, UK: Cambridge University Press, 2009), 14.

33 Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-conflict States: Amnesties* (New York: United Nations, 2009), 5, https://www.ohchr.org/sites/default/files/Documents/Publications/Amnesties_en.pdf.

34 See Pierre Hazan, *Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes*, Centre for Humanitarian Dialogue, 2020, https://hdcentre.org/wp-content/uploads/2020/03/Amnesty-A-Blessing-in-Disguise.pdf.

35 *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609, Article 6(5).

36 *Belfast Guidelines*, 9.

37 Michael P. Scharf, "Enforcement through Sanctions, Force, and Criminalization," in *The New Terror: Facing the Threat of Biological and Chemical Weapons*, ed. Sidney D. Drell and Abraham D. Sofaer (Chicago: Hoover Institution Press, 1999), 439–79; Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (January 2004): 5–44.

38 Freeman, *Necessary Evils*, 23; Christine Bell, "Negotiating Justice? Human Rights and Peace Agreements," *International Council on Human Rights Policy*, 2006, 1–2, https://reliefweb.int/report/world/negotiating-justice-human-rights-and-peace-agreements.

39 *International Convention for the Protection of All Persons from Enforced Disappearance*, Doc. A/RES/61/177, December 20, 2006, Articles 3, 4 (*ICPPED*).

40 According to the OHCHR, "most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy. In addition, amnesties may not restrict the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims' or societies' right to know the truth about such

violations." OHCHR, *Rule-of-Law Tools*, v, 11–26; see also William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2014), 174.

41 See, for example, Christine A.E. Bakker, "A Full Stop to Amnesty in Argentina," *Journal of International Criminal Justice* 3 (2005): 1106–20.

42 United Nations General Assembly (UNGA), *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Resolution 60/147, December 15, 2005, vii–ix; Schabas, *Unimaginable Atrocities*, 183.

43 For more on the Joinet/Orentlicher principles, see Frank Haldemann and Thomas Unger, "The UN Anti-impunity Framework: A Critical Appraisal," *UN Today*, April 8, 2021, https://untoday.org/the-un-anti-impunity-framework-a-critical-appraisal/.

44 Uruguay, for example, has held referenda on the country's amnesty law in 1989 and 2009. The result of both was to maintain an amnesty law, the *Law on the Expiration of the Punitive Claims of the State*. The amnesty was finally repealed by an act of Uruguay's Parliament in 2011. For more, see Debbie Sharnak, *Of Light and Struggle: Social Justice, Human Rights, and Accountability in Uruguay* (Philadelphia: University of Pennsylvania Press, 2023), in particular, chapters 6, 7.

45 OHCHR, *Rule-of-Law Tools*, 41, citing *Santos Mendoza et al. v. Uruguay*, Case nos. 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Report no. 29/92, October 2, 1992.

46 An example of this is in Colombia. See *Colombia: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, November 24, 2016, https://www.refworld.org/docid/5b68465c4.html.

47 OHCHR, *Rule-of-Law Tools*, 6.

48 OHCHR, *Rule-of-Law Tools*, 8.

49 *Belfast Guidelines*, 10.

50 See, *inter alia*, Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 647–67; Alex Borraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000); Lyn S. Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?* (Boulder, CO: Lynne Rienner Publishers, 2002).

51 Mustapha K. Darboe, "Who Got Amnesty from Gambia's Truth Commission?" *Justice Info*, March 21, 2022, https://www.justiceinfo.net/en/89070-who-got-amnesty-from-gambias-truth-commission-and-who-didnt.html; Mark Kersten, "'Some Reasons Are Obvious, Some Are Not: The Gambian Experience with Transitional Justice," in *Transitional Justice in Comparative Perspective Preconditions for Success*, ed. Samar El-Masri, Tammy Lambert, and Joanna R. Quinn (Cham, Switzerland: Springer, 2020), 149–84.

52 See, *inter alia*, Kasaija Phillip Apuuli, "Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda," *African Journal on Conflict Resolution* 5, no. 2 (2005): 33–62; Paul Bradfield, "Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo," *Journal of International Criminal Justice* 15, no. 4 (2017): 827–55.

53 Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver: UBC Press, 2010).

54 Marguerite Feitlowitz, "'We Know Nothing. It Isn't Taught': Secret Histories of Argentina's Dirty War," *Amnesty International Fortieth Anniversary* 54 (2001): 225–33.

55 *Belfast Guidelines*, 9.

56 John Dugard, "Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?" *Leiden Journal of International Law* 12, no. 4 (1999): 1001.

57 OHCHR, *Rule-of-Law Tools*, 7.

58 International Committee of the Red Cross, *Amnesties and International Humanitarian Law: Purpose and Scope*, July 14, 2017, https://reliefweb.int/report/world/amnesties-and-international-humanitarian-law-purpose-and-scope#:~:text=In%20accordance%20with%20these%20obligations%20and%20the%20limits,pertaining%20to%20the%20granting%20and%20scope%20of%20amnesties.

59 Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet," *Emory Law Journal* 46, no. 49 (2000): 205–22.

60 Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace, 2010), 36.

61 OHCHR, *Rule-of-Law Tools*, 9.

62 OHCHR, *Rule-of-Law Tools*, 9.

63 OHCHR, *Rule-of-Law Tools*, 8.

64 Human Rights Committee, "Rights Committee: Entrenched Impunity and 'Infernal Cycle of Violence' at the Heart of the Dialogue with the Central African Republic," OHCHR, March 5, 2020, https://www.ohchr.org/en/statements/2020/03/rights-committee-entrenched-impunity-and-infernal-cycle-violence-heart-dialogue.

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66 Mosby, "Administering Colonial Science," 160.

67 See, for example, TRC, *Canada's Residential Schools: The History, Part 2: 1939–2000*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 383–87.

68 Cited in Chinta Puxley, "Canada's Residential Schools a Form of Genocide: Truth and Reconciliation Chair," *Global News*, February 17, 2012, https://globalnews.ca/news/212969/canadas-residential-schools-a-form-of-genocide-truth-and-reconciliation-chair/.

69 *Universal Declaration of Human Rights*, GA Res 217A (III), 3rd Session, Supplement no. 13, UN Doc. A/810, 1948. See William A. Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights," *McGill Law Journal* 43 (1998): 406.

70 Schabas, "Canada and the Adoption," 403, 440.

71 Schabas, "Canada and the Adoption," 437.

72 *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 UNTS 277 (*Convention on Genocide*).

73 David B. MacDonald and Graham Hudson, "The Genocide Question and Indian Residential Schools in Canada," *Canadian Journal of Political Science* 45, no. 2 (July 2012): 433; Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, DC: Carnegie Endowment for International Peace, 1944), 27–28.

74 Jennifer Henderson and Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada," *English Studies in Canada* 35, no. 1 (March 2009): 19.

75 Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?," *McGill Law Journal* 62, no. 1 (2016): 259.

76 Akhavan, "Cultural Genocide," 259.

77 MacDonald, *Sleeping Giant Awakens*, 126–27.

78 Stanley Cohen, *States of Denial: Knowing About Atrocities and Human Suffering* (Cambridge, UK: Polity Press, 2001), 107, 108.

79 MacDonald, *Sleeping Giant Awakens*, 164–65.

80 MacDonald, *Sleeping Giant Awakens*, 165.

81 *Criminal Code*, RSC 1985, c. C-46, s. 318.

82 These correspond to Convention on Genocide, Article 2(b), (d), (e). Note also that the imposition of measures intended to prevent births within the group as an act of genocide that was not included in the *Criminal Code* is of particular relevance to addressing Canada's practice of sterilizing Indigenous women and girls. See, for example, Karen Stote, *An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women* (Blackpoint, NS: Fernwood Publishing, 2015). Due to the restrictions on access to health-care records, the Independent Special Interlocutor was not able to review records to determine if Indigenous girls, under the care of Indian Residential Schools, were subject to forced sterilization.

83 See comments by Dale Lysak in Kathleen Martens, "Canada Can't Be Prosecuted for Residential School Crimes, Says Former UN-Tribunal Lawyer," *APTN National News*, June 18, 2021, https://www.aptnnews.ca/national-news/canada-cant-be-prosecuted-for-residential-school-crimes-says-former-un-tribunal-lawyer/. A similar point is cited in MacDonald, *Sleeping Giant Awakens*, 38.

84 See MacDonald, *Sleeping Giant Awakens*, 24.

85 *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 90, Article 5.

86 *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24 (*Crimes Against Humanity Act*); *Rome Statute*, Article 7(1)(i), (j).

87 Fannie Lafontaine, *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012), n. 25, citing William A. Schabas and Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Carswell, 2007), 248.

88 *Crimes Against Humanity Act*, section 9(3) states that only the Attorney General of Canada can conduct proceedings for offences under sections 4–7 of the Act. See Fannie Lafontaine, "The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's Crimes against Humanity and War Crimes Act," *Quebec Journal of International Law* 23, no. 1 (2010): 25.

89 Lafontaine, "Unbearable Lightness," 7.

90 Lafontaine, "Unbearable Lightness," 7.

91 Kona Keast-O'Donovan, "Convicting the Clergy: Seeking Justice for Residential School Victims through Crimes against Humanity Prosecutions," *Manitoba Law Journal* 45, no. 4 (2022): 42.

92 Keast-O'Donovan, "Convicting the Clergy," 64; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

93 Gary Miller, Reception, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

94 Although the federal government and the church parties to the *Indian Residential Schools Settlement Agreement* were required to produce all relevant records to the TRC, the Commission was compelled to go to court three times for judicial decisions on Canada's obligation to produce all documents that the commission deemed relevant. I note that, despite court rulings in its favour, document production was slow, and this impacted the TRC's research. *Indian Residential Schools Settlement Agreement*, Schedule N, May 8, 2006, reprinted in TRC, *Honouring the Truth*, Appendix 1 (IRSSA); TRC, *Honouring the Truth*, 27–29.

95 Matt James, "The Structural Injustice Turn, the Historical Justice Dilemma and Assigning Responsibility with the Canadian TRC Report," *Canadian Journal of Political Science* 54 (2021): 383. In his analysis of the TRC's *The History, Part 2*, James argues that, "rather than offering explicit findings of fault, [the post-war history volume] draws on archival records and correspondence to show determinate public officials committing specific wrongs.... However, because the volume's authors refrained from treating such cases as instances of 'misconduct' warranting follow-up, they were unable to ask about whatever acts of leadership or decision might have informed them. In this way, cases of individual wrongdoing remain dormant, their lessons unpursued."

96 James, "Structural Injustice Turn."

97 James, "Structural Injustice Turn," 376–77.

98 James, "Structural Injustice Turn," 381–82.

99 TRC, *Honouring the Truth*, 3.

100 TRC, *Canada's Residential Schools: Missing Children and Unmarked Burials*, vol. 4 (Montreal and Kingston: McGill-Queen's University Press, 2016), 122–23 (emphasis added).

101 James, "Structural Injustice Turn," 378; Rosemary Nagy, "The Truth and Reconciliation Commission of Canada: Genesis and Design," *Canadian Journal of Law and Society* 29, no. 2 (2014): 199–217.

102 The TRC noted that its list of criminal convictions had limitations because the Commission was unable to review various court and police records. TRC, *Honouring the Truth*, Appendix 3. For more on the Royal Canadian Mounted Police's (RCMP) investigations, see TRC, *Canada's Residential Schools: The Legacy*, vol. 5 (Montreal and Kingston: McGill-Queen's University Press, 2015), 190–92.

103 TRC, *Honouring the Truth*, 165.

104 TRC, *The History, Part 2*, 548.

105 TRC, *The History, Part 2*, 414.

106 TRC, *Honouring the Truth*, Appendix 3, 365–66.

107 TRC, *The History, Part 2*, 412.

108 TRC, *The History, Part 1*, 413–14; see also 414–51 for accounts of individual perpetrators who were convicted of sexual abuse.

109 TRC, *The History, Part 1*, 451.

110 Cohen, *States of Denial*, 106.

111 TRC, *The History, Part 2*, 562.

112 TRC, *The Legacy*, 203.

113 TRC, *The Legacy*, 167.

114 TRC, *Canada's Residential Schools: Reconciliation*, vol. 6 (Montreal and Kingston: McGill-Queen's University Press, 2015), 91.

115 TRC, *The Legacy*, 167.

116 TRC, *The Legacy*, 167.

117 TRC, *The Legacy*, 202.

118 Brett Forester, "Despite Promise of Reconciliation, Trudeau Spent Nearly $100M Fighting First Nations in Court during First Years in Power," *APTN National News*, December 18, 2020, https://www.aptnnews.ca/national-news/trudeau-spent-nearly-100m-fighting-first-nations-in-court-during-first-years-in-power/.

119 Forester, "Despite Promise of Reconciliation."

120 TRC, *The History, Part 2*, 451.

121 TRC, *The History, Part 2*, 412.

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130 Letter from Foster LLP to Karim Khan, QC, Chief Prosecutor, International Criminal Court, Office of the Prosecutor, June 3, 2021. In a letter on July 29, 2021, the Office of the Prosecutor informed the lawyers that, because the conduct described occurred prior to July 1, 2002, it was not within the International Criminal Court's jurisdiction.

131 Keast-O'Donovan, "Convicting the Clergy," 89.

132 *American Convention on Human Rights*, May 23, 1969, 1144 UNTS 123. See Senate of Canada, "Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights," Government of Canada, May 2003, https://publications.gc.ca/collections/collection_2011/sen/yc32-0/YC32-0-372-4-eng.pdf.

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134 Canada was one of four countries that voted against the *UN Declaration on the Rights of Indigenous Peoples*, UNGA Resolution 61/295, UNGAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007 (*UN Declaration*) (the other countries that voted against it were Australia, New Zealand, and the United States). See the voting record on the *UN Declaration* at https://digitallibrary.un.org/record/609197?ln=en; see also Alex Neve, "Shame on Canada for Opposing the UN Indigenous Peoples Declaration," *The Lawyers Weekly*, 28, no. 6 (June 2008): n.p.

135 The TRC noted that, "for many years, Aboriginal people were hindered in seeking legal redress in the courts of Canada because of provisions in the *Indian Act*. Provisions enacted in 1927 forbade them or anyone on their behalf from raising money to begin court action, or from beginning legal proceedings against the government, without the minister's permission." TRC, *The Legacy*, 199. This provision was repealed in 1951.

136 TRC, *The History, Part 2*, 556–57.

137 TRC, *The History, Part 2*, 557.

138 Recommendations included: to increase public awareness; to support the RCMP's investigation of Indian Residential Schools; to provide short-term support to victims of Indian Residential Schools; and to plan for negotiated or litigated resolution of issues. Nuu-chah-Nulth Tribal Council, *Indian Residential Schools: The Nuu-chah-nulth Experience*, 1996, Appendix 4, 207–20.

139 Nuu-chah-Nulth Tribal Council, *Indian Residential Schools*, 172–88; see also TRC, *The History, Part 2*, 557.

140 Assembly of First Nations (AFN), *Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals* (Ottawa: AFN, 1994), 196, cited in TRC, *The History, Part 2*, 556.

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143 RCAP, *Looking Forward, Looking Back*, 363.

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151 Law Commission of Canada (LCC), *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Minister of Public Works and Government Services, 2000), Appendix A, 425–26.

152 LCC, *Restoring Dignity*, 134.

153 LCC, *Restoring Dignity*, 174–75.

154 LCC, *Restoring Dignity*, 158–61.

155 LCC, *Restoring Dignity*, 258.

156 LCC, *Restoring Dignity*, 258.

157 LCC, *Restoring Dignity*, 258.

158 LCC, *Restoring Dignity*, 74. In addition to the forms of redress discussed above, the LCC also reviewed and evaluated the potential of ombudsman offices, children's advocates and commissions, *ex gratia* payments, community initiatives, and various other mechanisms for redress programs.

159 LCC, *Restoring Dignity*, 109–12.

160 LCC, *Restoring Dignity*, 66.

161 LCC, *Restoring Dignity*, 303–4.

162 LCC, *Restoring Dignity*, 271.

163 LCC, *Restoring Dignity*, 415.

164 LCC, *Restoring Dignity*, 278.

165 LCC, *Restoring Dignity*, 271.

166 LCC, *Restoring Dignity*, 274.

167 The LCC also assessed several lustration processes, "that employ informal sanctions through public exposure of human rights abuses" by opening government and secret police files that, in some cases, led to mass purging of government officials. LCC, *Restoring Dignity*, 269.

168 LCC, *Restoring Dignity*, 273.

169 LCC, *Restoring Dignity*, 279.

170 "Safeguarding the Future and Healing the Past: The Government of Canada's Response to the Law Commission of Canada's Report—Restoring Dignity: Responding to Child Abuse in Canadian Institutions," Conclusion, Government of Canada, accessed July 9, 2024, https://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/dig/.

171 "Safeguarding the Future."

172 TRC, *The History, Part 2*, 567–68. For an overview of the class action lawsuits, see TRC, *The History, Part 2*, 566–69; see also Stanton, *Reconciling Truths*, 77–92.

173 Stanton, *Reconciling Truths*, 87.

174 TRC, *The History, Part 2*, 560–61.

175 Canada, *Indian Residential Schools Resolution Canada, Performance Report for the Period Ending March 31, 2003* (Ottawa: Treasury Board of Canada Secretariat, 2003), cited in Independent Assessment Oversight Committee, *Independent Assessment Process: Final Report*, 2021, 15, https://www.residentialschoolsettlement.ca/IAP_Final_Report_English.pdf.

176 TRC, *The History, Part 2*, 561.

177 *Reconciliation and Healing: Alternative Resolution Strategies for Dealing with Residential School Claims* (Ottawa: Minister of Indian Affairs and Northern Development, March 2000), v; see also TRC, *The History, Part 2*, 564. The principles established in the exploratory dialogues were that the process should be accessible, victim centred, and confidential (if required by the former student); do no harm; protect the health and safety of the participants; be representative; be public/transparent; be accountable; be an open and honourable process; be comprehensive, inclusive, and educational; be holistic, just and fair, respectful, voluntary, flexible, and forward looking (106–13). These principles were subsequently adopted in the TRC's mandate in Schedule N of the *IRSSA*, 339.

178 TRC, *The History, Part 1*, 564.

179 National Consortium of Residential School Survivors, "Assembly of First Nations—Litigation Only Option—Lack of Ottawa's Political Will," press release, *Turtle Island News*, October 16, 2002, cited in Kim Pamela Stanton, "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies" (PhD diss., Faculty of Law, University of Toronto, 2020), 81.

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181 AFN, *Assembly of First Nations Report*, 3, 5, cited in TRC, *Legacy*, 212.

182 AFN, *Assembly of First Nations Report*, 36.

183 TRC, *Legacy*, 212.

184 Canadian Bar Association (CBA), *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors* (Toronto: Canadian Bar Association, 2005), 16.

185 CBA, *Logical Next Step*, 20.

186 Parliament of Canada, Standing Committee on Aboriginal Affairs and Northern Development, 38th Parliament, 1st Session, no. 018, February 15, 2005, https://www.ourcommons.ca/Content/Committee/381/AANO/Evidence/EV1636789/AANOEV18-E.PDF.

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188 Parliament of Canada, *Standing Committee on Aboriginal Affairs and Northern Development, Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of IRS Claims*, 38th Parliament, 1st Session, https://www.ourcommons.ca/DocumentViewer/en/38-1/AANO/report-4/.

189 Standing Committee on Aboriginal Affairs, *Study on Effectiveness*.

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195 TRC, *The History, Part 2*, 560.

196 Kathleen Mahoney, "The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History," *University of New Brunswick Law Journal* 69 (2018): 198–232.

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199 Stanton, "Truth Commissions," 80.

200 Stanton, "Truth Commissions," 80–81.

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202 TRC, *Honouring the Truth*, 27.

203 TRC, *The History, Part 2*, 575–76.

204 TRC, *The History, Part 2*, 576.

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PART TWO

Implementing Indigenous Laws and Decolonizing the Canadian Legal Framework

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CHAPTER 6

Upholding Indigenous Laws

When Creator gave us those Sacred laws it was a forever agreement.

— Scott Fox, Ga Na (Blackfoot) Blood Tribe[1]

Every society has a Creation Story, founding constitutions, and original commitments that help members of those societies determine how to live with integrity and how to get along with others, both within their own society and with other societies. Indigenous Peoples, like all societies, have developed distinct laws, legal systems, protocols, and processes that have served them to do this effectively for millennia. Survivors, Indigenous families, and communities working to find the missing and disappeared children and unmarked burials are applying Indigenous laws to guide their search and recovery efforts. The importance of Indigenous laws governing these processes was emphasized at each National Gathering. Those individuals leading search and recovery work made clear that Indigenous laws are fundamental to provide coordinated and robust mechanisms to recover, investigate, protect, and commemorate the missing and disappeared children and unmarked burials.

Given the importance of Indigenous laws in search and recovery work, this chapter focuses on:

- Indigenous resistance and the revitalization of Indigenous laws;
- The complex questions that are being considering in applying Indigenous laws to finding the missing and disappeared children and unmarked burials;

- The characteristics of Indigenous laws; and
- The Indigenous laws and legal principles that are currently being applied in search and recovery work.

This chapter reflects the evolving application, interpretation, and adaptation of Indigenous laws and principles. It draws on many sources, including the Truth and Reconciliation of Canada's (TRC) Final Report, academic literature, and information and knowledge shared at National Gatherings and in community meetings during my mandate.[2]

It is not within the scope of this chapter to include a detailed description of the many, varied Indigenous legal systems, laws, processes, and protocols of Indigenous Peoples within Canada. Rather, it provides an overview of some general principles and characteristics of Indigenous laws and how specific Indigenous Nations are implementing these in the context of search and recovery work. Where possible, specific Indigenous legal principles, laws, processes, and protocols are discussed. A particular focus is given to the Indigenous laws that Survivors, Indigenous families, and communities have shared at National Gatherings.

Indigenous Laws Are Internationally Recognized Rights of Indigenous Peoples

The rights of Indigenous Peoples to uphold and apply their Indigenous laws, legal systems, protocols, and processes are recognized and affirmed at international law in various mechanisms and agreements, including the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*).[3]

Indigenous laws emanate from the inherent sovereignty of Indigenous Peoples. This sovereignty has led to recognition within international law of the right to self-determination. The United Nations (UN) Expert Mechanism on the Rights of Indigenous People states:

> The right to self-determination is a central right for [I]ndigenous [P]eoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen [I]ndigenous legal institutions, and to apply their own customs and laws.[4]

Many articles in the *UN Declaration* further emphasize Indigenous Peoples' right to govern their own affairs and uphold and apply their own laws, including:

Article 3

Indigenous [P]eoples have the **right to self-determination**. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous [P]eoples, in exercising their **right to self-determination, have the right to autonomy or self-government** in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous [P]eoples have the **right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions**, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 34

Indigenous [P]eoples have the **right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs**, in accordance with international human rights standards.[5]

INDIGENOUS RESISTANCE AND THE REVITALIZATION OF INDIGENOUS LAWS

> Our Elders are not advisors in our process, our Elders are decision makers. Our Elders, they know the oral history. There is no legal system or any government that is going to come into our community and tell us we're lying.... Truth-telling has to come from our people.
>
> **— Participant[6]**

As discussed in the introduction, Canada's settler colonial policies of assimilation were and are aimed at the elimination of Indigenous Peoples. These policies included explicit legislated efforts by the Canadian State to suppress, undermine, and replace Indigenous legal processes, such as hereditary and matrilineal Indigenous governance practices and structures.[7] The Canadian State also criminalized Indigenous laws and legal processes, such as the potlatch (a central economic, political, and legal ceremony of west coast First Nations) and tamawanas (Blackfoot Sundance).[8] Canada also launched and continues to implement[9] a sustained and comprehensive attack on Indigenous legal systems and the ability to transmit Indigenous laws orally from one generation to the next. These measures have included various policies that separated children from their families and communities, including the forcible removal of Indigenous children to be taken to Indian Residential Schools and other associated institutions.[10]

Despite these systemic and sustained attacks, Indigenous Peoples have always resisted and ensured the survival of their Indigenous legal systems. Sometimes, this has involved practising laws and upholding legal systems in hiding. In some cases, Indigenous legal systems were not easily recognizable as law by the Canadian State, which meant that Indigenous Peoples could hide their laws in plain sight.[11] Indigenous laws contained in songs, dances, beading, and regalia, for example, have been continually transmitted by Indigenous community members, Elders, and Knowledge Keepers throughout generations.

Centuries of violent eliminatory policies and laws, however, have impacted Indigenous laws, systems, and processes.[12] As a result, Indigenous communities are actively working to revitalize their Indigenous legal systems,[13] including in the context of health care, family violence,[14] criminal law,[15] and community-centred policing. The TRC emphasized the importance of recovering and revitalizing Indigenous laws as central to forwarding reconciliation.[16] During its mandate, the TRC and the Indigenous Bar Association worked with the Indigenous Law Research Unit at the University of Victoria on revitalizing Indigenous laws through the Accessing Justice and Reconciliation Project.[17] The Indigenous Law Research Unit at the University of Victoria has continued its work and, along with several other law schools across Canada, provides an important model of revitalization.[18] In 2019, the federal government also started to provide funding to Indigenous law revitalization initiatives and Indigenous law institutes in response to the TRC's Call to Action 50.[19]

TRC Call to Action 50

In keeping with the *UN Declaration*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

Indigenous communities have maintained their Indigenous laws and legal systems through many complex challenges, including colonialism and the numerous attempts—first by colonial governments and then by the Canadian State—to undermine Indigenous sovereignty and disrupt Indigenous legal systems. As a result of Indigenous Peoples' resistance, determination, and revitalization efforts, Indigenous laws are being applied across Canada to govern the search and recovery of the missing and disappeared children and unmarked burials.

What Are Indigenous Laws?

> In discussing why unmarked graves and missing children are important, we need to recall that we have traditional laws that tell us what to do. And they say the most difficult is when a child's Spirit leaves, [and] is called home.
>
> — Dr. Chief Wilton Littlechild, Survivor[20]

Indigenous laws refer to the legal systems, principles, and processes of Original Peoples within Canada, including First Nations, Inuit, and Métis. Specifically, Indigenous laws refers to, "the reasoned principles and processes that Indigenous societies used and still use to govern themselves ... [that] predate the common and civil law systems and continue to evolve, adapt and apply to circumstances today."[21] Indigenous laws are intelligible, accessible, applicable, and legitimate.[22] Cree legal scholar Val Napoleon explains that, "Indigenous law is a crucial resource for Indigenous peoples. It is integrally connected with how we imagine and manage ourselves both collectively and individually. In other words, law and all it entails is a fundamental aspect of being collectively and individually self-determining as peoples."[23] As sovereign Nations, Indigenous Peoples continue to create, implement, and abide by distinctive Indigenous laws, protocols, and processes, which have been developed and adapted since time immemorial by Indigenous Nations to reflect their own cultural values and suit their own needs.

Inuit Qaujimajatuqangit

Inuit Qaujimajatuqangit principles reflect Inuit Traditional Knowledge and societal values[24] and guide Inuit society. These include:

ᐃᓅᖃᑎᒌᑦᓯᐊᕐᓂᖅ (Inuuqatigiitsiarniq): Respecting others, relationships, and caring for people;

ᑐᙵᓇᕐᓂᖅ (Tunnganarniq): Fostering good spirit by being open, welcoming, and inclusive;

ᐱᔾᑦᓯᕐᓂᖅ (Pijitsirniq): Serving and providing for family and/or community;

ᐋᔩᖃᑎᒌᓐᓂᖅ (Aajiiqatigiinniq): Decision making through discussion and consensus;

ᐱᓕᒻᒪᒃᓴᕐᓂᖅ (Pilimmaksarniq): Development of skills through observation, mentoring, practice, and effort;

ᐃᑲᔪᖅᑎᒌᓐᓂᖅ (Ikajuqtigiinniq): Working together for a common cause;

ᖃᓄᖅᑑᕐᓂᖅ (Qanuqtuurniq): Being innovative and resourceful; and

ᐊᕙᑎᑦᑎᓐᓂᒃ ᑲᒪᑦᓯᐊᕐᓂᖅ (Avatittinnik Kamatsiarniq): Respect and care for the land, animals, and the environment.

There is a significant diversity among Indigenous Nations across Canada.[25] There is not one set of Indigenous laws that applies to all Indigenous Nations or circumstances: Anishinaabe, Mi'kmaq, Inuit, and Stó:lō laws, for example, are not the same. Every Indigenous Nation has its own laws, legal systems, protocols, and processes[26] that reflect their unique relationships with Creator, Creation, each other, and their territories. Indigenous laws include responsibilities to the land, other entities, and living beings.[27] These legal systems include individual and communal rights as well as responsibilities under Indigenous laws, which bind human and other-than-human communities in reciprocal relationships across past, present, and future generations.

Although there is a danger in generalizing across the rich and diverse Indigenous cultures within Canada, there are some characteristics of Indigenous laws that are common across many Indigenous Nations. The laws of diverse Indigenous Nations help people make decisions, work through conflicts, resolve problems, and respond to social needs. As Napoleon

clarifies, Indigenous laws apply to various areas, including, "building citizenship, responsibility and governance, lands and resources, and external political relations with other Indigenous peoples and the state."[28] Indigenous laws are upheld by, and accessible and accountable to, all community members within a particular Indigenous Nation.

Indigenous laws are performative and dynamic;[29] they are lived in the everyday.[30] Anishinaabe legal scholar John Borrows explains that they are living laws,[31] "Indigenous laws are part of living, contemporary systems.... Law, like culture, is not frozen. Legal traditions are permeable and subject to cross-cutting influences.... Legal traditions must continually be reinterpreted and reapplied in order to remain relevant amidst changing conditions."[32] Borrows expanded on this concept at the Toronto National Gathering:

> We have our own standards, principles, criteria, authority, measures, signposts, and guideposts. We have our own indicia for measuring how to regulate our affairs and how to resolve our disputes.... These things have been passed down to us and can be revitalized in ways that are contemporary, living and relevant.... Our challenge is to see our languages, our songs, our stories, our relationship to the natural world and reason in relationship to them and feel in relationship to them so that we can ... make them live. We make them live by giving them application.[33]

Indigenous laws are continuously evolving and adapting to respond to the needs of contemporary Indigenous societies.[34] Val Napoleon notes that, "Indigenous law contains thinking processes and intellectual resources, and it changes to live in each generation."[35] Similarly, Kwetiio, a member of the Kanien'kehá:ka Kahnistensera, explained that the Kaianere'kó:wa (Great Law or Great Good Path), "evolves with time ... it evolves with different circumstances ... no one can take that away from you ... all comes from Creation."[36] Finally, Indigenous Peoples uphold accountability, transparency, and fairness through their own institutions and processes, and they apply laws through interpretation, deliberation, and debate.[37]

Indigenous societies apply specific legal principles and processes to respond to varying situations.[38] Of relevance to the missing and disappeared children and unmarked burials, Indigenous laws include funerary and burial protocols and practices as well as legal rights and obligations relating to caring for the children's Spirits and to the lands where their burials are located. Many of these are referred to in more detail below.

Are Indigenous Laws the Same as Aboriginal Law?

> All Canadians need to understand the difference between Indigenous law and Aboriginal law.
>
> — TRC, *Canada's Residential Schools: Reconciliation*[39]

Indigenous laws—the legal systems of Indigenous Nations—are not the same as "Aboriginal law." Aboriginal law describes the area of jurisprudence developed by the Supreme Court of Canada that applies to "aboriginal peoples" under section 35 of the *Constitution Acts, 1982*, which includes First Nations, Inuit, and Métis Peoples within Canada.[40] Aboriginal law is therefore an area of Canadian constitutional law that has developed since 1982 and, up until recently, been determined exclusively by non-Indigenous judges.[41]

What Are the Sources of Indigenous Laws?

> I would like to share some of nis núyem, which is my story or my truth. And núyem in Haisla translates to story. It includes our history shared in our old stories as well as the memories held by our Elders ... it is through our stories that we learn our history, our identity, our protocols and beliefs, and the natural laws of the land in each of our respective territories.
>
> — Megan Metz, Haisla Youth[42]

Indigenous laws, along with related legal systems, processes, and procedures, are, "embedded in non-state social, political, economic and spiritual institutions."[43] They are therefore transmitted through people's relationships with each other, the land, and other beings, all of creation and with Creator. Laws in Indigenous societies are recorded and passed down from one generation to the next in various ways, including through teachings, songs, dances, ceremonies, totems, oral histories, and languages.[44] John Borrows argues that understanding the foundations of Indigenous legal systems, "can lead to a better appreciation of their contemporary potential, including how they might be recognized, interpreted, enforced and implemented."[45] He highlights the complexity, diversity, and uniqueness of Indigenous legal systems and identifies five sources of Indigenous law:

1. Sacred laws, "stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time";

2. Natural laws are based on, "observations of the physical world";
3. Deliberative laws are, "formed through processes of persuasion, deliberation, council, and discussion";[46]
4. Positivistic laws consist of the, "legal rules, regulations and teachings that people follow based solely on their perception of the authority of the person or persons proclaiming them"; and
5. Customary laws are, "practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them."[47]

As is demonstrated throughout this chapter, Indigenous laws are contained and reflected within Indigenous languages.[48] There are, "over 11 different [Indigenous] language families, which include 50 different languages" in Canada.[49] Even within the same language group, these languages may contain regional differences that reflect the unique relationships of the Indigenous Peoples within that region with their territories.[50] Each Indigenous Nation's language shapes its understanding of the world and reflects its laws.[51] Hereditary Chief and Mi'kmaq scholar Stephen J. Augustine notes that, "the collective knowledge and memory accumulated over the long period of time is reflected in [Indigenous Peoples'] language and philosophy of life."[52] Ensuring that these languages are passed down from one generation to the next, therefore, is a central component of revitalizing and applying Indigenous laws.

Scott Fox, Ga Na (Blackfoot) Youth, described the Indian Residential School System's deliberate attack on Indigenous languages and its intergenerational impacts, "My grandfather didn't teach his children [their] language out of love, because every time he spoke his language he was beaten. He prevented his kids from [having] that same experience, so he withheld that."[53] Many Survivors of Indian Residential Schools chose not to teach their children any Indigenous languages to protect them from experiencing the harm that they had endured at these institutions. Many fluent Indigenous language speakers are aging, and the number of Indigenous language speakers in some communities is very low. Concerted and deliberate efforts need to be put in place to ensure that these languages survive.[54] The TRC noted that, "the revitalization of Indigenous law and governance systems depends on the revitalization of Indigenous languages."[55] Because of this, ensuring the health of Indigenous languages is fundamental to revitalizing Indigenous laws.

Who Can Hold and Share Indigenous Legal Knowledge?

> Njinee—you have to be very careful ... if you're with Elders they will guide you.
>
> — Dr. Marcella Fontaine, Sagkeeng First Nation[56]

Within Indigenous societies, certain people are entrusted with learning, holding, and sharing Indigenous legal knowledge. These are most often Elders and Knowledge Keepers who have been trained for years and have been recognized within their Indigenous community as having earned the authority to be referred to with these titles.[57] The TRC emphasized that, "Indigenous law is learned through a lifetime of work."[58] Elders and Knowledge Keepers may be trained in specific types of knowledge,[59] such as traditional medicines, spiritual and emotional support, midwifery, songs, and knowledge of Treaty relationships and promises, including Wampum.

Indigenous laws exist and are conveyed orally within relationships and are transmitted from one generation to the next by those with the legal knowledge and authority to share them.[60] Indigenous men, women, and 2SLGBTQQIA people may be the holders of certain types of Indigenous legal knowledge.[61] Indigenous legal knowledge may also be held collectively; in many instances, the different knowledges of many Elders and Knowledge Keepers, when combined, can provide guidance for making difficult decisions or to resolve disputes.[62] Certain types of Indigenous legal knowledge can only be shared at certain times of the year, in certain locations, and with certain people[63] and/or during particular ceremonies.[64] There are also protocols about whether someone who has received an Indigenous legal teaching may share that knowledge with others.[65]

Certain Elders and Knowledge Keepers are entrusted with the knowledge to help the Spirits of those who have died pass from the human world to the Spirit World to rest with their ancestors. In the context of the missing and disappeared children and unmarked burials, these Elders and Knowledge Keepers can provide guidance and support to families and communities who have been looking for their loved ones, both while they may still be missing and after they are found. Cree Elder Fred Campion emphasized the importance of seeking those who hold this knowledge to help with search and recovery work:

> People in the communities [must] reach out to those that have been given the responsibility of carrying some of the ceremonies.... Each community can do a feast ... family members can bring protocol ... call out [the children's] names and have them feasted and taken home.... In all our Nations we have been given ... responsibilities and gifts to do that.[66]

Elders and Knowledge Keepers across Canada are being called on for guidance to uphold the obligations of the living to the Spirits and bodies of the missing and disappeared children. In doing this, they are both applying existing Indigenous legal principles and protocols and adapting them as needed.

Time-Tested Methods of Transmitting Oral Histories under Indigenous Laws

All legal systems have ways of assessing the reliability of testimony and other evidence that informs decision-making. Under Indigenous legal systems, Indigenous Peoples have developed diverse practices and protocols to assess the reliability and validity of the laws and principles being applied and interpreted. These practices include gathering, remembering, expressing, and respectfully testing truths, both one's own and those that a person has been entrusted to hold. Orality—listening, learning, and sharing knowledge orally—is at the heart of how Indigenous societies perform these functions.[67] In Indigenous societies, orality has sustained and transmitted knowledge through innumerable generations.

Indigenous communities have created a vast collection of oral histories—the knowledge and stories passed down from one generation to the next. Oral histories that contain laws and legal principles that have supported Indigenous Peoples' aspirations[68] to live in sustainable and balanced relationships with all beings and entities within their ancestral territories. Oral histories, which live in their telling, are essential for the continuity of Indigenous cultures, political institutions, and laws.[69] As stated by the late Mohawk legal scholar Patricia Monture-Angus, oral history is, "an entire process of accurately recording history."[70] She emphasized that, "what you can hold in your head cannot be taken from you and destroyed in the same way a book can. The institution of oral history ... ensures [the] passing down of history from generation to generation."[71]

There are robust processes under Indigenous laws to validate and strengthen the reliability of oral histories. These processes are varied and include:

- Internal cross-referencing: the confirmation and accuracy of oral history when truths are repeated by different community members or members of a group;[72]
- Oral footnoting:[73] citing the sources from which the knowledge has been gathered;[74] and
- Peer review: having those listening confirm and correct the history being told.[75]

These processes are important to ensure oral histories continue to convey key principles of Indigenous laws. Because Indigenous Nations record and transmit their histories orally, oral histories are in some cases the only record of particular events, laws, principles, and decisions.

Another type of oral history exists—one based on the lived experiences of Survivors of Indian Residential Schools. In response to Elder Dave Courchene's question, "When you talk about truth, whose truth are you talking about?" the TRC responded:

> By truth we mean not only the truth revealed in government and church residential school documents but also the truth of lived experiences as told to us by Survivors and others in their statements to this Commission. Together, these public testimonies constitute a new oral history record, one based on Indigenous legal traditions and the practice of witnessing.[76]

Survivor testimonies about the missing and disappeared children and unmarked burials are contributing to this oral history record. In some instances, Survivor testimonies may be the only source of information about the circumstances surrounding the deaths and burials of the missing and disappeared children and the locations of the unmarked burials.[77] As a result, the gathering of oral histories and the sharing of the circumstances of these children's lives and deaths are crucial to both identifying the missing and disappeared children and locating their burials.

KEY CONSIDERATIONS FOR INDIGENOUS LAWS IN SEARCH AND RECOVERY WORK

Indigenous laws are being applied and adapted by Survivors, Indigenous families, and communities to govern their search and recovery of the missing and disappeared children and unmarked burials. In some instances, this requires the application of existing Indigenous laws, such as upholding obligations to protect and respect the burials of one's ancestors. In other cases, it requires thinking through existing legal principles and adapting them to apply to novel circumstances. One example of a novel circumstance is deciding how to proceed in caring for and identifying the children from many different Nations buried within territories that are not their ancestral lands. Indigenous protocols to care for these children's Spirits and burials, and to make decisions regarding potential exhumation and DNA identification may differ from Nation to Nation, pursuant to their own Indigenous laws and legal systems. These protocols and decisions, therefore, must be adapted to account for this situation.

The search and recovery of the missing and disappeared children and unmarked burials raises many legal questions that must be determined in accordance with Indigenous laws. These include the following:

- What are the Spirits of the missing and disappeared children trying to communicate to those still living in the present?
- Who are the children? Where are they located? How do we respond if we know one of these things but not the other? How do we respond if we know neither a child's identity nor their location?
- Where is the information to determine the missing and disappeared children's identities and what happened to them in their lives? How can those leading search and recovery efforts access and take control of this information? How and where can this information be kept safe?
- Who is responsible for meeting the needs of the children in these various circumstances? What are the principles, processes, and standards of care that apply?
- What obligations exist to care for the bodies and the Spirits of the missing and disappeared children? How do we ensure that both their bodies and Spirits are treated with honour, dignity, and respect?
- What considerations apply in deciding which search methods to use? What considerations apply in deciding whether to exhume or repatriate a child's body? What needs to be put in place to take care of any DNA that is collected?
- What are the obligations to the sites or lands where children's burials are located? Are there ongoing obligations to the sites or lands where children's burials were once located but now have been removed and reburied elsewhere? Who is responsible for meeting these obligations? How do we ensure the continuity of care of the sites?
- What are the needs and entitlements of a child's living relations and future generations?
- How does a Nation respond to the needs of their children who are buried on other Nations' territories or the needs of children from other Nations whose bodies are buried on their territory?

- How will conflicts and different perspectives within communities, or between individuals, families, or communities whose relations may be buried at the same site be addressed?
- Are searchers, Survivors, family members, Knowledge Keepers, Elders, and Ceremony leaders sufficiently supported?
- Who needs to be involved in making specific decisions? How will impacted families and communities be kept updated on the progress of search and recovery work?
- Which decisions or information need to be made public? When and how should this be done?
- How can Indigenous Peoples navigate Canadian laws that interfere with the Indigenous legal obligations of Survivors, Indigenous families, and communities to the children?
- What is the history and current legal status of the sites or lands where the children are located? What conflicts around ownership, access, and control are Indigenous communities encountering? Are there existing legal mechanisms under Canadian law that can be used to access and protect the sites on an interim basis and in the long term?
- What are the potential wrongs or crimes that need to be investigated? Which agencies or organizations are best able to investigate? What guidance or leadership do they need, and how can it be provided?
- What is required to achieve accountability and justice for the missing and disappeared children? How should individual perpetrators, deceased perpetrators, and institutions be held accountable? Which laws and processes apply, and which institutions should be involved?
- What are the Indigenous and State legal considerations around compensation or reparations?

Survivors, Indigenous families, and communities are working through these difficult questions as they continue to search for the missing and disappeared children and unmarked burials.

WHAT INDIGENOUS LAWS AND LEGAL PRINCIPLES ARE BEING APPLIED TO SEARCH AND RECOVERY WORK?

Indigenous communities have implemented policies and processes that are based on their distinct Indigenous legal systems to guide search and recovery work. This includes applying Indigenous laws to all aspects, including:

- Gathering Survivors' truths and testimonies in respectful, culturally relevant and trauma-informed ways;
- Designing processes to find and search records and to care for the data and information collected;
- Planning and implementing site searches;
- Sharing knowledge within and amongst affected communities; and
- Hosting and participating in commemoration and memorialization activities and ceremonies.

As emphasized above, Indigenous laws and legal principles vary across Indigenous Nations, and each Nation will continue to determine the ways in which Indigenous laws govern their search and recovery work. However, a review of knowledge shared by those searching for the missing and disappeared children and unmarked burials reveals the following Indigenous legal principles that are being applied. This is a non-exhaustive list that will continue to evolve as search and recovery work continues.

1. Search and Recovery Work Is Sacred

> This is a Sacred, spiritual process. It needs to be done right.
>
> — Elder Eleanor Skead[78]

As Survivors, Elders, and Knowledge Keepers have consistently made clear, searching for the missing and disappeared children and unmarked burials is a Sacred responsibility. The Sacredness of this responsibility is connected to the Sacredness of life and death. Survivor Doug George-Kanentiio explains:

> [W]hen we are given the three Sacred breaths of life at the beginning of our time on this earth, we have duties and obligations, and at

> conclusion of our time on earth, we are instructed that physical body, once the three Sacred breaths have left, has to return, in our mourning ceremony to the embrace of Mother Earth. This physical transition has to take place in accordance with the traditional rituals and natural laws.[79]

It is also connected to the Sacred source of Indigenous laws. Scott Fox explains:

> The source of traditional law is Sacred, meaning it was handed down to us from Creator, what we call our inherent rights. We inherited those from Creator, and there are certain elements to our Sacred law—where I come from we have what we call "asan," a red paint. This is my ceremonial shirt and there is red paint on here. Our songs, which is our Sacred way of singing. Our ceremonies, among them is the sweat lodge, the all night smoke, our circle camp—this is the substance of our Sacred law. These are the elements we can touch, that Creator gifted us.[80]

Many Survivors, Elders, and Knowledge Keepers have spoken of the Spirit. Survivor Charlene Belleau, from Esk'etemc First Nation, explained that the Spirits of the missing and disappeared children are accompanying those searching for them, "Our missing children are our ancestors too, they are with us every step of the way as we search and bring their Spirits home."[81] Similarly, Sheryl Rivers said, "Our ancestors are here guiding us.... I felt the presence of all these young children that finally have a voice."[82] The Spirits of the missing and disappeared children have been invited to witness this Sacred work through ceremonies, such as the Empty Chair ceremonies, and Sacred Fires that are burning in their honour, both at National Gatherings and at the sites where searches and investigations are ongoing. The Spirits of the missing and disappeared children are also being felt at the sites of the former Indian Residential Schools and other institutions.[83]

The Survivors, Indigenous families, and communities leading search and recovery efforts are also Sacred. This was reaffirmed by Manitoba Keewatinowi Okimakanak Grand Chief Garrison Settee, of the Pimicikamak Cree Nation, in his closing at the National Gathering in Montreal, "You are Sacred people—you are resilient, courageous.... You are like the Eagles moving majestically ... rising above the atrocities, pains and abuses perpetrated against you. You are ... warriors."[84]

2. Indigenous Ceremonies Are Integral to the Process

> We had a distinct way to honour the people who left us. There were ceremonies, there were songs. And for our children in unmarked burials, they have yet to receive this. There is a place in our heart that aches because we have not yet sent them off in our Sacred way.
>
> **— Scott Fox, Ga Na (Blackfoot) Youth**[85]

Ceremonies are a central part of Indigenous legal systems and are conducted by Elders or Knowledge Keepers before, during, and after the sharing of Indigenous teachings, oral histories, and legal knowledge. The TRC noted:

> Sacred ceremony has always been at the heart of Indigenous cultures, law, and political life ... they connect people, preparing them to listen respectfully to each other in a difficult dialogue. Ceremonies are an affirmation of human dignity; they feed our spirits and comfort us even as they call on us to reimagine or envision finding common ground. Ceremonies validate and legitimize Treaties, family and kinship lines, and connections to the land. Ceremonies are also acts of memory sharing, mourning, healing, and renewal; they express the collective memory of families, communities, and nations.[86]

Indigenous ceremonies help people to engage with one another and all other beings with kindness and respect. They also provide teachings on how to care for the lands and waters in a way that respects the needs of past, present, and future generations.

Indigenous ceremonies are being incorporated within search and recovery efforts. One participant at the Edmonton National Gathering noted, "We need the medicines here before us as we discuss children, death, and our loved ones who departed. We have special songs and ceremony. We have special smudge that is used and we need to make time for a holistic space so we acknowledge the Spirit in this work."[87] Ceremonies are taking place in public and in private and include protocols for community discussions, lighting Sacred Fires, preparing the sites and people for search efforts, opening and closing both internal community and public Gatherings where announcements of findings are made, and to help the Spirits of the missing and disappeared children journey to rest with their ancestors.

Councillor Bernadine Harper, of Onion Lake Cree Nation, emphasized the importance of ceremonies to help people move from one stage to the next in their life journey:

> When babies are born, the welcoming ceremony is sung with whoever is in the room either the dad, or grandmother; they sing a song. The traditional name can be given at that time as well. When a child becomes a teenager, then we need to find the Elders in the community to share rights of passage. The women go with Elder women and they go into the bush for four days. The male goes with Elder males and they go hunting for four days. It's the oral teachings that are passed down. When we become adults there are also rights of passage. The ceremonies are very important to carry us over to the next phase.[88]

In the context of the missing and disappeared children, many of the people involved in search and recovery work spoke about the need for ceremonies to take place for the children. Ga Na (Blackfoot) Elder and Survivor Keith Chiefmoon explained:

> When we were notified that we had [unmarked burials] on our reserve, we acknowledged that we had to do a ceremony to acknowledge those who had passed on ... in our tradition we tell them to go on their journey and we call them by their name ... we don't know how those children lost their lives, so sometimes we think that they're still here. So that's why we have the ceremony that sends them on their journey.[89]

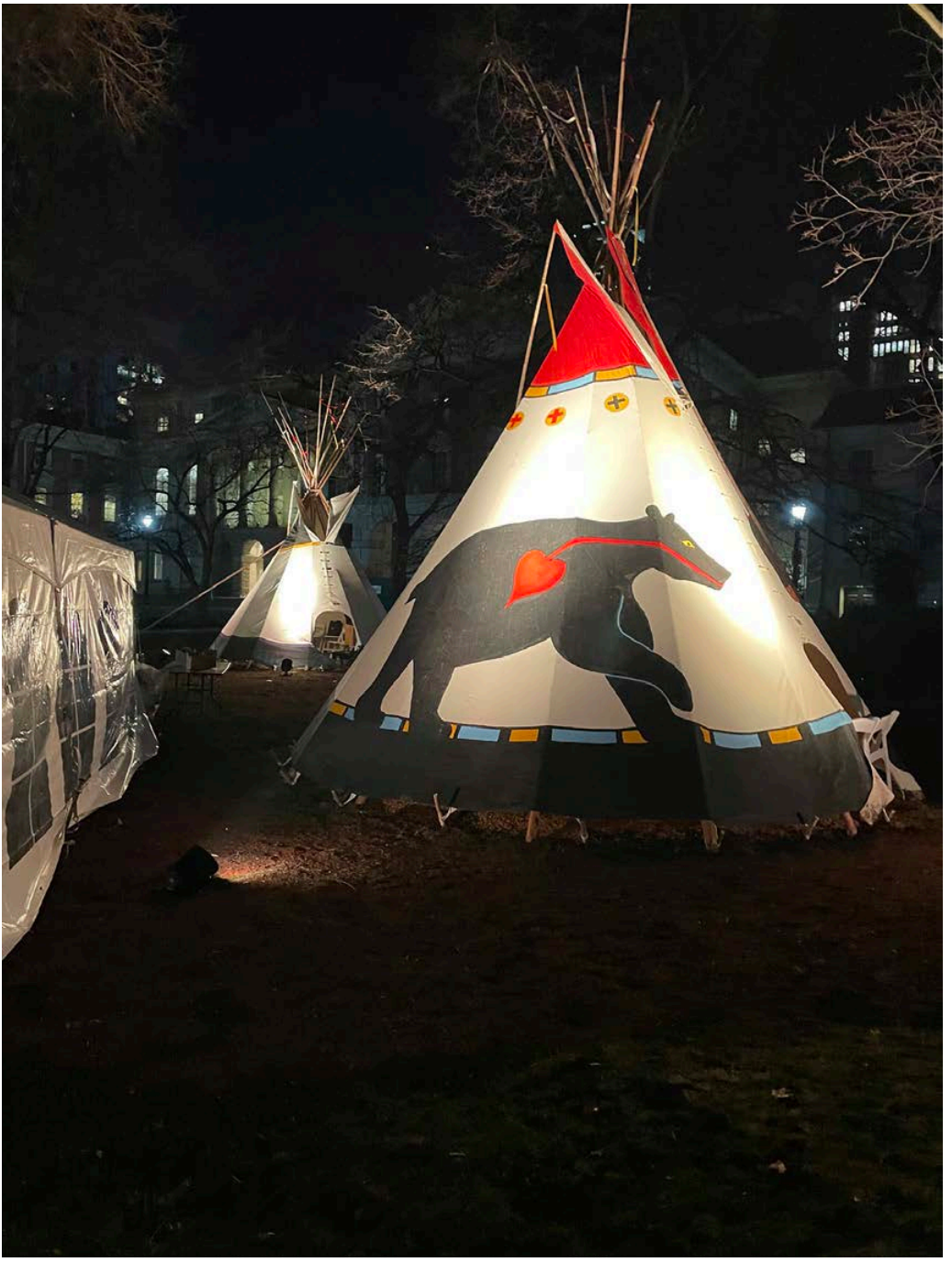
Belleau spoke of the ceremony that was done to bring the children's Spirits home from St. Joseph's Mission Indian Residential School:

> All of our Nations came from their respective communities from Alkali Lake, from Anaham, from Redstone, from Quesnell and all came together at St Joseph's Mission on horseback to take our children's Spirit back home. [It was a] very powerful ceremony. We spent three or four days together camping, listening, and supporting each other. We had a Grand Entry of all of the horseback riders. Our Chiefs were a part of this Grand Entry of horses ... to take our children home. [There was also] a riderless horse there. The riderless horse signified our children that never came home. We came to take them home as well.[90]

At the National Gathering in Edmonton, Dr. Chief Wilton Littlechild spoke of the ceremonies done in accordance with Cree laws for the children recovered in unmarked graves near Red Deer:

> When 17 children were found [close to] Red Deer along the river by a farmer, most of them were from my community [the Ermineskin Cree Nation]. So we did ceremony for four years to get permission to bring them home.... [The children were buried in] boxes and ... on the side of the box [was] "9-year-old girl" or "12-year-old boy." There was a particular one, it said "6-year-old boy." I was taken [to Indian Residential School] when I was six so I carried that [box] home—a little boy. I don't know who the boy is ... what was important was [that] their Spirits came home so we could have our four-night wake, so that we could sing our 16 traveling songs each night. And then we had a proper burial for them and a feast. And of course, we had a feast for four years after. We just finished those.[91]

Indigenous ceremonies are also being conducted when searching sites. During the search of one of the former Blue Quills Indian Residential School sites—where the University nuhelot'įne thaiyots'į nistameyimâkanak Blue Quills is now located, Sherri Chisan said, "Every day the search team began with a Pipe Ceremony in the morning and at the end of every day, the team came into the Tipi. The team also brought their equipment in for a special blessing ceremony to help them let go of whatever they had encountered on those grounds."[92] A participant at the Toronto National Gathering emphasized that the use of technology and Indigenous ceremonies must occur together, "I'm glad that GPR [ground-penetrating radar] will be part of the search [process] but I also want ceremonies."[93] The inclusion of Indigenous ceremonies at every stage of the search and recovery process is necessary to uphold Indigenous laws and is deeply connected to the Sacred nature of finding the missing and disappeared children and unmarked burials.



Teaching Tipi on the lawn in front of the Ontario Court of Appeal at Osgoode Hall during the National Gathering in Toronto, where Indigenous laws were discussed, March 28, 2023 (Office of the Independent Special Interlocutor).

3. Truth-Finding, Truth-Telling, and Witnessing

> We acknowledge the support that we received of many who stood with us to ensure the importance of truth but also the steps towards justice, and that's for the families and for the children that have been impacted. We know that the confirmation of the missing has impacted people locally, regionally, nationally, but we also know that the light is on the truth and that the pursuit of justice and peace and healing is that path moving forward.
>
> — Kúkpi7 Rosanne Casimir, Tk'emlúps te Secwépemc[94]

Truth-finding, truth-telling, and witnessing are key Indigenous legal principles that Survivors, Indigenous families, and communities are applying while searching for the missing and disappeared children and unmarked burials.

The Importance of Truth-Finding

> If we're going to talk about truth, we have to talk about those [children] who never had an opportunity to be buried.
>
> — Participant[95]

Finding the truth about what happened to the missing and disappeared children is an obligation under Indigenous laws. At many National Gatherings, Survivors, Indigenous families, leaders, and community members stressed that truth comes before reconciliation and that truth is inherently linked to justice. In relation to the search and recovery of the missing and disappeared children at the former site of the Alberni Indian Residential School, the Survivors and Elders have made clear that "there is no reconciliation without truth and there can be no change without justice."[96] The full truth of what happened to the missing and disappeared children, who they are, where they are buried, and why there are so many unmarked burials must be revealed. Megan Metz, Haisla Youth, emphasized:

> It's time for the light to be shone on this truth in its entirety.... It's time for Canada as a whole to see this uncomfortable truth for what it is. Our people have been existing in this state of discomfort since the arrival of the settler nations. It's time for them to feel it, see it, sit with those unsettling feelings and learn from it, so it does not happen again.[97]

Revealing the full truth in all its complexity requires tracing the movement of each child, using records and Survivor testimonies, from when a child was first taken to an Indian Residential School through to any other institution or location they were sent.[98] Uncovering as much information as possible about each child's life, death, and burial is necessary. Attending to the silences, gaps, and omissions in that information is also important; these can communicate what is missing and which children are not mentioned. Only after as much knowledge, data, and information is gathered as is possible will the full truths about the missing and disappeared children and unmarked burials be revealed.

Truth-Telling

> In Ojibwe thinking, to speak the truth is to actually speak from the heart.
>
> — Elder Jim Dumont[99]

The importance of truth-telling in the context of the harms inflicted on Indigenous children by the State and churches, including the truths about the missing and disappeared children and unmarked burials, cannot be underestimated.[100] It is vitally important to:

- Restore the dignity and identity to those who have suffered grievous harms;[101]
- Document the truths of those who have suffered oppression and correct misrepresentations of the past;[102]
- Prevent governments from publicly claiming the wrongdoing never occurred;[103]
- Raise societal awareness of the legacy of injustice and create conditions favourable to healing for Survivors;[104] and
- Promote remembrance of tragedies and reduce the likelihood of recurrence.[105]

Truth-telling creates a counter-history of Indigenous resistance[106] and constitutes an act of resistance in itself. Survivors' truths about their experiences are important narratives that attest to their lived experiences of resistance, resilience, and resurgence.[107] Survivor truth-telling ensures that, "the scars remain visible"[108] and challenges and counters denialism.

Honouring Survivors' Truths

> All the Survivors [need] to be honoured or remembered in some way, because we need to teach what happened.
>
> — Participant[109]

Survivors must be honoured and acknowledged for raising public awareness about the truths of the missing and disappeared children and unmarked burials.[110] Many Survivors were not believed as children when they spoke of the horrors occurring in the institutions. Others have said that they feared what would happen to them if they did speak up. Today, many Survivors have overcome this fear and are sharing truths. They are stepping back into their own trauma and walking the grounds of former Indian Residential Schools and associated sites to help find where the missing and disappeared children may be buried. Many have pointed out the places where they remember mounds of fresh earth and areas of the grounds where they or others were forced to dig graves for other children.[111] It is due to their ongoing resistance, resilience, and advocacy, over decades, that efforts are being made to find all the missing and disappeared children.

Survivors are the living witnesses. Through their testimonies about what happened, they are speaking for the missing and disappeared children by revealing the truths of their experiences. The valuing of lived experiences is an important principle across Indigenous legal systems.[112] Survivors are telling the truths of their lived experiences and standing up in accordance with Indigenous legal principles, processes, and laws to uphold their responsibility to bring dignity, honour, and respect to the missing and disappeared children.

Testimonies of the living witnesses carry the truths of the missing and disappeared children through history to the present moment. At the National Gatherings, it was made clear that there is urgency in gathering these testimonies. David Aglukark, who manages search efforts to find missing and disappeared Inuit children for Nunavut Tunngavik Inc., said, "Our Elders and Survivors are aging, and some have already passed. It's important for us to start going to them and gathering information."[113] Since Survivors' lived experiences are key to identifying the children and locating the unmarked burials, those leading search and recovery work have put in place truth-gathering processes that are respectful and accord with Indigenous legal principles.

Williams Lake First Nation's Application of Secwépemc Legal Principles to Support Survivors' Truth-Telling

Williams Lake First Nation has developed a trauma-informed process governed by Secwépemc sovereignty and legal principles to gather Survivors' truths and testimonies to support search and recovery work at the St. Joseph's Mission Indian Residential School.[114] The St. Joseph's Mission was operated by the Catholic Oblates as an Indian Residential School between 1886 and 1981 and was funded by the federal government.

The Williams Lake First Nation's Interview Process provides an opportunity for Survivors to share their truths and testimonies, and it also has processes for non-Indigenous people, such as former staff of the institution or ranch workers to participate in an interview process. The Williams Lake First Nation prioritizes interviewees whose age is more advanced or with deteriorating health, arranges Indigenous language translation as needed, and ensures health supports are available before, during, and after the interview takes place.

Nancy Sandy, part of a research team actively working on the St. Joseph's Indian Residential School/Onward Ranch Investigation into the missing and disappeared children, explained how the search and recovery process is based on the inherent jurisdiction of Williams Lake First Nations. She outlined the following Secwépemc Legal Principles, which are guiding the interview process, and acknowledge the interviewees' truths:

- Tšílem: The way things are or were in your memory;
- Cwecwelpúsem: Remembering the actions around you;
- Lleq̓méntes ell ta7ulécw: Understanding that there were places you could not go to or boundaries you could not cross;
- Lexeyém: Telling your story as you remember it;
- K̓elélnem: Recognizing that you listened to what occurred, and you are acting upon what you have seen and heard;
- Xyemstwecw: Recognizing the respect one must hold for one another;

- Xqwenqwnélltsʔe: Recognizing that sharing is to be kind-hearted and generous; and
- Q̓ix te Melámen: Recognizing that the medicine used in telling your story is powerful.[115]

At many National Gatherings, Survivors, intergenerational Survivors, families, and community members discussed how many of the living witnesses are not ready to share their truths. Providing these testimonies places a burden on them to recall their painful and traumatic experiences and to overcome the fear instilled in them. George Pachano, Survivor of St. Phillip's Indian Residential School in Fort George, who is leading search and recovery work at the two Indian Residential Schools that operated in Chisasibi, Quebec, shared that many Survivors were reluctant to speak about their experiences. He said that, "there really have been no discussions ... about the abuses that took place, especially the missing children and unmarked graves anywhere. It was only maybe four years ago until anything really came out." He emphasized the need for pre-work to be done to support Survivors to overcome their reluctance to speak about their experiences and to share information about the missing and disappeared children and unmarked burials. In his work, he has created different opportunities and ways for Survivors to provide their testimonies—both in person and virtual. He recounted, "We invited all the Survivors and anybody else who wanted to come. But these sessions had very low attendance. Like I said, it's still a problem for us to talk about Residential Schools."

Some Survivors may be reluctant to speak about their experiences because they do not want to pass the heavy burden of these truths on to their loved ones.[116] As Megan Metz said:

> [M]y grandfather was always reluctant to share his truth with us. I think some stories are just so heavy. You don't wish to share the weight of them with your loved ones. Maybe he just wasn't ready. Before his time came to journey home to the other side, I wish I could have learned more about his experience. He wasn't ready to share during his time here and my heart breaks a little more each time I learn new pieces of his story from others in our community.
>
> I realize now, that maybe, this was his way of trying to protect me. He wanted me to only experience unconditional love, kindness, and joy. He was my number one supporter in all that I did and he played a major role in my upbringing.[117]

The understandable reluctance of some Survivors in sharing the truths of their experiences and knowledge about the missing and disappeared children may mean that, in some cases, new information may be revealed in the future at a time when they are ready to share.

Validating the lived experiences and truths of Survivors is therefore central. Regional Chief Gerald Antoine noted, "that genocidal process that we all endured implants a constant fear.... We doubt ourselves because of the things that happened to us. When we do share our truths ... our fear [leaves]."[118] Validating Survivors' lived experiences is a key principle guiding the search and recovery efforts being led by the Wauzhushk Onigum Nation of the former St. Mary's Indian Residential School site. The Kaatagoging Initiative emphasizes the importance of wisdom gained through experiences and has as one of its guiding principles, "Gego Gotachiken (Don't be afraid): Survivors felt the oppression of those institutions that took away their voice, their identity. We encourage Survivors to speak up." Caroline Ratt-Misponas, Survivor of the Prince Albert Indian Residential School, emphasized the need to validate Survivors because of their experiences at the institutions, "One of the things that people really need is to be validated. And when you are a Residential School Survivor, you were never validated as a person."[119] Survivor Keith Chiefmoon said, "Ii'ka'ki'maan. Don't give up. I want to acknowledge all Survivors that are here. The Canadian government has done everything to annihilate us.... They did what they did, but the thing is we are still here—we are still here to stay. They have trouble accepting that."

Survivors must be honoured for their courage in standing and speaking up for the missing and disappeared children. As living witnesses, they are the best source of knowledge about who the children are, what happened to them, and where they may be buried. Listening to Survivors, at their pace, acknowledging the burden they carry, and heeding their guidance regarding when, where, and how searches should be conducted are key ways in which those leading search and recovery efforts are honouring Survivors.

The Role of Witnesses as Carriers of History

> Biiziindun (listening): Listen carefully. Everyone will be heard and hear others.
>
> **— Kaatagoging Initiative Wauzhushk Onigum Nation**[120]

Diverse Indigenous legal orders recognize the role and importance of those who act as witnesses—in both formal and informal contexts—to significant knowledge or events. As carriers of history, witnesses uphold the legal responsibility to listen, remember, care for, and

appropriately share or pass on information.[121] Ensuring that knowledge is shared appropriately is often a requirement under Indigenous laws and protocols, and, as such, Indigenous witnesses often start by indicating that they have sought guidance and permission from Elders, Knowledge Keepers, and relevant family members prior to sharing their knowledge.[122] Witnesses have the right, and the duty, to respond to critiques and to maintain the accuracy of what they have witnessed. Important events or knowledge will commonly call for multiple witnesses, who may each be asked to recount what they know or the truth as they remember it.[123] Witnessing practices within Indigenous legal orders can serve to promote the public accountability of decisions or determinations.[124]

Some intergenerational Survivors have been asked to carry the truths about the missing and disappeared children and unmarked burials by Survivors or family members. They may have been asked to continue the search for a missing loved one who was never returned home from the various institutions they were taken to by the State and churches.[125] This is also a form of witnessing. As intergenerational witnesses, they may be carrying key information that may help in the recovery of the missing and disappeared children and unmarked burials. Finally, administrators or those who maintained the buildings of the institutions may also be witnesses who hold and carry important information. They may have first-hand knowledge of what happened to the missing and disappeared children or the location of their burials. They may hold information that was told to them by someone else or that they learned from hidden, lost, or misplaced records held in boxes in church basements or family homes. These witnesses may be able to provide key pieces of information to help identify a child or locate an unmarked burial.

Indigenous Youth as Witnesses

In solidarity with Survivors, many Indigenous youth are taking up a witnessing role. Indigenous youth were invited to attend, present, and witness each National Gathering. These witnesses have identified themselves collectively as the "Young Warriors":

> There is a lot of power in sharing stories and sharing your truth.... I am grateful to be here to be learning from our Elders, Knowledge Keepers, and Survivors, it's important that we carry their stories forward for them.
>
> **— Megan Metz, Haisla Youth**[126]

We're still in this process of truth-telling … our communities are also still learning that truth, and it's not just Canada having to realize that. This is just one truth of many that will come to light in my lifetime. And I'm just glad that I'm here to witness and to hear all of you share, so that one day when I'm in your shoes, I can continue to advocate for our people [and] I can pass those stories on to the next generation.

— Taylor Behn-Tsakoza, Dene Youth[127]

[T]he unique position of Indigenous youth … can best be described as Standing at the Crossroad. You see on the one hand we as Indigenous youth are seeing our communities come together to share our stories—to pass on generations of knowledge, stories, and of ceremonies. On the other, however, we see the Elders and Survivors of residential schools reliving the trauma that comes with every announcement of more unmarked graves being found. It is in this crossroad that we as Indigenous youth see, hear, and honour the truth of what has happened. It is where we stand making the commitment to ensure that the history and legacy of residential schools is not forgotten. It is also where we stand in ensuring that it never happens again.

— Benjamin Kucher, Métis Youth[128]

After the youth panel [at the National Gathering], I spent time connecting with Elders and community members. Here, an Elder came up to me and she said, "When they took me away to that school, you were the girl I dreamed of becoming." This profound moment is when I realized what it means to be the product of what our ancestors prayed for. It is something I have not and will never forget. It is profound to be amongst the youth advisory circle, to sit alongside our Survivors and Elders as we do this work and to witness the reciprocity. Our Elders witness what our ancestors prayed for, who our Elders dreamed of becoming. The youth hear the stories, receive the blessings and carry our future forward into the light.

— Tracie Leost/Golden Eagle Woman, Red River Métis Youth[129]

> Attending the Gathering in Toronto was an experience I will carry with me for the rest of my life; I don't think I really could grasp the magnitude of what to expect, learn, or hear when I decided to accept the invitation to speak at the Gathering. Hearing Survivors share their experiences sometimes for the first time in their life in front of their fellow peers was a kind of strength I have yet to be able to compare to anything else I've ever witnessed. Coming home I really didn't know how to share my experience because I didn't feel as though words could do [it] justice; … this work is something that must be experienced, these realities, stories and teachings are something I feel is vital for more of our youth to witness and be a part of. To me, the work being done … is a way of promising the Elders, Survivors and family members of [the children who died at] Residentials Schools and [are buried in] unmarked burials that …[their truths] will not die with them…. [It is also a way to] ensure that this can never happen again.
>
> **— Stephanie Nirlungayuk, Inuk Youth**[130]

4. Caring for Children in Life and after Death

Those leading search and recovery efforts are guided by the principles that the bodies and Spirits of the missing and disappeared Indigenous children must be treated with honour, respect, and dignity.[131] In many Indigenous societies, children have special significance and are owed particular care and respect. Coast Salish legal scholar Sarah Morales notes that the Hul'qumi'num Mustimuhw view children as, "the most important segment of society … as the future of the community they are to be shielded from harm wherever possible."[132] For the Michi Saagiig Nishnaabeg, children are, "highly respected people, valued for their insights, their humour, and their contributions to families and communities…. Children [are] seen as Gifts, and parenting [is] an honour."[133] Vanessa Prescott, Métis Youth, spoke about receiving teachings on the Cree word "awâsis," "In English, we use the word 'child' but 'awâsis' does not mean child, it means 'sacred gift on loan from creation, for you to raise on behalf of creation.'"[134] Many Elders and Knowledge Holders shared similar understandings of the importance of children within Indigenous laws and legal systems at meetings and National Gatherings over the last two years.[135]

The deep respect for, and responsibility to care for, children extends throughout life and after death. Survivors, Indigenous families, and communities have consistently emphasized

their responsibilities under Indigenous laws to find the missing and disappeared children, identify them, and protect their burials. They have also emphasized the Sacred nature of the work, which is based in Indigenous laws that recognize the integrity and status of people who have passed from this life. While a person's needs change upon death, they do not become inanimate objects or lose their status as individuals, relatives, and community members. The presence and dignity of persons after death is signified in many processes and protocols, including the Empty Chair, Spirit Plates, offerings, and ceremonies. These are not symbolic gestures but, rather, recognitions of the legal rights of the children under Indigenous laws, with corresponding obligations upon the living.[136]

The obligations to take care of the missing and disappeared children are held both individually by the families of those children and collectively by their communities. Scott Fox described learning from an Elder about how the entire community is responsible for the care of children under Blackfoot law:

> Kimiksistohkanaokosinnooni ("in reality we are all parents of the children").... [I asked:] "Why is it I become a parent when someone is brought into our community?" And he said: "That's why, because they were born, now you have the obligation and the responsibility to look out for them as though they are your child." And then it hit me—that's why my grandparents were my parents, and aunts and uncles were my parents, everyone older than me looked out for me like I was their son.... Each child belongs to the community.[137]

Indigenous women have a particular role in many Indigenous legal systems. As Cree legal scholar Sylvia McAdam (Saysewahum) notes, in the nêhiyaw (Cree) legal system, women provided education, resolved disputes, and took responsibility for the care of children:

> The women's teachings are the educational system of the *nêhiyaw* Nation. There existed a group of women called *okihcitâwiskwêwak* whose role was to provide the legal "system" of the *nêhiyaw* people. These women invoked laws and provided remedies on a case-by-case basis, depending on the situation or circumstances before them. As well, the women are the first to carry each child born into the Nation.[138]

The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) also describes the important role of Indigenous women, Two-Spirited and gender diverse people, as first teachers, leaders, healers, providers, and protectors.[139]

In accordance with their legal obligations under Indigenous laws, Indigenous women are working to search for and recover the missing and disappeared children and unmarked burials. In speaking about the reasons that the Kanien'kehá:ka Kahnistensera (Mohawk Mothers) are fighting for the rights of the children who may be buried on the grounds of the former Allan Memorial Institute at McGill University, Kahentinetha identified some of the responsibilities of women under Mohawk laws:

> The women are the progenitors of the soil. We bring the children onto our Mother Earth. And we have duties and responsibilities to take care of our Mother and to take care of our children. So each one of us is born to do that and we have no choice but to take care of our Mother and to take care of our children....
>
> We wanted to get our children. We wanted them and we need to have them because it is part of our culture—we have to take care of our children and all our people who died. The children have been taken from us and we want them back so we can ... complete our own lives and to make the world safe for the children we now have and the ones who are coming.... There's a lot at stake and our children are watching us.[140]

Indigenous laws recognize the continuing obligations of the living towards their loved ones and their ancestors who have passed to the Spirit World. The missing and disappeared children have the right to be found and cared for according to their own laws. These children's families and communities also have the right—and the responsibility—to ensure that this work is done in a way that brings honour, respect, and dignity to these children.

5. Protecting the Lands Where Burials Are Located

> There is an urgent need to centre Indigenous protocols and laws to protect and care for these lands.
>
> — **Participant**[141]

Indigenous laws reflect the relationships and responsibilities that Indigenous Peoples have with their ancestral territories—those territories upon which Indigenous Peoples were placed and given the responsibility to care for by Creation and the Creator.[142] Indigenous laws are inherently connected to these lands and waters. For the Mi'kmaq, for example:

> [The] laws for caring for the earth is *netukulimk*. *Netukulimk* are sets of customary legal practices focused on Mikmaq obligations related

> to land and resource use. Non-human forms participate in these constituting governance relationships. Detailed rules and processes guided their behavior and were aimed at fostering sustainability under this rubric. The performance of these duties was and is "interpreted as an expression of Mi'kmaq law ways" and provided a management structure for working with Mikmaq law across communities.[143]

As under Mi'kmaq laws, living within ancestral territories provides lessons and teachings about how humans must interact with the lands and waters as well as the non-human beings and entities in and on them.[144]

Indigenous laws therefore have particular application to the burial sites, wherever they might be located, of the missing and disappeared children. Indigenous laws are being adapted and, as legal scholar Hadley Friedland indicated, there is a need to, "recentre the exercise of inherent Indigenous jurisdiction, laws and protocols" to protect these sites and ensure access to those leading search and recovery work.[145]

Given the importance of caring for ancestral territories, any land dispossession, and any other disruptions to Indigenous Peoples' connections to their territories, constitutes a breach of Indigenous laws. It impedes the ability of Indigenous Peoples to uphold their responsibilities to care for their ancestral territories and all the entities that reside within and rely on them.[146] Prohibiting or inhibiting Survivors, Indigenous families, and communities from accessing or protecting the burial grounds of the missing and disappeared children, wherever they may be located, is also a breach of Indigenous laws.

6. The Centrality of Relationships: Interdependence and Interconnectedness

> Nawendiwin (the art of being related).
>
> Inawendig manidoo (we are all related).
>
> — Anishinaabe legal principles[147]

Relationships are central to Indigenous laws.[148] They situate Indigenous people within Creation[149] and create, "expectations (what to expect of others) and obligations (responsibilities to others)."[150] Within Indigenous Nations, the creation of law is deliberative, meaning it takes place in relationship and discussion with others. John Borrows notes that, "we make law together ... this makes us agents of law, architects of law, not objects of law."[151] Maintaining

relationships also creates accountability within Indigenous legal systems because "[people] will abide by laws simply for the benefit of being in relation to others."[152] Indigenous laws and legal decision-making focus on interdependence and interconnections and maintaining harmonious relationships between members of the community and between humans, the land, and other life forms.[153] As explained by the MMIWG Inquiry:

> *[I]nterconnectedness* is the idea that the rights of individuals and of the collective are connected to rights of the land, water, animals, spirits, and all living things, including other communities or Nations. Interconnectedness recognizes that everything and everyone has purpose and that each is worthy of respect and holds a place within the circle of life. These roles and responsibilities, as well as the principles of law within them, can be expressed in language, use of land, ceremony, and in relationships.[154]

In describing Nuu-chah-nulth laws and belief systems, hereditary chief and scholar Umeek, E. Richard Atleo emphasizes both interrelatedness and interconnectedness:

> In a view of reality described as *tsawalk* (one), relationships are *qua* (that which is). The ancient Nuu-chah-nulth assumed an interrelationship between all life forms—humans, plants, and animals. *Relationships are*. Accordingly, social, political, economic, constitutional, environmental, and philosophical issues can be addressed under the single theme of interrelationships, across all dimensions of reality—the material and non-material, the visible and the invisible ... all questions of existence, being, knowing, regardless of seeming contradictions, are considered to be *tsawalk*—one and inseparable. They are interrelated and interconnected.[155]

Similarly, in Anishinaabe law, the concepts of interrelatedness and interconnection are central:

> Nawendiwin ... refers to the core principle that relationship and kinship are central to Anishinaabeg life, including law. Relationships are vital to the sustenance of the collective and are established, maintained, and renewed through people's choices and actions. The principle of Nawendiwin includes an ethic of interrelatedness between human and non-human communities and creates obligations and responsibilities between the parties. These relationships are both durable and dynamic, are rooted in Creation and original teachings, and are responsive to changing needs.[156]

The Indigenous laws of many different Indigenous Nations emphasize the reciprocal nature of relationships between humans and other entities and life forms and highlight interdependence.[157]

Interconnection is important.[158] Indigenous communities are connected regardless of provincial, territorial, or international borders. At the National Gathering in Vancouver, one participant noted, "Who knows what happened south of the border. Our communities are so connected. Let us not forget about our brothers and our sisters to the north and to the south."[159] Although respecting interrelatedness and interconnectedness and creating harmony and balance are key aims of Indigenous legal systems, it is important not to idealize or misrepresent Indigenous societies as always harmonious, balanced, and peaceful. As Borrows highlights, "war, conflict, and social disorder were painful and periodic facts of life, as is the case with all peoples."[160] These conflicts occurred both within Indigenous societies and with other Nations—both Indigenous and non-Indigenous.

Indigenous laws and legal principles are also subject to different interpretations within Indigenous societies. Borrows explains that, "all legal traditions are subject to various interpretations. Disagreement is endemic in human affairs. Indigenous peoples are no different, and their societies are likely to contain divergent interpretations of any law that could be examined."[161] Indigenous laws are created as much from the need to resolve conflicts as from agreements and consensus within and between Nations.[162] As a result, Indigenous Nations have developed legal processes to effectively address both internal and external conflicts as well as highly developed mechanisms for consensus decision-making.

Indigenous communities are facing many difficult decisions in the context of searching for and recovering the missing and disappeared children and unmarked burials. Communities are discussing internally the difficult questions of how to identify the missing and disappeared children, whether to exhume the children from their burials, whether to conduct DNA testing, or whether to leave them to rest where they are currently buried. There are differing opinions on these difficult decisions as there would be in any society. In addition, there is an added complexity of many different Indigenous laws and protocols potentially being applicable because children were taken from so many different Indigenous communities to the institutions. As a result, Indigenous laws and legal principles are being considered through relationships and discussions both within and between Indigenous communities to determine the best way forward.

7. Taking Responsibility for One's Actions: Acknowledgement and Accountability

A core concept in many Indigenous legal systems is the importance of taking responsibility for one's actions.[163] Borrows explains the role of taking responsibility under Anishinaabe law:

> Legal functions ... are embedded in our languages, our songs, our stories, they are found in our lands as we reason by analogy ... as we take responsibility, we take accountability of our own affairs and our own relations. [This enables us] to take care of each other and create good relations in accordance with Mino-biimadiziwin.

Similarly, Gordon Christie, an Innuvialuit legal scholar, describes both the importance of taking responsibility as well as the way in which Indigenous people learn about what it means to do this. He notes that, in many Indigenous communities, members are taught how to fulfill their responsibilities through:

> years of gentle instruction [and] a process of maturation aided by a community's careful system of guidance. Central to this process of moral education is building a core sense of responsibility, one which would come to be an integral part of one's sense of personal identity.... This sense [of responsibility] must be carefully instilled, carefully nurtured and carefully maintained. An individual possessed of this sense will know what to do and how to act so as to travel the good path, to live a good life. This involves, essentially, doing as one must towards fellow beings, both human and non-human.[164]

Taking responsibility requires both acknowledging and apologizing for one's role in the harm caused, developing empathy for the person harmed, and being accountable for repairing the harm to the extent that it is possible. The principle of taking responsibility for one's actions is central to many Indigenous legal systems. For example:

- Tŝilhqot'in legal principles include "acknowledging and taking responsibility"[165] in the context of disputes, harms, or injuries in human relationships and links this acknowledgement to action to repair harm caused through restitution or compensation.[166]
- Mi'kmaq legal principles include taking responsibility for harmful actions, providing restitution to those harmed, and developing empathy towards victims.[167]

- Cree legal principles include acknowledging responsibility for harms caused. This acknowledgement requires corresponding action, such as making restitution or paying compensation to the person harmed or their family.[168]
- In Inuit societies, there are processes for a gathering, which may include a feast, where everyone expresses their view on what went wrong and what should be done to resolve the problem. The person who caused the harm is confronted with the harm done to others through their decisions and actions. In addition, acknowledgement and remorse are required as important steps for the person who caused the harm.[169]
- Under Hul'q'umi'num laws, teachings may differ slightly from one community to the next; however, they often involve apologies and restitution being offered to restore balance within the community when someone has been harmed.[170]
- The Ned'u'ten people (Lake Babine First Nation in British Columbia) have a shaming and cleansing (wiping away tears) ceremony that occurs in the feast hall.[171] In Ned'u'ten society, shaming is used to deter future conduct that prevents that person from living up to their name.[172] The person who caused harm must show regret, apologize, acknowledge wrongdoing, and make retribution.[173] The shame must be wiped clean to bring social relations back into balance.

Indigenous legal systems may also have processes for restoring persons to wholeness and holding wrongdoers accountable even when victims or perpetrators have died or cannot be located. Feasting processes in Gitxsan and other Northwest Coast Indigenous societies, for example, may formally recognize and repair injuries to a person's daxgyet (spiritual integrity and standing within the Nation). They may also deal with transgressions against Gitxsan law "even without the transgressing parties."[174]

Each of these examples demonstrates the importance of taking responsibility, acknowledgement, and taking action to repair harm caused to others under Indigenous laws and to prevent the same harmful behaviour in the future. This has important implications for the Canadian State and churches: taking responsibility would recognize the humanity of the missing and disappeared children and the harm caused to Survivors, Indigenous families, and communities of not knowing what happened to the children and where they are buried.[175] Importantly, taking responsibility requires corresponding action by the Canadian State and

churches—action aimed at making sure that these types of mass human rights violations never occur again.[176]

8. Taking Care of Everyone

> I am singing the Eagle's song today to ask for strength. The Eagle has such high regard because it flies the highest, sees the furthest, and when we use Eagle Feathers, like we see for the smudging, or in prayer for circle, or anytime we have Eagle Feathers on our regalia, it helps carry our message up to the Creator. So today, right now in transition I am going to ask for strength from the Spakwus to come in and take care of each and every one of us, take care of these tears that we are sharing as well, the medicine, the healing.
>
> — Sheryl Rivers[177]

Throughout the National Gatherings, Survivors, Indigenous families, and communities emphasized the importance of taking care of everyone involved in the search and recovery efforts in a holistic manner. This requires taking care of each person spiritually, mentally, emotionally, and physically at every stage of the process. It also requires taking care of all Indigenous people in all communities across Turtle Island. This concept is reflected in the name of the search and recovery work that the Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) is leading to find the missing and disappeared children who were taken to St. Paul's Indian Residential School in North Vancouver, British Columbia. As researcher Ashley Whitworth describes:

> [O]ur why is in our name. Yúusnewàs—it means to take care of all, to take care of everybody, to take care of everything. It is not a project. It is forever. It is what we want to do. Not only for the Squamish Nation members. Not only for our neighbors but also for everyone. So we're here today to take care of everyone.[178]

Indigenous legal principles, processes, protocols, and ceremonies are being implemented before, during, and after gathering Survivor testimonies, searching sites, and communicating findings. Many participants at the National Gatherings spoke to the importance of culturally relevant and responsive supports for Survivors—the living witnesses—who are providing testimonies as well as others leading search and recovery efforts.

Taking care of everyone in a holistic way is also a principle being applied to the missing and disappeared children. As noted, participants at the National Gatherings spoke frequently

about the importance of bringing respect, honour, and dignity to the bodies and Spirits of the missing and disappeared children.[179] One participant shared:

> We as Gitxsan believe—when my little guy was just a baby, he had fallen a few steps and he was crying. I went running and I was going to yank him up and my mom stopped me, and she said: "no, no, you don't yank him up. You leave him there for a few seconds and you gently pick him up, because part of his Spirit might lie there." And I learned that. And I connected that with trauma-informed care. We as First Nations people ... have our own trauma-informed care. We as Gitxsan ... believe that if we experienced trauma somewhere part of our Spirit still remains there. So it is our responsibility to go back to those sites. To retrieve our ancestors, to call them back, and to bring them back to our community.[180]

Taking care of the bodies of the missing and disappeared children requires finding the burials and protecting them. As discussed above, taking care of the Spirits of the missing and disappeared children requires the conducting of Indigenous ceremonies to bring the Spirits of the children back home to their families and communities and to release the Spirits so that they may rest with their ancestors. These ceremonies may differ depending on the particular Indigenous Nation and community.[181]

9. Respect for All Views in Decision-Making

> The leaders in our community go well beyond Chief and Council. We have Spiritual Leaders, Fire Keepers, Ceremony Leaders, Grandmothers and Grandfathers, and Survivors who are the true leaders of this process.... This required us to consult with surviving Elders in our community and beyond ... we would be non-invasive yet open and inviting to [all] community members who wished to be involved.
>
> **— Niibin Makwa (Derek J. Nepinak), Chief of the Minegoziibe Anishinabe[182]**

Indigenous legal systems include decentralized decision-making processes[183] where all community members' views are invited and respected. The importance of respecting the views of all is a central principle in many Indigenous legal systems.[184] Anishnaabe scholar Dale Turner notes that, in accordance with the Haudenosaunee Great Law of Peace, "a human being possesses intrinsic value and ought to be accorded respect."[185] Accordingly, one must

therefore recognize that others "have the right to speak their mind and choose for themselves how to act in the world."[186] Anishinaabe laws also emphasize individual autonomy[187] and respect for each person.

The respect accorded to the views of each person is reflected in many Indigenous legal processes. In Inuit societies, for example, the principle of *aniaslutik* means that everyone is given a chance to express their side of the story.[188] In the context of disputes, this provides a form of checks and balances, "making it less likely for one person or method to dominate when problems are addressed."[189] Cree legal processes also provide an opportunity for each person to express their views through the use of Circles, where all participants are invited to speak and provide their perspectives on the conflict or issue and its resolution. Circles are used for many purposes, including to deliberate on decisions and to collaboratively and collectively resolve disputes[190] in order to, "attempt to restore proper balance in [people's] lives and within their communities."[191] The respect accorded to all life forms and entities extends to decision-making. Borrows emphasizes the importance of non-human entities and future generations being represented in decision-making under Indigenous laws.[192] In alignment with these Indigenous legal concepts, there is emerging recognition in Canada, and other countries, of the legal personhood of rivers and waterways.[193]

With regard to the missing and disappeared children and unmarked burials, Indigenous Peoples are implementing this principle into their search processes. For the search at Pine Creek Indian Residential School, Niibin Makwa (Chief Derek Nepinak) explained:

> Difficult discussions need to happen within the safety of our ceremony ... each engagement, ground search and community update always involves these [Pipe, Water, and Drum] Ceremonies.... We committed that a four-day Sacred Fire would be lit at the start of each phase of ground searches. This Sacred Fire is out of respect for the lost children who did not return home to their families.... [It] has created opportunities for community members to come to the Fire and share their thoughts and their feelings. The ceremonies set the stage for respectful discussion and ensure the safety of everyone involved. Not everyone participates, but all are respected.[194]

Survivors, Indigenous families, and communities may hold different views about the appropriate form of reparations, including decisions relating to exhumation and repatriation of the children. Indigenous laws, protocols, and processes have proven to be effective methods to resolve conflicts within and between communities that include respecting varying views.

Anishinaabe Decision-Making in Treaty 3

In the ongoing development of the Anishnaabe Nation of Treaty 3 health law, the Grand Council of Treaty 3 has created a process that implements Anishnaabe law to gather and consider the views of all who wish to participate. At the National Gathering in Toronto, Anishinaabe lawyer Sara Mainville described this process as follows:

> ***Visioning:*** Starting with ceremony and hosting community sessions, asking for the voices of Anishinaabe members to share their vision for health care in their community.
>
> ***Scouting:*** Using the community voice to map and blueprint out a vision for health in Treaty 3.
>
> ***Hunter/Warrior/Gatherer:*** Sharing the community voices with leadership, Anishinaabe councils, and partner organizations to collectively translate into a written health law.
>
> ***Feasting and Celebrating:*** Ceremony, Celebrations, and Feast take place upon the declaration of the health law.

Mainville explained that through this process the aim is that the full context is completely understood by everyone; community knowledge informs the decision-making; solutions are considered through consensus decision-making with protocols, Helpers, and ceremony; and all are of one mind. She emphasized that, "a similar process [can be followed] when we're having these discussions and making these hard decisions about what to do [in the context of the missing children and unmarked burials]."

10. Taking the Time Needed to Do This Work Right

> Weweni (taking our time): Any decisions we make today can affect future generations for many generations.
>
> Bebekaa (doing it right): There are consequences to the decisions being made. This is a Sacred, spiritual process. It needs to be done right.
>
> — Elder Eleanor Skead, Kaatagoging Initiative[195]

Indigenous laws include processes for quiet reflection, respectful silence, and internal community discussions and deliberations.[196] These processes are important to ensure that all views and interests are taken into account and decisions are made in a way that upholds Indigenous laws. As Sara Mainville explains, "it takes us a long time to do things because one of the first things our Elders tell us is to be careful. Those constant personal interactions, those constant discussions are really important. Doing things in the right way is really important."[197] Katherine Nichols, who is working with the Sioux Valley Dakota Nation to support the search for the missing and disappeared children and unmarked burials relating to the former Brandon Indian Residential School, noted, "While we have made a lot of progress, there is still a lot of work to do. All of these things take time and it's important to give people the time to be able to sit, think, and contemplate the implications."[198] Those leading search and recovery efforts emphasized the importance of taking the time needed to make sure it is done right. Ogimaw Andy Rickard explained:

> The recovery of the missing children and identifying possible unmarked graves goes beyond the current time frame allotted for this project. The difficult work we are undertaking may take a generation to complete. We understand the profound magnitude of the work the Spirit has asked us all to do. In this respect, we do not want to rush the work and [need] to take the necessary time to do it right.[199]

The importance of taking the time needed and not rushing the work was echoed throughout the National Gatherings by participants and speakers.

Several participants also highlighted the tension between the urgency of this work and making sure it is done carefully and properly. Sarah Longman, a member of George Gordon First Nation and Board Chair of the Regina Indian Industrial School site, stated, "This work can't

happen fast enough and yet we need to take our time. We have community members passing away and they don't yet have the answers. Yet we know it may take generations to do this work."[200]

Those leading search and recovery work continually emphasized their long-term commitment and dedication to identifying the missing and disappeared children and locating the unmarked burials. As one participant stated, "where's the Sacred law about this whole process? This will not be determined by a mandate or a timeline or the amount of money.... This is our process. This should be our process ... until the day that we are satisfied [that we have found] what we are looking for."[201] This long-term commitment was reiterated by Benjamin Kucher, a Métis Youth who is working with Indigenous communities to search the sites using GPR, "We are committed to this work, committed to finding the truth, finding answers to what happened, and committed to bringing these children home."[202]

11. Responsibilities to Past, Present, and Future Generations

> The word for great-grandparents/ancestors, aanikoobijiganag, is also the word for great-grandchildren ... there's seven generations represented and you are in the middle. Whatever happened to your great-grandparents affects you. Whatever happens to you is going to affect your great-grandchildren. Because you're in the middle, you have an opportunity to change what happened to your great-grandparents. You can try to fix that, you can try to mitigate it so that it doesn't get past you, so that it doesn't affect future generations.
>
> — Elder Peter Schuler, Mississaugas of the Credit[203]

In Indigenous legal thought, past, present, and future are not separate but are interconnected.[204] Understanding the Sacred nature of relations connecting past, present, and future generations informs Indigenous laws. Survivor Charlene Belleau told those at the Vancouver National Gathering, "you are here today because the ancestors chose you to do this work and the ancestors knew you would have the strength and the courage to find our missing children."[205] Those living in the present have responsibilities both to past generations and to future generations of human and other-than-human entities. Under Haudenosaunee law, Mohawk scholar Taiaiake Alfred explains, "We have to refer to both the past and the future in our decision-making. This is where we get the concept of the 'seven generations': we're supposed to be listening to our grandfathers, our ancestors, but we also need to listen to the grandfathers yet to come."[206] Hohahes Leroy Hill, a Haudenosaunee Sub Chief and

Faithkeeper, said, "We are called to respect and take care of what Creator provides, for the next generation and the one coming after."[207]

For the missing and disappeared children and their unmarked burials, Indigenous communities have responsibilities under Indigenous laws to ensure the children receive proper ceremonies and to protect their burial sites.[208] Vicki Manuel, in the context of Tk̓emlúps te Secwépemc's search and recovery work, explained, "We always remember—the work we do is for the children: past, present and future."[209] Similarly, Kwetiio highlighted the importance of considering future generations in the decisions that are made and actions that are taken today, "You are always conducting yourself for those faces to come."[210] Many Indigenous laws recognize this ongoing relationship, which is upheld in diverse death, funerary, and after-death ceremonies and practices. Métis ethnographer Morgan Baillargeon's exploration of Nêhiyaw (Plains Cree) understandings and protocols around death discusses the "symbiotic" or reciprocal relationship between living and deceased relations, who, "continue to be an important part of the community."[211] Morales notes that the Hul'qumi'num legal principles of respect and responsibility encompass many relationships, including with ancestors.[212]

The living have responsibilities to care for the Spirits and burial places of their ancestors. As described by Haudenosaunee educator Wendy Hill, "when someone dies, we put a chair at the table and every meal we fix a meal for them.... That food is a sign of love and a sign of acknowledgement, and it is the least that we can do. [The obligation of] the ones living is to try and remember the ones who have passed on."[213]

Similar practices are integrated into many community-led search processes. Elder Eleanor Skead described this in the context of the Wauzhushk Onigum Nation's Kaatagoging Initiative, "We always burn a plate, a Spirit dish ... the children are hungry, the ones that are left on our site that didn't have an opportunity to have proper ceremonies to make it home ... but they're still part of our community."[214] The children who died in unnatural circumstances, and the children who died outside of their home territories or communities, may have specific needs. Haudenosaunee Elder Tom Porter explained at the National Gathering on Indigenous laws that:

> [I]f somebody dies and it's not natural, it is the belief of our Elders and the practice of our Elders that that Spirit cannot travel to the next world. It gets stuck where the tragedy took place ... you have to go over there with the food and the Sacred tobacco to where the [death] took place so you can go and release that Spirit from that tragedy and they can go on.... Those children whose graves are not found are stuck there yet. Because

> it is tragic what happened to them. That's why it's important to find where they are. And then each Nation has to consult with their oldest Elders, the ones that still know the history and the original teachings of the Creator ... to consult on how to handle that.... And that's when our young will be free. And that's when we can begin our work to make sure the next generations will never be lost again.[215]

Elder Tom Porter speaking at the National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023 (Office of the Independent Special Interlocutor).

Throughout the National Gatherings, many expressed concerns about whether the proper ceremonies and protocols were followed in accordance with Indigenous laws so that the Spirits of the children who died could properly rest with their relatives and ancestors. Elder Howard Mustus said:

> In the Nakota culture, when an individual passes on, we mourn for a number of days. The Clan has a lifelong commitment to acknowledge their departure. Every year, annually, we have a feast for those [who have] departed.... When I'm presented the Pipe, I have to encourage

> the Spirit of that individual to travel into the Spirit world and not look back. Encourage him by reminding him that the Creator was satisfied with you accomplishing those challenges that he imposed on you. You've done your job, so do not look back and travel freely into the Spirit world. I'm not too sure with these unmarked graves, if anyone has ever [done] a ceremony for them to allow them to travel into the Spirit world and join their relatives.[216]

This journey is of particular importance for those who are buried in unmarked graves or remain outside their communities. Cree Elder Fred Campion told the National Gathering in Toronto that, "the children [are] stuck in those places because they didn't have the opportunity to live or to have a connection to ... their own tradition and culture."[217]

Depending on how these responsibilities to Spirits are fulfilled by the living, it may lead to mutual protection, blessing, or harm.[218] Within Coast Salish law, as Chief Earl Jack of the Penelakut Tribe explained:

> [T]he disturbance of the dead is dangerous to the living, who may suffer sickness, poor fortune or death. For this reason, the dead were placed in cemeteries, such as burial islets, distant from village life. Only those persons who own the traditional ritual knowledge to deal with the dead may visit the cemeteries and care for the Spirits through ceremonial practices.[219]

As is the case under Coast Salish law, many Indigenous Nations have laws that place careful boundaries around who may access such sites as well as how, when, and why they may be accessed.

Finding the missing and disappeared children and locating and protecting their unmarked burials also upholds responsibilities to future generations under Indigenous laws. These responsibilities have two aspects: first, that the search and recovery of the missing and disappeared children and unmarked burials is completed in this lifetime so that the burden is not passed onto future generations of Indigenous people and, second, that all Canadians and Indigenous Peoples understand the full history of what happened to the missing and disappeared children so that everyone can work together to ensure it never happens again. As Kahentinetha stressed, "we can never let this happen again. Never."[220]

12. Inter-Nation Collaboration

> We Indigenous people gathered here have a responsibility.... We are ever united. Look what we can do together. We have done a lot of work together for ourselves, for our past, for our future. That's what we have done to take back what we lost at the Residential Schools. By working together, we can bring about a better result for many people.... Let us stand and journey together to build a better world, a better life, with trust, honesty, and determination. We all have a duty and responsibility to build a better world for our children, our grandchildren, and their grandchildren.
>
> — Piita Irniq, Inuk Survivor[221]

Survivors, Indigenous families, and communities emphasized the importance of supporting one another and exchanging knowledge to help each other in their search and recovery efforts. Seneca lawyer Kathleen Lickers emphasized at the National Gathering in Toronto that, "one of the truths of this Gathering, is that we are here to stand beside each other ... to call upon the strength of our ancestors and those in the room who can help guide us."[222] The importance of Indigenous Peoples standing together in solidarity to find the missing and disappeared children and unmarked burials was a common theme throughout the Gatherings. Barbara Lavallee, of Cowessess First Nation, while leading search and recovery efforts at the former Marieval Indian Residential School, stressed the importance of sharing what they have learned with others:

> Throughout this year and a half we've had the honour of sharing information with [those searching] many, many other Indian Residential School sites across Canada. We look at them as sister and brother organizations where we all need each other, we communicate without politics, without media, that's where our best meetings are held. I acknowledge every site that we've ever interacted with and I thank them for the information exchange.[223]

Similarly, Charlene Belleau, a Survivor who is working within a team leading searches and investigations into the missing and disappeared children and unmarked burials relating to St. Joseph's Mission, also stressed the importance of working collaboratively since children were taken from so many different Indigenous communities:

> Many of our children [in British Columbia] not only attended one residential school, but they attended maybe two or three. Some of our

> children went over to Alberta for school. Some went into the Yukon. So we all need to be able to work together in the work we are doing to find the missing children.[224]

Participants also identified searching for and recovering the missing and disappeared children as a common vision and purpose that unites all Indigenous communities. Benjamin Kucher contrasted the divisiveness and isolation of Indian Residential Schools with the unifying nature of search and recovery efforts:

> These searches are about finding the truth, finding out what happened, who was responsible, and how we can get justice—if we can get justice. It's about bringing communities together—these schools were divisive and isolating. We need to come together to collaborate to bring these children home. It's about honouring the Survivors and their stories and honouring the Spirits of those who did not make it home.[225]

The need for collaboration and knowledge sharing across the many Indigenous Nations leading search and recovery work was identified as necessary to ongoing efforts to bring the children home.

Indigenous Knowledge Exchange and Community Collaboration: The BC Provincial Liaison

In addition to working within the team leading search and recovery in relation to St. Joseph's Mission, since July 2021, Charlene Belleau has also been working as the BC Provincial Liaison. In this role, Belleau works to build and maintain a network of relationships amongst Indigenous communities in British Columbia. This is to ensure that communities have the tools and resources required to move ahead with research and site searches and to support each other in the process.

The mandate of the First Nations Liaison includes:

- Providing advice and assistance to First Nations at different stages of the investigative process, including support for accessing federal and provincial funding and related supports;
- Providing advice to the province of British Columbia on the response to findings at former Indian Residential Schools and Indian Hospitals in British Columbia; and

- Acting as a communications link between First Nations investigating the sites of former Indian Residential Schools and Indian Hospitals in British Columbia.

Since 2021, the province of British Columbia, with the support of the First Nations Liaison, has supported in-person provincial gatherings, which bring together Survivors, Indigenous leaders, and project leads from each of the communities planning or conducting searches on or near Indian Residential Schools and Indian Hospitals in British Columbia.

In October 2021, Sacred Medicine Bundles were prepared and provided to each lead community in a ceremony at Tk̓emlúps te Secwépemc. This included the gifting of a Sekani7 Stick, which carries significant meaning in Secwépemc culture.

Ceremonies are held at each provincial gathering to acknowledge the Sacred responsibilities that each community has assumed in caring for the missing and disappeared children and unmarked burials to provide them with strength and support through traditional teachings and cultural practices.

The agenda for the provincial gatherings is based on feedback from communities leading searches and often reflects common challenges or priorities, including issues related to archival research, oral truth-telling, ground searches, federal and provincial funding, commemoration, and the recovery, identification, and repatriation of remains.

The provincial gatherings are planned with and hosted by a lead community on their territory to ensure provincial gatherings are responsive to the needs of communities and provide opportunities for other communities to visit the sites of former Indian Residential Schools and Indian Hospitals in other parts of the province. They also create a safe, supportive, and collaborative space for communities leading searches to share promising practices and to explore common challenges and possible solutions.

13. Indigenous Sovereignty, Autonomy, and Non-interference

Indigenous legal principles of respect for the autonomy of Indigenous Peoples and non-interference in the internal affairs of a Nation by an outside Nation are central aspects of many Indigenous legal systems. These legal systems include a long history of Indigenous diplomacy and treaty making between and among Indigenous Nations in what is now North

America.[226] This long history of Indigenous diplomacy has resulted in numerous confederacies of peace among previously warring Nations. These treaties and agreements include confederacies of peace among multiple Indigenous Nations such as the Three Fires Confederacy of the Anishinaabe and the Haudenosaunee Confederacy.[227]

One well-known example of an agreement founded on these legal principles is the Two Row Wampum, which emphasizes mutual respect and non-interference as key principles underlying relationships between sovereign Nations.[228] As Borrows recounts, the Two Row Wampum became the basis for the agreements made between the Haudenosaunee and the Dutch in 1645, with the French in 1701, and with the English in 1763–1764.[229] Borrows describes that:

> [T]he belt consists of two rows of purple wampum beads on a white background. Three rows of white beads symbolizing peace, friendship, and respect separate the two purple rows. The two purple rows symbolize two paths or two vessels travelling down the same river. One row symbolizes Haudenosaunee people with their law and customs, while the other row symbolizes European laws and customs. As nations move together side by side on the river of life, they are to avoid overlapping or interfering with one another.[230]

Kanien'kehá:ka Knowledge Keeper Osennontion explains the importance of respecting the sovereignty of Nations under Haudenosaunee law, "It should be said that when we were given our own ways to life, we were never given a government for any others but ourselves, and to this day, we maintain our end of the original agreement to co-exist, not to impose our ways on others."[231] Kwetiio explains the principle of non-interference embodied within the Two Row Wampum:

> The earth is our Mother. The only way we could [protect it] is using our original laws.... In our ways, we have the Teioháte, the Two Row Wampum.... The onkwehonwe had our original way which was Kaianere'kó:wa (Great Law of Peace). These two paths, these two peoples were to live in harmony with each other so long as they stayed in their own path ... we were never to interfere in each other's business, never to interfere in each other's cultures and the way we conduct ourselves. The Kanien'kehá:ka Kahnistensera take this very seriously—it is our duty that we are born with as Kahnistensera under Kaianere'kó:wa. Our duty as Kahnistensera is to take care of the children—of past, present, and Ne tahatikonhsontónkie, which means the faces to come.[232]

In relation to the search and recovery of the missing and disappeared children and unmarked burials, Survivors, Indigenous families, and communities have made clear that they are sovereign and autonomous and, therefore, in the best place to determine, in accordance with their laws and protocols, all aspects of the process. This includes search and recovery planning, making decisions about what is appropriate for accountability and justice, and the best way to honour the missing and disappeared children and protect the unmarked burials.[233] They also have made clear that Indigenous sovereignty extends to information, knowledge, and data about Indigenous Peoples, including information about the missing and disappeared children and unmarked burials. Survivor Doug George-Kanentiio also emphasized the importance of having Indigenous people leading the search and recovery process, "We have to control all instances of this initiative ... nothing for us without us."[234]

Upholding Cree Law in the Search and Protection of Unmarked Burials in Onion Lake Cree Nation

Cree lawyer Eleanor Sunchild, King's Council, Council member Bernadine Harper, and Elder Rose Watchmaker shared how Onion Lake Cree Nation is applying Cree laws to care for the missing and disappeared children who were buried on their territory.[235] Onion Lake Cree Nation, which straddles the Alberta-Saskatchewan border in Treaty 6, had two Indian Residential Schools on its territory: St. Barnabas was operated by the Anglican church from 1892 to 1943, and St. Anthony was operated by the Catholic church from 1894 to 1974. Both institutions were relocated within the community after fires. As a result, there are at least four separate sites where unmarked burials may be located.

Bernadine Harper described Onion Lake Cree Nation's approach to beginning the search:

> When we started this process we had our own community Elders, our Lodge Keepers, our Ceremony Keepers and we went to them. We also had an Elders' Council and we turned to them for guidance, support, and direction. We had several meetings and we explained what was going to happen and they said their prayers. They had their Lodges to make sure that we're doing the right thing … that means no shortcuts … the Elders told us to slow down, this has never been done before. We have to abide by the supreme laws we were

> born with. As First Nation people we all belong to Turtle Island. We were all born with gifts, ceremonies, and protocols. That's what they wanted us to follow.[236]

Harper explained how Elders provided the care, patience, and knowledge to apply Cree laws to the unprecedented and uncertain work of finding and caring for generations of the missing and disappeared children. Oral histories and Survivor memories helped identify locations to search. Elders related the ways in which Cree laws respond to the children's physical, spiritual, and social needs, including those of their families and communities. This approach also helped address the complex technical and logistical decisions that community leaders had to make:

> There were [children from] about ten surrounding First Nations communities that [were] brought … to those schools … it's a huge process and that's where the Elders told us to slow down … there were prayers and ceremonies that had to be done in order for us to continue…. The Elders told us to slow down and not to go into this GPR thing [right away].
>
> They told us to let them rest … that's why our communities stopped for a whole year and a half. We had to make sure that we do things according to protocol so that there's no consequences that would fall on our children, grandchildren or [future] generations.[237]

Specific protocols apply to meet the needs and obligations identified by community Elders. Harper spoke of pakitinâsowin (offering ceremonies). These were conducted before anyone was allowed onto the search sites:

> There were children buried [there] so they had to honour and respect the ones that didn't make it home. They sang those four songs. After they sang then that's when the Elders gave that go ahead to move forward.[238]

The needs of living relatives, search teams, and Survivors are also upheld within the Nation's Cree laws. After each day of the ground search, a team of community members helped people with their emotions, painful memories, and trauma. Elder Rose Watchmaker said, "There's still a lot of pain out there that hasn't been shared by some of the people that went to school there. They keep it very well hidden and most have gone on without ever telling their stories."

Cree legal processes provide spaces for truths to be heard and held in ceremony. Onion Lake Cree Nation's search process is not just about finding the locations of unmarked graves. Speakers shared how many of the rights of passage under Cree laws to mark every stage of a person's life journey were never provided for the missing and disappeared children. This remains an obligation that the community must meet. Harper said:

> Parents missed out on giving the knowledge to their children. Missed out on giving the rights of passage. [Children] were deprived of the right to a proper funeral.... Now we have to do the ceremonies for the unmarked graves. The four days of lighting the Sacred Fire. In death, the ceremony songs are sung to help the Spirit cross over.[239]

The community also discussed if and how to repatriate children who have been buried outside their own communities. It was explained how community Elders interpreted Cree laws on this point:

> Once there's a burial, we have to leave it there but we can do ceremonies of calling the Spirit of the children that died at the schools. We can call their Spirits and send them back home.

CONCLUSION

Indigenous Peoples are following their Sacred responsibilities under Indigenous laws to find the missing and disappeared children and unmarked burials. They are incorporating Indigenous ceremonies into truth-finding, truth-telling, and witnessing processes and upholding their responsibilities to care for the bodies and the Spirits of the missing and disappeared children and the lands where their burials are located. They are collaborating across Nations, maintaining relationships with one another as sovereign Nations, and engaging in difficult discussions and deliberations about which Indigenous laws apply and how they can be adapted to bring dignity, respect, and honour to the missing and disappeared children and their burial sites.

Survivors, Indigenous families, and communities are applying, interpreting, and adapting Indigenous laws, protocols, and processes to govern all stages of search and recovery work. They are demonstrating how Indigenous laws—as living, evolving laws—are effectively governing searches and investigations across Turtle Island. As Grand Chief Garrison Settee indicated, Indigenous families and communities are steadfast in their commitment to uphold

their legal obligations to find the missing and disappeared children, "They cannot speak for themselves so we must speak on their behalf. We must be their voice and we will not be silent. We will speak for them. We will not let them down. We will not fail. We will find them."[240]

1 Scott Fox, "Youth Perspectives on Upholding Indigenous Laws in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

2 Truth and Reconciliation of Canada (TRC), *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015).

3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UNGAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007 (*UN Declaration*), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

4 United Nations (UN) Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, Study, Doc. A/HRC/24/50, July 30, 2013, para. 19, https://documents.un.org/doc/undoc/gen/g13/160/21/pdf/g1316021.pdf.

5 *UN Declaration* (emphasis added).

6 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

7 For a discussion of the impact of the federal government's imposition of the *Indian Act*, RSC 1985, c I-5 (*Indian Act*), on hereditary governance systems, see generally Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government," *Windsor Yearbook of Access to Justice* 22 (2003): 341, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2551&context=scholarly_works. For a discussion of the impact of the *Indian Act* on matrilineal governance systems, see Bernice Hammersmith (Cree Métis), "Restoring Women's Value," in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, ed. John Bird, Lorraine Land, and Murray MacAdam (Toronto: Irwin Publishing, 2002), 125.

8 The potlatch and tamanawas were prohibited in the *Indian Act* between 1884 and 1951. See Val Napoleon, "Extinction by Number: Colonialism Made Easy," *Canadian Journal of Law and Society* 16, no. 1 (2001): 117.

9 In the supplementary report entitled *A Legal Analysis of Genocide*, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) characterizes the policies of genocide that the federal government has implemented aimed at destroying Indigenous Peoples as taking different incarnations over centuries and indicates that these policies are still ongoing. MMIWG Inquiry, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: Privy Council Office, 2019), 10. Many scholars have identified the ways in which these genocidal policies have changed form over the years, for example, as Indian Residential Schools closed and the Sixties Scoop was implemented, which has now turned into the Millenium Scoop. See, for example, Justice Harry S. LaForme, "Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights; 30 Years of Recognition and Affirmation," in *Canadian Charter of Rights and Freedoms*, 5th ed, ed. Errol Mendes and Stephane Beaulac (Markham, ON: LexisNexis Canada, 2013), 740, para. 50.

10 TRC, *Canada's Residential Schools: Reconciliation*, vol. 6 (Montreal and Kingston: McGill-Queen's University Press, 2015), 46.

11 For discussions of the varied ways in which Indigenous laws are recorded, practised, upheld, and transmitted, see Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance through Alliance* (Toronto: University of Toronto Press, 2020); Robert YELḰÁTŦE Clifford, "Listening to Law," in "Indigenous Law, Lands and Literature," special issue, *Windsor Yearbook of Access to Justice* 33, no. 1 (2016): 47 (regarding WSÁNEĆ law); Jerry Fontaine and Don McCaskill, *Di-bayn-di-zi-win (To Own Ourselves): Embodying Ojibway-Anishinabe Ways* (Toronto: Dundurn Press, 2022); Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018); Karonhianó:ron Alice MacDonald, *Rotiianehrenhseraká:ion kanien'kéha tehontenonhwerá:tons: Traditional Mohawk Ceremonies*, ed. Kanerahtenha:wi Hilda Nicholas, trans. Karonhianó:ron Alice MacDonald, illus. Katsi'tsákwas Ellen Gabriel (Kanehsatà:ke, QC: Tsi Ronterihwanónhnha ne Kanien'kéha, 1990); Joe Karetak, Frank J. Tester, and Shirley Tagalik, eds., *Inuit Qaujimajatuqangit : What Inuit Have Always Known to Be True* (Halifax: Fernwood Publishing, 2017); Marianne Ignace and Ronald E. Ignace, *Secwépemc People, Land, and Laws* (Montreal and Kingston: McGill-Queen's University Press, 2017); Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994); Umeek, E. Richard Atleo, *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver: UBC Press, 2011); Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich Publishing, 2015), among many others.

12 TRC, *Reconciliation*, 52; Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories," *McGill Law Journal* 61, no. 4 (2016): 754, para. 3.

13 Napoleon and Friedland, "Inside Job," 754, paras. 6–10.

14 One example has been in place since the 1970s in the Aseniwuche Winewak Nation of Canada. The Aseniwuche Winewak Nation has developed a program called Mamowichihitowin Program, which is a diversion program in partnership with the Hinton Friendship Centre for those dealing with historic trauma and accused of abuse and sexual violence. It considers the accused person as part of the family unit, and all are treated with therapy as a family unit and individually. The accused person is also engaged in reclaiming traditional practices, including receiving teachings, songs, and participating ceremonies. It is worth noting that Dr. Hadley Friedland concluded that, in the Aseniwuche Winewak Justice Project, it was made clear that, under Cree law, safety is foundational. See Hadley Friedland, "Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System," *University of New Brunswick Law Journal* 67 (2016): 312. Another example is in the Sts'ailes, a sovereign Coast Salish First Nation, which created a Te Lalem Program where a family at risk of having their children taken away by the child welfare system is supported as a family unit. Both of these initiatives are described in the documentary by the Native Counselling Services of Alberta, "Home Fire: Ending the Cycle of Family Violence," YouTube, March 20, 2015, https://www.youtube.com/watch?v=lmstyXc6FnI.

15 There are a number of Indigenous community diversion programs that divert Indigenous people accused of criminal offences out of the criminal justice system into Indigenous legal processes. The federal government provides cost-shared funding with provinces and territories that match the amounts for Indigenous justice diversion programs across Canada. The most extensive number of these programs operates in Ontario with over 50 programs being funded by the Indigenous Justice Division, which is part of the Ministry of the Attorney General—only nine of which are cost shared with the federal government. These programs are designed and delivered by Indigenous communities and organizations and governed by Indigenous legal principles and processes. They include both Indigenous Community Justice Programs and Indigenous Restorative Justice Programs.

16 TRC, *Honouring the Truth*, 16.

17 For more information and the reports created as a result of this project, see "Resources: Our Publications," Indigenous Law Research Unit, accessed July 16, 2024, https://ilru.ca/resources-2/.

18 The Indigenous Law Research Unit at the University of Victoria (established in 2012) evolved out of a collaboration by the TRC and Indigenous Bar Association with University of Victoria researchers and was funded by the Law Foundation of Ontario. See Indigenous Law Research Unit, https://ilru.ca/. This initiative is described in detail in TRC, *Reconciliation*, 75–77. Other Indigenous Law Research Institutes in Canada include the Wahkohtowin Law and Governance Lodge in the Faculty of Law at the University of Alberta (established in 2018) ("Faculty of Law: Wahkohtowin Law and Governance Lodge," University of Alberta, accessed July 16, 2024, https://www.ualberta.ca/wahkohtowin/index.html); the Indigenous Legal Orders Institute in the Faculty of Law at the University of Windsor (established in 2019) ("Indigenous Legal Orders Institution," University of Windsor Faculty of Law, accessed July 16, 2024, https://www.uwindsor.ca/law/Indigenous-Legal-Orders-Institute); and the Mino-Waabandan Inaakonigewinan Indigenous Law and Justice Institute in the Bora Laskin Faculty of Law at Lakehead University (established in 2021) ("Mino-Waabandan Inaakonigewinan," Lakehead University, accessed July 16, 2024, https://www.lakeheadu.ca/programs/departments/law/mino-waabandan-inaakonigewin).

19 For more details, see Department of Justice, "Revitalization of Indigenous Laws Across Canada," Government of Canada, last modified May 17, 2021, https://www.canada.ca/en/department-justice/news/2021/05/revitalization-of-indigenous-laws-across-canada.html.

20 Dr. Chief Wilton Littlechild, "Opening Remarks," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

21 Jessica Asch and Tara Williamson, *Practice Material: Introduction to Indigenous Law* (Vancouver: Law Society of British Columbia Professional Legal Training Course, 2024), 3, https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/Indigenous.pdf.

22 See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 137–76.

23 Val Napoleon, "Thinking About Indigenous Legal Orders," in *Dialogues on Human Rights and Legal Pluralism*, ed. René Provost and Colleen Sheppard (Dordrecht, Netherlands: Springer, 2013), 230.

24 "Inuit Societal Values," Government of Nunavut, accessed July 16, 2024, https://gov.nu.ca/information/inuit-societal-values; see also "Inuit Qaujimajatuqangit," Nunavut Impact Review Board, accessed July 16, 2024, https://www.nirb.ca/inuit-qaujimajatuqangit.

25 John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada," in *The Oxford Handbook of the Canadian Constitution*, ed. Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (Oxford: Oxford University Press, 2017), 14; Gerald R. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford: Oxford University Press, 1995), 12; TRC, *Reconciliation*, 45.

26 TRC, *Reconciliation*, 45.

27 As Beedahbin Peltier makes clear, "Indigenous laws include responsibilities to other species." Beedahbin Peltier, "Upholding Indigenous Laws through Medicines," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

28 Napoleon, "Thinking About Indigenous," 230.

29 James (Sákéj) Youngblood Henderson, "Aboriginal Jurisprudence and Rights," in *Advancing Aboriginal Claims: Visions/Strategies/Directions*, ed. Kerry Wilkins (Saskatoon: Purich Publishing, 2004), 71.

30 Tracey Lindberg, "Critical Indigenous Legal Theory" (PhD diss., University of Ottawa, 2007).

31 John Borrows, "Seven Gifts: Revitalizing Living Laws through Indigenous Legal Practice," *Lakehead Law Journal* 2, no. 1 (2016): 2, https://llj.lakeheadu.ca/article/view/1490; see also TRC, *Reconciliation*, 52–53.

32 Borrows, *Canada's Indigenous Constitution*, 59–60.

33 John Borrows, "Revitalizing Indigenous Laws to Address Trauma and Rekindle Hope," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

34 TRC, *Reconciliation*, 52.

35 Val Napoleon, *What Is Indigenous Law? A Small Discussion* (Victoria, BC: University of Victoria Indigenous Law Research Unit, 2016), 2, https://www.uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf?fbclid=IwAR2R4Dvph14Rn6U4SsUTlpZCoxb7uExm4hlWhgFUhDrG3aFNqGkhcWyenNU.

36 Kwetiio, Indigenous Community Perspectives Panel, "Indigenous Laws and the Colonial Legal System," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

37 Napoleon, *What Is Indigenous Law*, 2. John Borrows discusses the role of interpretation and deliberation in relation to several Indigenous legal orders. Borrows, "Indigenous Constitutionalism," 27.

38 Borrows explains that in Anishinaabe constitutionalism, "leadership was decentralized and most often associated with a situation and not a particular person." Borrows, "Indigenous Constitutionalism," 27.

39 TRC, *Reconciliation*, 45.

40 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35.

41 In September 2022, Justice Michelle O'Bonsawin was the first Indigenous person ever to be appointed as a justice on the Supreme Court of Canada. Nick Boisvert, "Michelle O'Bonsawin Becomes 1st Indigenous Person Nominated to Supreme Court of Canada," *CBC News*, August 19, 2022, https://www.cbc.ca/news/politics/michelle-obonsawin-scc-nomination-1.6556152.

42 Megan Metz, "Youth Perspective on the Importance of Indigenous Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control Over Knowledge and Information, Vancouver, British Columbia, January 18, 2023.

43 Napoleon, "Thinking About Indigenous," 231. Napoleon uses the term "Indigenous legal orders" to differentiate Indigenous laws from the centralized state-based legal systems that are "managed by legal professionals in institutions that are separate from other social and political institutions."

44 TRC, *Reconciliation*, 46–47, citing Elder Reg Crowshoe; "Indigenous Law 101 Graphic," Indigenous Law Research Unit, accessed July 16, 2024, https://ilru.ca/wp-content/uploads/2020/08/Indigenous-Law-101-With-Resources.pdf; Rebecca Johnson and Bonnie Leonard, "'Coyote and the Cannibal Boy': Secwépemc Insights on the Corporation," in *Corporate Citizen: New Perspectives on the Globalized Rule of Law*, ed. Oonagh E. Fitzgerald (Waterloo, ON: CIGI Press, 2020), 37; Michael Coyle, *Indigenous Legal Orders in Canada: A Literature Review* (London, ON: University of Western Ontario Law Publications, 2022), 6, https://ir.lib.uwo.ca/lawpub/92.

45 Borrows, *Canada's Indigenous Constitution*, 23.

46 These deliberations can themselves draw from other sources, but Borrows clarifies that the "proximate" source of most Indigenous law is developed through people talking with one another. Borrows, *Canada's Indigenous Constitution*, 35.

47 Borrows, *Canada's Indigenous Constitution*, 23–58. For a visual representation of Indigenous law's sources and resources, see "Indigenous Law 101 Graphic," Indigenous Law Research Unit (website). In "Reconciliation through Relationality in Indigenous Legal Orders," Alan Hanna builds on this analysis to argue that "relationality" is a sixth source of Indigenous law. Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders," *Alberta Law Review* 56, no. 3 (2019): 828.

48 See, for example, Umeek, *Principles of Tsawalk*, ix.

49 Borrows, "Indigenous Constitutionalism," 14.

50 See, for example, Umeek, *Principles of Tsawalk*, ix.

51 Kwetiio, Indigenous Community Perspectives Panel, "Indigenous Laws and the Colonial Legal System," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023; see also Coyle, *Indigenous Legal Orders*, 6.

52 Stephen J. Augustine, Hereditary Chief and Keptin of the Mi'kmaq Grand Council, "Preface: Oral History and Oral Traditions," in *Aboriginal Oral Traditions: Theory, Practice, Ethics*, ed. Renée Hulan and Renate Eigenbrod (Halifax: Fernwood Publishing, 2008), 4.

53 This accords with the TRC's findings that children were routinely punished for speaking Indigenous languages at Indian Residential Schools. See TRC, *Honouring the Truth*, 81.

54 The UN General Assembly declared 2019 the International Year of Indigenous Languages (UN General Assembly , *Resolution Adopted by the General Assembly on 19 December 2016*, Resolution A/RES/71/178, January 31, 2017). It then also declared 2022 to 2032 the International Decade of Indigenous Languages (UN General Assembly, *Resolution Adopted by the General Assembly on 18 December 2019*, Resolution A/RES/74/135, January 23, 2020) to draw global attention to the critical need for revitalization and transmission of Indigenous languages and the need for resources to preserve, revitalize, and promote them.

55 TRC, *Reconciliation*, 74.

56 Dr. Marcella Fontaine, National Advisory Committee Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

57 A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991), 19–20.

58 TRC, *Reconciliation*, 46.

59 Augustine, "Preface: Oral History," 3.

60 Coyle, *Indigenous Legal Orders*, 6.

61 For sources that attest to the Indigenous legal knowledge women carry, see Aimee Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering Conducted with Anishinaabe Elders, Roseau River, Manitoba, June 20–23, 2013* (Winnipeg: University of Manitoba Centre for Human Rights Research and Public Interest Law Centre, 2013), 30, https://create-h2o.ca/pages/annual_conference/presentations/2014/ANI_Gathering_Report_-_June24.pdf; see also McAdam (Saysewahum), *Nationhood Interrupted, 2; Chapman v. Luminis Pty Ltd*, [2002] (No 4) 123 FCR 62 (the Australian case relating to the Hindmarsh Island bridge controversy, in which Ngarrindjeri female Elders held knowledge of the spiritual significance of the waters where the bridge would be constructed; they refused, however, to share their oral histories in relation to this knowledge in court because it was forbidden under their law). For a discussion of the responsibilities of women and 2SLGBTQQIA people in healing under Indigenous laws, see MMIWG Inquiry, *Legal Analysis of Genocide*, vol. 1a, 156.

62 Ardith Walkem, "Co-Chair Remarks," Celebrating Indigenous Legal Traditions Law Conference, First Nations House of Learning, University of British Columbia, Vancouver, British Columbia, November 6–7, 2006.

63 Under Nisga'a law, for example, "the ancient law ... forbids the telling of one's history to another, other than within one's own tribe. It is also illegal to tell the history of another tribe." See Rod Robinson (Sim'oogit Minee'eskw), "Nisga'a Patience: Negotiating Our Way into Canada," in Bird et al., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, 187.

64 John Borrows indicates that Inuit laws are recited at feasts or during the dark period and that, under Secwépemc law, "reading the land and stories at original locations helped/helps Secwepemc people identify the sources and limits of

jurisdiction within their territories and, under Gitksan and Wet'suwet'en law, many laws are shared in the Feast Hall." Borrows, "Indigenous Constitutionalism," 16, 35, 36–37, citing Ron Ignace, "Our Oral Histories Are Our Iron Posts: Secwepemc Stories and Historical Consciousness" (PhD diss., Simon Fraser University, 2008).

65 See generally John Borrows and Kent McNeil, eds., *Voicing Identity: Cultural Appropriation and Indigenous Issues* (Toronto: University of Toronto Press, 2022); see also Mehtab Khan, *Traditional Knowledge and Creative Commons – White Paper,* August 1, 2018, 10–11, http://dx.doi.org/10.2139/ssrn.3550362. Unfortunately, too often, these rules have been broken by non-Indigenous people and researchers who have appropriated this knowledge in breach of Indigenous laws. See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Dunedin, New Zealand: University of Otago Press, 2008), 42.

66 Elder Fred Campion, "Upholding Indigenous Laws and Ceremony," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

67 For a recent review of how Canadian courts have treated Indigenous oral testimony and evidence, see Jimmy Peterson, "Judicial Treatment of Aboriginal Peoples' Oral History Evidence: More Room for Reconciliation," *Dalhousie Law Journal* 42, no. 2 (2019): 484.

68 Borrows emphasizes that Indigenous Peoples, like all societies, have ideals that are contained in law, but like every human society, "they did not always abide by their highest values." Borrows, "Indigenous Constitutionalism," 13; see also Napoleon, "What Is Indigenous Law," 2.

69 See Jo-Ann Archibald (Q'um Q'um Xiiem), *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (Vancouver: UBC Press, 2008).

70 Patricia A. Monture, "Locating Aboriginal Peoples in Canadian Law: One Aboriginal Woman's Journey through Case Law and the Canadian Constitution" (LLM thesis, York University, 1998), 50–51.

71 Monture, "Locating Aboriginal Peoples," 50–51.

72 John Borrows, "Listening for a Change: The Courts and Oral Tradition," *Osgoode Hall Law Journal* 39, no. 1 (2001): 20.

73 Keith Thor Carlson, *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010), 61. Carlson is describing in particular the practice of, "good Stó:lō historians."

74 Both internal cross-referencing and oral footnoting were discussed in more detail in Office of the Independent Special Interlocutor (OSI), "Indian Residential School Cemeteries as Sites of Truth and Conscience," in *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* (2024).

75 Augustine, "Preface: Oral History," 2. Hereditary Chief Augustine's concept of peer review is discussed below in relation to the Circle process.

76 TRC, *Reconciliation*, 7.

77 Nisoonag Partnership (Serpent River First Nation, Mississaugi First Nation, Sagamok Anishnawbek), Submission to the OSI, August 31, 2023, 5 (on file with the OSI).

78 Elder Eleanor Skead, "Ensuring Community Well-Being in the Search and Recovery of Missing Children," Voices of Community Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

79 Doug George-Kanentiio, "Upholding Indigenous Laws in the Seach and Recovery of Missing Children," Voices of Survivors Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

80 Scott Fox, "Youth Perspectives on Upholding Indigenous Laws in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

81 Charlene Belleau, "Importance of Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," Voices of Survivors Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

82 Sheryl Rivers, "Closing Prayer," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 28, 2023.

83 "Episode 1: A School They Called Alcatraz," in *Kuper Island*, produced by CBC, podcast, May 17, 2022.

84 Grand Chief Garrison Settee, Pimicikamak Cree Nation, "Closing Remarks," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Montreal, Quebec, September 7, 2023.

85 Scott Fox, "Youth Perspective on Upholding Indigenous Laws in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

86 TRC, *Reconciliation*, 163.

87 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

88 Bernadine Harper, Council Member of the Onion Lake Cree Nation, "Cree Traditional Laws in the Recovery of Missing Children at Onion Lake Cree Nation," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

89 Elder Keith Chiefmoon, "Upholding Indigenous Laws and Ceremony Panel," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

90 Charlene Belleau, Voices of Survivors Panel, "The Importance of Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

91 Dr. Chief Wilton Littlechild, "Voices of Survivors," Panel Presentation, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2023.

92 Dr. Sherri Chisan, "Ensuring Community Well-Being in the Search and Recovery of Missing Children," Voices of Community Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

93 Participant, "Participant Dialogue," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023; see also OSI, *National Gathering on Unmarked Burials: Upholding Indigenous Laws in the Search and Recovery of Missing Children, Summary Report*, March 2023, 52, https://osi-bis.ca/wp-content/uploads/2023/11/OSI-SummaryReport_Toronto_2023_web.pdf.

94 Kúkpi7 Rosanne Casimir, "Breakout Session: Media: Ensuring the Respectful Treatment and Public Disclosure of Community Information and Knowledge," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Information and Knowledge, Vancouver, British Columbia, January 18, 2023.

95 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

96 Elected Chief Councillor Ken Watts, "Where to Begin," Leadership Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Montreal, Quebec, September 7, 2023. Other presenters emphasized the need for truth before reconciliation, including Kristin Kozar, "Facilitated Dialogue," Indigenous Archives Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Information and Knowledge, Vancouver, British Columbia, January 17, 2023, and Dr. Cornelia Wieman, "Keynote Address: Practising Trauma-informed Mental Health and Wellness," National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

97 Megan Metz, Haisla Youth, "Youth Perspective on the Importance of Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023.

98 This is one of the Guiding Principles for the OSI's work during its two-year Mandate.

99 TRC, *Reconciliation*, 8, citing Elder Jim Dumont at the Traditional Knowledge Keepers Forum in June 2014; Jim Dumont, "Statement to the Truth and Reconciliation Commission of Canada," Statement no. SE049, Winnipeg, Manitoba, June 26, 2014.

100 This section is based on the discussion in Kirsten Manley-Casimir, "Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach" (PhD diss., University of British Columbia, January 2016).

101 TRC, *Truth and Reconciliation Commission of Canada: Interim Report* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012), 12.

102 Federico Lenzirini, ed., *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008), 620.

103 Lenzirini, *Reparations for Indigenous Peoples*, 620.

104 Lenzirini, *Reparations for Indigenous Peoples*, 620.

105 Lenzirini, *Reparations for Indigenous Peoples*, 620.

106 Jennifer Henderson and Pauline Wakeham, "Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada," *English Studies in Canada* 35, no. 1 (2009): 9.

107 Jeff Corntassel, Chaw-win-is, T'Lakwadzi, "Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation," *English Studies in Canada* 35, no. 1 (2009): 140–41.

108 Keavy Martin, "Truth, Reconciliation, and Amnesia: *Porcupines and China Dolls* and the Canadian Conscience," *English Studies in Canada* 35, no. 1 (2009): 63.

109 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

110 This is one of the Guiding Principles for the OSI's work during the course of its two-year Mandate.

111 Survivors have been speaking about, and pushing for, the search and recovery of the missing children before, during, and since the TRC. For example, the TRC documents that, in a public statement to the TRC in July 2011, Simone, an Inuk Survivor from Chesterfield Inlet, talked about how part of the reason he was speaking up was because of his niece, who was never returned home and whose parents had still not found her grave. TRC, *Reconciliation*, 14, citing Simone (last name not provided), "Statement to Truth and Reconciliation Commission of Canada," TRC AVS Statement, Statement no. SC092, Inuvik, Northwest Territories, July 1, 2011.

112 TRC, *Reconciliation*, 65, citing Métis Elder Elmer Ghostkeeper.

113 David Aglukark, "Applying Trauma-Informed and Culturally Safe Approaches to Statement Gathering and Other Research in Support of Community Search Efforts," Panel Presentation, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 30, 2022.

114 Nancy Sandy, "Practical Barriers, Jurisdictional Issues, Indigenous Cultural Protocols and Laws, and Land Reclamation/Land Back," Protecting and Accessing Indian Residential Schools and Other Sites Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

115 Nancy Sandy, "Practical Barriers, Jurisdictional Issues, Indigenous Cultural Protocols and Laws, and Land Reclamation/Land Back," Protecting and Accessing Indian Residential Schools and Other Sites Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

116 TRC, *Reconciliation*, 123.

117 Megan Metz, Voices of Survivor Families, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Information and Knowledge, Vancouver, British Columbia, January 18, 2023.

118 Regional Chief Gerald Antoine, Assembly of First Nations, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

119 "Episode 4, Part 1: Caroline's Story," in *Still Here Still Healing*, podcast, November 30, 2020

120 Elder Eleanor Skead, Panel on Ensuring Community Well-Being in the Search and Recovery of Missing Children, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

121 TRC, *Reconciliation*, 7, 173–77; see also Andrée Boisselle, *Law's Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* (Victoria: University of Victoria, 2017), 176.

122 Many speakers and participants at the National Gatherings indicated that they sought guidance and permission prior to presenting or sharing information about missing children and unmarked burials during the participant dialogues.

123 See, for example, the Williams Lake First Nation's St. Joseph Mission Indian Residential School Investigation principles for gathering Survivors' Truths and Testimonies, as outlined in the summary report of the OSI's first National Gathering. OSI, *Moving from Our Heads to Our Hearts to Our Hands: Summary Report of the National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children*, September 12–14, 2022, 27, https://osi-bis.ca/wp-content/uploads/2023/02/OSI-SummaryReport-Edmonton-Sept2022_web_v2.pdf.

124 See Rachel Ariss, "Bearing Witness: Creating the Conditions of Justice for First Nations Children," *Canadian Journal of Law and Society* 36, no. 1 (2021): 124–28.

125 This was the case for William Osborne, Jackson Osborne, and Betty Oniske who were asked to continue the search for their three Aunties who were never returned home from Indian Residential School. For a detailed account of their

search, see TRC, *Interim Report*, 26–29.

126 Megan Metz, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023. Megan Metz was one of several Indigenous youth who was invited to attend the National Gatherings to learn from and carry forward Survivors' knowledge and life stories.

127 Taylor Behn-Tsakoza, Voices of Survivor Families Youth Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

128 Benjamin Kucher, Young Warriors Submission to the OSI, August 30, 2022 (on file with the OSI).

129 Tracie Leost, Young Warriors Submission to the OSI, August 30, 2022 (on file with the OSI).

130 Stephanie Nirlungayuk, Young Warriors Submission to the OSI, August 30, 2022 (on file with the OSI).

131 This is one of the Guiding Principles for the OSI over the course of the two-year Mandate.

132 Sarah Morales (Su-taxwiye), *Indigenous Legal Responses to Hate Incidents: A Coast Salish Case Study* (British Columbia's Office of the Human Rights Commissioner, June 2022), 16.

133 Leanne Betasamosake Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: ARP Books, 2011), 123. The place and importance of children within the Michi Saagiig Nishnaabeg legal order is explored in Tara Williamson, Simon Owen, with Cheyenne Arnold-Cunningham, with Mshkiki Gitigaan Kwe (Katelyn Brennan), the Indigenous Law Research Unit, and Niijkiwendidaa Anishnaabekwewag Services Circle, *Nawendiwin: The Art of Being Related: Anishinaabeg Kinship-Centred Governance and Family Law* (Lək̓ʷəŋən & WSÁNEĆ Territory: Indigenous Law Research Unit, 2021), https://ilru.ca/wp-content/uploads/2022/03/Nawendiwin_Report.pdf; see also Craft, *Anishinaabe Nibi Inaakonigewin Report*, 18, citing Elder Niizhoosake Copenace, Onigaming First Nation.

134 Vanessa Prescott, "Youth Perspective on the Importance of Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," Voices of Survivor Families, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023; see also Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016), 57.

135 See OSI, *Upholding Indigenous Laws*.

136 For an extended discussion of how these obligations are being met in this Sacred work, see OSI, *Upholding Indigenous Laws*.

137 Scott Fox, "Youth Perspectives on Upholding Indigenous Laws in the Search and Recovery of Missing Children," Voices of Survivor Families Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

138 McAdam (Saysewahum), *Nationhood Interrupted*, 24.

139 MMIWG Inquiry, *Legal Analysis of Genocide*, vol. 1a, 149–61.

140 Kahentinetha, "Indigenous Laws and the Colonial Legal System," Indigenous Community Perspectives Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

141 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

142 Kahentinetha, "Indigenous Laws and the Colonial Legal System," Indigenous Community Perspectives Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023. She said, "We have all been placed on a certain part of Turtle Island and we are supposed work on that particular part … to do what we are supposed to do—that is to take care of it. We are the caretakers."

143 TRC, *Reconciliation*, 13, citing Elder Reg Crowshoe; Borrows, "Indigenous Constitutionalism," 19, citing Kerry Prosper, Jane McMillan, Anthony Davis, and Morgan Moffitt, "Returning to Netukulimk: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance," *International Indigenous Policy Journal* 2, no. 4 (2011): 1–17 (emphasis in original).

144 See, for example, Borrows, "Indigenous Constitutionalism," 30, discussing Cree law as being, "based on relationships found in the natural world," citing Robert A. Brightman, *Grateful Prey: Rock Cree Human-Animal Relations* (Berkeley: University of California Press, 1993); see also Oren Lyons, "Spirituality, Equality, and Natural Law," in *Pathways to Self-Determination: Canadian Indians and the Canadian State*, ed. Leroy Little Bear, Menno Boldt, and J. Anthony Long (Toronto: University of Toronto Press, 1984), 6.

145 Hadley Friedland, "Breakout Session: Practical Barriers, Jurisdictional Issues, Indigenous Cultural Protocols and Laws, and Lad Reclamation/Land Back," Protecting and Accessing Indian Residential Schools and Other Sites Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022.

146 There are countless examples of such breaches. For recent examples in the context of land use, see Robert YELḰÁTʔTE Clifford, " WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)," *McGill Law Journal* 61, no. 4 (2016): 755; Joshua Nichols and Sarah Morales, "Finding Reconciliation in Dark Territory: 'Coastal Gaslink, Coldwater,' and the Possible Futures of 'DRIPA'," *University of British Columbia Law Review* 53, no. 4 (2021): 1185; Tsleil-Waututh Nation, *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal* (North Vancouver, BC: Tsleil-Waututh Nation Sacred Trust Initiative, 2016), https://twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf.

147 Nawendiwin is explained along with other Michi Saagiig Nishnaabe laws in Williamson et al., *Nawendiwin*. John Borrows explained the concept of inawendig manidoo in his presentation "Revitalizing Indigenous Laws to Address Trauma and Rekindle Hope," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

148 Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today," *McGill Law Journal* 61, no. 4 (2016): 847–84; Hanna, "Reconciliation through Relationality," 828.

149 Mills, "Lifeworlds of Law," 861–62; see also Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 10.

150 Hanna, "Reconciliation Through Relationality," 828. As Alan Hanna notes, "[people] will abide by laws simply for the benefit of being in relation to others." See also MMIWG Inquiry, *Legal Analysis of Genocide*, vol. 1a, 131.

151 John Borrows, "Breakout Session: Revitalizing Indigenous Laws to Address Trauma and Kindle Hope," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

152 Hanna, "Reconciliation through Relationality," 833.

153 Diandre Thomas-Hart, "Health and Wellness Supports Needed for Youth in the Search and Recovery of Missing Children," Voices of Survivor Families, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 30, 2022; Umeek, *Principles of Tsawalk*, 37; Coyle, *Indigenous Legal Orders*, 6.

154 MMIWG Inquiry, *Legal Analysis of Genocide*, vol. 1a, 137 (emphasis in original).

155 Umeek, *Principles of Tsawalk*, ix.

156 Williamson et al., *Nawendiwin*, 28; see also Craft, *Anishinaabe Nibi Inaakonigewin Report*, 18.

157 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 148. In his discussion of Haudenosaunee culture, Borrows notes that the three white rows of the Two Row Wampum stand for mutuality, sharing, interdependence, and interconnectedness.

158 See, for example, Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan*, 9.

159 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023.

160 Borrows, "Indigenous Constitutionalism," 13.

161 Borrows, *Canada's Indigenous Constitution*, 60.

162 Borrows, "Indigenous Constitutionalism," 32–33.

163 Wilhelm Verwoerd, "Toward a Response to Criticisms of the South African Truth and Reconciliation Commission," in *Dilemmas of Reconciliation: Cases and Concepts*, ed. Carol A.L. Prager and Trudy Govier (Waterloo, ON: Wilfrid Laurier University Press, 2003), 272.

164 Gordon Christie, "Law, Theory and Aboriginal Peoples," *Indigenous Law Journal* 2 (2003): 109.

165 Val Napoleon, "Tsilhqot'in Law of Consent," *University of British Columbia Law Review* 48, no. 3 (2015): 887; Marie-Andrée Denis-Boileau, "The Gladue Analysis: Shedding Light on Appropriate Sentencing Procedures and Sanctions," *University of British Columbia Law Review* 54, no. 3 (2021): 581-582, citing Jessica Asch and Alan Hanna, "Tsilhqot'in Legal Traditions Report," in *Accessing Justice and Reconciliation Project* (Victoria: University of Victoria Indigenous Law Research Unit, 2013).

166 Denis-Boileau, "Gladue Analysis," 581–82, citing Asch and Hanna, "Tsilhqot'in Legal Traditions Report."

167 Hannah Askew and Lindsay Borrows, in partnership with Chippewas of Nawash Unceded First Nation no. 27, *Accessing Justice and Reconciliation: Anishinabek Legal Traditions Report*, ed. Hadley Friedland, Maegan Hough, and Renee McBeth (Victoria: Accessing Justice and Reconciliation Project, 2012), 64, citing *Accessing Justice and Reconciliation Project: The Mi'kmaq Legal Traditions Report* [unpublished], 2013.

168 Hadley Friedland, *Accessing Justice and Reconciliation: Cree Legal Traditions Report in Partnership with Aseniwuche Winewak Nation*, ed. Jessica Asch, Hadley Friedland, Maegan Hough and Renee McBeth (Victoria: Accessing Justice and Reconciliation Project, 2012), 33.

169 TRC, *Reconciliation*, 60.

170 TRC, *Reconciliation*, 71.

171 TRC, *Reconciliation*, 72, citing Lorna June McCue, "Treaty-Making from an Indigenous Perspective: A Ned'u'ten-Canadian Treaty Model" (LLM thesis, University of British Columbia, 1998), 238.

172 McCue, "Treaty-Making," 236.

173 McCue, "Treaty-Making," 236, citing Jo-Anne Fiske and Betty Patrick, Lake Babine Nation, *Cis dideen kat – When the Plumes Rise: The Way of the Lake Babine Nation* (Vancouver: UBC Press, 2000), 176.

174 TRC, *Reconciliation*, 73, citing Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issues for the Gitxsan," in *Intercultural Dispute Resolution in Aboriginal Contexts*, ed. Catherine Bell and David Kahane (Vancouver: UBC Press, 2004), 188–89.

175 Celeste Hutchinson, "Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Residential Schools Provide Justification for Aboriginal Cultural Rights?" *Saskatchewan Law Review* 70 (2007): 425.

176 Hutchinson, "Reparations for Historical Injustice," 425.

177 Sheryl Rivers, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

178 Ashley Whitworth, "The Power of Data," Indigenous Community Perspective Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023

179 This was also a guiding principle for the OSI during its two-year Mandate.

180 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023.

181 In "The Lifeworlds of Law," Aaron Mills (Wapshkaa Ma'iingan) refers to the particular worldview of an Indigenous Nation as its "lifeworld," which he describes as "the story it tells of creation, which reveals what there is in the world and how we can know." He also describes it as "the ontological, epistemological, and cosmological framework through which the world appears to a people." Mills, "Lifeworlds of Law," para. 27.

182 Niibin Makwa (Derek J. Nepinak), Chief of the Minegoziibe Anishinabe (Pine Creek First Nation), "Ensuring Community Well-Being in the Search and Recovery of Missing Children," Voices of Community Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

183 Larry Chartrand, "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority," *Review of Constitutional Studies* 18, no. 1 (2013): 63.

184 For a more detailed discussion of the principle of respect under Indigenous legal systems, see Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law," *McGill Law Journal* 61, no. 4 (2016): 951–56. This paragraph draws on the analysis in this article.

185 Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), 49.

186 Turner, *This Is Not a Peace Pipe*, 49. Similarly, in *Wasáse: Indigenous Pathways of Action and Freedom*, Taiaiake Alfred notes that, "the freedom and power that come with understanding and living a life of indigenous integrity are experienced by people in many different ways, and respect must be shown to the need for individuals to find their own way according to their own vision." Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005), 39.

187 Borrows, "Indigenous Constitutionalism," 28.

188 TRC, *Reconciliation*, 60.

189 TRC, *Reconciliation*, 60.

190 TRC, *Reconciliation*, 59, citing Val Napoleon, Emily Snyder, and Lindsay Borrows, *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community, and Post-Secondary Educators* (Victoria: Indigenous Law Research Unit, Faculty of Law, University of Victoria, 2013), 21, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-285.pdf.

191 TRC, *Reconciliation*, 59. Importantly, in "Navigating through Narratives of Despair," Hadley Friedland notes Cree legal principles relating to ensuring safety, particular of women and children, must also inform these processes. Friedland, "Navigating through Narratives of Despair," 269–312.

192 Borrows, *Recovering Canada*, 44–45.

193 In February 2021, the Innu Council of Ekuanitshit and the Minganie regional county municipality issued a joint declaration of legal personhood for the Matehekau Shipu River in eastern Quebec. See also Aotearoa/New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. For an extended discussion of how Indigenous and non-Indigenous laws have regarded the Whanganui River, see Āneta Hinemihi Rāwiri, "Te Awa Tupua, Indigenous Law and Decolonisation," *Victoria University of Wellington Law Review* 53, no. 3 (2022): 431. There are also examples in Bolivia (Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth]); in Ecuador (protections enshrined in the Constitution of the Republic of Ecuador, 2008); and Colombia (Supreme Court of Colombia recognized the Amazon ecosystem as a legal person in 2018).

194 Niibin Makwa (Derek J. Nepinak), Chief of the Minegoziibe Anishinabe (Pine Creek First Nation), "Ensuring Community Well-Being in the Search and Recovery of Missing Children," Voices of Community Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

195 The Kaatagoging Initiative was described by Elder Eleanor Skead, "Ensuring Community Well-Being in the Search and Recovery of Missing Children," Voices of Community Panel, National Gathering on Unmarked Burials: Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022. See also a summary of her presentation in the summary report for this gathering. OSI, *Addressing Trauma in the Search and Recovery of Missing Children: Summary Report*, November 2022, 34, https://osi-bis.ca/wp-content/uploads/2023/03/OSI-SummaryReport_Winnipeg_Nov2022_web-1.pdf.

196 TRC, *Reconciliation*, 13, citing Elder Stephen Augustine's discussion of Mi'kmaq law.

197 Sara Mainville, "Panel Presentation: Indigenous Laws Relating to Burials," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

198 Katherine Nichols, "Voices of Community: Knowledge Sharing Panel," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

199 Ogimaw Andy Rickard, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

200 Sarah Longman, Voices of Community: Knowledge Sharing Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

201 Participant, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

202 Benjamin Kucher, Voices of Survivor Families, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

203 Elder Peter Schuler, "Opening Remarks," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

204 See, for example, Umeek, *Principles of Tsawalk*, 154, where he says that, "[p]ast, present and future are *tsawalk* – one" (emphasis in original).

205 Charlene Belleau, "Voices of Survivors," Panel Presentation, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023.

206 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press Canada, 1999), xxii; Deganawide, John Fadden, and Kahonhes (illus.), *The Great Law of Peace of the Longhouse People: Kaianerekowa Hotinonsionne* (Akwesasne via Rooseveltown, NY: Akwesasne Notes, 1975), 50, para. 57 ("thus the Five Nations completely united and enfolded together, united into one head, one body, and one mind. They shall therefore labour, legislate, and council together for the interest of future generations").

207 Hohahes Leroy Hill, "Welcome Dinner," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 27, 2023.

208 See, for example, Darlene Johnston, *Respecting and Protecting the Sacred* (Toronto: Ipperwash Inquiry, 2006), 6, http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf (who articulates the responsibilities to the dead under Anishnaabe law).

209 Vicki Manuel, Voices of Community: Knowledge Sharing Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

210 Kwetiio, "Indigenous Community Perspectives: Indigenous Laws and the Colonial Legal System," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

211 Morgan G.F. Baillargeon, "Walking Among Birds of Fire: Nehiyaw Beliefs concerning Death, Mourning and Feasting with the Dead" (PhD diss., University of Ottawa, 2004), 150, 199.

212 Morales, *Indigenous Legal Responses to Hate*, 12–13.

213 Wendy Hill, "Opening Remarks," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 27, 2023.

214 Elder Eleanor Skead, Panel on Enduring Community Well-Being in the Search and Recovery of Missing Children, National Gathering on Addressing Trauma in the Search and Recovery of Missing Children, Winnipeg, Manitoba, November 29, 2022.

215 Elder Tom Porter, "Keynote Address," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

216 Elder Harry Mustus, "Closing Prayer," National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 13, 2022. Many speakers and participants at the National Gatherings echoed the concern that the appropriate and necessary ceremonies may not have been done for the missing children.

217 Elder Fred Campion, "Upholding Indigenous Laws and Ceremony," Elders' Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

218 Baillargeon, "Walking Among Birds of Fire," 150, 199, and generally.

219 Quoted in John Borrows, "Aboriginal Title and Private Property," *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71 (2015): 95.

220 Kahentinetha, "Indigenous Laws and the Colonial Legal System," Indigenous Community Perspectives Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

221 Piita Irniq, Voices of Survivors Panel, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

222 Kathleen Lickers, Co-chair, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

223 Barbara Lavallee, "Breakout Session: Ensuring the Respectful Treatment and Public Disclosure of Community Information and Knowledge," Media Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 18, 2023.

224 Charlene Belleau, "Importance of Data Sovereignty and Access to Records in the Search and Recovery of Missing Children," Voices of Survivors Panel, National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information, Vancouver, British Columbia, January 17, 2023; see also OSI, *National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Knowledge and Information: Summary Report*, January 2023, 33, https://osi-bis.ca/wp-content/uploads/2023/08/OSI-SummaryReport_Vancouver2023_web_v3.pdf.

225 Benjamin Kucher, Voices of Survivor Families, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Edmonton, Alberta, September 14, 2022.

226 See generally, Borrows, "Indigenous Constitutionalism," 23–29.

227 See, for example, Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan*, 53. Here, Cardinal and Hildebrandt describe the Peace Treaty between the Cree and the Blackfoot.

228 For a Haudenosaunee explanation of the Two Row Wampum Treaty, see "Two Row Wampum – Gaswéñdah," Onondaga Nation, accessed July 16, 2024, https://www.onondaganation.org/culture/wampum/two-row-wampum-belt-guswenta/.

229 Borrows, *Canada's Indigenous Constitution*, 75–76.

230 Borrows, *Canada's Indigenous Constitution*, 75–76; see also generally Alfred, *Peace, Power, Righteousness*; Beverly Jacobs, "International Law/The Great Law of Peace" (LLM thesis, University of Saskatchewan, 2000), 13, 16. Borrows also describes how the negotiations that resulted in the Treaty of Niagara accorded with Anishinaabe, Haudenosaunee, and other Indigenous legal traditions and recognized Indigenous sovereignty and the nation-to-nation relationships between First Nations and the British Crown (28–29).

231 Osennontion and Skonaganleh:rá, "Our World," *Canadian Woman Studies* 10, nos. 2–3 (1989): 8–10; Patricia A. Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice," *University of British Columbia Law Review* 26 (1992): 239, para. 53.

232 Kwetiio, "Indigenous Community Perspectives: Indigenous Laws and the Colonial Legal System," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

233 This view is supported by many Indigenous scholars. See generally Wahpimaskwasis (Little White Bear) Janice Alison Makokis, who emphasizes that Cree women need to reframe self-determination to include ceremony and spirituality. Janice Alison Makokis, "Nehiyaw iskwew kiskinowâtasinahikewina—paminisowin namôya tipeyimisowin: Learning Self Determination through the Sacred," *Canadian Woman Studies* 26, nos. 3-4 (2008): 39–51. See generally Tamara Starblanket (Nehiyaw Iskwew (Cree woman)) from Ahtahkakoop First Nation, Treaty Six Territory, who identifies that the path forward from the colonial genocide of the Indian Residential School System necessitates Indigenous self-determination as an inherent right and necessary response to colonial violence. Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State* (Atlanta, GA: Clarity Press, 2018). See also Glen Coulthard, who emphasizes that Indigenous Peoples must dismantle colonialism themselves. Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory* 6 (2007): 437; Taiaiake Alfred, Wasáse, 111.

234 Doug George-Kanentiio, "Participant Dialogue and Sharing," National Gathering on Unmarked Burials: Affirming Indigenous Data Sovereignty and Community Control over Information and Knowledge, Vancouver, British Columbia, January 17, 2023.

235 Bernadine Harper, Eleanor Sunchild, Elder Rose Watchmaker, Council Member of the Onion Lake Cree Nation, "Breakout Session: Cree Traditional Laws in the Recovery of Missing Children at Onion Lake Cree Nation," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

236 Bernadine Harper, Council Member of the Onion Lake Cree Nation, "Breakout Session: Cree Traditional Laws in the Recovery of Missing Children at Onion Lake Cree Nation," National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

237 Harper, "Breakout Session: Cree Traditional Laws."

238 Harper, "Breakout Session: Cree Traditional Laws."

239 Harper, "Breakout Session: Cree Traditional Laws."

240 Grand Chief Garrison Settee, Pimicikamak Cree Nation, "Where to Begin," Leadership Panel, National Gathering on Unmarked Burials: Supporting the Search and Recovery of Missing Children, Montreal, Quebec, September 7, 2023.

CHAPTER 7

The Lack of Legal Protection for Indigenous Burial Sites under Canadian Law

> We were given the sacredness of the land. We must take good care of it, as our future generations will depend on it. As well, we were given that gift and that responsibility by Kitche Mando and we must respect this gift and the life Kitche Mando has given us.... The White man stands on the graveyard of our ancestors who are underground. They were here first. This is a fact.
>
> — Elder David Tookate, Attawapiskat First Nation[1]

Honouring and respecting loved ones after death and providing dignified burials are key concepts shared across all societies. Committing indignities to burials and human remains is contrary to social norms, and prohibitions on doing so have been codified in rules and laws. In Canada, this is evident in laws regulating burials and how bodies should be treated after death as well as in laws that criminalize the undignified treatment of a dead human body or human remains.[2] Canadian law also recognizes rights to bodily integrity after death—for example, people can make choices about how they should be buried and on the treatment of their body after death.[3] There are also prohibitions on damaging, altering, or desecrating burials.[4] Unfortunately, these laws have not been equally applied or enforced to protect the burials of Indigenous people.

Since the earliest settlers arrived in what is now known as Canada, the lack of legal protections for Indigenous burial sites has been consistent and falls within the continuum of practices that settler colonial States put in place to assimilate and eliminate Indigenous Peoples.[5] The aim of settler laws, policies, and practices was and is to displace Indigenous

Peoples and permanently replace them with White settler communities. These laws, policies, and practices are part of a coherent system designed to serve settler interests and subjugate and undermine Indigenous laws, governance and family structures, and spiritual and cultural beliefs. They include the forcible taking of Indigenous children to Indian Residential Schools; the forced indoctrination of these children into Christianity; the attempts to sever family ties; the creation of conditions where the mistreatment, abuse, and neglect of children was rampant, unpunished, and contributed to high death rates; the failure to notify families about their children's deaths or the location of their burials; and the failure to ensure the respectful, honourable, and dignified burials of the children who died and to protect their burial sites.

A key part of eliminating Indigenous Peoples and replacing them with White settler communities is the construction of a narrative of settler belonging. Consistent with this, the attempted erasure and suppression of Indigenous Peoples' presence over millennia on these lands is a central aspect of settler colonialism. As Leey'qsun scholar Rachel Flowers argues, "settler colonialism is invested in gaining certainty to lands and resources and will achieve access through the dispossession of Indigenous peoples, violently or legislatively."[6] Flowers links this dispossession with the removal of Indigenous bodies from the land. Similarly, Michi Saagig Nishnaabeg scholar Leanne Betasamosake Simpson argues that, "the removal and erasure of [our] bodies from the land make it easier for the state to acquire and maintain sovereignty over land because this not only removes physical resistance to dispossession, it also erases the political orders and relationships housed within Indigenous bodies that attach our bodies to the land."[7]

Seen in this light, the desecration of Indigenous burials and the ongoing lack of legal protections for such burials is one form of the attempted dispossession and erasure of Indigenous Peoples. Indigenous burial sites generally, and especially in the context of the missing and disappeared children and their unmarked burials, are a constant reminder of the violence that is at the root of the creation of Canada. The failure to provide legal protections for Indigenous burial sites therefore advances both settler colonialism and settler amnesty in Canada. The lack of legal protections has led to centuries of desecration of Indigenous burial sites. Desecration occurs when a Sacred place is treated with violent disrespect.[8] In Canada, this desecration has ranged from grave robbing,[9] exhumation and reburying of Indigenous people who had converted to Catholicism by religious officials,[10] purposeful bulldozing or removal of grave markers or headstones,[11] and accidental and deliberate desecration during excavation for the development and redevelopment of lands where Indigenous burial sites exist. Anishnaabe scholar Darlene Johnston notes that, due to this long history of disrespect and

deliberate desecration of Indigenous burial sites, many Indigenous Peoples became reluctant to reveal the locations of these burials to non-Indigenous people.[12]

Canada's long history of failing to ensure that Indigenous burials and human remains are treated with respect and dignity, and of infringing Indigenous Peoples' responsibilities under Indigenous laws to protect their Sacred burial grounds and cemetery sites, is heinous. There is an inextricable link between Sacred burial sites and the identity and cultural survival of Indigenous Peoples;[13] these sites, "form part of the spiritual, psychological and social foundations of ... Indigenous individuals and communities."[14] The lack of protections therefore constitutes an attack on Indigenous identity. This attack is particularly atrocious when contrasted with the robust provincial and territorial legislative regimes that regulate and protect government-run, church-run, or privately run cemeteries in Canada.[15]

For Indigenous Peoples, protecting and maintaining the burial sites of loved ones and ancestors is vital. Indigenous Nations have robust laws, practices, and protocols to honour, respect, and protect the burial sites of their loved ones and ancestors. These laws and protocols are aimed to uphold responsibilities to past, present, and future generations. Indigenous burial sites are Sacred places of spiritual connection. Yet these sites are often under threat of destruction or desecration when they stand in the way of private landowners, corporate developers, public infrastructure, resource development projects, or the recreational activities of non-Indigenous people. This chapter outlines the link between the lack of protection for Indigenous burial sites, settler colonialism, and settler amnesty. It analyzes the various protections under Canadian law that could have been applied to protect Indigenous burial sites, including the burials of children during the operation of Indian Residential Schools. This analysis includes a review of the constitutional protections for Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*.[16] It concludes with a discussion of Canada's resistance to, and then acceptance of, the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) and its current Action Plan.[17]

CANADA'S FAILURE TO PROTECT THE BURIAL SITES OF CHILDREN WHO DIED AT INDIAN RESIDENTIAL SCHOOLS

As noted in *Sites of Truth, Sites of Conscience*,[18] the Truth and Reconciliation Commission of Canada (TRC) concluded that, throughout the history of the Indian Residential School System, the federal government failed to establish and enforce adequate standards and regulations to guarantee the health and safety of the children taken to Indian Residential Schools.[19] This resulted in the unnecessarily high death rate of children at these institutions.[20] The TRC also concluded that, "the practice ... was to keep burial costs low, and to oppose sending the

bodies of students at schools back to their home communities."[21] Since the institutions were expected to pay for the costs of burying children who died out of their operating budgets, children were often buried on the institutional grounds or in cemeteries nearby.[22] Once the institutions closed, the federal government failed to adequately plan for the ongoing care and upkeep of the cemeteries or burial sites of the children.[23]

Disrespect for those who have died causes harm to those who are living.[24] The lack of protection of the burials of the missing and disappeared children inflicts ongoing harms to Survivors, Indigenous families, and communities. These harms include:

- **The devaluation and dehumanization of Indigenous people:** the federal government has consistently devalued and dehumanized Indigenous people, in life and after death, through the imposition of assimilative laws and policies and the mass human rights violations and atrocities that it has committed against Indigenous children, families, and communities. This includes the fact that many, if not most, of the missing and disappeared children are buried in unmarked burials.[25]

- **The imposition of colonial spiritual violence:** spiritual violence was imposed on Indigenous Peoples in various ways, including through the Indian Residential School System[26] and by denying families the right to bury their children in accordance with their spiritual and cultural practices.

- **The disrespect for Indigenous families and communities whose children are missing or have been disappeared:** the federal government failed to treat the families and communities of the missing and disappeared children with respect. It failed to notify families about the fate of their children and the locations of their burial. It also failed to investigate the circumstances of the children's deaths.

- **The harm to the human dignity and integrity of Indigenous people, families, and communities:** the lack of protection of burial sites is an affront to the human integrity and dignity of Indigenous people as it constitutes a denial of Indigenous identity and an attempt to erase Indigenous histories.[27] It denies Survivors, Indigenous families, and communities the ability to uphold their responsibilities under Indigenous laws to care for the burials and to properly grieve for the missing and disappeared children.

The lack of legal protections for the burial sites of the missing and disappeared children is consistent with colonial patterns of genocide and settler amnesty. If the burials remain unmarked and unprotected, the evidence of atrocities and mass human rights violations remains hidden. If no investigation is conducted to determine the circumstances surrounding the deaths of the children and their burials, no one can or will be held accountable for the unlawful acts that may have caused or contributed to these deaths.

Lack of Legal Protections for the Unmarked Burials at the Former Site of the Brandon Indian Residential School

> There are no words to describe the devastating impact this has on the Survivors and families of these [S]acred children. The children buried beneath Turtle Crossing deserve the utmost respect and dignity and instead have been driven over, disregarded, and camped on while a business profits from the exploitation of a burial site.
>
> — Southern Chiefs' Organization[28]

Rubble from the former Brandon Indian Residential School, June 2013 (photo permission provided by Gordon Goldsborough, Manitoba Historical Society/University of Manitoba).

The lack of legal mechanisms at the federal, provincial, and municipal level has impacted the ability of Indigenous communities to access and protect cemeteries at the former sites of Indian Residential Schools across Canada. One example is at the former site of the Brandon Indian Residential School. The Brandon Indian Residential School, also known as the Brandon Industrial Institute, was located on the Assiniboine River in southwestern Manitoba and operated from 1895 to 1972.[29] The building was demolished in 2006. The decision to demolish it was not led by the community nor was the land returned to the local First Nation.[30]

There were several cemeteries associated with the institution. A cemetery was established on the institution's grounds in 1896. By 1912, when the principal wrote to the federal government for permission to create a new cemetery, at least 51 children from 12 Indigenous communities in Manitoba had been buried, "at the lower end of the farm close to the Assinaboine [*sic*] River."[31] The Brandon Indian Residential School's first cemetery is on land that was later leased, developed, sold, forgotten, sold again, and literally parked on.[32] The newer cemetery was located on the hill behind the institution, but, unfortunately, it was also neglected over time.[33] In 1921, the site of the first cemetery and the surrounding land was leased to the City of Brandon.[34] As part of the land-clearing efforts, the grave markers were removed, and the property became Curran Park, a municipal park with a swimming pool and picnic grounds.

In the 1960s and 1970s, Alfred Kirkness, a Survivor of the Brandon Indian Residential School, worked tirelessly to identify the location of the cemetery. He was determined to have the graves of the children marked and the memory of the children treated with respect. Through his efforts, the location of both cemeteries was documented, and some of the children who died at the institution were identified.[35] As a result of Kirkness' work, the Indigenous Friendship Society, the Brandon Girl Guides, and the Rotary Club all started supporting efforts to respect the children's burials and protect the cemetery. Eventually, the cemetery was protected by a fence, and a commemorative cairn was placed and maintained by the Brandon Girl Guides. However, the site was not recognized as a cemetery or heritage space under provincial law, and no restrictions were placed on the land title to indicate that the property included the cemetery site and burials of children. In 2001, the City of Brandon sold the property, and it is now privately operated as the Turtle Crossing Campground RV Park. Sometime between 2005 and 2010, the fence and cairn were removed, and RV camping spots were constructed on the cemetery site and on top of the children's burials.

Sioux Valley Dakota Nation, the closest First Nation to the former Brandon Indian Residential School, has been attempting to access and protect this Sacred site for over a decade. In 2012, the Nation offered to do a geophysical survey of the site, but the landowner declined to cooperate. Although the Nation provided the landowner with archival evidence of the cemetery and requested the support of federal and provincial governments, the property remained unprotected and inaccessible to the Nation until the landowner applied for a permit to redevelop the campsite in 2018. This led to the creation of a working group and an investigation that identified 56 potential unmarked burials on the campground. Despite the confirmations of these burials, camping was not restricted at the site until 2021 after the public confirmation of unmarked burials at the Kamloops Indian Residential School. Sioux Valley Dakota Nation has been requesting the assistance of the municipal, provincial, and federal governments to access and protect these unmarked burials. The Sioux Valley Dakota Nation has been working to continue searches of the site to delineate the cemetery boundaries, and, once that is complete, a fence could be erected to protect the burial sites. In October 2022, the Sioux Valley Dakota Nation planned to complete a second survey of the site, but the landowner denied access at that time.[36]

The Southern Chiefs' Organization described the impact that the lack of protection of the burials has had on Survivors and the families of the children buried there:

> The city of Brandon sold this land in 2001, knowing it contained a cemetery, with no protections or safeguards in place. There has been no action or efforts to expropriate the land by the city of Brandon, the province of Manitoba, or the government of Canada. This is disrespectful to the deceased, their family members, and Survivors. This lack of political will from all orders of government to protect these children highlights the continuing perspective that First Nation people are "less than" others, a view that has permeated colonial governments for hundreds of years. Families and communities need support from all governments to conduct searches, but instead the business interests of the private sector takes precedence. It is impossible to talk about accountability and justice when key decision-makers refuse to be involved.[37]

The Southern Chiefs' Organization has called on the City of Brandon to buy back the land so that the cemetery and unmarked burials can be protected.[38]

In August 2023, the Manitoba Keewatinowi Okimakanak (MKO) and Sioux Valley Dakota Nation publicly called on the province of Manitoba to protect the burials by designating the cemetery in the Turtle Crossing Campground RV Park as a provincial heritage site under the *Heritage Resources Act*.[39] According to MKO Grand Chief Garrison Settee, "it's inexcusable that the province has not granted protection to these sites … [which] should be protected with dignity and utmost respect."[40] Former Chief Jennifer Bone of the Sioux Valley Dakota Nation highlighted the barriers created by the lack of legal mechanisms to access and protect this site. She noted, "We continue to advocate. We're not giving up … you know how important it is to not only the Sioux Valley Dakota Nation but to all Indigenous people throughout the country.… The inability to access private property … where our loved ones are buried. It's a huge issue."[41]

The Long History of Conflicts Created by the Lack of Protection of Indigenous Burial Sites in Canada

Unfortunately, disputes about accessing, protecting, and returning the lands where Indigenous burials sites are located has a long history in Canada. The conflicts over Indigenous lands in Oka in 1990 and Ipperwash Park in 1995 are part of a five-hundred-year history of Indigenous resistance that began when European settlers first arrived. In both cases, Indigenous people peacefully reoccupied and blocked access to lands to assert their sovereignty. They did so to uphold their responsibilities under Indigenous laws to protect their lands, which included Sacred burial sites. Two key reports came out of these conflicts: the *Report of the Royal Commission on Aboriginal Peoples*,[42] which was a direct response to the Oka Resistance, and the *Report of the Ipperwash Inquiry*,[43] which followed a provincial public inquiry. Both reports highlight the need to repair relationships between various levels of governments and Indigenous communities and recommended legal reforms to adequately protect and respect Indigenous burial sites.

Report of the Royal Commission on Aboriginal Peoples

The bones of the Mohawk dead are piled on top of one another in the tiny graveyard just off the highway west of the town of Oka. Wedged between the driveway to the Oka Golf Club and the club's parking lot, the cemetery has been left with no room to expand. The graves are tightly packed together, and stray golf balls are sometimes found strewn among the decaying headstones. The ninth hole is just a few metres away. The names on the headstones read like a genealogy of the

> Kanesatake Mohawks: Gabriel, Nicholas, Nelson—the parents, grandparents, and great-grandparents of the people who stood together in the Pines during the spring and summer of 1990.[44]

In July 1990, the Oka Resistance at Kanehsatà:ke began when Kanien'kehá:ka (Mohawk people) peacefully occupied lands called The Pines, an area of significance within their traditional territory, to protect against municipal encroachment. The Pines included a Mohawk cemetery as well as a forest of cultural, spiritual, and ecological importance.[45] The municipality of Oka, Quebec, planned to clearcut The Pines to build condominiums and expand a golf course. Municipal officials prioritized the provision of recreational activities for non-Indigenous people over ensuring the protection of the Sacred burial site and forest. On July 11, 1990, the Kanien'kehá:ka set up a barrier to protect their lands and uphold their responsibilities to safeguard their ancestors' burial sites. Those occupying The Pines included Elders, Knowledge Keepers, grandmothers and grandfathers, men, women, and children. The municipality of Oka called in the Sûreté du Québec (the provincial police). As the conflict escalated, the Royal Canadian Mounted Police and the Canadian military were brought in to disband the occupation. As part of the attempt to protect The Pines, the Kanien'kehá:ka blocked the Mercier Bridge, preventing suburban commuters from getting into Montreal. Violence escalated, and a tense standoff lasted for 78 days. Hundreds of people were injured in the violence,[46] and several died as a result of the conflict.[47]

The historical context is important to understand because, without it, there is a danger of deepening false, harmful stereotypes about Indigenous people when they exercise their rights under Canadian laws and uphold their responsibilities under Indigenous laws. The dispute relating to the lands where The Pines are located began in the 1700s:

- In 1714, the Kanien'kehá:ka were offered title to a large tract of land that included The Pines as an incentive to relocate them from what is now Montreal.[48]
- In 1717, without the Kanien'kehá:ka knowing, the king of France granted these lands to the Roman Catholic Seminary of St. Sulpice.[49] This grant of lands included a term that the Sulpicians were the proprietors of the lands but that the title would revert to the king if the, "lands should be abandoned by the Indians."[50]
- In 1721, the Kanien'kehá:ka agreed to be relocated on the understanding that the large tract of land in Kanehsatà:ke would belong to them.
- In 1735, the king of France enlarged the land grant to the Sulpicians.[51]

- In the 1740s and 1750s, the Kanien'kehá:ka fought along the French in wars against the British.
- In 1841, after a dispute about the lands, the British, through the legislature of Lower Canada, passed an Act recognizing the Sulpicians as the owners of the land.[52]

Subsequently, the Sulpicians sold the lands where The Pines were located.[53] By 1990, these lands were owned by the municipality of Oka.[54] The Mohawks of Kanehsatà:ke have consistently asserted their rights to the lands before, during, and after the land grant to the Sulpicians.[55]

During the 150 years prior to the peaceful occupation of The Pines, the Mohawks of Kanehsatà:ke made many attempts to settle their claim first through colonial, then through Canadian, legal processes. They petitioned Lord Elgin in 1848 and 1851, petitioned the Governor General of Canada in 1868 and 1870, and visited the king of England in 1909.[56] Subsequently, on three different occasions—in 1912, 1975, and 1977—they advanced claims to these lands:

- In 1912, the Judicial Committee of the Privy Council in London presided over a claim by the Mohawks of Kanehsatà:ke to title to the lands that included The Pines. The Sulpicians argued that any rights of the Mohawks that might have existed were eliminated by the grants made to the Sulpicians by the king of France.[57] The Privy Council held that the Act passed by the legislature of Lower Canada in 1841 had rendered explicit the Sulpicians' title to the land.[58] The Privy Council further held that the Mohawks of Kanehsatà:ke had the right to occupy and use the land until the Sulpicians exercised their unfettered right to sell it.[59] The Mohawks' claim was therefore denied.
- In 1975, the Mohawks of Kanehsatà:ke, Akwesasne, and Kahnawà:ke made a joint, comprehensive land claim to the federal and Quebec governments asserting Aboriginal title to lands that included the Seigneury of St. Sulpice. The federal minister of Indian and Northern Affairs rejected the claim on the basis that the Mohawks had not possessed the land since time immemorial and that any Aboriginal title that may have existed had been extinguished by historical statutes.[60]

- In 1977, the Mohawks of Kanehsatà:ke submitted a specific claim in relation to the lands that included The Pines. In 1986, the federal government rejected the claim relying on a Department of Justice opinion that there was no legal obligation owed by the federal government to the Mohawks in relation to past dealings with their lands.[61]

It was only after many unsuccessful attempts to protect these lands and the Sacred cemetery site that the Kanien'kehá:ka began their occupation of The Pines in the spring and summer of 1990.

In the aftermath of the Oka Resistance, Prime Minister Brian Mulroney established the Royal Commission on Aboriginal Peoples (RCAP) in 1991. The RCAP's Final Report was issued in 1996 and, in relation to Indigenous burial sites, concluded:

- Indigenous Peoples' identities are deeply entwined with their territories, including Sacred burial sites;[62]
- Ancestral burial grounds are considered Sacred land;[63]
- Protection of historical and Sacred sites are essential to the spiritual health of Indigenous Nations;[64] and
- Legal protections under Canadian law are limited and fail to appropriately include Indigenous Peoples in decisions in relation to Sacred lands, including those where burials are located.[65]

Specifically, the RCAP identified limitations in the legislation relating to historical site designation and protection, development of lands, and archaeological excavations.[66] It noted that:

> the search for historically and culturally significant objects often leads archaeologists to burial grounds. Aboriginal people have asked that these objects be left in the ground and that graves not be disturbed out of respect for the dead and in recognition that the burial grounds remain the collective property of Aboriginal people.[67]

The RCAP issued a comprehensive five-volume report in 1996 that included recommendations specific to protecting burial sites.

RCAP's Recommendations Relating to Indigenous Burial Sites

The RCAP made several recommendations relating to Indigenous cultural and heritage sites and burial grounds, which were never implemented. These include:

2.4.58

Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing:

(a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;

(b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);

(c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and

(d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include:

(a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

(b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and

(c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

What Has Happened since the Oka Resistance?

The Kanien'kehá:ka of Kanehsatà:ke continue to work to have the lands returned and The Pines protected. Since 2008, the lands in dispute at Oka have been under negotiations through the federal government's Specific Claims process, which deals with outstanding claims by First Nations in relation to lands, other assets, and the fulfillment of Treaties.[68] To date, no agreement has been reached. In the 2000s, a private developer bought the lands and started building houses on the disputed territory without the consent of the Kanien'kehá:ka.

The province of Quebec has one of the weakest legal regimes for protecting Indigenous burial sites in all of Canada.[69] There are few provincial regulations relating to exhuming and managing archaeological human remains.[70] The Quebec Ministry of Culture and Communications (MCC) has general responsibility for archaeological work in the province.[71] If human remains are located and the coroner determines that the remains are archaeological, Article 951 of the *Civil Code of Quebec* applies, which vests ownership of everything above and below the surface to the property owner, which includes any artifacts or human

remains discovered.[72] In 1985, there was a transfer of heritage management to the municipalities, which vastly increased their power and discretion.[73] Municipalities do not have any formal requirements to consult with Indigenous communities, even if there are decisions to move or rebury Indigenous human remains.[74] Starting in 2011, the MCC has been obligated to notify First Nations and Inuit before excavating on Indigenous lands; in all other cases, consultation is not required but is strongly recommended.[75] Overall, the legal framework has many gaps for protecting Indigenous burials and leaves the decision to consult with Indigenous communities in the sole discretion of municipalities, private landowners, and archaeologists.

The lack of legal protections has threatened the Sacred burial ground at The Pines. Despite an agreement between the Kanien'kehá:ka and the private developer that The Pines would not be disturbed, several trees were cut down to support a housing development in 2017. This sparked a renewed conflict and direct action by the Kanien'kehá:ka to stop development on the lands. In 2019, the private developer indicated that he was willing to return 60 hectares, which included The Pines, to the Kanien'kehá:ka through the federal ecological gifts program. This offer, however, was contingent on the federal government purchasing approximately 150 more hectares.[76] When this agreement was being considered, the mayor of Oka made public remarks opposing the transfer that were offensive and characterized by many Kanien'kehá:ka as racist hate speech.[77] Despite there being no legal requirement to do so, the mayor also indicated that the municipality of Oka should be consulted by the federal government prior to any transfer agreement being put in place.[78] In 2021, the municipality of Oka designated a section of The Pines as a municipal heritage site without the consent of the Kanien'kehá:ka. It also rezoned much of the land from residential development land to ecological conservation land. Both the federal ecological gifts program and the municipal heritage designation place conditions on the lands that some Kanien'kehá:ka believe interfere with their sovereignty.[79] At the time of writing this Final Report, and over three hundred years since these lands were forcibly taken, the Kanien'kehá:ka continue to fight to have their Sacred lands returned.[80]

Report of the Ipperwash Inquiry

> It is important to understand how First Nation peoples view burial grounds. To us, our ancestors are alive and they come and sit with us when we drum and sing. We did not bury them in coffins, so they became inseparable from the soil. They are literally and spiritually, part of the earth that is so a part of us. That is one reason why we have such a strong feeling for the land of our traditional

territories—our ancestors are everywhere. It is a sacrilege to disturb even the soil of a burial ground. It is an outrage to disturb, in any way, actual remains.

— Chippewas of Nawash Unceded First Nation, Submission to the Ipperwash Inquiry[81]

While the RCAP's Final Report was national in scope, the province of Ontario was the focus of the Ipperwash Inquiry. The Ipperwash Inquiry was launched in 2003 to inquire and report on the events surrounding the fatal police shooting of Dudley George during the peaceful occupation of Ipperwash Park.[82] The occupation began in May 1993 when community members and descendants from Stony Point First Nation as well as other First Nations people began to peacefully occupy the military camp in Ipperwash Provincial Park (also known as Camp Ipperwash).[83] The Stony Point community's burial grounds were located in the military camp site.[84] The peaceful occupation included Elders, men, women, and children.

As was the case in Oka, the Kettle and Stony Point First Nation[85] had advocated for decades for the burial grounds to be protected and for the return of the lands. When Ipperwash Provincial Park was created in 1937, the Kettle and Stony Point First Nation notified federal authorities about the existence of the burial ground in the park.[86] By 1975, the Ontario government was aware of the burial site[87] but took no action to preserve or protect it.[88] In 1942, the federal government appropriated reserve lands, including the lands where the burial site was located, under the *War Measures Act* for a military training base.[89] The Kettle and Stony Point community members were forcibly relocated from these lands.[90] The federal government promised that the relocation would be temporary and that the lands would be returned; however, it did not keep this promise. The Department of National Defence then promised to return the lands in 1994, but, again, this promise was not kept; the military operations continued at Camp Ipperwash into the summer of 1995. As a result, so did the peaceful occupation of Camp Ipperwash.

On July 29, 1995, Stony Point members decided to take control of the military barracks. On the same day, Base Commander Captain Doug Smith ordered the military personnel to leave the barracks to avoid a physical confrontation with First Nations people.[91] At this point, the Kettle and Stony Point First Nation had been advocating for the return of their lands for over 50 years.[92] On the night of September 6, 1995, based on flawed and inaccurate information that the Indigenous people in the park had firearms, the Ontario Provincial Police (OPP), in full riot gear, marched towards the peaceful gathering of 25 community members. A chaotic confrontation ensued during which Cecil Bernard George was "excessively beaten on his head and face by the OPP"[93] and police officer Kenneth Deane fatally shot the unarmed Dudley George.[94]

In his Final Report, Inquiry Commissioner the Honourable Justice Sidney B. Linden concluded that the Stony Point people have a deep connection to the gravesites where their ancestors are buried.[95] Several submissions to the Ipperwash Inquiry explained this deep connection, including the submission from Dudley George's family:

> The Anishnaabeg belief is that the souls of their departed ancestors are attached to their bones. As such, Anishnaabeg treat the bones of their ancestors with great reverence, and abhor the disturbance of graves. This has been their way since time immemorial, and will be their way evermore. This explains why the Chief and Council made a point of asking that the burial ground in Ipperwash Park be fenced off and preserved when it was discovered in 1937. It is also half the reason why the Stony Pointers occupied the Park in September 1995—to reclaim the burial grounds of their ancestors that had been desecrated.[96]

Legal scholar Darlene Johnston, a member of Chippewas of Nawash Unceded First Nation, further explains why protecting these burial grounds is so important to the people of Stony Point:

> In Anishnaabeg culture, there is an ongoing relationship between the Dead and the Living; between Ancestors and Descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty not only harms the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.[97]

In his findings, Justice Linden found that the lack of protection of the gravesites and burial grounds had a significant impact on the community:

> The Stoney Point people were devastated that their reserve's gravesites and burial grounds were not protected as the Canadian government had promised. When the Aboriginal soldiers returned, they were shocked to see the desecration of the Stoney Point cemetery. The military's disrespect and insensitivity to these sacred sites deeply affected the Aboriginal people.[98]

Justice Linden also found that the failure of governments to take measures to protect the burial grounds was a key reason for the expansion of the occupation; he concluded that, "the

Aboriginal people were disturbed that the government had not taken measures to erect a fence around the gravesites in the park to ensure the sacred [burial] grounds were protected, maintained and respected."[99] Justice Linden concluded that both the provincial and federal governments, as well as the OPP, had contributed to escalating the tensions that resulted in Dudley George's death. With respect to the burial grounds, he found that both the provincial and federal governments were aware of the Kettle and Stony Point community's concerns over the lack of protection or return of these lands, but neither government had taken action to resolve the matter or protect the burial grounds.[100] Justice Linden also held that the OPP did not have accurate information, nor did they understand when they marched into the park on September 6, 1995, in full riot gear that the Stony Point community members were protecting their ancestral burial grounds.[101] Justice Linden concluded that confrontations over Indigenous burial sites are foreseeable and that the best way to avoid conflicts is to engage Indigenous people in the decision-making process.[102] He also noted that including Indigenous people in decision-making processes is consistent with the honour of the Crown.[103]

In April 2016, the Chippewas of Kettle and Stony Point First Nation and the federal government signed a settlement agreement that included the safe return of Camp Ipperwash.[104] Prior to returning the lands, remediation was required due to the fact that the land was used for military purposes. The settlement agreement provided that the lands would be returned once they were remediated, and they would be added to the community's reserve lands. It was estimated that the work to remediate would take over 25 years.[105] In September 2020, Ipperwash Provincial Park was returned to the Chippewas of Kettle and Stony Point First Nation.[106] Sam George reflected that his brother Dudley George, "paid an awful price.... He gave his life for the burial grounds, for the people of our communities."[107]

Ipperwash Inquiry's Recommendations Relating to Indigenous Burial Sites

Seven of the Ipperwash Inquiry's one hundred recommendations focused on protecting and enhancing Indigenous control over Indigenous burial sites. Recommendations 22–28 noted that:

> 22. The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burials and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation

in decision making. These rules and policies should eventually be incorporated into provincial legislation, regulations and other government policies as appropriate.

23. The provincial government should ensure that the *Funeral, Burial and Cremation Services Act* (2002) includes the same appeals process for all types of cemeteries and burials and an obligation to consider Aboriginal values if a burial site is determined to be Aboriginal.

24. The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of "Aboriginal values" in all Class EA [Environmental Assessment] documents and other guidance and policies applicable to public lands.

25. The provincial government, in consultation with First Nations and Aboriginal organizations should determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites.

26. The provincial government should encourage municipalities to develop and use archaeological master plans across the province.

27. The provincial government should prepare plain language public education materials regarding Aboriginal burial and heritage sites.

28. The provincial government should work with First Nations and Aboriginal organizations to develop an Aboriginal burial and heritage site advisory committee.[108]

Are Legal Protections Sufficient after Ipperwash?

As a result of the Ipperwash Inquiry, legislative reforms have taken place in Ontario to bolster legal protections for cemeteries and Indigenous burial sites. Despite these reforms, gaps and complexities continue to exist that create constraints for Indigenous communities to care for and protect the burials of their loved ones and ancestors. Ontario's 2002 *Funeral, Burial and Cremation Services Act* (*FBCSA*) and regulations apply to both provincially recognized cemeteries and other "burial sites."[109] The Act requires anyone who discovers, or has knowledge of, a burial site to, "immediately notify the police or coroner."[110] Once these agencies complete their death investigations, the matter may be transferred to the Registrar appointed under the *FBCSA*, who may require the landowner to, "cause an investigation to be made to determine the origin of the site."[111] Under the *FBCSA*, investigations must be done by a provincially licenced archaeologist who must determine whether the site was intended as a burial site for human remains, the "probable cultural origins or religious affiliation" of the human remains, and the boundaries of the burial site.[112] Once the origin of a site is determined, the Registrar must declare the site an "aboriginal peoples burial ground,"[113] a "burial ground,"[114] or an "irregular burial site."[115] Only once the Registrar makes a determination as to what kind of burial site it is are the "representatives of the person whose remains are interred" then made aware of the existence of the burial site.[116]

Sites that the Registrar classifies as an "[A]boriginal [P]eoples burial ground" or a "burial ground" trigger a site disposition agreement.[117] A site disposition agreement is to be entered into between the landowner and representative(s) of the deceased person(s) interred at the site.[118] The disposition agreement generally creates restrictions on what activities can and cannot take place at the burial site.[119] If an agreement cannot be reached, the matter is referred to an arbitrator, whose decision is binding.[120] Sites categorized as an "irregular burial site" do not require a site disposition agreement, but the landowner is required to, "ensure that the remains found in the site are interred in a cemetery."[121] This legal regime offers some protections to burials:

- Sites being investigated by the coroner are protected through the coroner's broad powers of investigation under the *Coroners Act* and cannot be disturbed unless on a coroner's instructions.
- Sites deemed to be "[A]boriginal [P]eoples burial grounds" or "burial grounds" can only be dealt with in accordance with the terms of the "site disposition agreement," and no remains or artifacts can be removed without the representative's consent.[122]

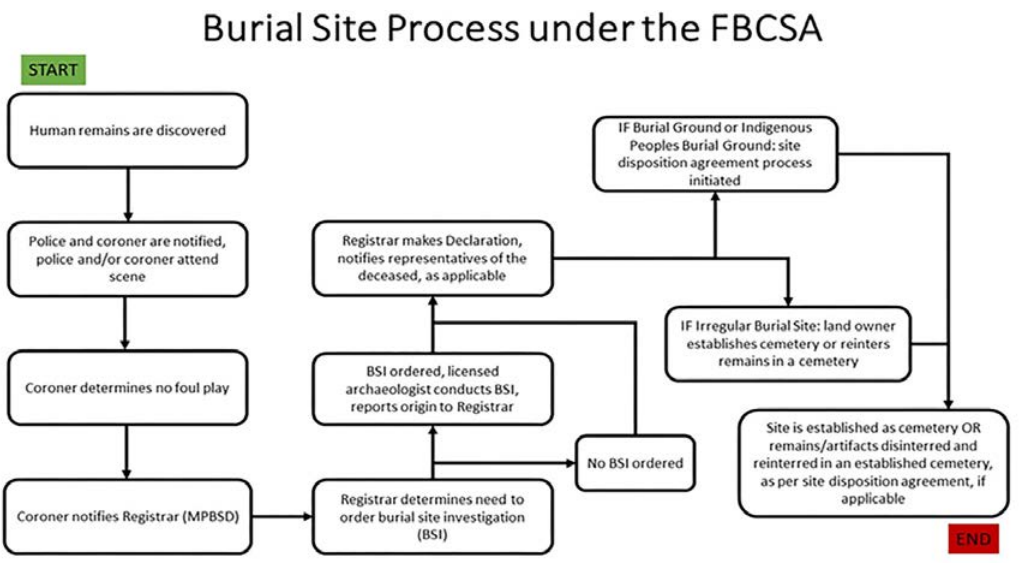
For burial sites deemed to be "irregular," very few legal protections exist, and a wide discretion is provided to the landowner, especially where no representatives of the person or people interred on the site have been identified. In such cases, landowners must either ensure the remains are reinterred in a local municipal cemetery or establish the site itself as a cemetery under the *FBCSA*.[123] This determination can be made without the consent of any interested or impacted Indigenous community.[124]

The *FBCSA* does not legislate any Indigenous involvement upon the discovery of human remains. The provisions place oversight and authority with the provincial government or with those individuals authorized by the provincial government to conduct work pursuant to the *FBCSA*, and they include:

- A professionally licensed archaeologist can begin an investigation and must notify the Registrar after five days of initiating the investigation of the probable cultural origin of the remains.
- The Registrar considers all of the information provided and decides whether human remains represent a formal burial (that is, whether the person was intended to be buried in that location).[125]
- The Registrar decides which Indigenous community or communities are the likely representatives of the deceased person(s) discovered at a burial site and notifies them.[126]
- In the case of a determination of an irregular burial site, Indigenous representatives are, in practice, notified; however, there is no required involvement of Indigenous communities in decisions relating to site disposition or the treatment of human remains.[127]
- There is generally no provincial funding under the *FBCSA* to support the participation of Indigenous communities in investigations, to support repatriation and reburial efforts, or to support the establishment of a new cemetery.[128]

The *FBCSA* also makes no provision for burial sites that do not fit into one of the three designations that the Registrar must make: an Aboriginal Peoples burial ground, a burial ground, or an irregular burial site.

Burial sites at former Indian Residential Schools and associated institutions may potentially contain the remains of both Indigenous and non-Indigenous people as well as intact and "irregular" burials. While the *FBCSA*'s protection of unmarked burial sites is significant



Graphic of burial site processes under the *FBCSA* (provided by the Ontario Ministry of Public and Business Service and delivered to the Office of the Independent Special Interlocutor by correspondence dated April 13, 2023; on file with the Office of the Independent Special Interlocutor).

among Canadian jurisdictions, the legal protections are only triggered once shovels hit the bones of the ancestors, and this is too late in the process. The law offers little incentive, and no compensation, for private or corporate landowners to facilitate Indigenous-led searches and investigations for unmarked burials. While Ontario's legislation goes further than most other jurisdictions by explicitly recognizing Indigenous interests in the protection of Indigenous burial grounds, it still leaves significant gaps for Survivors, Indigenous families, and communities to access and protect sites being searched for the unmarked burials of the missing and disappeared children.

The Chiefs of Ontario's Kee:Way Committee

In response to Recommendation 28 of the Ipperwash Inquiry's Final Report,[129] the Chiefs of Ontario established the Kee:Way Committee of Elders, Knowledge Keepers, and technical advisors. The following Indigenous provincial-territorial organizations within Ontario each appointed one Elder and one technical spokesperson to the Kee:Way Committee:

- Anishinabek Nation;
- The Association of Iroquois and Allied Indians;

- Grand Council Treaty 3;
- Nishnawbe Aski Nation; and
- Representatives from the Independent First Nations.[130]

As part of its commitment to support this work, the Anishinabek Nation (formerly known as the Union of Ontario Indians) has produced two toolkits for Indigenous Nations within Ontario to navigate legal issues related to ancestral burial protections and repatriation: *A Toolkit for Understanding Aboriginal Heritage and Burial Rights and Issues* in 2015[131] and the *Heritage and Burials Toolkit: First Nation Responses to Repatriation and Sacred Sites* in 2020.[132] While this work has been challenging in Ontario, the Kee:Way Committee has had an important role in the return of ancestral remains, supporting search and recovery of the missing and disappeared children, and advocating for a comprehensive Indigenous-led legal framework for Indigenous burial sites and repatriations.[133]

Other Examples of the Desecration of Indigenous Burial Sites in Canada

> The cemetery in Iqaluit is located in a bog ... they didn't listen to our traditional knowledge ... so our people are being buried in muck ... we're trying to bury our people traditionally ... in stone cairns. We're trying to open a traditional cemetery so that our people won't be buried in muck and swamps.
>
> **— Pakak Picco, Inuk youth**[134]

There are numerous other examples of the desecration of Indigenous burial sites in Canada. Various reasons are given to rationalize the desecration of Indigenous graveyards and burial sites, including forced relocation; public infrastructure projects, including hydroelectric development; and private and corporate land development, including for recreational activities. The following is a select list of examples of Indigenous burials that have been disturbed and desecrated:

- In 1905, the federal government expropriated the entire Fort William First Nation village in Ontario and land totalling 648 hectares to allow the Grand Trunk Pacific Railway to build a railway terminus grain elevator. The community was evacuated, buildings were torn down, and the First Nation's

burial site was exhumed and moved to a new location. The grain terminus was never completed, and the Grand Trunk Pacific Railway went bankrupt. The Canadian government later granted the land it had expropriated to the Canadian National Railway.[135]

- In 1919, the City of Winnipeg completed an aqueduct that would provide water directly to the city, but it required the relocation of the Shoal Lake Reserve from the mouth of the Falcon River to a man-made island. The aqueduct flooded the community's traditional burial grounds and isolated the community from the mainland.[136]

- In 1929, the Hydro-Electric Power Commission of Ontario (Ontario Hydro, now Hydro One) built a dam outside Lac Seul First Nation Reserve at Ear Falls in northern Ontario, which is part of Treaty 3. The water rose over several years and flooded approximately 17 percent of Lac Seul's reserve land (11,304 acres) and desecrated the graves in the community.[137]

- In 1938, Ontario Hydro constructed a dam on the Kenogami River, which caused flooding and damaged 16 graves of community members of Ginoogaming First Nation on the shores of Long Lake.[138]

- In 1952, Alcan (now Rio Tinto) completed construction of the Kenney Dam on the Fraser River in British Columbia to generate electricity to power its aluminum smelters.[139] The Kenney Dam forced members of the Cheslatta Carrier First Nation to leave their homes and move to land outside their traditional territories with only two weeks' notice.[140] The Cheslatta understood that any of the graves at risk of being flooded would be moved to higher ground and they were also assured that most burials would not be affected by the higher water levels.[141] Alcan moved only two graves from one of the community's cemeteries and then flooded the rest of the burials there and placed a plaque to memorialize the Cheslatta community members whose resting places are now underwater.[142] A second community burial ground, which was considered above flood level, was flooded in 1957 when a spillway from the dam was opened.[143] This washed many graves away and scattered coffins and skeletal remains in and around Cheslatta Lake. More recently, in 2015 and 2017, high water further disturbed additional burials. Community members continue to find bones along the lakeshore.[144]

- In 1955, Ontario entered into a lease with the Hiawatha First Nation to establish the Serpent Mounds Provincial Park, which is named for the burial mounds on the property.[145] While the province managed the park until 1995, programming included an open-air exhibit and educational programming that put excavated Indigenous burials on display to the public.[146]


Out Of The Storied Past By Mabel Burkholder

Digging At Serpent Mound Promises Light On History

"Digging at Serpent Mound Promises Light on History," *Hamilton Spectator*, July 28, 1956.

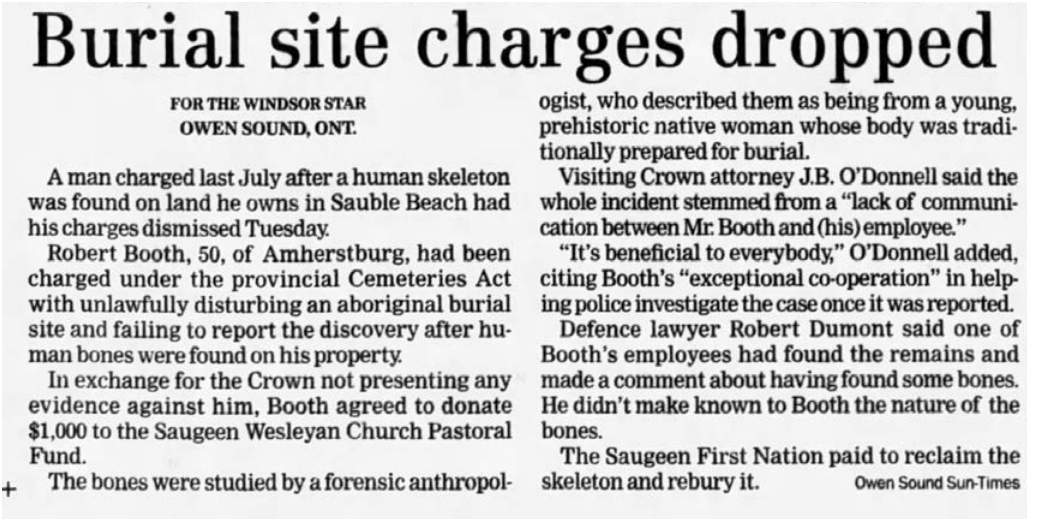
- In 1976, Dr. Walter Kenyon, a curator and archaeologist affiliated with the Royal Ontario Museum, began an excavation of unmarked Indigenous burials that were discovered during construction in Grimsby, Ontario.[147] Kenyon was arrested by Six Nations community members, but, later, Kenyon and other archaeologists published the results of the Grimsby cemetery excavations, including images of Sacred objects and burials in the process of excavation.[148]

- In the 1990s, Kwikwetlem [kʷikʷəƛ̓əm] community members began to observe seasonal flooding at the community's cemetery. George Chaffee has been working to determine the cause of the flooding and how to protect the burial sites since the late 1990s. He clarified that, historically, the Kwikwetlem had buried their ancestors in the mountains.[149] However, after being forced onto reserves in the mid-1800s, the community had to establish a new cemetery and chose a piece of land that the Elders indicated would not flood even if water levels in the Coquitlam River rose.[150] The first burial occurred in that cemetery in 1881.[151] In 1904, a dam was constructed on the Coquitlam River, and a second dam was built within 10 years. Hydrology research confirmed that damming the Coquitlam River, urban sprawl, and climate change have combined to alter the water pattern of the river and cause flooding.[152] In 2023, the threat to the burials is ongoing, and the community continues its work to protect these Sacred sites.[153]

- In the early 1990s, members of the Saugeen Ojibway Nation occupied a residential lot in the city of Owen Sound to protect and reclaim an Anishnaabe burial ground.[154] The lands where the burial ground was located were initially reserve lands set out in accordance with the Crown's treaty obligations contained in the Treaty of 1857. Subsequently, a portion of reserve lands were surrendered to the Crown, and, in a meeting relating to this surrender, it was made clear by Saugeen Ojibway Nation that the burial grounds were not to be disturbed.[155] In 1903, the Department of Indian Affairs sold these lands, and two houses were built on top of the burials.[156] Over the years, graves have been desecrated and looted; artifacts and remains have been removed and sent to museums.[157] Soil from the site was sent to a quarry mill to fabricate bricks that were later used to construct many buildings in Owen Sound and the surrounding community.[158] As a result of the Nation's advocacy, the lands were returned to the Saugeen Ojibway. The two houses were carefully removed from on top of the burial grounds, and several graves were found disturbed just underneath the foundation of one house.[159] The site has now been protected, and a memorial has been placed to commemorate those buried there.[160]

- In July 1998, Robert Booth, a cottager in Sauble Beach, was one of very few people ever charged under the Ontario *Cemeteries Act* with failing to report the discovery of, and unlawfully disturbing, a burial site on his property.[161] A forensic anthropologist confirmed the burial was a traditional burial of a, "young, pre-historic native woman."[162] The charges were dismissed, and the Crown agreed not to present any evidence against Booth if he donated the sum of $1,000 to assist Saugeen First Nation with the reburial costs.[163]

The above is not a full and complete list of the desecration of Indigenous burial sites. Unfortunately, there are many more examples throughout Canadian history.



Burial site charges dropped

FOR THE WINDSOR STAR
OWEN SOUND, ONT.

A man charged last July after a human skeleton was found on land he owns in Sauble Beach had his charges dismissed Tuesday.

Robert Booth, 50, of Amherstburg, had been charged under the provincial Cemeteries Act with unlawfully disturbing an aboriginal burial site and failing to report the discovery after human bones were found on his property.

In exchange for the Crown not presenting any evidence against him, Booth agreed to donate $1,000 to the Saugeen Wesleyan Church Pastoral Fund.

The bones were studied by a forensic anthropologist, who described them as being from a young, prehistoric native woman whose body was traditionally prepared for burial.

Visiting Crown attorney J.B. O'Donnell said the whole incident stemmed from a "lack of communication between Mr. Booth and (his) employee."

"It's beneficial to everybody," O'Donnell added, citing Booth's "exceptional co-operation" in helping police investigate the case once it was reported.

Defence lawyer Robert Dumont said one of Booth's employees had found the remains and made a comment about having found some bones. He didn't make known to Booth the nature of the bones.

The Saugeen First Nation paid to reclaim the skeleton and rebury it.

Owen Sound Sun-Times

"Burial Site Charges Dropped," *Windsor Star*, August 5, 1998. Material republished with the express permission of Windsor Star, a division of Postmedia Network Inc.

Indigenous Community Concerns About the Lack of Protection of Indigenous Burial Sites under Canadian Law

Over the decades, Indigenous leadership and communities have identified many concerns with the lack of legal protections for Indigenous burial sites. These include the following:

- The lack of equal respect and protection afforded to Indigenous burials as compared with those of non-Indigenous people;[164]
- The objectifying of Indigenous human remains, which are treated as property, the object of scientific study, or as an inconvenience;[165]
- The disrespectful terminology used in legislation[166] and by archaeologists[167] to describe Indigenous burials and human remains;[168]
- The failure to report the finding of Indigenous burials and associated artifacts due to the financial implications for private or corporate landowners;[169]
- The fact that legislative mechanisms are often designed to expedite development and decision-making and may be heavily influenced by pressure from private landowners and developers;[170]
- The fact that Indigenous communities are notified and consulted too late in the process and have no decision-making authority in provincial legislative and regulatory frameworks to protect burials sites located on Crown or private lands;[171]

- The insufficient monitoring and enforcement of the legal protections that do exist,[172] including:
    - Few prosecutions for crimes relating to the desecration of Indigenous burial sites;[173]
    - Failure to ensure permit conditions are being complied with;
    - Insufficient legal mechanisms to compel professionals, including archaeologists, and non-Indigenous organizations, such as museums, to release human remains and artifacts taken from burials;
    - Government reluctance to use legal powers that exist to delay or stop development on private or corporate lands; and
    - Insufficient notice requirements, engagement, and involvement of Indigenous communities when burial sites or human remains are located.[174]

The Lack of Protection of Indigenous Burials Sites Creates a Conflict of Laws

> This is the belief of our people here at KI [Kitchenuhmaykoosib Inninuwug]. There is a higher law than Canadian law. And that's the conflict that we're in. We are starting to, even though we [did not] have written law as Indigenous law, we [had] the strong beliefs that we are willing to sacrifice our freedom to uphold, lay our lives down to uphold. But now we are in the process of documenting our laws, whether [the Canadian government and industry] recognize them or not.... These are our laws. We have ownership of these laws and we will uphold these. You don't have to like it [but] ... we are a sovereign nation here at KI.
>
> **— A member of the Six Kitchenuhumaykoosib Inninuwug Leaders**[175]

Indigenous Peoples within Canada have individual, familial, and collective responsibilities to care for and protect the burials of their loved ones and ancestors in accordance with their Indigenous laws, protocols, and ceremonies. The current Canadian legal framework places Indigenous people and communities in a conflict of laws whenever Canadian laws prevent

them from upholding their responsibilities under Indigenous laws. Some examples of this include:

- Disrupting the ability of families and those with specialized knowledge and responsibilities to access sites and care for burials and maintain the balance between the living and the Spirits of the ancestors;[176]
- Failing to ensure that items buried with their loved ones and ancestors are kept and protected together with the remains;[177] and
- Putting Indigenous community members who monitor, patrol, and assert their sovereignty to protect their burial sites in potential danger due to conflicts with developers, private landowners, governments, and police.

Indigenous communities often appeal to various levels of government, corporations, and private landowners to respect the burials of their ancestors and use the limited legal means available under Canadian law to protect these Sacred sites.

Minnawaanagogiizhigook (Dawnis Kennedy), a legal scholar from Roseau River Anishinaabe First Nation, explains that the denial and suppression of Indigenous laws and legal orders has led to many of these conflicts:

> Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly displaced by Canadian law, or as existing only within and according to the terms set by Canadian law. Canadian law's tendency to deny the existence and significance of [I]ndigenous legal orders demonstrates disrespect for these legal orders.[178]

This disrespect places Indigenous Peoples in the impossible situation of determining how best to protect their Sacred burial sites when there is no adequate avenue under Canadian law to do so. Anishnaabe scholar Wapshkaa Ma'iingan (Aaron Mills) notes that:

> flashpoint encounters resulting from direct action initiatives aren't so much about the failure to recognize or adequately ensure enjoyment of s. 35 rights as they are about sharply different legal orders imposing differing (and often conflicting) sets of obligations on the same group of people. The primary conflict resolution issue is therefore one of jurisdiction, not the status of existent Indigenous constitutional rights.[179]

Wapshkaa Ma'iingan points out that Indigenous people are faced with conflicting obligations when obligations under Canadian law do not align with those under Indigenous laws.

Anishnaabe scholar John Borrows describes the ways in which Indigenous Peoples engage in what he terms "civil (dis)obedience" in such situations, with a view to enhancing, "relational freedom and democratic self-determination."[180] He explains:

> I have bracketed the first syllable in *dis-obedience* to signal that an act of disobedience in one context may, in another context, be considered obedience to either Indigenous people's laws or the state's own unenforced or unrealized standards. Thus in some settings disobedience to Canadian law (as interpreted by governments) could well be obedience to Indigenous law. Furthermore, in some situations so-called civil disobedience could be characterized as obedience to Canadian law "as it should be," if such laws applied Indigenous legal principles or the state's own highest standards.[181]

Borrows makes clear that civil (dis)obedience exists along a continuum that encompasses many types of actions, including democratic engagement, strategic alliances, and direct action.[182] He describes the various ways in which Indigenous communities engage in direct action and the long history of attempts at using diplomatic, political, and legal means to resolve disputes prior to doing so. Importantly, Borrows highlights the fact that, over the course of Canadian history, settlers have used direct action much more frequently than Indigenous Peoples. He points out that, "non-Aboriginal occupation of Indigenous lands has long overshadowed fleeting Indigenous uses of direct action throughout Canadian history. Non-Indigenous civil (dis)obedience has been astonishingly successful in transferring Indigenous land to non-Indigenous people."[183]

After exhausting political and legal avenues, however, Indigenous people face difficult decisions about whether to engage in direct action to prevent the desecration of Indigenous burials. These decisions are particularly difficult since under Canadian law Indigenous people may face criminalization and imprisonment.[184] It is also difficult since taking steps to safeguard Sacred spaces requires valuable time and effort and involves stress, fear, and danger for those on the front lines.[185] This takes a toll at both the individual and community level and spreads across generations. Indigenous direct action to protect burial sites is often misrepresented by media and misunderstood by non-Indigenous people, government officials, and police as "unruly," "lawless," and/or "criminal,"[186] which may result in, "grave misunderstandings and toxic backlash."[187] However, these actions are better characterized as conflicts

of law—instances where Canadian law fails to respect and protect Indigenous burial grounds and criminalizes those who challenge these long-standing injustices. In these situations, the lack of adequate legal protections creates a dilemma for Indigenous Peoples: either they take direct action as a last resort to protect the burial sites, or they breach their own Indigenous legal responsibilities and watch their Sacred burials being desecrated.

The Gaps and Complexity of the Canadian Legal Framework

> In Canada, Aboriginal peoples' burial sites are largely treated as archaeological sites and not afforded the same respect or protection as Euro-Canadian cemeteries. This is a significant point of inequity, as it implies culture- and race-based distinctions between Aboriginal and non-Aboriginal Canadians. Shouldn't all Canadians be able to expect that the burial grounds of their ancestors and loved ones remain protected, and that they have a say in any decisions made about their protection?
>
> — George Nicholas et al., "Open Letter on Grace Islet"[188]

Within the Canadian legal framework, federal, provincial, territorial, and municipal laws impact access to, and protection of, Indigenous burial sites. The *Constitution Act, 1867,* sets out the legislative and jurisdictional powers of the federal and provincial governments:

- **Federal powers** are set out in section 91 and include jurisdiction over a number of matters such as military, national defence, navigation, immigration, and criminal law. The federal government also has jurisdiction over federal lands. Section 91(24) provides the federal government with jurisdiction over "Indians and Lands Reserved for Indians."
- **Provincial powers** are set out in section 92 and include a broad range of powers including health, education, social welfare, municipalities, and the administration of justice. Provinces also exercise jurisdiction over public lands and property rights.[189]

The division of constitutional powers affects the legal protections for Indigenous burial sites as they may be located on federal, reserve, provincial, municipal, or privately owned lands, and, therefore, different legislative regimes apply depending on their location.

The Division of Powers and Interjurisdictional Neglect

Using its powers over, "Indians and Lands reserved for Indians," the federal government enacted the *Indian Act* in 1876.[190] The *Indian Act* governs many aspects of First Nations people's lives, including by recognizing some First Nations as "bands" under the Act,[191] defining who has status as an Indian and regulating the administration of reserve lands. The *Indian Act* has also been used to deny the legal rights of First Nations people and communities. For example, up until the 1950s, the *Indian Act* had compulsory enfranchisement provisions whereby First Nations people lost their status as an Indian if they enrolled in the Canadian military, went to university, or, for Indigenous women, married a non-Indian man. Provisions were enacted prohibiting First Nations from raising money for legal claims from 1927 to 1951 and prohibiting cultural ceremonies such as the Potlatch and the Tamanawas from 1884 to 1951.[192]

Due to the division of powers between federal and provincial governments, those with status under the *Indian Act* often find themselves caught between the federal and provincial government, with each pointing at the other to provide funding for various services, such as health, education, and child welfare.[193] Although for most Canadians, the division of power impacts their lives inconsequentially, for many First Nations people, it creates barriers to accessing basic services that most Canadians take for granted. The constitutional division of powers therefore creates a situation of interjurisdictional neglect[194] for many First Nations people.

As discussed above, the Canadian legal framework was never designed to protect Indigenous burial sites. Rather, it provides robust regulation and protection for government-run, church-run, or privately run cemeteries. This is apparent when examining several key characteristics of this framework, including who holds the power and discretion to grant access to, and protection of, the sites as well as whose interests are protected and prioritized. Here are just a few examples:

- **Non-Indigenous governments and professionals retain authority and discretion over the treatment of human remains and protection of burials:** the legal protections that exist often require an exercise of discretion and judgment about the "value" and characterization of the burial site.

These judgments are made through the lens of settler colonial law and often do not reflect or respect Indigenous laws, cultural protocols, or ceremonial practices.[195]

- **Governments are reluctant to use the limited legal powers that exist:** there is a lack of transparency and accountability to Indigenous Peoples regarding decisions about how Indigenous burial sites are defined as either archaeological, heritage, or cemetery sites. Where powers exist within legislation (such as stop work orders), governments have been reluctant to interfere in land "development" activities,[196] which in turn influences how Indigenous burial sites are defined.

- **Disincentives exist in reporting findings of human remains and protecting burials:** private and corporate landowners are disincentivized from reporting human remains that may be unearthed, from providing access to the sites, or from protecting the sites. For example, property owners and developers may be required to pay for archaeological assessments if they disclose that human remains have been discovered on their property. Private and corporate landowners may also legally block access to their lands even in instances where there are suspected or known Indigenous burials.

- **Insufficient monitoring and enforcement mechanisms:** few people have been prosecuted for crimes relating to the desecration of Indigenous burial sites. There are limited legal mechanisms to compel archaeologists to return human remains and artifacts that they gather from these burial sites, even when they are being held in breach of their professional and contractual obligations. In some cases, Indigenous community members have patrolled or monitored the sites themselves, which has put them in potential danger during conflicts with security guards, developers, and private landowners.

- **Legal protections are triggered too late in the process:** it is often only after human remains are discovered or the shovels have hit the bones of the ancestors that legal protections apply.

The Inability of Canada's Domestic Human Rights System to Protect Unmarked Burial Sites

> Indigenous legal systems have their own human rights concepts that should form part of the human rights framework that is used to assess and resolve complaints brought by Indigenous Peoples. Incorporation of Indigenous legal definitions of human rights, and mechanisms for ensuring fairness and freedom from discrimination, is a cornerstone of access to justice.
>
> **— Ardith Walpetko We'dalx Walkem**[197]

Canadian human rights laws have diverse and deep roots, but today's domestic human rights agencies generally trace their origins back to the post-war period.[198] Canada's human rights statutes draw key values, approaches, and concepts from the international human rights system and particularly from the *Universal Declaration of Human Rights*.[199] However, most human rights statutes do not attempt to capture the full range of human rights as understood in international law.[200] In general, Canadian human rights statutes are anti-discrimination statutes. They prohibit discrimination in a limited number of social areas—generally, employment, housing, services, contracts, and vocational associations or trade unions—on specific protected grounds. These grounds have expanded over time. They prohibit discrimination based on religion or creed; marital or family status; mental or physical disability; age; sex; sexual orientation; gender identity; and race, ethnicity, place of origin, nationality, colour, or ancestry. Many also include at least some protections against discrimination based on prior criminal record and receipt of public assistance.

Reviewing the protected social areas, it quickly becomes clear that domestic human rights laws and agencies do not provide a pathway to protection for Indigenous burial sites. This limitation of human rights statutes reflects the broader failure of Canada's domestic human rights regime to reflect, respect, and uphold Indigenous rights. Historically, human rights language and frameworks have not been particularly meaningful or effective for Indigenous Peoples in their struggle for their rights. In some cases, human rights language has been employed as an instrument of colonization. For example, the federal government's 1969 White Paper, which proposed a profoundly assimilationist approach to Indigenous Peoples, framed its proposals in the language of human rights.[201] The White Paper

was condemned by Indigenous people—Harold Cardinal memorably characterized it as a tool for cultural genocide[202]—and was ultimately retracted.

There has been, as one author describes, a, "systematic, continuous and enduring refusal to recognize First Nations' human rights in Canada."[203] An example of this process of denial can be found in the now repealed section 67 of the *Canadian Human Rights Act*, which was enacted "temporarily" in 1977 and remained in effect for more than 30 years.[204] Section 67 exempted the *Indian Act* from any application of the *Canadian Human Rights Act*, thereby shielding from the human rights process the provisions of the *Indian Act* itself as well as any decisions made under it by the federal government or band councils.[205] As well as explicitly narrowing the access to human rights processes, section 67 led to a misperception that all actions carried out by First Nations leadership or the federal government were shielded from complaints.[206]

In addition to the historical exclusion of Indigenous people from domestic human rights frameworks, there are many enduring reasons for the continuing limited engagement between domestic human rights processes and Indigenous people, including:

- Processes that are complex, lengthy, time-consuming, and intimidating: the process itself can require considerable courage and impose its own trauma, particularly hearings in which complainants must be cross-examined and submit themselves to an alienating space.[207]
- The individualized nature of complaints that most human rights systems are designed for often fail to meaningfully address systemic issues: this is a challenge for all rights-seeking communities but is particularly stark for Indigenous Peoples, for whom systemic issues such as over-representation in the child welfare and criminal justice systems; denial of land and Treaty rights; and access to clean water, food security, and safe housing are pressing collective priorities.[208]
- Many human rights agencies are still struggling to develop processes that are culturally appropriate when interacting with Indigenous people[209] and still have significant work to do in communicating with Indigenous people and communities.[210]

More profoundly, there is a fundamental mismatch between the domestic human rights system as it is designed and the rights and needs of Indigenous people.

Canada's domestic human rights framework can be understood as a colonizing institution. It has been pointed out that, "domestic human rights mechanisms do not address Indigenous Peoples' human rights as rights which belong to Peoples. As a result, Indigenous Peoples consider existing human rights mechanisms ... an imperfect fit."[211] Nor do domestic human rights laws reflect Indigenous laws and practices, contrary to Article 40 of the *UN Declaration*, which calls for effective remedies for all infringements of individual and collective rights in a manner that gives due consideration to Indigenous customs, traditions, rules, and legal systems as well as international human rights.[212] It has been argued that, despite the history of separating the two, Indigenous rights are human rights and that the human rights of Indigenous people cannot be protected without including and realizing their rights as Indigenous Peoples.[213]

Federal Laws and Policies That Affect Burials

Federal jurisdiction over the lands where burial sites may be located is limited as matters related to "property" are generally under the constitutional jurisdiction of the provinces. Lands under federal jurisdiction include First Nations reserves, national parks, lands owned by federal government departments (such as the Department of National Defence, Agriculture and Agri-Food Canada, Environment and Climate Change Canada, and various port authorities), and lands where a federally regulated development project is proposed.[214] There is no single statute that governs burial sites on federally controlled lands. Parks Canada and the Department of National Defence are two federal bodies that have specific policies for responding to archaeological discoveries on the federal lands for which they are responsible, whereas for other departments it is up to the federal manager to decide how to respond.[215] A Parks Canada Management Directive applies to all, "cemeteries, burial grounds, human remains, funerary objects, and grave markers found on federal Crown lands."[216] Upon a discovery of human remains on federal lands, the directive requires that applicable provincial or territorial law be followed and that the police and/or coroner be notified to lead initial investigations. Remains that are determined to be non-forensic, "shall be treated with respect and dignity," and, "any activity related to them must be undertaken ... in consultation and cooperation with the appropriate group."[217] Apart from these broad guidelines, however, there are currently no specifically legislated obligations or clear mechanisms on federal lands for Indigenous communities to access and protect sites for searches or once unmarked burials associated with Indian Residential Schools are located.

Burial sites can be nominated for federal historic site designation, which recognizes, "a place that has a direct association with a nationally significant aspect of the history of Canada."[218]

Designations can be granted with respect to sites located anywhere across the country, including federal and provincial/territorial Crown land, reserve lands, and private lands, with the landowner's permission. Designation as a National Historic Site is symbolically useful and might garner public and political support to protect the sites; however, currently, such federal designation does not provide any legal protections.[219]

Heritage or Historic Site Designations

Heritage or historic site designations provide sites with a range of legal protections, including enforceable prohibitions on harmful activities or conduct. These designations are available at the provincial, territorial, and municipal levels. Heritage laws vary in terms of what protections exist for sites before they receive official heritage designation; the degree and scope of protections; the enforcement mechanisms and penalties for contravention; and the specific recognition of Indigenous heritage sites, objects, and jurisdiction. Heritage legislation outlines the provincial/territorial and municipal responsibilities over heritage sites and designation processes within their respective jurisdictions. Many jurisdictions have far more municipal heritage designations than provincial ones, based on the recognition that local governments may be more in touch with the values, priorities, and histories of their local geography and communities.[220] In most provinces and territories, temporary "stop work orders" are available under heritage legislation when there is a risk of destroying or damaging a site that may qualify for protection.[221] However, governments tend to be reluctant to issue these.

Some former Indian Residential Schools have been designated as heritage sites at the municipal, provincial, and territorial levels, including:

- The **Edmonton Indian Residential School** (located in St. Albert) was designated a provincial historic place in 1983.[222]
- The **St. Joseph (Dunbow) Industrial School** in Alberta received provincial historic designation in 1976 and includes a cemetery.[223]
- The **Regina Indian Industrial School Cemetery** in Saskatchewan was designated a municipal heritage property in 2016 and a provincial heritage property in 2017.[224]

- The **Battleford Industrial Residential School Cemetery** in Saskatchewan was designated a municipal heritage property in 2018 and a provincial heritage property in 2019.[225]
- The **Muscowequan Indian Residential School** was designated a municipal heritage property in 2016[226] and a national historic site in 2021.[227]
- The **Portage la Prairie Indian Residential School** in Manitoba was designated a provincial heritage site in 2005[228] and a national historic site in 2020.[229]
- The **Shubenacadie Indian Residential School** in Nova Scotia was designated a national historic site in 2020.[230]
- The **Shingwauk Indian Residential School** in Ontario was designated a national historic site in 2021.[231]

It is important to note that heritage designations do not provide absolute protection to designated sites. Under heritage legislation, provincial, territorial, and municipal governments generally have powers to make exceptions and issue permits to alter heritage designated sites.[232] In doing so, these governments are permitted to balance the preservation of heritage sites, including Indigenous burial sites, with other interests, such as economic development.[233]

Reserve Lands

Reserve lands have been set aside for many First Nations across Canada under the federal government's jurisdiction under section 91(24). According to geographer Cole Harris, the creation of the reserve system was a spatial strategy of dispossession designed to separate Indigenous Peoples from their territories.[234] Reserve lands are federal lands. The *Indian Act* governs the administration of reserves, which are defined as, "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."[235] Under the *Indian Act*, reserve lands must be surrendered to the federal government by the First Nation prior to the sale or transfer of title.[236] The federal government also has the power to expropriate reserve lands for public purposes.[237]

Burials on reserve lands for the most part arose after First Nations were confined to them. Although the *Indian Act* does not set out detailed regulations for the maintenance or care of burial grounds, it does contemplate the use of reserve lands for burial purposes. It provides

powers to the federal minister of Indigenous Affairs to authorize the use of lands for Indian burial grounds and expenditures for the burial of, "deceased indigent members of the band."[238] There are explicit provisions in the *Indian Act* to prohibit the desecration of burial grounds. Section 91(1) clarifies that certain property on a reserves, including, "an Indian grave house" or "carved grave pole," may not be acquired by, "trading with Indians" without written consent by the minister.[239] Section 91(3) prohibits the removal or destruction of a grave house or grave pole, along with other culturally significant structures or carvings, and section 91(4) indicates that those who breach this prohibition are guilty of an offence and liable on summary conviction of a fine not exceeding $200 or a term of imprisonment not exceeding three months. At the time of researching and writing this Final Report, no information was found to indicate that anyone has ever been charged under these provisions.

Provincial and Territorial Laws That Affect Burials

Provincial and territorial laws regulate cemeteries and burial grounds as well as the treatment of human remains that are exhumed purposefully or accidentally disinterred. These regimes provide significant power and discretion over what happens to Indigenous burials and burial grounds to provincial ministers, government officials, and private landowners. Most jurisdictions legally distinguish between burials located in licenced cemeteries and those recovered on other lands. Ontario's legislation is one of the strongest examples of cemetery legislation and has explicit provisions relating to, "Aboriginal [P]eoples burial grounds."[240] Once recognized or registered as a cemetery,[241] provincial and territorial laws generally provide strong legal protection. This includes restrictions on the sale or transfer of the site and regulations or requirements to ensure maintenance of the sites and records, to facilitate public and/or family access, and to preserve the dignity of the persons buried there.[242]

When human remains are uncovered outside registered cemeteries, there is a complex interaction between legislation governing the investigations of coroners[243] and archaeologists. Once the presence of human remains is confirmed, police and/or coroners or medical examiners complete an investigation. In general, coroners or medical examiners hand over the investigation to heritage ministries if they determine that no foul play has occurred or that they are historic and, therefore, of, "no forensic interest."[244] One significant shortcoming of this determination in the context of searching for the missing and disappeared children and their burials is that the children were taken and died over a 150-year period or more. The remains of children in unmarked burials may therefore be characterized as historic but still require a criminal or forensic investigation. When police and/or coronial investigations have concluded or are deemed unnecessary, provincial and territorial laws and policies related to heritage, historical, or archaeological resources and/or cemeteries apply to regulate and protect burial

sites. Archaeological regulations and policies may apply during searches as well as once human remains have been discovered in order to protect the sites and findings. Most jurisdictions require permits for conducting searches, even those that do not disturb the soil.[245] Other laws, dealing with environmental assessment and natural resource management, may also apply depending on the location and features of the site.

REPRESENTATIVE EXAMPLE: COMPARING AND CONTRASTING HUL'QUMI'NUM LAWS AND BC PROVINCIAL LAWS RELATING TO BURIALS

This section summarizes and juxtaposes Indigenous laws relating to the protection of burials under Hul'qumi'num laws with the BC provincial legal regime that applies to Indigenous burial sites. It provides one example that illustrates the barriers and limitations of the Canadian legal system in protecting Indigenous burial sites that all Indigenous communities face.

Hul'qumi'num Laws Relating to Burials

> Have I received teaching from my parents or [E]lders? Yes. I've always been told to be ... careful and be mindful ... of our ancestors. You always pay respect. It's like when you visit ... a gravesite, you have to carry yourself in a certain way. You always have to have a prayer in your heart and tsiit sul'hween [thank the ancestors].... Thank them, and in a very respectful way.
>
> — Charles Seymour, Cowichan Tribes[246]

The Hul'qumi'num[247] (also known as Coast Salish Peoples) in British Columbia, like all Indigenous Nations, have robust laws that apply to the treatment of human remains and burials of loved ones and ancestors. There is a deep respect for the sites where burials are and for all items buried with the loved ones and ancestors. The living have ongoing responsibilities to maintain and protect these burial sites. With respect to burials, there is a law of non-disturbance.[248] Burials must not be disturbed unless there are exceptional circumstances, such as a threat to the burial site, either by humans or natural forces.[249] There are "ritual specialists" who have inherited family rights to care for and protect burial sites and follow specific protocols to mediate with the Spirit world and ensure the protection of the living.[250] As Ray Peter of the Chemainus First Nation recounts, "before white man law, we took care of our own dead. There ... were specialties. Someone would prepare the body for

burial.... But we didn't stuff them with any of the things they do today. There were special people, they still have them today, special people that dig graves. We're no longer allowed to take care of our own dead [due to provincial regulations]."[251] Those responsible for caring for burials and human remains hold specialized knowledge of the ceremonial and funerary protocols that must be followed. They include people with specialized knowledge relating to washing and preparing the body, constructing a cedar box or casket, ceremonial dancers and mourners, pall bearers who carry the coffin to the burial site, and thi'thu' to conduct burning ceremonies and feed the dead.[252]

There are also Hul'qumi'num laws of avoidance related to burial sites. There is, "a marked separation between the space of the living and the space of the dead. The dead and their belongings are not allowed within the houses of the living, and the living are forbidden to trespass upon the resting places of the dead."[253] There are restrictions on who can visit burial sites (children, pregnant women, or those who are ill should not visit these sites) as well as when visits may occur (daylight hours only) and, for communal visits, only at certain times of year.[254] Under Hul'qumi'num law, there is a collective responsibility to care for the burial sites of loved ones and ancestors:

> At least once a year extended families would gather together to weed and clean their burial grounds and share a meal with their deceased family members. On these commemorative occasions, all persons were invited to their family burial ground, including women and children. The family would hire a *thi'thu'* to perform a "burning ceremony," and a feast would be held in honour of the deceased family members, with food being ritually burned so that it would feed the spirits of the dead.[255]

The Hul'qumi'num laws remain intact; however, in many instances, particularly where burials are located on private property, Canadian laws impede families, specialists, and communities from upholding their responsibilities to care for their loved ones' and ancestors' burials.

British Columbia's Provincial Regime Regulating Burial Sites

In British Columbia, the *Heritage Conservation Act* applies to private and Crown lands.[256] Section 12.1(2)(b) prohibits the damage, desecration, or alteration of a burial place and the removal of human remains or objects from a burial except as authorized by a permit. The Act automatically protects Indigenous burial sites whether they are presently known/recorded or not yet recorded. The minister has powers under the Act to protect sites where burials are located. Pursuant to section 16.1, the minister may issue a stop work order that prohibits for up to 120 days any alteration of property that has or may have heritage value. Pursuant to

section 20(1) of the *Heritage Conservation Act*, the minister may also, "acquire, manage and conserve property or acquire an interest in property" or "dispose of the property." Under section 21 of the *Heritage Conservation Act*, the minister may order the owner of a heritage property to preserve the property from damage, deterioration, or neglect at the expense of the owner or at the expense of the owner and the government on a cost-sharing basis.

Demonstrating the Gaps in BC Laws: The Threat to Coast Salish Burials on Grace Islet

> We follow what we call our *snu'uy'ulh*—teachings that tell us not to do these things to other people, people's human remains, their ancestors that have gone before us. Their ancestors, the non-First Nations ancestors, they have what they call their *snu'uy'ulh*. It's written in law, Canadian law and British Columbia law. They call it the *Heritage [Conservation] Act*, for one example. The *Cemeteries Act,* for another example ... tells them that they have rules that they have to follow ... and I think that ... our *snu'uy'ulh*, our rules should be respected every bit as much as any other rules that are set by the governments of Canada and BC.
>
> — George Harris, Chemainus First Nation[257]

Grace Islet, in the Southern Gulf Islands of British Columbia, have been used for centuries by many Coast Salish communities as a burial site for their ancestors.[258] In the Hul'qumi'num language, the islet is called *shmukw'elu*.[259] Grace Islet was recorded as an archaeological site in 1966.[260] In 1974, it was registered as a provincial heritage site.[261] The islet became privately owned in the early 1990s. In 2006, kayakers found human remains exposed on the shoreline while they were at the islet.[262] When archaeologist Eric McLay, working with the Hul'qumi'num Treaty Group, attended at the site, he found a vandalized/disturbed burial cairn on the shoreline containing the remains of an adult and a child/youth.[263] He also noted in his report that there were at least two other burial cairns present on the islet.

In 2010, an archaeological impact assessment identified 15 stone burial cairns on the site.[264] Despite this, in 2011, the landowner obtained a municipal building permit.[265] In 2014, when the private landowner began to build a home on Grace Islet, First Nations from the Saanich Peninsula, Cowichan Valley, and beyond worked to stop the construction by, among other means, monitoring the site and gathering photographic evidence of development activity, notifying the BC government of breaches of the terms of the site alteration permit, launching

a public campaign to pressure the province to purchase the land, engaging in direct action to protect the site, and requesting the minister to suspend the permit and issue a stop work order.[266] After the BC government refused to issue a stop work order, the Tsartlip First Nation, under the leadership of Chief Don Tom, issued its own stop work order and affixed it on the fence surrounding the development site.[267]

In November 2014, Minister Maurine Karagianis introduced a bill to amend the BC *Heritage Conservation Act*, intending to increase protections for Indigenous heritage sites and stated that, "recent events on the First Nations burial grounds on Grace Islet serve to highlight the urgent need for better protection. While most communities would be horrified by the concept of building houses on top of cemeteries, First Nations burial sites have frequently been destroyed by highways and housing. It is wrong and unacceptable."[268] Also in November 2014, the Cowichan Tribes sent a draft statement of claim for Aboriginal title over Grace Islet to the BC government, indicating that they would start a legal claim if the land was not protected from development.[269] The Cowichan Tribes made clear that other First Nations may also have Aboriginal title over the islet as it has been used as a shared burial place among many First Nations in the area. The Penelakut, Halalt, Tsartlip, Tseycum, and Tsawwassen First Nations also declared their interests in Grace Islet as an ancestral burial site.[270]

In February 2015, the BC government purchased Grace Islet. The purchase price included significant compensation to the landowner for the costs and losses incurred,[271] while the First Nations received no compensation.[272] The BC government assigned the title of the land to the Nature Conservancy of Canada, which is working with nine First Nations to care for and manage the site.[273] Elders and community members from the Tseycum, Tsawout, Tsartlip, Cowichan, Pauquachin, Lyackson, Stz'uminus, Penelakut, and Halalt First Nations held celebrations and ceremonies to commemorate this agreement and its protection of the burial sites on *shmukw'elu*.[274] The threat to the Sacred burial sites on shmukw'elu illustrates the failures of provincial laws in providing adequate protection to Indigenous burial sites, particularly when lands are privately owned. It also illustrates that, even where agreements are put in place to protect these sites, they may not provide any compensation for the harms done to Indigenous communities or for the time, effort, and expense required to ensure that these sites are protected. Although this site is now protected, the Hul'qumi'num still do not have full control of *shmukw'elu*.

INTERIM MEASURES TO ACCESS AND PROTECT SITES

In situations where there are imminent threats to sites being searched for unmarked burials, there are interim measures available to access and protect sites, including stop work orders and injunctions. These measures are limited by political and judicial discretion that involve considering competing rights. They also only provide short-term protections for the sites (for a brief description of some legislative tools, see Appendix A). In some instances, Indigenous communities and those leading search and recovery work have been successful in having both stop work orders[275] and injunctions applied to protect Indigenous burial sites generally[276] as well as sites being searched for the unmarked burials of the missing and disappeared children.[277]

Stop Work Orders

Provincial heritage laws generally give ministers the authority to issue a "stop work order" (also called a "stop order") to temporarily halt activities to protect property that may be of cultural or heritage value. These orders are temporary and can range from 15 days (in Alberta)[278] to up to 180 days (in Ontario),[279] with some provinces allowing extensions for up to another 60 days.[280] The purpose of a stop work order is generally to provide time for archaeological investigation, "recording" a historic resource, excavating or "salvaging" a historic resource, developing a plan to avoid or minimize damage, and/or determining whether the property should be designated and protected as a heritage site.[281]

One example of this process is the stop work order issued in November 2022 by the municipality of Saugeen Shores, Ontario, at the Ne'bwaakah Giizwed Ziibi archaeological site north of the mouth of the Saugeen River.[282] The push for a stop work order began in early November when, "a concerned resident contacted the Municipal Offices to report an unauthorized demolition." The municipality immediately sent someone to the site to issue a verbal stop work order, and, after notifying Saugeen First Nation, a posted stop work order was affixed at the site.[283] The property has been registered as an archaeological site since the 1950s with the Ministry of Tourism, Culture and Sport, and, while the province is meant to enforce these rules, the municipality stepped in because the town is committed to supporting the preservation of the, "historical and culturally significant area."[284] The municipality indicated that they would not issue any further work permits for the site. However, heavy demolition equipment had travelled over the protected site, and Saugeen Elders were concerned that any remaining fragile artifacts beneath the surface may have been damaged.[285]

Some provinces and territories indicate that an object or site that is the subject of a stop work order "could" be designated or registered under heritage legislation.[286] Others do not. The Yukon *Historic Resources Act* states that:

> even though the site is not a historic site and is not subject to a notice of intended designation as a historic site, if the minister believes on reasonable grounds that there are historic resources or human remains at the site that are likely to be damaged or destroyed by an activity that is being carried out or is proposed to be carried out on the site, the minister may, by written stop-work order served on the owner or lessee of the site, require the owner or lessee to cease the activity immediately, or to not begin it, and to submit to the minister a historic resource impact assessment or development plan or both and any other plans, documents, material, and information about the activity and the site as the regulations require.[287]

Stop work orders can provide a mechanism to temporarily protect unmarked graves and burial sites associated with Indian Residential Schools and to allow for investigations, the development of plans or agreements, or further actions. In practice, however, governments seem reluctant to use these powers.

Injunctions

Another mechanism that exists in the Canadian legal system that could potentially protect the unmarked burials of the missing and disappeared children is a court-issued interim or interlocutory injunction. Such injunctions must be part of a broader legal action.[288] Interim and interlocutory injunctions can be ordered by the court to stop a party from doing something in order to, "preserve the existing state of affairs," while the parties go through legal proceedings to resolve a dispute.[289] Generally, the court applies a three-part test to determine if the injunction should be granted. The court will determine if there is a serious issue to be tried in the main legal action, whether irreparable harm will occur, and whether on a balance of convenience the harms are worthy of injunctive relief.[290] Injunctions have been used as a tool by settlers to allow "developments" to proceed in the face of Indigenous opposition and as, "a tool of colonialism."[291] A 2019 policy brief of the Yellowhead Institute reviewed over 100 injunction-related cases involving First Nations and First Nations people between 1958 and 2019.[292] They found that, "success rates of injunctions for First Nations people in Canada are very low," a mere 18.5 percent across Canada.[293] The policy brief notes that, "it is more often the case that injunctions are used against First Nations to circumvent their ability

to assert Aboriginal rights/title and treaty rights in relation to Crown and corporate development projects."[294]

Notwithstanding these findings, however, there are a few examples of Indigenous people obtaining injunctions to protect burials sites. In *Touchwood File Hills Qu'Appelle District Chiefs Council Inc. v. Davis*, an application for an interlocutory injunction was granted to the District Chiefs Council preventing any excavation, construction, altering or dealing with land after, "signs of several graves, including one small coffin made of wood, and one large coffin, with no cover, containing the skeletal remains of a tall adult" were discovered in the basement of a building site in the Town of Fort Qu'Appelle.[295] In deciding whether to issue an injunction, the court learned that, "there have already been removed from the building site the following graves: (1) an adult, with buffalo robe, Indian style head ornamentation, pipes, spears, knife, hatchet (2) an infant, with what appears to be a stone flake, of the sort that comes about by the construction of a stone projectile point (3) at least 2 other graves."[296] Included in the affidavit evidence filed with the court, it was noted that, at the construction site, "the workmen first brought up several graves, and that they crushed the skull of one with their equipment, and that they removed these skeletal remains from their graves without proper care and as a result it is now impossible to determine precisely where they were found, or the direction they faced, or the fashion in which they were placed in the ground."[297] Upon reviewing the evidence, the court found that, "irreparable damage will be done if the defendants proceed with their project without first giving the authorities and the plaintiff an opportunity to deal with the human skeletal remains."[298] The interim injunction, however, was granted for only a short period of time—a mere 34 days.[299]

In *Hunt v. Halcan Log Services Ltd.; Halcan Log Services v. Kwakiutl Indian Band*, the Kwakiutl Indian Band and one of the Hereditary Chiefs sought an injunction to restrain Halcan Log Services from logging on Deer Island until the trial or disposition of their Aboriginal and Treaty rights claim to hunt, harvest, and access the grave sites of their ancestors on the Island was determined.[300] In turn, Halcan alleged that Kwakiutl Indian Band members were trespassing on the Island and obstructing Halcan's access to the lands.[301] The court granted the injunction to halt Halcan's logging on the island and dismissed Halcan's request to, "enjoin the Kwakiutl Indian Band, its members and anyone acting under its instruction from trespassing on Deer Island."[302] The court noted that, "to grant the order sought would be to prohibit the Kwakiutl from having access to the island to visit burial grounds and carry out traditional ceremonies. It would also stop them from exercising the rights they claim to hunt, harvest roots, berries and fish on and around the island. To permit a continuation of those activities during the interim period until trial will cause no harm to Halcan."[303]

More recently, the Kanien'kehá:ka Kahnistensera were successful in obtaining a temporary interim order to stop McGill University from redeveloping lands that may contain the unmarked burials of Indigenous children.

How the Kanien'kehá:ka Kahnistensera Are Trying to Use Canadian Legal Mechanisms to Protect Unmarked Burials

> We went into the White man's court because the White man does not follow his laws. So we went in there and said, "You must follow your laws. We are going to follow ours and you are going to follow yours." ... We wanted to get our children. We wanted them and we need to have them because it is part of our culture—we have to take care of our children and all our people who died. But in this case, the children have been taken from us and we want them back so we can ... complete our own lives and make the world safe for the children we now have and the ones who are coming.
>
> **— Kahentinetha, a member of the Kanien'kehá:ka Kahnistensera**[304]

The Kanien'kehá:ka Kahnistensera, also referred to as the Mohawk Mothers, are five members of the Women's Council Fire that were successful in their efforts to pause McGill University's redevelopment of the Royal Victoria Hospital grounds to ensure that an appropriate plan was put in place to search for unmarked burials of Indigenous people on the site.[305] The Royal Victoria Hospital historically included the Allan Memorial Institute, which was a psychiatric hospital and research institute where controversial, non-consensual medical experimentation (the "MK-Ultra" experiments) was conducted in the 1950s and 1960s. The victims of these experiments included Indigenous children who were sent to the hospital from Indian Residential Schools and Federal Hostels.[306]

Rotinnonnhsonni (also known as Iroquois) law and cultural protocol is the foundation for the work of the Kanien'kehá:ka Kahnistensera. They have been acknowledged and authorized, in accordance with the Constitution of the Rotinonhsonni Confederacy and its clan-based consensual decision-making system, to represent the collective rights of the sovereign Kanien'kehá:ka people in the legal proceedings. Under Kaianere'kó:wa (Great Way or Great Good Path, sometimes called the Great Law of Peace), the Kanien'kehá:ka Kahnistensera are the,

"progenitors of the Nation" who, "shall own the land, and the soil."[307] They are thus the caretakers of thequenondah (two mountains beside each other or "Mount Royal"),[308] and it is their, "duty to protect all life," including their children and ancestors.[309] This includes ensuring that, "allegations of undiscovered evidence and unmarked graves are considered with the respect, gravity and cultural sensitivity that they deserve."[310]

On October 27, 2022, the Kanien'kehá:ka Kahnistensera obtained a court-ordered injunction affirming their jurisdiction over the site on, "traditional Rotinonshonni territory that has never been ceded or otherwise consensually transferred."[311] The injunction paused McGill University's excavation work on the redevelopment of the Royal Victoria Hospital grounds so that a search for unmarked graves could be conducted, based on evidence submitted suggesting that, "Indigenous and/or non-Indigenous children may be buried in the vicinity of the Henry Lewis Morgan pool, and in adjacent grounds of the Ravenscrag gardens of the Allan Memorial Institute."[312] The Kanien'kehá:ka Kahnistensera cited the sworn testimony of Lana Ponting, a Survivor of the MK-Ultra experiments, who indicated that Indigenous people, including children, were victims of these experiments; that rumours of unmarked burials had been circulating among patients since the 1950s; and that suspicious activities were conducted outside the building at night.[313] The Kanien'kehá:ka Kahnistensera also submitted evidence of the well-known and wide-ranging medical experimentation done on Indigenous children who were deemed "wards" of the State and were therefore under the federal government's care.[314] They further asserted that, "the site may contain archaeological remains from the first pre-colonial Iroquoian village"[315] and indicated that it is, "an extreme offense" under Rotinonshonni law to disturb their ancestors.[316]

Based on the evidence and submissions from the Kanien'kehá:ka Kahnistensera,[317] Justice Gregory Moore of the Quebec Superior Court granted an interim injunction recognizing that the Kanien'kehá:ka Kahnistensera raised legitimate concerns about identifying unmarked graves before they were disturbed.[318] He held that the Kanien'kehá:ka Kahnistensera would suffer serious or irreparable harm if the injunction were not issued.[319] Importantly, he based his findings of irreparable harm on the Kanien'kehá:ka Kahnistensera's and other community members':

- "[A]nguish at being prevented by the redevelopment project from fulfilling their obligations to look after generations past, present, and future";[320]

- "[T]rauma ... from not knowing what happened to their family and community members, from the possibility that they were mistreated and suffered, and from the threat their remains will be disturbed";[321] and
- Lack of trust that McGill University and other defendants would honour their claims that they will be respectful of Indigenous concerns, citing the fact that McGill allowed excavation to begin just two days before the court hearing commenced.[322]

He also noted that the ceremonies that the Kanien'kehá:ka Kahnistensera indicated should be conducted were not part of the redevelopment plans.[323] Justice Moore invited the parties to meet out of court to create an appropriate archaeological search plan, without which he noted that, "the plaintiffs and those who share their concerns will continue to face the trauma that comes from not knowing whether, when or how their community members' graves might be disturbed."[324]

In the context of lands that may contain unmarked graves or burial sites of Indigenous people, Survivors, Indigenous families, and communities leading searches may have to seek a court order to either stop development on a site or to gain access to a site where access is being blocked. While this pathway has not generally improved relationships or resolved disputes, it is one of few tools available to those upholding their responsibilities under Indigenous laws to protect the burials of the children when landowners refuse to provide access and governments refuse to use legislative tools such as stop work orders.

OTHER LEGAL MECHANISMS THAT CREATE RIGHTS OF ACCESS AND IMPOSE LIMITED PROTECTIONS

There are other legal mechanism that Survivors and Indigenous communities might explore to gain access to privately owned sites where unmarked burials might be located. They are limited, however, in that they do not provide full protection of the sites, and they do not result in the lands being returned or transferred to Indigenous Peoples.

Easements

Easements are a "non-possessory" right that an individual or specified group can acquire through a voluntary agreement with a landowner in order to use their real property for a specific purpose, while the owner still holds the legal title for all other purposes.[325] An

"affirmative easement" gives the easement holder a right to do something on the other parties' land—for example, to move across their property (known as a "right of way") or for ceremonial use.[326] A "negative easement" gives up the right of a landowner to do something on their property, such as to build in a certain area that would impede access to the holder of the easement.[327] An easement is registered on the land title and, "runs with the land," meaning it remains on the title if ownership changes, ending only when the holder of the easement, "discharges their rights from the certificate of title."[328] The agreement outlines all the rights, obligations, and restrictions that both parties have.[329] An easement cannot impose a positive obligation (or "covenant") on the landowner—for example, to maintain a road or pathway.[330] Such an agreement could be established between a party and a landowner as a contract, but it would not "run with the land" and bind future owners.[331]

Indigenous Peoples in the United States have acquired easements for cultural purposes. For example, in Massachusetts, two Indigenous conservation trusts have been formed to hold "cultural respect easements" to, "provide Indigenous people with safe areas to practice their traditional and spiritual lifeways, such as ceremonies, seasonal celebrations, camping, and more."[332] Ramona Peters, the chair and founder of the Native Land Conservancy, explains:

> A Cultural Respect Easement is the closest expression of land reparation to [I]ndigenous people achieved without an actual transfer of deed. It offers assurance for us to safely access areas of our Ancestral homelands to exercise spiritual and cultural practices. Respect for our culture includes respect for our relationship with the earth, especially in areas where our ancestors prayed, danced, toiled, lived and were buried.[333]

In Canada, easements have more commonly been acquired by environmental or heritage conservation trusts to protect land. However, Indigenous Peoples are beginning to promote reconciliation and Indigenous interests in conservation[334]—for example, to include Indigenous harvesting in easement agreements.[335]

Easements can be a tool to access and protect burials located on private land. Elements of an agreement could include enabling the Indigenous community's ("easement holders") access for ceremonial and cultural uses, visiting gravesites, and/or restricting the landowner from conducting development or activities on specific areas that would impede the rights of the easement holders to care for burials. An easement, however, cannot require that landowners take actions to maintain or protect the sites.

Covenants

Covenants are a legally binding agreement that puts specific limits on what a landowner can do on their property. Under common law, covenants can only be restrictive or negative to "run with the land," meaning that they can only create a limitation on the landowner, not an obligation to do something.[336] Different from easements, the agreement must typically be between two parties that own adjacent (touching) parcels of land, whereas one property becomes the "servient tenement" (land burdened by the covenant) and one becomes the "dominant tenement" (land that benefits from the covenant).[337] Some provincial legislation has overridden these common law requirements.

For example, in British Columbia, under section 219 of the *Land Title Act*, specific parties that do not own adjacent land can act as covenantee (the party to whom the promise is made), including, "the Crown or a Crown corporation or agency; a municipality, a regional district" or "any person designated by the minister on terms and conditions the minister thinks proper" to register against a land title a negative or positive covenant that binds successive owners.[338] The landowner maintains ownership and most of the property rights, but the covenant can restrict the uses of land to protect, "natural, cultural, and other important features"; grant access to the holder of the covenant; and outline a protective agreement and management plan.[339] Also in British Columbia, the provincial government can impose restrictive covenants to protect "archaeological sites" in instances where subdivision of land is being considered,[340] based on section 219 of the *Land Title Act*.[341] In the Yukon, under the *Historic Resources Act*, the minister, or a party designated by the minister, and the owner of a site can sign a historic resource agreement to, "provide for the maintenance, preservation or protection of a site and the historic resources or human remains at that site."[342] Such an agreement would act as a covenant and run with the land.

For Indigenous communities seeking to access and protect unmarked graves and burials associated with Indian Residential Schools, the statute-based covenants described above are more likely to be useful than common law covenants since they do not require adjacent land ownership and may allow both restrictions (negative covenants) and obligations (positive covenants).

THE CANADIAN CONSTITUTION AND INDIGENOUS BURIAL SITES

> The governments of the day, our legal guardians and fiduciaries, do not want to discuss ways of transforming legal or political institutions to include Indigenous

> peoples in nation-states.... They do not want to end their national fantasies and myths about their nation, or to expose the injustices that have informed the construction of state institutions and practices. They do not want to create a postcolonial state.
>
> — James (Sa'ke'j) Youngblood Henderson[343]

As discussed above, the conflicts in Oka and Ipperwash occurred in the 1990s along with many others, both before and after, due to the lack of legal protections of Indigenous burial sites under Canadian law. Indigenous burial sites are still not protected despite the fact that constitutional protections were put in place in 1982 that could, and should have, been applied to protect them. This section first outlines the relevant aspects of constitutionally protected rights that could be applied to provide access to, and protection of, Indigenous burial sites, specifically, section 35 of the *Constitution Act, 1982*.[344] It then critiques the ways in which the federal government and Canadian courts have limited the applicability of these constitutional protections to exclude Indigenous burial sites and, in turn, further settler amnesty.

Section 35: Aboriginal and Treaty Rights

The term "Aboriginal law" refers to the body of Canadian law articulated by the Supreme Court of Canada in interpreting the constitutionally protected rights of Aboriginal Peoples under section 35 of the *Constitution Act, 1982*. Section 35 provides constitutional protection to, "the existing aboriginal and treaty rights of the [A]boriginal [P]eoples of Canada."[345] The term "[A]boriginal [P]eoples" under section 35 is defined to include Indians, Inuit, and Métis Peoples within Canada.[346] Courts have established that section 35 must be interpreted in alignment with its purpose[347] and, importantly, has identified reconciliation between Indigenous and non-Indigenous people as the "grand purpose" of section 35.[348] Under section 35, the Supreme Court of Canada has acknowledged the unique constitutional position of "Aboriginal Peoples" within Canada. This unique constitutional position has led to the development of key concepts that inform the interpretation of section 35, including the government's fiduciary duty to Aboriginal Peoples, the honour of the Crown, and the duty to consult and accommodate.

Fiduciary Duty and the Honour of the Crown

In *R. v. Sparrow*, the Supreme Court of Canada established that governments have a fiduciary duty to Aboriginal Peoples,[349] which, "requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake."[350] This duty was developed due to the high degree of discretionary

control that the Crown gradually assumed over the lives of Indigenous Peoples, which left them, "vulnerable to the risks of government misconduct and ineptitude."[351]

More recently, many section 35 constitutional law cases have focused less on the government's fiduciary duty and more on the honour of the Crown.[352] The court has specified that the honour of the Crown is a constitutional principle[353] that is intricately linked to the reconciliation purpose of section 35, "This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[354] Every aspect of the relationship between Aboriginal Peoples and Canadian governments must be governed by the honour of the Crown. Specifically, the court held that, "in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.'"[355] The honour of the Crown, "refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[356] These overarching principles guide the interpretation of the constitutionally protected rights of Aboriginal Peoples under section 35.

Duty to Consult and Accommodate

The duty to consult and accommodate is a positive obligation on governments that must be fulfilled in all instances where it contemplates actions that may impact existing or yet-to-be-proven Aboriginal or Treaty rights.[357] To date, case law has established that the duty to consult and accommodate applies to federal, provincial, and territorial governments and that this duty cannot be delegated.[358] The duty to consult, "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[359] The duty to consult applies to both proven and not-yet-proven claims (that is, asserted claims). In *Delgamuukw v. British Columbia*, which involved a claim by the Gitskan and Wet'suwet'en for Aboriginal title to fifty-eight thousand square kilometres of their traditional territory in British Columbia, the court held:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not

> rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[360]

The duty falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim and the seriousness of the potential impact on the right.[361] Deep consultation is required, "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high."[362] Additional consultation may be required as new information is revealed.[363] The duty to consult can also include requirements on government to provide mechanisms and support, including financial assistance, for participation in consultation processes.[364] The fact that the determination of the strength of the claim falls to the government creates a conflict since the government is responsible for the potential infringement of section 35 rights and must provide information and meaningful opportunities to participate in consultation processes.[365] As a result, the duty to consult and accommodate can be subject to political will since there is a built-in incentive to assess the strength of claim at the lower end to reduce consultation and accommodation requirements. In the event that this happens, an Indigenous community can take the government to court; however, this is time-consuming, stressful, and costly.

Where the government action may significantly and adversely affect section 35 rights, the government has a duty to accommodate. This requires "taking steps to avoid irreparable harm or to minimize the effects of infringement" of the rights. The court has established that the duty to accommodate is aimed at, "seeking compromise in an attempt to harmonize conflicting interests" and requires, "good faith efforts to understand each other's concerns and move to address them."[366] The court held that:

> balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.[367]

If a breach of the duty to consult and accommodate is found, the court may suspend or quash the government's decision,[368] provide injunctive relief, order damages, or order that appropriate consultation and accommodation be carried out.[369]

The Supreme Court's articulation of the duty to consult and accommodate has been critiqued by some academics as limiting Aboriginal rights. For example, Innuvialuit legal scholar Gordon Christie argues that the duty to consult supports government views on how Indigenous lands should be used and does not require that lands be used in a way that corresponds to Indigenous understandings of their relationships with the lands.[370] Christie notes that, "in seeking to trigger the duty to consult, an Aboriginal nation is acknowledging its lack of alternative recourse, and seeking to bring to bear this inadequate, assimilative tool upon problems generated by the larger colonial context within which its members have lived for many generations."[371] In the context of Indigenous burial sites, this duty is often triggered only after Indigenous burials have been uncovered and desecrated.

Aboriginal Rights

R. v. Van der Peet is the seminal case about Aboriginal rights.[372] In *Van der Peet*, the Supreme Court of Canada identified the purpose of constitutionally protecting Aboriginal rights as follows:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that [Aboriginal Peoples] lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[373]

To prove an Aboriginal right, the Supreme Court of Canada held that the onus is on the Aboriginal community to show that an activity is, "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[374] In *Van der Peet*, the court also held that the relevant time frame to determine whether an activity is integral to the distinctive culture is the time period prior to contact with Europeans.[375] In *R. v. Powley*, the court clarified that, for Métis communities, the time frame is different to account for the fact that Métis communities arose after contact with European settlers, noting that the time frame is, "after a particular Métis community arose and before it came under the effective control of European laws and customs."[376]

Indigenous and other legal scholars levelled significant criticisms of the *Van der Peet* test when it was first set out by the court, arguing that it would freeze Aboriginal rights in their pre-contact form.[377] Subsequently, in *R. v. Sappier; R. v. Gray*, the Supreme Court of Canada made clear that Aboriginal rights are not to be interpreted as frozen in time, but, rather, "the nature of the right must be determined in light of present day circumstances."[378] This clarification reflects the understanding that Indigenous societies, like all societies, evolve to adapt to changing circumstances and that Aboriginal rights have similarly evolved over time. In *Van der Peet*, the court also clarified that "distinctive" does not mean "distinct."[379] In other words, a practice, custom, or tradition like hunting, fishing, harvesting wood, or funerary or burial practices can still be considered distinctive even though all cultures have such practices. Determining whether a "distinctive" practice exists does not involve a comparison with other cultures but rather requires considering the Aboriginal culture itself to determine whether a practice, custom, or tradition is a "distinguishing characteristic" of that culture.[380]

Aboriginal rights may also be site specific, meaning that the rights are tied to a particular site and can be exercised on that specific tract of land.[381] In these cases, even if an Aboriginal community does not have rights to the land, they may still have constitutionally protected Aboriginal rights to access the land to engage in activities that are integral to their distinctive culture. Aboriginal rights recognized under section 35 must be framed in a way that is, "cognizable to the Canadian legal and constitutional structure."[382] Aboriginal Peoples must therefore frame their claims in ways that use legal concepts and claims that can be recognized by Canadian courts. Currently, because the vast majority of judges in Canadian courts are non-Indigenous and because the Canadian legal system relies on precedents drawn from common law cases, claims that are most similar to common law concepts are the more likely to be understood and upheld in Canadian courts.

Aboriginal Title

Aboriginal rights may also be proprietary rights in the form of Aboriginal title. The seminal case on Aboriginal title is *Delgamuukw*, in which the Supreme Court of Canada confirmed that Aboriginal title is a *sui generis*[383] interest in land that arises due to the fact that Indigenous communities were living on the land prior to the assertion of British sovereignty.[384] Despite the fact that Aboriginal title is rooted in the pre-existence of Indigenous communities, the court described Aboriginal title as, "a burden on the Crown's underlying title ... that crystallized at the time sovereignty was asserted."[385] The relevant time for proving Aboriginal title is the date of the assertion of Crown sovereignty,[386] which varies across Canada.

Aboriginal title is a communal right and an exclusive right to the land itself.[387] In *Delgamuukw*, the court set out the test for Aboriginal title,[388] which requires claimants to meet three requirements: occupation of the land prior to the assertion of sovereignty;[389] continuity of occupation from pre-sovereignty to the present;[390] and exclusivity of occupation.[391] In *Tsilquot'in Nation v. British Columbia*, the Supreme Court of Canada held that Aboriginal title consists of ownership rights, including, "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[392] Once established, Aboriginal title is constitutionally protected under section 35. Aboriginal title lands cannot be transferred or sold to anyone other than the Crown[393] and are within the exclusive federal jurisdiction because they fall within section 91(24) as, "lands reserved for the Indians."[394] The Supreme Court of Canada has noted that provincial governments are therefore prevented from legislating specifically in relation to these lands,[395] but provincial laws of general application may apply on Aboriginal title lands, subject to several limitations.[396] The limitations include the justified infringement test (described below) and federal powers under section 91(24).[397]

In the context of Indigenous burial sites, Aboriginal title provides the highest level of protection because the Indigenous Nation with confirmed Aboriginal title has constitutionally recognized jurisdiction over such lands. However, this only provides limited protections for Indigenous burial sites across Canada for three reasons: first, to date, only a few Indigenous Nations, such as the Tŝilhqot'in Nation[398] and the Haida Nation,[399] have recognized and affirmed Aboriginal title in Canada; second, Aboriginal title rights can only be proven in areas where Indigenous Peoples who occupied the territory prior to the assertion of Crown sovereignty have not entered into Treaties; and, third, Aboriginal title rights are not absolute as they may be justifiably infringed by government (see the discussion below).

Treaties

> Too many Canadians still do not know the history of Aboriginal peoples' contributions to Canada, or understand that by virtue of the historical and modern Treaties negotiated by our government, we are all Treaty people.
>
> —TRC, Final Report[400]

Section 35 also protects Treaty rights, which arise out of Nation-to-Nation agreements between the Crown and Indigenous Peoples. As constitutional scholar Jennifer Dalton explains:

> Treaties and treaty-making were historically recognised by Europeans as the appropriate method to establish relations between settlers and Indigenous peoples; originally for the purpose of maintaining peace and developing trade and military alliances. Equally important, these treaties were viewed by Aboriginal peoples and Europeans alike as agreements between nations or sovereign peoples; Aboriginal treaties and treaty-making are rooted in claims of prior occupancy and prior sovereignty.[401]

As discussed in the previous chapter, Indigenous Nations also have a long history of inter-Nation diplomacy to establish peaceful and respectful relations. The early Treaties between colonial powers and Indigenous Nations are powerful examples of inter-societal agreements that draw on the diplomatic traditions, values, protocols, and practices from both Indigenous and non-Indigenous societies.[402] These early Treaties, which were aimed at establishing peace and friendship (also referred to as the "Peace and Friendship Treaties") were negotiated at a time when power was relatively balanced between Indigenous and non-Indigenous societies.[403] These Treaties, "can be seen as creating an inter-societal framework in which first laws [that is, Indigenous legal orders] intermingle with Imperial laws to foster peace and order across communities."[404] The Two Row Wampum is one example of an early Treaty that embodies central principles of intercultural cooperation between colonial powers and Indigenous Peoples on the basis of peace, friendship, and respect.[405]

Beginning in 1764 and up until 1923, many Treaties were negotiated that contained land cession and surrender provisions (often referred to as "cede and surrender provisions").[406] These Treaties cover significant parts of Ontario, Manitoba, Saskatchewan, and Alberta. The "cede and surrender" provisions in the written versions of these Treaties specified that the Indigenous signatories surrendered all lands to the Crown except those set aside for their,

"sole and exclusive use."[407] In exchange, certain rights were included for Indigenous signatories, including hunting and fishing rights and lump sum and annual payments, and some contained provisions relating to medicine chests and education. There is a divergence in the interpretation and meaning of the provisions contained in these Treaties, which has led to significant litigation. One main concern is that the written agreements were in English, and translators were present to translate the terms of the Treaties to Indigenous representatives. Turtle Mountain Ojibwe scholar Heidi Kiiwetinepinesiik Stark highlights that, "the written treaties did not always faithfully reflect the terms verbally agreed to by the participating nations. This became evident to the First Nations when the government response did not mirror the promises made during the negotiations."[408]

In the context of the cede and surrender provisions, Indigenous laws would never contemplate severing relationships with the land, given that Indigenous Nations have ongoing responsibilities to care for their ancestral territory for the generations yet to come. In cases where there are assertions that the cede and surrender provisions were not clearly communicated to Indigenous signatories, federal and provincial governments routinely argue that these provisions be interpreted as a full surrender of jurisdiction and title to lands, except for those specifically set aside under the Treaty. By contrast, Indigenous signatories have consistently taken the position that:

- Treaties are Nation-to-Nation agreements to share the lands with settlers wherein Indigenous Peoples retained sovereignty and jurisdiction over their territories; and
- These provisions established the basis of a relationship that needed to be renewed regularly with changing circumstances.[409]

Indigenous oral histories support this interpretation of the Treaties.[410] In his review of historical records, anthropologist Michael Asch confirms that the documents also support the interpretation that Indigenous Nations never voluntarily relinquished their sovereignty and jurisdiction over their territories through the Treaties.[411]

Since the signing of these Treaties, there has been ongoing disputes relating to the fact that lands were not set aside in accordance with the terms of the Treaties[412] and that other terms of the Treaty agreements, including in relation to annual payments to Treaty beneficiaries, have not been implemented in an honourable way.[413] In some cases, Indigenous communities have indicated that their lands were taken under Treaties even though no one with authority to do so had signed the Treaty,[414] and, in other cases, coercive measures, including withholding rations, were imposed to force Indigenous leaders and community members to sign

Treaties.[415] Despite all of this, Treaties are seen by Indigenous Peoples as Sacred agreements that were signed between sovereign Nations that contain promises that were made orally and in writing that must be upheld.[416]

When faced with claims relating to the interpretation of historic Treaties, Canadian courts must determine, "the common intention of the parties" at the time of the signing of the Treaties.[417] The basic principles of treaty interpretation include:

- That the Crown must be presumed to have been acting with integrity and honour, which means that interpretations about the common intention of the parties cannot be incompatible with the honour of the Crown;
- That Treaty terms must not be interpreted as, "frozen at the date of signature" but, rather, must support the modern exercise of Treaty rights;
- That Treaties should be liberally construed, and any ambiguities or doubtful expressions must be resolved in favour of the Indigenous signatories; and
- That courts, while interpreting the Treaty language generously, cannot alter the terms of the Treaty or exceed what is, "possible on the language" or realistic.[418]

Many disputes about the interpretation of historic Treaties are ongoing and have yet to be resolved either though litigation or negotiation. In its Final Report, the TRC noted that, "the negotiation of treaties, while seemingly honourable and legal, was often marked by fraud and coercion, and Canada was, and remains, slow to implement their provisions and intent."[419] In many instances, the federal government, and, in some cases, provincial governments, have failed to uphold Treaty obligations.[420]

Treaties and Indigenous Burial Grounds

The Peace and Friendship Treaties that contain land cession and surrender provisions do not specifically mention Indigenous burials or burial grounds. From the perspectives of colonial and then Canadian government officials, there was generally little to no consideration of maintaining Indigenous Peoples' connections to ancestral burial grounds when determining the location of the lands to be set aside for the sole use and occupation of the Indigenous signatories.[421] The focus was instead on forcibly relocating Indigenous Peoples to small allotments of land to make way for settlement and to "civilize" and Christianize Indigenous Peoples. The government's priority was to move Indigenous people off lands that were considered desirable for settlement and moving them onto arable lands so they could take up farming.[422] This

resulted in many Indigenous Peoples being separated from their ancestral burial grounds. Cemeteries on reserve lands were therefore mostly established after First Nations were forcibly relocated to reserves.

The responsibility for administering and upholding the promises contained within the historic Treaties generally rest with the federal government. In some cases, the provinces are also involved.[423] Within historic Treaty lands, there is often a mix of lands with different types of land ownership: federal, provincial, territorial, private, and corporate lands. Various laws must be applied in accordance with the constitutionally protected Treaty rights of the signatory Indigenous Nations. Starting in 1975 with the *James Bay and Northern Quebec Agreement*, self-government and land claims agreements have been negotiated between Indigenous Nations and the federal government.[424] These agreements, also referred to as "modern Treaties," are also constitutionally protected[425] and contain detailed provisions to regulate the relationship between sovereign Nations. These modern Treaties often contain provisions about different categories of lands covered within the land claim area, which are subject to different laws. For example, some categories of land may be subject to inherent Indigenous jurisdiction ("Indigenous-governed lands"), while others may be subject to federal or provincial jurisdiction.

Many of these agreements contain provisions that refer directly to the regulation, treatment, and protection of Indigenous burials and burial grounds. These agreements also often clarify which laws will apply to burials depending on where they are located. For example, many recent land claim agreements contain provisions that set out:

- Indigenous jurisdiction over what happens when burials or human remains are found on Indigenous-governed lands, including in relation to the notification, protection, or disturbance of burial sites and the excavation, investigation, preservation, protection, and reburial or other disposition of human remains;[426]
- Cooperative agreements between various levels of Canadian governments and the Indigenous Nations that may be negotiated to co-manage sites where burials are located on Crown land, including parks and conservation areas;[427] and
- Consultation requirements with the Indigenous Nation when permits are being issued by the province that may disturb burials located outside Indigenous-governed lands.[428]

In total, 24 modern Treaties have been negotiated in northern Canada and British Columbia in the past 40 years.[429] There are also ongoing modern Treaty negotiations occurring in other areas, such as Ottawa, where there are unceded Indigenous lands that were never surrendered under historic Treaties.

Settler Amnesty in Section 35 Jurisprudence

Although, internationally, Canada is seen by some as a leader in recognizing Aboriginal rights, the constitutional protections afforded to Indigenous Peoples, consistent with settler amnesty, only came after crucial advocacy by Indigenous people and communities, and they remain subject to significant limitations. As the late constitutional scholar Peter Hogg documented, the inclusion of section 35 in the *Constitution Act, 1982*, was hard fought:

> [Section 35] emerged late in the process of drafting the *Constitution Act, 1982*. It was not in the October 1980 version of the bill. It was in the April 1981 version, but without the word "existing." The entire provision was then dropped from the November 5, 1981 version, which was the first version of the bill to achieve the agreement of most of the provinces. The omission attracted severe criticism, and later in November the first ministers agreed to restore it, but with the addition of the word "existing."[430]

Hogg noted that the Supreme Court of Canada has interpreted the term "existing" to mean "unextinguished" at the time that section 35 was added to the *Constitution Act* in 1982.[431] This initial refusal to include section 35 and then the adoption of this provision only with the qualifier "existing" are strategies that Canada implemented to resist the constitutional protection of Indigenous Peoples' rights.

Although more examples could be included, the following sections describe four manifestations of settler amnesty in the context of section 35 jurisprudence and the resistance of governments at all levels in Canada to meaningfully recognize and affirm Aboriginal and Treaty rights.

Canadian Courts Unquestioning Acceptance of Canadian Sovereignty

> How can lands possessed by Aboriginal peoples for centuries be undermined by another nation's assertion of sovereignty? What alchemy transmutes the basis of Aboriginal possession into the golden bedrock of Crown title?
>
> — John Borrows, "Sovereignty's Alchemy"[432]

In section 35 cases, Canadian courts start from the premise that Canadian sovereignty is a given fact. This premise is based on the belief that the only legitimate legal authority emanates from sovereign States, which derive their legitimacy from international law.[433] As discussed in earlier chapters, international law itself arose to support the colonial taking of Indigenous lands[434] and has actively excluded Indigenous Nations from participating as sovereign States at the international level. This "colonializing mythology"[435] idealized European legal systems and values and positions these as universal standards of civilization while, at the same time, devaluing Indigenous sovereignty and laws.[436]

The assertion of Canadian sovereignty is based on racist, colonial legal doctrines, such as the Doctrine of Discovery and *terra nullius*, and interpretations of international law that were aimed at determining disputes among colonial powers who were travelling to other lands to "discover" them. Legal scholar Patrick Macklem explains:

> During the period of initial European contact and colonial expansion in North America, it was accepted practice among European nations that the first to discover vacant land acquired sovereignty over that land to the exclusion of other potential discoverers. With populated land, sovereignty was acquired by the discovering nation not by simple settlement, but by conquest and cession, but such land could be deemed vacant if its inhabitants were insufficiently Christian or civilized. International law subsequently deemed North America to be vacant, and regarded the acquisition of territorial sovereignty by European powers as occurring through the mere act of discovery and settlement.[437]

Based on its assertion of Canadian sovereignty, the Crown has created the legal fiction that it was the original occupant of all of Canada and therefore has underlying title to all lands in Canada.[438] Macklem further notes that, "although the Crown was imagined as the original occupant of all of Canada, actual Aboriginal occupants were not recognised as owning their land as a result of a series of fictional Crown grants. The Crown was thus relatively free

to grant third-party interests to whomever it pleased, which it did: to settlers, mining companies, forestry companies, and others."[439] Innuvialuit legal scholar Gordon Christie points out that, based on the mere assertion of sovereignty, Crown title even extended to areas where no Europeans had even ventured.[440]

Russell Lawrence Barsh, legal scholar and UN consultant, highlights that the imperial statutes in effect at the time of the establishment of the colony of Canada, "did not expressly subordinate Indigenous peoples of those territories to [Canada's] legislative supremacy, nor in any way extinguish Indigenous laws. In subsequent administrative actions and judicial decisions, however, settlers assumed that Indigenous peoples had only such rights as settlers themselves chose to recognize legislatively."[441] Similarly, legal scholar Richard Stacey asserts that, "the Crown's unilateral assertion of sovereignty over what later became Canada ... left Indigenous peoples with little practical opportunity to exercise political sovereignty, even though in many cases Indigenous sovereignty was never extinguished as a matter of formal law."[442] He writes that Canada therefore has a, "sovereignty deficit."[443]

The unquestioning acceptance of Canadian sovereignty and jurisdiction means that conflicts of laws between Indigenous legal orders and Canadian laws are mediated solely through the Canadian legal system. Anishnaabe scholar Wapshkaa Ma'iingan (Aaron Mills) highlights the way in which the unquestioning acceptance of sovereignty leads Canadian courts to focus on the wrong questions: instead of asking whether Canadian or Indigenous jurisdiction should apply, courts focus on whether Aboriginal Peoples can prove that they have existing Aboriginal and Treaty rights.[444] The unquestioning acceptance of Canadian sovereignty therefore places a heavy burden on Indigenous Peoples to prove that they were in their territories prior to the assertion of Canadian sovereignty and that their traditions, practices, and activities were central to their cultures at that time.[445]

The unquestioning acceptance of Canadian sovereignty is another manifestation of settler amnesty. It enables Canada to avoid the discomfort of interrogating the racism and colonialism upon which its sovereignty claim is based and the long history of oppression that colonial and then Canadian governments directed at Indigenous Peoples as a result of this assertion.

Political Maneuvering and the Suppression of Section 35 Rights

Throughout Canada's history, colonial, federal, and provincial/territorial governments have worked in tandem to infringe and suppress the rights of Indigenous Peoples. In his analysis of *Delgamuukw*, Anishinaabe scholar John Borrows describes the various ways in which the provincial and federal governments' laws and policies suppressed the democratic participation

of Indigenous people and imposed measures to make it impossible for Indigenous Peoples to challenge breaches of their constitutional and human rights:

> In 1872, when Aboriginal peoples outnumbered the settler population approximately 4:1 in the province [of British Columbia], and more than 15:1 on the north coast, one of the new province's first legislative acts was to exclude Indians from voting. This same government continued to uphold previously prejudicial laws that denied Indians fee simple title to pre-empted lands taken up through settlement, a right freely granted to non-Aboriginal people in British Columbia. Furthermore, this government did not acknowledge any legal interest of Aboriginal peoples over lands they traditionally or contemporaneously used and occupied. As a result, the province surveyed extremely small and inadequate reserves for Indians, and it would not recognize any broader Aboriginal title to land. When Aboriginal peoples in British Columbia repeatedly tried to challenge this mistreatment, the province responded by further diminishing their land rights and their political rights. The federal government eventually followed suit by amending the *Indian Act*, making it virtually illegal to raise such matters before the courts. The exclusion of Aboriginal peoples from democratic participation in British Columbia through the passage of these corrupt laws should be a paramount consideration when there are claims that Aboriginal peoples are subject to Canada's legislative authority.[446]

A similar analysis could be made in each province and territory that documents the actions and omissions of the various levels of government that have breached the human and constitutional rights of First Nations, Inuit, and Métis Peoples.

Coupled with litigation and negotiation strategies that have aimed to first deny, then minimize, and then only partially acknowledge the harms committed against Indigenous Peoples,[447] the State's suppression of, and failure to protect, Indigenous Peoples and their rights are evidence of settler colonialism and the Canadian State's attempts to eliminate Indigenous Peoples through violent colonial strategies of annihilation and assimilation. It is not surprising therefore that ongoing gaps in legal protections for Indigenous burial sites continue to exist.

Extinguishment

The Supreme Court of Canada has held that Aboriginal rights can be extinguished if it is proven that there was a, "clear and plain intention" to extinguish such rights.[448] This can occur through legislation or by consent through the negotiation of Treaties or other agreements. Up until 1982 when Aboriginal and Treaty rights were constitutionally enshrined in section 35, the Supreme Court of Canada has held that the government could unilaterally extinguish Indigenous Peoples' rights.[449] The court has made clear that government legislation that merely regulates in an area, such as provincial hunting and fishing legislation, does not meet the high standard of demonstrating a clear intent to extinguish such rights.[450]

Extinguishment has been one of the most significant strategies of settler amnesty in Canada's history. The colonial, then federal, government's approach to Treaties was, and still is, built around the concept of extinguishment.[451] The clearest examples are the cede and surrender clauses that are found in most Treaties signed with Indigenous Nations since 1875.[452] These provisions extinguish Aboriginal title and may provide specific rights that are protected in the Treaty. Such specific rights might include the right to use and occupy a small portion of the Treaty signatories' traditional territory and/or rights of access to other areas for specific purposes—for example, to hunt, fish, and trap. Modern Treaties also contain provisions extinguishing legal claims against the government for past infringements of Aboriginal rights.[453] Lawyer Paul Joffe characterizes extinguishment as discriminatory, out of date, and in breach of the human rights of Indigenous Peoples and notes that it has been criticized by two UN committees.[454]

Justified Infringement

Another manifestation of settler amnesty is the "justified infringement" test created by the Supreme Court of Canada in *R. v. Sparrow*. The court held that, once a complainant establishes that the government law in question, "has the effect of interfering with an existing [A]boriginal right," the government can justify the infringement by showing that the law has a valid objective and the infringement is in accordance with the principle of the honour of the Crown and the Crown's fiduciary duty to Aboriginal Peoples.[455] If the infringement is justified, the law infringing the Aboriginal right is upheld. The Supreme Court of Canada explicitly rejected a "public interest" test to determine whether infringements of section 35 rights are justified. Specifically, the court found, "the 'public interest' justification so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."[456]

The *Sparrow* test was subsequently modified and expanded in *Tsilhqot'in Nation v. British Columbia* in 2014.[457] The current test for justified infringement of section 35 rights requires that the government prove:

1. It has upheld its duty to consult and accommodate the affected Aboriginal community(ies) or group(s).[458]
2. The law in question has a valid legislative objective that is compelling and substantial.[459]
3. The Crown has acted honourably and in accordance with its special trust relationship with Aboriginal peoples (the Crown's fiduciary duty),[460] including by:
    - Not substantially depriving future generations of the benefit of the right;[461] and
    - Showing that the infringement is proportional, which means:
        - The infringement must be necessary to achieve the government's goal ("rational connection");
        - The government must go no further than necessary to achieve its goal ("minimal impairment"); and
        - The benefits that are expected to flow from the goal must outweigh the adverse effects on the Aboriginal right ("proportionality of impact").[462]

The court has also established that, where infringements are justified, such as for conservation purposes, the government must prioritize Aboriginal rights over other interests because of the constitutional nature of such rights.[463] Although the justified infringement test contains several protective elements, including an assessment of the sufficiency of consultation and accommodation and the requirement that the Crown acts honourably, there are at least two elements of the test that have enabled ongoing and wide-ranging infringements of section 35 rights: the determination of a valid legislative objective and the assessment of the proportionality of the impact.

Valid Legislative Objective

The government's objectives that can be relied on to justify an infringement of section 35 rights are wide-ranging and have expanded over the development of section 35 jurisprudence.

In *Sparrow*, the Supreme Court of Canada identified the types of objectives that could be characterized as "compelling and substantial" as: the conservation and management of natural resources; public safety; and the pursuit of economic and regional fairness.[464] Just seven years later, in *Delgamuukw*, the Supreme Court of Canada expanded the list of valid objectives that could justify the infringement of Aboriginal rights (and Aboriginal title) to include, "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, [the] protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[465]

Initially, the case law relating to justified infringement was confined to the federal government's legislation in the context of Aboriginal rights. However, in subsequent cases, the Supreme Court of Canada has applied the justified infringement test to Treaty rights.[466] Since the Supreme Court of Canada's 2014 decision in *Tsilhqot'in Nation*, provincial governments can justifiably infringe section 35 rights provided the test is met.[467] The case law under section 35 therefore continues to extend the application of the justified infringement test in ways that permit a broad scope of infringement in a wide number of contexts. The consequential impact is that governments have infringed Aboriginal and Treaty rights and developed, exploited, and expropriated Indigenous lands for a wide variety of reasons, including for the benefit of the, "broader social, political, and economic community" within Canada.[468]

Proportionality Test

In *Sparrow*, the Supreme Court of Canada explicitly rejected a "public interest" justification for infringing Aboriginal rights. However, in the same year, the court later issued a decision in *R. v. Gladstone*, which seemingly contradicted this holding by indicating that the interests of the, "broader social, political and economic community" may also be of compelling and substantial importance to justify the infringement of Aboriginal rights. The court wrote that:

> Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive [A]boriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to

> pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that [A]boriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[469]

Balancing the constitutionally protected rights of Indigenous Peoples with the interests of the broader Canadian society privileges non-Indigenous interests.[470]

Up until 2014, the justified infringement test did not explicitly contain a "proportionality" assessment. In *Tsilhqot'in Nation*, the Supreme Court of Canada imported the three stages to determining proportionality from *R. v. Oakes*.[471] *Oakes* is the seminal Supreme Court of Canada case establishing the test under section 1 of the *Canadian Charter of Rights and Freedoms* for the government to justify limiting *Charter* rights.[472] Since section 35 was purposefully placed outside the *Charter*, it was not intended to be subject to the limitations set out in section 1 of the *Charter*. The *Oakes* test has been the subject of significant academic commentary.[473] The imported *Oakes* proportionality test to justify an infringement of section 35 constitutional rights has three elements: (1) the infringement must be rationally connected to the objective, and there must be a link between the impugned measure and the pressing and substantial objective; (2) the infringement must impair the right no more than is reasonably necessary to achieve the objective; and (3) there must be proportionality between the deleterious and salutary effects of the law.[474]

The Impact of Settler Amnesty on Section 35 Rights

Taken together, these developments in the section 35 case law have vastly and continuously reduced Aboriginal Peoples' access to, and jurisdiction over, their ancestral territories. They support settler amnesty and constitute a backward-looking attempt to justify the violent taking of Indigenous lands and mass human rights violations committed by the State against Indigenous Peoples. Although there have been some important developments in Supreme Court of Canada's jurisprudence relating to section 35, these are overshadowed by the ways in which the court continues to limit the scope of section 35 rights by prioritizing the interests of the broader society over the constitutionally protected rights of Indigenous Peoples. In the context of protecting Indigenous burial sites, Canadian courts have generally failed to

uphold the rights of Indigenous Peoples to access, protect, and maintain the burial sites of their loved ones and ancestors. The result is that Canada has a long and ongoing legacy of permitting the desecration of Indigenous burial sites in breach of the internationally recognized rights of Indigenous Peoples.

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) was developed over several decades by Indigenous representatives from around the world who worked tirelessly to have it adopted at the international level.[475] The *UN Declaration* was put in place to address, "the urgent need" to respect and promote the inherent rights of Indigenous Peoples, including those affirmed in Treaties, agreements, and other constructive arrangements with States.[476] In its preamble, the *UN Declaration* acknowledges the long history of oppression and discrimination against Indigenous Peoples and affirms, "that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust."[477] It affirms the individual and collective human rights of Indigenous Peoples and specifies that the rights recognized within the *UN Declaration*, "constitute the minimum standards for the survival, dignity and well-being of the [I]ndigenous [P]eoples of the world."[478] Legal scholar Michael Coyle highlights that the *UN Declaration*'s use of the term "peoples" is a recognition of Indigenous Peoples and, "their status as distinct and equal peoples."[479] This is an important affirmation of the collective aspects of the right of Indigenous Peoples to self-determination, which prior to the Declaration's enactment was a gap in international law.[480]

Settler Amnesty and Canada's Resistance to the UN Declaration

The UN General Assembly adopted the *UN Declaration* on September 13, 2007. One hundred and forty-three UN member States voted in favour of the Declaration.[481] After failed attempts to defeat, weaken,[482] and delay the progression of the Declaration, Canada ultimately voted against it.[483] Joffe notes that, "Canada was the only country on the 47-member Human Rights Council to vote against it in the General Assembly."[484] The only other countries that voted against the Declaration were the United States, Australia, and New Zealand.[485] All four countries that voted against it are settler colonial States that have a history of committing mass human rights violations against Indigenous Peoples.[486] During the negotiations of the wording of the *UN Declaration*, Joffe documents that Canada attempted to weaken many provisions of the Declaration including by seeking proposed amendments in August 2007

to qualify the right to self-government. Canada sought to qualify the right to self-government by creating instead a joint or contingent right exercised in cooperation with the State.[487] Canada also proposed to amend Article 31 by deleting the right to "control" and "protect" cultural heritage, traditional knowledge, and traditional cultural expressions.[488]

More recently, it has been uncovered that, consistent with settler amnesty, Canada worked with Australia in 2003 to draft a "government-friendly" alternative version of the *UN Declaration* without Indigenous input.[489] Specifically, the two governments worked together to draft alternative text that provided weaker protections than the *UN Declaration* by eliminating references to demilitarization, restitution of land, and cultural genocide.[490] These efforts were not successful. After the adoption of the *UN Declaration* and for the next nine years, Canada took the position internationally that the *UN Declaration* did not apply domestically since Canada had not signed onto it.[491] Joffe notes that, "this appears to be the first time that Canada has vigorously opposed a human rights instrument adopted by the General Assembly."[492] Canada provided a number of reasons for opposing the *UN Declaration*, including that:

- It would require the Canadian government to repeal the *Indian Act*;[493]
- The provision relating to free, prior and informed consent is too stringent and constitutes a veto for Indigenous Peoples;[494]
- Articles in the Declaration are incompatible and inconsistent with Canada's constitutional order;[495]
- The Declaration would jeopardize the Treaties with Indigenous Peoples;[496]
- It had concerns about demilitarization on Indigenous lands;[497] and
- It could undermine Canada's negotiations relating to intellectual property in other fora.[498]

Joffe points out that Canada's opposition to the *UN Declaration* was unsubstantiated and that the Canadian government, "consistently refused to provide any written legal analysis to substantiate its claims regarding the Declaration. It [invoked] solicitor-client privilege to justify the non-disclosure of the legal implications of its various positions on Indigenous peoples' rights."[499] Canada also lobbied other States to oppose the *UN Declaration*.[500]

In May 2008, over one hundred legal scholars and experts issued an open letter indicating that there was no "credible legal rationale" for opposing the *UN Declaration* and that its implementation in Canada would be consistent with the Canadian constitution. Further, these

scholars and experts concluded that Canada's reasons for opposing the Declaration were both, "erroneous" and, "misleading."[501] In addition, Joffe notes that Canada's opposition to the *UN Declaration* was inconsistent with its international obligations:

> As a member state of the UN, Canada has a duty to respect the purposes and principles of the *Charter of the United Nations* (*UN Charter*), which require actions "promoting and encouraging respect" for human rights and not undermining them. In Canada, this duty is reinforced by the underlying constitutional principle of respect for human rights and freedoms.
>
> As an elected member of the Human Rights Council, Canada accepted the commitment to "uphold the highest standards in the promotion and protection of human rights ... [and] fully cooperate with the Council." This co-operation includes supporting the Council in carrying out its responsibility "for promoting universal respect for the protection of all human rights ... for all, without distinction of any kind and in a fair and equal manner."[502]

Canada's opposition to the *UN Declaration* was heavily criticized by UN bodies and international human rights organizations.[503] Then UN High Commissioner and former Supreme Court of Canada Justice Louise Arbour indicated profound disappointment with respect to Canada's opposition to the Declaration and characterized it as a, "surprising stand for a country that likes to see itself as a model of tolerance and respect for the rights of all."[504] Canada's opposition significantly harmed Canada's reputation and credibility in relation to human rights both with Indigenous Peoples and at the international level.[505]

Canada Finally Endorses the *UN Declaration*

On May 10, 2016—a full nine years after the *UN Declaration* was adopted at the international level—Canada finally endorsed the Declaration without qualification.[506] On June 21, 2021, the Canadian federal government enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*UN Declaration Act*).[507] The purpose of this Act is to, "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and "provide a framework for the Government of Canada's implementation of the Declaration."[508] Specifically, it mandates the federal government, "in consultation and cooperation with Indigenous peoples," to prepare and implement an Action Plan to achieve the objectives of the *UN Declaration*.[509]

Scholars have noted that the federal *UN Declaration Act* does not explicitly incorporate the provisions of the *UN Declaration* into the laws of Canada but, rather, only indicates that processes of consultation and cooperation with Indigenous Peoples are required to make Canadian laws consistent with the *UN Declaration*'s articles.[510] This collaborative process is both necessary and important and respects Indigenous governance and sovereignty. It also aligns with the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission of Canada (TRC), which outlined a vision of reconciliation as a journey based on mutual respect, reciprocity, and Nation-to-Nation relationships.[511] The federal government's legislated commitment to make the laws of Canada consistent with the *UN Declaration* is a significant step forward; it marks an important beginning in the federal government moving away from settler amnesty and a culture of impunity towards accountability, justice, and reconciliation.

The Federal *UN Declaration Act Action Plan*

On June 21, 2023—National Indigenous Peoples Day—the federal government released the 2023–2028 *UN Declaration on the Rights of Indigenous Peoples Act Action Plan* (*Federal UNDA Action Plan*).[512] The *Federal UNDA Action Plan* was developed in consultation and cooperation with Indigenous Peoples within Canada. The *Federal UNDA Action Plan* includes 166 specific measures that address the *UN Declaration*'s nine thematic areas, which are identified as self-determination, self-government and recognition, and enforcement of Treaties; lands, territories, and resources; environment; civil and political rights; participation in decision-making and strengthening Indigenous institutions; economic, health, and social rights; cultural, religious, and linguistic rights; education, information, and media; and implementation and redress.

The goals of the *Federal UNDA Action Plan* that relate to the protection of Indigenous burial sites include that Canada will, "honourably fulfill all of its legislated, common law, fiduciary and constitutional obligations and responsibilities" to Indigenous Peoples;[513] ensure that Indigenous rights mechanisms are informed by Indigenous laws and legal systems and international human rights law;[514] and support the exercise of Indigenous Peoples inherent rights, including the Sacred responsibilities that Indigenous Peoples have to their lands, waters, and resources, including the right to own, use, develop, and control lands and resources within their territories.[515] The *Federal UNDA Action Plan* makes the following specific commitments that relate to Indigenous burial sites and the recognition and affirmation of section 35 rights, including:

- Creating a new rights recognition approach that will not include extinguishment as a policy objective;[516]

- Honourably implement historic and modern Treaties, self-government agreements, and other constructive arrangements;[517]
- Implementing co-development mechanisms and processes for legislation and agreements and increasing Indigenous participation in decision-making;[518] and
- Broadening cooperative management approaches, governance, decision-making, and access in collaboration with Parks Canada relating to heritage sites and archaeology.[519]

The *Federal UNDA Action Plan* also includes Commitment no. 107 that relates specifically to search and recovery work. It states that the government of Canada will take the following action, in consultation and cooperation with Indigenous Peoples:

> 107. Support the ongoing work of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools and act upon her recommendations, including with a view to aligning federal laws with the *UN Declaration*.[520]

The *Federal UNDA Action Plan* also requires annual reporting by the federal government on the implementation progress.

Provincial and Territorial Implementation Legislation

British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act* (*BC Declaration Act*) in November 2019.[521] The purposes of the *BC Declaration Act* are:

> (a) To affirm the application of the Declaration to the laws of British Columbia;
>
> (b) To contribute to the implementation of the Declaration; and
>
> (c) To support the affirmation of, and develop relationships with, Indigenous governing bodies.[522]

In his comparative analysis of the federal and BC legislation, legal scholar Ryan Beaton notes that, although they contain many similar provisions, the *BC Declaration Act* has an additional provision when compared with the federal Act. Specifically, section 7(1) provides:

> 7(1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf

> of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:
>
> (a) the exercise of a statutory power of decision jointly by
>
> (i) the Indigenous governing body, and
>
> (ii) the government or another decision-maker;
>
> (b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.[523]

Beaton asserts that the inclusion of this section is important as it signals a commitment to negotiating on a government-to-government basis rather than litigating as the primary means to implementing the *UN Declaration* in British Columbia.[524]

On March 30, 2022, British Columbia released its Action Plan, 2022–2027, which was co-developed in consultation and collaboration with Indigenous Peoples within the province. The BC Action Plan contains a commitment to, "work with First Nations to reform the *Heritage Conservation Act* to align with the *UN Declaration*, including shared decision-making and the protection of First Nations cultural, spiritual, heritage sites and objects."[525] In October 2023, the Northwest Territories passed legislation committing to implement the *UN Declaration* that is entitled the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act* (*NWT Declaration Implementation Act*).[526] The purpose of the Act is:

> (a) To affirm the Declaration as a universal human rights instrument with application to the Indigenous peoples of the Northwest Territories and the laws of the Northwest Territories;
>
> (b) To provide a framework for the implementation of the Declaration by the Government of the Northwest Territories in collaboration and cooperation with Indigenous Governments or Organizations; and
>
> (c) To affirm the roles and responsibilities of Indigenous Governments or Organizations in the implementation of the Declaration.[527]

As with the acts passed by the federal and BC governments, the *NWT Declaration Implementation Act* mandates the co-development of an Action Plan and annual reporting by the government on the progress of implementation. In addition, in section 13, it contains a similar provision to section 7(1) of the *BC Declaration Act*. These legislative commitments

are now part of the legal framework in Canada and signal an important shift in Canada's approach that provides cautious optimism that Indigenous burial sites will be afforded the legal protections that they are due in these jurisdictions.

The *UN Declaration*'s Application in Jurisdictions without Implementation Legislation

Even absent domestic implementation legislation, there are compelling arguments that the *UN Declaration* applies in Canada. Declarations that are adopted as a resolution of the UN General Assembly are considered "soft law" and, therefore, not binding international law, absent domestic legislation.[528] Many legal scholars, however, emphasize that this interpretation requires significant nuance in the context of the application of the *UN Declaration* in Canada. Law professor Nigel Bankes highlights that the *UN Declaration* translates and applies the, "general rules and principles of international human rights law—such as the right to self-determination, the right to equality, the right to be free of discrimination, and the right to culture—to the particular situation of Indigenous peoples."[529] Manitoba Métis scholar Brenda Gunn clarifies:

> In international law, a declaration in and of itself does not create binding legal obligations on a State, but declarations do have legal effect and states are expected to abide by them. As a declaration, the UN Declaration cannot be simply dismissed as non-law. In international law, "'a declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."[530]

Professor Robert Hamilton emphasizes the importance and increased weight of declarations in the international law context. He notes that:

> declarations are a unique and particularly important UN instrument. The UN Office of Legal Affairs writes, "In the United Nations practice, a Declaration 'is a formal and solemn instrument ... in view of the greater solemnity and significance of a Declaration', it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it." Thus, while the Declaration is a "soft law" instrument, [it] may be a particularly persuasive one given its broad support and the importance of declarations as articulations of international norms of considerable significance.[531]

Importantly, James (Sa'ke'j) Youngblood Henderson, international human rights lawyer and educator and a member of the Chickasaw Nation, rejects the soft law characterization completely. Considering human rights through an Indigenous legal lens, he asserts that, "human rights are not aspirational or soft law: they are natural rights held by humans" based on "inherent human dignity"; as such, in his view, "states have no ability to limit these ... rights."[532]

In addition to the important weight that declarations have, Gunn notes that Canada is bound by many of the provisions of the *UN Declaration* because many of the rights contained within it are already in the international human rights treaties that Canada has ratified.[533] As identified in various areas of this Final Report, the relevant articles of the *UN Declaration* with respect to the protection of Indigenous burials sites include:

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as **archaeological and historical sites**, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with [I]ndigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their **religious and cultural sites**; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the **access** and/or repatriation of ceremonial objects and **human remains** in their possession through fair, transparent and effective mechanisms developed in conjunction with [I]ndigenous peoples concerned.

Article 25

Indigenous peoples have the right to maintain and strengthen their **distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands**, territories, waters and coastal seas and other resources and to **uphold their responsibilities to future generations** in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give **legal recognition and protection to these lands**, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the [I]ndigenous peoples concerned.[534]

The following international treaties that Canada has ratified that guarantee rights and set out State obligations that directly relate to the Articles listed above include:

- Article 18 (the right to freedom of religion and to manifest such religion in practice) and Article 27 (the right of people individually or in community to enjoy their culture and practice their own religion) of the *International Covenant on Civil and Political Rights*;[535]

- Article 15 (the right to take part in cultural life) of the *International Covenant on Economic, Social and Cultural Rights*;[536] and
- Article 2 (prohibition on racial discrimination and positive obligation on States to eliminate it in all forms) in the *International Convention on the Elimination of All Forms of Racial Discrimination*.[537]

A Decolonized Interpretation of the *Convention on the Rights of the Child*

The *Convention on the Rights of the Child* deals explicitly with rights of living children and came into force in September 1990.[538] Several Articles can be interpreted in a decolonized and expansive way to have application to the search and recovery of the missing and disappeared children and their burials. For example:

- **Article 2** places a positive obligation on States to prevent discrimination;
- **Article 8** upholds the right of the child to an identity, including a name, and places positive obligations on States to re-establish a child's identity;
- **Article 9(4)** establishes that, where a child is separated from their parents, the parents and family members are entitled to, "essential information about the whereabouts of the child"; and
- **Article 30** guarantees the right of the child to their own religion.

Taken together and interpreted and applied expansively and in alignment with Indigenous laws, these Articles support the rights of the missing and disappeared children to have their names restored and to be buried or reburied in accordance with the funerary and burial practices and ceremonies that correspond to their spirituality. They also support the rights of families and communities to information about the location of the children's burials. Most importantly, these provisions support the assertion that the missing and disappeared children must be treated with dignity and respected both in life and after death in accordance with Indigenous laws.

Canadian courts may also apply the articles of the *UN Declaration* if they are found to be customary international law.[539] Hamilton explains that, "any right credibly characterized as a

reflection of customary international law is applicable by common law courts in the absence of domestic incorporation, so long as there is no explicit contrary domestic legislation."[540] Paul Joffe notes that:

> examples in the Declaration of customary international law include ... the general principle of international law of *pacta sunt servanda* (treaties must be kept); the prohibition against racial discrimination; the right to self-determination; the right to one's own means of subsistence; the right not to be subjected to genocide; the obligation of states under the *UN Charter* to promote "universal respect for, and observance of, human rights and fundamental freedoms for all"; and the requirement of good faith in the fulfillment of the obligation assumed by states in accordance with the UN Charter.[541]

The *UN Declaration* is binding on Canada as a result of (1) Canada's endorsement of the Declaration; (2) Canada's ratification of other international treaties that contain similar rights, protections, and obligations; (3) customary law; and (4) domestic implementation legislation.

Recent Application of the *UN Declaration* in Canadian Law

On February 9, 2024, the Supreme Court of Canada released its decision in the *Bill C-92 Reference* case.[542] In this case, the court was asked to determine the constitutionality of the *Act Respecting First Nations, Inuit and Métis Children, Youth and Families,* which the federal government enacted to establish national standards to protect Indigenous children and affirmed Indigenous Peoples', "inherent right to self-government recognized and affirmed by s. 35 of the Constitution Act, 1982."[543] The Act creates a framework for Indigenous Peoples to exercise jurisdiction in the area of child and family services[544] and incorporates by reference the laws made by Indigenous Peoples in this area.[545] In finding that the law was constitutional, the Supreme Court of Canada, for the first time since the *UN Declaration* was endorsed by Canada, provided substantive commentary on the *UN Declaration*. The court noted the following in paragraphs 3 and 4 of its decision:

> [3] The Act is part of a broader legislative program introduced by Parliament to achieve reconciliation with First Nations, the Inuit and the Métis "through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership" (preamble). The framework serving as the foundation for this reconciliation initiative by Parliament is the *United*

> *Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 ("Declaration" or "UNDRIP"), adopted by the United Nations General Assembly in 2007. That international instrument provides that "Indigenous [P]eoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs" (art. 4). Among the matters dealt with in the Declaration, the provisions setting out "the right of [I]ndigenous families and communities to retain shared responsibility for the upbringing ... and well-being of their children, consistent with the rights of the child" (preamble; see also art. 14) are of particular relevance to this reference. The Declaration also refers to the right of Indigenous [P]eoples to transmit their histories, languages and cultures to future generations (art. 13(1)), in addition to emphasizing the right not to be subjected to any act of violence, including "forcibly removing children of the group to another group" (art. 7(2)).
>
> [4] While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take, "in consultation and cooperation with [I]ndigenous [P]eoples, ... the appropriate measures, including legislative measures, to achieve the ends" of the Declaration (art. 38). Recognized by Parliament as "a universal international human rights instrument with application in Canadian law," **the Declaration has been incorporated into the country's positive law** by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("*UNDRIP Act*"), s. 4(a).[546]

Legal scholars have considered the importance of "braiding legal orders"—specifically, Indigenous laws, international human rights law, and Canadian constitutional law—to apply the *UN Declaration* in Canada.[547] Similarly, the Supreme Court of Canada pointed out that the Act:

> reflects Parliament's openness to using three different types of legal norms that will be interwoven in this framework for reconciliation to ensure the well-being of Indigenous children: the legislative authority of Indigenous peoples in relation to child and family services, the legislative provisions enacted by Parliament to establish national standards, and the international standards referred to in the Declaration. The

> metaphor of "braiding" together these three types of norms has been helpfully proposed to explain how the Declaration should be implemented in Canada, so as to "work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope."[548]

The court's detailed consideration and application of the *UN Declaration* in the context of the federal Act signals a promising shift. This important decision will no doubt impact how courts across the country will interpret the *UN Declaration* and apply it to federal, provincial, and territorial laws moving forward. It provides critical guidance for legal reform that is an essential element of reparations to advance reconciliation in Canada.

Applying the *UN Declaration* to Section 35 Claims to Access and Protect Indigenous Burial Sites

To date, there has been no Canadian cases that explicitly confirm that Indigenous burial sites are protected under section 35. However, there are compelling reasons that such sites merit constitutional protection. Constitutional protection of Indigenous burial sites is consistent with the unique constitutional position of Aboriginal Peoples and the grand purpose of reconciliation under section 35. Interpreting Aboriginal and Treaty rights in accordance with the *UN Declaration* creates an imperative to interpret these rights through the lens of international human rights. In considering the current section 35 case law in the context of the unmarked burials of missing and disappeared children, governments have breached both their fiduciary duty and the honour of the Crown in failing to protect burial sites from desecration.[549]

Caring for, maintaining, and protecting the burials of loved ones and ancestors is a customary practice of Aboriginal Peoples.[550] All Aboriginal Peoples have distinctive laws and ceremonial practices and protocols for caring for, protecting, and maintaining the burials of loved ones and ancestors that are integral to their distinctive cultures. Importantly, these laws, ceremonies, and practices have evolved to adapt to changing circumstances, including the significant impact of colonialism. As a result, regardless of where Indigenous burial sites exist and regardless of whether the funerary practices and burials have been adapted to include Christian practices, these rights are entitled to constitutional protection under section 35. Due to the centrality of Indigenous funerary and burial practices and the deep connection between the living and the dead within Indigenous societies, there is little doubt that the rights of Indigenous Peoples to access, protect, and maintain the burials of their loved ones and ancestors meets the test for Aboriginal rights set out in *R. v. Van der Peet.*[551]

These Aboriginal rights include both general rights to govern and regulate the treatment and protection of burial sites in the context of Indigenous-governed lands as well as rights to access sites where burials are located. This applies equally to Treaty rights whether they arise from historic or modern Treaties. In the context of historic Treaties, an honourable interpretation that presumes the Crown is acting with integrity supports ongoing access to, and protection of, Indigenous burial sites, whether these sites are located within the areas set aside for the sole and exclusive use of Indigenous Nations or in the larger territory that was surrendered under the terms of such Treaties. There are persuasive arguments that section 35 protections should have extended to Indigenous burial sites as soon as the *Constitution Act, 1982*, was enacted. However, the recent adoption and legislative commitments to implementing the *UN Declaration* in Canada have provided an opportunity to reconsider section 35 as it applies to Indigenous burial sites. Indeed, then Minister of Indigenous and Northern Affairs Carolyn Bennett, in her speech to the UN Permanent Forum on Indigenous Issues in May 2016, said, "By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada."[552] This is an explicit recognition by the federal government that adopting the *UN Declaration* requires a critical rethinking and strengthening of section 35 rights.

International law can be considered in section 35 jurisprudence both as an interpretive lens through the application of international customary law and where international instruments are binding on Canada. There are convincing precedents for the use of international human rights laws in the interpretation of domestic law. The Supreme Court of Canada has applied international human rights law in numerous cases over the years, including in the context of interpreting constitutional protections under the *Canadian Charter of Rights and Freedoms*.[553] In the context of section 35 rights, former Chief Justice of the Supreme Court of Canada Beverley McLachlin stated:

> Aboriginal rights from the beginning have been shaped by international concepts.... More recently, emerging international norms have guided governments and courts grappling with [A]boriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, [A]boriginal rights are an international matter.[554]

The Supreme Court of Canada has emphasized the importance of considering international human rights law in various cases, including cases relating to the protection of *Charter* rights

and environmental law. To date, in Canada, there has been a distinct separation between the domestic human rights system and section 35 jurisprudence. There has only recently been an acknowledgement of the significant breaches of Indigenous Peoples' human rights and the mass atrocities committed by the federal government. There is an urgent need to adopt a human rights-based approach that is grounded in the *UN Declaration* to interpret section 35 rights.[555] Joffe notes that, to date, Canadian courts have failed to engage in a comprehensive human rights analysis in alignment with international human rights standards in case law relating to Aboriginal and Treaty rights.[556]

Section 35 rights must be interpreted pursuant to the rights and obligations set out in the *UN Declaration*. The *UN Declaration* recognizes the importance of Indigenous laws, of Indigenous Peoples' relationships with their territories, of supporting Indigenous Peoples in upholding responsibilities to future generations, of ensuring Indigenous Peoples' rights to practise their own spirituality, and of facilitating Indigenous access, control, protection, and maintenance of sites of cultural significance. These key principles have specific application to the protection of Indigenous burial sites as section 35 Aboriginal and Treaty rights. Regardless of the locations of these sites within Canada—whether they are on federal, provincial, territorial, or privately held lands—the rights of Indigenous Peoples and the State obligations contained in the *UN Declaration* must be applied to protect these sites.

In addition, Indigenous Peoples' rights to care for, access, maintain, and protect the burial sites of their loved ones and ancestors must outweigh competing interests that are aimed at recreational or commercial purposes. Although there has been a tendency in the case law to prioritize economic and recreational interests over the protection of Aboriginal rights, with Canada's recent commitment to meaningfully change its laws to comply with the *UN Declaration*, a new legal framework that includes legislative protections of Indigenous burial sites at all levels is required. This new framework must:

- Recognize the inherent rights of Indigenous Peoples to access, maintain, protect, and care for the burial sites of loved one and ancestors;
- Protect confirmed, known, and suspected burial sites, including those being searched for the unmarked graves of the missing and disappeared children; and
- Respect the principle of free, prior and informed consent of affected Indigenous Nations where the development of lands or government action is proposed that may impact confirmed, known, or suspected Indigenous burial sites.

Canadian law provides protections too late in the process—only once burial sites have been confirmed. However, there are burial sites that are "known" within Indigenous communities that may not have been disclosed or made known to governments for their protection. In addition, in the context of search and recovery work, there are "suspected" burial sites. A robust legal framework will provide legal protection to all three of these types of sites—confirmed, known, and suspected. In addition, the importance of seeking the consent of Indigenous Nations cannot be understated; free, prior and informed consent must apply to all legislation, administrative measures, development decisions, or government action affecting confirmed, known, and suspected Indigenous burial sites.

Just as Aboriginal rights must be interpreted to evolve to respond to contemporary circumstances, the Supreme Court of Canada's case law on section 35 must similarly evolve. As James (Sa'ke'j) Youngblood Henderson argues, we must find ways to, "counteract the Eurocentric contamination of [our] minds" and create new pathways forward that respect and uphold the rights of Indigenous Peoples to care for all their relations—those living and those yet to come and those who have journeyed to rest with the ancestors.[557]

CONCLUSION

The long history of the lack of protection of Indigenous burial sites has led to the desecration of Indigenous burials and a conflict of laws. As the TRC's Final Report highlights, the way in which law has been used to oppress Indigenous communities has led to significant distrust and suspicion of Canada's legal system among many Indigenous Peoples.[558] The Canadian justice system is therefore viewed by some as creating more injustice than justice for Indigenous people and communities. This view is supported when the robust legal protections in place for government-run, church-run, and privately run cemeteries are contrasted with the relative lack of protection for Indigenous burial sites. It is also supported with the many instances of government authorized desecration of Indigenous burial sites. The injustice is particularly apparent when government and courts have justified such desecration for reasons of economic development, recreational use, and the prioritizing of private and corporate interests over the constitutionally protected rights of Indigenous Peoples. This long legacy of desecration and dehumanization of Indigenous Peoples illustrates the ongoing nature of settler colonial harm and settler amnesty in Canada.

Considering the long history of desecration of Indigenous burial sites can be disheartening; however, there is some movement towards positive change. The formal adoption of the *UN Declaration* and its application in Canadian law provides a renewed opportunity for

governments at all levels, as well as for Canadian courts, to consider the legal protections that must be put in place to align Canadian laws with the rights and obligations set out in the *UN Declaration*. Indigenous Peoples have rights and responsibilities under Indigenous laws to respect, care for, access, and protect the burial sites of their loved ones and ancestors that must be reflected in a new legal framework in Canada. Implementing robust and enforceable laws to protect Indigenous burial sites, including the burials of the missing and disappeared children, will contribute to reparations and restore dignity to the missing and disappeared children and their families and communities.[559] Importantly, applying the *UN Declaration* as the primary framework to protect Indigenous burial sites not only upholds Aboriginal and Treaty rights but also the international human rights of Indigenous Peoples within Canada.

APPENDIX A

Selection of Laws and Regulations Applicable to Burial Sites

Federal

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Parks Canada Agency Act	*Parks Canada Agency Act*, SC 1998, c. 31, s. 4(1), https://laws-lois.justice.gc.ca/eng/acts/P-0.4/index.html. See also Parks Canada, "Archeology and the Law," modified November 19, 2022, https://parks.canada.ca/culture/arch/page4/doc2.	Parks Canada, established by the *Parks Canada Agency Act*, oversees and generally conducts archaeological work and programs on federal lands to "protect and preserve archaeological resources" in "areas of natural or historic significance to the nation." Canada has no statutory protections of unmarked burial sites, only policies and guidelines. In order to conduct an archaeological search on federal land, permission is only required from the federal department manager; provincial or territorial archaeological permits are not required (however in practice notification is generally provided). It does not however appear that unmarked graves and burials associated with Indian Residential Schools would be considered archaeology within the federal policy framework, as according to Parks Canada, "human remains cannot be considered archaeological resources under the Cultural Resource Management Policy."	"Federal archeology" in the *Parks Canada Agency Act* means "the conduct of archaeology on federal lands" whereby "the agency's archaeological experts provide advice, tools, and information to other federal land managers on archaeology and environmental assessment to help implement the Government of Canada's *Archaeological Heritage Policy Framework* (1990). See Parks Canada, "Policies and Guidelines," https://parks.canada.ca/agence-agency/bib-lib/politiques-policies/archeologie-archaeology.

British Columbia

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
British Columbia	*Heritage Conservation Act*, RSBC 1996, c. 187, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96187_01.	The province may enter into a formal agreement with a First Nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the Indigenous people who are represented by a First Nation. "Heritage object" means, whether designated or not, personal property that has heritage value to British Columbia, a community, or [A]boriginal people. "Heritage site" means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community, or [A]boriginal people. Agreement under the Act must be in writing and must be approved by the Lieutenant Governor in Council. No provision of this Act and no provision in an agreement entered abrogates or derogates from the Aboriginal and Treaty rights of a First Nation or of any Indigenous Peoples. If a Treaty First Nation, in accordance with its final agreement, makes laws for the conservation and protection of, and access to, heritage sites and heritage objects on its Treaty lands, several sections of the Act do not apply in relation to those Treaty lands. Contravention of this Act may lead to a fine up to $1,000,000, depending on the action and whether the party is an individual or a corporation, and may also result in imprisonment of up to six months or up to two years depending on the offence. The minister may also apply to the BC Supreme Court for an injunction restraining a person from "committing, or continuing to commit, a contravention" of the Act or its regulations and for a "restoration or compliance order" to remediate harms already caused.	Applies whether sites are located on private or public land. The *Heritage Conservation Act* (*HCA*) protects marked and unmarked "burial place[s] that [have] historical or archeological value," and human remains located in these places, from being damaged, desecrated, altered, or removed. The *HCA* generally applies to burial sites that pre-date 1846. The Act gives the minister broad discretion to acquire property, enter into agreements to protect sites, and require landowners to preserve them from "damage or deterioration." Section 4 establishes a process for First Nation involvement in such protections. Sites meeting the "historical or archeological value" criteria are protected even if they are not formally designated as heritage sites. According to the BC government, protections under the *HCA* could also apply to suspected unmarked burial sites as long as there is a "sufficient supporting rationale" to extend such protections (which may be built through ground-penetrating radar (GPR) surveys, historical documentation, Survivor accounts or other oral histories, or other evidence). The Act does not include a power allowing the government to expropriate private land for the purpose of protecting it. Pursuant to British Columbia's commitments under the *Declaration on the Rights of Indigenous Peoples Act*, the province has committed to reforming the *HCA* to establish "shared decision-making and the protection of First Nations cultural, spiritual, and heritage sites or objects." This work commenced in 2022–2023.

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
British Columbia	*Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44. https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044.	The purposes of this Act are: (a) to affirm the application of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) to the laws of British Columbia; (b) to contribute to the implementation of the *UN Declaration*; (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies. In consultation and cooperation with Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the *UN Declaration*.	This Act has implications for the protection of unmarked graves and burial sites through Article 12 of the *UN Declaration*, which provides that Indigenous Peoples have the right to repatriation of their human remains.

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
British Columbia	*Land Act*, RSBC 1996, c. 245, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96245_01.	Subject to compliance with this Act and the regulations, the minister may dispose of surveyed or unsurveyed Crown land by any of the following means, as the minister considers advisable in the public interest, to a person entitled under this Act: (a) application; (b) public auction; (c) public notice of tender; (d) public drawing of lots; (e) public request for proposals; (f) listing with a brokerage licensed under the *Real Estate Services Act*; (g) land exchanges. The minister may; (a) sell Crown land, (b) lease Crown land, (c) grant a right of way or easement over Crown land, (d) grant a licence to occupy Crown land, or (e) transfer ownership of fossils located on Crown land, grant the right to remove fossils from Crown land, or both, if done in accordance with the Act In a disposition of Crown land, the minister may impose the terms, covenants, stipulations, and reservations that the minister considers advisable, and without limiting those powers, the minister may impose some or all of the following terms: (a) the applicant must personally occupy and reside on the Crown land for a period set by the minister; (b) the applicant must do that work and spend that money for permanent improvement of the Crown land within that period the minister requires; (c) the consideration that must be paid for a disposition of Crown land.	This law sets out how Crown land in the province is administered. While it does not specifically deal with burial sites, the *Land Act* does allow the government to "reserve" any Crown land "for any purpose that the [provincial Cabinet] considers advisable in the public interest." This is a very broad power, which may in theory be used to protect and ensure Indigenous access and control of potential unmarked burial sites. The province of British Columbia is currently reviewing the *Land Act* to bring the legislation into alignment with the *Declaration on the Rights of Indigenous Peoples Act*. These amendments are necessary to ensure the *Land Act* supports British Columbia's shared and consent decision-making agreements with Indigenous Governing Bodies regarding the access and use of public lands in the province.

Alberta

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Alberta	*Historical Resources Act*, RSA 2000, c. H-9, https://kings-printer.alberta.ca/1266.cfm?page=H09.cfm&leg_type=Acts&isbncln=9780779837267.	The *Historical Resources Act* (*HRA*) applies to all provincial lands, whether publicly or privately owned. Under this legislation, the minister responsible has the authority to define historic resources, protect historic places, and regulate land development on designated sites. The *HRA* prohibits damage to archaeological sites, including any residential school site with subsurface features (such as burials). The *HRA* would apply to protect unmarked burial sites before they are confirmed or registered as cemeteries under the *Cemeteries Act*.	Human remains are not considered to be historic resources, but the burial locations may be protected under the *HRA*. The Act prohibits intentional and unauthorized damage to archaeological sites and includes punishments for the damage or destruction of historical resources. The minister can require anyone proposing an activity or development to undertake an assessment and take salvage, preservation, or protective measures. Section 49 of the *HRA* provides for temporary stop orders to protect sites that have not yet been formally designated as historic resources, although the government of Alberta indicated to the OSI that "to date, there has not been a need to implement this provision."
Alberta	*Cemeteries Act*, RSA 2000, c. C-3. https://kings-printer.alberta.ca/1266.cfm?page=C03.cfm&leg_type=Acts&isbncln=9780779836741.	This Act defines "cemetery" broadly as any "land that is set apart or used as a place for the burial of dead human bodies or other human remains or in which dead human bodies or other human remains are buried." Under this Act, Indigenous and residential school burial sites would be protected once the presence of human graves is confirmed. Cemetery lands may not be "sold, transferred, mortgaged, pledged, hypothecated, charged, or encumbered" without the consent of the Director of Cemeteries.	Any Certificate of Title to these lands would be flagged to ensure that no transfer of lands is done without the Director of Cemeteries' consent. Owners of registered cemeteries are required to create and maintain records and make those records available to individuals with family ties to any person interred in the cemetery.

Saskatchewan

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Saskatchewan	*Heritage Property Act*, SS 1979–80, c. H-2.2, https://www.canlii.org/en/sk/laws/stat/ss-1979-80-c-h-2.2/latest/ss-1979-80-c-h-2.2.html. *Archaeological Burial Management Policy*, https://www.saskatchewan.ca/residents/parks-culture-heritage-and-sport/heritage-conservation-and-commemoration/conservation-advice-and-information/research-and-publications.	The *Heritage Property Act* (*HPA*) applies to "any property that is of interest for its architectural, historical, cultural, environmental, archaeological, palaeontological, aesthetic or scientific value." Heritage property is formally designated by a municipality or the province. Section 64 makes it an offence to "destroy, desecrate or deface any pictograph, petroglyph, human skeletal material, burial object, burial place or mound, boulder effigy or medicine wheel," or to "remove, excavate, or alter" the same materials without a permit. These protections cover all "Sites of Special Nature," even if they are not designated as heritage properties. Pursuant to section 64(2) of the Act, any use of an archaeological burial that may result in its disturbance requires a ministerial permit.	The Saskatchewan government has indicated that burial sites associated with Indian Residential Schools would not be considered "Sites of Special Nature" under the HPA and so would not be protected under this legislation unless they are formally designated as heritage properties. Where appropriate, a caveat may be placed on a property containing a re-interred archaeological burial to protect it from future land development. In the event of reburials on Indian Reserve lands, the minister will transfer ownership of skeletal remains and associated funerary objects from the provincial Crown to the appropriate Indian Band. If an archaeological burial is shown to be Métis, the Métis Nation Saskatchewan, will be consulted to determine final disposition of the remains and burial objects.

Manitoba

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Manitoba	*Path to Reconciliation Act*, CCSM, c. R30.5, https://web2.gov.mb.ca/bills/40-5/b018e.php.	This Act affirms that the government of Manitoba is committed to reconciliation and will be guided by the Calls to Action of the Truth and Reconciliation Commission and the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) and the Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls. The Act requires the minister responsible for reconciliation to develop a strategy for reconciliation.	This Act has implications for the protection of unmarked graves and burial sites through Article 12 of the *UN Declaration*, which provides that Indigenous peoples have the right to repatriation of their human remains.
Manitoba	*Cemeteries Act*, CCSM, c. C30, https://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=c30.	Manitoba's *Cemeteries Act* applies to any "land that is set apart or used as a place for the burial of dead human bodies … or in which dead human bodies … have been buried."	This Act provides robust protections but makes no specific allowance to ensure Indigenous access or control over sites in which missing or disappeared children may be buried.

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Manitoba	*Heritage Resources Act*, CCSM, c. H39.1, https://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=H39.1.	Burial sites deemed of "historic or pre-historic" significance is governed by this Act. This legislation vests ownership and right of possession of human remains in the provincial Crown and requires those who propose to conduct excavation, removals, or development work on an intended or designated heritage site to apply for a permit. Where the minister has reason to believe that there are heritage objects or human remains on or under any land, and that they are likely to be damaged or destroyed by reason of any activity including commercial, industrial, agricultural, residential, construction, or other development or activity, the minister may enter into an agreement with the owner of the land or the person undertaking the activity respecting the searching for, and the excavation, investigation, examination, preservation, and removal of, any heritage object or human remains found on or under the land. The Act also provides for "heritage covenants" to protect sites in perpetuity. If the minister "believes on reasonable and probable grounds that a person is in breach" of terms and conditions under the Act, they may issue an order that requires a person to "remedy the breach within a period of time stated in the order" or require it to be done immediately if there's a possibility of irreparable or costly damage. The Act imposes penalties of up to $5,000 for individuals, and $50,000 for corporations, "for each day that the offence continues" and allows a judge to also make an order for the cost of any "repair, restoration or reconstruction."	While this Act could apply to children who may be found at unmarked burial sites associated with the Indian Residential School System, no suspected or confirmed burial sites are currently protected under heritage designations. Non-designated sites, which include all of the former Indian Residential School grounds in Manitoba, can also be subject to "heritage resource impact assessment" orders, which require landowners to cease activities or developments that might damage or destroy heritage resources or human remains until a permit is issued. Searches and excavations of human remains that have "heritage significance," and are located outside recognized cemeteries or burial grounds, are specifically prohibited on any land in Manitoba except pursuant to a heritage permit, on terms and conditions set by the minister. The minister may also issue stop orders to require unauthorized or harmful activities to cease and be remedied.

Ontario

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Ontario	*Funeral, Burial and Cremation Services Act*, SO 2002, c. 33 – Bill 209, https://www.ontario.ca/laws/statute/02f33.	Under this Act, as soon as the origin of a burial site is determined, the registrar shall declare the site to be, (a) an unapproved [A]boriginal [P]eoples cemetery; (b) an unapproved cemetery; or (c) an irregular burial site. An unapproved [A]boriginal [P]eoples cemetery is land set aside with the apparent intention of interring therein, in accordance with cultural affinities, human remains and containing remains identified as those of persons who were one of the [A]boriginal [P]eoples of Canada. The registrar, on declaring a burial site to be an unapproved [A]boriginal [P]eoples cemetery or an unapproved cemetery, shall serve notice of the declaration on such persons or class of persons as are prescribed. All persons served with notice shall enter into negotiations with a view of entering into a site disposition agreement. If a site disposition agreement is not made within the prescribed time, the registrar shall refer the matter to arbitration.	"Irregular burial site" means a burial site that was not set aside with the apparent intention of interring human remains in it.
Ontario	*Ontario Heritage Act*, RSO 1990, c. O.18, https://www.canlii.org/en/on/laws/stat/rso-1990-c-o18/220915/rso-1990-c-o18.html.	This Act grants the authority to designate any property as being of "cultural heritage value or interest" to municipal councils, if the property is within the municipality, or to the minister in consultation with the Ontario Heritage Trust, for properties both within and outside municipal boundaries. The Act includes First Nations bands under the *Indian Act* within the definition of municipalities. First Nations have the same powers as municipalities to designate properties "to be of cultural heritage value or interest" that are within their reserve lands. The Act is not limited to buildings or structures.	"Heritage properties" in Ontario are "properties the Government of Ontario owns or controls that have cultural heritage value or interest," including cultural heritage landscapes and archaeological sites. Either of these may be an avenue for protecting unmarked graves and burials associated with Indian Residential Schools. The Act does not specifically acknowledge Indigenous laws, Aboriginal rights, or Treaty rights.

Quebec

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Quebec	*Cultural Heritage Act*, P-9.002, s. 1, https://www.legisquebec.gouv.qc.ca/en/document/cs/p-9.002.	This Act governs the designation of historic sites of local and provincial importance. This includes "deceased persons of historical importance" and "any property indicating prehistoric or historic human occupation." A "Native community" has the same powers as a municipality, which allows First Nations to identify and protect heritage sites on reserve or Cree-Naskapi lands. The Act explicitly allows for excavation on heritage sites for the purpose of disinterment without the minister's authorization if the work involves no changes to buildings on the site. All other surveys or excavations require an archaeological research permit. Permits are issued by the minister and overseen by local heritage councils. These councils are authorized to issue temporary stop orders (for up to 30 days) if they perceive a real threat of significant property degradation.	This Act does not provide Indigenous communities with independent authority to search for unmarked burial sites. Even if they gain access to such sites, searches may be limited by the decisions of local heritage councils and the provincial government.

New Brunswick

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
New Brunswick	*Heritage Conservation Act*, SNB 2009, c. H-4.05, https://www.canlii.org/en/nb/laws/stat/snb-2009-c-h-4.05/latest/snb-2009-c-h-4.05.html.	Under the Act, the property in, and the title and right of possession to, an archaeological object, palaeontological object, or burial object discovered in the province is vested to the Crown. The minister may require a person in possession of an archaeological object, palaeontological object, or burial object discovered in the province to deliver the object to the minister. Any archaeological object or burial object for which the property has vested in the Crown shall be held in trust by the Crown for the [A]boriginal [P]eoples of the province if: (a) it is in the possession of the minister, and (b) it is identified by the minister as being of [A]boriginal origin. The minister may enter into agreements with a duly mandated governing body of one or more First Nations with respect to the identification, conservation, and protection of places and objects that represent the cultural heritage of the [A]boriginal [P]eoples, including agreements respecting the communication of any discovery of those places and objects, the transfer of ownership of those objects and the designation of those places as provincial heritage places or local historic places. The Act, or an agreement entered under the Act, does not abrogate or derogate from the [A]boriginal or [T]reaty rights of a First Nation or of any [A]boriginal [P]eoples.	Should Indigenous communities want to investigate potential burial sites, they have to make an application to the minister.

Nova Scotia

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Nova Scotia	*Heritage Property Act*, RSNS 1989, c. 199, https://www.canlii.org/en/ns/laws/stat/rsns-1989-c-199/96027/rsns-1989-c-199.html.	The Act protects "built heritage" that includes "important places such as ... cemeteries ... and cultural landscapes." Heritage properties may be designated if they are deemed to have heritage value to the province.	Nova Scotia provides minimal legislative direction regarding land searches, burial sites, and protection. The focus of this Act is on conserving and protecting stylistic/historic architectural factors of buildings, streets, and neighbourhoods.
Nova Scotia	*Special Places Protection Act*, RSNS 1989, c. 438, s. 1. https://nslegislature.ca/sites/default/files/legc/statutes/specplac.htm.	This Act is focused on archaeological, historical, and natural sites and enables the government to designate protected sites on public or private land, through a research permit system. The purpose of the Act is to "provide for the preservation, protection, regulation, exploration, excavation, acquisition, and study of archaeological and historical remains and palaeontological sites which are considered important parts of the natural or human heritage of the Province."	Primarily concerned with the preservation of ecological sites.

Prince Edward Island

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Prince Edward Island	*Ancient Burial Grounds Act*, RSPEI 1988, c A-11, s. 1. https://www.princeedwardisland.ca/sites/default/files/legislation/A-11-Ancient%20Burial%20Grounds%20Act.pdf.	Pursuant to this Act, burial grounds vest in the province.	Any community who wishes to conduct a search of burial grounds must contact the minister before doing so.
Prince Edward Island	*Archaeology Act*, RSPEI 1988, c. A-17.1. https://www.princeedwardisland.ca/sites/default/files/legislation/a-17-1-archaeology_act.pdf.	Pursuant to this Act, the minister has the authority to enter into an agreement with "Aboriginal communities" to develop protocols if human remains are located, where the minister believes such human remains are of Mi'kmaq ancestry.	The archaeological site may be protected for a specified amount of time not exceeding 120 days.

Newfoundland and Labrador

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Newfoundland and Labrador	*Historic Resources Act*, RSN 1990, c. R-8 s44. https://www.assembly.nl.ca/Legislation/sr/statutes/h04.htm.	This Act defines historic sites as "a site, area, parcel of land, building, monument or other structure in the province which is considered by the minister to be of historical or architectural significance." While the minister is responsible for issuing permits associated with the protection and preservation of historic resources and palaeontological resources of the province, the minister may apply conditions that the holder of the permit comply with the *Labrador Inuit Land Claims Agreement Act*.	Unique to Newfoundland and Labrador is the mention of *Labrador Inuit rights and the Labrador Inuit Land Claims Agreement Act* in the Historic Resources Act. The government of Newfoundland and Labrador is a signatory to the *Labrador Inuit Land Claims Agreement* (*LILCA*) and has endorsed "Chapter 15 of the Agreement related to Archaeology, Inuit Cultural Materials, Inuit Burial Sites and Human Remains."
Newfoundland and Labrador	*Exhumation Act*, RSN 1995, c. F-6.1, s. 30. https://www.assembly.nl.ca/legislation/sr/statutes/e18.htm.	This Act shall be read and applied in conjunction with the *Labrador Inuit Land Claims Agreement Act* and, where a provision of this Act is inconsistent or conflicts with a provision, term, or condition of the *Labrador Inuit Land Claims Agreement Act*, the provision, term, or condition of the *Labrador Inuit Land Claims Agreement Act* shall have precedence over the provision of this Act.	

Yukon

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Yukon	*Yukon Umbrella Final Agreement*, May 29, 1993, s. 13.4.3, https://www.rcaanc-cirnac.gc.ca/eng/1297278586814/1542811130481.	Pursuant to the *Umbrella Final Agreement*, if human remains are discovered, the First Nation(s) on whose Traditional Territory the site is located will be notified as soon as the Royal Canadian Mounted Police (RCMP) has determined it is not of a forensic or criminal nature. The Nation(s), alongside the director of the Heritage Branch, and the land manager "will assume interim responsibility for protection and investigation of the site." The Minister of Tourism for Heritage may also enter into an agreement with a "First Nation or the Tetlin Gwich'in or landowner or user for any investigation, excavation, examination and preservation, and removal of the remains, consistent with land claim provisions."	Yukon has established a co-governance framework for the care and protection of burial sites. In 1990, the territorial and federal governments and the 14 Yukon First Nations established the *Umbrella Final Agreement*, which includes guidelines to protect human remains.

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Yukon	*Cemeteries and Burial Sites Act*, RSY 2002, c. 25. https://laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2002/2002-0025/2002-0025.pdf.	This Act provides that there shall be "no disturbance of burial sites" without the permission of the minister and that the minister may also grant a permit to any person who wishes to care for, ornament, and protect a burial site.	

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Yukon	*Guidelines Respecting the Discovery of Human Remains and First Nation Burial Sites*, https://yukon.ca/sites/yukon.ca/files/tc/tc-guidelines-discovering-human-remains-first-nation-burial-sites-yukon.pdf.	If human burial remains are accidentally discovered the following guidelines apply: (a) The finder will immediately cease any further activity at the site and report the site to the RCMP. (c) Based on the information it receives, the RCMP will notify: (1) the coroner's office if the site is of a forensic or criminal nature; or (2) both the First Nation(s) in whose Traditional Territory the site is located and the Heritage Branch if the site is a suspected historic or First Nation burial site. The land manager/permitting authority shall take reasonable measures to protect the site from environmental factors and any form of unauthorized interference or disturbance. The director of the Heritage Branch, the affected First Nation(s), and land manager shall take reasonable measures to restrict access and ensure that the human remains and any grave offerings are not further disturbed pending the investigation and identification of the remains. The RCMP may be consulted about protecting the site where human remains are at risk of being destroyed or damaged. The Minister of Tourism for Heritage may issue a stop work order prohibiting any further activities and may make an agreement with the First Nation or the Tetlit Gwich'in or landowner or user for any investigation, excavation, examination and preservation, and removal of the remains, consistent with land claim provisions. The Heritage Branch/land manager will direct an archaeologist or qualified examiner to carry out an investigation under any required permits, in consultation with the affected First Nation and other affected parties, to make an initial report citing, if possible, the cultural affiliation of the human remains.	

(continued on next page)

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
		Within a reasonable time to be specified by the minister, and the affected First Nation(s), the archaeologist or qualified examiner shall deliver a written report. The written report shall attempt to identify: the representative group of the interred; the geographic boundaries of the site; the grave offerings or other heritage resources that may be associated with the remains or the site. The archaeologist or examiner may, with the agreement of the proper authority and the representative of the interred, if known, remove all or part of the human remains for further analysis or for temporary custody where the remains may otherwise be at risk. If the site is determined to be a Yukon First Nation burial site, or Tetlit Gwich'in burial site, the appropriate representative will be contacted in writing to provide further direction on the disposition of the remains.	

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Yukon	*Historic Resources Act*, RSY 2002, c. 109, https://www.canlii.org/en/yk/laws/stat/rsy-2002-c-109/latest/rsy-2002-c-109.html.	Pursuant to this Act, the ownership and the right to possession of human remains that are found by any person in land other than settlement land vests in the government of the Yukon. If the site where the human remains are found is not on settlement land but is a "burial site of Indian people," then the Yukon First Nation to whose traditional territory the site pertains is entitled to take over the ownership and right of possession of the human remains, and, if the site is on public lands, then it shall be managed jointly by the government of the Yukon and Yukon First Nation to whose traditional territory the site pertains. The ownership and right to possession of "human remains of Indians" that are found by any person in land that is settlement land vests in the Yukon First Nation to which the settlement land belongs, and that First Nation is entitled to manage the "burial sites of Indian people" in that land and may control the exhumation, examination, and reburial of human remains "of Indians found in those sites." If the minister believes that there are historic objects or human remains on or under any land, and that they are likely to be damaged or destroyed because of any activity that is being, or is proposed to be, carried out on or under the land, the minister may make agreement with a Yukon First Nation or the owner of the land or the person undertaking the activity about searching for, and the excavation, investigation, examination, preservation, and removal of historic objects or human remains found on or under the land.	
Yukon	*Yukon Archaeological Sites Regulations*, https://yukon.ca/sites/yukon.ca/files/tc-archaeological-permit-guidelines.pdf.	Permit holders are required to communicate the aims and findings of their research with local communities. If the permit holder does not do so, the Cultural Services Branch will forward reports to the First Nations in whose territory(ies) the project was carried out.	Class 2 permits authorize site excavation and the collection of artifacts. The Cultural Services Branch, Archaeology is the repository for all artifacts collected under the authority of a Class 2 Permit, on non-First Nation lands. On First Nation lands, permit holders are directed to contact the First Nation Heritage Office.

Northwest Territories

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Northwest Territories	*Protected Areas Act*, SNWT 2019, c.11, https://www.justice.gov.nt.ca/en/files/legislation/protected-areas/protected-areas.a.pdf.	This Act is to be interpreted in a manner consistent with the recognition and affirmation of existing Aboriginal and [T]reaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult. An area in the Northwest Territories may be nominated as a protected area, and the minister shall consider the nomination without delay. An Indigenous government or organization may nominate to the minister an area to be considered for approval as a protected area. A person who has an Aboriginal or [T]reaty right within a protected area does not require a permit to exercise that right in that protected area and is not required to pay a fee to do so.	Information about the Act can be found here: https://www.gov.nt.ca/ecc/sites/ecc/files/resources/fact_sheet_-_protected_areas_act.pdf.
Northwest Territories	*Archaeological Sites Regulations*, NWT Reg 024-2014, https://www.canlii.org/en/nt/laws/regu/nwt-reg-024-2014/110872/nwt-reg-024-2014.html.	These Regulations define an archaeological site as one where an archaeological artifact is found having any tangible evidence of human activity that is more than 50 years old, in respect of which an unbroken chain of possession cannot be demonstrated. Sections 3, 5, and 11 protect archaeological sites and any artifacts found therein.	

Nunavut

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Nunavut	*Nunavut Land Claims Agreement*, SC 1993, c. 29. https://www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf.	In addition to parks, other areas that are of particular significance for ecological, cultural, archaeological, research, and similar reasons require special protection. Inuit shall enjoy special rights and benefits with respect to these areas. The archaeological record of the Inuit of the Nunavut Settlement Area is a record of Inuit use and occupancy of lands and resources through time. The evidence associated with their use and occupancy represents a cultural, historical, and ethnographic heritage of Inuit society, and, as such, the government recognizes that Inuit have a special relationship with such evidence, which shall be expressed in terms of special rights and responsibilities. The archaeological record of the Nunavut Settlement Area is of spiritual, cultural, religious, and educational importance to Inuit. Accordingly, the identification, protection, and conservation of archaeological sites and specimens and the interpretation of the archaeological record is of primary importance to Inuit, and their involvement is both desirable and necessary.	In recognition of the spiritual, cultural, and religious importance of certain areas in the Nunavut Settlement Area to Inuit, Inuit have special rights and interests in these areas.

Source	Link to Legislation	Text, Summary, or Statute Description	Notes
Nunavut	*Nunavut Archaeological and Palaeontological Sites Regulations*, SOR/2001-220, https://www.canlii.org/en/ca/laws/regu/sor-2001-220/latest/sor-2001-220.html.	All archaeological artifacts collected by a permittee shall be submitted on or before March 31 of the year following the year for which the permit was issued, (a) where the artifacts were collected on Inuit-owned lands, to a curation repository designated by the Inuit Heritage Trust under section 33.7.6 of the Nunavut Land Claims Agreement; or (b) where the artifacts were collected on any other lands, to a curation repository designated by the designated agency under section 33.7.7 of the Nunavut Land Claims Agreement. (2) Any Denesuline archaeological specimens collected by a permittee shall be submitted to the designated agency on or before March 31 of the year following the year for which the permit was issued.	In Nunavut, unmarked burials may fall under the definition of archaeological sites protected by *Nunavut Archaeological and Palaeontological Sites Regulation*. Nunavut defines an archaeological artifact as one that is 50 years or older with an unbroken chain of possession or a regular pattern of usage that cannot be demonstrated. Excavation of an archaeological site or removal of an archaeological artifact is prohibited without a permit. Nunavut is currently the only jurisdiction in Canada without a designated heritage space to present, preserve, and promote its shared histories and cultures. The government of Nunavut and Nunavut Tunngavik Inc., among others, have been working to establish a Nunavut Heritage Centre.

1 Quoted in Jacqueline Hookimaw-Witt, "Keenebonanoh Keemoshominook Kaeshe Peemishikhik Odaskiwakh [We Stand on the Graves of Our Ancestors]: Native Interpretations of Treaty no. 9 with Attawapiskat Elders" (MA thesis, Trent University, May 1998), 136, https://www.collectionscanada.ca/obj/s4/f2/dsk2/tape15/PQDD_0016/MQ30219.pdf.

2 For example, section 182 of the *Criminal Code*, RSC 1985, c. C-46, criminalizes interference with, or indignity to, a dead human body or human remains.

3 Hilary Young, "The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is," *Marquette Elder's Advisor* 14, no. 2 (Spring 2013): 199.

4 See, for example, section 12.1 (2)(b) of British Columbia's *Heritage Conservation Act*, RSBC 1996, c. 187 (BC *Heritage Conservation Act*) (which prohibits any damage, desecration, alteration to, or removal of human remains from a burial place).

5 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (December 2003): 387–88 (Wolfe terms this, "the settler-colonial logic of elimination," which aims at the dissolution of Indigenous societies and the creation of a new colonial society on the expropriated land base).

6 Rachel Flowers, "Refusal to Forgive: Indigenous Women's Love and Rage," *Decolonization: Indigeneity, Education and Society* 4, no. 2 (2015): 34, https://jps.library.utoronto.ca/index.php/des/article/view/22829/19320.

7 Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017), 42.

8 The *Merriam-Webster Dictionary* defines the verb "desecrate" as, "to violate the sanctity of" and "to treat disrespectfully, irreverently, or outrageously." "Desecrate," Merriam-Webster Dictionary, accessed July 23, 2024, https://www.merriam-webster.com/dictionary/desecrating.

9 Grave robbing is a common phenomenon across settler colonial States. Graves were often pillaged and desecrated for the purposes of gathering valuables, which may have been buried with a person, or collecting Indigenous people's bones for various purposes, including to study and/or display in museums. The robbing of Indigenous graves for skulls has been linked to eugenics—a form of scientific racism, which aimed to prove the false, racist, and debunked theories that White people are superior to racialized and Indigenous Peoples. Wolfe, "Settler Colonialism," 390. European explorers and settlers frequently engaged in grave robbing and the desecration of Indigenous burials. See, for example, Sidney B. Linden, *Report of the Ipperwash Inquiry*, vol. 4 (Toronto: Queen's Printer for Ontario, 2007), 2 (which indicates that Anishinabek graves were robbed by English settlers).

10 Darlene Johnston, *Respecting and Protecting the Sacred* (Vancouver: Allard Research Commons, University of British Columbia, 2006), 17, https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1190&context=fac_pubs.

11 See, for example, the Fort Providence cemetery where children who died while attending the Sacred Heart Indian Residential School are buried. The cemetery was ploughed under after the burials of the eight church officials were moved. Truth and Reconciliation Commission of Canada (TRC), *Canada's Residential Schools: Missing Children and Unmarked Burials*, vol. 4 (Montreal and Kingston: McGill-Queen's University Press, 2016), 131–32; Albert J. Lafferty et al., "Integrating Geomatics, Geophysics, and Local Knowledge to Relocate the Original Fort Providence Cemetery, Northwest Territories," *Arctic* 74, no. 3 (2021): 408–9; Charlotte Morritt-Jacobs, "How One N.W.T. Community Is Remembering the Victims of Sacred Heart Residential School," *APTN News*, July 12, 2021, https://www.aptnnews.ca/national-news/nwt-community-buried-in-unmarked-graves-sacred-heart-residential-school/. See also the cemetery associated with the Marieval Indian Residential School, where children who died there are buried and where the Roman Catholic church bulldozed the cemetery in 1960 and removed existing grave markers. Larissa Kurz, "Cowessess Chief, Catholic Archdiocese Confirm Grave Markers at Cemetery Site 'Destroyed' in '60s," *SaskToday*, June 24, 2021, https://www.sasktoday.ca/southeast/local-news/cowessess-chief-catholic-archdiocese-confirm-grave-markers-at-cemetery-site-destroyed-in-60s-4172709; "Cowessess First Nation and Saskatchewan Polytechnic Search for Unmarked and Unidentified Graves," Saskatchewan Polytechnic, July 2021, https://saskpolytech.ca/news/posts/2021/cowessess-frst-nation-and-sask-polytech-search-for-unmarked-and-unidentified-graves.aspx.

12 Johnston, *Respecting and Protecting the Sacred*; Anishinabek Nation, *Heritage and Burials Tool Kit: First Nation Responses to Repatriation and Sacred Sites* (North Bay: Union of Ontario Indians, 2020), 7, https://anishinabek.ca/Flipbooks/FNRRSacredSites.pdf.

13 Catherine Bell, "Protecting Indigenous Heritage Resources in Canada: A Comment on *Kitkatla v British Columbia*," *International Journal of Cultural Property* 10, no. 2 (February 2005): 248; see also Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred," *University of Toronto Law Journal* 64, no. 1 (Winter 2014): 64–105.

14 Natasha Bakht and Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," *McGill Law Journal* 62, no. 3 (March 2017): 779.

15 David M. Schaepe, George Nicholas, and Kierstin Dolata, "Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation," First Peoples' Cultural Council, December 2020, https://fpcc.ca/wp-content/uploads/2020/12/FPCC-Decolonizing-Heritage-Processes-and-Legislation.pdf.

16 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

17 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Resolution 61/295, UNGAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007 (*UN Declaration*).

18 Office of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites Associated with Indian Residential Schools (OSI), *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* (OSI, 2024), https://osi-bis.ca/historical-report/.

19 TRC, *Missing Children*, 122.

20 TRC, *Missing Children*, 122.

21 TRC, *Missing Children*, 118.

22 TRC, *Missing Children*, 120.

23 For a detailed discussion of the ways in which the federal government's actions and inactions contributed to the crisis of missing and disappeared children and unmarked burials, see OSI, *Sites of Truth, Sites of Conscience*.

24 Young, "Right to Posthumous Bodily Integrity," 197–267.

25 TRC, *Missing Children*, 134.

26 TRC, *Canada's Residential Schools: Reconciliation*, vol. 6 (Montreal and Kingston: McGill-Queen's University Press, 2015), 96.

27 Robin Hickey and Rachel Killean, "Property Loss and Cultural Heritage Restoration in the Aftermath of Genocide: Understanding Harm and Conceptualising Repair," *International Journal of Transitional Justice* 15, no. 3 (November 2021): 469.

28 Southern Chiefs' Organization, Submission to the OSI, August 30, 2023, 6 (on file with the OSI).

29 "Brandon Residential School," The Children Remembered, accessed August 19, 2024, http://thechildrenremembered.ca/school-locations/brandon/ (the building remained vacant from 1972 until 2006 when it was demolished).

30 Catherine McBain, "De-Colonial Intersections of Conservation and Healing: The Indian Residential School System" (MA thesis, Carleton University, 2021), 87, citing Elsie Catcheway, "Destroying the Evidence of Our Past," *Grassroots News*, April 18, 2006, https://curve.carleton.ca/system/files/etd/b4e8f676-b87d49bf-9a84-0e0d89dca075/etd_pdf/d849f11d75c6fb3776ae91ca44c94b3d/mcbain-decolonialintersectionsofconservationandhealing.pdf.

31 "Admission of Pupils—Brandon Industrial—Residential School," 1895–1933, vol. 13761, file part 1, RG10, Library and Archives Canada (LAC); Letter from David Laird, Indian Commissioner for Manitoba and the North-West Territories, February 16, 1900, "Applications for Withdrawal of Savings Funded by the Department to the Credit of Ex-Pupils of Different Industrial Schools in the Norway House (Berens River) Agency," file 95,833–23, vol. 3891, RG10, LAC. The "Dinsdale List" was provided by the United Church of Canada Archives, Conference of Manitoba Northwestern Ontario and All Native Circle Conference. Note that it is likely that this list was based on "Register of Admissions and Discharges Related to the Brandon Industrial School [textual record]," 1895–1923, R216-451-0-E, RG10-C-VI, LAC.

32 For more information about the cemetery, see Clare Cook, David Cuthbert, and Anne Lindsay, "A Cup of Cold Water: Alfred Kirkness and the Brandon Residential School Cemeteries," *Manitoba History* 78 (Summer 2015): n.p., http://www.mhs.mb.ca/docs/mb_history/78/brandoncemeteries.shtml.

33 Cook, Cuthbert, and Lindsay, "Cup of Cold Water."

34 See Colin Slark, "The Two Histories of Turtle Crossing," *Brandon Sun*, June 5, 2021, https://www.brandonsun.com/local/2021/06/05/the-two-histories-of-turtle-crossing.

35 Cook, Cuthbert, and Lindsay, "Cup of Cold Water."

36 Chelsea Kemp, "Southwestern Manitoba First Nation Denied Access to Search for Unmarked Graves," *CBC News*, October 3, 2022, https://www.cbc.ca/news/canada/manitoba/sioux-valley-unmarked-graves-1.6603671.

37 Southern Chiefs' Organization, Submission to the OSI, August 30, 2023, 6 (on file with the OSI).

38 Marney Blunt, "Calls for City of Brandon to Buy Back Residential School Cemetery Land, Currently a RV Campground," *Global News*, June 4, 2021, https://globalnews.ca/news/7922915/calls-city-of-brandon-buy-backresidential-school-cemetery-land/.

39 Chelsea Kemp, "MKO and Sioux Valley Dakota Nation Call on Province to Protect Unmarked Grave Sites on Private Land," *CBC News*, August 2, 2023, https://www.cbc.ca/news/canada/manitoba/sioux-valley-mko-unmarked-graves-1.6924775; *Heritage Resources Act*, CCSM, c. H39.1.

40 Quoted in Kemp, "MKO and Sioux Valley Dakota Nation."

41 Quoted in Kemp, "MKO and Sioux Valley Dakota Nation."

42 Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples*, 5 vols. (Ottawa: Canada Communication Group, 1996).

43 Linden, *Ipperwash Inquiry*, vol. 4.

44 Geoffrey York and Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Company, 1992), 42.

45 Ken Hughes, *Report on Events at Kanesatake in the Summer of 1990*, Fifth Report, Standing Committee on Aboriginal Affairs and Northern Development, House of Commons (Ottawa: Parliament of Canada, 1991). Hughes notes that The Pines was one of the earliest reforestation initiatives in North America (18). He cites Michel Girard, a historian well versed in the history of the Oka Forest, who testified before the Standing Committee on Aboriginal Affairs as follows: "They [the Mohawk people] planted hemlock, bunching them together and the amazing thing is that, today this forest is very healthy and it reproduces the natural eco-system. I am going to make a claim here. I think it is the only forest in North America that has been planted in a bunch like this, the oldest one for sure. That forest should be studied by foresters and by people who are interested in replanting, because its success is so amazing. Nowadays golden eagles, bald eagles and pine warblers, very rare species of birds, love to nest in this forest.... By the 1920's the Oka experiment was recognized throughout the province of Québec and also in Canada as a real success" (16).

46 Among the wounded was 14-year-old Waneek Horn-Miller, a member of Kahnawake, who was stabbed through the chest with a police bayonet while trying to carry her younger sister to safety on the last day of the standoff. The bayonet just missed Horn-Miller's heart, and she nearly died as a result. Despite being attacked and almost killed by Canadian Armed Forces officer on the federal government's orders, Horn-Miller went on to compete internationally in water polo and represented Canada at the Sydney Olympics in 2000.

47 York and Pindera, *People of the Pines*, 405. Geoffrey York and Loreen Pindera write that, "Corporal Marcel Lemay was the first victim of the Oka crisis, but he was not the last. An elderly Mohawk died of heart failure in early September, just a few days after he suffered the terror of the stone-throwing mob on the outskirts of Kahnawake. Another elderly man in Oka was poisoned by tear gas that wafted down from the Pines on July 11. He never fully recovered and died several months later."

48 RCAP, *Report on Aboriginal Peoples*, 1:197.

49 RCAP, *Report on Aboriginal Peoples*, 1:196–97.

50 John Thompson and Mary Jane Jones, *A Brief History of the Land Dispute at Kanesatake (OKA) from Contact to 1961: Prepared under Contract for the Treaties and Historical Research Centre, Comprehensive Land Claims Branch* (Ottawa: Department of Indian and Northern Affairs, 1991), 10.

51 RCAP, *Report on Aboriginal Peoples*, 1:196–97.

52 RCAP, *Report on Aboriginal Peoples*, 1:197.

53 RCAP, *Report on Aboriginal Peoples*, 1:197.

54 The RCAP notes that part of The Pines was acquired by the municipality of Oka in 1959 to construct a nine-hole golf course, and, in the 1990s, the municipality wanted to expand the course to 18 holes. RCAP, *Report on Aboriginal Peoples*, 1:198.

55 RCAP, *Report on Aboriginal Peoples*, 1:197.

56 RCAP, *Report on Aboriginal Peoples*, 1:198.

57 Patricia Begin, Wendy Moss, and Peter Niemczak, *The Land Claim Dispute at Oka* (Ottawa: Library of Parliament Research Branch, 1990), 2, http://madgic.library.carleton.ca/deposit/govt/ca_fed/lop_okadispute_1992.pdf.

58 Begin, Moss, and Niemczak, *Land Claim Dispute*, 2.

59 RCAP, *Report on Aboriginal Peoples*, 1:198.

60 Begin, Moss, and Niemczak, *Land Claim Dispute*, 2.

61 Begin, Moss, and Niemczak, *Land Claim Dispute*, 2.

62 RCAP, *Report on Aboriginal Peoples*, 3:550.

63 RCAP, *Report on Aboriginal Peoples*, 3:550.

64 RCAP, *Report on Aboriginal Peoples*, 3:549.

65 RCAP, *Report on Aboriginal Peoples*, 3:551.

66 RCAP, *Report on Aboriginal Peoples*, 3:551.

67 RCAP, *Report on Aboriginal Peoples*, 3:551.

68 Crown-Indigenous Relations and Northern Affairs Canada, "The Specific Claims Policy and Process Guide," Government of Canada, accessed August 19, 2024, https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629.

69 See generally Diane Martin-Moya et al., "And Still, Ancestors Remain Out of Their Graves: Reflections on Past, Present, and Future Bioarchaeological Practices while Building an Indigenous Cultural Heritage Database in Quebec," *American Antiquity* 88, no. 3 (August 2023): 386–401.

70 Martin-Moya et al., "And Still," 395.

71 Quebec's Ministry of Culture and Communications has established a web portal for archaeological fieldwork. Archaeologists who are issued licenses on public and private lands must file a report in French within a year of their investigation, which may create language barriers for Indigenous communities to access this information. In addition, only archaeologists and professionals working on heritage-related projects can access this portal. See Martin-Moya et al., "And Still," 388.

72 *Civil Code of Québec*, CCQ 1991, s. 951.

73 Martin-Moya et al., "And Still," 394–395.

74 Martin-Moya et al., "And Still," 395.

75 Martin-Moya et al., "And Still," 389.

76 Ka'nhehsí:io Deer, "Developer Offers to Give Land Back to First Nation Where Oka Crisis Happened," *CBC News*, July 11, 2019, https://www.cbc.ca/news/indigenous/kanesatake-pines-gregoire-gollin-1.5204242; Sean Carleton, "The Legacy of Oka in an Era of Supposed Reconciliation," *The Conversation*, September 24, 2019, https://theconversation.com/the-legacy-of-oka-in-an-era-of-supposed-reconciliation-123150.

77 Colin Harris, "Tensions Rise in Oka as Mayor Speaks of Being 'Surrounded' by Mohawks," *CBC News*, July 18, 2019, https://www.cbc.ca/news/canada/montreal/tensions-rise-in-oka-as-mayor-speaks-of-being-surrounded-by-mohawks-1.5216064.

78 Deer, "Developer Offers to Give Land."

79 Marcus Bankuti, "Oka Denied on Pines Land Legal Maneuver," *Eastern Door*, May 15, 2023, https://easterndoor.com/2023/05/15/oka-denied-on-pines-land-legal-maneuver/.

80 Laurence Brisson Dubreuil, "Oka Backtracks on Land Protection," *Toronto Star*, January 24, 2022, https://www.thestar.com/news/canada/oka-backtracks-on-land-protection/article_87a1a9f4-d88d-587f-a0ea-d2c0e96e8882.html. For additional background, see Carleton, "Legacy of Oka."

81 Sidney B. Linden, *Report of the Ipperwash Inquiry*, vol. 2 (Toronto: Queen's Printer for Ontario, 2007), 131.

82 Sidney B. Linden, *Report of the Ipperwash Inquiry*, vol. 1 (Toronto: Queen's Printer for Ontario, 2007), 1.

83 Linden, *Ipperwash Inquiry*, 4:10.

84 Linden, *Ipperwash Inquiry*, 4:10.

85 The federal government recognized the Kettle and Stony Point communities as one Band under the *Indian Act* in 1919. Linden, *Ipperwash Inquiry*, 4:4.

86 Linden, *Ipperwash Inquiry*, 4:5, 41.

87 Linden, *Ipperwash Inquiry*, 4:41.

88 Linden, *Ipperwash Inquiry*, 4:5.

89 Linden, *Ipperwash Inquiry*, 4:1; *War Measures Act*, RSC 1985, c. W-2.

90 Linden, *Ipperwash Inquiry*, 1:75.

91 Linden, *Ipperwash Inquiry*, 4:12.

92 In its investigations, the Ipperwash Inquiry concluded that the Department of National Defence was not willing to return the lands and did not relent to pressure from the federal Department of National Health and Welfare and the Indian Affairs Branch that began after that war ended in 1947. Linden, *Ipperwash Inquiry*, 4:9. The Inquiry also found that no action was initiated by the federal government regarding the return of the lands (4:9).

93 Linden, *Ipperwash Inquiry*, 4:69.

94 Linden, *Ipperwash Inquiry*, 4:72.

95 Linden, *Ipperwash Inquiry*, 4:6.

96 Dudley George's family submission, quoted in Linden, *Ipperwash Inquiry*, 2:132–33. The other reasons for the occupation were to reclaim the land and get the negotiations for the return of lands moving after it had stalled. Linden, *Ipperwash Inquiry*, 4:10.

97 Johnston, *Respecting and Protecting the Sacred*, 6.

98 Linden, *Ipperwash Inquiry*, 4:8.

99 Linden, *Ipperwash Inquiry*, 4:18.

100 The Ipperwash Inquiry also found that the Ontario government, "did not attach sufficient importance to the existence of these sacred sites or to the spiritual and cultural attachment of the Aboriginal people to these burial grounds." Linden, *Ipperwash Inquiry*, 4:40.

101 Linden, *Ipperwash Inquiry*, 4:68. The Inquiry found that the police operations had several flaws that contributed to the police shooting of Dudley George, including flawed communications, both within the Ontario Provincial Police (OPP) and between the police and Indigenous community members occupying the park (4:31–34, 53–62). Among the many issues, the Inquiry found that the police intelligence was not tested for reliability, specifically with respect to whether the community members had firearms at the peaceful occupation and characterized police communications as "a broken telephone scenario" (4:56–57). The Inquiry also found that OPP officers had committed acts of aggression and racism towards the Indigenous people occupying the park (4:27–29). It found that the OPP had made the decision to march in on the Stony Point community members in the park based on, "inaccurate and unverified information" (4:59). It also found that Premier Mike Harris' government had inappropriately interfered with police operations (4:24, 33, 42–43, 52). It also found that Premier Harris had made a racist statement in a meeting with provincial government staff and OPP officers (4:46). Finally, the Inquiry found that the federal and/or provincial government negotiators had failed to engage in dialogue with the Stony Point members to try to resolve the tensions relating to the lack of return of the appropriated lands (4:14, 35).

102 Linden, *Ipperwash Inquiry*, 4:129.

103 Linden, *Ipperwash Inquiry*, 4:129.

104 Crown-Indigenous Relations and Northern Affairs Canada, "The Ipperwash Final Settlement Agreement: A Journey toward Reconciliation," Government of Canada, April 12, 2016, https://www.rcaanc-cirnac.gc.ca/eng/1100100016386/1542901037003.

105 Kate Dubinski, "Quarter Century after Killing of Dudley George, Ontario Provincial Park Land Returned to First Nation," *CBC News*, September 8, 2020, https://www.cbc.ca/news/canada/london/ipperwash-provincial-park-returned-to-kettle-stony-point-first-nation-1.5715748.

106 The province of Ontario transferred the land to the federal government and then the land was added to the First Nation's reserve through the federal Additions to Reserve process. See Dubinski, "Quarter Century."

107 Kerry Gillespie, "Ipperwash Land Returned to Indians," *Toronto Star*, December 21, 2007, https://www.thestar.com/news/canada/ipperwash-land-returned-to-indians/article_fc6f9234-74aa-5b61-b8c3-113efd4e31d6.html.

108 Linden, *Ipperwash Inquiry*, 2:22–28.

109 *Funeral, Burial and Cremation Services Act*, SO 2002, c. 33, s. 1 (*FBCSA*); *Ontario Regulation 30/11* (*O. Reg. 30/11*). The *FBCSA* defines "burial site" as, "land containing human remains that is not a cemetery."

110 *FBCSA*, s. 95.

111 *FBCSA*, s. 96(1).

112 *O. Reg. 30/11*, General, s. 174(1). In practice, a buffer zone is created around the burials for that is included within the boundary of a burial site.

113 Section 97 of the *FBCSA* defines "[A]boriginal [P]eoples burial ground" as, "land set aside with the apparent intention of interring in it, in accordance with cultural affinities, human remains and containing remains identified as those of persons who were one of the aboriginal peoples of Canada."

114 Section 97 of the *FBCSA* defines "burial ground" as, "land set aside with the apparent intention of interring in it, in accordance with cultural affinities, human remains and containing remains identified as those of persons who were not one of the aboriginal peoples of Canada."

115 Section 97 of the *FBCSA* defines "irregular burial site" as, "a burial site that was not set aside with the apparent intention of interring human remains in it."

116 *O. Reg. 30/11*, General, s. 174(4).

117 *FBCSA*, s. 99.

118 *FBCSA*, s. 91(1) and (2); *O. Reg. 30/11*, General, s. 177.

119 *FBCSA*, s. 99.

120 *FBCSA*, s. 99.

121 *FBCSA*, s. 100(1).

122 *O. Reg. 30/11*, General, s. 179.

123 *FBCSA*, s. 100(1); *O. Reg. 30/11*, General, s. 178.

124 The Ontario Ministry of Public and Business Service Delivery, by correspondence to the OSI, dated April 13, 2023, stated:

When the ministry's Registrar declares an Indigenous burial site on private land to be an irregular burial site, the agreement of Indigenous communities with respect to the disposition of the remains is not required under the *FBCSA* or its regulations. The Registrar must inform any Indigenous communities that would be representatives if the site were an aboriginal peoples burial ground of the burial site declaration, but the disposition of such remains is at the sole discretion of the land owner, who is not required to get consent from any Indigenous peoples to move or conduct scientific analysis of the remains or associated artifacts. The landowner is merely obligated to ensure the remains are interred in a cemetery. As a matter of operational policy, the Registrar will suggest that the landowner work with Indigenous communities on the final disposition, though the Registrar has no specific powers to compel them to do so.

125 *FBSCA*, s. 98.

126 *FBSCA*, s. 99; *O. Reg. 30/11*, General, ss. 145(1), 177. Where there are consultation requirements, in some cases only the Indigenous community with the "closest affiliation" has been consulted even where there may be other communities' who have interests in protected Sacred burial sites. See, for example, *Hiawatha Indian Band et al. v. Ontario (Minister of the Environment) et al.*, [2007] 221 OAC 113 (DC).

127 *O. Reg. 30/11*, General, s. 178.

128 *FBSCA*, s. 96(4). For a critical analysis of the *FBSCA* and *O. Reg. 30/11*, see Timmins Martelle Heritage Consultants, "Indigenous Rights in the Discovery of Human Remains in Ontario," *Timmins Martelle Heritage Consultants Blog*, November 9, 2018, https://tmhc.ca/indigenous-ancestors-part-one. The only exception to this is that, in circumstances of undue hardship whereby provincial funding is providing for private landowners to support investigations of the site, the province would generally elect to pay for Indigenous engagement.

129 Linden, *Ipperwash Inquiry*, 4, Recommendation 28.

130 Kee:Way (Heritage & Burials) Committee, "Dialogue Session," Chiefs of Ontario: Fall Chiefs Assembly, Toronto, ON, November 15-17, 2022, https://static1.squarespace.com/static/5f29b2710512b20bd57bed44/t/63726c304e827438c03c1146/1668443188182/BG-FCA+-+Dialogue+Session+-+KeeWay+Committee.pdf.

131 Anishinabek Nation, *A Toolkit for Understanding Aboriginal Heritage and Burial Rights and Issues* (North Bay: Union of Ontario Indians, 2015), https://www.anishinabek.ca/wp-content/uploads/2016/06/Anishinabek-Heritage-Burials-Toolkit.pdf. This toolkit was created "to offer assistance to member First Nations to understand heritage and burial rights and issues and provides a general explanation of what are heritage and burial rights, and items for First Nations to consider if a situation arises where heritage or burial rights or issues are affected."

132 Anishinabek Nation, *Heritage and Burials Tool Kit*. This toolkit describes the Anishinabek Nation's role on the Chiefs of Ontario First Nation Heritage and Burial Sites Advisory Committee and the continued work of Anishinabek Nation member First Nations in protecting the burials of their ancestors. It also showcases emerging practices, like the Sustainable Archaeology program partnership between the Museum of Ontario Archaeology, the University of Western Ontario, and McMaster University.

133 Kee:Way (Heritage & Burials) Committee, "Dialogue Session."

134 Richard (Pakak) Picco, "Indigenous Laws Relating to Burials," panel presentation, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 28, 2023.

135 Gerry McNeilly, "The Historical Context," in *Broken Trust: Indigenous People and the Thunder Bay Police Service*, ed. Office of the Independent Police Review Director (Office of the Independent Police Review Director, 2018), 33, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/02/18-12-14-Written-Closing-Submisions-Mishkeegogamang-First-Nation-1-3.pdf.

136 "Our History," Shoal Lake 40 First Nation, accessed August 19, 2024, https://shoallake40.ca/our-history/.

137 *Southwind v. Canada*, [2021] SCC 28, paras. 8, 33; see also "Lac Seul First Nation Flooding Compensation Case Heads to Supreme Court of Canada," *CBC News*, December 8, 2020, https://www.cbc.ca/news/canada/thunder-bay/lac-seul-first-nation-flooding-supreme-court-1.5832446.

138 *Medeiros v. Ginoogaming First Nation*, [2001] FCT 1318, paras. 2, 49, 51.

139 RCAP, *Report on Aboriginal Peoples*, 1:453–54.

140 RCAP, *Report on Aboriginal Peoples*, 1:456. The RCAP described how most families homes were bulldozed and burned down before they could return for their belongings.

141 RCAP, *Report on Aboriginal Peoples*, 1:457.

142 RCAP, *Report on Aboriginal Peoples*, 1:457 (the plaque reads, "This monument was erected in 1952 to the memory of the Indian men, women and children of the Cheslatta band, laid to rest in the cemetery on Reservation Five (Seven), now under water. MAY THEY REST IN PEACE." Betsy Trumpener, "Homes Burned, Cemetery Flooded; 67 Years Later, First Nation Wins Redress," *CBC News*, April 18, 2019, https://www.cbc.ca/news/canada/british-columbia/cheslatta-compensated-for-1952-alcan-relocation-1.5102933.

143 RCAP, *Report on Aboriginal Peoples*, 1:457.

144 Trumpener, "Homes Burned, Cemetery Flooded." In 2019, the BC government and the Cheslatta signed a restitution agreement. "Cheslatta Carrier Nation, Province Sign Agreements to Address Historic Wrong," BC Government News, April 17, 2019, https://news.gov.bc.ca/releases/2019IRR0036-000704.

145 Ministry of the Environment, Conservation and Parks, "Serpent Mounds Provincial Park Management Plan," Government of Ontario, updated July 12, 2021, https://www.ontario.ca/page/serpent-mounds-provincial-park-management-plan.

146 Timmins Martelle Heritage Consultants, "Indigenous Rights."

147 Timmins Martelle Heritage Consultants, "Indigenous Rights."

148 Walter Andrew Kenyon, *The Grimsby Site: A Historic Neutral Cemetery* (Toronto: Royal Ontario Museum Publications in Archaeology, 1982); Mary Kackes, *The Osteology of the Grimsby Site* (Edmonton: Department of Anthropology, University of Alberta, 1988), http://www.arts.uwaterloo.ca/~mkjackes/Grimsby%20Monograph.pdf.

149 Josh Kizelj, "A First Nation's Quest to Know Why Their Cemetery Was Flooded," *The Tyee*, March 2, 2023, https://thetyee.ca/News/2023/03/06/First-Nation-Quest-To-Know-Why-Cemetery-Flooded/.

150 Kizelj, "First Nation's Quest."

151 Kizelj, "First Nation's Quest."

152 Kizelj, "First Nation's Quest."

153 "Protecting Sacred Spaces: Kwikwetlem Historical Cemetery," First Peoples' Cultural Council, June 28, 2023, https://fpcc.ca/stories/kwikwetlem-historical-cemetery/.

154 This burial ground contained many graves including of people who fought in the War of 1812. Eric Johnston, quoted in David McLaren, *Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted Their Rights and Claims and Dealt with the Backlash*, Chippewas of Nawash Unceded First Nation, December 2005, 82, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/under_siege.pdf.

155 McLaren, "Under Siege," 23; "Saugeen Ojibway Demand Control of Burial Ground Restoration," *Anishinabek News* 5, no. 1 (January 1993): 1, https://anishinabeknews.ca/wp-content/uploads/2013/04/1993-1.pdf.

156 "Saugeen Ojibway Demand Control," 1.

157 "Saugeen Ojibway Demand Control," 1; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 69.

158 McLaren, "Under Siege," 23; "Saugeen Ojibway Demand Control," 1; Borrows, *Freedom*, 69.

159 McLaren, "Under Siege," 29.

160 Borrows, *Freedom*, 69.

161 Jonathan Jackson, "Charges Dismissed: Bones Were Disturbed on Sauble Beach Land," *Owen Sound Sun Times*, August 5, 1998, 1–2; *Cemeteries Act*, RSO 1990, c. C.4.

162 Jackson, "Charges Dismissed."

163 Jackson, "Charges Dismissed" (it is unclear if this sum of money was donated directly to Saugeen First Nation or to the Saugeen Wesleyan Church pastoral fund, which likely facilitated the reburial).

164 Catherine Bell and Val Napoleon, "Introduction, Methodology, and Thematic Overview," in *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, ed. Catherine Bell and Val Napoleon (Vancouver: UBC Press, 2008), 22; Ray Peter, quoted in Eric McLay et al., "'A'lhut tut et Sul'hweentst [Respecting the Ancestors]: Understanding Hul'qumi'num Heritage Laws and Concerns for the Protection of Archaeological Heritage," in *First Nations Cultural Heritage*, ed. Bell and Napoleon, 163, 179; Senwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title," *Supreme Court Law Review* 67 (2014): 289–317.

165 Dr. Peggy J. Blair, "Fact Sheet: The Non-Protection of Canadian Aboriginal Heritage (Burial Sites and Artifacts)," Centre for International Sustainable Development Law, October 2005, 1, https://www.cisdl.org/wp-content/uploads/2018/05/HeritageSitesFacts.pdf; McLay et al., "'A'lhut tut et Sul'hweentst," 173, 187.

166 John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy," *University of Toronto Law Journal* 47, no. 4 (1997): 442; Ontario Government, "Special Interlocutor Request for Information 5: Emerging Practices FINAL," Responses to OSI Questions to Federal, Provincial, and Territorial Governments, May 19, 2023, 4–5 (on file with the OSI).

167 McLay et al., "'A'lhut tut et Sul'hweentst," 157.

168 Schaepe, Nicholas, and Dolata, "Recommendations for Decolonizing."

169 McLay et al., "'A'lhut tut et Sul'hweentst," 174.

170 Bell and Napoleon, "Introduction," 23; George Nicholas et al., "Open Letter on Grace Islet," Intellectual Property Issues in Cultural Heritage (IPINCH), Simon Fraser University, September 2, 2014, 2, https://www.sfu.ca/ipinch/sites/default/files/resources/declarations/ipinch_open_letter_on_grace_islet_sept_2_2014.pdf.

171 McLay et al., "'A'lhut tut et Sul'hweentst," 181; Ontario, "Special Interlocutor Request for Information 5 – Emerging Practices FINAL," Responses to OSI Questions to FPT Governments, May 19, 2023, 4 (on file with the OSI).

172 McLay et al., "'A'lhut tut et Sul'hweentst," 180; Ontario, "Special Interlocutor Request for Information 5."

173 McLay et al., "'A'lhut tut et Sul'hweentst," 181.

174 Ontario Government, "Special Interlocutor Request for Information 5."

175 Dayna Nadine Scott and Andree Boisselle, "If There Can Only Be 'One Law', It Must be Treaty Law: Learning from Kanawayandan D'Aaki," *University of New Brunswick Law Review* 2745 (2019): 251–52, https://digitalcommons.osgoode.yorku.ca/scholarly_works/2745/. KI6 refers to the six Kitchenuhumaykoosib Inninuwug leaders (the Chief, Deputy Chief and four Band Councillors) who were arrested and put in jail in March 2008 for defending their land from exploratory mining drilling by junior mining company Platinex Incorporated. The Ontario Court of Appeal allowed the sentence appeal in May 2008 and freed the KI6. It is worth noting that there are several ancestral burials located near Platinex's proposed drill sites. See Rachel Ariss and John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law," *Indigenous Law Journal* 10, no. 1 (2011): 10.

176 McLay et al., "'A'lhut tut et Sul'hweentst," 155, 163.

177 Bell and Napoleon, "Introduction," 23. Here, Bell and Napoleon refer specifically to Ktunaxa and Hul'qumi'num laws and concerns regarding the separate legal regimes that apply to artifacts versus human remains and the fact that provincial legislation does not differentiate between items collected from burials and other artifacts.

178 Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders," in *Indigenous Legal Traditions*, ed. Law Commission of Canada (Vancouver: UBC Press, 2007), 78, cited by Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, kaye tahsh Crown," *Indigenous Law Journal* 9, no. 1 (2010): 107–66, para. 74.

179 Wapshkaa Ma'iingan, "Aki, Anishinaabek, kaye tahsh Crown," para. 4.

180 Borrows, *Freedom*, 53.

181 Borrows, *Freedom*, 53 (emphasis in original).

182 Borrows, *Freedom*, 58, 61.

183 Borrows, *Freedom*, 68.

184 See, for example, the 2020 criminal charges laid against Skyler Williams, a Haudenosaunee land protector, in relation to direct action to stop the development of land that the Haudenosaunee have claimed is unceded from the construction of a subdivision in Caledonia. Skyler Williams was charged with failure to comply with an undertaking, failure to comply with a release order, and mischief. He was granted an absolute discharge. See Kierstin Williams, "Judge Relies on Haudenosaunee Law in Court Decision for 1492 Land Back Lane Defender," *APTN News*, July 12, 2023, https://www.aptnnews.ca/featured/judge-relies-on-haudenosaunee-law-in-court-decision-for-1492-land-back-lane-defender/; see also *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, [2008] ONCA 534; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2008] ONCA 533 (in which eight Indigenous leaders were sentenced to jail for refusing to abide by injunctions when they resisted development within their territories).

185 See, for example, "Years after Oka, Mohawk Activist Ellen Gabriel Says Indigenous People Still Treated as 'Dispensable,'" *As It Happens*, produced by CBC Radio, November 16, 2018, https://www.cbc.ca/radio/asithappens/as-it-happens-50th-anniversary-special-friday-1.4903581/years-after-oka-mohawk-activist-ellen-gabriel-says-indigenous-people-still-treated-as-dispensable-1.4903609.

186 There are many examples of police racism in their interactions with Indigenous land defenders. See, for example, "Racist Comments by Ontario Police Caught on Videotape," *CBC News*, January 20, 2004, https://www.cbc.ca/news/canada/racist-comments-by-ontario-police-caught-on-videotape-1.467801.

187 Borrows, *Freedom*, 54.

188 Nicholas et al., "Open Letter on Grace Islet," 1.

189 *Constitution Act, 1867* (UK), 30, 31 Vict., c. 3.

190 *Indian Act*, RSC 1985, c. I-5.

191 Section 2(1) of the *Indian Act* defines "band" as "a body of Indians:

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951;

(b) for whose use and benefit in common, moneys are held by Her Majesty; or

(c) declared by the Governor in Council to be a band for the purposes of this Act."

192 The Potlatch is a central economic, political, and legal ceremony practised by west coast First Nations, and the Tamanawas is the Blackfoot sun dance.

193 An example of such jurisdictional infighting was the dispute between the government of Manitoba and the federal government about which level of government should be responsible for the costs associated with the home care of Jordan River Anderson, a member of the Norway Cree First nation. Jordan was a young boy with complex medical needs who spent his first two years in hospital. When he was two years old, the doctors said Jordan could be discharged to go home but, unfortunately, the Manitoba and federal government engaged in a two-year dispute about which government was responsible for the homecare costs. Prior to Jordan's return home, he tragically passed away at the age of five, never having spent a day in his family home. On December 12, 2007, Jordan's Principle was passed with unanimous support in the House of Commons. The motion read: "The government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children." See Indigenous Services Canada, "Timeline: Jordan's Principle and First Nations Child and Family Services," Government of Canada, October 20, 2023, https://www.sac-isc.gc.ca/eng/1500661556435/1533316366163. Subsequently, the Canadian Human Rights Tribunal determined that the federal government was failing to implement Jordan's Principle in multiple instances, including in the case of *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, [2016] CHRT 2.

194 This term arose after the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) described the ways in which First Nations people fall through the cracks due to disputes between provincial and federal governments regarding which should provide funding. The MMIWG Inquiry frequently used the term "interjurisdictional cooperation" and called for the elimination of "jurisdictional gaps and neglect" in Call for Justice 1.6. See MMIWG Inquiry, *Reclaiming Power and Place: Executive Summary of the Final Report* (Ottawa: Canada Privy Council Office, 2019), 26, 63. Constance MacIntosh terms this same phenomenon "jurisdictional roulette" in which Indigenous people are caught in the middle between the two levels of government, neither of which wants to bear the financial responsibilities for programs and services. See Constance MacIntosh, "Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health," in *Just Medicare: What's In, What's Out, How We Decide*, ed. Colleen M. Flood (Toronto: University of Toronto Press, 2006), 193–94.

195 Graben, "Resourceful Impacts," 78, 90, 98.

196 There are only a handful of instances when provincial ministers have issued stop work orders to protect Indigenous burial sites. One example is in Saskatchewan when, on May 23, 1985, the then minister of the Department of Culture and Recreation issued a temporary stop work order to delay construction of a house for 60 days due to the existence of Indigenous burials on the site. See *Touchwood File Hills Qu'Appelle District Chiefs Council Inc. v. Davis*, 41 SaskR 263, para. 7 (Sask Ct QB) (*Touchwood File Hills*).

197 Ardith Walpetko We'dalx Walkem, *Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights* (Vancouver: BC Human Rights Tribunal, 2020), 6.

198 Ontario's *Racial Discrimination Act*, SO 1944, c. 51, which was Canada's first anti-discrimination law, was passed in 1944. This was followed by the *Fair Employment Practices Act*, SO 1951, c. 24; the *Female Employees Fair Remuneration Act*, SO 1951, c. 26; and the *Fair Accommodation Practices Act*, SO 1954, c. 28. In 1962, these were amalgamated into the country's first human rights legislation, the Ontario *Human Rights Code*, SO 1961–62, c. 93, which at the same time created the country's first Human Rights Commission. Other provinces followed suit over the next 15 years, and a federal statute covering federally regulated employees was passed in 1977.

199 *Universal Declaration of Human Rights*, GA Resolution 217A (III), UNGAOR, 3rd Session, Supplement no. 13, UN Doc. A/810, 1948 (*UDHR*). Seven human rights statutes—those of Manitoba, Ontario, Newfoundland, Prince Edward Island, Nunavut, Northwest Territories, and Yukon—explicitly reference the *UDHR* in their preambles, while Alberta, Quebec, Saskatchewan, and Nova Scotia adopt the language from the *UDHR*'s preamble.

200 Quebec's *Charter of Human Rights and Freedoms*, SQ 1975, c. C-12 (*Quebec Charter*), is a notable exception. In addition to non-discrimination provisions found in other Canadian human rights statutes, it contains an extremely broad range of rights, including privacy rights, free expression rights, property rights, linguistic rights, political and judicial rights, rights of the child, educational, cultural, and environmental rights, and more. The *Saskatchewan Human Rights Code*, SQ 2018, c. S.24.2, without being as broad as the *Quebec Charter*, does include rights to free association, freedom of conscience, electoral rights, and freedom from arbitrary imprisonment.

201 For a discussion of the White Paper's context in Canadian human rights discourse and its impact on understandings of Aboriginal rights, see Dominique Clement, *Human Rights in Canada: A History* (Waterloo, ON: Wilfrid Laurier University Press, 2016), 79.

202 Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & MacIntyre, 1999), 5.

203 J.R. Miller, "Human Rights for Some," in *Taking Liberties: A History of Human Rights in Canada*, ed. David Goutor and Stephen Heathorn (Oxford: Oxford University Press, 2013), 257.

204 Section 67 of the *Canadian Human Rights Act*, RSC 1985, c. H-6, was repealed in 2008, via the *Act to Amend the Canadian Human Rights Act*, SC 2008, c. 30. It came into effect on June 30, 2008, with a three-year transition process attached. The rationale for section 67 was that, at the time of the enactment of the *Canadian Human Rights Act*, discussions were underway regarding reforms of the *Indian Act* with respect to the status of First Nations women and non-status men, and the intent was to defer human rights challenges to the conclusion of those discussions. However, section 67 endured for decades, long after questions regarding the status of these women were resolved.

205 Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act* (Ottawa: Minister of Public Works and Government Services, 2005), 2.

206 Canadian Human Rights Commission, *Matter of Rights*, 4.

207 Bruce Granville Miller, "An Ethnographic and Humanistic View: Does the BC Human Rights Tribunal Hold Promise for Indigenous People?" *Vibrant Virtual Brazilian Anthropology* 18, no. 3 (2021): 12.

208 Ontario Human Rights Commission, *To Dream Together: Indigenous Peoples and Human Rights Dialogue Report*, September 2018, 37–43, https://www.ohrc.on.ca/en/dream-together-indigenous-peoples-and-human-rights-dialogue-report; Walkem, *Expanding Our Vision*.

209 Alberta Human Rights Commission, *Indigenous Human Rights Strategy: External Review Report*, April 2022, https://albertahumanrights.ab.ca/media/mgvfpenu/ihrs-external-review.pdf.

210 Such surveys have recently been completed on behalf of both the Alberta and British Columbia human rights systems. See Alberta Human Rights Commission, *Indigenous Human Rights Strategy*; Walkem, *Expanding Our Vision*.

211 Walkem, *Expanding Our Vision*, 6.

212 *UN Declaration*, Article 40.

213 See, for example, Joyce A. Green, ed., *Indivisible: Indigenous Human Rights* (Halifax: Fernwood Publishing, 2014).

214 Parks Canada, "Unearthing the Law: Archaeological Legislation on Lands in Canada," Government of Canada, modified November 19, 2022, 1, https://www.pc.gc.ca/docs/r/pfa-fap/index.

215 Parks Canada, "Unearthing the Law," 2.

216 Parks Canada, "Parks Canada Archaeological Recording Manual: Excavations and Surveys," Government of Canada, modified May 27, 2024, Appendix G: Human Remains, Cemeteries, and Burial Grounds, https://parks.canada.ca/agence-agency/bib-lib/politiques-policies/archeologie-archaeology/fp-es/annexeg-appendixg.

217 Parks Canada, "Parks Canada Archaeological Recording Manual," Appendix G.

218 Parks Canada, "National Historic Site Designations," Government of Canada, modified February 6, 2024, https://parks.canada.ca/culture/designation/lieu-site.

219 See "Issues and Campaigns: Legal Protection," National Trust for Canada, accessed July 25, 2024, https://archive.nationaltrustcanada.ca/issues-campaigns/legal-protection.

220 Manitoba's *The Heritage Resources Act*, CCSM, c. H39.1, for example, holds that provincially designated sites, "represent unique, rare, outstanding examples of Manitoba's development, its peoples or natural history." Municipally designated sites are important locally to the area or region. As a result, Manitoba currently only has about 110 provincially designated sites and over 500 municipal ones. See "Municipal Heritage Resource Guide," Canada's Historic Places and Heritage Manitoba, accessed July 25, 2024, 54, http://heritagemanitoba.ca/images/pdfs/preserveResources/Municipal_Heritage_Resource_Guide_Heritage_MB.pdf.

221 See, for example, *Ontario Heritage Act*, RSO 1990, c. O.18, ss. 35.2, 42.

222 "Alberta Register of Historic Places: Edmonton Indian Residential School," Heritage Resources Management Information System, accessed July 25, 2024, https://hermis.alberta.ca/ARHP/Details.aspx?DeptID=1&ObjectID=4665-0461.

223 "Alberta Register of Historic Places: St. Joseph's (Dunbow) Industrial School," Heritage Resources Management Information System, accessed July 25, 2024, https://hermis.alberta.ca/ARHP/Details.aspx?DeptID=1&ObjectID=4665-0199.

224 "Searching Saskatchewan Places," Government of Saskatchewan, accessed July 25, 2024, https://www.saskatchewan.ca/residents/parks-culture-heritage-and-sport/heritage-conservation-and-commemoration/search-for-a-heritage-property.

225 "Searching Saskatchewan Places."

226 "Searching Saskatchewan Places."

227 Parks Canada, "Former Muscowequan Indian Residential School National Historic Site of Canada," Government of Canada, accessed July 25, 2024, https://www.pc.gc.ca/apps/dfhd/page_nhs_eng.aspx?id=16272. See also Parks Canada, "Residential Schools in Canada," Government of Canada, accessed July 25, 2024, https://parks.canada.ca/culture/designation/pensionnat-residential.

228 Manitoba Historical Society, "Historical Sites of Manitoba: Portage La Prairie Indian Residential School / National Indigenous Residential School Museum of Canada," Manitoba Historical Society Archives, revised May 2, 2024, https://www.mhs.mb.ca/docs/sites/portageresidentialschool.shtml. Specifically, the Rufus Prince Building is provincially designated. Government of Manitoba, Historic Resources Branch, "Manitoba Provincial Heritage Site no. 119," Government of Manitoba, accessed July 25, 2024, https://www.gov.mb.ca/chc/hrb/prov/p119.html.

229 Parks Canada, "Residential Schools in Canada" ("Former Portage La Prairie Indian Residential School National Historic Site, Manitoba").

230 Parks Canada, "Residential Schools in Canada" ("Former Shubenacadie Indian Residential School National Historic Site, Nova Scotia").

231 Parks Canada, "Residential Schools in Canada" ("Former Shingwauk Indian Residential School National Historic Site").

232 See, for example, *Ontario Heritage Act*, s. 42; *Heritage Conservation Act*, s. 12.4.

233 See, for example, *Kitkatla Band v. British Columbia*, [2002] 2 SCR 146, para. 76.

234 Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire," *Annals of the Association of American Geographers* 94, no. 1 (2004): 165.

235 *Indian Act*, s. 2(1).

236 *Indian Act*, s. 37.

237 *Indian Act*, s. 35.

238 *Indian Act*, ss. 18(2), 66(2), respectively.

239 *Indian Act*, s. 91(1).

240 *FBCSA*, ss. 95, 97–99, respectively.

241 See the *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, parts 5, 9 (*CIFSA*). This may be done through registering a Certificate of Public Interest on the title to the land where the cemetery is located.

242 See, for example, *CIFSA*, parts 5, 9; *Cemeteries Act*, RSA 2000, c. C-3, s. 74.

243 The next chapter explores the limitations of death investigations under Canadian law, including coroners' investigations.

244 This is the case in Ontario, for example.

245 British Columbia, Alberta, and Saskatchewan are the exceptions in this regard, specifically exempting searches (such as ground-penetrating radar) that do not involve excavation.

246 Quoted in McLay et al., "'A'lhut tut et Sul'hweentst," 158.

247 The term Hul'qumi'num refers to six First Nations who comprise the Hul'qumi'num Treaty Group: the Chemainus First Nation, the Cowichan Tribes, the Halalt First Nation, the Lake Cowichan First Nation, the Lyackson First Nation, and the Penelakut Tribe. See McLay et al., "'A'lhut tut et Sul'hweentst," 150.

248 McLay et al., "'A'lhut tut et Sul'hweentst," 165.

249 McLay et al., "'A'lhut tut et Sul'hweentst," 167. For a discussion of Hul'qumi'num laws relating to exhumation and reburial, see *Upholding Sacred Obligations*, chapter 12.

250 McLay et al., "'A'lhut tut et Sul'hweentst," 162.

251 McLay et al., "'A'lhut tut et Sul'hweentst," 163.

252 McLay et al., "'A'lhut tut et Sul'hweentst," 164.

253 McLay et al., "'A'lhut tut et Sul'hweentst," 168.

254 McLay et al., "'A'lhut tut et Sul'hweentst," 169–70.

255 McLay et al., "'A'lhut tut et Sul'hweentst," 171–72 (emphasis in original).

256 *Heritage Conservation Act*.

257 Quoted in McLay et al., "'A'lhut tut et Sul'hweentst," 178–79 (emphasis in original).

258 "Grace Islet," Nature Conservancy Canada, accessed July 25, 2024, https://www.natureconservancy.ca/en/where-we-work/british-columbia/featured-projects/salish-sea/grace-islet.html.

259 Nicole Kilburn, *Grace Islet Chronology: Provincial Archaeological Site Record Information*, March 19, 2013, 1, https://nicolekilburn.opened.ca/wp-content/uploads/sites/3129/2010/09/Grace-Islet-Chronology.docx.

260 Kilburn, *Grace Islet Chronology*, 1.

261 John Borrows, "Aboriginal Title and Private Property," *Supreme Court Law Review* 71 (2015): 95, para. 9.

262 Kilburn, *Grace Islet Chronology*, 1; see also Sarah Petrescu, "Attempt to Downplay Grace Islet Burial Ground Dismays Archeologists," *Times Colonist*, August 8, 2014, https://www.timescolonist.com/local-news/attempt-to-downplay-grace-islet-burial-ground-dismays-archeologists-4612382.

263 Kilburn, *Grace Islet Chronology*, 2.

264 Borrows, "Aboriginal Title," para. 9.

265 Borrows, "Aboriginal Title," para. 9.

266 Borrows, "Aboriginal Title," para. 11; see also generally Kilburn, *Grace Islet Chronology*.

267 Roy L. Hales, "A Stop Work Order for the Construction on Grace Islet,'" *Cortes Currents*, September 18, 2014, https://cortescurrents.ca/a-stop-work-order-for-the-construction-on-grace-islet/.

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269 Borrows, "Aboriginal Title," paras. 12–13.

270 Borrows, "Aboriginal Title," para. 16.

271 Wendy Stueck, "British Columbia Pays $5.45 Million for Grace Islet," *Globe and Mail*, February 16, 2015, https://www.theglobeandmail.com/news/british-columbia/british-columbia-pays-545-million-for-grace-islet/article23022593/; see also Borrows, "Aboriginal Title," para. 18.

272 Borrows, "Aboriginal Title," para. 18.

273 "Grace Islet."

274 "Ceremony Celebrates Grace Islet Partnership," BC Government News, March 17, 2015, https://news.gov.bc.ca/releases/2015FLNR0035-000350.

275 See, for example, *Touchwood File Hills*, para 7.

276 See for example *Touchwood File Hills*; see also *Hunt v. Halcan Log Services Ltd.*, [1987] 4 CLNR 63 (BCSC) (also known as *Halcan Log Services v. Kwakiutl Indian Band*, [1987] 4 CNLR 63) (*Hunt*).

277 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application for Declaratory Relief and to Obtain an Interlocutory Injunction and a Permanent Injunction*, Superior Court of Québec (Civil Division) no. 500-17, March 25, 2022.

278 See *Historical Resources Act*, AB 2000, c. H-9, s. 49.

279 See *Ontario Heritage Act*, ss. 35.2, 62.

280 Newfoundland and Labrador's *Historic Resources Act*, RSNL 1990, c. H-4, s. 31; *Historic Resources (Amendment) Act*, SNL 2019, c. 4.

281 For example, under section 31 of the *Newfoundland and Labrador's Historic Resources Act*, a temporary stop order of not more than 30 days can be issued (and extended for up to 60 more days) if the minister is, "of the opinion that a person is engaged in an activity that is likely to result in damage to or destruction of an historic resource" to permit: "(a) [the] salvaging of the historic resource ...; (b) [the] conducting of an archaeological investigation of the historic resource ...; or (c) [the] investigating of alternatives to the damaging or destruction of the historic resource." In Saskatchewan's *Heritage Property Act*, SS 1979–80, c. H-2.2, s. 4(1), the temporary stop order can be up to 60 days, "to allow the minister to: (a) salvage the heritage property in danger; (b) record or excavate the heritage property; (c) investigate alternatives to the destruction of the heritage property; or (d) designate the property pursuant to this Act." Section 29(1) of the Act grants the same powers to a mayor or reeve.

282 Rob Gowan, "Saugeen Shores Places Stop Work Order on Demolition Work at Archaeological Site," *The Post*, November 30, 2022, https://www.thepost.on.ca/news/local-news/saugeen-shores-places-stop-work-order-on-demolition-work-at-archaeological-site.

283 Saugeen Shores Communique, "Town Issues Statement on Demolition at Ne'Bwaakah Giizwed Ziibi Site," *Saugeen Times*, November 28, 2022, https://saugeentimes.com/town-issues-statement-on-demolition-at-nebwaakah-giizwed-ziibi-site/.

284 Saugeen Shores Communique, "Town Issues Statement on Demolition."

285 Sandy Lindsay, "Scubby's Point Protected Archeological Site Again under Scrutiny," *Saugeen Times*, November 28, 2022, https://saugeentimes.com/scubbys-point-archeological-site-again-under-scrutiny/.

286 For example, under the *Alberta Heritage Act*, SA 1973, c. 5, s. 35(1), the minister may issue a, "Temporary Stop Order for a period not exceeding 15 days, ... where the Minister is of the opinion that any person is engaged in an activity which he considers likely to result in damage or destruction to any site which could be designated as a Registered Heritage Site or as a Classified Heritage Site."

287 *Historic Resources Act*, RSY 2002, c. 109.

288 "Injunction," Thomson Reuters Practical Law, Glossary Resource no. 4-502-4584, accessed August 9, 2024, https://ca.practicallaw.thomsonreuters.com/4-502-4584.

289 For guidance on the process to obtain an interlocutory injunction see Jeff Berryman and Kiri McDermott-Berryman, "Rules of Civil Procedure Chapters, Preservation of Rights in Pending Litigation, Rule 40: Interlocutory Injunction or Mandatory Order," in *Civil Procedure and Practice in Ontario*, ed. Noel Semple (Ottawa: Canadian Legal Information Institute, 2021), https://www.canlii.org/en/commentary/doc/2021CanLIIDocs2032#.

290 *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199.

291 Kate Gunn, "Injunctions as a Tool of Colonialism," *First Peoples Law Blog*, July 30, 2020, https://www.firstpeopleslaw.com/public-education/blog/injunctions-as-a-tool-of-colonialism.

292 Marc Kruse and Carrie Robinson, "Injunctions by First Nations: Results of a National Study," *Yellowhead Institute Policy Brief*, Issue 43, November 14, 2019, https://yellowheadinstitute.org/wp-content/uploads/2019/11/injunction-brief.pdf.

293 Kruse and Robinson, "Injunctions by First Nations," 2.

294 Kruse and Robinson, "Injunctions by First Nations," 3.

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296 *Touchwood File Hills*, para. 5.

297 *Touchwood File Hills*, para. 5.

298 *Touchwood File Hills*, para. 11.

299 *Touchwood File Hills*, para. 13.

300 *Hunt*, 2.

301 *Hunt*.

302 *Hunt*, 8–9.

303 *Hunt*, 9.

304 Kahentinetha and Kwetiio, Kanien'kehá:ka Kahnistensera (Mohawk Mothers), "Indigenous Community Perspectives: Indigenous Laws and the Colonial Legal System," Panel Presentation, National Gathering on Unmarked Burials: Upholding Indigenous Laws, Toronto, Ontario, March 29, 2023.

305 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 7.

306 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 18.

307 "Kahnistensera," Mohawk Mothers, accessed August 9, 2024, https://www.mohawkmothers.ca/the-stakeholders.

308 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 19.

309 "Kahnistensera,"

310 "Kahnistensera,"

311 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 17.

312 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 30.

313 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 33.

314 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 35.

315 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, paras. 20, 29.

316 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*, para. 45.

317 Kanien'kehá:ka Kahnistensera and the Rotiskenrakehte, *Originating Application*; *Kahentinetha et al. v. Société Québécoise des Infrastructures et al.*, [2022] Quebec Superior Court Case no. 500-17-120-468-221, August 25, 2022, Kahnistensera Mohawk Mothers Case File, List of Affidavits and Exhibits, reprinted in *Mohawk Nation News*, August 27, 2022, https://mohawknationnews.com/blog/2022/08/27/mohawk-mothers-file-case-aug-25-22/.

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320 *Kahentinetha et al.*, para. 21.

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337 Higgins, Adam, and Biring, "Land Title Instruments," 2.

338 *Land Title Act*, RSBC 1996, c. 250, s. 219.

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345 *Constitution Act*, 1982, s. 35(1).

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347 *R. v. Sparrow*, [1990] 1 SCR 1075, para. 56 (*Sparrow*).

348 *Beckman v. Little Salmon/Carmacks First Nation*, [2010] SCJ no 53, para. 10 (*Little Salmon*).

349 *Sparrow*, paras. 59, 62.

350 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] SCC 73, para. 18 (*Haida Nation*).

351 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, paras. 79–80.

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356 Manitoba Métis Federation Inc. v. Canada (Attorney General), [2013] 1 SCR 623, para. 65.

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358 *Haida Nation*, para. 63.

359 *Haida Nation*, para. 35.

360 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para. 27 (*Delgamuukw*).

361 *Haida Nation*, paras. 39, 43–45.

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363 *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] SCC 40, para. 20 (*Clyde River*).

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365 Kirsten Manley-Casimir, "Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relationship Approach" (PhD diss., University of British Columbia, January 2006), 86.

366 *Haida Nation*, para. 49.

367 *Haida Nation*, para. 50; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] SCC 74, [2004] 3 SCR 550, para. 2.

368 *Tsilhqot'in Nation v. British Columbia*, [2014] SCC 44, [2014] SCJ no. 44, para. 79 (*Tsilhqot'in Nation*).

369 *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, para. 37.

370 Gordon Christie, *A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation* (Vancouver: Allard Research Commons, University of British Columbia, 2005), para. 56.

371 Christie, *Colonial Reading*, para. 45.

372 *R. v. Van der Peet*, [1996] 2 SCR 507 (*Van der Peet*).

373 *Van der Peet*, paras. 30–31 (emphasis in original).

374 *Van der Peet*, para. 46. This is often referred to as the "integral to the distinctive culture" test or "the *Van der Peet* test."

375 *Van der Peet*, para. 60.

376 *R. v. Powley*, [2003] SCC 43, para. 37.

377 See, for example, John Borrows, "The Trickster: Integral to a Distinctive Culture," *Constitutional Forum* 8 (1997): 28–29; see also generally Russel Lawrence Barsh and James (Sa'ke'j) Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand," *McGill Law Journal* 42 (1997): 993.

378 *R. v. Sappier*; *R. v. Gray*, [2006] SCC 54, para. 48 (*Sappier*). Consistent with this, the Supreme Court of Canada held that sufficient proof of Aboriginal rights is for Aboriginal claimants to demonstrate that they have continued to engage in those practices, customs, or traditions in contemporary times. Kent McNeil clarifies that continuity is not a requirement to prove Aboriginal rights but, rather, a means by which Aboriginal communities can meet the evidentiary burden of proof for the pre-contact time frame. See Kent McNeil, "Continuity of Aboriginal Rights," in *Advancing Aboriginal Claims: Visions/Strategies/Directions*, ed. Kerry Wilkins (Saskatoon: Purich Publishing, 2004), 129–30.

379 *Van der Peet*, paras. 71–72.

380 *Van der Peet*, para. 71.

381 *R. v. Adams*, [1996] 3 SCR 101, para. 30 (*Adams*).

382 *Van der Peet*, para. 49.

383 *Sui generis* is a Latin term for "of its own kind."

384 *Delgamuukw*, paras. 112, 114. In *Roberts v. Canada*, [1989] 1 SCR 322, SCJ no. 16, para. 30, the Supreme Court of Canada further confirmed that, "[A]boriginal title pre-dated colonization by the British and survived British claims of sovereignty."

385 *Delgamuukw*, para. 145.

386 *Delgamuukw*, paras. 114, 152.

387 *Delgamuukw*, para. 111.

388 *Delgamuukw*, para. 16.

389 John Borrows has pointed to practical difficulties with the requirement of proving prior occupation due to the fact that in some instances Indigenous communities may have had laws prohibiting the use of particular tracts of land within territories or creating buffers between competing Indigenous Nations. See John Borrows, "Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution," in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008), 161, 181; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 131.

390 Kent McNeil has argued that the continuity requirement is not necessary because, based on common law property rules, present or prior possession is proof of title as against any person challenging title, unless that challenger can show better title at the past or present relevant time. Kent McNeil, "The Onus of Proof of Aboriginal Title," *Osgoode Hall Law Journal* 37, no. 4 (1999): 775.

391 In *Delgamuukw*, the court clarified that the exclusivity requirement, "must take into account the context of the [A]boriginal society at the time of sovereignty" (para. 156) and that it provides the, "possibility of joint title" arising from "shared exclusivity" (para. 158).

392 *Tsilhqot'in Nation*, para. 73. It is important to note that some scholars have been critical of the characterization of Aboriginal title as a "property right" since the concept of "ownership" of land does not reflect the interdependent and interconnected aspects of Indigenous Peoples' relationships with their ancestral territories nor the sovereignty of Indigenous Nations. Bradley Bryan, "Property as Ontology: On Aboriginal and English Understanding of Ownership," *Canadian Journal of Law and Jurisprudence* 13, no. 1 (2015): para. 9. Douglas Sanderson and Amitpal C. Singh have suggested instead that Aboriginal title would be more appropriately characterized as a sovereign right of Indigenous Peoples, "to make laws about the use of a territory." Douglas Sanderson and Amitpal C. Singh, "Why Is Aboriginal Title Property If It Looks Like Sovereignty?" *Canadian Journal of Law and Jurisprudence* 34, no. 2 (2021): para. 1.

393 *Delgamuukw*, paras. 112–15. This principle arises from the *Royal Proclamation of 1763*, the history of which John Borrows describes and critiques in John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation," *UBC Law Review* 28 (1994): 1–47. Specifically, Borrows asserts that, "the Royal Proclamation is a 'fundamental document' in First Nations and Canadian legal history. Yet, Canadian courts have often treated the Royal Proclamation of 1763 as a unilateral declaration of the Crown's will in its provisions relating to First Nations.... The Royal Proclamation should be re-interpreted ... [as] part of a treaty between First Nations and the Crown which has never been abridged or repealed, and which stands as a positive guarantee of First Nations self-government. The other part of the treaty is contained in an agreement ratified at Niagara in 1764" (para. 4).

394 Kent McNeil, "Aboriginal Title and Section 88 of the Indian Act," *UBC Law Review* 34, no. 1 (2000): 159, citing *Delgamuukw*, 1116–18.

395 *Delgamuukw*, para. 178.

396 *Tsilhqot'in Nation*, para. 101.

397 *Tsilhqot'in Nation*, paras. 102–3.

398 In 2014, the Supreme Court of Canada granted the Tŝilhqot'in Nation a declaration of Aboriginal title over approximately 1,900 square kilometres of its ancestral territory. *Tsihlqot'in Nation*, para. 66; see also "Declared Title Area," Tŝilhqot'in National Government, accessed July 26, 2024, https://www.tsilhqotin.ca/declared-title-area/.

399 On May 16, 2024, the *Haida Recognition Amendment Act* received royal assent in British Columbia legislation, recognizing the Haida Nation's Aboriginal Title over its traditional territory of Haida Gwaii. "Historic Haida Aboriginal Title Legislation Receives Royal Assent," BC Government News, May 16, 2024, https://news.gov.bc.ca/releases/2024IRR0027-000768.

400 TRC, *Reconciliation*, 4.

401 Jennifer Dalton, "Aboriginal Title and Self-government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?" *Windsor Review of Legal and Social Issues* 22 (2006): 32–33.

402 Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada," *American Indian Culture and Research Journal* 34, no. 2 (2010): 148; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995), 117.

403 Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples," *Osgoode Hall Law Journal* 33, no. 4 (1995): 657. This is so because in Jeremy Webber's words, these agreements were negotiated, "before [I]ndigenous societies were undermined."

404 Borrows, *Canada's Indigenous Constitution*, 21.

405 Tully, *Strange Multiplicity*, 127–28; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 148.

406 For a more detailed discussion of these treaties, see Crown-Indigenous Relations and Northern Affairs Canada, "Upper Canada Land Surrenders and the Williams Treaties (1764–1962/1923)," Government of Canada, modified February 15, 2013, https://www.rcaanc-cirnac.gc.ca/eng/1360941656761/1544619778887.

407 See, for example, Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts: Treaties No. 1 and No. 2," Government of Canada, modified August 30, 2013, https://www.rcaanc-cirnac.gc.ca/eng/1100100028664/1581294165927.

408 Stark, "Respect, Responsibility, and Renewal," 150.

409 Renewal of Treaty commitments and understandings would often be done through regular Treaty Councils. See Stark, "Respect, Responsibility, and Renewal," 148–49; see also John Borrows, "Domesticating Doctrines: Aboriginal Peoples and the Royal Commission on Aboriginal Peoples," *McGill Law Journal* 46 (2001): 630; Sara Mainville, "A Right without a Rights-Holder Is Hollow Hunting Down a Lasting Relationship with Canada: Will UNDRIP Help?" *Osgoode Hall Law Journal* 57 (2020): 123, para. 59.

410 Stark, "Respect, Responsibility, and Renewal," 148–49.

411 See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 111.

412 An example is the leagues versus miles claims whereby, under the terms of many Treaties that contained land surrender provisions, the promised lands were measured in leagues, but the reserves were set aside using the much shorter measurement of miles, resulting in breaches of the terms of the Treaties. See, for example, Indian and Northern Affairs Canada, "Status Report on Specific Claims," Government of Canada, July 4, 2011, https://specific-claims.bryan-schwartz.com/wp-content/uploads/docs/Status%20Report%20on%20Specific%20Claims.pdf. See "Gull Bay (BAND-188)," "Nipissing First Nation (BAND-220)," "Thessalon (BAND-202)," "Wahnapitae (BAND-232)," and "Wikwemikong (BAND-175)." This only lists a few of the many leagues versus miles claims that have been settled or are still outstanding in the specific claims process.

413 See, for example, *Restoule v. Canada (Attorney General)*, [2021] ONCA 779 (which involved a claim that the Crown has not honoured the perpetual annuity (that is, annual payment) provision in the Robinson Huron Treaties). This litigation has led to a recent Settlement Agreement.

414 See the summary of the Temagami's position in *Attorney-General of Ontario v. Bear Island Foundation et al (OCA)*, 68 OR (2d) 394, [1989] OJ no. 267, s. 1(a).

415 James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life* (Regina: University of Regina Press, 2019), 114.

416 Senate Standing Committee on Aboriginal Peoples, *How Did We Get Here? A Concise, Unvarnished Account of the History of the Relationship Between Indigenous Peoples and Canada* (Ottawa: Senate of Canada, 2019), 15; Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 54.

417 *R. v. Marshall*, [1999] 3 SCR 456, para. 78 (*Marshall*). Specifically, the Supreme Court of Canada held that, "the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."

418 *Marshall*, para. 78. In *R. v. Nowegijick*, [1983] 1 SCR 29, the court held that, "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (36).

419 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 1.

420 TRC, *Honouring the Truth*, 53.

421 There was also little to no consideration of maintaining Indigenous Peoples' connections to ancestral burial grounds in the context of reserve lands set aside outside areas covered by Treaties. See generally Douglas C. Harris, *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1949–1925* (Vancouver: UBC Press, 2008).

422 See generally Jean-Pierre Morin, "Empty Hills: Aboriginal Land Usage and the Cypress Hills Problem, 1974–1993," *Saskatchewan History* 55, no. 1 (Spring 2003): 5–20.

423 See, for example, the Robinson Huron Treaty, about which an arbitration panel determined that Ontario became responsible for paying augmented annuities after Confederation. *Restoule v. Canada (Attorney General)*, [2021] ONCA 779, para. 68.

424 *James Bay and Northern Quebec Agreement*, Grand Council of the Crees (Eeyou Istchee), November 11, 1975, https://www.cngov.ca/wp-content/uploads/2023/09/jbnqa-1.pdf.

425 *Constitution Act, 1982*, s. 35(3).

426 *Maa-nulth First Nations Final Agreement*, April 1, 2011, ss. 5.3.1, 20.6.1, 21.2.1, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/final_maanulth.pdf; *Nisga'a Final Agreement*, May 11, 2000, ch. 6(2), 17(6), https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/nisga-a-lisims-government; *Tsawwassen First Nation Final Agreement*, April 3, 2009, ch. 14(2e), https://www.rcaanc-cirnac.gc.ca/eng/1100100022706/1617737111330; *Tla'amin Final Agreement*, April 5, 2016, chs. 5(17b), 14(4b-c, 5, 7–8), https://www.rcaanc-cirnac.gc.ca/eng/1397152724601/1542999321074; *Gwaii Haanas Agreement*, January 30, 1993, para. 4.3(c), https://www.haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf; *Westbank First Nation Self-Government Agreement*, April 1, 2005, part XV, para. 157(a-c), https://www.wfn.ca/docs/self-government-agreement-english.pdf.

427 *Maa-nulth First Nations Final Agreement*, s. 23.10.1(b); *Tsawwassen First Nation Final Agreement*, ch. 14 (20–25); *Agreement Concerning a New Relationship between le Gouvernement du Québec and the Crees of Québec*, February 7, 2002, chs. 2.2, 3.9, https://www.legisquebec.gouv.qc.ca/en/document/cr/m-35.1.2,%20r.%201; *Nunavik Inuit Land Claims Agreement*, July 10, 2007, part 20.6, https://www.rcaanc-cirnac.gc.ca/eng/1320425236476/1551119558759.

428 In Newfoundland and Labrador, the minister needs to consult the Indigenous government prior to issuing a permit to authorize the disturbance of a site that is believed to be a burial site. See *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador*, December 1, 2005, part 15.6.13, https://www.rcaanc-cirnac.gc.ca/eng/1293647179208/1542904949105. There is stronger language in the *Yukon Umbrella Final Agreement*, signed May 29, 1993, part 13.9.1.2, https://www.rcaanc-cirnac.gc.ca/eng/1297278586814/1542811130481; *Gwich'in Comprehensive Land Claim Agreement*, December 22, 1992, part 9.5.1, https://www.rcaanc-cirnac.gc.ca/eng/1427294051464/1551108998878 (which requires "joint approval" by the Yukon and First Nations governments).

429 Michael Coyle, "From Consultation to Consent: Squaring the Circle?" *University of New Brunswick Law Journal* 67 (2016): 236.

430 Peter W. Hogg, "The Constitutional Basis of Aboriginal Rights," *Lex Electronica* 15, no. 1 (2010): 181–82.

431 Hogg, "Constitutional Basis," 181–82.

432 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," *Osgoode Hall Law Journal* 37, no. 3 (1999): 558.

433 Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative," *Windsor Yearbook of Access to Justice* 30 (2012): 139–140.

434 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005), 3.

435 James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism," *Saskatchewan Law Review* 58 (1994): 247.

436 Manley-Casimir, "Incommensurable Legal Cultures," 137, 139–42; Henderson, "Postcolonial Indigenous Legal Consciousness," para. 36.

437 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), 91.

438 Macklem, *Indigenous Difference*, 91–93; see also generally Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

439 Macklem, *Indigenous Difference*, 92–93.

440 Christie, *Colonial Reading*, 17, 22.

441 Russell Lawrence Barsh, "Indigenous Rights and the *Lex Loci* of British Imperial Law," in Advancing Aboriginal Claims: Visions/Strategies/Directions, ed. Kerry Wilkins (Saskatoon: Purich Publishing, 2004), 108.

442 Stacey, "Honour in Sovereignty," 405, 437–38.

443 Stacey, "Honour in Sovereignty," 407.

444 Wapshkaa Ma'iingan, "Aki, Anishinaabek, kaye tahsh Crown," para. 4.

445 Justice Claire L'Heureux-Dubé emphasized this heavy burden in her dissent in *Van der Peet*, paras. 164–71.

446 Borrows, "Sovereignty's Alchemy," 546–47.

447 See *Upholding Sacred Obligations*, chapter 5.

448 *Adams*, para. 48.

449 *Delgamuukw*, para. 173. The Crown bears the burden of proving extinguishment. *Sappier*, paras. 57, 63. For a detailed discussion and critique of extinguishment, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion," *Ottawa Law Review* 33, no. 2 (2002): 301–46. For a discussion about how such legislative extinguishment was in breach of British imperial law, see generally Barsh, "Indigenous Rights," 91.

450 *Sappier*, paras. 60, 63.

451 Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty," *UBC Law Review* 35 (2002): para. 75. In *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services Canada, 1995), the RCAP distinguished between "blanket extinguishment" and "partial extinguishment," with the latter being defined as, "provisions that seek to eliminate some, but not all, Aboriginal land rights throughout the territory in question" (6). The RCAP also noted that, as late as 1995, "blanket extinguishment remains a central component of federal comprehensive claims policy" (43).

452 Morin, "Empty Hills," 11.

453 See, for example, provisions 26 and 27 of the *Nisga'a Final Agreement*, RSBC 1999, c. 2.

454 Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, ed. Jennifer Preston, Jackie Hartley, and Paul Joffe (Vancouver: UBC Press and Purich Publishing, 2010), 74.

455 *Sparrow*, para. 62.

456 *Sparrow*, para. 72.

457 *Tsilhqot'in Nation*.

458 *Tsilhqot'in Nation*, para. 77.

459 *Sparrow*, para. 71.

460 *Sparrow*, para. 75.

461 *Tsilhqot'in Nation*, para. 86.

462 *Tsilhqot'in Nation*, para. 87.

463 *Sparrow*, para. 78. In *R. v. Gladstone*, [1996] 2 SCR 723 (*Gladstone*), the court limited this holding to non-commercial contexts by indicating that this prioritization only applies to "internally limited" rights, such as the right to fish for food, which are limited in that each person only needs a limited number of fish to eat. See Peter W. Hogg and Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification?" *Lakehead Law Journal* 1, no. 1 (2015–16): 8.

464 *Sparrow*, para. 71. Although in *Sparrow*, the court explicitly rejected a "public interest" justification for infringing Aboriginal rights, the same year, the court issued a decision in *Gladstone* that seemingly contradicted this holding by indicating that the interests of the, "broader social, political and economic community" may also be of compelling and substantial importance to justify the infringement of Aboriginal rights (para. 73). For a critique of this development, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" *Constitutional Forum* 8, no. 2 (1997): 35.

465 *Delgamuukw*, para. 165.

466 See *R. v. Badger*, [1996] 1 SCR 771; *Marshall*. For a trenchant critique of the extension of this test to apply to Mik'maq treaty rights in *Marshall*, see James (Sa'ke'j) Youngblood Henderson, "Constitutional Powers and Treaty Rights," *Saskatchewan Law Review* 63 (2000): 719–49.

467 Kent McNeil, "Indigenous Territorial Rights in the Common Law," *Osgoode Hall Law School Legal Studies Research Paper Series* 12, no. 13 (2016): 39. Kent McNeil notes that, prior to this case, "there was doubt over whether provincial legislatures had the constitutional authority to infringe Aboriginal rights, given these rights are within the core of exclusive federal jurisdiction over "Indians, and Lands reserved for Indians."

468 For a description of the ways in which economic development has been prioritized over the protection of section 35 rights, see Christie, *Colonial Reading*.

469 *Gladstone*, para. 73

470 *Van der Peet*, para. 315 (Justice Beverley McLachlin's dissent).

471 *R. v. Oakes*, [1986] 1 SCR 103 (*Oakes*). Some commentators indicate that this is helpful to create more predictability in the test for justifying infringements. See, for example, Hogg and Styler, "Statutory Limitation," 3–15. While others are more critical, see, for example, Cherie Metcalf, "Aboriginal Title in the Supreme Court of Canada," *Supreme Court Law Review* 78 (2017): paras. 58–63.

472 Section 1 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

473 Over eight hundred legal academic articles have been written about the *Oakes* test to date.

474 *Oakes*; *Tsilhqot'in Nation*.

475 *UN Declaration*.

476 *UN Declaration*, preamble.

477 *UN Declaration*, preamble.

478 *UN Declaration*, Article 43.

479 Coyle, "From Consultation to Consent," para. 8.

480 Paul Joffe, "UNDRIP: Canadian Government Positions Incompatible with Genuine Reconciliation," *National Journal of Constitutional Law* 26, no. 2 (March 2010): 127.

481 In total, 143 States voted in favour of the *UN Declaration*.

482 Paul Joffe notes that Canada sought to include a proposed amendment in August 2007 that the *UN Declaration* be interpreted in accordance with the "constitutional frameworks" of each State. He notes that Indigenous Peoples, "rejected such proposals as constituting a discriminatory double standard and as likely to legitimize state actions to deny them their rights." See Joffe, "Canada's Opposition," 77. He also notes that the Canadian government proposed an amendment to qualify the right to self-government so that it would be a joint or contingent right exercised in cooperation with the Canadian State (80). Canada also wanted to eliminate the right to "control" and "protect" cultural heritage, traditional knowledge, and traditional cultural expressions and just leave the words "maintain" and develop" in relation to these rights. Joffe, "UNDRIP," 185.

483 *UN Declaration*; see also Alex Neve, "Shame on Canada for Opposing the UN Indigenous Peoples Declaration," *The Lawyers Weekly*, June 6, 2008.

484 Joffe, "Canada's Opposition," 71.

485 See also Neve, "Shame on Canada."

486 Heidi Fraser-Kruk, *Canada's Failure to Support the United Nations Declaration on the Rights of Indigenous Peoples: An Intersectional Analysis of the Repercussions as Seen through the Inter-Woven Lenses of Women's Rights, Environmental Rights, and Poverty Alleviation*, Lawyer's Rights Watch Canada, 2009. https://www.lrwc.org/wp-content/uploads/2012/03/Canada.Failure.to_.Support.UNDRIP.pdf.

487 Joffe, "Canada's Opposition," 80.

488 Joffe, "Canada's Opposition," 80.

489 Brett Forester, "Canada Led Efforts to Weaken Original UN Indigenous Rights Declaration," *CBC News*, January 15, 2024, https://www.cbc.ca/news/indigenous/canada-australia-un-indigenous-rights-declaration-1.7080734; see also Daniel Hurst, "Howard Government Worked with Canada to Oppose UN Declaration on Indigenous Rights," *The Guardian*, December 31, 2023, https://www.theguardian.com/australia-news/2024/jan/01/howard-government-canada-un-declaration-indigenous-rights.

490 Forester, "Canada Led Efforts."

491 Neve, "Shame on Canada."

492 Joffe, "Canada's Opposition," 85.

493 Stacey, "Honour in Sovereignty."

494 Coyle, "From Consultation to Consent," 238; Joffe, "Canada's Opposition," 82.

495 Robert Hamilton, "The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation," *UBC Law Review* 53 (2021): 1097, para. 1; Joffe, "Canada's Opposition," 76–77.

496 Joffe, "Canada's Opposition," 79.

497 Joffe, "Canada's Opposition," 78.

498 Joffe, "Canada's Opposition," 81.

499 Joffe, "Canada's Opposition," 84.

500 Joffe, "UNDRIP," 164 and 166.

501 "Open Letter – UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument," *NationTalk*, May 1, 2008, https://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument. Note that this reproduction of the letter does not include all the names of scholars and experts who signed it.

502 Joffe, "Canada's Opposition," 84–85.

503 See, for example, Joffe, "Canada's Opposition," citing Amnesty International Canada, *Canada and the International Protection of Human Rights: An Erosion of Leadership? An Update to Amnesty International's Human Rights Agenda for Canada*, December 2007, 7–8; see also Joffe, "UNDRIP," 147, citing then UN High Commissioner for Human Rights Louise Arbour, who described Canada's opposition to the *UN Declaration* as a, "surprising stand for a country that likes to see itself as a model of tolerance and respect for the rights of all."

504 Quoted in Joffe, "UNDRIP," 147.

505 Joffe, "Canada's Opposition," 71, 94.

506 Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples," Government of Canada, May 10, 2016, https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html.

507 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14 (*UN Declaration Act*).

508 *UN Declaration Act*, s. 4.

509 *UN Declaration Act*, s. 6.

510 See, for example, Ryan Beaton, "Performing Sovereignty in a Time of Ideological Instability: BC's Bill 41 and the Reception of UNDRIP into Canadian Law," *UBC Law Review* 53, no. 4 (September 2021): 1031–32, para. 30; Nigel Bankes, "Implementing UNDRIP: Some Reflections on Bill C-262," University of Calgary Faculty of Law Blog, November 27, 2018, ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf.

511 RCAP, *Report on Aboriginal Peoples*, 1:643–62; TRC, *Reconciliation*, 13, 19–20, 37–38.

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513 *Federal UNDA Action Plan*, 29.

514 *Federal UNDA Action Plan*, 29.

515 *Federal UNDA Action Plan*, 33.

516 *Federal UNDA Action Plan*, 31, Priority 23.

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518 *Federal UNDA Action Plan*, 41, Priorities 66–68.

519 *Federal UNDA Action Plan*, 45–46, Priorities 95–96.

520 *Federal UNDA Action Plan*, 48, Priority 107.

521 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044/ (*BC Declaration Act*).

522 *BC Declaration Act*, s. 2.

523 *BC Declaration Act*, s. 7(1).

524 Beaton, "Performing Sovereignty," paras. 34–37.

525 Government of British Columbia, *Declaration on the Rights of Indigenous Peoples Act Action Plan, 2022–2027* (Victoria: Government of British Columbia, 2022), Action 4.35, 27, https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf.

526 *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c. 36 (*NWT Declaration Implementation Act*).

527 *NWT Declaration Implementation Act*, s. 5.

528 Hamilton, "United Nations Declaration," para. 1.

529 Bankes, "Implementing UNDRIP," para. 2.

530 Brenda Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples," *UBC Law Review* 53 (2012): 1074, para. 16.

531 Hamilton, "United Nations Declaration," para. 6, citing UN Office of Legal Affairs Memorandum, Doc. E/CN.4/L.610, April 2, 1962.

532 James (Sa'ke'j) Youngblood Henderson, "The Necessity to Exploring Inherent Dignity in Indigenous Knowledge Systems," in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, ed. John Borrows et al. (Waterloo, ON: Centre for International Governance Innovation, 2019), 224.

533 Gunn, "Legislation and Beyond," para. 22.

534 *UN Declaration*, Articles 11, 12, 25, 26 (emphasis added).

535 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171.

536 *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3.

537 *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 UNTS 195.

538 *Convention on the Rights of the Child*, November 20, 1989, 1577 UNTS 3.

539 Gunn, "Legislation and Beyond," para. 19.

540 Hamilton, "United Nations Declaration," para. 6.

541 Joffe, "Canada's Opposition," 89–90.

542 *Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 (*Bill C-92 Reference*); *Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c. 24.

543 *Bill C-92 Reference*, para. 9.

544 *Bill C-92 Reference*, para. 134.

545 *Bill C-92 Reference*, para. 122.

546 *Bill C-92 Reference*, paras. 3, 4 (emphasis added).

547 See generally Borrows et al., *Braiding Legal Orders*.

548 *Bill C-92 Reference*, para. 7.

549 For a detailed discussion of the various ways in which the government has failed to protect the burial sites of children who died while in the custody and care of the state and churches at Indian Residential Schools, see *Sites of Truth, Sites of Conscience*.

550 There are legal precedents upholding Indigenous customary practices in Canada. See, for example, *Connolly v. Woolrich*, [1867], 17 RJRQ 75 (Que SC) (which upheld the validity of a Cree marriage and awarded the son of that marriage a share in Mr. Connolly's estate); see also *Casimel v. ICBC*, [1993], 106 DLR (4th) 720 (BCCA) (which held that two elderly grandparents had adopted their 30-year-old grandson by Carrier law and were therefore entitled to death benefits as dependent parents upon his death).

551 *Van der Peet*.

552 Carolyn Bennett, Minister of Indigenous and Northern Affairs, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10 [2016]," transcript, modified May 11, 2016, https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html.

553 See, for example, *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] SCC 54, paras. 64–66. Notably, this case dealt with an Indigenous claim under both section 35 and section 2(a) (freedom of religion) of the *Charter* to protect a site that is Sacred to the Ktunaxa Nation. Several scholars have made compelling arguments that section 2(a) *Charter* protections should apply in the context of Sacred sites, which would necessarily include Indigenous burials sites. See, for example, Bakht and Collins, "Earth Is Our Mother," 81; Kent Williams, "How the *Charter* can Protect Indigenous Spirituality; or, the Supreme Court's Missed Opportunity in Ktunaxa Nation," *University of Toronto Faculty of Law Review* 77, no. 1 (2019): 1–26; Howard Kislowicz and Senwung Luk, "Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom," *Supreme Court Law Review* 88 (2019): 205–29.

554 Joffe, "Canada's Opposition," 72, citing Beverley McLachlin, "Aboriginal Rights: International Perspectives" (speech delivered at the Order of Canada Luncheon, Canadian Club of Vancouver, February 8, 2002).

555 Some scholars have suggested that working outside section 35 may be more useful in the context of implementing the *UN Declaration* since section 35 case law would have to be reimagined significantly in order to comply with the Declaration. See, for example, Richard Hamilton, "Asserted vs. Established Rights and the Promise of UNDRIP," in Borrows et al., *Braiding Legal Orders*, 164.

556 Joffe, "Canada's Opposition," 74.

557 Henderson, "Postcolonial Indigenous Legal Consciousness," para. 8.

558 TRC, *Reconciliation*, 48.

559 Hickey and Killean, "Property Loss," 479 (Hickey and Killean emphasize the importance of dignity restoration as a key means of reparations in the context of damage to cultural heritage).

CHAPTER 8

Death and Legal Investigations: A History of Failures

INTRODUCTION

When Indigenous children suffered injuries, perished, or disappeared from Indian Residential Schools, police authorities rarely intervened or conducted investigations. In most cases, suspicious circumstances went unaddressed, leaving families bereft of explanations or justice. Even when police investigations occurred, they were superficial at best, often dismissing the children's and their families' accounts or blaming the children while clearing institutional staff and government officials from responsibility. This chapter examines the systemic failures of governments to thoroughly investigate and prosecute those responsible for the negligence and abuse of Indigenous children. It highlights how the criminal legal system and death investigations have shielded wrongdoers, perpetuating a culture of impunity. The State's exercise of authority to convene investigations, inquests, and inquiries served as a form of settler amnesty, wilfully ignoring criminal harms against Indigenous children at Indian Residential Schools and associated institutions.

The failures of Canada's legal system to secure—or even strive for—justice for Indigenous children, their families, and communities were well documented by the Truth and Reconciliation Commission of Canada (TRC):

> The federal government and the churches failed in their responsibility to children. That failure was massive in size and scandalous in nature.... The colonization and marginalization of Aboriginal peoples created a situation in which children were vulnerable to abuse, and civil

> authorities were distant, hostile, and skeptical of Aboriginal reports of abuse. As a result, there were very few prosecutions when the schools were in operation.... The police investigations that took place in the 1990s were almost invariably mounted in response to organized efforts on the part of the former students themselves.[1]

The thousands of cases of missing and disappeared children from Indian Residential Schools and related institutions encapsulates Canada's colonial genocide. The lack of proper investigations into the children's disappearances represents an ongoing injustice. What transpired—whether neglect, abuse, or worse—constitutes mass human rights violations and potential criminal acts and crimes against humanity. Unfortunately, these harms are not merely historical, as the abuse and discrimination are replicated and reinforced in contemporary legal frameworks.

Indigenous people have faced historic racism and injustices within the Canadian criminal legal system. Sadly, these injustices persist today for Indigenous communities, most evident in modern policing and child welfare systems where disproportionate rates of apprehensions and incarceration, abuse, and mistreatment continue to be perpetuated. Entrenched in systemic discriminatory practices, policing and child welfare services across Canada are in a crisis with respect to their relationships with Indigenous communities, and urgent reforms are needed. With specific reference to the ongoing deficiencies and neglect of the legal system, the TRC's Final Report concluded:

> The Canadian legal system also failed the children. When it eventually began to respond to the claims of abuse in the late 1980s, it initially did so inadequately and in a way that often re-victimized the Survivors. To Survivors, the criminal and civil justice systems seemed to be tipped in favour of the school authorities and school administrators. To Survivors, the justice system was a barrier to their efforts to bring out the truth of their collective experience.[2]

The TRC's damning assessment of the legal system echoes the sentiments of Indigenous people who feel re-victimized by a legal system skewed in favour of wrongdoers. Responding to the TRC's Calls to Actions[3] and strenuous advocacy by Survivors and Indigenous communities, governments are slowly acknowledging the need to uncover the full truth, especially the truth about the missing and disappeared children and their burials.

This chapter also highlights how the State has failed to adequately support Indigenous-led efforts to locate the missing and disappeared children and negligently and belatedly initiated

investigations into the deaths of Indigenous people. The epidemic of missing and murdered Indigenous women and girls underscores the legal system's ongoing failure to care about, and provide justice to, Indigenous communities. As noted by the National Inquiry into Missing and Murdered Indigenous Women and Girls, Indigenous people continue to go missing at rates far greater than that of the general population, and the Canadian legal system has regularly forsaken Indigenous families who are looking for their disappeared relatives or are seeking answers relating to their deaths.[4] A review of how the Canadian legal system functions is provided herein. It is a complex system with many dimensions involving different levels of government, and it is often not well understood, even by those directly involved in it. Included in this review is an examination of how key parts of the system—specifically, the criminal law components and coroners' investigations—failed to respond to the concerns of Indigenous families and communities when they were seeking help to find missing and disappeared loved ones.

The reasons for these shortcomings are important to recognize to transform the systems and structures that have failed Indigenous Peoples for almost two hundred years. Understanding the roots of this failure is crucial for systemic change to create new Indigenous-led systems that will be more responsive and just. Creating effective mechanisms of investigation and redress for Indigenous communities that include Indigenous laws and knowledge is necessary to provide justice. This includes ensuring that both the individual circumstances and the systemic patterns that contribute to the disappearance and deaths of Indigenous people be fully investigated in a manner that is responsive to Survivors, their families, and communities and provides personal and institutional accountability.

SETTLER AMNESTY IN THE CANADIAN LEGAL SYSTEM

There is no such thing as a "Canadian legal system"—one system that covers all aspects of the law across this country. Canada has a multiplicity of legal systems, including the criminal legal system, the public or administrative legal system, and the civil legal system. Within each of those systems, there are discrete and distinct elements, some of which are the responsibility of the federal government, and some are the responsibility of provincial and territorial governments. Importantly, in addition to all these systems, which find their basis in the *Constitution Act, 1867*, there are also Indigenous justice systems—systems that have been in place since time immemorial.[5] These systems are based on and reflect the laws of distinct Indigenous Nations[6] and do not owe their existence to colonial structures, constitutional negotiations, or the division of powers between the federal and provincial governments. Indigenous justice systems therefore exist independently and regardless of whether they are formally recognized

by federal, provincial, or territorial governments. These systems are made up of laws, processes, and protocols that must be at the forefront of investigations into the missing and disappeared children and unmarked burials, specifically, and death investigations of Indigenous people, more generally.

As discussed earlier in this Final Report, there is settler amnesty and a culture of impunity that pervades Canada's relationship with Indigenous Peoples, especially in relation to the Indian Residential School System. It has never been in the interest of the State to truly hold accountable the government and church officials most responsible for the Indian Residential School System. This reluctance can be partially explained by the way in which the legal system operates, but, as shown in other chapters, settler amnesty is ingrained into the very fabric of this country. Settler amnesty effectively covers everything—from individual acts to systemic patterns that led to the disappearance and deaths of so many Indigenous children. Such amnesty, especially when not openly acknowledged or accompanied by deep social transitions, instigates impunity and frustrates justice. The Canadian legal system, without significant changes, is neither fit for nor intended to fit the purpose of securing justice for Survivors, Indigenous families, and communities. Thomas McMahon, general legal counsel to the TRC, summarized the ubiquity of settler amnesty as follows:

> It is a century long history of almost no reports to the police, inadequate investigations, acquittals, lenient sentences, convictions coming decades too late, and accused and witnesses dying before trial. Abuse over the century was hushed up with internal staff dismissals and transfers (sometimes with recommendations), if any action at all was taken. This is the history of a century of Canada's criminal justice system failing to protect [I]ndigenous children.[7]

THE CRIMINAL LEGAL SYSTEM

Canada's criminal legal system was founded on principles of colonialism, where Indigenous lands were taken by settlers through manipulation, force, and coercion. The legal framework that emerged from this colonization has systematically marginalized Indigenous Peoples and their rights. As discussed throughout this Final Report, the federal government created assimilation policies and genocidal structures aimed at eradicating Indigenous cultures, languages, and ways of life, and, as demonstrated in this chapter, colonial legal systems and law enforcement were used to accomplish this racist goal.

The *Criminal Code*, as well as other legal structures, reflected colonial attitudes towards Indigenous Peoples.[8] Legislation and law enforcement were used to criminalize Indigenous cultural practices, such as the Potlatch ban in the late nineteenth and early twentieth centuries, which prohibited Indigenous ceremonies and practices. The Indian Residential School System was a key component of government strategy, designed to forcibly assimilate Indigenous children into settler culture by physically separating the children from their families and communities and stripping them of their Indigenous ways of being. The criminal legal system in Canada has several distinct components that include the *Criminal Code*, police, prosecution services, and courts, all of which fortified the maintenance of the Indian Residential School System and the racist policies that perpetuated widespread discrimination against Indigenous Peoples. The following sections provide a brief overview of these different components and their role in reinforcing colonial policies of systemic racism and settler amnesty.

Criminal Code

The *Criminal Code* sets out what acts or omissions are considered criminal in Canada and the range of sentences for each of these crimes. Criminal offences are also set out in some other federal statutes—most notably, the *Controlled Drugs and Substances Act*, which addresses the possession and trafficking of drugs.[9] The *Criminal Code* is a federal law, and it applies across the country in each province and territory.[10] Historically, legislation and other legal mechanisms were deployed for the expropriation of Indigenous lands in Canada, including deceptive Treaties, discriminatory government policies, and militant law enforcement. Laws and legal frameworks have been used to marginalize and disenfranchise Indigenous communities rather than upholding their rights and interests. When Indigenous Peoples have tried to protect and defend the land against resource extraction projects and environmental degradation, they have frequently faced barriers to accessing justice and have experienced systemic discrimination within the legal system.

The exercise of legal powers permitted by the *Criminal Code* have been used to enforce laws that facilitate this dispossession of Indigenous lands indirectly, such as *Criminal Code* provisions related to trespassing, theft, and rebellion. While the *Criminal Code* itself may not contain provisions explicitly allowing for the taking of Indigenous lands, the enforcement of laws related to property rights and order have long been used to support the broader colonial agenda of land dispossession and the assimilation of Indigenous Peoples.[11] When looking at the challenges that Indigenous Peoples have faced within the legal system in Canada, the focus is often on the actions of the police and the courts. However, the *Criminal Code* itself has also been problematic for Indigenous Peoples for at least three distinct reasons. First, as the

TRC pointed out in its Final Report,[12] one of the difficulties with prosecuting many of the perpetrators who physically abused the children at Indian Residential Schools is that section 43 of the *Criminal Code* still provides an explicit justification for teachers (and others) to use reasonable force to discipline children under their supervision.[13] This section has been in the *Criminal Code*, in one form or another, since 1892.[14]

The Supreme Court of Canada found section 43 to be constitutional in 2004.[15] The section currently reads as follows, "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances." The TRC found that the existence of this exception, to what would otherwise clearly constitute assault, was used to justify the physical abuse perpetrated against the children at the institutions, "In their mission to 'civilize' and Christianize, the school staff relied on corporal punishment to discipline their students. That punishment often crossed the line into physical abuse. Although it is employed much less frequently now, corporal punishment is still legally permissible in schools and elsewhere under Canadian law."[16] While section 43 of the *Criminal Code* permitted the use of reasonable force by institutional staff, the reality is that excessive physical punishment was employed as a means to discipline children at Indian Residential Schools, particularly targeting young children to "civilize and Christianize" them and exterminate their "Indian" ways.[17]

The Royal Canadian Mounted Police's (RCMP's) own 2011 report on its role in the Indian Residential School System detailed the severe forms of corporal punishment meted out by staff at the institutions against the children for minor alleged infractions.[18] The RCMP's report documented that Indigenous parents filed many complaints with the RCMP regarding how their children were being treated. In May 1943, a mother of a female child taken to the Mount Elgin Indian Residential School in Ontario reported concerns that the, "principal raises the skirts of girls when he whips them as punishment" and "goes to the girls' bedroom with a flashlight and flashes the light in their faces."[19] Among the numerous references of whippings and strappings of children documented in the RCMP's 2011 report, one account in 1930 of a 16-year-old boy assaulted by the principal of the Norway House Indian Residential School in Manitoba is demonstrative of how the legal system ignored the violence suffered by Indigenous children:

> RCMP
>
> "Report on Conclusion of Case"
>
> Defendant: Principal of IRS [Indian Residential School]

Offence: Common Assault, Sec. 291 C.C. of C.

Sentence: Charge dismissed with warning to accused to punish only with the strap.

Summary: Boy asked the Principal for a sweater. According to the boy's evidence, the Principal struck him in the head with his fist, knocked him down, kicked him, and then dragged him across the floor to another room and strapped him. Male student's evidence corroborated by two other boys. Report notes that other stories regarding the Principal's harshness have been brought to the RCMP's attention.[20]

Kasa Dene Elder and Survivor Mary Caesar recounted that the abuse began as soon as the children entered the institutions. Caesar recalled that, upon her arrival at the Lower Post Indian Residential School, located near the south Yukon-British Columbia border, the children's, "hair was cut and their home clothing taken away. Anyone who resisted was physically reprimanded. 'They would punch me in the head and ears.... 'It was just sadistic from the time you stepped in the doors.'"[21] The severity of punishment often escalated over matters connected to the children's culture, such as speaking their Indigenous language or playing and behaving in other ways that related to their Indigenous customs. Caesar described how the nuns would wash the children's mouths out with soap for speaking their own language and, "stick straight pins in [the children's] thighs, [their] hips and [their] backside to keep [the children] sitting still."[22]

Survivors have shared their experiences of harsh and dehumanizing punishment for trivial matters such as playing noisily, bed-wetting, and failing to complete assigned chores. There have been numerous accounts of severe punishment for sneaking food, which was driven by the pervasive hunger experienced by many children, some of whom were deliberately starved as part of government-sanctioned nutrition experiments conducted at the institutions.[23] Historian J.S. Milloy noted that, in 1940, Principal H. Grant employed punishment at the Carcross institution in the Yukon. Grant admitted to children being, "strapped on various parts of their bodies so severely that they had to be held down."[24] When this punishment, "proved futile," Grant regularly resorted to a tactic that one of the teachers assured him had worked at another institution—cutting off the child's hair. When one girl stole a loaf of bread, she was given what Grant termed a "close haircut."[25]

In addition to abusive physical discipline administered using straps, wooden boards or paddles, sticks, rulers, and shovels, one institution, "used an electric chair to shock students as young as six":[26]

> One former male St. Anne's student, who attended the school between 1957 and 1962, said "a supervising nun would make him sit in an electric chair, tie his wrists to armrests and administer shocks," the court file states. "The nun strapped him in the electric chair and electrocuted him until he was semiconscious." A female student, who attended the school between 1957 and 1964, alleged she was forced to eat her vomit and punished by "electrocution" in the chair.[27]

To the extent that section 43 of the *Criminal Code* permitted staff at the institutions to use "reasonable force" as a method of corporal punishment towards Indigenous children, there can be little doubt that, even compared to colonial standards at the time, the abuses described by Survivors crossed over into serious assaults.

McMahon advocates that legal interpretations of section 43 of the *Criminal Code* are situated, "within a Christian, non-Indigenous worldview,"[28] noting that Indigenous parenting methods and values pertaining to corporal punishment likely conflicted with, "European standards of the day":

> Principals recognized they were violating parental norms, but concluded that such norms were "inappropriate." In 1922, Andrew Paull, the corresponding secretary of the Allied Tribes of British Columbia, wrote to W.E. Ditchburn, the chief inspector of Indian agencies in British Columbia, to complain that the principal of the Alberni industrial school, Mr. Currie, "unmercifully whips the boys on their backs, which is objected to as well as Mr. Curry [*sic*] fighting and kicking the boys for the purpose of correction. It is further reported that Mr. Curry [*sic*] gets extremely mad at the slightest provocation, and whips or hits the boys with his fists, or chokes them." Currie said he thought himself to be "patient, kind and lenient with every child who shows any attempt at obedience to the rules, but certain offences must be dealt with firmly." But, he said, Aboriginal parents never punished their children. "The result is that when the teacher does it they magnify the thing to appear that the child was being murdered."[29]

Notably, as discussed later in this chapter, Alberni principal H.B. Currie was moved to the Birtle Indian Residential School in Manitoba in 1927 and later stood trial for sexual assault of four female students.[30] Currie's history of violence and abuse was known to the Presbyterian church and officials of the Department of Indian Affairs, who managed the situation by switching Currie's job with the principal of the Birtle Indian Residential School, who was also accused of abuse.[31]

Sphenia Jones, an 80-year-old Survivor, vividly recalls the horrors she witnessed at the Edmonton Indian Residential School in the 1950s, which now drives her unwavering pursuit for justice. Jones recounts taking care of little Marjorie Victoria Stewart after she was "bashed" in the back of her head as punishment.[32] In 1955, around the time that Jones was in the institution, the Quebec Court of Appeal expressly noted that, "if a teacher strikes a pupil on the head by way of discipline his act is completely unjustified" and if a teacher hits a child on the spine with a hard object, such as a ruler, or bangs a child's knuckles against a hard object, like a desk, this is similarly "unjustified."[33] Notwithstanding this judicial censure of the types of physical punishment that were routinely meted out against Indigenous children, no such constraints seemed to apply to the Indian Residential School System. Jones is now leading a class-action lawsuit against the Catholic church, alleging that a priest's remarks dismissing evidence of unmarked graves were defamatory and caused harm to Survivors.[34]

Denialism as a Form of Defamation

In a contested legal battle, 80-year-old Sphenia Jones, a Survivor and Elder of the Haida Nation, is spearheading a class-action lawsuit against the Catholic church and Reverend Marcin Mironiuk. Jones filed the class-action lawsuit against the church for withholding records relating to Indigenous children and specifically named Mironiuk as a defendant for making defamatory comments about Survivors.[35]

The lawsuit, which was initiated in July 2023, alleges that, during an April 2021 sermon, Mironiuk made derogatory statements in Polish, dismissing reports of unmarked graves. Mironiuk publicly declared that the discovery of graves of missing children were "lies" and "manipulation" and claimed Indigenous children died of natural causes.[36] These remarks, made in the wake of the confirmation of unmarked burial sites at the former Kamloops Indian Residential School, were perceived as

defamatory and harmful to Survivors, including Jones, who endured trauma at an institution. In the 1950s, Jones was forced to attend Indian Residential School at the age of 11. Jones' recollections paint a haunting picture of the atrocities inflicted upon Indigenous children within the confines of the institutions. Forced from her community of Haida Gwaii, Jones was taken on a traumatic journey to Edmonton, punctuated by stops to pick up other children, some of whom would never complete the trip alive.[37] Jones recalls the bodies of the deceased children being thrown off the train. During her time being confined at the institution, she had her fingernails "ripped out" for speaking her own language, was hit with sticks, repeatedly slapped in the head, and witnessed the death of other children.[38]

Jones recollected that she took breakfast to a little girl, Marjorie Victoria Stewart, who was in the infirmary because a supervisor had hit Marjorie in the head with a two-by-four for running in the hallway. Jones described that the girl's head was "bashed in" at the back.[39] When Jones informed Marjorie's sisters and institution staff that she found Marjorie dead with blood all over the pillow, Jones was "strapped" and forced by staff to keep quiet about the situation. Jones does not know if Marjorie's body was sent home or buried.[40]

Despite efforts by lawyers representing the Archdiocese of Edmonton and the Oblate Fathers to have the class-action case dismissed, a Calgary judge ruled on April 22, 2024, that it could proceed, citing that the claim had a reasonable chance of success. This decision marks another moment in the quest for accountability and justice for Indian Residential School Survivors. The defence contested that Mironiuk's statements directly targeted Jones and disputed that the remarks constituted group defamation. However, Justice James Farrington deemed the claim valid, highlighting concerns over the interpretation of Mironiuk's remarks and their potential injurious impact on Survivors.

The case not only seeks justice for individual Survivors but also confronts the broader issue of denialism surrounding the Indian Residential School System. The lawyer representing Jones emphasized the importance of recognizing the harm caused by Mironiuk's words and asserted that parishioners and others who heard them may be inclined to believe the validity of denialism because the remarks were made by a priest. The Mironiuk incident is not an isolated occurrence of a priest engaging in denialism. In July 2021, a Roman Catholic priest in Winnipeg was reported as giving a series of live-streamed sermons asserting that Survivors lied about being sexually abused so that they would receive more settlement money from the federal government.[41]

By seeking to hold accountable those who perpetuate harmful denialist narratives, Jones' legal battle aims to confront the painful truths of Canada's colonial history. The denialism and misrepresentation of Indigenous truths and history by settlers is re-traumatizing for Survivors, Indigenous families, and communities. Despite the gravity of the offence and the harm caused to Indigenous Peoples, it appears that Mironiuk may continue to preach in Ontario. Though he was suspended in Edmonton, his continued position as a religious leader in another province indicates the lack of accord between religious entities to address discriminatory, racist, and anti-Indigenous sentiments within their organizations.

The use of physical violence as a disciplinary tool not only inflicted horrific bodily pain but also left lasting psychological scars on generations of Indigenous children, contributing to a legacy of trauma that continues to reverberate through Indigenous communities in Canada today. Despite the TRC's Call to Action 6 to repeal section 43 of the *Criminal Code*, it remains the law. During its work, the TRC was only able to confirm 40 criminal convictions of Indian Residential School perpetrators. The federal government failed to comply with the TRC's request to produce all documents related to prosecutions. Although there were some police investigations in the 1990s, there are likely hundreds of abusers who were never investigated or charged, some of whom may still be living.[42] As explained by McMahon:

> Crimes occurred within Indian residential schools from the very beginning. The crimes included theft of children's property, forcible confinement, criminal negligence causing death, physical assault and sexual assault. The criminal justice system was used to intimidate (terrorize?) parents and children, deprive them of basic freedoms, charge them with ridiculous offences such as theft of government clothing for trying to run away. The police were agents of the Indian residential school, there to enforce government policy and law. The criminal justice system ignored the crimes that were happening at the schools. On the rare occasions when the criminal justice system got involved, charges were not laid; when charges were laid, acquittals were common; when convictions were secured, obscenely lenient sentences were given; investigations were kept as narrow as possible; no one kept track of the complaints, charges or convictions; no one retained the original documents of charges and convictions. Once it came time to have a Truth and Reconciliation Commission, the RCMP and Justice Canada stonewalled and refused to conduct an adequate search for

> relevant records and refused to provide the documents they knew about to the TRC. This was done in knowing disobedience of the binding court order, which is what the *Indian Residential Schools Settlement Agreement* was, to provide the TRC with all relevant documents.
>
> All students of Canadian history, criminal law, human rights, [I]ndigenous rights and criminology need to know this history.[43]

With few criminal convictions of perpetrators in the 1990s, Survivors launched civil lawsuits against the federal government and churches, seeking compensation for sexual, physical, and psychological abuse in addition to the loss of culture and language. Several class-action lawsuits were also launched in the 1990s related to the Indian Residential School System and other associated institutions. By 2001, there were more than eighty-five hundred lawsuits. By 2005, that number had grown to more than eighteen thousand.

Cover-Up of Abuse at the Lower Post Indian Residential School[44]

The investigation into abuse at the Lower Post Indian Residential School, led by Corporal Dave Friesen in the late 1950s, was one of the first known law enforcement efforts to conduct a criminal investigation into Indian Residential School abuses in Canada. In 1957, Friesen, based at the Watson Lake detachment in the Yukon, launched an investigation into Ben Garand, an employee at the institution. Friesen began to probe Garand's actions after noticing suspicious behaviour from Garand, who was known to have a disreputable nickname based on his sexual predations.

The Lower Post Indian Residential School was operated by the Catholic Missionary Oblates of Mary Immaculate from 1951 to 1975. Piqued by Garand's reputation of befriending young boys from the institution, Friesen followed Garand to a remote cabin where he discovered four Indigenous boys and bottles of liquor. Further investigation and a statement by one of the boys revealed that children from Lower Post were being sexually assaulted by Garand. Although Friesen's investigation revealed extensive sexual abuse, Friesen faced obstacles from the institution in pursuing the investigation. Based on one of the boys' detailed accounts, Friesen laid a charge of indecent assault against Garand. When reporting the events to the principal, Father Yvon Levaque, Friesen was informed that Levaque was well

aware of the abuse and that he had terminated Garand's employment. Friesen was then met with indifference from Levaque when the notion that Garand was still abusing the boys was raised, leaving Friesen with the clear impression that the protection of the church took precedence over the well-being of the boys.

Upon securing four witnesses, a trial was scheduled to take place in Prince Rupert. However, before the trial commenced, Friesen was transferred to Edmonton and unable to maintain a means of communication with the witnesses. Despite initially showing determination in wanting the charges to proceed, one of the four witnesses did not show up when subpoenaed. The trial, scheduled for December 1958, saw a distressing turn of events, as key witnesses recanted their testimonies in court. It was later suspected that they had been coerced or intimidated into silence, although specific details remained elusive. During the trial, one of the witnesses was required to repeat a statement detailing a sexual encounter with Garand that the witness had testified about in a preliminary hearing. Unable to repeat his statement, all other witnesses followed with recanting their statements. Despite the inability to pursue the sexual charges against Garand, no consideration was given to the circumstances under which Garand brought the boys to the cabin and fed them alcohol. The trial concluded with the charges against Garand being dropped due to a lack of evidence, leaving the abuser and the institution unpunished at the time.

According to Friesen, the principal's actions clearly prioritized the reputations of the church and institution over the welfare of the children. This cover-up and the resultant enduring trauma were never fully acknowledged, prompting Indigenous leaders to seek a papal apology and to push for broader recognition and redress for Indian Residential School abuses. Despite being aware of the gravity of Garand's actions, the church enabled Garand to be placed in a position where he would continue to have direct contact with the boys. In 1995, correspondence between the Vicariate Apostolic in Whitehorse, the Provincial Father in Montreal, and Oblates in Rome revealed their awareness of Garand's assault of boys at Lower Post. A letter by the Superior General states, "poor Brother.... My soul is pained by this kind of business. I never would have believed this of the poor Brother." Outside Friesen's charges against Garand, reports and issues of sexual abuse at Indian Residential Schools continued to be covered up.

Many years after the trial, Friesen came across an article detailing the work of the BC Indian Residential School Task Force, which was assembled to address growing awareness of allegations of abuse at the institutions in the region. Friesen faxed

his information to the Task Force and learned about an ongoing investigation into Lower Post Residential School, Garand, and 12 former students who had filed complaints against him. Renewed efforts to address these injustices emerged. The TRC confirmed the widespread collusion between church officials and government bureaucrats to suppress abuse allegations. The Task Force led to new charges against Garand and other perpetrators. Although Garand died in jail before he could be fully brought to justice, it was noted that he was facing additional charges of sexual abuse in British Columbia.

The second reason that the *Criminal Code* has been problematic for Indigenous Peoples is that a person can only be charged and prosecuted for something they did in the past if the alleged illegal conduct was an offence in the *Criminal Code* at the time it was committed. This means that, if someone committed a sexual offence in the 1970s, that person would be prosecuted under the law as it was in the 1970s. Often, due to different social mores, these earlier laws were much narrower in terms of the behaviour that was considered criminal than they are today.[45] One such example is the crime of "rape," which was abolished in 1982, and the new offence of "sexual assault" was established. Since 1983, the *Criminal Code* has recognized the offence of sexual assault, which includes different degrees of abuse, assault, and rape. Sexual assault is any unwanted touching of a sexual nature, and there are several specific offences dealing with different types of sexual assault.[46] The law is now clear that there can be no consent unless it is given at the time of the sexual activity.[47] Previously, the *Criminal Code* only prohibited the crime of "rape," and it had a very narrow definition:

> Until January 1983, four criteria were required by statute to constitute an act of rape: (1) the act had to involve sexual intercourse—that is, penetration; (2) the act had to be committed by a man with a woman; (3) the act had to be committed without her consent, or with her consent if the consent was extorted by threats or fear of bodily harm, was obtained by impersonating her husband, or was obtained by false and fraudulent representations as to the nature and quality of the act; and (4) the act had to occur outside the bounds of marriage.[48]

If the alleged acts occurred before 1983, then they had to fall within the definition of "rape" for charges to be laid. This means that sexual acts against males could not be prosecuted as "rape."[49] Sexualized acts against a male was treated as an act of gross indecency.[50] Further, unless there was penetration, other forms of sexual touching against women and girls over the age of 14 years old were not considered as "rape."

Many other examples exist. Today, following the report from the Committee on Sexual Offences Against Children and Youths, significant reforms to the *Criminal Code* were made in 1988 to sanction child sexual abuse.[51] Any offences created at this time could only be laid today against perpetrators of child sexual abuse at the Indian Residential Schools if the crimes occurred after 1988. Prior to 1988, the old laws would apply, which unfortunately were not as robust and often treated the sexual abuse of children as misdemeanour offences.[52] In addition, as discussed later in this chapter regarding pre-charge screening powers, the fact that the crime occurred decades earlier may factor into prosecutorial discretion and lead to no charges being laid. If the crime was committed a long time ago, police and the crown attorney may decide it is not in the "public interest" to prosecute.

Criminal Prosecution Involving Alberni Indian Residential School

Very few criminal prosecutions have taken place against individuals associated with the Indian Residential School System in Canada. One of the earliest and largest criminal trials against an Indian Residential School abuser was the case of Arthur Plint, who had worked at the Alberni Indian Residential School, which operated from 1900 to 1973 in Port Alberni, British Columbia. The institution was notorious for its inhumane and abusive conditions and various crimes committed against Indigenous children. It is reported to be, "one of six residential sites where children were subjected to government-sanctioned medical experiments," including forced malnutrition.[53] The harmful legacy of the crimes committed continues to be felt by Survivors and communities that had their children taken to this institution.

On March 21, 1995, 18 Survivors participated in a criminal trial and testified against Arthur Plint. Plint was accused of sexual and physical abuse during his time as a boys' dormitory supervisor at Alberni Indian Residential School. The institution was described by BC Supreme Court Justice Douglas Hogarth as, "nothing less than a form of institutionalized pedophilia."[54] Justice Hogarth stated that considerations for the accused's age would not be made given the gravity of the claims. At the time of his prosecution, Plint was 77 years old, and, upon pleading guilty, he was sentenced to 11 years in prison.

Art Thompson's (Thlop-kee-tupp) victim impact statement detailed his experiences at the Alberni Indian Residential School and Plint's role in the crimes committed against many of the children. Thompson was kept for nine years at

the Alberni institution. From his first day, Thompson recalls that he was forced to shave his head and remove his clothes, and he was assigned a number to replace his name. Thompson detailed the nutritional, cultural, verbal, and physical abuse that he suffered at the hands of Plint and other staff.

Willie Blackwater is also a Survivor of sexual and physical abuse at the Alberni Indian Residential School, where he was kept for ten years. In the mid-1960s, Blackwater was forcefully taken from his home and sent to the institution, where he struggled with the dislocation of family and culture. After Plint's prosecution, Blackwater and other Survivors filed a civil lawsuit against the government and the United Church, who were responsible for running the institution. The lawsuit acted as the foundation for official apologies from the federal government and the $2.9 billion *Indian Residential School Settlement Agreement* (*IRSSA*).[55]

While the Plint case was significant because it brought to light the widespread abuse that occurred within the Indian Residential School System, few other perpetrators have been prosecuted. Further, little attention was given to which entities and organizations were complicit in the abuse. For example, Tseshaht First Nation has called for investigations into the RCMP's role in the forceful removal of Indigenous children from their families and communities and its negligence in handling reports of abuse or death. Tseshaht First Nation emphasizes the need to hold institutions accountable for past and current wrongdoings.[56]

A third problem with the *Criminal Code* is that its primary focus is on the actions of individuals rather than organizations. This makes it difficult to hold the government, churches, and other institutions that created, directed, and operated the Indian Residential School System responsible for the abuse or deaths of children in the institutions. Section 22.1 of the *Criminal Code*, which sets out the criminal liability of organizations for the negligence of its representatives, only came into force in 2004, a few years after the closure of the last Indian Residential School in 1997.[57] Pursuant to section 22.1, organizations may be held criminally liable if a representative was, "acting within the scope of their authority," and the senior officer(s) responsible for the activities relevant to the offence, "depart markedly from the standard of care" that could reasonably have prevented the offence.[58]

Before 2004, what was known as the "identification doctrine" required that an offence must be committed by a "directing mind" of the organization for the organization to be held liable.[59] The Supreme Court of Canada summarized the doctrine in 1993, "In order for a corporation to be criminally liable under the 'identification' theory, the employee who physically

committed the offence must be the 'ego', the 'centre' of the corporate personality, the 'vital organ' of the body corporate, the 'alter ego' of the employer corporation or its 'directing mind.'"[60] The criminal acts that children suffered at Indian Residential Schools were often perpetrated by ordinary staff of the institution. Those staff could not be seen as the "centre" or the "controlling mind" of the religious order running the institution or the government department responsible for funding and supervising the institutions. This means that the identification theory would protect the leaders of the religious orders and the senior government officials from criminal prosecution for the actions of their employees.[61] While it could have been argued that a principal may have been the "directing mind," complaints against principals were routinely ignored and dismissed.

The *Criminal Code* was rarely used to prosecute the abuse suffered by Indigenous children at Indian Residential Schools while they were in operation. Instead, the *Criminal Code* permitted certain forms of violence to go unchecked and allowed institutions and their staff to evade responsibility—in essence, creating a culture of impunity and granting amnesty to the perpetrators.

Policing

In Canada, policing is largely a provincial responsibility. While the RCMP is often seen as a national police service, their national activities are limited.[62] The RCMP provides policing services in provinces, territories, or specific municipalities when they have been asked to enter into specific arrangements with each jurisdiction, referred to as "contract policing," for a set fee and duration. The RCMP describes contract policing as, "the heart of what the RCMP does."[63] Most large municipalities have their own police services, and some provinces have provincial police services that provide services to smaller cities, towns, and communities.[64] Most municipal police services are governed by a local police services board that provides governance and oversight, including setting the budget for the service and hiring the chief of police.[65] Provincial police agencies and the RCMP do not have similar types of governance boards.[66]

The exercise of discretion and subjectivity is inherent to policing. The role of police is to ensure the safety of the community not only through the enforcement of the *Criminal Code* but also through other activities. In community-oriented policing, officers are encouraged to use their discretion to address underlying community issues and build trust with residents. Police have discretion in interpreting and deciding when and how to enforce laws. For example, what constitutes "reasonable suspicion" for a stop and search varies depending on the circumstances and the officer's judgment. Depending on how the officer perceives the

situation, an officer may give a warning rather than issue a ticket for a minor traffic violation. In some instances, police discretion is explicitly legislated. For example, the *Youth Criminal Justice Act* specifically endorses the use of police discretion when dealing with young people under the age of 18.[67] Police discretion when dealing with people over 18 is generally used on a case-by-case basis rather than in accordance with codified rules for the exercise of discretion.

As discussed below, one of the most critical areas where police discretion and subjectivity arise relates to the "use of force," wherein police officers decide on an appropriate response to an incident, ranging from verbal commands to deadly force. These decisions are highly subjective and influenced by factors such as the officer's perception of the threat and personal biases, which research confirms result in disparities in how individuals are treated based on factors such as race and socio-economic status, which disproportionately impact Indigenous people.[68] Since 1969, there has been the development of Indigenous police officers within the RCMP under the, "we must police our own lands plan."[69] Today, pursuant to the First Nations and Inuit Policing Program, there are 35 stand-alone Indigenous police services across Canada that serve 155 First Nations and Inuit communities, primarily in Ontario and Quebec but also in Manitoba, Saskatchewan, Alberta, and British Columbia.[70] There is only one Inuit police service in Nunavik in Northern Quebec.[71] The issue that has consumed Indigenous policing since its inception has been how to access and maintain equitable, stable, and consistent funding to allow them to provide the necessary services that communities need and deserve. At present, funding for Indigenous police services is provided by federal and provincial governments through funding agreements. These agreements are time-limited, which has meant that Indigenous police services face ongoing challenges to create long-term plans since their budgets and their continued existence is not guaranteed.[72]

The lack of sustainability caused by governments' short-term and insufficient funding arrangements with Indigenous police services is a form of systemic discrimination, as the public safety and well-being of Indigenous communities do not receive equitable attention and resources as non-Indigenous communities. The issue of under-funding and under-resourcing of policing of Indigenous communities is currently the subject of human rights litigation.[73] The Indigenous Police Chiefs of Ontario launched a federal human rights complaint asserting that the federal government's failure to provide, "a standard of policing in First Nations communities that is adapted to their needs and that is equal in quality and quantity to services provided in non-Indigenous communities with similar conditions" is discriminatory.[74]

Pekuakamiulnuatch Takuhikan Challenge the Inadequate Funding for Police Services

The issue of whether governments adequately fund Indigenous police services was recently before the Supreme Court of Canada (SCC). On April 24, 2024, the SCC heard the case of *Attorney General of Québec v. Pekuakamiulnuatsh Takuhikan*, which raises issues regarding whether federal, provincial, and territorial governments must fulfill the constitutional principle of the honour of the Crown in their funding contracts with Indigenous communities pursuant to the First Nations and Inuit Policing Program (FNIPP).[75]

The Pekuakamiulnuatsh Takuhikan is a band council representing the Pekuakamiulnuatsh Innu community in the Saguenay–Lac-Saint-Jean region of Quebec. Pekuakamiulnuatsh Takuhikan launched a civil suit accusing the federal government and Quebec of breaching obligations under the constitutional principle of the honour of the Crown by persistently under-funding of the FNIPP. The federal government divides responsibility for the costs of the FNIPP, "with provinces and territories in accordance with a 52% federal and 48% provincial/territorial cost-share ratio."[76] The FNIPP, created in 1992, supported the establishment of First Nations police services with the intent to provide culturally responsive policing and to keep, "cultural teachings at the forefront" so that police can serve Indigenous communities more effectively.[77] However, as highlighted by various inquiries, the FNIPP has been subject to much criticism for being chronically under-funded, leading to inadequate policing services for Indigenous communities.[78]

The Quebec Court of Appeal found that Canada and Quebec failed to ensure Pekuakamiulnuatsh First Nation's police services were equal in quality to those offered to non-Indigenous communities and thereby breached their duty to act honourably.[79] In concurring reasons, Quebec Court of Appeal Justice Marie-France Bich pointed out that, "First Nations must be able to rely on their own police services, and they are encouraged to develop such services, given that those provided by provincial or federal police forces are not only inadequate, but profoundly detrimental to them."[80] The Indigenous Police Chiefs of Ontario and the Assembly of First Nations appeared as interveners before the SCC in the case, alleging systemic discrimination in resourcing for Indigenous community safety. In its factum filed with the SCC, the Assembly of First Nations contended that, "this discriminatory under-funding of First Nations policing has led to numerous tragic incidents and loss of life in First Nations communities."[81]

History of Systemic Racism towards Indigenous Peoples by Police Services

Historically, police services or militia were deployed to enforce authority and control over Indigenous Peoples and lands and the containment of Indigenous resistance movements. Law enforcement officers were instrumental in implementing colonial and assimilation policies, such as forced relocations, including supporting Indian Residential Schools, and the suppression of Indigenous cultures and languages. Even today, for Indigenous people, their primary interface with the criminal legal system typically begins with encounters with the police, who serve as the system's public face. While other elements of the legal system, like crown attorneys, defense counsel, judges, and court proceedings, are triggered, this only occurs after criminal charges are laid, and it is the police who engage with individuals regularly, even in the absence of charges.

Recent surveys—notably, the General Social Survey (GSS) conducted by Statistics Canada in 2020—confirmed a pronounced level of distrust among Indigenous people towards law enforcement. According to the data, 22 percent of Indigenous respondents expressed little to no confidence in the police, compared to just 11 percent of non–visible minority Canadians.[82] The GSS evaluated police performance across six key areas, including law enforcement, promptness of response, crime prevention, citizen safety, and fair treatment. Alarmingly, Indigenous people consistently reported lower satisfaction rates than non-Indigenous people, often at double the rates.[83] These findings highlight a troubling trend of mistrust. Before examining the reasons of this mistrust, it is important to discuss two fundamental concepts: over-policing and under-policing. Both phenomena stem from the discretionary powers wielded by law enforcement officers in deciding whether to engage with individuals. Over-policing denotes situations where police proactively exercise discretionary powers to engage with individuals or community, whereas under-policing denotes situations where police are disinterested or refrain from engaging with individuals or community.

Over-policing and under-policing share common traits, primarily rooted in the exercise of police discretion. As previously mentioned, police discretion has a pivotal role in determining whether to stop, question, caution, charge, or ignore a person based on various circumstances.[84] Importantly, such discretion can impact not only individual encounters but also entire communities, influencing police responses to events happening in certain neighbourhoods, how a community may be vulnerable to victimization, or how a community can become the target of hyper-surveillance. It is this discretion that often shapes the perceptions and experiences of Indigenous people and communities in their interactions with law

enforcement. Understanding these dynamics is essential for unravelling the complexities of Indigenous-police relations and addressing systemic issues within the criminal legal system.

Over-Policing

Numerous instances of over-policing of Indigenous Peoples in Canada demonstrate systemic injustices. These examples include the use of police to resolve disputes between government and Indigenous Peoples about land, the desire to keep Indigenous people out of certain areas in a region, and the enforcement of the government's discriminatory edicts under the *Indian Act*—specifically, its participation in the forced removal of Indigenous children from their families to confine them at Indian Residential Schools and other associated institutions, including the apprehension of children by police on behalf of child welfare agencies.[85]

Historical Examples

Since 1867, Indigenous efforts to assert land and resource rights have often been met with active police opposition. Courts and governments have later acknowledged the validity of Indigenous claims, but only after arrests, convictions, and sentences have been imposed. Notably, convictions of land defenders remain on records despite subsequent recognition of the justness of Indigenous actions. One of the first examples of the use of police to pre-emptively resolve land disputes was regarding the North-West Resistance of 1885 (also known as the North-West Rebellion). Métis and First Nations resistance to their forced displacement in Saskatchewan and Alberta to clear the land for White settlement prompted the government to initiate a police response. The North-West Mounted Police (NWMP), which was the precursor to the RCMP, aided by armed citizen volunteers, were tasked with stopping the resistance, and, eventually, the military were called in.[86] Louis Riel, the leader of the Métis, and several other Indigenous leaders, such as Chief Poundmaker, were arrested and convicted, and some were executed for treason.[87]

It is now recognized that the North-West Resistance was not an insurrection. Riel has been celebrated in Manitoba with a statue in his honour on the grounds of the provincial legislature, and Canada Post issued a stamp in 2019 commemorating Riel and his earlier role in the Red River Resistance in Manitoba.[88] The question of whether Riel should be posthumously pardoned is a matter that is still being debated.[89] Poundmaker was exonerated in 2019.[90] The unresolved debate over Riel's pardon and ongoing calls for exoneration of other Indigenous leaders highlight the enduring legacy of injustice perpetuated through police intervention. Such historical injustices demand acknowledgement and redress to forge a path towards genuine reconciliation.

The use of police in the North-West Resistance is just one of many instances where the Canadian State has used police force to end legitimate protests by Indigenous people and Nations. This continues to the present day. As the Assembly of First Nations noted:

> For 150 years, the RCMP and its predecessor, the Northwest Mounted Police, have played a central role in imposing colonial "order." This enabled settler access to land and resources while displacing Indigenous Peoples from their lands and suppressing resistance. First Nations Peoples continue to face systemic racism across many institutions in the Canadian justice system, including police services.[91]

From the outset of the Indian Residential School System, the police have been the enforcement arm of government in many ways. During the early years of the Indian Residential School System, the federal government's express policy was to, "continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question."[92]

One example of the legal system's control of Indigenous communities was the government's enactment of the pass system, making it impossible for First Nations people to leave the boundaries of the reserve without the permission of the Indian Agent.[93] According to historian F. Laurie Barron, "the pass system served the purposes of the Department of Indian Affairs whose *raison d'etre* was to oversee the experience in social engineering" that reflected their "racist perceptions" and "Christian principles," which underpinned, "the assimilation programme administered in day and residential schools."[94] Barron points out that the pass system was used as a means of controlling parental access to children who were forcibly taken to Indian Residential Schools:

> Indian Agents were instructed not to allow Indians off the reserve for the purpose of visiting industrial schools, unless they had a pass showing the time and purpose of their absence and specifying the name of each individual in the group covered by it. They were also instructed to limit such passes to one every three months, although additional passes might be issued in the event that a school child became ill.[95]

Barron concludes that, "the fact remains that Canadian attempts to culturally assimilate the Indian were riddled with racist assumptions about the inferiority of Indians and the need to control and segregate them as a people."[96]

Along with helping Indian Agents to enforce the pass system, police were used to outlaw various Indigenous customs and practices. In the 1880s, the federal government outlawed

the practice of the Potlatch and the Sundance (tamanawas) in the *Indian Act*. In addition to outlawing certain ceremonies and dances, the wearing of traditional dress at gatherings was prohibited.[97] According to Barron, the Department of Indian Affairs and law enforcement worked together to curtail First Nations' rituals from the 1880s to the 1930s:

> Indian Affairs turned to the legislative process in order to deal more effectively with specific problems. This was true especially of the Sun dance. In that respect, the department occasionally found it convenient to invoke the provisions of an 1884 amendment to the *Indian Act* banning "give-away" ceremonies, originally intended to stamp out the potlatch in British Columbia. In I895, an amendment to the *Indian Act* proscribed all ceremonies involving "wounding or mutilation," an obvious reference to what Sun dancers referred to as "making braves," and in 1906 (with slight changes in 1914) the *Indian Act* was again amended to place a general ban on dancing of every description.[98]

Police were responsible for the enforcement of these provisions. For example, "in 1898, a Rain Dance was held on Piapot Reserve, even though the dance had been outlawed three years earlier. In retaliation, the government had Chief Piapot arrested and ultimately deposed."[99] In 1902, the Indigenous community of the Poor Man Reserve (Kawacatoose First Nation) rebelled and threatened the Indian Agent after the, "Indian agent had a group of Indians arrested and tried for dancing illegally."[100] Due to the Potlatch ban, Kwakwaka'wakw Chief Dan Cranmer secretly hosted a Potlatch in 1921 for 300 people in Mimkwamlis on Village Island, British Columbia. Learning of the event, Indian Agents deployed police to arrest the participants. Charges against most people were not pursued after they agreed to give up all their regalia and objects associated with the Potlatch and to never participate in the ceremony again. However, over 40 people were charged—20 received jail sentences of two to three months, and 22 were given suspended sentences.[101]

The *Indian Act* also removed the ability of First Nations to govern themselves as they had always done, replacing traditional governance practices with a one-man, one-vote system.[102] The Six Nations of the Grand River rejected the *Indian Act* processes and continued to choose Chiefs in the Longhouse according to their traditions. In response, the federal government engineered what is still referred to as "the '24 takeover," an assertion of federal government authority that required police enforcement:

> In September [1924] ... Duncan Campbell Scott, the deputy superintendent general of Indian Affairs, secured cabinet approval to establish an elected council [at Six Nations]. The chiefs and Col. C.E. Morgan,

> the local superintendent, had been holding council meetings in the agricultural exhibit hall in Ohsweken while the council house underwent repairs. On the morning of 7 October 1924 they convened the proceedings in the normal way. Then, at noon, without prior notice to the chiefs, Colonel Morgan read the order-in-council removing the Confederacy from power. He then announced the date for the first election of the band council. Although they had expected the government to make such a move, the chiefs were unprepared for the announcement. When Morgan finished, the chiefs quietly disbanded and gathered outside in shock. On Morgan's orders, the Royal Canadian Mounted Police (RCMP) seized the wampum used to sanction council proceedings and other council records from the council house, and deposited them in the safe at the Indian Office in Brantford. On the doors of the hall they posted a proclamation announcing the date and procedures for the first election.[103]

Police and Indian Residential Schools

The TRC highlighted that police services had a direct role in enforcing the compulsory attendance of children at Indian Residential Schools and other institutions. According to the TRC, many Indigenous children's first encounter with the legal system involved RCMP officers appearing in their communities to physically apprehend them and take them to an institution. The RCMP were also tasked with coercing parents to turn over their children, "The Mounted Police, who were appointed residential school truant officers in 1927, were, along with local police, used to force parents to send or return their children to school."[104] The TRC determined that Indian Residential Schools and Indian Agencies were so poorly staffed that they had to rely on law enforcement to handle truancy.[105] The RCMP commissioned a report in 2011 to study their role in the Indian Residential School System.[106] By examining historical "chronicles"—diarized updates made by institutional staff—this report confirmed the RCMP's role in working with Indian Agents and church officials to apprehend the children.

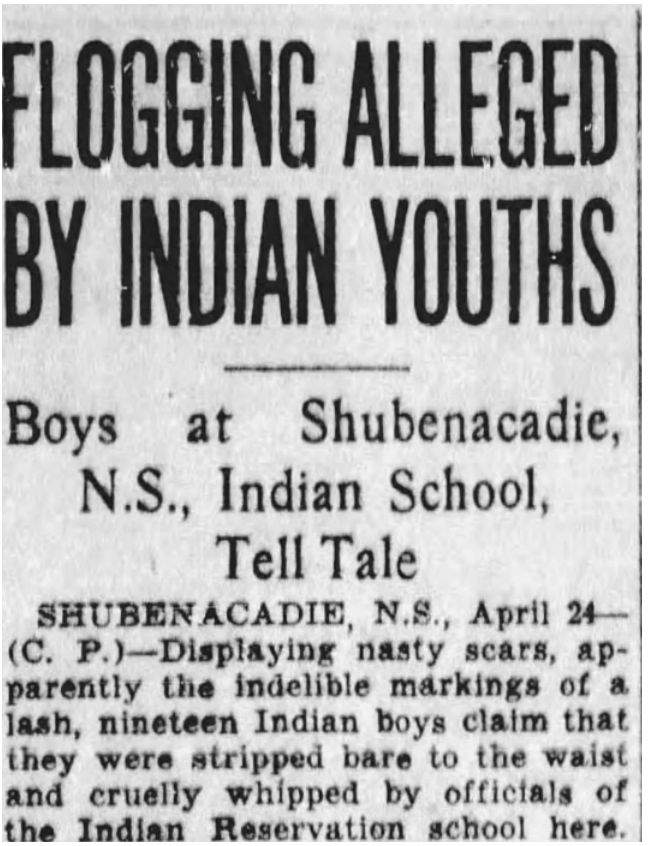
Recent acknowledgements by public figures, including former Minister of Public Safety and Emergency Preparedness Bill Blair, have recognized the RCMP's undeniable role in the Indian Residential School System. Appearing before the Standing Committee on Public Safety and National Security on June 2, 2021, Blair spoke about the Indian Residential School System following the confirmation of unmarked burials at the Kamloops Indian Residential School.

Blair acknowledged, "the clear and unavoidable RCMP role in that tragedy."[107] This point was also made by Terry Teegee, the Regional Chief of the BC Assembly of First Nations, to the Standing Committee, as quoted in the committee's report on systemic racism in policing:

> For many years, since colonization began, the police force was used to take our people off the land. More recently, with the advent of the residential school policies, many of our children were taken from our homes and brought to residential schools. In my language, Dakelh, the Carrier language, we call the RCMP nilhchuk-un, which, interpreted in our language, is "those who take us away." Really, it was the RCMP who took our children away. In many respects, that's the way we still see the RCMP.[108]

The RCMP's 2011 report documented that the RCMP were directly and routinely involved in the apprehension and transportation of children from their homes to the institutions and in patrolling runaways.[109] Chronicles prepared by Indian Residential School staff documented that, even before RCMP officers were legally made truant officers, the RCMP were, "involved in searching for and bringing truants back to school" and, "that some children were tried in police court or in court, or even sent to prison following their capture."[110] Numerous examples of RCMP involvement in returning children to Indian Residential Schools were inventoried in the report. For example, an October 1907 chronical excerpt from Onion Lake Indian Residential School in Saskatchewan noted that the institution's officials called the RCMP about a truant child. Even though the boy had been brought back to the institution by a relative, the RCMP, after his return, "came and got him to give him a little taste of prison," and he was kept by the RCMP for one night so as to compel the boy to, "promise not to run away."[111] Another excerpt documented seven children who ran away from Providence of the Sacred Heart in Kootenay, British Columbia, in October 1923. The institutional records indicated that the police searched for the runaways and that they were held in prison for 15 days.[112] Although details were missing, another excerpt from a BC Catholic Indian Residential School chronical noted that, "the culprits"—two boys—"should be whipped by the police in front of the children" as a means to make the physical punishment of the boys an example and warning for the other students.[113]

The participation of law enforcement in the physical punishment of Indigenous children at Indian Residential Schools was not an isolated occurrence. In May 1934, the Privy Council appointed a retired judge of the Exchequer Court of Canada, Justice L.A. Audette, as a commissioner to investigate and report, pursuant to the *Inquiries Act*, on the circumstances of the alleged flogging of 19 Indigenous boys at the Shubenacadie Indian Residential School in



FLOGGING ALLEGED BY INDIAN YOUTHS

Boys at Shubenacadie, N.S., Indian School, Tell Tale

SHUBENACADIE, N.S., April 24—(C. P.)—Displaying nasty scars, apparently the indelible markings of a lash, nineteen Indian boys claim that they were stripped bare to the waist and cruelly whipped by officials of the Indian Reservation school here.

"Flogging Alleged by Indian Youths," *Montreal Star*, April 24, 1934.

Nova Scotia.[114] The boys, ranging in age from six years to 18 years, alleged that they were stripped down to their waist and viciously whipped by the institution's caretaker, as authorized by the principal, Reverend Father Jeremiah Patrick Mackie.[115] According to Mackie, the boys were flogged in order to ascertain who had stolen $53.44 from the Sisters' funds out of the office. Upon investigating the situation, the local RCMP officer learned that a group of boys had gone into town and purchased, "cake, candy, tobacco, knives, chewing gum, etc." and informed Mackie of the boys' identities.[116] Mackie ordered that multiple boys be strapped in various instances, and this occurred in the presence of the RCMP officer.[117] After the floggings, 10 boys escaped from the institution, and their families complained about the abuse to the Indian Agent, who reported the matter to the Department of Indian Affairs, leading to the formal inquiry. The Indigenous families demanded that Mackie be removed as the principal. Newspaper reports in the month that followed noted that several of the boys still displayed heavy scars on their backs from receiving 10 to 20 lashes.[118]

At the inquiry, which lasted just two days in June 1934, Justice Audette heard from 24 witnesses, including Mackie, the caretaker, the RCMP officer, the boys, and others. Some of the boys admitted to the theft or of having knowledge of the theft.[119] The RCMP officer explained the steps he took to investigate the boys. When questioned if the thrashing was excessive, the RCMP officer claimed that he did not see any boy receive more than five lashes and said, "I could not call it severe" because he did not see blood.[120] In his report, Justice Audette described the institution as, "a magnificent brick building standing atop a high grassy hill overlooking the Shubenacadie village" and noted that the incident was a, "thrashing ordered by the Principal of the school to restore discipline."[121] Justice Audette described how the boys

were whipped, that some had their hair clipped, and that some were put on bread and water for about three days. Citing the *Criminal Code* provision permitting corporal punishment, Justice Audette pointed out that it was lawful to punish a child using physical force. Reciting the adage, "spare the rod and spoil the child," he suggested that any weaker punishment than strapping would have had no effect on the "Indian pupils," who would have responded with derision, suggesting that the boys were uncivilized and insolent:[122]

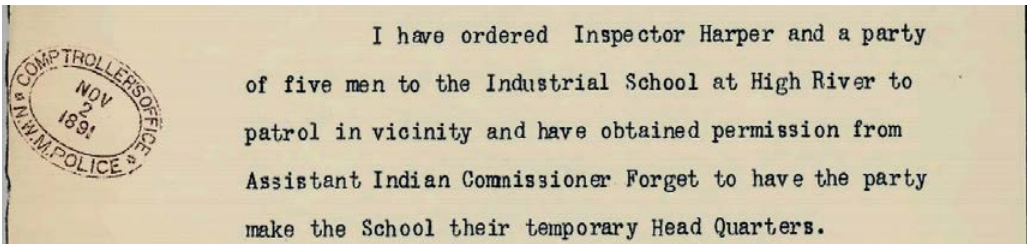
> Moreover these Indians, in terms of civilization, are children, having human minds just emerging from barbarism. If strap, cane and birch are used in the white man's schools, as a fair human expedient, why can it not be resorted to with the Indians? The laws of the land have changed the environment of the Indians and they must be taught to adjust themselves to the new environment.[123]

Justice Audette concluded that, "far from finding fault with the Principal for what he has done, he should be commended and congratulated for carefully investigating the conduct of his pupils and finding all the culprits and punishing them in a commensurate manner."[124]

Although the RCMP's 2011 report indicated that, "calls for service were a very rare occurrence from a school's perspective," documentary evidence establishes that the RCMP provided various services to officials of the institutions.[125] Precise details about the extent of police involvement in enforcing the *Indian Act* provisions and compelling attendance at the institutions remain elusive for numerous reasons, including inadequate records, the denial of access to archival materials, and the purposeful destruction of records. Records that are available, however, clearly reveal various police interventions in addition to locating truant children. To what extent the RCMP and local police pooled resources and collaborated with the religious orders and institutions in their jurisdictions varied by area, based on catchment relationships and responsibilities and detachment/division needs.

In describing the powerful role and importance of the "Mounted Police" in the 1880s–1890s to the colonial project, historian R.C. Macleod noted that the police, "were an integral part of the National Policy, helping to mold the social and political character of the region."[126] For example, in 1891, Police Commissioner L.W. Herchmer of the NWMP Regina detachment wrote to the NWMP Ottawa comptroller, advising that he deploy 20 additional men to the Macleod District as well as a strengthening of forces in Gleichen and Coutis, along with supplying an interpreter. In this letter, Herchmer stated that he ordered an inspector and five men, "to the Industrial School at High River to patrol vicinity and have obtained permission from Assistant Indian Commissioner Forget to have the party make the School their

temporary Head Quarters."[127] Herchmer explained that he took, "these precautions in view of the probable death of the Indian 'Steals Fire' and the probability of a few of the younger and more impetuous Indians attempting to give trouble."[128]



Letter from the Commissioner to the Comptroller, Macleod District, North-West Mounted Police, October 28, 1891 (NCTR Archives, 46a-c002719-d0001-001, Royal Canadian Mounted Police Fonds, Library and Archives Canada).

Given the sparce record-keeping practices at that time, it is not surprising that detailed records of the reasons for police intervention and policing activities in association with the institutions were not kept. The RCMP's 2011 report substantiated the absence of records as follows:

> It was also observed that the issue of Indian Residential Schools is virtually absent from history books on the RCMP. It was also learned from RCMP Annual Reports that the *Indian Act* was enforced by the RCMP, without details given on what sections of the Act people were convicted under....
>
> With the exception of investigation files, the RCMP has not kept records of past police interventions linked to the Indian Residential School [S]ystem. The scarcity of available RCMP data prompted the researchers to use additional sources of information such as private archives and historical government files.[129]

The TRC described how a May 1941 directive circulated by the secretary of the Indian Affairs branch to all Indian Agents, inspectors, and Indian Residential School principals outlined "radical change" in departmental policy regarding the limiting of requests for, "services of the RCMP in order to locate truant or absentee pupils from Indian residential schools."[130] The circular noted that, given the substantial costs associated with the RCMP's services to track down runaway children, Indian Agents and principals were no longer to contact the RCMP, "unless the Principals and staffs of the Indian Agencies have exhausted all their efforts." The directive stated that the, "principals of Indian residential schools are also expected to put forth every effort to return absentee pupils without cost to the Department before calling on Indian Agents and other officials to assist them."[131]

Nevertheless, archival documents indicate that the police continued to be called upon by Indian Residential Schools to deal not just with truancy but also with other matters, such as to assist with alleged uncooperative Indigenous families; to punish children for alleged behavioural issues; to arrest children for alleged offences; to deal with fires and accidents; and to enforce quarantine measures. In contrast, archival documents reveal very few instances of police being contacted to address children's reports or their family's concerns of mistreatment. Given that institutions routinely resorted to using the police, the overarching impact of police enforcement served to coerce Indigenous families and instill fear, positioning the police as agents of colonial oppression. Historical records and Survivors' testimonies unequivocally demonstrate how the threat and actual enforcement actions of police were wielded by colonial authorities to compel Indigenous compliance with unjust, discriminatory, and racist policies, perpetuating intergenerational trauma and shaping Indigenous people's perceptions of law enforcement as an instrument of oppression.

Contemporary Examples

The use of police to quell legitimate Indigenous concerns persists today, reflecting a broader pattern of State suppression. Recent examples include the Kanehsatà:ke Resistance (Oka Crisis) in Quebec; the occupation of Ipperwash Provincial Park in Ontario;[132] Indigenous fishers' actions in Burnt Church in New Brunswick and Gustafson Lake in British Columbia; and the protests around oil and gas pipelines across the country, just to name a few. As noted in the previous chapter, these instances often stem from Indigenous concerns about land and resource rights, which are routinely disregarded by governments until direct action becomes unavoidable. In all these cases, Indigenous people had raised concerns about their rights to land and resources before the direct action occurred, but these concerns were ignored by governments. After a period of time—sometimes decades[133]—Indigenous people felt they had little option than to engage in direct action and defend the lands in question. Governments responded with police force.

In addressing land disputes, alternatives to police intervention exist, such as negotiating and establishing parameters for peaceful demonstrations. However, experience has shown that senior law enforcement officials often authorize, and governments encourage, local police to completely dismantle such demonstrations. Unfortunately, governments frequently opt for these heavy-handed police responses, effectively dismissing Indigenous grievances and privileging their own perspective of law and treating Indigenous communities defending their lands as criminals. Tragically, the incidents that occurred at Oka and Ipperwash resulted in the loss of life due to pre-emptive police actions.[134] Relying on police force as a primary means to address such disputes exacerbates tensions and undermines efforts towards peaceful outcomes.

While some may defend police actions as carrying out government or court-order directives, examples like Oka and Ipperwash demonstrate that law enforcement agencies can exercise discretion in favour of non-violent resolutions. The Ontario Provincial Police's (OPP) revised *Framework for Police Preparedness for Indigenous Critical Incidents* exemplifies a proactive approach that acknowledges the complexity of Indigenous protests and prioritizes peaceful resolution.[135] This Framework explicitly recognizes the uniqueness of Indigenous disputes and that:

> Indigenous occupations, protests and demonstrations are often complex in nature and qualitatively different from single issue labour or political disputes. The OPP shall make every effort to foster awareness of historical and cultural factors that may contribute to the uniqueness and impact of Indigenous issues. These factors shall be considered when determining what police resources may be required to peacefully resolve such incidents.[136]

However, such policies are not universally adopted, and adherence may vary. For Indigenous communities, distrust of law enforcement is understandable given historical experiences and the ongoing challenges in securing fair treatment and respect for their rights, especially those involved in exercising their right to protest.

In addition, over the span of 150 years, law enforcement has also been instrumental in implementing laws aimed at segregating Indigenous communities from certain urban areas. Until the case of *R. v. Heywood* in 1994,[137] the *Criminal Code* criminalized vagrancy, providing police with discretionary powers to determine who was deemed a vagrant, often resulting in the expulsion of Indigenous people from specific locales. In addition, local bylaws were frequently used to achieve similar ends. As noted, police discretion is central to the exercise of these powers to move and exclude Indigenous people. Research confirms that Indigenous people are more likely to be stopped and searched by police than White, Asian, and South Asian individuals.[138] One of the most egregious manifestations of over-policing occurred through the notorious Starlight Tours in Saskatoon during the early 2000s. As detailed in two provincial inquiries, police deliberately targeted Indigenous men by picking them up on winter nights and leaving them stranded on the outskirts of town, sometimes without essential clothing like coats or shoes, leading to fatalities in the harsh winter conditions of the prairies.[139]

Recently, Chris Murphy, a Saskatoon defence lawyer, raised concerns about a troubling pattern of over-policing by the city's police service. He discovered that police officers were frequently stopping, searching, and ticketing Indigenous men under the guise of enforcing the local

bicycle bylaw.[140] This revelation came to light during Murphy's defence of an Indigenous man who was stopped while riding his bicycle in downtown Saskatoon. Murphy's suspicions of discriminatory exercise of police powers under the bicycle bylaw crystallized when he requested police data on bicycle bylaw tickets issued between January 2020 and December 2022. Despite facing opposition from the police, who were citing privacy concerns, a judge ordered the release of these internal records. Upon studying the records, it became apparent that a significant majority of the tickets were issued to Indigenous individuals, particularly in the downtown area. This raised serious questions about racial profiling and the selective enforcement of bylaws. However, before the court could rule on whether the bicycle stop had violated the man's rights under the *Canadian Charter of Rights and Freedoms*, the Crown unexpectedly dropped the criminal charges against Murphy's client.[141] This abrupt halt to the legal proceedings prevented a definitive resolution to the constitutional issues raised by the case. In response to Murphy's attempts to expose the internal police records, the police sought a court order to prevent him from publicly disclosing the information. Despite their efforts, a judge ruled in Murphy's favour, allowing him to discuss the records in open court.

This case has broader implications beyond the specific incident, shedding light on systemic issues of mistrust and injustice within Indigenous communities. It shows the importance of accountability in police practices and how issues of racial profiling and unequal treatment under the law continue to be a pressing concern.

Over-Policing through Bicycle Stops

Systemic discrimination and racial profiling by police officers targeting Indigenous people is pervasive, notably in the form of street checks.[142] This form of over-policing typically occurs on trivial pretexts. For instance, in 2011, an Ontario Human Rights Tribunal found that the human rights of Garry McKay, an Oji-Cree man, were violated because he was unlawfully arrested by Toronto police officers. McKay was stopped and arrested while distributing flyers in the early morning hours simply because the police assumed McKay's immaculate-looking bicycle had to have been stolen. The Tribunal noted that, "two concepts commonly identified with racial profiling are the phenomena of over-policing and pretext policing":

> Over-policing refers to the practice of heightened or targeted policing of a particular group or within a specific geographical area. Over-policing occurs when police focus greater attention on

> a racialized population or neighbourhood associated with a racialized community. Over-policing of a racialized population may also occur as a secondary consequence of deploying police resources to economically poorer areas where there is higher representation of racialized groups.
>
> Pretext policing occurs when police ostensibly detain or investigate an individual for one reason when, in reality, there is a secondary purpose or ulterior reason to the interaction. The initial contact in pretext policing, generally associated with police stops or searches, happens for a simple or innocuous reason (e.g., a traffic violation) and then leads to more intense scrutiny (e.g., vehicle search).[143]
>
> In July 2003, McKay and his friend, also an Indigenous man, were stopped by police in Toronto while they were walking with McKay's new bicycle en route to deliver flyers for work. Despite being cooperative, answering the police officers' questions and providing identification information, the police continued to suspect that McKay had stolen the bicycle. McKay was arrested for possession of stolen property, patted down for weapons, handcuffed, placed in a police cruiser, and threatened even though his bicycle did not match the description of any bike stolen in the police's records check. The police believed that the bicycle had to be stolen simply because the police perceived that McKay looked dirty and dishevelled, while the bicycle looked to be in pristine condition.[144] The Human Rights Tribunal found that the police's, "suspicions doubting McKay's ownership of the bike were the culmination of various stereotypical notions of Aboriginal people being poor, uncivilized, lacking of credibility, and prone to criminality."[145]

Research provides extensive analysis of police interactions with Indigenous populations, elucidating systemic biases and discriminatory practices. For example, studies examining police use of force and police-involved deaths highlight the stark and dangerous overrepresentation of Indigenous people. In 2006, the Ipperwash Inquiry funded a study to examine police use of force cases documented by Ontario's Special Investigations Unit (SIU).[146] This study found that "Aboriginal Canadians" were "highly over-represented" in Ontario police use-of-force cases. The study concluded that while, "Aboriginals are only 1.7% of the provincial population," they represent, "7.1% of all civilians involved in SIU investigations. The odds ratio indicates that Aboriginals are 4.2 times more likely to appear in an SIU investigation than their representation in the general population would predict."[147]

More recently, based on 2016 census data, despite comprising only 5.1 percent of the population in Canada, Indigenous individuals account for 16.2 percent of police-involved fatalities, emphasizing a disproportionate use of force against Indigenous communities.[148] Research tracking death at the hands of police when force was used on civilians has determined that there is a marked degree of disproportionality with Indigenous people, who represent 25 percent of fatalities.[149] Notably, unlike gender disparities that exist for other racialized groups where women are less likely to be subject to police use of force, the research confirms that both Indigenous men and women are targeted by police.[150] Indigenous women are, "7.1 times greater than the White female rate" to experience problematic interactions that become matters subject to the Ontario SIU's review, including heightened use of force incidents:

> Interestingly, it appears that the police in Ontario are somewhat more likely to use physical force against Aboriginal women (SIU case rate = 12.4 per 100,000) than against White males (SIU case rate = 8.6 per 100,000). Overall, the data suggest that Aboriginal males in Ontario are the demographic group who are the most likely to become involved in an SIU investigation (SIU case rate = 48.1 per 100,000), followed closely by Black males (44.5 per 100,000).[151]

These findings highlight the urgent need for systemic reforms within law enforcement agencies to address ingrained biases and ensure equitable treatment of Indigenous people under the law.

Child Welfare Apprehensions

The historical relationship between Indigenous communities and the child welfare system in Canada has also been marred by pervasive racism, reflecting the broader systemic issues of colonial genocide. As the TRC noted, although the practice of children being taken into Indian Residential Schools started to decline in the 1960s, this was replaced with the mass apprehension of Indigenous children by the child welfare system, resulting in the "Sixties Scoop."[152] The expansive apprehension of Indigenous children by child welfare services was described by the TRC as a "growing crisis" requiring urgent attention. Given the significant and distressing number of Indigenous children taken into Canada's child welfare system, this is now called the "Millennium Scoop" as it has continued from the 1960s to the present day.

Research exposes a deeply troubling reality: Indigenous children and youth are disproportionately represented in admissions to the custody of child welfare agencies, reflecting the ugly legacy of Canada's colonial past. For example, despite comprising only 4.1 percent of the population under the age of 15, Indigenous children make up approximately 30 percent of foster children in Ontario.[153] Studies show that neglect, often stemming from chronic family concerns such as pervasive poverty, intergenerational trauma and substance addictions, along with discriminatory welfare practices are the main reasons Indigenous children are taken into the child welfare system. There is little doubt that this current crisis of the over-representation of Indigenous children in the child welfare system is a modern form of historical assimilationist policies and cultural genocide, echoing the forcible removal of Indigenous children by the Indian Residential School System.

The threat of police was and continues to be a factor in child apprehensions. Although the police are not always present when children are apprehended by child welfare authorities, the law allows for police to assist with these apprehensions. The threat of police involvement can and has been used to coerce parents to hand over their children. As with Indian Residential Schools, the threat of police enforcement is often as powerful as if the police were actually present.

Child Welfare's System Echoes Colonial Past

In the heart of northern Ontario lies Grassy Narrows, a First Nation community where the plight of Indigenous children within the child welfare system is starkly evident. Megean Taylor is a resilient spirit who, like many others from her community, has endured the painful cycle of displacement and discrimination at the hands of colonial child welfare institutions. Megean recounted that she had been relocated more than 20 times during her placement in the child welfare system and was constantly subjected to racist remarks at the hands of her foster families.[154] Statistics reveal that a staggering 54 percent of children under the age of 14 in foster care across Canada are Indigenous, despite constituting just 7.7 percent of the child population.[155] Megean's experience is not an isolated incident. It is emblematic of a systemic issue deeply rooted in Canada's history of forced colonial assimilation and cultural erasure. The relentless relocation of Indigenous children from their communities mirrors the ugly legacy of Indian Residential Schools, perpetuating intergenerational trauma and severing vital cultural ties.

In 2022, the tragic murder of a 12-year-old Indigenous boy by his foster parents in Burlington, Ontario, left Indigenous communities haunted with similar memories of the abuse and death of past generations. Shockingly, despite prior investigations into the abuse of the child's sibling by the same couple, authorities continued to place the boy in their care.[156] This egregious oversight highlights a disturbing pattern of negligence and indifference within the child welfare system in relation to Indigenous children. Reports by the Ontario Association of Children's Aid Societies shed light on the profit-driven nature of for-profit group homes,[157] where Indigenous children are often seen as lucrative commodities rather than vulnerable individuals in need of care.[158] Indigenous-led organizations receive significantly less funding than their for-profit counterparts, exacerbating the disparity in resources and perpetuating a cycle of neglect.

The harrowing testimonies of former workers and residents paint a grim picture of life within these group homes, likened to modern-day prisons where Indigenous youth are subjected to dehumanizing treatment and cultural suppression. Reports reveal Indigenous youth being unduly restrained, subject to unnecessary physical force, punished for speaking their language, and labelled as "difficult" because of their trauma. Described as, "another phase of residential schools,"[159] these group homes' lack of accountability for their actions remains a reflection of the colonial racism and stereotypes against Indigenous people that continue to exist in public institutions. Such conditions not only perpetuate the trauma of colonial oppression but also constitute a form of ongoing cultural genocide.

Under-Policing

Under-policing occurs when the police ignore Indigenous communities and are not there when they are requested or needed. It also occurs when they do not investigate alleged crimes against Indigenous victims. Under-policing is a reality in Indigenous communities in all parts of Canada—on and off reserve and in rural and urban areas—and there are clear systemic roots to this problem that compound the marginalization of Indigenous Peoples. With the confirmations of unmarked burials across the country, there is some public interest in understanding these historical injustices. A common question posed is what happened in the individual cases of abuse or deaths of children at Indian Residential Schools, and why were they not the subject of police investigations over the years.

Historical Examples

As with over-policing, there are many examples of the practice of under-policing that include the failure to investigate abuses and deaths at Indian Residential Schools and the ongoing failure to investigate the disappearance and murders of Indigenous women and girls. During the Indian Residential School era, there were many crimes committed against Indigenous children, most often by the staff who worked in these institutions. To understand the extent of the abuse that Indigenous children suffered, a survey of the claims settled as part of the Independent Assessment Program (IAP) of the *IRSSA* is revealing. IAP payments were only made to those Survivors who experienced serious physical or sexual abuse while at the institutions. The IAP process compensated over thirty-four thousand Indian Residential School Survivors.[160]

When Indian Residential Schools operated, police rarely investigated the accidents and deaths of children, routinely accepting the accounts of the institution's staff about what occurred or only conducting perfunctory investigations. As noted above, police officers were deployed to enforce truancy and other repressive punishment against Indigenous children (an example of over-policing) rather than responding to reports of injuries, mistreatment, abuse, disappearances, and deaths of the children.[161] Even when investigations were commenced, such as at the Kuper Island Indian Residential School in 1939, police were unwilling or unable to counteract the institutional power that kept the genocidal system in place. Anishinaabe journalist Duncan McCue has observed that, "as far as the government and church were concerned, investigating and prosecuting wrongdoers took a backseat to protecting the school's reputation."[162] The TRC described this as an endemic dynamic in covering up sexual abuse:

> A review of the records makes it clear that sexual abuse of students occurred during this period. When allegations of abuse were brought forward by students, parents, staff, or former staff, government and church officials often did not report the matter to the police. Frequently, investigations amounted to little more than seeking out and accepting the denials of the accused school official. Even when government and church officials concluded that the allegations were accurate, they were more likely to simply fire the perpetrator than bring in the police. In some cases, individuals whose predatory behaviour was recognized were allowed to remain at the schools, which provided them with continued opportunities to abuse children.[163]

"Not a Shred of Evidence": Settler Colonial Networks of Concealment and the Birtle Indian Residential School[164]

The Presbyterian church established the Birtle Indian Residential School in 1888. Henrie B. Currie, who was appointed as principal in 1927, is one of the rare cases where a perpetrator was investigated by the police and prosecuted by a local crown attorney. But, like others, Currie was acquitted because the legal system believed him rather than the Indigenous children.

Currie was brought to trial in 1930 for the abuse of four Indigenous girls between the ages of 14 and 18 years old. Despite consistent victim impact statements of sexual violence and substantial proof against him, Currie was acquitted. He was "reinstated as principal in 1931 in the brand-new building that still stands today."[165] Currie is an example of the how abusers, who committed horrific acts of violence and abuse, evaded responsibility and how justice was denied because of inadequate police investigations, scepticism towards Indigenous victims, and active efforts by church officials and Indian Agents to undermine the victims' accounts. Prior to Birtle, Currie worked at the Alberni Indian Residential School, where he was removed as principal because of complaints of physical abuse and that several girls had become pregnant, which was blamed on the Indigenous boys in the institution.

In 1928, when the father of a Birtle victim was made aware of Currie's abuse, the father reported it to Percy G. Lazenby, the Indian Agent overseeing the institution. Lazenby forced the victim to retract her claim and failed to report the case to his superiors. It was only two years later when a White man known to the victim's father wrote a letter on the family's behalf to local authorities that the Attorney General required the Manitoba Provincial Police to investigate. The father and the other victims continued to face resistance at every stage of the investigation because the Presbyterian church and the Department of Indian Affairs stood by Currie despite the growing number of claims against him:

> The news of Currie's charges at Birtle reached church and government offices, officials worked to bolster the reputation of the accused principal. Indian Agent Lazenby, for instance, despite being aware of Currie's abuses two years earlier told the police in their 1930 investigation that "Mr. Currie was a man of impeachable character." Lazenby also refused to cooperate with the investigation. One Sergeant described him as "a close friend" of Currie's who

> was unwilling to give information that might be detrimental [to the principal].[166]

While awaiting the trial, reports of Currie's extensive bribery and coercion to force the girls to recant their stories came to light. Due to duress and the bribery of their families, the girls distanced themselves from their original testimony at trial, and Currie was acquitted.

The public institutions and the Department of Indian Affairs failed to protect the victims and their families from Currie's influence during his trial, which consequently impacted the statements and evidence provided. After the trial, the girls were charged with perjury. The girls admitted that they had lied at trial when they recanted their original stories, "They had been pressured by family members whom Currie paid to recant their stories."[167] Despite being aware that Currie was improperly acquitted, the court sentenced two of the Indigenous girls to two-year prison terms for perjury. According to the IAP School Narrative, church officials overseeing the Birtle institution continued to deny the claims:

> In a report, the Synodical Missionary Superintendent of the Presbyterian Church noted that the Principal of Birtle IRS was acquitted of "charges of immoral conduct" and that at the trial "there was not a shred of evidence in support of any of the charges" [BIR-000526-0000; BIR-000526-0001]. The report does not elaborate on the details surrounding the charges and from whom the complaints were made.[168]

Currie was principal until September 1933, when he resigned due to his wife's health.[169] Throughout Currie's tenure, "extensive strategies of a cover-up by the Indian Agent, the Presbyterian Church, and the Department of Indian Affairs, including blatant bribery, transferring accused principals to other schools, document falsification,"[170] and even forced marriages, permitted Currie to remain in a position of power where he could continuously harm Indigenous children.

The TRC concluded that the few police investigations relating to abuses perpetrated on the children rarely resulted in criminal prosecutions and that several RCMP investigations of abuse and mistreatment of children by teachers, priests, nuns, and other staff and officials involved in the Indian Residential Schools System were compromised by the federal government.[171] In 2012, the TRC requested copies of all records in the federal government's possession for every criminal conviction relating to Indian Residential Schools, and the

federal government failed to comply.[172] With the limited documents available to it at the time, the TRC found that 40 people had been criminally convicted of abusing children at Indian Residential Schools. In a chapter called "A Denial of Justice," the TRC's Final Report was critical of the fact that there were few criminal prosecutions during the operation of Indian Residential Schools. This lack of prosecutions is a cause of concern still today.

According to the RCMP's 2011 report, as the law enforcement agency responsible for policing most Indian Residential Schools, it only investigated 14 deaths of Indigenous children at the institutions between 1897 and 1951.[173] All the deaths were ruled as accidental or due to illness, with no charges laid.[174] Between 1994 and 2003, the RCMP in British Columbia established a province-wide task force—the BC RCMP Native Indian Residential School Task Force (BC Task Force)—to investigate Survivor allegations of abuse and other offences.[175] Along with a team of RCMP investigators, the BC Task Force employed a researcher who specialized in Indigenous and missionary history.[176] In 2003, based on the investigation work of the BC Task Force, the RCMP charged Edward Gerald Fitzgerald, a former boys' dormitory supervisor, with multiple counts of physical and sexual assault against ten boys at the Lejac and St. Joseph's Mission Indian Residential Schools in British Columbia. Fitzgerald, then 77, fled to Ireland, avoiding justice due to the absence of an extradition agreement. The charges resulted from the BC Task Force's efforts, which, although it was one of the largest sexual assault investigations in Canadian history, led to a mere, "total of 14 individuals [being] charged with various offenses since the first allegations were made to police in 1989."[177] According to a 2021 news report, during the time the BC Task Force was active, it, "identified 180 suspects, of whom one-third were already dead."[178] News stories repeatedly noted that perpetrators of Indian Residential School abuse evaded justice because of delays, gaps in the justice system, and the death of suspects and victims. While the BC Task Force investigated 974 separate allegations, the TRC concluded that, in nine years of work, only five men were ever convicted of a crime.[179]

Only a few police investigations have brought to light the traumatic experiences endured by Indigenous children in Indian Residential Schools, highlighting the widespread abuse and mistreatment that occurred within these institutions. Between 1996 and 2008, the RCMP in the Northwest Territories investigated allegations of physical abuse, sexual assault, and emotional trauma inflicted on children at Grollier Hall in Inuvik and at Turquetil Hall in Chesterfield Inlet. None of the 236 abuse and sexual abuse allegations from Turquetil Hall were brought to court.[180] The OPP's investigation into St. Anne's Indian Residential School in Fort Albany, Ontario, similarly resulted in few charges and fewer convictions. The five-year investigation into abuses at St. Anne's led to charges against seven former staff and convictions for five.[181] None involved the deaths of children.

Police investigations into crimes committed at Indian Residential Schools are continuing, and recently, one arrest was made.[182] A decade-long RCMP criminal investigation into the Fort Alexander Indian Residential School, operated by the Catholic church in Manitoba, resulted in one charge of indecent assault being laid in 2022 against Arthur Masse, a retired priest.[183] The RCMP began investigating allegations of sexual abuse at the institution in 2010. The Fort Alexander Indian Residential School opened in 1905 on the territory of the Sagkeeng First Nation. The assault of Victoria McIntosh, a ten-year old Anishinaabe girl, was alleged to have occurred sometime between 1968 and 1970, when the school closed. Although, "widespread sexual abuse of students was an open secret at the school" and "public revelations of abuse at the school first came to light during a historic 1990 interview that Phil Fontaine, then-Chief of the Assembly of Manitoba Chiefs, gave to the CBC," no investigation was launched until a decade later.[184] A RCMP spokesperson acknowledged that the investigation was hampered by the passage of time[185] and was awaiting advice regarding charges from the provincial Crown prosecutors.[186]

A review of the Fort Alexander criminal investigation file by Crown prosecution services and consultation with crown attorneys took two years to determine that no further charges would be laid.[187] When a statement was issued that the Crown was expected to publicly announce its charging decision, Sagkeeng First Nation Chief Derrick Henderson shared with the media that he was not informed of the status of the case, saying, "it's something that's kind of expected from our people now.... We're just kind of waiting. It's a wait and see game all the time. It's unfortunate, but that's the way the system is."[188] In a Winnipeg court in May 2023, McIntosh recounted her traumatic experience of being sexually abused over 50 years ago by Masse, who was 93 years old at the time of the trial. Masse, wearing his priest attire, pleaded not guilty and denied the allegations, claiming no memory of the incident.[189] During the two-day trial, McIntosh, while holding an Eagle Feather, testified and described how Masse had assaulted her in a bathroom in the institution, which left her terrified and sickened.[190] She recounted Masse's attempts to fondle and kiss her, emphasizing her fear and distress during the ordeal. Despite feeling terrified, she managed to escape and reported the incident to the police in 2015 following a resurgence of memories triggered by a settlement claim meeting.

Masse was acquitted after the two-day judge-alone trial. While Justice Candace Grammond acknowledged the likelihood that the assault had occurred, she could not conclude beyond a reasonable doubt who was the perpetrator.[191] Although McIntosh had recalled that her attacker wore a priest collar, Justice Grammond noted that there, "were several priests

working at the school during the time of the alleged assault who could've been wearing similar collars."[192] Although Justice Grammond acquitted Masse, the judge found McIntosh to be a credible witness and Masse's credibility to be lacking:

> Grammond found elements of Masse's memory to be unreliable, including his account of how the school's in-house complaints process worked at the time. He suggested he received hardly any complaints in his time at the school.
>
> Masse also said he couldn't remember what kind of uniforms the students wore at the time and suggested that school policy allowed students to go to the bathroom without asking permission.
>
> Grammond found his recollection of the complaint process and bathroom policy to be "disingenuous."
>
> "Aspects of the accused's evidence were self-serving and intended to distance himself from the complainant's allegations and to downplay the rigid school structure described by the complainant," said Grammond.[193]

Contemporary Examples

More recently, examples of the failures of police services across the country to investigate the cases of missing and murdered Indigenous women and girls have been exposed. One example of this police indifference, among many, is the case of serial killer Robert Pickton, who preyed on women, particularly Indigenous women, for years in the Downtown Eastside of Vancouver. Between 1978 and 2001, at least 65 women disappeared from Vancouver's Downtown Eastside. Pickton, who operated a pig farm in nearby Port Coquitlam, was charged with murdering 26 of the women. He was convicted on six charges and sentenced to life in prison. In a jail cell conversation with an undercover police officer, Pickton admitted that he disposed of his victims' bodies at a rendering plant. The murders led to the largest serial killer investigation in Canadian history, and Pickton's pig farm became the largest crime scene in the country.[194] The case became a flashpoint in the broader issue of missing and murdered Indigenous women and girls in Canada. In 2012, a provincial inquiry into the case concluded that "blatant failures" by police, including inept criminal investigative work, compounded by police and societal prejudice against sex trade workers and Indigenous women led to a,

"tragedy of epic proportions."[195] Discussing the police response, or lack thereof, in the Pickton case, Justice Wally Oppal concluded in his report *Forsaken: The Report of the Missing Women Commission of Inquiry* that:

> Systemic bias against the women who went missing from the DTES [Downtown Eastside] contributed to the critical police failures in the missing women investigations.... Bias is an unreasonable departure from the police commitment to providing equitable services to all members of the community. The systemic bias operating in the missing women investigations was a manifestation of the broader patterns of systemic discrimination within Canadian society and was reinforced by the political and public indifference to the plight of marginalized female victims.[196]

Missing and Murdered Indigenous Women and the Prairie Green Landfill

Indigenous women and girls have been disproportionately targeted by violence and are subject to higher rates of disappearances than non-Indigenous women and girls in Canada. In the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry), law enforcement agencies were criticized for their systemic bias and discrimination against Indigenous communities, which affects how seriously police take reports of missing Indigenous women and girls. This bias can lead to delays or failures in investigating cases involving Indigenous victims. Cases of missing and murdered Indigenous women and girls were often under-reported or poorly documented by police, leading to further delays or even dismissals in investigations. These systemic failures and negligence within law enforcement agencies contribute to an ongoing crisis in relation to disappeared Indigenous women and girls and failure of the police to track patterns of violence and properly respond.

The recent Manitoba landfill search is a situation that highlights the institutional unwillingness to investigate crimes against Indigenous women and girls. Morgan Harris, Marcedes Myran, Rebecca Contois, and an unidentified woman named by Indigenous Elders as Mashkode Bizhiki'ikwe or "Buffalo Woman" went missing in Manitoba. All four women were murdered by Jeremy Skibicki,[197] and it is believed that their bodies were dumped at the Prairie Green Landfill around May 2022.[198]

While the Winnipeg Police believe the remains of at least Morgan and Marcedes are in the Prairie Green Landfill, police refused to search the landfill, citing safety concerns and a low likelihood of success.[199] Cambria Harris, the daughter of Morgan Harris, described the lack of police response as dehumanizing and stated that she should not have to beg officials to aid in recovery efforts.[200] The reclamation of bodies is important to the families of the murdered women to properly grieve and to honour their loved ones.

The government has suggested that asbestos, and concerns for the workers, was the main cause for denying the search. Family members asserted that, if local police services do not have the resources or skills to carry out the landfill searches, the government should bring in others to assist with the search.[201] However, no attempts or requests were reported despite the extended passage of time. Further, a feasibility study, "commissioned by an Indigenous-led committee" found that toxic chemical concerns are not unique to the Prairie Green Landfill and that such concerns always exist when conducting landfill searches. They noted that appropriate steps can be taken to reduce or prevent any complications that may arise.[202] Regardless of whether the women's bodies are found in the landfill, a search is owed to the murdered women and their families. Choosing not to search is a, "breach of dignity."[203] It is the responsibility of authorities to assure the families of the victims that everything within their power is being done to retrieve and recover the bodies of the women and bring them back to their families.

This issue is reflective of the institutionalized racism against Indigenous people. The 231 Calls for Justice in the MMIWG Inquiry's Final Report, "characterize(s) this violence as a systemic issue" against Indigenous communities.[204] Although some speculated that costs may be a barrier, Indigenous advocates point out that resources invested into other landfill searches within Canada have not been considered. The search budget for Nathanial Bretell[205] was not, "publicly contemplated nor calculated in advance by policymakers and neither was it communicated by any media."[206] Stating the cost to the public without adequate information and without placing it in a historical and cultural context allows the media to spread denialism. Narrow framing and scrutinization of the search are forms of discrimination as there is a clear disparity in who public institutions decide to search for and prioritize.

Instead of helping Indigenous families and communities locate their missing loved ones, policing services have been actively trying to prevent Indigenous communities from demonstrating and advocating for the search to occur. Police have

repeatedly been used to stop Indigenous communities from speaking out against law enforcement's failure to conduct the necessary investigations and searches required to recover the bodies of the women. Using police to quell Indigenous voices instead of conducting searches highlights hypocrisy and disparity in the police's resource allocation where Indigenous communities are chronically under-supported by law enforcement agencies compared to non-Indigenous communities. Actively fighting the ongoing crisis about the safety and wellness of Indigenous women by repressing public protest is again a reflection of institutionalized racism against Indigenous people.

Initially, the Manitoba government under former Premier Heather Stefansson had stated that it would not support search and recovery efforts. As a result of the advocacy by the families of the women and Indigenous communities across the country, the new provincial government under Premier Wab Kinew pledged to help locate the women's bodies.[207] In January 2024, faced with delays and a lack of commitment, Cambria Harris filed a human rights complaint against Kinew. The Manitoba government has since committed $20 million to searching the Prairie Green Landfill. The federal government will match the funds to help bring answers and healing to the families. Though feasibility studies estimated the costs to be twice the amount committed, Kinew stated that, "every cubic metre for that section of Prairie Green can be searched."[208] At the time of writing this Final Report, no set timeline has been shared for the search.

The repeated examples of police failing to investigate requests from families to look for missing and disappeared Indigenous women and girls suggests that, for many police, Indigenous people are simply seen as less worthy victims and not deserving of police services. In 2019, the MMIWG Inquiry in Canada released its final multi-volume report addressing the systemic issues surrounding violence against Indigenous women and girls.[209] The MMIWG Inquiry's findings were extensive and highlighted various systemic policing failures and deep-rooted issues contributing to the violence. The MMIWG Inquiry identified colonialism, racism, sexism, and intergenerational trauma as the root causes of the disproportionately high rates of violence against Indigenous women, girls, and LGBTQ2S+ individuals. The MMIWG Inquiry concluded that Canada's historical and ongoing systemic discrimination against Indigenous peoples, particularly the failures of law enforcement, had a significant role in perpetuating violence and failing to protect Indigenous women and girls. It criticized policing services for their inadequate response to addressing the crisis of missing and murdered Indigenous women and girls. It called for increased accountability, improved data collection,

better coordination among government agencies to address the problem effectively, and other legal reforms to remediate the underlying causes that have led police to ignore the crisis of missing and murdered Indigenous women and girls.

At the core of the under-policing that Indigenous people face is racism—both systemic and direct. Though there are many examples of how racism among police services contributes to under-policing and heightened vulnerability of Indigenous people, the long-standing, entrenched, and grave concerns related to the Thunder Bay Police Service (TBPS) is one such example.

Systemic Racism in the Thunder Bay Police Service

Former Senator and Justice Murray Sinclair conducted an investigation into the TBPS Board on behalf of the Ontario Civilian Police Commission during the 2017–2018 period. The investigation unearthed a deeply troubling reality: the Police Service Board had failed to acknowledge and effectively address a pervasive pattern of violence and systemic racism against Indigenous people in Thunder Bay. Sinclair's analysis revealed a stark discrepancy between the Board's mandate and its actual performance, particularly in relation to protecting and serving Indigenous communities. Sinclair's report drew attention to long-standing challenges in the Board's relationship with Indigenous people, highlighting systemic racism and a lack of trust as critical factors contributing to the serious crisis in policing. Sinclair identified the following factors as part of the systemic problem:

- A perception that police will minimize, dismiss, or fail to investigate complaints of violence against Indigenous people with diligence, particularly if intoxicants are involved;
- Poor communication with Indigenous victims of crime and their families by the TBPS;
- A fear that formal complaints by Indigenous individuals directed to the TBPS will result in repercussions against the complainant; and
- A general failure by TBPS to address recurring categories of crime against Indigenous people in a comprehensive and systemic way.[210]

Citing the writings of Tanya Talaga, Sinclair stated that, "the state of policing and of community/Indigenous relations in Thunder Bay today cannot be understood

without reference to the community's past, and its legacy of colonial institutions and structures."[211] Sinclair emphasized the urgent need to address the high level of violence and victimization experienced by Indigenous people, noting that, "it is reasonable to expect that special efforts would be made to ensure the safety and security of that population, and to put resources, plans and policies in place to protect them."[212] To address these shortcomings, Sinclair put forth 32 recommendations to dismantle the systemic discrimination in the policing of Indigenous peoples in Thunder Bay. Key among the recommendations was that an administrator be appointed to oversee the functions of the Police Service Board. The ultimate goal identified by Sinclair was to create a police service that is truly responsive to the needs of Indigenous Peoples who have long been marginalized and mistreated within the city.

In Thunder Bay, Ontario, the way in which police have investigated the deaths of Indigenous people was the subject of an in-depth review and report entitled *Broken Trust: Indigenous People and the Thunder Bay Police Service*.[213] The *Broken Trust* report was issued by the Office of the Independent Police Review Director (OIPRD) in 2018. The report was made in response to significant concerns raised by the Indigenous community regarding the TBPS. The OIPRD reviewed 37 sudden death investigations involving Indigenous people from 2009 to 2018.[214] Among the OIPRD's findings was that racism within the TBPS resulted in faulty investigations and the classification of deaths as accidents rather than as crimes.[215]

As a result of the findings of the *Broken Trust* report, at least nine of the 37 cases were subject to reinvestigation. Subsequently, more cases came to the attention of the government, further reinvestigations were launched, and Indigenous communities and human rights advocates have called for the dismantling of the TBPS because of its racist and troubling treatment of Indigenous people.

Calls to Dismantle the Thunder Bay Police Service Due to Misconduct, Neglect, Racism, and Violence[216]

Although the *Broken Trust* report identified systemic racism and significant deficiencies in the investigation of Indigenous people's deaths in 2018, these continue to be significant issues today. Indigenous families who have lost loved ones and sought the assistance of the TBPS to no avail have called for the disbanding of the TBPS and dissolution of the Police Service Board. This recent demand was

announced during a press conference by the Nishnawbe Aski Nation (NAN) at Queen's Park on April 22, 2024, citing entrenched systemic discrimination in the city's police and a long-standing and deep history of distrust between Indigenous Peoples and the TBPS. NAN, along with the families of Corey Belesky, Jenna Ostberg, and MacKenzie Moonias—who were all found deceased in the past 18 months, with the TBPS failing to take appropriate action—emphasized the need for a new police service to take over the investigations into these deaths.

NAN's Grand Chief, Alvin Fiddler, criticized the TBPS for repeatedly failing to properly investigate the deaths of Indigenous community members, stating that the families have no confidence in the current police service given their ongoing mistreatment of Indigenous people and disregard for Indigenous concerns and needs. He called for the immediate disbanding of the TBPS and the creation of new support services to ensure justice for the affected families. While the criticism of the TBPS and calls for disbanding have existed for years, the newly created position of an inspector general of policing has brought renewed attention to the issue. Though acknowledging that he had the authority to disband a police service, the inspector general of policing noted that this is a measure of last resort and that he would be looking into the families' complaints.[217]

Julian Falconer, a lawyer representing the families, pointed out that the situation has not improved since the 2018 release of the *Broken Trust* report, which identified systemic racism within the TBPS. Falconer mentioned that a separate investigation, Project Cedar, is ongoing into the deaths of 13 Indigenous people in Thunder Bay, but he criticized the lack of progress and the re-traumatization experienced by Indigenous families seeking justice.[218] Falconer noted that the *Broken Trust* report found that nine sudden death investigations of Indigenous people were so flawed that they required reinvestigation. Additionally, a confidential report from February 2022 identified that 14 more sudden deaths and 25 unresolved cases of missing and murdered Indigenous women and girls in Thunder Bay also needed reinvestigations. Falconer expressed frustration with the TBPS's handling of these cases, describing the investigative process as stalled and ineffective. He noted the mishandling of Stacey DeBungee's death in 2015, where premature conclusions were drawn without proper investigation. In 2023, a police officer involved in DeBungee's case was found guilty of discreditable conduct and neglect of duty.

In addition to these complaints of failure to properly investigate deaths, other systemic issues persist within the TBPS. Indigenous residents of Thunder Bay have also filed human rights complaints of police brutality against the TBPS. Among

them is John Semerling, a 61-year-old Métis man, who was allegedly assaulted by TBPS Constable Ryan Dougherty during a mental-health wellness check in November 2022. Dougherty has been charged with assault causing bodily harm by Ontario's Special Investigations Unit. Semerling reported that Dougherty used excessive force, leaving him with a concussion and a broken nose and did not have his body-worn camera activated.[219] This incident is one of many involving allegations of excessive force by the TBPS. Tanya Robinson, a First Nations woman, also filed a complaint after being wrongfully arrested and mistreated by police due to mistaken identity in September 2022. In late 2021, the Ministry of the Attorney General initiated an investigation by the OPP into alleged misconduct within the TBPS. This probe resulted in charges against three police employees.[220]

The TBPS's former police chief, Sylvie Hauth, and the TBPS's former legal counsel, Holly Walbourne, have been charged with obstruction, obstructing justice, and breach of trust. The majority of the charges relate to allegations that Hauth and Walbourne were "practising deception" in interactions with the Thunder Bay Police Service Board and the Ontario Civilian Police Commission.[221] Walbourne resigned coinciding with the start of the OPP's investigation. Hauth, who became police chief in 2018 following the *Broken Trust* report, was suspended in June 2022. Hauth resigned in January 2023 after 30 years of service, thus avoiding a police misconduct hearing. Sergeant Mike Dimini was also charged with two counts of assault, along with charges for breach of trust and obstructing justice. None of the allegations or criminal charges have yet to be proven in court.[222]

Indigenous communities in Thunder Bay continue to raise alarm over the persistent racial profiling and violence faced by Indigenous people, emphasizing the need for significant systemic change within the policing services.

Entrenched racism and the perception that Indigenous people are less worthy victims persist within Canadian law enforcement today. In the wake of the 2018–2019 reports by Senator Murray Sinclair, the OIPRD, and MMIWG Inquiry, the Standing Committee on Public Safety and National Security unequivocally highlighted Canada's legacy of colonialism and systemic racism within policing, including the RCMP, and the resulting intergenerational trauma.[223] When a community faces over-policing, this excessive surveillance breeds distrust and suspicion towards law enforcement. Residents understand they are under heightened scrutiny and subject to more coercive tactics than their counterparts. They rightfully feel targeted for harsh treatment. Conversely, when a community experiences under-policing, this insufficient attention also fuels distrust and suspicion. In this scenario, residents comprehend

that they are deemed less worthy of police assistance; their lives deemed less valuable than other people.

Indigenous communities across Canada often find themselves subjected to both over- and under-policing, exacerbating a profound and justified mistrust of law enforcement. This deep-rooted distrust corrodes any hope for a positive relationship between Indigenous communities and the police. As distrust festers, tensions escalate, further deteriorating the situation. In such an environment, positive interactions and effective policing become increasingly elusive, perpetuating a cycle of mistrust and exacerbating existing tensions. Until such systemic disparities are addressed and Indigenous peoples are treated as worthy members of society, there is little chance of fostering genuine trust. In his investigation into the death of Neil Stonechild, one of the victims of the horrific Starlight Tours, Justice David Wright of the Saskatchewan Court of Queen's Bench highlighted an exchange between Neil Stonechild's sister Erika and one of the lawyers at the inquiry:

> **Q.** In general terms, can you explain to us why ... you don't go to the police?
>
> **A.** In general terms. There was no trust established there at all, period. My mother tried to teach us children that under every circumstance that you need help, call the police. That's their job, that's what they're there for. When you have conflict with that, what you've been taught all your life, but you're experiencing a whole lot of other things that suggest otherwise, then I'm sorry—there were a few incidences in my personal life and our entire family's. And I'm talking—when I say my entire family I'm talking about my mother and my brothers, you know, my uncle, my cousin, whoever happened to be most in our home at the—at that time. They were never reported simply because there is no trust. And it didn't—and it's not going to say that I'm slashing up the Saskatoon Police Force because, please, there is a lot of good people out there, I know that there is. But we can't ignore the fact that they're human, everybody's a human being. We didn't have no trust for the City Police. If we had more trust for the City Police, my mother would have been reporting them left, right and centre, every time they went AWOL from somewhere, or run away from their community home where she was trying so hard to help them, you know, understand their cycle of life, or whatever you want to call it, they're way of being and holding themself.[224]

Justice Wright found that in Saskatchewan there are two solitudes, two different realities lived by the Indigenous and the non-Indigenous populations.[225] Non-Indigenous people viewed the police as trusted civil servants who are there to protect them, while Indigenous people viewed the police as perpetrators of harm.

A similar conclusion was reached in the *Broken Trust* report regarding the TBPS, "our meetings revealed nothing short of a crisis of trust afflicting the relationship between Indigenous People and TBPS. This crisis of trust was palpable at most of our meetings, whether the participants were youth, Elders, service providers, professionals or Indigenous leaders."[226] Recently, a 2021 independent civilian review into Toronto policing practices, conducted by former Ontario Court of Appeal Justice Gloria Epstein, heard evidence from Indigenous communities and families who reported missing loved ones to their local police services to no avail. These Indigenous families shared that they, "experienced dismissal, contempt or outright discrimination, when police evoked racist stereotypes and assumptions about Indigenous people as drunks, runaways or prostitutes." Families reported that police ignored their concerns that something went awry with their loved ones and responded with, "assumptions that Indigenous people were 'drunks,' 'runaways out partying' or 'prostitutes unworthy of follow-up.'"[227] Justice Epstein found that systemic discrimination contributed to many deficiencies in the police investigations, noting that the findings were, "not dependent on an intention to discriminate but on the effect of differential treatment on communities traditionally overpoliced and underserviced."[228] Epstein issued 151 recommendations.

In January 2019, Bruce McArthur pled guilty to eight counts of first-degree murder and was sentenced to life imprisonment without the possibility of parole for 25 years. His crimes shocked the nation and prompted widespread scrutiny of issues related to the policing of LGBTQ2S+, Indigenous, and racialized communities and their well-being and safety. The case also highlighted the ongoing challenges faced by marginalized communities in accessing justice and protection from violence. Former Ontario Court of Appeal Justice Gloria Epstein led the Civilian Review that issued the 2021 report known as the *Missing and Missed Report*, examining systemic failures within the Toronto Police Service's (TPS's) handling of missing persons cases, including disturbing problems with how the police investigated the missing person reports regarding the victims of serial killer Bruce McArthur.[229]

In an extensive four-volume report, the Epstein review identified serious shortcomings and flaws in the TPS's efforts to deal with missing persons cases, which allowed

McArthur to evade detection and continue his crimes for an extended period. The *Missing and Missed Report* highlighted several key points related to missing Indigenous people, including that, "Indigenous women and girls, including LGBTQ2S people, are—to an unconscionable degree—more vulnerable to violence":

- Mistrust and strained relationship: the report acknowledged a strained relationship between Indigenous communities and the TPS, rooted in a legacy of over-policing and under-protection. This legacy has led to a deep mistrust of the police among Indigenous communities.
- Systemic barriers: the report identified systemic barriers that prevent effective investigations into missing persons cases from Indigenous communities. These barriers include biases, stereotypes, and a lack of understanding of Indigenous communities' needs and experiences.
- Neglected investigations: missing persons cases from marginalized communities, including Indigenous and racialized communities, were often left unsolved for long periods, given low priority, and lacked coordinated investigation efforts. This neglect contributed to a perception of indifference towards these communities.
- Community engagement: the report emphasized the need for strong community engagement and civilian participation in missing persons investigations. It suggested that current policing methods are inadequate in addressing the complex issues faced by marginalized communities.
- Recommendations: the report provides numerous recommendations to improve the relationship between the police and marginalized communities, including Indigenous people, aimed at fostering trust, increasing accountability, and enhancing cultural competence within policing. Specific recommendations were made to address the unique needs of Indigenous communities, such as creating partnerships with Indigenous organizations, deploying Indigenous liaison officers, and acknowledging the historical context of colonial policies in shaping distrust towards the police.[230]

The Epstein review highlighted the urgent need for transformative change to address policing's systemic failures in investigating missing persons, particularly cases involving Indigenous individuals.

The findings of the Sinclair report, the *Broken Trust* report, the MMIWG Inquiry, and the Epstein review resonate beyond their specific locations, shedding light on systemic racism and discrimination prevalent across all Canadian jurisdictions. Acknowledgements by police services nationwide regarding their roles in over- and under-policing Indigenous communities signify a belated but necessary step towards accountability. Despite the myriad recommendations from numerous reports and public inquiries for reform, with only a few listed above, there has been little substantive change within Canadian police services to address issues of racial bias, systemic discrimination, and mistrust that have hindered effective investigations and efforts to ensure the safety of Indigenous people and communities.[231] One of the primary recommendations made by the MMIWG Inquiry was for Canada to develop an independent national police task force that is specifically designed to meet the needs of family members and survivors of violence against Indigenous women, girls, and LGBTQ2S+ people.[232]

The deep-seated distrust of law enforcement held by Indigenous communities is rooted in both historical injustices and contemporary realities. The scepticism harboured by Indigenous Peoples highlights the urgent need for concrete actions and sustained efforts by law enforcement agencies to rebuild trust and prevent the chronic victimization of Indigenous people and their over-criminalization. Given this historical and harsh reality of over- and under-policing, Indigenous communities have valid concerns about the ability of police services to conduct meaningful investigations into past crimes, including the missing and disappeared children and unmarked burials, and to prevent future crimes being committed against Indigenous people.

Crown Attorneys

Crown attorneys (also called "crown prosecutors") are the legal representatives of the Attorney General, responsible for prosecuting offences that are before the courts. Crown attorneys work closely with the police agencies that investigate the offences being prosecuted. For the most part, the crown attorneys who prosecute offences under the *Criminal Code* are provincial or territorial government lawyers,[233] employed within the portfolio of the provincial or territorial Attorney General's office.[234] The role of crown attorneys within the criminal legal system varies depending on the approach that each provincial or territorial jurisdiction takes with respect to whether the crown attorney's office lays charges.

Under the *Criminal Code*, there are three categories of criminal offences: summary, indictable, and hybrid. Except for "summary offences" that are minor,[235] there is no time limit, or, in other words, no statute of limitations, for serious crimes in Canada. The more serious offences are referred to as "indictable offences," and there is no restriction on prosecuting

these offences for events that occurred decades earlier. In practice, prosecutions for historic criminal offences have been for murder, manslaughter, and sexual assault. However, most criminal offences are "hybrid offences." Hybrid offences can be prosecuted as summary or indictable at the sole discretion of the crown attorney. In most provinces and territories, it is the police who lay the criminal charges, and it is the crown attorney who then prosecutes those offences. Crown attorney pre-charge screening programs exist in British Columbia, Quebec, and New Brunswick. In these provinces, the police will investigate and recommend that charges be laid, but it is the crown attorney who reviews and approves charges before police lay them and ultimately decides whether prosecutions will ensue. These jurisdictions are referred to as "charge approval" jurisdictions because the criminal process only begins after the crown attorney determines that it should.

In provinces utilizing charge approval or pre-charge screening, the rates of stayed or withdrawn charges are significantly lower compared to other provinces. These pre-charge screening processes require the crown attorney to review and approve charges before the police can lay them. Using this approach, Quebec experienced a 29 percent lower rate of charges being stayed or withdrawn, New Brunswick had 37 percent, and British Columbia exhibited 54 percent, averaging a drop of 40 percent of stayed or withdrawn charges across the three provinces with pre-charge screening. A pre-charge screening pilot project deployed by the RCMP in three Alberta communities found that the pre-charge screening reduced the number of charges laid by 29 percent.[236] Conversely, Ontario's rate of stayed or withdrawn charges was notably higher at 68 percent, indicating a trend of over-charging and putting forward cases into the court system that are unlikely to lead to convictions.[237]

According to the Ontario Human Rights Commission, "it is noteworthy that the fact of being charged, in and of itself or in conjunction with pre-trial custody, can have serious negative consequences for charged individuals in terms of financial hardship (job loss, legal expenses, etc.), diminished employment prospects, interrupted education pathways and reputational harm."[238] Specifically with respect to addressing systemic discrimination against Indigenous Peoples, the Ontario Human Rights Commission draws attention to the fact that bias and racism have resulted in the over-representation of Indigenous people in the criminal justice system and that this should be factored in during any pre-charge screening process. Notably, on the other side, there are also equity factors that should be considered that will weigh in favour of laying a charge when the victim of the offence is an Indigenous person, including the over-representation of Indigenous women and girls as victims of violent offences.[239] Such equity factors are recognized in sentencing principles pursuant to section 718.04 of the *Criminal Code*, which specifically codifies Indigenous Peoples and females as being especially vulnerable.[240]

Like the police, crown attorneys exercise a great deal of discretion. Even in jurisdictions that are not based on charge approval, it is the crown attorney who ultimately decides whether a matter will proceed to trial or plea or whether they will be dealt with in a different manner—for example, the withdrawal of charges or diversion. The Supreme Court of Canada has said that when deciding on a particular case, the crown attorney is akin to a mini minister of justice.[241] Crown attorney discretion is not something that can be reviewed by the courts.[242] While crown attorneys retain a significant level of discretion, provincial attorneys general often provide input or guidance to crown attorneys on how that discretion should be exercised through set standards and guidelines. Increasingly, these crown attorney guidelines are public.[243] Crown attorneys have a significant role and responsibility in the criminal legal system. If crown attorneys do not carry out that role fairly, then miscarriages of justice can result. As an example, the wrongful conviction of Donald Marshall Jr. in 1971 was due in large part to the Crown's failure to discharge their professional obligations arising from their belief that Donald Marshall was guilty, whether the evidence showed that or not.[244]

In 1988, the Manitoba government established the Aboriginal Justice Inquiry. The inquiry was co-chaired by Justice Alvin Hamilton and Justice Murray Sinclair, who later became the chair of the TRC. The Aboriginal Justice Inquiry was called in response to two specific incidents. The first incident was an example of under-policing. In 1987, two non-Indigenous men went to trial in The Pas for the death of Helen Betty Osborne in 1971. Osborne was from Norway House First Nation and was in The Pas to attend school. By the time of the trial, it was clear that many in The Pas knew a great deal about the crime when it occurred, but there were no developments in the case for 16 years.[245] The second incident was an example of over-policing, the death of J.J. Harper. In 1988, Harper, the executive director of the Island Lake Tribal Council, was shot by a Winnipeg police officer when walking on the street one evening in Winnipeg. The day after the shooting, Winnipeg police exonerated the officer who killed Harper.[246]

The Aboriginal Justice Inquiry issued a comprehensive report that examined all aspects of the criminal legal system and Indigenous Peoples in 1991. When discussing the role of the crown attorney, the Aboriginal Justice Inquiry's report found that:

> a significant part of the problem is the inherent biases of those with decision making or discretionary authority in the justice system. Unconscious attitudes and perceptions are applied when making decisions. Many opportunities for subjective decision making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of

> the problem is that while Aboriginal people are the objects of such discretion within the justice system they do not "benefit" from discretionary decision making and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences.[247]

Citing this finding from the Aboriginal Justice Inquiry's report, the Ontario Court of Appeal in 2012 in *United States v. Leonard* wrote:

> The sound exercise of prosecutorial discretion is fundamental to the fair administration of criminal justice. The decisions of prosecutors have enormous implications for accused persons and for the justice system. Discretionary decision-making was identified in the Report of the Aboriginal Justice Inquiry of Manitoba ... as a source of injustice to Aboriginal people in the criminal justice system.[248]

Racist and Dehumanizing Behaviour in Court

The trial of Bradley Barton in 2015 for the killing of Cindy Gladue, a 36-year-old Cree mother of three children, shows another aspect of problematic prosecutorial behaviour. In that case, the crown attorney, as well as defence counsel and witnesses, repeatedly referred to Cindy Gladue as "Native." This behaviour was criticized by the Supreme Court of Canada:

> I wish to comment briefly on the language used to refer to Ms. Gladue at trial. Witnesses, Crown counsel, and defence counsel all repeatedly referred to Ms. Gladue as a "Native girl" or "Native woman"—by the Court of Appeal's count, approximately 26 times.
>
> In my view, while in some cases it may be both necessary and appropriate to establish certain biographical details about an individual such as his or her race, heritage, and ethnicity where that information is relevant to a particular issue at trial, and while witnesses may at times rely on such descriptors without being prompted by counsel, it is almost always preferable to call someone by his or her name. There may be situations where it would be appropriate for the trial judge to intervene to ensure this principle is respected.

> Being respectful and remaining cognizant of the language used to refer to a person is particularly important in a case like this, where there was no suggestion that Ms. Gladue's status as an Indigenous woman was somehow relevant to the issues at trial. While there is nothing to suggest that it was anyone's deliberate intention in this case to invoke the kind of biases and prejudices against Indigenous women discussed above, the language used at trial was nevertheless problematic. At the end of the day, her name was "Ms. Gladue," not "Native woman," and there was no reason why the former could not have been used consistently as a simple matter of respect.[249]

Here, the Supreme Court of Canada recognized how both crown attorney and defence counsel dehumanized Cindy Gladue through their use of language. Labelling Ms. Gladue as "Native woman" rather than identifying her by her name clearly demonstrated a lack of respect to Cindy Gladue's humanity as a caring mother of three children, a person who was dearly loved, and a member of a community.

Another disturbing aspect of the trial was that an intimate part of Cindy Gladue's deceased's body was submitted as an exhibit in the trial by the crown attorney. Troubled by the decision to introduce this exhibit, Victoria Perrie, a Métis lawyer, wrote:

> On March 10, 2015, an Alberta Court made the decision to allow a deceased Indigenous woman's vaginal tissue into open court. One of the most recognizable victims in modern history, Ms. Cindy Gladue, was reduced to a piece of tissue in a truth-seeking process that did not include the truths of Indigenous groups, in hopes of providing justice. Members of the media, the victim's family, the jury, bailiff, and every other average Joe that came into the courtroom that day watched Ms. Gladue's dignity stripped away, her most private area handled like an object in open court. Objectified, dehumanized, and raped as an aid to explanation for the jury, the image was projected onto a large screen at the front of the court room for all to see.
>
> At no point … was Ms. Gladue's family or spirituality considered. Your status as deceased should not release you from physical integrity and security. Because you are deceased, your body does

> not become the property of the State to objectify as seen fit, at the whim of a court. Consent should have been obtained from Ms. Gladue's next of kin and/or community.[250]

In their intervener factum to the Supreme Court of Canada, the Women of the Métis Nation/Femmes Michif Otipemisiwak wrote:

> The dismemberment of an Indigenous woman's body and the use of it as evidence in a trial was a shocking assault by the state on Indigenous women. This is a matter of great importance to the Indigenous women of Canada. It should be a matter of great concern to this court because it has brought the justice system into disrepute. This horrific act is the part of the trial that has overshadowed all other considerations in the minds and hearts of Indigenous women in Canada. We are horrified by what happened. Now in Canada, quite justifiably, Indigenous women fear gender-based violence by the state in the name of "justice." The state cannot be permitted to re-victimize women in this manner. No justice was served by this barbaric, cruel and violent indignity to an Indigenous woman. It was a secondary assault by the trial process itself on a family already traumatized by the crime. It was also an assault on all Indigenous women.[251]

Although the display of Gladue's body parts was before the Supreme Court of Canada, there was no mention of this issue in its 262-paragraph decision.

Cindy Gladue's family has spoken out about how harmful their experience with the criminal justice system has been due to the disrespect towards Ms. Gladue during the trial processes. This disrespect and dehumanization stand in stark contrast to her family's description of her: "Cindy was a protector. She was a protector to many, and she lit up the room with her loving, joyful spirit. We want her to be remembered as the beautiful woman she was."[252]

The discretion held by crown attorneys is subjective and can be influenced by various factors, including the nature of the offence, the strength of the evidence, the interests of justice, and the specific circumstances of the accused individual. Factors such as stereotypes, cultural misunderstandings, and institutional biases may influence crown attorneys' decision-making processes, leading to disparate outcomes for Indigenous individuals. Additionally, socio-economic factors, such as poverty and lack of access to legal resources, may further exacerbate

these disparities. As such, there can be no doubt that the subjective nature of prosecutorial decision-making also makes it susceptible to bias. Crown attorneys, like all individuals, may hold implicit biases based on factors such as race, ethnicity, gender, socio-economic status, and other personal characteristics. These biases can influence their decision-making at various stages of the criminal justice process, including charging decisions.

Given the important role that provincial crown attorneys have in the criminal justice system and their discretion to prosecute cases and negotiate plea bargains, they must be vigilant to the risks of inherent biases. Research has indicated systemic racism against Indigenous people in Canada's criminal justice system, and the discretion held by crown attorneys is one of the areas where this bias can manifest. Indigenous people in Canada are over-represented in the criminal justice system as both victims and offenders. Scholarship has highlighted that Indigenous persons experience a disproportionate number of wrongful convictions.[253] Research has also shown that, in addition to facing higher rates of arrest, prosecution, and incarceration compared to non-Indigenous people, Indigenous individuals are more likely to be charged, prosecuted, and convicted for similar offences compared to non-Indigenous individuals.[254] This suggests that crown attorneys may exercise their discretion in a manner that disproportionately targets Indigenous people and contributes to their over-representation in the criminal justice system.

Coroner's Inquests and Indian Affairs Boards of Inquiry

The Coroner and Medical Examiners System

There is no overarching federal authority with respect to death investigations. The responsibility to investigate deaths rests within the jurisdiction of each province and territory that has developed its own laws and coroner or medical examiners systems to review sudden deaths. The specific role of the coroner or medical examiner is governed by the relevant legislation—for example, the *Coroners Act* or the *Fatalities Inquires Act*—in each province and territory.

While the terms "coroner" and "medical examiner" are often used interchangeably, each represent a different legal system used to investigate deaths. Medical examiners are physicians, but coroners do not need to be physicians, except in the provinces of Ontario and Prince Edward Island.[255] The majority of provinces/territories have coroner systems, while medical examiner systems exist in Alberta, Manitoba, Nova Scotia, and Newfoundland and Labrador. Coroners and medical examiners conduct reviews and investigations into approximately 15–20 percent of all deaths.[256] The role of the coroner or medical examiner is to determine

how someone has died. Coroners and medical examiners are not called upon to investigate every death occurrence, only those deaths that appear to not be related to natural causes. In addition to investigating sudden or unexpected deaths, under some circumstances—for example, if a person dies in police custody, jail, or a nursing home, depending on the jurisdiction—the coroner or medical examiner will automatically become involved.

Although a coroner does not have to be a physician in seven of the provincial/territorial jurisdictions, they will rely on information from physicians who usually are specifically trained in forensic pathology and death investigations and conduct examinations or autopsies in cases that are referred to them. In addition to relying on medical evidence, coroners can also gather other information regarding the circumstances of a person's death. Coroners and medical examiners generally are responsible for answering five questions regarding the deceased person and their death: who died, when, where, how, and by what means did they die. The "who" question seeks to identify the deceased person. "When" speaks to the time of death, although time cannot always be determined precisely. "Where" refers to the location of the death, which is significant because, as noted above, deaths that occur in certain settings—such as jails—will result in further mandatory steps being taken. In terms of the "means of death," there are typically five categories: natural causes, accident, homicide, suicide, or undetermined.

In the coroner or medical examiner system, a finding of death by homicide, however, does not mean that a crime has necessarily been committed. In this context, homicide refers to a death that is caused by another person. The term "homicide" is not synonymous with the criminal offences of manslaughter or murder. Most legislative systems for coroners and medical examiners across the country have some provision to conduct some form of public "inquisitional" hearing. These are often referred to as inquests or public inquiries. These hearings are generally limited to issuing recommendations for the prevention of further deaths in similar circumstances.[257] The hearing is conducted in a public forum and relies on a jury panel to answer the five questions. Coroner's juries often propose measures to avert similar occurrences, but these recommendations are not legally binding. In some provinces, such as Manitoba, rather than having a jury panel, fatality inquiries are presided over by a judge.[258]

Prior to Canada's Confederation, the Office of the Coroner was first established in Upper Canada in 1780 and the first *Coroners Act* was passed in 1850.[259] Until 1892, the Office of the Coroner could commit people for trial for murder after holding an inquest.[260] The power to commit people to trial was repealed in 1892 with the enactment of the *Criminal Code*, and the coroner was authorized to identify a person to a magistrate or justice for issuing criminal charges.[261]

Institutional Responsibilities Ignored

The intergenerational violence and harms committed against Indigenous families by the Canadian State was not perpetuated simply through the solitary mechanism of Indian Residential Schools but, rather, through an entire machinery of colonial institutions that worked together to conceal the deaths and fates of Indigenous children. Operating in tandem with Indian Residential Schools, Indian Agents, police, and medical officers contributed to the narrative that the institutions and their staff were never at fault for the disappearance or deaths of the Indigenous children in their care. The injustice and inhumanity experienced by Indigenous children connected to the Indian Residential School System did not end with their deaths but persisted as police investigations, the Department of Indian Affairs' Board of Inquiries, and inquests and inquiries concealed any church or State liability for the events surrounding or contributing to the children's deaths.

In 1894, section 11 of the *Indian Act* granted the minister of Indian Affairs the authority to make Indian Residential School attendance mandatory and enforce severe penalties to those who refused to abide by the law.[262] With mandatory attendance being strictly enforced, Indigenous children were legally compelled into a colonial system that simultaneously subjugated and neglected them. When Indigenous children ran away, the Department of Indian Affairs did little to fund search efforts, assigning the financial and staffing burden on institutional authorities, who often considered such searches to be not worth the energy and expenditure.[263] In these contexts, when runaway children disappeared or died, Indian Residential Schools simply did not investigate and/or belatedly reported the situation, leaving families without any answers to how their child died and why.[264] When formal reviews of the circumstances or investigations did take place, such inquiries routinely failed to acknowledge how the institution's practices neglected the children and how the misdeeds of staff contributed to their disappearances or deaths.[265]

Until 1935, the federal government, through the Department of Indian Affairs, did not enforce any consistent policy or procedure for reporting and investigating the deaths of Indigenous children.[266] When such a policy was officially circulated for deaths of children at Indian Residential Schools, what followed were performative investigations into the circumstances of the death that typically cast blame on the children for their own demise and discharged any responsibility of the settler adults overseeing the children. The concerns and complaints of the parents of the deceased children were either rejected as disgruntled or ignorant grievances or mollified with assurances to take care of their other children and provisions of goods and supplies.[267]

Prior to 1915, the Department of Indian Affairs reported annually on the number of children who died in the care of Indian Residential Schools, in part as the product of tracking tuberculosis cases.[268] This reporting appeared to cease for 20 years until 1935. A new policy was enacted by way of Official Circular C1-1-23, issued on April 17, 1935, wherein Indian Affairs required the Indian Residential Schools, Indian Agents, and attending medical officers to complete a Form Number 414 Memorandum of Inquiry into the Cause and Circumstances of the Death (Form 414 Memorandum) when a child died at an institution. Pursuant to the Form 414 Memorandum, the Indian Agent was also required to convene and participate in a "Board of Inquiry." According to the 1935 Circular and Department of Indian Affairs documentation, when a child died at an Indian Residential School, the principal was required to immediately inform the Indian Agent of the death.[269] In turn, the Indian Agent was then responsible for organizing a Board of Inquiry, consisting of themselves as chairman, the principal of the Indian Residential School, and the medical officer for the purposes of reviewing and documenting the circumstances surrounding the child's death.[270]

The three-person Board of Inquiry was required to promptly assemble in person to jointly complete the Form 414 Memorandum and forward it to the Department of Indian Affairs.[271] The principal, the physician who attended the deceased child, and the Indian Agent were expected to each fill out and sign a prescribed "Statement" that was attached to the Form 414 Memorandum, answering a standard set of questions regarding the condition and circumstances of the child's death. If the child died because of an accident, the Indian Agent was also required to take statements of witnesses and attach these statements to the Form 414 Memorandum, all of which were to be sent to the Department of Indian Affairs.[272]

The three-person Board of Inquiry was also required to promptly inform the parents or guardians of the deceased child about their child's death and provide notice of the Board of Inquiry.[273] According to instructions on the Form 414 Memorandum, the Board of Inquiry ideally was to be held within 48 hours after the child died. Parents or guardians were allowed to attend, or send a representative, to the inquiry to provide a statement. Although the deceased child's family was to be informed of the inquiry, the Form 414 Memorandum instructions directed that the inquiry was not to be delayed by more than 72 hours to accommodate the parents/guardians to attend. As such, families, if informed about their child's death, were given very little time to travel to the location of the inquiry, which was typically held at the Indian Residential School. The TRC described this as, "an extreme limitation, considering the relative isolation of many of the residential schools and the limited communications of the day."[274] If the Indian Agent was located, "at such a distance from the residential school as to make it impracticable" for the Indian Agent to attend the Board of Inquiry, the

Indian Agent was required to designate, "a responsible local resident," such as a justice of the peace or a member of the RCMP or provincial police, as their proxy. In these circumstances, the Department of Indian Affairs would pay "a reasonable fee" based on the Indian Agent's recommendation to the individual substituting for the Indian Agent.

The Board of Inquiry was convened for the purposes of reviewing, documenting, and accounting to the Department of Indian Affairs on the events surrounding the death of the child. In a February 1937 letter, Philip Phelan, the chief of the Training Division of the Department of Indian Affairs, wrote to the Indian Agent of Port Alberni, British Columbia, advising that the completion of the Form 414 Memorandum and the Board of Inquiry were, "necessary in order to protect both the school authorities and department officials, and, at the same time, give the Department full information regarding the circumstances attending the death of a pupil at a residential school."[275] The Form 414 Memorandum explicitly stated that the Board of Inquiry was, "not designed to take the place of, or prevent, any other inquiry, including an inquest, which may be required by law."[276] As such, even when a Board of Inquiry reviewed the child's death and reported back to the Department of Indian Affairs, this should not have precluded proper investigations by the police, coroner, or medical examiner.

Although the Form 414 Memorandum set out the logistics for the Board of Inquiry, no information was specified regarding the handling of the child's body or burial. Most notably, even though the Form 414 Memorandum stipulated that the Department of Indian Affairs would pay a reasonable fee to the Indian Agent's proxy to substitute for the Board of Inquiry's duties because of the distance of travel, there was no information stated on the face of the Form 414 regarding who would bear the cost of travel for the family to attend the inquiry nor information of who would assume the costs of transporting the child's body back to their home community.[277] Rarely were any details of burials or transportation of the child's body noted in the Board of Inquiry's handwritten or typed summaries about the death. Various letters and documentation exchanged between the Department of Indian Affairs, Indian Residential School administrators, and Indian Agents clearly show that the federal government disputed absorbing funeral expenses and refused to fund the costs of returning the bodies of the children back to their families and communities. Upon receiving requests for reimbursement, which were often attached to the Form 414 Memorandum, the Department of Indian Affairs frequently rejected these requests, explaining that the departmental policy was not to pay for funeral expenses when a child died and required, "the school management to provide funeral expenses, if they are unable to obtain same from parents or other relatives."[278]

For example, in letters exchanged in December 1943 and January 1944 between the principal of the Shingwauk Indian Residential School in Sault Ste. Marie, Ontario, the Indian Agent for the region, and the superintendent of the Department of Indian Affairs branch reveals that the superintendent refused to pay the account of $25 for the costs of the casket and the undertaker's work in moving the body of Fred Nahwehgezhic from the hospital back to the institution for burial. In addition to refusing to pay for these expenses, the superintendent noted that the principal and the Indian Agent had failed to complete and forward the Form 414 Memorandum. As such, the Form 414 Memorandum on Fred's death was completed over a month after his death. Upon receiving the completed Form 414 Memorandum, the Department of Indian Affairs continued to maintain that, "it has not been the policy of this Department to pay funeral expenses when a pupil dies in a residential school."[279]

Further, the instructions from the Department of Indian Affairs were unclear and confusing. While it was evident that the Form 414 Memorandum needed to be completed if the child died at an Indian Residential School, it appears that the Form 414 Memorandum was not always completed if the child died after being sent to a hospital or sent elsewhere by the institution. For example, archival records from 1942 indicate that the Department of Indian Affairs did not strictly enforce the requirement to complete the Form 414 Memorandum if the child was admitted to hospital and died there.[280] However, other archival records indicate that a Form 414 Memorandum was required if the child died in hospital, notwithstanding how long the child was admitted for treatment.[281] These inconsistencies and discrepancies resulted in a patchwork of approaches in reporting the deaths of children connected to Indian Residential Schools.

Through an exploration of various inquiries into the deaths of Indigenous children in Indian Residential Schools, it is evident that the provincial and territorial death investigation systems, and the Canadian legal system, routinely overlooked accountability of the Indian Residential School officials and State-related agencies.[282] Though the TRC documented many of these children's deaths, an examination of the details contained in various Form 414 Memorandums and the record-keeping surrounding the mandated Department of Indian Affairs' Board of Inquiries reveal that it was rare that any fault would be laid with the institutions for the circumstances contributing to the children's deaths. Instead, blame was routinely placed on the children, all the while disrespecting the rights and interests of bereaved Indigenous families. Set out below are examples of instances where inquiries into the deaths of children at Indian Residential Schools effectively concealed the causes of children's deaths.

Boards of Inquiry: Deflecting Responsibility

A review of an array of Form 414 Memorandums and ancillary documents recording the deaths of Indigenous children at Indian Residential Schools from 1935 to 1951 revealed how Boards of Inquiry, purportedly to provide transparency and accountability about the events surrounding a child's death, deflected or concealed institutional responsibility. While the Form 414 Memorandum required that parents/guardians be promptly notified of a child's death, records confirm many instances when parents/guardians were not notified.[283] For example, March 1937 correspondence from Simon Wesley to the Secretary of the Department of Indian Affairs explicitly requested that Indian Affairs assist in helping to, "arrange that parents be notified of any sickness or death of their children" at the Sioux Lockout Indian Residential School.[284] The letter expressly stated that, "it is always through other sources that we find out of the children's welfare, and not by the school authorities" and questioned why the families were not being notified.[285] In response, the acting principal explained that condolence letters were written to the parents of deceased children, but the parents had complained that they did not receive the letters.[286]

Documentation revealed that the Boards of Inquiry often singularly relied on the accounts of institutional staff implicated in the incidents. These reports were rife with self-serving explanations that were used to mislead parents of the deceased children into thinking nothing could have been done to prevent their child's death. Set out below are examples of Boards of Inquiry that worked to conceal information of the deaths of children.

Death of Simon Francis Jefferies, St. Augustine's Indian Residential School, Sechelt, British Columbia

Simon Jefferies, a 13-year-old boy at the St. Augustine's Indian Residential School, started to feel ill with abdominal pain on the morning of September 2, 1935.[287] Officials attributed Simon's stomach ailment to the fact that he, along with, "a number of boys were taken sick as the result of eating green apples which they had stolen."[288] The other boys recovered, but Simon continued to be unwell such that a doctor was called six days later. When Simon's situation deteriorated on September 11, 1935, he was transported to St. Paul's Hospital in Vancouver. At the hospital, it was determined that Simon had chronic peritonitis and likely also suffered from "old tuberculosis." Emergency surgery for intestinal obstruction was performed on September 14, but Simon died after the operation. The hospital's post-surgery records noted that Simon was, "rather ill nourished."[289]

According to the Form 414 Memorandum, Dr. F. Inglis, the physician who provided services to the institution, expressed concern that he was not notified earlier about the boy's illness.[290]

The Form 414 Memorandum materials included a short half-page written record, dated September 17, 1935, of the verbal statement provided by Abraham Jefferies, Simon's father. The statement, likely taken by the Indian Agent as part of the Board of Inquiry, claimed to document that the father thanked the Indian Agent and physicians for their assistance in Vancouver. The father was noted to have stated that, "the trouble at the school is that children feel sick and won't tell the Principal until they are real bad. I am quite satisfied with everything done for my boy and have nothing to say."[291] On September 19, 1935, Indian Agent F.J.C. Ball wrote a two-page letter to Dr. Harold W. McGill, MD, the deputy superintendent general of Indian Affairs reporting on the results of the Board of Inquiry into Simon's death. In this correspondence, Ball stated that he believed Simon's death, "was no doubt hastened as a result of eating green apples."[292] Ball further indicated that, given Simon's underlying condition, the institution likely, "did all they could for the boy," saying the, "only criticism of the school authorities is that sickness is not reported to the medical officer, Dr. Inglis, quickly enough," noting that another child was also hospitalized with appendicitis where the doctor, "was not called until the boy was in serious condition."[293]

Even though he suggested the institution was not to be blamed for Simon's death, the Indian Agent's correspondence detailed numerous concerns regarding the institution's new administrator and treatment of the children. He outlined significant unease about the, "education, welfare, safety and general wellbeing of the pupils" in relation to the new leadership at St. Augustine's.[294] Ball wrote that he felt it was his, "duty to report these matters," even if it exceeded his authority[295] and indicated that he personally could not, "see why these schools should be held sacrosanct and above all criticism."[296] Ball further raised concerns regarding how the new principal, Reverend Father Fahlman, ran the institution.[297] Ball pointed out that food purchases had been reduced by Fahlman, indicating that, "the feeding of the children is not up to the former standard."[298] He also referenced the hospital's clinical report of Simon that showed that he was "rather ill nourished" and presumed poor nourishment contributed in part to Simon's illness.[299] Additionally, Ball raised concerns regarding the new principal's complete overhaul of staff, noting strong objection that children were now left with little instruction and care. Ball pointed out that the previous Sister Nurse at the institution, "knew all the Sechelt Indians and their family histories" and was trusted by the doctor. Ball indicated that he and Dr. Inglis believed that the former nurse would have recognized the symptoms of the other boy hospitalized for appendicitis and that, as such, the boy's situation would not have become so acute.[300] Ball continued to write that he lacked, "clear understanding of an agent's duties with regard to residential schools," pointing out that some principals cooperate with Indian Agents and encourage inspections, whereas other principals resent or were disinterested in Agents.[301] Ball summed up his negative experience with the head administrator of

St. Augustine's as follows, "I know that the satisfactory standard at Sechelt [St. Augustine's] School for the care of the pupils has not been maintained under present regime and that not only is cooperation lacking but there is a veiled hostility becoming more and more apparent which I can not yet understand."[302]

While the deputy superintendent general acknowledged Ball's letter and indicated that it had been referred to the attention of Schools and Medical Branches of the Department of Indian Affairs, no other documentation is contained in the archival file indicating if and/or how the concerns were addressed. Notwithstanding the Indian Agent's detailed and explicit criticisms of the administration of the institution, the Form 414 Memorandum concluded that the, "School care was judicious, and everything possible was done for the boy."[303] Additional records from 1937 relating to the deaths of four children as the result of a measles epidemic at St. Augustine's reveals that the concerns regarding the care of the children had not abated and that parents were calling for the institution to be investigated. In a monthly report submitted to the Department of Indian Affairs in January 1937, F.J.C. Ball, the same Indian Agent as in Simon's case, wrote:

> There are still many bitter complaints from the Indian parents, as to the treatment of the pupils at the school, and I am afraid it may end with some untoward incident. On my last visit to the reserve, the Indians stated they were going to hire "the best lawyer in Vancouver" to investigate the school, as soon as they earned enough money from logging and fishing.[304]

A month later, on February 4, 1937, Ball wrote a letter to the secretary of Indian Affairs reporting that Indigenous parents and children had raised concerns of mistreatment, including physical punishments around the time of one child's death, but, "this was denied by the school authorities and could not be corroborated."[305] As Ball described, "the mental attitude of both pupils and parents toward the School is very unfavourable and complaints are continually being made."[306] He referenced forwarding an enclosed letter, presumably written by Simon's brother and provided to the Agent by the boy's father. Notably, the file included this handwritten letter dated January 22, 1937, two years after Simon's death. Although it is not specified, based on the Indian Agent's description, it is likely the letter that was authored by Simon's brother, who was also at the St. Augustine's Indian Residential School. The letter states:

Sechelt School

Dear Father,

> I am writing you a few lines to let you know things that are going on in the school. I wonder if the chiefs could do something about it.
>
> We are not allowed to talk to our parents or any of those who are in the Village, we're not even allowed to smile or say hello at them. This school is not a school at all it is a jail house now its more than a jail.
>
> And the food is a pig's food it is not fited (sic) for human being to eat it [illegible] apple cores, rotten spreads and worms and rotten meat and they force us to eat it that's why some boys get sick they don't like to eat it ... [illegible] ... but that's all I can tell you.
>
> Arthur Jeffries.[307]

The Indian Agent concluded his letter to the secretary of Indian Affairs saying that, "unless definitely instructed to do so," he would not make any recommendations as a past investigation had been unhelpful. T.R.L. MacInnes, the secretary of Indian Affairs, sent a letter in reply, acknowledging that the Indian Agent was, "not satisfied with the management of the Sechelt Residential School" and, as such, a copy of the Agent's letter was being forwarded to the Indian Commissioner to investigate the complaints.[308] No other documents are included in the archival file indicating what, if anything, occurred in the way of an investigation. According to the IAP School Narrative for St. Augustine's, Father Falhmann served as principal until September 1937.[309]

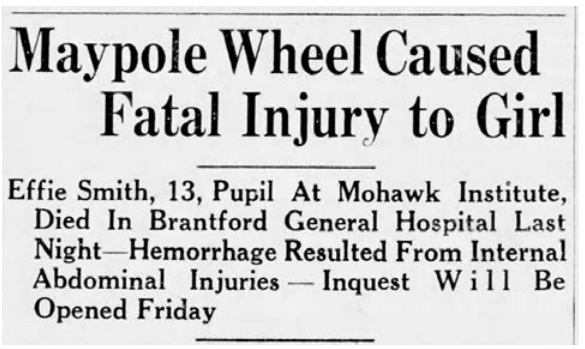
Death of Effie Smith, Mohawk Institute, Brantford, Ontario

One of the few cases that led to an actual coroner's inquest and recommendations regarding children's safety at an Indian Residential School involved the death of Effie Smith, age 13, from the Muncee-Delaware Nation on May 11, 1936. Effie had been taken to the Mohawk Institute in Brantford, Ontario. While at the institution, Effie was crushed under a one-hundred-pound metal maypole wheel, which was part of the institution's playground equipment that had only the previous week been subject to repair.[310] Effie was transported to the Brantford General Hospital where she died of internal bleeding and a ruptured pancreas.[311]

According to the investigation that ensued, the five girls playing on the maypole had looped a plank through the maypole chains to make a swing. As the girls were swinging, the maypole wheel slipped its axel and collapsed, crushing Effie underneath it.[312] During the investigation, C.H. Lager, the boys' master at the institution, acknowledged that the pole was cracked. However, Lager gave the Board of Inquiry a statement indicating that

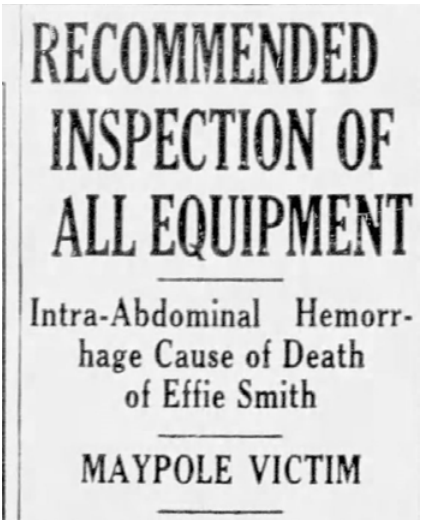
the accident was caused by the unbalanced weight of the five girls using the maypole at one time.[313] Senior Mistress Hardie stated that, although she was on duty at that time, she did not have someone supervising the girls while they played on the equipment.[314] Immediately after the accident, the uninjured girls ran to report the accident to Hardie.[315] Hardie confirmed that, had she seen the girls playing, she would not have permitted the girls to play on the equipment in that manner. The day after Effie's death, the principal informed the Department of Indian Affairs that the situation was, "purely an accident" and "no one was to blame."[316]

Following the Board of Inquiry, the Indian Agent made no recommendations regarding the lack of supervision of the children, nor did he note the fact that the equipment was cracked. The RCMP attended the accident site and documented that the maypole was a "home made affair" and that the pole had an obvious split.[317] A Coroner's Inquest was convened at the police station in Brantford on May 15, 1936.[318] The death and the inquest were reported in the *Brantford Expositor* on May 16, 1936, which indicated that a large crack could be seen along the pole.[319]



Maypole Wheel Caused Fatal Injury to Girl

Effie Smith, 13, Pupil At Mohawk Institute, Died In Brantford General Hospital Last Night—Hemorrhage Resulted From Internal Abdominal Injuries — Inquest Will Be Opened Friday



RECOMMENDED INSPECTION OF ALL EQUIPMENT

Intra-Abdominal Hemorrhage Cause of Death of Effie Smith

MAYPOLE VICTIM

Left: "Maypole Wheel Caused Fatal Injury to Girl," *Brantford Expositor*, May 12, 1936; Right: "Recommended Inspection of All Equipment," *Brantford Expositor*, May 16, 1936. Material republished with the express permission of Brantford Expositor, a division of Postmedia Network Inc.

The principal, Reverand H.W. Snell, together with Dr. R.H. Palmer and C.H. Lager, gave evidence at the Coroner's Inquest, which was led by Dr. D.A. Morrison and Crown Attorney F.E.D. Wallace.[320] During the Inquest, the crown attorney questioned the institution's officials about their knowledge of the large crack, which was denied by Principal Snell despite the crack being reported as clearly visible. Lager, the boys' master, confirmed that he was

aware of the crack but did not think it was a danger to the children.[321] Officials were also questioned about whether the Department of Indian Affairs contributed funds to the institution's playground equipment. The Coroner's Inquest jury, consisting of seven people, found the maypole unsafe and recommended that the playground equipment be regularly inspected by a competent inspector.[322] Despite the jury's conclusions and recommendations, the institution's officials, the Indian Agent, and the RCMP maintained that the death was purely accidental and no responsibility could be placed on the institution.[323]

To prove that the institution was not negligent, the principal wrote to the Department of Indian Affairs protesting the jury's verdict.[324] To support his objections, the principal noted that Effie's mother accepted the conclusion that no blame could be attached to the institution and that her son would continue to attend the Mohawk Institute. Notably, although Effie's death and the Coroner's Inquest are of public record, the IAP School Narrative makes no mention of them.[325]

Deaths of Allen Willie, Johnny Michel, Maurice Justin, and Andrew Paul, Lejac Indian Residential School, Fraser Lake, British Columbia

Another example of an inquest and news coverage into the deaths of Indigenous children was the case of four boys who ran away from the Lejac Indian Residential School. Allen Willie, age nine, Johnny Michel, age seven, Maurice Justin, age eight, and Andrew Paul, age eight, ran away from the institution sometime during the day on January 1, 1937.[326] The institution was under the control of Bishop Coudert that morning as the principal, Father Patrick McGrath, was away until early evening. A search for the boys was not started until the next day. Their bodies were found frozen on Fraser Lake near the Nautley Reserve.[327] According to Priest Jean Donze, who supervised the boys earlier that day, the boys were only wearing indoor clothes. A report indicated that the boys likely froze to death because the night temperature was minus 20 degrees Celsius with six inches of snow on the ice.

The Indian Agent was only informed of the deaths two days later. A Coroner's Inquest was held on January 4, 1937. According to a news report citing the coroner, Dr. C. Pitts, an "Indian witness" at the Inquest gave testimony that corporal punishment caused the boys to run away.[328] However, the coroner later stated to the press that there was no evidence to indicate that cruelty at the institution prompted the boys to take the "fatal trek." The Inquest determined that the deaths were accidental. Although the Indian Agent maintained that there was no blame to be attached to anyone at Lejac, the six-person jury, "recommended the limiting of corporal punishment at the school."[329] The facts that came to light through witness testimony at the one-day Inquest revealed that, on the morning of January 1, the boys

had asked the bishop for permission to go visit their families, but the bishop had refused on the basis that the boys were too young to leave the institution alone. When the boys did not appear for their 6:00 p.m. supper, the Sister informed the bishop that the boys were missing; however, the bishop did not advise the principal until after 9:00 p.m. No reason was noted for the delay in reporting. Around 1:00 p.m. the next day, the principal asked the institution's driver to go in his car to the Nautley Reserve to locate the boys. The principal did not send the driver earlier that day because the driver was also the institution's postmaster and was busy with those duties. Upon attending the Reserve, the driver learned that the boys never arrived. Further inquiries ensued, a search party was finally organized around 4:00 p.m., and the bodies were discovered that evening.

Reports indicated that truancy had increased at the institution with the appointment of two new priests from France who did not speak English. While concerns were raised regarding excessive corporal punishment reported by "Indian witnesses,"[330] institutional authorities denied any mistreatment or negligence and instead suggested the reverse, that truancy was increasing because corporal punishment was being discouraged by the Department of Indian Affairs.[331] The principal testified at the Coroner's Inquest that, of the 71 children at the institution, 90 percent of them were there against their parents' wishes.[332] The principal implied that the problem was that, when children ran away, their parents welcomed them home, did not notify the institution, and did not return the children. The principal stated that it was, "practically impossible to prevent" the children from running away.[333]

In making its recommendations, the jury noted that the institution could have taken "more definitive action" on the evening the boys were discovered missing and that there should be "more co-operation" between the authorities and the parents of the children to, "avoid any repetition of such an incident."[334] The jury further noted corporal punishment should only be administered by English-speaking staff.[335] In official Department of Indian Affairs correspondence that followed the Inquest, the Indian Agent, Lejac Indian Residential School authorities, and the Department of Indian Affairs all maintained that the concerns were exaggerated and that no fault should be attributed to the institution. The IAP School Narrative indicated that, in March 1937, the Indian Commissioner interviewed some parents and the staff at the institution. The IAP School Narrative noted that the, "transcript of the interviews contains references to the use and methods of corporal punishment at the school" and documented that the Indian Commissioner concluded that there was no evidence to show that punishment had anything to do with the boys leaving the school.[336]

Death of Courtland Claus, Mount Elgin Indian Residential School, Ontario

On June 11, 1939, Courtland "Cody" Claus, four years old, fell 30 feet from a window at the Mount Elgin Indian Residential School in Muncey, Ontario.[337] He was transported to London Children's Hospital, where he died the following day.[338] Cody had an ear infection and was being kept in bed on an upper-level floor of the institution, when he is alleged to have climbed onto the windowsill and fell out of the second-storey window.[339] The room's window did not have a screen because it had been removed for repair, and steps had not been taken to block access to the window. Cody died from severe fractures.

Dr. T.R. McLeod, the medical superintendent who was called to the scene and examined the body, explicitly noted in the Form 414 Memorandum that he, "did not approve of [a] four-year-old child being left alone in a dormitory" and that the fatality could have been avoided if the institution had replaced the screen on the room window.[340] Similarly, A.D. Moore, the Indian Agent, also noted that precautions should have been taken to fasten the window when the screen was removed for repair and described the building as dangerous for children because of the low windowsills.[341] Notwithstanding acknowledging that a four-year-old child requires attention and that Cody was not properly supervised, the Indian Agent made observations suggesting that Cody was partly at fault. The Indian Agent described little Cody as a child who, "had his own way" and "did not obey orders given to him by his superiors."[342]

Despite the physician's clear notations suggesting liability on the part of the institution, Cody's father, Jesse Claus, signed a statement one day after the child's death. In the statement, the father purportedly stated that he did not place blame on the institution. Jesse Claus' statement, which appears to be written for him by the Indian Agent and witnessed by the medical superintendent, cited the death as, "a pure accident" and that, "no blame could be attached to any member of the staff" of the institution.[343] In the same statement, Jesse Claus indicated that he wished that his two other children remain at the institution.[344] Documentation in the file indicated that the Indian Agent and institution had granted admission to Cody, despite being under the age for enrollment, because the father was "a cripple" and the parents were separated.[345]

The local media reported that the death was considered an accident by Dr. A.R. Routledge, the chief coroner, who consulted with Norman Newton, the local crown attorney, and concluded that no Coroner's Inquest would be ordered.[346] In a rare example of a Form 414 Memorandum detailing what the institution did with the body of a deceased child, it is noted that Principal Oliver B. Scrapp arranged for the local undertaker to provide a casket and look

after Cody's body. This is likely because someone had to be responsible for the removal of Cody's body from the hospital where he had died the day after the fall. Following the Board of Inquiry, the principal wrote to the Dr. H.W. McGill, the director of Indian Affairs, in a letter dated June 13, 1939:

> Because of the sad nature of the case I assumed responsibility for the funeral arrangements at this end and transportation of the body to the home on the Brantford Reserve. The undertaker's account, including preparation of the body and supply of the casket will be approximately $20.00. I will submit the accounts properly certified in due course.[347]

In a report attached to the June 13 letter, the principal informed that a Coroner's Inquest was unnecessary because the incident was deemed an accident by the RCMP, the crown attorney, and the coroner.[348] According to the RCMP's division report, dated June 13, 1939, the RCMP officials looking into the matter agreed not to hold the Inquest.[349] No information was recorded about why a four-year-old sick child was left unsupervised in an upper-level room with a wide-open window. In a letter dated June 21, 1939, R.A. Hoey, the Department of Indian Affairs superintendent of welfare and training, wrote back to the principal indicating that if the institution had properly installed window screens, the accident may not have occurred and that the Department of Indian Affairs would not be reimbursing the institution for the cost of the casket:

> This accident emphasizes the fact that young children confined to the infirmary should not be left alone unless every precaution has been taken to prevent any accident. In this particular case it would appear that if there had been a proper screen in the window the boy would not have fallen out. *No provision is made in the appropriation for Indian Education for the funeral expenses of pupils at Indian residential schools as such costs are usually provided by the school management*.[350]

Deaths of John Kioki, Michael Matinas, and Michael Sutherland, St. Anne's Indian Residential School, Fort Albany, Ontario

On April 18–19, 1941, three boys—John Kioki, Michael Matinas, and Michael Sutherland—ran away from St. Anne's Indian Residential School in Fort Albany, Ontario.[351] It was suspected that the boys drowned while trying to cross a frozen lake; however, their bodies were never recovered.[352] According to the policy of the Department of Indian Affairs when children ran away, Indian Residential School officials were required to oversee a thorough

search of the area for the missing children.[353] The staff at St. Anne's did not commence a timely search for these three boys. The eventual search was unsuccessful, and the manner of death was never confirmed.[354]

During the RCMP's investigation, Father Langlois, the principal, was asked why the matter had not been reported to the police in a timely manner and why the staff had failed to organize a prompt search for the boys.[355] Langlois indicated that the staff assumed that the boys would return at night or during mealtime. Langlois confirmed that he only reported the matter to the Mission at Moosonee one week later. The RCMP's report indicated that Langlois and the Mission at Moosonee failed to notify the police.[356] Bishop Henri Belleau of the Mission at Moosonee told Indian Affairs in correspondence that it did not occur to him to notify the RCMP because, "we could see no use in doing this soon."[357] The Indian Agent was also not notified when the boys went missing. Bishop Belleau reported to the Department of Indian Affairs that the Kioki family had, "no words of reproach" against the institution or the principal and claimed the families were satisfied with the institution's efforts.[358] However, documentation in the archived file clearly indicates otherwise. Charles Kioki, father of John, provided a statement to the RCMP that he suspected that the boys had run away due to mistreatment and was suspicious of the thoroughness of the search for the boys.[359] Kioki indicated that he had heard from the children prior to their escape that they were not well fed and were being mistreated. The children also reported that their letters were censored, and if they included anything undesirable about the institution the letter would be torn up by those in charge.

A second father, Albert Matinas, also informed the RCMP that the children reported being mistreated. Matinas was told by other children that the priests instructed the children to stay silent on the matter and not to disclose anything they had seen or experienced while being kept at the institution during the winter.[360] The RCMP's report noted that another one of Matinas' children had died at the same institution. The Indian Agent informed the fathers that it was necessary to discipline children and that the children probably complained because they were unable to adapt to the rules. Both fathers rejected this explanation and claimed that they would no longer permit their children to be sent there. Despite this concern, the RCMP officer in charge of the death investigation noted that, while the fathers' indignation regarding the loss of their children was understandable, nothing more could be done and closed the investigation. The RCMP officer indicated that efforts were made to persuade the fathers that, "it was difficult to believe a child regarding treatment received in school as they naturally find it hard to get accustomed to school life and necessary regulations there. This endeavor was not very well accepted and both fathers said that they would not send anymore [*sic*] of their children to school."[361]

The RCMP's report noted that, given the fathers' concerns, it was likely that other parents will, "be loath to send their children for the purposes of receiving education" to the institution.[362] Despite the RCMP's assistant director of criminal investigation, K. Duncan, writing that it was, "very regrettable that the officials of the school did not report this matter" to the detachment at the time,[363] the institution was found to have acted properly and was absolved of any responsibility. Writing to Philip Phelan, the chief of the Training Division of Indian Affairs, a few months after the incident, Bishop Henri Belleau, the Vicar Apostolic of James Bay, strenuously asserted, "I frankly confess I cannot understand how any accusation of negligence could be substantiated against the Father Principal of the School."[364] Contrary to the documented reports about the fathers' frustration, distress, and criticisms of the institution, the Indian Agent and medical officer assigned to the Board of Inquiry into the missing boys claimed to the director of Indian Affairs in August 1942 that, "the fathers of the boys were present and left the inquiry apparently satisfied that no individual was to blame for the fatalities."[365] The Department of Indian Affairs documents indicated that they provided the fathers with fare for their trip and food provisions of 75 pounds of flour, eight pounds of sugar, eight cans of milk, two pounds of tea, one pound of baking power, 14 pounds of lard, and six boxes of matches.[366]

The IAP School Narrative documented various reports of physical violence meted out by administrators around the time of the boys' disappearances. The IAP School Narrative summarized that, "some statements made by former IRS [Indian Residential School] students to the [OPP] during the 1990s investigation alleged that the boys who ran away in 1941 did so due to physical abuse suffered at the IRS."[367]

Deaths of Myrtle Jane Moostos and Margaret Bruce, Gordon's Indian Residential School, Punnichy District, Saskatchewan

On the afternoon of July 14, 1947, Myrtle Jane Moostos, who was 16 years old and from the James Smith Cree Nation, and Margaret Bruce, who was 11 years old and from the Muskowekwan First Nation, were reported to have died due to drowning at a small lake located near the Gordon's Indian Residential School in Punnichy District, Saskatchewan.[368] On the afternoon of the incident, "several children" were at the lake, and the girls had been sitting on a raft, when one girl fell into the water and the second jumped in to try to rescue her. A third girl survived by remaining on the raft. According to administrators of the institution, the lake was strictly off-limits for the children, and staff claimed to be unaware that the children had left the yard to go to the lake, which was only about four hundred metres away.[369] However, in documents recording various children's testimonies of the event, it is clear that the children frequently played both near and in the lake, including using a makeshift raft. The raft was

constructed out of four gasoline barrels and a wooden frame and was supposed to be stored by the staff near the pumphouse by the lake.[370] On the day of the drownings, staff had left the raft by the shore after using it, and the girls took it onto the lake.[371]

In the Form 414 Memorandum, the Indian Agent found that no blame should be attributed to the institution's officials, and, in closing the Board of Inquiry, the Indian Agent wrote that:

> [U]nder present conditions it has been impossible to have constant supervision at all times. We recommend more staff to provide constant supervision. As well more recreational equipment for the children, more organized supervision to keep them employed at all times. We also recommend there should be a boat available at the school premises for any contingencies.[372]

Archival records indicate that a Coroner's Inquest was convened, and five jury members were appointed: the principal, a municipal secretary, and three individuals from the local community. The jury members were taken to the scene of the drownings, and various staff and children were called to testify. The matron stated that she had warned various girls the week previous not to leave the institutional grounds because the girls had taken to playing in the garden adjacent to the institution. The matron further stated that she did not realize that the garden gave the children "easy access" to the lake.[373]

Reverend Wickenden speculated that the children went to the lake that Saturday afternoon because they were unable to visit their families like other children who were permitted to leave for weekend visits because their homes were closer to the institution. Wickenden reported that:

> The school had been asked to try to overcome the ill will among the Indians, so a concession was made and the children allowed to go home one Sunday a month and the boys on Saturday afternoon also. There is a strong demand on the part of the parents that the children visit their homes whenever possible leading to a continual shifting of responsibility.... The children should not have gone down to the lake.... Perhaps those [children] from far away reserves feel the restrictions and the fact that they never get home during the year. The girls concerned are those that lived a distance. The Sunday they mentioned was one of the visiting Sundays. This may have been the day they started going down to the lake—it was a nice day and they might have been able to slip off.[374]

The lack of supervision was attributed to a shortage of staff.[375] The institution refused to take responsibility for the deaths and actively blamed the girls themselves for their drowning.[376]

The Coroner's Inquest jury similarly determined that fault could not be attached to the officials in charge of the institution.[377] The Department of Indian Affairs superintendent of welfare and training reported that, "no further action is required as the girls were breaking strict orders at the time of the mishap."[378] Notwithstanding the evidence documenting that children of all ages would play near the lake, that there was insufficient supervision of the children, and that the staff had left the raft at the lakeshore, the institution was not found to be responsible for any part of the two girls' deaths, and, instead, the girls were blamed for playing at the lake.

Death of Reggie Allan, St. Michael's Indian Residential School, Alert Bay, British Columbia

Very little was recorded about Reggie Allan and the events leading to his death on May 20, 1948.[379] All that can be gleaned from the Form 414 Memorandum is that Reggie was playing with four friends near St. Michael's Indian Residential School in Alert Bay, British Columbia. It appears that, on May 18, 1948, the boys climbed a high tree to swing. Reggie fell at least 50 feet and fractured his skull. He was taken to hospital and died two days later. While the Form 414 Memorandum's statements from the principal and the attending physician contained scant details, the Indian Agent's statement detailed serious criticism of the institution. The Indian Agent recommended that the Department of Indian Affairs should require the institution to, "remove all means of amusement within school property which are dangerous" and should, "insist that all children enrolled in this school be properly supervised at all times."[380] The Indian Agent noted that:

> Supervision in this school is lacking and has been for the past four years or more. Children are allowed to roam around at will when they are out of the classroom. The staff are not aware of where they are or what they are doing. I have complained about this before but no improvement is noted as well. The school lacks organization of the right type and this must originate with the principal. I do not think we will ever have proper supervision until adequate, efficient staff of the right type is employed. This means paying proper remuneration to employees, something which is not done at the present time.[381]

No other information is contained in the archival file, and it appears that there were no official investigations into Reggie's death.

Death of Albert Nepinak, Pine Creek Indian Residential School, Camperville, Manitoba

On April 9, 1951, Albert Nepinak, who was 11 years old, was found dead due to exposure to the elements after running away from the Pine Creek Indian Residential School in Camperville, Manitoba.[382] Albert and two other boys ran away from the institution, but the two other boys returned that evening wet and hungry. According to the principal's Form 414 Memorandum statement, Albert, "had walked approximately 12 miles in an attempt to reach home at Smoky Island."[383] After trying to cross Duck River, Albert turned back and tried to walk around the river. At some point, Albert laid down from exhaustion, covered himself with hay and eventually died of exposure only 1.5 miles from his home at Smoky Island.[384] Although the institution had learned that Albert was missing, officials did not send a search patrol out for him until one full day later, after learning from Albert's father that he never reached home.[385]

On April 19, 1951, R.S. Davis, the regional supervisor of Indian Agencies in Winnipeg, reported to the Indian Affairs Branch that, "as death was due to exposure no one is to blame."[386] In a response letter two days later, Superintendent of Education Philip Phelan wrote to Davis that he was not satisfied with the action taken by the principal. According to Phelan, there was no mention of any member of staff trying to locate the children.[387] Phelan found the lack of a search to be unacceptable, writing that, "it has always been felt that when pupils run away it is the duty of the staff to make an endeavour to find them and bring them back. Occurrences such as the one we are discussing reflect on our residential school system and on those operating the schools."[388] Phelan requested an investigation into Albert's death and stated that, if necessary, special instructions should be issued to all principals of Indian Residential Schools regarding proper procedures that must be followed when children ran away.

In response, Davis claimed that the principal had assumed the boy had followed his father, who had been working at the institution at the time and was on his way home.[389] The following day, Albert's father told the principal that Albert was not home, but he might have gone to his grandfather's home. It was Albert's father who eventually located Albert's frozen body during the search process. As a result of this investigation, Davis concluded that he was satisfied that, "it appears to me that in this case reasonable steps to find the boy were taken and no blame is attached to the Principal of the school."[390] No further details were included in the archival file to indicate what, if anything, occurred to require the administrators of the institution to launch timely searches for missing children.

Summary

During the years that the Indian Residential School System was in operation, coroners or medical examiners rarely investigated the deaths of the children. The information contained in the Form 414 Memorandums relating to the deaths of children, and the subsequent action or inaction of those responsible for their care, exemplifies an often negligent, and sometimes callous, approach to investigating the circumstances of how and why the children died in the institutions.

A myriad of archival records shows that the lack of staff supervision, poor conditions, mistreatment, and deficient nutrition, as well as the insufficient health services available in the institutions, contributed to circumstances that led to numerous children dying. These documents also reveal that these circumstances and issues were common knowledge and chronic. Nevertheless, deflection, victim blaming, and even vilifying the children that died was rampant. Deaths were quickly classified as accidental, and no further steps were taken to investigate surrounding conditions or causes. It is evident that grieving parents were either placated into waiving the institution's responsibility with promises of care for their other children, or the parents' concerns were discounted as ignorant and dismissed as disgruntled.

Even in the situations where the evidence and reports recognized that more could have been done by officials to prevent the children's deaths, the Boards of Inquiry and police investigations failed to hold the institutions responsible. Staff and supervising administrators were routinely exonerated, the institutional issues underlying the circumstances were glossed over, and the children's deaths were minimized. The very legal systems and processes put in place to examine the causes and conditions of the deaths were used to deflect any responsibility of the colonial authorities, once again discounting the dignity of Indigenous children's lives and deaths and allowing the culture of impunity to continue.

Grand Jury Inspections of Indian Residential Schools in Kenora, Ontario

Pursuant to the *Jurors Act* in Ontario in the 1960s, grand juries were empanelled and authorized to carry out inspections of public institutions, such as jails, police stations, prisons, hospitals, asylums, homes for the aged, and detention homes.[391] Relying on local citizens to visit, survey, and report on the physical premises, administration, and general status of the institution, the grand jury system was intended to provide some form of external oversight. Following a grand jury's inspection, they were required to prepare a report setting out the conditions of the

institution. Archival records indicate that at least two Indian Residential Schools were inspected by a grand jury in 1968 in the District of Kenora, Ontario.[392]

The grand jury's April 1968 report documented that the jury was concerned that the Cecilia Jeffrey Indian Residential School was not actually functioning as a school for the, "Indian children, ages 6–16 years" that were being held in the institution. The grand jury found that the institution was "over crowded," that there were "insufficient" staff to care for the children, and that there was a "pressing need … for [an] indoor recreation area to be used during the winter." The grand jury expressed serious criticism over the 66-cent daily food allowance, which they felt was grossly inadequate, noting the "absurdity" of the fact that the allowance had not increased in five years. The grand jury further found the clothing allowance was entirely too low and noted fire hazards in relation to the building's wooden staircase and old laundry equipment.

This grand jury also inspected the St. Mary's Indian Residential School in April 1968. The jury noted that Father LeBleu, the principal, strongly objected to being subjected to twice yearly inspections and questioned why the institution was even being inspected. This resulted in the grand jury requesting clarification regarding their authority to inspect Indian Residential Schools. In contrast to the April 1968 inspection, the next grand jury that conducted a follow-up inspection in November 1968 observed the Cecilia Jeffrey Indian Residential School to be, "clean and well administered and the children were contended and happy group."[393] Reflecting on the criticism of the previous grand jury, the November jury noted that it was likely that the provincial government was going to assume full control of the institution and believed the requisite improvements identified in the April report would be implemented with this transfer.[394] With respect to the St. Mary's Indian Residential School, the second grand jury simply noted that the principal indicated that advance notice of the inspection would have been appreciated. The November 1968 grand jury stated that they felt, "morally obligated to carry out … inspections in areas other than the immediate Kenora area," and, therefore, they also inspected the "McIntosh Residential Indian School."[395] The grand jury explained that, according to the Department of Indian Affairs, McIntosh was slated to be permanently closed, leading the grand jury to express hope that the facility would be converted to a juvenile rehabilitation centre.

The April versus November 1968 grand jury inspections reveal the wide discrepancies in reporting on the treatment of children in Indian Residential Schools and the varying attitudes of settlers towards Indigenous Peoples. While the April report

documents the impoverished care provided to Indigenous children, the November report provided a more sanitized account. The April report reveals neglect and substandard living conditions at the Cecilia Jeffrey Indian Residential School, including overcrowding, inadequate staff, food, and clothing, and safety risks. This report showed the critical failure to provide basic care and safety for Indigenous children, raising alarm over what now is understood to have been systemic neglect within these institutions. Conversely, the November report paints a markedly different picture, describing the same institution as, "clean and well administered" with happy children. This stark contrast minimizes the severity of the issues previously reported. The divergent findings between the two reports demonstrate the inconsistency and potential biases in the inspection processes. The April grand jury's detailed criticism reflected a more urgent and realistic appraisal of the conditions, while the November grand jury's more favourable assessment displayed reluctance to confront ongoing systemic issues or an influence of colonial attitudes that sought to downplay the mistreatment of Indigenous children.

Death of Albert Morrison: An Institutional Cover-Up

Asylum, Orillia, Ontario, Canada, 1910, file PCR-1763, Valentine & Sons, Baldwin Collection of Canadiana, Toronto Public Library Digital Archives.

Albert Edward Morrison, a Cree youth originally from Moose Factory, Ontario, was sent to the Ontario Hospital School[396] in January 1952[397] at the age of 16.[398] Albert had been at the Bishop Horden Hall Indian Residential School, which was operated by the Anglican church on Moose Factory Island until his mental health is stated to have declined.[399] Albert was the fifth child of six siblings.[400] On his sixteenth birthday, Albert, who had been showing signs of, "depression, apathy, and later aggression" was restrained by the RCMP and forced into a straitjacket to be incarcerated at the Cochrane Jail in northeastern Ontario. Pursuant to a judge's order, Albert was transferred eight hundred kilometres away from Moose Factory to the Ontario Hospital School, where he was diagnosed as experiencing psychosis, "with a mental age of eight years."[401]

Albert had been held at the Ontario Hospital School for two years when, in 1954, he died at the age of 18.[402] Originally named the "Orillia Asylum for Idiots," the institution was provincially run and Ontario's oldest facility for people perceived to have developmental disabilities or mental disorders.[403] It was opened in 1876 and closed in 2009, when its inhumane conditions became the subject of class-action lawsuits. Those who were sent to the Ontario Hospital School were subjected to rampant abuse, neglect, overcrowding, and death.[404] When children fled or their families disclosed this abuse to police, officers often took them back to the institution and rarely believed or investigated these complaints.[405]

In her in-depth study on the treatment of children in the institution,[406] mental health researcher Katharine Viscardis uncovered records suggesting that Albert had been brutally murdered by a staff member and that other residents and staff had witnessed the events leading up to Albert's tragic death. Upon further investigation, it became clear that the circumstances surrounding Albert's death were deliberately suppressed by the administrators of the Ontario Hospital School and authorities.[407] Viscardis exposed the cover-up of the horrendous violence meted out by institutional staff towards patients and dedicated an entire chapter of her dissertation to documenting the facts surrounding Albert's murder.[408]

Viscardis argued that Albert's death was evidence of colonial racism.[409] She wrote that Albert's death, "resulted from the violent conditions of his institutionalization and was excused and justified by his construction as a 'mentally defective,' 'Indian' 'delinquent.'"[410] She concluded that there was a conspiracy of silence and a culture of denial that extended beyond the institution itself to other State institutions, including the police.[411] At the Ontario Hospital School, Albert was housed in Cottage D, a dormitory notorious for its dehumanizing conditions, along with 56 other boys. In Cottage D, Albert became friends with Harold Johnston, a boy with Ojibway and Mohawk roots, who later witnessed the attack on Albert.[412] On February 2, 1954, Albert was viciously beaten by Harold Rogers, a medical attendant working at

the institution.[413] Three days prior to his death, Albert had left the Ontario Hospital School without permission to see a movie at the local theatre. When Albert was reported missing from the institution, he was escorted back to the facility by local police. Rogers, who killed Albert, reported that Albert was, "writing letters home" to Moose Factory."[414]

As punishment upon his return, Albert was ordered to stay in his flannel nightgown for several days.[415] Defying these orders, the next morning Albert appeared at breakfast dressed in his regular clothes. According to the institution's version of events at that time, Albert was directed by Rogers to return to the dormitory and put on his flannel nightgown. When Albert refused, Rogers claimed that Albert had become violent towards him, prompting what the local media called a "scuffle," with Albert falling on a table.[416] According to Rogers' testimony, once he gained control of Albert, he took Albert back to the dormitory where Albert complained of feeling sick and went to bed. Shortly thereafter, Albert's dead body was discovered.[417] A staff doctor was called to the scene, and an internal investigation was carried out by Dr. Fred C. Hamilton, the institution's superintendent.[418] After obtaining witness statements from Rogers and another staff witness, Dr. Hamilton determined that there was no wrongdoing and concluded in a one-page report that Albert's death was an accident.[419] At that time, Dr. Hamilton was reported as saying, "[Rogers] is still on the job and there is no question of suspending him."[420] Dr. Hamilton described Albert as a, "husky youth with a vicious temper" and claimed that Albert had tried to throttle Rogers.[421]

Despite an autopsy showing that Albert died of a ruptured liver and brain swelling, his death was deemed accidental by officials. Dr. Hamilton was reported in a newspaper story as saying that the oedema (swelling) of Albert's brain, as recorded by the autopsy, was not as a result of the incident with Rogers but, rather, because Albert was "psychotic."[422] A further newspaper story, one week after the death, reported that the Ontario Hospital School had not notified the provincial police of the boy's death, and the newspaper reported that it had confirmed this fact with the school's superintendent, Dr. Hamilton.[423] Consequently, provincial police only opened an investigation one week after the death and, after just one day, closed the case, stating that they had, "found no evidence the boy was mistreated."[424] Albert's family was informed that he had died in an accident, and the family requested Albert's body be returned to Moose Factory for burial.[425] Albert was buried in the Anglican cemetery in Moose Factory. No Coroner's Inquest was planned until the failure of the institution to notify the police of the death garnered media attention.[426] The media reports led to the local crown attorney calling for an Inquest to inquire into the circumstances of Albert's death.[427]

The Coroner's Inquest on February 18, 1954, which was presided over by Dr. K.C. Jardine, did not include any testimony from witnesses who were residents of the institution.[428] The

provincial pathologist gave evidence claiming that the ligaments holding up Albert's liver were weak, causing his death.[429] The only other witnesses were the institution's staff doctor, Dr. Hamilton, Rogers, and another staff attendant. Based on these testimonies and after a half-hour deliberation, the jury of five men concluded that Albert's death was an accident.[430] Rogers continued to work at the institution until his retirement.[431]

Although Albert's story remained hidden from the general public for almost four decades, Albert's friend, Harold Johnston, was haunted by the violence and abuse he suffered and witnessed in the institution.[432] In March 1991, Johnston informed the OPP that he had witnessed Rogers violently beat his friend Albert to death on the morning of February 2, 1954.[433] Johnston recounted that he could no longer eat breakfast because of the memories of that fatal morning.[434] The OPP launched a new investigation, which included the exhumation and forensic examination of Albert's body. The OPP's reinvestigation revealed many troubling findings:

- Albert's death was not reported to the police until a week after he died;
- Multiple records related to his death were missing, including the original pathologist's report, the death inquest transcript, the burial permit, and the records of the internal investigation carried out by the institution; and
- Hundreds of potential witnesses were never interviewed.[435]

Twenty-two witnesses, including residents of the institution who had not been approached to testify at the Coroner's Inquest, disclosed that they had witnessed Rogers brutally beat Albert to death.[436] According to their evidence, Rogers repeatedly punched, kicked, and smashed Albert's head against the floor.[437] Rogers continued to violently beat Albert even after Albert lost consciousness and was unable to defend himself.[438] Rogers then threatened the residents who had witnessed the attack to stay silent about what they had seen.[439] A staff attendant told police investigators that he observed Rogers bring Albert to a common bathroom, where he heard loud thuds.[440] After a few minutes, the staff attendant observed Albert exit the bathroom running, begging Rogers to stop. Soon after, Albert was found dead on a bed.[441]

During the OPP's reinvestigation, police learned that many more residents complained of egregious mistreatment at the hands of staff, especially Rogers. The mistreatment included daily military-style punishments and beatings, degrading sexual abuses, manual labour, assaults, and confinements in straitjackets for days on end.[442] For example, Albert's friend Harold Johnston recounted ongoing beatings with baseball bats to the head, being tied up, and heinous sexual abuse with broom handles.[443] Witnesses (who were children at the

time) claimed that Rogers was notorious around Cottage D and responsible for sadistic and extreme forms of abuse against the children.[444] A forensic pathology report prepared during the OPP's investigation documented that Albert's injuries included a ruptured liver, brain swelling, internal bleeding of the abdomen, and a broken hip, and it concluded that these injuries were consistent with a severe beating or punching.[445] The OPP's reinvestigation led to Rogers being criminally charged with manslaughter on February 15, 1992, in relation to his attack on Albert. Rogers was also charged with two counts of assault causing bodily harm and one count of gross indecency in relation to three other residents.[446] Rogers was 72 years old when he was arrested and died before the case went to trial.[447] Five other male staff attendants were charged with abuse; however, the charges were either dropped due to a lack of evidence or those who did go to trial were found not guilty due to insufficient evidence.[448]

Prevailing theories that the residents' complaints were false contributed to the rampant culture of victim blaming, denialism, and silence that were ultimately used to justify Albert's murder. Viscardis highlighted how discriminatory attitudes were reflected in local media accounts that:

- Used racially loaded, degrading, and ableist descriptions of Albert as an "unruly," "violent," and "incorrigible" Indigenous youth[449] while portraying Rogers as an innocent staff member;[450]
- Characterized the brutal beatings inflicted on Albert and his eventual death as the result of a "scuffle" rather than acknowledging the power dynamics in the abusive colonial and ableist carceral setting that he was held in;[451] and
- Placed the blame on Albert due to his inability to obey and behave in a socially acceptable manner.[452]

Viscardis noted that, "Albert's mental health history, his construction as 'Indian,' and his positionality as an institutionalized youth was taken as evidence by news reports to support Rogers' claims of self-defence."[453]

Other key people also actively contributed to this narrative. For instance, Dr. Hamilton's 1954 investigation characterized Albert as the instigator of the conflict, highlighting his "mental deficiency" and "maniacal tendencies" and characterizing him as, "restless and uncooperative."[454] Dr. Morrison's prejudiced perspective of Albert is most obvious in his description of the youth as "husky" "with a vicious temper" when contrasted to the institution's clinical records, which documented that Albert weighed "124 lbs," was generally "slow," "moderately good work," and "quiet." Dr. D.E. Zarfas' clinical notation, made the day that

Albert was returned to the facility by the police, documented that, "[Albert] was quiet and polite. [Albert] said he realized that he should not have left to go to the show and that it was necessary for me to insist that he wear his pyjamas for 3–4 days."[455]

During the reopening of the case in the 1990s, Jack Spencer, the assistant executive of the institution, communicated to the media and the public that violence towards residents was uncommon.[456] This was despite clear evidence of frequent and egregious abuse, neglect, and violence described by the Survivors of the institution, as documented in the civil lawsuits that followed. Even Rogers' family members weighed in, claiming that the case against Rogers was absurd and that the evidence and testimony given by people with disabilities was "utterly ludicrous" because they were not credible and should not be taken seriously.[457] There is evidence that the Ontario Hospital School continued to hamper police investigations even after Albert's death. Viscardis uncovered a letter from the Orillia police chief to a crown attorney in 1976 complaining that the institution was refusing to cooperate with police during investigations and was suppressing important evidence, including cleaning up crime scenes, destroying evidence related to the rapes of residents, and allowing inadequate reporting and record-keeping to continue among staff attendants.[458] At the Ontario Hospital School, Albert was the victim of an institutionalized form of violence that infringed on his human rights, contravened the institution's responsibility to care for and protect him, and led to his violent and tragic death.

Over one thousand people are buried in the institution's cemetery, although due to poor record-keeping and the removal of grave markers, the total number of burials is unknown.[459] Prior to 1958, patients who died at the institution and were not buried privately were buried in unmarked graves only identified by a number assigned based on the order of death.[460] After 1958 and until 1971, when no new burials were to be interred, graves were marked with the person's name, year of birth, and year of death.[461]

Current Coroner Death Investigation Systems

The Canadian legal system has been subject to numerous inquiries and commissions, but the coroners' system's interactions with Indigenous Peoples have largely been overlooked, with the notable exception of the Goudge Inquiry report in 2008.[462] The Goudge Inquiry examined numerous pediatric deaths, particularly those subjected to autopsies by Dr. Charles Smith, a pathologist at the Hospital for Sick Children in Toronto, shedding light on deficiencies in coroner services in Ontario, including in remote First Nations communities. In volume 3 of the Goudge report, in a chapter titled "First Nations and Remote Communities," Justice

Stephen Goudge highlighted the unavailability of coroner services in northern and reserve communities. Families in these areas often remained uninformed about the cause of death of their loved ones.[463] The report issued 14 recommendations aimed at rectifying the lack of confidence in coroner services for remote First Nations, including that coroners should attend death scenes in these communities and develop proper communication protocols.[464]

Subsequent efforts have seen coroner offices taking steps to aid investigations into missing and disappeared Indigenous children, such as collaborating with the TRC.[465] The TRC's Missing Children Project received support from the Chief Coroners and Medical Examiners of Canada, with offices across the country contributing records related to the deaths of Indigenous children at Indian Residential Schools. However, the coroner system in Ontario faced further scrutiny during the Coroner's Inquest into the deaths of seven First Nations youth in Thunder Bay.[466] These young individuals died while attending high school in Thunder Bay due to the absence of high schools in their remote home communities. This Inquest revealed that families often were not provided with the initial determination of the cause of death or detailed autopsy results. As a result, families were left uninformed about the true circumstances of their loved ones' deaths.

The Thunder Bay Coroner's Inquest resulted in six specific recommendations directed towards the Office of the Chief Coroner (OCC).[467] These recommendations aimed to improve data collection, provide coroner services to remote areas, coordinate coroners' schedules, develop communication protocols with Indigenous Peoples, and allow extended family members access to information. However, progress on these recommendations has been mixed, with Aboriginal Legal Services' *2021 Report Card on Recommendations* noting that some recommendations have been implemented but that there has been little or no progress on others.[468]

Challenges also exist regarding the definition of "forensic interest."[469] This concept of "forensic interest" arises in cases where human remains are found. In Ontario, when skeletal unidentified human remains are discovered, a forensic anthropologist consultant from the OCC and the Ontario Forensic Pathology Service determine whether the skeletal remains have "forensic interest" and whether the discovery warrants an investigation into how and why the person died. If the remains are determined to be "archaeological or historical" in nature (that is, more than 50 years old), no further death investigation is likely to be made by the police or the coroner.[470] The factors that go into discretionary determinations of "forensic interest" are not set out in law or regulation. Literature suggests that "forensic interest" is determined by gauging whether the remains would be subject to a criminal investigation.[471] If the remains are deemed to be too old (over 50 years in Ontario), it is generally thought

that there is no "forensic interest" because there would be no criminal investigation. The threshold for determining "forensic interest" varies depending on jurisdiction—for example, in Australia it can be up to 100 years.[472]

Pursuant to section 175(1) of *Ontario Regulation 30/11*, once the coroner declares that no foul play is suspected in relation to the human remains, the coroner must notify the Registrar responsible for burial sites under the *Funeral, Burial and Cremation Services Act*.[473] The Registrar will then examine the facts to determine whether to issue an order against the landowner to have a burial site investigation.

Redefining "Forensic Interest" in Ontario

In August 2020, three bones were uncovered when utility workers were digging a trench on private property on Glenwood Drive in Brantford, Ontario.[474] Pursuant to the *Coroners Act* and the *Funeral, Burial and Cremation Services Act*, the Brantford Police and the OCC were notified of the discovery. After forensic analysis, the OCC determined that the remains were human, and radiocarbon dating indicated that there was a 77.9 percent probability that they pre-dated 1814. It was therefore determined that the remains did not have, "recent medico-legal significance," and, as a result, there was "no forensic interest."[475] As such, the matter was then turned over to the Registrar of Burials for an archaeological assessment.

The soil was removed from the trench and deposited at a different site to be inspected. Prior to the inspection of this soil and during the archaeological assessment, a communication error occurred, and the soil was again moved to a third location. When the inspection of the soil finally took place, an additional human bone was found. The archaeological assessment involved consulting with the Mississaugas of the Credit First Nation, the Haudenosaunee Development Institute, Six Nations of the Grand River, and the Survivors' Secretariat. This consultation revealed that:

- The property where the ancestor bones were found was approximately 3.2 kilometres away from the former Mohawk Institute Indian Residential School.
- This property had been owned by Abraham Nelles, the principal of the Mohawk Institute between 1837 and 1872.[476]
- In 2003–2006, a condominium complex had been built on the property.

- An archaeological assessment had not been completed before the condominium complex was built.

These unusual circumstances caused the archaeological investigators to suspend fieldwork and consult with the Registrar of Burials. Discussions occurred between the Survivors' Secretariat, the Chief Coroner, and the Registrar of Burials, and a decision was made to proceed with further investigation pursuant to the authority of the OCC. This further investigation determined that:

- A burial feature was present on the site;
- The human remains were likely moved from a different unknown location; and
- The remains had been disturbed three times: first, by a tree spade, second, by a shovel, and, finally, by those digging the trench.

The investigation concluded that although it was unclear whether the person operating the tree spade was aware they had disturbed the remains, it was likely that the person using the shovel was aware that they had dug into the bones. The disturbance with the shovel likely occurred during landscaping work in the early 2000s and was never reported to the authorities, which was in breach of the legislation in place at the time.

During the coroner-led investigation, the remains were exhumed. Over five hundred small glass beads were located adjacent to the ancestor's bones associated with the lower leg, consistent with its presence on clothing. Indigenous Cultural and Human Rights Monitors Wendy Hill and Beverly Jacobs, from the Survivors' Secretariat, confirmed that the beads were from a boy's or man's regalia, likely leggings or a breechcloth. Further forensic analysis, including an osteological report, radiocarbon dating of the bone sample, and chemical dating of the glass beads, supported the conclusion that the remains were from an Indigenous boy between the ages of 11 and 14 years old who had likely died in the late 1600s.[477]

The Brantford case illustrates that determinations of "forensic interest" by coroners are not straightforward, nor are they informed by Indigenous laws, principles, protocols, knowledge, and values. The determination of what constitutes "forensic interest" is not enshrined in any law or regulation, nor is it guided by Indigenous laws, principles, or values, potentially undermining cultural sensitivity and justice in handling cases involving Indigenous Peoples.

While radiocarbon dating of the bones led to the initial conclusion that the human remains were "historical" and, therefore, of no "forensic interest," further evidence and, crucially, the advocacy of Indigenous communities and Survivors required that this determination be reassessed. This further evidence included the location where the remains were found (near the Mohawk Institute and on land that had once been owned by the principal of the institution), the archaeologists' finding that the remains had been disturbed multiple times, and osteological findings that the remains were from a young person. All these factors resulted in a reconsideration of the "forensic interest" determination. As the Chief Coroner for Ontario said, "in retrospect ... given the proximity to the Mohawk Institute and the recognition of unmarked burials in locations that are at or associated with residential schools, this is obviously of forensic interest."[478]

Due to the criticisms of coroner services in failing to provide adequate investigations in the context of deaths of Indigenous people, there are ample reasons for Indigenous communities leading search and recovery efforts to be wary of involving coroners and medical examiners in their investigations. However, there are some examples of a willingness by coroners' offices to change their practices and processes to improve these services in supporting efforts to locate, identify, and investigate the deaths of the missing and disappeared children.

The Residential Schools Death Investigation Team

In May 2022, the OCC for Ontario announced its commitment to collaborate closely with Indigenous communities when human remains are discovered in proximity to Indian Residential Schools.[479] To facilitate this initiative, the office established the Residential Schools Death Investigation Team, spearheaded by Dr. Dirk Huyer, the Chief Coroner for Ontario. The primary objective of the Residential Schools Death Investigation Team is to scrutinize deaths that may be linked to the 18 Indian Residential Schools in Ontario, as well as the St. Joseph's Training School, operated by the Ontario government, where at least nine deaths of children and youth have occurred.[480] Their review encompasses the deaths listed on the National Centre for Truth and Reconciliation (NCTR) Memorial Register, additional deaths discovered during research, and cases from the OCC's "Unidentified Remains" files. Any suspicious deaths suggesting potential criminality are referred to the OPP's Criminal Investigations Branch for further examination.

The Residential Schools Death Investigation Team seeks to employ a respectful and community-focused approach in its investigations, aiming to avoid redundant

research already undertaken by Indigenous-led teams. It seeks consent from Indigenous communities leading search efforts before delving into research on children's deaths at former institutions. Currently, the Team is collaborating with several First Nations actively engaged in search and recovery efforts at 18 institutions in Ontario.[481] The Residential Schools Death Investigation Team has sought access to records housed in various archives, including the NCTR, Statistics Canada, and the Ontario Archives. Notably, the Team has obtained unrestricted access to NCTR records under the authority of the *Coroners Act*, enabling comprehensive investigations.

In addition, the Residential Schools Death Investigation Team utilizes publicly available information sources such as letters, books, yearbooks, and news articles to identify children who died at Indian Residential Schools. As of September 2023, leveraging these sources, they had identified approximately, "79 additional deaths in Ontario residential schools of the 18 that were not listed by the NCTR."[482] Dr. Huyer told the Standing Senate Committee on Indigenous Peoples that, "of the 433 [Indigenous children] who are listed by the NCTR, our team has found the answers, through evaluation of publicly available records, for 136 [individuals]."[483] The Team has shared information on these additional deaths with the Indigenous communities they collaborate with and with the NCTR. For these additional deaths, the Team was able to locate children's names, exact or approximate dates of death, and the recorded circumstances of their deaths. In some cases, burial markers or locations have also been identified, although many of these children's burials are yet to be located. This enabled the NCTR to remove these children's names from the NCTR's "Unknown List" and list their death in relation to a particular Indian Residential School.

The Residential Schools Death Investigation Team is also available to meet with Survivors and others with information about the circumstances surrounding a particular child's death, when invited to do so. As Dr. Huyer said at the Edmonton National Gathering, "we know we are a government organization and that we need to earn trust. I understand the distrust.... This is something that will be community-led, Survivor-led, if we are asked." Additionally, Dr. Huyer said that, "if communities wish to reach out to us and ask us questions, we will share those records and that information to help answer questions of which children may have attended [certain institutions] and which children may have died, and to help to understand where they may be buried so that it will be of assistance to them."[484] Furthermore, the Residential Schools Death Investigation Team extends its efforts

beyond Indian Residential Schools to review the OCC's "Unidentified Remains" files. This aims to determine if further investigations are warranted, identify cases related to Indian Residential Schools, establish connections to missing and murdered Indigenous women and girls, facilitate the return of Indigenous remains to their communities, and enhance current and future coroner practices regarding unidentified remains.

The Public Inquiry System

Public inquiries, often referred to as royal commissions of inquiry, can be established by the federal, provincial, and territorial governments in Canada. The terms of reference for these inquiries are set by the governing body initiating them, typically including a deadline for a final report and sometimes interim report timelines. While inquiries are commonly led by judges or lawyers, it is not a statutory requirement, and multiple commissioners may be appointed for their varied expertise. Recent inquiries in Canada, such as the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) and the Mass Casualty Commission in Nova Scotia, exemplify the scope and focus of these investigations. While inquiries can make recommendations to the government, they lack the authority to enact new laws or prosecute individuals, although they can identify faults in actions, persons, and entities.[485]

Over the past 40 years, numerous inquiries have addressed the oppression of Indigenous Peoples in Canada, ranging from national to regional scopes.[486] Some of these inquiries have been incredibly wide-ranging—for example, the Royal Commission on Aboriginal Peoples (RCAP).[487] Unlike the RCAP, the TRC was not established pursuant to the *Public Inquiries Act*, and therefore the TRC was not a public commission of inquiry, which led to many obstacles in its work.[488] Similar to the RCAP, the MMIWG Inquiry and the Viens Commission of Inquiry in the province of Quebec[489] looked at broader issues that engage many different aspects of Canadian society. Some inquiries have had a more specific focus, such as the Cariboo-Chilcotin Justice Inquiry.[490] Many inquiries have scrutinized the relationship between Indigenous Peoples and the legal system, aiming to shed light on the impacts of colonial policies. One of the earliest to indicate that the colonial system engaged in "cultural genocide" was the inquiry conducted by Associate Chief Justice Edwin C. Kimelman of the Manitoba Provincial Court. Justice Kimelman led the inquiry into Manitoba's child welfare system's treatment of the adoption of Indigenous children by out-of-province families. In his final report *No Quiet Place,* he concluded that the child welfare system was guilty of "cultural genocide."[491]

Systemic Discrimination in Quebec

The Quebec provincial government initiated the Viens Inquiry in December 2016 following public outcry over allegations of police abuse and violence against Indigenous women in Val-d'Or, a city located five hundred kilometres northwest of Montreal. The Val-d'Or Native Friendship Centre had a crucial role in supporting Indigenous women as they came forward with their experiences of serious mistreatment by police, including physical and sexual assault and "starlight tours" (the police practice of picking up an Indigenous person and abandoning them on the outskirts of town, often in the cold of night). Retired Superior Court Justice Jacques Viens was tasked with conducting a comprehensive examination of the treatment of Indigenous people by public services in Quebec. The inquiry, lasting over 38 weeks, collected 1,188 testimonies and expert opinions. While primarily held in Val-d'Or, the Viens commission also visited several other communities, including Mani-Utenam, Mistissini, Montreal, Kuujjuaq, and Kuujjuarrapik. Overall, 277 individuals shared their experiences of interactions with police, health-care providers, youth protection services, and the justice system.

Viens' report, which was released in September 2019, called for the Quebec government to apologize to First Nations and Inuit communities for the harm caused by provincial laws, policies, and practices. This was the first of 142 recommendations in the 520-page report, which highlighted the systemic discrimination faced by Indigenous people in accessing public services. Viens emphasized the need for reforms across various sectors, including policing, social services, corrections, justice, youth protection, mental health services, and education. He also suggested that the province's ombudsman oversee the implementation of the recommendations. Despite the comprehensive nature of the report, some critics felt that it inadequately addressed police accountability in their treatment of Indigenous women. Four years after the release of the Viens report, less than a third of the recommendations had been implemented.

In October 2023, Marc-André Dowd, Quebec's ombudsman, provided the first update on the inquiry, based on a three-year investigation into the public service's treatment of Indigenous people. Dowd identified significant shortcomings, particularly in youth protection services, where only four out of 30 recommendations had been fully implemented or were on track. He attributed the slow progress to a lack of strategic direction, fragmented initiatives, and inadequate planning by

the Quebec government. While the Veins Inquiry brought critical issues to light and proposed extensive reforms, the implementation of the recommendations has been sluggish and incomplete, leaving much room for improvement in addressing the systemic discrimination faced by Indigenous communities in Quebec.

Hundreds of recommendations have been made. Recommendations, Calls to Action, and Calls for Justice from public inquiries and the TRC extend beyond governmental spheres. Important decisions of the Supreme Court of Canada have also cited several of these reports.[492] However, many recommendations remain unimplemented, and there is no comprehensive repository tracking their progress.[493] Additionally, assessing the impact of recommendations is challenging as some are easier to implement than others, and inquiries often fail to prioritize foundational recommendations. For example, responding to the MMIWG Inquiry's Call for Justice 1.7 in January 2023, the former minister of Crown-Indigenous Relations appointed Jennifer Moore Rattray as the ministerial special representative to advise and issue recommendations regarding the goal to create an Indigenous and Human Rights Ombudsperson. The ministerial special representative subsequently, "conducted engagement with 600 people representing 125 organizations, including national and regional First Nations, Metis, and Inuit organizations, federal government departments, and provincial and territorial governments" regarding Call for Justice 1.7.[494]

In her report submitted on May 30, 2024, the ministerial special representative advised Gary Anandasangaree, the present minister of Crown-Indigenous Relations, on the key steps, priorities, and timelines for the creation of four Indigenous and Human Rights Ombudspersons: one First Nations, one Inuit, one Métis, and one urban Indigenous.[495] The report stated that the intention of the four ombudspersons is to, "respect and reflect distinctions, while working together in one office in the National Capital Region to protect and defend all Indigenous and human rights."[496] The report also discussed the infrastructure and jurisdictional mechanisms necessary to establish complaint processes to address Indigenous and human rights concerns with respect to government services and programs.[497] The report noted that, throughout the engagement process, Indigenous communities expressed significant scepticism that, even if the ombuds structures were created, these individuals and offices would uphold Indigenous and human rights given, "the context of the legacy of residential schools and day schools, the Sixties Scoop, and ongoing child welfare and MMIWG2S+ crises."[498] Minister Anandasangaree issued a statement welcoming the report and indicated that the federal government would work with the provinces and territories to respond to the recommendations.[499]

In commemorating the five-year anniversary of the MMIWG Inquiry's Final Report, Marion Buller, the chief commissioner of the Inquiry, described the progress on the implementation of the 231 Calls for Justice as operating at a "glacial pace."[500] Buller pointed out that the recommendations for the federal government to establish a National Indigenous and Human Rights Tribunal and ombudsperson should have been acted on years ago given that Indigenous Peoples have had no substantive recourse for ongoing equity rights violations.[501]

CONCLUSION

The purpose of this chapter has been to highlight how the death investigation and criminal legal systems failed to protect Indigenous children at Indian Residential Schools and other institutions. These systems have shielded wrongdoers and created a culture of impunity. The State's failure to exercise its authority to conduct adequate investigations into the harms committed against Indigenous children is evidence of the de facto settler amnesty that exists in Canada. It is therefore not surprising that Indigenous Peoples have little trust in these systems.

Consistent with international human rights laws, principles, and standards, the right to truth is owed to Indigenous Peoples. The Canadian State has legal and moral obligations to ensure that a full investigation is conducted into the disappearances and deaths of the children. Such investigations, however, must not be led or constrained by the existing systems that have harmed Indigenous Peoples for well over one hundred years. A new mechanism must be created—one that is Indigenous-led and governed—a new search and truth recovery process that meets international human rights principles, norms, and standards on the right to seek and obtain truth, accountability, and justice. This new mechanism would respect Indigenous sovereignty and apply Indigenous laws and protocols as required by the *United Nations Declaration on the Rights of Indigenous Peoples*, as is detailed in the concluding chapter of this Final Report.[502]

1 Truth and Reconciliation Commission of Canada (TRC), *Canada's Residential Schools, The History, Part 1: Origins to 1939*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 451; see also TRC, "A Denial of Justice," in *Canada's Residential Schools: The Legacy*, vol. 5 (Montreal and Kingston: McGill-Queen's University Press, 2015).

2 TRC, *The Legacy*, 185–86.

3 TRC, *The Legacy*, 291–92.

4 The Missing and Murdered Indigenous Women and Girls Inquiry (MMIWG Inquiry) concluded that, "Indigenous women and girls are 12 times more likely to be murdered or missing than any other women in Canada, and 16 times more likely than Caucasian women." MMIWG Inquiry, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a (Vancouver: Privy Council Office, 2019), 55. As of April 1, 2015, 174 Aboriginal females, constituting 10 percent of the total 1,750 missing females recorded nationwide by the Canadian Police Information Centre, have been missing for at least 30 days. Despite comprising 4.3 percent of the Canadian population, Aboriginal women are disproportionately represented among the missing and murdered. In the Yukon, Indigenous women had a homicide rate that was 12 times higher than non-Indigenous women. For more details, see Royal Canadian Mounted Police (RCMP), "Statistical Analysis of New Data: Missing and Murdered Cases," in *Missing and Murdered Aboriginal Women: 2015 Update to the National Operational Overview* (Ottawa: RCMP, 2015); see also Research and Statistics Division, Department of Justice Canada, "Just Facts: Missing and Murdered Indigenous Women and Girls," Government of Canada, July 2017, https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/july04.pdf.

5 *Constitution Act, 1867* (UK), 30 & 31 Vict, c. 3.

6 See *Upholding Sacred Obligations*, part 2, chapter 6.

7 Thomas McMahon, "Indian Residential Schools Were a Crime and Canada's Criminal Justice System Could Not Have Cared Less: The IRS Criminal Court Cases," *Social Sciences Research Network* (*SSRN*), May 4, 2017, 43, https://ssrn.com/abstract=2906518.

8 *Criminal Code*, RSC 1985, c. C-46.

9 *Controlled Drugs and Substances Act*, SC 1996, c. 19.

10 In other countries, such as the United States and Australia, criminal law is the responsibility of each state. That is why in the United States, while murder is a crime across the country, in some states the penalty can include death, while in others that is not an option.

11 Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Little, Brown and Company, 1992).

12 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), 144–45.

13 *Criminal Code*, s. 43 states: "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."

14 As explained by Thomas McMahon in his submission to Canada's federal Justice and Human Rights Parliamentary Committee entitled "Truth and Reconciliation: Why Canada Should Repeal S. 43 of the *Criminal Code* (Canada's Corporal Punishment Law)," *SSRN*, April 30, 2024 ("in 1892, Canada enacted its *Criminal Code*, which included s. 55: 'It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances'"). It can be seen that this is simply a continuation of what was said in the Hopley case in 1860, in which a schoolmaster in Sussex, England, was charged with manslaughter for beating a student to death with a stick during a punishment. Even in 2017, the *Criminal Code* s. 43 states, "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances." In other words, the law has not changed more than 150 years later. McMahon, "Truth and Reconciliation," 3.

15 *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4.

16 TRC, *The Legacy*, 66.

17 TRC, *The Legacy*, 66.

18 Marcel-Eugene LeBeuf, *The Role of the Royal Canadian Mounted Police during the Indian Residential School System* (Ottawa: RCMP, 2011), 26–28.

19 LeBeuf, *Role of the Royal Canadian Mounted Police*, 301.

20 LeBeuf, *Role of the Royal Canadian Mounted Police*, 329. In this brief description, it is unclear if the "charge dismissed" means the case proceeded to criminal court and the judge found the principal not guilty with a warning to exercise caution in administering only the strap or that the RCMP closed the case file by giving the principal a warning.

21 Patrick White, "B.C. Residential School's Story Starts with Abuse, Ends in Fire, but Points toward Justice," *Globe and Mail*, December 10, 2021, https://www.theglobeandmail.com/canada/article-lower-post-bc-residential-school/.

22 "Mary Caesar: Lower Post Residential School," transcript of interview, Legacy of Hope Foundation, accessed July 31, 2024, https://legacyofhope.ca/wherearethechildren/stories/caesar/.

23 Noni E. Macdonald, Richard Stanwick, and Andrew Lynk, "Canada's Shameful History of Nutrition Research on Residential School Children: The Need for Strong Medical Ethics in Aboriginal Health Research," *Paediatrics and Child Health* 19, no. 2 (February 2014): 64; Canadian Press, "Alberni First Nation Aims to Reclaim Narrative from Shadows of Residential School," *Vancouver Island Free Daily*, February 5, 2023, https://www.vancouverislandfreedaily.com/news/alberni-first-nation-aims-to-reclaim-narrative-from-shadows-of-residential-school-7242440.

24 J.S. Milloy, *"Suffer the Little Children": The Aboriginal Residential School System 1830–1992* (Ottawa: Royal Commission on Aboriginal Peoples (RCAP), May 1996, 172), https://data2.archives.ca/rcap/pdf/rcap-126.pdf.

25 Milloy, *Suffer the Little Children*, 172.

26 "Survivors from Electric Chair-equipped Residential School Facing Another Court Fight with Ottawa," *APTN News*, February 13, 2015, https://www.aptnnews.ca/national-news/survivors-electric-chair-equipped-residential-school-facing-another-court-fight-ottawa/.

27 Jorge Barrera, "Ottawa Initially Fought St. Anne's Residential School Electric Chair Compensation Claims," *CBC News*, December 2, 2017, https://www.cbc.ca/news/indigenous/st-annes-residential-school-electric-chair-compensation-fight-1.4429594.

28 Thomas McMahon, "'We Must Teach the Indian What Law Is': The Laws of Indian Residential Schools in Canada," *SSRN*, April 18, 2017, 71, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954877.

29 McMahon, "We Must Teach the Indian What Law Is," 71.

30 Tyla Betke, "'Not a Shred of Evidence': Settler Colonial Networks of Concealment and the Birtle Indian Residential School," *Canadian Historical Review* 104, no. 4 (December 2023): 519–44.

31 Betke, "Not a Shred of Evidence," 528.

32 Amy Judd, "Punished and Hit for Speaking Her Language, a B.C. Residential School Survivor Is Not Staying Silent," *Global News*, June 25, 2021, https://globalnews.ca/news/7981899/residential-school-survivor-speaking-out-conditions-trauma/.

33 *Campeau v. The King*, 1951 CanLII 448, 360–61 (QC CA).

34 Kerry Slack, "Residential School Survivor Suing Catholic Priest for Defamation," *APTN News*, July 29, 2024, https://www.aptnnews.ca/national-news/survivor-sues-catholic-church/.

35 Alanna Smith and Kristy Kirkup, "Calgary Judge Permits Class-Action Lawsuit over Priest's Residential-School Remarks," *Globe and Mail*, April 22, 2024, https://www.theglobeandmail.com/canada/article-calgary-judge-permits-class-action-lawsuit-over-priests-residential/.

36 Smith and Kirkup, "Calgary Judge"; see also Teri Fikowski, "Residential School Survivor Leads Class-Action Lawsuit against Catholic Church, Priest," *CTV News*, April 23, 2024, https://calgary.ctvnews.ca/residential-school-survivor-leads-class-action-lawsuit-against-catholic-church-priest-1.6857891; Madeleine Cummings, "Edmonton Priest Placed on Indefinite Leave after Denying Reports of Unmarked Graves at Residential Schools," *CBC News*, August 13, 2021, https://www.cbc.ca/news/canada/edmonton/edmonton-priest-marcin-mironiuk-leave-residential-school-1.6140624.

37 Judd, "Punished and Hit."

38 Judd, "Punished and Hit."

39 Judd, "Punished and Hit."

40 Judd, "Punished and Hit."

41 Judd, "Punished and Hit"; Jenn Allen, "Winnipeg Catholic Priest Accuses Residential School Survivors of Lying About Abuse for Money," *CBC News*, July 29, 2021, https://www.cbc.ca/news/canada/manitoba/rheal-forest-residential-schools-1.6121886.

42 TRC, *Honouring the Truth*, 106; TRC, *Canada's Residential Schools: The History, Part 2: 1939–2000*, vol. 1 (Montreal and Kingston: McGill-Queen's University Press, 2015), 412.

43 McMahon, *Indian Residential Schools*, 68.

44 This summary is based on an extensive report by Patrick White, "What a Long-Forgotten BC RCMP Task Force Uncovered About Residential School Abuses," *Globe and Mail*, December 13, 2021, https://www.theglobeandmail.com/canada/british-columbia/article-what-a-long-forgotten-bc-rcmp-task-force-uncovered-about-residential/.

45 This protection against the application of what are referred to as retroactive laws enshrined in section 11(g) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Charter*), which states that "any person charged with an offence has the right ... not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian ... law."

46 *Criminal Code*. For example, s. 271 deals with sexual assault, s. 272 with sexual assault with a weapon or threats, and s. 273 with aggravated sexual assault.

47 *Criminal Code*, s. 273.1(1.1).

48 Julian V. Roberts, *Sexual Assault Legislation in Canada: An Evaluation* (Ottawa: Research Section, Department of Justice Canada, 1992), 3, https://publications.gc.ca/collections/collection_2022/jus/J23-9-5-1991-eng.pdf.

49 See Constance Backhouse, "Rape and Attempt to Commit Rape," A History of Canadian Sexual Assault Legislation 1900–2000, accessed July 31, 2024, https://www.constancebackhouse.ca/fileadmin/website/rape.htm. For example, according to the *Criminal Code, 1892*, SC 1892, c. 29, s. 266, rape was defined as "the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act."

50 Constance Backhouse, "Acts of Gross Indecency," A History of Canadian Sexual Assault Legislation 1900–2000, accessed July 31, 2024, https://www.constancebackhouse.ca/fileadmin/website/gr_indec.htm

51 Robin F. Badgely, *Sexual Offences against Children: Report of the Committee on Sexual Offences against Children and Youths* (Ottawa: Department of Justice Canada, 1986), https://publications.gc.ca/site/eng/9.840126/publication.html. Following the 1988 amendments, several offences could apply to child sexual abuse, including sexual interference, invitation to sexual touching, sexual exploitation of a young person, and exposing genitals to a child. For a summary of the 1988 amendments, see Mary Wells, *Canada's Law on Child Sexual Abuse: A Handbook* (Ottawa: Department of Justice Canada, 1990), https://www.ojp.gov/pdffiles1/Digitization/128329NCJRS.pdf.

52 Wells, *Canada's Law on Child Sexual Abuse*.

53 Canadian Press, "Alberni First Nation Aims to Reclaim Narrative."

54 "Punt Gets 11 Years for Residential School Atrocities," *Ha-Shilth-Sa*, April 11, 1995, 1, https://data2.archives.ca/e/e449/e011207390.pdf.

55 Judith Lavoie, "Horrors at Alberni Indian Residential School Verified," *Focus on Victoria*, March 3, 2023, https://www.focusonvictoria.ca/reporting/72/; *Indian Residential Schools Settlement Agreement*, Schedule N, May 8, 2006, reprinted in TRC, *Honouring the Truth*, Appendix 1 (*IRSSA*).

56 Lavoie, "Horrors at Alberni Indian Residential School"; "Tseshaht Calls for Truth and Justice," Tseshaht First Nation, accessed August 5, 2024, https://tseshaht.com/tseshaht-calls-for-truth-and-justice/.

57 Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, SC 2003, c. 21. This amendment was brought about in response to the 1992 Westray mining disaster in Nova Scotia, in which 26 miners were killed but no owners or managers of the mine, nor the corporation itself, were successfully prosecuted.

58 *Criminal Code*, s. 22.1.

59 The identification doctrine is explained in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 SCR 662; *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 SCR 497.

60 *Rhône v. Widener*.

61 This would be through the constitutional rule against retrospectivity in section 11(g) of the *Charter*. There is little case law on whether defences to a charge can be retrospectively restricted, but in *R v. Dineley*, 2012 SCC 58, the Supreme Court of Canada ruled that a change to legislation that restricted a defence should not be retrospectively applied.

62 The RCMP refers to this work as federal policing, and it encompasses activities such as border integrity, cybercrime, serious and organized crime, financial crime, intelligence, and international investigations. See "Federal Policing," RCMP, modified August 2, 2024, https://rcmp.ca/en/federal-policing.

63 "Community Policing," RCMP, modified November 21, 2018, https://www.rcmp-grc.gc.ca/ccaps-spcca/index-eng.htm.

64 For example, the Ontario Provincial Police (OPP) and the Sûreté du Quebec. British Columbia had a provincial police force until 1950 when they disbanded it and engaged the RCMP. See Rhianna Schmunk, "B.C. Had a Provincial Police Force Once Before. Why Did It Vanish?" *CBC News*, April 30, 2022, https://www.cbc.ca/news/canada/british-columbia/bc-provincial-police-force-1958-to-1950–1.6436025.

65 Police boards do not get involved in making decisions about day-to-day police operations.

66 There are independent provincial bodies that can examine the actions of police, such as the Independent Investigations Office of the BC Office of the Police Complaint Commissioner, the Alberta Serious Incident Response Team, and the Office of the Independent Police Review Director and the Special Investigations Unit in Ontario, but these bodies do not set the overall direction for the police. They investigate individual complaints regarding police actions. Complaints regarding actions of the RCMP are addressed by the Civilian Review and Complaints Commission for the RCMP.

67 See, for example, *Youth Criminal Justice Act*, SC 2002, c. 1, ss. 6, 7 (which deal with extrajudicial measures through the use of police cautions).

68 Tracking (In)Justice, "Police-involved Deaths Are on the Rise, as Are Racial Disparities in Canada: A Look at Recent Trends in Police-Involved Deaths in Canada," Tracking (In)Justice Project, February 10, 2023, https://trackinginjustice.ca/analysis-increase-in-deaths-and-racial-disparities/.

69 Leon Harris, "Indians Finally Get Own Police Force," *Montreal Gazette*, May 16, 1969.

70 Public Safety Canada, "About First Nations Police Services in Canada," in Government of Canada, *Engaging on Federal First Nations Police Services Legislation: Discussion Guide*, 2022, 4, https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/nggng-fdrl-frst-ntns-plc-srvcs-lgsltn-2022/nggng-fdrl-frst-ntns-plc-srvcs-lgsltn-2022-en.pdf.

71 "Our History," Nunavik Police Service, accessed August 7, 2024, https://www.nunavikpolice.ca/en/about/our-history/. These 35 services provide policing services to 155 First Nations and Inuit communities.

72 At the time of the writing of this Final Report, there were a number of legal actions launched against the federal government with regard to the underfunding and temporary nature of Indigenous policing agreements that are awaiting a decision. See, for example, Kate Rutherford, "3 Northern Ontario Indigenous Police Services Await Federal Judge's Ruling on Funding Stalemate," *CBC News*, June 14, 2023, https://www.cbc.ca/news/canada/sudbury/police-indigenous-funding-inadequate-federal-1.6877093; Matt Gilmour, "22 Indigenous Police Forces in Quebec File Human Rights Complaint Accusing Ottawa of Underfunding Them," *CTV News*, October 30, 2023, https://montreal.ctvnews.ca/22-indigenous-police-forces-in-quebec-file-human-rights-complaint-accusing-ottawa-of-underfunding-them-1.6624002. This is not a new problem for Indigenous police services. It was recognized by the RCAP in its 1996 report on criminal justice. RCAP, *Bridging the Cultural Divide* (Ottawa: Minister of Supply and Services Canada, 1996), 85–86.

73 Colin Freeze, "First Nations Police Launch Human-Rights Complaint against Ottawa over Funding," *Globe and Mail*, April 4, 2023, https://www.theglobeandmail.com/canada/article-first-nations-police-complaint/; see also "Indigenous Police Services Push Back on Discriminatory Funding: Canadian Human Rights Complaint Filed by Indigenous Police Chiefs of Ontario," Falconers LLP, April 3, 2023, https://falconers.ca/indigenous-police-services-push-back-on-discriminatory-funding/.

74 "CHRT [Canadian Human Rights Tribunal] Complaint Filed by IPCO [the Indigenous Police Chiefs of Ontario] – March 29, 2023," Falconers LLP, April 3, 2023, 8 https://falconers.ca/wp-content/uploads/2023/04/IPCO.-FNIPP-Human-Rights-Complaint.-Cover-Sched-A.-Mar-29-2023-FINAL-for-sharing.pdf; see also Ka'nhehsí:io Deer, "AFN Calls for Federal Government to Recognize First Nations Jurisdiction over Policing," *CBC News*, July 10, 2024, https://www.cbc.ca/news/indigenous/afn-resolution-policing-jurisdiction-1.7259691.

75 The Chief of the Pekuakamiulnuatsh First Nation had also pursued a human rights complaint with the Canadian Human Rights Tribunal, alleging discriminatory treatment by Public Safety Canada in connection with the implementation of the First Nations and Inuit Policing Program (FNIPP). *Dominique (on Behalf of the Members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4. The tribunal found that Public Safety Canada discriminated against the Pekuakamiulnuatsh community in the provision of a service on the basis of their race, national, or ethnic origin because of the systemically discriminatory nature of the FNIPP. The tribunal concluded that the community experienced adverse treatment because of the short duration of the funding agreements, and the inadequate funding resulted in the poor implementation of the FNIPP.

76 Public Safety Canada, "First Nations and Inuit Policing Program," Government of Canada, March 21, 2022, https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/brgnl-plcng/plcng-prgrm-en.aspx.

77 Brittani Schroeder, "Indigenous Police Services Fight for Funding Equality: A Look into the 2023 Funding Crisis," *Blueline*, February 8, 2024, https://www.blueline.ca/indigenous-police-services-fight-for-funding-equality-a-look-into-the-2023-funding-crisis/.

78 The Expert Panel on Policing in Indigenous Communities, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities* (Ottawa: Canadian Council of Academies, 2019), https://www.cca-reports.ca/reports/policing-in-indigenous-communities/.

79 Aidan Macnab, "SCC Hearing Case with Implications for Government Funding of First Nations Police Services," *Canadian Lawyer*, October 17, 2023, https://www.canadianlawyermag.com/news/general/scc-hearing-case-with-implications-for-government-funding-of-first-nations-police-services/380588.

80 *Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699, para. 132.

81 Julie McGregor, Factum of the Intervener, Assembly of First Nations, submitted to the Supreme Court of Canada, April 18, 2017, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/40619/FM130_Intervener_ASSEMBLY%20OF%20FIRST%20NATIONS.pdf.

82 Adam Cotter, "Perceptions of and Experiences with Police and the Justice System among the Black and Indigenous Populations in Canada," Statistics Canada, February 16, 2022, https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00003-eng.htm.

83 The numbers for each category include: enforcing the laws (10 percent versus 5 percent); promptly responding to calls (16 percent versus 7 percent); providing information on crime prevention (16 percent versus 9 percent); ensuring the safety of citizens (11 percent versus 5 percent); and treating people fairly (15 percent versus 7 percent). Cotter, "Perceptions of and Experiences with Police."

84 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," Attorney General, accessed August 2, 2024, 28–29, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf.

85 *Indian Act*, RSC 1985, c. I-5.

86 Stewart Mein, "North-West Resistance," *Indigenous Saskatchewan Encyclopedia*, accessed August 2, 2024, https://teaching.usask.ca/indigenoussk/import/north-west_resistance.php.

87 Louis Riel was arrested, convicted of treason, and hung. In addition to Riel, eight First Nations men were hung in relation to their role in the Resistance: Kah – Paypamahchukways (Wandering Spirit); Pah Pah-Me-Kee-Sick (Walking the Sky); Manchoose (Bad Arrow); Kit-Ahwah-Ke-Ni (Miserable Man); Nahpase (Iron Body); A-Pis-Chas-Koos (Little Bear); Itka (Crooked Leg); and Waywahnitch (Man Without Blood). Pîhtokahanapiwiyin, also known as Poundmaker, was convicted of treason and sentenced to three years in prison. Mein, "North-West Resistance"; "History: Battleford National Historic Site," Parks Canada, accessed August 7, 2024, https://parks.canada.ca/lhn-nhs/sk/battleford/culture/histoire-history.

88 "Stamp Marks 150th Anniversary of the Historic Red River Resistance," news release, Canada Post, November 6, 2019, https://www.canadapost-postescanada.ca/cpc/en/our-company/news-and-media/corporate-news/news-release/2019-11-06-stamp-marks-150th-anniversary-of-the-historic-red-river-resistance.

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267 See, for example, "Account and Receipt Issued on by D. Wynne General Merchant to Department of Indian Affairs for Provisions Supplied to the Kioki Family upon the Death of Son John Kioki," June 30, 1942, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460–23, part 1, vol. 6186, RG10, LAC.

268 Maureen Lux, *Separate Beds: A History of Indian Hospitals in Canada* (Toronto: University of Toronto Press, 2018).

269 See, for example, letter from the Superintendent of Six Nations to the Secretary of the Department of Indian Affairs, May 12, 1936 (noting the protocol pursuant to the Circular C1-1-23, issued April 17, 1935), Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466–23, part 1, vol. 6202, RG10, LAC; see also letter from Indian Agent Moore to Secretary of DIA, January 8, 1937 (again citing Circular C1-1-23 dated April 17, 1935, requiring the completion of Form 414 Memorandum "immediately following the death of a pupil of an Indian Residential School." NCTR Archival materials include several examples of the Department of Indian Affairs writing to Indian Agents and principals instructing that the requisite Form 414 Memorandum be completed and returned to the Department. See letter from Philip Phelan, DIA Chief of Training Division to Indian Agent S. Lovell, January 19, 1937, The Pas Agency – Guy Roman Catholic Residential School – Deaths of Pupils, 1937–1943, file 655–23, part 1, vol. 6315, RG10, LAC (stating that, "it is necessary that a memorandum of enquiry into the cause and circumstances of the death of each [child] be forwarded, on the proper form for that purpose" and that the forms needed to be "promptly completed in the case of the death of a pupil and that they are forwarded to the Department").

270 Form no. 414, Department of Indian Affairs. For examples, see "St. Augustine's IRS Summary – April 2023," Indian Residential School Records, April 5, 2023, https://indianresidentialschoolrecords.com/wp-content/uploads/2023/04/St-Augustines-IRS-Summary-April-2023.pdf, citing "Sechelt Residential School Board of Inquiry into death of Simon Francis Jeffries Aged 13 Pupil no 146," September 17, 1935, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

271 Form no. 414, Department of Indian Affairs.

272 Form no. 414, Department of Indian Affairs.

273 Form no. 414, Department of Indian Affairs.

274 TRC, *Missing Children*, 9.

275 Letter from Philip Phelan, chief of the Training Division of the Department of Indian Affairs, to Indian Agent of Port Alberni, BC, February 1937, West Coast Agency – Alberni Residential School – Death of Pupils, 1937–1945, file 877-23, part 1, vol. 6436, RG10, LAC.

276 Form No. 414, Department of Indian Affairs.

277 Form No. 414, Department of Indian Affairs; see also TRC, *Missing Children*, 9, 119–22, 126, 138.

278 Memorandum from Philip Phelan, Indian Affairs Branch Chief Education Division, to Major D.M. McKay, June 13, 1949, Brandon Residential School – United Church – Deaths of Pupils, 1940–1949, file 576-23, part 1, vol. 6259, RG10, LAC.

279 Letter from R.A. Hoey, Superintendent of Welfare & Training to R.P.G. Laurence, Indian Agent, Sault Ste. Marie, December 7, 1943, Sault Ste. Marie Agency – Shingwauk Residential School – Church of England – Death, 1936–1944, file 469-23, part 1, vol. 6214, RG10, LAC.

280 Letter from J.F. Lockhart, Fort Frances Agency – Fort Frances Residential School – Death of Pupils, 1942–1953, file 463-23, part 1, vol. 6195, RG10, LAC.

281 Letter from J.D. Sutherland, Acting Superintendent of Indian Education to Robert Howe, Acting Indian Agent Cranbrook, March 18, 1936, Kootenay Agency – Kootenay Residential School – Death of Pupils, 1935–1950, file 884-23, part 1, vol. 6455, RG10, LAC.

282 Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC; Touchwood Agency – Gordon Residential School – Deaths of Pupils, 1940–1947, file 654-23, part 1, vol. 6312, RG10, LAC; Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC; Portage La Prairie Agency – Pine Creek Residential School – Roman Catholic – Deaths of Pupils, 1935–1951, file 582-23, part 1, vol. 6272, RG10, LAC; James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

283 It is important to acknowledge that many Form 414 Memorandums do not exist for many deceased children. Form 414 Memorandums were destroyed as part of department record destruction schedule, poor school record-keeping, negligence, or purposeful and intentional destruction by the school administration.

284 Letter from Philip Phelan, Chief of Training Division, to Reverend J.F.J. Marshall, Principal of Sioux Lookout Indian Residential School, March 2, 1937, Kenora Agency – Sioux Lookout Residential School – Church Of England – Death of Pupils, 1935–1949, file 470-23, part 1, vol. 6216, RG10, LAC.

285 Letter from Philip Phelan, Chief of Training Division, to Reverend J.F.J. Marshall, Principal of Sioux Lookout Indian Residential School, March 2, 1937, Kenora Agency – Sioux Lookout Residential School – Church Of England – Death of Pupils, 1935–1949, file 470-23, part 1, vol. 6216, RG10, LAC.

286 Letter from Fred A. Mayo, Acting Principal of Sioux Lookout Indian Residential School to Philip Phelan, Chief of Training Division, March 11, 1937, Kenora Agency – Sioux Lookout Residential School – Church Of England – Death of Pupils, 1935–1949, file 470-23, part 1, vol. 6216, RG10, LAC.

287 "Form 414 Memorandum, C. Statement of Indian Agent, re: Simon Francis Jeffries," n.d. [ca. September 14, 1935], Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

288 "Form 414 Memorandum, C. Statement of Indian Agent, re: Simon Francis Jeffries," n.d. [ca. September 14, 1935].

289 "Form 414 Memorandum, C. Statement of Indian Agent, re: Simon Francis Jeffries," n.d. [ca. September 14, 1935].

290 "Form 414 Memorandum, C. Statement of Indian Agent, re: Simon Francis Jeffries," n.d. [ca. September 14, 1935].

291 "Sechelt Residential School Board of Inquiry into Death of Simon Francis Jeffries, Aged 13, Pupil no 146, Statement of Abraham Jeffries," September 17, 1935, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

292 Letter from Okanagan Agency Indian Agent, F.J.C. Ball to Harold W. McGill, M.D., Deputy Superintendent General of Indian Affairs, re: Inquiry into the Death of Simon Francis Jeffries, September 19, 1935, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

293 Letter from Ball to McGill, September 19, 1935.

294 Letter from Ball to McGill, September 19, 1935.

295 Letter from Ball to McGill, September 19, 1935.

296 Letter from Ball to McGill, September 19, 1935.

297 The Missionary Oblates of Mary Immaculate had the responsibility for the management of the school at this time. The NCTR's school narrative indicates the school principal's full name was Reverend Father Theophile J. Falhmann, O.M.I. "Sechelt IRS School Narrative," NCTR, modified April 7, 2005, https://t-r-c.ca/nctr/school_narratives/sechelt.pdf; Letter from Ball to McGill, September 19, 1935.

298 "Sechelt IRS School Narrative"; Letter from Ball to McGill, September 19, 1935.

299 Form 414 Memorandums from other institutions also noted concerns of poor nutrition as a contributing factor to children's deaths. For example Carlton Agency – Lac La Ronge Residential School – Deaths, 1936–1939, file 656-23, part 1, vol. 6317, RG10, LAC (which includes various death records for at least four students where the Indian Agent repeatedly documented in the Form 414 Memorandum submitted to the Department of Indian Affairs that the students of Lac La Ronge Residential School were residing in terrible conditions, poor ventilation, ill and contagious pupils were not segregated and there was insufficient food. The Indian Agent stated that the children, "only received Irish Bread and hard oatmeal in the morning and a little peanut butter once a week." The Indian Agent further stated that the dormitories and classrooms were overcrowded, and better food needed to be supplied, noting that the, "food these children received is very poor, not the right quality for growing children").

300 Letter from Ball to McGill, September 19, 1935.

301 Letter from Ball to McGill, September 19, 1935.

302 Letter from Ball to McGill, September 19, 1935.

303 Letter from Ball to McGill, September 19, 1935.

304 "Report for the Month of January 1937, on Vancouver Agency, F.J.C. Ball, Indian Agent," February 10, 1937, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

305 Letter from F.J.C. Ball to the Secretary Indian Affairs Branch, February 4, 1937, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

306 Letter from Ball to the Secretary Indian Affairs Branch, February 4, 1937.

307 Letter from Arthur Jeffries to his father, January 22, 1937, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

308 Letter from Secretary T.R.L. MacInnes to F.J.C. Ball Indian Agent, February 9, 1937, Vancouver Agency – Sechelt Residential School – Death of Pupils, 1936–1937, file 887-23, part 1, vol. 6461, RG10, LAC.

309 "Sechelt IRS School Narrative," 16.

310 "Recommended Inspection of All Equipment," *Brantford Expositor*, May 16, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

311 "Form 414 Memorandum, B. Statement of the Physician Who Attended the Deceased Pupil, re: Effie Smith," May 11, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

312 "Examination of the Four Girls on Swing with Effie Smith [Investigation Statement]," n.d. [ca. May 14, 1936], Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

313 "Statement by C.H. Lager, Boy's Master, Mohawk Institute [Investigation statement]," n.d. [ca. May 14, 1936], Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

314 "Statement by Miss Hardie, Senior Mistress, Mohawk Institute [Investigation statement]," n.d. [ca. May 14, 1936], Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

315 "Statement by Hardie, Mohawk Institute," n.d. [ca. May 14, 1936].

316 "Statement by Hardie, Mohawk Institute," n.d. [ca. May 14, 1936].

317 Letter from Horace W. Snell, Principal [Mohawk Institute] to the Secretary, Department of Indian Affairs, May 12, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

318 "Inquiry Verdict re: Effie Smith," May 16, 1934, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

319 "Royal Canadian Mounted Police Ohsweken Detachment Report re: Effie Smith (Indian) – Mohawk Institute, Brantford, Ont. Accidental Death," May 16, 1934, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

320 Letter from E.P. Randle, Indian Superintendent, Six Nations to the Secretary, Department of Indian Affairs Enclosing Statements [inclusive of investigation statements], May 14, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

321 "Statement by C.H. Lager, Boy's Master, Mohawk Institute [Investigation statement]," n.d. [ca. May 14, 1936], Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

322 "Recommended Inspection of All Equipment," *Brantford Expositor*, May 16, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

323 "Royal Canadian Mounted Police Ohsweken Detachment Report re: Effie Smith (Indian) – Mohawk Institute, Brantford, Ont. Accidental Death, May 16, 1934," Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

324 Letter from Horace W. Snell, Principal [Mohawk Institute] to the Secretary, Department of Indian Affairs, May 25, 1936, Six Nations Agency – Mohawk Residential School – Deaths, 1936, file 466-23, part 1, vol. 6202, RG10, LAC.

325 "Mohawk Institute Indian Residential School IAP School Narrative," NCTR, May 31, 2013, https://t-r-c.ca/nctr/school_narratives/mohawk_institute.pdf.

326 Letter from R.H. Moore, Indian Agent to the Secretary, Department of Indian Affairs, January 6, 1937, Stuart Lake Agency – Lejac Residential School – Death of Pupils, 1934–1950, file 881-23, part 1, vol. 6446, RG10, LAC.

327 Letter from Moore, Indian Agent to the Secretary, Department of Indian Affairs, January 6, 1937.

328 "Indian School Authorities Absolved in Lake Tragedy," *Vancouver Sun*, January 6, 1937.

329 "Indian School Authorities Absolved."

330 "Indian School Authorities Absolved"; Letter from C. Pitts, Coroner, to R.H. Moore, Indian Agent, January 6, 1937, Stuart Lake Agency – Lejac Residential School – Death of Pupils, 1934–1950, file 881-23, part 1, vol. 6446, RG10, LAC (Pitts wrote that, "Indian witnesses maintained corporal punishment resulted in runaways, hence the jury's recommendation re. discipline").

331 Letter from Pitts to Moore, January 6, 1937.

332 "[Inquiry] Report re: Willie, Allen, Michel, Johnny, Justin Maurice, Paul Andrew, Vanderhoof Detatchment [Sworn testimony of Father Patrick McGrath, Principal of the Lejac Indian Residential School]," January 1937, Stuart Lake Agency – Lejac Residential School – Death of Pupils, 1934–1950, file 881-23, part 1, vol. 6446, RG10, LAC.

333 "[Inquiry] Report re: Willie, Allen, Michel, Johnny, Justin Maurice, Paul Andrew, Vanderhoof Detatchment [Sworn testimony of Father Patrick McGrath, Principal of the Lejac Indian Residential School]," January 1937.

334 "The Government of British Columbia Inquisition [Verdict re: Allen Willie, Johnny Michel, Maurice Justine, Andrew Paul]," January 4, 1937, Stuart Lake Agency – Lejac Residential School – Death of Pupils, 1934–1950, file 881-23, part 1, vol. 6446, RG10, LAC.

335 "Government of British Columbia Inquisition [Verdict re: Allen Willie, Johnny Michel, Maurice Justine, Andrew Paul]," January 4, 1937.

336 "Lejac IRS School Narrative," NCTR, accessed August 8, 2024, 11, https://t-r-c.ca/nctr/school_narratives/lejac.pdf.

337 Letter from A.D. Moore, Indian Agent to the Secretary, Department of Indian Affairs Branch, June 15, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

338 "Report re: Cody Claus, Victoria Hospital, London [Ontario]," June 14, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

339 Letter from Rev. O.B. Strapp, Principal of the Mount Elgin Indian Residential School to Dr. H.W. McGill, Director of Indian Affairs [re: Reporting the Death of Pupil #791 Courtland (Cody) Claus], June 13, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

340 "Form 414 Memorandum, B. Statement of the Physician Who Attended the Deceased Pupil, re: Cody Claus," n.d. [ca. June 12, 1939], Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

341 "Form 414 Memorandum, C. Statement of Indian Agent, re: Courtland (Cody) Claus," n.d. [circa June 12, 1939], Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

342 "Form 414 Memorandum, C. Statement of Indian Agent, re: Courtland (Cody) Claus," n.d. [circa June 12, 1939].

343 "Sworn Statement of Jesse Claus of Ohsweken," June 12, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

344 "Sworn Statement of Jesse Claus of Ohsweken," June 12, 1939.

345 "Memorandum for file: Re: Courtland (Cody) Claus, No. 791 Mount Elgin, extracted by Philip Phelan, Chief Training Division," June 20, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

346 "Newspaper clipping "Injuries Fatal to Muncey Boy," [no newspaper source recorded]," n.d. [ca. June 1939], Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

347 Letter from Rev. O.B. Strapp, Principal of the Mount Elgin Indian Residential School to Dr. H.W. McGill, Director of Indian Affairs [re: Burial chargesf for Courtland (Cody) Claus], June 13, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

348 Letter from Strapp, Principal of the Mount Elgin Indian Residential School to McGill, Director of Indian Affairs [re: Burial chargesf for Courtland (Cody) Claus], June 13, 1939.

349 "Royal Canadian Mounted Police, Muncey Detachment, Report re: Cody Claus (Indian) – Brantford, Ont. Deceased," Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC.

350 Letter from R.A. Hoey, Superintendent of Welfare & Training to Rev. OB. Strapp, Principal of the Mount Elgin Indian Residential School, June 21, 1939, Caradoc Agency – Mount Elgin Residential School – Deaths of Pupils, 1939–1944, file 468-23, part 1, vol. 6210, RG10, LAC (emphasis added).

351 "Report on the Death of Three Boys of Our Lake Ste-Anne School at Albany, James Bay by Paul Langlois, Principal," June 14, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

352 "Report on the Death of Three Boys of Our Lake Ste-Anne School at Albany, James Bay by Paul Langlois, Principal," June 14, 1941.

353 Letter from Philip Phelan, Chief Training Division to Rev. H. Belleau, Vicar Apostolie of James Bay, July 17, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

354 "Memorandum to the Deputy Minister Re: Indian Boys John Kioki, Michael Sutherland and Michael Matinas," May 5, 1942, and "Report on the Death of Three Boys of Our Lake Ste-Anne School," June 14, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

355 "Inquiry into Deaths of John Kioki, Michel Matinas, Michel Sutherland, Statement of Father Langois," n.d. [ca. June 1942], Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

356 "Royal Canadian Mounted Police, Moosonee Detatchment Report Re: John Kioki, Attawapiskat, Ont., Michel Sutherland, Weemusk, Ont., Michel Matinas, Attawapiskat, Ont. – Missing from R.C. Mission Indian School, Fort Albany, Ont.," June 27, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

357 Letter from Rev. H. Belleau, Vicar Apostolie of James Bay to Philip Phelan, Chief Training Division Indian Affairs, July 26, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

358 Letter from Rev. H. Belleau, Vicar Apostolie of James Bay to Philip Phelan, Chief Training Division Indian Affairs, July 26, 1941.

359 "Inquiry into deaths of John Kioki, Michel Matinas, Michel Sutherland, Statement of Charles Kioki – Father of John Kioki," n.d. [ca. June 1942], Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

360 "Royal Canadian Mounted Police, Moosonee Detatchment Report Re: John Kioki, Attawapiskat, Ont., Michel Sutherland, Weemusk, Ont., Michel Matinas, Attawapiskat, Ont. – Missing from R.C. Mission Indian School, Fort Albany, Ont.," June 27, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

361 "Royal Canadian Mounted Police, Moosonee Detatchment Report Re: John Kioki, Attawapiskat, Ont., Michel Sutherland, Weemusk, Ont., Michel Matinas, Attawapiskat, Ont. – Missing from R.C. Mission Indian School, Fort Albany, Ont.," June 27, 1941.

362 "Royal Canadian Mounted Police, Moosonee Detatchment Report Re: John Kioki, Attawapiskat, Ont., Michel Sutherland, Weemusk, Ont., Michel Matinas, Attawapiskat, Ont. – Missing from R.C. Mission Indian School, Fort Albany, Ont.," June 27, 1941.

363 Letter from K. Duncan, Assistant Director, Criminal Investigation to the Director, Indian Affairs Branch, Re: John Kioki, Michel Sutherland and Michel Matinas, (Truancy, Fort Albany, Ontario, July 14, 1941, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

364 Letter from Rev. H. Belleau, Vicar Apostolie of James Bay to Philip Phelan, Chief Training Division Indian Affairs, July 26, 1941.

365 Letter from Dr. T.J. Orford to Dr. H.W. McGill, Director Indian Affairs Branch, August 21, 1942, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

366 "Provisions Supplied to Charles Kioki and Family Authorized by Doctor Orford," June 30, 1942, Treaty no. 9, James Bay Agency – Albany Roman Catholic Mission Residential School – Deaths of Pupils, 1935–1942, file 460-23, part 1, vol. 6186, RG10, LAC.

367 "St. Anne's (Fort Albany) Indian Residential School IAP School Narrative," NCTR, August 1, 2014, 20, https://t-r-c.ca/nctr/school_narratives/st_anne.pdf.

368 "Memorandum from Bernard F. Neary, Superintendent of Welfare and Training to R.A. Hoey Re: Drownings at the Gordon's Indian Residential School," June 18, 1947, Touchwood Agency – Gordon Residential School – Deaths of Pupils, 1940–1947, file 654-23, part 1, vol. 6312, RG10, LAC.

369 "Royal Canadian Mounted Police Report, Punnichy Detachment, Re: Myrtle Jane Mostoos & Margaret Bruce (Treaty Indians) Accidental Drowning of – Gordon's Indian School," June 18, 1947, Touchwood Agency – Gordon Residential School – Deaths of Pupils, 1940–1947, file 654-23, part 1, vol. 6312, RG10, LAC.

370 "Royal Canadian Mounted Police Report, Punnichy Detachment, Re: Myrtle Jane Mostoos & Margaret Bruce (Treaty Indians) Accidental Drowning of – Gordon's Indian School," June 18, 1947.

371 "Royal Canadian Mounted Police Report, Punnichy Detachment, Re: Myrtle Jane Mostoos & Margaret Bruce (Treaty Indians) Accidental Drowning of – Gordon's Indian School," June 18, 1947.

372 "Form 414 Memorandum, C. Statement of Indian Agent, re: Myrtle Jane Mostoos," June 14, 1947, Touchwood Agency – Gordon Residential School – Deaths of Pupils, 1940–1947, file 654-23, part 1, vol. 6312, RG10, LAC; Form 414 Memorandum, C. Statement of Indian Agent, re: Margaret Bruce, June 14, 1947, Touchwood Agency – Gordon Residential School – Deaths of Pupils, 1940–1947, file 654-23, part 1, vol. 6312, RG10, LAC.

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