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Reparations for Cultural Loss to Survivors of Indian Residential Schools

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Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
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Graduate Studies in Law
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Abstract

This paper is an investigation into appropriate forms of reparation to compensate survivors and descendants of survivors of Indian Residential Schools for loss of culture.

Indian Residential Schools perpetrated serious individual abuses upon pupils; however, Aboriginal peoples as a group also sustained a serious harm – an injury to their culture. Whereas tort law and alternative dispute resolution mechanisms have provided redress for individual losses, a group-oriented reparations solution is required to compensate for cultural loss. This paper will set out the historical record of the school policy, and investigate the nature of the loss, i.e. culture, and its intergenerational relationships. The methods by which common law courts have dealt with contemporary cultural loss claims will be outlined, as well as the reparations scheme that has been implemented by the Canadian government. After analyzing the legal and non-legal responses to claims for loss of culture, a legislative solution will be offered that aims to protect and promote Aboriginal culture as it stands in Canada today.

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1.0 INTRODUCTION

Between 1874 and 1996 approximately 150,000 Aboriginal children were removed from their families to attend one of the 130 residential schools that operated in Canada. The schools existed in every province and territory except Newfoundland & Labrador, Prince Edward Island, and New Brunswick.¹ Approximately 80,000 former students survive today.

The explicit goal of residential schools was to assimilate Aboriginal children into wider western society by removing them from the cultural influences of their homes. While concerted government efforts have provided reparations to survivors for the physical and psychological abuses they suffered at the schools, the government has not effectively compensated Aboriginal people for the most valuable loss suffered – loss of culture.

Loss of culture is a novel claim in law that Canadian courts have been unwilling or unable to ascribe damages for. Unlike Francophone minority populations in Canada

¹ In June 2010 the Supreme Court of Newfoundland and Labrador, Trial Division, certified a class action proceeding on behalf of Labrador Innu, Inuit, and Métis individuals who had attended five residential schools in St. Anthony, Newfoundland, and coastal Labrador between 1949 and approximately 1980. Two of the schools were administered by Moravian Missionaries, while the remaining three were run by the International Grenfell Association. Alleged damages include physical and sexual abuse, as well as cultural loss. As with other residential school claims, the class members also allege that their attendance forced them to become ashamed of their Aboriginal identities, and negatively affected the abilities of future generations to raise children. The federal government has defended the claims on the same basis it reasoned excluding Newfoundland and Labrador Indian residential schools from the national settlement agreement in 2006, i.e. because Newfoundland and Labrador Aboriginals were not covered under the *Indian Act*, S.C. 1876 (39 Vict.), c. 18, and that after 1949 when the province joined Confederation the federal government merely funded the schools and was in no way involved in their administration. The plaintiff's argue that under Term 3 of the Terms of Union matters not specifically referred to are deemed to be as if the province had joined Canada in 1867. As per the *Newfoundland Act, 1949*, 12 & 13 Geo. VI, c. 22 (U.K.) (i.e. the *Terms of Union* between Canada and Newfoundland), "The Constitution Acts, 1867 to 1940, shall apply to the Province of Newfoundland and Labrador in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland and Labrador had been one of the provinces originally united except in so far as varied by these Terms ..." The plaintiff's also cite numerous examples of the federal government furnishing monies to Newfoundland and Labrador for the provision of education, housing, and social services to Aboriginal peoples in Labrador subsequent to 1949. *Anderson v. Canada (Attorney General)*, [2010] 3 C.N.L.R. 1.

which enjoy explicit and positive constitutional protections, Aboriginals have been left with a court-rendered interpretation of s. 35(1) that sets out a unique fiduciary duty obligating the federal government to act in the best interests of Aboriginal groups when dealing with them or on their behalf. In addition to recognizing and protecting Aboriginal rights that have not been extinguished as of 1982, courts have interpreted the Crown's fiduciary duty as an obligation to exercise the utmost level of reasonable restraint when encroaching upon Aboriginal rights (i.e. these rights are not absolute). Additional case law has interpreted an Aboriginal right to be a practice that was integral to the distinctive nature of the particular Aboriginal claimant group's culture prior to contact with Europeans, and which continued until 1982.

The implication of these decisions is that the set of legal rights which have been granted to Aboriginals are inherently retrospective. They defend activities that Aboriginal groups participated in centuries ago, but do not provide any positive protections that would allow Aboriginal culture to develop and flourish today. The current legal framework protects Aboriginal interests, but provides no basis for promoting them. This has been particularly frustrating in the residential school context, because the school system itself was a direct assault aimed at destroying culture. Any Aboriginal right or aspect of culture destroyed by the schools prior to 1982 has no legal basis for being revisited or revived. The result is that the legacy of the schools which prevented rights continuing until 1982 persists today in the form of a legal system that provides no basis for promoting and regenerating Aboriginal culture.

An effective remedy must therefore come by legislative action. Only government bodies have the power to acknowledge the intergenerational harm and moral culpability

involved in a claim for loss of culture. The loss of culture borne by Aboriginal peoples would benefit from two actions: (1) legislative enactment, be it constitutional or otherwise, recognizing Aboriginal language rights in areas where numbers warrant; and (2) establishment of culturally relevant institutions, i.e. schools, with grassroots training and programming that would allow and train Aboriginal groups to actively run and, in the case of schools, set significant parts of the curriculum. Whatever amount of culture was lost due to the residential school experiment likely cannot be regained. Therefore, the most effective remedies for affecting culture as a group loss will be group-based remedies that protect and promote what Aboriginal culture remains.

2.0 HISTORY

The founding theory underlying Canada's residential school experiment was that of Christian missionary zeal in saving the souls of savages by converting them to the Christian faith. The reality of this belief put into practice brought about the same results in Canada as experienced by native populations that had come into contact with western missionaries in the South Pacific, Africa, and Asia. The result has been a cultural genocide, or ethnocide. The direct aim of Christian missionaries amongst Canada's Aboriginal peoples, as well as similar groups throughout the world, has been to achieve what C.W. Hobart and C.S. Brant call 'cultural replacement,' or

... the attempt, in undeveloped areas, to replace the traditional culture with a modern one in a short period – a generation or two – through the introduction of modern technological means, organizational forms, and ideological orientations, on a more or less massive basis, without thoughtfully considering the articulation and interactive effects of such introductions.²

² C.W. Hobart & C.S. Brant, "Eskimo Education, Danish and Canadian: A Comparison" (1966) 3 The Canadian Review of Sociology and Anthropology 2 at 48.

The authors' own definition has a certain tinge of prejudice, in that they generally consider the populations which missionaries infiltrate to be relatively 'undeveloped.' In contrast, many authors go to lengths to demonstrate the organization and technical abilities of native groups. Viewpoints on development aside, the efforts of church/missionary groups in rural Canada to 'kill the Indian in the child' clearly fall within the 'cultural replacement' definition. The machinery of this cultural teardown and rebuild was the residential school: a total institution designed to completely immerse Aboriginal children in western culture and assimilate them into productive members of the expanding Canadian nation, founded on western beliefs and principles.

2.1 Early History: 1620-1830

The underpinnings of the modern residential school system in Canada were laid by the Récollets, a French Roman Catholic missionary group, beginning in New France in the 1620's. It was their pursuit to civilize Algonquin children through small residential schools. Before the first half of the seventeenth century was over, the Récollets were joined by the Jesuits and the Ursulines, male and female missionary groups respectively. In 1663, when France took direct control of New France and reorganized it as a colony, it decreed that the education of Aboriginal children could not be neglected, and efforts were made to support the aforementioned religious groups in schooling Aboriginal children. However, early attempts proved futile and the effort was soon abandoned.

The problem was that Aboriginal groups who were in contact with the French during those colonial times were self-sufficient, and as such there was no apparent advantage to having their children schooled by Europeans. The same disinterest was largely mirrored by French colonists, who found Aboriginals useful allies in war and in

supplying furs. For these tasks Aboriginal peoples were already ideally qualified and many therefore saw little reason to meddle.

Aboriginal residential schooling was also entertained in British North America by the New England Company, a protestant missionary group based in New Brunswick in the late 1700's. Unlike the system in New France, the New England Company's design saw Aboriginal pupils being apprenticed out to local farm families subsequent to spending some time at the schools, which were largely vocational in nature. Problems occurred when families with which the Aboriginal pupils were apprenticed and billeted, who were supposed to be teaching them Christian ideas, instead mistreated them through neglect, overwork, and abuse.³

The idea of residential schools was also experimented with in the western part of what would become Canada. The Anglican Church Missionary Society, with help from the Hudson's Bay Company, established a boarding school for Aboriginal children on the Red River at the future site of Winnipeg in 1820. Again, Aboriginal groups showed little interest in sending their children to such an institution and it closed within the decade.

What might be called the 'new wave' of policy towards educating Aboriginal youth began in the 1830's. British immigrants settling across the west pressured the colonial government to deal with or remove Aboriginals from the area. In 1846, the government of Upper Canada, along with church officials, convened at Orillia, Ontario to devise a strategy for dealing with Aboriginal peoples. The palpable interests of church and state were the same; the church would save souls at schools which were government funded, therein erasing the 'Indian problem' faced by proliferate English and French

³ J.R. Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66 Sask. L. Rev. 357 at para. 4.

settlers. This union would persist until the last residential school closed its doors in the 1990's.

2.2 The Royal Proclamation, 1763

Conventional policy for dealing with Aboriginal peoples was codified in the Imperial Government's 1763 Royal Proclamation at the end of the Seven Years War, and was premised largely on the advantages to be had in affiliating with certain Aboriginal groups for the purposes of warring with the French. The Proclamation reaffirmed established protections afforded to Indians through treaties, in addition to setting new ones limiting land surrender arrangements. It states that Indians to whom the Crown is connected "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds ..."⁴ The Proclamation therefore essentially applies to lands acquired by cession or surrender, as all other lands "are reserved to the said Indians, or any of them."⁵ This seemingly means that all lands not acquired by surrender remain in the possession of Indians through their right of first usage or occupying said lands prior to European contact. The Proclamation goes on to "strictly forbid ... all our loving subjects from making any Purchase or Settlements ... of any of the Lands above reserved, without our especial leave and Licence for the Purpose ... [of doing so],"⁶ therein establishing that only those individuals who are expressly licensed as official agents of the Crown specifically empowered to purchase pieces of Indian land may do so, to the exclusion of all others. This concept is reaffirmed in the

⁴ The Royal Proclamation of 1763, as quoted in David W. Elliott, *Law and Aboriginal Peoples in Canada*, 4th ed. (North York: Captus Press, 2000) at 208.

⁵ *Ibid.*

⁶ *Ibid.*

document shortly thereafter: “no Private person [will] ... make any purchase from the said Indians of any Lands reserved [for them] ... but ... if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us.”⁷ Settlers who had “wilfully or inadvertently ... [habited] upon any ... Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians ... [are ordered] to remove themselves from such Settlements.”⁸ This clause reaffirmed a number of past treaties demanding the removal of settlers from Indian reserve land, usually prompted by Indian complaints. Trading between settlers and Indians is encouraged by the Proclamation, although it requires that people who do partake in such trade obtain a special licence to do so, which is subject to revocation should the holder fail to abide by any attached regulations as established by a colony’s Governor or Commander-in-Chief. Thus the administration encouraged trade; although strict parameters were introduced in order for the British government to exert complete control over each and every trade that was to take place (it is possible that the government may have thought trade would aid assimilation through dependency on European goods).

The Proclamation therefore, and especially its seemingly innovative clause purporting that all lands not specifically ceded to the Crown by Indians remain in Indian possession, grants huge portions of land to Indians, the only qualification being on lands already legitimately purchased by the Crown. However, this clause only reaffirms what had already been established in earlier treaties, i.e. that Indians had a pre-existing right to and interest in the land. As was asserted in the 1963 case of *R. v. Koonungnak*⁹

⁷ *Ibid.* at 208-209.

⁸ Elliott, *supra* note 4 at 208.

⁹ (1963), 42 C.R. 143 (N.W.T. Terr. Ct.).

This proclamation has been spoken of as the 'Charter of Indian Rights.' Like so many great charters of English history, it does not create rights but rather affirms old rights. The Indians and the Eskimos had their Aboriginal rights and English law has always recognized these rights.¹⁰

Despite this confirmation of rights, the Proclamation does not lend complete autonomy or sovereignty to Indians who remain under the protection of the federal government upon lands owned by said government in trust for the Indian inhabitants thereupon.

The Proclamation established British Indian policy throughout all of its North American holdings, including those gained from France in the February 1763 Treaty of Paris, and was meant in large part to assert British control over these areas. Britain's holdings were far from secure and it faced potential threats from the French populace in Québec, the expanding American colonies to the south, as well as from degenerating relations with Indian groups that had led to Pontiac's 1763 rebellion. Through the official creation of an expansive Indian hunting ground area, the British colonial administration hoped to curb all three of these threats by establishing its authority over the western lands it wished to continue to own, without necessarily having to thoroughly settle them immediately. Therefore, from at least one standpoint, the 1763 Proclamation may have not been so much about the protection of Indian interests, but about the Crown's interest in maintaining control over British North America.

2.3 1830 - 1879

Secretary of State for the Colonies of British North America George Murray initiated a major change in Aboriginal policy from that set out in the 1763 Royal Proclamation when in 1830 he announced that policy would no longer be made with a primary view to military relations. The shift in policy had become necessary due to

¹⁰ *Ibid.* at para. 70.

increasing settlement in the southern part of Upper Canada, and the corresponding increase in interactions between settlers and Native groups. The Department of Indian Affairs thus began a policy of ‘civilization’; the primary feature was to conglomerate Indian bands together on ‘reserves’ or settlement sites that were serviced with Protestant mission schools for children, as well as training in agriculture and other settler crafts such as commercial fishing and saw milling for adults. The objective was to make Aboriginal peoples self-sufficient and capable of operating in a modern economy, while simultaneously assimilating them into the wider North American populace.

An interesting element to this new policy was that it was implemented within the framework of the 1763 Royal Proclamation, in which Aboriginal groups were recognized as self-governing entities. The Department was to function as a foreign office, requiring it to persuade Aboriginal Chiefs to consent to policy implementation, as opposed to controlling Bands itself. Despite its attempt at assimilation, the Department did not supersede the Aboriginal right to self-rule.

However, this restraint would be relatively short lived. In 1842 Governor Charles Bagot released the findings of a two-year investigation into conditions on Indian reserves, which revealed that these groups were stagnated in what he called a “half-civilized state.”¹¹ The opinions voiced in Bagot’s report would help form the basis for a new policy towards Aboriginal peoples: assimilation. The ideas were later endorsed by Lord Elgin, who had observed with favour industrial schools in the West Indies. For Bagot, education had to be at the centre of any such policy. He suggested industrial schools featuring instruction in manual labour that would be off-reserve and centralized.

¹¹ John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 12.

Whereas boys would be instructed in agricultural and mechanical trades, girls would be educated in domestic ones, such as cooking and needlework.¹² While being taught by white-European educators in schools which also housed them, Aboriginal pupils would “imperceptibly acquire the manners, habits and customs of civilized life.”¹³

Due to continuing Aboriginal self-government, the Department presented its recommendations for the creation of industrial schools to band councils. Aboriginal peoples, for their own part, were not unanimously opposed to residential schools.¹⁴ Bay of Quinte Mohawk Chief Paulus Claus told the Upper Canadian government in 1846 that he viewed schools as offering Aboriginal peoples the possibility of great improvement, and that educating their youth was the “only hope to prevent our race from perishing and to enable us to stand on the same ground as the white man.”¹⁵ Provisions for European-style schooling were made in many of the treaties that ceded Aboriginal title to colonial rule in the nineteenth century. Some band councils went so far as to forego payment of up to a quarter of their annual treaty payments from the government in exchange for

¹² *Ibid.* at 13.

¹³ *Ibid.*

¹⁴ Initially, many Aboriginals saw value in the potential of a residential school education; however, this attitude greatly changed when it was realized that an IRS education would be unlikely to lead to meaningful employment (or employment at all). In the late nineteenth century immigration and negative racial attitudes in general resulted in the majority of Euro-Canadians preferring to hire non-Aboriginal workers. Jennifer Lorretta Pettit, ‘*To Christianize and Civilize*’: *Native Industrial Schools in Canada* (Ph.D. Thesis, University of Calgary Department of History, 1997) [unpublished] at 303-304.

¹⁵ Chief Paulus Claus, as quoted in Suzanne Fournier & Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre, 1997) at 54. According to de Tocqueville in his seminal *Democracy in America* North American Aboriginals would not accept civilization as a gift. He commented that “... when the side that has the physical force has intellectual superiority too, it is rare for the conquered to become civilized; they either withdraw or are destroyed. For this reason one can say that, generally speaking, savages go forth in arms to seek enlightenment but do not accept it as a gift.” Although de Tocqueville’s analysis cannot explain the pervasiveness of North American First Nations populations, there is insight in his observation that people will generally not accept learning or enlightenment as a gift – they need to see the value it will bring to their own way of life before becoming willing to adopt it. Alexis de Tocqueville, *Democracy in America* (New York: Harper & Row, 1966) at 304.

monies to go towards an education fund.¹⁶ However, these would be overshadowed by the *Indian Act*, 1876,¹⁷ which conceived the reserve system, as well as the end of day schools, that were deemed undesirable due to their inability to combat the influence of Aboriginal culture at home.¹⁸

Despite the opening of several schools by the early 1850's, a Commission report in 1858 judged that the system was not functioning as envisioned. The report followed the mindset established in the *Gradual Civilization Act*¹⁹ passed a year earlier, which required any male Indian over the age of 21 who could read and write either French or English, possessed some elementary form of education, and was free from debt, to become enfranchised, thereby surrendering his Indian rights. The Act required Aboriginal peoples who became enfranchised to adopt a surname. This surname would also be given to his wife and, if any, children. It also entitled him to a piece of land of up to 50 acres, as well as a payment of money equal to his portion of money given to a particular tribe in a particular year. By accepting the land and property, the Aboriginal forewent any claim to land reserved for the tribe. He would become a British subject. Just as the Act attempted to assimilate Aboriginal adults, schools would attempt to assimilate children.

The implementation of residential schools – a total institution that would immerse Aboriginal children in Western European culture – is largely attributed by many authors

¹⁶ Milloy, *supra* note 11 at 16.

¹⁷ *Indian Act*, S.C. 1876 (39 Vict.), c. 18.

¹⁸ In addition to failing to full immerse Aboriginal children in western teachings, day schools likely faltered due to high truancy rates. In a survey of 74 schools in 1876 it was found that of 2,044 enrolled students there was an average daily attendance of 1,026. Of 215 Aboriginal day schools in 1889 there were 5,759 enrolled students, with an average daily attendance rate of 2,980. Of 231 schools in 1891 there were 6,202 enrolled students – average daily attendance was 3,112. In 1896, of 239 schools with 7,112 enrolled students, average daily attendance was 3,131. Marion Joan Boswell “*Civilizing*” *The Indian: Government Administration of Indians, 1876-1896* (Ph.D. Thesis, University of Ottawa, 1977) [unpublished] at 243.

¹⁹ *Gradual Civilization Act*, S. Prov. C. 1857 (20 Vict.), c. 26.

to have been the brainchild of Regina M.P. Nicholas Flood Davin, as promoted by him in a report to the federal government in 1879. Davin took his inspiration from the American system of Aboriginal residential school education, which he had been commissioned to investigate by John A. MacDonald. Davin noted the American view to ‘aggressive civilization’, i.e. disregard for day schools. He also recognized the futility in attempting to reform adult Aboriginals. As for the grown Aboriginal, according to Davin, “[l]ittle can be done with him ... The child, again, who goes to a day school learns little, and what little he learns is soon forgotten, while his tastes are fashioned at home, and his inherited aversion to toil is in no way combated.”²⁰ Somewhat ironically, Davin also noted aspects built into the American system of Aboriginal relations that would require a century to take root in Canada. In commenting on what he called the five ‘civilized’ American Indian nations, Davin noted that upon Indian reservations Aboriginals “have their own schools ; a code of their own ; a judiciary ; a national council which enacts laws ; newspapers in the native dialect and in English ; and they are, in effect, five little Republics within the Republic ...”²¹

2.4 1879 – 1996

By the end of the nineteenth century, the federal government was set on creating a residential system of schooling, citing that day schooling was ineffective due to truancy and ongoing contact with native language and culture. Thus the three Aboriginal schools which opened in 1883 were designed to be total institutions that would house Aboriginal pupils for ten months per year, therein immersing them in western education and culture (previous treaties allotting for schools to be built on reserves were effectively ignored).

²⁰ Letter from Nicholas Davin to the Minister of the Interior (14 March 1870) “Report on Industrial Schools for Indians and Half-Breeds” at 2.

²¹ *Ibid.* at 5.

This system expanded to include eighty schools by 1920 whose day-to-day teachings were being carried out by various Christian denominations on behalf of the Department of Indian Affairs which remained as administrative overseer. About 60% of the schools were being run by Catholic orders, most notably the Oblates of Mary Immaculate (an order of male missionaries), while an additional 25% were controlled by the Anglican Church and the remainder split between Methodists and Presbyterians.²² Originally schools were differentiated as industrial, boarding, or residential; schooling aims were the most ambitious (i.e. well funded) in the industrial schools, with less money for boarding and residential schools. Over time the distinctions were lost but in either case the federal government's aim was the same for all: increase Aboriginal self-sufficiency and therein reduce the government's financial obligation to support Aboriginals by removing them from their native communities and educating them in the ways of western Europeans. The policy, quite simply, was one of assimilation.²³

Life at the schools, whether they were run by Catholic, Anglican, Presbyterian, or Methodist groups, was universally similar from inception in 1883 until efforts to abolish in 1969. Missionaries gathered children from their individual families and communities and brought them to buildings that could be hundreds of miles away, to be taught by employees who did not speak in any Aboriginal tongue or understand Aboriginal practices (not that they were there to do so in any case). Students were gathered up in what became known as the 'cattle truck' to spend ten months away from home.²⁴

²² Miller, "Troubled Legacy: A History of Native Residential Schools", *supra* note 3 at para. 10.

²³ The policy was certainly not lost on Sir John A. Macdonald who in circa 1880 said that a national goal would be "to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit to change." Milloy, *supra* note 11 at 6.

²⁴ Wintrob and Sindell note the importance of the community on Aboriginal child development, and how children growing up in an Aboriginal community are taught to mature into responsible adults. The authors explain that children typically begin taking on chores such as caring for smaller siblings, carrying firewood,

According to one girl, “they literally chased us down ... [I remember] Mum’s crying and I can remember [saying] ‘What’d I ever do to you? ... Why are you sending me away?’”²⁵ Upon entering children’s hair was cut and clothing changed to reflect European styling. This routine was also the same throughout the residential school system. Students operated on a half-day system, where they spent half the day leaning in the classroom, and the other half completing chores and jobs throughout the building. The theory or hope was to provide Aboriginals with a rudimentary education in English, mathematics, and other basic subjects, as well as an aptitude for work that would enable them to gain employment as farm workers or positions involving similar type labour. The reality however was sometimes quite different. In many schools, during fall harvest time many students would be sent to complete fieldwork for weeks on end. This was essential to allot for the necessities of teachers and students alike during the winter. The result, due in large part to excessive labour and inadequate basic necessities, was a 24% national death rate of pupils in schools, while an additional 18% died shortly upon being sent home.²⁶ One former student from a school near Sioux Lookout, Ontario recalls being permanently sent to manual labour after two years, never again stepping inside a

and accompanying adults to retrieve animals from snares from ages four to six. “Children are aware of their contributions ... As a child gains skill in performing different kinds of tasks adults pointedly begin to ignore overt dependent behaviour such as crying or seeking attention and nurture the child’s self-esteem through approval and encouragement of his new skills and ability to take responsibility.” Development, especially for boys, is centred around skills in the bush, and it is through teaching their children bush skills that Aboriginal societies have traditionally aided in the emotional growth of the child. Disabling this from taking place by removing children from their parents, would have been highly detrimental to both Aboriginal child and parent. Department of Forestry and Rural Development, *Education and Identity Conflict Among Cree Indian Youth: A Preliminary Report* by Ronald M. Wintrob & Peter S. Sindell (Ottawa: Rural Development Branch, Department of Forestry and Rural Development, 1968) at 13-15.

²⁵ Celia Haig-Brown, *Resistance and Renewal* (Vancouver: Tillacum Library, 1988) at 44.

²⁶ Suzanne Fournier and Ernie Crey, *Stolen From Our Embrace* (Vancouver: Douglas & McIntyre, 1997) at p. 49. At the File Hills residential school in Saskatchewan 69% of students died of tuberclosis during school years 1900 – 1910. *Ibid.* at 58.

classroom.²⁷ The reality of the alleged education being offered at the schools was likely as big a myth as the idea that the schools were meant to bring prosperity to Aboriginal peoples (or at least schooling that went beyond manual labour). In addition to the large amount of time devoted to labour, Aboriginal education at the schools was also circumvented by the large amount of classroom time devoted to religious teaching (i.e. conversion), and the demonizing of native religious beliefs. Recalls one former student

In the morning we had to get up at six o'clock, perfect silence ... [wash up] get in line and stand in line in perfect silence ... And then we marched from there down to the chapel and we spent more than an hour in the chapel every morning ... [where] they interrogated us on what it was all about being an Indian ... He [the priest] would just get so carried away at that old altar rail ... to hammer it into our heads that we were not to think or act or speak like an Indian. And that we would go to hell and burn for eternity if we did not listen to their way of teaching.²⁸

In short, the religious mandate, similar to the government's cultural-economic mandate, was one of complete indoctrination.

Of course perhaps the most notable and disturbing factor present in residential schools, which itself was no less than another tool forcing assimilation and leading to cultural loss by invoking shame over being Aboriginal, is that of the rampant abuse that took place at the hands of Church (and vicariously) government employees. Specific abuses, whose mention here may seem gratuitous, becomes important later where plaintiffs are in need of evidence proving that modes of discipline at the schools were extreme and outrageous, even in spite of forms of corporal punishment which may have been generally accepted by society at the time. In 1900 at one residential school an Aboriginal boy was confined to bread and water subsequent to 'entering an Indian

²⁷ Miller, *supra* note 3 at para. 18.

²⁸ Haig-Brown, *Resistance and Renewal*, *supra* note 25 at 54.

House'; in 1903 another was whipped and confined for stealing apples; in 1897 another was strapped for 'disturbing the dorm,' and forced to kneel for an entire day.²⁹ One Gitskan tribe member, a plaintiff in *Blackwater v. Plint*³⁰ which will arise later, recalls being anally raped by the defendant about once a month for three years. The rape may not have necessarily come as punishment for the breaking of any particular school rule; however, it nevertheless lends to the argument underlying loss of culture through shame and alienation. Subsequent to telling one of his teachers, he was beaten so severely by Plint that he had to be hospitalized for three weeks. On commenting on the effects of this violence later in life, he says that:

I got to Grade 12 but I quit before I graduated, because I didn't want to give the government the satisfaction of bragging about any more residential school graduates ... I was eighteen, an adult, but I'd been a sex object, a toy, from the time I was ten ... I lived with a woman for four years, until our son was three, and then we separated. When we were together I had a lot of anger. I was like Jekyll and Hyde; I loved her and my son, but then the anger and violence would take over. I think about my son a lot and I really care for him. Someday maybe I'll be able to explain and apologize to him.³¹

The experience of this individual is by no means unique.³² Stories of bruises that took weeks to heal, reconstructive genital surgery, and overcoming shame are all too common.

²⁹ *Ibid.* at 61.

³⁰ [2005] 3 S.C.R. 3.

³¹ Haig-Brown, *Resistance and Renewal*, *supra* note 25 at 69. There are also fears about Aboriginal self-government due to sexual abuse on young boys: "for many Aboriginal women, such problems have fuelled fears about self-government. Handing over more power to male leaders who have not protected the rights of women and children will only lead to further victimization ... the first step is for men to face the way they've taken out their pain and anger on those closest to them." Ruth Teichroeb, *Flowers On My Grave* (Toronto: Harper Collins, 1997) at 124.

³² As of June 2000, a special R.C.M.P. task force set up in 1995 to investigate complaints of sexual abuse at residential schools across Canada had received more than 3,400 allegations. Jane Armstrong "Oblate Brother faces dozens of sex charges" *The Globe and Mail* (2 June 2000) A3.

The residential school system was an outrageous practice of forced indoctrination and assimilation administered with an iron fist.³³

3.0 CULTURE

Defining “culture” has been a main focus of anthropologists since the second half of the twentieth century. It can mean different things to different people, but in pith and substance culture is “human activity comprising spiritual, organizational, and material items ...”³⁴ Culture is the “knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.”³⁵ Unlike biological characteristics that are inherited by one generation from another, “culture comprises those human traits that are learned and learnable and are therefore passed on socially and mentally ...”³⁶ Culture can comprise anything in social life, be it language, art, religion, or morals. If infants have an innate capacity for social relations, culture is what determines how that person will come to view the world, and operate in it.³⁷ The world

³³ In addition to residential schools, there were a number of additional direct assaults on Aboriginal culture in the nineteenth and twentieth century’s that are worthy of mention. In British Columbia a *Land Ordinance*, 1870 R.S.B.C. 1871, c. 44 permitted a European male over age 18 to occupy up to 320 acres of land and claim legal title to it, whether there were any Aboriginal interests thereupon or not. The Indian Act, 1876 prohibited Aboriginals from similarly acquiring land specifically in Manitoba and the Northwest Territories, and an amendment to the Act in 1927 made it illegal for an Aboriginal to retain a lawyer to advance a claim to land. From 1880 to 1951 the Indian Act prohibited the potlatch, a pacific Aboriginal festival with singing and dancing that acted as a ritual value system that helped to self-define Aboriginal groups. In 1885 the Act also banned the Sun Dance, a similar festival practiced by Prairie Aboriginals. In 1880 the Indian Act sought to deny Aboriginal their Indian status by forcing enfranchisement upon any Aboriginal who obtained a university degree, or became a minister, priest, or lawyer. The Act also banned forms of traditional Aboriginal government, and imposed Band Councils that were always subject to an approval power from the Department of Indian Affairs. Calvin Helin, *Dances with Dependency: Indigenous Success through Self-Reliance* (Vancouver: Orca Spirit Publishing & Communications, 2006) at 94-96.

³⁴ H. James Birx, ed., *Encyclopedia of Anthropology* (London: Sage Publications, 2006) at 636.

³⁵ Thomas Barfield, ed., *The Dictionary of Anthropology* (Oxford: Blackwell Publishers, 1997) at 98.

³⁶ *Ibid.*

³⁷ Berry and Georgas note three forms of cultural transmission by which a group may perpetuate culture to subsequent generations: vertical, horizontal, and oblique. Vertical transmission describes the descent of cultural characteristics from parent to child. Horizontal transmission denotes learning from one’s peers and siblings, while oblique transmission refers to what one learns from other adults and institutions (ex. community organizations and schooling). When the cultural transmission process occurs entirely within

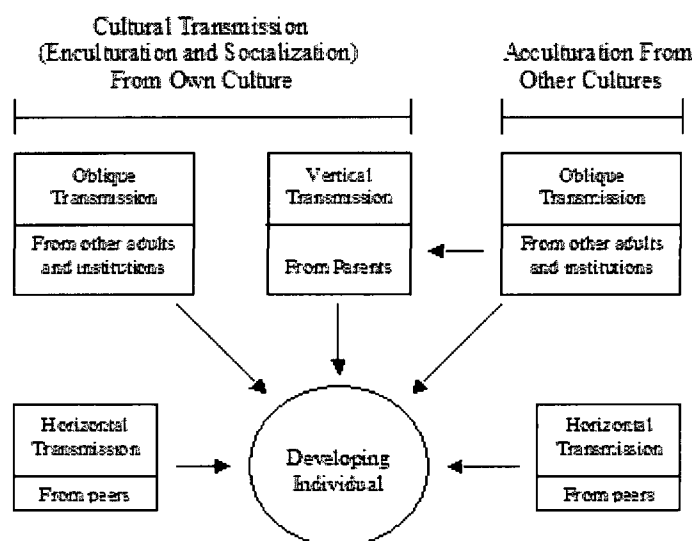
has many cultures that span across nations and borders. Each comes with its own worldview and set of norms and products, and each must be viewed as worthwhile in its own way.

3.1 Cultural Change

Culture is not static; rather, it is constantly evolving as a group reacts to new events, and incorporates those experiences into their worldview and ways of reacting to the world (whether that is through morals, law, art, etc.). Culture may also be affected when a group carrying one culture confronts a group having another. In the nineteenth century, and into the twentieth, western thinkers considered cultures as existing on a hierarchical scale, with non-western ones being inferior. These 'native' cultures were thought to be uncivilized, with less intelligent people and inferior institutions. There may be certain paramount values that are important across cultures, i.e. respect for basic

one's primary culture, enculturation and socialization occur. However, when the process is affected by a secondary culture, acculturation occurs where transmission is also inputted from other culture(s) (see diagram below).

The Ecocultural Framework and Cultural Transmission



See John W. Berry & James Georgas, "An Ecocultural Perspective on Cultural Transmission: The Family across Cultures" in Ute Schönplflug, ed., *Cultural Transmission: Psychological, Developmental, Social, and Methodological Aspects* (New York: Cambridge University Press, 2009) 95 at 103.

human life, but “between the specific way of life that we know we should not impose on anyone else and the general conditions which that way of life and all others ought to meet, there lies nothing but judgment.”³⁸ Cross-cultural judgment may be warranted if and where a higher ethical good to which all cultures should aspire can be determined. This may seldom be the case, but “if one culture wants to influence the practice of another, it had better do so in the terms of the other culture’s history of judgment.”³⁹ The influencing culture needs to frame its actions and understand what it is doing by adopting, as much as possible, the worldview of the less-dominant one. It needs to put itself ‘in the shoes’ of that other group, and attempt to affect it in a way that does not affect its core values, to the extent that those values do not offend universal attributes to which all cultures should aspire. No culture has an absolute right to change another. One culture may borrow attributes from another (known as “diffusion”); however, when a culture featuring dominating institutions and technologies comes into long-term contact with a less-modernized one, a phenomenon known as “acculturation” may occur, where the less dominant one becomes saturated by the newcomer.⁴⁰

3.2 Cultural Loss

It is possible for a person to function appropriately within more than one culture and self-identify with more than one culture. A person may be of a family with two parents of different heritages, they may live somewhere with a large population of people from another culture, or they may choose to live somewhere for a period of time where they become permanently influenced by the ways of another culture. This ‘outside’ influence is not necessarily detrimental to ones ‘core’ culture, because “identification

³⁸ Samuel Fleischacker, *The Ethics of Culture* (Ithaca: Cornell University Press, 1994) at 150.

³⁹ *Ibid.* at 151.

⁴⁰ Barfield, *supra* note 35 at 95.

with one culture is independent of identification with any other culture; therefore, increasing identification with one culture does not require decreasing identification with another.”⁴¹ However, when saturated for long periods of time, cultural losses may occur. This is particularly the case when there is an adverse impact on traditional activities, networks of social relations, feelings of self-esteem and overall emotional well-being.⁴² Basically, cultural loss occurs when something of value to that culture is taken away or diminished over time.⁴³

Sometimes these losses may be compensated. For example, the loss of ability to engage in a traditional activity like fishing in one area may be compensated by the ability to fish in a similar area. Where a ready-made solution is unavailable, remedies become more complicated. These may include an increase in the ability for the subordinated culture to engage in other types of traditional activities, the affirmation of certain minority rights in wider society, and/or monetary payments. It is important to compensate in a way that respects the minority culture’s worldview, and allows members of the subordinated culture to feel that the majority recognizes the value of what has been lost and why it was wrong to take it. It is also important to ensure that the other culture

⁴¹ Hillary N. Weaver & Maria Yellow Horse Brave Heart. “Examining Two Facets of American Indian Identity: Exposure to Other Cultures and the Influence of Historical Trauma” (1999)2 *Journal of Human Behaviour in the Social Environment* 19 at 21.

⁴² Robin Gregory & William Trousdale. “Compensating Aboriginal cultural losses: An alternative approach to assessing environmental damages” (2009) 90 *Journal of Environmental Management* 2469 at 2470.

⁴³ Bannister and Barrett list a number of physical and intellectual facets in which legislation may be required in order to adequately preserve a culture, and specifically protect it from exploitation (i.e. especially in the case of Aboriginal knowledge that may be commercially useful in the manufacture of medicines): “sacred property; knowledge of useful plants, animals, soils, and minerals (including preparation, processing, formulation, and storage methods); knowledge of ecosystem conservation; genetic resources originating on Indigenous territories; classificatory systems of knowledge; and other forms of cultural heritage.” Kelly Bannister & Katherine Barrett, “Harm and Alternatives: Cultures under Siege” in Nancy J. Myers & Carolyn Raffensperger, eds., *Precautionary Tools for Reshaping Environmental Policy* (Cambridge, Mass.: The MIT Press, 2006) 215 at 219-200.

receives as good a substitute source of satisfaction for a loss of culture as possible, particularly when what has been lost cannot be replaced.

3.3 Cultural Replacement

When culture is being deliberately or unintentionally affected by another culture, cultural replacement may occur. This is an attempt to replace traditional culture within a generation or two. Subsequent to first contact with Europeans, Aboriginal peoples engaged in a process of diffusion where they borrowed certain material goods and ideas from Europeans and incorporated them, for better or for worse, into their own culture, i.e. guns, alcohol, and commerce. These things were selectively borrowed by Aboriginals based on the perceived usefulness they would give for their own society.

Diffusion was followed by acculturation, i.e. continuous contact resulting in substantial changes and reorganization of the Aboriginal way of life. This was particularly detrimental to Aboriginal culture because their sheer numbers were so decimated by epidemics brought on by European contact, e.g. smallpox, measles, and tuberculosis. The effect on Aboriginals was thus twofold: (i) loss of culture through acculturation due to continuous contact, and (ii) additional loss of culture due to declining numbers of people, particularly elders. The result is that “[w]ithout cultural remembering, there is no cultural knowledge, nothing to pass on to next generations ... Without shared cultural knowledge there are no societies, just groups of culturally orphaned individuals unable to create their shared future. As such, people can be pushed to the margins of the dominant society ...”⁴⁴ When Europeans came to North America they irreparably changed Aboriginal culture. The more Europeans spread throughout the

⁴⁴ Cynthia C. Wesley-Esquimaux & Magdalena Smolewski. *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004) at 41.

continent, the more Aboriginals became integrated, and the more their own ability to execute collective social action became impaired. Aboriginal culture truly moved to the margins of a dominant society and, to a large extent, it remains there still.

3.4 Culture as a Group Right & Cultural Preservation

Culture has inherent value that is worthy of protection. Will Kymlicka includes culture in the list of primary goods essential for human development, originally developed by John Rawls.⁴⁵ Culture is important because it gives people structure to form and nurture their beliefs about what constitutes the good life. He explains that the range of options or life choices for people is determined by the following:

... [their] cultural heritage. Different ways of life are not simply different patterns of physical movements. The physical movements only have meaning to us because they are identified as having significance by our *culture*, because they fit into some pattern of activities which is culturally recognized as a way of leading one's life. We learn about these patterns of activity through their presence in stories we've heard about the lives, real or imaginary, of others ... We decide how to live our lives by situating ourselves in these cultural narratives ...⁴⁶

Just as Rawls identifies self-respect as a primary good that is necessarily had by each individual in order to access the means to the good life, Kymlicka posits that identity with culture is similarly, if not more important, to the well-being of the individual. Liberal theory is correct in asserting that individuals have the right to accept or reject the life options, cultural and otherwise, that are available; however, it is imperative that people

⁴⁵ For Rawls, primary goods are “things that every rational man is presumed to want. These goods usually have a use whatever a person's rational plan of life.” Primary goods include “rights and liberties, powers and opportunities, income and wealth. (Later ... the primary good of self-respect has a central place.)” See John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971) at 62. In contemplating why Rawls left culture out of his list of primary goods, Kymlicka conjectures that Rawls, “like most post-war political theorists, work[ed] with a very simplified model of the nation-state, where the political community is co-terminous with one and only one cultural community.” Kymlicka rejects the notion that Rawls believed that individuals are self-sufficient outside society, and therefore not in need of a cultural context from which to exercise informed choices. Will Kymlicka, *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989) at 177.

⁴⁶ *Ibid.* at 165.

have a secure starting point from which to begin making reasonable judgments. This secure point of reference is provided by one's culture.

Jeremy Waldron disagrees, positing that Kymlicka's argument only shows that people need *a* cultural reference point, but not any one particular reference point.

Waldron stresses that people are capable of operating in a multitude of cultures, any one of which may provide an adequate basis for making what Kymlicka alludes to as choices regarding the good life.⁴⁷ One culture is not necessarily any better or any worse than another. As long as a person is capable of making such choices, they have secured an

⁴⁷ Waldron is adamant that the argument to preserve cultures is fallacious from the start. He points that all of history has been a mixing of cultures, with various cultures coming and going, disappearing and evolving over time. "Maybe cultural homogeneity is not, in any interesting sense, the normal state of the human community at all, but simply something that happens when, for whatever reason, the members of a given community do not have the opportunity to interact with others on a basis that enables them to indulge what appears to be a hard-wired human curiosity and to learn from each other and appropriate or copy various practices and traditions." Cultural heterogeneity may be the natural state of the history of human interactions; however, whether citing Kant's theory of cosmopolitan right, or the inherit right of respect for other peoples and other civilizations, nothing gives a conquering people the right to attempt to assimilate a native population into their own culture. Jeremy Waldron, "Multiculturalism and *mélange*" in Robert K. Fullinwider, ed., *Public Education in a multicultural society* (New York: Cambridge University Press, 1996) 90 at 107-108. With regards to the value that may be had in a country with a multitude of different cultures, R.M.W. Dixon argues that the preservation of Australian Aboriginal culture benefits the Australian population on whole, effectively because it makes the country a more interesting and varied place. It also provides a positive outcome because people who are more self-secure in their own identity will be better citizens in general. He says that "Many different types of people in a country make for a healthy country. Each group of people has its own cultural profile which co-exists and interrelates with the overall national culture, each strengthening the other ... If a group is encouraged to maintain its own language ... it will help its self-image ... [and] will make its members happier and better and more effective citizens." Austl., Commonwealth, Senate Standing Committee on Education and the Arts, *Report on a National Language Policy* (Canberra: Australian Government Publishing Service, 1984) at 81. In reply to an argument that variety adds to the overall worth of a nation, Waldron would likely acknowledge that under his own scheme for cultural interaction "... the category of the exotic may eventually fade away; we may less and less have the experience ... of being confronted with cultural materials wholly different from those with which we are familiar. But ... human creativity ... can go on from within a given society." Essentially Waldron argues that societies themselves, thanks to human ingenuity and changing preferences, change over time, and culture and cultures within that society will evolve. Outside influence, while it might add exotic components, is not necessary to spurn genuine and interesting cultural evolution. Waldron, "Multiculturalism and *mélange*", *supra* note 46 at 108. Barth notes that when ethnic groups come into contact with one another, minority groups in particular can develop complex methods by which to interact with other members of the group, and signal membership and exclusion. He observes that "... the persistence of ethnic groups in contact implies not only criteria and signals for identification, but also a structuring of interaction which allows the persistence of cultural differences." Fredrik Barth, "Introduction" in Fredrik Barth, ed., *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* (Boston: Little, Brown and Company, 1969) 7 at 15-17.

adequate cultural structure in which to operate. Knowingly or unknowingly, Waldron is referring to people's bicultural capabilities:

A person needs cultural meanings; but she does not need a homogenous cultural framework. She needs to understand her choices and the options facing her in contexts in which they make sense, but she does not need any single context to provide commensurable meanings for all the choices she has. To put it crudely, people need culture, but they don't need cultural integrity. And since no one needs a homogenous cultural framework or the integrity of a particular set of meanings, no one needs to be immersed in one of the small-scale communities which, according to Kymlicka and others, are alone capable of securing this integrity and homogeneity.⁴⁸

Waldron similarly thinks that the importance of language is overrated. Kymlicka, taking lead from Ronald Dworkin, argues that “‘the centre of a communities cultural structure is its shared language’, ... and this language and structure can be enriched or diminished in the opportunities it provides.”⁴⁹ Waldron, in comparison, argues that language is not necessarily the key to all cultures. He notes that texts and products from one culture may be translated into the language and relevant meanings/understandings of another culture.⁵⁰

For these reasons it is difficult, if not impossible, to ‘attack’ a culture. Culture is a group product – this Waldron does not seem to dispute – rather, he depends on it to make his argument. Culture may be identifiable with a group, but it exists independently within each individual. Rare is the case where a culture is completely insulated. Rather, “Each person’s identity is given not only by the culture of the community to which she belongs (if there is such a community), but also by the effect on her of the other cultures

⁴⁸ Waldron, “Multiculturalism and *mélange*”, *supra* note 47 at 104-105.

⁴⁹ Kymlicka, *Liberalism, Community, and Culture*, *supra* note 45 at 177.

⁵⁰ For example, as will be seen later, *Romeo and Juliet* could be translated into an Aboriginal language, and while students might not be able to relate to a narrative set in Italy, they could readily be made to understand the concept of family feuds, i.e. both text and meaning may be translated.

that surround or impinge on her.”⁵¹ In effect, not only might a given culture be different things for different people within that cultural group, but each person within that group carries a multitude or a mixture of values from different cultures within them. Because this *mélange* produces different values in different people, an attack on one person’s dignity and self-respect (values inspired and by culture) may not affect them in the same way as another member of that same cultural group.

Waldron understates the value of culture. He may not have been thinking about a forced cultural transition the likes of which Aboriginal residential schoolchildren underwent, but to suggest that cultural integrity is unnecessary seems unrealistic, and even offensive. The end-product of many of the schools, i.e. children and adults ‘stuck’ between cultures while not being able to fully identify or become accepted by either, attests to this. Waldron may be right in suggesting that “[t]o preserve a culture – to insist that it must be *secure*, come what may – is to insulate it from the very forces and tendencies that allow it to operate in a context of genuine choice.”⁵² It is not being suggested that minority cultural groups be completely insulated within their own sphere of operation. What is desired, as will be discussed later, is an environment in which a minority Aboriginal culture may be cultivated, practiced, and protected, while simultaneously being interactive with the ‘outside’ world. This essay will suggest that: (i) while there may be something artificial about preserving a minority Aboriginal culture in one given state (as this ignores the natural evolution of a culture over time), it is offensive for one cultural group to attempt forced assimilation of another, i.e. through a policy such as the Indian Residential School (IRS) system, and (ii) the most effective way

⁵¹ Waldron, “Multiculturalism and *mélange*”, *supra* note 47 at 113.

⁵² Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” in Will Kymlicka, ed., *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) 93 at 109.

to provide reparations for a minority cultural group that has been so aggrieved is to provide them with a means by which to promote and protect their culture, so that it gives them a secure context by which to view, interact with, and evaluate other cultures and the outside world.

If culture may be viewed as a good, as much as it is a good to the individual, it is simultaneously a product of the group.⁵³ Cultural rights are group rights. To satisfy other goods, such as personal fulfillment, satisfying experiences, and positive outcomes, one relies on culture – and, as Kymlicka argues, this must be one's own culture. Culture, in turn, relies on the group, therein making cultural rights group rights. But in reality there is power in numbers. There may be little hope for fostering what Kymlicka calls a 'decaying culture' if there are just not enough people to support it, or in cases where a very small number of people belonging to a minority culture move to a new area. Cultures are of value and worth protecting. But it is not right to demand a government to implement policies and spend money to maintain all of them. As is the case with French language education rights outside Québec, a government should only be required to fund minority interests where numbers warrant. Just because one cannot effectively practice culture on one's own does not necessarily mean that the government is obligated to provide the means for one to do so. The paradox, as pointed out by Kwame Appiah, is that a minority culture will be entitled to less support the closer it moves towards extinction.⁵⁴

⁵³ Charles Taylor explains that a good is made public "when its provision to one requires it being supplied to all." Charles Taylor, *Philosophical Arguments* (Cambridge, Massachusetts: Harvard University Press, 1995) at 138.

⁵⁴ Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, New Jersey: Princeton University Press, 2005) at 123.

But, to at least some degree, policies that aim at preserving minority cultures necessitate the promotion of that culture. Cultural preservation in Québec is undeniably connected to Québécois nationalism. Creation, more than preservation, seems to be the goal. This is fine, but it is unclear where government obligations end or begin. For Francophones in Québec, as pointed out by Charles Taylor,

It is not just a matter of having the French language available for those who might choose it. This might be seen as the goal of some of the measures of federal bilingualism over the last twenty years. But it also involves making sure that there are a community of people here in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to create members of the community, for instance, in their assuring that future generations continue to identify as French-speakers.⁵⁵

Concern for survival of a culture is one thing, as is respect for autonomy of a minority group. But Kymlicka's philosophy is a preservationist one more than it legitimizes heavy-handed promotion. In the end, which struggling cultures a government decides to fund and preserve/promote must depend on a reasonable and unbiased evaluation of the likelihood of the culture carrying on, i.e. whether their numbers warrant spending the resources. It is a fine line to be evaluated. On the one hand, it may be argued that if a culture is 'decaying' "it must be because ... people no longer find it worthy of their allegiance."⁵⁶ State action, in such a scenario, would be interference with the natural progression of things. Yet the state is likely seldom so impartial: "Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably

⁵⁵ Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed. *Multiculturalism: Examining the Politics of Recognition* (Princeton, New Jersey: Princeton University Press, 1994) 25 at 59. Ethnic nationalism may cause problems for minorities within the minority. The Grand Council of the Crees (Eeyou Astchee), for example, stress that culture is derived from a 'people', and that a people may be defined as a group with a common will. They hold that because Québec Francophones and Québec First Nations have different views and sources of self-identification and self-determination they are in fact, two distinct groups. Grand Council of the Crees (Eeyou Astchee). *Never Without Consent: James Bay Crees' Stand Against Forcible Inclusion into an Independent Québec* (Toronto: ECW Press, 1998) at 30-32.

⁵⁶ Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, 1995) at 108.

involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups.”⁵⁷ When to prop up a decaying culture will always be a judgment call. States will frequently, but not always, have a certain degree of responsibility for maintaining and promoting minority cultures. This is particularly the case for Canada, where minority culture protection has been included in the Constitution, and because Canada has signed international declarations to the same effect. However, given the Crown’s unique fiduciary obligations to Aboriginal people, and given Canada’s direct immoral involvement in the attempted destruction of Aboriginal culture through the residential school experiment, it seems fitting that Canada uptake an obligation to protect and promote minority Aboriginal cultures in (geographical) areas where sufficient numbers present a reasonable possibility that those cultures will carry on to future generations.

3.5 Aboriginal Cultural Loss

Aboriginal peoples have a rich culture which, to some extent, has been lost through the efforts, both implicit and explicit, of colonizing Europeans. Aboriginal culture and spiritual beliefs centre on the natural world. Nature defines “their culture, their way of life, their fundamental rights, their religious and cultural ceremonies, their patterns of survival and, above all, their identity.”⁵⁸ Upon arrival, European settlers expropriated and altered the native landscape which, in turn, dramatically altered Aboriginal culture. By showing what natives would have perceived as a lack of respect for land (whether doing so was *bad* or not), Europeans exhibited a lack of recognition of

⁵⁷ *Ibid.*

⁵⁸ Kymlicka, *Multicultural Citizenship*, *supra* note 56 at 34.

the centrality of land to Aboriginal culture.⁵⁹ Cynthia Wesley-Esquimaux describes it as the “[w]estern binary distinction between culture and nature ...”⁶⁰ It is an example of the stark differences that can exist between different cultures, and the profound negative impacts that one culture can have on another when it fails to examine its actions through the other’s eyes.

No action was a more direct assault attempting to abolish Aboriginal culture than the residential school system. It was an attempted ‘cultural genocide’ aimed to destroy Aboriginal culture by severing the intergenerational artery of knowledge linking elders and children.⁶¹ Inside residential schools, Aboriginal children were punished for speaking their native language, practicing native religion, and appearing Indian in any

⁵⁹ Stuart Kirsch attempts to give a contemporary example of this by noting that Americans move homes on average six times in their lifetime, giving them an attachment to land that is ‘modest’ at best. In contrast, natives on the Marshall Islands regard land as an entity that is “an integral part of who people are and how they situate themselves in the world.” It defines their sense of self, “both personal and cultural.” Stuart Kirsch, “Lost Worlds: Environmental Disaster, ‘Culture Loss,’ and the Law” (2001) 42 *Current Anthropology* 167 at 172-3.

⁶⁰ Wesley-Esquimaux & Smolewski. *Historic Trauma and Aboriginal Healing*, *supra* note 44 at 34.

⁶¹ The *Convention on the Prevention and Punishment for the Crime of Genocide* was adopted by the United Nations on December 9, 1948. Canada was a signatory country, and unanimously adopted the Convention by a vote in Parliament in 1952. Article II defines genocide as 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, and (e) Forcefully transferring children of the group to another group. The last IRS closed in 1996, although the system underwent a marked downturn in the 1980’s. Depending on when one marks the end of the system, it was in existence for up to four decades during which time Canada was a signatory of the Convention. It may not have been the official policy of the schools to kill Aboriginal children, but that the official policy offends subsections (b), (c), and most certainly (e), seems plain and obvious. It was the official mandate of the IRS policy to remove Aboriginal children and place them in another group. Forcing children to abandon their traditional way of life undoubtedly caused serious bodily and mental harm. As a result, Canada may be seen to have offended the convention. That being said, the term ‘cultural genocide’, as used here, does not necessarily refer to the act of genocide. This essay is not an investigation into the uses of international law. Rather, I use the term ‘cultural genocide’ in a general sense to refer to the government’s direct (and admitted) aim to eradicate Aboriginal culture. *Convention on the Prevention and Punishment of the Crime of Genocide*, GA Res. 260 A (III), UN GAOR, 1948. As per article II of the Genocide Convention, genocide requires “intent to destroy either the group as a whole or a significant portion of the group ... the ability of perpetrators to actually destroy a group is irrelevant to the offence.” Without proof of intent, genocide has not occurred within the meaning of the Convention. Paul Starkman, “Genocide and International Law: Is there a Cause of Action?” (1984) 8 *Am. Soc. Int’l L. Rev.* 1 at 6-7.

way. They were physically, emotionally, and psychologically abused. They were incarcerated, starved, and forced to endure long periods of time away from the nurturing environments provided by their families. In providing the answers former pupils gave in response to questions on how the schools affected them later in life, J.W. Berry offers some telling insights. For example: “I now realize how devastating the residential schools were for our people. It moulded them and made them embarrassed of who they are.”⁶²; “I felt that I didn’t belong anywhere”⁶³; and, “All those things that I learned at home, (respect, sharing, caring) were all taken away from me by those so-called men and women of God. I began to hate my people because they were the reason I was here at Residential School.”⁶⁴ The residential experiment has largely contributed to present-day Aboriginal issues of addictions, violence, suicide, crime, trouble forming social relationships, and lack of parenting skills. In this way, the intergenerational impact of the assimilation experiment that was the residential school system continues to perpetuate itself.⁶⁵

Culture is social in that it provides the construction for an individual to make meaningful decisions about how to lead their own life. It sets out values that dictate one’s worldview. By participating in culturally relevant activities people have a sense of connection with their own past and this helps to give them a sense of self. This is an

⁶² J.W. Berry “Aboriginal Cultural Identity” (1999) 19 *The Canadian Journal of Native Studies* 1 at 17.

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 24.

⁶⁵ Commenting on his lack of parenting skills, one former residential school pupil explains: “I didn’t have the affection of a loving father-child relationship, like kissing your younger children. So back when my child was born, I had no communication skills. I only learned years later what it takes to love a child. Over the years, I have learned to love myself. Then I’ll be able to learn to love my child. There was nothing like that when I was growing up in a residential school. Because I was in residential school until I was eighteen years old, so I really didn’t learn anything. No love and no hugs from the priests and the nuns. I just came out cold.” Jessica Ball & Ron George. “Policies and Practices Affecting Aboriginal Fathers’ Involvement with their Children” in Jerry P. White et al., eds. *Aboriginal Policy Research: Moving Forward, Making a Difference*, vol. III (Toronto: Thompson Educational Publishing, 2006) 125 at 127.

important base point from which people draw meaning, and understand and define *who* they are. It connects generations. Yet what is being argued for protection here is not the nationalism to which culture may in large part give rise. Culture is not necessarily something that is consciously contemplated in normal circumstances. One may not normally contemplate their own culture at length; rather they just participate in it.

Waldron notes that “One keeps faith with the mores of one’s community by just following them, not by announcing self-consciously that it is the mores of one’s community that one is following [doing so] calls into question some of the self-conscious posturing often associated with nationhood.”⁶⁶ Kymlicka argues that minority cultures need special protection to help compensate for “unequal circumstances which put the members of minority cultures at a systematic disadvantage in the cultural marketplace, regardless of their personal choices”⁶⁷ As will later be argued, this disadvantage

⁶⁶ Jeremy Waldron, “What is Cosmopolitan?” (2000) 8 *The Journal of Political Philosophy* 227 at 233–4

⁶⁷ Kymlicka, *Multicultural Citizenship*, *supra* note 56 at 97. It is important to note that Kymlicka does not regard all cultures as warranting protection in the *mélange* of a cosmopolitan society. Instead, only non-immigrant cultures deserve such protection as per what Kymlicka calls his ‘consent theory’. This theory posits that because immigrant groups voluntarily chose to leave their homelands they in doing so waived their right to be guaranteed to work and live within their own culture or cultural stronghold. It is true that some immigrants are forced to flee their home country, e.g. refugees, however, Kymlicka argues that this is an injustice that must ultimately be solved in their own homeland. In contrast, ‘national groups’ such as Aboriginal Canadians were either involuntarily incorporated into a new state, and/or voluntarily joined at some point after confederation with legal guarantees that their cultural interests would be respected. This is how Kymlicka avoids owing legal linguistic and/or other rights to all minority groups. Alan Patten argues this is contrary to another of Kymlicka’s thesis, namely that culture is a primary good and people have a need to develop within not just any culture, but their own culture. Patten asks, “if access to one’s own societal culture is such an important and fundamental good, then it is puzzling how immigrants could ever be thought to have waived their rights to re-create their own societal culture in the receiving society.” It is a problem that Kymlicka does not address, however, it is likely that Kymlicka’s line of thinking would be that just because an immigrant group waived their right to legal protection does not mean that parents can nevertheless offer to pass on cultural attributes to their children. Alan Patten, “Who Should Have Official Language Rights?” in André Braen, Pierre Foucher, and Yves Le Bouthillier, eds. *Languages, Constitutionalism and Minorities* (Toronto: LexisNexus, 2004) at 241. This issue is well evidenced in Canada. While travelling across the country as part of the Royal Commission on Bilingualism and Biculturalism from 1964–1967 André Laurendeau noted that people often inquired with him as to the apparent unjustness of granting language rights to Francophones but not other minority linguistic groups such as Ukrainians. In his journal he noted that “In the west multiculturalism means the reality of ‘ethnic groups’ who, strangely enough, seem to believe that to grant something to [the] French is to take something away from them, or at the very least to create an unjust situation for if they accept to a great

warrants (additional) special constitutional protection, similar to that granted to minority French or English language educational rights⁶⁸ It is only in this way that Canadian society can begin to truly remedy the effects of the residential school system's assault on Aboriginal culture, and give Aboriginal people the best chance at choosing a conception of the good life that is both informed by, and carried out with their own culture at centre

3.6 Normative Considerations of Intercultural Contact

The founding purpose of the residential school system was to assimilate Aboriginal people into wider society, thereby relieving the state's burden of maintaining Aboriginal organizations, and making them productive members of the western-style economy The state did this by squarely aiming at the most vulnerable Aboriginal subgroup – children – and attempting to sever the cultural ties between generations In practical terms the most effective way to accomplish this was to separate Aboriginal children from their families and the cultural influences that would naturally be cultivated in the home environment As noted by Gisela Trommsdorff, “[s]uccessful internalization [of cultural values] is predicted when the child feels accepted, when he or she regards the parents as adequate models, and when the parents communicate the message clearly”⁶⁹ In residential schools, young and impressionable Aboriginal children were taught to view their native cultures and parental role models with disparagement, and their ‘acceptance’ by school administrators depended on them shirking all that was known to them The

extent the necessity of losing their languages, why shouldn't everyone in Canada have to do so? This is particularly true of the Ukrainians Andre Laurendeau, *The Diary of Andre Laurendeau Written During the Royal Commission on Bilingualism and Biculturalism 1964-1967*, trans by Patricia Smart & Dorothy Howard (Toronto James Lorimer & Co, 1991) at 47

⁶⁸ *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 23

⁶⁹ Gisela Trommsdorff, “Intergenerational Relations and Cultural Transmission” in Ute Schonpflug, ed., *Cultural Transmission Psychological Developmental Social and Methodological Aspects* (New York Cambridge University Press, 2009) at 132

resulting product for the children was an identity crisis, and many, seemingly stuck between two cultures, carry this crisis of self-identity on to this day.

As previously noted, day schools were a failure in the eyes of government and church officials because children maintained their Aboriginality (it is possible for someone to function in more than one culture). According to one Catholic Bishop, it was important that Aboriginal youth be “caught young to be saved from what is on the whole the degrading influence of their home environment.”⁷⁰ By getting children young (age 6), and separating them from their families for as long a period of time as possible, officials sought the most effective methods available to replace Aboriginal culture with a western one. This method was to give students a rudimentary education in reading, geography, and history, while simultaneously training Aboriginal youth in trades so that they could go forth and be productive members of the economy (boys were taught carpentry, blacksmithing, and agriculture, while girls were trained in baking, laundering, and general household work). Of course, there was also ongoing religious teaching. The entire aim was to systematically erase all remnants of Aboriginal culture and replace them with a new one.

The underlying purpose of the schools, and the officially sanctioned methods by which that purpose was carried out, were unjust if one accepts the moral premise that all cultures need to be respected (short of offending basic human rights) and that everyone is entitled to make choices about how to live their own life.⁷¹ Culture itself, as previously

⁷⁰ Milloy, *supra* note 11 at 27.

⁷¹ John Stuart Mill penned the basis for personal autonomy by arguing that individuals have the right to liberty, by which he meant protection against the tyranny of political rulers. His principle is that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or

stated, is in part a system or baseline of values that informs individuals about how to conceive one's actions and judge the actions of others. But culture is not an individual characteristic. Culture is a constantly evolving group product that spans generations. It will later be argued that this collective nature of what has been lost (i.e. culture) requires a collective remedy to compensate for that loss, but at present it is necessary to evaluate the nature of culture itself to understand the quality of just what has been lost by Aboriginal people due to the residential school experience. Culture is intergenerational, in that it depends on contemporary members of a group, as well as past and future members. It is a collectively generated way of thinking about problems and understanding the world that is imparted upon and moulded by each individual in the collective. Rajeev Bhargava explains that since "conceptual framework, language, collective memory, future visions, rules, norms and customs, myths and rituals, morality and religion, provide a sense of who we are and our self-worth, culture is inextricably linked to individual and collective identity"⁷² Culture changes constantly over time. However, it can only be maintained in its naturally occurring state when the transfer of cultural resources from one generation to the next is uninterrupted.

It is true that one culture may be affected by another culture when the two come into contact. Intercultural contact is inevitable in the modern world. However, an injustice occurs when one culture saturates another without offering protections, and a worse injustice occurs when a dominant culture deliberately attempts to quash another⁷³

forbear because it will be better for him to do so" John Stuart Mill, *On Liberty* (Toronto: Broadview Literary Press, 1999) at 51-52

⁷² Rajeev Bhargava, "How Should We Respond to the Cultural Injustices of Colonialism?" in Jon Miller & Rahul Kumar, eds., *Reparations: Interdisciplinary Inquiries* (New York: Oxford University Press, 2007) 215 at 218

⁷³ Kant argued that colonists had no right to assimilate native populations due to what would develop as his theory of cosmopolitan right. Kant claimed that all civilizations had an inherent right to receive, and

Individuals make choices according to the values informed by their culture. They are autonomous in making these decisions. Yet when the group they are a part of is having its culture inundated by the values and beliefs of another culture, then that group is ceasing to be autonomous.⁷⁴ This is the core of the problem of why cultural loss is hard to observe and measure. Culture is an anamorphous group product that is manifested through individual actions. But it is difficult for an individual to gauge, or perhaps even realize, what they have lost when the very tools by which they are given to evaluate problems are being attacked, and particularly when this occurs over a span of generations. As culture is depleted in individuals, this will be mirrored over time by a depletion of institutions. The end product is a culture that will inevitably fade.

The seizure of Aboriginal children from their families and their forced enrolment at residential schools with an aim to assimilate culture appears to offend our public morals (even if it apparently did not during the bulk of the period during which the schools actually operated).⁷⁵ Future cases rooted in tort law, and particularly other forms of legislative reparation, will depend on this moral condemnation if there is to be compensation for loss of culture itself. But if this is the basis for later arguments for

obligation to provide, hospitality to members of a visiting civilization when the two came in contact. Even if one group arrived to provide enlightened culture and civilization to the other, nothing could legitimize the typical plundering and extermination that usually came with colonialism. Cosmopolitanism seeks to guarantee the sovereignty of nation-states by protecting their internal affairs from outside influence. Robert Fine, *Cosmopolitanism* (New York: Routledge, 2007) at 24-25.

⁷⁴ This may be the stage at which the conditions of a group's reproductive capacity or machinery should be protected and/or even promoted.

⁷⁵ It is worthy to note that *what* is moral is always relative, and changes over time. Sumner notes that "... 'immoral' never means anything but contrary to the mores of the time and place. Therefore ... there is no permanent or universal standard by which right and truth in regard to these matters can be established." There may be some conflict as to reasoning when a culture can legitimately judge another; however, there is conceivably less divergence in agreeing that a culture can legitimately look back and judge itself. It is unlikely, but possible, that some day the residential school experiment may be looked back upon as a legitimate exercise of state power, however unlikely that may be. In the present, all a society can do is judge and take action to the best of its abilities and in good faith. William Graham Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (New York: Ginn and Co., 1934) at 418.

reparations, and particularly non-traditional ones, then it will be useful to set out exactly *why* it is that such attempted force-assimilation offends common morals. Generally speaking, today there are two conditions that must be had by a state or nation in order to earn respect on the international stage: (i) it must be willing to respect the integrity and interests of other nations and keep its commitments, and (ii) its institutions must create and administer laws with an authority derived from its members and protect the basic rights of those members.⁷⁶ A British Royal Commission investigating relations with Aboriginals prior to establishment of residential or day-schools commented that North American Indians were not under control of the Crown:

The Indians, though living among the king's subjects in these countries, are a separate and distinct people from them, they are treated as such, they have a policy of their own, they make peace and war with any nation of Indians, when they think fit, without control from the English. It is apparent the crown looks upon them not as subjects, but as a distinct people ... So from thence I draw this consequence, that a matter of property in the lands in dispute between the Indians as a distinct people and the English subjects, cannot be determined by the law of our land, but by a law equal to both parties, which is the law of nature and nations ...⁷⁷

It seems to be that, at least during the period when British and French attitudes towards Aboriginals were as allies, Europeans recognized and respected the independence and organization of Aboriginal societies. Of course once the view of Aboriginals changed to being an obstacle to settlement, this attitude quickly changed, as did policy.

The policy that removed Aboriginal children from their homes and placed them in residential schools was no doubt disrespectful to Aboriginal nations. It was also

⁷⁶ Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Malden, Massachusetts: Blackwell Publishers, 2002) at 33.

⁷⁷ The Royal Commission that issued this decree sat in 1705, 1738, and 1743 in order to evaluate a claim being made by the Mohegan Indians who sued the colony of Connecticut in British court for the invasion of their land by colonial settlers. Rupert Costo & Jeanette Henry, *Indian Treaties: Two Centuries of Dishonour* (San Francisco: The Indian Historian Press, 1977) at 6.

disrespectful to Aboriginal families who suffered due to their children's absence. Yet the suffering experienced by these parents, and the national disrespect, is not enough to warrant naming the action as an injustice.⁷⁸ According to Kymlicka, building on Rawls, the attempted-assimilation was wrong because culture is a basic good, i.e. something that all citizens need and all governments should respect and seek to protect.⁷⁹ Janna Thompson goes beyond this individual-rights argument for cultural protection, and explains that removing Aboriginal children was wrong because it breaks the family unit and intergenerational tie between one generation and the next. In addition to inflicting grief by separating parent and child, removing children interferes with what she calls a 'lifetime-transcending interest' to pass information from one generation to the next: "[i]t breaks their connection with the future in a way that is likely to undermine their ability to live a meaningful life."⁸⁰ It is important that parents at least have the chance to pass on their values and beliefs to their children. When this ability is taken away, a fundamental right has been interfered with.

There are imaginable situations in which reasonable people might deem it advisable for parents to be prevented from passing on beliefs to their children; however, unless it is clearly identified that children would be harmed by having a relationship with their parents, then parents may be said to have an entitlement to raise their children as

⁷⁸ Many Aboriginal groups share a belief that parents have an overarching obligation to be good to their children, and that if they are not the Creator will take their children away. Halkow speculates that this belief likely had an impact in Aboriginal parents understanding or reasoning why representatives of the government were coming to remove children to residential schools. The Creator "... belief may have been reinforced by Indian Agents who pointed out to First Nations parents that they were not able to provide their children with adequate food or clothing, and that their children would be better cared for in residential schools. It is a possibility that these parents experienced guilt and shame about their perceived inability to care for their children at home as well as to protect them from mistreatment at residential school." Yvonne Lucienne Halkow, *Personal impact of residential school experiences on First Nations people* (M.Sc. Thesis, University of Alberta, Department of Human Ecology, 1996) [unpublished] at 103.

⁷⁹ Kymlicka, *Liberalism, Community, and Culture*, *supra* note 45 at 162.

⁸⁰ Thompson, *Taking Responsibility for the Past*, *supra* note 76 at 134.

they see fit. Of course some might argue that this is a judgment call and, in fact, just the sort of judgment call that was made upon the inception of Indian residential schools, where ‘civilizing’ Aboriginal children was seen to be both in the country’s best interest and their own. Yet if Britain/Canada had respected Aboriginal nations as per above, then this kind of negative judgment would have been avoided in the overarching respect for a nation. As a ‘lifetime-transcending interest’, parents have an entitlement to pass on culture, or at least a right to non-interference in attempting to pass it on. Any attempt to sever this natural right may be said to be morally repugnant. Thompson explains that

[a] particularly important part of the heritage that people are entitled to pass on to their children is their culture and religion. Culture and in many cases religion are identity forming. By inheriting our culture, our descendants are able to regard our history, and the history of our community, as also belonging to them. It makes meaningful relationships between generations possible, and enables descendants to appreciate other things that we pass on to them. When this heritage is bound up with the learning of a language, it underwrites the very possibility of transgenerational communication. Children once grown are entitled to leave their culture or abandon their religion, but when they have grown up in the cultural or religious community of their parents, they are not so likely to lose the ability to maintain meaningful contact with the possibility of return.⁸¹

Contemporary Aboriginal peoples frequently complain that as a result of their experiences with the residential school system, they feel as though they are caught between two cultures without ‘belonging’ to either.⁸² They have a lack of self-identity.

⁸¹ Thompson, *Taking Responsibility for the Past*, *supra* note 76 at 135.

⁸² Kariya notes that the same isolationist policy pursued by the Crown in separating Aboriginal children from their families failed to produce dying Aboriginal communities that were cut off from wider society. “Having established protective policies and separate reserves for Indians, it was impossible to introduce effective assimilation policies. Setting a people apart and legalistically and socially labeling them as Indians established a cycle of social reinforcement within the Indian communities and also within the dominant Euro-Canadian society. The people caught within the net of government policy objectives were no longer true Indians, nor could they be ordinary Canadians. By the very fact of special legislation and separate treatment, they had become people in limbo and assured of continuing in such a position ...” Of course, it was never the government’s intention to assimilate Aboriginal adults on reserves. Such a conversion was deemed unlikely or impossible, and the impetus for creation of the IRS system itself. But

These individuals have not made the decision to ‘switch’ from one culture to another. Rather they were forced to do so. But when the new culture did not accept them, or they did not properly and fully accept or adopt it, they did not have an ‘original’ or natural culture to fall back upon.

Where Thompson posits the idea of ‘lifetime-transcending interests’, Rawls stresses the importance of family relations and individuals as representatives of ‘family lines’ that span generations.⁸³ This is how Rawls forwards a theory of intergenerational justice without inserting theoretical people from different generations behind a veil of ignorance in the ‘original position’ where they would have to design a ‘just’ society without knowledge of where they themselves would fall within the socioeconomic spectrum (i.e. the idea being that without such knowledge people would design a just welfare-state where the worst-off would live some minimally acceptable form of the good life). Successors have a natural right to inheritance and parents/elders have a natural right to bequest based on the natural love and affection that parents have for their offspring. Family relations produce good citizens and also ensure that people get support during troubling times in their lives when, were it not for family members, the social net of the state might be required to intervene.⁸⁴ There is value in this service and as such

the fact that these isolated Aboriginal communities endured, and that many residential schoolchildren returned to them upon being unable to adapt to wider Canadian society, in part created and perpetuated the current state of affairs where many Aboriginal people have been affected by the IRS assault on culture, and continue to live in a diminished state of their native way of life. Paul Kariya, “Department of Indian Affairs and Northern Development: The Culture-Building Process Within an Institution” in James Duncan & David Ley, eds., *Place/Culture/Representation* (New York: Routledge, 1993) 187 at 197.

⁸³ Rawls, John. *A Theory of Justice, Revised Edition* (Cambridge, Massachusetts: Harvard University Press, 1999) at 256.

⁸⁴ Thompson, *Taking Responsibility for the Past*, *supra* note 76 at 127. Family has a paramount value in its innate ability to teach morality. According to Burbank “... family does not simply provide an enduring and motivating schema of self with others. It also provides a metaphor of morality; and our sense of morality, of what is good and bad, is what moves us to action.” Victoria Burbank, “From Bedtime to On Time: Why Many Aboriginal People Don’t Especially Like Participating in Western Institutions” (2006) 16 *Anthropological Forum* 3 at 8.

states ought to respect the intergenerational relationships of its citizens. States are also under a natural obligation to be impartial in its policies and not favour one demographic or culture over another.

4.0 INTERGENERATIONAL JUSTICE

Because culture is a product that spans generations, the idea the reparations may be owed to current Aboriginal people is premised on a moral argument for intergenerational justice. This notion must be a strong one if claims for reparations will later be judged to overcome arguments against them that cite limitations periods. It seems clear now that the church and state-sanctioned policy of removing Aboriginal children from their families, even if some families at the time in fact thought it was in their children's best interests, was morally reprehensible. Official apologies from both the churches involved and the federal government speak to this fact. This official policy was wrong because when the children were put into the schools they were malnourished, abused, and demoralized. But, as is argued here, perhaps the most deeply offensive ill-treatment was forced cultural replacement.

Parents, and members of a group at large, have a right to pass on to their children things of significance that they want to perpetuate. There is a special relationship of love and affection between parents and children, and between ancestors and successors, that warrants protection of a right of bequest of values and ideas, i.e. culture.⁸⁵ It is very

⁸⁵ Janna Thompson, "Coming to Terms with the Past in Australia" in Jon Miller & Rahul Kumar, eds., *Reparations: Interdisciplinary Inquiries* (New York: Oxford University Press, 2007) 69 at 80. Trommsdorff also stresses that while transmission of culture usually occurs as a passage of information from parent to child, this passage can also be bi-directional, with children influencing the culture of their parents. She also stresses that children may not choose to internalize all of the cultural aspects proffered by their parents, or may accept but then alter them. "The transmission of culture may be seen as deriving from the child's internalization of values. Certain values can be enacted differently and may change their meaning during individual development and social change. Intergenerational transmission of culture can change the relationships between values and behaviour and can influence innovations. This assumption

important for most parents “to pass on to their children ... the opportunities to appreciate certain values, to engage in particular activities or to enjoy particular goods. For example ... religious values ... cultural norms, to appreciate the ideas that they regard as important, and more generally, to be able to live in their cultural community and participate in its activities.”⁸⁶ That parents have a right to pass this information on to their children seems an innate truth. Children, in turn, may choose to not accept this bequest. They may walk away from their culture and join another, or determine that they do not share their parent’s beliefs. But it is a deep injustice to prevent them from being exposed to this information in the first place; to deny them the ability to make the choice of their own volition.

In a similar vein, it may be argued that if Aboriginal peoples had not experienced a loss of culture due to the residential school system and other official policies of government, then they would have lost that culture anyway due to their inevitably increasing contact with western society over time. Even if children had not been forcibly removed from their homes, over time some parents may have chosen to send their children to western schools anyway, and some Aboriginal children or adults may have chosen to attend such schools over the years. They may have done so because attendance at those schools may well have better prepared them to function within western society (if that is something they wanted to do). Waldron, as will be addressed again later, notes that there is no way to know what would have happened over time, and that present reality should be accepted as it is.⁸⁷ To guess what would have happened had a historical

takes into account both the active role of the child in the process of transmission and internalization and the heterogeneity of cultures and societies. Trommsdorff, *supra* note 68 at 127 & 152.

⁸⁶ Thompson, “Coming to Terms with the Past in Australia”, *supra* note 85 at 80.

⁸⁷ Jeremy Waldron, “Redressing Historic Injustice” (2002) 52 U.T.L.J. 135 at 144-146.

group not been aggrieved is an illegitimate inquiry, because there is no way to answer the question. Waldron's position is that to estimate how to compensate Aboriginal people for loss of culture due to the residential school experience is an invalid inquiry because attempting to gauge what position they would have been in had the wrong not been perpetrated involves so many variables that the final product would be no more than a guess.⁸⁸ And a guess is not a good enough basis upon which to gauge a massive compensation package.

Thompson replies to Waldron by offering two arguments. First, Waldron's position is based on too many assumptions, because: (i) it is implausible to argue that most Aboriginal parents would have not chosen to attempt to pass on native culture to their children, and (ii) it is similarly unreasonable to assume that most Aboriginal children would choose to completely abandon it.⁸⁹ Secondly, it may be argued that Waldron's objection is fallacious from the start, because if one accepts the proposition that parents ought to be able to make a cultural bequest to their children, and children have a right to be exposed to it (regardless of what they choose to do with it), then what would have happened over time is irrelevant.⁹⁰ The offence has been committed by severing that intergenerational transfer of information. What might have happened afterwards is, as Waldron himself posits, is nothing but a guess. What is relevant is that Aboriginals were deprived of the opportunity to make that cultural transfer in the first place. An underlying problem with cultural loss, of course, is that once a violation has been identified it may be difficult to compensate for, because what has been lost – the

⁸⁸ Waldron explains that "The difficulties in this task are those of all counterfactual speculation ... Would they have held on to the land and passed it on to their children and grandchildren? Or would they have sold it – but this time to a fair price – in response to the first honest offer they were given?" *Ibid.* at 144.

⁸⁹ Thompson, "Coming to Terms with the Past in Australia", *supra* note 85 at 81.

⁹⁰ *Ibid.* at 81.

exact amount of culture that has been depleted – is difficult or impossible to measure.

Nevertheless, as will be argued, compensation, in various forms, is possible. Despite the fact that culture, regardless of all the definitions that may be offered, is in some ways an inherently vague concept (and particularly difficult for courts to deal with as some sort of tangible loss), it is important to recognize what has been lost, and design reparations that, as much as possible, compensate for this loss.

In addition to losses to the individual, loss of culture may be viewed as a group loss. Groups may be seen as having lifetime-transcending interests the same as individuals do. Culture, by its very nature, is a group function that depends on numbers to give it power and meaning. As carriers of that meaning, groups on whole are likely to be as interested as individuals in passing on cultural heritage to whomever they may consider their successors. Going back to the idea of Rawls' theory of justice, if people in the original position were asked to design a just society, and determine what duties they owed their successors (or what rights those successors were entitled to claim), it is likely that those people would determine that their own successors would be entitled to claim from them whatever it was that they themselves were entitled to receive from their predecessors.⁹¹ The resulting hypothesis is that future generations are entitled to demand from current generations whatever it is that current generations are demanding from their own predecessors. Presuming that current generations have a special interest in receiving cultural bequests, and also have an interest in perpetuating their own cultures and cultural bequests, it may be derived that intergenerational justice mandates the ability of

⁹¹ Janna Thompson, *Intergenerational Justice: Rights and Responsibilities in an Intergenerational Polity* (New York: Routledge, 2009) at 62.

individuals from different generations, i.e. family lines or people with lifetime-transcending interests, to receive and pass on cultural heritage.

The state, for its own part, must be seen as having a moral and legal obligation to protect the intergenerational interests of its citizens, including those interests that have to do with passing-on of culture. The state governs a society that is intergenerational – people use existing institutions; they may modify them or not and then ‘pass’ those institutions on to their successors.⁹² People may protect their intergenerational interests by protecting these institutions during their lifetimes. The state must promote and uphold the law so that individuals may uphold their intergenerational commitments and communities. When a state discriminates against a certain group by not allowing them to make cultural bequests to their heirs, it is systematically discriminating against the lifetime-transcending interests of family lines. Worse still is the case when a state itself is the perpetrator of detriment to such intergenerational lines. In doing so, it commits a wrong against both the contemporary individuals and their heirs. The law as an institution embodies a moral concept. The law can change, of course. But it generally requires people to believe that their general judicial beliefs are reasonable and would be accepted by their successors as well as themselves.⁹³ The flip-side of this state duty to protect the interests of citizens on an intergenerational plane is that when the state fails to meet this duty, it owes reparations.

⁹² Burke notes how individuals and societies naturally inherit institutions from their ancestors as follows: “... it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers ... We have an inheritable crown, an inheritable peerage, and a House of Commons and a people inheriting privileges, franchises, and liberties from a long line of ancestors.” Edmund Burke, *The Philosophy of Edmund Burke*, ed. by Louis I. Bredvold & Ralph G. Ross (Ann Arbor: University of Michigan Press, 1960) at 206.

⁹³ Thompson, *Intergenerational Justice*, *supra* note 91 at 89.

It is true, as Waldron has pointed out, that sometimes damage done many generations ago cannot be repaired. But this does not mean that current generations must accept their bequests, or lack thereof, as they are. Reparations for historical injustices need to repair the harm to individuals and groups in such a way as to be regarded as a fair bargain for cooperation between generations.⁹⁴ Waldron's arguments based on temporality are shortsighted, if not fallacious. There is a limit on historical responsibility. Nobody is owed reparations for the Norman Conquest. Historical responsibility is relevant for as long as that particular history is relevant to contemporary and future citizens.⁹⁵ Where history is relevant, reparations that remedy the pith and substance of the original harm are owed by the state as representative entity of past governments and past citizens.

5.0 CASE LAW

There are a number of different non-legal remedies that may be available to alleviate, as much as possible, the effects of the residential school program. But before these are investigated it is useful to look at one particular course of action: litigation.

⁹⁴ *Ibid.* at 82.

⁹⁵ *Ibid.* Although he acknowledges that there may as of yet be no precise formula or measure by which to determine exactly how historical wrongs are to be measured and how far back current communities must look, Nozick prescribes a philosophy that also appears willing to look as far back in the past as is relevant in order to determine whether a historical wrong should be rectified. "A distribution is just if it arises from another just distribution by legitimate means ... The existence of past injustice ... raises the third major topic under justice in holdings: the rectification of injustice in holdings ... a principle of rectification ... uses historical information about previous situations and injustices done in them ... and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society ... If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized." Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 152-153. Aboriginal Canadians are victims of colonization, yet they argue for a seat at the table as opposed to emancipation. Aboriginals want to work with government to carve out their own niche of power in this country – likely because they realize they have no other choice. Laselva notes that Aboriginals "... frequently insist that they own much of Canada ... because they were its original inhabitants ... Although they usually refuse to draw the conclusions that appear to follow from them ... what Aboriginals appear to want is not decolonization as such, but equal partnership in a reconstituted Canada." Samuel V. Laselva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montréal: Mc-Gill-Queens University Press, 1996) at 150-151.

There has been a plethora of case law, particularly from Canadian and Australian courts, initiated by plaintiffs who were former residents of residential schools. These cases have argued for damages based on mistreatment, failed duties, and a range of physical and emotional abuses. While these issues are certainly of the utmost seriousness, what is being examined here in particular is how the courts address the issue of loss of culture. As a remedy, it will also be prudent to investigate how courts deal with cultural loss claims in order to evaluate their usefulness versus the usefulness of other types of remedies.

5.1 Australian Case Law

Australian courts were the first to look at culture as a head of damage, or a cause of action in itself. Of course the weight of foreign common law decisions on Canadian courts is slight at best; nevertheless, it is useful to examine how foreign jurisdictions deal with largely theoretical notions of loss of culture from a practical real-world standpoint. *Napaluma v. Baker* (1982), 29 S.A.S.R. 192 (S.C.).

In this early case, a South Australian Supreme Court Judge accepted that loss of cultural standing in a community should be considered in a general damages assessment. The plaintiff was a twenty-two year-old Aboriginal man who suffered mental disability and loss of fine movement ability subsequent to an automobile accident. As a result, he would have a reduced role in traditional ceremonies and would not be informed of certain secret traditional knowledge, because he could not be trusted to keep it a secret, nor did he have the capability to pass it on to youth later in life. Zelling, J. awarded \$10,000 for a novel head of damage, which he described as a loss of status within the plaintiff's Aboriginal culture. His explanation is worth quoting at some length:

His [the plaintiff's] real loss of amenities, however, is one which I have found very little in which to guide me as to assessment. The plaintiff has been through the ceremonies of the Aboriginal community up to date and has been made a man. However, in the ordinary course of events, further secrets would be entrusted to him and he would, in our parlance, rise to higher degrees. It is now certain that the plaintiff will not be advanced to further degrees in Aboriginal lore for two reasons, firstly, he may not keep secret what is entrusted to him and secondly, he has not the ability to pass on accurately the secrets to others. Accordingly, he is left out of some ceremonies and he plays a merely minor passive role in others and he is therefore less than a full member of the Aboriginal community. He will not play the part in relation to reciprocal relationships with other Aborigines of his own peer group, nor will he be consulted, at least not as much as others, in making tribal decisions, in this case, have to put a separate figure, as I said, for loss of amenities which, although they include loss of ability to play sport, are basically a loss of position in the Aboriginal community. Doing the best I can on this head and conscious that I look at the problem with European eyes and not with the eyes of those within the community, I allow \$10,000 for loss of amenities on this head alone.⁹⁶

Although Zelling, J. did not explicitly say so, clearly he is going to lengths to try to highlight the plaintiff's loss of status or place within his own community, i.e. his own loss of culture. Zelling, J. does not explain in any detail exactly how he quantified the loss of the plaintiff's ability to partake in traditional activities at \$10,000. Yet clearly he identifies that the plaintiff lost *something* of value by becoming unable to partake in these activities. The \$10,000 may be somewhat arbitrary, but the recognition given to cultural loss, and the willingness to make an award for a claim that was (and is) novel, is an important landmark.

Dixon v. Davies (1982), 17 N.T.R. 31 (S.C.).

This 1982 Australian case also involved an automobile accident, although here the plaintiff was a young boy who was struck by a vehicle. Subsequent problems involved a

⁹⁶ Andrew Collett, *Napaluma v. Baker*, Case Comment (1982), 29 S.A.S.R. 192 (S.C.) online: Aboriginal Law Bulletin <[http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AboriginalLB/1982/28.html?query=title\(Napaluma%20%20and%20.%20Baker\)>](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AboriginalLB/1982/28.html?query=title(Napaluma%20%20and%20.%20Baker)>)>.

serious and permanent limp. Anthropological evidence entered at trial showed that the boy was unlikely to achieve adult status and enjoy the ability to partake in many traditional activities as an adult because of his injury. This inability to partake in traditional activities would deny him certain cultural knowledge. Out of a general \$45,000 award for pain and suffering, the Judge specifically awarded \$20,000 for loss of cultural fulfillment.

Weston v. Woodroffe (1985), 36 N.T.R. 34 (S.C.).

A twenty-six year-old Aboriginal man was involved in a car accident that caused him to lose a leg beneath the knee. Although he could still attend traditional ceremonies, he could not actively participate in many of them. Although he was not an outcast, the trial judge awarded general damages of \$45,000, noting in part that the award compensated for reduction in the plaintiff's participation in traditional life.

Cubillo v. Commonwealth of Australia, [2000] F.C.A. 1084 (Aust. Fed. Ct.).

This case involved two Australian Aboriginal plaintiffs who claimed loss of culture as a result of forced removal from their families at the age of eight and placement in residential schools which, like those in Canada, were administered by churches. According to the plaintiffs the government's actions were directly aimed at: (1) destruction of the child's association with his or her mother, family and culture; (2) assimilation of 'part-Aboriginal' children into non-Aboriginal society; (3) provision of domestic and manual labour for Europeans; and (4) a desire to 'breed out "half-caste" Aboriginal people and protect the primacy of the Anglo-Saxon community'.⁹⁷ The

⁹⁷ Jennifer Clarke, *Cubillo v. Commonwealth of Australia*, Case Comment, [2000] F.C.A. 1084 (Aust. Fed. Ct.) online: Melbourne University Law Review <<http://www.austlii.edu.au/au/journals/MULR/2001/7.html#Heading1109>>.

plaintiffs argued causes of action based on false imprisonment, negligence, breach of statutory duty, and breach of fiduciary duty.

The action failed, largely based on the doctrine of laches and the fact that the limitation period, according to the court, had long expired. This, despite the fact that the plaintiffs argued that given their psychiatric injuries they had only recently 'discovered' their injuries and that subsequent to this discovery their delay in commencing an action was not unreasonable. In dismissing the case, however, the Judge did comment that cultural loss could be a legitimate head of damage upon which compensation could be based.

Trevorrow v. State of South Australia (No 5), [2007] S.A.S.C. 285.

The plaintiff, Bruce Trevorrow, was born to Aboriginal parents and spent the early part of his life living in an Aboriginal community. At age thirteen months the plaintiff received medical attention at a children's hospital and was discharged after a week. Upon being discharged the plaintiff was taken into foster care by a non-Aboriginal family at the behest of the Aborigines Protection Board. The plaintiff remained with the foster family until he was ten years old, during which time he did not see his birth parents. He was returned to them at age eleven, causing lifelong trauma to him as well as both families.

The key to this case was the judge's finding that the removal was illegal as judged by laws in effect at the time. Two officers of the Aborigines Protection Board testified that they were fully aware that the Aborigines Department could not remove a child without first involving the Children's Welfare Department. The Department had also received a legal opinion to this effect.

In awarding general damages Gray, J. noted that “The plaintiff as a result of the State’s conduct has not developed a cultural identity with his people. This is a material and compensable loss. He has been unable to fit in or belong ...”⁹⁸ The court held that the state had been guilty of false imprisonment by placing the plaintiff with a foster family, and not alerting his natural family that this had been done. Damages amounted to \$525,000 (Australian dollars).

5.2 Canadian Case Law

Canadian courts have not been as progressive as Australian ones in terms of granting damages for cultural loss. However there are positive examples. The seminal residential school case, *Blackwater v. Plint*,⁹⁹ did include a claim specifically made for loss of culture on appeal, but that claim was dismissed because it had not been pleaded at trial. A number of other cases have been, and may be, successful in making claims for cultural loss in Canadian courts.

Gawa v. Horton (1982), 37 B.C.L.R. 130 (S.C.).

The plaintiff, a native Gitskan language teacher, was struck by a truck travelling between twenty and forty-five miles per hour on an Indian reserve in British Columbia. Alcohol was a factor. Subsequent to the accident, the plaintiff was unconscious for three weeks. At the time of trial three years later, the plaintiff still had severe mental disability that made it hard for her to remember things in the short-term, severe motor-skill deficiency that made it impossible for her to walk or drive, and problems with her eyesight that made it difficult for her to read and impossible to write. In calculating an award for pain, suffering, and loss of enjoyment of life, Hutchinson J. doubled his

⁹⁸ *Trevorrow v. State of South Australia (No 5)*, [2007] S.A.S.C. 285 at 1197.

⁹⁹ [2005] S.C.C. 58 [*Blackwater*].

original amount to \$40,000, based on “the plaintiff’s loss of status in the community, her inability to perform the ceremonial functions as chief that she used to perform and her social ostracism”¹⁰⁰

Kwakiutl Nation v. Canada (Attorney General), [2004] C.N.L.R. 82 (B.C.S.C.).

Gawa was followed in *Kwakiutl Nation v. Canada (Attorney General)*, where the plaintiffs brought an action against Canada and the province of British Columbia for breaching fishing treaty rights granted to them in the Douglas Treaty of 1851. The plaintiffs specifically claimed damages for the loss of culture they suffered due to not being able to fish on their traditional fishing grounds. Canada brought an application demanding “particulars as to the loss of culture, how damages for loss of culture are to be calculated and the quantum of damages for this loss ... Canada asserts that a claim for damages based on loss of culture is a novel cause of action and, as such, requires greater detail in material facts supporting the claim.”¹⁰¹

According to the Court, in order to make a novel claim specifically for loss of culture the plaintiffs would have to sufficiently plead material facts evidencing a loss of culture. The plaintiffs, in turn, argued that fishing constituted a cultural purpose for them, and that fishing helped “to generate wealth for the potlatch system which contributed to the flourishing of their culture....”¹⁰² The plaintiffs also argued that the defendants had interfered with their fishing rights by preventing them from implementing their own laws, customs, and traditions in the traditional area in question. The plaintiffs elaborated that “[f]ish and the wealth connected to fish and marine resources are integral

¹⁰⁰ *Gawa v. Horton* (1982), 37 B.C.L.R. 130 at para. 19 (S.C.).

¹⁰¹ *Kwakiutl Nation v. Canada (Attorney General)*, [2004] C.N.L.R. 82, at 40-41 (B.C.S.C.) [*Kwakiutl Nation*].

¹⁰² *Ibid.* at 50.

to Kwakiutl culture ... The diminishment of the marine resources and habitat has adversely affected the ability of the Kwakiutl to conduct potlatches and other ceremonies.”¹⁰³ In defining the assault that was taken out on culture, Harvey, J. noted that “[i]t is clear that when the plaintiffs discuss culture, they mean all of the laws, spiritual practices, ceremonies, customs and traditions integral to the Kwakiutl people.”¹⁰⁴ However, despite the apparent diminishment of marine resources and their ability to fish in the area, the Court held that the plaintiffs had failed to casually link that diminishment with loss of culture. The Court set out that the plaintiffs must further explain exactly how a reduction in resources caused culture loss. Examples could be a reduction in the number of potlatches, or the extinguishment of some other ceremony or ceremonies since 1851.¹⁰⁵

The case is ongoing, so it offers no definitive answer on how Canadian courts may address an explicit claim for cultural loss. The defendant’s demands for particulars in *Kwakiutl Nation* are extensive, and even if the plaintiffs are able to satisfy them, they will still have to overcome all the procedural and evidentiary hurdles (i.e. limitations periods, burdens of proof, and sufficient evidence) typically associated with claims for Aboriginal rights, and even more-so, loss of culture.

A similar explicit claim for loss of culture is occurring in *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*,¹⁰⁶ which involves claimed damages for destruction of fishing grounds adjacent to a reserve. A named issue to be determined is “[w]hether a claim for cultural loss is cognizable at law and, if so,

¹⁰³ *Kwakiutl Nation*, *supra* note 101 at 50.

¹⁰⁴ *Ibid.* at 51.

¹⁰⁵ *Ibid.* at 52.

¹⁰⁶ *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2008] 3 C.N.L.R. 136 (F.C.T.D.).

how it should be valued.”¹⁰⁷ Interim legal costs were awarded to the plaintiffs in this case, perhaps making it more likely that it would have ultimately gone to trial. If it did, the decision would have been an extremely important one in setting some precedent as to how contemporary Canadian courts will deal with claims for cultural loss. As it happened, the claim was settled in a related proceeding with the defendant paying \$21.5 million.¹⁰⁸ Until a court makes an explicit decision on how to handle cultural loss claims, the issue remains unresolved, and claims will remain novel and largely unfounded in anything more than moral notions.

Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel) (2009), 454 A.R. 53 (C.A.).

Gift Lake involved a *Métis* plaintiff group that applied for a review of the compensation it was receiving for oil and gas, and mining operations that were being carried out on its land. The Land Access Panel found only minor evidence of ‘cumulative effects’ of those operations on the plaintiffs. The plaintiffs argued that the Panel enforced an unreasonable evidentiary burden on it by requiring it to show specific negative effects that the development was having on them. Instead, the plaintiffs argued that, as per *Delgamuukw v. British Columbia*,¹⁰⁹ evidentiary rules must be liberalized in Aboriginal claims such as to allow oral evidence. They went on to argue that these same liberalized ‘rules’ of evidence ought to be applied to claims of cultural loss. The Court, however, concluded that the Panel’s approach was not overly rigid, and that it took a comprehensive approach in attempting to address and quantify an inherently difficult subject matter. Picard, J.A. noted that

¹⁰⁷ *Ibid.* at 18.

¹⁰⁸ *Hagwilget Village v. Canada*, [2009] F.C.J. No. 1086, at para. 2.

¹⁰⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

The expert reports and testimony underscore the challenges involved in converting into monetary terms the value of loss of a traditional way of life. How many dollars, for example, will compensate for the fact that a grandparent can no longer teach youngsters how to prepare country food, harvest wildlife or use wildlife products? What price should be attached to the stigma of eating wildlife harvested from an area that has been inundated with oil and gas development?¹¹⁰

The Panel, in its report, had noted the cultural value of the fishing area in question.

However, it had concluded that there was insufficient evidence to determine the actual negative impacts of development.¹¹¹ The Court agreed with the Panel's findings.

Tort law seeks to establish the original position a plaintiff would have been in but for the defendant's misconduct. The Canadian legal reality is that Aboriginal people are more often required to evidence what aspects of traditional culture they have retained, as opposed to what culture they have lost. Evidencing loss of culture requires a problematic burden of proof and, as will be seen, courts have been too willing to construct the original position of Aboriginal plaintiffs as already highly troubled and culturally compromised.

5.3 Tort law obstacles

Canadian tort law and the rules of civil procedure present at least four preliminary issues relevant to claims which may be made by the survivors of Indian Residential Schools: (i) vicarious liability, (ii) crown fiduciary obligation, (iii) the legal status of churches, as well as (iv) crumbling skulls and multiple sufficient causes. The success of tort claims for cultural or other losses often hinges on the ability of the court to find vicarious liability on behalf of churches and government for the actions of residential school personnel. Such a finding generally rests on the ability to find a sufficiently

¹¹⁰ *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)* (2009), 454 A.R. 53 at para. 41 (C.A.) (QL).

¹¹¹ *Ibid.* at 13.

strong connection between the individual's assigned duties and illegal act. Similarly, the Crown has a unique treaty based and constitutionally entrenched duty to act in the best interest of Aboriginal peoples and protect their assets. This must be interpreted to be inclusive to culture as well. The legal status of churches is considered, as it has been in the case law, with reference to the organization of the Catholic Church, which has been successful at avoiding damage payments at the national and international level.

Crumbling skull and multiple sufficient causes, as will be seen later, are key defences that have been successfully used by defendants in cases alleging cultural and other losses.

Taken together, these issues provide a fundamental basis upon which to premise an argument for recovery of cultural loss and gauge its likelihood of success.¹¹²

5.3.1 Vicarious Liability

¹¹² One relatively novel tort law approach that Aboriginals may consider is making a claim for the tort of intentional infliction of mental harm. This cause of action derives from the English case *Wilkinson v. Downton*, [1897] 2 Q.B. 57 where the court determined that it was unlawful to act in a way that was calculated to inflict physical harm on another. Although the case specifically mentioned physical harm, it was actually more concerned with the impetus, which was a mental harm. The facts were that as a practical joke the defendant told the plaintiff her husband had been seriously injured. The plaintiff was shocked, and fell ill. Although his conduct was legal, the court held that the plaintiff's right to personal safety had been infringed upon. The elements of the tort were deemed to be: (i) intention, requiring the defendant to either intend the harm caused, or be recklessly indifferent to it, (ii) harm caused, meaning that the likelihood that the plaintiff would be affected must be ascertained according to general notions of cause and effect at the time, (iii) without just cause or excuse (there are conceivable cases, such as extracting information with regards to a crime on the person, where 'causing' a person emotional pain is in the interests of greater justice). Christian Witting, "Tort Liability for Intended Mental Harm" (1998) 21 U.N.S.W.L.J. 55 at 62-67. The tort, which was called 'intentional infliction of nervous shock' was successfully argued in the Canadian case *Boothman v. Canada*, [1993] 3 F.C. 381 (F.C.T.D.) where a supervisor in a place of employment was found to have willingly and maliciously destroyed the self-esteem of an employee through threats of bodily harm, insults in front of others, yelling profanities, as well as forbidding her to leave the office without permission. The court commented that "The damage resulting from these actions is psychological in nature and includes depression and anxiety attacks, feelings of suicidal despair and social isolation." The court determined that the elements of the tort, as set out in *Timmermans v. Buelow* (1984), 38 C.C.L.T. 136 (Ont. H.C.) were: (i) An overt act, whether physical, verbal or both by the defendant, (ii) Intent by the defendant to do that act or to speak those words, (iii) Circumstances which would lead a reasonable person in the position of the defendant to foresee a reasonable likelihood of fear or emotional upset on the part of the plaintiff..., (iv) Actual harm amounting to nervous shock--i.e. going beyond the kind of emotional upset needed to satisfy element and going beyond, in many instances, the limits of reasonable prevision. \$10,000 was awarded for pain and suffering for assault and intentional infliction of nervous shock. *Boothman v. Canada*, [1993] 3 F.C. 381 (F.C.T.D.).

Vicarious liability denotes a responsibility one party has for torts committed by another because of the relationship between them – it is strict liability, meaning that no proof of wrongdoing on the part of the ‘other’ party is necessary. Liability of the original tortfeasor is not displaced; the plaintiff is merely provided with an alternative defendant.¹¹³ Many different categories of vicarious liability exist, although the one most relevant to residential school cases is that of master and servant, or employer – employee.

An employer becomes strictly liable for torts committed by employees during the course of their employment based on the justification that an entity that benefits from an enterprise is liable for tentative harms associated with it, and because an employer entity has the oversight capability to supervise employees and the workspace so as to minimize the risk of harm.¹¹⁴ While employers are usually responsible for the torts of their employees, they are not responsible for torts committed by independent contractors, or entities not under the direct control and supervision of the employer. Independent contractors are governed merely by the terms of their contract with the employer – how they go about doing the work is typically at their discretion. However, the judiciary is willing to include so called independent contractors under the vicarious liability umbrella by expanding the control test to emphasize degrees of supervision that may exist (as opposed to unambiguous control) between employer and contractor, or by examining to what degree the employee or independent contractor is integrated into the employers business. The court may also consider characteristics typical of an employment relationship, such as whether the employee/contractor uses the employer’s tools, workspace, or services, or whether the employee/contractor hires their own helpers,

¹¹³ Philip H. Osborne, *The Law of Torts*, 2d ed. (Toronto: Irwin Law, 2003) (QL).

¹¹⁴ *Ibid.* Osborne also cites that employers are better positioned than employees to absorb loss, either through liability insurance or adjusting the prices of the good or service being provided.

whether the method of payment may best be described as a wage or lump sum contract, and whether the employee/contractor is in a position of risk so as to either make a profit or incur a loss during work.¹¹⁵

In order to be held tortiously liable for a loss created by an employee the action that caused the loss must be committed within the course of employment as a function authorized by the employer, although courts are willing to interpret employment functions in a very broad manner (largely so as to be more liberal in providing an injured party access to remuneration). An employer may also be held liable for the intentional wrongdoings of an employee despite the fact that such an action may be intuitively outside the scope of employment.¹¹⁶ An employer will be found liable where an employee is placed in a position that creates or enhances risk of the wrongful act occurring.¹¹⁷ That is, the employer did not merely place an employee in a situation that gave opportunity for the act, but one that actually increased the risk of the wrongful act occurring. Factors to be considered when testing whether the wrongdoing was at least in some part precipitated by employer decisions include:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee's power.¹¹⁸

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 41.

The intentional tort of sexual assault arose in the case of *Bazley v. Curry*,¹¹⁹ where the defendant's employer (a non-profit organization) operated residential facilities for troubled children. Employees were effectively directed to take the role of an active parent, engaging in such activities as bathing and toileting. Unbeknownst to the Children's Foundation (the employer), the defendant was a pedophile and committed 19 confirmed acts of sexual abuse while employed. The Foundation was found vicariously liable for Curry's actions because "[t]he employer's enterprise created and fostered the risk that led to the ultimate harm. The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered ..."¹²⁰ The sexual assault was deemed to be a reasonable 'enterprise risk' inherent to the type of business carried out and undertaken by the employer upon commencing trade.

However, the test for material increase of risk was not met in *Jacobi v. Griffiths*¹²¹ where the defendant sexually assaulted children in their home subsequent to building a relationship with them while acting as director of a Boys and Girls club. According to the Court, there was an insufficient connection between the employment duties of the defendant as organizational director of the Club and the type of employer sponsored intimate relationship that would be necessary to warrant a finding of vicarious liability – "[c]learly 'but for' his employment Griffiths would never have even been introduced to the complainants ... [however] The sexual abuse only became possible when Griffiths managed to subvert the public nature of the [employment] activities"¹²²

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* at para. 58.

¹²¹ [1999] 2 S.C.R. 570.

¹²² *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 at para's 12 and 80. According to Binnie J.: "The key to this case, in my view, is that the Club's 'enterprise' was to offer group recreational activities for children to be enjoyed in the presence of volunteers and other members. The opportunity that the Club afforded Griffiths to abuse whatever power he may have had was slight. The sexual abuse only became possible when

Courts have been ready to find vicarious liability on behalf of the federal government and churches in cases dealing with intentional torts perpetrated by residential schoolteachers and resident administrators. In *Blackwater v. Plint*, the Supreme Court of Canada restored apportionment of 25% liability on the United Church (with the remaining 75% attributed to government) upon making seven findings:

1. The principal responsible for hiring the defendant was an employee of the church. The principal received a wage, was supervised, and could be hired or fired by the church.
2. The church was responsible for 'all aspects of the operation and management' of the residential school in question, and controlled the defendant who was a dormitory supervisor.
3. The church maintained an employee pension plan for which the defendant was party.
4. The principle did not have the authority to dismiss employees. Any dismissals had to be approved of by the Church Advisory Committee.
5. The church controlled the school's line of credit.
6. The church provided regular inspections.
7. Upon hearing testimony the trial judge found sufficient control for the church to be found vicariously liable.¹²³

In sum, the court found that the church had sufficient control over activities in the school, and that the defendant, a dormitory supervisor, was placed in a sufficiently intimate condition by his employer so as to increase the risk of a sexual assault occurring.

Vicarious liability was found not to be present in *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*¹²⁴ where an individual employed

Griffiths managed to subvert the public nature of the activities. The success of his agenda of personal gratification, which ultimately progressed to sex acts, depended on his success in isolating the victims from the group. The progress from the Club's program to the sexual assaults was a chain with multiple links, none of which could be characterized as an inevitable or natural "outgrowth" of its predecessor ..." *Ibid.* at para 80.

¹²³ *Blackwater*, *supra* note 99 at para's 22 – 31. The Crown also bears a unique obligation under the *Crown Liability and Proceedings Act* which holds it "liable for the damages for which, if it were a person, it would be liable ... (b) ... in respect of (i) a tort committed by a servant of the Crown." *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, ss. 3, and 3(a). The Crown Liability and Proceedings Act further stipulates that the alleged tortious action must give rise to a claim against the perpetrator himself: "10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession." *Crown Liability and Proceedings Act*, *supra* note 119 at s. 10.

at a residential school as a baker, boat driver and oddjobber sexually assaulted the plaintiff on a regular basis for five years.¹²⁵ The majority held that if every employee at the school, regardless of the details of their job or the degree of prescribed contact with children, were held liable for employer actions then that employer would be burdened by direct or absolute liability as opposed to vicarious liability. The sufficient control test was deemed to not have been met because of the lack of contact with children inherent to the particular job. In analyzing the five test factors from *Bazley* Binnie J. concluded that

- 1 [Defendant] Saxey was not "permitted or required" to be with the children at all, apart from trips in the motorboat which were supervised by one of the religious brothers or equivalent and occasionally in the bakery.
- 2 .. Saxey's conduct was abhorrent and in direct opposition to the Oblates' aims
- 3 While a degree of intimacy with staff is inherent in any residential school such intimacy did not involve Saxey, who was expected to devote himself to baking, maintenance and driving the motorboat. Saxey's duties required no significant contact with the students, and his quarters where the sexual abuse took place was located in an area off limits to students.
- 4 The respondent did not confer any power on Saxey in relation to the appellant
- 5 .. In *Bazley*, at para 42, the Court said that "[i]t must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks" Such a statement cannot fairly be said of the respondent employer in this case¹²⁶

In sum, the required strong connection between employee duties and the opportunity for sexual assault was not met. The employer did not put the employee in a position with employment features that materially increased the likelihood a sexual assault would occur. The defendant had a "[m]ere opportunity to commit a tort [, which] is insufficient"¹²⁷ to meet the necessary strong connection test. The limited prescribed contact the defendant had, or was supposed to have, with children in the eyes of the court

¹²⁴ [2005] 3 S C R 45

¹²⁵ *E B v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] S C J No 61

¹²⁶ *Ibid* at para 48

¹²⁷ *Blackwater*, *supra* note 99 at para 62

overshadowed other pragmatic considerations, such as the fact that the defendant resided in the residential school building and, as became apparent, had access, albeit illicit, to unsupervised children.¹²⁸ The Court again emphasizes that to impose liability in such situations would be to impose direct liability on the church and government for all tortious acts no matter how distant from the job-created power.

5.3.2 Crown Fiduciary Obligation

Modern regard of Crown fiduciary obligation derives from interpretation of the *Indian Act*. This arose as a main issue in the 1984 case of *Guerin v. Canada*,¹²⁹ where the Musqueam Indian Band said it had been aggrieved because in the 1950's the Department of Indian Affairs had negotiated and leased a substantial portion of Musqueam territory to a private party interested in using it to develop a golf course, but had done so at a price substantially below the land's appraised worth. The Court ruled that when the federal government acts on behalf of Aboriginals in situations where they do not have the legal empowerment to act for themselves, and are thereby vulnerable, then the government "obligation carries with it a discretionary power, [and] the party thus

¹²⁸ One theory of liability that is closely associated with vicarious liability and particularly relevant to institutional sexual abuse is non-delegable duty; however, Canadian courts have not been receptive to its use. In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 the Supreme Court of Canada devised a two-step approach for breach of a non-delegable duty: (i) the statute must be evaluated as to whether it gives an entity an absolute duty or paramount authority in a matter, and (ii) policy considerations such as the reasonable expectations of the persons dependent on that duty being properly carried out must be considered. Non-delegable duty and the problems it presents as a theory of liability were well evidenced in the Australian case of *New South Wales v. Lepore* (2003), 155 A.L.R. 412 (H.C.A.) where the respondent was suing over a number of assaults that had occurred against him in a state-run school when he was a boy. The court considered an argument for non-delegable duty; however, it held that to impose such a duty was unreasonable because it would extend the potential liability of an employer to the intentional and criminal acts of an employee. This is akin to an absolute duty, which is too broad and too demanding a responsibility to reasonably place on an employer. The court preferred a vicarious liability approach where an employer is responsible for the unauthorized acts of an employee if they are connected to authorized acts such as they might be considered modes, albeit improper modes, of doing them. Canadian courts have preferred the vicarious liability approach for the same reason; however, the theory of non-delegable is one worth mentioning.

¹²⁹ [1984] 2 S.C.R. 335 [*Guerin*].

empowered becomes a fiduciary”¹³⁰ and is therein obligated to act in the vulnerable party’s best interests. As concisely stated in *Blackwater v. Plint*, a fiduciary duty “is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests.”¹³¹

The *Constitution Act, 1867*,¹³² and the *Constitution Act, 1982*,¹³³ also point to a fiduciary obligation on part of the Crown. The 1867 Act in s. 91(24) gives the federal government power over ‘Indians and lands reserved for the Indians’, while the s. 35.1 of the 1982 Act demands that any change to the federal government’s duty to existing and continuing Aboriginal rights may only come at a constitutional conference attended by the Prime Minister, provincial, and Aboriginal leaders. Section 25 guarantees that no Charter guarantee to any Canadian will ‘abrogate or derogate’ from an Aboriginal right, be it derived from treaty or evidenced as an un-extinguished traditional practice. This obligation was reaffirmed in *R. v. Sparrow*,¹³⁴ a case affirming traditional Aboriginal fishing rights, where the court asserted that “a general guiding principle for s. 35(1)... is [that], the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial ...”¹³⁵

In order to clarify the fiduciary obligation that has evolved through Crown contact with Aboriginals since European contact, it may be useful to observe how such an obligation is viewed in another jurisdiction. In the Australian case of *Williams v The*

¹³⁰ *Guerin*, *supra* note 129 at 384.

¹³¹ *Blackwater*, *supra* note 99 at para 57.

¹³² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

¹³³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹³⁴ [1990] 1 S.C.R. 1075 [*Sparrow*].

¹³⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 59.

Minister, Aboriginal Land Rights Act & Anor,¹³⁶ the plaintiff was the daughter of an Aboriginal mother and Irish born father. The child was placed under the care of the Aborigines Welfare Board in various children's homes from shortly after birth until the age of 18 in year 1960. In 1993, the former ward of the state commenced an action against the federal government of Australia claiming she had developed a borderline personality disorder as a result of her time in the care of the state, as well as further psychiatric injury due to being denied bonding and attachment with her mother as a child which caused a 'disorder of attachment' later in life. Her specific allegations included negligence and breach of fiduciary duty. The unofficial state policy at the time was to remove half-blood (analogous to Canadian Métis) Aboriginal children from their biological family for their own 'protection'.¹³⁷ The Court refused to find any existence of negligence or a fiduciary duty owed to Aboriginals: "At common law, no action lies for, in effect, "bad parenting" or "bad upbringing" ... Thus for example, had the plaintiff stayed with her mother, and developed a disorder of the type alleged, it would appear that the plaintiff could not have sued her mother."¹³⁸ It continued, "In Canada there has been a greater willingness to find fiduciary relationships duties and obligations than in Australia and in New Zealand."¹³⁹ The Australian precedent can be differentiated because no official state policy of assimilation existed, even if the effect of its unofficial policies was similar.¹⁴⁰ In Canada, quite the opposite is the case, and this provides a basis upon which fiduciary duty rests.

¹³⁶ [1999] NSWSC 843 [*Williams*].

¹³⁷ Barbara Cummings, Jenny Blokland, and Rebecca Laforgia, "LESSONS FROM THE STOLEN GENERATIONS LITIGATION" <<http://www.law-lib.utoronto.ca/Diana/fulltext/cumm.htm>>.

¹³⁸ *Williams*, *supra* note 136 at para. 102.

¹³⁹ *Ibid.* at para 704.

¹⁴⁰ Even if assimilation was the intended goal of Australian state administrators, that goal was not explicitly enumerated to the degree was in Canada.

The Canadian government's fiduciary obligation to Aboriginals derived from case law, coupled with Constitutionally entrenched protections for un-extinguished Aboriginal rights (i.e. rights that continued to be practiced as of 1982 and have not been surrendered by treaty), provides the basis for the federal government's obligation to safeguard Aboriginal culture.¹⁴¹ Aboriginal culture was not extinguished, although certainly diminished, throughout the residential school experiment. If section 35(1) provides a foundation for an umbrella fiduciary obligation to protect, among other things, Aboriginal property title and traditional fishing rights, then similarly it must be interpreted to protect the most basic existing and continuing Aboriginal right – culture.¹⁴²

5.3.3 Legal Status of Churches

In Canadian law, national church organizations are recognized as establishments or institutions under the law, and enjoy equal power as compared to one another and in

¹⁴¹ In *Wewaykum Indian Band v. Canada* the Supreme Court of Canada set out that the general law supporting fiduciary duty applies to the Crown-Aboriginal relationship, including the types of equitable principles that were discussed in *Guerin*; however, the fiduciary relationship between these two parties is not one of general indemnity, rather "The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected." In *Wewaykum Indian Band* the court held that the Crown had met its fiduciary obligations to an Indian Band in a claim affecting lands not subject to a treaty or claim, even though there later arose a dispute between two different bands as to rightful ownership of the area. Despite the government-sanctioned overlapping of two Aboriginal reserves, the government was held to have met its obligations of loyalty and good faith, and not to be in breach of its fiduciary obligations to either group. The point, then, is that the federal government is not generally liable for all wrongs perpetrated unto Aboriginal groups, and this needs to be acknowledged. However, it is here argued that the nature of culture as an Aboriginal interest is one of extreme importance and deserving of protection. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at 86.

¹⁴² In *Blackwater v. Plint*, the Court considered two arguments providing a basis for fiduciary duty: (1) "put on an individual basis ... the government of Canada and the Church occupied a trust-like relationship with attendant trust-like duties with respect to Mr. Barney and other students at the school. As such, it was required to put their interests first and avoid disloyalty in its conduct toward them." The court here adheres to the findings of the trial court, namely that the Church and federal government had not been dishonest or intentionally disloyal, and thus the duty had not been breached; (2) "a second broader argument focussing on Aboriginal children collectively can be discerned. This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples." The Court resolves that it cannot resolve this issue, which could not be solved at trial, on appeal. It is a mere 'contextual background' to the larger, or narrower, sexual assault case. *Blackwater*, *supra* note 99 at para's 59 – 62.

relation to the federal government¹⁴³ The issue of legal establishment of churches in Canada has yet to be directly taken up by the judiciary, and most cases dealing with their legal status hark from the earliest decades of the twentieth century, focusing on when the church attains a degree of organization sufficient to be defined as an establishment¹⁴⁴ According to this body of case law, which continues to be upheld today, religious organizations are voluntary associations The authority of a church over its members “is based on their voluntary membership and mutual contractual consent to the doctrine and discipline of the association ”¹⁴⁵

This recognition as voluntary association has provided a basis for churches to enforce their own constitutions on an internal basis, but it has also led to considerable complications for third parties attempting to sue an unincorporated institution The Catholic Church has successfully argued that it is not liable for damages relating to Aboriginal residential school abuse claims because as an unincorporated religious institution and a voluntary association it is not an entity capable of being sued In *J R S v Glendinning*,¹⁴⁶ Ross J held that the Catholic Church as a voluntary organization could not be sued, although its principals could – namely individual Bishops and Diocese organizations “the 1845 and 1873 Acts [conferring certain property rights] do not

¹⁴³ Statutory law adopted from England originally only recognized the Church of England, however now provincial law recognizes any religious organization “that is organized for the advancement of and for the conduct of worship, services or rites of the Buddhist, Christian, Hindu, Islamic, Jewish, Baha i, Longhouse Indian, Sikh, Unitarian or Zoroastrian faith, or a subdivision or denomination thereof” *Religious Organizations Lands Act*, R S O 1990, c 1

¹⁴⁴ For example, “[t]he process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions In the fullest sense a church is said to be established when all the provisions constituting the church’s system or organization receive the sanction of a law which establishes that system throughout the state and excludes any other system ” See *Halsbury’s Laws of Canada*, 4th ed , (Markham, Ontario Lexis Nexis, 2006) vol 14 at para 334

¹⁴⁵ M H Ogilvie, *Religious Institutions and the Law in Canada*, 2d ed (Scarborough, Ontario Carswell, 1996) (QL) at chapter 8 C para 9

¹⁴⁶ (2000), 191 D L R (4th) 750 (Ont Sup Ct) [*Glendinning*]

incorporate the Church, but rather the Bishop as the Diocese. I conclude that the Church, not being a natural person, nor a corporation, is also not a body which has been given those capacities by that legislation.”¹⁴⁷ The court sees the church as effectively operating as two different entities: the Church organization itself with head office in Vatican City which tends to religious practices, and the diocese incorporated under provincial law which oversees secular matters. In the words of the Court:

[w]hile the Church is spiritual and ecclesiastical in nature, it nevertheless exists and functions in a secular world. Subsequent enactments of the Legislature gave the Diocese power to execute promissory notes, to borrow money on the credit of the corporation and to give security therefore and to acquire and hold personal property and movables for the purpose for which the corporation is constituted. It is, I would suggest, apparent that it is the corporate entity which is empowered by its enabling legislation to manage the temporal affairs of the Church in the diocese and which has the legal capacity to sue and be sued in secular matters. In other words, the corporate diocese is a secular arm of the Church ...¹⁴⁸

Thus, damages in residential school cases involving the Catholic Church as defendant have in fact come from individual dioceses and perpetrators. The non-secular ‘half’ of the church may neither sue nor be sued, only its secular diocese incorporations.

Under the current *Indian Residential Schools Settlement Agreement*, when claimants proceed through the process that the agreement sets out, the federal government has agreed to pay 100% of the compensation awarded up front where the most serious acts occurred after 1 April 1969.¹⁴⁹ Where the most serious offences

¹⁴⁷ *Ibid.* at para 47. Earlier in the judgment but on the same point Ross J. comments that “The Roman Catholic Church (“The Church”) is a world-wide unincorporated association of individuals. Its members are those who subscribe to the Christian faith understood in the Catholic tradition. The leader of The Church is Pope John Paul II and its headquarters is located at the Vatican City, which itself is a recognized and independent sovereign state with immunity from prosecution in the Courts of Canada by virtue of the State Immunity Act R.S.C. (1985), S.S-18 [sic].” *Glendinning, supra* note 146 at para 3.

¹⁴⁸ *Ibid.* at para 20.

¹⁴⁹ The *Canada Labour Code*, R.S.C. 1985 c. L-2, which originally came into force in 1965 is a major factor in determining legal responsibility over non-teacher employees in residential schools. Subsequent to

occurred before this date, the government will pay 70% of the award, and the remaining portion will be paid by the church involved if that church has an agreement with Canada (this 70/30 liability apportionment has been the trend in residential school litigation).¹⁵⁰

If there is no agreement, then the remaining 30% may be paid by the church on a case-by-case basis, or it might not be paid at all. The Anglican and Presbyterian churches have signed agreements guaranteeing their 30% shares. The United and Catholic churches will evaluate claims on a case-by-case basis.¹⁵¹

5.3.4 Crumbling Skulls and Multiple Sufficient Causes

Fundamental tort law typically requires use of the ‘but for’ test to analyze causal effects on a loss. Canadian law rejects use of an ‘apportionment of causes’ analysis that attributes a degree of loss, and a corresponding reduction of damages, to a pre-existing frailty on behalf of a plaintiff (unless the prior cause was itself an illegal act). Where there is uncertainty as to what would have happened to the plaintiff had there been no tort, probability applies. For periods when it is probable that the plaintiff would

1969 this was not an issue, because the federal government completely took over management of the schools; however, prior to 1969 exactly who the employer was is debatable. In a 1966 decision of the Canada Labour Relations Board it was determined that said workers were employees of the Crown because, although the Church carried out most of the hiring processes, the government had a right to veto the appointments. Also, church administrators overseeing management of the schools were responsible to regularly report to the government as to the business of the schools. Because the Crown had paramount oversight, domestic workers at the schools were deemed to be Crown employees therein placing liability for their actions on the Crown as well. Delores M. Vader, “*I Don’t Know, I Just Work Here...*” *Passing the Buck in the Management of Indian Residential Schools* (M.A. Thesis, Carleton University Department of Canadian Studies 1999) [unpublished] at 38-42. In 1967 the Dept. of Indian Affairs and Northern Development received a similar opinion from George Caldwell, who wrote that the alternative to labelling domestic workers as Church employees would be to “... return to a system of grants to the churches in support of their operating a residential school. The grant system clearly establishes the churches as employers ... [however this] assumes the churches are putting some major financial contribution into the residential schools and the grant is a subsidy or a grant in aid of service. This is not the case, as the schools are owned by the Crown and the churches make no significant financial contribution to their support [emphasis added].” Canada, Department of Indian Affairs and Northern Development, *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, (Ottawa: The Canadian Welfare Council, 1967) at 125-126 (Project Director: George Caldwell).

¹⁵⁰ Ken R. Halvorson, *Indian Residential School Abuse Claims: A Lawyer’s Guide to the Adjudicative Process* (Toronto: Thomson Carswell, 2005) at 3.

¹⁵¹ *Ibid.* at 4.

experience the injury regardless of whether the tort had occurred, they will not be compensated; however, for periods where it is probable that the plaintiff would have been well, damages are warranted. Where harm is divisible or the result of two or more independent torts, then a reverse onus effectively arises to burden the defendants (causation is inferred).¹⁵² The devaluation rule arises here which states that each accident or tort must be considered separately where injury is brought about by “a combination of a number of causes ... damages for the first accident are determined immediately before the second accident.”¹⁵³ The key is that a plaintiff must be fairly reimbursed for each injury although responsibility may be apportioned by a court (this is a successive injury scenario which is different from a scenario where one injury or set of injuries are caused in a single event by more than one defendant).¹⁵⁴

Issues surrounding multiple sufficient cause arise where loss flows from two or more legally relevant causes that are each able to have caused the overall injury – but for each absent of the other the injury still would have occurred (for example, a plaintiff who is shot simultaneously by two different defendants).¹⁵⁵ Strictly applied, the ‘but for’ test might lead to the conclusion that neither party is culpable. The typical solution is to

¹⁵² See *Snell v. Farrell*, [1990] 2 S.C.R. 311. If some injuries may have been caused by a different event an onus burdens the plaintiff to prove the accident being litigated was the event that caused the loss. According to Macdonald, J. in *Paine v. Donovan* “[n]o one cause is sufficient to cause the plaintiff’s loss. It is a combination of a number of causes ... What occurs when the devaluation principle is used is that damages for the first accident are determined immediately before the second accident. The Court is not allowed to look at what transpired after the second accident insofar as the first accident is concerned. However, considerable evidence may be produced after the second accident and up to the date of the trial that may be directly related to the first accident. Using the devaluation principle, which states you have to assess damages previous to the second accident, such information could not be used.” *Paine v. Donovan* (1994), 118 Nfld. & P.E.I.R. 91 at 418 (P.E.I. S.C. (T.D.)).

¹⁵³ *Ibid.* at 418.

¹⁵⁴ For example, in *Paine v. Donovan* the plaintiff was involved in three separate motor vehicle accidents over three years. Responsibility was apportioned as follows: 15 per cent to the first accident; 57.5 per cent to the second one; 20 per cent to the third accident; and 7.5 per cent to the plaintiff. The subsequent accidents had caused new injuries in addition to aggravating existing ones from the first and second accidents. *Ibid.*

¹⁵⁵ Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Carswell, 1995) at 786.

compensate the victim (and punish defendants) for the collectivity of wrong suffered.

The devaluation rule posits that the extent to which the injury is immediate or continuing should be considered, and damages apportioned accordingly. Similarly, the material contribution test asks whether the defendant's conduct was more than a de minimus cause of the plaintiff's loss, and, if so, will apportion liability.

Contrary to intuition, cultural loss has actually been used by defendants to reduce damages in residential school survivor cases where specific torts are being alleged as a cause of action. In *Blackwater v. Plint* the court applied what it called a 'compensation principle' by theoretically placing the plaintiff in the position they would have been in had they not been subject to the tort of sexual abuse. According to the defendant, because a sexual abuse victim would have experienced a loss of culture while attending residential school regardless of whether they were sexually (or physically) abused or not, damages awarded for specific sexual abuse claims must be reduced.¹⁵⁶ At trial the Court held the following:

¹⁵⁶ Zoe Oxaal, "Tort Recovery for Loss of Culture and Language in Residential School's Litigation" (2005) 68 Sask. L. Rev. 367 (QL) at para 12. Another avenue of argument, although it has not yet been accepted by Canadian courts as preferable to the more straightforward causation test set out in *Snell v. Farrel*, is that of loss of chance. This is a doctrine that is somewhat inherently speculative, and asks the law to assess a hypothetical outcome, i.e. but for the defendant's conduct the plaintiff would not have been deprived of the opportunity to obtain a benefit or avoid a loss. It is the idea of a lost opportunity that loss of chance doctrine focuses on. In the United Kingdom the seminal case is *Chaplin v. Hicks*, [1911] 2 K.B. 786, where by breaching a contract the defendant prevented the plaintiff from partaking in the final stage of a beauty contest which involved twelve of fifty entrants. The court made an award for loss of chance valued at 25% of the contest winnings, which it arrived at by approximately calculating her chances of winning the contest, i.e. 1/12 (although the court did not delve into an evaluation of what the actual likelihood of her winning would have been as compared to the other contestants). Generally, loss of chance requires a court to assess on a balance of probabilities: (i) whether the claimant would have sought to obtain the advantage which forms the subject matter of the claim; and (ii) where the claim is contingent on the hypothetical acts of a third party, that the claimant has lost a real or substantial chance as opposed to a chance that is speculative or fanciful. In *Laferrière v. Lawson*, [1991] 1 S.C.R. 541 the Supreme Court of Canada dealt with a loss of chance argument in a case where the plaintiff had died after their doctor removed a cancerous lump during a biopsy, but did not inform the patient of the found cancer or order any follow-up (the patient later developed a more generalized form of cancer). The court decreed that it preferred a more rigorous test for causation. Nevertheless, loss of chance is an interesting principle in tort to apply to the residential school case due to the way in which it focuses on the *opportunity* that was lost by a plaintiff.

[i]t is not the judicial role or function to engage in a consideration of such societal matters. My task is to apply the principles of tort law and assess a dollar award for the injuries, which the plaintiffs have suffered and which were caused by the proven sexual assaults. These principles require me to consider the fact of attendance at residential schools not as a basis for an award of damages in and of itself, but rather as a factor to be considered when assessing the impact of the sexual abuse ... Leaving aside the sexual assaults, the plaintiffs would still have been at AIRS and they would:

- (a) have been living away from their families, communities and culture;
- (b) have been forced to speak English instead of their own Native languages;
- (c) have had to eat food that was vastly different from what they were used to;
- (d) have been subjected to the physical pain and the fear associated with the violence among the children;
- (e) have endured the terror of the gauntlet;
- (f) have been the victims of excessive corporal punishment from supervisors and other adults at AIRS ...¹⁵⁷

What the court does in assessing damages for a sexual assault claim is consider how the plaintiff's life would be affected had he attended a residential school and not been sexually assaulted, versus how he is affected now upon having attended the school and being sexually assaulted while there.¹⁵⁸ The result, at least in the jurisprudence thus far, is that cultural loss would have occurred due to the residential school experience whether former students were subjected to specific torts such as sexual abuse or not. Until cultural loss can provide a cause of action in itself, it may continue to be dismissed as a 'societal matter' that actually operates to stay or reduce plaintiff damages instead of increase them.

¹⁵⁷ *W.R.B. v. Plint* (2001), 93 B.C.L.R. (3d) 228 (B.C.S.C.) at 333 – 334.

¹⁵⁸ In the words of Chief Justice Brenner "My task is to set an award of damages sufficient to compensate the plaintiffs for the differences between the way their lives would have been, given what even the defendants concede placed them in a severely compromised position by reason of their forced attendance at AIRS and the way their lives have been, given the additional, but by no means insubstantial, fact of the sexual assaults." *Ibid*, at para 336.

In this sense, the 'but for' test only serves to frustrate the matter. But for one cause the damage would have occurred anyway due to another.¹⁵⁹ It cannot be said that but for the physical or sexual abuse incurred at a residential school one's culture would have been retained.¹⁶⁰ Again, this problem becomes evident in *Blackwater v. Plint* where Brenner, C.J. turns the plaintiff's own testimony regarding cultural loss around to show how he would likely have been aggrieved in the same way had he been sexually abused or not:

I have concluded that Plint sexually assaulted Mr. F.L.B. on the four occasions he was able to describe ... these acts ... require that the court make a significant damages award ... However the particular challenge in this case is to try to determine the extent to which these tortious acts caused or materially contributed to any ongoing psychological injuries ... At AIRS, Mr. F.L.B. describes the "enormity" of the loss of his culture and connection with his family as being "overwhelming" and the effects "irreversible". Being sent to AIRS, he says, cost him his identity and self-esteem ... At AIRS, both before and after he was sexually abused, Mr. F.L.B. regularly fought with other boys. He did so because he became terrified when somebody got angry with him and "it was meanness that took over me". This instinctive "meanness", and the overwhelming urge to resort to violence,

¹⁵⁹ In *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333 the Supreme Court of Canada recognized that in special circumstances there may be exceptions to the basic 'but for' test, and the 'material contribution' test may be applied (although it disagreed that *Resurface* was an appropriate situation in which to apply it). Liability based on material contribution is a concept worth mentioning here, as in the future it may prove relevant to residential schools litigation. In order for a court to use a material contribution test generally speaking two requirements are involved: (i) it must be impossible for the plaintiff to prove that the plaintiff's injury was caused by the defendant's negligence using the 'but for' test. This impossibility must be due to factors outside the plaintiff's control, such as lack of scientific knowledge; and, (ii) the defendant must have clearly breached a duty of care owed to the plaintiff and leaving that plaintiff open to unreasonable risk of injury. The material contribution test, although seldom used in Canadian courts, may prove useful to future residential school litigants due to its relaxing of the traditional 'but for' test in cases where absolute knowledge as to the cause of harms is impossible to precisely determine

¹⁶⁰ As a parallel example consider *Carmichael v. Mayo Lumber Co.* where the plaintiff was not compensated for the failure of a vinyl repair business because of an injured hand. The plaintiff was financially broke, and thus the hand injury had not altered his position; but for an accident causing the injury the business would have failed anyway. See *Carmichael v. Mayo Lumber Co.* (1978), 85 D.L.R. (3d) 538 at 542 (B.C.S.C.).

pre-existed the sexual assaults and continued unchanged following the sexual assaults.¹⁶¹

Brenner, C.J. concludes that “The assaults Mr. F.L.B. suffered at the hands of Plint did represent an egregious breach of trust”¹⁶²; however, no damages were allowed for cultural loss since whatever losses occurred at the school would have occurred whether the plaintiff was sexually assaulted or not. It cannot be said that but for the sexual assault F.L.B. would not have incurred a loss of culture. A case for damages based on cultural loss and psychological injury was further frustrated by the fact that the plaintiff came from an extremely violent home setting, as well as pre-existing family problems with alcoholism. Where plaintiffs come from backgrounds that may objectively be argued to lend to their destructive behaviour both at the school and later in life (as was noted by a psychologist in the *Plint* case), it may thus work against the plaintiff’s interests to enter a cultural loss claim due to the defendants ability to use this background information as evidencing a ‘crumbling psychological skull’ where similar problems would have encountered despite abuse at the school.¹⁶³

However, the Assembly of First Nations argues that individual perpetrators and the federal government should not hide behind the illusion of the crumbling skull theory in denying their responsibility of creating an environment where abuse took place.

According to the Assembly,

Canada should not argue (as it did in the *Blackwater* case) that the ill effects suffered from physical and sexual abuse – such as the inability to hold a job or function well within a family context – would have happened anyway because the residential school setting was

¹⁶¹ *W.R.B. v. Plint* (B.C.S.C.), *supra* note 157 at 519 – 526.

¹⁶² *Ibid.* at para 532.

¹⁶³ Oxaal, “Tort Recovery for Loss of Culture and Language in Residential School’s Litigation”, *supra* note 156. The plaintiff also “apparently told [psychologist] Dr. O’Shaughnessy that virtually all his family members have relationship difficulties.” *W.R.B. v. Plint* (B.C.S.C.), *supra* note 150 at para. 536.

highly harmful. Given the racist nature of the Indian Residential School experiment, it is inappropriate to apply the “crumbling skull” doctrine to limit compensation under the [A]DR process.¹⁶⁴

According to the British Columbia Law Institute, “[a]n intentional tortfeasor who takes advantage of a pre-existing condition for his own personal gain should not then be permitted to argue that the existence of this condition relieves him of full responsibility for paying damages.”¹⁶⁵ In such a scenario, the plaintiff “actually exploits the plaintiff’s pre-existing condition”¹⁶⁶ – and this should not provide a basis for a defendant to escape liability. This argument also seems to run against the general thrust of tort law which demands that a perpetrator take their victim as they find them, and remain liable for resulting damages. Where there are multiple sufficient causes, whether the plaintiff’s skull has been deemed thin or not, the devaluation theory mandates that all torts be evaluated and the perpetrators apportioned liability accordingly. Devaluation theory may be seen to work hand-in-hand with the philosophy behind thin skull theory. The latter posits that a perpetrator takes their victim as they find them and should be held liable for all losses flowing from their action(s). Devaluation theory, where one cause is culpable (i.e.: abuse of schoolchildren and loss of culture suffered under the system and at the hands of individual employees) and another cause may not be culpable at law (i.e. a bad

¹⁶⁴ “Assembly of First Nations Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools” online: < <http://www.afn.ca/Residential%20Schools%20Report.pdf> >.

¹⁶⁵ “Civil Remedies for Sexual Assault - A Report prepared for the British Columbia Law Institute by its Project Committee on Civil Remedies for Sexual Assault” online: <<http://www.bcli.org/pages/projects/sexual/CivilRemReport.html>>. The B.C. Law Institute considers remedies for sexual assault in the context of multiple instances of sexual assault perpetrated against a single individual, concluding that all perpetrators should be equally liable for resulting damages, even if the final perpetrator encountered a much ‘thinner skulled’ victim than the first – “In cases where the defendant was the first abuser, but seeks to avoid paying full damages on the basis that the plaintiff’s injuries were caused in part by subsequent abuse, it can be said that the defendant actually created the “thin skull” condition of the plaintiff, increasing her vulnerability to future sexual violence. Again, it would be unjust to allow the defendant to escape or minimize his liability for the full extent of the plaintiff’s injuries in this type of case.” *Ibid.*

¹⁶⁶ *Ibid.*

home life), dictates that the non-culpable cause should be seen as providing a background upon which the culpable tort should be placed with which to understand the overall situation (i.e.: how a thin skull may have arisen), but that a court should nevertheless use a measure or starting point of “life without wrongs or compensable events”¹⁶⁷ in assessing damages.

The multiple sufficient causes issue may also be overcome by altering reference to the ‘original position’ of potential IRS claimants. Theoretically, tort law attempts to place plaintiffs in the original position they would have been in but for the defendant’s wrongful conduct. However, this is difficult in the case of sexual abuse claims, because such abuses rarely happen in isolation, but instead are perpetrated in combination with additional sexual abuses and/or other physical abuses over a long period of time. This situation is aggravated further for many Aboriginal families, whose material conditions prior to school attendance may make quantifying damages difficult. Elizabeth Adjin-Tettey suggests that, given the historical mistreatment of Aboriginal people, instead of comparing residential school victims to the original position they would have been in had they not attended the schools at all, they should be compared to the average Canadian public at large. She explains that:

...a better comparator group should be non-Aboriginal, mainstream Canadians. The Canadian government contributed to compromising the material conditions and hence the so-called original position of Aboriginal people. It should therefore not be permitted to rely on their current material conditions as the relevant point of reference in assessing what their original position would have been absent the wrongdoing that they suffered while in government care.¹⁶⁸

¹⁶⁷ According to the author, “the ‘non-culpable’ sufficient cause is part of the very backcloth in respect of which the factual causation question is asked. Implicit in the notion of ‘cause’ is the idea that the event made a ‘difference’ ...” Cooper-Stephenson, *Personal Injury Damages in Canada*, *supra* note 148 at 788.

¹⁶⁸ Elizabeth Adjin-Tettey, “Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses” (2007) 25 Windsor Y.B. Access Just. 95 (QL).

By using everyday Canadians as the original position comparator group, the negative comparator effects of colonization may be bypassed. Aboriginal people appear to be particularly susceptible to the crumbling skull principle, because in many cases their original position was already severely compromised prior to entering the schools.

Aboriginals are marginalized socio-economically, and are much more susceptible to social problems than other subgroups of society. Because of this vulnerability, and because Canada is likely the underlying perpetrator of this position, it may be appropriate to reconsider the original position measurement or comparator for IRS claimants.

5.4 Temporality and Limitations Periods

The most obvious issue with reparation claims for historical injustices is that civil actions will be time-barred for far exceeding any statute of limitation for bringing an action. Arguably, the passage of time ends the appropriateness of other forms of reparation as well. In Canadian law, estoppel by laches sets out that a plaintiff who waits an unreasonably lengthy time to assert their claim loses the right to compensation. The practical use of the law is that it leaves the past in the past, so that future generations are not infinitely burdened with the wrongdoings of their ancestors. In terms of temporality, reparations theory also begs the question of how far back may one look: can France now sue for losing Québec in the 1763 Treaty of Paris, or can people of Welsh and Scottish descent sue France for losing control of England in the Norman Conquest? There must be some point where claims for historical injustices become unreasonable because they are time-barred.

As already noted, Thompson argues that historical wrongs are relevant, and deserve some form of reparation, for as long as those historical wrongs continue to affect

contemporary generations in a meaningful and relevant way. Mari J. Matsuda suggests that, as is the case with traditional tort law, a continuing wrong does not stop the limitations clock from beginning to run until after the effects of the wrong completely expire.¹⁶⁹ Historical injustices, by their very nature, require a more flexible timeline in which to commence an action. Where there is continuing stigma and economic harm being brought upon the victim of an affected group, or their descendants, then reparations are still an appropriate remedy.¹⁷⁰ Particularly in the case of reparations for Aboriginals and residential school survivors, the injuries that have been suffered due to the historical wrong, i.e. lack of meaningful education, political access, and resources, are the same injuries that now make it difficult (albeit not impossible) for victims and their descendants to compile the necessary resources in order to launch claims.¹⁷¹

A historical injustice claim needs a limitation period that is based on proximate cause, which will consider the overall magnitude of the harm, as well as social goals such as fair compensation and retribution.¹⁷² The case of Aboriginal residential schoolchildren warrants bending the traditional rules of temporality; because at the time the harms were originally perpetrated, the victims were in a position that rendered them completely

¹⁶⁹ Mari J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L.L. Rev. 323 at 381.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* at 382. Limitations periods operate the same way in Canadian Aboriginal residential school abuse claims as they do in Australia. Commenting on the Australian case, Abrahams argues that the doctrine of laches/limitations periods should be defunct for two reasons. The first being that "the particular harm done to the members of the Stolen Generations was such that many, if not all, of them have been unable to comprehend the extent of the loss which resulted from their removal from their families." Because most 'stolen' Aboriginals ultimately received very low education once taken, they are in a low socioeconomic position later in life, and less able to access services, or have knowledge of them to begin with. Secondly, in the Australian case, as would likely have been the case for many Canadian claims (that would have opted out of the *Settlement Agreement*, or pursued individual claims before the Agreement was instituted), there is a severe lack of availability of and access to records. Melissa Abrahams, "A Lawyer's Perspective on the Use of Fiduciary Duty With Regard to the Stolen Generation" (1998) 21 U.N.S.W.L.J. 213 at 214.

¹⁷² Matsuda, *supra* note 169 at 383.

powerless. Again, the proper test for temporality to be used here is one which focuses on the victims. Unlike wrongs that were committed in the distant past, IRS victims and their descendants are still identifiable and, in many circumstances, still living in a disadvantaged position which was brought about (at least in significant part) by that original harm. Given that the original wrong is still having a cause-effect relationship with living people, it holds that they should be able to commence an action.¹⁷³

5.5 Individual vs. Group Remedies

As a remedy, tort law jurisprudence is inherently oriented towards individual redress. If an overall goal of reparations is to heal society on whole, it will be inherently difficult for individual payments to achieve this. Liberal legal tradition may stress individual autonomy and responsibility, and legitimize individual payments where perpetrators and victims are readily identifiable, but when this is not the case the law needs to take a more group-rights perspective of the problem and concentrate on group healing. *Gawa*, *Cubillo*, and the other Australian cases all involved plaintiffs who were suing for damages resulting due to a loss of status or some loss of connection that they themselves experienced with their culture. *Gift Lake Métis Settlement*, and other cases that involve destruction of, or inaccessibility to traditional lands, may be something of an exception. But generally, case law has involved a reduction in the plaintiff's identity with a culture, while the culture itself continues to exist intact. *Kwakiutl Nation* was fundamentally different, in that it did not involve plaintiffs who had lost a connection to their culture; rather, the claim was that portions of the culture itself had been substantially

¹⁷³ Of course, some might argue that, for example, Québécois are still experiencing the harms of capitulation to the British in 1763, or the same for South Africans, Indians, or Irishmen. The key seems to be finding a reasonable scale for gauging real harm and moving forward accordingly. Ultimately, as will be seen in the section on legislative remedies, the laches issue and proximate harm question in reparations cases will likely be a political one.

lost. Because the case is ongoing, no court was ultimately able to offer direction on how to compensate for loss of an actual culture.

Culture is inherently communal in nature. It is the “knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man *as a member* of society [emphasis added].”¹⁷⁴ Culture may be largely manifested by the actions of individuals; however, in the sense that culture is developed as a combination of the experiences of different people in interacting with everyday life, and the combination of those experiences across generations, culture is at base a group phenomenon. Litigation and individual monetary remedies are one of a number of available remedies for a historical group wrong, which will be examined. However, as I will argue, litigation is not the best way to address the loss of culture that has occurred due to the residential school experience.

As a group phenomenon, culture needs a group-based remedy. Culture is highlighted by language and traditional activities. When the residential school system took effect, it attempted to steal these things from Aboriginal youth or prevent them from ever learning them in the first place. In order to reimburse for cultural loss, a remedy needs to address both the protection of existing Aboriginal culture and, to the extent possible, develop a method by which to reincarnate that which has been lost.

A group-based remedy requires an approach that courts are ill equipped to provide. Civil actions that attempt to obtain damages for loss of culture linked to the operation of residential schools have always failed in this country. A more fruitful route for obtaining a group-based remedy must result from an appeal to government. This may be seen as a departure point from court-based arguments for reparation and moving

¹⁷⁴ Barfield, ed.. *The Dictionary of Anthropology*, *supra* note 35 at 98.

towards political arguments for reparations for loss of culture specifically. Governments have a duty to protect their citizens, and when they fail to maintain this protection they may be liable to repair the harm. Governments and the citizenry they represent inherit the liabilities of their predecessors. Particularly where the effects of a historical injustice continue, governments may be liable to compensate contemporary victims. This argument faces the problem that operation of the schools was legal at the time they were in operation and sovereignty does not demand reparations now be made for a practice that was perfectly legal at the time. According to the International Law Commission's Articles on State Responsibility (2001), "[a]n act of a state does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."¹⁷⁵ The schools operated as per a policy of the federal government, and while a government in some cases may be liable for errors in the implementation of a policy, they are not generally liable for underlying theoretical issues with a policy itself.

The argument here, again, would likely have to be a political one, and therefore one that is more likely to succeed in a public and morally-charged reparations claim made to the federal government, as opposed to a claim made in court. The purpose here is to investigate these issues in theoretical terms, not just how they would play out in a court. That being said, whatever the legal status of the schools may have been up until even the end of the twentieth century, we know today that the practice was wrong and violated the basic human rights of Aboriginals. For this reason, compensation is owed. It is equivalent to saying that the prohibition against forced enrollment at culturally-modifying

¹⁷⁵ Max du Plessis, "Reparations and International Law: How are Reparations to be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should they Take?" (2003) 22 Windsor Y.B. Access Just. 41 at 10 (QL).

institutions has gained universal acceptance and has become a *jus cogens*, or ‘compelling law’ that binds states with a degree of retrospective liability.¹⁷⁶

5.6 Canadian Response: The Indian Residential School Settlement

The Canadian government has made a number of attempts at redress for the wrongdoings of the Indian Residential School system. In a *Statement of Reconciliation* in March 1998, the federal government apologized to residential school pupils who had been physically and mentally abused while in the system, and supplied \$350 million to fund an Aboriginal Healing Foundation and community based healing projects. In 2003, Canada unveiled its plan for an alternative dispute resolution process to provide compensation to former pupils who had been the victims of physical or sexual abuse at the schools, and/or wrongfully confined while there. The culmination of the Canadian response to Indian Residential School class-actions has been the \$1.9 billion compensation package announced in 2005 and finalized in 2006 as part of the *Indian Residential Schools Settlement Agreement* (the “Settlement”). The package will financially compensate all former pupils of the schools, and establish a Truth and Reconciliation Commission (in addition to providing additional funding for the Aboriginal Healing Foundation), which provides a forum for former students to tell the story of their experiences.

By granting personal payments, and providing a community forum, the *Settlement* attempts to make reparations for both individual and community losses. From the standpoint of the community, the *Settlement* promotes reconciliation through a Truth and Reconciliation Commission, which provides a culturally-appropriate forum for survivors and their families to share their experiences and the impact that the schools had on them.

¹⁷⁶ *Ibid.* at 15.

The Commission will create a record of the system by creating a repository for records that will be publicly available. Its aim is to heal individuals and communities by involving them in the settlement process.

From the standpoint of the individual, the *Settlement* provides for individual payments (which will be discussed in detail later) for all confirmed survivors, and sets up an independent assessment process to evaluate claims of sexual and serious physical abuse. In certain circumstances, such as where a claimant's losses exceed the monetary limits set out by the independent assessment process, and/or where courts are deemed necessary in order to assess evidence necessary to substantiate allegations due to complexity or volume, then cases may circumnavigate the *Settlement* process and proceed in court.¹⁷⁷ Otherwise, however, cases will proceed through the framework set out in the settlement agreement.

5.6.1 The Settlement Framework

The *Settlement* process is administered by an Adjudication Secretariat based in Regina that provides independent adjudicators for each case, and schedules hearings. These administrators are assigned cases and supervised by the Chief Adjudicator's Reference Group (CARG), which is made up of representatives from the federal government, churches, Aboriginal organizations, and lawyers representing Aboriginal claimants. Working closely with the Secretariat are Resolution Managers from Indian Residential Schools Resolution Canada, a federally funded program within the Department of Indian and Northern Affairs. These Managers are assigned to claimant files and will communicate with claimant lawyers much the same way as defence

¹⁷⁷ Adjin-Tettey, *supra* note 168.

counsel. It is the job of Resolution Managers to protect the interests of the government throughout the process.

Adjudicators in Process A may only award compensation for certain types of abuse perpetrated by certain abusers (see descriptions in Appendix 2). In general, abuse can encompass physical and sexual assaults against students that were perpetrated by personnel employed at the schools and, in some cases, by other students. Proof of these assaults must be established on a balance of probabilities; although, generally speaking, in an ADR process the evidence required may be less compelling than that required in a civil court. The onus of proving connection between alleged abuse and resulting harm is more relaxed, with the settlement process requiring merely a plausible link between abuse and harm. The result, as is the result in most any sexual assault case, is that in alleged instances of physical and sexual abuse the adjudicator must evaluate the uncorroborated testimony of a claimant as to what happened to them decades ago.

Compensation is awarded on a points system that calculates the presence and severity of acts, harms, aggravating factors, and loss of opportunity (see Appendix 2). Acts of assault are determined to have occurred or not occurred on a balance of probabilities and points are awarded based on their nature, severity, and frequency. Adjudicators are perscribed a range of points for each act and have the discretion to choose the appropriate point level within that range. For example, repeated, persistent incidents of anal or vaginal intercourse are deemed to be at the fifth, or highest level of commensurable points, whereas one or several such incidents would be at the fourth level, and incidents of fondling or kissing would be at the first level.¹⁷⁸

¹⁷⁸ Halvorson, *supra* note 150 at 19.

Points for the next category – harm – are assessed at the highest level possible, and, according to the same top-down hierarchical format as the categorization of acts, a greater number of points are awarded for more serious harms. Of the five levels of harm, from highest to lowest, exemplified effects of abuse might be: personality disorders and suicidal tendencies (level 5); severe post-traumatic stress disorder and lack of trust in others (level 4); occasional obsessive-compulsive and panic states, some post-traumatic stress disorder (level 3); occasional difficulty with personal relationships, some mild post-traumatic stress disorder (level 2); and occasional short-term anxiety, nightmares, bed-wetting, aggression, and/or panic states (level 1).¹⁷⁹ Adjudicators have been instructed that:

The plausible link test is different from the *Athey v. Leonati* test in litigation. If on hearing the evidence there is a plausible link (plausible meaning reasonable or probable) between the proven abuse and the proven harm or loss of opportunity, pre and post IRS experiences do not need to be and should not be explored.¹⁸⁰

Harms are thus considered on a balance of probabilities, and a plausible link between act and the harm must be established.

Aggravating factors are circumstances such as intimidation, humiliation, or threats which may have made the abuse worse. If one of more aggravating factors is found to be present on a balance of probabilities, then the adjudicator may increase the act-assault and harm points by between 5-15%. An adjudicator has power to use their discretion to gauge the seriousness of the aggravating factor(s) in the context in which they occurred.

¹⁷⁹ *Ibid.* at 20.

¹⁸⁰ *Ibid.* at 29.

The process does not award compensation for potential career expectations; however, it does award points for loss of the opportunity to gain better employment and to gain a better education. These losses will be determined by an examination of the claimant's record of employment. If a claimant can convince an adjudicator on a balance of probabilities that their prospects of employment were reduced due to their experiences at residential school, and there is a found to be a plausible connection between the two, then extra points may be awarded in one of three loss of opportunity categories: (i) chronic inability to obtain or retain employment (11-15 points); (ii) inability to undertake/complete education or training resulting in under-employment, and/or unemployment (6-10 points); and (iii) diminished work capacity – physical strength, attention span (1-5 points).¹⁸¹ If a claimant, for example, were to prove that they became addicted to alcohol as a result of their experiences, and evidence that their alcoholism caused a regular inability to obtain or retain employment, or a diminished work capacity, then they might qualify for extra points under category (i) or (iii).

Finally, for future care, an adjudicator may award up to \$10,000 for medical treatment and counselling and up to an additional \$5,000 if psychiatric treatment is also required. The adjudicator must consider the claimant's commitment to obtaining future care, as well as treatment that may already have been received, travel costs, and the availability of treatment.¹⁸²

Once total points are accounted for, an adjudicator will consult the prescribed table, which converts points to dollar amounts. A point total will fall within a certain

¹⁸¹ Halvorson, *supra* note 150 at 33.

¹⁸² *Ibid.* at 36.

range, and where it falls within that range (higher/lower) will determine how the dollar compensation will be finalized.

Where claimants allege assault that did not leave a lasting physical injury a more efficient process – ‘Process B’ – is initiated, where awards of compensation cannot exceed \$3,500. Where a physical assault or wrongful confinement occurred that exceeded the disciplinary standards of the day, and/or was for an improper purpose, up to \$1,500 may be awarded. An improper purpose could be arbitrariness, uncontrolled anger, and/or retaliation for complaints. Where aggravating factors, such as frequency of the punishment over an extended period of time, punishment combined with threats, intimidation, or humiliation, and/or where age is a relevant factor in relation to the act, then an award of up to \$3,500 may be made.

In either Process A or B, an adjudicator must render a decision within 30 days of the hearing as per a prescribed format. A claimant has 30 days to review a decision report and, if they wish, seek review. If no review is sought the Resolution Manager will release the award.

Compensation under the *Settlement* is an important part of a comprehensive reparation scheme. However, cash payments to individuals do not provide reparation for the deepest damage done by the schools – culture. Cash payments do not help to rebuild a community or the culture that binds it. Culture is inherently a group product. Cash payments to individuals and, as will be seen, the *Settlement’s* Truth and Reconciliation Commission, do not address this fundamental wrongdoing.

6.0 REPARATIONS

Over the past three decades an increasing number of countries have partaken in official apologies and other forms of reconciliation for what have become widely acknowledged as historical injustices. Native Hawaiians, Canadian and American World War II internees, and Korean ‘comfort women’, holocaust victims, and/or their predecessors, have all benefited from state-sponsored compensation programs.¹⁸³ The increasing commonality of official apologies, reparations, and truth and reconciliation commissions is likely the result of a worldwide trend towards liberal democratic values that has marked an increased respect for human rights subsequent to WWII.¹⁸⁴ The key for all of these ‘claimants’ is that their calls for some form of reparation have been recognized by legislatures, as opposed to courts. Legislatures are not encumbered by legal rules of civil procedure that involve limitations periods and strict rules of evidence. Although it may well take the structure of a traditional lawsuit, i.e. *Victims of Indian Residential Schools v. Canada (The Country that Failed to Protect Them)*, many of the issues that would arise are essentially political. Certainly, the issue of how to address

¹⁸³ Canada has been involved in several reparations programs for historically wronged groups, including Japanese Canadians, Chinese Canadians, and Ukrainian Canadians, all of which are worthy of note. During World War II approximately 22,000 Japanese Canadians were taken to prison camps due to their ancestry. Their property was seized and auctioned off, and they were simultaneously forced to pay for the cost of their imprisonment. In 1998 the Canadian government entered into an agreement with the National Association of Japanese Canadians which granted \$21,000 for each survivor (the total package was worth \$300 million, which included \$12 million for educational and cultural activities). In 1885 the federal government imposed a \$50 ‘head-tax’ on all new Chinese immigrants, which was raised to \$500 by 1903 (the equivalent of two-years wages for the average Canadian). In 2006 the federal government apologized for the tax and, although it explicitly stated in its apology that it was not to be taken as an admission of guilt, the government ultimately ‘voluntarily’ paid \$20,000 to each survivor. From 1914 to 1920 approximately 80,000 people of primarily Ukrainian lineage were imprisoned due to a fear of connection they may have to their country of origin. The *Internment of Persons of Ukrainian Origin Recognition Act*, enacted in 2005, requires the government to negotiate with representatives of the Ukrainian community in order to find an adequate way to compensate the Ukrainian community. In 2008 it was announced that a \$10 million fund would be put in place to commemorate the experience. Groups can apply for funding for educational and cultural activities relating to the internment. Bradford W. Morse, “Reconciliation Possible? Reparations Essential” in Marlene Brant Castellano, Linda Archibald, & Mike DeGagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 233 at 236-239.

¹⁸⁴ Carole Blackburn, “Producing legitimacy: reconciliation and the negotiation of Aboriginal rights in Canada” (2007) 13 *Journal of the Royal Anthropological Institute* 621 at 624.

cultural loss has proved to be one that courts have a particularly difficult time grappling with. At the very least, direction from a legislature would be useful. But it is more likely that, given the aforementioned procedural problems, a reparations package prepared and administered by government would: (i) be more likely to garner money for cultural programming than specific compensation for cultural loss in court, and (ii) be better administered through a government department as a group award, as opposed to lump sum monetary payments to an individual. Legislatures are better able to offer comprehensive solutions, in that, unlike a court, they can hold public inquiries, hearings, and pass laws and resolutions on any matter of public interest. They can also design multi-faceted remedies that go beyond cash awards.

This is not to say that money may not be one component of a comprehensive reparations scheme. But because loss of culture inherently has many dimensions, i.e. collective identity, transmission of traditional knowledge, meaningful employment, and traditional activities and ceremonies, a remedy may need to involve actions such as the right to partake in hunting and fishing activities in a new area, new lands for degraded ones, and support and recognition of forms of Aboriginal governance.¹⁸⁵ These types of remedies are most ably supported by governments, not courts.

Legislatures are also best apt to recognize the underlying moral arguments for reparations as compensation for loss of Aboriginal culture. In addition to whatever procedural issues may be faced in a courtroom, the residential school program was an officially sanctioned government policy at the time of its implementation. It is true that in the last decade of its existence, Canada was under a constitutional obligation to protect

¹⁸⁵ Robin Gregory & William Trousdale. "Compensating Aboriginal cultural losses: An alternative approach to assessing environmental damages" (2009) 90 *Journal of Environmental Management* 2469 at 2471.

minority cultures as per s. 35 of the Constitution Act, 1982, and Canada also may have been subject to international laws against genocide and in favour of the protection of Aboriginals in general since the 1940's. Nevertheless, the fact that the schools operated as an official policy of government makes suing the government for that policy difficult. The argument is, inherently, a moral one, i.e. ignorance on behalf of government is no excuse. Whatever policy may have been enacted in the past, we now know that the assimilation project that was attempted by Canada for over a century in Indian Residential Schools was wrong, and offended many basic rights of the individuals and groups involved. The argument runs that compensation is owed by government for the continuing effects of this policy, even if it may have been *legal* at the time.

The idea of reparations is to make a victim whole from a past wrong. By the nature of the subject matter, replacing culture that is lost will be very difficult, if not impossible. Yet this cannot frustrate action. When Canada issued its official apology for the residential school system, it expressed remorse and acknowledged guilt at least to some degree.¹⁸⁶ This was expression of a moral feeling, which demands a moral

¹⁸⁶ There is great value in an apology; one recognized, a wronged group is better able to begin moving on and healing. However, there are potential detrimental impacts for a government making an apology. Morse notes that "Some federal officials view the *Statement of Reconciliation*, made in January 1998 by the Honourable Jane Stewart, then Minister of Indian and Northern Affairs, as being a major contributor to the avalanche of class-action lawsuits from residential school Survivors and their families." Bradford W. Morse, "Reconciliation Possible? Reparations Essential" in Marlene Brant Castellano, Linda Archibald, & Mike DeGagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 233 at 243. Of course there are also potentially detrimental psychological impacts to a historically wronged group that does not receive an apology. Says Taylor "... our identity is partly shaped by recognition or its absence ... Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being." By not acknowledging and apologizing for a harm, that wrong hangs in the air, so to speak, as ill-will and continues to affect the wronged group who otherwise may not be able to move on with the healing process. Charles Taylor, *Multiculturalism and 'The Politics of Recognition'* (New Jersey: Princeton University Press, 1992) at 25.

response. The settlement agreement that arose from *Residential Indian Schools (Re)*¹⁸⁷ allotted \$1.9 billion in ‘common experience payments’ to be made to former school pupils. The plan includes a payment of \$10,000 for the first year, or part of a first year, which a former student spent at a residential school, and \$3,000 for each school year, or part of a school year, after that.¹⁸⁸ The average amount paid to each survivor or descendant is \$20,625.¹⁸⁹ Former pupils who claim they were the victims of serious physical or sexual abuse may make a claim for between \$5,000 and \$275,000, or more if they can prove loss of income.¹⁹⁰ These claims are judged by an Independent Assessment Process provided for by the settlement agreement. The settlement also provides \$125 million to establish a Healing Foundation to provide programming, \$60 million for a Truth and Reconciliation fund to support research and document findings, and \$20 million for a Commemoration Fund to provide money for commemorative ceremonies. It is worth making a note as to the attitudes recipients have towards the payments they receive. The Aboriginal Healing Foundation has polled a number of beneficiaries, and found that satisfaction from the money is short lived, and decreases steadily over time.¹⁹¹ After analysing the results, researchers concluded that this change in perception was due

¹⁸⁷ (2002), 222 D.L.R. (4th) 124 (Alta. Q.B.). Also see: “Re Residential Schools Class Action Litigation” online: Official Court Notice for Residential Schools Settlement <<http://www.residentialschoolsettlement.ca/settlement.pdf>>

¹⁸⁸ “Residential Schools Settlement. Official Court Notice” online: <http://www.residentialschoolsettlement.ca/detailed_notice.pdf>

¹⁸⁹ This is the average amount being paid as of 15 October 2010. “Common Experience Payment Statistics”, Indian and Northern Affairs Canada, online: <<http://www.aic.gc.ca/ai/rqpi/cep/st/index-eng.asp>>

¹⁹⁰ *Ibid.*

¹⁹¹ Gwen Reimer, *The Indian Residential School Settlement Agreement’s Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation: Ottawa, 2010) at 47.

to the fact that many recipients were quickly distributing the money among immediate and extended family members, and/or spending it themselves.¹⁹²

The residential school settlement is a comprehensive reparations program that aims to heal the harm done by the government's former policy by providing for individual payments to survivors, as well as the establishment of a Foundation to aid in healing Aboriginals as a group. The problem with the settlement is that it does not explicitly address perhaps the most valuable asset that was lost, or partially lost, due to the policy, i.e. culture. The Aboriginal Healing Foundation features as its mission statement the encouragement and support of sustainable healing processes to address the results of physical and sexual abuse at the institutions and their intergenerational impacts. If any facet of the settlement agreement is aimed at restoring culture, the Foundation is it. However, funding for the Foundation is strictly limited to issues of physical and sexual abuse. According to one past-President of the Foundation, it cannot provide funding for: (1) language and culture programs, (2) capital infrastructure, (3) compensation, or (4) litigation-related activities.¹⁹³

The Truth and Reconciliation Commission, Canada's highly-touted group healing based response to the IRS tragedy, is a venue for survivors and the descendants of survivors to air their grievances of the system, and partake in group discussions. This, in itself, does have great value. Canada has acknowledged the wrongfulness of the system and provided a forum for its ill effects to be brought to light. The ability for victims to

¹⁹² As per the study's findings, recipients who reported that the common experience payment had "mostly positive impacts declined from 50% when polled 0-6 months subsequent to receipt, 25% at 7-12 months subsequent, and 27% at 13-18 months. Those who reported "mostly negative impacts" was relatively stable at approximately 15% over all three time periods, while those reporting "both positive and negative impacts" shifted from 35% at 0-5 months subsequent, and then to 55% at 7-12 months, and 60% at 13-18 months. At best, the common experience payment has had mixed results for beneficiaries. *Ibid.* at 183.

¹⁹³ Georges Erasmus, "Reparations: Theory, Practice and Education" (2003) 22 Windsor Y.B. Access Just. 189 at 197 (QL).

express their aggrievement in front of the entity that failed to protect them is of great value to both parties. That being said, the Truth and Reconciliation Commission is just that: a forum in which to air and discuss grievances. It is not a body funded or empowered to engage in programs that rebuild culture. It addresses the needs of individuals to talk about their experiences, and in that way it may provide great benefit in helping to rebuild self-esteem and provide an environment of reconciliation between Canada and Aboriginals. But it does not address loss of culture. The closely linked Aboriginal Healing Foundation does fund grants for projects that may, at least in part, aid in the rebuilding of Aboriginal culture. For example, in 2003 55% of funding provided by the Foundation went to healing activities such as healing circles, sex offender programs, wilderness retreats, elder support networks, and programs held on the land.¹⁹⁴ 17% of projects funded were for prevention and awareness, i.e. sexual abuse awareness, and 7% of funding went to projects to honour Aboriginal history, such as building knowledge of the residential school legacy through memorials, commemorations, and documentation.¹⁹⁵ Programs that memorialize the residential school legacy and attempt to provide therapy to ensure that survivors can deal with the abusive history they may have encountered there are certainly worthwhile projects. But they are not squarely aimed at the protection of, or re-building of culture.¹⁹⁶

6.1 Problems & Solutions: The Current Cultural Protection Scheme

¹⁹⁴ Reimer, *The Indian Residential School Settlement Agreement's Common Experience Payment and Healing*, *supra* note 191 at 198.

¹⁹⁵ Erasmus, "Reparations: Theory, Practice and Education", *supra* note 193.

¹⁹⁶ According to the Foundation's past-President, "Most difficult of all are the matters of language and culture – losses considered by many survivors to be an instance of cultural genocide. The effects of assimilationist policies upon Aboriginal languages and cultures are widely considered to be the greatest impact of the residential school legacy, and therefore the Foundation plays a role in addressing these effects by directing to alternative funding sources projects which are, as a result of their larger community aspirations, supportive of language and cultural renewal." *Ibid.*

So long as loss of culture is not a recognized cause of action in Canada, and so long as residential school survivors and their descendants do not receive some form of reparation specifically for their loss of culture, Aboriginals will lack closure and continue to experience a particular gap between themselves and wider Canadian society. Cultural loss has never been a head of damage in residential school claims. The underlying reason why Canadian common law courts have such a difficult time dealing with loss of culture may be because our system of law is essentially an individual-focused one that aims to make reparations for individual losses that can be readily quantified. But cultural losses are group losses. The residential school settlement did include a common experience payment in lieu of an alternative dispute resolution process, as well as afforded survivors the opportunity to tell their story at public hearings. However, despite the fact that monetary payments are an important component of any comprehensive plan, they, even when coupled with the public hearings, are not enough. It does not address community cultural deficits.

Common experience payments do not restore culture. But, by the same token, it is unlikely that any remedy can truly restore an amount of culture that has been lost. Culture is an ever evolving and anamorphous social creation. It is difficult to affect it from the outside, i.e. cultural 'restoration' runs the risk of being artificial or of little use.¹⁹⁷ The nature of culture, to a large degree, is that once part of it is gone it is gone forever. Language, customs, and traditions are not tangible things that can be given back in a courtroom. The government's common experience payment to survivors and their

¹⁹⁷ An example of a remedy aimed at 'restoring' culture is the use of recording devices to make records of a given language. This has been done for some Canadian Aboriginal and other languages, but while the practice may be useful for historians, it does nothing to rejuvenate a dying language.

descendants, while important, does not restore culture either. But on the same token, it does not protect what culture remains either.

It is this idea, i.e. protecting what Aboriginal culture remains, that is the best remedy for Aboriginal communities today. The best way to do this is through constitutional amendment. This protects the interests of the community, and, through Aboriginal cultural-specific schooling, could fulfill the promises of education promised by the government some century and a half ago.

6.2 Current Constitutional Protections Are Inadequate

Aboriginal rights are currently protected in s. 35(1) of the Constitution, which mandates that “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”¹⁹⁸ This section has been interpreted by the Supreme Court of Canada in *R. v. Van der Peet*¹⁹⁹ where the Court defined an Aboriginal right as an activity that is “an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.”²⁰⁰ This activity being claimed as a right must have existed before the time of first contact with Europeans, and existed continually until 1982.²⁰¹ But courts will only recognize traditions which are integral to Aboriginal culture, and which can be “framed in terms cognizable to the Canadian legal and constitutional structure.”²⁰² The current test for protection of Aboriginal rights therefore requires an Aboriginal right which is “integral” to their culture to be comparable to a common law right. This potentially poses a major problem

¹⁹⁸ *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

¹⁹⁹ [1996] 2 S.C.R. 507 [*Van der Peet*].

²⁰⁰ *Ibid.* at 46.

²⁰¹ *Ibid.*, at 59.

²⁰² *Ibid.*, at 49.

for the protection of Aboriginal culture, which could involve things like resource use, traditional child-rearing methods, and protection of oral histories.²⁰³

In *Wesley v. Alberta*,²⁰⁴ a case dealing with Aboriginal title and treaty rights to resources, the problems associated with the *Van Der Peet* test were illustrated when Canada and Alberta argued that the plaintiffs, in accordance with *Van Der Peet*, were obligated to “identify the exact nature of the activity claimed to be a right.”²⁰⁵ Canada and Alberta further claimed that the plaintiffs had “provided only vague generalities and examples of rights and interference and that they needed a better response to defend.”²⁰⁶ The Aboriginal group involved claimed that Canada had interfered with their way of life, as well as their ability to earn a livelihood from the land due to destruction of lands and natural resources. In response, Canada demanded particulars of:

... the aspects of the Plaintiffs ability to earn a livelihood that are alleged to have been seriously compromised; when, where and the ways in which the severe interference or serious compromise occurred; the identity of the persons whose way of life and ability to earn a livelihood was interfered with or compromised; the identity of the persons who interfered with and compromised the way of life and ability to earn a livelihood of the Plaintiffs; the identity of the persons who have been irreparably damaged; the identity of the persons who have caused the irreparable damage; what the irreparable damage is; the specific culture, customs, traditions, language, values, spiritual links of the Plaintiffs that have been interfered with, and when and how and by whom the interference occurred; what specific special relationship of the Plaintiffs with the Traditional Lands and Natural Resources has been interfered with, and when, how, and by whom such interference occurred. Canada further asks what the spiritual links to the Traditional Lands and certain of the Natural Resources are.²⁰⁷

²⁰³ Celeste Hutchinson, “Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Residential Schools Provide Justification for Aboriginal Cultural Rights?” (2007), 70 Sask. L. Rev. 425 at 66.

²⁰⁴ *Wesley v. Alberta*, [2009] A.J. No. 752 (QL) [*Wesley*].

²⁰⁵ *Ibid.* at 44.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* at 137.

The Court ruled that Canada has the right to receive this information. The appeals process in this case is ongoing, but even with the *R. v. Delgamuukw* precedent that Aboriginal oral history is to be accepted in Canadian courts, Canada's demand for particulars in *Wesley* illustrates the difficulty Aboriginals may face in evidencing traditions and ways of life that may have existed centuries ago, and how they will be weighted by contemporary courts.²⁰⁸

The decision in *Wesley* was based in part on the analysis developed in *Van der Peet*, and confirmed in *R. v. Pamajewon*.²⁰⁹ In *Pamajewon*, a case that had implications on whether Aboriginal groups had a right to self-government, the Supreme Court of Canada considered whether a right existed to participate in and regulate gambling activities on a reserve. Using the *Van der Peet* test Lamer, J. investigated whether gambling comprised a historic and contemporary (as of 1982) practice integral to the distinctive culture of the plaintiff's Aboriginal group. Upon examining the historical evidence available, the court determined that, although the Ojibwa people had a history of gaming and sporting events, there was insufficient evidence pointing to a conclusion

²⁰⁸ This, despite that in *Delgamuukw* the court ruled that Aboriginal title is likely not limited to uses that are integral to the customs and traditions of Aboriginal societies: "Although this is not determinative, the conclusion that the content of Aboriginal title is not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive Aboriginal societies has wide support in the critical literature ... the content of Aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. However, nor does Aboriginal title amount to a form of inalienable fee simple ... The content of Aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit on the content of Aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land -- it is a sui generis interest that is distinct from "normal" proprietary interests, most notably fee simple." *Ibid.* at 124-5.

²⁰⁹ [1996] 2 S.C.R. 821 [*Pamajewon*].

that this had occurred on any large scale; nor was it an integral part of the integral culture of the group. As such, no contemporary right to regulate gaming existed.²¹⁰

The rights that have been granted to Canadian Aboriginals, and the way in which Courts have framed their willingness to recognize them, is a double-edged sword. On the one hand basing Aboriginal rights in the existence of independent Aboriginal societies pre-contact, rather than any power had by the conquering nation, suggests a willingness to work with Aboriginal groups to define their contemporary rights. But on the other hand, "... indigenous societies are limited in their capacity to press their rights claims when there has been substantial change, interruption or disruption of their traditional laws, customs or practices – regardless of the source of the alteration in question."²¹¹ The current state of Canadian law serves Aboriginal rights claimants well when the interest being claimed can be related to a pre-contact activity. However, the test will not aid Aboriginals to any degree when making a claim related to an interest that has been extinguished, i.e. certain aspects of culture.

6.3 Fiduciary Relationship

The inadequacies of current constitutional protections are perhaps most apparent in case law surrounding s. 35(1), which has been interpreted to establish a fiduciary relationship between the federal government and Aboriginal peoples based on their

²¹⁰ The common law which has resulted as an interpretation of the constitution has set out a number of precedents of how Aboriginal claims are to be dealt with. *R. v. Morris*, [2006] 2 S.C.R. 915 and *R. v. Badger*, [1996] 1 S.C.R. 771 set out that Aboriginal rights do not need to be carried out by the same means as they historically were (e.g. modern weapons may now be used for hunting). Treaties and agreements must be interpreted in a way such that "...any ambiguities or doubtful expressions ... be resolved in favour of the Indians" (*Badger*, at para. 41). As per *R. v. Sundown*, 1999 1 S.C.R. 393, the *Badger* interpretation is correct because "In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators" (*Sundown*, at para. 24). When dealing with Aboriginals, the 'honour of the Crown' is always at stake, meaning that sharp practice will not be tolerated in any way (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 75).

²¹¹ Michael Murphy, "Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada, and New Zealand" (2009) *Can. Bar Rev.* 357 at 359.

unique pre-contact existence. This relationship brings about an obligation to justify activities that somehow infringe upon the exercise of an Aboriginal right.²¹² The standard for determining when interference is justified is set out in *R. v. Sparrow*.²¹³ Here, the Supreme Court set out that a court must ask: (1) if there is a valid legislative objective at hand, and if so, then (2) was the special fiduciary trust relationship between the government and Aboriginal people considered before moving forward with that objective? This second part may be clarified by investigating whether the infringement was as slight as possible so as to allow the objective to proceed, whether fair compensation was made, and whether the Aboriginal group was consulted. The *Sparrow* test for justification of infringement of Aboriginal rights was upheld in *R. v. Badger*,²¹⁴ however, it has since lost some of its force due to subsequent decisions in *R. v. Gladstone*²¹⁵ and *R. v. Delgamuukw*. In *Gladstone*, the issue was whether an Aboriginal group in British Columbia had the right to fish for commercial purposes. Lamer, C.J. found that the group had such a right, but when inquiring whether this right could be justifiably infringed upon he held there was insufficient evidence. Nevertheless, he did comment heavily on the *Sparrow* test, saying that

... in the context of the objectives which can be said to be compelling and substantial under the first branch of the Sparrow justification test, the import of these purposes is that the objectives

²¹² Rotman stresses that the government can and should meet its fiduciary duty by taking reasonable steps to accommodate an Aboriginal group's wishes prior to taking any action that might adversely affect it. In the case of *Kruger v. R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.) which concerned inadequate compensation for expropriation of Aboriginal lands, Rotman explains that "... the Crown should have weighed the effects of its desire to expropriate the Penticton band's land with the anticipated effects that the taking of the land would have had on the band." The appropriate remedy, argues the author, would have been a return of the value of the land to the band, as well as a disgorging of any benefits obtained by the Crown from the illegitimate sale. Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 278-279.

²¹³ [1990] 1 S.C.R. 1075.

²¹⁴ *R. v. Badger*, [1996] 1 S.C.R. 771.

²¹⁵ *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].

which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by Aboriginal peoples ... Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive Aboriginal 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 Aboriginal 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 Aboriginal societies are a part of that community), some limitation of those rights will be justifiable.²¹⁶

Lamer effectively broadened the objectives for which the government could justifiably interfere with Aboriginal rights as per the first part of the *Sparrow* test by defining such situations as being ‘compelling and substantial’, a phrase which could encompass a myriad of economic interests. Similarly, in *Delgamuukw*, Lamer, C.J. interpreted *Sparrow* as setting what appears to be a relatively low bar for interference with Aboriginal rights. He again explained that

... in my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title.²¹⁷

The purpose of s. 35(1) is to constitutionally protect Aboriginal interests that are unique and continuing. Yet the first arm of the *Sparrow* test is framed solely in terms of the interests of the rest of society. Although the second part of the test attempts to temper this by suggesting Aboriginal consultation, laws that solely forward the interests of non-

²¹⁶ *Gladstone*, *supra* note 215 at 72-73.

²¹⁷ *Delgamuukw*, *supra* note 109 at 165.

Aboriginal Canadian society should not, generally, be seen as compelling enough to justify infringing upon or limiting an Aboriginal right. This appears to be the slope down which *Gladstone* and *Delgamuukw* have started to slide. Sparrow established that the federal government has a fiduciary duty to give priority to Aboriginal interests, subsequent to valid conservation goals. In *Gladstone*, Lamer, C.J. noted the fiduciary duty, but also noted a difference between fishing for ceremonial purposes and fishing for commercial purposes. When doing so for ceremonial purposes the group will, at some point, “have sufficient fish to meet these needs.”²¹⁸ However, when fishing for commercial purposes where conservation goals have been met, the government is not required to grant Aboriginals an exclusive right to fish. Instead, the government must merely evidence that it regarded Aboriginal interests in the area, and distribute fishing rights amongst Aboriginals and non-Aboriginals alike in a way that respects that Aboriginals have a priority right to that resource over other users. After conservation goals are met, this distinction allows government to limit the degree to which Aboriginals may rely on an Aboriginal commercial right to fish, in order to allocate fishing interests to non-Aboriginals, i.e. Crown fiduciary duty does not truly prevent the federal government from interfering with constitutionally protected Aboriginal interests.²¹⁹

6.3.1 An IRS Claim for Breach of Fiduciary Duty

Fiduciary relationships are protected because of the trust and confidence placed by one party in another in a particular context. Fiduciary doctrine is rooted in public

²¹⁸ *Gladstone*, *supra* note 215 at 57.

²¹⁹ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 191.

policy and the need to protect relationships that are deemed socially valuable.²²⁰ The fiduciary duty which exists between the Crown and First Nations peoples has arisen primarily due to the interactions between the two in the period from contact to the exit of France as a major colonial power in North America subsequent to the Seven Year's War and Royal Proclamation in 1763. During this period, highlighted by conflicts between the English and French, relationships between the Crown and Native groups were based on mutual need and respect. Aboriginals needed European colonizers for trading purposes, and the latter needed Aboriginals for trading and military alliances. Relations were on a nation-to-nation basis, with both being recognized as sovereign. The special fiduciary relationship that was created, or recognized in, the Royal Proclamation of 1763, and later s. 91(24) of the *Constitution Act, 1867*, and s. 35 of the *Constitution Act, 1982*, continues to bind the Crown in a position of trust with respect to Aboriginal peoples, and requires it to act to their benefit.

In a number of private class-action lawsuits initiated by IRS survivors and their families against the Crown and Churches prior to the Settlement Agreement occurring, plaintiffs sought partial relief in the form of a declaration that the defendants breached their fiduciary duty to Aboriginals in the operation of the schools. Some of these claims settled, but to date other lawsuits that have claimed breach of fiduciary duty in the residential school context as it relates to culture have been denied on that point or are outstanding. The question of whether the Crown breached its fiduciary duty to Aboriginals by failing to protect culture in particular remains unanswered. Magnet presents an argument for breach of fiduciary duty on the question of culture by arguing

²²⁰ Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, *supra* note 212 at 152.

that various treaties and the Crown's duty to educate set out in the Indian Act, as well as guardianship agreements that were entered into with some Aboriginal parents, resulted in the Crown becoming a ward of the children with the requisite responsibility to act in their best interests.²²¹ He continues to argue that because the Crown used its legislative power through the Indian Act and various treaties to (i) gain guardianship over Aboriginal children, and (ii) gain control over Aboriginal education, Aboriginal parents should have been able to reasonably expect that the Crown would have acted in their best interests, i.e. to provide quality education and protection of their children.²²²

But of course, as Magnet later points out, the explicit intent of the residential school system was to destroy culture.²²³ As was seen in the historical review of the system's creation, bureaucrats were quite forthcoming about the objective of affecting culture. Meaningful education was never really the primary aim at all. This, according to Magnet's line of argument, is irrelevant. Even at the system's conception in the mid-nineteenth century there already existed a fiduciary relationship between the Crown and

²²¹ Joseph Eliot Magnet, *Litigating Aboriginal Culture* (Edmonton: Juriliber, 2005) at 86. In a 1967 Report to the Department of Indian Affairs and Northern Development George Caldwell recommended that a residential school student "... who must be removed from his own home for a welfare reason be handled by the Child Welfare Division in the same legal process that is now available to other children in the province who are made temporary or permanent wards of the Director of Child Welfare." Caldwell did not define exactly what a 'welfare reason' was, but he likely meant such a reason as would be relevant for any other removal of a child for welfare reasons. Caldwell did not make a recommendation for Aboriginal children who had positive home lives, but were being removed purely for the purpose of attending a residential school. However he did comment that "The legal status of the Indian child in the residential school in respect to care and custody is obscure. The removal of the child from his home by an administrative decision relieves the parent of the responsibility for the care of the child; however, the custody of the child is left in doubt, particularly when the program is structured for him to return for a two-month period in the summer." Canada, Department of Indian Affairs and Northern Development, *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, (Ottawa: The Canadian Welfare Council, 1967) at 149 (Project Director: George Caldwell).

²²² Magnet, *supra* note 221 at 87.

²²³ Recall the words of Duncan Campbell Scott, deputy superintendent of the Department of Indian Affairs from 1913 to 1932, who announced that the purpose of the residential school system was "to be rid of the Indian question. That is [the] whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian problem." Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco: City Lights Books, 2004) at 14.

Aboriginals as recognized in the Royal Proclamation of 1763, and later the *Constitution Act, 1867*. Even if the schools were an official policy of government, this underlying duty would have been superior law. Says Magnet:

Given that the residential school policy required the Crown to assume responsibility for a fundamental aspect of reserve life – the education and protection of reserve children – and gave the Crown absolute discretion as to how to accomplish this, it is difficult to imagine how the Crown’s fiduciary duty could be more intense. Protecting the value of reserve land is important, certainly. Protecting the fundamental well-being of an entire generation of reserve children conscripted into the care of the Crown is, by contrast, supremely important.²²⁴

Because there existed at law a duty for the Crown to act in the best interests of Aboriginal children, and because the Crown acted directly in detriment of this duty by sanctioning the preference of its own interests over those of Aboriginal children (and people on whole), it breached its fiduciary duty.

6.3.2 Limitations of Canadian Case law

Despite this apparent obvious breach of duty, Canadian courts have been unwilling to recognize a violation of the Crown’s fiduciary duty to Aboriginal people in cases where a cognizable Aboriginal interest cannot be found, i.e. an interest or right that is cognizable at common/civil law. This type of interest needs to be very specific, and the roadblock for possible claims that is encountered goes back to the frozen rights problem, i.e. courts will only recognize as cognizable rights that were integral to Aboriginal culture and practiced until 1982. Chilwen Cheng highlights this problem by pointing out that by limiting recognition and protection of Aboriginal rights to “merely continuing rights to discrete practices and customs, the Court is in danger of reducing

²²⁴ Magnet, *supra* note 221 at 89.

Aboriginality to a package of anthropological curiosities rather than manifestations of an Aboriginal Nation's right to occupation, sovereignty and self-determination.”²²⁵ The problem is that the apparent right had by Aboriginal peoples, or any other group, to practice their native culture has not been interpreted as a specific right enforceable at law by Canadian courts. Says Cheng, “Aboriginality is a claim to a collective identity which is logically prior to whatever discrete (and distinctive) cultural practices characterize a given society--practices that will necessarily vary in each case.”²²⁶ Fiduciary duty is inescapably linked to the requirement for cognizable Aboriginal interest, and it is this link that frustrates claims for breach of that duty based on assaults on culture and failure to provide quality IRS education. Essentially, the pith and substance of the problem is that the law will recognize specific Aboriginal rights, but is less capable of recognizing underlying whole or overarching ones, at least in this context.

This ratio is apparent in Canadian case law dealing with Aboriginal peoples making claims for breach of fiduciary duty. For example, in the recent case of *Lax Kw'alaams Indian Band v. Canada (Attorney General)*²²⁷ the plaintiff Band argued that a breach of “fiduciary duty [had] arise[n] from the reasonable expectation that the Crown would act in the plaintiff’s best interest, but that it had acted to their detriment by building a community that relied on commercial fishing, and then restrict[ed] ... their [i.e. the Aboriginal groups] right to pursue that enterprise.”²²⁸ The plaintiffs had been attempting to make a claim for commercial fishing rights but, according to the court, failed to prove on a balance of probabilities that their ancestors participated in trade of

²²⁵ Chilwen Chienhan Cheng “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997) 55 U.T. Fac. L. Rev. 419 at para. 30.

²²⁶ *Ibid.*

²²⁷ [2008] 3 C.N.L.R. 158 (B.C.S.C.) [*Lax Kw'alaams Indian Band*].

²²⁸ *Ibid.* at para. 506.

fish before contact with Europeans in a way that was ‘central and significant’ to their society’s distinctive culture. As per *R. v. Van der Peet* the court subscribed to the judgment that in order to establish an Aboriginal right as protected under s. 35(1) of the Constitution a plaintiff must prove: (i) the existence of the ancestral practice, custom or tradition (i.e. the activity advanced as supporting the claimed right); (ii) that the activity was integral to the pre-contact society (i.e. that it was marked as distinctive); and (iii) reasonable continuity between the pre-contact practice and the contemporary claim.²²⁹ Integral to an Aboriginal group’s distinctive culture (i.e. pre contact way of life) is taken to mean a central and significant part of that culture that truly made the society what it was. In this case, because the plaintiffs failed to establish a right to fish commercially, no cognizable common law interest was found, and the court consequently deemed that no fiduciary duty with relation to the fisheries existed either.

Lax Kw’alaams Indian Band is in-line with the established body of Canadian jurisprudence on fiduciary duties in the Crown-Native relationship. As a further review, this body of case law effectively began with *Guerin v. R.* in 1984, which found that the nature of Aboriginal title imposed a *sui generis* or unique and enforceable fiduciary duty on the Crown when dealing with Aboriginal interests. This was clarified further in 1990 when the Supreme Court of Canada in *Sparrow* determined that “the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.”²³⁰ *Sparrow* is significant because it signalled or recognized a burden on the part of government when

²²⁹ *Ibid.* at para. 10.

²³⁰ *Sparrow*, *supra* note 135 at para. 75.

exercising their legislative authority with regards to Aboriginal peoples. In *R. v. Adams*²³¹ the court found that regulations which gave unfettered and unstructured authority to a minister may violate the Crown's fiduciary duty to Aboriginal peoples: "[I]n light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights ... in the absence of some explicit guidance."²³² In *Osoyoos Indian Band v. Oliver (Town)*²³³ the Supreme Court of Canada considered where the fiduciary duty of the Crown lay when lands were removed from reserve status. The Court determined that in order to expropriate reserve land the Crown must preserve the Aboriginal interest to the greatest extent practicable.²³⁴

The Crown was found to have failed to uphold this obligation in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*.²³⁵ Here the Crown had transferred two parcels of reserve land and mineral rights thereto from the plaintiff Band to the Director of the *Veterans Land Act*²³⁶ in 1948 to promote agriculture among veterans. At the time the Band agreed to the transfer, and with the money it gained from the sale the Department of Indian Affairs and Northern Development purchased additional reserve land for the Band. In 1976 oil and gas were discovered and development began on the land which had been sold. In 1978, the

²³¹ [1996] 3 S.C.R. 101.

²³² *Ibid.* at para. 54.

²³³ [2001] 3 S.C.R. 746.

²³⁴ The court defined a two-step process for determining when a fiduciary argument may arise in land expropriations: "In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable." *Ibid.* at para. 53.

²³⁵ [1995] 4 S.C.R. 344.

²³⁶ 1942, S.C. 1942, c. 33.

plaintiffs commenced legal action. Ultimately, the Supreme Court of Canada held that as a trustee of the Band's land the Department was obligated to only surrender said land when doing so was in the best interests of the Band, in which case the Band was to receive compensation based on sale for a reasonable price. In this case, although the Crown appeared to have satisfied its obligation to secure a fair price for the sale, it was negligent in its duty in including mineral rights as part of that sale. Including such rights was unusual, and against the Department's usual policy of reserving subsurface rights for the benefit of the Aboriginal group.

*Wewaykum Indian Band v. Canada*²³⁷ clarified the Crown's fiduciary obligations in what the court called a 'flood' of post-*Guerin* fiduciary claim cases, and confirmed that a fiduciary duty is not present in the Crown-Native relationship in all circumstances. The case itself involved applications from two Bands who were seeking some form of financial compensation from the Crown for a historical inaccuracy in setting out their reserve boundaries (essentially, both Bands claimed a portion of the other's land, but were willing to accept compensation in lieu of redrawing the boundaries). Although the court agreed with the plaintiff's assessment of boundary inaccuracy, it held that no equitable relief was available and no fiduciary duty had been breached because at no time did the Crown defy its obligations of loyalty, good faith and disclosure. The Crown had met its obligation to create new reserves, and was deemed to have fulfilled each of the plaintiff Band's interests by allocating it adequate reserve land. Moreover, each of the plaintiff Band's were found to have been fully aware of the clerical error with regards to boundaries upon creation in 1938, yet had long since abandoned any claim for

²³⁷ [2002] 4 S.C.R. 245 [*Wewaykum Indian Band*].

compensation.²³⁸ Although the court ultimately concluded that the expiry of limitations periods effectively barred any claim the Bands might have anyway, this case highlights that the Crown's fiduciary duty to Aboriginal people is not all-encompassing, and will not arise as a cause of action in every circumstance. As was the case in *Blueberry River*, the court in *Wewaykum* noted that the primary use of this duty in litigation would be to prevent an exploitative bargain. In such a context as this, the Crown's primary obligation will be to use 'ordinary diligence' to avoid the destruction/transfer of an Aboriginal groups quasi-property interest in its reserve land through unfair bargains.

6.3.3 New Zealand Case Law

Like Canada, New Zealand has also had an interesting treatment of Crown-Native fiduciary duty. In that country, fiduciary duty between the two parties is recognized to have derived from the 1840 Treaty of Waitangi between the British Crown and various Maori Aboriginal tribes. Although there is significant difference between the English and translated Maori text, the treaty recognizes Maori ownership of land as well as the establishment of a British governor (whether the treaty also conferred British sovereignty over New Zealand is questionable). The body of fiduciary jurisprudence from New Zealand offers much the same ratio as *Guerin* in Canada; nevertheless, the doctrines from this country are worthy of investigation.

In *New Zealand Maori Council v. Attorney General of New Zealand*,²³⁹ the Privy Council considered whether the government could transfer a state-owned broadcasting corporation to a private operator. The plaintiff was concerned that that Maori language

²³⁸ The court concluded that "It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome." *Wewaykum Indian Band*, *supra* note 237 at para. 102.

²³⁹ [1994] 1 All E.R. 623.

would be (further) weakened as a result because any private operator would be unlikely to provide much if any Maori language programming. The Treaty of Waitangi was agreed to guarantee Maori people undisturbed possession of their traditional lands and ‘other properties’ including ‘Maori treasures’, which were recognized to include language.²⁴⁰ As is the case in Canadian case law, the Council determined that “While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.”²⁴¹ In the present case it was determined that transfer of the public broadcaster would not necessarily impede the government from fulfilling its obligations under the treaty (should they be deemed to exist in this context), because if it wished to promote Maori language it would still be capable of doing so. For example, it could simply buy airtime from the new owner upon which to broadcast Maori language programming. Despite the possible sale, the government would still be able to promote Maori language television if it were willing to accept the costs of doing so.²⁴² Because it could maintain some degree of effective control over broadcasting, and still promote Maori language television programming, the government was found to not have breached its fiduciary duty.

In *Ngai Tahu Maori Trust Board v. Director General of Conservation*²⁴³ fiduciary duties with relation to consultation and accommodation were considered. The government had issued a commercial whale-watching permit to an individual who began competing in the business with a Maori operator. The plaintiff claimed the Treaty of

²⁴⁰ According to the Council, “While the second article refers to ‘other properties’, the Maori text uses the word ‘taonga’ and in the recognition of that text the word ‘taonga’ is translated as treasures. It is accepted that those treasures include the Maori language.” *Ibid.* at 629.

²⁴¹ *Ibid.*

²⁴² *Ibid.* at 632. It was also found that under the treaty the obligation for language upkeep was a shared responsibility, and Maori are required to make special effort to promote language in the home. *Ibid.* at 631.

²⁴³ [1995] 3 N.Z.L.R. 553 (C.A.).

Waitangi had been breached because it insulated them from competition. The court clarified that the treaty specifically mentioned undisturbed possession of property interests, including Native fisheries, but that this could not be interpreted to extend to commercial tourism businesses. Because of this shortcoming, no fiduciary duty could be construed as attached.

6.3.4 Conclusion on Fiduciary Duty

The New Zealand case law can inform Canadian legal doctrine through its focus on the partnership between the Maori of that country, and the current administration which has replaced the predecessor colonial government. Although fiduciary law with respect to Aboriginal populations is less developed in New Zealand as opposed to Canada, New Zealand's treatment puts both parties on more of a footing as equals, as opposed to emphasizing the paternalistic power relation between the two. What the New Zealand case law does not provide, however, is a sound basis upon which loss of culture may be pointed to as a cause of action for Crown failure of fiduciary duty. Both New Zealand and Canadian case law highlight the reasoning that fiduciary duty requires only that the party in a trustee position make reasonable efforts or accommodations for the party whose best interests they are obligated to be mindful of. These obligations are not set; rather, they change with individual circumstances. Because Canadian jurisprudence limits actions for breach of fiduciary duty to breaches of rights that are cognizable at law, there does not appear to be an actual basis from which to claim that the residential school policy of attempted cultural assimilation breached the Crown's fiduciary duty. Canadian jurisprudence is effectively unable to take a macro view of the situation. It cannot enforce the Crown's fiduciary duty to act in the best interest of Aboriginal people

because it is limited to viewing individual or micro infringements of the duty that are comparable to activities deemed illegal in western/European legal systems. Conceiving of and implementing a system of forced assimilation is an action hardly reconcilable with the Crown's fiduciary duty; however, there is a serious shortcoming in the design of Canadian law that renders courts unable to recognize it.

6.4 Charter Protections Are Inadequate

The *Canadian Charter of Rights and Freedoms*²⁴⁴ itself also poses possible threats to Aboriginal traditional ways of life, and therefore culture. The Charter is another example of the independent as opposed to group-focused viewpoint of our common law system of justice. The Charter views Aboriginal rights from an individual rights standpoint that cannot comprehend Aboriginal values. Because the Charter is concerned with public, not private, power, it does not protect individual autonomy in, say, the workplace where an employee does not have a constitutional right to freedom of expression.²⁴⁵ Yet Aboriginal rights straddle the public-private law distinction. The source of Aboriginal power is recognized by the Crown, yet it does not flow from the Crown. In this sense Aboriginal rights are not in the public sphere. But since Aboriginal rights and Aboriginal law deal with social, economic, and political matters, they are not entirely of the private sphere either.²⁴⁶

Section 25 of the Charter demands that the judiciary interpret Charter rights in a way that does not abrogate or derogate from Aboriginal treaty rights, or any form of self-government that may be recognized by s. 35 of the Constitution. To the extent that Aboriginal self-government authority may be recognized by sections 25 & 35, the

²⁴⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴⁵ Macklem, *Indigenous Difference and the Constitution of Canada*, *supra* note 219 at 197.

²⁴⁶ *Ibid.* at 198.

Charter does not apply to this exercise of self-government power.²⁴⁷ However, as pointed out by Patrick Macklem, s. 25 can also be used to argue the opposite conclusion, i.e. as an instruction to the judiciary that s. 35 self-government rights should not be diminished through Charter application, that the Charter does apply to the exercise of Aboriginal self-governmental power, and the judiciary should supervise the exercise of Charter application in a way that does not derogate from self-government rights.²⁴⁸ The result is that, according to s. 25, the judiciary cannot interpret Charter rights in a way that abrogates or derogates from Aboriginal rights guaranteed in s. 35. Section 25 allows the judiciary to avert the effect the Charter would otherwise have on Aboriginal governments, and it also enables the judiciary to enforce the Charter against Aboriginal self-government authority where doing so would not threaten Aboriginal interests.

The Charter has also been criticized in its application to Aboriginal peoples based on its own cultural bias. Individual rights debates may themselves be antithetical to Aboriginal traditions which focus on communal approaches to land, personality, and social life. Another problem with an individual rights focus is that it emphasizes the ideal that “everyone should be treated equally, regardless of disadvantages and differences. The reality is that there are economic, social and political factors that create unequal

²⁴⁷ Torpey notes that some have objected to land claims, self-government, and other forms of Aboriginal control of their own affairs “because of the Aboriginal governments’ record of corruption, nepotism, and undemocratic practices.” This being the case, Torpey nevertheless sees no alternative to restorative land claims and other forms of empowerment, and emphasizes that negotiated reparations schemes, which may involve varying levels of Aboriginal self-government (which may or may not involve certain degrees of federal government oversight) is the only way to lift Aboriginal groups from the relative bottom of the socioeconomic ladder. John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Cambridge, Mass.: Harvard University Press, 2006) at 63-64.

²⁴⁸ Macklem, *Indigenous Difference and the Constitution of Canada*, *supra* note 219 at 203.

access to justice for First Nations' people."²⁴⁹ By creating a set of laws that are more centered on the community and collective rights, Charter shortcomings for Aboriginal application might be overcome.

6.4.1 Available Charter Protections

Although it lies outside the Charter, s. 35 of the Constitution protects 'existing Aboriginal and treaty rights.' The effect of 'existing' essentially limits Aboriginal rights to those which were not extinguished either voluntarily or by legislation before 17 April 1982. Section 35 will not retroactively breathe new life into those rights that, one way or another, disappeared from Aboriginal usage; however, it may be used to protect those rights that were merely regulated or restricted.²⁵⁰ Thus, prior to 1982, the federal government could extinguish Aboriginal rights through legislation that exemplified clear and plain intention to do so.

The section of the Charter which is most applicable to Aboriginal rights is s. 25, which states that the Charter will not diminish Aboriginal rights. This section is therefore not as important as s. 35 of the Constitution in granting positive rights; however, it does have value in guaranteeing that the Charter may not be used to quash an Aboriginal right because it amounts to a privilege that discriminates against non-Aboriginals. The effect

²⁴⁹ Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nations' Jurisdiction: An Analysis of the Debate* (M.A. Thesis, University of Saskatchewan, 2005) [unpublished] at 31.

²⁵⁰ Prior regulation of a right is not equivalent to extinguishment. As explained by Conrad, J., "Regulation and extinguishment are fundamentally different concepts. A right that has been extinguished ceases to exist. On the other hand, a right that is regulated even to the point of unenforceability does not necessarily cease to exist, it is merely rendered dormant until the restricting regulation is repealed or altered. The fundamental content of the right remains unchanged at all times." *R. v. Arcand*, [1989] 2 C.N.L.R. 110 (Alta. Q.B.).

is that Aboriginal peoples enjoy a unique constitutional status that may not be threatened by outside non-members.²⁵¹

Despite these protections offered in the Constitution and Charter, what remains lacking is a judicial interpretation that forwards an obligation on government to assert these rights in a positive fashion. The Constitution simply does not provide a basis for the creation of positive rights. This may be contrasted with the set of positive rights that Francophone's gained in sections 23 and 24 of the Charter.²⁵² Section 23 is "designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing ..."²⁵³ The purpose of s. 23 is to protect and promote Canada's two official languages and attached cultures, i.e. English and French. While these rights attach to individuals, they apply only when numbers warrant, and the specific programs or facilities that a

²⁵¹ Ghislain Otis, "Aboriginal Governance with or without the Canadian *Charter*" in Gordon Christie, ed. *Aboriginality and Governance: A Multidisciplinary Perspective from Québec* (Penticton, B.C.: Theytus Books, 2006) 265 at 279.

²⁵² Grammond establishes the parallel between the interests of Aboriginals and linguistic minorities, emphasizing that the difference between the two is first-occupancy of Aboriginals. It is this occupancy, of course, that has been used by the Supreme Court of Canada to build the unique set of fiduciary duties owed by the federal government to Aboriginals. Inasmuch as it is a creation of the courts (derived from s. 35(1) of the constitution), the fiduciary protection for Aboriginals may be differentiated from the set of constitutionally provided explicit rights enjoyed by minority Francophone communities. Grammond explains that "... from a theoretical standpoint, the cases of the indigenous peoples raise the same issues of equal treatment and cultural difference as do the cases of other ethnic minorities (for example, linguistic minorities). In recent years, the Supreme Court of Canada has recognised that constitutional provisions dealing with official-language groups and indigenous peoples share the same basic objective (or constitutional value) of 'minority protection,' while also noting that first occupancy of the land distinguishes the indigenous peoples from other minorities." Thus, while the tools available to each group in terms of protecting their minority interests, and particularly minority language interests, differ greatly, both are effectively in the same theoretical position. Sébastien Grammond, "Disentangling 'Race' and Indigenous Status: the Role of Ethnicity" (2008) 33 *Queen's L.J.* 487 at 496. Grammond also points to the acknowledgment given by the Supreme Court of Canada to the same parallel in *Reference re Secession of Québec*, where the court commented that "Consistent with this long tradition of respect for minorities ... the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing Aboriginal and treaty rights ... The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value." That value being, of course, protection of minority interests. *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at para. 82.

²⁵³ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 27.

government will be required to provide will vary depending on the number of people who can be reasonably expected to participate. As was pointed out in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*²⁵⁴ education rights are particularly vulnerable to the ‘numbers warrant’ requirement, because for every year that government perpetrates inaction and does not build French-language schools outside Québec the likelihood of Francophone student assimilation increases, to the possible point where numbers will no longer warrant, and the school will no longer be necessary.²⁵⁵

The Charter thus guarantees minority language rights to English and French minority populations. This has been particularly useful for minority French populations calling for French-language schools outside Québec. Aboriginals looking to advance their interests with regards to language or other rights have no such positive constitutional provision to rely on in making their claims.²⁵⁶ There is no constitutional protection guaranteeing government protection of Aboriginal minority language rights and other interests. Because s. 23 guarantees do not extend to Aboriginal language

²⁵⁴ [2003] 3 S.C.R. 3 [*Doucet-Boudreau*].

²⁵⁵ Iacobucci and Arbour, JJ. for the majority explained that “If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected ...” *Ibid.* at para. 29. The court also “found that the respondents had not given sufficient attention to the serious rate of assimilation among Acadians and Francophones in Nova Scotia. The Province treated s. 23 rights as if they were but one more demand for educational programs and facilities, and failed to accord them due priority as constitutional rights. Meanwhile, assimilation continued.” *Ibid.* at para. 6.

²⁵⁶ Nahanee suggests “that the right to language is both an individual and collective right, and in both instances it has been denied by the State. A court could be asked to order a structural injunction requiring the Government of Canada to provide funds for Indian language education for all age groups.” This is the remedy that the court in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 upheld under s. 24(1) of the Charter due to the plaintiff’s breach of a positive Charter right (failure to build French-language schools in a timely manner). In this case the structural injunction was an order to provide the court with periodic progress reports as to construction of the new school. However, unlike minority French language rights that are guaranteed under s. 23 of the Charter, and provided with s. 24 as a remedy for breaches, Aboriginal language interests enjoy no such protection. Teresa Nahanee, “Indian Challenges: Asserting the Human and Aboriginal Right to Language” in Sylvie Léger, ed., *Linguistic Rights in Canada: Collusions or Collisions?* (Ottawa: Canadian Centre for Linguistic Rights, University of Ottawa, 1995) 471 at 483-484.

interests, s. 24 which requires courts to issue effective and responsive remedies guaranteeing meaningful Charter protections, cannot be invoked by Aboriginals. The purpose of this section is to invoke a remedy that “meaningfully vindicates the rights and freedoms of the claimants.”²⁵⁷ The end result is that Aboriginal peoples are lacking the kind of positive rights grounded in the Constitution that speakers of Canada’s two official languages (and by extension, cultures) enjoy.

6.4.2 Constitutional Limitations and Alternatives

Because the Constitution and Charter do not confer positive rights for Aboriginal peoples, the result of interpretation by the courts has been limited to construing them negatively so as to restrain government power affecting Aboriginal interests. The seminal decision came in *R. v. Van der Peet*, which deemed that in order for an Aboriginal right to garner Constitutional protection it must pass the two-part distinctive culture test where: (i) the disputed practice is evidenced as integral to the pre-contact culture of the group, and (ii) the practice must be balanced with and cognizable to the common/civil law. *Sparrow* set out that ‘existing Aboriginal rights’ as named in s. 35 of the Constitution “must be interpreted flexibly so as to permit their evolution over time.”²⁵⁸ But this has not been the case. The *Van der Peet* test is flawed because it focuses on historical cultural evidence instead of investigating what Aboriginal laws would have allowed. As pointed out by Bradford Morse, the supposed importance of Aboriginal views may be touted by the courts, but they do not enter into the actual test

²⁵⁷ *Doucet-Boudreau*, *supra* note 253 at para. 55.

²⁵⁸ *Sparrow*, *supra* note 135 at para. 27.

used by contemporary courts in determining whether Aboriginal practices are worthy of protection.²⁵⁹

An alternative conception of testing for and protecting Aboriginal rights is offered by Russell Barsh and James Henderson.²⁶⁰ Whereas *Sparrow* requires that a practice existed as of 1982, and *Van der Peet* requires integrality and cognition at common law, a different option would be to adopt the ‘doctrine of continuity’ as was done by the Australia High Court in *Mabo v. Queensland [No. 2]*.²⁶¹ This reasoning proposes that when the Crown conquers a new land it takes in the *lex loci* or ‘law of the place’, meaning that the local law remains in place until clearly altered by the Crown. In *Mabo* Brennan J. held that Native title is grounded in traditional Native law and customs, and that there was no difference between Aboriginal land rights and other types of rights. Effectively, the court set out a platform from which Australian Aboriginals could argue the merits of their own law, and how that would have construed the issue. It allots for an Aboriginal perspective as opposed to a western one. Of course the latter was forwarded in *Van der Peet*, where Supreme Court of Canada took it upon itself to determine what made each Aboriginal society unique based on available evidence. Morse points out that although the court in *R. v. Pamajewon* noted the importance of traditional laws as pointed out in *Mabo*, no examination of the relevant Ojibway laws on the issue of gaming was attempted.²⁶² The court instead made historical evidence the focal point of its assessment. According to Morse

²⁵⁹ Bradford W. Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997) 42 McGill L.J. 1011 at 1031.

²⁶⁰ Barsh, Russel Lawrence & James Youngblood Henderson. “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill L.J. 993.

²⁶¹ (1992), 175 C.L.R. 1 (Aust. H. Ct.).

²⁶² Morse, “Permafrost Rights”, *supra* note 259 at 1031.

This diverted the exploration away from the more familiar determination of what the legal rules are – albeit within the context of Aboriginal law as recognized by the common law – into a judicial assessment of historical, sociological, and anthropological evidence of what constitutes an integral, central, significant, defining or distinctive part of a culture that was freeze-dried at the time of contact with Europeans.²⁶³

The test is thus as assessment of an Aboriginal groups past and rights that may be observed therein. It does not allow for adequate growth of these rights, and offers nothing in the way of positive rights.²⁶⁴ Aboriginals have lost the right to be defined by their own laws, or even to have those laws considered in the analysis. This, despite the fact that they are not technically conquered peoples, unlike the French in Canada who enjoy a far superior set of positive Constitutional rights. The *Van der Peet* test is unrealistic because by attaching recognition of Aboriginal legal rights to distinctive aspects of Aboriginal culture it does not effectively recognize Aboriginal unique or sui generis legal status, or the natural proclivity of cultures to change over time. Aboriginal communities, like others, may at times decide to revive a certain aspect of their culture that has not been present or apparent for some time. This could mean certain types of art, ceremonies, and/or political institutions. Or, an Aboriginal group might decide to adopt an institution of another group, or develop a hybrid Aboriginal-foreign institution that draws upon aspects of multiple traditions. The freedom to make this sort of choice is central to any self-governing community, even if it is not completely sovereign (indeed, there is no need for it to be). But Aboriginal groups do not have this ability enshrined in the Constitution, even if certain groups have gained degrees of autonomy and decision-

²⁶³ *Ibid.* at 1031.

²⁶⁴ Morse continues to say that “This approach bears little resemblance to the way in which cultures in fact evolve, adapt and transform over time. It also excludes what may have later become, or what may become in the future, integral to the very survival of Aboriginal cultures.” *Ibid.* at 1032.

making powers. The Constitution and Charter have not been interpreted to confer upon government any positive duty to forward Aboriginal rights, i.e. creating programs aimed at protecting Aboriginal culture by promoting it, as opposed to protecting what already exists. Because of this shortfall Aboriginal peoples cannot look to the Constitution as a source of power to enhance their future. For Aboriginal people the Constitution protects the status quo, but does not go beyond the duty to merely maintain it.

6.5 Reparations for Canadian Aboriginals: Education

Despite the fiduciary duty owed by the federal government to Aboriginal groups in Canada there is a deficit of protection offered to their culture in the Constitution. Even though s. 35(1) already explicitly protects existing Aboriginal and treaty rights, the Supreme Court in *Van der Peet* has restricted this protection to activities that were integral to Aboriginal culture prior to first contact with Europeans and continued to be an active part of that culture until 1982.²⁶⁵ However, the test does not recognize the fact that culture is anamorphous and in a constant state of flux. The Court did recognize that rights will not be frozen (and as such, for example, modern hunting methods are acceptable in lieu of traditional ones); nevertheless, this poses a potential problem for culture lost as a result of the residential school experience. While *Van der Peet* interprets the Constitution to protect rights that have evolved over time to be implemented in new forms, it does not recognize any protection or offer any redress for rights or portions of culture which have been destroyed. The root problem here, of course, is that nobody, not even Aboriginal people themselves, can identify what exactly was lost due to the residential schools project. As such, the requirement that an Aboriginal tradition be

²⁶⁵ The Aboriginal right being claimed must be “framed in terms cognizable to the Canadian legal and constitutional structure.” *Van der Peet*, *supra* note 199 at 49.

evidenced as integral to culture to be protected is a very high threshold to meet. The requirement that a particular tradition be continuing in order to warrant constitutional protection is similarly impossible to meet in the case of what was lost in residential schools.

The underlying problem which must be faced in the case of culture and residential schools is that what has been lost is lost. There is likely no way to get back exactly what residential schools took away.²⁶⁶ It is clear from examining a history of the schools and their pupils that a major assault on culture occurred, but rather than being wiped away this culture continued to exist, albeit in a diminished form. The most effective way to provide Aboriginals reparation for what was taken from them is to take steps to protect what Aboriginal culture does exist in Canada, and aim to protect and build it over time. Reparation for Aboriginals must take the form of additional rights, be they constitutional or implemented through an ordinary piece of legislation.

Should these additional rights for Aboriginal peoples be made through the constitution they would still be subject to the justification process outlined in *Sparrow*, but the federal government would bear a greater burden of justification for infringement on Aboriginal cultural rights. Of course, constitutional amendments are inherently divisive and time-consuming. Legislation with the same effect in mind could bypass these legal realities, but of course has the downside that it could be relatively easily amended or repealed in the future. Whichever way would be the most prudent to grant

²⁶⁶ It may be difficult to quantify an amount of money or other remedy that will be appropriate to compensate for a loss of culture. "Amorphous ideas such as sovereignty, dignity, personhood and liberty are incapable of uniform valuation [However] This objection should carry little weight. Judges and juries calculate non-quantifiable damages all the time The cy pres doctrine in trust law and commercial law, for example, allows such inexactitude. If named trust beneficiaries are absent, a court will determine alternative beneficiaries The courts will attempt to achieve the goals of the law to the extent possible, accepting a certain level of misallocation." Matsuda, "Looking to the Bottom", *supra* note 169 at 386.

Aboriginal peoples greater cultural protections in the Canadian legal context, an outline of methods by which these protections may be implemented will follow below.

Protection of minority culture has already been dealt with at length in Canada in the collective rights minority language education cases. In *Mahé v. Alberta*²⁶⁷ and *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)*,²⁶⁸ minority groups argued that rights to institutions were critical to the survival of their communities. The Court in *Mahé* noted that

reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49:

Language is not merely a means or medium of expression; it colors the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity.

Similar recognition was granted by the Royal Commission on Bilingualism and Biculturalism ...

Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture ...

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.²⁶⁹

²⁶⁷ *Mahé v. Alberta*, [1990] 1 S.C.R. 342 [*Mahé*]. This case concerned Francophones in Alberta who desired a French-language education for their children. The Supreme Court introduced the idea of a sliding scale for minority French language education where, for example, with a certain number of children schools might be required to provide classrooms and programs in French. In areas with a greater number of people desiring a French education construction of an entirely new school might be warranted.

²⁶⁸ *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)* (2001), 56 O.R. (3d) 505 (C.A.).

²⁶⁹ *Mahé*, supra note 267 at 32-33.

The Charter protects minority French language rights in provinces where it is not spoken by the majority population. This has in part led to judicial recognition that some institutions are open to special influence by minority communities. In *Lalonde*, as pointed out by Joseph Eliot Magnet, sociologists gave evidence as to the importance of a French language hospital to a Franco-Ontarian community.²⁷⁰ Aboriginal schools, or schools where Aboriginal curriculum is emphasized, could act as such a cultural hub for Aboriginal communities. The creation of such schools, or specialized school curriculum, would be an appropriate group-focused mode of reparation that, coupled with legal protections for existing Aboriginal culture, could aid in the rebuilding of Aboriginal culture.²⁷¹ Unlike the Aboriginal school settlement's common experience cash payments meant to compensate for experiences endured at the schools, or the Truth and Reconciliation Commission which affords survivors a venue in which to discuss the emotional trauma they experienced and continue to experience (and hopefully find some self-healing in that act of receiving public recognition), promotion of Aboriginal curriculum in Aboriginal-focused schools would offer a starting point for a real solution for Aboriginal cultural loss. It would not focus on the past, but on the future. It would attempt to impart culture, through teachings on language, art, and beliefs, to Aboriginal children that they might not receive otherwise. In doing so, these schools might offer Aboriginal children above and beyond what was originally offered to them at the

²⁷⁰ Magnet, *supra* note 221 at 184.

²⁷¹ Since the 1970's there have been several major agreements between the federal government and Aboriginals that provide for Aboriginal language education rights. The James Bay and Northern Québec Agreements grant such rights to James Bay Cree and Inuit groups. James Bay Inuit have invoked exclusive Inuktitut instruction in primary schools, and James Bay Cree have made Cree the primary language of instruction at the same level. Marianne Ignace & Ron Ignace. "Canadian Aboriginal Languages and the Protection of Cultural Heritage" in Catherine Bell & Val Napoleon, eds. *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 417 at 428.

beginning of the residential school project nearly two centuries ago: a practical education that would allow them to operate within western society if/when they should choose to and a meaningful education in Aboriginal-Canadian culture.

This form of reparation for lost culture is appropriate because it is a group-focused award. It is a kind of award that cannot be envisioned by our traditional individual-loss oriented tort system; instead it is an award that addresses a group-oriented loss, i.e. culture, with a group-oriented remedy. The importance of language to culture, and giving administrative control of culturally sensitive institutions to the people who use them is clear in both *Mahé* and *Lalonde*. While s. 23 of the Charter guarantees minority language education rights to French speaking communities outside Québec (where numbers warrant), s. 35(1) is aimed at protecting Aboriginal communities and culture.²⁷² The cultural protective needs of Aboriginal communities in Canada are no less important than the protective needs of Francophones outside Québec, and indeed they are likely more-so in need of protection. Like Francophones, Aboriginals need institutions over which they have administrative influence or control so as to ensure that these institutions are reflective of their own culture.²⁷³ The most important type of institution where promotion of Aboriginal cultural values is needed is in the schools, as was originally identified nearly two centuries ago. Just as residential schools were targeted at

²⁷² A problem that may face culturally-relevant education in many Aboriginal communities is that of a small number of children, such that numbers will not warrant a school offering adequate Native programming. The Dakota Tipi, Long Plain, and Sioux Valley Aboriginal groups in Manitoba, and Bear River in Nova Scotia, for example, cannot currently support community schooling, and must send their children off-reserve. Other communities may be large enough to support their own schools, but may not have the resources to organize Native education programs. Binda points out that "Even some larger bands ... have not developed full school systems controlled by the communities. The children attend nearby provincial schools ... With this type of dispersal of pupils, control, participation and, of course, quality of education, may suffer. K.P. Binda, "Decentralization and the Development of Aboriginal Education Systems: New Genesis" in K.P. Binda & Sharilyn Calliou, eds., *Aboriginal Education in Canada: A Study in Decolonization* (Toronto: Canadian Educators' Press, 2001) at 52.

²⁷³ Magnet, *supra* note 221 at 193.

destroying Aboriginal culture, so must schools with Aboriginal curriculum, and under at least some degree of Aboriginal administrative control, be targeted at re-building Aboriginal culture.

Because language is the principal instrument of cultural transmission, its protection and promotion, in areas where there are sufficient numbers and concentration of interested speakers, is of paramount importance.²⁷⁴ The best place for forwarding this cultural interest is within schools where children may be targeted. Coupled with home-use, and giving a language value in everyday usage, struggling languages may thrive.

In order to preserve Aboriginal language and culture through education at school, Band councils and the Aboriginal community at large must become involved in setting curriculum so that Aboriginal values may come through in the instruction.²⁷⁵ By incorporating these values, an Aboriginal-focused education will promote self-esteem and

²⁷⁴ It seems natural that, as is the case with French-language schools outside Québec, Aboriginal language schools (whether they be operating as an immersion program, or a school offering at least some degree of Aboriginal curriculum) be established only where numbers warrant. It may also be problematic that Aboriginal language programs established in areas with significant biculturalism and acculturation pressures may not be successful. This, not only because of pressures from outside culture(s), but because, where numbers do not warrant such a program, its validity and authenticity may come into question: "Although the presence of traditional Aboriginal cultural practices may have a place in literary programs located in a First Nation community, the inclusion of such practices may not be considered authentic in a predominately non-native community." See Debra Diane Hauer, *"That's how people learn. It's through the connection": Collaborative Learning in an Aboriginal Adult Literacy Centre* (M.Ed. Thesis, University of Ottawa, 2008) [unpublished] at 116.

²⁷⁵ For example, on curriculum, Elizaberh A. Piwowar suggests that Aboriginal views must be emphasized. Where possible, Aboriginal-authored materials should be used. "Values and experiences portrayed should be compatible with Native culture and Native experience. If they are not, the teacher must be sure to explain, and interpret. If communities choose to follow provincial curricula, teachers must be prepared to make 'foreign' material meaningful. Even though *Romeo and Juliet* is set in Italy, many Native students have experienced family feuds, and could be led to look at modern day parallels." Teachers must also be cognizant of how to organize deadlines and foster classroom relations. In Aboriginal culture, it is considered wrong to outdo one's peers, and as such competitiveness is frowned upon, and is a deemed strategy if employed by teachers. Aboriginals also have a different concept of time, and as a result students work best with topical/unit deadlines, as opposed to day/date deadlines – "The right time for something in Native culture is when everyone is ready." See Elizabeth A. Piwowar, *Towards a Model for Culturally Compatible Native Education* (M.A. Thesis, University of Calgary, 1990) [unpublished] at 146, and 129.

give students a holistic education that will serve them in their everyday lives²⁷⁶ When training teachers to provide education to Aboriginal students, and particularly teachers from outside the community, it is important that these teachers come to live within the Aboriginal community and understand its values, so as to be able to work with them and impart them to schoolchildren²⁷⁷ In addition to teaching professionals, in a school centred at least in part on Aboriginal-sensitive teaching, Band councils may decide to involve elders and community members Aboriginal society is more organized along familial and communal lines than mainstream western society, and this type of organization is reflected in the way in which teaching is traditionally achieved²⁷⁸ This is part of the reason why residential schools were particularly detrimental to Aboriginal children Certainly an education in reading, writing, and mathematics is to be greatly valued, but the style in which it was taught was not conducive to Aboriginal learning²⁷⁹

²⁷⁶ Chandler and Lalonde have concluded that Aboriginal youth who are more secure in their sense of cultural-self are dramatically less likely to commit suicide than youth who experience their culture as being “marginalized the trustworthy ways of one’s community are criminalized, legislated out of existence, or otherwise assimilated” The authors examined 197 Bands in British Columbia from 1987 to 2000, and ranked them for six markers of cultural continuity (1) whether the Band had achieved a degree of self-government, (2) litigated for Aboriginal title to land, (3) gained some degree of control over health, (4) education, and/or (5) policing services, and (6) created community facilities for the preservation of culture The results of their study reveal that the more of these factors that were present in a community, the less likely it was to have youth suicides Michael J Chandler & Christopher E Lalonde, “Cultural Continuity as a Protective Factor against Suicide in First Nations Youth” (2008) 10 *Horizons Policy Research Initiatives* 68 at 70-72

²⁷⁷ Piwowar points out that, in many cases, incoming teachers may work in Aboriginal communities for years without learning Aboriginal values, or the way of the community Even in isolated Aboriginal communities, teachers have a tendency to group together socially, as opposed to engaging the larger community Piwowar, *Towards a Model for Culturally Compatible Native Education*, *supra* note 275 at 111

²⁷⁸ One residential school student describes how he learned prior to entering formal school “If I did something wrong, my grandfather would tell me a long story, and I would figure out for myself its meaning and what it told me about what I had done [my grandmother] was always teaching She’d cook wonderful things and tell me why it was so important to have respect for everything on earth that feeds us” This quote may appear to refer more to the teaching of basic morals than the components of a formal education, however, it does reflect the type of communal teaching styles that are best effective for Aboriginal students See Law Commission of Canada *Restoring Dignity Responding to Child Abuse in Canadian Institutions* (Ottawa Public Works and Government Services, 2000) at 64

²⁷⁹ Educators need to target Aboriginal learning styles and strengths in an attempt to effectively transmit education to students, including both education that is specific to native culture, as well as western

Aboriginal children need an education that is taught by a number of different people, as well as reinforced at home. When the community becomes part of the school, it can truly come to own it. When the band council and community involve themselves in the establishment and curriculum setting in schools, and there is communication and partnering between the community and school professionals, schools themselves can become effective institutions of education and cultural transmission.²⁸⁰

Lack of education is the most significant roadblock for Aboriginals seeking to attain socio-economic equality in Canada.²⁸¹ In addition to a chance for better-paying

education (e.g. science and mathematics). Hodgson-Smith notes that Aboriginal students learn best through observation and interpretation of visual materials. According to academic studies, Aboriginal students score lower than average on tests measuring verbal ability, but above average in tests of perceptual analysis, motor skills, and visual discrimination. The author posits that Aboriginal student 'spatial skills were supported by cultural factors and that students of all ages held strong image memory.' Kathy L. Hodgson Smith, "Issues of Pedagogy in Aboriginal Education" in Marlene Brant Castellano, Lynne Davis, & Louise Lahache, eds., *Aboriginal Education: Fulfilling the Promise* (Vancouver: UBC Press, 2000) 156 at 159-160.

²⁸⁰ Piwowar stresses the importance of communication and cooperation between schools and the community at large. If teachers do not feel as though they are part of the decision making process, the relationship between the two groups may become strained and adversarial. Should a power imbalance tip the other way, band councils risk having their power reduced to a rubber-stamp function. Some bands may require significant training from other established bands, or other institutions, before beginning to control their own schools. Piwowar, *Towards a Model for Culturally Compatible Native Education*, *supra* note 275 at 114.

²⁸¹ Horowitz explains the situation succinctly, saying that a colonized group must "demand preferences in education, employment, or business. An indigenous group deserves preferential treatment if it is backwards, for otherwise the 'sons of the soil,' at the mercy of immigrants who prefer their own people, will be 'dispossessed in their own country.'" Donald L. Horowitz, *Ethnic Groups in Conflict* (Los Angeles: University of California Press, 1985) at 213-214. A bicultural education would allow Aboriginals to operate within wider Canadian society, should they choose to do so. In addition to providing Aboriginals with a better education, an improved educational system would also aid Aboriginals in moving beyond what Tom Flanagan describes as the ongoing fallacy in contemporary Aboriginal policy, which, according to him, focuses on land as a source of wealth. Flanagan argues that the primary focus of contemporary policy is aimed at land claims and land rights, as if the land that settlers took from Aboriginals is still the key to their future wealth. Although much of Flanagan's writing is controversial, he is correct in saying that EuroCanadians do not hold the key to the improvement of Aboriginals. It is true that the federal government has the power to make available to Aboriginals self-government, education rights, language rights, etc., however, Aboriginals, like any group, must draw from within in order to find self-worth and financial success. This is important because, as also pointed out by Flanagan, the majority of resource royalty agreements Aboriginal groups are currently bargaining for concern resources that are finite. Just as a non-bicultural education (or no effective education at all) will stunt Aboriginal Canadians from operating within wider Canadian society, so will financial dependency on resource royalties. Gordon Gibson, *A New Look at Canadian Indian Policy* (Vancouver: Fraser Institute, 2009) at 123. Using the example of one resource-rich Aboriginal group in Alberta, Flanagan evidences that while some members of the group have

jobs, recent analysis has shown that Aboriginal peoples who are more educated and affluent are more aware of their Aboriginal culture and more likely to participate in culturally relevant activities.²⁸² Increased education and the economic benefits it brings (e.g. a sense of self-worth gained through meaningful employment) are also connected to better health and well-being.²⁸³ According to the United Nations

Access to and completion of education is a key determinant in
the accumulation of human capital and economic growth. Educational

become well off, the majority remain welfare-dependant with associated social problems. Says Flanagan, “Royalties bought new houses and pickup trucks for the residents, but few ever became self-supporting wage earners.” He also comments that “Ownership of resources may produce some royalty flow ... ; but unless the rentiers acquire the skills and attitudes – the human capital – needed in a modern economy, the royalties will quickly be dissipated.” It might be argued here that Flanagan is missing the point of Aboriginal interest groups, i.e. if Aboriginals are legally entitled to these resource rights then who is anyone else in Canada to deny them what is rightfully theirs? Canada itself is a relatively resource-dependent country in terms of natural resource exports, and in any case an influx of money could be used to fund education and employment programs in Aboriginal communities. Whatever the outcome of this debate, Flanagan has noted an important fact in highlighting that education and ingenuity are the true keys of development. Tom Flanagan, *First Nations? Second Thoughts*, 2nd ed. (Montréal: McGill-Queen’s University Press, 2005) at 184.

²⁸² Note that this analysis was of urban Aboriginal people only. *Urban Aboriginal Peoples Study (Main Report)* (Toronto: Environics Institute, 2010) at 57. When asked what post-secondary education had done for them, one respondent replied “What did it not do? It got rid of my inferiority complex, better economic position, improved social status position ... I stopped tolerating abuse, and people saw my resiliency and determination.” *Ibid.* at 122. A debate as to whether to teach Aboriginal students about their native culture in schools at all ignited in Australia in 2006, when then Federal Education Minister Julie Bishop endorsed a report saying that teaching Aboriginal culture in school “prevents Aboriginal children making progress.” The report’s author, then Labor Party Minister Gary Johns, doubted whether “... a culture that is pre-literate and pre-numerate [could] survive in an education system that is meant to make children literate and numerate ...” The report, and its official endorsement, stirred a great deal of controversy, particularly from those who argued that a strong sense of culture and self actually makes Aboriginal students “stronger ... socially, emotionally and mentally better equipped for educational attainment.” The curriculum was not dropped as the report suggested, but it is interesting to note that even in the modern-day, and even in a country with an Aboriginal experience like Australia’s, old-world attitudes may prevail, even in the top echelons of government. Geoff Maslen, “Move to ban Aboriginal culture” *The Times of London Educational Supplement* (7 July 2006), online: Times Educational Supplement <<http://www.tes.co.uk/article.aspx?storycode=2259422>>.

²⁸³

Aboriginal and non-Aboriginal Labour Market Outcomes, 2006			
	Participation Rate	Employment Rate	Unemployment Rate
Non-Abor. population	66.9	62.7	6.3
Abor. population	63.0	53.7	14.8
On-reserve	52.2	39.3	24.7
Off-reserve	66.6	58.4	12.2

Andrew Sharpe et al., *The Effect of Increasing Aboriginal Educational Attainment on the Labour Force, Output and the Fiscal Balance* (Ottawa: Centre for the Study of Living Standards, 2009) at 19.

outcomes also extend beyond individual and national income. Education is a force that develops well-rounded and engaged citizens, and builds more cohesive and participatory societies.²⁸⁴

Education for Aboriginal people can also be a fertile ground for transmission of culture.²⁸⁵ But for education to be effective, both in terms of providing quality instruction for Aboriginal students and transmitting culture, a quality framework is required. This is seriously lacking in Canada. A precedent already exists in mid-twentieth century Québec schools. Prior to the 1960's Québec schools may have been doing a good job of transmitting culture: however, dropout rates were extremely high, and graduating students were not matching the academic attainments of students from English Canada.²⁸⁶ This changed dramatically during the province's quiet revolution, which included large investments in public education, and creation of a Ministry of Education.²⁸⁷

The Aboriginal education system in Canada, or perhaps more accurately the lack thereof, needs to be overhauled just as Québec successfully overhauled its system a half-century ago. The *Indian Act, 1876* established the Department of Indian Affairs as the curator of Aboriginal education, overseeing and providing schools for Aboriginal children. The Hawthorne report white paper in 1967 recommended the repeal of the

²⁸⁴ UNESCO Institute for Statistics, *Financing Education – Investments and Returns (2002 Edition) Executive Summary*, online: Organization for Economic Co-operation and Development < http://www.uis.unesco.org/TEMPLATE/pdf/wei/WEI_ExecSummary_Eng.pdf > at 5.

²⁸⁵ According to Richards, "Education from Kindergarten to grade 12 is about transmission of culture." Richards, *Culture Matters* ... article, p. 260. However, it is also noteworthy that in a recent survey of urban Aboriginals it was found that most participants did not "learn about Aboriginal people, history and culture in elementary and high school, and it is not until the post-secondary level that they recall learning about their culture in any measure." Despite this, only 38% stated that they were concerned about losing their Aboriginal cultural identity. *Urban Aboriginal Peoples Study (Main Report)* (Toronto: Environics Institute, 2010) at 67 and 117.

²⁸⁶ John Richards, "Culture Matters, but ... Explaining Trends among Urban Aboriginal Peoples" in Keith Banting et al., eds. *Belonging? Diversity, Recognition and Shared Citizenship in Canada*, vol. III (Montréal: The Institute for Research on Public Policy, 2007) 247 at 260.

²⁸⁷ Until this time most Québec public schools were church-operated.

Act's education sections, and suggested transferring administration of Aboriginal education to the provinces. In 1972 Aboriginal groups made their own recommendation in a position paper titled "Indian Control of Indian Education".²⁸⁸ The federal government accepted the recommendations of the Aboriginal groups, and the responsible Department (Indian and Northern Affairs Canada, or INAC) began to transfer administrative responsibility of on-reserve schools to Band Councils. As a result, the structure that persists today is that the Department funds Band Councils and First Nations educational authorities to provide education to students; however, the Department has retained authority over pedagogy and the setting of curriculum.

The main ongoing problems with the current system of Aboriginal education are that: (1) it is under-funded, and (2) it does not allow flexibility for culturally relevant Aboriginal curriculum in its delivery. The result is that the system has a dismal track record of success. According to the 1996 census approximately 60% of on-reserve Aboriginals aged 20-24 had not completed high school or an equivalent diploma program, and these numbers were unchanged in 2001 and 2006.²⁸⁹ With regards to the first problem – funding – the federal government's current policy to fund Aboriginal schools to per-student levels comparable with provincially funded schools is fallacious.²⁹⁰

²⁸⁸ The paper in part stated that "“Unless a child learns about the forces which shape him: the history of his people, their values and customs, their language, he will never really know himself or his potential as a human being.” “Indian Control of Indian Education”, online: Assembly of First Nations < <http://www.afn.ca/article.asp?id=830>>.

²⁸⁹ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Ottawa: Caledon Institute of Social Policy, 2008) at 1.

²⁹⁰ The Hon. Jim Prentice confirmed the comparable funding index in 2007 before a Standing Committee on Aboriginal Affairs and Northern Development. He stated "The dollars that are being expended are, in total, expended on about 125,000 children in schools. If you do the math, you'll see that this works out to something in the neighbourhood of \$10,000 per student ... The comparison that many people make is to what is being spent in the provincial school system. It is roughly comparable ... By and large it is a fair comparable expenditure." Hon. Jim Prentice, "39th Parliament, 1st Session: Standing Committee on Aboriginal Affairs and Northern Development, Evidence (29 May 2007), online: House of Commons

According to the Auditor General's 2004 report as of 2001 population percentages for those over age 15 with a high school diploma were 68.7% and 41.4% for the overall Canadian population and First Nations population respectively.²⁹¹ It was further estimated that it would take at least 28 years to close this gap (up from an estimated 23 years in 2000).²⁹² But in order to catch-up to national levels, spending on Aboriginal education needs to be increased, not matched with provincial funding levels.²⁹³ In a recent survey of 240 Aboriginal educational administrators only 18% believed that students from their schools could transfer into comparable grades in provincially funded public schools, and in fact most students on on-reserve schools were found to be an average of 2 grades behind their age-expected attainment when compared to provincial counterparts.²⁹⁴ In order for Aboriginal students to catch up to the country at large,

<<http://www2.parl.gc.ca/committeebusiness/CommitteeHome.aspx?Cmte=AANO&Language=E&Mode=1&Parl=39&Ses=1>>.

²⁹¹ *Report of the Auditor General of Canada to the House of Commons, 2004* (Ottawa: Office of the Auditor General of Canada, 2004) at 10.

²⁹² *Ibid.*

²⁹³ At this point some might critique the idea of increased funding. Frances Widdowson has become a voice for those opposing increased funding to Aboriginals, arguing that an industry forwarded by lawyers, bureaucrats, and academics has sprung-up around Aboriginal issues who, combined, advocate a return to some sort of pre-contact society. As will be shown here, increased funding is warranted for Aboriginal education, albeit with increased oversight and (provincial) government involvement in the delivery of that education until First Nations communities reach the point where they can effect it themselves. Widdowson and Howard also argue that restoring old Aboriginal rights (e.g. fishing) holds Aboriginals back, and will not help them deal with the modern world. They go on to claim that "The simplistic logic that dysfunction results from low self-esteem – and that some manufactured sense of "cultural pride" will overcome these predicaments – has detrimental effects on many levels of government policy and public attitudes towards native people. The Aboriginal industry advocates subsistence practices and the retention of tribal values ... However, reverting to past practices cannot provide anyone with the resources to meet with present or future challenges; at best, it is a mechanism for avoidance." The real argument for positive Aboriginal rights, misconstrued by Widdowson and Howard as a throwback to irrelevant tribal rights, must be pursued from the premise that Aboriginal culture is inherently valuable, and an important and necessary starting point for building one's self-identity (which itself is inherently valuable in providing a basis for becoming a productive citizen). Frances Widdowson & Albert Howard, *Disrobing the Aboriginal Industry: The Deception behind Indigenous Cultural Preservation* (Montréal: McGill-Queens University Press, 2008) at 77.

²⁹⁴ Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Ottawa: Caledon Institute of Social Policy, 2008) at 6. According to a 2005 investigation by the Department of Indian and Northern Affairs "Youth themselves believe education requirements within the reserve school are 'too slack' and reported that making the transition to an off-reserve school or post-

clearly defined principles which will allow for gains to be made need to be set out.

Equality of funding will only help to close this gap if equality is taken to mean equal long-term quality of education, as opposed to equality of dollars spent.

In order to make additional funding effective, the management structure of Aboriginal schooling needs to be reworked. The current system lacks centrality: individual First Nations schools are managed by their own individual Band Councils. These Councils have varying degrees of experience in delivering education, and with an average of less than 1,000 residents per reserve, most Councils have very limited resources with which to provide a quality system of education. In 2007 then Minister of Indian Affairs and Northern Development Jim Prentice commented before a Parliamentary Standing Committee that

The biggest challenge with the education system, I would submit, is not the dollars per se; it is rather the absence of an overall school system that individual schools are part of. Previous governments have created a system in this country where individual First Nation schools are one-off schools operating outside any school system. It's fair to say that it's not working very well. We are achieving the lowest educational outcomes certainly anywhere in Canada, and amongst the lowest in any western democracy, from this approach.²⁹⁵

As of 2006 there were sixteen informal alliances formed between various Band Councils to share educational resources and curriculum. These associations, as well as individual

secondary education can be difficult if the quality of on-reserve education is poor. *The Landscape: Public Opinion on Aboriginal And Northern Issues*, online: Indian and Northern Affairs Canada <<http://dsp-psd.pwgsc.gc.ca/Collection/R1-23-2005E.pdf>> at 39. It is also important for Aboriginal high school students to attend one school during their high school career, or at least as few schools as possible. According to a 2008 survey the highest Aboriginal high school completion rate (56.4%) was achieved by the 31.3% of Aboriginal students who did not change high schools. This underlines the importance of continuity of quality education. Cheryl Aman & Charles Ungerleider. "Aboriginal Students and K-12 School Change in British Columbia" (2008) 10 Horizons Policy Research Initiatives 31 at 32.

²⁹⁵ Hon. Jim Prentice, "39th Parliament, 1st Session: Standing Committee on Aboriginal Affairs and Northern Development, Evidence (29 May 2007), online: House of Commons <<http://www2.parl.gc.ca/committeebusiness/CommitteeHome.aspx?Cmte=AANO&Language=E&Mode=1&Parl=39&Ses=1>>.

schools operated by individual Bands, have had varying degrees of success. The Cree school board in northern Québec created as part of the James Bay settlement in 1975 serves 3,000 students in nine communities, and is often cited as a successful venture: however, dropout rates from 1992 to 1998 were measured at 88%.²⁹⁶ Like other boards, the Cree organization struggles to adapt provincial curriculum for Cree students. More success may be had in B.C., where in 2007 the provincial government passed the *First Nations Jurisdiction over Education in British Columbia Act*²⁹⁷ which creates a First Nations Education Authority that in the future may bear the responsibility for setting curriculum and delivering education to participating schools in First Nations communities. The province is now required to consult with participating First Nations communities before changing education policy in a way that materially affects delivery of education in a First Nations community. According to the then-Minister the Act “creates a system that will be managed by First Nations in British Columbia and it will be culturally-tailored and respect language and traditions, while meeting provincial standards.”²⁹⁸ Similar legislation has also been enacted in Nova Scotia under the *Mi’kmaq Education Act*²⁹⁹ passed in 1999, while the 1998 Nisga’a Treaty in B.C. gave that group substantial control over delivering education to its young people.

Despite these individual gains, and whatever successes may be had by individual First Nations schools, on whole the lack of a comprehensive system for first Nations education is harming the educational outcomes of Aboriginal youth. Recognizing the lack of an overall management system of education for Aboriginals, the Royal

²⁹⁶ Mendelson, *Improving Education on Reserves*, *supra* note 294 at 10.

²⁹⁷ S.B.C. 2007, c. 40.

²⁹⁸ “First Nations Jurisdiction Over Education in British Columbia Act Receives Royal Assent”, online: Indian and Northern Affairs Canada < <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2006/2-02830-eng.asp>>.

²⁹⁹ S.N.S. 1998, c. 17.

Commission on Aboriginal Peoples in its 1996 report recommended the creation of a national-level governing body with national authority over First Nations education. The Report recommends a four-part organizational structure culminating in a national Aboriginal group negotiating educational policies with the provinces, and administering Aboriginal educational institutions either in partnership or independently of the provinces.³⁰⁰ The Report envisions Aboriginal groups being capable of

... establish[ing] education authorities to make policy on education goals and standards, the administration of community schools, tuition agreements and purchase of provincial or territorial services. Some nations will be able to develop infrastructure for autonomous policy development, access to specialist services, hiring of personnel, training and professional development of educators, curriculum development and research. Some will want to join with other nations to carry out these functions ...³⁰¹

On the importance of culturally relevant education delivery, the Report emphasizes that

Aboriginal people are determined to sustain their cultures and identities, and they see education as a major means of preparing their children to perceive the world through Aboriginal eyes and live in it as Aboriginal human beings. Aboriginal education therefore must be rooted in Aboriginal cultures and community realities. It must reinforce Aboriginal identity, instil traditional values, and affirm the validity of Aboriginal knowledge and ways of learning.³⁰²

The Report envisions what is needed: a national management body overseeing education in First Nations communities. Delivery, i.e. curriculum, must be provided in a way that is culturally relevant, and is cognizant of Aboriginal forms of traditional learning so that materials may be taught in a way that Aboriginal children are able to understand and appreciate. According to the Auditor General's 2000 report First Nations expressed

³⁰⁰ Government of Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996), online: Indian and Northern Affairs Canada <http://www.collectionscanada.gc.ca/webarchives/20071211052946/http://www.ainc-inac.gc.ca/ch/rcap/sg/si54_e.html>.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

major concern over lack of culturally relevant educational delivery, including “chronic shortages of qualified teachers for native language instruction and native studies, lack of culturally appropriate curricula and funding shortfalls.”³⁰³ The report notes the

Department’s inability to deliver effective education to Aboriginal peoples, saying:

Indian and Northern Affairs Canada cannot demonstrate that it meets its stated objective to assist First Nations students living on reserves in achieving their educational needs and aspirations. For example, the Department does not have the necessary assurance that First Nations students are receiving culturally appropriate education. Moreover, the progress in closing the education gap for Indian students living on reserves has been unacceptably low.³⁰⁴

It may appear a lofty goal, but what has been evidenced in Aboriginal educational programming thus far is that a minority of students are able to grasp western-style education when delivered through western-style methods. A national educational body, created through federal legislation, would help First Nation communities to centralize and share resources for education delivery, and ultimately improve the educational outcomes of Aboriginal students.

7.0 LANGUAGE

³⁰³ *Report of the Auditor General of Canada to the House of Commons, 2000* (Ottawa: Office of the Auditor General of Canada, 2000) at 4.47. Within schools, it is notable that, according to a 2005 survey, 44% of on-reserve Aboriginals would prefer the use of traditional approaches to teaching language (e.g. elders and cultural activities) as opposed to a mixed approach of traditional approaches and modern multimedia methods (38%) or just using modern multimedia methods (14%). *The Landscape: Public Opinion on Aboriginal And Northern Issues*, online: Indian and Northern Affairs Canada <<http://dsp-psd.pwgsc.gc.ca/Collection/R1-23-2005E.pdf>>.

³⁰⁴ *Report of the Auditor General of Canada to the House of Commons, 2000* (Ottawa: Office of the Auditor General of Canada, 2000) at 4.1. When the Department was audited again in 2004, the results were no better. The Auditor General noted that there were serious weaknesses in Department oversight of Aboriginal education. Effectively, most government bureaucrats saw the Department’s role as funding Band Councils to provide education, without seeing any responsibility or necessity to aid in the actual delivery of that education (s. 5.65-5.69). The 2000 report also noted serious funding inequities for various Band Councils: “Aboriginal people are determined to sustain their cultures and identities, and they see education as a major means of preparing their children to perceive the world through Aboriginal eyes and live in it as Aboriginal human beings. Aboriginal education therefore must be rooted in Aboriginal cultures and community realities. It must reinforce Aboriginal identity, instill traditional values, and affirm the validity of Aboriginal knowledge and ways of learning.” *Report of the Auditor General of Canada to the House of Commons, 2000* (Ottawa: Office of the Auditor General of Canada, 2000) at 5.72.

It is likely that there is no one factor more central to the idea of culture, than language. When Aboriginal children in Indian Residential Schools were prohibited from speaking their mother tongue, their sense of identity was severely damaged. The result has been a psychological disorientation and spiritual crisis for IRS children, as well as their descendents. In its 1996 Report the Royal Commission on Aboriginal Peoples emphasized that language is

.. the principal instrument by which culture is transmitted from one generation to another, by which members of a culture communicate meaning and make sense of their shared experience Because language defines the world and experience in cultural terms, it literally shapes our way of perceiving – our world view.³⁰⁵

To a large extent, language *is* culture³⁰⁶ The residential schools' mandate to strip Aboriginal children of this cultural heritage and tool for cultural transmission was a pointed one In order to grant Canadian Aboriginals effective reparations for damage to their language, it is fitting that the government take steps to protect and promote it. The current status of many Aboriginal languages is dim According to a 1996 census, while 800,000 people reported Aboriginal identity, only 207,000, or 26%, said that an Aboriginal language was their mother tongue.³⁰⁷ Only 145,000 (18%) of the cumulative total reported an Aboriginal language as being the primary language spoken at home, although 233,000 (30%) reported that they could understand and speak an Aboriginal

³⁰⁵ Government of Canada, *Report of the Royal Commission on Aboriginal Peoples Gathering Strength*, vol 3, supra note 300 at 602

³⁰⁶ Handler, commenting on the curious link between Québécois language culture, comments that "To be Québécois is to act Québécois As an illustration of this cryptic formulation, consider the example of language language – the fact of speaking French – is the one element of Québécois culture that people invariably specify Yet they see language as more than behaviour As the example of language shows, Québécois behavior is more than behaviour it is the manifestation of an inner essence that is physical as well as spiritual Richard Handler, *Nationalism and the Politics of Culture in Québec* (Madison, Wisconsin University of Wisconsin Press, 1988) at 38

³⁰⁷ Norris, M J & L Jantzen "Aboriginal Languages in Canada's Urban Areas Characteristics, Considerations and Implications" in David Newhouse & Evelyn Peters, eds , *Not Strangers in These Parts Urban Aboriginal Peoples* (Ottawa Policy Research Initiative, 2003) at 94

language well enough to carry on a conversation.³⁰⁸ It is likely that only three of Canada's remaining 50 Aboriginal languages have a large enough speaking population to be considered secure: Inuktitut, Cree, and Ojibwe (all of which have a speaking population of over 20,000).³⁰⁹

Critical to the survival of any language is proliferation of its use by young people. Aboriginal languages that have a better chance of survival are used by those groups that have members who, comparatively, will be slower to age. For example, Inuktitut speakers aged on average from 23 to 24 from 1981-1996, while Cree speakers on average aged from 26 to 30.³¹⁰ In contrast, languages that became increasingly endangered during the same years, including Kutenai and Tlingit, had speakers that on average increased in age from 44 to 52 and 47 to 58 respectively.³¹¹ However, for some Aboriginal languages with smaller bases, research has shown that while these languages might not be the primary home language or mother tongue of the relevant group, young people in that group may still have gained the ability to speak it as a second language. For example, Kutenai, an endangered Aboriginal language, is spoken as a mother tongue by an older generation (average age 52), but is understood by a significant portion of a younger generation (average age 37).³¹² Language continuity is also closely tied to demographics. Aboriginal individuals in cities are much less likely to speak an

³⁰⁸ *Ibid.*

³⁰⁹ Mary Jane Norris, "Canada's Aboriginal Languages" (1998) Canadian Social Trends 8 at 10.

³¹⁰ Norris, "Canada's Aboriginal Languages", *supra* note 309 at 14.

³¹¹ *Ibid.*

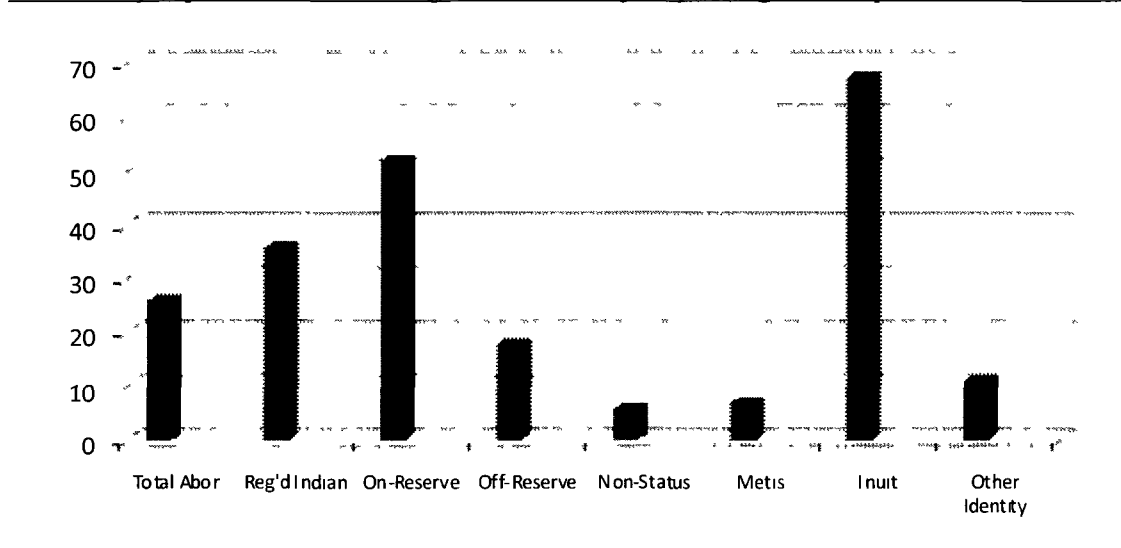
³¹² Norris & Jantzen. "Aboriginal Languages in Canada's Urban Areas: Characteristics, Considerations and Implications", *supra* note 307 at 98.

Aboriginal language than those on-reserve, while Inuit, arguably the most insulated Aboriginal group of all, are the most likely to speak their native tongue.³¹³

At this juncture, however, it may be prudent to inquire as to what the goal of Aboriginal language protection and promotion is. The reality is that there is power in numbers, and the less numerous and/or insular an Aboriginal speaking community is, the more likely that its members, and particularly its young people, will be influenced to move into speaking the language of the more dominant culture. According to Fishman, it is “a recurring ethnolinguistic reality that the speakers of the threatened language are mostly bilingual, almost always speakers ... [of] the mainstream language as well as (or even better than and in preference to) ‘their own’”. Finally, it is also clear that this co-territoriality and the primarily uni-directional bilingualism that it fosters is likely to persist indefinitely into the future.”³¹⁴ The mainstream language will likely present more

³¹³ Northern communities and reserves are the most likely areas for transmission of Aboriginal languages. Off-reserve or less insulated communities, presumably due to the influences of other dominant culture(s), are much more likely to house a percentage of Aboriginals lacking a native mother tongue.

% of Identity Population with an Aboriginal Mother Tongue by Aboriginal Group and Place of Residence



See : Norris & Jantzen. “Aboriginal Languages in Canada’s Urban Areas: Characteristics, Considerations and Implications”, *supra* note 307 at 99.

³¹⁴ J.A. Fishman, “Why is it so Hard to Save a Threatened Language?” in Joshua A. Fishman, ed. *Can Threatened Languages be Saved?* (Toronto: Multilingual Matters, 2001) 1 at 9.

employment, educational, and perhaps social opportunities than may be offered by the threatened language speaker's native tongue, and as such they will likely be motivated to adopt it as a second language. The end-game 'solution' is that some balance between local and global languages is desirable, i.e. a reasonable compromise that will allow native language speakers to cultivate their language and culture in insulation, while simultaneously interacting with the wider country at large through controlled interactions.³¹⁵ There is no return to a golden past where ethno-linguistic groups were clearly separated with extremely controlled and infrequent relations. Cultural and linguistic differences were easily cultivated and maintained in such a world, but that time has passed. What is needed in today's multicultural society is greater self-regulation of the aspects of culture, so that increased global cultural homogeneity may be counterbalanced by independent cultural institutions.

The immediate response is that Aboriginal language education is needed in schools. But to be truly successful and to foster a positive attitude towards one's native

³¹⁵ *Ibid.* at 7. An investigation into language preferences amongst Australian Aboriginals revealed that most wanted their children to be bilingual in English as a second language, but not to the detriment of their native Aboriginal tongue. "Regardless of the health of their community language, virtually all people that the committee spoke to were adamant that they wanted their children to gain a high level of competence in Standard Australian English ... for them to have equal access to services and employment ... However, communities did not want proficiency in English to be at the expense of the community language or culture." Austl., Commonwealth, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Language and Culture – A Matter of Survival: Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance*, (Canberra: Australian Government Publishing Service, 1992) at 32. Freedon concludes that there were neutral or positive consequences for children enrolled in an Cree immersion program from grades one to three in terms of: (1) their English language development and literacy skills, and (2) their overall academic achievement (i.e., as with children in French or English immersion programs, if children start early enough there will be no negative consequences to overall educational or language attainment as a result of being enrolled in a bilingual program). The consequences of the immersion program were determined to be: (i) high levels of oral and written Cree language ability; (ii) a neutral or positive effect on cognitive development; (iii) a positive effect on the attitude towards Cree language and culture; (iv) a better relationship with Cree family members, and; (v) a better understanding of Indian/non-Indian relations in Canada. Program success indicators were determined to be: (i) an early total immersion format; (ii) adequate Cree language resource materials; (ii) only teaching subjects in Cree where sufficient materials exist; (iii) a pool of qualified bilingual teachers, and; (iv) well-planned program management. Shirley Margaret Fredeen, *A Foundation for Cree Immersion Education* (M.Ed. Thesis, University of Saskatchewan, 1988) [unpublished] at 160-164.

tongue in individuals, successful language legislation needs to find some way to promote the language use in everyday communication.³¹⁶ The language needs to have meaning in application. It is also imperative that the language have practical application: survival as a historical note or oddity is unlikely.³¹⁷ Marianne Ignance and Ron Ignance use the example of Gaelic in Ireland as an example. In that country, Gaelic was recognized as an official language in 1919, and even with efforts to have it taught as a required course in schools, the language has all but been extinguished due to absence of its transmission in the home and community.³¹⁸ In Peru as of 1993 a number of indigenous languages were given special status as the ‘official’ language of certain zones in which their traditional speakers formed majority populations. However, likely due to lack of significant programs to make the language meaningful, Spanish remains the dominant tongue. Notably, one language that has been successfully restored – Hebrew – was enabled by the creation of a Jewish nation-state whose parliament enacted and enforced laws to make that language the language of government, schools and universities, and effectively, commerce.

³¹⁶ It is worthy to note that not all Aboriginal groups have the problem of trying to regain use of their native culture and languages through education. In coastal Labrador the converse is true, as noted by Philpott et al.: “Most aboriginal students in Canada enter school fluent in English and specific programs are set in place to reintroduce the native language. The Innu have the opposite concern, with children entering school fluent only in Innu-aimun, necessitating an instructional model that follows a late immersion into English approach.” The end result is the same, i.e. seeking an effective bicultural education for Innu children; however, the educational model has to be approached in a different way. David F. Philpott, et al., *Recommendations for an Effective Model of Innu Education: Report to the Education Steering Committee*, June 2005 (St. John’s: Memorial University, 2005) at 7.

³¹⁷ As part of the reparations program for victims of its own residential school experiment, Australia’s *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* recommended that Aboriginal language, culture, and history programs be taught at regional centres devoted to that purpose. Pritchard notes that the purpose was “to re-establish, to the extent possible, the situation that existed prior to the perpetration of gross violations of human rights.” Teaching native languages as a historical curiosity may have some value; however, it is not as valuable as a working language that is part of a ‘working’ culture. Sarah Pritchard, “The Stolen Generation and Reparations” (1998) 21 U.N.S.W.L.J. 259 at 263.

³¹⁸ Ignance, “Canadian Aboriginal Languages and the Protection of Cultural Heritage” *supra* note 271 at 427.

There are also a number of international law protections for language and culture that are worthy of note. The 1948 United Nations *Universal Declaration of Human Rights* sets out in Article 2 that its therein named rights and freedoms are guaranteed without distinction, including distinction based on language.³¹⁹ The 1966 *International Covenant on Civil and Political Rights* states that all individuals have the right to self-determination, and to freely pursue their own economic, social, and cultural development.³²⁰ The 1992 *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* sets out that states that ratify the agreement must develop legislation to protect the interests of cultural and linguistic minorities, and further states that such minorities have the right to enjoy their own culture and speak their own language without discrimination.³²¹ The 1989 *International Labour Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries* sets out that, wherever practicable, Aboriginal children should be taught to read and write in their native language, or the language most commonly used by the group to which they belong.³²² Additionally, adequate measures must also be taken to ensure that these children also receive an education in at least one of the official languages of a country. The *Declaration on the Rights of Indigenous Peoples* states that Aboriginals have the right to revitalize their languages and culture and transmit this

³¹⁹ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. Story notes that the original drafting of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 1021 (entered into force 9 December 1948) included cultural genocide as an offence; however, this was struck out in revisions made by the sixth Committee. Cultural genocide had been defined as “any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group.” Matthew Storey, “Kruger v. The Commonwealth: Does Genocide Require Malice?” (1998) 21 U.N.S.W.L.J. 224 at 228.

³²⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14.

³²¹ *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res. 47/135, UN GAOR, 47th Sess., Supp. No. 49, UN Doc. A/47/49 (1993).

³²² *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 72 I.L.O.

information to future generations.³²³ When Aboriginal cultures are threatened, countries must take reasonable steps to protect them. Of course the ‘rights’ contained in these U.N. documents are difficult to transform into real and usable change, particularly in absence of national legislation reflecting the same values and wording.³²⁴ The result, unlike the case for constitutionally protected French language rights, is that the government has “by and large ignored the existence of indigenous languages, tacitly relying on the ability of Aboriginal people to use English.”³²⁵

In Canada, the Northwest Territories’ *Official Languages Act*³²⁶ guarantees French and English language equality, as well as that of five Aboriginal languages. Nevertheless, Aboriginal language use in that jurisdiction has continued to decline, a factor that Fishman credits to the emphasis of translation of government services and documents into Aboriginal languages, as opposed to promoting actual language use through grassroots community efforts. Canadian Aboriginal languages may also have some degree of Constitutional protection in s. 35(1) of the Constitution Act, which affirms Aboriginal treaty rights. Aboriginal people have claimed, at times, that use of traditional languages was included in such original treaties.

Aboriginal language interests are also represented in some modern agreements. The James Bay and Northern Québec Agreements contain language education rights, and

³²³ *Declaration on the Rights of Indigenous Peoples*, GA Res. 295, UNGAOR, 61st Sess., UN Doc. A/RES61295 (2007).

³²⁴ Nersessian emphasizes that although the 1948 Universal Declaration on Human Rights and other U.N. agreements guarantee cultural and minority rights, these devices are inherently limited due to the “... voluntary and good faith participation of states party to the instruments themselves. Adjudicated violations (including those amounting to cultural genocide) create at most an obligation to desist from the offending practice and to pay compensation ... Those most likely to commit cultural genocide are least likely to participate in any voluntary human rights scheme.” David Nersessian, “Rethinking Cultural Genocide Under International Law”, online: (2005) 2:12 Human Rights Dialogue at para. 9 < http://www.cceia.org/resources/publications/dialogue/2_12/section_1/5139.html >.

³²⁵ Ignace, “Canadian Aboriginal Languages and the Protection of Cultural Heritage” supra note 271 at 426.

³²⁶ *Official Languages Act*, R.S.N.W.T. 1988, c. O-1.

as a result the James Bay Cree have established Cree as the primary language of education in elementary schools. Northern Québec Inuit have done the same. Coupled with home use, these languages have thrived. Similarly, the non-application of French Language Bill 101 to Aboriginal populations led to Mohawk immersion programs on reserves in that province, and their similar thriving. But despite these apparent successes, Aboriginal languages remain a much under-funded pursuit in Canada. In 2005, for example, \$160 million over 10 years was proposed for Aboriginal language promotion, yet funding for French language promotion over the same period totalled \$751.3 million.³²⁷ In Nunavut, in 2005 French speakers received \$3,902 per capita in language services funding, compared to \$44 per capita for Inuit speakers on comparable funding.³²⁸ Aboriginal language interests require legislation that recognizes the significance of Aboriginal languages (if not making them official national languages), and commitments to providing funding for real language promotion and preservation efforts within interested communities.

8.0 CONCLUSION

The Indian Residential School Policy was morally wrong because it perpetrated physical and psychological harms on the students. Aboriginal children lost touch with the society in which they had previously felt at home; yet most did not become functional or accepted in mainstream western society. As serious as the individual injuries to children may have been, Aboriginal people on whole also sustained a very serious injury

³²⁷ Ignace. "Canadian Aboriginal Languages and the Protection of Cultural Heritage", *supra* note 271 at 431.

³²⁸ *Ibid.* Of course, this may merely bolster the argument that larger numbers warrant larger cultural investments, at least where that language or culture is still in decline. This still leaves the question of whether Aboriginal language/culture is receiving adequate funding, particularly when it is accepted that the culture is in need of promotion, and has numbers to warrant that promotion.

– an injury to their culture. What was truly unjust about the residential school *policy* was not individual injury to children, but the assimilation goal which was aimed at Aboriginals as a group. The official objective of the policy was to give future generations of Aboriginals a secure place in western culture. Yet the experiment was a failure, leaving generations of Aboriginals lost between two cultures.

Culture is of immense value because it provides a solid background narrative from which individuals may understand themselves and make choices between significant rational options. Everyone needs *a* culture; but whether they need their own native culture, or any culture, may be debatable. It is entirely possible for an individual to operate effectively in more than one culture. The fact that the Indian Residential School policy failed was not due to the underlying theory of the policy itself, as offensive as it may have been. If it had worked, future generations of Aboriginals would have gained secure membership in western culture, and all would have lived harmoniously as one. The policy failed due to its very own racist tendencies. The schools were underfunded, and the education Aboriginal children were set to receive would never have truly allowed them to be ‘full’ members of outside society. The policy was also offensive, and perhaps doomed to fail, because of the violent nature by which it was executed. It is one thing to choose or even to drift into another culture, but quite another thing to be forced into it.

Canada has gone to lengths to provide reparations to Aboriginal peoples for the residential school experience and its intergenerational effects. It has provided an alternative dispute resolution process to make available money to compensate individuals for physical and psychological harms, and it has created a Truth and Reconciliation

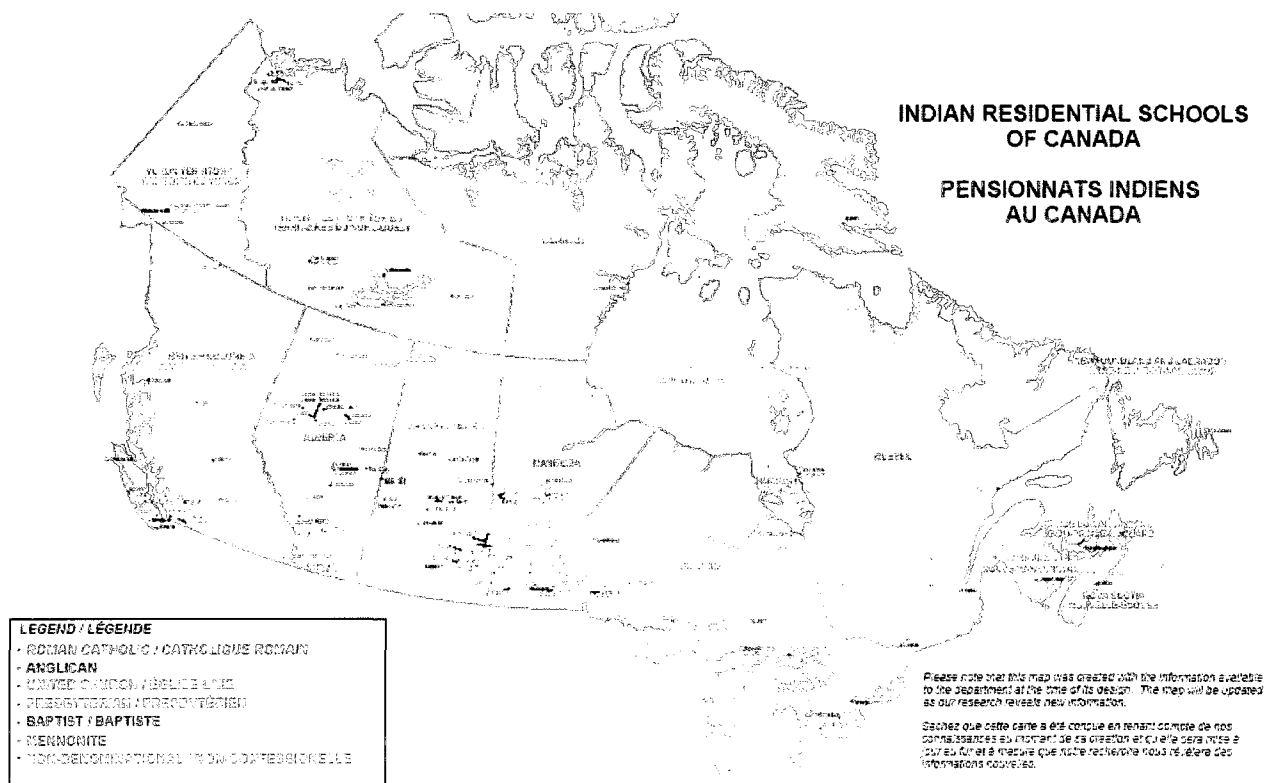
Commission as a forum for survivors to air their grievances with the schools. But what it has not done, or not done effectively, is to address the group harm, i.e. harm to culture, which was the greatest harm inflicted by the system. The settlement does not attempt to compensate for loss of culture, and Canadian courts have been unwilling or unable to do the same. Loss of culture is a novel claim, but whether it ever succeeds as a cause of action or not, the best ways in which to make reparation for this type of loss will be legislative as opposed to judicial. It is unlikely that whatever amount of culture was lost due to the schools can ever be regained. Therefore, the best form of reparation for loss of culture will be the protection and promotion of what culture remains.

It does not necessarily hold true that the government is responsible for promoting all minority cultures in a country; however, when a culture has a reasonable base of support, and when a government is itself morally responsible for an assault aimed at damaging that culture, then an obligation arises. Aboriginal organizations, most likely regional councils that oversee groups of Band Councils, need greater control of institutions that have the ability to affect and promote culture. The most effective cultural institutional base are schools for young people. Canada has already granted some degree of power over educational institutions to Aboriginal groups where numbers warrant. By expanding this base of influence by effectively training Aboriginal groups in how to provide quality education, while simultaneously ensuring that Aboriginal values providing a guiding influence in philosophy and curriculum, Aboriginal culture may flourish in areas where numbers warrant. Whereas Francophones outside Québec enjoy a specific constitutional provision protecting their education rights where numbers warrant, Aboriginal peoples have only a general reference to a federal government obligation to

honour Aboriginal treaty rights, coupled with its general fiduciary obligation. Aboriginal people would benefit from a legislative provision – preferably a constitutional one – that recognized similar rights for their own educational interests. By providing such guarantees, coupled with grassroots programming to teach Aboriginal groups how to effectively run culturally relevant institutions, the wrongs of the Indian Residential School system may be remedied.

Appendix 1

Indian Residential Schools in Canada



Nova Scotia

Shubenacadie (Roman Catholic)

Ontario

Albany Mission (Roman Catholic)
Cecilia Jeffrey (Presbyterian)
Chapleau (St. Joseph's) (Anglican)
Fort Frances (Roman Catholic)
Fort William (St. Joseph's) (Roman Catholic)
Kenora (McIntosh) (Roman Catholic)
Mohawk Institute (Anglican)
Moose Fort (Anglican)
Mount Elgin (Muncey, St. Thomas) (United Church)
Pelican Lake (Anglican)
St. Anne's (Fort Albany) (Roman Catholic)
St. Mary's (Kenora, St. Anthony's) (Roman Catholic)

Shingwauk Home (Anglican)

Sioux Lookout (Anglican)

Spanish (Roman Catholic)

Manitoba

Assiniboia (Roman Catholic)
Birtle (Presbyterian)
Brandon (United Church)
Cross Lake (St. Joseph's) (Roman Catholic)
Dauphin (McKay) (Anglican)
Elkhorn (Washakada) (Anglican)
Fort Alexander (Pine Falls) (Roman Catholic)
Guy Hill (The Pas) (Roman Catholic)
Norway House (Notre Dame Hostel) (Roman Catholic)
Norway House (United Church)
Pine Creek (Camperville) (Roman Catholic)

Portage la Prairie (United Church)
Sandy Bay (Roman Catholic)

Saskatchewan

Beauval (Roman Catholic)
Cowessess (Marieval) (Roman Catholic)
Duck Lake (St. Michael's) (Roman Catholic)
File Hills (United Church)
Gordon's (Church of England)
Lac La Ronge (Church of England)
Muscowequan (Roman Catholic)
Onion Lake (Prince Albert, St. Alban's, All Saints, St. Barnabas) (Church of England)
Onion Lake (St. Anthony's) (Roman Catholic)
Qu'Appelle (Lebret) (Roman Catholic)
Round Lake (United Church)
St. Phillips (Roman Catholic)
Sturgeon Landing (predecessor to Guy Hill, MB) (Roman Catholic)
Thunderchild (Delmas) (Roman Catholic)

Alberta

Assumption (Hay Lakes) (Roman Catholic)
Blood (St. Mary's, Immaculate Conception) (Roman Catholic)
Blue Quills (Roman Catholic)
Crowfoot (Blackfoot, St. Joseph's) (Roman Catholic)
Desmarais (Wabiscaw Lake, St. Martin's) (United Church)
Edmonton (Roman Catholic)
Ermineskins (Roman Catholic)
Fort Vermilion (St. Henry's) (Anglican)
Holy Angels (Fort Chipewyan) (United Church)
Lesser Slave Lake (Anglican)
Morley (Roman Catholic)
Old Sun's (Roman Catholic)
St. Albert (Roman Catholic)
St. Augustine (Smokey River) (Roman Catholic)
St. Bernard (Anglican)
St. Bruno (Anglican)
St. Cyprian (Roman Catholic)
St. Paul's (Roman Catholic)
Sacred Heart (Roman Catholic)
Sturgeon Lake (Anglican)
Vermilion (Roman Catholic)
Wabasca (St. John's) (Anglican)

Northwest Territories

Akaiicho Hall (Roman Catholic)
Aklavik (Immaculate Conception) (Roman Catholic)
All Saints (Aklavik) (Anglican)
Fort Resolution (St. Joseph's) (Roman Catholic)
Fort Simpson (Roman Catholic)
Fort Smith (Roman Catholic)
Grollier Hall (Roman Catholic)
Hay River (Anglican)
Providence Mission (Roman Catholic)

British Columbia

Ahousaht (United Church)
Alberni (United Church)
Alert Bay (St. Michael's) (Anglican)
Cariboo (Roman Catholic)
Christie (Roman Catholic)
Coqualeetza (United Church)
Cranbrook (St. Eugene's, Kootenay) (Roman Catholic)
Kamloops (Roman Catholic)
Kitamaat (United Church)
Kuper Island (Roman Catholic)
Lejac (Fraser Lake) (Roman Catholic)
Lower Post (Roman Catholic)
Port Simpson (United Church)
Sechelt (Roman Catholic)
Squamish (St. Paul's, North Vancouver) (Roman Catholic)
St. George's (Anglican)
St. Mary's Mission (Roman Catholic)
St. Michael's (Alert Bay Girl's Home) (Anglican)

Yukon

Carcross (Anglican)
St. Paul's Hostel (Anglican)

Nunavut

Chesterfield Inlet (Roman Catholic)

In 1931 there were 44 Roman Catholic (RC), 21 Church of England (CE), 13 United Church (UC) and 2 Presbyterian (PR) schools. These proportions among the denominations were constant throughout the history of the system.

See “Indian Residential Schools in Canada” online: Indian Residential Schools Resolution Canada <
<http://www.irsr.gc.ca/english/maps.html>>.

Appendix 2

Calculating Compensation in Process A

<u>Level of Abuse</u>		
Level	Description	Comp. points
SL 5 Sexual abuse, level 5	- Repeated, persistent incidents of anal or vaginal intercourse - Repeated, persistent incidents of anal or vaginal penetration with an object	45-60
SL 4 Sexual abuse, level 4	- One or several incidents of anal or vaginal intercourse - Repeated, persistent incidents of oral intercourse - One or several incidents of anal or vaginal penetration with an object	36-44
SL 3 Sexual abuse, level 3	- One or several incidents of oral intercourse - One or several incidents of digital anal or vaginal penetration - One or several incidents of attempted anal or vaginal penetration (excluding attempted digital penetration) - Repeated, persistent incidents of masturbation	26-35
PL Physical abuse	One or more physical assaults causing a physical injury that - led to or should have led to hospitalization or serious medical treatment by a physician - caused permanent or demonstrated long-term physical injury - impaired or disfigured - caused loss of consciousness - broke bones - caused serious but temporary incapacitation requiring bed rest or infirmary care for several days Examples include severe beating, whipping, and second-degree burning	21-25
SL 2 Sexual abuse, level 2	- One or more incidents of simulated intercourse - One or more incidents of masturbation - Repeated, persistent fondling under clothing	11-25
SL 1 Sexual abuse, level 1	- One or more incidents of fondling or kissing - Nude photographs taken of the Claimant - An adult employee or other adult who was lawfully on school property exposing themselves - Any touching of a student, including touching with an object, by an adult employee or other adult who was lawfully on the premises that exceeds recognized parental contact and violates the sexual integrity of the student	5-10
OWA Other wrongful act	- Being singled out for physical abuse by an adult employee or other adult who was lawfully on the premises that was grossly excessive in duration and frequency and which caused psychological harms at the H3 level or higher - Any other wrongful act committed by an adult employee or other adult who was lawfully on the premises that is proven to have caused psychological harms at the H4 or H5 level	1-10

<u>Level of Harm</u>		
Level	Description	Comp. points
H5	Continued harm resulting in serious dysfunction Evidenced by: psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting from such a pregnancy, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.	20-25
H4	Harm resulting in some dysfunction Evidenced by: frequent difficulties with interpersonal relationships, development of obsessive-compulsive and panic states, severe anxiety, occasional suicidal tendencies, permanent significantly disabling physical injury, overwhelming guilt, self-blame, lack of trust in others, severe post-traumatic stress disorder, some sexual dysfunction, or eating disorders.	16-19
H3	Continued detrimental impact Evidenced by: difficulties with interpersonal relationships, occasional obsessive-compulsive and panic states, some post-traumatic stress disorder, occasional sexual dysfunction, addiction to drugs, alcohol or substances, a long term significantly disabling physical injury resulting from a defined sexual assault, or lasting and significant anxiety, guilt, self-blame, lack of trust in others, nightmares, bed-wetting, aggression, hyper-vigilance, anger, retaliatory rage and possibly self-inflicted injury.	11-15
H2	Some detrimental impact Evidenced by: occasional difficulty with personal relationships, some mild post-traumatic stress disorder, self-blame, lack of trust in others, and low self-esteem; and/or several occasions and several symptoms of: anxiety, guilt, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	6-10
H1	Modest detrimental impact Evidenced by: Occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	1-5

<u>Aggravating Factors</u>	
Add 5-15% of points for Act and Harm combined (rounded up to the nearest whole number)	
Verbal abuse	Intimidation / inability to
Racist acts	Complain / oppression
Threats	Humiliation
Sexual abuse accompanied by violence	Degradation
Failure to provide care or emotional support following abuse requiring such care	Age of the victim

<u>Future Care</u>	
Care	Additional compensation (dollars)
General – medical treatment, counselling	up to \$10,000
If psychiatric treatment required, cumulative total	up to \$15,000

<u>Consequential Loss of Opportunity</u>	
Opportunity lost	Additional compensation (points)
Chronic inability to obtain or retain employment	11-15
Inability to undertake/complete education or training resulting in under-employment, and/or unemployment	6-10
Diminished work capacity – physical strength, attention span	1-5

<u>Compensation</u>		
Compensation points	Compensation (\$) B.C. – Yukon – Ont.	Compensation (\$) Rest of Canada
1-10	\$5,000 - \$10,000	\$5,000 - \$10,000
11-20	\$11,000 - \$20,000	\$11,000 - \$15,000
21-30	\$21,000 - \$35,000	\$16,000 - \$25,000
31-40	\$36,000 - \$50,000	\$26,000 - \$35,000
41-50	\$51,000 - \$65,000	\$36,000 - \$50,000
51-60	\$66,000 - \$85,000	\$51,000 - \$70,000
61-70	\$86,000 - \$105,000	\$71,000 - \$90,000
71-80	\$106,000 - \$125,000	\$91,000 - \$110,000
81-90	\$126,000 - \$150,000	\$111,000 - \$130,000
91-100	\$151,000 - \$180,000	\$131,000 - \$150,000
101-110	\$181,000 - \$210,000	\$151,000 - \$170,000
111+	Up to \$245,000	Up to \$195,000

See Ken R. Halvorson, *Indian Residential School Abuse Claims: A Lawyer's Guide to the Adjudicative Process* (Toronto: Thompson Carswell, 2005), 19-22.

Appendix 3

Selected Adjudicator Awards in Process A										
Prov./ Terr.	Abuse	Pts.	Harms	Pts.	Aggr. Factors	Lost Opp.	Pts.	Future Care	Total Points	Total Comp.
B.C.	SL5: repeated anal intercourse	58	H4: chronic post- traumatic state	17	13%	1.2	10	\$1,000	95	\$166,000
B.C.	SL5: repeated vaginal intercourse	50	H4: panic states, suicidal	16	7%	1.2	6	\$15,000	77	\$135,000
B.C.	SL5: repeated anal intercourse	60	H5: suicidal, inability to form personal relationships	25	15%	1.3	15	\$15,000	113	\$265,000
B.C.	SL4: one incident vaginal intercourse	38	H4: suicidal, sexual dysfunction	15	15%	L3	13	\$10,000	77	\$130,000
B.C.	SL4: one incident vaginal intercourse	38	H3: addiction	12	6%	L1	5	\$500	58	\$82,500
B.C.	SL4: two incidents anal intercourse	40	H3: interpersonal relationships, addiction	15	10%	L2	8	\$10,000	69	\$110,000
Yk.	SL3: repeated masturbation	32	H3: addiction	12	10%	0	0	\$3,000	48	\$65,000
B.C.	SL3: one incident oral intercourse	35	H3: suicidal, addiction	15	10%	n/a	n/a	\$15,000	55	\$100,000
B.C.	SL3: one incident digital vaginal penetration	26	H2: self- blame, lack of trust	8	5%	L2	3	\$8,000	39	\$58,000
Ab.	PL3: beating, temporary blindness	25	H3: guilt, self-blame	13	10%	L2	10	\$10,000	52	\$65,500

B.C.	PL3: broken nose, scar	21	H1: humiliation, loss of self-esteem	2	7%	L2	7	\$1,000	32	\$38,000
Mn.	PL3: slapped ears, deafness	25	H3: physical injury, addiction	15	5%	0	0	\$7,500	45	\$52,500
B.C.	SL2: repeated fondling	25	H3: addiction	12	5%	L1	3	\$2,500	42	\$55,500
B.C.	SL2: repeated masturbation	20	H3: anger, addiction	13	6%	L2	7	\$5,760	42	\$59,760
B.C.	SL2: more than once incident simulated intercourse	20	H3: addiction, interpersonal relationships	13	10%	L3	14	0	51	\$66,000
B.C.	PL2: broken finger	11	H3: long term physical injury	11	5%	L1	2	0	26	\$21,000
B.C.	PL2: one incident of burning	20	H3: nightmares, lack of trust, addiction	15	15%	L3	15	\$5,000	56	\$85,000
Mn.	PL2: strapping, scar	20	H2: mild post-traumatic stress disorder	10	15%	0	0	\$7,500	35	\$37,500
Ab.	SL1: fondled by students	10	H3: interpersonal relationships, addiction	12	8%	0	0	0	24	\$24,000
Ab.	SL1: fondling	10	H3: anger, personal relationships	15	15%	L2	10	\$10,000	38	\$45,000
Sk.	SL1: attempted kissing	5	H1: nightmares	2	5%	0	0	0	8	\$7,500
B.C.	PL1: back injury	7	H3: long-term physical injury	11	7%	0	0	0	20	\$20,000
On.	PL1:	5	H2: anxiety,	8	6%	0	0	\$10,000	14	\$24,000

	strappings, calluses 6 weeks		lack of trust							
Ab.	PL1: black eyes	10	H2: self- blame, loss of self- esteem	10	15%	L1	5	\$10,000	29	\$34,000

See Ken R. Halvorson, *Indian Residential School Abuse Claims: A Lawyer's Guide to the Adjudicative Process* (Toronto: Thompson Carswell, 2005), 165-170.

Appendix 4

Schedule 'N' to the Indian Residential Schools Settlement Agreement

SCHEDULE "N"

MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

Principles

Through the Agreement, the Parties have agreed that an historic Truth and Reconciliation Commission will be established to contribute to truth, healing and reconciliation.

The Truth and Reconciliation Commission will build upon the "Statement of Reconciliation" dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). These principles are as follows: accessible, victim centered, confidentiality (if required by the former student), do no harm, health and safety of participants, representative, public/transparent, accountable, open and honourable process, comprehensive, inclusive, educational, holistic, just and fair, respectful, voluntary, flexible, and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.

Reconciliation is an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Metis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups.

Terms of Reference

1 Goals

The goals of the Commission shall be to

- (a) Acknowledge Residential School experiences, impacts and consequences,
- (b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission,

- (c) Witness,¹ support, promote and facilitate truth and reconciliation events at both the national and community levels,
- (d) Promote awareness and public education of Canadians about the IRS system and its impacts,
- (e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use,
- (f) Produce and submit to the Parties of the Agreement² a report including recommendations³ to the Government of Canada concerning the IRS system and experience including the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools,
- (g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement)

2 Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations

Pursuant to the Court-approved final settlement agreement and the class action judgments, the Commissioners

- (a) in fulfilling their Truth and Reconciliation Mandate, are authorized to receive statements and documents from former students, their families, community and all other interested participants, and, subject to (f), (g) and (h) below, make use of all documents and materials produced by the parties. Further, the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation,

¹ This refers to the Aboriginal principle of "witnessing"

² The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the Commissioners

³ The Commission may make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals

Appendix 5

Major Reparations Programs: United States

Program	Year(s)	Payer	Recipient	Payment	Total Cost	Cause
Indian Claims	1946	U.S.	Indian Tribes	Various	\$800 million	Land taken by force or deception
Japanese Internment	1988	U.S.	Internees	\$20,000	\$1.65 billion	Internment of Japanese Americans during World War II
Radiation Exposure	1990	U.S.	People exposed to radiation	\$50,000 - \$100,000	\$117 million	Exposure of radiation from nuclear tests, or from mining
Hawaiian Annexation	1993	U.S.	Descendants of native Hawaiian groups	(apology)	\$0	Loss of lands after annexation in 1897
Rosewood	1994	Florida	Survivors, descendants	\$375 - \$150,000	\$2.1 million	Murder and destruction of black town in 1923
Syphilis Experiments	1997	U.S.	Victims of experiments	\$5,000 - \$37,500	\$9 million	Denied treatment for syphilis without telling victims, 1932-1972
Mexican-American Land Titles	1997-1998	U.S.	Descendants of property owners	(investigation of claims)	\$0	Failure to recognize Mexican or Spanish land under 1848 treaty

See Eric A. Posner & Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices" (2003) 103 Colum. L. Rev. 689, 696.

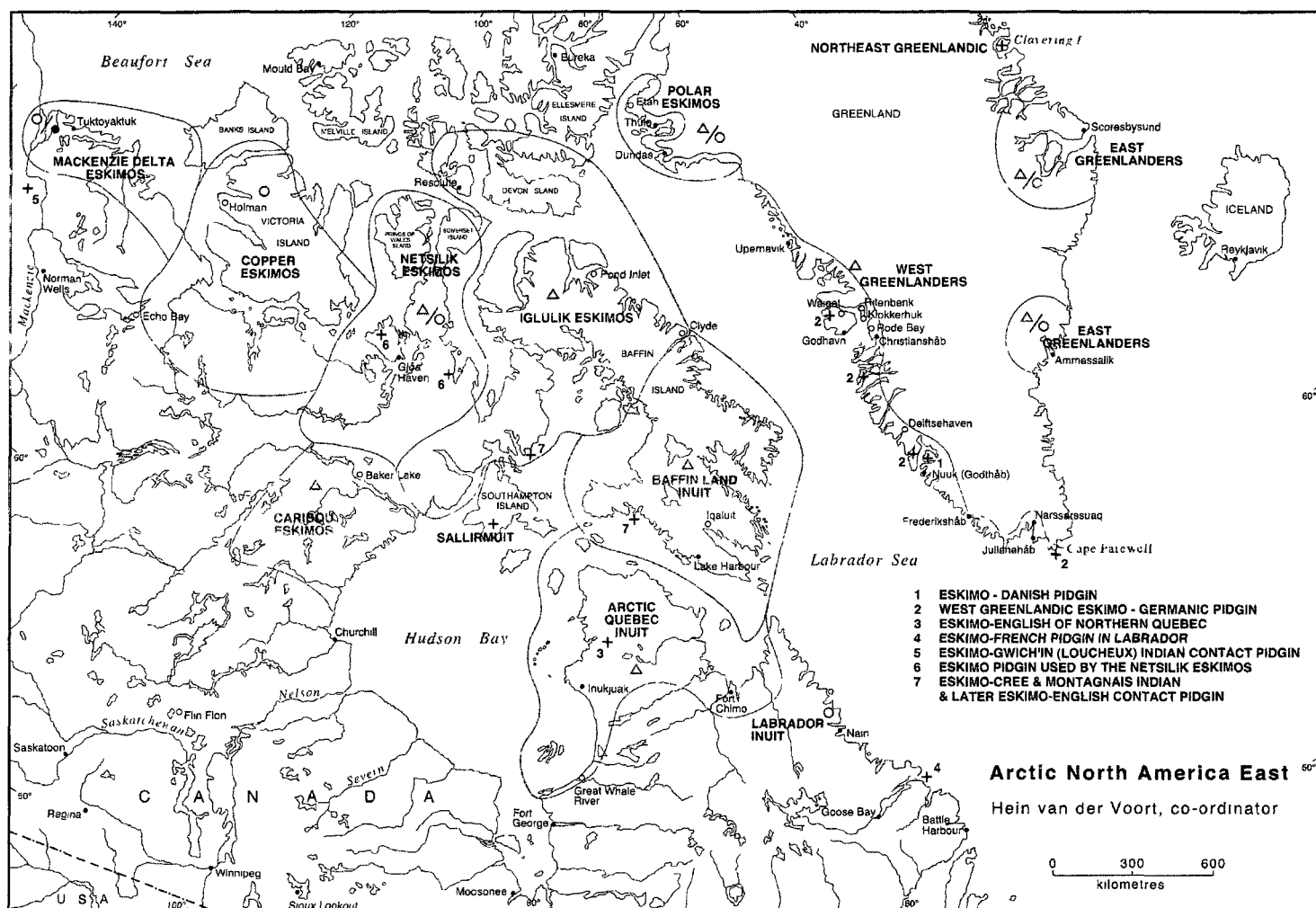
Major Reparations Programs: International

Program	Year(s)	Payer	Recipient	Payment	Total Cost	Cause
Holocaust	Various, 1947-1992	West Germany, Germany	Israel; Holocaust victims, descendants; organizations	Various	<DM 100 billion	Holocaust
East Germany	1990, 1993, 1994	Property recipients	Property owners	Restitution of property, or compensation	\$9 billion in cash	Confiscation of property by communist government, 1949-1990
Czechoslovakia (now Czech Republic)	1991	Property recipients	Property owners	Restitution of property, or compensation	\$11 billion, of which \$2 billion in cash	Confiscation of property by communist government, 1949-1990
Chile	1992	Chile	Victims of Pinochet, descendents	Monthly pension of 140,000 pesos, plus other benefits		Execution, torture, and exile of at least 200,000 people
Korean Comfort Women	1995-1996	Japan (through printed donations)	"Comfort Women" in Japanese occupied Asian countries	\$19,000 (through "private" funds)	\$20 million proposed	200,000 women used as sex slaves by Japanese army during World War II
Canada	1998	Canada	Aboriginals	Various	CA \$350 million	Forced assimilation of children

See Eric A. Posner & Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices" (2003) 103 Colum. L. Rev. 689, 697.

Appendix 6

Endangered Aboriginal Languages: Arctic North America East



Symbols: Δ Potentially endangered language: decreasing numbers of children learn the language (green)

- Endangered language: the youngest speakers are young adults (red)
- Seriously endangered language: the youngest speakers have reached or passed middle age (red)
- ⊕ Moribund language: only a few elderly speakers are left (blue)
- + Extinct language: no speakers are left (black)

Potentially endangered language

- (i) Arctic Québec Inuit
- (ii) Baffin Land Inuit
- (iii) Caribou Eskimos
- (iv) East Greenlanders
- (v) Iglulik Eskimos
- (vi) Netsilik Eskimos
- (vii) Polar Eskimos
- (viii) West Greenlanders

Endangered Language

- (i) Copper Eskimos
- (ii) East Greenlanders
- (iii) Labrador Inuit
- (iv) Mackenzie Delta Eskimos
- (v) Netsilik Eskimos
- (vi) Polar Eskimos

Seriously endangered language

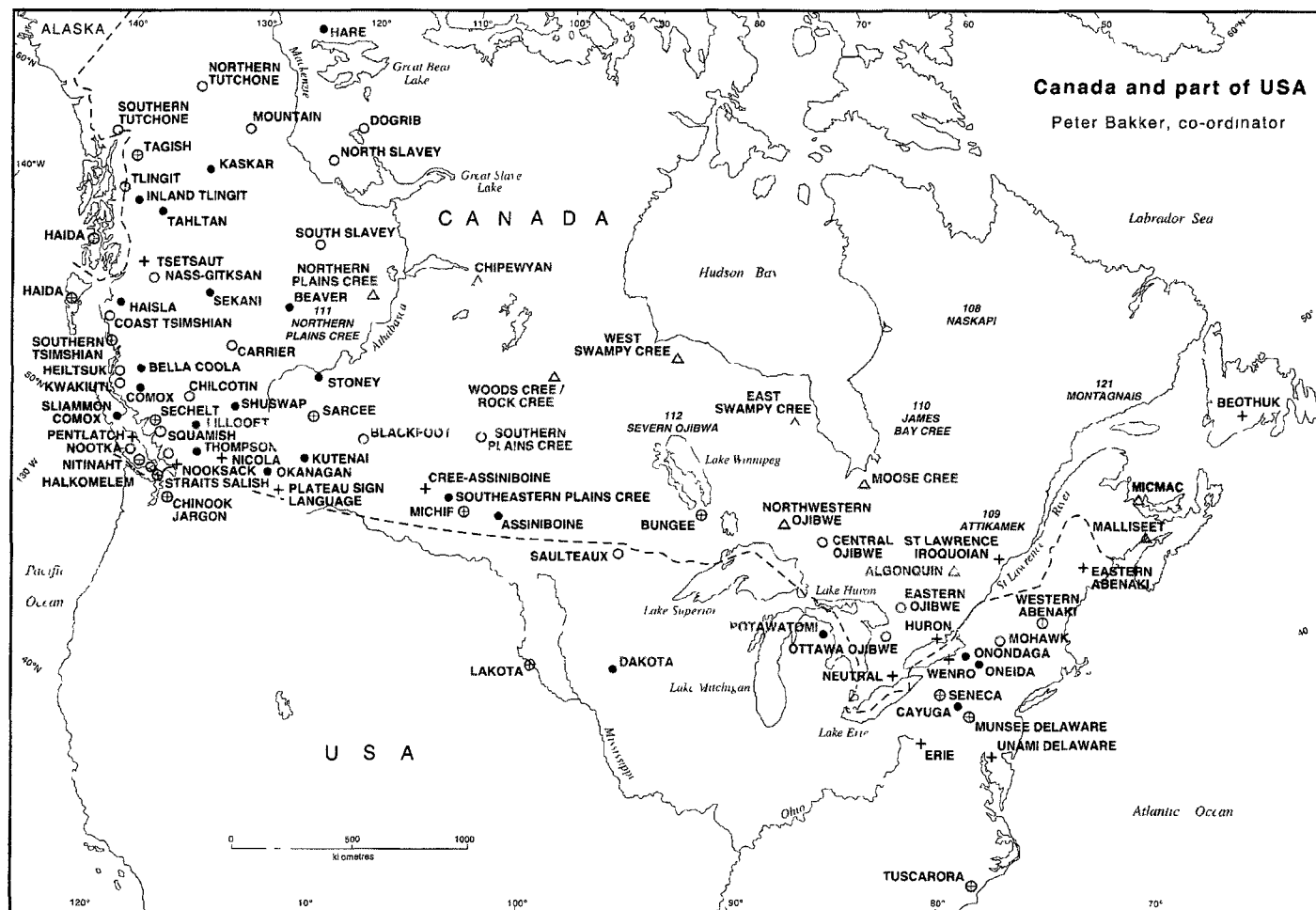
- (i) Mac. Delta Eskimos

Extinct language

- (i) Eskimo – Danish Pidgin
- (ii) Eskimo Pidgin used by the Netsilik Eskimos
- (iii) Eskimo-Cree / Montagnais Indian / Eskimo-English Contact Pidgin
- (iv) Eskimo-English of Northern Québec
- (v) Eskimo-French Pidgin in Labrador
- (vi) Eskimo-Gwich'in (Loucheux) Indian Contact Pidgin
- (vii) Northeast Greenlandic
- (viii) Sallirmuit
- (ix) West Greenlandic Eskimo – Germanic Pidgin

See Stephen A. Wurm, *Atlas of the World's Languages in Danger of Disappearing* (Barcelona: UNESCO Publishing, 2001), 72-3.

Endangered Aboriginal Languages: Canada and part of USA



Potentially endangered language

- (i) Algonquin
- (ii) Chipewyan
- (iii) East Swampy Cree
- (iv) Malliseet
- (v) Micmac
- (vi) Moose Cree
- (vii) Northern Plains Cree
- (viii) Northwestern Ojibwe
- (ix) West Swampy Cree
- (x) Woods Cree / Rock Cree

Endangered language

- (i) Blackfoot

- (ii) Carrier
- (iii) Central Ojibwe
- (iv) Chilcotin
- (v) Coast Tsimshian
- (vi) Dogrib
- (vii) Eastern Ojibwe
- (viii) Halkomelem
- (ix) Heitsuk
- (x) Kwakiutl
- (xi) Mohawk
- (xii) Mountain
- (xiii) Nass-Gitskan
- (xiv) Nootka
- (xv) North Slavey
- (xvi) Northern Tutchone

- (xvii) Ottawa Ojibwe
- (xviii) Saulteaux
- (xix) Shuswap
- (xx) South Slavey
- (xxi) Southern Tutchone
- (xxii) Tlingit

Seriously endangered languages

- (i) Assiniboine
- (ii) Beaver
- (iii) Bella Coola
- (iv) Cayuga
- (v) Comox
- (vi) Dakota
- (vii) Hare
- (viii) Haisla
- (ix) Inland Tlingit
- (x) Kaskar
- (xi) Kutenai
- (xii) Lillooet
- (xiii) Okanagan
- (xiv) Oneida
- (xv) Onondaga
- (xvi) Potawatomi
- (xvii) Sekani
- (xviii) Sliammon Comox
- (xix) Southeastern Plains Cree
- (xx) Stoney
- (xxi) Tahltan
- (xxii) Thompson

Moribund languages

- (i) Bungee
- (ii) Chinook Jargon
- (iii) Haida
- (iv) Lakota
- (v) Michiff
- (vi) Munsee Delaware
- (vii) Nitnaht
- (viii) Sarcee
- (ix) Sechelt
- (x) Seneca
- (xi) Southern Tsimshian
- (xii) Squamish
- (xiii) Straits Salish
- (xiv) Tagish

- (xv) Tuscarora
- (xvi) Western Abnaki

Extinct languages

- (i) Beothuk
- (ii) Cree-Assiniboine
- (iii) Eastern Abenaki
- (iv) Erie
- (v) Huron
- (vi) Neutral
- (vii) Nicola
- (viii) Nooksack
- (ix) Pentlach
- (x) Plateau Sign Language
- (xi) St. Lawrence Iroquoian
- (xii) Tsetsaut
- (xiii) Unami Delaware
- (xiv) Wenro

See Stephen A. Wurm, *Atlas of the World's Languages in Danger of Disappearing* (Barcelona: UNESCO Publishing, 2001), 76-7.

Appendix 7

Model of an Aboriginal Education System

Local Community	• Participates in policy making through representation in Aboriginal nation governing bodies and nation education authority. • Makes decisions on instruction of local students. • Implements nation policy in local Aboriginal institutions. • Negotiates tuition agreements in accord with nation policy. • Participates in decision making in post-local institutions under provincial/programs territorial jurisdiction institutions.
Aboriginal Nation	• Enacts or adopts laws on Aboriginal education. • Establishes an education authority to make policy on ▪ education goals and means of achieving them in the nation, ▪ administration of schools and colleges within the nation, ▪ tuition agreements, ▪ purchase of provincial/ territorial services. • Receives revenues and distributes funds for government services including education. • Participates in establishing policy framework province-wide through representation in multi-nation organizations.
Multi-Nation Organization	• Negotiates policy framework with the province or territory ▪ for tuition agreements, ▪ access to provincial or territorial services, ▪ transfer between Aboriginal and provincial or territorial academic programs. • Develops curriculum. • Monitors academic standards in Aboriginal system. • Advises provincial ministers of education, colleges and universities and training. • Provides an umbrella for representation of community of interest governments administering education.
Canada-Wide Networks	• Federated organizations reflecting nation interests ▪ electronic clearinghouse, ▪ statistical clearinghouse, ▪ documentation center, ▪ associations for setting standard programs and accrediting secondary institutions.

See: Government of Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996), online: Indian and Northern Affairs Canada < http://www.collectionscanada.gc.ca/webarchives/20071211052946/http://www.ainc-inac.gc.ca/ch/rcap/sg/si54_e.html>.

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