INTERNATIONAL HUMAN RIGHTS INTERNSHIP PROGRAM | WORKING PAPER SERIES

VOL. 9 | NO. 1 | SUMMER 2020

Canada in Transitional Justice? Situating the Indian Day School Settlement Agreement on Canada's Pathway to Decolonization

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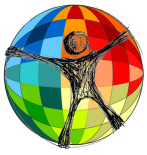

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ABSTRACT

The Indian Day School Settlement Agreement, reached in 2018, committed Canada to providing approximately $1.5 billion in compensation to those who attended eligible Day Schools from 1863 to 1995. Those running these schools, like the Indian Residential Schools, inflicted physical, sexual, emotional, and spiritual abuse upon the students forced to attend them, with the ongoing effects of this abuse continuing to be felt today. Following the landmark Indian Residential School Settlement Agreement in 2006, and the creation of the Truth and Reconciliation Commission stemming from that agreement, many scholars sought to place that settlement within the framework of transitional justice. Notably, however, there has been little academic discourse around the more recent Day School settlement. This paper aims to fill that gap by looking at whether the Day School settlement can be viewed as a transitional justice measure in Canada in a transition to a decolonial society. The first part of this paper takes a closer look at Day Schools and the Day School settlement in an historic and legal context. The next part explores what elements are necessary for transitional justice to occur in a settler-colonial state. The third part argues that without further measures, the Day School settlement cannot be shoehorned into a transitional justice framework. This paper concludes by looking at what measures may be necessary, in addition to the Day School settlement, for Canada to begin the transition to a decolonial society.

CONTENTS

Introduction

Canada has a long history of discriminatory treatment of Indigenous peoples. From the time of the Crown's assertion of sovereignty, Indigenous lives have been shaped by colonial policies and cultural genocide. The Indian Days Schools (IDS) are one chapter of this colonial legacy. The Garry McLean [Indian Day School] Class Action Settlement Agreement (IDSSA) was intended to redress some of the harms inflicted by IDS and to facilitate healing amongst survivors. [1] The IDSSA provides compensation to 120,000-140,000 survivors of IDS, most of whom were left out of the landmark Indian Residential Schools Settlement Agreements (IRSSA) in 2006. Many have argued that the IRSSA, coupled with the launch of the Truth and Reconciliation Commission of Canada (TRC) and former Prime Minister Harper's official apology for Canada's role in Indian Residential Schools (IRS), is a transitional justice measure. Drawing on this debate, this paper will look at whether the IDSSA can or should be conceptualized within the framework of transitional justice, and whether it advances the Canadian state towards a transformed, decolonial society. I will begin by situating Indian Day Schools within the colonial timeline and briefly outline the actions to date against Canada in relation to the control of Indigenous children. I will then give a brief history of the IDSSA. Turning to the framework of transitional justice, I will explore whether Canada can employ transitional justice, without a transition in regime. Ultimately, I find that the IDSSA does not fit into the transitional justice framework, no matter how much the framework is stretched, as it does not fulfil the basic aims of transitional justice. Finally, I make recommendations for what needs to occur in concert with the IDSSA for Canada to transition to a decolonial society.

The Colonial Timeline

Canadian policies aimed at the social control of Indigenous peoples in Canada have been carried out through the targeting of Indigenous children since before Confederation.[2] The

[1] *Garry Leslie et al. v. Canada (AG)* [Settlement Agreement], 2019 FC 1075 [*IDSSA*].

[2] See Marlyn Bennett, Cindy Blackstock & Richard De La Ronde, *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada*, 2nd ed (First Nations Research Site of the Centre of Excellence for

Canadian government began operating Indian Day Schools in the mid-1800s as a way to assimilate Indigenous children into the dominant Canadian culture.[3] While these schools continued to operate, the government, in concert with various Christian churches, began opening Indian Residential Schools towards the latter half of the century, as a way to further remove children from their culture and community influences. The purpose and functioning of these two types of institutions were effectively the same, the only discernable difference being that children attending day schools returned home every afternoon.[4]

In 1894, it became mandatory for Indian[5] children to attend Indian Day Schools, Residential Schools, or Industrial Schools.[6] Children were banned from speaking their language and they faced an environment in which their culture was denigrated. Furthermore, there was widespread physical, emotional, sexual, and spiritual abuse of children attending these institutions. The Residential and Day Schools continued to operate for over a century, with the federal government beginning to transfer the control of IDS to the provinces, territories, and

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Child Welfare and The First Nations Child & Family Caring Society of Canada, 2005) at 10.

[3] Amongst the schools included in the Federal Indian Day School Settlement, 1863 is the earliest recorded date of operation of an IDS. However, there are hundreds of schools that were excluded from the settlement, so the earliest date of operation is likely earlier. See *IDSSA, supra* note 1 at Schedule K.

[4] For a detailed history of Indian Residential Schools, see John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: Univ Manitoba Press, 1999); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), online (pdf): <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [*TRC Final Report*]. For more on the Indian Day Schools, see Jackson Pind, Raymond Mason & Theodore Christou, "Indian day school survivors are seeking truth and justice", *The Conversation* (26 October 2020), online: <https://theconversation.com/indian-day-school-survivors-are-seeking-truth-and-justice-146655>; Raymond Mason, *Spirit of the Grassroots People: Seeking Justice for Indigenous Survivors of Canada's Colonial Education System* (Montreal & Kingston: McGill-Queen's University Press, 2020) [*Spirit*].

[5] See *Indian Act* (RSC, 1985, c. I-5) for the legal definition of 'Indian.'

[6] See Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: The History, Part 1 Origins to 1939", *The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (2015), online (pdf): <http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf> at 254-5.

Indigenous governments in the 1960s.[7] The last four IDS closed in 1994.[8] The federal government began shutting down IRS in the 1950s, with the last school closing in 1996.

However, while the federal government began to disentangle itself from policies of assimilation through education, it began to pursue other processes to assimilate Indigenous children. Child welfare agencies replaced schools as the primary mechanism to maintain control over Indigenous children.[9] From the early 1950s, the number of Indigenous children apprehended by the state grew alarmingly fast. By the 1980s, Indigenous children made up over half the children in the care of the state in some provinces.[10] The majority of these children were adopted into non-Aboriginal homes, often outside of the province or country, and their heritage was denied. This period of child apprehensions from approximately 1961 to the 1980s became known as the Sixties Scoop.

Following the release of multiple reports detailing the harm the child welfare system was having on Indigenous children and their communities, the government amended some child welfare laws and policies.[11] These reforms, however, had little effect. The Royal Commission on Aboriginal Peoples (RCAP) highlighted this failure in 1996, yet rather than implementing the recommendations of the RCAP to address the problem, the federal government imposed a 2% funding cap on all services for Indigenous peoples, including child welfare services.[12] By 2016,

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[7] See *Garry Leslie McLean et al. v. Canada (AG)*, 2019 FC 1075 [*McLean*] at para 18.
[8] See *IDSSA, supra* note 1 at Schedule K.
[9] See Bennett, Blackstock & De La Ronde, *supra* note 2 at 18-19.
[10] See Erin Hansen, "Sixties Scoop" (2009), online: *First Nations and Indigenous Studies, University of British Columbia* <https://indigenousfoundations.arts.ubc.ca/sixties_scoop/>; Bennett, Blackstock & De La Ronde, *supra* note 2 at 19.
[11] See e.g. Edwin C Kimelman, *No Quiet Place* (Winnipeg: Manitoba Community Services, 1985); Patrick Johnson, *Native Children and the Welfare System* (Toronto : Canadian Council on Social Development in association with James Lorimer & Co, 1983); National Indian Brotherhood, *Indian Control over Indian Education* (Ottawa: Assembly of First Nations, 1972).
[12] "Volume 3: Gathering Strength", *The Report of the Royal Commission on Aboriginal Peoples* (1996), online (pdf): <http://data2.archives.ca/e/e448/e011188230-03.pdf> at 27. For an explanation of the 2% funding cap see Tim Fontaine, "First Nations welcome lifting of despised 2% funding cap", *CBC News* (10 December 2015), online: <https://www.cbc.ca/news/indigenous/first-nations-funding-cap-lifted-1.3359137>.

over half of all children in foster care in Canada were Indigenous, despite accounting for just 7.7% of Canadian children.[13] Raven Sinclair explains that "the 'Sixties Scoop' has merely evolved into the 'Millenium [sic] Scoop.'"[14]

Legal Actions to Date

While these colonial, assimilationist policies continue, survivors of the IRS, IDS, Sixties Scoop, and Millennium Scoop have begun to seek redress through the courts for the harms they have suffered. In the 1980s, former students of the IRS started launching legal actions against the government and the churches that ran the schools. The Assembly of First Nations and Inuit representatives eventually negotiated a comprehensive settlement with Canada and the religious institutions implicated in the operation of IRS. Approved in 2006, the IRSSA is the largest class action settlement in the history of Canada.[15] Canada agreed to pay $1.9 billion for the Common Experience Payment[16] and up to $275,000 to each student who experienced sexual or physical abuse through an Independent Assessment Process.[17] The agreement also provided for the creation of the TRC, for which Canada agreed to fund $60 million.[18] Canada further paid $125 million for healing initiatives and $20 million for commemoration

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[13] See Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (2018), online (pdf): <http://www3.ohrc.on.ca/sites/default/files/Interrupted%20childhoods_Over-representation%20of%20Indigenous%20and%20Black%20children%20in%20Ontario%20child%20welfare_accessible.pdf> at 7.

[14] See Raven Sinclair, "Identity lost and found: Lessons from the sixties scoop" (2007) 3:1 First Peoples Child & Family Rev 65 at 67.

[15] Canada, Plaintiffs, The Assembly of First Nations and Inuit Representative & The General Synod of the Anglican Church of Canada, The Presbyterian Church of Canada, The United Church of Canada and Roman Catholic Entities, *Indian Residential Schools Settlement Agreement* (8 May 2006), online (pdf): <http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf> [*IRSSA*].

[16] The Common Experience Payment provided $10,000 for the first year attended and $3,000 for each subsequent year to all eligible students (*IRSSA*, *ibid* at 44).

[17] As of March 2019, the Federal government had paid a total of $3.18 billion in IAP payments (Canada, "Statistics on the Implementation of the Indian Residential Schools Settlement Agreement" (19 February 2019), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1315320539682/1571590489978>.

[18] See *IRSSA*, *supra* note 15 at 23.

activities.[19] The agreement spans the entire timeframe that IRS were operating in Canada—from 1874 to 1996.

The TRC was the first national truth commission created in an established democracy.[20] It was given a 5-year mandate to collect testimonies from survivors and to educate the public about the legacy of IRS, in order to contribute to truth, healing and reconciliation.[21] The TRC released its 6-volume final report in 2015, *Honouring the Truth, Reconciling for the Future*, which included 94 calls to action for governments, Indigenous peoples, and the private sector.[22] Upon receiving the report in 2015, the Federal government publicly committed to implementing the recommendations; however, progress has been slow.[23] That being said, it is undeniable that awareness about Indian Residential Schools and the negative impact they had and continue to have has grown amongst the general population since the TRC released its report.[24] However, while *Honouring the Truth, Reconciling for the Future* provides a detailed history of IRS in Canada, it only briefly mentions IDS. There is not, as of yet, a public report that details the history of IDS in Canada.[25]

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[19] *Ibid* at 24.

[20] International Centre for Transitional Justice, *Canada's Truth and Reconciliation Commission* (2008), online (pdf): <https://www.ictj.org/sites/default/files/ICTJ-Canada-Truth-Facts-2008-English.pdf>.

[21] See *IRSSA, supra* note 15 at Schedule N.

[22] *Supra* note 4.

[23] The Yellowhead Institute released a report at the end of 2019, claiming that only nine of the Calls to Action had been completed. See Canada, "Delivering on Truth and Reconciliation Commission Calls to Action" (5 September 2019), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801> (government's commitment); Eva Jewell & Ian Mosby, "Calls To Action Accountability: A Status Update On Reconciliation" (17 December 2019), online: *The Yellowhead Institute* <https://yellowheadinstitute.org/2019/12/17/calls-to-action-accountability-a-status-update-on-reconciliation/> (critique on implementation).

[24] According to the Environics Institute, the number of non-Aboriginal Canadians who knew about IRS grew from approximately 51% in 2008 to 66% in 2016. Of those aware of IRS, three-quarters believed that there was a connection between the challenges faced by Aboriginal peoples today and the legacy of IRS. See *Canadian Public Opinion on Aboriginal Peoples* (The Environics Institute for Survey Research, 2016) at 31.

[25] Notably, however, there are a number of books and articles that detail individuals' and specific communities' experiences of IDS. See e.g. Mason, *supra* note 4; Helen Raptis (with members of the Tsimshian Nation), *What We Learned: Two Generations Reflect on Tsimshian Education and the Day Schools*

Many of the students who attended IDS suffered similar harms to those who attended Residential Schools, yet they were excluded from the IRSSA.[26] In 2009, Ray Mason and Garry McLean filed a class action against the federal government on behalf of IDS survivors. After various legal delays, the case was certified in 2018, with a settlement reached later that year.[27] Canada agreed to pay $1.27 - $1.4 billion in compensation to those who attended eligible Indian Day Schools from 1863 to 1995.[28] Canada further agreed to provide $200 million to a Legacy Fund for commemoration events, wellness and healing projects, and the restoration of Indigenous languages and culture. First Nations can apply to this fund with project proposals to receive funding.

While IRS litigation was ongoing, survivors of the Sixties Scoop launched a multitude of court actions against Canada.[29] In 2017 the Sixties Scoop Settlement Agreement was reached, which merged all the ongoing actions and provided redress for approximately 20,000-30,000 Indigenous children who were removed from their homes between 1951 and 1991 and placed into non-Indigenous homes. Canada agreed to pay $500 - $750 million to eligible class members and $50 million for the establishment of a foundation devoted to memorialization, reconciliation, and healing.[30]

(Vancouver: UBC Press, 2016); WD Hamilton, *The Federal Indian Day Schools of the Maritimes* (Fredericton: Micmac-Maliseet Institute, 1986).

[26] Kenneth Deer explains: "The damage from day schools was just as severe as residential schools. The only difference between the day schools and residential schools is that you went home at night." See Ka'nhehsí:io Deer, "120 years of Indian day schools leave a dark legacy in Kahnawake Mohawk Territory" *CBC News* (12 May 2019), online: <https://www.cbc.ca/news/indigenous/kahnawake-indian-day-schools-1.5127502>.

[27] See *McLean, supra* note 7.

[28] Class members are eligible for $10,000 to $200,000 each, depending on the severity of harm suffered. See note 51 for a detailed breakdown. Eligible dates of attendance for each IDS is based on those listed in Schedule K of the *IDSSA*. *Ibid* at 9-10; *IDSSA, supra* note 1 at Schedule K.

[29] See *Brown v. Canada (AG),* 2018 ONSC 3429 at para 1.

[30] *Ibid* at paras 8-9. The Agreement stated that if there were fewer than 20,000 eligible class members, Canada would pay $500 million to be divided equally amongst all survivors up to a maximum of $50,00/person. If there were between 20,000 and 30,000 eligible members, each member would receive $25,000. If there were more than 30,000 members, Canada would pay $750 million to be divided equally among all class members. (*Brown v Canada (AG)* [Settlement Agreement], 2018 ONSC 3429 at s. 4.01). As of November 2020, almost 35,000 claims had been received, with almost

Meanwhile, in 2007, the First Nations Child and Family Caring Society of Canada filed a complaint under the *Canadian Human Rights Act* alleging discrimination in the provision of child welfare services to First Nations children living on reserves and in the Yukon.[31] After a number of procedural decisions and appeals, the Canadian Human Rights Tribunal (CHRT) ruled in 2016 that the federal government's First Nation Child and Family Services Program and the funding associated with it was discriminatory on the basis of race and national ethnic origin.[32] In 2019, the CHRT released a compensation order for their original decision, where it found the government's discrimination to be willful and reckless, and awarded the maximum amount allowed under statute.[33] The order compelled the government to pay $20,000 to every First Nations child that was removed from their home since 2006, and where the removal was unnecessary, an additional $20,000. Canada has applied for judicial review of this compensation order and it remains before the court.[34]

14,500 approved. Over 16,000 are currently under review or have been determined as requiring more information (Collectiva, "Sixties Scoop Settlement: Claim Statistics Table" (November 2020), online: *Class Action Sixties Scoop Settlement* <https://sixtiesscoopsettlement.info/#settlementAgreement>).

[31] See Cindy Blackstock, *The Complainant: The Canadian Human Rights Case on First Nations Child Welfare* (2016) 62:2 McGill LJ 285.

[32] See *First Nations Child and Family Caring Society of Canada et al. v. Canada (Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2. The CHRT ordered Canada to immediately cease its discriminatory behaviour and provided directions for immediate, mid-term, and long-term relief. Canada failed to comply with this ruling, and over the following three years, the CHRT issued no less than 8 non-compliance orders against the federal government. See e.g. *First Nations Child & Family Caring Society of Canada et al. v. Canada (Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14; *First Nations Child & Family Caring Society of Canada et al. v. Canada (Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35; *First Nations Child & Family Caring Society of Canada et al. v. Canada (Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 4.

[33] The Tribunal stated: "Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle." (*First Nations Child & Family Caring Society of Canada et al. v. Canada (Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 at para 231). Under statute, the CHRT is authorized to award a maximum of $20,000 for pain and suffering that the victim experienced as a result of the discriminatory practice and an additional $20,000 where the defendant is found to be "engaging … in the discriminatory practice wilfully or recklessly." (*Canadian Human Rights Act,* RSC, 1985, c H-6 at s. 53).

[34] Canada is arguing that since the Caring Society brought forth the case, the CHRT's order to compensate the children who were not complainants to the action is beyond its jurisdiction (*Canada (AG) v First Nations Child & Family*

In parallel to this action, a number of class actions were launched against Canada seeking compensation for children harmed by on-reserve child welfare services. In September 2020, the Federal Court certified two class actions with which various others merged.[35] The actions are seeking a total of $16 billion in compensation for children who experienced harm as a result of federally administered Indigenous child welfare services between 1991 and 2019.

Added up, the aforementioned settlement agreements combined with the current litigation cover a continuous period from 1863 to 2019. Canada has agreed to pay over $7.6 billion to provide redress to those who attended Indian Residential and Day Schools and those who were taken from their homes in the Sixties Scoop, and will likely be paying more in the near future to those who experienced harm from the child welfare system since 1991. What is clear in all three settlements is that while the survivors are being compensated primarily for the physical, sexual, and emotional abuse they suffered while under the care of the Canadian state, the harms they suffered go beyond those abuses. Loss of culture, language and identity are highlighted in all three settlements as being enduring damages as a result of government's actions. Yet, of the $7.6 billion that Canada has committed through settlements, over $6.5 billion is to compensate individuals for primarily physical and sexual abuse. While one of the mandates of the IDSSA Legacy Fund is to support efforts to restore Indigenous languages and culture, this is just one area of focus that the $200 million is meant to address.

In his approval order of the IDSSA, Justice Phelan stated, "It is not possible to take the pain and suffering away and heal the bodies and spirits, certainly not in this proceeding," and I agree that one action alone cannot reverse the harms caused by over a century of colonial policy.[36] This is why transitional justice, as will be discussed below, requires multiple, complementary measures to be employed in order to be successful. Nevertheless,

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Caring Society of Canada et al [Notice of Application for Judicial Review] 2019 T-1621-19 at 6.

[35] See Olivia Stefanovich, "Ottawa agrees to certify 2 class action lawsuits over the treatment of First Nation children", *CBC News* (3 September 2020), online: <https://www.cbc.ca/news/politics/feds-first-nation-children-class-action-certification-1.5710717>.

[36] *McLean, supra* note 7 at para 3.

it is telling that the majority of the funds from the settlements have gone to compensating individuals for abuses recognized by private tort law, while providing redress for colonial harms is a much lower priority. As Canada's leaders publicly commit to supporting healing, and we consider the extent to which Canada's financial compensation can provide redress for the harms its colonial policies have inflicted since Confederation, it begs the question: can Canada be considered to be engaging in transitional justice? To answer that question, I will first provide a more detailed portrait of the IDSSA.

A Closer Look at the IDSSA

> I had TB as a child, and [spent 4 years in a sanitorium, so] I couldn't speak English. All I could speak was my native tongue, and when I went to day school here, I was punished for it. Every time I tried to speak, I couldn't speak English, so I got strapped and I got my hair pulled, my tongue pinched, and I was ostracized and I had to stand on a corner and balance a book on my head for a long, long time, seemed like hours. And then, after that, I had to write on the chalkboard: 'I will never speak Indian again' about 100 times.
>
> —Ray Mason (Cree, Peguis First Nation)[37]

Ray Mason, an IDS and IRS survivor from Peguis First Nation in Manitoba, moved to Winnipeg in the late 1980s. Upon arriving there, Mason started a committee of other IRS and IDS survivors—the goal was to connect with as many in the province as possible in order to work towards achieving justice, compensation, and an apology from Canada for their treatment.[38] After years of traveling around Manitoba and the rest of the

[37] Ray Mason quoted in Karen Pauls, "'Just get it done:' Indian day school survivors divided over proposed settlement" *CBC News* (13 May 2019), online: <https://www.cbc.ca/news/canada/manitoba/just-get-it-done-indian-day-school-survivors-divided-over-proposed-settlement-1.5132262>.

[38] See Mason, *Spirit, supra* note 4 at 60.

country to bring together survivors, Mason named the group *Spirit Wind*.[39]

As negotiations around the IRSSA were happening, *Spirit Wind* was organizing to have day school survivors be included in the settlement. Splitting IRS and IDS survivors up was, in his view, unfair and non-sensical: "How can some suffering be worthier of recognition than others?" he writes.[40] During their operation, more children attended IDS than IRS each year, so the exclusion of IDS survivors from the IRSSA was the exclusion of the majority of those who suffered from the colonial education system.[41]

Although *Spirit Wind* was unsuccessful in having IDS survivors included in the IRSSA, they continued reaching out to Day School survivors to organize another national class action. In 2009, at one of the *Spirit Wind* meetings, Mason recruited Joan Jack, an Indigenous lawyer working at a small firm in Winnipeg, to take on their case. Jack believed in the cause and agreed to represent them *pro bono*. From the start, Mason and Jack agreed they wanted to do things differently than the IRSSA–they wanted to ensure it was an inclusive process rooted in traditional ways. Jack drafted the statement of claim in 2009, at which point Mason organized multiple workshops with hundreds of community members who gave their input and approval for the way the statement of claim was drafted.[42] Once the Statement of Claim was complete, Mason took it into a sweat and had it blessed by an Elder, before submitting it to the Federal Court.[43]

Shortly after submitting the Statement of Claim to the court, they made Garry McLean the representative plaintiff.[44] In the meantime, Jack and *Spirit Wind* continued to reach out to

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[39] Mason asked Dave Murdoch, an elder from his Elder, for advice. After meditating in the woods for seven days, Murdoch came back to Mason with the name *Spirit Wind*, a name given to him by the great spirits. (*Ibid* at 65).
[40] *Ibid* at 87.
[41] See Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (2015), online (pdf): <http://www.trc.ca/assets/pdf/Principles%20of%20Truth%20and%20Reconciliation.pdf> at 32.
[42] See Mason, *Spirit, supra* note 4 at 82.
[43] *Ibid* at 83.
[44] Mason had only attended an IDS for two years, before moving to an IRS and he believed it was important to have a representative plaintiff who had attended Day Schools for his entire schooling. McLean had attended IDS for 10 years and was happy to step in as the lead plaintiff. *Ibid*.

survivors across the country and research all the schools they attended. This, however, was a costly undertaking, and Jack's law firm eventually went bankrupt in 2012.[45] She transferred the case to another firm; however, Mason felt that they were a low priority to the firm and eventually found Gowling to take over the case in 2016.[46] Throughout the whole process, Mason's three priorities were attaining:

> 1. An apology for what they did to us in the Colonial System and the Indian Day School system in the same manner as our brothers and sisters got in the ISSA.
> 2. Financial compensation for cultural genocide, which is described as trying to make you into another human being (like taking the Indian out of the child), including loss of our language, physical and sexual abuses, emotional trauma/abuse, student on student abuse/bullying.
> 3. Guarantee that our history must also be incorporated in all public schools, colleges, and universities. This would give non-Native people more insight into what the colonial system has done to our people, our culture and our communities, and how that still affects us every day.[47]

In 2018, the class action was certified by the Federal Court and settlement negotiations began between Gowling and the Ministry of Crown-Indigenous Relations. They reached a tentative settlement that year, and while an official apology was not part of the agreement, Minister of Crown-Indigenous Relations Carolyn Bennett did publicly recognize the harm that was caused by the "harmful and discriminatory government policies" of operating and sending children to Indian Day schools.[48] A few months later, McLean died, before the settlement was approved by the court–

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[45] See Kathleen Martens, "Ojibwa lawyer seeks $55M in damages from law firm", *APTN News* (18 September 2020), online: <https://www.aptnnews.ca/national-news/lawsuit/>.
[46] See Mason, *Spirit, supra* note 4 at 86.
[47] *Ibid* at 87.
[48] CPAC, "Govt Reaches Agreement with Former Indian Day School Students" (6 December 2018) at 00h:1m:30s, online (video): <https://www.cpac.ca/en/programs/headline-politics/episodes/65894245/>.

a stark reminder of the rate at which IDS survivors were dying each year. The final settlement was approved by the Federal Court in August 2019.

The Canadian government agreed to provide $200 million to support "Legacy Projects for commemoration, wellness/healing, and the restoration and preservation of Indigenous languages and culture."[49] The parties agreed to create five claim levels with a corresponding compensation from Canada attached to each. This was intended to avoid the Individual Assessment Process that was part of the IRSSA, which many survivors found to be traumatic to complete.[50] Anyone who attended an eligible IDS is entitled to $10,000 under the level 1 claim level. Former students can claim a higher level if they experienced sexual or serious physical abuse while attending day schools.[51] The claim process was, according to the settlement agreement, "intended to be expeditious, cost-effective, user-friendly and culturally sensitive."[52] This process was designed with lessons from the IRSSA in mind.

Lessons from the IRSSA

In early 2020, the National Centre for Truth and Reconciliation released the report *Lessons Learned: Survivor Perspectives*, which documents survivors' experiences related to the IRSSA in order to "inform future work on settlements, truth-telling, reconciliation and healing."[53] Though the report was only published in 2020, research began in 2018 and informed the design of the IDSSA. For example, while some IRS survivors appreciated the incorporation of cultural elements into the IRSSA process, others felt they were forced to deal with people who had no cultural competencies while undergoing it, which was damaging.[54] This was something that Mason felt strongly about

[49] See *IDSSA, supra* note 1 at para 3.01.
[50] See *McLean, supra* note 7 at para 11.
[51] Level 2 claimants are entitled to $50,000; level 3 claimants are entitled to $100,000; level 4 claimants are entitled to $150,000; and level 5 claimants are entitled to $200,000 (*IDSSA, supra* note 1 at Schedule B).
[52] *Ibid* at para 9.03 (1).
[53] National Centre for Truth and Reconciliation, *Lessons Learned: Survivor Perspectives* (2020), online (pdf): <http://nctr.ca/assets/reports/Modern%20Reports/Lessons_learned_report_final_2020.pdf> at 2 [*Lessons Learned*].
[54] *Ibid* at 14-15.

since the beginning and made every effort to pursue the IDSSA process in traditional ways for all survivors. IRS survivors also pointed out the lack of efforts to revitalize Indigenous languages through the process as a failure to remedy the harms caused by IRS.[55] In response to these concerns, the Legacy Fund created through the IDSSA is explicitly intended to fund projects with the goal of language revitalization.

The biggest concern, however, amongst IRS survivors who shared their experiences, was the re-traumatization and re-victimization that occurred for many survivors while participating in the IRSSA processes. Survivors often had to deal with complicated application processes and were required to recount painful and traumatic memories multiple times for the CEP and IAP. Additionally, many survivors were aggressively questioned about their testimony during the IAP process and felt disbelieved by the lawyers and judges.[56] Where they were denied compensation after testifying to the abuse they suffered, survivors felt re-victimized and de-valued. There were reports of survivors returning to substance abuse after years of sobriety, diagnoses of PTSD, and even suicides as a result of participating in the IRSSA processes.[57] The IDSSA was specifically designed using a trauma-informed approach to avoid these problems.

The IDSSA claimants only need to fill out one application and the do not need to orally testify to any abuse they experienced while attending the schools. For claim level 1, applicants only need to write their personal information, which schools they attended, and the years that they attended them. The government does not review these applications; they are sent to an independent Claims Administrator who must make a determination within six months.[58] For claim levels 2-5, applicants must give a written account of the abuses they endured, as well as evidence of attendance at an eligible school. Applicants for levels 4 and 5 must also include some additional documentation to support their claim.[59] For all the claim levels, if someone is unable to provide the required documentation, they may sign a

[55] *Ibid* at 25.
[56] *Ibid* at 29.
[57] *Ibid*.
[58] See *IDSSA, supra* note 1 at Schedule B.
[59] Level 4 & 5 claimants must provide the names or positions of those who inflicted the harm, supporting narratives or records, and health records that support their claim.

sworn declaration that is witnessed by a guarantor in lieu. After being reviewed by the administrator, claims for levels 2-5 are forwarded to the government at which point they have 60-90 days to provide evidence if they wish to refute the claim. There is a limit to the number of claims Canada can contest through this process.[60] Where a claimant's application is denied or assessed to be at a lower level, the Claims Administrator must provide reasons, and claimants are entitled to reconsideration by a Third-Party Assessor. The Claims Administrator is the only body that communicates with claimants about their application and at no point in the process are claimants cross-examined.

While the application process was intended to avoid the mistakes of the IRSSA, there have been some criticisms that survivors do not have the option of giving oral testimony, especially given that, as a result of IDS, many survivors have low levels of educational attainment. As Senator Murray Sinclair explains:

> We must never forget that the one thing about the Residential School experience as it was with the Day School experience is that the educational component was a minimal part of what the effort was all about. The primary purpose of the educational system during that era was really to indoctrinate children into a different culture and there were very few opportunities to provide a good education. So my concern about the Day School survivors is they're now being told that they have to do all of the work themselves. They're being asked to find the documents; they have to prove they went to the school… We're talking about a population of people whose literacy rates are the lowest in Canada.[61]

[60] Canada may only contest 5% of claim level 2 applications, 15% of level 3 applications, 45% of level 4 applications, and up to 100% of level 5 applications (*ibid*).

[61] The Current, "Why the former chair of the TRC is worried about the Indian day school settlement" (14 May 2019) at 00h:17m:00s, online (radio): <https://www.cbc.ca/radio/thecurrent/the-current-for-may-14-2019-1.5134138/why-the-former-chair-of-the-trc-is-worried-about-the-indian-day-school-settlement-1.5134211>.

As Senator Sinclair highlights, while the application process may have been designed to be as simple and straightforward as possible, it is still presenting barriers that may exclude survivors.

Furthermore, despite the process being designed to avoid the re-traumatization of survivors, some First Nations health officials have called the IDSSA process "unethical." [62] IRS survivors highlighted how critical the supports were that were available to them throughout and after the IAP and TRC hearings, but they also identified the lack of supports available to their children and grandchildren in the community. [63] Given the intergenerational effects of IRS, intergenerational healing is required, yet the supports available were primarily for the survivors only.[64] As with the IRSSA, supports are available to survivors throughout the IDSSA process, including a 24/7 toll-free emotional distress hotline. However, there are not any support resources for those who have been intergenerationally impacted by IDS. Additionally, many survivors prefer to seek support at the community level, rather than through a hotline. This has meant that community-level healthcare programs have experienced a large influx of people requiring their services, with many of the workers untrained to deal with the trauma the survivors are experiencing. Just a few weeks after the claims process opened, the Atlantic Policy Congress of First Nations Chiefs Secretariat requested "immediate additional legal, financial and mental health resources" from Canada to help deal with the emotional trauma the applications had triggered for many community members.[65] In addition to retraumatizing survivors, the Union of Nova Scotia Mi'kmaq claims that healthcare workers are being traumatized, through hearing survivors' narratives and lacking the resources and mental health training required to adequately support them.[66] So while the IDSSA was intended to be attentive to the potential

[62] See Nic Meloney, "Communities 'asked to clean up somebody else's mess' as day school settlement claims open old wounds", *CBC News* (18 February 2020), online: <https://www.cbc.ca/news/indigenous/day-school-settlement-mental-health-support-1.5464693>.
[63] See *Lessons Learned, supra* note 53 at 16.
[64] *Ibid* at 56.
[65] See Nic Meloney, "Atlantic First Nations seek emergency assistance with 'tsunami' of work from Indian day school claims", *CBC News* (5 February 2020), online: <https://www.cbc.ca/news/indigenous/indian-day-school-claims-emergency-support-1.5451893>.
[66] *Ibid*.

re-traumatization of survivors and was designed to avoid causing further harms to communities, it may have fallen short in this goal.

In addition to these shortcomings, some key lessons from *Lessons Learned* were flat out ignored. For example, many IRS survivors highlighted the benefit of the process of truth-telling and forgiveness that was a part of the TRC as well as the public recognition of the legacy of the IRS today.[67] Critically, no TRC or other public truth-finding forum was established as a part of the IDSSA. While the Legacy Fund is intended to support projects that, among other things, commemorate the IDS, it is unlikely to be on the same scale as were truth telling processes through the IRSSA.

Furthermore, many IRS survivors highlighted the importance of the federal government's apology. It had a profound impact on many peoples' healing and allowed them to feel validated.[68] Neither the federal government nor any of the churches that were involved in running IDS have agreed to publicly apologize to survivors.[69] This seems like a glaring omission and a huge impediment to healing for many. IDS survivors suffered the same harms as IRS survivors, so the lack of an apology for IDS is hurtful to many.

Other concerns raised by IRS survivors in *Lessons Learned* include the exclusion of some survivors from the settlement– students who attended Boarding schools, Day schools, Metis schools, and Residential schools in the far North or Labrador were ineligible for the IRSSA, and other former students lacked the proper documentation to qualify.[70] Additionally, some former students who were incarcerated at the time of the settlement did not find out about the settlement until it was too late, while others were barred from participating in the IRSSA processes due to financial barriers.[71] The IDSSA suffers from some of the same gaps; for example, there have been reports that up to 700 IDS have been excluded from the IDSSA.[72] As part of the agreement, Gowling is offering free legal advice to anyone applying for the

[67] See *Lessons Learned, supra* note 53 at 6, 14.
[68] *Ibid* at 16.
[69] See Pind, Mason & Christou, *supra* note 4.
[70] See *Lessons Learned, supra* note 53 at 20-21.
[71] *Ibid* at 22.
[72] See Melissa Ridgen, "School survivors left out of federal settlement gear up for class-action suit" *APTN News* (14 November 2019), online: <https://www.aptnnews.ca/infocus/school-survivors-left-out-of-federal-settlement-gear-up-for-class-action-suit/>.

IDSSA, and their toll-free number is listed on the claim form, so this should address the exclusion of some survivors for financial reasons. It remains to be seen whether incarcerated IDS survivors will face the same difficulties in accessing the settlement as did incarcerated IRS survivors. While some lessons were learned from the IRSSA, the IDSSA seems to come up short in many other respects. With this is mind, I will now turn to the concept of transitional justice and provide a brief background of the concept before turning to the question of whether the IDSSA can understood as a transitional justice measure.

What is Transitional Justice?

Transitional justice emerged as a concept in the late 1980s as a way to redress large scale human rights abuses in the context of a number of political transitions that were occurring in Eastern Europe and Latin America.[73] Initially conceptualized as a combination of justice measures to provide relief to victims of human rights abuses, while supporting the political transition from authoritarian rule or conflict to democracy and peace, the concept of transitional justice has expanded to encompass wider contexts in recent years. Paul Seils, the former vice-president of the International Centre for Transitional Justice describes transitional justice broadly as "justice-focused processes that societies undertake in the aftermath of large-scale human rights violations, normally in the relatively recent past."[74] In situations where massive, systemic abuse has occurred, traditional criminal justice measures may be insufficient, on their own, to effectively provide redress to victims of those abuses and for a society to heal. Rather, a holistic approach may be required that attends to the needs of victims and perpetrators alike, focusing on individuals and communities, with the ultimate goal of achieving a transformed society.[75]

Transitional justice has traditionally been understood to have four pillars: truth-seeking, criminal accountability,

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[73] UN Peacebuilding, *What is Transitional Justice? A Backgrounder* (20 February 2008), online: (pdf) <https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf> [*What is Transitional Justice?*]

[74] Paul Seils, *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions* (International Centre for Transitional Justice, 2017) at 2.

[75] Joanna R Quinn, "Whither the "Transition" of Transitional Justice?" (2015) 8 Interdisciplinary J HRL 63 at 65.

reparations and institutional reform or guarantees of non-recurrence.[76] Transitional justice measures often include criminal prosecutions, public apologies, truth commissions, security system reform, and memorialization. For transitional justice to be effective, a number of the aforementioned measures need to be used in concert. As Elster argues, "truth *without* justice is not necessarily desirable," for recounting the truth while knowing that the perpetrators will go free may be more damaging than healing for victims.[77] Furthermore, memorialization or public apologies may be seen as empty words, if not accompanied by redress for victims or punishment of those who committed harms. [78] Reparations may be viewed as "blood money" if not accompanied by systemic reform.[79] Regardless of which measures are employed, transitional justice is widely understood to require a multiplicity of processes with the ultimate goal of bringing about a restoration of trust in the state, the rule of law and good governance. [80] In many cases, it is also intended to achieve democratization, peace building, and conflict prevention. [81] Although often not explicitly acknowledged, the transitional

[76] In 2010, the United Nations Secretary General further proposed the use of national consultations as a necessary element of transitional justice. In recent years, many scholars have also proposed economic justice as a fifth pillar, arguing that without addressing the underlying inequalities that contributed to conflict in the first place, transitional justice measures are unlikely to be effective in the long run. See Wendy Lambourne, "What Are the Pillars of Transition Justice: The United Nations, Civil Society and the Justice Cascade in Burundi" (2014) 13 Macquarie LJ 41 at 43 (four pillars); *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (10 March 2010), DPA/UNSG/2010-00904 (national consultations); Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs" (2012) 21:2 Social & Legal Studies 171 (economic justice); Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 Intl J Transitional Justice 266 (economic justice); Dustin N Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice" (2013) 26 Harv Hum Rts J 149 (economic justice). See also Jon Elster, "Justice, Truth, Peace" (2012) 51 Transitional Justice 78 ("To create a durable peace, however, it is not enough to address the issue of violence by measures of transitional justice. One also has to address the issues of exploitation, inequality, and poverty by measures of distributive justice." at 89).

[77] *Supra* note 76 at 84.

[78] See UN Peacebuilding, *supra* note 73 at 4.

[79] *Ibid*.

[80] See Seils, *supra* note 74 at 2-3.

[81] *Ibid*.

justice paradigm is built upon the assumption of liberalism as neutral and "universizeable."[82]

Transitional Justice and Reconciliation

Transitional justice is also, often, assumed to have the goal of reconciliation. However, Seils argues that whether reconciliation is a goal of transitional justice is context-specific and may not always be a prominent theme.[83] In traditional transitional justice contexts, where there is a regime change, reconciliation may not be seen as a priority or even an aim of transitional justice. Rather, it is in the contexts where there are strong continuities throughout the "transition" that reconciliation is likely be a goal of transitional justice.[84] Rather than conceptualizing reconciliation as a goal that can be reached, Skaar argues reconciliation is more useful when conceived of as a process.[85] It is also worth asking *who* desires reconciliation through transitional justice. While states may pursue reconciliation as a goal, many of those who have suffered from structural violence may view reconciliation as a way to silence dissenting voices and uphold the status quo.[86] However, even in contexts where reconciliation is clearly a goal of transitional justice, what reconciliation is, and whether or not it is even a realistic goal remain less clear. Furthermore, Skaar argues that there is a dearth of research on how different transitional justice measures may actually affect the achievement of reconciliation.[87]

Conceptions of reconciliation may range from 'thin'—that is, the peaceful coexistence of former enemies—to 'thick'—which may include forgiveness, mercy, mutual healing, and harmony.[88]

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[82] See Augustine SJ Park, "Settler Colonialism, Decolonization and Radicalizing Transitional Justice" (2020) 14 Intl J Transitional Justice 260 at 266.
[83] *Supra* note 74 at 4.
[84] *Ibid*.
[85] See Elin Skaar, "Reconciliation in a Transitional Justice Perspective" (2013) 1:1 Transitional Justice Rev 54.
[86] For a strong critique of reconciliation as a goal in colonial contexts, see Jeff Corntassel and Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru" (2008) 9:4 HR Rev 472; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: Univ Minnesota Press, 2014).
[87] *Supra* note 85 at 57.
[88] *Ibid* at 65.

Interestingly, in much of the literature that assumes reconciliation to be a goal of transitional justice, the authors fail to make explicit their understanding of reconciliation.[89] According to Seils, reconciliation involves "processes of building or rebuilding relationships after massive violations of human rights."[90] While this definition is broad enough to capture reconciliation in a multiplicity of contexts, if reconciliation is intended as a goal of a specific transitional justice project, a context-specific understanding of reconciliation is required. How are those relationships to be built? On whose terms? The Truth and Reconciliation Commission of Canada understands reconciliation as "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples."[91] In the child welfare context, Cindy Blackstock argues that there must be four phases of reconciliation: truth telling, acknowledging that Indigenous child welfare principles exist and should be respected, restoring balance by providing opportunities for redress and capacity building for the future, and relating (recognizing that reconciliation is an ongoing process).[92] These two definitions are much more helpful, because if reconciliation is an aim underlying a transitional justice process, then we not only need to understand what reconciliation looks like in that context, but also who is meant to be reconciling.

A number of scholars point to the different forms of reconciliation that can occur between different actors.[93] For

[89] For example, the UN Secretary General has defined transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation," yet it fails to explain what reconciliation means in this context. Interestingly, South Africa's *Promotion of National Unity and Reconciliation Act, 1995* does not even define reconciliation in its definitions, nor does the South African Truth and Reconciliation Commission. However, throughout its final report, it becomes clear that reconciliation is conceived as being synonymous with "national unity." See United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General* (2004), S/2004/616 at 4; Truth and Reconciliation Commission of South Africa, *Final Report*, vol 1 (1998), online (pdf): <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> at 23, 49.

[90] *Supra* note 74 at 5.

[91] *TRC Final Report, supra* note 4 at 6.

[92] See Cindy Blackstock et al, *Reconciliation in Child Welfare: Touchstones of Hope for Indigenous Children, Youth, and Families* (National Indian Child Welfare Association, 2006) at 8-9.

[93] See e.g. Seils, *supra* note 74; Park, *supra* note 82; Skaar, *supra* note 85.

example, Seils understands there to be four overlapping yet distinct forms of reconciliation: individual, interpersonal, socio-political, and institutional.[94] Individual reconciliation is the process of rebuilding one's own life and may involve confronting the trauma that one has experienced. It is often a prerequisite for all other forms of reconciliation, as if someone has not come to terms with what has happened with themselves, they will be unable to (re)build relationships with others.[95] Interpersonal reconciliation is the restoring of the relationship between perpetrators and victims; the beneficiaries and the dispossessed. This form of reconciliation requires mutuality, with the perpetrator interacting directly with the victim in asking for forgiveness and the victim granting forgiveness. [96] Socio-political reconciliation is rebuilding of relationships between different groups in society, with them mutually agreeing to solve future disputes through peaceful means.[97] Finally, institutional reconciliation is where institutions tasked with protecting civil liberties and human rights win back the trust of the segment of society which they failed to protect.[98] This is often done through institutional reforms and requires "the reconstruction of vertical trust between citizens and the state."[99] Clearly reconciliation is going to look different based on what actors are reconciling in what contexts. Thus, where reconciliation is desired, those pursuing it should be clear as to what they perceive it to be. For example, a common critique of reconciliation in Canada is that efforts tend to be on Indigenous people reconciling themselves to the reality of the colonial-settler state.[100] While this approach to reconciliation is clearly antithetical to decolonization, we do not necessarily need to abandon reconciliation as a goal altogether. Rather, we can reconceptualize reconciliation within a decolonial framework as we consider who needs to reconcile with what.

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[94] *Supra* note 74 at 5-6.
[95] *Ibid* at 5.
[96] See Skaar, *supra* note 85 at 66.
[97] See Seils, *supra* note 74 at 6.
[98] *Ibid* at 6.
[99] *Ibid* at 6.
[100] See e.g. Coulthard, *supra* note 86; Taiaiake Alfred, "Reconciliation as Recolonization" (21 September 2016) at 00h:12m:45s, online (radio excerpt): *CKUT Community Radio* <https://archive.org/details/TAlfred20sept2016>.

The Necessity of Transition

Whether reconciliation is an explicit goal of transitional justice will often depend on the degree to which a society is undergoing a transition, which begs the question, how necessary is transition for transitional justice to occur? While this field was initially conceived in the context of states transitioning from conflict to peace and from authoritarianism to democratization, the scope of transitional justice has expanded over the years to include contexts that are not necessarily undergoing such an obvious transition. Quinn considers this expansion of the field of transitional justice and looks at what factors need to be present for a society to be considered in transition. Taking into account the transitional period, the legacy of recent large-scale abuses, what the society is transitioning to, and any evidence of actual transformation, Quinn creates three categories of transitions in which transitional justice may occur: the "run-of-the-mill post-conflict transition," "pre-transitional states," and "non-transitional states."[101] Non-transitional states are those that are outwardly seen as peaceful and democratic, but where a discreet incident or violence directed towards a small subset of the society occurs that serves to "weaken the social fabric of the whole society."[102] These states have no intention of transitioning to a new governmental regime, yet transitional justice measures have been implemented to repair the harm that persists in society. Settler-colonial states making efforts to address their colonial legacies, such as Canada, fit neatly into Quinn's conception of non-transitional states, but the question remains, can transitional justice truly occur in such a context?

Many scholars have pointed to the actions undertaken by the Canadian government to provide redress for the Indian Residential schools as clearly fitting within the bounds of transitional justice.[103] The IRSSA includes five measures typically

[101] *Supra* note 75 at 67-70.
[102] *Ibid* at 75.
[103] See e.g. Quinn, *supra* note 75; Rosemary L Nagy, "The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission" (2013) 7 Intl J Transitional Justice 52; Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: transitional justice for indigenous people in a non-transitional society" (2009) Aboriginal Policy Research Consortium International 295; Jennifer Matsunaga, "Two faces of transitional justice: Theorizing the incommensurability of transitional justice and decolonization in

associated with transitional justice: a common experience payment, an independent assessment process, the establishment of the TRC, and provisions for memorialization and community healing.[104] In addition to the IRSSA, former Prime Minister Harper publicly apologized in 2008 for the negative consequences of IRS.[105] In it, he characterized the assimilationist policy as "wrong" and he asked for the forgiveness of Aboriginal peoples for "failing them so profoundly."[106] Harper also recognized that the lack of an official apology from the government to that point had been an impediment to reconciliation and healing. The IRSSA was the first major process in Canada where the Canadian government accepted responsibility and provided redress for the harms caused by colonial governmental policies. For many Canadians, the IRSSA signaled the turning of a new leaf, or the start of a new chapter in Canada. The government seemed genuine about reconciliation, atoning for past harms, and transitioning to a transformed, decolonial society.[107] This was, for many, a clear case of transitional justice in a settler-colonial context.

Transitional Justice and Decolonization

This image of turning the page and trying to make a break from Canada's past, however, is troubling to some, who believe it actually perpetuates a colonial mindset. This can be seen at the micro level in the differing responses to and expectations following the official apology for IRS. Jung explains that for many non-Indigenous Canadians, the apology was meant to "close a chapter of Canadian history" and to "put the past behind us."[108] Conversely, for many Indigenous leaders and IRS survivors, the apology signalled a commitment to ongoing efforts to fix the

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Canada" (2016) 5:1 Decolonization: Indigeneity, Education & Society 24 at 35.

[104] See *IRSSA*, *supra* note 15.

[105] Stephen Harper, On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools* (11 June 2008), online (pdf): <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-RECN/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf>.

[106] *Ibid*.

[107] Harper's apology was generally well-received, though some doubted its credibility and found it to be lacklustre See Quinn, *supra* note 75 at 77; Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools*, 2nd ed (Toronto: Univ Toronto Press, 2017) at 36-37; Nagy, *supra* note 103 at 58; Jung, *supra* note 103 at 9.

[108] *Supra* note 103 at 18.

harms that persist from IRS. The conflict between these expectations has caused frustration on both sides, causing many Indigenous peoples to doubt Canada's commitment to reconciliation. As Jung puts it: "First Nations saw it as a beginning, whereas the government may have seen it as an end." Although Canada may view itself as transitioning away from colonialism, it is not actually engaging in decolonization. Dene scholar Glen Coulthard explains that in settler-colonial contexts with no transition in regimes, such as Canada, "state-sanctioned approaches to reconciliation must ideologically manufacture such a transition by allocating the abuses of colonization to the dustbins of history, and/or purposely disentangle processes of reconciliation from questions of settler-coloniality as such."[109] Thus we can view assertions that Canada is undergoing transitional justice and reconciliation as a form of gaslighting Indigenous peoples into believing Canada is a post-colonial state, without actually doing the decolonizing work.

However, while criticisms of using a liberal framework to guide decolonization are valid, a number of scholars have argued that we can expand the transitional justice framework to recognize and incorporate Indigenous worldviews. For example, Nagy highlights how transitional justice measures often conceptualize healing from a western perspective and fail to account for Indigenous healing needs.[110] Indigenous healing may require language revitalization, the return of lands, and a rebalancing of power, rather than simply clinical interventions. If transitional justice measures take those needs into account, then the transitional justice framework can facilitate decolonization, rather than reinforcing liberalism and colonialism. Likewise, Park argues that transitional justice can be "radicalized," through decentering and challenging the legitimacy of the settler state, to contribute to decolonization.[111] She explains how transitional justice theory typically conflates 'transition' with 'liberalization,' which has the effect of delegitimizing other futures; however, this approach is not necessary.[112] She posits that "suspending the taken-for-granted assumption of liberalism as a goal for transitional justice" can allow us to reimagine transitional justice in a way that promotes decolonization.[113] All this is to say that

[109] *Supra* note 86 at 108.
[110] *Supra* note 103 at 60-61.
[111] *Supra* note 82.
[112] *Ibid* at 266.
[113] *Ibid*.

while there are valid criticisms of how transitional justice has been conceptualized in settler-colonial states up to this point, they do not preclude the possibility of transitional justice measures being used to further decolonization.

Canada's Stance

For all the scholars who have tried to situate the IRSSA and Canada's subsequent actions within a transitional justice framework, one key voice is missing. Does Canada see itself as employing transitional justice? In her review of Canadian governmental documents, Jennifer Matsunaga finds that the words 'transitional justice' only appear in reference to foreign states. In its foreign peace and security policy, Canada explicitly establishes itself as a country that can help other states transition from conflict and authoritarianism to long-term peace and stability.[114] The Canadian government has stated that it supports international transitional justice, as it is in line with Canada's priorities of the "promotion of democracy, human rights and the rule of law."[115] Thus, in proclaiming its expertise in assisting foreign countries through transitional justice, Canada can simultaneously distance itself from the conflicts and issues that plague the nations undergoing transition, while also imposing Western liberal values in foreign states. While the Canadian government engages with this work with 'others,' it fails to recognize transitional justice as occurring within its borders. Canada can thus promote nation-state-centred building abroad while ignoring the ill effects of that nation-state building at home. However, despite Canada not seeing itself as employing transitional justice measures domestically, Matsunaga argues that it in fact does, just through other names.[116] For example, where reparations may be employed as a tool of transitional justice abroad, similar measures are framed as "symbolic justice," "state redress, " or "the politics of amends" in the Canadian context.[117] Just because it may not be politically expedient to admit to engaging in transitional justice practices domestically does not mean that Canada is not doing so in the context of IRS.

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[114] See Matsunaga, *supra* note 103 at 35.
[115] *Ibid* at 35.
[116] *Ibid* at 28.
[117] *Ibid* at 35 referencing Wolf, Winter and Braun.

It makes sense that Canada is trying to distance itself from transitional justice in the domestic context if we consider how the transitional justice paradigm fits into Mutua's savage-victim-saviour framework.[118] Where Canada lends support and expertise to implementing transitional justice abroad, the citizens of the country where the measures are being employed are the victims, the State that has failed to protect its citizens is the savage, and Canada can act as the saviour. Through their interventions and assistance in implementing transitional justice measures, Canada is able to transform the savage into a liberal State, thereby coming to resemble Canada more closely. The end goal is to transition to a society that mirrors the saviour's. To acknowledge its actions at home as being a part of transitional justice, would be to admit that it was the savage and would be delegitimizing. To be the savage would be to lose credibility in assisting other savages transition to saviour. It is clear why Canada does not want to characterize any domestic processes as being a part of transitional justice. Canada is able to uphold colonial policies and frameworks at home in refusing to acknowledge itself as undergoing transitional justice. However, the fact remains that Canada employed multiple measures through the IRSSA that clearly fit into a transitional justice framework. Naming it as such is critical if we want to seriously engage in decolonization. Whether the IDSSA can fit into a transitional justice framework, however, is another question.

The IDSSA in the Transitional Justice Framework

Many scholars have argued that the IRSSA is part of a transitional justice process in Canada, but can the same be said for the IDSSA? Clearly, there are a lot of similarities between the two. Those designing the process tried to learn from the IRSSA, attempting to make the IDSSA more trauma-informed and victim-centred, yet the IDSSA was not as comprehensive as the IRSSA. No truth-seeking processes have been implemented and no public apologies are planned. Ultimately though, we need to look at how these measures stand up against the pillars of transitional justice to see how well the IDSSA fits into that framework. Recalling that the four traditional pillars of transitional justice are truth-seeking, criminal accountability, reparations and institutional reform or

[118] See Makau Mutua, "Savages, victims, and saviors: the metaphor of human rights" (2001) 42:1 Harvard Intl LJ 201.

guarantees of non-recurrence, I will now turn to how well the IDSSA upholds those pillars.

Firstly, the IDSSA does not engage in meaningful truth-seeking. Written testimonies from the claim process only go to the independent assessor and government. There is no truth-telling for the nation as a whole. While the Legacy Fund will likely fund some projects that aim to promote truth-telling, the extent of those activities is not guaranteed by the settlement agreement.

There is also no criminal accountability for those who perpetrated harm against IDS students. In the IDSSA, the federal government admitted no liability, and any accusations made through the claims process will not be used to pursue criminal charges against individuals.[119]

Reparations, in the context of transitional justice, are intended to serve two goals: to recognize the loss and pain suffered by victims in order to help them become rights-holders entitled to redress, and to provide actual benefit to victims.[120] If we consider this through a Western liberal lens, then the IDSSA arguably did provide reparations. Minister Bennett publicly recognized the harm done by the IDS, and through the settlement agreement, all eligible class members became rights-holders. Individual survivors are receiving financial compensation for the harms they suffered while attendings IDS, which is benefitting them. Canada has provided $300 million to the Legacy Fund, which could be seen as financial reparations for the communities.

However, if we look at this through an Indigenous worldview, the financial compensation provided is less likely to resemble reparations. Granted, projects funded through the Legacy Fund that focus on language revitalization will benefit entire communities and actually help to heal the damage inflicted on communities by IDS. However, this is the only collective measure for Indigenous communities; the majority of the financial compensation is only going toward a very narrow conception of who was a victim. Furthermore, the way in which the Canadian government is splitting up and excluding survivors could be seen as undermining reparations. The lasting damage to communities

[119] See *McLean, supra* note 7 at para 7.
[120] Ruben Carranza, "The Right to Reparations in Situations of Poverty" (2009) International Center for Transitional Justice at 2.

as a result of Canada's assimilative policies includes loss of language and culture, intergenerational abuse, mental health and substance abuse problems, and poor educational attainment. These impacts on communities are felt collectively and cannot be broken up and apportioned to qualifying Residential Schools, qualifying Day Schools, other government-run schools for Indigenous children, and child welfare policies. While Indigenous communities are concerned about the intergenerational impacts of these schools, the settlement primarily serves to compensate only those generations that attended.

Many Indigenous nations in Canada share the principle of the seven generations.[121] For example, under Haudenosaunee law, citizens must act in a way that respects the seven generations to come, as there is an understanding that those living today are borrowing the world from future generations.[122] Under this philosophy then, in order to provide reparations for the harms caused by IDS, Canada would need to provide benefits to those who are seven generations on from the IDS survivors. Ultimately, while the individual financial compensation and the Legacy Fund will have a positive benefit in some individuals' lives and communities, this individualistic approach fails to provide culturally appropriate reparations, while it reinforces neoliberalism over decolonization.

The final pillar of restorative justice is the guarantee of non-recurrence. Canada has not apologized for the harm it has caused through the IDS. Canada continues to employ assimilative policies against Indigenous children. Canada remains responsible for the provision of First Nations education, which is chronically underfunded resulting in Indigenous peoples continuing to have the lowest educational attainment in Canada.[123] The Federal government has neither committed to non-recurrence, not made any structural reforms to ensure non-recurrence.

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[121] See Jennifer Nutton & Elizabeth Fast, "Historical Trauma, Substance Use, and Indigenous Peoples: Seven Generations of Harm From a 'Big Event'" (2015) 50:7 Substance Use & Misuse 839 at 839.
[122] See Kayanerehkowa, *The Great Law of Peace,* online: <https://qspace.library.queensu.ca/bitstream/handle/1974/14846/Drummond_et_al_2013_Debate_on_First_Nations.pdf?sequence=1>.
[123] See Don Drummond & Ellen Kachuk Rosenbluth, *The Debate on First Nations Education Funding: Mind the Gap* (2013) Working Paper 49 School of Policy Studies, Queen's University, online (pdf): <https://qspace.library.queensu.ca/bitstream/handle/1974/14846/Drummond_et_al_2013_Debate_on_First_Nations.pdf?sequence=1>.

Clearly, the IDSSA cannot be said to be a part of transformative justice in Canada. While scholars have attempted to stretch the bounds of transitional justice to include states that are not undergoing a typical transition, to apply it in this context would be stretching it too far. Regime change or not, transitional justice measures need to fulfil the essential elements of transitional justice. The IDSSA fails to fulfil any of them. While recognizing the importance of the IDSSA to all the survivors who will receive compensation through it, and the benefits that will come out of the Legacy Projects, this settlement cannot be said to be occurring within a society that is moving towards transformation.

Moving Towards Transitional Justice?

While the IDSSA agreement does not fit into the framework of transitional justice, no single measure in any context can lead to transitional justice. Transitional justice requires the use of multiple measures that address different aspects of the harm caused. Thus, in the right context, the IDSSA could be considered one tool, among many, that contributes to decolonization within a transitional justice framework.

While it is clear that the IDSSA does not contribute to truth-seeking, criminal accountability, or guarantees of non-recurrence, those could be achieved through other measures. For example, Canada could commit to launching and funding an inquiry or a truth commission into the history of colonial education in Canada and its legacy today. Any process should be victim-centred and trauma-informed and be guided in its design by the lessons learned from the IRSSA. Along with this process, there should be a commitment by various levels of government to implement any recommendations that come out of that report, even if they are systemic, destabilizing recommendations that challenge assumptions underlying the settler-colonial state.

In my research, there was not any evidence of a strong desire for criminal accountability amongst IDS survivors. If, upon consultation with IDS survivors and the seven generations after them, it is clear that criminal accountability (even if posthumously) would contribute to healing, then it should be pursued. If this process is pursued, serious consideration should be given to pursuing criminal accountability through Indigenous legal systems.

Canada could also provide reparations to Indigenous communities. These reparations should go beyond monetary compensation and be based upon what IDS survivors and their communities highlight as necessary for their healing. This could include a commitment to long-term sustainable funding for language revitalization (rather than the limited, project-based model currently offered through the Legacy Fund). This may also require the redistribution of land. Reparations should be guided by communities and based on their contextual needs, and Canada should cease making distinctions between the different assimilationist policies that Indigenous children were harmed by in their provision of reparations.

Perhaps most importantly, Canada must guarantee non-recurrence. Canada should commit to properly funding Indigenous education and social services, using the principle of substantive equality, ensuring funding is sufficient not only to meet current day needs, but also to address the gaps created by over 150 years of underfunding. Canada should stop fighting the CHRT's ruling in court and implement the decision. Canada should prioritize the implementation of the TRC Calls to Action. Other institutional changes that may be required to guarantee non-recurrence should be identified by Indigenous communities and implemented by Canada.

Finally, perhaps the most obvious measures would be to implement what Mason has been seeking since he formed *Spirit Wind*: an apology, financial compensation for cultural genocide, and the incorporation of IDS history into all schools.[124] The IDSSA was hard won by advocates like Garry McLean and Ray Mason who devoted over a decade of their lives to ensuring survivors of IDS were compensated for the harms they experienced. This analysis is in no way meant to take away from the importance of the IDSSA to the lives of many IDS survivors. However, as the sole measure currently in place to address the legacy of IDS, it cannot be considered to be part of a process of transitional justice. With the implementation of the aforementioned measures, guided by the needs of Indigenous communities, the IDSSA could come to be seen as one measure, among many, in Canada's transition to a decolonial society. However, without the use of other tools in the transformative justice toolbox, the IDSSA alone is simply a

[124] See note 47.

discreet class action settlement that will provide temporary redress to the individuals in the class. More action is needed if Canada truly wants to transition to a just, transformed society.

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