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Appraising the Past

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Appraising the Past: Assessing the Limitations of Compensatory Approaches to Restorative Justice within the context of Canada's Indian Residential Schools Legacy

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Beginning in the late 1880s, First Nations children across Canada were removed, often forcibly, from their homes and placed in Indian Residential Schools, where they were compelled to abandon their Native languages, culture, and religion on account of both physical and psychological abuse.[1] At present, the government of Canada is making attempts to remedy this dark chapter of its history by providing survivors with various forms of reparations so as to promote reconciliation throughout Canadian society at large. As Antonio Buti reminds us, "the right to reparations for wrongful acts has long been recognized as a fundamental principle of law essential to the functioning of legal systems."[2] As will become evident in this paper, reparations made according to a state-run, top down approaches is untenable. Reparations for harms suffered by First Nations children, their families, and communities under Canada's Indian Residential Schools system illustrates a case of transitional justice mechanisms as work in a *de facto* non-transitional context.[3] That being said, it is conceivable to characterize the struggles of many First Nations peoples at present to achieve justice for past wrongs

[1] Joanna Rice, "Indian Residential School Truth and Reconciliation Commission of Canada," *Cultural Survival Quarterly* 35.1 (2011): 22.
[2] Antonio Buti, "Canadian Residential Schools—The Demands for Reparations," *Flinders Journal of Law Reform* 5.1 (2000): 227.
[3] Robyn Green, "Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement," *Canadian Journal of Law and Society* 27.1 (2012): 129.

and greater prospects for both present and future generations as transitional; these are collective and purposeful movements from oppression to opportunity. On June 11, 2008, Prime Minister Stephen Harper delivered a public apology on behalf of the previous and current government, on account of retrospective remorse and according to its duty under international common law to redress and offer reparations to victims of gross human rights violations.[4]

Are reparations an effective means of redressing the incalculable harms committed against First Nations peoples during the Indian Residential Schools era? Although not sufficient, and at times inherently problematic, this paper finds that reparations can be a legitimate goal of justice seeking within the context of redressing victims of Canada's residential schools system insofar as they are rendered adaptable to case-by-case specificities and are mindful of both the unique needs and rights of First Nations peoples. It will be demonstrated that their symbolism is often more highly regarded and can serve a more useful purpose than any literal interpretation of their worth. Notwithstanding the imperfections of compensatory programs and associated forms of retroactive redress, to deprive survivors by any means of opportunities to make claims to reparations is ultimately unjust.

It is the focus of this paper to assess the strengths and weaknesses of reparations programs designed to address the widespread human rights abuses suffered under the residential schools system, with particular attention paid to the Indian Residential Schools Settlement Agreement (IRSSA) and its various individual and collective measures, including a Common Experience Payment (CEP), a Truth and Reconciliation Commission (TRC), an Independent Assessment Process (IAP), commemoration initiatives, and healing projects.[5] By situating the IRSSA within a general

[4] Jennifer Henderson and Pauline Wakeham, "Colonial Reckoning, National Reconciliation? Aboriginal Peoples and the Culture of Redress in Canada," *English Studies in Canada* 35.1 (2009): 2.

[5] "Backgrounder – Indian Residential Schools Settlement Agreement," Aboriginal Affairs and Northern Development Canada, last modified September 15, 2010,

framework of policies and procedures that have oppressed and continue to limit Indigenous nationhood in Canadian society, this paper will shed light on the limited success of Canada's reconciliatory process thus far. First, there will be a brief yet comprehensive history of Canada's residential schools system, following the passage of the Indian Act in 1876. Next, a theoretical discussion of reparative justice mechanisms as they relate to international human rights law will set the stage for an analysis of Canada's reparations programs for both the physical and psychological abuses suffered by First Nations children, their families, and communities at large. A substantial emphasis is placed on the relative merits and shortcomings of the IRSSA's CEP and IAP. Finally, recommendations for the improvement of these mechanisms going forward will be proposed.

The extent of harms suffered, both physical and psychological, in combination with the schools' espousal of assimilationist policies and practices, have rendered the Indian Residential Schools system one of the most horrific episodes of Canadian history. The foundational principles of the Indian Residential Schools system had pre-Confederation origins, although the institutions were most active following the passage of the Indian Act in 1876.[6] The system was funded by the government's Department of Indian Affairs and administered by four of Canada's principal churches.[7] From the mid-19th century until the official closing of the last federally run residential school in 1996, First Nations children and their families were sidelined from wider Canadian society by the system, owing to the distinctiveness of their language, culture, and ethnicity.[8] The 1837 House of Commons

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accessed March 31, 2013, http://www.aadnc-aandc.gc.ca/eng/1100100015755/1100100015756.

[6] Pamela O'Connor, "Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment," *International Journal of Legal Information* 28.2 (2000): 238.

[7] Rice, "Indian Residential School Truth and Reconciliation Commission of Canada," 22.

[8] "Indian Residential Schools," Health Canada, last modified March 5, 2013, accessed April 6, 2013, http://www.hc-sc.gc.ca/fniah-spnia/services/indiresident/index-eng.php.

Select Committee on Aborigines maintained that state-enforced removal of children from their families, and by extension their communities, would ensure that both First Nations peoples at present, as well as future generations, be groomed for "Christianity, civilization, and British citizenship."[9] Accordingly, large, specialized institutions, known as residential schools, were developed in order to segregate and confine First Nations children as they underwent assimilation procedures.[10] Much of the education administered was designed to instill European beliefs.[11] The use of English was enforced, while Native languages and ancestral cultural practices were suppressed through various forms of physical and psychological harms, including widespread neglect, starvation, physical violence, sexual abuse, and related deaths.[12] According to a 1996 report by the Royal Commission on Aboriginal Peoples (RCAP):

> [c]hildren were frequently beaten severely with whips, rods, and fists, chained and shackled, bound hand and foot and locked in closets, basements, and bathrooms, and had their heads shaved or hair closely cropped.[13]

It has been compellingly argued that the intergenerational, or even multi-generational, effects of these traumas have become manifest in many present-day parenting behaviours within First Nations communities.[14] Recurrent negativity can normalize during one's impressionable childhood years, ultimately shaping an individual's perception of appropriate behaviours towards their own children in unhealthy ways.

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[9] Andrew Armitage, "Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand," (Vancouver: UBC Press, 1995): 204.
[10] Ibid., 205.
[11] Buti, "The Demands for Reparations," 232.
[12] Rice, "Indian Residential School Truth and Reconciliation Commission of Canada," 22.
[13] Linda Popic, "Compensating Canada's 'Stolen Generations'," *Indigenous Law Bulletin* 7.2 (2008): 14.
[14] Armitage, "Comparing the Policy of Aboriginal Assimilation," 208.

Attendance at residential schools became mandatory for First Nations children according to an amendment to the Indian Act in 1920, although "formal education was not central to their purpose."[15] The curricula were designed to inculcate Eurocentric religion, culture, and language so as to "kill the Indian in the child."[16] As of 1950, only 10 percent of First Nations attendees had surpassed grade six-level education, compared to 30 percent of non-First Nations children.[17] Formal schooling was often limited to half days, with the rest of the day largely devoted to domestic activities or vocational training.[18]

As then-Grand Chief of the Assembly of Manitoba Chiefs, Phil Fontaine's disclosure of his firsthand experiences of racism, physical violence, and sexual abuse at the Fort Alexander Indian Residential School served as a major catalyst for raising awareness throughout Canada as to the reality of the nation's objectionable past.[19] During a CBC interview in 1990, Fontaine advocated for an urgent public inquiry into the history and administration of the Indian Residential Schools system.[20] Testimonies from First Nations peoples across Canada collected by RCAP the following year highlighted the pressing "structural and attitudinal changes in Canadian society [that] must take place to improve Indigenous-settler relations."[21] Notably, substantive attention was paid to the lasting intergenerational and even multigenerational effects of residential schooling within First Nations communities (including, but not limited to, socio-economic marginalization, continued alcohol and drug abuse, emotional disorders such as chronic depression, passivity,

[15] Buti, "The Demands for Reparations," 232.
[16] Green, "Unsettling Cures," 133.
[17] Buti, "The Demands for Reparations," 232.
[18] Rice, "Indian Residential School Truth and Reconciliation Commission of Canada," 23.
[19] Henderson and Wakeham, "Colonial Reckoning, National Reconciliation?," 9.
[20] Ibid.
[21] Green, "Unsettling Cures," 133.

and powerlessness) and the imperative to facilitate individual and collective healing accordingly.[22]

The obligation to make reparations is recognized under customary international law according to existing international human rights norms and "principles of universalist morality."[23] It is affirmed and upheld by judicial decisions of international courts and other human rights organs, such as the United Nations Human Rights Committee (UNHRC).[24] Many human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CROC), and the Convention against Torture (CAT), confer a duty upon the international community to make appropriate reparations for human rights violations.[25] A breach of a given treaty or convention constitutes a crime under international law, and, as such, "involves a corresponding duty to make reparations."[26] It is critical to note that Canada is a signatory to and has ratified all of these listed treaties. As a basic rule of international customary law, Canada therefore has a responsibility to meet their stated provisions. According to Section 9(18) of General Assembly resolution 60/147:

> [V]ictims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which

[22] Elizabeth Adjin-Tettey, "Righting Past Wrongs through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses," *Windsor Yearbook of Access to Justice* 25.1 (2007): 99.
[23] Richard Vernon, "Against Restitution," *Political Studies* 51.3 (2003): 544.
[24] Buti, "The Demands for Reparations," 227-28.
[25] Ibid., 227.
[26] Ibid., 228.

> include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[27]

This paper's focus lies within the Canadian context of assessing the respective strengths and weaknesses of government-instituted reparations programs to redress harms inflicted by the residential schools system. As such, it is important to define and differentiate these various forms of reparation. Restitution "[restores] the victim to the original situation before the gross violations… occurred" and includes, but is not limited to, the "restoration of liberty, enjoyment of human rights, identity, family life and citizenship…and return of property," whereas compensation involves the provision of monetary remuneration "proportional to the gravity of the violation and the circumstances of each case."[28] Resolution 60/147 is relatively unclear as to who is the duty-bearer of each type of reparation, and so the legalistic distinctions between restitution and compensation within the Canadian residential schools context will be outlined below. Rehabilitation "should include medical and psychological care as well as legal and social services."[29] Satisfaction and guarantees of non repetition are complementary in their aims; the former entails, for example, the "cessation of continuing violations," public apologies, commemorations, and tributes for victims, while the latter can comprise measures such as strengthening the independence of the local judiciary and reforming laws conducive to rights violations.[30]

Human rights violations that occur systematically on a large scale are, by their nature, realistically irreparable. Remedies that attempt to restore a victim's original position, or even provide a victim with opportunities to prosper beyond their original inequity, will ultimately fail to be proportional to the gravity of the injury

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[27] "Resolution 60/147 adopted by the General Assembly," United Nations, last modified March 21, 2006, accessed April 1, 2013, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/147.
[28] Ibid.
[29] Ibid.
[30] Ibid.

inflicted.[31] Richard Vernon argues in a similar manner against attempts to match financial remedies to gross, intangible harms, yet is aware of the value of reparations in combination with other reparative mechanisms, such as apology, as potentially "enough to reflect a serious intention."[32]

According to Taiaiake Alfred, there is a case to be made for the symbolic power of financial redress:

> Without massive restitution made to Indigenous peoples, collectively and as individuals...including land [and] transfers of federal and provincial funds…reconciliation will permanently absolve colonial injustices and is itself a further injustice.[33]

Although it is pragmatically impossible to put a price on gross, intangible harms, Alfred maintains that victims may actually be worse off in the absence of financial reparations. This may be true to a certain extent, on a case by case basis, as some individuals are likely to feel further oppressed rather than gratified by the quantification of harms suffered. However, as this paper will make evident, there are alternative means to render accountability that can be implemented through reparative justice mechanisms that equally, if not to a greater extent, affirm perpetrator culpability and may at the same time ensure redress for victims.

There is an unequivocal obligation for states under international law to make reparations for human rights abuses inflicted and suffered. How best to go about making reparations, however, is context dependent and thus a moot point. "The 'grossness' of the abuses… the pattern of previous repression and violence, the cultural background, the legal system , the socio-

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[31] Dinah Shelton, "Remedies in international human rights law," (London: Oxford University Press, 1999): 19-20

[32] Vernon, "Against Restitution," 553.

[33] Taiaiake Alfred, "Restitution Is the Real Pathway to Justice for Indigenous Peoples," in Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey, ed. Gregory Younging, Jonathan Dewar, and Mike DeGagne, (Ottawa: Aboriginal Healing Foundation, 2009): 181.

economic circumstances, and the country's position in the world order" all affect the content and method of delivery of reparations.[34] Additionally, the reparation should strive to be proportionate to the wrong committed, while the practicable capacity of government resources to furnish reparations must be considered. Ultimately, however, it is the interests and needs of victims that are of paramount importance; having endured the harms, victims are regrettably best positioned to determine appropriate measures of redress.

The IRSSA, purposed with addressing the legacy of the Indian Residential Schools system and putting an end to the reproduction of colonial practices of assimilation, came into effect on September 19, 2007 upon approval by the Ontario Court of Appeal.[35] Both individual and collective measures, including the CEP, TRC, and IAP, commemoration initiatives, and healing projects, have been integrated into its mandate.[36] Being Canada's largest ever class-action settlement, the IRSSA serves, at least in part, a symbolic function as a concrete expression of the aforementioned struggles endured by First Nations peoples.[37] Yet, there is extensive controversy surrounding the IRSSA's pragmatic implications, in terms of the substantiality and equity of its material and non-material reparations for former students. Moreover, even its symbolic function must be qualified, owing to the widespread upset felt across First Nations communities as to its relative ineptitude in these areas.

The IRSSA's two state-administered compensatory programs, the CEP and the IAP, were designed to restore benefits to victimized groups by providing a concrete means of recovery for intangible loss. In order to critically assess each program, it is first important to note a distinction between the laws of compensation and restitution, so that it can be better understood why the state has taken to redressing victims in the way that it has, and so that associated limitations with current reparative mechanisms are recognized. While restitution is

[34] Buti, "Demands for Reparations," 234.
[35] "Backgrounder – Indian Residential Schools Settlement Agreement"
[36] Ibid.
[37] Ibid.

typically a court-ordered payment from a convicted offender for damages, compensatory programs involve government payments for victim losses notwithstanding an arrest or prosecution.[38] Despite the gravity of the offenses in question, the Canadian government has not been criminally convicted by any national or international means and as such is the director of its own compensatory programs, set by state law. The implications of this are twofold. On the one hand, the state, as a key perpetrator, has taken on the role of remediation. Hence, there is greater likelihood for a conflict of interest, whereby compensation policies are designed in such a way that they actually protect state interests as opposed to promote victim rights; the balance of power is in favour of the state as a simultaneous offender and remediator. On the other, offering financial compensation or "pay-outs" for systematic injustices (especially in the absence of criminal accountability) allows the state to circumvent its responsibility to address the deeper complexities of reconciliation by enacting necessary legislative or constitutional changes.[39] Thus, although the IRSSA came about as a victim-led response to the top down approach of traditional litigation procedures, it still has work to do with respect to providing more equitable representation for victims' needs and interests.

The CEP was designed to acknowledge aspects of residential schooling such as culture and language loss that had often been overlooked in traditional litigation procedures, wherein greater emphasis was placed on redress for sexual abuse and physical violence.[40] A total of $1.9 billion was set aside for CEPs, $10,000 of which was paid to all applicants for their first year of residential schooling, with $3,000 granted for each year thereafter.[41] The IAP provided supplementary compensation to those deemed to have suffered the most "severe" harms, and places greater emphasis on

[38] "Restitution," The National Center for Victims of Crime, accessed April 5, 2013, http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution#comp.
[39] Green, "Unsettling Cures," 136.
[40] "Backgrounder – Indian Residential Schools Settlement Agreement"
[41] Henderson and Wakeham, "Colonial Reckoning, National Reconciliation?," 11.

experiences of sexual abuse and physical violence.[42] These experiences were ranked and calculated in accordance with predetermined hierarchies of harm, and individuals were awarded compensation points in proportion to the acts committed against them. A verified experience of Sexual Abuse Level 5, for example, which involved repeated and persistent incidents of intercourse or penetration, was awarded between 45-60 points, whereas Sexual Abuse Level 1, involving "one or more incidents of fondling or kissing," nude photographs, or other forms of violating touching, merited between 5-10 points.[43]

A key tenet of effective reparations is that they must be extended to all First Nations peoples affected so as to ensure equitable reconciliation. One potential strength of the CEP, therefore, was its inclusiveness of a wide range of First Nations claimants and the ostensible evenhandedness of its payments. Claimants needed only provide proof of their enrollment in a residential school to apply for CEPs.[44] This is not to say that the payments by any means reasonably account for the harms endured, but that all survivors had equal access to a standard remedy. It can conversely be argued, however, that the provision of fixed amounts of monetary compensation failed to account for the uniqueness of individual claims, and paled in comparison to the amounts that might be granted in individual court cases.[45]

Another potential strength is the attention paid to effects such as culture and language loss, which highlights the systematic nature of the schools' assimilationist policies and weakens any assertion that abuses can be explained by individual criminal action. Taking into consideration the large number of applicants, the IAP was created in such a way so as to methodologically process claims

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[42] Ibid.

[43] "Independent Assessment Process Guide, Version 3.2," Indian Residential Schools Adjudication Secretariat, last modified April 4, 2013, accessed April 6, 2013, http://www.iap-pei.ca/information/forms/iap-guide-v3.2-20130404-eng.php.

[44] "Backgrounder – Indian Residential Schools Settlement Agreement"

[45] Henderson and Wakeham, "Colonial Reckoning, National Reconciliation?," 11.

and efficiently provide redress. However, applicants often reported that their claims "were met with skepticism and judgment or that they were made to feel like liars or frauds."[46] Although the IAP may have been well intentioned in its aims to provide certain victims who suffered above and beyond others with supplementary compensation, its ranking system was morally deficient. By reducing individual experience to a hierarchical points system, and then further attributing an estimated monetary value to that experience, a subjective sense of humanness was displaced by an objective and ultimately bureaucratic process. These mechanisms provided limited opportunities for dialogue between claimants and the Canadian government, and risked downplaying the sensitive nature of the information disclosed.

The IRSSA has also been criticized for the unrealistic deadlines for CEP and IAP compensation applications and for the time constraints placed on the TRC mandate, which often generated added anxiety for survivors. Individuals were expected to apply for the CEP by September 19, 2011 and for the IAP by September 19, 2012.[47] These hardline limitations failed to account for survivors being at "different stages of the healing process" at different times, and furthermore can restrict access to new testimonies or other resources that may become available following the application deadline.[48] Both the deadline for applying to the IRSSA's compensatory programs and the TRC mandate should have been extended. To deny new applications is in a sense to prematurely arrive at a resolution, which will ultimately complicate and frustrate genuine reconciliatory efforts.

According to Green, there are drawbacks in attempting to situate the Indian Residential Schools system resolutely in the past. Furthermore, she notes that a "fixation upon *resolution* [is] problematic in its correlation with *forgetting*."[49] Certainly the state as a key perpetrator has no prerogative to downplay the past. Attempts to

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[46] Ibid., 139

[47] "Backgrounder – Indian Residential Schools Settlement Agreement"

[48] Green, "Unsettling Cures," 139.

[49] Ibid., 130.

achieve justice for residential schools survivors and their families will ultimately prove futile if they are made at the cost of reserving important truths. For some survivors, choosing to forget the past may be a purposeful individualized coping mechanism.[50] However, latent resentment or enmity may be more encumbering to both self and community-wide healing than realized. Although truth sharing and the receipt of Common Experience Payments may reinvigorate unpleasant memories and have the potential to incite renewed tensions, to suppress past realities is to lose meaning in the present and risks the ever more devastating consequence of denying an informed future.

Thus, moving forward, First Nations peoples, the Canadian government, and citizens at large, must together search for new and creative ways to frame the past in a constructive manner. To recall the aphorism "knowledge is power," confronting and drawing upon the past in present-day reconciliatory efforts will enable both parties to make enlightened decisions by allowing for greater symmetry, if not victim advantage, in victim-perpetrator power relations. Creating superior opportunities for meaningful dialogue may instill a sense of courageousness in survivor victims—an empowering force that could help to atone for the subjection and shame espoused in residential schools.

Thus far, reparative approaches to justice seeking within the Canadian Indian Residential Schools context have had a tendency to carry over past victim-perpetrator power balances into present-day reconciliation efforts, providing First Nations peoples with limited prospects for self-directed participation in designing their own prospects and opportunities, and often reinforcing colonial hierarchies. Indigenous notions of healing and Western, liberal notions of justice must be considered and applied collaboratively when assessing the efficacy of the IRSSA. As many First Nations communities historically espouse oral traditions, greater opportunities

[50] Marc A. Flisfeder, "A Bridge to Reconciliation: A Critique of the Indian Residential School Truth Commission," *The International Indigenous Policy Journal* 1.1 (2010): 10.

for dialogue between both survivors and administrators, and between fellow survivors with a shared common experience, will be central to healing. Ultimately, greater opportunities for Indigenous knowledge to guide and enact mechanisms of redress must be advanced. Given the uniqueness of the First Nations ethos and the incalculability of harms suffered, viable justice for Indian Residential Schools survivors in the end lies beyond material repairs. Alternative conceptualizations of healing, such as allocating greater resources to culture and language revitalization programs, may more appropriately address reconciliatory needs at present, and sustain amity in the long term. Additional resources should also be allocated to dealing with the intergenerational and multigenerational effects of the residential schools system, as present compensatory programs tend to limit opportunities for relatives of survivors to advance their own claims, or to collect payments on behalf of the deceased.[51]

Members of the TRC's Survivor Committee have become frustrated with the stalling of the Commission's work because, as a public forum, it is often used as a platform for expressions of dissatisfaction with and disapproval for the compensation process.[52] At present, it would be altogether regressive, unjust, and impossible to either refuse new payments or revoke existing ones. Ideally, the IRSSA's compensatory programs should be amended according to the satisfaction and approval of its recipients. This would then allow for the TRC to more effectively carry out its work exclusive of conflicting agendas. However, this too is likely to prove impossible in light of the inherent limitations in according financial reparations for non-material transgressions already discussed. The TRC and the compensatory programs will therefore be required, at least in the interim, to function simultaneously. Although reparative justice mechanisms are rarely mutually exclusive and often actively enrich one another, a potential solution may be to establish and publicize clearer guidelines as to the purposes of each, and to create opportunities for First Nations community members intent on

[51] Green, "Unsettling Cures," 139-40.
[52] Ibid., 131.

promoting its foundational goals of truth telling and reconciliation to act as TRC facilitators.

This paper sought to assess the strengths and weaknesses of reparations programs designed to address the widespread human rights abuses suffered under the Indian Residential Schools system, with a focus on the IRSSA and its various individual and collective measures, notably those geared towards compensation. Although not sufficient, and at times inherently problematic, this paper has found that reparations can be a legitimate goal of justice seeking within the context of redressing victims of Canada's residential schools system insofar as they are rendered adaptable to case-by-case specificities and are mindful of both the unique needs and rights of First Nations peoples. Notwithstanding the imperfections of the CEP and IAP, to deprive survivors of opportunities to apply for reparations that they are rightfully owed is inherently unjust. However, greater resources must be allotted to non-material forms of reparations, including an extended TRC mandate and programs that aim to renew and reinforce historically oppressed First Nations culture, language and religion. Going forward, it is of paramount importance that the legacy of Indian Residential Schools is constructively framed in new and creative ways. True reconciliation is not to forgive and forget, but to remember and change.

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