SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2014-47

***UNSETTLING THE LAWYERS: OTHER FORMS OF
JUSTICE IN INDIGENOUS CLAIMS OF
EXPROPRIATION, ABUSE, AND INJUSTICE***

Carrie Menkel-Meadow

cmeadow@law.uci.edu

University of California, Irvine ~ School of Law

Georgetown Law Center

The paper can be downloaded free of charge from SSRN at:

UNSETTLING THE LAWYERS: OTHER FORMS OF JUSTICE IN INDIGENOUS CLAIMS OF EXPROPRIATION, ABUSE, AND INJUSTICE†

This article considers, from the experience of the Indian Residential Schools Settlement, the limitations of the current formal justice system and the common ways that lawyers and parties act within it. Looking at the combinations of lawsuits, settlement negotiations, structured compensation schemes, truth and reconciliation processes, and memorial and education programs now provided for in the IRSS, the article suggests that we may need 'process pluralism' and different orientations to deal with modern mass harms: now recognized harms (like loss of culture, family, language, as well as physical, mental, and social injury) that the formal legal system has not yet developed the capacity to address. Placing the IRSS in a larger international context, the article suggests that some legal and social recognition of 'new' human harms and injuries has necessitated the development of different legal and quasi-legal processes. Whether called 'restorative,' 'transitional,' or 'alternative' justice, new forms of dealing with wrongs, harms, and conflicts will require redesigning legal processes and institutions; legal professional education; and social, cultural, and philosophical orientations to human injuries and 'redress.' Not all who are injured (both individually and in groups) want or require the same 'remedies,' and our conventional and historical common law and adversarial system must be adapted to the diverse needs of those who are injured by past and unconscionable wrongs, especially when inflicted by major governmental, religious, and civil society institutions and practices.

Keywords: transitional justice, restorative justice, alternative dispute resolution, legal process, legal profession, legal education

* Chancellor's Professor of Law, University of California, Irvine Law School, and AB Chettle, Jr, Professor of Law, Dispute Resolution and Conflict Resolution, Georgetown University Law Center

† Thank you to Mayo Moran and Kent Roach for the invitation to participate in the extraordinary event at the University of Toronto on 17–18 January 2013 examining the processes which led to the negotiation of the Indian Residential Schools Settlement, itself an extraordinary process with an extraordinary, but not yet finished 'outcome.' I have been moved, humbled, and educated by observing those who participated in the process and those who now seek to make more sense of it five years later.

I *Introduction: Unsettling the lawyers – What process for what injustice?*

What role can the legal profession, law, and legal processes play in the search for justice, reconciliation, and restoration of humanity after great (mass) harm has been done? This is a question faced by any lawyer in human rights, personal injury, civil and constitutional rights, criminal, discrimination, and international law. The twentieth century and the legacies of nineteenth (and earlier) centuries of colonization, genocides, expropriations of land, culture, homes, bodies, souls, and human dignity have now forced us to reconceive how we deal with the past (in the present and for the future) when harm has been caused, not only to individuals, but to whole groups of people, in numbers that challenge our western legal conceptions of individualism and in content that challenges our conceptions of what wrongs or injustice consist of. To what extent must conventional legal processes (lawsuits, judgments, damage awards, and injunctions) expand or give way to include a different set of processes and remedies for the recognition and acknowledgement of harm and hurt, where full restitution or compensation cannot be made, where injured victims¹ cannot be 'made whole' in the conventional way our (Anglo-American-Canadian) adversarial system provides for? What can lawyers contribute to alternative legal processes to attempt to deal with (if not right) the wrongs that have been done to others, especially as conceptions of right and wrong are themselves changeable over time?

In the present article, I hope to draw on my life's work as a process pluralist² both to commend the Canadian Indian Residential Schools Settlement for its attempt to provide models of different processes to deal with a gross and mass injustice done to the Indigenous peoples of Canada and to reflect on what this process might teach us about how

1 I use scare quotes for 'victims' because the concept of 'victimhood' in restorative justice work is itself controversial. Some see anyone who has been hurt by mass atrocities as 'victims'; others say there was no 'intent' to treat some people badly at some point in time when theories of behaviour were different (theories of colonization and 'civilizing'; others don't want to be labelled 'victims' for the connotation of passivity and acceptance of hurt and harm. So, I use scare quotes to signal that most of the terminology in the fields of restorative and transitional justice are themselves contested. See e.g. Margaret Kohn & Keally McBride, *Political Theories of Decolonization: Postcolonialism and the Problem of Foundations* (New York: Oxford University Press, 2011); Andrew Woolford & RS Ratner, *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations* (New York: Routledge-Cavendish, 2008).

2 See Carrie Menkel-Meadow, 'Peace and Justice: Notes on the Evolution and Purposes of Plural Legal Processes' (2006) 94 Geo LJ 553.

legal processes and lawyers must be able to reconceive how they attempt to achieve justice in situations, like this, when great wrongs are done to many. It is my view (and argument) that current legal institutions and legal education are inadequate to deal with more modern recognition of different claims of value and loss (e.g., loss of culture, loss of homeland, loss of language, loss of family, and intergenerational injustice) and more diverse claims for justice, restoration, reparation, or restitution, after great harm has been done. The Indian Residential Schools Settlement is one illustration of how conventional legal processes (individual lawsuits, class actions) in a variety of different levels of courts and jurisdictions evolved into national, regional, and local sets of processes to attempt to deal with personal and group harms by drawing on both conventional legal processes (lawsuits, discovery, negotiations and settlement, compensation) and more modern (and local and Indigenous) processes of restorative justice, through truth and reconciliation processes, testimonies, apologies, commemoration, and ongoing care and counselling. My hope here is to spur us on to reconceive the role of the lawyer in designing more tailored or 'bespoke'³ processes and institutions for the necessary processes of recognizing, taking responsibility for, and apologizing for past wrongs, while at the same time, focusing on more complex remedies for moving from the past to the future,⁴ including compensation, apologies, and affirmative action to improve and repair the lives of those who suffer from the legacies of great harm. This must, in my view, include both victims and perpetrators (or their descendants)—in current terminology, both the 'settlers' and those who were here 'first'—as we now must live together with our histories and our futures.⁵

3 See Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010/1) 32 Mich J Int'l L 1.

4 See Carrie Menkel-Meadow, 'Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation' (2004) 5 Cardozo Journal of Conflict Resolution 97.

5 Claims of land acquisition through 'conquest' have dominated western conceptions of property and sovereignty throughout the colonial period (and earlier) but are largely contested by Indigenous peoples throughout the world. Modern legal theory has questioned these conceptions intellectually, but this has not solved the problems of actual co-existence in a wide variety of modern territories, e.g. Canada, Australia, the United States, Chile, Brazil, Argentina, South Africa, Zimbabwe, Israel, Palestine, Turkey, Iraq (Kurdistan), much of the Middle East and large parts of Asia and Africa, as well. What makes a territory or a people sovereign? See Joseph Singer, *Property Law: Rules, Policies and Practices*, 5th ed (New York: Wolters Kluwer Aspen Law and Business, 2010).

As many now write about ‘unsettling’ the settlers (whether Canadian,⁶ Australian,⁷ American,⁸ British,⁹ French, or other colonizers) so they take responsibility for what they or their ancestors have done to the original inhabitants of the lands they conquered or settled, I want here to unsettle the lawyers about how they (we) deal with these past injustices – old methods of lawsuits, trials, and affixing (through the legal necessity of individualized proof) of blame may not be adequate to repair the harms that have been done in the past, if we who inhabit these lands in the present hope to live together, more reconciled to our future shared fates.

II *The past: Claims for harms and injuries*

Other articles in this issue¹⁰ more fully recount the history of the Indian Residential Schools litigation and settlement in Canada. Here, I just want

- 6 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: University of British Columbia Press, 2010) [Regan].
- 7 Sarah Maddison & Morgan Brigg, *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Sydney: The Federation Press, 2011) [Maddison & Brigg].
- 8 David Wallace Adams, *Education for Extinction* (Lawrence: University of Kansas Press, 1995).
- 9 *Oranges and Sunshine*, directed by Jim Loach (See Saw Films / Sixteen Films, 2010): this film depicts a slightly different form of cruelty – thousands of British children, orphans, foster care children, were forcibly ‘deported’ to Australia and Canada in the 1950s and 1960s and often abused and forced to work, while being deprived of their families and homeland. A dedicated British social worker, Margaret Humphries, discovered this practice and has worked tirelessly to both reunite families and seek justice for the children, now grown, who have suffered from this modern form of dislocation. A more recent film, *Philomena*, directed by Stephen Frears (IMBdPro, 2013), depicts the cruelty of the church in separating children from their unwed mothers in England and using forced adoption to send the children to other countries, including the United States. The modern interest in these stories and films demonstrates a growing awareness of the wrongs done, including loss of family, and so forth, and the role of the state and otherwise ‘charitable’ and religious organizations in perpetrating such wrongs. There is a confluence here of recognition and interest in these cases and the abandonment in more recent times of legal doctrines of immunity that shielded the wrongdoers from responsibility and liability; see e.g. Mayo Moran, ‘The Role of Reparative Justice in Responding to the Legacy of the Indian Residential Schools’ (2014) 64:4 UTLJ [present issue] [Moran].
- 10 See Moran, *ibid*; John Borrows, ‘Residential Schools, Respect, and Responsibilities for Past Harms’ (2014) 64:4 UTLJ [present issue]; Kent Roach, ‘Blaming the Victim: Canadian Law, Causation, and Residential Schools’ (2014) 64:4 UTLJ [present issue] [Roach]; Kathleen Mahoney, ‘The Settlement Process: A Personal Reflection’ (2014) 64:4 UTLJ [present issue] [Mahoney].

to set forth briefly the larger legal context in which this litigation and settlement is now globally located. In many respects, one can think of the twentieth century as the culmination of several centuries of struggle over the formal and legal recognition of international human rights,¹¹ as the horrors of World Wars I and II and the Nazi genocide issued in the Nuremberg Trials and the United Nations Universal Declaration of Human Rights in the late 1940s, to be followed by many more formal treaties and declarations (e.g. the International Covenant on Civil and Political Rights (1967), the Genocide Convention (1948), the Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Declaration on the Rights of Indigenous Peoples (2007)); and then formal adjudicative institutions to accept claims, adjudicate, and order remedies (both criminal and civil) for human rights violations (e.g. European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court). In another important legal development, modern human rights law now grants individuals (and sometimes non-governmental and other organizations) standing to sue, where formerly only nation states could be party to international claims of rights violations. As a result of this expanded recognition of juridical entities with rights to sue (and be sued), Indigenous groups have now been mobilized to sue on behalf of themselves, their peoples, and their land in international, national, regional, local, and even private and quasi-private tribunals (e.g. international investment arbitration) for claims involving human rights, property, and other cultural and resource expropriation.¹²

In the last two centuries, nations have also increasingly recognized new human and civil rights in their own constitutions, beginning with the French Declaration of the Rights of Man and of the Citizen, the United States Bill of Rights (amendments to the 1789 US Constitution), the Canadian Charter of Rights and Freedoms (1982), and the many new constitutions of the new nations of the postcolonial era and those formed after the fall of the Berlin Wall and the dissolution of the Soviet Union.¹³ Some nations, like Argentina,¹⁴ formally adopt recognition of

11 See Lynn Hunt, *Inventing Human Rights: A History* (New York: WW Norton, 2007); Henry Steiner, Ryan Goodman, & Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, 3d ed (New York: Oxford Press, 2007).

12 See e.g. Christopher Whytock, 'Some Cautionary Notes on the Chevronization of Transnational Litigation' (2013) 1 Stanford Journal of Complex Litigation 467.

13 See e.g. Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law*, 3d ed (New York: Foundation Press, 2014).

14 *Argentina Constitution*, (1994), art 22, incorporating international human rights treaties as part of the constitution.

international human rights obligations in their own constitutions; other nations, even without formal written constitutions (e.g. the United Kingdom and Israel), recognize human and civil rights to be adjudicated in their national courts.¹⁵

In addition to the formal recognition of genocide, torture, slavery, discrimination, and other mass atrocities in courts of law, the twentieth century has also produced legal recognition of civil claims for 'mass torts,' often but not always brought as class actions, when large groups of individuals or discrete groups of peoples have been collectively (and individually) harmed in accidents, intentional or not (both natural¹⁶ and man-made disasters¹⁷), terrorist attacks,¹⁸ by products (e.g. asbestos,¹⁹ medical devices, treatments or drugs²⁰) or other forms of collective malfeasance. Collective or class actions, in American law, were not originally intended (under Rule 23 of the Federal Rules of Civil Procedure) to apply to individually suffered harms and hurts (where it was thought that injuries would be more individualized²¹), but for decades now, groups of people harmed similarly by known defendants can bring claims for injunctions, damages, and other forms of relief (e.g. medical monitoring in health cases) in a collective action, a legal practice now recognized in other parts of the world, including Canada.²²

So, in the last few decades, both individuals and groups of people have sued in domestic, international, and even private (arbitration) tribunals for both civil (damages and injunctions) and criminal remedies (imprisonments, punishment, fines, etc). Modern legal claims include demands for compensation for lost lives, limbs, health, property, wages, consortium, dignitary rights, pain and suffering, emotional harm, torture,

¹⁵ See e.g. Aharon Barak & Erin Daly, *Dignity Rights: Courts, Constitutions and the Worth of the Human Person* (Philadelphia: University of Pennsylvania Press, 2012).

¹⁶ Gerald Stern, *The Buffalo Creek Disaster: How the Survivors of One of the Worst Disasters in Coal Mining History Brought Suit* (New York: Vintage, 1977).

¹⁷ Jonathan Haar, *A Civil Action* (New York: Vintage, 1996).

¹⁸ Kenneth Feinberg, *What's a Life Worth?* (New York: Public Affairs Press, 2006).

¹⁹ Carrie Menkel-Meadow, 'The Ethics of Mass Torts Settlements: When the Rules Meet the Road' (1995) 80 Cornell L Rev 1159.

²⁰ Carrie Menkel-Meadow, 'Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender and Process' (1998) 31 Loy LA L Rev 513.

²¹ See e.g. Deborah Hensler, 'A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation' (1995) 73 Tex L Rev 1587; Francis McGovern, 'Settlement of Mass Torts in a Federal System' (2001) 36 Wake Forest L Rev 871; Jack B Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Evanston, IL: Northwestern University Press, 1995).

²² See e.g. Garry Watson, 'Class Actions: The Canadian Experience' (2001) 11 Duke J of Comp & Int'l Law 269.

opportunity costs, and more recently, for such things as group harms and collective losses. Modern litigation has produced some more modern remedies in the form of medical monitoring and treatment for some health claims, injunctions to monitor organizational compliance with discrimination claims or monitor prison conditions,²³ 'coupons' and new forms of economic compensation for some consumer and anti-trust claims as well as the controversial affirmative actions of setting goals and quotas for job hiring and promotion or other benefits in both private and public settings. The Indian Residential Schools litigation has been significant for many reasons, but among those reasons are newly stated claims for loss of language, loss of culture, and the intergenerational harm that have come from the forced displacement of children away from their parental homes, raising important questions about what claims can or should be recognized in courts.²⁴

The claims brought by former residents of Indian Residential Schools in Canada were brought both individually and collectively as class actions for claims of abuse (physical, mental, and sexual) and of loss of home, culture, language, and family over a period of years. In Canada, Australia, and the United States (my own country has not yet formally apologized or taken any formal action with respect to similar claims), Indian children were removed from their homes, beginning in the seventeenth century and continuing until well into the present.²⁵ In my own country, for example, it is estimated that the peak year for enrolment in Indian boarding schools was 1973, when an estimated 60 000 children remained in such schools.²⁶ The justifying ideology of such schools was the claim that Natives or Indigenous people needed to be 'civilized.' As early as

²³ See e.g. Susan Sturm, 'Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons' (1990) 138 U Pa L Rev 807; Margo Schlanger, 'The Politics of Inmate Litigation' (2004) 117 Harv L Rev 2799.

²⁴ Jennifer Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice' (2002) 52 UTLJ 253; Zoe Oxaal, 'Removing That Which Was Indian from the Plaintiff: Tort Recovery for Loss of Language and Culture in Indian Residential Schools Litigation' (2005) 68 Sask L Rev 367; See also Jeffrey Alexander, Ron Eyerman et al, *Cultural Trauma and Collective Identity* (Berkeley: University of California Press, 2004). This, of course, implicates the important jurisprudential question in common law systems of how new legal claims are articulated by claimants and lawyers and when they are recognized by judges and courts, creating new legal causes of action through the common law. See e.g. Oliver Wendell Holmes, Jr, *The Common Law* (Cambridge, MA: Belknap Press); John Noonan, *Persons and Masks of the Law* (Berkeley: University of California Press, 2002).

²⁵ In Canada, the last residential Indian school operated by the government was closed in 1996. There remain only a few residential or boarding schools in either Canada or the United States and they are now often operated by Indigenous peoples themselves.

²⁶ 'American Indian Boarding Schools' (25 March 2014) [Boarding Schools] online: Wikipedia <http://en.wikipedia.org/wiki/American_Indian_boarding_schools>.

1634, Fr Andrew White of the Society of Jesus established a mission to 'extend civilization and instruction to this ignorant race and show them the way to heaven.'²⁷ While both Harvard College (as early as 1665) and later Dartmouth College admitted Indigenous students to their colleges for education along with the colonists in the East, later schools in the Western regions of the colonies were initially founded by missionaries. Thus, modern litigants have sued both governmental bodies and a variety of Protestant and Catholic churches that established schools in the name of 'civilizing' the local 'savages.' Reflecting typical comments of the time, a United States Army officer, Richard Henry Pratt, is reported to have said famously, in 1892 (serving as a model for policies developed by the Bureau of Indian Affairs): 'A great general has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man.'²⁸ Pratt developed a policy of assimilation 'through total immersion.'²⁹ Curricula in Indian boarding or residential schools depended on learning English and English/American/Canadian/Australian history and culture and silencing and prohibiting all use of Native languages and practices. Long hair was cut; religious or tribal customs were prohibited and severely punished, often with harsh physical discipline. Physical conditions in the schools themselves were substandard, deficient in sanitary and heating and other health conditions. The modern lawsuits also alleged (and proved) sexual assault on both male and female students as well as harsh corporal punishment and mental degradation and anguish. Compulsory conversion to Christianity was part of most schools, whether religiously or governmentally funded and managed. In the early 1920s and 1930s, some government reports indicated there were infectious disease (including tuberculosis and other communicable diseases) and physical and mental abuse, and the first demands of activists and some government officials that the schools be reformed or eliminated began.

In Canada, the residential schools for First Nations (including Métis, Inuit, and other groups) were funded by the Canadian government's Department of Indian Affairs but mostly administered by Christian

²⁷ Henry Foley, *Records of the English Province of the Society of Jesus* (London: Burns and Oates, 1878) at 352, online: Internet Archive <<http://archive.org/details/recordsofenglish00fole#page>>.

²⁸ Cited in Charla Bear, 'American Indian Boarding Schools Haunt Many' (12 May 2008), online: National Public Radio <<http://www.npr.org/templates/story/story.php?storyId=16516865>>; see also Andrea Smith, 'Soul Wound: The Legacy of Native American Schools,' *Amnesty International Magazine* (26 March 2007), online: <<http://www.amnestyusa.org/node/87342>>.

²⁹ Cited in Boarding Schools, *supra* note 26.

churches. Attendance at a day industrial or residential school for First Nations children was mandatory and often enforced by compulsory assignment to a residential school, especially, but not exclusively, in more rural regions. Estimates range, but suggest that close to 150 000 students passed through these schools before they were closed in the 1990s.³⁰ In addition to claims of abuse within the institutions themselves, modern lawsuits also made claims for the ‘intergenerational harms’ of higher rates of alcoholism, drug use, and domestic violence within communities in which family and Indigenous social structures were destroyed and disrupted by the effects of compulsory removal to residential schools. The media brought attention to this issue in a variety of ways, aided by the efforts of the litigation lawyers representing victims and the courageous actions taken by First Nations victims of these schools, as well as by some documentary films and published narratives, children’s stories, novels, and plays.³¹

In an important, but seen by many still to be a purely ‘symbolic’ act, Prime Minister Stephen Harper publicly apologized in Parliament on 11 June 2008 on behalf of the Canadian government for this long-standing policy, following on from a March 1998 Statement of Reconciliation issued by the government for those who were sexually or physically abused. The government established an Aboriginal Healing Foundation and allocated some \$350 million to fund community-based healing programs. In 2003, in response to both lawsuits and increasing publicity about the schools and their legacy, the government launched an alternative dispute resolution (ADR) process for compensation and psychological support for those who could prove some form of physical or sexual abuse or other conditions of ‘wrongful confinement.’³² The ADR process was itself quite controversial: there were claims that the high standard of proof demanded for particular claims did not address all the actual experiences of harm, differences in awards, and arguments that the government used this process to obtain ‘legal certainty and closure’ and not to fully acknowledge Indigenous demands for apologies and

30 ‘Canadian Indian Residential School System’ (26 March 2014), online: <http://en.wikipedia.org/wiki/Canadian_Indian_residential_school_system>.

31 See e.g. *The Mission School Syndrome*, written by Vic Istchenko & Jim Atkinson (Northern Native Broadcasting, 1985); *Where the Spirit Lives*, directed by Bruce Pittman (Screen Door, 1989); *Beyond the Shadows*, directed by Peter Von Puttkamer (Gryphon Productions, 1993); *Stolen Children* (CBC Learning, 2008); Shirley Sterling, *My Name is Seepeetza* (Toronto: Groundwood Books; House of Anansi Press, 1992); Sylvia Olsen, *No Time to Say Goodbye: Children’s Stories of Kuper Island Residential School* (Victoria, BC: Sono Nis Press, 2001).

32 Regan, *supra* note 6 at 111–42.

other kinds of reparations. Kathleen Mahoney, in this issue,³³ describes in greater detail how inadequate the ADR process was, risking re-victimizing claimants and giving the lie to the meaning and ideology behind alternative dispute resolution processes which are intended to be more, not less, sensitive to people's needs when they are making claims such as these.

The Truth and Reconciliation Commission born out of the Indian Schools Settlement, discussed more fully below, documented deaths, disease, forced sterilizations, sexual abuse, corporal and harsh punishments, inadequate and poorly heated facilities, poor sanitation, inadequate education, and some forced labour, particularly agricultural work. In Canada, some of the government reports issued in the 1940s criticized much Indian policy and eliminated some of the compulsory policies, but existing schools remained underfunded and lawsuits have demonstrated that abuse continued well into the 1990s. As more fully reported in other articles in this issue and in the full report of the Indian Residential Schools Settlement,³⁴ a series of successful lawsuits led to large monetary payments of damages from the Canadian government and from the major churches (Catholic, Anglican, United Church, and Presbyterian) which administered and ran the schools. Settlement talks began in the early 2000s, as some feared the lawsuits might actually bankrupt the Canadian government and cause serious financial difficulties for the churches.

In stories and reports featured at this conference, *Assessing Canada's Indian Residential Schools Litigation and Settlement Processes*, we learned how activist National Chief Phil Fontaine, representatives of the Ministry of Justice, and government mediators met with the lawyers, claimants, and representatives of First Nations, churches, and government bodies in a series of mediated meetings to arrive at what is still the largest (in dollars) settlement of a claim against the Canadian government. The Indian Residential Schools Settlement provided for \$5 billion dollars³⁵ in total allocation for

- 'common experience payments' to be paid to all former students who resided in a school;
- an independent assessment process for individualized claims of sexual, physical, or other abuse;

³³ Mahoney, *supra* note 10.

³⁴ *Indian Residential Schools Settlement Agreement* (May 2006), online: <<http://www.residentialschoolsettlement.ca/settlement.html>>.

³⁵ Fact Sheet: Indian Residential Schools Settlement Agreement (last updated 1 January 2014), online: Aboriginal Affairs and Northern Development Canada <<https://www.aadnc-aandc.gc.ca/eng/1332949137290/1332949312397>>.

- a truth and reconciliation commission, mandated to hold seven national events, create a public historical record, and provide awareness about the school system and its impact;
- a commemoration initiative, with an allocation of \$20 million to support local, regional, and national activities to honour, remember, memorialize, and pay tribute to former students, their families, and communities; and
- other measures to support healing, through the Aboriginal Healing Funds and Indian Residential Schools Resolution Health Support Program.³⁶

This settlement began to operate on 19 September 2007, after approval by the participating parties and relevant courts.

While the motivations to come to a mediation table and seek negotiation and settlement of such mass injustices are many and vary among the parties who choose to participate in such events (and we can never really know them all, especially in a confidential process, often protected by formal undertakings of secrecy and confidentiality, whether by contract, legislation, or informal agreement), the fact that so many diverse actors came together to forge this multi-faceted settlement of compensation, apology, hearings, ceremonies, documentation, truth telling, commemoration, treatment, and healing is historically important and significant, not only for Canada and its many peoples, but for what this process might teach others who suffer similar group-focused but individually suffered injuries.³⁷

What lessons can we learn from what we do know about the processes and ultimate settlement of these grievous wrongs? What can lawyers and the legal system bring to these issues? What might lawyers and legal systems learn from what has been accomplished here?

³⁶ Ibid.

³⁷ It is my view, based on my current research and scholarly work – e.g. Carrie Menkel-Meadow, *Cultural Variations in Restorative Justice* [unpublished] – that these mass harms are not similar to each other at all but, indeed, pain, death, suffering, torture, discrimination, abuse, and so forth and reactions to them are quite culturally diverse. Efforts to create new forms of restorative justice must be culturally sensitive to the particular historical and cultural facts on the ground, but we can still learn about how to structure such processes from all that have gone before; see e.g. Carrie Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual Review of Law and Social Science 161; Carrie Menkel-Meadow, 'Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not) Do about It: Lessons from International and Domestic Fronts' (2009) 14 Harvard Negot L Rev 195; Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2d ed (New York: Routledge, 2010) [Hayner]; Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania, 2010).

*III The present and future: Restorative, reconciliative,
and transitional justice as additions to legal justice*

Make no mistake about it, conventional litigation strategies were, in my view, absolutely essential for some rectification of the Indian Residential Schools harms and claims. It is also my view that they alone should not be the sole or even primary way of attempting to 'resolve' (or as I prefer to say³⁸) 'deal with' or 'handle' this dark chapter in Canadian history.

Litigation, whether individual or, in this case, collective (class action), frames the legal issues and calls the attention of the defendant(s) (in this case, the government and the churches) and the public to the fact that a claim has been made in a public forum with demand for remedial action. Lawsuits serve the function of clarifying legal claims, asserting demands for redress, and in the course of discovery and information exchanges, often produce the evidence necessary to prove claims (as long as the legal claims are already recognized in law). In the case of the Indian Residential Schools litigation, these functions were performed, with information produced and enough successful verdicts for large amounts of money to provide the motivation to seek what is known in aggregate litigation as a 'global settlement.' That is, the Canadian government and the churches feared economic loss and the continued anger and resentment of various parts of the polity (including both First Nations peoples and others who both acknowledged or denied the claims). That the mediation which resulted in the ultimate settlement was achieved is a momentous event for Canada and for legal history and for the legal profession, but it is not without its lessons and cautions. I comment here on a few, based on my work as a conflict resolution and legal profession scholar and mediation practitioner.

At its best, the Indian Residential Schools Settlement is one exemplar of what I have come to call a 'transformative moment' in the development of the legal system, a further evolution from the days of trial by fire or ordeal to adversarial (or inquisitorial) trial and now to more hybrid

³⁸ As a dispute 'resolution' scholar and practitioner, I have long refused the phrase 'resolution' as descriptive of our field. Some disputes and conflicts can never be fully resolved, and this is clearly one of those. There is no way to make many of the victims whole; we cannot bring back those who have died or suffered enormously from these grievous wrongs. Instead, what we do in the conflict resolution field is try to handle conflicts and disputes, by acknowledging them, confronting them, talking about them, and then looking for many different methods and modes for doing something about them for those in conflict and dispute as well as for those affected by conflicts and disputes (e.g. children, subsequent generations, etc.).

forms of justice,³⁹ which include mediation, multi-party dispute resolution,⁴⁰ transitional justice, restorative justice, and more responsive and inclusive forms of justice.⁴¹ Injured parties can request and often receive remedies or outcomes not available in conventional litigation, which focuses on the past, not the future. So modern developments in restorative justice permit, indeed encourage, apologies, commitments by the parties to undertake changes in their future relationship, and in some cases, particular actions or recompense (or services provided). In addition, restorative justice processes often involve whole communities, not just the litigation parties, and are themselves often derived from Indigenous, local, and alternative dispute resolution processes.

If our conventional adversarial system requires plaintiffs and defendants (the latter the doers of bad acts to the plaintiff) to prove their duties and obligations and failures to each other by proof and evidence, then they may have a remedy prescribed by legal principles of liability – in these cases, damages for abuse, physical, and mental harm. But in the Indian school litigation we also see the limits of the traditional adversarial model – many of the doers of bad acts (or non-feasance as well as malfeasance) are no longer with us and many, if not most, of the victims are also now gone.⁴² How do we remedy past harms to those currently living who continue to suffer from those harms but cannot confront or claim against the individuals responsible? How do we remedy the group harms? And although our modern legal system has, for the most part, abolished the doctrines of sovereign or charitable immunity, the institutional wrongdoers – the government and the churches – would, at common law, have been immune from suit for the policies they developed and implemented.⁴³ If we now allow claims against governments and churches and charities in particular settings, we still do not formally or

39 Carrie Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve' (2004) 57 *Current Legal Problems* 85, online: <<http://dx.doi.org/10.1093/clp/57.1.85>>.

40 Carrie Menkel-Meadow, ed, *Complex Dispute Resolution (Foundations, Multi-Party and Democratic Deliberation and Decision Making, and International Dispute Resolution)* (Aldershot, UK: Ashgate Press, 2012).

41 Phillippe Nonet, Philip Selznick, & Robert Kagan, *Law and Society in Transition: Toward Responsive Law* (Berkeley: University of California Press, 2001).

42 Others in this issue have reviewed how the structures and requirements of our common law and adversarial system have worked together to restrict liability through doctrine; see e.g. Moran, *supra* note 9 (proof requirements); Roach, *supra* note 10 (procedural and ethical requirements of the Canadian and most other Anglo adversarial legal systems); see also Trevor CW Farrow, 'Residential Schools Litigation and the Legal Profession' (2014) 64:4 *UTLJ* [present issue].

43 See Moran, *supra* note 9, for discussion of doctrinal charitable and sovereign immunity issues.

legally recognize some of the claims actually experienced as harms by the victims – loss of family (consortium?), loss of language, loss of culture, loss of group belongingness. So the lawsuits are useful in framing new categories of claims as lawyers transform the narrative expressions of their client's stories and pain into legally cognizable claims⁴⁴ which still have not been fully accepted by the formal legal system.

To the extent, however, that participation of First Nation representatives, as claimants, lawyers, mediators, and judges, allowed the expression of and demand for recognition of claims beyond those formally recognized by the legal system, the mediation of actual claims with multiple parties (not just two sides to the dispute⁴⁵) permitted the development of more than conventional compensation – some recognition of more Indigenous forms of remedies in apologies, truth commissions, reconciliation, and commemoration events and activities.

As a process of conflict resolution, mediation creates room for more a direct expression of claims, narratives, and human desires, including demands for justice and principles, and it provides a forum where feelings can be recognized and demands for moral, religious, and ethical attention to the issues be confronted (as well as authorizing the statement but not adjudication of legal claims). Mediation allows (at great risk and with difficulty, requiring a different form of professional training and skill) more direct confrontation and discussion among and between those involved in the claims than do formal rules of evidence and testimony in court, but it also promises more direct understanding, transformation, and mutual knowledge.⁴⁶ Mediation of all kinds of disputes, both in the courts, criminal and civil, and outside (including in the family, workplace, commercial, labour, business, diplomacy), has now

⁴⁴ See Carrie Menkel-Meadow, 'The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us' (1985) 2 *Journal of Dispute Resolution* 25.

⁴⁵ I have argued in many essays and articles that our conventional adversarial system has too often dichotomized legal conflicts into two sides, when, in reality, many conflicts involve more than one issue and more than two parties; see Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Post-Modern, Multi-cultural World' (1996) 38 *Wm & Mary L Rev* 5. Stuart Hampshire, in his Tanner lectures, has opined that the Anglo-American adversarial system of conflict resolution, '*audi alterum partem*' (hear the other side), is one of the most notable of human achievements where, when we cannot agree on the substantive good, we might agree on the processes for resolving our differences; see Stuart Hampshire, *Justice Is Conflict* (Princeton, NJ: Princeton University Press, 2000). While I applaud the notion that conflict resolution is among our most significant human skills (and sciences), our postmodern world requires us to hear all sides to a conflict, not just two; see e.g. Carrie Menkel-Meadow, 'The Lawyer's Role(s) in Deliberative Democracy' (2004/5) 5 *Nevada Law Review* 347.

⁴⁶ See Carrie Menkel-Meadow, Lela Love, & Andrea Schneider, *Mediation: Practice, Policy and Ethics*, 2d ed (New York: Wolters Kluwer Aspen, 2013).

inspired the development of alternative processes in a wide variety of settings including mass harms, post-conflict transitional justice, criminal justice, and human rights violations.⁴⁷ As in the Indian Schools Settlement, different forms of restorative, restitutionary, apologetic, and compensatory processes have now been used to document truth (e.g. the many truth and reconciliation commissions in a variety of post-conflict settings⁴⁸), offer apologies, reintegrate offenders into the community, grant forgiveness, prescribe future-oriented restitutionary behaviour, adapt and recraft contingent outcomes, and revisit the agreed-on terms of any agreement. In short, new forms of restorative or transitional justice are evolutionary developments supplementing and adding to our more conventional justice system. Such forms of justice, providing both permanent institutions and more temporary ones, allow different rules of engagement (narrative without cross-examination, evidence without formal rules, and more direct communication, often with professional intercessions) and different outcomes (not only damage awards or injunctions, but apologies, commitments to future undertakings, and the creation of new monitoring, counselling, health, or educational programs). Most importantly, these forms of justice can provide both individual and group opportunities for expression of harm, acknowledgement of guilt, confession, apology, and forgiveness. The Indian Residential Schools Settlement, by allocating funds for commemoration and truth commission activities, demonstrates just how other forms of (more responsive) justice can be tailored to particular situations.

Yet the processes of restorative justice in general and the Indian Residential Schools Settlement in particular are not without dangers and problems as well. Authenticity of participation is essential if apologies and forgiveness are to be taken seriously. Critics of the South African truth and reconciliation process noted that many of the key actors – for example, the lawyers and judges who enforced the apartheid regime – did not fully participate.⁴⁹ Earlier efforts to involve Indigenous peoples

⁴⁷ Andrea Kupfer Schneider, 'The Intersection of Dispute System Design and Transitional Justice' (2009) 14 Harv Negot L Rev 289.

⁴⁸ Hayner, *supra* note 37; Robert I Rotberg & Dennis Thompson, *Truth v Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000); Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999); Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge, UK: Cambridge University Press, 2006); James Gibson, *Overcoming Apartheid: Can Truth Resolve a Divided Nation?* (New York: Russell Sage Foundation, 2004); Jane Sromseth, *Accounting for Atrocities: National and International Responses* (Cambridge, UK: Cambridge University Press, 2003).

⁴⁹ David Dyzenhaus, *Judging the Judges – Judging Ourselves: Truth, Reconciliation and Apartheid Legal Orders* (Oxford: Hart, 2003).

in Canadian law making have been similarly criticized.⁵⁰ The pre-Settlement ADR process (and some of the language) in the final settlement document reflects the co-opting of alternative processes by conventional legal language and requirements – what seemed alternative instead required conventional proof at a hearing and the process was considered by many to be over-professionalized and legalized, even when hearing officers were not lawyers or were First Nations people.⁵¹ The danger of co-optation by legal concepts and legal language of even the most alternative processes remains a danger in many efforts to craft tailored processes for particular situations and has been noted by some critics of the Canadian Indian Schools Settlement process, dominated by the Canadian legal establishment.⁵² The same has been notable in the use of ADR by many formal court systems.⁵³ Individualized hearings intended to provide compensation for those specifically injured have devolved into conventional, legal evidentiary hearings, inflicting the pain of reliving abuse on rape victims, who often complain that trials become a second rape, and demonstrating just how difficult it is to truly change a legal process.

In Australia, the path-breaking case of *Mabo v Queensland* (1992)⁵⁴ recognized, for the first time, the legitimacy of land claims of Aboriginal people, but in the twenty years since, new legislation and the reassertion of conventional colonial conceptions of proof of land claims has not much altered the landscape. Aboriginal critics in both Australia and Canada continue to lament the failure of the colonials to really engage in true dialogue and work towards understanding the different conceptions of justice and meaning of those communities.⁵⁵ True healing and forgiveness cannot be commanded. Critics claim that postcolonial governments still seek closure (whether of compensation amounts or land title) of conventionally framed legal claims and are not willing to reopen or

⁵⁰ Julia Hughes, 'Instructive Past: Lessons from the Royal Commission on Aboriginal Peoples for the Canadian Truth and Reconciliation Commission on Indian Reservation Schools' (2011) 27 CJLS 101 [Hughes], critiquing aspects of the Royal Commission on Aboriginal Peoples and some aspects of the Indian Schools Settlement and the truth and reconciliation process.

⁵¹ See Regan, *supra* note 6 at 141–2, suggesting that Aboriginal desires for healing were co-opted by the needs of the colonial government for closure and for limiting damages and compensation.

⁵² Hughes, *supra* note 50.

⁵³ See Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: The Law of ADR' (1991) 19 Fla St L Rev 1; but *cf.* Julie MacFarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (Vancouver: University of British Columbia Press, 2008).

⁵⁴ 175 CLR 1 (the doctrine of *terra nullius* does not apply to Australian land ownership).

⁵⁵ See e.g. Maddison & Brigg, *supra* note 7.

revisit earlier settlements. Others are concerned that even commemorative events and truth and reconciliation commissions do not engage the whole society. Prime Minister Stephen Harper apologized at a brief session in Parliament in 2008; Australia had a full Apology Day, with expectations that the entire nation would participate in public places; the United States has yet to offer any formal recognition of the many harms it has inflicted on its Indigenous population.⁵⁶ Yet, despite these very public and symbolic events, underlying resentment may continue. How can such issues be resolved and the different perspectives be reconciled if economic, educational, health access, and other conditions that transcend the legal issues of the residential school cases are not ameliorated?

Thus, it can be said that the Canadian Indian Residential Schools Settlement Agreement has been momentous, in many respects. It arises from what is probably the first truth and reconciliation process *within* a nation, not in connection with a violent ongoing conflict or civil war, and one of the largest compensatory settlements by a former colonial power (including both governmental and religious bodies); it acknowledges wrong doing and attempts to rectify some harms through both material and more non-material acts, with the desire to correct, account for, and change a nation's history and its relationship to its first citizens and inhabitants. Yet the settlement is both honoured and criticized for what it has accomplished and what it has not. Aboriginal life in Canada, as in much of the rest of the colonized world, is still distorted by poverty, dislocation, abuse, alcoholism, health and education deficiencies, experiences of inequality and discrimination, and ambivalence about relations with the larger polity.

At the same time, there are many valuable lessons to be learned from as well as questions still to be resolved about both the process and the substantive settlement itself:

1. Litigation may be necessary, but not sufficient, to deal with mass (group) harms. Litigation frames issues, publicizes bad acts, generates information, and provides the initial framework for legal liability.
2. Legal liability is not enough for acknowledging deeper moral and historical claims. To the extent that legal doctrines (such as proof and evidentiary requirements, legal fees rules, immunity, and the limitations of remedial imaginations and powers⁵⁷) limit what courts

⁵⁶ Although, interestingly, when I was recently in Australia, the claim was made that at least the United States had signed many treaties with its Aboriginal people (some more honoured in the breach than not, but at least there was open and public negotiation and public documentation of claims, relationships, and some expectations!).

⁵⁷ See Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' (1984) 31 UCLA L Rev 754, for my original argument that

can do, litigation may be inappropriate for the handling, management, and resolution of complex, multi-party, long-term, and complex social, political, and legal issues.

3. Even collective (class actions, consolidations) or other forms of aggregate litigation⁵⁸ may be inadequate for the resolution of complex group and individually based claims that rely on both individual proof and collectively or group-based or experienced harm. Some claims and harms require more complex hybridized treatment.
4. Litigation may be a starting point, but is inadequate for the recognition of 'harms' experienced that are not yet recognized as legal claims (e.g. loss of language/culture/family/group).
5. Conventionally trained lawyers and judges may be limited in how they conceive of legal claims and harms and be unable to enter into the subjective experience of those who experience harms and claims not yet recognized by formal legal systems. As some have noted, the Indian Residential Schools Settlement is still western and legal in conception – a settlement of lawsuits and legal issues, not the reintegration and healing of communities.
6. Those harmed in such group/mass settings may have a great variety of experiences that cannot easily be fit into legal remedies; thus more flexible, tailored, and 'bespoke' processes (and outcomes) may be necessary to deal with the human variation in injurious experiences.
7. Process pluralism (drawing on meditational, restorative justice as well as litigation) may be a better way to conceive of managing such complex claims. There may be preferred orders for such processes: litigation to frame claims; negotiation and mediation to explore deeply felt needs, interests, preferences, applicable principles, motivations, emotional, group, ethical, religious, and other concerns in order to search for a variety of different kinds of outcomes and solution. Some processes may need to be public for educational and judicial (justice-seeking) purposes; others may require some confidentiality, to provide protection for individuals, and to explore potentially controversial solutions.
8. Group and mass claims require a menu of choices for processes and outcomes – some of those who have been injured will want public hearings; others will prefer privacy and secrecy to reveal what happened to them and to seek accountability from those who caused

courts (and the shadows of their rulings that create bargaining endowments) have limited remedial powers to resolve many legal and human problems.

⁵⁸ See American Law Institute, *Principles of Aggregate Litigation* (Philadelphia, PA: ALI, 2012).

harm. Some will want compensation; others will want apologies. Some will be willing to forgive (if not forget); others never will. One size will not fit all. Our legal system requires more diverse processes than binary legal hearings with win/lose outcomes. The Indian Residential Schools Settlement has at least attempted to create a menu of some choice and differentiated processes for different purposes.

9. Those who engage in the legal work affecting large groups of people with great injury will require training and skills which may be quite different from or additional to conventional legal training – negotiation, mediation, problem solving, responsive dialogue, dispute system design,⁵⁹ counselling, healing, and non-legal forms of communication. It may be that alternative or more appropriate forms of justice will require differently skilled professionals at different stages of these processes.
10. Complex, historically based, and group claims may require processes that are more susceptible to change and modification ('contingent' solutions) than conventional legal processes provide for. This is part of the development of the newer legal processes of deliberative democracy and consensus building as methods of managing and handling modern complex legal (and human) disputes that do not lend themselves so easily to final resolutions. (Consider here environmental, scientific, medical, family and some business issues, where change may affect resolution, so that re-opener clauses and other opportunities for re-negotiation are required.) What do we do when new information comes to light, during, or even after, the resolution of some claims?
11. Finally, when do seemingly *sui generis* claims of harms, like the often repeated (US, Australia, Canada, UK and other perpetrators of similar harms) practices of abuse, require their own particular, culturally specific processes, with a mixture of legal, historical, and emotional healing, with both backward-looking and forward-facing concerns? Will it ever be possible to plan for and design such processes in advance or to use the similar processes in different settings, or must such mass and group and culturally specific claims always be designed *sui generis*?

It is my view that the Indian Residential Schools Settlement demonstrated use of a variety of legal and non-legal processes that attempted, in an imperfect but very human way, to face up to a shameful period in the national history of Canada and the equally shameful human

⁵⁹ Nancy Rogers, Robert Bordone, Frank Sander, & Craig McEwen, *Designing Systems and Processes for Managing Disputes* (New York: Wolters Kluwer Aspen, 2013).

behaviour of most colonial powers. If we can learn anything from what has been accomplished thus far, it is that human frailty and bad behaviour evolves and changes over time. As we now acknowledge the wrongs we have done, we must continue to explore and experiment with new ways to attempt to reconcile and reintegrate ourselves with each other. For me, this means that law, lawyers, and legal processes will have to evolve to improve our relations with each other, to enable us to really hear the needs and demands of others, like First Nations peoples, in their own terms and with their own values, and to create new forms of process and new remedial ideas to reach new understandings of each other and true healing, especially, as here, where we can never achieve full compensation and remediation.