

USING ALTERNATIVE DISPUTE RESOLUTION TO RESPOND TO INDIAN RESIDENTIAL SCHOOL ABUSE

Carla M. McGrath

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At the heart of the vision of residential education - a vision of the school as home and sanctuary of motherly care - there was a dark contradiction, an inherent element of savagery in the mechanics of civilizing the children.⁽¹⁾

From the 1840s until 1984 the Roman Catholic, Anglican and United Churches of Canada, funded by the federal government, directed residential schools for aboriginal children, in an effort to assimilate aboriginal youth into Euro-Canadian society.⁽²⁾ At these "Indian Residential Schools" ⁽³⁾ the children were barraged by European language, religion, values, and discipline in a forcible attempt to "kill the Indian in the child."⁽⁴⁾

The quality of life at these institutions was extremely poor and damaging. The children were grossly underfed and malnourished; siblings were not permitted to speak to each other; residents were subjected to heavy labour; and outbreaks of disease were ignored.⁽⁵⁾ As a result of underfunding; the method of financing individual schools; lack of oversight; and failure to ensure that staff treated children properly, all residents suffered from neglect and abuse, which led to immeasurable damage and death.⁽⁶⁾ As Suzanne Fournier writes: "[a]t all periods of the schools' operation, it is certain that students died concealed deaths due to misadventure, abuse and neglect, which might be characterized - had the schools ever been held culpable - as criminal negligence, manslaughter and even murder."⁽⁷⁾ Given this hostile and inappropriate environment, it is not surprising that the schools often failed to provide students with an adequate education, leaving some children to graduate functionally illiterate.⁽⁸⁾

In addition to the poor quality of life and education, physical and sexual abuse was epidemic at these institutions. Discipline was oppressive and strict, usually involving physical pain and humiliation.⁽⁹⁾ Children endured having needles pushed through their tongues for speaking their own languages; were often deprived of food and confined to isolation for long periods; suffered verbal abuse through ridicule and public indignity; experienced frequent whippings and having to wear soiled sheets on their heads as punishment for bedwetting; were denuded of their traditional long-hair; and endured frequent beatings for "insubordination."⁽¹⁰⁾ Sexual abuse was also prevalent, as attested to by hundreds of former students who have stepped forward as adults with allegations of sexual misconduct.⁽¹¹⁾

The net result of such treatment and conditions was lasting psychological harm. In fact, all students suffered from feelings of disconnection, powerlessness, and degradation to varying degrees.⁽¹²⁾ Degradation was used as a tool to enforce conformity and obedience, since those who feel frightened, worthless and ashamed of who they are may be more easily manipulated. Meanwhile, vulnerability and an inability to trust grew out of physical and psychological isolation, a hostile, punitive environment, and the forcible detachment from their families and communities. Powerlessness was also a dominant response, which originated in the knowledge that any allegations of abuse would not be believed, as well as through the arbitrary withholding of basic necessities.⁽¹³⁾

Aboriginal individuals and communities are still suffering from the effects of residential school education. Indeed, the schools' legacy is one of anger, sadness, shame, loss, and rage, which has manifested itself in substance abuse, dysfunctional families, Post-Traumatic Stress Disorder, panic attacks, insomnia, eating disorders, sexual inadequacy or addiction, inability to form intimate relationships, and suicide.⁽¹⁴⁾ Separated from their parents, and often only sent home when their death was imminent, residential school students did not have the opportunity to learn parenting skills, cultural traditions, nor their customary way of life, thus having a profound impact on the health of their communities, especially since the heart of many native cultures is the family unit. Also, on an individual level, parenting of their own children has been a challenge and has often been plagued by the continuation of the cycle of abuse.⁽¹⁵⁾

Clearly, there are serious legal and non-legal issues to be addressed between those who participated in the residential school experience. In an attempt to heal and seek redress, thousands of victims are filing civil actions against those responsible for the schools - the churches and the federal government. However, when one considers the nature of the conflict and the parties' needs, interests and goals, one must seriously question civil litigation's potential for achieving an appropriate and meaningful resolution. Indeed, of the spectrum of redress mechanisms available, it seems that designing an alternative dispute resolution (ADR) system to handle the onslaught of civil litigation might be a more appropriate and meaningful option, not only for many survivors, but for all those involved.

Since each abuse case is unique in terms of the type and amount of abuse endured, as well as in terms of individual needs and interests, it would be unwise to require or prescribe only one means of resolving these disputes. Indeed, the institutions involved should not attempt to prevent victims from engaging the traditional mechanisms of criminal prosecution, civil litigation or non-legal processes, by imposing a mandatory ADR regime. ADR is not a panacea that will automatically optimally serve each individual victim. However, on the whole, it does seem that an ADR system may be the most appropriate means of addressing the majority of victims' needs. Therefore, this paper explores the nature of the dispute, the parties' interests, and the primary mechanisms available to resolve the conflict, ultimately concluding that an ADR approach seems to have the greatest potential for meeting the parties' needs and interests. The primary recommendation is therefore that the disputant institutions fund the design of a dispute resolution system that addresses the issues, concerns and suggestions outlined herein.

Legal aspects of the dispute

Individual disputes between aboriginal survivors and the institutions that were responsible for the Indian residential schools are currently a pressing problem. Given that there have already been several criminal trials of the perpetrators, and that many perpetrators are no longer alive or are judgement-proof,⁽¹⁶⁾ victims have turned their focus toward the accountability of the Government of Canada and the participant churches. Indeed, the number of survivors filing civil cases based on sexual, physical, psychological, emotional, and cultural abuse is increasing dramatically.⁽¹⁷⁾ As of March 2000, it was reported that the federal government was facing 5,800 individual law suits, in addition to seven class actions.⁽¹⁸⁾ Moreover, many litigators believe that the actions already filed merely represent "the tip of the iceberg."⁽¹⁹⁾ Especially considering nearly 100,000 aboriginal people attended the residential schools, this deluge of litigation is a significant problem for both the federal government and the churches who are concerned that millions of dollars will have to be diverted from programs in order to meet their legal costs.⁽²⁰⁾ The churches also fear that church property will have to be sold.⁽²¹⁾ In total, it has been estimated that the potential cost to the churches and the federal government may reach \$1 billion.⁽²²⁾

The legal case against the directing institutions appears fairly strong. There is substantial evidence that

both the churches and the federal government were aware of the conditions and abuse plaguing the schools, yet failed to take steps to meaningfully address the problems.⁽²³⁾ As the Royal Commission on Aboriginal Peoples (RCAP) found: "[t]he avalanche of reports on the condition of children - hungry, malnourished, ill-clothed, dying of tuberculosis, overworked - failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action."⁽²⁴⁾ The desire to avoid public accountability and legal liability outweighed any sense of duty to protect the abused children.⁽²⁵⁾ There is also ample evidence of sexual abuse at numerous institutions.⁽²⁶⁾

In addition to lasting physical and psychological effects, experts have also confirmed direct connections between the residential school experience and the corrosion of aboriginal cultures and dysfunction in their communities.⁽²⁷⁾ Indeed, as RCAP reports: "...although the 'roots of the problem are complex', it is 'apparent that the destruction of traditional Indian culture has contributed greatly to the incidence of child sexual abuse and other deviant behaviour.'"⁽²⁸⁾ It has also been proven that since survivors learned as children that adults exert power and control through abuse, their parenting skills are often dysfunctional, and it is not uncommon for them to inflict abuse on their own children.⁽²⁹⁾

Justiciability of Legal Issues

While it is certain that not all former students would be able to successfully prove a legal case due to a host of legal and procedural issues, the courts have already found substantial government and church liability on several grounds. Following recent Supreme Court of Canada jurisprudence on institutional child abuse,⁽³⁰⁾ lower courts have held both the churches and the federal government liable for abuse perpetrated by their employees.⁽³¹⁾ In *Mowatt v. Clarke*,⁽³²⁾ for example, not only were the church and government both employers of the perpetrator, but they were also found to be negligent (United Church was held 60% liable, while the federal government was 40% liable). In addition, the United Church was also found to be in breach of its fiduciary duty.

Further, the Manitoba Queen's Bench has ruled that a case alleging breach of fiduciary duty should go to trial on the basis of loss of identity and culture. The defendants had tried to strike the motion on the basis of the Limitation of Actions Act,⁽³³⁾ however, the court held that the plaintiff could bring her claim under s.2(1)(k), which is "other equitable grounds of relief".⁽³⁴⁾ As this case illustrates, the courts have begun to ensure that child abuse claims are not barred despite the lapse of many years,⁽³⁵⁾ and that there is a developing area of the law in relation to purposeful attempts to eradicate certain cultures.⁽³⁶⁾

Additionally, depending on the facts of a particular case, cultural genocide,⁽³⁷⁾ negligence and failing to provide the necessities of life are also potentially fruitful legal grounds upon which plaintiffs may bring an action against the institutions.⁽³⁸⁾ The Government of Canada and the Roman Catholic Church have already been accused of failing to provide the necessities of life in a 900 person class action in Nova Scotia. This class action also alleges that the priests and nuns who ran the school physically and sexually abused the students.⁽³⁹⁾

Parties' Interests and Goals

According to prevailing conflict resolution theory, the onslaught of civil litigation is the manifestation of victims' attempts to find a means of satisfying their currently unmet interests. Interests are crucial to understanding the nature and scope of any dispute since they are the needs and desires that motivate the parties to act, and lay behind the parties' positions. Ultimately, the appropriateness and potential effectiveness of any dispute resolution mechanism depends on how well all three elements (procedural,

substantive and psychological) of the parties' interests fit with the features of the mechanism. Therefore, it is important to examine the nature of the interests that drive the present civil litigation process, not only in order to assess its potential "success" in dispute resolution, rather than legal, terms, but also to guide the consideration of other potential approaches.

Victims

Of course the needs and interests of each victim will vary according to the type and extent of abuse suffered; (40) however, given that the numerous disputes at issue are of the same general type, and extensive work has been done in assessing victims' needs, it is possible to construct a generalized set of interests for the purpose of this examination. The chart which follows outlines these generalized interests. (41)

<u>Procedural</u>	<u>Substantive</u>	<u>Emotional / Psychological</u>
Minimize stress and pain	Personal Healing	Recognition that wronged
Active involvement in process and in any design of programs (voluntary)	Heal families	
Protection against power imbalance	Personal healing	Punish those responsible
Appropriate representation and legal advice	Educational opportunities	Public awareness
Opportunity to tell own story	Stop cycle of abuse	Memorialize event / deceased
Ensuring no conflict of interest on government's part	Resolution that reflects partnership	A "human" process
Access to redress (often financial barriers)	Financial security	Empowerment
Appropriate support for both victims and their families	Appropriate, effective and lasting solutions	Prevention of child abuse
Trauma training for participants	Rebuild and ensure survival of cultural identity	Closure
Informed choices / options	Knowledge of where deceased buried	
Culturally appropriate	Personal and community safety	
	Clear, unqualified, voluntary apologies	

Government of Canada

Due to strict government security it is impossible to ascertain the government's true interests in relation to resolving cases of residential school abuse; however, based on the federal government's past and present conduct (and in particular its demonstrated willingness to collaboratively explore the possibility of an ADR approach), (42) one might speculate that its interests include those listed in the following chart.

<u>Procedural</u>	<u>Substantive</u>	<u>Emotional /</u>
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		Psychological
Avoid court action wherever possible	Minimize costs	Closure
Perception that process is just	Honour fiduciary duty	Avoid negative publicity
Cost-sharing	Reempower individuals and communities	
Practicality and efficiency	Approval of majority of mainstream society	
	Minimize international embarrassment	
	Prevention of future incidents in other contexts	
	Practical and efficient solution	

Churches

Based on media reports and publications, one might plausibly speculate that the following chart reflects the churches' primary interests. [\(43\)](#)

<u>Procedural</u>	<u>Substantive</u>	<u>Emotional / Psychological</u>
Avoid court action where possible	Financial security	Spiritual healing (reduction of shame and recovery)
Cost-sharing	Maintenance of service to members	Minimize negative publicity
Efficiency	Healing of victims	

Comparison of Interests

The crucial issue to be determined is whether all three elements of the parties' respective interests can be addressed through one particular type of dispute resolution mechanism. In engaging in this analysis, generalizations of the compatibility of the parties' interests serve as helpful guideposts. Fortunately, it seems that the parties are generally procedurally complementary, and actually reflect interests that are inconsistent with using civil litigation as the conflict resolution approach. In terms of substantive interests, while they are not entirely complementary, they by no means necessitate a distributive approach to conflict resolution. [\(44\)](#) It also seems that the parties would want to ensure that the victims' needs take precedence, provided they are tempered by practicality and feasibility. Such priority seems logical given that the Law Commission has emphasized that victims' needs and interests should be paramount based on moral grounds, [\(45\)](#) and that the institutions likely wish to minimize negative media coverage and preserve as much of their reputation as possible. Also, even though the parties seem more focussed on distancing their involvement with each other and achieving closure with respect to this dispute, it should be remembered that the parties have an ongoing relationship with respect to other matters, and given that they are seeking a restorative outcome, the establishment and preservation of a good relationship seems important.

Appropriate Dispute Resolution

In light of the parties' interests, civil litigation does offer some opportunity to meet their goals. Ultimately however, neither civil litigation, nor other means of redress, such as criminal proceedings, traditional

compensation programs, institutional initiatives, or public inquiries, have the potential to meet all parties' interests. In fact, not even the victims' interests alone are fully met by any of these approaches.

Evaluation of Civil Litigation

Comparative Benefits for Victims

That victims' have chosen to pursue civil litigation in order to address the escalating conflict between themselves, their communities, and those responsible for the residential school program is certainly understandable. From a legal perspective it seems to be the only option that gives sufficient weight to victims and their needs, since the very purpose of civil litigation is to obtain monetary compensation for damages suffered at the hands of a defendant.⁽⁴⁶⁾ By contrast, the criminal justice system is ill-equipped to address the needs and interests of residential school survivors.⁽⁴⁷⁾ Indeed, while there have been criminal convictions of some of the perpetrators of the abuse,⁽⁴⁸⁾ victims only have a peripheral role in such proceedings; so while the publicity surrounding criminal trials can serve to recognize victims' emotional interests through a general critique of the system,⁽⁴⁹⁾ their political and substantive interests of active involvement in a culturally sensitive process that will result in a restorative solution both for themselves and their communities are not addressed. Moreover, even if criminal injuries compensation schemes were available to all victims of residential school abuse nationally, the awards granted are purely monetary and minimal, thus not meeting any of the three elements of victims' interests.⁽⁵⁰⁾ Still further, the criminal prosecution approach is only relevant to a sliver of those who suffered abuse since many of the perpetrators are elderly or have died;⁽⁵¹⁾ there has been a considerable period of time since the assaults; the fact that the victims were children at the time of the abuse makes meeting evidential requirements a challenge; and the victims' are dependent on law enforcement agencies and the Crown to lay and pursue charges.

In addition to civil litigation's attractiveness as compared to criminal prosecutions, there are also numerous other benefits. Civil actions provide the opportunity to "punish" the institutions since they have not been convicted of crimes; victims may wish to confront those responsible and/or recount the details of the abuse in the public forum of the courtroom; the commencement of the action may encourage other victims to seek compensation; the public exposure may serve to reduce the amount of abuse ongoing in institutions;⁽⁵²⁾ victims can initiate the process unilaterally, without having to gain the attention of the government and churches through political manoeuvring; civil actions in the wake of successful criminal prosecutions are inexpensive to litigate and unlikely to fail;⁽⁵³⁾ the standard of proof is the balance of probabilities;⁽⁵⁴⁾ and victims have far more control over and involvement in civil actions.⁽⁵⁵⁾

Inability to Fully Meet Victims' Interests

Despite these benefits, one still must examine the extent to which civil litigation meets all the interests involved, and question whether there is a more appropriate means of dispute resolution. Indeed, there are significant drawbacks to civil litigation which do not accord with survivors' interests. Most significantly, the outcome of litigation is never certain.⁽⁵⁶⁾ Of particular concern in the context of physical abuse within the institutions is that the defendant may be able to plausibly suggest that the conduct in question was not "offensive" in the disciplinary context of the time.⁽⁵⁷⁾ Likewise, some may be able to establish that the standard of care owed in historical context was sufficiently lower than the current standard, thus defeating a particular negligence claim.⁽⁵⁸⁾ The relevant area of the law is also fairly young, thus making litigation even more uncertain.⁽⁵⁹⁾

Furthermore, in terms of victims' emotional and procedural interests, the civil litigation process is inadequate. The cost of litigation is extremely high; actions would likely span several years;⁽⁶⁰⁾ the process can cause significant anxiety and in fact "revictimize" the plaintiff due to aspects such as aggressive questioning; the passage of time makes the recollection of details in cross-examination difficult;⁽⁶¹⁾ and the churches may be judgement proof if their financial resources are depleted by extremely onerous legal fees. From a procedural perspective, stress and pain would not be minimized; lawyers, not the plaintiffs, dominate and control the process;⁽⁶²⁾ there are financial barriers to engaging the system; sensitivity or support for victims and their families is generally not accorded; many victims are uncomfortable with the public nature of the proceedings;⁽⁶³⁾ and the process is generally not culturally appropriate. In terms of psychological interests, the nature of the process is to determine whether the victims were wronged, not acknowledge this fact outright; the process is cold and not "human"; and empowerment is minimized by the dominance of lawyers and rigid court procedure.⁽⁶⁴⁾

In terms of final outcome (substantive interests), the remedies available through civil actions also may not meet survivors' interests. Monetary awards are the typical result, thus negating the opportunity for apologies, the creation of educational opportunities, and other restorative solutions.⁽⁶⁵⁾ While damages do try to restore victims to the position they would have been in had the abuse not occurred, it is worthwhile to consider Dickson C.J.'s words in *Andrews v. Grand and Toy Ltd.*: "[m]oney is a barren substitute for health and personal happiness..."⁽⁶⁶⁾ Further, it is important to acknowledge that Professor Feldthusen and other academics have persuasively argued that the courts have often failed to make sufficient damage awards for lost earning capacity.⁽⁶⁷⁾

In terms of substantive outcome then, there is little opportunity for sufficient damages to fund personal, family and community healing efforts, educational opportunities, memorializations, financial security, safety, ending the cycle of abuse, and rebuilding cultural identities. Indeed, it seems, based on this analysis, that this situation is of the type that Professor Macfarlane referred to when she wrote: "...legal standards do not guarantee access to realistic solutions that meet the needs of individuals whose lives are ruptured by legal disputes. They may even obstruct access as dispute resolution through the courts becomes increasingly stylised, complex and expensive."⁽⁶⁸⁾ Thus, one must consider whether a combination of monetary compensation and other creative remedies may better meet the interests of the parties.

Compatibility with the Churches and the Federal Government's Interests

From the perspective of the institutions, they would likely want to avoid civil litigation entirely, largely due to its onerous costs and public nature. In light of the fact that the contingent liability for these cases is nearly one billion dollars, and that the churches expect to experience financial difficulties as a result, civil litigation is certainly problematic. Litigation is also a problem for these organizations in terms of negative publicity, since the media would likely portray these parties as denying any responsibility for the harm caused to the young children, as well as call attention to the power imbalance between the institutions (and their ability to retain a team of lawyers and experts) and the disadvantaged survivors. The consequences of such a depiction would certainly be detrimental to the reputations of the institutions. Further, any legal technicalities which result in the dismissal of a case, or the award of a small amount of damages where the plaintiff has clearly suffered as a result of his or her experience at a residential school, may also contribute to the perception that the process is unfair. Clearly, this approach centres on negative aspects rather than focusing on a willingness to redress past wrongs, and move forward toward closure and healing.

A further concern for the federal government is its fiduciary relationship with aboriginal people in

Canada. Pursuing civil litigation is inherently an adversarial action; yet, the nature of a fiduciary relationship requires the fiduciary (here, the Crown) to act in the best interests of the beneficiary. Arguably then, engaging in adversarial conflict resolution could be considered inconsistent with the Crown's fiduciary obligation. As Professor Chartrand has argued, the federal government should work cooperatively with aboriginal people in order to meet its fiduciary obligation, which would thus translate into negotiating in a collaborative, problem-solving manner, rather than use adversarial approaches such as the courts or positional negotiation.⁽⁶⁹⁾ The implications of this legal argument seem to suggest that a collaborative approach to the resolution of the conflict, which focuses on victims' needs, would be consistent with the federal government's interests of avoiding litigation and honouring its fiduciary obligation.

Other Means of Redress

Given that civil litigation cannot adequately address all the parties' interests, one must consider whether there are other mechanisms that could effectively resolve these disputes. It is important to acknowledge at the outset that attempts to merely avoid the conflict are inadvisable, given that the harm is so great and the cycle of abuse is continuing. Avoidance of the conflict would essentially mean leaving aboriginal people and communities to address the consequences of the abuse without sufficient resources or support, thus potentially aggravating rather than responding to the harm.

Gestures by the Churches and Federal Government

RCAP reports that by 1992 most of the churches had formally apologised to the victims of their schools, although the federal government did not address the issue until after RCAP's final report.⁽⁷⁰⁾ Aside from these apologies, both the churches and the government have dedicated substantial resources for the healing of victims and addressing issues of family violence.⁽⁷¹⁾ Funds from the federal government's \$350 million Aboriginal Healing Fund (AHF), for example, are made available to groups on a project by project basis for the collective benefit of all those who participate in the program. The AHF's mission is to "...encourage and support Aboriginal people in building and reinforcing sustainable healing processes that address the legacy of Physical Abuse and Sexual Abuse in the Residential School system, including intergenerational impacts."⁽⁷²⁾ Clearly, this approach is beneficial in that it reflects the government's acknowledgement of the problem; it takes a holistic/culturally appropriate approach; it includes survivors' families and communities; and it recognizes the importance of creating a historical record of residential school abuse and public education. Indeed, in many respects this program addresses many of the interests of the parties.

However, considering the drastic increase in litigation, clearly many survivors do not believe that programs such as the AHF adequately address their needs. Moreover, only those who have suffered physical and sexual abuse as a result of the residential school experience have access to these programs, yet studies have shown that every child who attended the schools suffered abuse to some extent (even if it was not physical or sexual). Indeed, it is now well-known that children who witnessed the physical and/or sexual abuse of other children may have suffered as much damage from the experience.⁽⁷³⁾

Additionally, one might speculate that those victims who no longer identify with their traditional culture may not be comfortable with the traditional healing emphasis of the projects funded by the AHF. Further, even people who do wish to participate may be too far removed from the location of the funded project to benefit from it. Illustrative of this difficulty is that although there is an ongoing project in Fort McPherson, NWT for those who attended Grollier Hall in Inuvik, the location of the project is too remote to benefit anyone other than residents of Fort McPherson.⁽⁷⁴⁾

Perhaps most significantly, considering that the AHF has been extremely well publicised, the onslaught of civil litigation seems to communicate a desire for an individualized process and remedy, as well as formal accountability for the government and churches. In order to address the desire to seek an individual remedy, the government and churches could consider establishing a compensation program (specifically for residential school survivors), similar in nature to the Criminal Injuries Compensation Board; however, as the Law Commission has raised, the funds allocated to such *ex gratia* programs are inadequate to address the needs of victims since they tend to be limited in scope, and are not based on any legal obligation to distribute funds.⁽⁷⁵⁾ While some of these programs have been beneficial in terms of ensuring that victims receive support, counselling, and financial advice,⁽⁷⁶⁾ they have been viewed negatively by victims since they are often characterized as a quick way "to sweep the problem under the rug" and avoid publicity.⁽⁷⁷⁾ Also, such compensation programs are predefined structures imposed on victims,⁽⁷⁸⁾ rather than a process that allows survivors to be involved and tell their story in a "human" rather than mechanical process, thus denying them any sense of empowerment or psychological healing. There have also been problems with victims not being provided with the opportunity to make informed choices about their options in the past, in other contexts.⁽⁷⁹⁾

Public Inquiries

Aboriginal leaders have repeatedly called for a public inquiry into the issue of residential school abuse. Such statements have subsequently been fortified by the recommendations of RCAP.⁽⁸⁰⁾ A public inquiry would further explore the wrongs committed, the needs of survivors and achieve a degree of public scrutiny and condemnation.⁽⁸¹⁾ This option would be beneficial in the sense that it would involve a comprehensive examination of the issues; inquiries are usually shorter than civil litigation in duration; individuals would have an opportunity to tell their stories; an inquiry would serve to validate the experiences of the victims; the process would serve to educate the public; and ultimately prevention concerns would likely be addressed through its recommendations.⁽⁸²⁾

However, it seems that the drawbacks of this approach outweigh the potential benefits. First, one must question the necessity of a public inquiry considering that RCAP canvassed the issues well enough to prompt the federal government to publicly apologize and dedicate \$350 million to the AHF. Second, such inquiries may subject victims to revictimizing examination and cross-examination, akin to what occurs in the civil actions. Third, survivors are not in control of the process. Fourth, hearings are often televised and very public thus deterring the participation of many victims who are uncomfortable detailing the horrific abuse they suffered in such a public way;⁽⁸³⁾ and finally, it is unlikely that the government or churches would be willing to invest such a significant amount of funds into a process that is more educational and investigative than meaningful in terms of resolving the specific disputes of individuals.

Viability of Other Approaches

While each of these remedial responses meets the interests of the parties to a greater or lesser extent, none of these existing approaches is without significant drawbacks. Certainly, a combination of various remedial responses could be effective in certain circumstances; however, pursuing a multiplicity of unrelated options would certainly fail to meet the government and churches' interests of cost effectiveness and efficiency - one must not forget that resources are not infinite, especially since the federal government would likely have to assume a large bulk of the costs. Therefore, the Law Commission's recommendation of engaging in a new, all encompassing approach seems to be the best course of action. As the Law Commission states: "If we rely on piecemeal, case by case, reactive, and largely adversarial approaches to redress which have been primarily used to date, it is likely to be a long, painful and expensive journey, both emotionally and financially..."⁽⁸⁴⁾ In contrast, by engaging in a comprehensive

effort, resources and expertise would be concentrated, thus minimizing duplication and multiple proceedings. Also, efficiency would be maximized through sharing models, experiences and lessons learned.⁽⁸⁵⁾

The Alternative Dispute Resolution Alternative

An interest-based ADR approach would be an ideal basis for a comprehensive and culturally sensitive process that would allow for individual redress, since its flexibility would enable the accommodation of all elements of the parties' interests. Indeed, the potential for building an effective and meaningful solution through collaborative means is great, as ADR approaches are not hampered by pre-defined constraints, and as the Law Commission states, "only budgets and creativity limit the scope."⁽⁸⁶⁾

Restorative Potential and Flexibility

Perhaps one of the most attractive features of using ADR is that, a restorative element can form a foundational pillar of the approach. Because the parties would design the solution themselves, based on the ADR principles of collaboration and relationship preservation, accommodation of all parties' interests and reconciliation can be the focus, rather than the winner-loser dichotomy which is the earmark of adversarial processes.⁽⁸⁷⁾ Additionally, only non-court based process are unlimited as to their scope and therefore can acknowledge and address all forms of abuse, including psychological, emotional, spiritual and cultural, in addition to physical and sexual.⁽⁸⁸⁾ In terms of "remedies" as well, ADR systems can be restorative and flexible in nature since they are able to "go beyond financial compensation and include: acknowledgement of the harm done, apology, funding for therapy, funding for education, financial counselling and any other relevant services."⁽⁸⁹⁾

Precedent has revealed the importance of being able to fashion a customized and nuanced solution if effectiveness is to be achieved. For example, as learned from the Nova Scotia School For Boys, Nova Scotia School for Girls, and Nova Scotia Youth Training Centre cases, victims require more than just compensation. Financial management advice on how to handle any monetary compensation so that it is used wisely and maximized in terms of earning potential is crucial. Further, negotiating a mechanism with governments to ensure that any compensation received does not affect any government assistance that the victims may be receiving (income assistance, disability, etc.) is very important to the survivors' well-being.⁽⁹⁰⁾

Opportunity for a Culturally Sensitive Process

One of the greatest potential benefits of an ADR approach is its ability to be sufficiently culturally sensitive. While not all victims identify with traditional aboriginal values and perspectives, many of the victims do not identify with the values that underlie Euro-Canadian society and instead have a more holistic, collective and restorative view of justice.⁽⁹¹⁾ Ensuring that an approach is culturally sensitive and appropriate is particularly important in this context since the purpose of the residential schools themselves was to eliminate aboriginal cultures. Indeed, many aboriginal community members have made it clear that any ADR model should be "traditionally based".⁽⁹²⁾ By using approaches and processes that permit adaptation in order to be more culturally appropriate, and allow for the design of culturally meaningful redress, this in itself becomes a form of redress. Also from a practical perspective, ensuring that cultural norms and behaviours are not a barrier to communication and understanding is crucial to ensuring a quality and effective agreement.⁽⁹³⁾

Accommodation of Special Needs of Victims

Likewise, ADR processes and structures can be customized so that they are appropriate for what academics have called the "psychologically injured plaintiff."⁽⁹⁴⁾ Indeed, victims of abuse often have special needs that are directly related to the abuse they suffered. Clearly, in order for a process to be successful, the parties must be aware of and make accommodations for the effects of such injuries, since if psychological impairments are not acknowledged and taken into consideration, this may adversely affect the outcome of the process, with considerable impacts on the person, their family and community.⁽⁹⁵⁾ Indeed, there is a myriad of issues that could be problematic if not addressed. For example, victims are often very suggestible, especially while remembering trauma or during periods of relative "sensory deprivation" like during negotiation. Also, they may have unrealistic ideas as to their own guilt.⁽⁹⁶⁾ Also, in option generation, some victims may be severely disadvantaged since some conditions, such as post traumatic stress syndrome, can lead to "...cognitive constriction, [a] foreshortened sense of their own future and difficulties in thinking outside a narrow range of well known planning strategies."⁽⁹⁷⁾ However, despite these and several other special issues that must be considered, academics are optimistic that collaborative ADR approaches can, for the most part, be effective in such circumstances provided that such issues are first addressed.⁽⁹⁸⁾

Empowerment

ADR approaches are centred on the parties themselves, rather than on a legal process and lawyers, thus providing the opportunity for real empowerment. Not only would victims be actively involved in the process, they would have a significant degree of control over the approach, and be able to participate in a relatively non-threatening environment, since the approach would be a non-adversarial one. Admittedly, the parties would have to address the issue of power imbalance between the institutions and the victims before any true empowerment could be realized; however, ADR processes and approaches offer several ways of responding to such power imbalance issues.⁽⁹⁹⁾ For example, ensuring that victims have independent legal advice would be essential. Legal counsel would be able to canvass all the victims' options with them and assist them in evaluating their relative strengths and weaknesses.⁽¹⁰⁰⁾ Additionally, processes that include a fairly interventionist third party, such as a mediator or facilitator, could be used to ensure that all parties have the opportunity to meaningfully participate.⁽¹⁰¹⁾

Another feature of an ADR approach that would assist in countering any power imbalance would be the opportunity to involve a more extended group of participants than just the parties. Indeed, provided all the parties agree, anyone may participate in the process to varying degrees. Such openness would allow for personal support people, counsellors, family and community members to participate in the resolution process.⁽¹⁰²⁾

Greater Potential for Facilitating an Appropriate Outcome

Extended participation would also likely enhance the quality of the outcome. Not only would the quality of the agreement be enhanced since the victims would be more likely to participate fully in solution development, but the resolution itself could address the needs and interests of any family members (or others) affected by the abuse suffered in the residential school system. Further, extended participation would provide the opportunity for the institutions to expose their decision-making constituents to the process. This involvement would be invaluable in the sense that these decision-makers would likely be more willing to agree to negotiated outcomes if they had been involved in developing them and understood their origins and rationale. A correlation to this is that involvement would also likely serve to facilitate "buy-in". For the federal government for example, representatives from the Treasury Board, Privy Council Office, Department of Finance and Department of Justice - all of whom are key federal decision makers - could be involved in the process, thus increasing the likelihood of their support of the

resolution. Such involvement would also likely expedite the process since the primary government representatives would not have to dedicate as much time to educating their own organization and obtaining internal approvals.

The Evolving Nature of the Relationship Between the Crown and Aboriginal People

One should also consider that recent jurisprudence seems to be directing that disputes between the Crown and aboriginal people should be resolved by negotiation rather than through the courts. In the recent watershed case of *Delgamuukw v. British Columbia*,⁽¹⁰³⁾ the court emphasized that aboriginal and Crown disputes should not "...tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach negotiated settlements."⁽¹⁰⁴⁾ Admittedly, this jurisprudence is in relation to aboriginal rights and title; however, it may reflect a recognition among the judiciary that issues between aboriginal people and the Crown are best resolved through ADR due to their special, ongoing relationship.

Protection of Privacy

The fact that ADR processes are private in nature would also be a significant benefit to the parties. Unfortunately, our society stigmatises survivors of abuse, thus prompting an interest in personal privacy,⁽¹⁰⁵⁾ despite the desire for public awareness generally. As a result, it would be significantly less stressful on survivors to be able to resolve their disputes in a private environment, out of the public eye.⁽¹⁰⁶⁾ Such a private setting would also be in the interests of the institutions in that they are likely very concerned about their reputations and public opinion. In order to meet survivors' interests however, it would be important to ensure that the parties "replace" the public profile of the courtroom with public education, strategic use of the media, and memorialization. Again, ADR's flexibility makes options such as a joint, comprehensive communications plan possible. Should the parties wish to engage in such an option, they would be able to control what information is communicated to the public, while still meeting the interests of survivors and protecting against any allegations of secrecy or having an overly-closed process.

Practical Benefits

From a practical perspective as well, ADR seems to be an ideal option. Certainly ADR processes can become very expensive and are not always more cost effective than litigation, but for the most part they do represent a more efficient and productive use of available resources.⁽¹⁰⁷⁾ Importantly, an ADR approach would allow the financially strapped churches and federal government to focus more of their resources on the outcome/resolution, rather than the process. Ultimately, the involvement of the churches in the resolution process would be significantly reduced if the process made them unable to offer any compensation or restorative resources. Even if the costs were the same in monetary terms however (which is unlikely since significantly less money would be dedicated to legal fees and negotiated settlement amounts are usually lower than those awarded in civil suits),⁽¹⁰⁸⁾ these financial resources would be "better spent" in the sense that they would contribute toward a healing process, where the survivor is more empowered, and the parties interact in a non-adversarial manner. Indeed, it is important to measure the quality of the process and outcome by such non-quantitative means.

It is also important to recognize that while it is true that about 92-98% of civil litigation is in fact resolved by out-of-court settlement, such settlement is generally negotiated inefficiently, at arm's length, solely on the basis of legal positions, and the road to the point of settlement is generally long and expensive.⁽¹⁰⁹⁾ It is also crucial to note that in many cases the costs outweigh the possible awards, and the positional bargaining used by lawyers is based on legal rights and ignores other possible avenues for settlement. By

contrast, in ADR, interests, needs, and non-legal issues can be discussed in addition to legal remedies, (110) thus making a comprehensive ADR approach different from and arguably superior to court-connected negotiation.

Success Stories

Also suggesting the appropriateness and potential of ADR in this context is the success of the few cases that have been resolved through using ADR processes to date. For example, Dennis and Steven Nyce of British Columbia were able to reach a mediated agreement with the federal government and the Salvation Army. The process was only seven months in duration and confidential, the Salvation Army apologized, and resources for the brothers' home community to help them with healing formed part of the redress package. (111) A confidential mediation was also held in Inuvik, and has generally been considered a positive experience by the participants. Mediated by a local lawyer, the process was simply aimed at providing the victim the opportunity to confront his abuser, tell his story and receive an apology. While this situation differs in that it involved the actual perpetrator rather than the sponsoring institutions, it illustrates that each individual's particular interests can be effectively and meaningfully accommodated through ADR processes.

Issues and Challenges

Despite the many benefits, there are still several issues and challenges that must be adequately considered and addressed before an ADR approach can be fully endorsed. First, the nature of the conflict is unique in the sense that it is a series of private disputes that have public significance due to the magnitude and severity of the abuse, the racialized targeting of the treatment, and the fact that the federal government has already been found liable in civil proceedings. These public components, in addition to the reality that aboriginal people are a disadvantaged group within Canadian society, may lead some to believe that residential abuse cases should be litigated rather than addressed through ADR. (112) Indeed, one could argue that the public nature of court proceedings, the protection the court can offer aboriginal people against the significantly more powerful institutions, and the need to set a precedent all suggest that this is a matter that is not appropriate for ADR. (113)

In response however, one could argue that the issue is by no means so clear cut. First, and most importantly, at their root, these are disputes where individuals have suffered individual harm. As a result, their interests should remain paramount. Second, it is important to acknowledge that enough legal precedent has already been set to prompt consideration of alternative means of resolving these cases by the churches and federal government. (114) Third, memorializations and increased public awareness can be achieved through the terms individual resolution packages or through the ongoing work of programs such as the AHF; clearly, litigation is not the only means of making this a public issue. Fourth, although the courts do provide certain procedural and substantive guarantees to disadvantaged groups, this argument assumes that the victims have the resources, strength, and ability to retain competent and ethical legal counsel in order to gain access to the court system. By contrast, an ADR process would likely be fully funded by the institutions, and ensure access to counsel, therapists and other support mechanisms. Also, by engaging in an interest-based means of conflict resolution, victims would not be surrendering their ability to engage in a rights based system. (115) Indeed, should they feel that they are being exploited or are involved in an unproductive process, victims could always pursue an action in court (assuming they have the resources and desire) or, in the alternative, engage in a power-based approach through using the media as a tool to manipulate the institutions on a political level in order to effect changes at a legal/practical level. (116)

Another issues that should be considered is the challenge of ensuring sufficient commitment to an ADR approach. Indeed, this may be a significant hurdle for some parties. As the Law Commission has found:

A large part of the reluctance of church and state to take responsibility, acknowledge the wrongs that allowed institutional child abuse to occur and to apologize for them is the belief that such acknowledgement and apology would result in increased lawsuits and that courts will treat these apologies as admissions of legal liability. There is a certain amount of legal writing indicating that this view is without foundation. It is equally possible, moreover, that the very opposite is true. Survivors who may have been satisfied with full and frank acknowledgement and apology and a modest settlement early on may become angrier and more demanding when confronted by years of official denial and footdragging from church and state. This behaviour also leaves it open to courts to award aggravated damages where the denial of liability was unreasonable." (117)

Fortunately, there are signs that the institutions are beginning to appreciate the Law Commission's argument. Indeed, the parties have already formally come together in a series of dialogues (118) to discuss possible dispute resolution approaches. These discussions have reflected a concern that "the Western civil litigation model is very adversarial and could be more damaging to survivors." (119) As a result, there is a willingness on all sides to explore the potential of ADR methodology "that would work toward building a safer process with plaintiffs." (120) This meeting was crucial in that the parties began building relationships (121) with each other, thus beginning to address the challenge of overcoming the "mistrust, fear and animosity" (122) experienced by the aboriginal community. As a first step, the parties agreed to test ADR through a series of pilot projects. (123) One must still remain cautiously optimistic however, since there has yet to be any full commitment by any of the parties.

Moreover, there will likely be significant mistrust on the part of aboriginal victims and groups due to their past relationship with the institutions. As well, many aboriginal people have become "desensitized" to new government initiatives, since there have been numerous policy efforts to assist aboriginal communities in recent years which have made significant promises, yet have failed to achieve meaningful change. Therefore, in an effort to counteract such scepticism, it would be crucial to ensure that aboriginal people are involved in any ADR process from its genesis in order to nurture commitment.

Another issue that would have to be addressed if an ADR approach were to be successful would be to ensure victims are well-informed about the process. Some survivors have unfortunately been led to believe that they simply have to identify themselves as a former student of the residential school system and then immediately receive monetary compensation. (124) The Assembly of First Nations (AFN) and the Indigenous Bar Association (IBA) are also very concerned about aggressive lawyers approaching survivors with "questionable marketing tactics" and "high contingency fees". (125) Still further, many of the plaintiffs' lawyers do not trust the intentions of an ADR process. Therefore, an extensive "education" effort would be crucial at the outset. Such an effort would have to emphasize a desire to enter into a *joint* ADR approach, and point out that while the federal government would be a party to the dispute resolution process, it would still retain its fiduciary obligation to aboriginal people. In this way, the government would have to ensure that the process was as fair and equitable as possible and in the best interests of aboriginal people.

On the whole, although there are certainly issues and challenges to be addressed, they do not appear to be insurmountable. Moreover, the potential benefits of an ADR approach, particularly compared to the alternative means of dispute resolution, seem to suggest that the parties should commit to developing a comprehensive ADR system in order to resolve their disputes.

Design issues and recommendations

Designing a system that would utilize collaborative ADR processes for resolving the current onslaught of residential school abuse cases would be a challenge and a massive undertaking; however, the potential benefit of such a system seems evident. Given the interests of the parties and issues surrounding the conflict, it also seems abundantly clear that an interest based approach to design and conflict resolution is most appropriate. The primary benefit of an interest-based design model is that it requires the parties themselves to participate in the design in a collaborative, problem-solving manner, thus co-operatively defining the shape and scope of the final system, and ensuring that it is appropriate to the parties' disputes. Such a design approach would also enable the parties to build the trust which will ultimately be crucial to their ability to resolve specific disputes in an effective manner, as well as teach the parties to communicate with each other, and foster a sense of ownership in the system. ⁽¹²⁶⁾

Clearly, an interest-based design process centres on the parties' own communication of their needs and interests. By necessity then, the discussion and recommendations reviewed herein are merely an attempt to suggest some issues that may be addressed in any such design endeavour. The actual design of a system must necessarily grow from the parties themselves, and will require the efforts of hundreds or even thousands of people.

The Crucial Importance of Party Participation

As implied throughout the previous discussion, the participation of all parties in the design of an ADR system is a crucial and common interest. The institutions are primarily concerned about costs, efficiency and a process which seems fair and just to both victims and external observers. These interests are largely motivated by the volume of cases that would use the ADR system, and by the fact that the institutions would be the ones to absorb the vast majority (if not all of the costs) of designing and implementing the system. For these parties, design participation would likely be viewed as good business practice, and even a condition precedent to obtaining the necessary authorizations for the investment of such a significant amount of resources from their respective organizations.

Given the necessary and significant financial investment by the institutions, their participation and involvement in designing a system seems obvious; however, the participation of the victims who will engage the system seems less so. Nevertheless, when one considers the survivors' interests, it is clear that their participation is one of their fundamental needs and goals. Indeed, as the Law Commission has stated: "[o]ne of the chief harms of institutional child abuse is powerlessness. It is clear, therefore, that a redress process that accords little status to survivors or is designed without consulting them becomes part of the same abusive pattern. It sends a message to survivors that they are not important, even in a process that is supposed to be about them or for them." ⁽¹²⁷⁾ Clearly, participation in and of itself is in essence part of a redress package and a milestone on the road to healing for many survivors.

There is also ample evidence that failure to achieve sufficient transparency in an ADR initiative would be problematic. The federal government has already paid 50 out-of-court settlements to survivors of the government-run school on the Gordon reserve in Saskatchewan, without acknowledging any responsibility or making an apology. Both the outcome and the secretness of this process has greatly angered aboriginal leaders, ⁽¹²⁸⁾ thus illustrating the need to work collaboratively in building a dispute resolution mechanism. While the specific outcome should be left to an individual victim to decide whether he or she believes it appropriately meets his or her interests, system transparency can help to assure those individuals' communities that the process is just and that victims are well educated about their options and choices. In this way, the criticism of aboriginal communities and leaders will likely be reduced since they would have a degree of assurance that survivors are not being revictimized.

A further consideration which supports victims' involvement in design is that the Law Commission has observed that the process used to create individual redress packages will likely affect how well it is received by survivors. (129) Since by and large, victims are not well off, and due to the potentially public and traumatizing effects of engaging other dispute resolution mechanisms, an offer of any redress that does not require litigation or even adversarial negotiation would likely be extremely attractive, thus increasing their vulnerability to exploitation by the institutions. (130) Therefore, it is crucial not to impose a unilateral program since it would seem to discount the needs of survivors and capitalize on their neediness, which in turn would lead to considerable cynicism. (131) Moreover, presenting a pre-designed system or approach would likely deepen any feelings of powerlessness and exploitation, thus potentially sparking court action in some cases. (132) Especially considering the unsettling historical relationship between aboriginal Canadians and the institutions, a fully participatory design process would have to be an important feature of any initiative, and clearly points to the appropriateness of an interest-based design model.

Interest-Based Design

As a first step in assessing the viability of designing, implementing and successfully using a dispute resolution system, one must ensure that there is sufficient dissatisfaction with the current system for the parties to engage in a new system. (133) In light of the parties' interests and recent actions, this dissatisfaction appears to be present. After addressing this threshold issue, an interest-based process can be conceptualized and used as a series of eight stages. (134)

Identifying the Participants

First, the stakeholders have to be identified, the problem must be defined, and the stakeholders must believe that there is potential for positive outcomes as a result of change. (135) As discussed, the parties in this context appear to already be exploring the potential for change and defining the parameters of the problem. It would still be important however, to ensure that *all* stakeholders have been identified at this early stage since participation is so important. In so doing designers should ensure that no particular victim feels required to participate in the design however. Especially considering that the design process itself may be difficult and lengthy, to compel victims would simply be a repetition of past patterns of behaviour. Indeed, as the Law Commission emphasizes, any initiative should ensure that it does not cause further harm to the victims. (136)

Additionally, it would be important to provide survivors with sufficient financial assistance to participate in the design of the system, while still allowing them the option of withdrawing from design "negotiations" and pursuing a civil action if they were to believe that their interests were not being met. (137) By providing survivors with sufficient resources and flexibility to participate fully, the institutions would be making an important gesture that would signify that the victims were dealing with the institutions as equals (for the first time), thus contributing to meeting their empowerment interest. (138) Further, such an action would help to ensure that the initiative does not appear to be a strategy to minimize liability. (139)

Also at this initial stage a facilitator or leadership for the initiative should be identified and those individuals must become extremely familiar with the nature of the conflict. (140) Authors have emphasized the crucial importance of choosing appropriate people to spearhead the initiative since ultimately, effective leadership plays a large role in ensuring that the process will work. (141) Most importantly, the person or individuals would have to be trusted by all parties. In this context, given the

nature of the disputes and the strained relationships between the parties, agreeing on leadership choices may be a significant hurdle.

Using the leadership of the AHF may be a potentially effective option however. The AHF is an organization that is at arm's length from the federal government and run solely by aboriginal people from across Canada, many of whom attended residential schools. This option would therefore be characterized by only an indirect connection with the federal government, thus likely satisfying survivors that the leadership is not part of the federal bureaucracy, yet providing the federal government with some oversight over the substantial funds they would have to contribute to the initiative. An additional benefit of this option would be that it would deny the churches a predominate leadership role, which one could argue should be avoided since they were the parties responsible for running the residential schools. As well, using the AHF would avoid the controversy over whether the Assembly of First Nations (AFN) is a sufficiently representative body to assume the leadership of such an initiative.

Alternatively, the parties could consider selecting one of the Commissioners from RCAP to serve as leader, supported by a directing board of representatives of each of the parties and each of the aboriginal organizations and groups, thus ensuring representative leadership. While one could argue that representative leadership is unimportant, in this case building trust and convincing aboriginal people that the process is fair, equitable and in their interests is of paramount importance.

Establishing Goal Dialogue

At the second stage, the parties must identify their goals, and those goals must be consistent with each of the parties' interests and organizational orientations.⁽¹⁴²⁾ While it is ultimately up to the parties and their constituents to define the goals of the system, in order to facilitate dialogue, it might be worthwhile for them to anchor their goal definition in the previously developed National Round Table Guiding Principles for Consensus Processes.⁽¹⁴³⁾ These guidelines seem to address the basic skeletal issues on which the parties could build, if appropriate. The ten principles for consensus processes include: 1) the approach should be purpose driven since individuals need a reason to participate in the process; 2) all parties with a significant interest in the issue should be involved; 3) participation should be voluntary; 4) the parties themselves should design the consensus process; 5) the process must be flexible; 6) all parties should have equal access to relevant information and the opportunity to participate effectively; 7) the parties should respect the diversity of values, interests and knowledge; 8) the parties should be accountable both to their constituencies and to the process itself; 9) realistic deadlines are essential; and 10) any agreement should be implemented and monitored effectively.⁽¹⁴⁴⁾

Exploring the Nature and Current Resolution of the Disputes

Third, the volume and nature of disputes, including the current resolution methods used, must be assessed. In conducting this analysis it is important to examine the usual results and how they affect the parties' interests. Potentially helpful methods of carrying out this assessment would be surveys, interviews, and focus groups, in addition to the findings of studies such as the RCAP and the Law Commission's final report on responding to child abuse in Canadian institutions. It may also be of assistance to simply gather information under the basic categories of 1) what aren't we doing?, 2) what should continue?, and 3) what should we stop?⁽¹⁴⁵⁾

Evaluate Options

Fourth, the parties must examine their options in light of their goals, interests and types of disputes that arise. At this stage the parties should also consider at what point in the life of the dispute ADR should be

used and whether different processes may be more appropriate at different stages.⁽¹⁴⁶⁾ Indeed, the parties should invest substantial time considering the spectrum of ADR processes that would be made available for the resolution of individual disputes. Factors such as the parties' goals, tolerance for risk and invasiveness, and the importance of on-going relationships would also have to be assessed.⁽¹⁴⁷⁾

It seems clear that in order to maximize effectiveness, the system would have to be flexible enough to adapt to different variants of individual disputes. Fortunately however, there are some overarching similarities which would likely aid the designers in determining a menu of process options.⁽¹⁴⁸⁾ Of the major and most commonly known ADR processes, conciliation, facilitation, mediation, and interest-based negotiation would likely be the most appropriate methods for resolving the spectrum of disputes. Which one of these processes, or variant thereof, should be chosen for a particular dispute would have to be determined by the parties, based on their ability to communicate with each other and power imbalance issues. For example, some individuals may feel sufficiently empowered and are strong enough communicators that they would be able to negotiate their own case. Others would likely require representatives to speak for them in either negotiation or mediation, while still others may not be able deal directly with the institutions, thus requiring shuttle-mediation or conciliation. While scholars have found that the direct involvement of the disputant is preferable since using agents complicates the transaction,⁽¹⁴⁹⁾ designers should acknowledge that the comfort and safety of victims is crucial, and that the use of representatives brings the benefits of expertise, protection against power imbalance/exploitation, and detachment.⁽¹⁵⁰⁾ Therefore, any system should accommodate the use of representatives in the processes, provided that they are not permitted to overtake the process thus preventing victims from feeling empowered, in control and having the opportunity to tell their stories.

Design

Only after the thorough assessment throughout the first four phases are parties generally prepared to design a system in the fifth stage. The design should specify several criteria, including: when ADR is appropriate; that ADR processes should be tailored to the particular disputes; disputants should have the requisite knowledge and skill to choose and use ADR; the system should be simple to use and easy to access; disputes should be resolved as early as possible, with the fewest bureaucratic requirements; and the disputants should be granted maximum control over the choice of method and/or neutral party.⁽¹⁵¹⁾

In addition to the exploration of specific processes, as discussed above, it is at this stage that designers will have to address several other issues. For example, the parties will have to ensure that onerous and time-consuming organizational and bureaucratic approvals do not become barriers to using ADR. As scholars repeatedly emphasize, disputants will not use a burdensome and tedious system if other dispute resolution alternatives like the court system are available.⁽¹⁵²⁾ Likewise, it is at this stage that designers will have to explore means of responding to power imbalances between the parties, the extent to which legal counsel should be involved in the process, and means of making competent counsel available to victims, since participating with the assistance of counsel appears to be a necessity given the issues at stake.

Also, since the vast majority of the dispute resolution processes and approaches are founded on a Euro-Canadian set of assumptions,⁽¹⁵³⁾ the application of such processes may not be productive or suitable. Therefore, in designing a system, the parties should explore means of adjusting any models or processes to ensure that they are culturally appropriate. Given that only one of the three parties *may* ascribe to different norms, and that many aboriginal people have become accustomed to interacting with the institutions based on Western norms, an adaptive means of adjusting for culture seems most appropriate in this context. Indeed, a prescriptive approach, that assumes that dispute resolution models are universal,

(154) not only seems unrealistic but also insulting to the victims, especially in light of the fact that the mandate of the residential schools was to "kill the Indian in the child". At the other end of the spectrum however, an elicitive approach, which holds that different conflict values require that resolution processes be built around these differences, (155) also seems unrealistic, but for different reasons. An elicitive approach would ignore that given the volume of disputes and the diversity of aboriginal cultures, customizing each process from first principles would be unwieldy and remarkably time consuming. Further, operating solely according to Mohawk or Cree (for example) norms would be extremely difficult for the institutions which have large bureaucracies who interact on the basis of Euro-Canadian norms. The compromise therefore seems to be striving to adapt an interest-based model (whose collaborative approach is fairly consistent with aboriginal values from the outset) so that it becomes more meaningful and appropriate for the aboriginal victims. The ability to be able to engage in such customization is yet another reason why the participation of all parties in the design process is crucial.

Just as the system designers will have to consider cultural issues, they will also have to address any special needs of the victims that arise from the abuse they suffered. Indeed, personal injury disputes often require special procedural adjustments if they are to be resolved effectively. (156) There are several challenges that designers should consider. As a first step, a mechanism to assess whether a particular case is unsuitable for an ADR process would be important, since both Alcorn and Noone insist that injuries should have stabilized at time that any ADR process is initiated. Otherwise the victim would not be sufficiently capable of participation. (157) A further problem can be that the institutions as "repeat defenders" may form an affinity with ADR professionals who are regularly retained, thus eroding the perception of impartiality. (158) As well, the traditional model of interest-based ADR rests on certain assumptions that do not contemplate that a party may be psychologically injured, thus necessitating an adjustment of the model. (159) Alcorn recommends that the victims should always be accompanied by legal counsel; any third party neutral must be cognisant of the degree to which they identify with the non-mentally ill parties and their stereotypes about mental illness; the process should be as informal as possible in order to minimize anxiousness, depression, or ambivalence about powerful figures; any third party should provide a written commitment to neutrality and impartiality; frequent breaks should be available; and the duration of sessions should be limited due to a tendency for rapid fatigue and concentration difficulties. (160) Alcorn also argues that ADR professionals have an ethical duty to educate themselves on likely the symptomatology and mental state of the victims. (161)

In addition to such substantive considerations, there are also procedural issues, such as eligibility criteria, if any, for gaining access to the ADR system, that should be considered at this stage. If access to the system would not be available to all former students, the parties should consider who should be vested with the responsibility of making such initial decisions, and whether such decisions would be "appealable".

Moreover, a solid design necessitates accessible loop-backs to the interest-based process, (162) for any disputant who choose to abandon the ADR process and seek redress through a rights-based forum such as the courts, or power-based fora such as the political arena or the media. As the Law Commission states "...disclosure to the media can be confidential and free...[and] may...bring public attention and therefore public pressure to bear on issues in a way that survivors often cannot do." (163) Given the attractiveness of the power-based fora to the aboriginal people involved in the process, and how detrimental such a course of action would be to the institutions, (164) the parties should examine in advance the potential for a joint communications plan and agree to procedural guidelines to govern the parties' interaction with the media, in order to deflate the potential volatility of the situation and build trust and consensus among the parties.

Structural issues surrounding the scope and form of any system would also be important to consider.

While it is clear that an integrated system would have the benefits of maximizing resources, benefits, and support structures, while also being more manageable and easier to ensure that all victims are being treated equitably and consistently, a large central structure is not necessarily in the parties' best interests. In fact, a local, community based structure may be more effective in meeting individuals' needs, enhancing access and flexibility, and providing a greater opportunity for culturally appropriate approaches and a sense of ownership over the process. Such grassroots involvement has been suggested by the Law Commission, which believes that in terms of effectiveness for survivors, "...the most effective process should be one that originates with and is controlled by survivors themselves and their communities or nations...[since] this is true empowerment." (165) RCAP has also emphasized the importance of allowing aboriginal communities to design and administer healing programs in order to meet the needs of victims, their families, and their communities. (166) However, the practicalities of such an approach would likely be a significant challenge, since not only would the institutions have to be willing to make representatives available in the communities, but also, ensuring sufficient centralized coordination would be extremely difficult.

There are also countless practical considerations that the designers will have to consider at the design stage, including realistic timeframes, whether resources are sufficient and how costs will be shared, and whether creative ideas such as secondment of employees might serve to reduce costs and improve expertise. Further, issues of accountability and ensuring that the federal government, in particular, is not in a situation of a conflict of interest would have to be considered and addressed. Moreover, since unsuccessful ADR experiences often lead to the impression that all forms of ADR will be unsuccessful or meaningless, the designers may first want to test their proposed design on experts ("shadow consultation") in order to enhance the likelihood of success. (167)

Training and Education

The sixth, and very important, aspect to an interest-based system design is ensuring that there is sufficient training and education of stakeholders. A "marketing effort" would be necessary in order to build trust and familiarity, communicate the benefits to participants, and offer incentives to use the system. Making key people available to participate, ensuring relatively quick turn-around times, and demonstrating that the procedures are equitable are also important messages that would have to be delivered. Additionally, it would be important to ensure that both users and neutrals are sufficiently well trained. This effort is generally best done with those who are involved in the conflict in some way since they are familiar with the dynamics at play and likely issues that will arise. (168)

Throughout this process, the design team should always seek to maximize incentives for stakeholders and reduce resistance through recognizing individuals who have used program. Making inquiries about specific sources of resistance and addressing each directly, would also be a crucial task which is necessary to ensuring the ultimate success of the system. Related to this, the designers should explore organizational and political constraints such as turf battles, or simple reluctance to try something new, and seek out ADR champions from among the parties' leadership to tout program and its successes. (169)

Implementation

Seventh, the parties will have to consider implementation issues. Often bridging the gap between conceptualization and effective implementation can be a challenge. Therefore, a wise approach is to first experiment with pilot projects, as the parties have already discussed. In determining the specifics of pilot projects it often best to try to choose disputes that have a high likelihood of success, that will occur during a limited time period (preferably 3-6 months), and specify evaluation criteria in advance. (170)

Evaluation

The final stage in an interest-based design approach would require the parties to ensure that their system is constantly undergoing evaluation. Assessment of needs should occur early and frequently, and evaluation should be tied to the original goals of the program, which were determined at the outset. The criteria for evaluating impact should focus on aspects such as efficiency, effectiveness, and satisfaction. Measurement of such effects would likely best be done through examining the administration, service delivery, and quality of the program. Only through constant evaluation can the changes be made that will ensure that the system is appropriate and effective (i.e. meeting the parties respective interests) and achieving lasting and meaningful solutions. ⁽¹⁷¹⁾

Conclusion

In sum, it seems clear that there is a pressing and substantial need to adequately address and resolve cases of residential school abuse. Indeed, the parties' present path toward relying civil litigation should be halted and reoriented toward a collaborative ADR approach if all aspects of the parties' interests and needs are to be acknowledged and addressed. An analysis of the parties' interests seems to clearly indicate that neither civil litigation, nor alternative means of redress, such as criminal prosecutions, traditional compensation programs, institutional initiatives, or public inquiries, have the potential to adequately address the spectrum of legal and non-legal issues which make up the conflict.

However, embarking on a new, comprehensive initiative to design and implement an ADR system to manage and guide the resolution of the abuse cases, appears to be a potentially fruitful and effective option. Indeed, ADR's restorative potential and flexibility; capacity to be sensitive to and accommodate issues of cultural appropriateness and special psychological needs of victims; potential for empowerment; increased capacity for facilitating appropriate outcomes; ability to protect the parties' privacy without impeding public education and memorialization efforts; practical benefits; and success stories, all signal the numerous benefits that an ADR approach could bestow on the disputant parties.

As a result, although there are numerous issues that the parties would have to canvass and assess, they would likely be best served by co-operatively engaging in an interest-based system design initiative. Such an effort would not only produce a system which has been specifically customized to the needs and interests of the parties themselves, thus maximizing the potential for meaningful and effective dispute resolution in using the system, but would also serve to empower survivors, build trust and communication between the parties, and ultimately encourage the use of ADR rather than litigation in resolving individual disputes. Indeed, although such a course of action would certainly be marked by significant challenges, substantial human and financial resources, and a considerable amount of time, surely the continuing and festering legacy of residential child abuse, which occurred as a by-product of a program of forced cultural assimilation, should sufficiently motivate the Canadian public to authorize the federal government and religious institutions to engage in a dispute resolution process that will provide the most meaningful and effective solutions possible.

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3.

⁰ The term "Indian" is used as it was part of the official name of these institutions and in order to distinguish the residential schools that aboriginal children attended from other residential institutions where abuse also occurred.

4.

⁰ Fournier, *Stolen From Our Embrace*, *supra* note 2 at 47; RCAP vol. 1, *supra* note 1 at 365.

5.

⁰ Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," online: Law Commission of Canada Website <<http://www.lcc.gc.ca/en/forum/ica/discussion.html>> (date accessed: 15 February 2000) at 13 [hereinafter "Minister's Reference on Institutional Child Abuse"]; RCAP vol. 1, *supra* note 1 at 358; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 57-61.

6.

⁰ RCAP vol. 1, *supra* note 1 at 353.

7.

⁰ Fournier, *Stolen From Our Embrace*, *supra* note 2 at 58.

8.

⁰ RCAP vol. 1, *supra* note 1 at 344-345; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 62.

9.

⁰ Monika Liebich, "Treatment and Conditions at Residential Schools," online: <<http://www.sd83.bc.ca/stu/9801/mrl3tre.html>> (date accessed: 15 February 2000) at 1; RCAP vol. 1, *supra* note 1 at 365-370.

10.

⁰ Monika Liebich, "The Negative Effects of the Schools," online: <<http://www.sd83.bc.ca/stu/9801/mrl3eff.html>> (date accessed: 15 February 2000) at 1 [hereinafter "The Negative Effects of the Schools"]; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 24, 56-57; RCAP vol. 1, *supra* note 1 at 366-369.

11.

0 RCAP vol. 1, *supra* note 1 at 377.

12.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 11.

13.

0 *Ibid.* at 11-12.

14.

0 Liebich, "The Negative Effects of the Schools," *supra* note 10 at 1; Turtle Island Native Network, "What is the Residential School Project?," online: Turtle Island Website <<http://turtleisland.org/healing/infopack5.htm>> (date accessed: 15 February 2000) at 2; RCAP vol. 1, *supra* note 1 at 377; *Ibid.* at 13; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 17, 63, 121, 131; Law Commission of Canada, News Release, "Law Commission of Canada Releases Report on Child Abuse in Canadian Institutions" (23 March 2000), online: Law Commission of Canada Website <<http://www.lcc.gc.ca/en/media/communiques/pr230300.html>> (date accessed: 25 March 2000).

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0 Liebich, "The Negative Effects of the Schools," *supra* note 10 at 1.

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0 Ronda, Bessner, "Institutional Child Abuse in Canada" (Fall 1998), online: Law Commission of Canada Website <www.lcc.gc.ca/en/papers/rapport/besrep/besrepmain.html> (date accessed: 15 February 2000) [hereinafter "Institutional Child Abuse in Canada"].

17.

0 Fournier, *Stolen From Our Embrace*, *supra* note 2 at 24-25.

18.

0 Rick Mofina, "Residential School Victims Changing Grievance Strategy to Class-Action Lawsuits," *The National Post*, 7 March 2000 [hereinafter "Residential School Victims Changing Grievance Strategy to Class-Action Lawsuits"].

19.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 14 of 67.

20.

0 Parker, James, "Lawsuits Have Churches on Their Knees" *The [Saskatoon] Star Phoenix* (3 February 2000) A1, online: The Star Phoenix Website <<http://www.saskstar.sk.ca/template.ihtml?id=leadstory>> (date accessed: 3 February 2000) [hereinafter "Lawsuits Have Churches on Their Knees"].

21.

0 *Ibid.*

22.

0 Milewski, Terry, "Church, Gov't Held Responsible for Assaults" *CBC TV News* (5 June 1998 10:34 PM EST), online: CBC Newsworld Website <<http://www.newsworld.cbc.ca/archive/html/1998/06/05/liable980605b.html>> (date accessed: 15

February 2000) [hereinafter "Church, Gov't Held Responsible for Assaults"].

23.

0 RCAP vol. 1, *supra* note 1; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 47-49.

24.

0 RCAP vol. 1, *supra* note 1 at 365.

25.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 15; RCAP vol. 1, *supra* note 1 at 337.

26.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 31-43 of 48.

27.

0 RCAP vol. 1, *supra* note 1 at 378-379.

28.

0 *Ibid.*

29.

0 *Ibid.*

30.

0 The AFN has summarized this jurisprudence as: "[t]he basic principle established in these cases is that employers will be legally responsible for wrongs done by their employees where there business creates or increases a risk of harm that is sufficiently connected to the activities they authorized their employees to carry out. This is true even where the employer has acted reasonably and done everything they could to prevent the harm": Assembly of First Nations, "Residential School Court Cases," online: Assembly of First Nations Website <http://www.afn.ca/Residential%20Schools/Residential_School_Cases.htm> (date accessed: 15 February 2000) at 1 [hereinafter "Residential School Court Cases"]].

31.

0 "Victims of Assault in Residential School Can Sue" *CBC Radio Report* (5 June 1998 03:52 PM EDT), online: CBC Newsworld Website <<http://www.newsworld.cbc.ca/archive/html/1998/06/05/liable980605a.html>> (date accessed: 15 February 2000); Milewski, "Church, Gov't Held Responsible for Assaults," *supra* note 22.

32.

0 [1999] B.C.J. No.1973, [1999] 11 W.W.R. 301 (B.C.S.C.).

33.

0 R.S.M. 1987, c. L 150.

34.

0 AFN, "Residential School Court Cases," *supra* note 30 at 1-2.

35.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 14 of 67.

36.

0 Mofina, "Residential School Victims Changing Grievance Strategy to Class-Action Lawsuits," *supra* note 18.

37.

0 *Ibid.*

38.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 16-20 of 67.

39.

0 "Former Residential Students Sue Government" *CBC TV News* (29 May 1997 8:42 AM), online: CBC Newsworld Website <<http://www.newsworld.cbc.ca/archive/html/1997/05/29/residential.html>> (date accessed: 15 February 2000).

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0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5; Fournier at 73.

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0 These interests have been culled from the following sources: Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5; C. Sutherland, "Executive Summary: The Needs of Victims of Institutional Child Abuse: A review by the Institute for Human resources Development (Nfld.) for the Law Commission of Canada (October 1998)" (7 December 1998), online: Assembly of First Nations Website <http://www.afn.ca/Residential%20Schools/Executive_Summary.htm> (date accessed: 15 February 2000) [hereinafter "Executive Summary"]; Maggie Hodgson, "Building Bridges: Developing a process together in Alternative Dispute Resolution" (July 1999), online: Assembly of First Nations Website <http://www.afn.ca/Residential%20Schools/Building_Bridges.htm> (date accessed: 15 February 2000) [hereinafter "Building Bridges"]; Hodgson, Maggie, "Residential Schools Update," online: Assembly of First Nations Website <<http://www.afn.ca/Residential%20Schools/Update.htm>> (date accessed: 15 February 2000); Fournier, *Stolen From Our Embrace*, *supra* note 2; Correspondence with Stephanie Irlbacher, Senior Policy Analyst, Beaufort/Delta Self-Government Negotiations Office, 22-23 February 2000 [hereinafter Correspondence with Stephanie Irlbacher]; Bessner, "Institutional Child Abuse in Canada," *supra* note 16.

42.

0 Hodgson, "Building Bridges," *supra* note 41.

43.

0 Parker, "Lawsuits Have Churches on Their Knees," *supra* note 20.

44.

0 Leonard L. Riskin, & James E. Westbrook, *Dispute Resolution and Lawyers*, abr.ed., 2nd ed. (St.Paul, Minn.: West Group, 1998) [hereinafter *Dispute Resolution and Lawyers*].

45.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5.

46.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 15 of 67.

47.

0 Sutherland, "Executive Summary," *supra* note 41 at 3-4.

48.

0 Fournier, *Stolen From Our Embrace*, *supra* note 2 at 64, 71-72, 74.

49.

0 RCAP vol. 1, *supra* note 1 at 378.

50.

0 According to the Law Commission, eligibility and award amounts (which are relatively small) vary widely across Canada: Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5.

51.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 15 of 67.

52.

0 *Ibid*; Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 33; Fournier, *Stolen From Our Embrace*, *supra* note 2 at 64.

53.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 14-15 of 67.

54.

0 *Ibid*; Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 33.

55.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 15 of 67.

56.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5.

57.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 17.

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0 *Ibid.* at 18.

59.

0 Sutherland, "Executive Summary," *supra* note 41 at 4.

60.

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0 Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited, 1997) at 5 [hereinafter *Rethinking Disputes*].

63.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5.

64.

0 Macfarlane, *Rethinking Disputes*, *supra* note 62 at 5.

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0 *Ibid.*; Macfarlane, *Rethinking Disputes*, *supra* note 62 at 23.

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0 Macfarlane, *Rethinking Disputes*, *supra* note 62 at 2.

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0 Larry N. Chartrand, "The Implications of the Fiduciary Duty on Aboriginal-Crown Negotiations: The Legal Obligations of the Crown to Negotiate Based on Problem-Solving Principled Negotiation Theory and Practice" (November 1998) [unpublished].

70.

0 RCAP vol. 1, *supra* note 1 at 379-382.

71.

0 *Ibid.*

72. 0 Aboriginal Healing Foundation, "Mission, Vision, Values," online: Aboriginal Healing Foundation Website <<http://www.ahf.ca/english/mission.html>> (date accessed: 2 February 2000) at 1.

73.

0 Fournier, *Stolen From Our Embrace*, *supra* note 2.

74.

0 The population of Fort McPherson is only about 1,000, while the communities whose children attended Grollier Hall are a significant distance from each other and are spread throughout the western arctic: Correspondence with Stephanie Irlbacher, *supra* note 41.

75.

0 Liebich, "The Negative Effects of the Schools," *supra* note 10; RCAP vol. 1, *supra* note 1 at 381; Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions: Executive Summary* (Ottawa: Law Commission of Canada, 2000) at 4.

76.

0 Turtle Island Native Network, "How Do I Start a Civil Lawsuit?," online: Turtle Island Website <<http://turtleisland.org/healing/infopack5c.htm>> (date accessed: 15 February 2000) at 2; Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 33 of 67.

77.

0 Sutherland, "Executive Summary," *supra* note 41 at 4.

78.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 36 of 67.

79.

0 *Ibid.*

80.

0 RCAP vol. 1, *supra* note 1 380-382.

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82.

0 Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 39-44 of 67.

83.

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84.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 5, 39.

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0 Turtle Island Native Network, "How Do I Start a Civil Lawsuit?," *supra* note 76 at 2; Bessner, "Institutional Child Abuse in Canada," *supra* note 16 at 33 of 67.

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0 Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (Fall 1986) 24 Osgoode Hall L.J. 605.

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0 Hodgson, "Building Bridges," *supra* note 41 at 1.

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94.

0 Alcorn, David, "Mediation and the Psychologically Injured Plaintiff" (1996) 12 Q.U.T.L.J. 162 [hereinafter "Mediation and the Psychologically Injured Plaintiff"].

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0 *Ibid.* at 164.

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0 *Ibid.*; Macfarlane, *Rethinking Disputes*, *supra* note 62.

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0 Julie Macfarlane, *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications Limited, 1999) [hereinafter *Dispute Resolution*].

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0 Macfarlane, *Dispute Resolution*, *supra* note 99.

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0 Alcorn, "Mediation and the Psychologically Injured Plaintiff," *supra* note 94 at 174.

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0 [1997] 3 S.C.R. 1010.

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0 Sonia Lawrence, & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252.at 252.

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0 Fournier, *Stolen From Our Embrace*, *supra* note 2.

106.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 40.

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0 Macfarlane, *Rethinking Disputes*, *supra* note 62.

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0 *Ibid.*

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0 *Ibid.* at 5-6.

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0 *Ibid.* at 6-7.

111.

0 Fournier, *Stolen From Our Embrace*, *supra* note 2 at 77-78.

112.

0 Riskin, *Dispute Resolution and Lawyers*, *supra* note 44; Andre R. Imbrogno, "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?" (1999) 14 *Ohio St.J. on Disp.Resol.* 855.

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0 William Ury, J. Brett, & S. Goldberg, *Getting Disputes Resolved* (San Francisco: Jossey-Bass, 1988) [hereinafter *Getting Disputes Resolved*].

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0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 32.

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0 *Ibid.* at 29.

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0 Approximately 300 people from across Canada attended these dialogues: Hodgson, "Building Bridges," *supra* note 41 at 2.

119.

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123.

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0 Fournier, *Stolen From Our Embrace*, *supra* note 2 at 77.

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0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 34.

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0 *Ibid.* at 36.

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0 Costantino, *Designing Conflict Management Systems*, *supra* note 126 at 117-124.

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0 Macfarlane, *Dispute Resolution*, *supra* note 99 at 606-612; Constantino, "How to Design Conflict Management Systems," *supra* note 126 at 48; Costantino, *Ibid.*

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0 Macfarlane, *Dispute Resolution*, *supra* note 99 at 633-640.

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0 Jeffrey Z. Rubin & Frank E.A. Sander, "When Should We Use Agents? Direct vs. Representative Negotiation" (October 1988) *Negotiation Journal* 395.

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⁰ *Ibid.*

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0 Constantino, "How to Design Conflict Management Systems," *supra* note 126.

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0 *Ibid.*

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0 Rena Ramkay, "The Mediation Process: Cultural Challenges" (Faculty of Law, University of Ottawa, 8 March 2000) [unpublished].

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0 Alcorn, "Mediation and the Psychologically Injured Plaintiff," *supra* note 94.

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0 *Ibid.* at 167-168; Macfarlane, *Rethinking Disputes*, *supra* note 62.

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0 Alcorn, "Mediation and the Psychologically Injured Plaintiff," *supra* note 94 at 162.

159.

0 *Ibid.* at 164.

160.

0 *Ibid.* at 172.

161.

0 *Ibid.* at 173.

162.

0 Ury, *Getting Disputes Resolved*, *supra* note 115; Macfarlane, *Dispute Resolution*, *supra* note 99.

163.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 32.

164.

0 There have been past examples where the media's portrayal of addressing disputes in a culturally sensitive way has been described as unjustified special treatment thus causing significant political fallout that could, in this context, potentially fatally wound any collaborative initiative: Duryea, *Conflict and Culture*, *supra* note 93 at 28.

165.

0 Law Commission of Canada, "Minister's Reference on Institutional Child Abuse," *supra* note 5 at 36.

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0 Costantino, *Designing Conflict Management Systems*, *supra* note 126 at 124-125.

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0 Constantino, "How to Design Conflict Management Systems," *supra* note 126.

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0 *Ibid.*

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0 *Ibid.* at 49.

171.

0 *Ibid.*