Executive Summary

Final Report on the Missing and Disappeared Indigenous Children and Unmarked Burials in Canada

INDEPENDENT SPECIAL
INTERLOCUTOR

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Office of the Independent Special Interlocutor for
Missing Children and Unmarked Graves and Burial Sites
associated with Indian Residential Schools

2024

Office of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools

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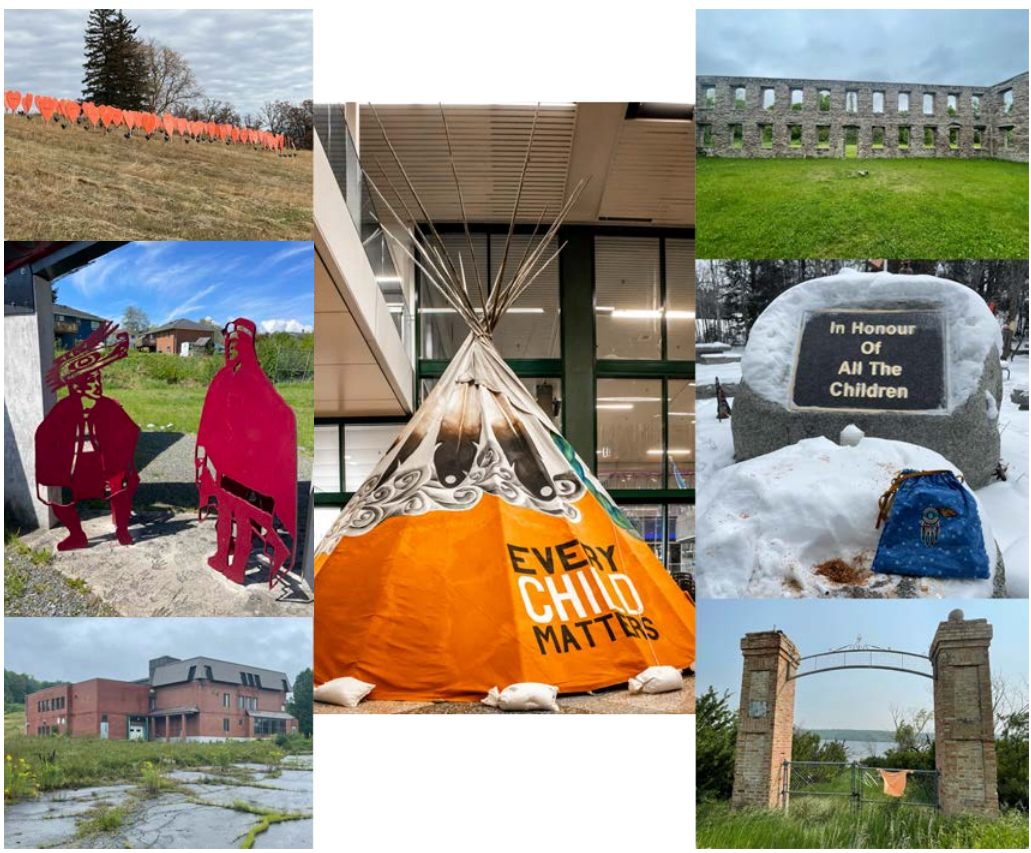
The information in this report may be upsetting for some because it contains content, including images, relating to the deaths and forced disappearances of children at former Indian Residential Schools and other institutions. If you require immediate support, please contact the following: the Indian Residential School Survivors Society's 24/7 Crisis Support Line: 1-800-721-0066 or the 24-hour National Indian Residential School Crisis Line: 1-866-925-4419.

Burning Medicine in a smudge bowl (Office of the Independent Special Interlocutor).

Preface



Images from the sites of Brandon (top left), Alberni (middle left), Cecil Butters Hospital (bottom left), Wikwemikong (top right), Cecilia Jeffrey (middle right), and Lebret (bottom right) (Office of the Independent Special Interlocutor).

I am humbled to have served as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools since June 2022. I have been honoured to meet with Survivors, Elders, Knowledge Holders, Indigenous families, and communities across Turtle Island who have generously shared their wisdom, knowledge, and experiences with me as they lead the Sacred work of searching for the missing and disappeared children who died at Indian Residential Schools and other associated institutions. I am grateful to the many communities who invited me into their territories and to all those who participated at the National Gatherings in Edmonton, Winnipeg, Vancouver, Toronto, Montreal, and Iqaluit. With heartfelt gratitude, I acknowledge Survivors who have never forgotten the missing and disappeared children and have been speaking for decades about the need to find them, despite the federal government's long resistance to admitting the full scope and ongoing harms of this grievous historical injustice.

The search and recovery work being done across the country is a complex truth-finding process—both individual and collective. For individuals, families, and communities, it fulfills a highly personal, yet universal, human need to know what happened to deceased loved ones and to mourn, bury, and memorialize them according to the laws, spiritual beliefs, and practices of one's own culture. Collectively, Canadians can no longer be bystanders in reconciliation. I am encouraged that a growing number of Canadians, including political leaders and senior church officials, now acknowledge that Indian Residential Schools were settler colonial institutions of genocide.

Yet despite the well-documented reality that thousands of Indigenous children died at Indian Residential Schools and at other institutions to which they were forcibly transferred, and are buried in unmarked and mass graves, many Canadians still find it hard to accept that the federal government committed such atrocities against children. And, unfortunately, a small but vocal group of denialists have mounted a concerted effort to attack the truths of Survivors, Indigenous families, and communities and claim that there are no missing and disappeared children and no unmarked or mass graves in this country.

While it may be tempting for Canadians to believe a mythical and idealized version of national history, denying the painful truths of Survivors and of the missing and disappeared children is a barrier to advancing reconciliation. A mature and healthy democracy is strengthened by its willingness and ability to confront the political, legal, and moral failures of its own past and change accordingly.

I express my deepest respect to each Indigenous family who allowed me to accompany them when, after so many years of searching, they were finally able to visit the burial place of their missing or disappeared family member. I was so honoured to walk with you, to join you in

offering prayers, and to stand quietly beside you as you lay Sacred items, Medicines, and flowers on Mother Earth where your little one is buried, letting them know you never forgot about them. May their Spirits now gently rest with the ancestors, knowing that they are loved and remembered.

These children died while in the care and custody of the Canadian State. I urge the federal government to now honour its legal, moral, and ethical obligations in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*, Indigenous laws, and international human rights and criminal laws.[1] All missing and disappeared children and every child buried in an unmarked or mass grave must be honoured, respected, and treated with the dignity that they deserve. Every child matters—in life and in death.

Kimberly R. Murray

Independent Special Interlocutor

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Introduction

Announcement of Independent Special Interlocutor's appointment (Office of the Independent Special Interlocutor).

WHY WAS A SPECIAL INTERLOCUTOR NEEDED IN CANADA?

The horrific truths about the missing and disappeared children and unmarked burials associated with Indian Residential Schools are well known within Indigenous families and communities. Starting in the 1960s, Survivors, Indigenous families, and communities in various parts of Canada have been working to locate, recover, and commemorate the missing and disappeared children and unmarked burials.

The Truth and Reconciliation Commission of Canada (TRC) completed the first systematic investigation into children's deaths and burials at these institutions. The TRC's Calls to Action identified specific actions required from governments, churches, and other organizations to support the search and recovery of the missing children and unmarked burials. Specifically, Calls to Action 71–76 required collaborative efforts by governments, entities, and organizations to gather and release records; to research the location of the burials of the missing children, both in Indian Residential School cemeteries and in other locations; to inform families of what happened to their children and of the location of their burials; to support commemorations and ceremonies to honour these children; and to respect Indigenous protocols in site investigations. Implicit in these Calls to Action is a requirement for sufficient funding for Indigenous communities to lead this Sacred work.

The TRC's Calls to Action received little public attention or response prior to the solemn announcement by the Tk̓emlúps te Secwépemc in May 2021 confirming that up to 215 potential unmarked burials had been recovered at the site of the former Kamloops Indian Residential School. This announcement was quickly followed by similar public confirmations by several other First Nations across Canada. The resulting global attention served as a catalyst for demonstrable action to implement Calls to Action 71–76.

The efforts within hundreds of Indigenous communities across Canada to search for and recover the missing and disappeared children and unmarked burials has revealed the complexity, scale, and lengthy timeframe required to complete this work. The Canadian legal framework is currently not equipped to provide adequate protections to these sites of truth before, during, and after the searches and investigations are done. This reality pointed to the need for critical thinking about a new legal framework and process to support search and recovery efforts, and to advance reconciliation in Canada.

As a result, in June 2022, the Minister of Justice and Attorney General of Canada appointed me to a two-year term as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools. In June 2024, my Mandate was extended for an additional six months.

WHAT WAS THE MANDATE?

My Mandate as the Independent Special Interlocutor aimed to ensure that the First Nations, Inuit, and Métis children whose graves and burial sites are now being recovered are recognized and treated with honour, respect, and dignity.

This Mandate included all burials of children who died while forced to attend Indian Residential Schools. This includes the children who died after being transferred from Indian Residential Schools to other institutions such as hospitals (Indian, private, or provincial), tuberculosis (TB) sanatoria, industrial or training schools and reformatories, and mental health institutions. The burial sites I examined included marked, unmarked, mass, and clandestine graves on institutional sites, on other lands associated with the institutions, and in registered municipal, church, and private cemeteries.

The Mandate stated that I was to function independently and impartially, in a non-partisan and transparent manner. This meant that I was to function according to my own skill and judgment, without influence from the federal government about the conclusions reached or the recommendations made. I was also to function in a non-partisan manner. I was to consider all information provided to me through meetings, submissions, and attending events in communities or at search sites or otherwise, along with research and analysis, in formulating my recommendations. All reports and recommendations made were to be simultaneously delivered to the federal government; Indigenous leadership, communities, and families; relevant international experts and bodies (such as the United Nations Special Rapporteur on the Rights of Indigenous Peoples); and the public.

I was mandated to begin a dialogue with Survivors, Indigenous families, and communities, as well as with the Government of Canada, provinces and territories, and other institutions such as church entities and other record holders, to develop a collective approach to identify a path forward. I was also asked to work collaboratively to identify needed measures and recommend a new federal framework to ensure the respectful and culturally appropriate treatment of the unmarked graves and burial sites of the children.

The Mandate specifically directed that I not interfere with any criminal investigations, prosecutions, or civil proceedings, and it did not grant me any powers to compel the production of information or documents from record holders.

The Empty Chair at the sixth National Gathering in Iqaluit, Nunavut, January 30, 2024 (Office of the Independent Special Interlocutor).

The Mandate required that I report on the progress of my work, which I did by delivering the following reports:

1. A November 2022 **Progress Update Report**, which described the work done in the first several months of the Mandate and outlined my plan for completing the Mandate commitments; and

2. A June 2023 **Interim Report**, which described the work and progress made in the first year of the Mandate.

HOW DID I APPROACH THE MANDATE?

Throughout the Mandate, I have carried in my heart all the children who were forcibly taken from their parents and communities by the Canadian State and placed in Indian Residential Schools and other associated institutions. I have been guided by all the Survivors—those still with us, and those who have already returned to the Spirit world. I have done my best to honour all the children whose Spirits have not yet had the opportunity to journey home

to rest with their ancestors. I have shared the anger and hurt of those families who were left wondering what happened to their children, who searched and searched for them, and whose questions went unanswered.

When I accepted this appointment in June 2022, it was very important to me to seek guidance from Survivors, Elders, and Knowledge Holders about how to complete my work. I benefited from their wise counsel and learned from them that the process of searching for and recovering the missing and disappeared children is as important as the result itself.

Participants at the sixth National Gathering in Iqaluit, January 30–February 1, 2024 (Office of the Independent Special Interlocutor).

Elders and Survivors also directed me to be a voice for the children. I have insisted on upholding the rights of the missing and disappeared children to ensure their Spirits and bodies are treated with honour, respect, and dignity. This required that I consider various mechanisms of accountability and justice for the children, Survivors, Indigenous families, and communities. Being a voice for the children also meant that, at times, I had to deliver hard messages to governments, churches, and other institutions—challenging them to do better.

The following principles guided my work throughout the Mandate:

- The bodies and Spirits of the missing and disappeared Indigenous children must be treated with honour, respect, and dignity.
- Survivors must be honoured and acknowledged for raising public awareness about the truths of unmarked burials of children who died at Indian Residential Schools.
- Indigenous families and communities have the right to know what happened to their children who died while in the care of the State and churches.
- Searches and investigations must follow the truth. This requires tracing the movement of each child, using records and Survivor testimonies, from when a child was first taken to an Indian Residential School through to any other institution or location they were sent.
- The search for unmarked burials and the recovery of missing and disappeared Indigenous children must be governed by Indigenous laws, the *United Nations Declaration on the Rights of Indigenous Peoples*, and the *United Nations Convention on the Rights of the Child*.

Participants at the fifth National Gathering in Montreal, Quebec, September 6–8, 2023 (Office of the Independent Special Interlocutor).

My engagement strategy and processes were designed to be respectful of Indigenous protocols, transparent, honest, and open. Mechanisms to report back to Survivors, Indigenous leadership, families, and communities were implemented, including the distribution of Summary Reports that reflected their input.

My activities included:

- Meeting with many Indigenous communities leading search and recovery work—including the research teams who were meticulously reviewing the archival records that, in many cases, they had to fight hard to obtain access to—and with Indigenous leadership and communities who were preparing themselves for, or recovering from, public announcements of their preliminary findings;
- Attending tearful and touching commemorative gatherings and ceremonies to honour the missing and disappeared children as well as the little ones who were found;
- Engaging with the National Centre for Truth and Reconciliation (NCTR), the National Advisory Committee on Missing Children and Unmarked Burials (NAC), provincial governments, territorial governments, municipalities, church entities, experts, academics, and relevant international bodies; and
- Hosting six National Gatherings to listen to, and learn from, Survivors, Indigenous families, communities, search teams, and forensic and legal experts, all of which informed my findings and recommendations for a new federal framework.

I have taken a broad approach to reflect the importance and expansive scope of the Mandate. I have focused on describing the systemic nature of the harm that has been perpetrated on the missing and disappeared children and their families and communities. In doing so, I have considered the conditions and realities that led to the death of so many Indigenous children while in the care and custody of the Canadian State and that impacted the location, circumstances, and nature of their burials. Consistent with the TRC's findings, my inquiry revealed frequent forced transfers from one institution to another. As such, and in accordance with the Mandate, I interpreted the term "missing children" to include any child who was never returned home from a government- or church-run institution, including those who are buried in unmarked graves in registered cemeteries. These children are aptly characterized as "missing" in circumstances where their families and communities were never notified of the

location of their burial. There are also children who were "disappeared" as per the definition of this term under international law.

MOVING TOWARDS AN INDIGENOUS-LED, HOLISTIC APPROACH TO REPARATIONS

Due to the systemic and egregious nature of the harm and atrocities perpetrated, I propose a holistic approach to reparations. To be effective, reparations measures must uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity, and security. They must provide redress for the systemic patterns of genocide in settler colonial countries, including the violence, oppression, land dispossession, and forced assimilation that Indigenous people and communities have endured and resisted.

The multidisciplinary research strategy was designed to achieve the objectives of my Mandate. My approach was Indigenous-centred, based in Indigenous laws and sovereignty, anti-colonial, rights-based, trauma-informed, culturally distinct, gender-specific, and cognizant of intersecting identities.

This Final Report builds on my November 2022 Progress Report and June 2023 Interim Report, and it comprises *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada* and *Upholding Sacred Obligations: Reparations for Missing and Disappeared Indigenous Children and Unmarked Burials in Canada*. Both of these works are summarized herein.

Key case studies and summaries provide concrete examples of existing legal, policy, and research barriers. I highlight emerging First Nations, Inuit, and Métis sovereignty-based models of search and recovery work that illustrate how communities are exercising their rights of self-determination and applying principles and practices of Indigenous laws. Some examples of government, church, police, and coroners' offices, archives, and other institutions adopting an anti-colonial approach to establishing constructive collaborations with Indigenous communities are also documented.

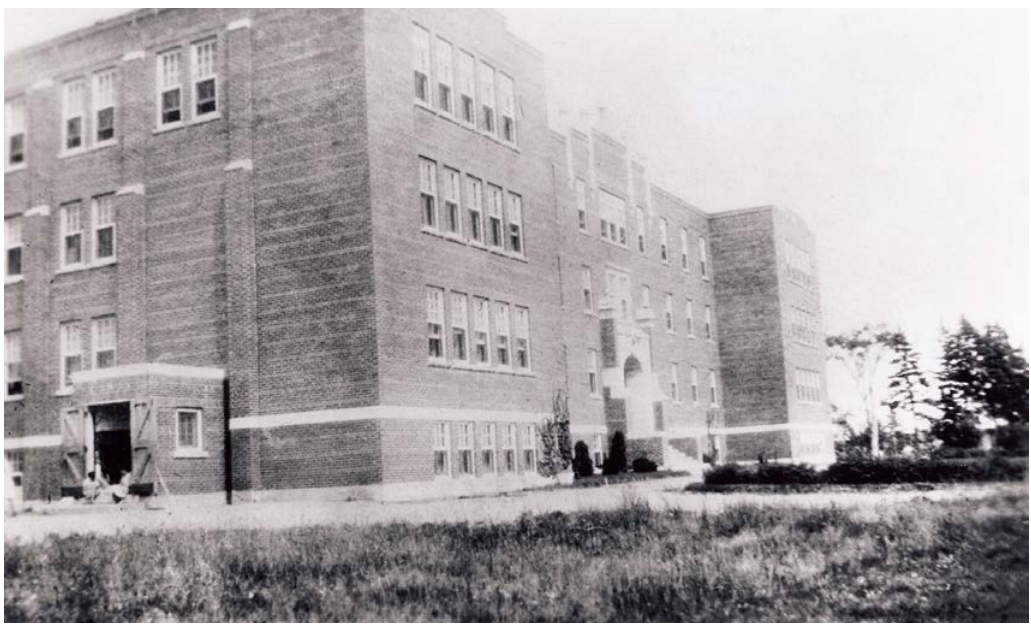
This Final Report sets out the elements of an Indigenous-led Reparations Framework to support the search and recovery of the missing and disappeared children and unmarked burials. The Reparations Framework is not a one-size-fits-all model; it is an inclusive, flexible framework that can be adapted and tailored to meet the specific needs of the Survivors, Indigenous families, and communities in diverse Indigenous Nations across the country.

Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada

> By the time I moved back to Shubenacadie in 1985 after an absence of twenty years I was beginning to be ready to confront the past.... I took some photographs from my car because I felt afraid that the priests and nuns could still be watching out of the now broken windows. A "No Trespassing" sign posted out front deterred me from entering the building that first day. When the pictures were developed, I showed them to former students and the intensity of their memories and flashbacks startled me. They remembered even more than I had allowed myself to remember. I returned to the derelict school several times and finally took pictures of every room. The images helped to jog the memories of former students, their families and tribal members. The code of silence that was imposed on us as children was beginning to break and stories began flooding in.
>
> — Isabelle Knockwood, Survivor of Shubenacadie Indian Residential School[1]

The Final Report of the Truth and Reconciliation Commission of Canada (TRC) provides indisputable historical evidence of genocide, crimes against humanity, and mass human rights violations in the Indian Residential School System.[2] The supposedly benevolent goal of assimilating Indigenous Peoples into settler colonial Canadian society proclaimed by government leaders, church officials, and bureaucrats for well over a century masked a more

sinister reality. Thousands of Indigenous children were subjected to violence, abuse, disease, and neglect in these institutions, and many of them died. Their death rates were far higher than those of non-Indigenous children. Indigenous families were provided with little to no information about what happened to their children. When the children died, government and church officials often did not return the children to their families and communities for burial. They were buried instead in cemeteries at the institutions, often in unmarked and mass graves that were sometimes dug by other children. Many of these cemeteries and burial sites were neglected, abandoned, and left unprotected.



[Shubenacadie Indian Residential School], 1930, P113/2000.**.01/N-23,976, Collection of Elsie Charles Basque, Nova Scotia Museum.

The TRC's findings are now widely accepted in Canada. However, the process of critically examining a country's history to promote truth, accountability, justice, reparations, and reconciliation can be easily disrupted. All Canadians need to understand the full and accurate account of a national history that articulates and acknowledges the magnitude of harms and wrongdoing committed by the State and churches against Indigenous Peoples at Indian Residential Schools and associated institutions. Healing can only begin with an acknowledgement that these painful truths are a part of Canada's history.

BURIAL GROUNDS AS SITES OF TRUTH AND SITES OF CONSCIENCE

The buildings, burials grounds, and cemeteries on the sites of former Indian Residential Schools are etched deeply in Survivors' memories. Once places of silence and suffering, they are now sites of truth. Once places of brutal violence and genocide, they are now sites of conscience. Survivors can never forget the memories of trauma and death held in these sites; now Canada and all Canadians must do so as well. A site of conscience holds truths about the past and memories of injustice that must be exposed, acknowledged, remembered, shared, and learned from so it can never happen again.

The TRC concluded that because of systemic underfunding and the lack of meaningful standards and policies, conditions at the Indian Residential Schools were extremely poor. Children suffered from insufficient nutrition, contaminated food, inadequate sanitation systems, lack of medical services, medical experimentation, faulty infrastructure, overcrowding, neglect, harsh discipline and treatment, and physical, sexual, mental, and spiritual abuse. As early as 1907, government officials were well aware that these conditions were resulting in the high death rates of children—rates that were much higher than those for children in the general population.[3] The children taken away from their families and communities died from many causes, including infectious illnesses, organ diseases, hemorrhages, suicide, injuries, and accidents. Children also died in fires due to faulty construction and the lack of safe fire escapes and planning. Many children died while trying to escape from the institutions. The TRC concluded that some children also died as the result of criminal acts.

The bodies of the children who died, sometimes hundreds or thousands of kilometres away from their homes, were seldom returned to their families and communities. This was the result of a well-documented government policy under which all costs associated with the burials of the children fell to the institutions, to be paid for out of their already underfunded operating budgets.[4] The remains of children who died at these institutions were therefore only returned to their families and communities in those circumstances where the family or community could arrange and pay for their return. They would first have to be notified of their child's death, which often did not occur.

From the beginning of the Indian Residential School System, church and federal government officials planned for the deaths and burials of children at their institutions. They established burial grounds, often informal and unregulated, on institutional grounds or in mission cemeteries. When an Indian Residential School was part of a village mission, the children who died were frequently buried in the cemetery that was shared with the rest of the village mission. In

these cases, the children were buried alongside members of the local community, missionaries, and institutional staff. Indian Residential Schools that were not located within a village mission often established cemeteries on their own property. The TRC concluded that there is a high probability that there are unmarked burials associated with every Indian Residential School site across the country. As well, children were sent to and died at other institutions, such as sanatoria, Indian Hospitals, reformatories, and industrial schools.

Sites of Truth, Sites of Conscience focuses on the documented Indian Residential School cemeteries and burial grounds where Indigenous children are known to be buried. Six representative examples of these burial locations—with images of historical records that support the testimonies of Survivors, the living witnesses—are included. These representative examples are of the Shingwauk Indian Residential School, the Sacred Heart Indian Residential School, the Edmonton (Poundmaker) Indian Residential School, the Battleford Indian Industrial School, the Cecilia Jeffrey Indian Residential School, and the Muscowequan Indian Residential School. The histories of the following 14 other Indian Residential School cemeteries and burial grounds across Canada are included in Appendix A to *Sites of Truth, Sites of Conscience*:

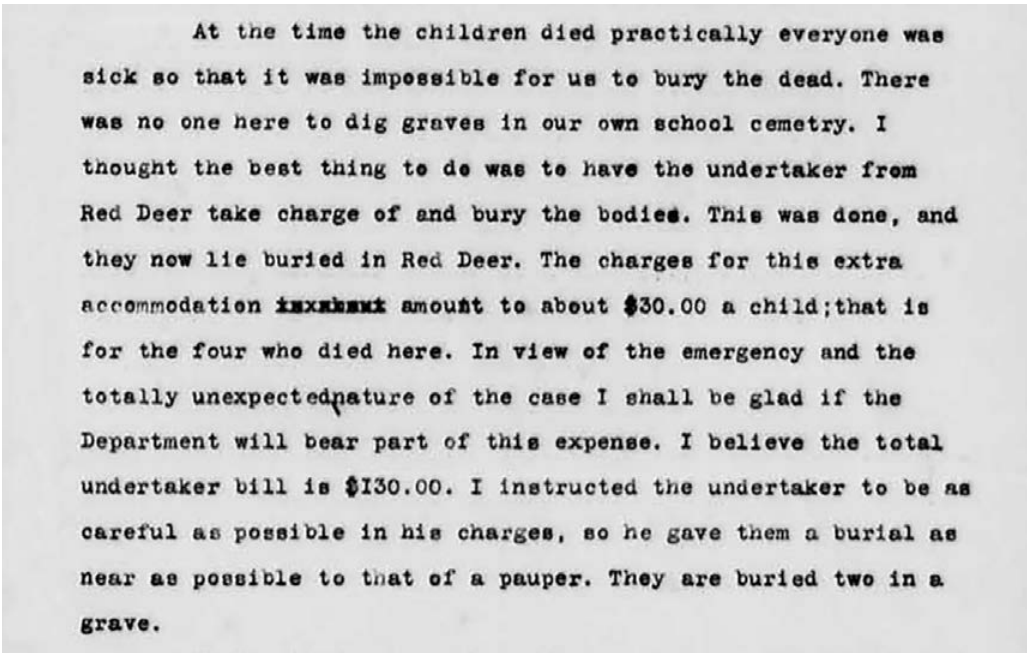
- St. Eugene's Indian Residential School, British Columbia;
- Lejac Indian Residential School, British Columbia;
- Dunbow Industrial School, Alberta;
- St. Mary's Indian Residential School, Alberta;
- Marieval Indian Residential School, Saskatchewan;
- Île-à-la-Crosse Residential Boarding School, Saskatchewan;
- Elkhorn Indian Residential School, Manitoba;
- MacKay (The Pas) Indian Residential School, Manitoba;
- Norway House Indian Residential School, Manitoba;
- Rat Portage/Kenora Indian Residential School, Ontario;
- Fort Frances Indian Residential School, Ontario;
- St. Philips/Fort George Indian and Eskimo Residential School, Quebec;
- Chootla Indian Residential School, Yukon; and
- All Saints/Aklavik Indian Residential School, Northwest Territories.

DEHUMANIZATION OF INDIGENOUS CHILDREN AFTER DEATH

> Many, if not most, of the several thousand children who died in residential schools are likely to be buried in unmarked and untended graves. Subjected to institutionalized child neglect in life, they have been dishonoured in death.
>
> — TRC's Final Report[5]

The dehumanization of children at Indian Residential Schools during their lives was continued after their deaths. Burials of children were treated differently from those of missionaries and institutional staff.[6] For example, at the Indian Residential School in Spanish, Ontario, the graves of missionaries and staff were marked with headstones that included their names and dates of birth and death, yet the graves of children were marked only with white wooden crosses.[7] At Sacred Heart Indian Residential School in Zhahti Kue (Fort Providence), Northwest Territories, after the cemetery was no longer being used, the remains of missionaries who had been buried there were exhumed and relocated to a new cemetery. But the burials of at least three hundred Indigenous people, including those of 161 children who died while in the care of Sacred Heart Indian Residential School, were ploughed over, and the cemetery was turned into a potato field by the Catholic mission.[8]

Fort Providence monument, "Unmarked Graves Located near Sacred Heart Residential School," Albert Lafferty, Indian Residential School History and Dialogue Centre.



At the time the children died practically everyone was sick so that it was impossible for us to bury the dead. There was no one here to dig graves in our own school cemetry. I thought the best thing to do was to have the undertaker from Red Deer take charge of and bury the bodies. This was done, and they now lie buried in Red Deer. The charges for this extra accommodation ~~xxxxxx~~ amount to about $30.00 a child;that is for the four who died here. In view of the emergency and the totally unexpectednature of the case I shall be glad if the Department will bear part of this expense. I believe the total undertaker bill is $130.00. I instructed the undertaker to be as careful as possible in his charges, so he gave them a burial as near as possible to that of a pauper. They are buried two in a grave.

Excerpt from J.F. Woodsworth to the Secretary of Indian Affairs, November 25, 1918, e07775371, file 116818-1B, volume 3921, RG10, Library and Archives Canada.

The treatment of Indigenous children's remains by the federal government and church entities that operated the institutions was driven primarily by cost-savings and convenience. To save money, children were required to create the cemeteries and dig the graves for those being buried.[9] The TRC found that, in some cases, two children were buried in the same grave to save costs and when numerous children died at a similar time, such as during influenza pandemics, the children were buried in common, mass graves.[10]

Also to save costs, Indian Residential School administrators often used inexpensive wooden crosses to mark the children's graves, and they demarcated the boundaries of the cemeteries with wooden fences. The wooden crosses and fences were therefore vulnerable to weather, to being washed away by flooding, and to being destroyed by fire. The loss of these markers and fences presents challenges to communities searching for the missing and disappeared children, because without them the extent of the cemeteries and the locations of the children's graves are difficult to establish.[11]

Once Indian Residential Schools began to be closed, the government made no plans to protect or maintain the cemeteries. As a result, many cemeteries were abandoned, fell into disrepair, and became vulnerable to disturbance and desecration.[12] In some cases, Indian Residential School administrators participated in the desecration of the cemeteries.[13] For example, historical records illustrate how the first cemetery at the Brandon Indian

Residential School was deliberately disappeared and is now occupied by the Turtle Crossing RV Park.

Survivor testimonies and oral histories indicate that some children were not buried at all. Survivors attest to the bodies of babies being placed in incinerators at Indian Residential Schools. These testimonies and oral history evidence hold veracity and truthfulness given the extent of corroboration and repetition among Survivors of the same institution and across many different Indian Residential Schools in the country. It demonstrates the importance of internal cross-referencing protocols relating to oral history evidence with other historical and relevant information.[14]

Wooden crosses marking burials in the Kenora Indian Residential School cemetery, June 1941, file SHSB 24829, Oblats de Marie-Immaculée Province oblate du Manitoba / Délégation, Archives de la Société historique de Saint-Boniface.

LACK OF OVERSIGHT AND ACCOUNTABILITY

The impact of the deficit of grave markers and cemetery demarcation is compounded by the systemic failure to create and maintain records of the deaths and burials of the children. The TRC concluded that the government failed to record the necessary information to answer, "the most basic of questions about missing children—Who died? Why did they die? Where are they buried?"[15] Of the thirty-two hundred deaths of children that the TRC was able to confirm, it noted that:

- For just under one-third of these deaths (32 percent), the government and the church administrators did not record the name of the child who died.

- For just under one-quarter of these deaths (23 percent), the government and the church administrators did not record the gender of the child who had died.
- For just under one-half of these deaths (49 percent), the government and the church administrators did not record the cause of death.[16]

Before the 1930s or 1940s, there was no centralized reporting system for deaths outside of annuity paylists (the lists of those receiving annual payments in accordance with the terms of historic Treaties), which often contained the barest of details.[17] Because these lists were updated by the local Indian Agent, who may have had little information about what was happening at a distant Indian Residential School, they are often vague or inaccurate. In addition, in 1933, the federal government created a policy that allowed Indian Residential School return records to be destroyed after five years and reports of accidents after ten years. As a result, 15 tons of records—about 200,000 files—were destroyed in the eight-year period between 1936 and 1944 alone.[18] With respect to the cemeteries, it appears that most were established informally, and little documentation is left to aid search and recovery efforts.[19]

TRACING THE MISSING AND DISAPPEARED CHILDREN ACROSS INSTITUTIONS

> Many of our children [from BC First Nations] not only attended one residential school, but they attended maybe two or three. Some of our children went over to Alberta for school. Some went into the Yukon. So we all need to be able to work together in the work that we are doing to find our missing children. Some were sent from the residential school to the Indian Hospitals and never came home. Again, we need to work together to help bring those children home that didn't come back from the Indian Hospitals.
>
> — Charlene Belleau, Survivor[20]

The Indian Residential School System intersected with multiple other institutions, including health-care facilities, child welfare agencies, and the juvenile and criminal justice systems. Children were forcibly transferred to and from Indian Residential Schools and to other institutional systems as part of an assimilative apparatus aimed at tightly controlling their social, physical, cultural, and spiritual environments. Parents and communities were often not informed when their children were transferred from one Indian Residential School to

another or to a hospital, a sanatorium, or a reformatory or even when their child fell ill or died in one of these institutions.[21] The breadth and complexity of this adds to the difficulty of tracing the missing and disappeared children and finding their burials.

Federal government officials sent Indigenous people to an increasingly diffuse number of institutions following the Second World War as more responsibility for Indigenous health, welfare, and education, and, particularly, tuberculosis patient care, was offloaded to provincial, and sometimes, private entities. Children were forcibly transferred from one institution to another for various purposes, such as to earn money for the institutions or for disciplinary or health purposes. These institutions included the following entities and systems.

The "Working Out" or "Outing" System

Children digging trenches for water pipes at the Mount Elgin Industrial Institute, Muncey [Mount Elgin Residential School], [circa 1909], file 90.162P/1169, United Church of Canada Archives, Toronto.

Beginning in the late nineteenth century, children and youth were trafficked from Indian Residential Schools to perform manual labour. They were forced to live and work in homes, on farms, and in businesses. Their placements were always brokered by the Indian Agents and the principals of the institutions. Through this system, the government sought to maintain tight social and economic control over Indigenous children and youth. While government and church officials claimed that the Outing System provided vocational training, it also enabled them to offload the costs of this "training" to others. By trafficking the children to perform manual labour for settlers, officials hoped to indoctrinate them into settler colonial culture and keep them from returning to their families and communities after being discharged from

the institutions.[22] The institutions were also dependent on the forced labour of the children, both practically and financially.[23]

As a result, children were at times detained within the Indian Residential School System beyond the legislated release age for their forced labour. This system contributed to the long-term displacement of children from their families and communities, making it more difficult to trace those who were never returned home from Indian Residential Schools.

Rescue Homes, Homes for Unwed Mothers, and Arranged Marriages

In Canada, the Good Shepherd Homes were part of a national network of institutions for girls and women, with transnational connections to Europe. The religious orders that ran these institutions focused on establishing "homes for unwed mothers" and housing "troubled" girls or "delinquent" offenders sent there by Indian Residential School officials or by the courts. The philosophy of these institutions reflected prevailing patriarchal social attitudes about women, class, race, and poverty. When girls became pregnant while at Indian Residential Schools, they would be sent to these institutions to be "rescued" and morally regulated rather than being returned to their home communities.[24] With their heavy emphasis on reform and rehabilitation through "moral improvement," these institutions were gendered sites of settler colonialism.

By the end of the nineteenth century, and as part of its efforts to compel Indigenous people to conform to colonial patriarchal gender norms, government and church officials were actively arranging the marriages of those being discharged from Indian Residential Schools. Many of the newly married were then sent to the File Hills Colony instead of being returned to their families and communities.[25]

Left: "[A] barn and horse team on the File Hills Colony belonging to a graduate of an Industrial School," 1911, file 93.049P/1111, United Church of Canada Archives. *Right*: "Indian home on the File Hills Colony, 191–?," file 93.049P/1112, United Church of Canada Archives.

Hospitals and Sanitoria

Indian Residential Schools were breeding grounds for tuberculosis due to the undernourishment of children and overcrowding. Especially before the 1940s, the federal government utterly failed to take the necessary measures to reduce the risks to the children who were sent to these institutions or to effectively respond to this health crisis. Experiments in the early twentieth century and into the 1930s with using tent and cottage hospitals for Indigenous patients, and turning the Indian Residential Schools themselves into sanitoria, did little to change this reality.[26] In the 1930s, the Canadian medical community took aim at the high rates of tuberculosis in Indigenous communities by claiming that Indigenous people posed a new kind of threat to settler society through the spread of what they termed "Indian Tuberculosis." This characterization reflected racist, harmful, and inaccurate beliefs that Indigenous people were more naturally susceptible to such diseases as opposed to acknowledging that the conditions imposed on Indigenous Peoples through settler colonialism actually increased the rates and spread of tuberculosis within Indigenous communities.[27] This perception of Indigenous people as a threat to non-Indigenous communities spurred the development of aggressive tuberculosis control programs, including extensive X-ray surveys and the development of Indian Hospitals and Sanatoria.

R.C. Mission hospital and school, [Fort Resolution (also known as Deninu Kue), Northwest Territories], file a101802-v8, Mackay Meikle / Department of Indian Affairs and Northern Development Fonds, Library and Archives Canada.

As the federal government turned its attention to the Arctic after the Second World War, its approach to controlling tuberculosis through case finding and institutionalization resulted in the mass removal of Inuit, including children at Indian Residential Schools and Federal Hostels, from the Arctic to hospitals and sanatoria in southern Canada.[28] Whether transferred to an Indian Hospital, an Indian Sanatorium, or to a bed in a municipal or provincial hospital, Canada's Indian health system operated with the expectation that it would provide health care to Indigenous people at half the cost paid for non-Indigenous patients in public facilities. While in the Indian health system, Indigenous people could be moved around without warning and without their consent. Just as in the Indian Residential School System, government decisions were based on prioritizing cost control, and officials sought the least expensive burial options for Indigenous people who died.[29]

Institutions for Children with Disabilities

Indigenous children with disabilities, who were targets of both ableism and racism, were especially vulnerable in the Indian Residential School System and at other institutions where they were transferred. Using its case-finding approach, government officials identified and apprehended children whom they considered to be cognitively or developmentally disabled and sent them to institutions thousands of kilometres away from their homes and families. Until at least the 1950s, there was a widespread, racist belief that disability occurred frequently among what were deemed to be "inferior races" and that, "skin colour and cultural traditions ... along with social conditions ... were constituted as reliable markers of disability."[30] This meant that Indigenous children were more likely to be characterized as "disabled" and institutionalized. The institutions they were taken to, much like the Indian Residential Schools, were disruptive, separating children from their families and exposing them to aggressive and harmful government and church strategies of assimilation and to the risk of injury and abuse. The children were frequently transferred from place to place, often to institutions that were ill-suited to care for them properly.

Child Welfare and Criminal Legal Systems

The TRC found that:

> from the 1940s onwards, residential schools increasingly served as orphanages and child-welfare facilities. By 1960, the federal government estimated that 50% of the children in residential schools were there for child-welfare reasons. The 1960s Scoop was ... simply a

> transferring of children from one form of institutional care, the residential school, to another, the child-welfare agency.[31]

The TRC further noted that until the 1960s, Indian Agents acted as social workers, making decisions to send a child to an Indian Residential School for child welfare reasons, since provincial child welfare agencies did not operate on reserves.[32] While Indigenous children could be transferred from Indian Residential Schools to various child welfare facilities, they could also be sent from such facilities to Indian Residential Schools.

There are at least three known cemeteries where children that died at the Butters Memorial Hospital are buried (Office of the Independent Special Interlocutor).

Indigenous children's acts of resistance while at Indian Residential Schools were criminalized with alarming regularity, and they were transferred to youth detention centres, reformatories, jails, prisons, and penitentiaries. While some children may have been sent from an Indian Residential School directly to a carceral facility by an official from the Department of Indian Affairs without any formal court proceedings, most were transferred through the criminal court system. This usually involved Department of Indian Affairs officials, Indian Residential School principals, child welfare workers, and the police. Children were sent to juvenile detention centres and to adult facilities, including penitentiaries.[33] When released from these carceral institutions, children were not always returned to the Indian Residential School they had been transferred from or to their home communities.

Upholding Sacred Obligations: Reparations for Missing and Disappeared Indigenous Children and Unmarked Burials in Canada

CREATING AN INDIGENOUS-LED REPARATIONS FRAMEWORK

> If we are talking about upholding our law, we have to remind Canada to uphold their own law.... If they are expecting us to uphold our laws, we are going to hold them accountable to uphold their own ... there's a lot of reckoning, a lot of accountability.
>
> — Participant[1]

Of the many human rights violations inflicted on Indigenous children and their families through the Indian Residential School System, the disappearances and deaths of thousands of Indigenous children is the ultimate act of injustice. Under international law, Survivors, Indigenous families, and communities who are victims of genocide, crimes against humanity, and mass human rights violations have the right to know the truth about these atrocities and the right to reparations for these harms.

The federal government must be fully accountable for what happened to these children—little ones who were vulnerable to the violence, abuse, disease, starvation, and neglect. For over a century while these institutions were in operation, officials did little to nothing to protect the children, despite the widespread knowledge by churches and successive governments of their mistreatment. It is important to remember that Survivors, Indigenous families, and communities are not only victims of human rights violations but also

holders of inherent, Treaty, constitutional, and human rights. As such, they must have decision-making powers in the development and implementation of any Reparations Framework for locating, recovering, and commemorating the missing and disappeared children and unmarked burials. An Indigenous-led Reparations Framework will identify the steps required to obtain accountability and to uphold Indigenous Peoples' individual and collective rights to self-determination, freedom, human dignity, and security.

Reparations in the Context of Settler Colonialism and Genocide

The circumstances leading to the need to locate and identify the missing and disappeared children and unmarked burials cannot be understood in isolation. They are evidence of one of the most horrendous impacts of genocide—the systematic and violent targeting of Indigenous children in settler colonial Canada as part of the colonization process. Settler colonial sovereignty relies on removing or undermining the sovereignty of Indigenous Peoples and replacing it with colonial claims to the lands and waters. The ultimate goal is to remove Indigenous connections to the land not only from the present but also from the past.[2] The taking of Indigenous lands was justified and made legal in settler eyes by the doctrines of discovery and *terra nullius* (a Latin term for "empty land"). These doctrines, along with the writings of various European political thinkers, reinforced the widely held belief that Europeans were politically, culturally, spiritually, and morally superior to Indigenous Peoples and that Western civilization was the vanguard of historical progress.[3]

This founding myth feeds into a celebratory national historical narrative that describes how European people "discovered" a new land, made it their own, and created a country by taming the wild, vast wilderness. Yet history told from Indigenous Peoples' viewpoint reveals something very different: a Canadian State formed through a history of violence perpetrated first by a colonial government and then by successive Canadian governments towards Indigenous Peoples. Equally important, from Indigenous Peoples' perspectives, Indigenous Nations have never ceded their sovereignty over their homelands or their right of self-determination.

The Indian Residential Schools were part of a "system" of settler colonialism aimed at eliminating Indigenous Peoples. This system operated within a complex institutional maze of government departments, various church entities, law enforcement agencies, universities, hospitals, and medical and child welfare organizations. Importantly, this system was operated by people who exerted power, control, and discretion over the children.

The levels of violence directed at Indigenous children within the Indian Residential School System should not be underestimated. As the Truth and Reconciliation Commission of Canada (TRC) concluded, this system was a central element of cultural genocide;[4] it consisted of a century-and-a-half history of colonial violence, widespread abuse, chronic neglect, poor living conditions, and disease that separated children from their families and communities and all too often led to disappearances and deaths of children. The TRC used the term "cultural genocide" rather than "genocide" because the TRC's terms of reference prohibited making findings of legal culpability.[5] However, the TRC wanted to make clear that the assimilative laws and policies that the federal government implemented and targeted at Indigenous Peoples, including the Indian Residential School System, were genocidal.

The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG Inquiry) reinforced the conclusion that the systematic violence perpetrated against Indigenous Peoples within Canada constituted genocide, referring to the pattern of deliberate destruction as "colonial genocide."[6] Nbisiing Anishinaabeg (Nipissing First Nation) scholar Alyssa Couchie identifies the anti-Indigenous settler colonial process as "slow atrocity violence."[7] She argues that reframing, "the notion of genocide as a potentially slower process of destruction by attrition, in contrast to the dominant yet problematic framings of international crimes as committed exclusively amidst the chaos of war and crisis focuses our attention on the discriminatory processes that lead to the targeted destruction of a group, rather than solely on its outcome."[8] This "genocide by attrition" describes the indirect processes by which certain groups are denied basic needs as a means to slowly assure their destruction.[9]

While genocide is most commonly associated with mass killings of a targeted population over a short period of time, as in the Holocaust, Rwanda, Cambodia, or Bosnia, genocide occurs differently in a settler colonial context. While it may include mass killings, it is also characterized by a complex web of institutions and systems that advance a long-term goal of destroying Indigenous Peoples' cultures and group identities as distinct sovereign peoples.[10] Regardless of the qualifier used before the word "genocide," all forms of genocide are genocide.

In the view of Murray Sinclair, the TRC's Chair, "it is important to acknowledge the residential school legacy as genocide because, first and foremost, Survivors themselves raised the issue. For many of them, recognition of colonial malevolence is necessary for the process of reconciliation to move forward."[11] To do otherwise becomes a barrier to reconciliation and reinforces a culture of impunity and denialism in Canada. The Indian Residential School System is one element of the immense onslaught of genocidal laws and policies of elimination that Indigenous Peoples have endured, resisted, and survived.[12] Situating the existence of the missing and disappeared children and unmarked burials in this broader context reveals the following historical and ongoing patterns of genocide in Canada:

1. **The destruction of Indigenous group identity, family structures, and connections to ancestral territories:** imposing child removal laws and policies that attack the right of family integrity by forcibly removing children from their families, communities, and Nations.

2. **The mistreatment, neglect, and abuse of Indigenous children:** operating institutions with substandard living conditions that endanger the health, safety, security, and well-being of Indigenous children, including rampant sexual, physical, emotional, and spiritual abuse, harsh punishment, and severe neglect.

3. **The systemic failure to provide adequate health care and ethical medical practices:** failing to prevent disease and malnutrition and subjecting children to medical experimentation, all of which contributed to unacceptably high death rates.

4. **The forced transfers of Indigenous children:** forcibly transferring children to Indian Residential Schools and other institutions such as sanatoria, Indian Hospitals, reformatories, industrial schools, and psychiatric hospitals, often without parental knowledge or consent.

5. **The dehumanizing and devaluing treatment of Indigenous children during their lives and after their deaths:** through various racist and discriminatory practices, including by erasing their family names and assigning them institutional numbers and by failing to treat them with human dignity and respect after their deaths, as evidenced by the lack of care in documenting their deaths, informing their families, and marking their burial places.

6. **The colonization of death through institutional spiritual violence:** including the forceful imposition of Christian beliefs about death and funerary practices as well as laws and policies prohibiting Indigenous funerary and ceremonial practices associated with burials and the memorialization of the deceased.

7. **The purposeful silencing and omission of the history of genocide in Canada:** systemic failure to document the historical and ongoing genocide of Indigenous Peoples within Canada, including the failure to educate Canadians about this aspect of Canada's national history. This systemic failure continues to create conditions where denialism can flourish.

8. **The systemic failure to provide accountability and justice, including:**

    - The devaluation and ongoing breaches of Indigenous laws;
    - The complicity of State and church institutions, including failures to investigate or prosecute perpetrators and failure to provide records of persons of interest;
    - The purposeful use of legal and political strategies by governments, churches, police, and other institutions to deny, minimize, or only partially acknowledge wrongdoing, creating a culture of impunity that effectively grants de facto amnesty;
    - The failure to provide families and communities with meaningful choices to repatriate the missing and disappeared children to their families and communities;
    - The failure to rematriate lands associated with cemeteries and unmarked burial sites through expropriation and other measures; and
    - The lack of educational and punitive measures to counter denialism.

Reparations in the International Context

Under international law, States that have violated their international legal obligations, resulting in substantive harms, have a political, legal, and ethical duty to make reparations. The federal government has either endorsed or ratified multiple international law instruments that include the right to effective remedies and reparations.[13] The 2005 United Nations (UN) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* outlines five types of reparations:

1. **Restitution:** such as the restoration of liberty, the enjoyment of human rights, identity, family life and citizenship, and the return to one's place of residence.

2. **Compensation:** for physical or mental harm; lost opportunities; loss of earnings; moral damage; and costs required for legal or expert assistance, medicine, medical services, and psychological and social services.

3. **Rehabilitation:** medical and psychological care as well as legal and social services.

4. **Satisfaction:** including full and truthful acknowledgement of the breach of international law and expressions of regret and formal apology. This can also include measures to cease continuing violations—for example, by searching for the whereabouts of the disappeared.

5. **Cessation, assurances, and guarantees of non-repetition:** such as providing human rights and international humanitarian law education; promoting the observance of codes of conduct and ethical norms—in particular, international standards; promoting mechanisms for preventing and monitoring social conflicts and their resolution; and reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[14]

Drawing on these international principles and guidelines, the TRC called for several forms of reparations. It concluded, "Words of apology alone are insufficient; concrete action on both symbolic and material fronts are required. Reparations for historical injustices must

include not only apology, financial redress, legal reform, and policy change but the rewriting of national history and public commemoration."[15] Reparations relating to the missing and disappeared children and unmarked burials in Canada require monetary compensation and the following material and symbolic reparations:

- Repatriation of children, where desired;
- Return of lands;
- Apology;
- Rewriting national history;
- Public education;
- Commemoration and memorialization; and
- Legal and policy reform.

Key Elements of Reparations Identified by Survivors, Indigenous Families, Communities, and Leadership

Written submissions to the Office of the Independent Special Interlocutor and participant comments at the six National Gatherings identified the elements of reparations that are required, including:

- Knowing the truth about how these atrocities and human rights abuses happened, who the children are, and where they are buried;
- Respect for Indigenous self-determination, including Indigenous sovereignty, laws, decision-making powers, and dispute resolution processes;
- Indigenous-led investigations based on Survivors' testimonies, records, and forensic methods to identify the children and locate unmarked burials;
- Preserving and disclosing records that may contain information about the missing and disappeared children and unmarked burials;
- Provision by the federal government of sufficient and sustainable funding for search and recovery efforts;

- An independent investigation of the Royal Canadian Mounted Police (RCMP), churches, and governments because they cannot investigate themselves;
- Holding individual and institutional perpetrators accountable and naming them, including governments, churches, and police;
- An admission of responsibility by the federal government for the genocide, including an acknowledgement, apology, and admission of guilt for historical injustices, coupled with substantive action;
- Recognition of, and reparations for, Métis communities and Survivors;
- Commemoration of the missing and disappeared children;
- A national healing plan for Survivors, Indigenous families, and communities that includes the revitalization of Indigenous languages, cultures, and ceremonies;
- Public education about the missing and disappeared children and unmarked burials; and
- Compensation and return of lands.

A New Approach to Reparations for Indigenous Peoples

To date, the federal government's legal and political response to Survivors' demands for truth, accountability, and justice has been inadequate. The federal government's ad hoc or reactive, incremental approach to rectifying the harms of the Indian Residential School System is consistent with a long-standing pattern of evading accountability by first denying responsibility and then forcing Survivors into litigation. When finally compelled to negotiate settlement agreements, the federal government often makes unilateral decisions about what reparations are required and how they will be implemented.

In developing a meaningful approach to reparations, Canada can learn from extensive experience—both positive and negative—in other jurisdictions, such as Australia, Colombia, Guatemala, Ireland, New Zealand, Peru, and the United States. In particular, the culturally distinct, community-driven, trauma-informed reparations processes developed in Guatemala and Colombia to find the truth about what happened to the disappeared, locate their burials, and ensure that communities decide for themselves how to honour them and restore human dignity are informative.[16] Canada can also find a strong foundation in the work of the

UN Expert Mechanism on the Rights of Indigenous Peoples. A 2019 report focusing on the concepts of recognition, reparation, and reconciliation made three overarching conclusions and recommendations:

1. The *UN Declaration on the Rights of Indigenous Peoples* should be the main framework for recognition, reparation and reconciliation. Recognition of [I]ndigenous [P]eoples, as well as reparation and reconciliation relating to past and current injustices, are essential elements for the effective implementation of the Declaration. Likewise, the Declaration itself is an instrument to pursue recognition, reparations and reconciliation.

2. Any process of reparation and reconciliation must be approached from an [I]ndigenous perspective, taking into account cultural specificities, including the spiritual connection of [I]ndigenous [P]eoples to their lands, their traditions related to identifying and healing injuries and their right to participate fully and effectively in decision-making.

3. Indigenous [P]eoples view recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of the right of [I]ndigenous [P]eoples to self-determination (including free, prior and informed consent), their rights to autonomy and political participation, their claims to their lands and the recognition of [I]ndigenous juridical systems and customary laws should be considered an essential part of recognition, reparation and reconciliation.[17]

The report also emphasized that, "in devising, implementing and evaluating reparation and reconciliation initiatives, [I]ndigenous [P]eoples and States should bear in mind that the process is as important as the outcome."[18] Further, "a crucial factor in the success of reconciliation and reparation initiatives is the incorporation of [I]ndigenous perspectives at all stages and the full and effective participation of [I]ndigenous [P]eoples, which is essential if these processes are to have a successful, legitimate outcome."[19]

The TRC made Indigenous laws central to its work and to the reconciliation framework, concluding that, "reconciliation will be difficult to achieve until Indigenous [P]eoples' own traditions for uncovering truth and enhancing reconciliation are embraced as an essential part

of the ongoing process of truth determination, dispute resolution, and reconciliation."[20] The TRC's approach confirms a long-known truth: Indigenous Peoples are in the best place to determine, in accordance with their laws and protocols, what is appropriate for truth-finding, accountability, and justice and to honour the missing and disappeared children and protect the unmarked burials. Indigenous laws must therefore inform any new Canadian legislation, policies, and regulations to accomplish this goal.

As Dr. Chief Littlechild points out, the tools for creating new legislation already exist. They are found in the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) and in the diverse Indigenous laws that have existed for millennia across Turtle Island.[21] The TRC established a national framework for reconciliation governed by Indigenous rights and Indigenous laws. This is a strong foundation for creating an Indigenous-led Reparations Framework to locate, recover, and commemorate the missing and disappeared children and unmarked burials.

THE FIRST ELEMENT OF A REPARATIONS FRAMEWORK: ACTIVATING AND ENFORCING INTERNATIONAL OBLIGATIONS

Applicable international instruments and legal principles, including the *UN Declaration,* are central to an Indigenous-led Reparations Framework. Canada has signed or ratified many relevant international instruments and, in many cases, has incorporated them into domestic law, taking on binding legal obligations. Where Canada has not signed or ratified a relevant international instrument, that instrument, and its core principles, can nonetheless still provide guidance. However, Canada's international obligations have been profoundly shaped by its efforts to avoid being constrained by or held accountable through them for its treatment of Indigenous Peoples. This includes its efforts to shape international laws and norms in ways that have excluded Indigenous experiences of settler violence, refusing to accede to international instruments that would impose obligations on Canada with respect to Indigenous Peoples, and limiting domestic application of international instruments that would provide a pathway to accountability for Indigenous people. Further, it is important to note that Indigenous worldviews, experiences, and needs have been systematically excluded from most international treaties, customs, principles, and institutions. In applying international laws to the Indian Residential School context, an anti-colonial and decolonizing approach is therefore necessary.

Settler Amnesty and the Culture of Impunity in Canada

> There are also clear positions that we have taken about how [search and recovery] work should unfold, and it first goes to accountability. If there are people who were a part of these atrocities that are living or institutions that can be held to account, they must be brought to justice. And this process should not be shy for bringing accountability to a place where there has not been accountability for Indigenous children.
>
> — President Natan Obed, Inuit Tapiriit Kanatami[22]

The Indian Residential Schools were created and run by specific individuals. Atrocities and harms against Indigenous children, families, and communities were carried out not by abstract entities but, rather, by people with faces, names, and professions. Specific clergy, nuns, physicians, researchers, policy-makers, and politicians benefited financially and professionally from the suffering of Indigenous people. Almost without exception, they did so with complete impunity, shielded from accountability by the actions of the Canadian State. Only a handful of those individuals that committed crimes against Indigenous children at former Indian Residential Schools have been prosecuted, while none of those most responsible have been held to account at either the domestic or international level.[23] Many perpetrators died long ago. The federal government and other institutions have worked harder to protect perpetrators than they ever did to protect Indigenous children, families, and communities. The Canadian State has instead embraced a culture of, "settler amnesia and willful forgetting"—a systemic impunity that is herein described as **settler amnesty**.[24]

What Is Settler Amnesty?

In the context of the Indian Residential School System, settler amnesty is an ongoing and unconditional refusal to investigate and prosecute those most responsible for the deaths, disease, and brutality inflicted on the children.

What Is Amnesty?

An amnesty can be granted by a government to prevent criminal investigations and prosecutions of individuals, including officials in government and other institutions, responsible for serious human rights abuses and certain international crimes.

What Is Impunity?

Impunity is freedom from facing any punishment or other consequences for harmful actions. A culture of impunity permits individuals and institutions to perpetrate harms knowing they will not be held accountable for their actions.

In general, amnesties can be understood as measures taken by a State that preclude the criminal investigation and prosecution of individuals responsible for serious human rights abuses and certain domestic and international crimes.[25] Amnesties differ from pardons or commutations in that they involve no criminal prosecution, liability, or punishment. Amnesties have been used to resolve a period of armed conflict or civil war and may be viewed as a "necessary evil" or the "least-worst option" available to societies. Amnesties have been justified in the context of securing a society's transition from war to peace or from authoritarian rule to democracy. However, in the context of peaceful States where no such transition is occurring, as in Canada, amnesties are more likely to foster impunity and frustrate justice than to promote democracy, the rule of law, or peace. Amnesties are considered acceptable for some types of crimes but not for others: the UN has repeatedly stated that it does not recognize amnesties for serious international crimes such as war crimes, crimes against humanity, and genocide.[26]

Settler amnesty in Canada with respect to the Indian Residential School System has several distinguishing—and disturbing—characteristics. This amnesty is:

- A **self-amnesty**, granted implicitly by the government to those most responsible for the crimes and human rights violations perpetrated against children;
- A **blanket amnesty**, which, outside of a handful of prosecutions, covers all individuals involved irrespective of their role, their seniority, and their responsibility for the crimes, the nature and severity of the crimes committed, and other factors;

- An **unconditional amnesty**, such that those who have benefited from it have not had to accept responsibility or participate in any truth, justice, or accountability forum. And they did not have to request protection from prosecution; and
- A **de facto amnesty**, which has not been proclaimed or officially adopted but, rather, is founded in the long-standing and active disinterest of the State in holding to account any of the people most responsible for the crimes committed.

This type of settler amnesty results in a lack of accountability for past harms, impunity for those responsible for the human rights violations and mass atrocities, and a sense of systemic, strategic, State-endorsed, and perpetuated amnesia. It responds to atrocities as if they did not occur and to victims and Survivors as if they did not exist.

Shielding Perpetrators: The Path to Settler Amnesty in Canada

Settler amnesty in Canada for Indian Residential School perpetrators was never legally proclaimed. Rather, it was a disguised amnesty, implemented through the State's purposeful avoidance of investigations into the systematic harms that the children faced and by the federal government's refusal to adopt international or domestic laws or join human rights bodies that would have provided Indigenous victims and Survivors with meaningful avenues for accountability.

The horrors at the Indian Residential Schools were State policy. When government-appointed inspectors and investigators reported on the deplorable conditions in the Indian Residential School System and the suffering of children, their reports and their recommendations were mostly ignored. When courageous Survivors reported physical or sexual abuse to the authorities, these complaints were rarely investigated or prosecuted; rather, the perpetrators were often kept on staff or were reassigned to another institution where they could prey on a new group of children.[27]

There is nothing haphazard about this impunity. Canadian government leaders, agents, and institutions carefully crafted policies to disappear Indigenous people and communities while avoiding accountability for their actions. Federal governments forestalled avenues that Indigenous people might have to pursue accountability in the realms of human rights and international law—for example:

- Canada had a significant role in ensuring that the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (*Convention on Genocide*) did not include cultural genocide.[28] It did so specifically because it would have left the country vulnerable to accusations that its treatment of Indigenous children and communities constituted genocide.[29]

- When, after ratifying the *Convention on Genocide* in 1952, Canada added genocide to its *Criminal Code*, it defined the term more narrowly than the Convention by excluding the following acts: "causing serious bodily or mental harm to members of the group"; "imposing measures intended to prevent births within the group"; and "forcibly transferring children of the group to another group."[30]

- Similarly, when enacting domestic legislation incorporating crimes under the *Rome Statute of the International Criminal Court* (*Rome Statute*), Canada did not include the international crimes of enforced disappearance or apartheid as crimes against humanity in its own *Crimes Against Humanity and War Crimes Act*.[31]

- Canada has decided not to sign or join numerous international human rights bodies that could help investigate human rights abuses against Indigenous children. Canada has not signed or ratified the *American Convention on Human Rights* nor accepted the jurisdiction of the Inter-American Court of Human Rights, which enforces it.[32] Canada has also chosen not to sign and ratify the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance* (*Convention on Enforced Disappearance*), which includes specific obligations for States to investigate disappearances and explicitly recognizes the right to truth.[33]

- Canada was one of the very few States to first vote against the adoption of the *UN Declaration*,[34] due in part to concerns regarding Article 7(2), which specifically addresses the forcible transfer of children.

The federal government has worked to protect perpetrators not only from prosecution but also from having their names made public. For example, in formulating the TRC's Mandate, the federal Department of Justice and the Catholic church entities were insistent that the Commission be denied the power to issue subpoenas, make findings of criminal or civil liability, name names, or accuse individuals of misconduct.[35] The federal government's position on reparations for the Indian Residential School System shifted over time as it moved from denying any wrongdoing that would require redress, to acknowledging partial responsibility for some of the harms, to negotiating settlement agreements. The federal government did not do this out of benevolence but, rather, in response to concerted and determined Indigenous actions on legal and political levels over decades.

Despite hard-won successes, Survivors, Indigenous families, and communities have been forced to continue to fight for reparations. The federal government's strategy of settler amnesty continues unabated and manifests in various ways to deny, minimize, partially acknowledge, and limit the government's liability for harms caused to Indigenous children. The federal government's domestic approach to addressing Indigenous Peoples' demands for recognition, equity, and justice for Indigenous children is remarkably consistent across the Indian Residential School System, the Sixties Scoop, foster care, and the child welfare systems. The federal government has a pattern of first denying responsibility for what happened to Indigenous children in these institutions, forcing Survivors into litigation, and then making decisions about how best to resolve these injustices without sufficient consultation with Survivors, Indigenous families, and communities.

An amnesty, "does not relieve the state of its obligations to find out the truth and inform the next of kin of the victims' fate and the location of the remains. The failure by state organs to provide information to a commission of inquiry can also constitute a violation of the right to truth."[36] The right to truth is a powerful potential antidote to the effect of the unconditional, blanket, de facto amnesty and the culture of impunity that the federal government has actively created and cultivated in Canada. It is time for Canada to shift from this culture of amnesty and impunity to a culture of accountability and justice.

The Enforced Disappearances of Children and Crimes Against Humanity

> In the journey to uncover the truth and to seek true justice for those who have been wronged, it is essential for colonial governments to acknowledge and accept that the Canadian legal framework is not the only framework of relevance here. Acknowledging the inherent sovereignty of Indigenous Peoples in Canada (and around the world) places us in a context of international law.
>
> **— Nisoonag Partnership, leading the investigations into the missing children at the Spanish Indian Residential School[37]**

Some Indigenous communities leading search and recovery efforts to locate the missing children and unmarked and mass graves insist that the children have been disappeared by the State.[38] Canadian politicians have also periodically referred to the children who were never returned home from Indian Residential Schools as "disappeared." For example, former Minister of Indian Affairs and Northern Development Jim Prentice stated in 2007 that, "we will get to the bottom of the *disappeared children*."[39] Unfortunately, the federal government has yet to do so.

There is an important distinction between the terms "missing" and "disappeared." While both refer to the absence of a person, being "disappeared" specifically requires the absence to be, "a result of force against the will of a person."[40] Terms like "missing" or "vanished" may be accurate in a literal sense, and the term "missing" helpfully describes the longing of families for their loved ones.[41] These terms, however, fail to reflect the State's culpability and responsibility for the fact that children died and went missing not because of the children's choices or actions but because of purposeful State violence, action, and force. Nor do they reflect the federal government's subsequent refusal to search for and return the children.

Pursuant to international legal criteria, the "enforced disappearance" of children requires the State to ensure that a full investigation into the deaths of the children occurs, that families be notified of the fate of the children, and that remedies be provided to the victims, including their families and communities. Canadians are beginning to understand the reality that many of the children in the Indian Residential School System were disappeared by those who were responsible for and operated the institutions. Thousands of children were taken from their homes and communities, placed in the care of the State and churches, and never returned

home.[42] With global attention on the missing children and unmarked burials in recent years, some people have begun to draw connections between the offence of enforced disappearance and the fate of the children in the Indian Residential School System.[43]

How is it possible that the families of the children and the communities they were taken from have been left to wonder what happened to the children who were never returned home? How should we understand the lack of action to investigate their deaths and return the children to their families and communities? These children did not just vanish. They were not disappeared by accident. The forced removal and transfer of Indigenous children was Canadian law and policy.[44] The State actively sought to break their sense of identity and belonging and their bonds to their families and communities. Those in charge of these institutions knew the children's chances of surviving were low.[45] They exposed the children to diseases that killed them, refused to provide them with enough food, and permitted non-consensual experiments to be conducted on them.[46] The conditions were so deadly that cemeteries were a regular part of the design of these institutions.[47]

As highlighted in *Sites of Truths, Sites of Conscience,* after being taken from their families and communities to Indian Residential Schools, many of the children were then transferred across a network of government and church-controlled institutions. When the children died, governments and police routinely failed to properly investigate their deaths and then ignored the pleas of families to be informed of what had happened to their children and, where desired, to have their remains returned. Many of the children are buried in unmarked graves, which are hallmark indicators of clandestine activities, wrongful deaths, and well-organized efforts to cover up human rights violations. While not every child taken to an Indian Residential School was the victim of an enforced disappearance, the actions and omissions of the Canadian State and its agents and officers disappeared many of the children. These children, their families, and their communities are the victims of enforced disappearances, as defined under international human rights law. Their disappearance is an ongoing human rights violation and likely also constitutes a crime against humanity for which the Canadian State bears responsibility.

The International Law of Enforced Disappearances

Sadly, enforced disappearances have been perpetrated around the world, whether in the context of oppressive dictatorships such as in Latin America, as an implement of war as is currently happening in Ukraine,[48] or in the deaths of migrants trying to reach safe haven in

Europe.[49] States have used enforced disappearances, "not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear."[50] The enforced disappearance of persons is a violation of international human rights laws. In 1992, the UN General Assembly adopted the *Declaration on the Protection of All Persons from Enforced Disappearance* (*Declaration on Enforced Disappearance*),[51] which was built upon by the 2006 *Convention on Enforced Disappearance*. The *Declaration on Enforced Disappearance* recognizes that enforced disappearances strike at the very core of human rights, are an offence to human dignity, and are a violation of the right to not be subject to torture or other cruel, inhuman or degrading treatment or punishment and the right to liberty and security of the person.

The human rights violation of enforced disappearance consists of the following elements:

- A deprivation of liberty;
- State authorization, support, or acquiescence to the deprivation; and
- A refusal to acknowledge, or the concealment of, the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.

These criteria are met in the case of children who were never returned home from Indian Residential Schools. Children were detained in these institutions, often without consent by a parent or guardian or only with coerced consent. The federal government authorized the detention of the children and then acquiesced in their enforced disappearances by failing to investigate the deaths of the children and thereby failing to notify the families of their fate. The TRC concluded that, "parents were often uninformed of their sickness and death. They were buried away from their families in long-neglected graves. No one took care to count how many died or to record where they were buried."[52]

No public emergency, threat to national security, war, or any other exceptional circumstances can be used to justify the disappearance of persons.[53] Put bluntly, enforced disappearances are never justified under any conditions. Under international law, enforced disappearances are continuing offences. According to Article 17.1 of the *Declaration on Enforced Disappearance*, the offence continues, "as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified."[54] This means that, as long as the fate of the person remains unknown, perpetrators are still committing an offence and may still be held accountable for these continuing and ongoing wrongs.[55]

In accordance with UN standards, Canadian authorities have an obligation to ensure prompt, thorough, and impartial investigations into all potentially unlawful deaths (including disappearances), regardless of how long ago the deaths or disappearances were. Investigations must respect the victim's families and communities who have the right to know the truth about what happened to their disappeared loved ones.[56] Because the Canadian State cannot investigate its own wrongdoing, Indigenous Nations, exercising their sovereignty, are best placed to lead these investigations.

International human rights law also enshrines the right to a remedy[57] and requires that victims have access to competent institutions or judicial bodies that can investigate and remedy the human rights violations committed against them.[58] In the context of remedies, the return of human remains is especially important when the direct victim of an enforced disappearance subsequently dies or is killed.[59] For the families and communities of the disappeared children, remedies and reparations include:

- A full investigation and disclosure of the fate of each child as a key first step;
- An acknowledgement of the harm and trauma for those searching for, and left to wonder what happened to, their disappeared loved ones; and
- Measures to dignify the life of the disappeared person by finding out what happened to them and, where applicable, returning their remains to their families for a proper burial.

The *Declaration on Enforced Disappearance* makes clear that the victims of enforced disappearances include the persons disappeared, their families, and their communities. The act and harm associated with the person's disappearance should be understood as more than the disappearance of a physical body. It is also the disappearance of kinship and a breaking of familial and community bonds. The very memory of the disappeared person is threatened.[60] There is a loss, and a pain, caused by a disappearance that is difficult to articulate—which the law cannot adequately address—but it is acknowledged by the extension of victimhood to the families and communities of the disappeared. As experts have pronounced, "enforced disappearance creates a network of victims that extends far beyond the individuals that are directly subjected to this human rights violation."[61] Therefore, in cases where the direct victim is killed, international human rights law recognizes that the obligations, reparations, and remedies are still owed to the direct victim's family and community.

Importantly, the *Convention on Enforced Disappearance* affirms a right to truth, confirming, "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end."[62] Without recognizing a right to truth and, therefore, to know the fate of a loved one, human rights cannot be fully and freely exercised. For some families, the search for truth may be more important than accountability, "Evidence from the field indicates that the need of families to know the truth is vital and sometimes has primacy over wanting justice; the desire for justice may be a secondary consequence of the primary desire to know the truth."[63] The right to truth in cases of human rights violations such as enforced disappearances is recognized as being relevant to individuals, societies, and the public more generally.[64]

The enforced disappearance of children is viewed as being especially serious under international human rights law. As a result, children receive special emphasis in both the *Declaration on Enforced Disappearance* and the *Convention on Enforced Disappearance*.[65] The *Convention on Enforced Disappearance* requires States to, "take the necessary measures to search for and identify the children ... and to return them to their families of origin."[66]

International Criminal Law

Enforced disappearances may constitute not only a violation of international human rights protections but also a violation of international criminal law. Specifically, enforced disappearances may be a crime against humanity. While many of the horrific acts committed in the Indian Residential School System precede the articulation of international criminal law, it remains useful to consider how past events may amount to international crimes. Crimes against humanity are those that violate not only direct victims but also all of humanity.[67] According to the *Rome Statute*, enforced disappearances constitute crimes against humanity if they are, "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[68] They must be committed with the intent to commit the underlying offence, although "intent" does not mean that the perpetrator is required to know all the details of what will follow when someone is detained or their liberty is deprived.[69]

The forcible transfer of tens of thousands of Indigenous children deprived them of their liberty and placed them at risk of malnutrition, disease, torture through medical experimentation, and death and led to unresolved trauma, ailments, dislocation, and family disruption. These children were disappeared for years and sometimes decades; many remain disappeared to this day. The genocidal violence that forced the children into the Indian

Residential School System and the disappearances of these children had the same settler colonial goal: the attempted elimination of Indigenous Peoples as distinct legal, political, and cultural groups.[70]

The disappearance of the children was systematic and widespread. The children's deprivation of liberty via the forcible transfer to Indian Residential Schools was Canadian policy. This was done by the Canadian State and agents authorized by the government to corral the children. Parents were required by law, or coerced in other ways, to send their children to these institutions.[71] This was not limited to one area or one moment in time. It happened across the country and was perpetrated unabated for decades and generations. The children did not receive the protection of the law; on the contrary, the law existed to force them into Indian Residential Schools and to protect the perpetrators. Most, if not all, families would have been unable to report these disappearances to the authorities as the authorities were themselves responsible for, or implicated in, these disappearances. The perpetrators knew that their conduct was intended to destroy Indigenous communities, break apart Indigenous families, and assimilate Indigenous children. They knew that they were part of a wider system and policy that identified Indigenous children as targets.

To date, the International Criminal Court has declined to investigate atrocity crimes committed against Indigenous children in Canada. However, as noted above, enforced disappearances are an ongoing crime for as long as the fate of the disappeared person remains unresolved.

The Lack of Canadian Law

Canada has actively worked to preclude access to justice for enforced disappearances. Contrary to its purported record as a human rights leader, Canada has failed to address enforced disappearances as either a human rights violation or a crime against humanity. Canada has deliberately and repeatedly declined to adopt international treaties or join international courts that might investigate these violations and atrocity crimes, and it has failed to enact domestic legislation relating to enforced disappearances.

As noted, Canada has refused to ratify or become a signatory to the human rights instruments that would offer a pathway to justice for the disappeared children, their families, and communities. It has neither signed nor ratified the *American Convention on Human Rights* or the *Inter-American Convention on Forced Disappearance of Persons*.[72] It has also failed to accept the jurisdiction of the Inter-American Court of Human Rights and has also not signed or ratified the *Convention on Enforced Disappearance*. When Canada ratified the *Rome Statute* and implemented the federal *Crimes Against Humanity and War Crimes Act*, it did not include enforced disappearances in its legislation.[73]

The refusal to create avenues to address enforced disappearances under international human rights law, international criminal law, and its own *Criminal Code* supports the conclusion that Canada's actions—or lack of action—are singularly due to its desire to avoid responsibility for its mistreatment of Indigenous people and communities. After all, only Indigenous people have consistently faced enforced disappearances throughout Canadian history and until this very day. This could all change if Canada commits to international legal regimes and systems that offer better and effective remedies and accountability than what is currently available.

Unmarked Burials and Mass Graves

> It is true that so many in this country are facing something that has never been dealt with ... there was an actual genocide inflicted upon our precious children. Communities are facing a difficult decision about what happens once those children are found: should they be exhumed? What happens after that? Is there a potential for criminal action?
>
> — Donald E. Worme, QC, Indigenous Peoples Counsel[74]

The work to search for and investigate the missing and disappeared children and the unmarked graves and burial sites has the potential to simultaneously represent an end and a new beginning: an end to Canada's long-cultivated settler amnesty with its culture of impunity, silence, and denial and a beginning for recovering, identifying, and, where desired, returning the missing and disappeared children to their families and communities. International law can provide a human rights framework for this essential work.

Understanding the Terminology

The terminology surrounding mass graves and unmarked graves has evolved over time. **Unmarked graves/unmarked burials** are burial sites that do not have a marker, whether a headstone, plaque, or sign, designating the presence of the grave. Unmarked graves may never have been marked, or they may have initially been designated as graves but are no longer marked due to neglect or natural or human damage. In Canada, the TRC, Survivors, and Indigenous communities and leaders have used the term "unmarked burials and unmarked graves" to describe the burial sites at former Indian Residential Schools as well as other associated sites. Internationally, the term "unmarked burial" is more commonly used. In this Final Report, the terms have been used interchangeably.

Mass graves do not have a single, generally accepted definition. While, by definition, the term refers to more than one body, there is no agreement over how many bodies must be present for a site to qualify as a "mass" grave.[75] Mass graves need not be the direct result of deliberate harms. Some, for example, were created for COVID-19 victims or victims of the 2010 earthquake in Haiti. In other words, not all mass graves must be the result of illegal activities, although the right to be buried in accordance with the deceased's cultural practices is likely to be violated whenever mass graves are created. Identifying mass graves is not necessarily proof that mass atrocities have been committed. The *Bournemouth Protocol on Mass Grave Protection and Investigation* defines a "mass grave" as:

> A site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonised, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness.[76]

Whether what is located at former Indian Residential Schools are found to be mass graves, mass burial grounds, or individual graves of children, all deserve and demand investigation and truth. The *Bournemouth Protocol*'s definition is helpful in that it covers and accurately reflects that at least some of the burial sites at these former institutions, as well as in registered cemeteries, constitute mass graves and require an Indigenous-led investigation into the circumstances of the deaths of the children and how their remains were treated after death.

Victims include the people whose remains are buried in the unmarked and mass graves, their families, and the communities who suffer because of the disappearance or lack of identification of those interred in the mass or unmarked graves.[77] This is in accordance with the definitions provided by various human rights protocols, studies, and international organizations. It also accords with Indigenous laws, which incorporate a broad concept of family and a collective responsibility to care for children.

A Human Rights Approach to the Treatment of Bodies

Generally, there is a direct connection between the discrimination that victims faced in life and the disregard for their dignity in death. The lack of care, concern, and equality in the treatment of those who lie in unmarked and mass graves is typically an extension of the lack of care, concern, and equality in the treatment that they received while alive. The children's graves at Indian Residential Schools and associated sites are the result of compounding and reverberating human rights violations, including decades of neglect and a refusal on the part

of the Canadian State to protect and adequately investigate the deaths and burial sites, the dehumanization of the children in life and in death, and a failure to provide Indigenous families and communities with information about the fate of their children.

An international human rights law lens offers an important way in which to understand unmarked graves and the missing and disappeared children, including:

- **The causes of death of those in unmarked and mass graves:** When they appear in the context of well-documented and known atrocities, unmarked and mass graves are often evidence of human rights violations and raise the presumption that the human rights of the individuals located in these graves were violated in life. The possible violation of these rights while the victims were alive, which may have contributed to, or directly resulted in, their deaths, gives rise to an obligation on the State to investigate. The federal government therefore has an obligation to fully support investigations into the circumstances of the children's deaths and ensure that their families and communities are informed of any findings.[78]

- **Treatment of the bodies and remains of the deceased:** While human rights generally only apply to the living, certain rights and obligations may extend to those who have died and the treatment of their remains. The Last Rights Project found that numerous obligations extend to the body of a deceased person, including the requirement that States search for missing persons, respect the body of the deceased person, locate and notify the relatives of those who have died and are missing, facilitate the return of the remains of the deceased person to families on request, treat the human remains in a dignified and respectful manner that is appropriate to the religious and cultural traditions of the deceased and their family, record the location of the burial and respect and maintain the gravesite, and provide special protection for the remains of children.[79] Of particular note is the federal government's systematic violation of the right of children to be buried in a manner that observes and respects the traditions and ceremonies of their families and communities. Their bodies have been left in places that neither they nor their loved ones wanted, and the children have often been denied proper burial ceremonies, in violation of their and their families' rights.

- **The rights of families and communities:** As discussed above, families and communities have an inalienable right to the truth.[80] This includes the right to know what happened to their loved ones—both with respect to

the circumstances of their death as well as the location of their death and burial. The State has an obligation to ensure a genuine and good faith investigation. Given that the State violated these rights, Survivors, Indigenous families, and communities have made it clear that it is not appropriate for the Canadian State to conduct the investigation of itself. Instead, it must support Indigenous-led investigations.

- **The protection of burial grounds and mass graves:** International law obliges States to preserve and, if families so choose, restore burial grounds. Many Indian Residential School cemeteries and burial grounds have been neglected, damaged over time, or purposefully destroyed and desecrated. Despite the prevalence of these sites across the country, there are no robust protections under Canadian law for unmarked and mass graves.[81] There is, therefore, an obligation on the federal government to immediately protect and restore these sites. Affected families and communities must be meaningfully involved in the development of the legal framework that is to be applied. Their free, prior and informed consent must be secured, their human rights fulfilled and promoted, and the sites of unmarked graves protected in accordance with Indigenous laws.

The Legal Meaning of a "Presumption"

A presumption in law means that an inference can be drawn that the fact being presented and relied upon is true. Presumptions can be either conclusive or rebuttable. A conclusive presumption cannot be challenged. A rebuttable presumption provides the opposing party with a chance to prove the fact being presumed is not true.[82]

In applying a rebuttable presumption in international human rights law in relation to unmarked and mass graves, an inference should be drawn that the human rights of the children were violated unless the federal government or churches can provide evidence that they were not. In other words, the fact stands unless the presumption is rebutted or disproved. The impact in law of a rebuttable presumption is that it shifts the burden of proof from one party to the other—in this case, it would shift the evidentiary burden away from Indigenous families and communities having to prove the children's rights were violated and, instead, would require the federal government and churches to prove that the children's rights were not violated.

Indigenous-Led, Culturally Relevant, and Respectful Approaches

When investigating unmarked and mass graves, there is a persistent tension between the treatment of the dead as "evidence of past wrongdoing" and their treatment as the "loved ones of family members and communities."[83] This tension has not always been well navigated by forensic investigation teams, and it has been particularly pronounced where the cultural divides between the teams and the communities looking for their missing and disappeared loved ones are wide.[84] In some cases, forensic analysis can fail to account for the dignified treatment of the missing or disappeared person and fail to consider the rights and views of the affected families and communities in the investigation processes.

By their nature, exhumations can cause great pain, even when successful in identifying missing or disappeared persons,[85] and they often raise complex moral, cultural, and ethical issues. Some communities may have Indigenous laws prohibiting exhumations under all circumstances, while others may not; in addition, views on exhumation may differ within the community or even within families. In the circumstances where there are mass graves, a family may want to exhume their child, but the identities of the other children in the grave may be unknown and permission from the other families and communities cannot be sought.

The literature and practice of forensic human rights points to several key elements that can minimize unintended and unnecessary harms to families and communities. These include:

- **Securing free, prior and informed consent:** Free, prior and informed consent is essential to minimizing harms when conducting investigations and forensic exhumations. Without proper care being paid to the views and needs of the affected families and communities, there is a risk that exhumations will perpetuate an inappropriate and overly forensic emphasis on individual identification while paying insufficient attention to the Indigenous legal obligations, views, feelings, and beliefs of affected families and communities.
- **Respecting the decision of whether to exhume:** Reckoning with the past is never simple. The decision of whether to exhume the remains of loved ones can be complex and fraught. Each family and community has the right to decide whether or not to disturb the graves. Some will choose to support the investigations and exhumations, and others will not. Choosing not to disturb graves should always be seen as an option worthy of respect and understanding.

- **Identifying the right persons and institutions to investigate and lead exhumations:** While the Canadian State has an important role and clear obligations to support investigations and establish the truth, given the generations of harm that the federal government has imposed through its genocidal policies, it cannot investigate its own wrongdoings. Although Indigenous communities should not have to bear the burden of leading searches and investigations, many have taken on this role in accordance with their Sacred responsibilities and Indigenous laws to find the children and protect the unmarked burials. As a result, it is centrally important that Indigenous communities determine who conducts the technical, forensic investigations and which experts they seek out for guidance. International organizations and experts can have an important role should the communities desire to seek them out for assistance. Any forensic specialists and organizations must demonstrate respect and care for the Indigenous laws, protocols, processes, and beliefs relating to the death and funerary practices of the affected communities. Trust between those conducting the exhumations and the affected families and communities is essential.
- **Providing full and sustainable funding to communities searching for their missing and disappeared children:** The federal government must provide full, sustainable, and accessible funding to all communities for Indigenous-led efforts to investigate the whereabouts, identities, and fates of the children; to repatriate and rebury remains if communities choose to do so; and to protect burial sites in accordance with Indigenous laws. Doing so is not an act of generosity or benevolence; it is an obligation.

Experimentation and Other Atrocities Against Indigenous Children

> The first year I went ... was in 1960, I was hungry all the time. That's one of the things I remember: the constant hunger.
>
> — Vincent Daniels, Survivor of St. Michael's Indian Residential School, Saskatchewan[86]

Many of the missing and disappeared children who are buried in unmarked graves died because of the extreme and poor conditions at Indian Residential Schools. In addition to the overcrowding, inadequate ventilation, and lack of access to appropriate health care, food deprivation was widespread. This lack of nutrition then became the basis for medical experimentation on the children, which was another violation of international law.

Food Deprivation at Indian Residential Schools

The Internationally Protected Right to Food

International law recognizes a right to food. Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (*Covenant on Cultural Rights*) recognizes the right of all people to adequate food and the right to be free from hunger, among other rights.[87] Canada ratified the *Covenant on Cultural Rights* in 1976 during the operation of the Indian Residential Schools. The right to adequate food is an individual right. It is also a collective right of Indigenous Peoples under the *UN Declaration*. Unfortunately, this international obligation has not yet been implemented into Canadian law.

The intentional deprivation of food to cause death and destruction of groups can be an act of genocide.[88] It was used in Ukraine in the early 1930s, commonly known as the Holodomor, which can be translated as "death by hunger,"[89] and, more recently, in the genocidal campaign against the people of Darfur in Sudan.[90] Food deprivation and starvation were key strategies of settler colonialism and used to attack and control Indigenous Peoples. The Canadian government refused to provide food and other rations in order to pressure Indigenous Peoples into signing Treaties,[91] to forcibly relocate Indigenous Peoples to facilitate White settlement,[92] to quell protests,[93] and to physically or sexually abuse and exploit Indigenous women.[94] In some instances, government officials withheld food rations from families in order to coerce parents to send their children to Indian Residential Schools.[95]

At the Indian Residential Schools themselves, hunger and malnutrition were common. While some institutions were better than others at providing sufficient food, the TRC concluded that, for the vast majority of the years that Indian Residential Schools operated, children were not fed adequately.[96] According to Survivor testimony and archival evidence, "children who attended Canada's Indian Residential Schools experienced chronic undernutrition characterised by insufficient caloric intake, minimal protein and fat, and limited access to fresh

produce, often over a period of five to ten years."[97] In some instances, the food provided to children was itself lethal. Evidence indicates that children at the Blue Quills Indian Residential School in Alberta were given tainted, unpasteurized milk to drink. This made them vulnerable to contracting tuberculosis and led directly to some deaths of children, sometimes within just weeks of their arrival at the institution.[98]

The foundational cause of hunger and malnutrition was the severe underfunding of the system by the federal government. The TRC found that, during the entire operation of the Indian Residential Schools, "[t]he government never adequately responded to the belated discovery that the type of residential school system that officials had envisioned would cost far more than politicians were prepared to fund."[99] The TRC also found that the funding for Indian Residential Schools was, "always lower than funding for comparable institutions in Canada and the United States that served the general population."[100] It concluded that:

> The federal government knowingly chose not to provide schools with enough money to ensure that kitchens and dining rooms were properly equipped, that cooks were properly trained, and, most significantly, that food was purchased in sufficient quantity and quality for growing children. It was a decision that left thousands of Aboriginal children vulnerable to disease.[101]

The results of the lack of sufficient nutrition on the children's health were predictable and well known: suffering, illness, and death by way of compromised immune systems and exposure to disease.[102] Although the federal government knew that its policies were fatal, it did nothing to change them.[103] Throughout the history of the Indian Residential School System, those who witnessed first-hand the poor conditions in these institutions and who reported them to government authorities were ignored or even penalized for speaking out.[104]

Experimentation on Children

Hundreds of Indigenous children were subjected to experimentation at Indian Residential Schools.[105] The TRC found that these experiments included nutritional experiments, the testing of vaccines, pharmaceutical testing, as well as other experiments related to extrasensory perception, bedwetting, fingerprints, and hemoglobin blood counts.[106] In most cases, the TRC found no evidence of parental consent.[107] These experiments were conducted primarily for the benefit of the social and economic well-being and health of non-Indigenous people, organizations, and governments as well as for the experimenters themselves. The terrible truth is that the federal government's food deprivation policy implemented by those

running the Indian Residential Schools was used to justify the nutrition experiments on the children; in these experiments, malnutrition was not a harm to be remedied but a "baseline" for research conducted to protect the White settler population.[108]

As Samir Shaheen-Hussain notes, "the knowledge that was gained through such experiments throughout most of the first half of the twentieth century benefited the Canadian government, medical researchers, and the settler population first and foremost."[109] Nutrition experiments were carried out by eminent researchers, including a head of the federal Department of Nutrition Sciences and a physician from SickKids hospital in Toronto. In some cases, children were intentionally deprived of nutrients for extended periods, either to create a "placebo group" or to establish a baseline for later experimental interventions.[110] The research was only possible because the Indigenous children were seen as expendable. As medical practitioners have recently pointed out, what is especially striking about the experiments is that they, "were performed among individuals who were already marginalized and vulnerable. No one was looking out for the best interests of these research subjects. They had no voice."[111]

International Legal Implications of the Experiments on Indigenous Children

The experiments conducted on the children violated numerous international laws and principles:

- The right to be free from torture or other cruel, inhuman or degrading treatment is protected under the *Universal Declaration of Human Rights* (*Universal Declaration*) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Convention against Torture*), both of which Canada acceded to. The *Convention against Torture* applies to all people, including medical and health officials, and emphasizes that the training of medical professionals must include education and information regarding the prohibition of torture.[112]

- Article 7 of the *International Covenant on Civil and Political Rights* (*Covenant on Political Rights*), to which Canada is a signatory, confirms that non-consensual medical and scientific experimentation is a method of torture and is a violation of rights.[113]

- Article 25 of the *Universal Declaration* protects the right to health. According to the UN's Office of the High Commissioner for Human Rights, the right to health includes the right to be free from non-consensual

medical treatment, such as medical experiments and research or forced sterilization and to be free from torture and other cruel, inhuman or degrading treatment or punishment.[114]

- Under Article 12 of the *Covenant on Cultural Rights*, Canada is also obligated to, "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[115]
- Under the *International Convention on the Elimination of All Forms of Racial Discrimination*, Canada committed to provide everyone, without distinction as to race, colour, or national or ethnic origin, with equality before the law, including in the provision of public health, medical care, social security, and social services.[116]
- Article 9(1) of the *Covenant on Political Rights* protects the right to liberty and security of the person.[117]

These experiments also violated the *Nuremberg Code*, a set of ethical standards for research that was developed in response to Nazi experimentation on human subjects.[118] This is not only apparent, most flagrantly, in the failure to obtain voluntary and informed consent but also in the serious harms the experiments caused to the children. Indeed, researchers admitted that, in some experiments, at the request of federal officials, medical care was withheld from the children who were part of the control groups to protect the integrity of the experiment's results.[119]

Some of these international instruments came into effect after the experiments and cannot be applied retroactively. However, even if it is not possible to bring forward legal cases at international courts or human rights bodies for the harms committed against Indigenous children at the former Indian Residential Schools and other associated institutions, the language and logic of human rights provides an important lens through which to consider the atrocities committed against the children both through the deprivation of food and through medical experimentation. It is therefore important to call these experiments what they were: a form of torture and cruel, inhuman, and degrading treatment of Indigenous children.

There has been some belated movement to acknowledge the harms caused by Canadian medical professionals and organizations against Indigenous people. This includes a 2023 apology from the College of Physicians and Surgeons of Manitoba for its historical and ongoing role in providing or refusing to provide care due to the Indigenous-specific racism of their doctors and administrators.[120] In general, however, doctors, nurses, medical researchers, and medical institutions who perpetrated medical colonialism against Indigenous people and children have escaped accountability. Further research, inquiry, and investigation is needed to reveal

the full scale of the experiments on Indigenous children at various institutions. Only by revealing the full truth and holding individual perpetrators, medical institutions, and governments accountable can justice be realized.

THE SECOND ELEMENT OF A REPARATIONS FRAMEWORK: IMPLEMENTING INDIGENOUS LAWS AND DECOLONIZING THE CANADIAN LEGAL FRAMEWORK

Upholding and Revitalizing Indigenous Laws

> In discussing why unmarked graves and missing children is important, we need to recall that we have traditional law that tell us what to do. And they say the most difficult is when a child's Spirit leaves, [and] is called home.
>
> — Dr. Chief Wilton Littlechild, Survivor, former TRC Commissioner[121]

Every society has a Creation Story, founding constitutions, and original commitments that help members of those societies determine how to live with integrity and how to get along with others, both within their own society and with other societies. Indigenous Peoples, like all societies, have developed distinct laws, legal systems, protocols, and processes that have served them to do this effectively for millennia. Survivors, Indigenous families, and communities working to find the missing and disappeared children and unmarked burials are applying these Indigenous laws to guide their search and recovery efforts.

Indigenous laws are central to how Indigenous Peoples imagine and manage themselves both collectively and individually, and they are a fundamental aspect of self-determination. As sovereign Nations, Indigenous Peoples continue to create, implement, and abide by distinctive Indigenous laws, protocols, and processes that have been developed and adapted since time immemorial to reflect their own cultural values and meet their own community needs.

There is a significant diversity among Indigenous Nations in what is now known as Canada. Every Indigenous Nation has its own laws, legal systems, protocols, and processes that reflect their unique relationships with Creator, each other, and their territories.[122] The laws of diverse Indigenous Nations help people make decisions, work through conflicts, resolve problems, and respond to social needs. Indigenous laws also include funerary and burial protocols and practices, including rights and obligations in relation to the care of the deceased's Spirit and to the lands where their burials are located.

Within Indigenous societies, certain people are entrusted with learning, holding, and sharing Indigenous legal knowledge. These individuals are most often Elders and Knowledge Keepers who have been trained for years and have been recognized within their community as having earned the recognition and authority to be referred to with these titles.[123] Indigenous legal knowledge may also be held collectively; in many instances, the different knowledge of many Elders and Knowledge Keepers, when combined, can provide a way forward for difficult decisions or to resolve disputes.[124] There are Elders and Knowledge Keepers entrusted with the knowledge to help people journey from the human world to the Spirit world to rest with their ancestors. These Elders and Knowledge Keepers can provide important guidance and support to families and communities who have been looking for their loved ones, both while they may still be missing or disappeared and after they are found.

Assimilationist policies in Canada included explicit legislated efforts to suppress, undermine, and replace Indigenous legal processes, including Indigenous governance practices and structures.[125] Policies such as the Indian Residential School System have undermined the ability to transmit Indigenous laws orally from one generation to the next. Indigenous Peoples have always resisted and ensured the survival of their Indigenous legal systems, despite the damaging effects of these assimilationist policies, and Indigenous communities are actively working to revitalize their Indigenous laws.[126]

The right of Indigenous Peoples to uphold and apply their Indigenous laws, legal systems, protocols, and processes is protected and affirmed by international law through various mechanisms and agreements, including the *UN Declaration*. These rights include the right to self-determination, the right to autonomy or self-government in matters relating to internal and local affairs, the right to maintain and strengthen distinct political, legal, economic, social, and cultural institutions, and, finally, the right to promote, develop, and maintain institutional structures and distinctive customs, spirituality, traditions, procedures, practices, and juridical systems and customs.

Applying Indigenous Laws and Legal Principles to Search and Recovery Work

Indigenous laws are being applied and adapted by Survivors, Indigenous families, and communities to govern all aspects of the search and recovery of the missing and disappeared children and unmarked burials, including:

1. Gathering Survivors' truths and testimonies in respectful, culturally relevant, and trauma-informed ways;

2. Designing processes to search records and to protect and care for the data and information gathered;
3. Planning and implementing the ground searches;
4. Sharing knowledge within and among affected communities about the status and results of searches; and
5. Hosting and participating in commemoration and memorialization activities and ceremonies where unmarked burials are located.

In some instances, this requires the application of existing Indigenous laws, such as upholding obligations to protect and respect the burials of one's ancestors. In other cases, it requires thinking through existing legal principles and adapting them to apply to new and arising circumstances. A review of the knowledge shared by communities reveals the following Indigenous legal principles that are being applied to further this Sacred work. This is a non-exhaustive list and will evolve as searches continue across Turtle Island.

1. **Search and recovery work is Sacred:** Life and death are Sacred, as are the laws themselves, which include Natural Laws from the Creator.
2. **Indigenous ceremonies are integral to the search process:** Ceremonies are a central part of Indigenous legal systems and are conducted by Elders or Knowledge Keepers before, during, and after the sharing of Indigenous teachings, oral histories, and legal knowledge. Indigenous ceremonies are being incorporated by Survivors, Indigenous families, and communities across Turtle Island as they search for the missing and disappeared children.
3. **Truth-finding, truth-telling, and witnessing are obligations under Indigenous laws:** Truth comes before reconciliation and is inherently linked to justice. The full truth of what happened to the missing and disappeared children, who they are, where they are buried, and why there are so many unmarked burials must be revealed. Truth-telling will restore dignity and identity to those who have suffered grievous harms, document the truths of those who have suffered oppression, prevent governments from denying the wrongdoing that occurred, raise societal awareness of the legacy of injustice, and create conditions favourable to healing for Survivors. Promoting the remembrance of tragedies will reduce the likelihood of recurrence.

4. **Children must be cared for in life and after death:** The bodies and Spirits of Indigenous children must be treated with honour, respect, and dignity. Survivors, Indigenous families, and communities have consistently emphasized their responsibilities under Indigenous laws to find the missing and disappeared children, to identify them, and to protect their burials.

5. **The lands where burials are located must be protected:** Indigenous laws reflect the relationships and responsibilities that Indigenous Peoples have with their ancestral territories. Indigenous laws are inherently connected to these lands.

6. **Relationships, interdependence, and interconnectedness are central:** Relationships are central to Indigenous laws. They situate Indigenous people within Creation and establish, "expectations (what to expect of others) and obligations (responsibilities to others)."[127] Within Indigenous Nations, the creation of law is deliberative, occurring in relationship and discussion with others. Indigenous communities are facing many difficult decisions in the context of searching for and recovering the missing and disappeared children and unmarked burials. As a result, Indigenous laws and legal principles are being considered through relationships and discussions both within and between Indigenous communities to determine the best way forward.

7. **Responsibility must be taken for one's actions:** Taking responsibility requires both acknowledging and apologizing for one's role in the harm caused, developing empathy for the person harmed, and being accountable for repairing the harm to the extent that is possible. This has important implications for the federal government and the churches.

8. **Everyone must be taken care of:** This requires taking care of each person involved in the search process spiritually, mentally, emotionally, and physically as well as caring for all Indigenous people across Turtle Island. The bodies and Spirits of the missing and disappeared children must also be taken care of.

9. **All views must be respected in decision-making:** Indigenous legal systems include decentralized decision-making processes where all community members' views are invited and respected. Survivors, Indigenous families, and communities may hold different views about the appropriate form of

reparations, including decisions relating to the exhumation and repatriation of the children. Indigenous laws, protocols, and processes have proven to be effective methods in resolving conflicts within and between communities.

10. **Time must be taken to do this Sacred work right:** Indigenous laws include processes for quiet reflection, respectful silence, and internal community discussions and deliberations in order to ensure that all views and interests are considered, and decisions are made in a way that upholds Indigenous laws. Those searching for the missing and disappeared children and unmarked burials have emphasized the importance of taking the time needed to make sure it is done right and have affirmed their long-term commitment and dedication to this process.

11. **Responsibilities to past, present, and future generations:** In Indigenous legal thought, past, present, and future are not separate but are interconnected.[128] Those living in the present have responsibilities both to past generations and to future generations of human and other-than-human entities. Communities have a legal responsibility under Indigenous laws to ensure that the children who died receive proper ceremonies and burials and that their burial sites are protected. Responsibilities also exist to complete the search and recovery process so that the burden is not passed onto future generations.

12. **Indigenous Peoples have a responsibility to collaborate and support each other:** Searching for and recovering the missing and disappeared children is a common vision and purpose that unites all Indigenous communities. Since children were taken from so many different Indigenous communities, there is a need for collaboration and knowledge sharing across Indigenous Nations.

13. **Indigenous sovereignty, autonomy, and non-interference must be respected:** Indigenous legal principles emphasize respect for the autonomy of Indigenous Peoples and non-interference in the internal affairs of a Nation by an outside Nation. Survivors, Indigenous families, and communities have made it clear that they are sovereign and autonomous and best placed to determine, in accordance with their laws and protocols, what is needed to ensure the respectful and culturally appropriate treatment of the burial sites of the missing and disappeared children.

The Lack of Legal Protections for Indigenous Burial Sites under Canadian Law

> We were given the sacredness of the land. We must take good care of it, as our future generations will depend on it. As well, we were given that gift and that responsibility by Kitche Mando and we must respect this gift and the life Kitche Mando has given us.... The White man stands on the graveyard of our ancestors who are underground. They were here first. This is a fact.
>
> — Elder David Tookate, Attawapiskat First Nation[129]

Honouring and respecting loved ones after death and providing dignified burials is a key concept shared across all societies. Committing indignities to burials and human remains is contrary to social norms, and prohibitions on doing so have been codified in rules and laws. In Canada, this is evident in the laws regulating burials and how bodies should be treated after death as well as the laws that criminalize the undignified treatment of a dead human body or human remains.[130] Canadian law also recognizes rights to bodily integrity after death—for example, people can make choices about how they should be buried and the treatment of their body after death.[131] There are also prohibitions on damaging, altering, or desecrating burials.[132] Unfortunately, these laws have not been equally applied or enforced to protect the burials of Indigenous people.

The desecration of Indigenous burials and the ongoing lack of legal protections for such burials is one form of the attempted dispossession and erasure of Indigenous Peoples. Indigenous burial sites generally, and especially in the context of the missing and disappeared children and their unmarked burials, are a constant reminder of the violence that is at the root of the creation of Canada. The failure to provide legal protections for Indigenous burial sites therefore advances both settler colonialism and settler amnesty in Canada.

For Indigenous Peoples, protecting and maintaining the burial sites of loved ones and ancestors is vital to upholding responsibilities to past, present, and future generations. Yet these sites are often under threat of destruction or desecration when they stand in the way of private landowners, corporate developers, public infrastructure, resource development projects, or the recreational activities of non-Indigenous people. Canada's ongoing failure to ensure that Indigenous burials and human remains are treated with respect and dignity, and its infringements on Indigenous Peoples' responsibilities under Indigenous laws to protect their Sacred burial grounds and cemetery sites, are an attack on Indigenous identity.

Canada's Failure to Protect the Burial Sites of Children Who Died While at Indian Residential Schools

The TRC concluded that failures of the federal government led to the unnecessarily high death rate of children taken to Indian Residential Schools and caused the practice of interring children in poorly maintained burial sites on institutional grounds or in nearby cemeteries.[133] Once the institutions closed, the federal government failed to adequately plan for the ongoing care and upkeep of the cemeteries or burial sites of the children.

Lack of Legal Protections for the Unmarked Burials at the Former Site of the Brandon Indian Residential School

The Brandon Indian Residential School was located on the Assiniboine River in southwestern Manitoba on Treaty 2 territory. It operated from 1895 to 1972.[134] There were several cemeteries associated with the institution. The first of these contained at least 51 children from 12 Indigenous communities at the time when no new burials were to be added in 1912. In 1921, the cemetery and the surrounding land was leased to the City of Brandon.[135] As part of the land-clearing efforts, the grave markers were removed and the property became Curran Park, a municipal park with a swimming pool and picnic grounds. In the 1960s and 1970s, Alfred Kirkness, a Survivor of the Brandon Indian Residential School, worked tirelessly to recover the location of the cemetery and was able to identify some of the children who died and were buried there.[136]

As a result of Kirkness' work, the Indigenous Friendship Society, the Brandon Girl Guides, and the Rotary Club collaborated to protect the cemetery with a fence and placed a commemorative cairn that was maintained by the Brandon Girl Guides. However, the site was not recognized as a cemetery or heritage space under provincial law, and no restrictions were placed on the land title to indicate that the property includes the cemetery site and burials of children.

In 2001, the City of Brandon sold the property, and it is now privately operated as Turtle Crossing Campground RV Park. Sometime between 2005 and 2010, the fence and cairn were removed, and RV camping spots were created in the cemetery site and on top of the children's burials. Sioux Valley Dakota Nation, the closest First Nation to the former Brandon Indian Residential School, has been attempting to access and protect this Sacred site for over a decade. Although the Nation provided the landowner with archival evidence of the cemetery and requested

A photo from May 1964 provided by Alfred Kirkness to the Office of Indian Affairs showing fallen wooden crosses that marked individual graves at the site of the former Brandon Indian Residential School cemetery, which became the city-owned Curran Park. Miscellaneous Land Matters – School Land – General, file 501/36-4, part 4, box 8, RG216, RG10, Library and Archives Canada.

SECOND SECTION

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SECOND SECTION

Mystery Of Graves At Curran Park Is Solved

The location of some graves at Curran Park has been determined, solving a lengthy mystery.

Determining the graves' location is almost the final step in a struggle by one man, Al Kirkness, an employee of the Dominion Experimental Farm.

He has been trying for years to have the graves marked and the memory of those buried there treated with the proper respect.

Buried in the area, about 200 yards southwest of the swimming pool, are students who were attending the Indian Residential School in the early 1900s.

The graveyard was eventually replaced by another towards the top of the hill northwest of the road. The graveyard in what is now Curran Park was not looked after, and the property was given to the federal department of agriculture by the department of Indian affairs as part of the experimental farm.

In 1921, the area was leased to the city of Brandon for 99 years. It was not until 1959 that it was actually used for recreational purposes.

Mr. Kirkness who attended the school as a child, watched with concern while Curran Park was developed. At one point he thought a camp kitchen had been built over the grave site.

Mr. Kirkness wrote two letters to The Sun. He felt the Indian children should be treated with the same respect accorded other people.

Finally, last Friday, city manager M. J. Shelley, accompanied by Dr. J. E. Andrews, research director of the experimental farm, went to Curran Park. There, Mr. Kirkness and C. H. Waldon, the experimental farm foreman, marked the location of the graves with four white stakes.

What remains now, said Dr. Andrews, is the problem of how to mark the location appropriately. "We've defined the area," he said, "now, perhaps we can put a clause into the lease specifying that the city should mark it."

The location, he said, contains no headstones or other markers. Some headstones, he indicated, had been removed when the city was cleaning the area for the park.

Dr. Andrews is open to suggestions as to how the graves might be suitably marked. "Maybe one of the service clubs around town would like to erect a cairn," he said.

At least Mr. Kirkness has accomplished one thing. The area is marked, and will probably be enclosed this summer, before vacationing families begin picnicking in the riverside park.

"Mystery of Graves at Curran Park Is Solved," Brandon Sun, June 5, 1963.

the support of federal and provincial governments, the property remained unprotected and inaccessible to the Nation until the landowner applied for a permit to redevelop the campsite in 2018. This led to the creation of a working group and an investigation that identified 56 potential unmarked burials on the campgrounds. Despite the confirmations of these burials, camping was not restricted at the site until 2021, after the public confirmation of unmarked burials at the former Kamloops Indian Residential School.

> The Sioux Valley Dakota Nation has been requesting the assistance of the municipal, provincial, and federal governments to access and protect these unmarked burials. In October 2022, the Sioux Valley Dakota Nation planned to do a second survey of the site, but the landowner denied access.[137] Former Chief Jennifer Bone of the Sioux Valley Dakota Nation highlighted the barriers created by the lack of legal mechanisms to access and protect this site. She said, "We continue to advocate. We're not giving up … you know how important it is to not only the Sioux Valley Dakota Nation but to all Indigenous people throughout the country.… The inability to access private property … where our loved ones are buried. It's a huge issue."[138]

Indigenous Community Concerns about the Lack of Protection of Indigenous Burial Sites under Canadian Law

Over the decades, Indigenous leadership and communities have identified many concerns with the lack of legal protections for Indigenous burial sites. These include the following:

- The lack of equal respect and protection afforded to Indigenous burials as compared with those of non-Indigenous people;
- The objectification of Indigenous human remains, which are treated as property, the object of scientific study, or as an inconvenience;
- The disrespectful terminology used in legislation and by archaeologists to describe Indigenous burials and human remains;[139]
- The failure to report the finding of Indigenous burials and associated artifacts due to the financial implications for private or corporate landowners;
- Legislative mechanisms that are often designed to expedite development and decision-making that may be heavily influenced by pressure from private landowners and developers;
- The fact that Indigenous communities are notified and consulted too late in the process and have no decision-making authority in provincial legislative and regulatory frameworks to protect burials sites located on Crown or private lands; and

- Insufficient monitoring and enforcement of legal protections that do exist, including:
    - Few prosecutions for crimes relating to the desecration of Indigenous burial sites;
    - Failure to ensure compliance with permit conditions;
    - Insufficient legal mechanisms to compel professionals, including archaeologists and non-Indigenous organizations, such as museums, to release human remains and artifacts taken from burials; and
    - Government reluctance to use legal powers that exist to delay or stop development on private or corporate lands; and
    - Insufficient notice requirements, engagement, and involvement of Indigenous communities when burial sites or human remains are located.

The Lack of Protection of Indigenous Burial Sites Creates a Conflict of Laws

The current Canadian legal framework places Indigenous people and communities in a conflict of laws whenever Canadian laws prevent them from upholding their responsibilities under Indigenous laws. Some examples of this include:

- Disrupting the ability of families and those with specialized knowledge and responsibilities to access sites and care for burials and maintain the balance between the living and the Spirits of the ancestors;
- Failing to ensure that items buried with their loved ones and ancestors are kept and protected together with the remains; and
- Putting Indigenous community members who monitor, patrol, and assert their sovereignty to protect their burial sites in potential danger, which may lead to disputes with developers, private landowners, governments, and police.

Indigenous communities often appeal to various levels of government, corporations, and private landowners to respect the burials of their ancestors and use the limited legal means available under Canadian law to protect these Sacred sites. Minnawaanagogiizhigook (Dawnis

Kennedy) explains that, "Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly displaced by Canadian law, or as existing only within and according to the terms set by Canadian law."[140] This disrespect for Indigenous laws places Indigenous Peoples in the impossible situation of determining how to best protect their Sacred burial sites when there is no adequate avenue under Canadian law to do so. After exhausting political and legal avenues, however, Indigenous people face difficult decisions about whether to engage in direct action to prevent the desecration of Indigenous burials.

Unfortunately, disputes about accessing, protecting, and returning the lands where Indigenous burial sites are located have a long history in Canada. The conflicts over Indigenous lands in Oka in 1990 and Ipperwash Park in 1995 are part of a five-hundred-year history of Indigenous resistance that began when European settlers first arrived. In both cases, Indigenous people peacefully reoccupied and blocked access to lands to assert their sovereignty over their territories. They did so to uphold their responsibilities under Indigenous laws to protect their lands, both of which included Sacred burial sites. Two key reports came out of these conflicts: the *Report of the Royal Commission on Aboriginal Peoples*,[141] which was a direct response to the Oka Resistance, and the *Final Report of the Ipperwash Inquiry*,[142] following a provincial public inquiry. Both reports highlighted the need to repair relationships between the various levels of governments and Indigenous communities and recommended legal reforms to adequately protect and respect Indigenous burial sites.

Royal Commission on Aboriginal Peoples' Recommendations Relating to Indigenous Burial Sites

The Royal Commission on Aboriginal Peoples (RCAP) made several recommendations regarding Indigenous cultural and heritage sites and burial grounds that were never implemented. These include:

2.4.58

> Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing:
>
> (a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;

(b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);

(c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and

(d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include:

(a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

(b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and

> (c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

The Ipperwash Inquiry found that both the provincial and federal governments were aware of the Kettle and Stony Point community's concerns over the lack of protection or return of their Sacred sites but had not taken action to negotiate a resolution or protect the sites.[143] It also found that the police officers did not have accurate information, nor did they understand that the Stony Point community members were standing up to protect ancestral burial grounds until the Ontario Provincial Police (OPP) was deployed into the park on September 6, 1995.[144] The Ipperwash Inquiry concluded that confrontations over Indigenous burial sites are foreseeable and that the best way to avoid conflicts relating to Indigenous burial sites is to engage Indigenous people in the decision-making process.[145] It also noted that including Indigenous people in decision-making processes is consistent with the honour of the Crown.[146]

There are numerous other examples of the desecration of Indigenous burial sites in Canada, including:

- In 1905, the federal government expropriated the entire Fort William First Nation village in Ontario as well as land totalling 648 hectares in order to allow the Grand Trunk Pacific Railway to build a railway terminus grain elevator. The community was evacuated, buildings were torn down, and the First Nation's burial site was exhumed and moved to a new location. The grain terminus was never completed, and the Grand Trunk Pacific Railway went bankrupt. The Canadian government later granted the land it had expropriated to the Canadian National Railway.[147]
- In 1919, the City of Winnipeg completed an aqueduct that would provide water directly to the city, but it required the relocation of the Shoal Lake Reserve from the mouth of the Falcon River to a man-made island. The aqueduct flooded the community's traditional burial grounds and isolated the community from the mainland.[148]
- In 1929, the Hydro-Electric Power Commission of Ontario (Ontario Hydro, which is now Hydro One) built a dam outside Lac Seul First Nation's reserve at Ear Falls in northern Ontario, which is covered by

Treaty 3. The water rose over several years and flooded approximately 17 percent of Lac Seul's reserve land (11,304 acres), desecrating the graves in the community.[149]

- In 1938, Ontario Hydro constructed a dam on the Kenogami River, which caused flooding and damaged 16 graves of community members of Ginoogaming First Nation on the shores of Long Lake.[150]
- In 1952, Alcan (now Rio Tinto) completed construction of the Kenney Dam on the Fraser River in British Columbia to generate electricity to power its aluminum smelters.[151] The Kenney Dam forced members of the Cheslatta Carrier First Nation from their homes to land outside their traditional territories with only a two-week notice.[152] The Cheslatta understood that any of the graves at risk of being flooded would be moved to higher ground and were also assured that most burials would not be affected by the higher water levels.[153] Alcan moved only two graves from one of the community's cemeteries and then flooded the rest of the burials there and placed a plaque to memorialize the Cheslatta community members whose resting places are now underwater.[154] A second community burial ground, which was considered above flood level, was flooded in 1957 when a spillway from the dam was opened.[155] This washed many graves away and scattered coffins and skeletal remains in and around Cheslatta Lake. More recently, in 2015 and 2017, high water further disturbed additional burials. Community members continue to find bones along the lakeshore.[156]
- In 1955, the province of Ontario entered a lease with the Hiawatha First Nation to establish the Serpent Mounds Provincial Park, which is named for the burial mounds on the property.[157] While the province managed the park until 1995, programming included an open-air exhibit and educational programming that put the excavated Indigenous burials on display to the public.[158]
- In 1976, Dr. Walter Kenyon, a curator and archaeologist affiliated with the Royal Ontario Museum, began an excavation of unmarked Indigenous burials that were discovered during construction in Grimsby, Ontario.[159] Kenyon was arrested by Six Nations community members, but, later, he and other archaeologists published the results of the Grimsby cemetery excavations, including images of Sacred objects and burials in the process of excavation.[160]

Burial site closed for discussions

GRIMSBY — All activity has stopped at an Indian grave site to give archeologists and Indians a chance to thrash out differences over its excavation.

Dr. Walter Kenyon, who is overseeing a dig at the 17th century Neutral common grave, has agreed to stop digging and close the site to visitors until Monday.

Dr. Kenyon, who met representatives of the Union of Ontario Indians, said: "We have reached a good workable relationship with a concerned Indian community."

A group of Indians moved in on the site Tuesday and made a citizen's arrest of Dr. Kenyon under the Canadian Criminal Code and Ontario Cemeteries Act. The Royal Ontario Museum archeologist was accused of treating human remains with indignity and disrespect.

Del Riley of the Union of Ontario Indians, who made the arrest, said the meeting with Dr. Kenyon was positive and productive.

"We both agreed we'd approach this thing reasonably," he said.

Nevertheless, some misunderstandings seem to have emerged from the meeting.

Dr. Kenyon later told reporters that he would continue to excavate Indian remains, but return the bones to Indians for reburial.

Mr. Riley, however, said Indians would never agree to more excavations.

"That is one thing we consider non-negotiable. We don't want the bones disturbed in any manner because they were buried for religious reasons at this particular spot," he said.

However, he said Indians may agree to an archeological procedure called "skimming." This would involve removing top soil to find the location of burial pits.

Mr. Riley, who said he will discuss the proposal with memb ers of the 54-band union, says skimming would allow archeologists to determine the limits of the burial site without disturbing human remains. An Indian observer would be posted at the site while the procedure is carried out.

Mr. Riley said Dr. Kenyon has promised to return human remains already excavated for reburial.

After the limits of the cemetery are determined, Mr. Riley would like to see it set aside as a historic site.

"It's a golden opportunity for the town of Grimsby. We'd like people to know more about our history. We want to work together so everybody is satisfied and no one offended."

Mr. Riley, an Indian Act researcher, added: "We'd be more than pleased to write up the history of the Neutrals. We have experts in this area too."

Mr. Riley stressed his quarrel is not so much with Dr. Kenyon as the provincial government which, he feels, doesn't have adequate legislation to protect Indian burial grounds. He hopes new laws will come out of the current dispute.

Indian representatives will meet Minister of Culture and Recreation Bob Welch on Monday to discuss the problem. Mr. Welch's department issues permits for archeological digs.

Meanwhile, calm has returned to the site, which had been buzzing with visitors since the dig started last month.

The site, which is surrounded by a snow fence and partly covered with a carnival-type tent, has been closed to the public. Most of the archeologists have returned to Toronto, but at least one person will remain to assure the site is not abused. There has already been one incident of minor vandalism.

Developer Ed Robinso n of Hamilton, who owns the land, said he is not concerned about the political dispute. He feels the problems should be resolved by next spring when he plans to start building a subdivision on the site.

About a historical site, Mr. Robinso n said: "If they want the land, they'll have to pay for it. It's valuable land, I had to pay for it."

"Burial Site Closed for Discussions," *Hamilton Spectator*, November 5, 1976 (Material republished with permission from Torstar Corporation).

- In the 1990s, Kwikwetlem [kʷikʷəƛ̓əm] community members began to observe seasonal flooding at the community's cemetery. George Chaffee has been working to determine the cause of the flooding and how to protect the burial sites since the late 1990s. He clarified that, historically, the Kwikwetlem had buried their ancestors in the mountains.[161] However, after being forced onto reserves in the mid-1800s, the community had to establish a new cemetery and chose a piece of land that the Elders indicated would not flood even if water levels in the Coquitlam River rose.[162] The first burial occurred in that cemetery in 1881.[163] In 1904, a dam was constructed on the Coquitlam River, and a second dam was built within ten years. Hydrology research confirmed that damming the Coquitlam River, urban sprawl, and climate change have combined to alter the water pattern of the river, causing the flooding.[164] In 2023, the threat to the burials is ongoing, and the community continues its work to protect these Sacred sites.[165]

- In the early 1990s, members of the Saugeen Ojibway Nation occupied a residential lot in the city of Owen Sound to protect and reclaim an Anishinaabe burial ground.[166] The lands where the burial ground was located were initially reserve lands set out in accordance with the Crown's treaty obligations contained in the Treaty of 1857. Subsequently, a portion of reserve lands were surrendered to the Crown, and, in a meeting relating to this, it was made clear by Saugeen Ojibway Nation that the burial grounds were not

to be disturbed.[167] In 1903, the Department of Indian Affairs sold these lands, and two houses were built on top of the burials.[168] Over the years, graves were desecrated and looted, artifacts and remains removed and sent to museums.[169] Soil from the site was sent to a quarry mill to fabricate bricks that were later used to construct many buildings in Owen Sound and the surrounding community.[170] As a result of the Nation's advocacy, the lands were returned to the Saugeen Ojibway. The two houses were carefully removed from on top of the burial ground, and several graves were found disturbed just underneath the foundation of one house.[171] The site is now protected, and a memorial has been placed to commemorate those buried there.[172]

Dr. Walter Kenyon examines some of the artifacts found at the Grimsby site. —Picture by Paul Legal

Indian chief asks Ottawa to intervene at grave dig

"Indian Chief Asks Ottawa to Intervene at Grave Dig," *Hamilton Spectator*, November 18, 1976 (Material republished with permission from Torstar Corporation).

- In July 1998, Robert Booth, a cottager in Sauble Beach, was one of very few people ever charged under the Ontario *Cemeteries Act* with failing to report the discovery of, and unlawfully disturbing, a burial site on his property.[173] A forensic anthropologist confirmed that the burial was a traditional burial of a, "young, pre-historic native woman."[174] The charges were dismissed, and the Crown agreed not to present any evidence against Booth if he donated the sum of $1,000 to assist Saugeen First Nation with the reburial costs.[175]

As seen in these examples, various reasons are given to rationalize the desecration of Indigenous graveyards and burial sites, including forced relocation; public infrastructure projects, including hydroelectric development; and private and corporate land development, including for recreational activities.

The Gaps and Complexity of the Canadian Legal Framework

Within the Canadian legal framework, federal, provincial, territorial, and municipal laws impact access to, and protection of, Indigenous burial sites. The division of powers affects the legal protections for Indigenous burial sites since they may be located on federal, reserve, provincial, municipal, or privately owned lands, and, therefore, different legislative regimes apply depending on their location.

Federal jurisdiction: federal jurisdiction over the lands where burial sites may be located is limited, as matters related to "property" are generally under the constitutional jurisdiction of the provinces. Lands under federal jurisdiction include First Nations reserves, national parks, lands owned by federal government departments, and lands where a federally regulated development project is proposed. There is no single statute that governs burial sites on federally controlled lands. Some departments have specific policies for responding to archaeological discoveries on the federal lands for which they are responsible, whereas for other departments, it is up to the federal manager to decide how to respond.[176] Burial sites can be nominated for federal historic site designation. Such designations are symbolically useful and might garner public and political support to protect the sites; however, they do not provide any legal protections.[177] Reserve lands are federal lands and are governed under the *Indian Act*.[178] There are explicit provisions in the *Indian Act* to prohibit the desecration of burial grounds that are located on reserves.[179]

Provincial and territorial jurisdiction: provincial and territorial laws regulate cemeteries and burial grounds and the treatment of human remains that are exhumed purposefully or accidentally disinterred. These regimes provide provincial ministers, government officials, and private landowners with significant power and discretion over what happens to Indigenous burials and burial grounds. Most jurisdictions legally distinguish between burials located in licensed cemeteries and those recovered on other lands. Once recognized or registered as a cemetery, provincial and territorial legislation generally provides strong legal protection of these sites. This includes restrictions on the sale or transfer of the land and requirements to ensure maintenance of the sites and records to facilitate public and/or family access and other regulations to preserve the dignity of the persons buried there.[180] It is important to note that, even where sites are designated as historic or heritage sites in relation to known Indigenous burial sites, provincial and territorial governments can issue permits to disturb or develop such sites. When human remains are uncovered outside registered cemeteries, there is a complex interaction between legislation governing coroners' and archaeological investigations.

Interim measures to access and protect sites: in situations where there are imminent threats to sites being searched for unmarked burials, there are interim measures available to access and protect sites, including stop-work orders and injunctions. For example, provincial heritage laws generally give ministers the authority to issue a stop-work order (also called a stop order) to temporarily halt activities to protect property that may be of cultural or heritage value. Another mechanism that exists in the Canadian legal system that could potentially protect the unmarked burials of the missing and disappeared children is a court-issued interim or interlocutory injunction. Such injunctions must be part of a broader legal action.[181] Interim and interlocutory injunctions can be ordered by the court to stop a party from doing something in order to, "preserve the existing state of affairs" while the parties go through legal proceedings to resolve a dispute.[182] Injunctions have been used as a tool by settlers to allow "developments" to proceed in the face of Indigenous opposition and as, "a tool of colonialism."[183] These measures are limited by political and judicial discretion that involves considering competing rights. They also only provide short-term protections for the sites. In some instances, Indigenous communities and those leading search and recovery work have been successful in having both stop-work orders[184] and injunctions applied to protect Indigenous burial sites generally[185] as well as sites being searched for the unmarked burials of the missing and disappeared children.[186]

Other legal mechanisms that create rights of access and impose limited protections: there are other legal mechanisms that Survivors and Indigenous communities might explore to gain access to privately owned sites where unmarked burials might be located. For example, easements are a "non-possessory" right that an individual or specified group can acquire through a voluntary agreement with a landowner to use their real property for a specific purpose, while the owner still holds the legal title for all other purposes.[187] Covenants are a legally binding agreement that puts specific limits on what a landowner can do on their property. Under common law, covenants can only be restrictive or negative to "run with the land," meaning that they can only create a limitation on the landowner, not an obligation to do something.[188] They are, however, limited in that they do not provide full protection of the sites, and they do not result in the lands being returned or transferred to Indigenous Peoples.

The Canadian legal framework was never designed to protect Indigenous burial sites. This is apparent when examining several key characteristics of this framework:

- **Non-Indigenous governments and professionals retain authority and discretion over the treatment of human remains and protection of burials:** the legal protections that exist often require an exercise

of discretion and judgment about the "value" and characterization of the burial site. These judgments are made through the lens of settler colonial law and often do not reflect or respect Indigenous laws, cultural protocols, or ceremonial practices.[189]

- **Governments are reluctant to use the limited legal powers that exist:** there is a lack of transparency and accountability to Indigenous Peoples regarding decisions about how Indigenous burial sites are defined as either archaeological, heritage, or cemetery sites. Where powers exist within legislation (such as stop-work orders), governments have been reluctant to interfere in land "development" activities, which in turn influences how Indigenous burial sites are defined.
- **Disincentives exist to reporting the findings of human remains and protecting burials:** private and corporate landowners are disincentivized from reporting human remains that may be unearthed and from providing access to the sites or protecting the sites. For example, property owners and developers may be required to pay for archaeological assessments if they disclose that human remains have been discovered on their property. Private and corporate landowners may also legally block access to their lands even in instances where there are suspected or known Indigenous burials.
- **Insufficient monitoring and enforcement mechanisms:** few people have been prosecuted for crimes relating to the desecration of Indigenous burial sites. There are limited legal mechanisms to compel archaeologists to return human remains and artifacts that they gather from these burial sites, even when they are being held in breach of their professional and contractual obligations.
- **Legal protections are triggered too late in the process:** it is often only after human remains are discovered or the shovels have hit the bones of the ancestors that legal protections apply.

The lack of legal mechanisms at the federal, provincial, and municipal levels has impacted the ability of Indigenous communities to access and protect sites of former Indian Residential School cemeteries across Canada.

The Canadian Constitution and Indigenous Burial Sites

Indigenous burial sites are still not protected even though constitutional protections were put in place in 1982 that could and should have been applied to protect them.

Section 35 and Aboriginal and Treaty Rights

Section 35 of the *Constitution Act, 1982*, provides constitutional protection to, "the existing aboriginal and treaty rights of the [A]boriginal peoples of Canada."[190] The term "[A]boriginal peoples" under section 35 is defined to include Indians, Inuit, and Métis Peoples within Canada.[191] The Supreme Court of Canada has identified reconciliation between Indigenous and non-Indigenous people as the "grand purpose" of section 35.[192] Under section 35, the court has acknowledged the unique constitutional position of "[A]boriginal peoples" within Canada, which is influenced by the following key concepts:

Fiduciary duty and the honour of the Crown: the government has a fiduciary duty to "[A]boriginal [P]eoples,"[193] which, "requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake."[194] Further, every aspect of the relationship between Aboriginal Peoples and Canadian governments must be governed by the, "honour of the Crown," which is, "the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[195]

Duty to consult and accommodate: the duty to consult and accommodate is a positive obligation on governments that must be fulfilled in all instances where it contemplates actions that may impact existing or yet-to-be-proven Aboriginal or Treaty rights.[196] This duty applies to federal, provincial, and territorial governments and cannot be delegated.[197] The duty to consult can include requirements on government to provide mechanisms and support, including financial assistance, for participation in consultation processes.[198] Where the government action may significantly and adversely affect section 35 rights, the government has a duty to accommodate. This requires taking steps to avoid irreparable harm or to minimize the impacts of the infringement of the rights."[199] This duty is aimed at, "seeking compromise in an attempt to harmonize conflicting interests" and requires, "good faith efforts to understand each other's concerns and move to address them."[200] If a breach of the duty to consult and accommodate is found, the court may suspend or quash the government's decision,[201] provide injunctive relief, order damages, or demand that appropriate

consultation and accommodation be carried out.[202] Unfortunately, in the context of Indigenous burial sites, this duty is often triggered only after Indigenous burials have been uncovered and desecrated.

Aboriginal rights: the Supreme Court of Canada has explained the purpose of section 35 as follows:

> What s. 35(1) does is provide the constitutional framework through which the fact that [Aboriginal Peoples] lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.... The [A]boriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.[203]

To prove an Aboriginal right, the Aboriginal community has the onus to prove that an activity is, "an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right."[204] "Distinctive" does not mean "distinct"—in other words, a practice, custom, or tradition like hunting, fishing, harvesting wood, or funerary or burial practices can still be considered distinctive even though all cultures have such practices.[205] Aboriginal rights are not to be interpreted as frozen in time, but, rather, "the nature of the right must be determined in light of present day circumstances."[206] Aboriginal rights recognized under section 35 must be framed in a way that is, "cognizable to the Canadian legal and constitutional structure."[207]

Aboriginal title: Aboriginal rights may also be proprietary rights in the form of Aboriginal title. Aboriginal title is a *sui generis* interest in land that arises due to the fact that Indigenous communities were living on the land prior to the assertion of British sovereignty.[208] Despite the fact that Aboriginal title is rooted in the pre-existence of Indigenous communities, the Supreme Court described Aboriginal title as, "a burden on the Crown's underlying title ... that crystallized at the time sovereignty was asserted."[209] The relevant time for proving Aboriginal title is the date of the assertion of Crown sovereignty, which varies across Canada.[210] Aboriginal title is a communal right and an exclusive right to the land itself.[211] Once established, Aboriginal title is constitutionally protected under section 35.

In the context of Indigenous burial sites, Aboriginal title provides the highest level of protection because the Indigenous Nation with confirmed Aboriginal title has constitutionally recognized jurisdiction over such lands. However, this only provides limited protections for Indigenous burial sites across Canada for three reasons: first, to date, only a few Indigenous

Nations, such as the Tŝilhqot'in Nation[212] and the Haida Nation,[213] have recognized and affirmed Aboriginal title in Canada; second, Aboriginal title rights can only be proven in areas where Indigenous Peoples who have occupied the territory prior to the assertion of Crown sovereignty have not entered into Treaties; and, third, Aboriginal title rights are not absolute, as they may be justifiably infringed by government.

Treaties: section 35 also protects Treaty rights that arise out of Nation-to-Nation agreements between the Crown and Aboriginal Peoples. Beginning in 1764 and up until 1923, many Treaties were negotiated that contained land cession and surrender provisions (often referred to as "cede and surrender provisions").[214] There is a divergence in the interpretation and meaning of the provisions of these Treaties, which has led to significant litigation. In the context of the cede and surrender provisions, Indigenous laws would never contemplate severing relationships with land because Indigenous Nations have ongoing responsibilities to care for their ancestral territory for the generations yet to come.

The Peace and Friendship and historic Treaties that contain land cession and surrender provisions do not specifically mention Indigenous burials or burial grounds. In fact, from the colonial government's, followed by the Canadian government's, perspectives, there was generally little to no consideration of maintaining Indigenous Peoples' connections to their ancestral burial grounds when they were determining the location of the lands to be set aside for the sole use and occupation of the Indigenous signatories.[215] Starting in 1975 with the *James Bay and Northern Quebec Agreement*,[216] self-government and land claims agreements have been negotiated between Indigenous Nations and the federal government. These agreements, also referred to as "modern Treaties," are also constitutionally protected.[217] Many of these agreements contain provisions that refer directly to the regulation, treatment, and protection of Indigenous burials and burial grounds.

Settler Amnesty in Section 35 Jurisprudence

Although, internationally, Canada is seen by some as a leader in recognizing Aboriginal rights, consistent with settler amnesty, the constitutional protections afforded to Indigenous Peoples only came after crucial advocacy by Indigenous people and communities, and they remain subject to significant limitations. The following are four manifestations of settler amnesty in the context of section 35 jurisprudence.

Unquestioning acceptance of Canadian sovereignty by courts: in section 35 cases, Canadian courts start from the premise that Canadian sovereignty is a given fact. This premise is based on the belief that the only legitimate legal authority emanates from sovereign States, which derive their legitimacy from international law.[218] The assertion of Canadian

sovereignty is based on racist, colonial legal doctrines, such as the Doctrine of Discovery and *terra nullius*, and interpretations of international law that were aimed at determining disputes among colonial powers who were travelling to other lands to "discover" them. Based on its assertion of Canadian sovereignty, the Crown has created the legal fiction that it was the original occupant of all of Canada and, therefore, has underlying title to all lands in Canada.[219] The unquestioning acceptance of Canadian sovereignty and jurisdiction means that conflicts of law between Indigenous legal orders and Canadian laws are mediated solely through the Canadian legal system.[220] The unquestioning acceptance of Canadian sovereignty therefore places the heavy burden on Indigenous Peoples to prove they were in their territories prior to the assertion of sovereignty and that their traditions, practices, and activities were central to their cultures at that time.[221]

Political manoeuvring to suppress the exercise of section 35 rights: throughout Canada's history, colonial, federal, provincial, and territorial governments have worked in tandem to infringe and suppress the rights of Indigenous Peoples.[222] This has been coupled with litigation and negotiation strategies that have aimed to first deny, then minimize, and then only partially acknowledge the harms committed against Indigenous Peoples.

Extinguishment of rights: Aboriginal rights can be extinguished if it is proven that there was a, "clear and plain intention" to extinguish such rights.[223] This can occur through legislation or by consent through the negotiation of Treaties or other agreements. Extinguishment has been one of the most significant strategies of settler amnesty in Canada's history. The colonial and then federal government's approach to Treaties was and is still built around the concept of extinguishment.[224]

Justified infringement: in *R. v. Sparrow*, the Supreme Court of Canada held that, once a complainant establishes that the government law in question, "has the effect of interfering with an existing [A]boriginal right," the government can justify the infringement by showing that the law has a valid objective and that the infringement is in accordance with the principle of the honour of the Crown and the Crown's fiduciary duty to Aboriginal Peoples.[225] The current test for justified infringement requires that the government prove:

- It upheld its duty to consult and accommodate the affected Aboriginal community(ies) or group(s);[226]
- The law in question has a valid legislative objective that is compelling and substantial;[227] and

- The Crown has acted honourably and in accordance with its special trust relationship with Aboriginal Peoples.[228] This element of the test includes considerations of proportionality.[229]

Although the justified infringement test contains several protective elements, there are at least two elements of the test that have enabled the infringement of section 35 rights:

- **Valid legislative objectives:** the government objectives that can be relied on to justify an infringement of section 35 rights are wide-ranging and have expanded over the development of section 35 jurisprudence.
- **Proportionality of impact:** the Supreme Court of Canada has imported the three stages to determining proportionality from *R. v. Oakes*.[230] *Oakes* is the seminal decision establishing the test under section 1 of the *Canadian Charter of Rights and Freedoms* (*Charter*) for the government to limit *Charter* rights.[231] Since section 35 was purposefully placed outside the *Charter*, it was not intended to be subject to the limitations set out in section 1 of the *Charter.*

Further, while, initially, the case law relating to justified infringement was confined to the federal government's legislation in the context of Aboriginal rights, in subsequent cases, the Supreme Court of Canada has applied the justified infringement test to Treaty rights.[232] Taken together, these developments in the section 35 case law have vastly and continuously reduced Aboriginal Peoples' access to, and jurisdiction over, their ancestral territories. They support settler amnesty and constitute a backward-looking attempt to justify the violent taking of Indigenous lands and the mass human rights violations committed by the State against Indigenous Peoples.

UN Declaration on the Rights of Indigenous Peoples

The *UN Declaration* was developed over several decades by Indigenous representatives from around the world who worked tirelessly to have it adopted at the international level.[233] The *UN Declaration* was put in place to address "the urgent need" to respect and promote the inherent rights of Indigenous Peoples, including those affirmed in treaties, agreements, and other constructive arrangements with States.[234]

The *UN Declaration* and Indigenous Burial Sites

With respect to the protection of Indigenous burial sites, relevant articles of the *UN Declaration* include:

Article 11

1. Indigenous [P]eoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as **archaeological and historical sites**, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with [I]ndigenous [P]eoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous [P]eoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their **religious and cultural sites**; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the **access** and/or repatriation of ceremonial objects and **human remains** in their possession through fair, transparent and effective mechanisms developed in conjunction with [I]ndigenous [P]eoples concerned.

Article 25

Indigenous [P]eoples have the right to maintain and strengthen their **distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands**, territories, waters and coastal seas and other resources and to **uphold their responsibilities to future generations** in this regard.

Article 26

1. Indigenous [P]eoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous [P]eoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give **legal recognition and protection to these lands**, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the [I]ndigenous [P]eoples concerned.[235]

The UN General Assembly adopted the *UN Declaration* on September 13, 2007. After failed attempts to defeat, weaken,[236] and delay the progression of the Declaration, Canada ultimately voted against it.[237] Paul Joffe, lawyer and human rights expert, notes that, "Canada was the only country on the 47-member Human Rights Council to vote against it in the General Assembly."[238] After the adoption of the *UN Declaration* and for the next nine years, Canada took the position in various meetings of States at the international level that the Declaration did not apply domestically since Canada had not signed onto it.[239] Joffe notes that, "this appears to be the first time that Canada has vigorously opposed a human rights instrument adopted by the General Assembly."[240]

On May 10, 2016—a full nine years after the *UN Declaration* was adopted at the international level—Canada finally endorsed the Declaration without qualification.[241] On June 21, 2021, the Canadian federal government enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[242] The purpose of the Act is to, "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and "provide a framework for the Government of Canada's implementation of the Declaration."[243] Specifically, it mandates the federal government, "in consultation and cooperation with Indigenous peoples," to prepare and implement an Action Plan to achieve the objectives of the *UN Declaration*.[244]

On June 21, 2023—National Indigenous Peoples Day—the federal government released the 2023–2028 *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan* (*Federal UNDA Action Plan*).[245] The Action Plan was developed in consultation and cooperation with Indigenous Peoples within Canada. The goals of the Action Plan that relate to the protection of Indigenous burial sites include that Canada will, "honourably fulfill all of its legislated, common law, fiduciary and constitutional obligations and responsibilities" to Indigenous Peoples;[246] ensure that Indigenous rights mechanisms are informed by Indigenous laws and legal systems and international human rights law;[247] and support the exercise of Indigenous Peoples' inherent rights, including the Sacred responsibilities that Indigenous Peoples have to their lands, waters, and resources, including the right to own, use, develop, and control lands and resources within their territories.[248] The *Federal UNDA Action Plan* makes the following specific commitments that relate to Indigenous burial sites and the recognition and affirmation of section 35 rights, including:

- Creating a new rights recognition approach that will not include extinguishment as a policy objective;[249]
- Honourably implement historic and modern Treaties, self-government, and other agreements as well as other constructive arrangements;[250]
- Implementing co-development mechanisms and processes for legislation and agreements and increasing Indigenous participation in decision-making;[251] and
- Broadening cooperative management approaches, governance, decision-making, and access in collaboration with Parks Canada relating to heritage sites and archaeology.[252]

The *Federal UNDA Action Plan* also includes Commitment no. 107, which relates specifically to search and recovery work. It states that the government of Canada will take the following action, in consultation and cooperation with Indigenous Peoples, "Support the ongoing work of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools and act upon her recommendations, including with a view to aligning federal laws with the *UN Declaration*."[253] The Action Plan also requires annual reporting by the federal government on implementation progress.

Applying the *UN Declaration* to Section 35 Claims to Access and Protect Indigenous Burial Sites

To date, there have been no Canadian cases that explicitly confirm that Indigenous burial sites are protected under section 35. However, there are compelling reasons that such sites merit constitutional protection. Constitutional protection of Indigenous burial sites is consistent with the unique constitutional position of Aboriginal Peoples and the grand purpose of section 35 of reconciliation. Interpreting Aboriginal and Treaty rights in accordance with the *UN Declaration* creates an imperative to interpret rights through the lens of international human rights. In failing to protect Indigenous burial grounds, generally, and the sites being searched for the unmarked burials of missing and disappeared children, specifically, governments have breached both their fiduciary duty and the honour of the Crown.

Caring for, maintaining, and protecting the burials of loved ones and ancestors is a customary practice of Indigenous Peoples.[254] Importantly, these laws, ceremonies, and practices have evolved to adapt to changing circumstances, including the significant impact of colonialism. As a result, regardless of where Indigenous burial sites exist and regardless of whether the funerary practices and burials have been adapted to include Christian practices, these rights are entitled to constitutional protection under section 35. These protected Aboriginal rights include both general rights to govern and regulate the treatment and protection of burial sites in the context of Indigenous-governed lands as well as rights to access sites where burials are located. This applies equally to Treaty rights, whether they arise from historic or modern Treaties. In the context of historic Treaties, an honourable interpretation that presumes the Crown is acting with integrity supports ongoing access to, and protection of, Indigenous burial sites, whether these sites are located within the areas set aside for the sole and exclusive use of the Indigenous Nations or in the larger territory that was surrendered under the terms of such Treaties.

There are compelling arguments that section 35 protections should have extended to Indigenous burial sites as soon as the *Constitution Act, 1982*, was enacted. However, the recent adoption and legislative commitments to implementing the *UN Declaration* in Canada have provided an opportunity to reconsider section 35 as it applies to Indigenous burial sites. International law can be considered in section 35 jurisprudence both as an interpretive lens through the application of international customary law and where international instruments are binding on Canada. The Supreme Court of Canada has applied international human rights law in numerous cases over the years, including in the context of interpreting constitutional

protections under the *Charter*.[255] In the context of section 35 rights, Beverley McLachlin, the former chief justice of the Supreme Court of Canada, stated that, "Aboriginal rights from the beginning have been shaped by international concepts.... More recently, emerging international norms have guided governments and courts grappling with [A]boriginal issues."[256] There is an urgent need to adopt a human rights-based approach that is grounded in the *UN Declaration* to interpret section 35 rights.

Although there has been a tendency in the case law to prioritize economic and recreational interests over the protection of Indigenous burial sites, with Canada's recent commitment to meaningfully change its laws to comply with the *UN Declaration*, a new legal framework is required that includes legislative protections of Indigenous burial sites at all levels, which must:

- Recognize the inherent rights of Indigenous Peoples to access, maintain, protect, and care for the burial sites of loved ones and ancestors;
- Protect confirmed, known, and suspected burial sites, including those being searched for the unmarked graves of the missing and disappeared children; and
- Respect the principle of free, prior and informed consent of affected Indigenous Nations where the development of lands or government action is proposed that may impact confirmed, known, or suspected Indigenous burial sites.

Just as Aboriginal rights must be interpreted to evolve to respond to contemporary circumstances, the Supreme Court of Canada's case law on section 35 must similarly evolve. As Chickasaw and Cheyenne legal scholar James Sákéj Youngblood Henderson argues, we must find ways to, "counteract the Eurocentric contamination of [our] minds" and create new pathways forward that respect and uphold the rights of Indigenous Peoples to care for all their relations—those who have journeyed to the Spirit world to rest with the ancestors, those living, and those yet to come.[257]

Death and Legal Investigations: A History of Failure

> It is a century long history of almost no reports to the police, inadequate investigations, acquittals, lenient sentences, convictions coming decades too late, and accused and witnesses dying before trial. Abuse over the century was hushed up with internal staff dismissals and transfers (sometimes with

> recommendations), if any action at all was taken. This is the history of a century of Canada's criminal justice system failing to protect [I]ndigenous children.
>
> — Thomas McMahon, "Indian Residential Schools Were a Crime"[258]

When Indigenous children suffered injuries, perished, or disappeared from Indian Residential Schools, police authorities rarely intervened or conducted investigations. In most cases, suspicious circumstances went unaddressed, leaving families bereft of explanations or justice. Even when police investigations occurred, they were superficial at best, often dismissing the children's and their families' accounts or blaming the children while clearing institutional staff and government officials from responsibility. As was pointed out by Thomas McMahon, the TRC's general legal counsel, the Indian Residential Schools were crime scenes from the outset.[259] Yet the Canadian criminal justice system—the *Criminal Code*, police, crown attorneys, and others responsible for protecting these children from crimes—not only failed to hold perpetrators to account but enabled these crimes to occur and shielded perpetrators from accountability. When action was belatedly taken in response to the determined efforts of Survivors, Indigenous families, and communities, the response often revictimized Survivors. The TRC concluded that the legal system seemed to be an obstacle to justice rather than a venue for it, "To Survivors, the criminal and civil justice systems seemed to be tipped in favour of the school authorities and school administrators. To Survivors, the justice system was a barrier to their efforts to bring out the truth of their collective experience."[260]

Federal and provincial governments' exercise of authority to convene investigations, inquests, and inquiries effectively served as a form of settler amnesty, wilfully ignoring criminal harms against Indigenous children at Indian Residential Schools and associated institutions and ensuring impunity for both the institutions themselves and for those who operated and worked in them. Nevertheless, Survivors, Indigenous families, and communities continued to fight for justice, eventually launching civil litigation against the federal government and churches to seek compensation for sexual, physical, and psychological abuse in addition to loss of culture and language. By 2005, there were more than eighteen thousand lawsuits as well as several class-action proceedings.

The failure of the justice system to respond to the crimes committed in the Indian Residential Schools System is one that continues to this very day. It is but one example of the historic and ongoing failures of the Canadian justice system to address the needs and rights of Indigenous people. This is a system that has never acknowledged or included Indigenous laws and legal systems—systems that have been in place since time immemorial. These failures have been identified in a cascade of reports.[261]

Failure to Investigate Injuries, Deaths, and Disappearances of Children at the Indian Residential Schools

Canada's criminal legal system was founded on principles of colonialism, where Indigenous lands were taken by settlers through manipulation, force, and coercion. The legal framework that emerged from this colonization has systematically marginalized Indigenous Peoples and their rights. The approach to injuries, deaths, and disappearances of children at the Indian Residential Schools and associated institutions was consistent with this approach and constitutes another form of settler amnesty. The injuries, disappearances, and deaths at the Indian Residential Schools were very rarely investigated in any meaningful way, whether at the time of their operation or for decades thereafter.

Abuse at the institutions was widespread. Independent Assessment Program (IAP) payments under the *Indian Residential School Settlement Agreement* (*IRSSA*) were made to those who experienced serious physical or sexual abuse while at the institutions.[262] The IAP process compensated over thirty-four thousand living Survivors.[263] Yet, during its work, the TRC was only able to confirm 40 criminal convictions of Indian Residential School perpetrators. The federal government failed to comply with the TRC's request to produce all documents related to prosecutions. There are likely hundreds of abusers who were never investigated or charged, some of whom may still be living.[264]

The TRC concluded that the few police investigations that related to abuses perpetrated on the children rarely resulted in criminal prosecutions, and several RCMP investigations of abuse and mistreatment of children by teachers, priests, nuns, and other officials at Indian Residential Schools were compromised by the federal government.[265] The RCMP, the agency responsible for policing in most Indian Residential Schools outside of Ontario and Quebec, investigated only 14 student deaths between 1897 and 1951.[266] All the deaths were ruled as accidental or due to illness, with no charges being laid.[267] Between 1994 and 2003, the RCMP in British Columbia established a province-wide task force—the BC RCMP Native Indian Residential School Task Force (BC Task Force)—to investigate Survivor allegations of abuse and other offences.[268] While the BC Task Force investigated 974 separate allegations, the TRC concluded that, in the nine years of the BC Task Force's work, only five individuals were ever convicted of a crime.[269]

Police investigations into crimes committed at Indian Residential Schools are continuing, and arrests are still being made.[270] For example, a decade-long investigation by the RCMP into the Fort Alexander Indian Residential School, operated by the Catholic church in Manitoba, resulted in one charge of indecent assault being laid against a retired priest in 2022. A RCMP spokesperson acknowledged that the investigation was hampered by the passage of time.[271]

Settler Amnesty

Obstacles to justice for Survivors, families, and Indigenous communities exist throughout Canada's legal systems. Reflecting and reinforcing a culture of impunity, they impeded access to justice during the operation of the Indian Residential School System and continue to impede access to justice now.

Canadian Criminal Code

The *Criminal Code* has been an obstacle to justice for Indigenous people in three ways:

Section 43: this section, which has been in force in one way or another since 1892 and was recently upheld as constitutional by the Supreme Court of Canada,[272] provides an explicit justification for institutional staff to use reasonable force to discipline children in their care.[273] The TRC found that this exception to what would otherwise clearly constitute assault was used to justify the physical abuse that children suffered, providing cover for the use of excessive force to punish children.[274] In addition to abusive physical discipline administered using straps, sticks, shovels, and other ways, one school, "used an electric chair to shock students as young as six."[275] Despite the TRC's Call to Action 6 to repeal section 43 of the *Criminal Code*, it remains the law.

Prohibition on retroactive application of the law: while there is no statute of limitations, if someone is charged with an offence that happened decades ago, the offence must have existed as illegal conduct in the *Criminal Code* at the time the crime was committed. This means that, if it is alleged that someone committed a sexual offence in the 1970s, that person would be prosecuted under the law as it was at that time. Often, these earlier laws were much narrower in terms of the behaviours that were considered criminal than they are now.[276] For example, while the *Criminal Code* has prohibited the crime of sexual assault since 1983, prior to that time, it prohibited only a very narrowly defined crime of rape. This means that sexual acts against males could not be prosecuted as "rape."[277] Sexualized acts against a male were treated as acts of gross indecency.[278] Further, unless there was penetration, other forms of sexual touching against women and girls over the age of 14 years old were not considered as "rape."

Individualized focus: the *Criminal Code* is primarily focused on the actions of individuals rather than organizations. This makes it difficult to hold the government, churches, and other entities that created, directed, and operated the Indian Residential School System responsible for the abuse or deaths of children in those institutions. Section 22.1 of the *Criminal Code*, which sets out the criminal liability of organizations for the negligence of its representatives,

only came into force in 2004, years after the closure of the last Indian Residential School in 1997.[279] Under the "identification doctrine" in force prior to section 22.1, leaders of the religious orders and senior government officials are buffered from criminal prosecution for the actions of their subordinates.[280] The *Criminal Code* was rarely used to prosecute individuals for abusing Indigenous children at the Indian Residential Schools while they were in operation. Instead, the *Criminal Code* permitted certain forms of violence to go unchecked and allowed institutions and their staff to evade responsibility—in essence, creating a culture of impunity and granting amnesty to the perpetrators.

Policing

Two First Nations men walking by an RCMP officer, past a Caucasian woman, towards a group of First Nations women and children seated on the grass, n.d. [1900–1976], box 3674, R216, RG10, Library and Archives Canada.

Historically, police services or militia were deployed to enforce authority and control over Indigenous Peoples and lands and contain Indigenous resistance movements. Law enforcement officers were instrumental in implementing colonial policies, such as forced relocations, and assimilation policies, including supporting Indian Residential Schools and the

suppression of Indigenous cultures and languages. The exercise of discretion and subjectivity is inherent to policing. The role of police is to ensure the safety of the community not only through the enforcement of the *Criminal Code* but also through other activities. In community-oriented policing, officers are encouraged to use their discretion to address underlying community issues and build trust with residents. The improper use of this discretion can result in either over-policing or under-policing.

Over-policing describes situations where police proactively exercise discretionary powers to engage with individuals or communities. Instances of over-policing include the use of police to resolve disputes between government and Indigenous Peoples about land and to keep Indigenous People out of certain areas of a city or town (such as with the pass system) and the enforcement of the government's discriminatory edicts under the *Indian Act.*[281] Police had a large role in the forced removal of Indigenous children from their families to confine them in Indian Residential Schools and other associated institutions[282] as well as in patrolling runaways.[283] Archival documents indicate that the police were also utilized by Indian Residential Schools to deal with uncooperative Indigenous families, to punish children for behavioural issues, to arrest children for offences, to deal with fires and accidents, and to enforce quarantine measures. Systemic patterns of over-policing continue today. For example, studies examining police use of force and police-involved deaths highlight the stark and dangerous over-representation of Indigenous Peoples.[284]

Under-policing refers to situations where police are disinterested or refrain from engaging with individuals or community. As was noted above, during the operation of the Indian Residential School System, police rarely investigated the accidents and deaths of children, routinely accepting the institution's accounts of what occurred or conducting only perfunctory investigations.[285] Contemporary examples of under-policing include the widespread and well-documented failure of police to investigate the cases of missing and murdered Indigenous women and girls.[286] The 231 Calls for Justice of the MMIWG Inquiry's Final Report identify this systemic issue.[287] The *Broken Trust* report into under-policing of the deaths of Indigenous people in Thunder Bay, Ontario, found that racism within the Thunder Bay Police Service meant that investigations of what should have been seen as crimes were too quickly determined not to be crimes and that basic investigative steps were not taken.[288] For many police, Indigenous people are simply seen as less-worthy victims.

This history—and ongoing practice—of extensive systemic and racist misuse of police discretion against Indigenous people underlies the high levels of mistrust of police among Indigenous people today.[289] In his investigation into the death of Neil Stonechild, one of the victims of the horrific Starlight Tours, Justice David Wright of the Saskatchewan Court of

Queen's Bench determined that Indigenous and non-Indigenous populations live in two separate realities with respect to policing.[290] Non-Indigenous people view the police as trusted civil servants who are there to protect them, while Indigenous people view the police as perpetrators of harm. Police forces have been integral to and, indeed, arms of colonial systems of oppression, including in the Indian Residential School System. Only Indigenous police services that have developed over the past 30 years were not complicit in the Indian Residential School System.

The deep-seated distrust of law enforcement held by Indigenous communities is rooted in both historical injustices and contemporary realities. The skepticism harboured by Indigenous Peoples highlights the urgent need for concrete actions and sustained efforts by law enforcement agencies to rebuild trust, to prevent the chronic victimization of Indigenous people and their over-criminalization. Given this historical and harsh reality of over- and under-policing, Indigenous communities have valid concerns about police services' ability to conduct meaningful investigations into past crimes, including the missing and disappeared children and unmarked burials, and to prevent future crimes being committed against Indigenous people.

The last 30 years have seen the development of Indigenous police services. There are 35 First Nations police services across Canada, primarily in Ontario and Quebec but also in Manitoba, Saskatchewan, Alberta, and British Columbia as well as one Inuit police service in Nunavik in Northern Quebec.[291] The issue that has consumed Indigenous policing since its inception has been how to access and maintain equitable, stable, and consistent funding to allow them to provide the necessary services that communities need and deserve. The lack of sustainability caused by governments' short-term and insufficient funding arrangements with Indigenous police services is a form of systemic discrimination, as the public safety and well-being of Indigenous communities do not receive equitable attention and resources compared to non-Indigenous communities. The issue of underfunding and under-resourcing of Indigenous police services is currently the subject of human rights litigation.[292]

Crown Attorneys

Like the police, crown attorneys exercise a great deal of discretion. It is the Crown who ultimately decides whether a matter will proceed to trial or plea or whether it will be dealt with in a different manner—for example, the withdrawal of charges or diversion. The Supreme Court of Canada has said that, when deciding on a particular case, the Crown is akin to a mini minister of justice.[293] If the Crown does not carry out this role fairly, then miscarriages of justice can result. For example, the wrongful conviction of Donald Marshall Jr. in 1971 was

due in large part to Crown misconduct arising from their belief that Donald Marshall was guilty, whether the evidence showed that or not.[294]

The 1988 Aboriginal Justice Inquiry in Manitoba, which was called in response to the fatal shooting of J.J. Harper by the Winnipeg police and the failure to investigate the murder of Helen Betty Osborne in The Pas, found that the inherent biases of those with discretionary or decision-making authority in the justice system was leading to inappropriate results for Indigenous people within the system.[295] Research has shown that Indigenous individuals are more likely to be charged, prosecuted, and convicted for similar offences compared to non-Indigenous individuals.[296] This suggests that crown attorneys may exercise their discretion in a manner that disproportionately targets Indigenous people and contributes to their over-representation in the criminal justice system.

Boards of Inquiry for Deaths in Indian Residential Schools: Deflecting Responsibility

Until 1935, the federal government did not enforce any consistent policy or procedure for reporting and investigating the deaths of Indigenous children.[297] At that time, the Department of Indian Affairs enacted a policy that required the Indian Residential Schools, Indian Agents, and attending medical officers to complete a standard set of paperwork, entitled Form Number 414 Memorandum of Inquiry into the Cause and Circumstances of the Death (Form 414 Memorandum). The Indian Agent was also required to convene and participate in a "Board of Inquiry" upon the death of a child at an Indian Residential School. The Form 414 Memorandum expressly stated that the Board of Inquiry did not preclude a local police investigation or Coroner's Inquest.[298] It was unclear, however, if a Form 414 Memorandum was required if the child died after being sent to a hospital or after being sent back home or elsewhere by the institution.

A review of various Boards of Inquiry into the deaths of Indigenous children at Indian Residential Schools highlights the routine disregard for the accountability of the officials and State-related agencies and the ways in which these Boards of Inquiry deflected or concealed institutional responsibilities.[299] A number of patterns can be discerned from the archival materials:

- Despite requirements to promptly notify parents and guardians of a child's death, this was rarely done.
- Boards of Inquiry routinely relied on the self-serving accounts of staff implicated in the death of the children.

- Complaints, even from other authority figures such as Indian Agents, about conditions at the institutions were overlooked or dismissed.
- Children, even very small ones, were blamed for the illnesses or injuries that led to their deaths. For example, a four-year-old who fell 30 feet to his death when he was left unsupervised next to an open window was blamed as being a child who "had his own way" and "did not obey orders given to him by his superiors."[300]
- Patterns of neglect or mistreatment of children were not considered in assessing causes of death. For example, in one case where children died when they attempted to escape from the institution after corporal punishment, the Board of Inquiry did not take into account previous complaints about the mistreatment of the children at the institution.[301]

Even in those situations where the evidence and reports recognized that more could have been done to prevent the children's deaths, the Boards of Inquiry and police investigations failed to hold the institutions responsible. Staff and supervising administrators were routinely exonerated, the institutional issues underlying the circumstances were glossed over, and the children's deaths were minimized.

Coroner's Investigations

In the context of death investigations by coroners or medical examiners, mandatory investigations are only initiated in certain circumstances defined by provincial and territorial legislation—for example, when deceased persons or human remains are unexpectedly discovered. Coroners and medical examiners have discretionary powers to initiate an investigation if they receive information about the possible existence of a body; however, they tend to exercise these powers carefully. Police and coroner's investigations are focused on determining the circumstances of the individual crime or death, and neither are designed to respond to mass, systemic human rights violations. In addition, various reviews and inquiries across Canada have found that coroners and medical examiners have not served Indigenous people and communities well.[302]

In May 2022, the Office of the Chief Coroner for Ontario announced its commitment to collaborate closely with Indigenous communities when human remains are discovered in proximity to any Indian Residential School.[303] To facilitate this initiative, the office established the Residential Schools Death Investigation Team, spearheaded by Dr. Dirk Huyer, the Chief Coroner for Ontario. The primary objective of the Residential Schools Death

Investigation Team is to scrutinize deaths that may be linked to the 18 Indian Residential Schools in Ontario, as well as the St. Joseph's Training School, operated by the Ontario government, where at least nine deaths of children and youth have occurred.[304] Any suspicious deaths suggesting potential criminality are referred to the OPP's Criminal Investigations Branch for further examination.

The Public Inquiry System

Over the past 40 years, numerous public inquiries and commissions have addressed the oppression of Indigenous Peoples in Canada, ranging from national to regional scopes.[305] The TRC, the MMIWG Inquiry, and the RCAP[306] were broad in scope and looked at many aspects of Canadian society. The Viens Commission of Inquiry issued a scathing report on the treatment of First Nations people and Inuit by public services in Quebec.[307] Some inquiries have had a more specific focus—for example, the Osnaburgh Windigo Tribal Justice Review,[308] the Cariboo-Chilcotin Justice Inquiry,[309] or retired Supreme Court of Canada Justice Frank Iacobucci's independent review of First Nations' representation on juries.[310] Reports from these inquiries have led to hundreds of recommendations. The recommendations, Calls to Action, and Calls for Justice from these inquiries extend beyond governmental spheres. Important decisions of the Supreme Court of Canada have also cited several of these reports, such as the RCAP's report.[311] However, many recommendations remain unimplemented, and there is no comprehensive repository tracking their progress.[312] Additionally, assessing the impact of recommendations is challenging, as some are easier to implement than others and inquiries often fail to prioritize foundational recommendations.

The death investigation and criminal legal systems failed to protect Indigenous children at Indian Residential Schools and other institutions. These systems have shielded wrongdoers and created a culture of impunity. The State's failure to exercise its authority to conduct adequate investigations into the harms committed against Indigenous children is evidence of the de facto settler amnesty that exists in Canada. It is therefore not surprising that Indigenous peoples have little trust in these systems.

The laws and systems described above were not created to support the investigations of genocide and mass human rights violations that occurred and that led to the deaths of children at Indian Residential Schools and other associated institutions. The Canadian legal system, without significant changes, does not fit, nor is it intended to fit, the purpose of securing justice for Survivors, Indigenous families, and communities. By design, the laws and systems described above focus on examining the individual circumstances of each death. They are not equipped to consider the systemic patterns of crimes. Given the nature of the Indian

Residential School System, and the mass deaths and violations of rights that it perpetrated, these legal systems do not have the capacity to effectively investigate the missing and disappeared children and unmarked burials. Further, these systems were complicit with, and deeply implicated in, these crimes.

Consistent with international human rights laws, principles, and standards, the right to truth is owed to Indigenous Peoples. The Canadian State has legal and moral obligations to ensure that a full investigation is conducted into the disappearances and deaths of the children. Such investigations, however, must not be led or constrained by the existing systems that have harmed Indigenous Peoples for over one hundred years. A new mechanism must be created, one that is Indigenous-led and governed—a new search and truth recovery process that meets international human rights principles, norms, and standards on the right to seek and obtain truth, accountability, and justice. This new mechanism would respect Indigenous sovereignty and apply Indigenous laws and protocols as required by the *UN Declaration*.

THE THIRD ELEMENT OF A REPARATIONS FRAMEWORK: FINDING TRUTH, REMATRIATING LANDS, AND REPATRIATING THE CHILDREN

Decolonizing Archives and Affirming Indigenous Data Sovereignty

> The importance of our people and communities having access to our own information is apparent. Our stories are part of this data. Without our stories, so-called Canada tried to sweep it under the rug. The more our stories become part of the historical record, the closer we can get to the truth. Who were these children? Why did they die? Where were they buried?
>
> — Vanessa Prescott, Métis, Clinical Herbal Therapist[313]

Archives in the Context of International Law

In settler colonial countries like Canada, State and church archives, much like legal and educational institutions, can either serve to perpetuate settler amnesty and a culture of impunity or strengthen truth, accountability, justice, and non-recurrence of mass human rights violations. As institutions of collective memory, archives hold records with information that

enable victims of State violence, their families and communities, and all citizens to determine the truth of what happened.

The right to know the truth about mass human rights violations associated with atrocity crimes, including genocide and crimes against humanity, is an internationally recognized right of victims, their families, and communities and is accompanied by a corresponding duty on the State to remember. The State must therefore protect and preserve records with information relating to atrocities and amend existing laws and regulations governing access to archives.[314] In line with these developing perceptions of the role of archives in upholding human rights, the International Council on Archives has issued the *Basic Principles of the Role of Archivists and Record Managers in Support of Human Rights* (*Basic Principles*), establishing professional and ethical guidelines to:

- Assist institutions that preserve archives in their task of ensuring the proper role of archivists in support of human rights;
- Provide guidelines for individual archivists and records managers who, in the course of their everyday work, make decisions that might affect the enforcement and protection of human rights;
- Provide support for professional associations of archivists and records managers; and
- Help international officials dealing with human rights issues understand the importance of the issues covered by the *Basic Principles* and the contribution that professional archivists and records managers can provide to the protection of human rights.[315]

UN Special Rapporteurs on the promotion of truth, justice, reparation and guarantees of non-recurrence have emphasized in several reports the responsibility of States to provide unrestricted access to records to enable investigations into mass human rights atrocities[316] and the need in many countries for reform to legislation governing archives to facilitate this access.[317]

The *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) recognizes the right of Indigenous Peoples to self-determination, including the right to maintain their distinct cultural practices, languages, and traditions.[318] This includes the right to control and manage Indigenous information and data, which is essential for promoting self-determination and protecting and preserving cultural heritage. Participants at the National Gathering in Vancouver emphasized the importance of the *UN Declaration* in

the affirmation of Indigenous data sovereignty and called on governments, archives, museums, universities, and other data institutions to adopt the *UN Declaration* in their access and ownership policies.[319]

Archives in Canada: Determining Truth and Countering the Impunity of Settler Amnesty

Some of the truths about the missing and disappeared children and unmarked graves are hidden in archives across the country, including government and church archives. The TRC's Final Report identified the vital role that archives have in documenting the history and legacy of the Indian Residential School System.[320] Collectively, archives across the globe have functioned as colonial gatekeepers, obstructing meaningful access to the truth. Archives are long-ignored systems of power that preserve, organize, and control important information about all levels of government, institutions, organizations, and their representatives within Canadian society. Although characterized as neutral sites of information management, archives were established to legitimize the State's dominion over natural resources, lands, and, by extension, Indigenous Peoples. The type of information collected and preserved reflects the priorities and perspectives of the settler colonial State.

While government records are essential to documenting the history and legacy of the Indian Residential School System, archives in Canada were not created until almost 40 years after the first Indian Residential School was in operation.[321] As a result, decades of records relating to the genesis and expansion of the Indian Residential School System were not organized or retained in accordance with any standardized archival record-keeping policy in Canada. Once government departments did start to archive their records, only those records that served to support the institutional memory of the structures, systems, and institutions of the settler colonial State were preserved. Today, federal government records are preserved at Library and Archives Canada (LAC). The TRC called on LAC to fully adopt and implement the *UN Declaration* and the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, also widely known as the UN *Joinet-Orentlicher Principles*, to protect Indigenous Peoples' inalienable right to know the truth about the human rights violations committed against them in the Indian Residential School System.[322] The TRC recommended that the federal government fund the Canadian Association of Archivists,[323] in collaboration with Indigenous communities, to conduct, "a national review of archival policies and best practices" to, "[d]etermine the level of compliance" with the *UN Declaration* and the *Joinet-Orentlicher Principles*. Although LAC and the Association of Canadian Archivists have come together to discuss their progress, most recommendations that could affect substantive change have gone unfulfilled.

"The Manuscript Room in the Public Archives Building, Sussex Drive. Ottawa, Ont.," ca. 1926–1930 (Library and Archives Canada / Canada.DPW / PA-137701).

Destruction and Preservation of Records

Many records relating to Indigenous people and communities have been purposely destroyed. The destruction of records by governments and churches has impeded Survivors, Indigenous families, and communities in their searches and investigations into the missing and disappeared children and unmarked burials. Much of the destruction of the Department of Indian Affairs' records is believed to have occurred during the Second World War to support the federal government's "scrap paper drive."[324] It is estimated that, between the years of 1937 and 1947, as much as, "15 tons of wastepaper" (meaning records of the Department of Indian Affairs) was destroyed.[325] The full extent of the federal government's destruction of records is unknown. As well, fires in government buildings also destroyed many records—most notably, the February 1897 fire in the West Block of Parliament that held both the Dominion Archives and records from the Department of Indian Affairs. Documents were also lost when they were being transferred from regional offices to the head office in Ottawa or destroyed in fires and floods at regional offices of Indian Agents.[326]

"Fire in the West Block of the Parliament Buildings," February 11, 1897, file C-017502, D.A. McLaughlin, Library and Archives Canada.

"Old documents found in West Block Parliament Building, Ottawa, Ont., during renovation," 1962, file PA-057473, Department of Public Works, Library and Archives Canada.

A group of records that may contain key information about the missing and disappeared children is scheduled for destruction. Notwithstanding the moratorium on the destruction of records, the Supreme Court of Canada has ordered that the confidential records of Survivors' applications and testimonies from the Independent Assessment Process (IAP) be destroyed on September 19, 2027,[327] unless Survivors opt to preserve their records for historical, public education, and research purposes at the National Centre for Truth and Reconciliation (NCTR).[328] Unlike other notice processes under the *Indian Residential Schools Settlement Agreement*, there have been limited efforts by the former Indian Residential Schools Adjudication Secretariat (which managed the IAP process), the federal government, and other entities to provide proper notices to Survivors about the opt-in process to preserve their truths at the NCTR.[329] In addition, many Survivors who participated in the IAP are no longer alive, and there is no way for living family members to opt in for them.

Accessing Government Records to Promote Truth and Justice

It has been observed that, "intellectual access to records that are by or about Indigenous communities can often be complicated by how archives restrict material based on copyright, government privacy legislation, or Western understandings of ownership."[330] Such colonial understandings have led to the creation of laws and policies that have only worked to impede Indigenous people and communities from accessing the records created by settlers about them, without their consent. Archival policies and operational procedures regularly deny requests from Indian Residential School Survivors, Indigenous communities, and researchers or often produce redacted records due to privacy issues. In practice, these laws, policies, and operational procedures have not supported Indigenous communities that are leading investigations into the missing and disappeared children and unmarked burials. These legislative regimes prioritize the rights of the person or institutions who created the records over those of the Survivors and the children whose lives are documented in the records.

In June 2023, the House of Commons Standing Committee on Access to Information, Privacy and Ethics issued a report entitled *The State of Canada's Access to Information System*. This report made several recommendations related to Indigenous Peoples, specifically that the federal government:

- Work with Indigenous Peoples to remove barriers to access information;
- Work with Indigenous Peoples to develop a mechanism of independent oversight that ensures their full and timely access to records held by federal government institutions for the purposes of substantiating historical claims; and

- Amend the *Access to Information Act* to update and align language used in relation to Indigenous peoples and communities, including the definition of "[A]boriginal government" in the Act.[331]

The Committee further recommended that the federal government improve the declassification system to provide greater access to Canada's history and that it implement a process for the automatic release of historical documents that are more than 25 years old.[332] Implementation of the Committee's recommendation would create greater access for Survivors and Indigenous families and communities that are searching for the missing and disappeared children and aid in facilitating their right to know the truth.

A further report about the federal government's access and privacy laws was released on February 27, 2024, by the Standing Senate Committee on Indigenous Peoples, which held two sessions as part of its ongoing response to recommendations made in its report *Honouring the Children Who Never Came Home*.[333] The purpose of these sessions was to address issues relating to the federal government's withholding of Indian Residential School records and the difficulties surrounding the *Privacy Act* and other related barriers.[334] The first session included witnesses Philippe Dufresne, the Privacy Commissioner of Canada, and Caroline Maynard, Canada's Information Commissioner.[335]

Commissioner Dufresne described the *Privacy Act* as, "old legislation" and emphasized the need to modernize the Act to reflect the reconciliation needs of Survivors, Indigenous families, and communities and their search and recovery efforts for the missing and disappeared children. Dufresne noted that the *Privacy Act* is focused on individual rights, choices, and identity and lacks consideration of Indigenous Peoples' collective rights. To incorporate these rights, Dufresne highlighted that section 8(2) of the *Privacy Act* does permit the disclosure of personal information as follows:[336]

> 8(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed,
>
> (m) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
>
> (ii) disclosure would clearly benefit the individual to whom the information relates.[337]

Dufresne suggested that reconciliation efforts are, "in the public interest" and outweigh the perceived invasion of privacy.

Commissioner Maynard testified that Canada lacks a public interest override in its access legislation, which may hold relevant information regarding the search and recovery efforts of the missing and disappeared children and their unmarked burials. Additionally, she stated that the access to information system is overwhelmed with access requests and government units and departments are not adequately resourced to respond to the demand.[338] Maynard further noted that an informal approach could be utilized to respond to access requests relating to Treaties. However, even with informal disclosure processes, there can be frustration because the government maintains control over the records. Additionally, Maynard explained that a significant amount of material released is first redacted by the federal government. Maynard proposed that mediation is necessary to address the growing mistrust of government and to ensure that Indigenous Peoples are receiving the information that they are entitled to, and require, to conduct investigations into the missing and disappeared children.[339] Both Commissioners emphasized the need for legislative action. Commissioner Maynard stated that an updated law is needed, one that creates a legal obligation to consult with Indigenous communities and organizations.[340]

Survivors, Indigenous communities, and researchers are finding that explanations for the lack of access to records are frequently shifting. The lack of adequate funding to archives and the lack of respect for the important nature of the records also impacts what is a complicated bureaucratic process. The mechanisms put in place by Canada to ensure information is made available to the public are inherently flawed. The Information Commissioner of Canada cannot help Indigenous communities and researchers when government departments are unwilling to work towards, or participate meaningfully in, reconciliation efforts. In interviews with the *Globe and Mail*, dozens of historians, researchers, archivists, and academics who regularly deal with LAC noted that the situation has become so dire that Canadian historians now often rely on the public archives of other countries to do research.[341] The issues with accessing records, even records that are more than one hundred years old, is a known problem within the academic research community. Canadian historians are concerned about processes that delay and restrict access for seemingly no reason. This deters people from conducting important research that could lead to public education and creating more informed and engaged citizens on history, which is of vital importance in an age of misinformation and denialism.

Accessing Church Records to Promote Truth and Justice

All the church entities that operated the Indian Residential Schools have committed to reconciliation with Indigenous Peoples, as specified in their apologies and statements of reconciliation. Yet many continue to block Survivors, Indigenous families, and communities from accessing church archives. Among the many problems with the *Access to Information Act* is its limited scope.[342] The *Access to Information Act* does not apply to the church entities that operated the Indian Residential Schools, even though they received funding directly from the federal government to enforce its genocidal policies. Many churches rely on the fact that the *Access to Information Act* does not apply to them to refuse access to their records and, at the same time, argue that the *Privacy Act* precludes them from releasing records.

The process of obtaining archival information from different churches is fraught with many challenges. Some of these challenges can be attributed to the diffuse nature of church organizations, confusing lines of authority within the church hierarchies, lack of central repositories or standardized archiving practices, varying degrees of cooperation, reluctance to accept responsibility for abuses and deaths, and the lack of transparency. Further, many church organizations implicated in the Indian Residential School System were not part of one large denomination; rather, they consisted of various religious entities with distinct philosophies, diverse geographical catchments, and an array of practices, often lacking standardized rules for archiving historical documents. Consequently, there is no uniformity in the preservation and accessibility of records across different religious entities. Unlike governmental structures that have established policies and operational procedures for archiving records that are public, church entities do not have publicly available protocols. Each religious denomination has its own formal or informal archival processes, leading to inconsistencies and difficulties in accessing information.

In correspondence from the Office of the Independent Special Interlocutor, over 60 different church entities were asked to share information on what steps they had taken, or were taking, to support Survivors and Indigenous families and communities searching for the missing and disappeared children, including what processes were in place to access church archives. Fewer than half of the church entities responded to the request for information. Of those that replied, only some provided full answers, while others indicated that they did not understand the questions or their relevance. Many only provided short answers and skipped several sections entirely. Many of the Catholic church entities that responded to the request for information indicated that no special processes or practices have been put in place for

Survivors, Indigenous families, and communities to navigate the archives. In contrast, other religious denominations, like the Anglican and United churches, have created portals or tools for Indigenous families and communities to make requests.[343]

One very concerning practice of several churches has emerged. When asked to provide records relating to Indian Residential Schools and the missing and disappeared children and unmarked burials, many respond by stating that all their records were provided to the TRC, which are now stored at the NCTR, which is part of the University of Manitoba.[344] As a result, these church records, which were not subject to federal or provincial privacy laws, are now in the NCTR's "vault," which is governed by the *National Centre for Truth and Reconciliation Act* (*NCTR Act*).[345] The *NCTR Act* incorporates the Manitoba *Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Act*, which both operate to restrict access to church records.[346] Records provided to the NCTR are not the original documents, they are copies. Survivors and communities should not have to file access requests through the NCTR processes to obtain documentation from church entities. Churches can and should provide access to their records that will demonstrate the history and patterns of their human rights violations against Indigenous children, their families, and communities.

Decolonizing Archives

In response to the TRC's Call to Action 70, the Steering Committee on Canada's Archives developed its *Reconciliation Framework*, setting out, "a vision, foundational principles, and a transformative path forward for the archives profession in Canada."[347] In addition to TRC's Final Report, the *UN Declaration*, and the *Joinet-Orentlicher Principles*, the *Reconciliation Framework* builds on knowledge from the First Nations principles of ownership, control, access, and possession (OCAP), Inuit Tapiriit Kanatami's National Inuit Strategy on Research, and the Principles of Ethical Métis Research from the Métis Centre at the National Aboriginal Health Organization. The *Reconciliation Framework*'s objectives are established with the, "primary objective of building relationships guided by the principles of respect, relevance, reciprocity, and responsibility."[348] To create systemic change, decolonizing work must respect cultural integrity, provide relevant services, foster reciprocal relationships, and demonstrate responsibility when working for and with Indigenous people and communities.[349] The *Reconciliation Framework* outlines objectives for reform to archival governance and management structures; professional practices; Indigenous ownership, control, and possession of data created by or about them; access to archival materials; arrangement and description of materials; and education.[350]

Decolonizing archival practices requires acknowledging and addressing historical injustices. Archival education must incorporate an expansive understanding of the historical context of colonialism and its impact on Indigenous communities. This includes recognizing the role that archives have had in perpetuating colonial narratives and marginalizing Indigenous voices. Archival education should emphasize the ethical use of archival materials, particularly when it comes to records related to the Indian Residential School System and other settler colonial institutions where mass human rights breaches have occurred against Indigenous people. Some emerging decolonizing practices include:

- The Oral Testimony Program of the Indian Residential Schools History and Dialogue Centre;[351]
- The Ādisōke facility to be opened in Ottawa in 2026 as a joint initiative of the Ottawa Public Library, Archives Canada, and the Algonquin Anishinabe Peoples of the Kitigan Zibi Anishinabeg,[352] and the Algonquins of Pikwakanagan First Nation;[353]
- The Shingwauk Residential Schools Centre, which is a "community-led/grassroots community archive, founded by Survivors and intergenerational Survivors";[354] and
- The Bringing the Children Home initiative of the United Church of Canada, which is committed to disclosing records and funding to Survivors and communities that are searching for the missing and disappeared children and their burials.[355]

Indigenous Data Sovereignty

In his 2024 report, UN Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, recommended that the federal government take measures to support Indigenous data sovereignty.[356] Indigenous data sovereignty refers to the right of Indigenous Peoples to exercise ownership, control, access, and possession over their data. It recognizes the unique cultural, social, and political contexts in which Indigenous data is collected, analyzed, and shared.[357] Indigenous data sovereignty promotes Indigenous-led research methodologies, respects community protocols for data sharing, and ensures that data collected from Indigenous communities is used ethically and with their consent. Such practices recognize the cultural significance of data and the need to protect Indigenous data from unauthorized

access or use. Indigenous data sovereignty also provides an opportunity for non-Indigenous researchers and organizations to learn from Indigenous knowledge and perspectives and to collaborate in respectful and mutually beneficial ways.[358]

The Global Indigenous Data Alliance, an international network dedicated to promoting Indigenous data sovereignty and governance, developed the CARE principles based on input from Indigenous Peoples around the world. The CARE principles were creating by building on the existing FAIR Principles, and the *UN Declaration*. These principles are:

Fair	**C**ollective Benefit
Accessible	**A**uthority to Control
Interoperable	**R**esponsibility
Reusable	**E**thics

The CARE principles are people and purpose oriented and meant to reflect the crucial role that data can have in advancing Indigenous innovation and self-determination.[359] In Canada, the guiding principles of Indigenous data sovereignty include the principles of OCAP (Ownership, Control, Access and Possession).[360] These guidelines were developed by First Nations and for First Nations-specific data. Métis and Inuit communities have similar principles that are in accordance with their community teachings and needs.

Indigenous data sovereignty is integral to truth-finding. Many Indigenous communities are asserting their sovereignty, establishing their own data and information systems to support search and recovery work. However, settler colonial archives still hold mass amounts of information that has remained inaccessible. Archival legislation must be changed. Archives must commit to decolonizing their systems, policies, and operational procedures by working closely with, and being accountable to, Indigenous people and communities. The federal government has international legal obligations to take effective measures to provide access to records to support the search and recovery of the missing and disappeared children and their unmarked burials.

Searching Sites of Truth

> These searches are about finding the truth, finding out what happened, who was responsible, and how we can get justice—if we can get justice. It's about bringing communities together—these schools were divisive and isolating. We

> need to come together to collaborate to bring these children home. It's about honouring the Survivors and their stories and honouring the Spirits of those who did not make it home.
>
> **— Benjamin Kucher, Métis Youth who is supporting Indigenous communities with ground searches**[361]

Cemeteries at former Indian Residential Schools are sites of truth and conscience where children are known to be buried. Government and church officials were aware that large numbers of children would die in these institutions, and they planned for their burials accordingly by establishing cemeteries. There are now many Indigenous-led search processes underway on the sites of former Indian Residential Schools and associated institutions across Canada. Determining the circumstances of each child's death and burial raises complex challenges. These searches must meet international legal principles and forensic standards while also meeting Indigenous legal criteria, cultural protocols, and practices.

Survivors Are the Living Witnesses

Survivors are at the heart of searching sites of truth—the cemeteries and unmarked burials at former Indian Residential Schools and associated institutions where their siblings, cousins, and friends who are missing and disappeared may have been buried. As they walk the sites with the search and recovery teams, they remember and speak for the children whose voices were silenced too soon. Their oral history interviews provide crucial evidence that does not exist in archival records. Archaeologists working with Indigenous communities to locate the unmarked burials of the missing and disappeared children emphasize the critical role of Survivors in the process. Archaeologist Dr. Scott Hamilton asks, "What do the Survivors say? That is your primary resource.... Written records are by and large bureaucratic documents created by the institutions.... Those data sources do not necessarily tell the same story."[362]

Survivors' knowledge about the missing and disappeared children and unmarked burials has also been shared amongst families over time, becoming part of the community's collective memory. Cree scholar Robyn Bourgeois notes that Indigenous families and communities have known for generations that children were buried, often in unmarked and mass graves, in cemeteries at Indian Residential Schools.[363] As search and recovery processes proceed across the country, the accuracy of Survivors' memories is being corroborated in archival records and ground searches.

Developing a Forensic Human Rights Approach for Search and Recovery Processes

Canada must establish a robust human rights-based approach to forensic investigations of unmarked burials and mass graves associated with the Indian Residential School System. Canada has legal obligations to uphold Western-based international law, principles, guidelines, and standards relevant to the missing and disappeared children and unmarked burials.[364] Equally important, applying Indigenous laws in forensic investigations can achieve important forms of justice and accountability for mass human rights violations based on Indigenous criteria. Forensic search and recovery processes must uphold, protect, and advance the human rights of Survivors, Indigenous families, and communities. Forensic human rights can provide opportunities for families and communities to grieve the deaths of the children, restoring human dignity. They can also encompass various forms of reparations such as public memorialization and commemoration and the rewriting of national history, correcting the historical record to counter settler amnesty and impunity.[365]

In applying forensic human rights approaches to Indigenous-led search and recovery processes, the following elements of the *Guiding Principles for the Search for Disappeared Persons*, established by the United Nations Committee on Enforced Disappearances (UNCED) in 2019, are particularly relevant:

- The right of victims and families to participate in searches and to receive information, progress reports, and search results must be protected and guaranteed.
- Searches must take a distinctions-based approach to consider the specific interests and needs of women and children and the cultural practices of Indigenous Peoples.
- There must be a comprehensive, coordinated strategy for search investigations using appropriate forensic methods, forensic experts, and other specialists with technical or other areas of expertise.
- Searches must be coordinated under a competent body and governed by public protocols to ensure effectiveness and transparency; search protocols should be revised and updated periodically to incorporate lessons learned, innovations, and good practices.[366]

Upholding the UNCED principles in developing anti-colonial Indigenous-led search and recovery processes within Canada will ensure that Indigenous and Western historical and

scientific methodologies work effectively together. However, doing so requires interpreting these principles through an anti-colonial lens. Indigenous Peoples, as holders of inherent, Treaty, and constitutional rights, not only have the human right to participate in searches but also to lead them. In taking a distinctions-based approach, it is insufficient to simply consider the cultural and spiritual practices of Indigenous Peoples; rather, they must be understood as integral to Indigenous legal systems transmitted through oral histories and practised in protocols and ceremonies.

For Survivors, Indigenous families, and communities exercising their right to truth, the purpose of the searches is to find out what happened to every child who was never returned home. They want answers to their questions because as Fredy Peccerelli, forensic anthropologist and the executive director of the Guatemalan Forensic Anthropology Foundation, told those at the Edmonton National Gathering, "the last thing that the families lose is hope."[367] At every National Gathering, participants emphasized that the forensic search and recovery process itself is as important as the outcome and must be Indigenous-led and sustainable over many years. This is consistent with the literature on reparations and the views of international experts with extensive experience in leading forensic investigations.[368]

Layering Evidence and Mapping Sites of Truth

Indigenous-led mapping and search and recovery processes have two dimensions: the macro-level of systemic patterns of genocide and mass human rights violations that become evident as communities share knowledge and research across sites of truth and the micro-level of site-specific investigations that are unique to each individual site. While there has understandably been a central focus on site-specific search and recovery processes, there is a need to map these sites of truth on a national scale as part of educating all Canadians about this aspect of Canada's history to advance truth, accountability, justice, and reconciliation. Various communities are at different stages of the micro-level, site-specific search and recovery process; some have been doing this work for several years, while others are just beginning. The work of the Carlisle Indian School Digital Resource Center in the United States, which has been mapping the site of the former Indian Industrial School since the mid-2000s, demonstrates the power and potential of mapping cemeteries both in terms of locating unmarked burials and as commemorative sites of truth and conscience.[369]

Cybercartography is an innovative practice that can support the goal of, "including community perspectives in various ways on maps, in addition to 'scientific' and other perspectives."[370] For example, for a cybercartography atlas for the Assiniboia Indian Residential School, Survivors' testimonies are layered together with archival documents such as photographs, site plans

and maps, architectural drawings, and correspondence related to a specific Indian Residential School to produce a more complete historical picture of the institution and the land and how these have changed over time.[371]

Tailoring Search Plans, Methodologies, and Technologies

Not every community has the same goals or objectives when they begin to search for the missing and disappeared children and unmarked burials. Different community or family needs may lead to different processes in the way in which the searches are implemented. These differences are important to explore, understand, and respect. There were, however, some common messages that emerged throughout the National Gatherings:

- **Truth seeking:** the searches are part of the unfinished truth seeking of the TRC, and carrying this work forward is an important part of healing.
- **Advancing justice and accountability:** while not every Survivor, family member, or community wishes to engage with the criminal legal system, the process of searching for and recovering missing children is, for many, its own form of justice.
- **Dignity:** all participants shared an understanding that the search for missing and disappeared children and unmarked burials is Sacred work. Search plans and processes must ensure the utmost dignity and respect for each and every one of those missing and disappeared.

Understanding the goals of a particular search will help to shape the search plan, methodology, and technology. There is significant complexity to search and recovery work. Determining the location of unmarked burials requires a historic understanding of the institutions' operations and the patterns relating to how children died and where they were buried.[372] Dr. Scott Hamilton emphasizes that, in preparing a search plan and timeline, multiple sources of information must be gathered and analyzed, including Survivor testimonies, archival records, and maps. All data should then be organized in a timeline to document the history of construction, operation, renovations, closure, and repurposing of the buildings and lands over time.[373] After gathering all this data into a timeline, using multiple sources of information, priority areas for ground searching can then be identified.[374] Each step of the process can take years—from gathering Survivors' truths, obtaining and reviewing records, gaining access to sites, and creating and carrying out robust ground search plans to analyzing the results. In addition, as new information is learned from Survivor truths and records reviewed, further searches may be required of other areas within the same sites or at new sites.

Searching Sites: Gathering Knowledge and Using Search Technologies

Many participants at the National Gatherings spoke about the need to create reliable maps of former Indian Residential School sites and potential burial grounds, building on the wisdom of Survivors and community knowledge. This work can be challenging due to the geography and changing land use over time, especially where the Indian Residential School buildings were moved to multiple locations. Two trustworthy and credible groups have created frameworks, resources, and tools that are available to assist communities preparing for, conducting, and analyzing site searches.

The **Canadian Archaeological Association's Working Group on Unmarked Graves** has created two documents: *Searching for Missing Children: A Guide to Unmarked Graves Investigations*[375] and *Recommended Pathway for Locating Unmarked Graves Around Residential Schools*, both of which can guide the development of site-specific scopes of work that focus on the application of remote sensing techniques to locate unmarked graves associated with Indian Residential Schools and associated institutions.[376] The **National Advisory Committee on Residential Schools, Missing Children and Unmarked Burials** has developed online educational resources and tools to guide all aspects of the search and recovery process, including a navigator document entitled *Navigating the Search for Missing Children and Unmarked Burials: An Overview for Indigenous Communities and Families*.[377] This document draws on the experiences of First Nations, Inuit, and Métis communities actively engaged in searches to identify key factors that communities should consider when designing their search processes.

A FEMIA Robotics D20 Drone with Riegl Lidar Sensor VUX-120 during a site search in 2024 (Office of the Independent Special Interlocutor).

Experts in search technologies who presented at the National Gatherings emphasized the need for a tailored search plan that is specific to each site being investigated. Many variables affect the use and effectiveness of the search technologies. Participants were encouraged to consider how communities might layer the use of the many tools and search techniques available to ensure the most effective process. The experts that presented on search technologies indicated that first-person truths and Survivors' testimonies about the sites and locations of potential burials are critically important to creating an effective search plan. They recommended that several technologies and techniques be used to ensure the accuracy of results and increase confidence in burial identification.[378] Available technologies and techniques include aerial-based remote sensing, light detection and ranging, ground-based geophysics, ground-penetrating radar (GPR), electrical resistivity/conductivity, magnetometry, historic human remains detection dogs, and eDNA. Each has its proper uses, strengths, and limitations. The highly technical information about search technologies and techniques that experts shared with participants at the National Gatherings highlighted how important it is for those leading searches and investigations to learn more about these different tools and to obtain the technical assistance they need to support their work.

A Mala Mira HDR Multi-Chanel Ground Penetrating Radar machine being towed across search area (left), and an S4 Subterra Gray Soil Spectroscopy machine (right) during a ground search in 2024 (Office of the Independent Special Interlocutor).

Emerging Practices of Indigenous-Led Forensic Search and Recovery Processes

> It is time for all levels of government to support First Nation families and communities. We must work to help the Spirits of our children come home to rest. It is time to right the wrongs. It is time for our people to author the narrative of our history. It is our history, it is our truth, it is our children, it is our Spirit, it is our healing and it is our time to lead.
>
> **— Grand Chief Garrison Settee, Manitoba Keewatinowi Okimakanak**[379]

The principles, protocols, and practices of Indigenous laws must guide every aspect of searches and investigations relating to the missing and disappeared children and unmarked burials. This begins with Survivors' truths and testimonies. Throughout the process of conducting the preparatory work for using GPR and other technologies and techniques for site searches, communities keep the memory and Spirits of the children close to their hearts. In working with communities, anthropologist Dr. Sarah Beaulieu notes that, "Cultural protocols are as equally important as the science behind GPR and given the nature and given the sensitivity of this work, one cannot do one without the other."[380] Each Indigenous Nation across Turtle Island has its own laws, cultural protocols, teachings, and ceremonies to guide the Sacred work of searching for and finding the missing and disappeared children and unmarked burials. As a result, Indigenous Cultural Monitors have a crucial role in search and recovery processes. For example, when searching the site of the former Mohawk Institute, the Survivors' Secretariat appointed Cultural Monitors to ensure that Haudenosaunee and Anishinaabe laws, customs, ceremonies, protocols, and processes are respected and observed. In their role as Cultural Monitors, Knowledge Keepers and Elders may also determine the cultural significance of artifacts found with human remains that can assist in forensic identifications.[381]

Collaborative Relationships and Emerging Practices within and between Indigenous Nations

Participants at the six National Gatherings identified inter-jurisdictional collaborations to support search and recovery processes as essential. Collaborative structures and initiatives within and between sovereign Indigenous Nations are being created so that communities can build expertise and share knowledge, information, and promising practices. The importance

of having political, administrative, and technical leadership and expertise at community, regional, and national levels cannot be overstated. The children who were sent to Indian Residential Schools, Federal Hostels, and associated institutions came from many different and often very distant communities. Given this reality, the TRC's Call to Action 76 recommended that searches be conducted based on the principle that the Indigenous community most affected should lead the investigation.

What does this look like in practice? Determining the lead community is somewhat less complicated when a former institution was located on or near a reserve and most of the children came from within one Nation. However, First Nations, Inuit, and Métis children from different Nations were often sent to the same Indian Residential School by government and church officials. Addressing this diversity and complexity in search and recovery processes is critical. In some regions, several Indigenous Nations are implementing their own community-based models while also participating in inter-jurisdictional collaboration and information sharing networks and forums. Others are taking a more centralized approach and several Nations in one geographical area have created a regional Indigenous-led working group to collaborate with local communities, providing expertise, coordination, and health supports for search and recovery efforts at various institutional sites. These two different models are tailored according to the specific cultural, political, historical, and geographic circumstances of the Nations involved.

Archaeologists Joshua Murphy (left) and Micaela Champagne (right) checking a GPR radargram for any anomalies and signal penetration in snowy conditions at the site of the former Marieval Indian Residential School, Cowessess First Nation, Winter 2022 (photo provided by Micaela Champagne).

Critical Decisions in Indigenous-Led Forensic Search and Recovery Processes

As forensic search and recovery processes progress, there are several critical decisions that will determine their path forward. When Survivors, Indigenous families, and communities make the difficult decision to begin forensic ground searches, they do so with mixed emotions and different opinions about what they hope to find. A GPR search may indicate potential unmarked burials, but only further investigation can confirm the presence of human remains. Difficult decisions must be made about whether to excavate the area or use less intrusive methods such as core sampling and eDNA testing so that graves are left undisturbed. The process of deciding the most appropriate next step may take considerable time as communities and community members hold internal discussions.

How Do You Know What Ground Search Techniques Should Be Used?

> This will depend on the conditions at the site. Ground-penetrating radar (GPR), the technique used at the Kamloops Indian Residential School, is the most widely used and has the most successful track record for identifying unmarked graves in cemeteries. It has decades of use by archaeologists across the globe. However, there are some conditions where this approach does not work well. Fortunately, there are many other techniques that have also had success in identifying unmarked graves in and outside of cemeteries. While one approach may be enough, the best results are often achieved when multiple techniques are used together, as each provides a distinct data set that can offer different insights on features of interest and help confirm the presence of a grave, thereby improving confidence in the results. Establishing which approach is best should be done by a trained professional with knowledge of the specific site being surveyed, in partnership with the local community.
>
> — Canadian Archaeological Association[382]

While forensic experts can make technical recommendations about which search technologies are best suited to search a specific area, the final decision rests with communities, guided by Knowledge Keepers, Elders, and Survivors.

Building and Sharing Knowledge and Expertise

At the National Gathering in Iqaluit in January 2024, Dr. Andrew Martindale, an archaeologist and member of the National Advisory Committee, cautioned that none of the technologies were originally designed for finding graves. While many people might know how to use the technology, few currently know how to use it for the purpose of finding burials. National standards do not exist to ensure that search technicians are properly trained and qualified to do this highly specialized work. He said that national standards must be established. The National Advisory Committee believes that the best way forward is for Indigenous communities to be trained in the use of these technologies and lead the searches. He emphasized that the data collected must remain in the control of the community and not with private consultants. He supported Survivors' calls for long-term funding as search and recovery processes will take years, if not decades.[383]

Dr. Martindale's observations are consistent with what was heard from communities and participants at all National Gatherings over the past two years. It is particularly important to establish national ethical standards and guidelines for those who are working with Indigenous communities. Although there are many ethical experts, technicians, and companies working with those leading search and recovery efforts to search sites, there are some that are charging exorbitant fees; withholding data collected before, during, or after investigations (that is, GPR data collected); refusing to have their work peer reviewed; misrepresenting their expertise in searching for and identifying unmarked burials; and deliberately or negligently misleading Survivors, Indigenous families, and communities about the capabilities of search technologies.

The Canadian Archaeological Association's Working Group on Unmarked Graves has observed that, "The systemic barriers that communities face in terms of local technical capacity, training, racism, safety and security issues, access to records and expertise, land disputes, among other critical issues, are impeding their efforts to determine the whereabouts and number of unmarked graves in a timely manner." Noting that community training is urgently required, the Working Group has recommended that training resources must be developed for communities and that the development of these resources be centralized to avoid duplication of effort and to ensure that there is consistency in the information communities are receiving.[384]

Emerging Practices

The following are examples of practices and initiatives that provide culturally respectful archaeological and search technology support and guidance to Indigenous communities:

Institute of Prairie and Indigenous Archaeology: under the direction of archaeologist Dr. Kisha Supernant (Métis/Papaschase/British), the institute is Indigenous-led and is committed to supporting Indigenous-engaged archaeological research, developing educational approaches that integrate Indigenous ways of knowing and being into archaeological teaching and training, and changing cultural heritage policies in ways that reflect the values of Indigenous communities in Western Canada. The institute is not only the first of its kind in Canada, but it is also the first in the world to focus on Indigenous archaeology.[385]

Survivors' Secretariat: the Survivors' Secretariat has established the Reclaiming Our Role – Youth Supporting Survivors Program.[386] The program is focused on training young people from Six Nations of the Grand River and other impacted communities to operate the GPR machines on lands associated with the Mohawk Institute.[387]

Cowessess First Nation and Saskatchewan Polytechnic: in 2021–2022, working with a research team from Saskatchewan Polytechnic who conducted a GPR survey on the former site of the Marieval Indian Residential School, Cowessess First Nation developed an interactive map of the cemetery there. The coordinates of known graves and possible unmarked graves were collected using land surveying techniques and were plotted on the digital map. Death records of people buried in the graves were collected. Together, these were used to create an online interactive map, which can be searched by name, birth year, death year, age, and gender.[388]

Search and recovery efforts on the scope and scale now being conducted by Indigenous communities is unprecedented in Canada.[389] Therefore, it is crucial for these searches to meet international legal principles and forensic human rights standards established to govern such forensic investigations worldwide. Equally important, they must meet Indigenous legal criteria, incorporating both Indigenous and Western legal, historical, and scientific concepts, methodologies, and practices. Indigenous-led search and recovery processes are

combining Survivors' testimonies with archival records to map new conceptual, spatial, and relational understandings of the lands, cemeteries, and potential unmarked burials. This forms the basis for establishing ground searches using various technologies that have rich anti-colonial and transformative potential. Survivors, Indigenous families, and communities are finding truth in healing ways that affirm their sovereignty, self-determination, and human rights through establishing collaborative relationships to share knowledge and emerging practices within and between Indigenous Nations. This also serves to strengthen accountability, justice, and reconciliation to counter settler amnesty and impunity across Canadian society.

Rematriating Lands

> No mechanism exists to repatriate and return the land originally taken from First Nations (housing previous Indian Residential Schools or associated unmarked burials and buildings). Uncovering the history of the IRS [Indian Residential Schools] should also include resources and support to research land transfers and purchases and determine how the current owners came to be in possession of the land.... There are ongoing land claims associated with the sites of previous Indian Residential School sites, the expedition and prioritization of these claims could assist communities in gaining essential access to the sites requiring searching.
>
> — Anishinabek Nation[390]

My Mandate as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burials Sites associated with Indian Residential Schools directs me to, "Consider how a federal legal framework could support pathways for the acknowledgement and methods for the possible return of First Nations, Inuit, and Métis lands that were assigned or expropriated to accommodate churches and residential school sites and associated lands."[391] Returning the lands where former Indian Residential Schools were built and cemeteries were established to bury Indigenous children who died in these institutions requires setting this historical reality in the broader context of settler colonial genocide, strategies of land dispossession, and attacks on Indigenous self-determination.

The Truth and Reconciliation Commission (TRC) described how European States gained control of Indigenous Peoples' lands[392] and issued Call to Action 47, calling on, "federal, provincial, territorial and municipal governments to repudiate concepts to justify European

sovereignty over Indigenous [P]eoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, litigation strategies that continue to rely on such concepts."[393] To date, Call to Action 47 has not been implemented by any level of government in Canada.

Numerous legal barriers continue to exist that are impeding the searches and investigations for the missing and disappeared children and the unmarked burials. Survivors, Indigenous families, and communities are finding creative ways to use the limited legal mechanisms that are available under Canadian law to provide access to and protection of sites before, during, and after searches and investigations. They are also working collaboratively with various levels of government, organizations, and private landowners to implement cooperative measures. These collaborative measures rely on the benevolence and cooperation of governments, churches, and private landowners, which make them vulnerable to changing priorities and dependent on the whim of the political party in power, changes to church leadership, or land ownership.

When States have violated their international legal obligations causing substantive harms, they have a political, legal, and ethical duty to make reparations. In the context of protecting the burial sites of the missing and disappeared children, material reparation measures must include the rematriation of the lands where the missing and disappeared children are buried.[394] This would be consistent with the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) and would ensure that Indigenous Peoples are able to care for and protect the children who are buried on those lands.

Terminology Relating to the Return of Indigenous Lands

Various terms have been used, and are used, to describe the concept of returning lands to Indigenous Peoples.

Land Back is a campaign that began on social media as a hashtag (#LandBack) shared by Arnell Tailfeathers (Blackfoot Confederacy).[395] Since 2018, the Land Back movement has come to represent, "the reclamation of everything stolen from the original Peoples," inclusive of land, language, ceremony, food, education, housing, health care, governance, medicines, and kinship.[396]

Land Restitution is a term for the return of jurisdictional control over lands to Indigenous Nations. In legal and political philosophy, jurisdiction is the right to

make and enforce laws over a geographic area. It also often includes control over the extraction and development of natural resources.[397] By transferring power and wealth back to Indigenous Peoples, land restitution, which includes the water, natural resources, and infrastructure on the land, supports Indigenous sovereignty, self-determination, and economic and environmental justice.[398]

Land Repatriation is similar to Land Back and land restitution, as it is the act of returning the title and jurisdiction of land to Indigenous Nations. Repatriation as a process or term is most often linked to Indigenous Peoples through the repatriation of cultural property from museums, universities, and private collectors, which were appropriated through theft or commerce.

Land Rematriation is a term that goes beyond the act of returning land to Indigenous communities. Land rematriation, "encapsulates the idea of re-establishing an inseparable connection between the people and their ancestral land, allowing them to engage in reciprocal relationships guided by respect, reverence, and care. This process acknowledges that the land is not just a physical space, but a spiritual and cultural foundation that shapes the identity and worldview of Indigenous communities."[399]

Photo of a picnic table in Montreal, Quebec, taken July 27, 2022 (Office of the Independent Special Interlocutor).

What Is Rematriation?

Rematriation refers to Indigenous women's concept of restoring Indigenous Peoples' deep spiritual bonds and interconnectedness with Indigenous territories.[400] The late Stó:lō thought leader Lee Maracle first coined the term "rematriation" and described it as, "the restoration of matriarchal authority and the restoration of male responsibility to these matriarchal structures to reinstate respect and support for the women within them."[401] Rematriation

emphasizes the central role and value of Indigenous women within Indigenous communities and the connections of Indigenous Peoples to Mother Earth.[402] The centering of women and Mother Earth is consistent with many Indigenous legal, governance, and social orders. Rematriation involves, "revitalizing the relationship between Indigenous lands, heritage, and bodies based on Indigenous values and ways of knowing, being, and doing."[403] This includes upholding key principles of Indigenous legal systems that emphasize the interconnectedness of people with, and the responsibilities they have to take care of, their territories and all the animate and inanimate life forms within them.[404]

A central focus of rematriation is the return of lands and the dismantling of settler colonial structures and power relations.[405] Rather than relying on settler colonial concepts, such as land ownership, rematriation centres Indigenous worldviews, legal frameworks, and relationships to ancestral territories.[406] The distinction is crucial: ownership implies control and domination, while rematriation supports respectful, symbiotic, reciprocal relationships with ancestral territories and all entities within them. Although the ultimate goal of rematriation is the return of land, rights relating to access such as to hunt, harvest, and conduct spiritual ceremonies also provide important ways for Indigenous Peoples to uphold these relationships and responsibilities. The framework of rematriation is therefore applicable for the purposes of searching for, recovering, and honouring the burials of the missing and disappeared children as it provides an important means to uphold responsibilities under Indigenous laws to care for the burial sites through the recovery and return of the lands where these Sacred burials are located.

Crown Land

The majority of lands in Canada are owned and managed by government. The concept of "Crown Land" comes from eleventh-century British law that asserts that only the Crown could properly own lands.[407] Less than 11 percent of land is in private hands, 41 percent is federal Crown land, and another 48 percent is provincial Crown land. These Crown lands generate government income through surface and subsurface rights to the mineral, energy, forest, and water resources leased to private enterprises. Other lands are designated as national and provincial parks, provincial forests, Indian reserve lands, or as federal military bases.[408]

Crown lands as a concept is a foundational obstacle to rematriation because it upholds the Doctrine of Discovery—and currently, there is no Canadian legal pathway to resume full jurisdiction and governance authority over Indigenous lands.[409]

As noted in *Tŝilhqot'in Nation v. British Columbia*, the, "content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it,"[410] which supports a fiduciary duty to Indigenous Nations but also a right to encroach on Indigenous lands if the government can meet the justified infringement test.[411] Because Canada uses their own legal mechanisms to *give* rights to Indigenous Nations, those Indigenous Nations that have proven title may also still be subject to provincial regulation of land and resources on their territories due to the underlying Crown title claim.[412]

The current Canadian legal and policy framework is failing to ensure Indigenous sovereignty and stewardship over the unmarked graves and burial sites associated with Indian Residential Schools. Despite these challenges, Indigenous communities and leaders continue to find ways to use the limited legal tools available to care for the burial sites of their ancestors.

UN Expert Mechanism on the Rights of Indigenous Peoples: Right to Land

In 2020, the UN Expert Mechanism on the Rights of Indigenous Peoples issued the report, *Right to Land under the United Nations Declaration on the Rights of Indigenous Peoples: A Human Rights Focus* (*Expert Mechanism Report*).[413] Drawing on Articles 25–28 of the *UN Declaration*, the *Expert Mechanism Report* identifies the importance of land rights for Indigenous Peoples and highlights the following:

1. Land is not a commodity. For Indigenous Peoples ... land is a defining element of their identity and culture and their relationship to their ancestors and future generations. Land rights are, "often intergenerational and thus carry an obligation of stewardship for the benefit of present and future members and as the basis for their continued existence as a peoples."[414]

2. Indigenous Peoples, "have their own customs, traditions and land tenure systems which should be respected."[415]

3. Indigenous Peoples have collective rights, "Respect for Indigenous Peoples' self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources."[416]

4. "The protection of lands, territories and natural resources is necessary to guarantee other rights of [I]ndigenous [P]eoples, including the rights to life, culture, dignity, health, water, and food."[417]

5. "[Indigenous Peoples'] rights and responsibilities *vis-à-vis* land predate" the *UN Declaration*, and the, "articles on land rights were the most important articles for [I]ndigenous [P]eoples during the negotiation of the Declaration and remain a work in progress."[418]

The report concludes with Advice No. 13,[419] which recommends that State actions including, "abolishing all laws, including those adopted during periods of colonization that purport to legitimize, or have the effect of facilitating, the dispossession of [I]ndigenous [P]eoples' lands,"[420] using Indigenous Peoples' own traditional dispute mechanisms, rather than litigating in the courts, [421] and instituting measures to end the violence against and persecution of defenders of Indigenous lands, and providing redress for the harm suffered.[422] Finally, it recommends that, "States and Indigenous Peoples should consider and implement innovative agreements for co-management of lands in cases where transfer of title is not desirable or possible."[423]

Protecting and Rematriating Lands: International Examples

Land rematriation continues to be a challenge for Indigenous Peoples worldwide. The return of Indigenous lands is subject to the changing political agendas and priorities of successive governments over time. Australia, Aotearoa New Zealand, and the United States share a similar history with Canada, having perpetrated mass human rights breaches and atrocity crimes against Indigenous Peoples and stolen Indigenous lands to further settler colonialism and having initially rejected the *UN Declaration* when it was adopted by the United Nations on September 13, 2007.

In **Australia,** the 1992 High Court decision in *Mabo and Others v. Queensland* acknowledged pre-existing Native title rights interests over their traditional lands and held that the common law of Australia recognizes rights and interest to land held by Indigenous Peoples under their traditional laws and customs.[424] Native title rights have been determined to exist over just under 40 percent of Australia. The 1993 *Native Title Act* creates processes through which Indigenous claims to land and title rights can be recognized and protected.[425]

Lawyer and former president of the National Native Tribunal in Australia, Raelene Webb has written that, "Across the mainstream and Indigenous political spectrum there is almost unanimous consensus that while native title holds great potential for Indigenous Australians, its full benefits have not yet materialized"[426] due to the, "unstructured but complex network of Anglo-Australian rules and regulations, Indigenous perspectives, and internal and external stakeholder expectations."[427] In 2021, the Australian government introduced

the *Native Title Legislation Amendment Act 2021*, which, according to the Australian government, "introduced measures to improve and strengthen the operation of the native title system including measures addressing native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes."[428] Most recently, the Australian government announced on June 4, 2024, that it had engaged the Australian Law Reform Commission to conduct an inquiry of the Native Title Act, noting that the review, "will investigate any inequalities, unfairness or weaknesses in the regime, which governs how development projects can occur in land subject to native title."[429]

There have been multiple returns of land in Australia that have placed stewardship of vulnerable ecosystems and Sacred natural sites back in the care of Indigenous Peoples. For example, after negotiating with the State government of Queensland, Australia returned more than 395,000 acres of land to the Eastern Kuku Yalanji people in September 2021.[430]

In **Aotearoa New Zealand**, the nearly 150 government-recognized Māori iwi (tribes) can have their grievances heard and proceed in the settlement process by registering their claims with the Waitangi Tribunal. The Waitangi Tribunal is a standing commission of inquiry that makes recommendations on claims brought by Māori relating to legislation, policies, actions, or omissions of the Crown that are alleged to breach the promises made in the *Treaty of Waitangi*, which was entered into by the British Crown and Māori rangatira (chiefs) on February 6, 1840.[431] The role of the Tribunal includes:

- Inquiring into and making recommendations on well-founded claims;
- Examining and reporting on proposed legislation if it is referred to the Tribunal by the House of Representatives or a Minister of the Crown; and
- Making recommendations or determinations about certain Crown forest land, railway land, State-owned enterprise land, and land transferred to educational institutions.[432]

When the Tribunal was first established in 1975, it was only able to investigate present-day violations of Māori sovereignty. In 1985, the Tribunal was provided with, "retrospective powers ... to investigate historical violations of Māori sovereignty going all the way back to the 1840 *Treaty of Waitangi*, opening the door to one of the world's strongest examples of reparations."[433] With these new retrospective powers, the Tribunal began to inquire into and report on treaty claims and matters relating to the restoration of Māori language and Māori land reform. The Tribunal does not have the ability to negotiate or settle treaty claims; however, it does make recommendations on claims for compensation.[434]

In 2023, the new national government, a coalition government comprised of the National Party, the ACT Party, and the New Zealand Party announced that the government does not recognize the UN Declaration as having any binding legal effect on Aotearoa New Zealand.[435] It has launched a review of all legislation with the aim of repealing or replacing any references to the principles of the *Treaty of Waitangi*, known as the Treaty Clause Review.[436] It has also proposed a Treaty Principles Bill, which the Waitangi Tribunal has found is:

> unfair, discriminatory, and inconsistent with the principles of partnership and reciprocity, active protection, good government, equity, and redress ... [and] also in breach of the Crown's duty to act honourably and with the utmost good faith. For the Crown to entertain "principles" that contain inaccurate representations of the text and spirit of the Treaty / te Tiriti and warped interpretations of te reo Māori from te Tiriti o Waitangi is a breach of the duty to act in good faith and to act reasonably.[437]

The **United States**, while no longer opposing the *UN Declaration*, does not regard it as legally binding or a statement of current international law. Rather, it views the *UN Declaration* as a, "moral and political force."[438]

As reported by the Indian Boarding School Initiative, "The United States Congress has acknowledged that, from the beginning, Federal policy toward the Indian was based on the desire to dispossess him of his land."[439] To effect this dispossession of land, the Unites States entered into treaties and other agreements with Tribes whereby Tribes ceded approximately one billion acres of land, "Treaties, although almost always signed under duress, were the window dressing whereby we expropriated the Indian's land and pushed him back across the continent."[440] Treaty making with Tribes ended in 1871, after which the US federal government, "used only statute, executive orders, and agreements to regulate Indian Affairs," which included Indigenous lands.[441]

In 1946, the US Congress established the Indian Claims Commission pursuant to the *Indian Claims Commission Act*. Land was predominantly the issue to be addressed by the Commission. However, the Commission did not have the authority to restore land rights. Instead, where a claim was successful, monetary compensation was provided in lieu of land title. The Indian Claims Commission was disbanded in the late 1970s, and the remaining cases were transferred to the US Court of Claims system.[442] The UN Expert Mechanism on the Rights of Indigenous Peoples study on land noted that, "the historic Indian Claims Commission left a mixed legacy because of its decision to award only monetary restitution rather than the

restoration of actual lands."[443] Further, from the outset, the Department of Justice, "fought the claims as aggressively as they would any other lawsuit against the United States,"[444] which brought into question the government's "dual position" of being both the defendant to the claims and the trustee of Indigenous Peoples' lands, as a conflict.[445]

In June 2021, the US Department of the Interior established the Federal Indian Boarding School Initiative, "a comprehensive effort to recognize the troubled legacy of federal Indian boarding school policies with the goal of addressing their intergenerational impact and to shed light on the traumas of the past."[446] In its first investigative report, the Federal Indian Boarding School Initiative recommended that the federal government, "support protection, preservation, reclamation, and co-management of sites across the Federal Indian boarding school system where the Federal Government has jurisdiction over a location."[447] Its second report proposed, among other recommendations, that the department should work to facilitate the return of former federal Indian Boarding School sites to government or Tribal ownership. Where former boarding school sites revert to or remain in US government ownership, "the Department should engage with Indian Tribes in government-to-government consultation when asked, to address the ownership and management of those sites, including the protection of burial sites and cultural resources."[448]

The State of California provides an example of the return of lands. In June 2024, the governor of California announced that it would be returning over 2,800 acres of ancestral land to the Shasta Indian Nation. This land had been flooded by the Copco I dam in the early twentieth century. This return of land to the Shasta Indian Nation is of particular interest because they are a non-federally recognized Nation. Because their lands were taken from them for the dams, they had no land base when the *Indian Reorganization Act* was passed in 1934—leaving them off the list of Tribes deemed eligible to receive services from the Bureau of Indian Affairs or other government agencies.[449]

California has also established the Tribal Nature-Based Solutions Grant Program. Funds pursuant to this program can be used by Tribes, "to purchase land, train workforce, expand and communicate traditional knowledge, build tribal capacity, and build projects and programs to protect culturally important natural resources and protect climate change."[450] Since its establishment in July 2023, this program has to date supported the return of approximately 38,950 acres of land to California Native American Tribes.[451]

All of the international examples examined have created some measures to strengthen Indigenous Peoples' relationship to the land, yet some fall short as they do not necessarily rematriate lands, which is the central goal for most Indigenous Peoples.

Rematriating Lands in Canada

> There is no doubt that legal recognition of rights has offered Indigenous people negotiating power, leverage, and expanded by degrees Aboriginal and treaty rights. In some cases, this has translated into some decision-making power and material benefits such as gaining expanded access to capital, contracts with companies, resource revenue sharing from provinces, and participation in regulatory processes. But this is unfolding through a relatively weak recognition of Indigenous jurisdiction. Hence, it is a trade-off for incremental change.
>
> — Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper*[452]

The forms of "incremental change" identified by the Yellowhead Institute include mechanisms such as: impact benefit agreements, government resource revenue sharing, and ownership and equity stakes.[453] These arrangements do not rematriate lands to Indigenous Peoples.

The UN Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, noted that, "Canada has adopted an incremental approach to 'modern treaty' negotiations, which can be characterized as self-government agreements, sectoral agreements, and other constructive arrangements,"[454] highlighting that there were 185 self-government negotiation tables across the country at various stages of negotiations. The Special Rapporteur found that:

> While these discussion tables can provide flexibility for negotiations based on the recognition of rights, mutual respect, cooperation and partnership, First Nations have criticized them as unilaterally developed by the Government, focused on negotiation instead of recognition, lacking transparency as regards revisions to policies guiding negotiation; and creating asymmetries of information that place First Nations at a disadvantage during the negotiation process. First Nations are calling for an Indigenous-led process to develop new federal policies and legislation recognizing and implementing their inherent rights, title and jurisdiction, including their right to free, prior and informed consent.[455]

Importantly, in the report, the Special Rapporteur held that, "True reconciliation can be achieved only if Canada respects existing treaties and **provides restitution and compensation for the loss of lands, territories and resources**."[456]

In May 2024, the House of Commons' Standing Committee on Indigenous and Northern Affairs issued its report *"We Belong to the Land": The Restitution of Land to Indigenous Nations*. The Standing Committee observed that Indigenous Peoples have fought, and continue to fight, for their lands to be returned, noting that:

> Land restitution is about correcting injustices and respecting Indigenous rights. It includes restoring Indigenous laws, governance, relationships and decision-making authority over the land; providing fair access to resources such as wildlife; addressing current inequalities between Indigenous Peoples and other Canadians; and providing access to capital and support for capacity development to ensure that Indigenous Nations can share in Canadian prosperity.[457]

It further noted that, "Indigenous Nations can use a variety of approaches to obtain access to their lands including through federal government policies and processes, the courts, international bodies or by asserting their own jurisdiction."[458] Problems exist within each of these approaches.

Federal policies and processes, which include the specific and comprehensive (modern) land claims, and addition to reserve processes, are lengthy, onerous, expensive, and outdated.[459] There are massive backlogs, they are restrictive and bureaucratic,[460] and they often only provide compensation for lands rather than land back.[461]

Courts have defined Aboriginal title narrowly, and it can be very difficult to prove Aboriginal title. Court processes are lengthy and costly, and the Crown respondents rely on technical defences to have the claims dismissed.[462]

Asserting jurisdiction often leads to the criminalization of the land defenders, who do not have the resources to challenge their criminalization in the criminal court system.[463]

The Standing Committee stated that it believed that the federal policies and processes, if modified, could contribute to reconciliation and facilitate the return of Indigenous lands.[464] It issued recommendations including that Crown-Indigenous Relations and Northern Affairs Canada work with Indigenous Nations to align its approach with the *UN Declaration*.[465]

The federal government's *2023–2028 UN Declaration on the Rights of Indigenous Peoples Act Action Plan (Federal UNDA Action Plan)* includes no measures related to the rematriation, repatriation, restitution, or return of land to Indigenous Peoples, either generally or specifically of lands where the burials of the missing and disappeared children are located. While the

Federal UNDA Action Plan identifies, "Lands, territories and resources" as one of the priority areas,[466] the actions identified under this priority only tinker with existing policies and processes rather than implementing anti-colonial transformative change. None of the actions relate to acknowledging that lands were assigned or expropriated to accommodate churches and to Indian Residential School sites and associated lands.

Who "Owns" Former Indian Residential School Site Lands?

While this Final Report necessarily focuses on land rematriation within the existing settler colonial legal and policy framework, it is important to note that the concept of Land Back is also interpreted more broadly by many Indigenous scholars and activists. Unangax̂ scholar Eve Tuck and professor K. Wayne Yang argue that decolonization must repatriate land while simultaneously recognizing how concepts and relationships with land have always been understood differently by Indigenous Peoples and settler populations.[467]

Measured against the huge swaths of Indigenous territories seized across Turtle Island that must be accounted for, the acres and hectares of lands of former Indian Residential School sites may seem small in comparison. However, these haunted lands loom large in Canada's history, and their importance to Survivors, Indigenous families, and communities should not be under-estimated. The federal government must now rematriate these lands, returning them to Indigenous Nations as restitution. Many Indigenous communities want these lands returned to their stewardship so that they can transform them from sites of colonial harm into healing places of truth-sharing where the missing and disappeared children and their burial sites can be properly protected, cared for, and commemorated in accordance with Indigenous laws.

To do so effectively requires knowing who currently "owns" these lands. Indigenous Services Canada's 2024 environmental scan report surveying the current status of land ownership and buildings on the former sites of the 140 Indian Residential Schools recognized under the *Indian Residential Schools Settlement Agreement* (*IRSSA*) provides a useful starting point.[468] The scan concluded that:

> The 140 former Indian Residential Schools recognized in the *IRSSA* occupied a total of 174 sites, with 76 located on reserve and 98 off-reserve. Of the 140 residential schools, 34 were located North of 60, and 106 were South of 60.
>
> **On-reserve sites:** Some reserve boundaries have changed over time, complicating confirmation of some locations of former residential

school sites on reserve. Some residential school sites on reserve land were surrendered by Indian Affairs to churches. While most of these lands eventually reverted to reserve land status, a small number of these sites remain as "donut hole" land parcels not yet converted to reserve land, and may be part of Additions to Reserve requests. For example, former residential school sites at Lytton, British Columbia, or Pine Creek, Manitoba. Two of the former Indian Residential Schools are designated as national historic sites.[469]

Off-reserve and Northern sites: Of the 98 off-reserve and Northern sites, 25 are wholly privately owned, 7 are fully or partially on federal Crown land, 5 are fully or partially owned by Indigenous entities, 17 are on provincial or territorial Crown land, 7 are on municipal land; 40 have mixed types of ownership/multiple jurisdictions (e.g., Indigenous, private, federal, provincial/territorial, church, modern treaties), many sites are owned by multiple private owners, 10 are partially or fully church owned, and 2 are included in other national historic sites.[470]

Non-*IRSSA* schools, federal day schools, institutions in the *Newfoundland and Labrador Anderson Settlement Agreement*, federal hospitals, and sanatoria were out of scope for the scan. The precise jurisdictional role for provincial and territorial governments with respect to former Indian Residential School sites located off-reserve requires further research in some cases. These are just two examples of the many limitations of the scan. Further work will be required to understand the legal status of these sites, a necessary first step to ensuring that Indigenous communities can conduct search and recovery efforts.

Emerging Practices of Land Rematriation

Despite the complexities of land tenure of former Indian Residential School sites, many Indigenous communities and Nations across the country have already been pursuing various strategies for the return of these lands. For example, in 2019, the federal government transferred the cemetery site at the former Regina Industrial School in Saskatchewan to the Regina Indian Industrial School (RIIS) Commemorative Association, a non-profit organization with a mandate to honour the memory of the children buried there and educate the public.[471] In other cases, church entities are actively engaging with Indigenous communities to return land where cemeteries and unmarked burials are located.

In some cases, such as the Portage La Prairie Indian Residential School,[472] the Treaty Land Entitlement process has been used to transfer sites to Indigenous control. The Treaty Land Entitlement process is part of Indigenous Services Canada's (ISC's) land management program. According to ISC:

> First Nations who did not receive all the land they were entitled to under treaties signed by the Crown and First Nations, can file a Treaty Land Entitlement (TLE) claim with the Government of Canada. TLE settlement agreements are negotiated between First Nations and the Government of Canada, typically with the participation of provincial/territorial governments.... The federal government must adhere to treaty obligations to provide the promised amount of reserve land to treaty First Nations. Generally, a TLE settlement agreement specifies an amount of land that a First Nation may either purchase on a willing buyer-willing seller basis, or select from unoccupied Crown land, or both in some cases, within an agreed to acquisition or selection area. Once purchased or selected, the First Nation may submit a proposal to the Government of Canada for the land to be added to the First Nation's reserve under the Additions to Reserve process.[473]

This is a lengthy and highly complex process, with multiple steps and stages, but it is often the only option available.

Communities and Nations may also purchase former sites. For example, on September 5, 2023, Williams Lake First Nation (WLFN) and the province of British Columbia announced that WLFN had recently purchased the former site of the St. Joseph's Mission Indian Residential School where 159 potential unmarked graves have been detected. The now 14-acre property, which was privately owned, was bought for $1.2 million, with an $849,000 contribution from the BC government. Negotiations with the province had begun in 2021, while conversations between WLFN leadership and the private landowners had been ongoing for decades.[474]

Applying the House of Commons Recommendations

While the examples above demonstrate how Indigenous Nations are working creatively within existing legal property regimes and using government policies and programs to reclaim former Indian Residential School sites, they also highlight Canada's failure to establish legislation,

policy, and a rematriation process tailored to the unique circumstances of sites where forensic investigations are active and evidence must be preserved. The Standing Committee found that Treaty and land claims policies and processes do not align with the *UN Declaration*.[475] The Standing Committee made two recommendations that are particularly relevant to this Final Report:

> Recommendation 8: That Crown-Indigenous Relations and Northern Affairs Canada, in partnership with Indigenous Nations, explore approaches to land restitution outside of the Comprehensive Land Claims Policy, the Recognition and Reconciliation of Rights Policy for treaty negotiations in British Columbia, the Specific Claims Policy and the Addition to Reserve Policy, such as recognizing and implementing Aboriginal title over specific parcels of land outside modern [T]reaty processes and establishing a process to adjudicate the rights of Indigenous Nations pertaining to their lands, territories, and resources in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*, and that the department provide each House of Parliament with a progress report on these efforts by December 2024.
>
> Recommendation 11: That the Government of Canada work with Indigenous Nations to create a national land restitution centre.[476]

These recommendations, if implemented, could create new viable options for land restitution and should be incorporated into the Federal UNDA Action Plan.

Clearly it is not enough nor is it acceptable that Indigenous Nations must navigate through Canada's ad hoc, piecemeal approach to rematriating the sites where the missing and disappeared children are buried. Canada must meet its international legal obligations to make reparations and provide restitution for the substantive harms it has inflicted on Indigenous Peoples through land dispossession, including lands where Indian Residential Schools were built. Such reparations must include the return of lands where the missing and disappeared children are buried. While Indigenous Nations have been working creatively with current legislations, policies, and processes, these are subject to changing political environments and government priorities. These mechanisms were never designed to address land return in the context of genocide and mass human rights violations. Nor were they created to advance truth, accountability, and justice for egregious wrongs of this magnitude.

Repatriating the Children

> Where's my grandmother? Where's my grandfather? ... Let us work together to find all our families. We have to put names on these graves or send them home.... Let's bring them home. And if we can't bring them home, let's go to them and have ceremonies.
>
> **— Navalik Tolonganak, Survivor, Cambridge Bay, Nunavut**[477]

Navalik (Nanoolavik) Tologanak, Survivor, speaking at the National Gathering on Unmarked Burials: Northern Voices in Iqaluit, Nunavut, January 31, 2024 (Office of the Independent Special Interlocutor).

Many Indigenous families and communities have been advocating for decades for the repatriation of children who died while at Indian Residential Schools or associated institutions. In some cases, they have spent years searching for their lost loved ones; once they are found, they may have to spend many more years fighting to have them returned home.

Indigenous Peoples within Canada and across the globe have long advocated for the return of their ancestors' remains and Sacred cultural items from museums, universities, and other State institutions and agencies. This important work must continue. However, Canada must now also engage in a different kind of repatriation process—one on a massive national scale—as part of reparations to return the human remains of the missing and disappeared children

to their families, communities, and Nations. There is an urgent need to expand the conceptual and legal scope of repatriation in Canada beyond the return of holdings in museums and universities to encompass the repatriation of the missing and disappeared children buried on or near former sites of Indian Residential Schools, hospitals, sanitoria, reformatories, and other State-run institutions.

Repatriation refers to the return of a person or possession to the care, custody, and/or ownership of their originating community.[478] The process and outcome of each repatriation may be different—and mean different things—for the families, communities, and Nations involved. Families and communities may choose to:

- Test the soil for chemicals that indicate the presence of bodies without exhuming any of the remains;[479]
- Not exhume graves, and mark and commemorate the children where they have been buried;
- Not exhume graves, but instead spiritually repatriate a child or children, using a ceremony to bring the Spirit of the loved one home;
- Excavate to confirm the presence of burials and then rebury and leave the children to rest in the same place;
- Approve partial exhumations and reburials where only some of the bodies are exhumed; and/or
- Seek the full exhumation and reburial of all of their loved ones and ancestors.

Repatriation raises complex and emotional questions of law, science, belief, and practice. Not all sites are the same, not all family members and communities have the same needs or beliefs, and not all repatriations, should they take place, are alike. Mourners have divergent viewpoints, opinions, and levels of interest in exhumations and physical repatriation.[480] This is to be expected since these decisions are extremely difficult. Respecting decisions about repatriation is one element of respecting Indigenous self-determination and the rights of Survivors, Indigenous families, and communities to determine the best course of action moving forward.

The 1996 Royal Commission on Aboriginal Peoples recognized that Indigenous custody and control over the burial sites of their ancestors and relatives, including the right to make decisions regarding exhumation or removal, is essential to upholding Indigenous legal principles and protocols governing the care of deceased kin.[481] Call to Action 74 of the Truth

and Reconciliation Commission emphasized government's obligation to respond to families' wishes for appropriate commemoration ceremonies and markers for the missing and disappeared children and reburial in their home communities where requested.

The repatriation of a child and/or the objects that were buried with them is part of a larger affirmation of the law, culture, and values of the community and Nation. Repatriations and reburials bring the ancestors close, braiding together the past, present, and future of the community.[482]

Repatriation of the children is now only in the beginning stages. Questions of whether or how to repatriate arise only once a child has been located. Locating a missing or disappeared child may first require searching through multiple archives for information, navigating legal property rights to access the land where graves are located, and overcoming all the difficulties of site searches. These processes demand extensive resources and years of work and are emotionally exhausting. As a result, most families and communities have not yet reached the stage where they can consider the profound questions associated with repatriation.

These decisions will be affected by the success or lack thereof in identifying remains, the location of the burial site, the Indigenous laws that are applicable, the wishes of the family and community, and the practical and financial challenges of transporting and reburying human remains, sometimes across thousands of kilometres and multiple provincial or territorial jurisdictions. The costs of relocation can be extensive, particularly if a child died and was buried far from home, a common occurrence. Families and communities who wish to bring their child or children home should not be prevented from doing so by the lack of adequate, sustainable funding. These questions can take on additional complexity when the remains of children cannot be identified. How can the remains of these children best be accorded dignity and respect, and how can they be memorialized? Where should they be placed to rest permanently? Who can make these decisions?

The questions surrounding repatriation must be addressed now, so that when families and communities have located their loved ones, they have the legal frameworks and the practical supports and resources that they need to take this step in the way that is right for them.

International Legal Obligations and Principles

International law confirms that States have obligations both to the remains of the dead and to their living families and communities. International legal and human rights instruments call on governments to recognize and facilitate the right of repatriation. Some of these instruments have been ratified by Canada and incorporated into domestic law, creating binding

legal obligations on Canada. Others, that Canada should sign and ratify but has not, include important principles and guidelines that must inform Canada's approach to repatriating the missing and disappeared children. It was the policy and practice of the federal government and churches not to fund the repatriation of children who died at Indian Residential Schools or other State-run institutions to their homes, families, and communities. To date, the Canadian government and the church entities have not established clear guidelines and policies or made a formal commitment to supporting the repatriation of children when requested by families and communities.

The right to repatriation is clearly and bindingly articulated in Article 12 of the *UN Declaration*:

> 1. Indigenous [P]eoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with [I]ndigenous [P]eoples concerned.

In July 2020, the UN Expert Mechanism on the Rights of Indigenous Peoples released a report with recommendations on how States should implement Article 12.[483] It recommended that:

- A human rights-based approach be applied to the repatriation of Indigenous Peoples' human remains; and
- Indigenous Peoples' rights to self-determination, culture, spirituality, religion, and knowledge, among other factors, be reflected by States' approach to repatriation.

As previously noted, Canada has not yet signed or ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* (*Convention on Enforced Disappearance*). This Convention requires States to, "locate, respect and return [victims'] remains."[484] The associated *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* provides that remedies may include,

"assistance in the recovery, identification and reburial of the [children's] bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities."[485]

Repatriation in Australia, Aotearoa New Zealand, and the United States

It is instructive to compare the repatriation environment in three other settler colonial countries—Australia, Aotearoa New Zealand, and the United States, that have similar histories of forced Indigenous child removals with accompanying high death rates.

Australia: Although Australia has no federal legislation that compels Australian museums and other institutions to return ancestral remains to Aboriginal and Torres Strait Islander Australian communities, there is various legislation that supports repatriation and cultural preservation measures. One example is the national Advisory Committee for Indigenous Repatriation, composed entirely of Aboriginal and Torres Strait Islanders appointed by the minister for the arts. The Committee provides strategic advice on policy and program issues to ministries within the Australian government concerning the repatriation of ancestral remains and Sacred objects held in Australian collecting institutions and overseas. They also provide advice on, "repatriation ... where there is limited provenance and no identified community of origin [and] [r]epatriation matters that affect all or many communities (as each community advises on its own cultural protocols for ancestors and objects)."[486]

Australia is also just beginning to confront the historical reality that the human remains of many Indigenous children lie not in museums or other holding institutions, but in unmarked graves at boarding schools, orphanages, and other institutions where they died while in the custody of the State. Recently, there have been growing calls from Survivors and their supporters for search and recovery efforts at Aboriginal Boarding Homes and other institutions where the Stolen Generations—Aboriginal children who were forcibly taken from their families and communities—may be buried in unmarked graves. In January 2024, the New South Wales government announced that it is providing funding for further investigations at the Kinchela Boys Training Home as well as two other institutions—the Cootamundra Girls' Home and the Bomaderry Infants' Home, working collaboratively with Survivors and their organizations through the Keeping Places Project,[487] which are, "Aboriginal community managed places for the safekeeping of repatriated cultural material."[488]

Aotearoa New Zealand: From the 1800s until the 1970s, the remains of Māori in Aotearoa New Zealand were stolen from Sacred grave sites and treated as objects to be bought, sold, and traded. Repatriation efforts have largely focused on returning these ancestors.[489] The *Museum*

of New Zealand Te Papa Tongarewa Act, 1992[490] established Te Papa, as a Crown entity to protect, preserve, and explore Māori heritage in Aotearoa New Zealand. In 2003, with this mandate, Te Papa established the Karanga Aotearoa Repatriation Programme (KARP) in order to facilitate the repatriation of Māori and Moriori ancestral remains.[491] KARP is dedicated to bringing Māori and Moriori kōiwi tangata (ancestors) home.[492] The government has only a facilitative role—it asserts no ownership over ancestors or authority over if, how, when, and to where they are repatriated. KARP may serve as a potential model for repatriation processes as Aotearoa New Zealand begins investigating the history of Māori and non-Māori children buried in unmarked graves at State-run institutions.

The Royal Commission of Inquiry into Abuse in Care was established in 2018 to investigate what happened to the children, young people, and adults in State care and in the care of faith-based institutions in Aotearoa New Zealand between 1950 and 1999.[493] In its Interim Report, under Recommendation 72, the Royal Commission of Inquiry directed that, "the Government should consider funding a national project to investigate potential unmarked graves and urupā or graves at psychiatric hospitals and psychopaedic sites, and to connect whānau to those who may be buried there. The Government should support tangata whenua who wish to heal or whakawātea the whenua where this has occurred."[494] In June 2024, the Royal Commission of Inquiry's Final Report found that Recommendation 72 had been partly implemented[495] and reiterated its call for an independent investigation, "The government should appoint and fund an independent advisory group to investigate potential unmarked graves and urupā at the sites of former psychiatric and psychopaedic hospitals, social welfare institutions or other relevant sites."[496]

United States: The *Native American Graves Protection and Repatriation Act* (*NAGPRA*), enacted in 1990, provides federally recognized Native American and Alaska Tribes, and Native Hawaiian Peoples with an enforceable legal mechanism for establishing repatriation processes for the return of ancestral human remains, funerary objects, Sacred cultural items, objects of cultural patrimony, and the protection of burial sites. *NAGPRA* applies to museums, universities, national parks, and all other government-funded federal agencies. While *NAGPRA* has significant limitations, including time-consuming processes, and only applies to federally recognized Tribes, it does create clear, proactive, and enforceable responsibilities for federal museums and agencies; specifies control and ownership over ancestral remains and cultural properties for lineal descendants, Tribal lands, and affiliated Tribal communities; and includes a dispute resolution mechanism. However, *NAGPRA* regulations for determining jurisdiction over "culturally unidentifiable remains" do not adequately recognize or protect the rights and interests of Indigenous Peoples over those of State agencies and institutions.[497] Nor does *NAGPRA* effectively compel State agencies to recognize Indigenous sovereignty,

cultural rights, and decision-making authority to determine the lineal descent of Native American, Native Alaskan, and Native Hawaiian human remains to identify them. There has been a lack of deference to Tribal knowledge, including that of family lines and cultural identity.[498] In many cases, State agencies or institutions have refused to comply with *NAGPRA* regulations, using their own repatriation regulations instead to make decisions about disinterment and repatriation.

In May 2022, the US Department of the Interior released its *Federal Indian Boarding School Initiative Investigative Report*.[499] This year-long investigation examined, "the loss of human life and lasting consequences of the Federal Indian Boarding School system."[500] The report recommended that the US government take action to, "Locate marked and unmarked burial sites associated with a particular Indian boarding school facility or site, which may later be used to assist in locating unidentified remains of Indian children."[501] It also made specific recommendations to amend *NAGPRA* to better protect Indigenous burial sites and facilitate repatriations. In 2012, Yacqui legal scholar Rebecca Tsosie observed that US legislators who drafted *NAGPRA* indicated that the bill was, "not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."[502] She noted that *NAGPRA* did not comply with the principles, norms, and standards of the *UN Declaration*. *NAGPRA* regulations were finally amended, effective January 12, 2024, making the law more consistent with the *UN Declaration* by requiring the free, prior and informed consent of Native American and Alaskan Tribes and Native Hawaiian Peoples in repatriation decision-making processes. US Department of Interior Secretary Deb Haaland (Pueblo of Laguna) said that, "the changes strengthen the authority and role of Indigenous communities in the repatriation process."[503]

In July 2024, the second volume of the *Federal Indian Boarding School Initiative Investigative Report* was released. Among the report's eight recommendations was that:

> The US Government should assist individuals in locating the records of their family members who attended Federal Indian boarding schools. Where children are known to have died and been buried at burial sites, the US Government should assist individuals in locating the burial sites of their family members and supporting them, and Tribes, in any efforts to either protect those burial sites or repatriate their remains to their homelands.[504]

Despite the amendments to *NAGPRA*, it still places a heavy burden on Tribal Nations, and it does not apply to private entities or churches. This makes passing legislation to establish a Truth and Healing Commission in the United States even more critical. In May 2023,

the *Truth and Healing Commission on Indian Boarding School Policies Act* was introduced in the US Senate.[505] If passed, this bill would establish a commission with investigative and subpoena powers to conduct a full inquiry into Indian Boarding Schools in the United States. This commission's duties would include:

- Making recommendations to protect unmarked graves and accompanying land protections; and
- Supporting repatriation and identifying the Tribal nations from which children were taken.[506]

The Lack of a Canadian Legal Framework for Repatriation

Reflecting the settler colonial ideology underlying the Indian Residential School System, no framework was ever put in place to ensure that the remains of the children would be returned to the care of their families, or to enable Indigenous families and communities to make decisions about their final resting places.

Without such a made-for-purpose legal framework, Indigenous families and communities who are attempting to bring their children home must navigate a, "patchwork of conflicting laws, legislation and policies enacted by various levels of government."[507] Some attempts have been made to rectify this. On the federal level, in 2019, Bill C-391, the *Indigenous Human Remains and Cultural Property Repatriation Act*[508], received unanimous support in the House of Commons but failed to make it through Senate before Parliament adjourned. The proposed bill was to be compliant with the *UN Declaration* and would have, "develop[ed] and implement[ed] a comprehensive national strategy to promote and support the return of Indigenous human remains and cultural property, wherever situated, to the Indigenous [P]eoples of Canada."[509] The proposed legislation included an accountability mechanism requiring regular progress reports to Parliament. The Act emphasized the central importance of recognizing and upholding Indigenous concepts and cultural traditions of repatriation and applying Indigenous concepts of ownership and dispute resolution methods in developing binding legislation and nationally recognized Indigenous jurisdiction over repatriation.

With the failure of Bill C-391, Canada continues to be in the early stages of establishing repatriation legislation and policy. No federal law addresses the repatriation of ancestors or Sacred possessions, either from institutions or directly from the places where they are found. In the federal government's Federal UNDA Action Plan, Measure 98 commits to co-developing comprehensive approaches (through laws, programs, and/or services), "to

enable the repatriation/rematriation of Indigenous cultural belongings and Ancestral remains."[510] However, the federal government's June 2024 progress report on implementing the Federal UNDA Action Plan notes that work has not yet begun on this priority.[511]

Most decisions regarding the custody, care, and repatriation of human remains found at Indian Residential Schools and associated institutions are governed by provincial or territorial laws. Laws governing human remains are generally dealt with by multiple statutes, including those governing public health, cemeteries, cremation, and other forms of interment, heritage sites, coroner's investigations, archaeological remains, and vital statistics. Which laws are applicable in a particular situation may depend on where the human remains are located or the age of the remains.

Provincial and territorial legal frameworks differ between jurisdictions but generally uphold the authority of governments to set the parameters of Indigenous involvement in decisions concerning the care and repatriation of ancestral remains. In some cases, provincial laws explicitly assert Crown ownership over human remains, including Indigenous human remains. These are discussed in more detail in the full Final Report; however, two examples are highlighted here.

In British Columbia, the *Declaration on the Rights of Indigenous Peoples Act,*[512] may provide a legal mechanism for the repatriation of the human remains of the missing and disappeared children under Article 12. The BC *Declaration on the Rights of Indigenous Peoples Act* Action Plan includes a commitment to, "co-develop a policy framework to support repatriation initiatives."[513] The 2023–2024 BC Action Plan Report noted that the First Peoples' Cultural Council, "supported repatriation pilot projects with funding so First Nations can plan, develop policies, conduct research and repatriate their cultural belongings from museums and other holdings."[514]

In Quebec, Bill 79, the *Communication of Personal Information Act*, supports Indigenous families' searches for their children who were taken to a, "health or social service institution" in the province before December 31, 1992,[515] including Indian Residential Schools. This law has helped many families find where their loved ones are buried.[516] Some families have expressed their desire to exhume burial sites to identify their children and/or repatriate them to their home communities.[517] Section 18 provides that families may be assisted through this process.[518] This assistance encompasses financial, legal, practical, technical, emotional, and spiritual support, much of it flowing through an Indigenous-led organization, the Association des familles Awacak.[519] It also involves collaborations with the Quebec coroner's office, the provincial Direction de soutien aux familles, and the Laboratoire de sciences judiciaires

et de médecine légale (LSJML) for DNA or other methods of identifying children.[520] The government has a website to assist families who wish to apply for support under the *Communication of Personal Information Act*.[521]

The implementation of the Act, which is closely aligned with search and recovery efforts, is an important first step in the repatriation process; it has both strengths and limitations. While the scope of the Act is limited to facilitating access to personal information held in institutional records, it does authorize the minister to conduct an investigation within an institution where warranted.[522] This legislative initiative provides valuable guidance into how a provincial government can support individual families through an Indigenous organization such as the Association des familles Awacak, which is effectively supporting families searching for their children. However, the Act is not based on the *UN Declaration*, which recognizes the collective sovereign and cultural rights of Indigenous Peoples to access institutional records and information. In addition, the initiative is not Indigenous-led and lacks independence from government.

In the absence of a national strategy to develop federal legislation governing the repatriation of the missing and disappeared children and given their constitutional jurisdiction over many of the sites that are subject to repatriation decisions, provinces and territories must amend their laws pertaining to death investigations, property and heritage designations, and cemeteries to facilitate repatriation processes, with the following interim measures:

- Laws that assert Crown ownership over human remains must be repealed or amended to ensure they do not apply to Indigenous ancestral remains and the missing and disappeared children. Ancestors and Sacred objects must not be considered "property" under any federal, provincial, or territorial legislation.
- Laws that privilege the scientific study or use of ancestral remains over Indigenous Peoples' human rights and cultural obligations to their deceased ancestors should be repealed and replaced with provisions that clearly uphold Indigenous laws and Indigenous-led repatriation processes for determining if, when, and how ancestral remains, including the missing and disappeared children, will be exhumed, tested, studied, stored, and reburied.
- Laws that require permits, approvals, or court orders for disinterment and reburial should be amended or clarified to prioritize accessible processes for the repatriation of missing and disappeared children.

- Regulations that require human remains to be transported in sealed containers by licensed funeral operators should be amended or clarified to ensure that Indigenous laws and protocols regarding the respectful treatment of the bodies and Spirits of the missing and disappeared children will be upheld and facilitated.

Bureaucratic Constraints on Funding Repatriation

Repatriation is costly. Expenses can include researching the location of remains, obtaining permits for reburial, travel costs for those who accompany the remains, funeral costs, and more.[523] Bringing home a child who was taken by the Indian Residential School System requires resources that few families have and that no family, community, or Nation should have to bear.

The federal government provides some funding for community-led repatriation work through Crown-Indigenous Relations and Northern Affairs Canada's (CIRNAC's) Residential Schools Missing Children Community Support Fund. After initially restricting the use of funds available to search and recovery efforts by excluding exhumation and DNA identification, CIRNAC has indicated that funding can be used to bring children home, including for:

- Identifying potential burial locations by conducting field surveys and/or archaeological investigations;
- Engaging with other affected communities to develop an inclusive approach for the identification of individual remains and their potential relocation; and
- Holding on-site ceremonies and other activities before/during/after field work is conducted according to cultural protocols (such as community feasts and healing circles).[524]

This funding is subject to numerous limitations:

- **The funds cover a restricted range of expenses.** Costs of exhumation, DNA testing, and relocation are not included in this list. Applicants must contact the program administrator to confirm whether, "activities supporting the physical identification and repatriation of human remains" are eligible for funding on a case-by-case basis.[525]

- **The funds impose rules and requirements that undermine community capacity to undertake search and recovery work.** For example, to receive funding from CIRNAC for DNA, excavation, or exhumation activities communities must obtain consent of both communities and families, a requirement that can place recovery efforts at an impasse.[526]
- **The funds do not support repatriation for all missing and disappeared children.** Funding is only available in relation to institutions recognized in the Indian Residential Schools Settlement Agreement and the Newfoundland and Labrador Residential Schools Settlement Agreement.
- **The funds are time limited.** Funding expires in 2025. However, not all remains of children who died at, went missing from, or were disappeared from Indian Residential Schools have been identified, and searches are still ongoing.[527] This type of time-limited funding does not recognize the complexity and difficulty of the processes that must be navigated to find and repatriate children.

From 2021 to 2023, the government allocated $232.1 million to support implementing Calls to Action 74–76, and an additional $91 million was allocated for fiscal years 2024 and 2025.[528]

In July 2024, Indigenous communities who have begun search and recovery efforts were abruptly informed that their funding for 2024–2026 would be significantly reduced. Both the arbitrary funding cap and the disrespectful way in which Indigenous communities were informed of this unilateral government decision were unacceptable. CIRNAC did not identify repatriation as a funding priority in its updated eligibility criteria,[529] making it even more difficult for Indigenous families and communities to exercise their right of repatriation. Furthermore, the funding cut represented a significant step backwards in terms of trust and relationship-building as the burden of finding the necessary resources to support ongoing search and recovery efforts, including repatriation, was once again unfairly placed on Survivors, Indigenous families, and communities. The public outcry denouncing the funding cuts was swift and widespread. On August 16, 2024, Minister of Crown-Indigenous Relations Gary Anandasangaree issued a statement reversing the decision. The extent to which the damage caused by the funding cut decision can be repaired remains to be seen.

This well-established historical pattern of asserting bureaucratic control over Indigenous programs and policies is documented throughout the Final Report. Currently, search and recovery processes are vulnerable to seemingly arbitrary changes to policies, programs, and

funding. Despite statements committing to support Survivors, Indigenous families, and communities engaged in this difficult and Sacred work, this recurring pattern is already evident. It is of paramount importance that, when Indigenous families and/or communities wish to repatriate the remains of a child, sufficient funding and other supports must be provided without inter-jurisdictional squabbling amongst various levels of government over who is responsible for providing it.

Gathering Wisdom on the Potential for a *NAGPRA* Plus Legislation in Canada

At the National Gathering in Iqaluit in January 2024, presenters from the Manitoba Keewatinowi Okimakanak's (MKO's) Path Forward Project shared their research on *NAGPRA*.[530] The Path Forward Project is an MKO truth-finding initiative that provides guidance, assistance, and support to MKO Survivors, Indigenous families, and communities engaged in searching for, identifying, commemorating, and repatriating missing and deceased children at former Indian Residential Schools, hospitals, and sanatoria. As part of their work, they have been analyzing *NAGPRA* to determine whether similar legislation would be suitable in Canada. They asked participants to consider the following: what could *NAGPRA*-style legislation look like in Canada; should the legislation incorporate the TRC's Call to Action 74 that provides for the reburial of the children where requested and Article 12 of the *UN Declaration*; and what would need to be adapted for the Canadian context? They noted that despite its shortcomings, *NAGPRA* has been impactful in the United States. It has codified the States' legal and human rights obligation to take positive action to protect and return ancestral remains and cultural items. However, as the applicability of a *NAGPRA*-style law to the Canadian context is contemplated, careful consideration must be given to how to strengthen similar repatriation legislation in Canada.

NAGPRA hinges on the foundational concept that Indigenous Peoples have a fundamental human and cultural right to repatriate their ancestors' human remains, funerary objects and Sacred cultural items. However, this critical fact was often lost in the jurisdictional conflicts that pitted the legal and scientific interests of museums and other State institutions and agencies against those of Indigenous Peoples. Anthropologist Chip Colwell observes that, "Although *NAGPRA* and its regulations do not include the words healing, reconciliation, or justice, these concepts have come to be seen as a core part of the law's implementation.... [However], [m]uch of the scholarly analysis of repatriation in the United States has focused on the historical, moral, and political conflict over the control of Native America's cultural

heritage."[531] He argues that reframing the implementation of *NAGPRA* through the conceptual lens of repatriation as a process of healing, justice, and reconciliation situates it more squarely in the realm of restorative justice that legislators in the US Congress envisioned.[532]

While American legislators may not have intended such consequences, from a Tribal perspective, applying their own laws, principles, cultural protocols, and ceremonial practices to repatriation processes is essential to healing, accountability, justice, and reconciliation.

Indigenous-Led Repatriation: Exercising Sovereignty and Applying Indigenous Laws

While concepts of healing are discussed in more detail later, it is important to note here that Survivors and Indigenous political leadership in Canada and across the globe envision healing and cultural revitalization as a form of anti-colonial political resistance that is linked to exercising Indigenous sovereignty and self-determination rights.[533] Caring for and staying connected to ancestors and deceased relations is central to the spiritual health of Indigenous Nations and communities.[534] The age or length of time people have been deceased is less important than their place within living kinships. A person's death, burial, and burial site have deep significance for Indigenous Nations and laws. This significance is enacted in ceremonies, protocols, and obligations. Among the motivations for Indigenous families and communities to find the burial sites of the missing and disappeared children is that they were not given this care, either at or after their deaths. These are ongoing traumas and unmet needs.

While the obligation to care for ancestors and to support the dead in their onward journey is shared among Indigenous Peoples, diverse Nations have different traditions, approaches, and practices for caring for and upholding their obligations to deceased relations. They may thus take different approaches to decisions about if, when, and how to repatriate children who were never returned home from Indian Residential Schools and associated institutions.

Indigenous control and leadership of repatriation is foundational to ensuring that Indigenous laws and protocols are respected, that families and communities receive the support that they need throughout these emotionally and logistically challenging decisions, and that the outcomes meet the needs of Indigenous communities and families. Repatriation can also be a powerful exercise of self-determination and community healing. The UN recommendations on the implementation of Article 12 of the *UN Declaration* emphasize that States' approaches to repatriation must reflect Indigenous Peoples' rights to self-determination.[535]

The laws and protocols of virtually all Indigenous societies indicate that the original burial sites of ancestors and deceased relations should be left undisturbed. In most circumstances, Nations would prefer to keep and care for ancestors where they have originally been buried. In situations where ancestors must be moved, either pursuant to a Nation's own laws, natural risks, or unavoidable incompatible land uses, exhuming and moving ancestors can and should be done by or under the control of Indigenous Nations themselves.

Repatriation has almost always occurred only after non-Indigenous people have unlawfully exhumed ancestors from their original burial sites or resting places and taken them from their home territories, often to be stored or displayed at institutions around the world.[536] While the Indigenous-led repatriation processes being developed in relation to the return of ancestors from museums are ongoing, repatriation of the missing and disappeared children is occurring in a very different context. These are not the ancient remains of ancestors stored in carefully catalogued museum collections, but the human remains of children buried at government and church-run institutions of forced child removal that still existed into the 1990s.

While few repatriations have yet occurred, those that have provide important insights into why Indigenous control and leadership of repatriation is essential. This will ensure that Indigenous laws, cultural protocols, and ceremonial practices are respected, that Survivors, families, and communities receive the support that they need, and that the outcomes meet the needs of Indigenous communities and families.

"Muscowequan Residential School" [1921, 1931] (Oblats de Marie-Immaculée Province oblate du Manitoba / Délégation, Archives de la Société historique de Saint-Boniface).

For example, the Muscowequan Indian Residential School operated on Treaty 4 Territory in what is now Saskatchewan from 1889 to 1997. Treaty, non-Treaty, and Métis children from many communities were taken to this institution. An unknown number of children died at Muscowequan and were buried in several sites that, over the years, were neglected, repurposed, or "forgotten."[537] In 1992, construction workers unexpectedly disinterred the remains of children buried in an unmarked cemetery on the former Muscowequan Indian Residential School grounds. Instead of stopping work, contractors put the children's remains into garbage bags.[538] When community leaders were notified, they ordered the work to be stopped immediately. When they learned about how the contractors had treated the children's remains, the community, "experienced shock, grief, anger, disbelief and hurt."[539] After further investigation, 19 unmarked burials were found. Muskowekwan Elders consulted with Elders and Knowledge Keepers from the communities whose children had been taken to the institution over its 111-year history. Following these consultations, and with protocols and ceremonies that followed the laws and traditions of all seven First Nations, the children's remains were reburied in a cemetery on Muskowekwan First Nation territory.[540]

Some Indigenous families, communities, and Nations are choosing, at least for now, not to excavate potential burial sites or exhume the children's bodies who have been recovered. Instead, they are conducting ceremonies in accordance with their Indigenous laws to bring the children's Spirits home. For example, the children who may be in the unmarked burials located on the territory of Onion Lake Cree Nation are being cared for through Cree ceremonies to help their Spirits journey onwards. And as part of the Stó:lō Nation's Xyólhmet ye Syéwiqwélh (Taking Care of Our Children) work, commemoration ceremonies were conducted in September and October 2023 to return a sense of dignity and respect for the Spirits of the children in unmarked burials on the grounds of the former St. Mary's Indian Residential School in Stó:lō Territory.[541]

It is likely that at least some, if not many, of the missing and disappeared children who have been buried far from home will not be identified soon, if ever. For some children, it may not even be possible to determine with any certainty which community they came from, given that most institutions apprehended children from many different communities. With the guidance of Elders and Knowledge Keepers, Survivors, Indigenous families, and communities leading search and recovery efforts at the sites where the unidentified children are found must decide how to create respectful resting places for them and how they should be memorialized and commemorated. When appropriate, many communities may decide to rebury these children where they were found.

Provinces, territories, and municipalities have policies regarding the burial of unidentified persons, and in Saskatchewan, for example, the province, under the *Archaeological Burial Management Policy,* [542] established a 10-acre "Central Burial Site" on the South Saskatchewan River in 1998 as a "last alternative" for the reburial of Indigenous human remains unearthed from archaeological or construction sites that have not been identified or claimed by a specific Nation.[543] The Saskatchewan Indigenous Cultural Centre's Elders' Council, with representation from all eight linguistic and cultural groups, coordinates ceremonies and prayers for these unknown ancestors when they are reinterred at this site.[544] There are also some international models to draw on. For example, in Australia, as part of repatriating ancestors whose remains were stolen, bought, or traded, the government has committed to establishing a National Resting Place within a new national Aboriginal and Torres Strait Islander cultural precinct in Australia's capital Canberra-Ngurra Precinct. The National Resting Place will care for ancestors returned from overseas by the Australian government whose community of origin cannot be ascertained.[545]

Indigenous laws generally emphasize the importance of preventing disturbance of grave sites. Many Nations did not, in their laws and protocols, make provision for the relocation of remains, or envisioned such relocations only in limited circumstances. The circumstances of the current search and recovery work are unprecedented and unique. In many cases, children died and were buried far from their families, homes, and communities and were denied burials that accorded with Indigenous laws, cultural protocols, and ceremonies. Many Indigenous Nations do not have established processes that can be easily applied to these circumstances. However, Indigenous laws, cultural protocols, and ceremonies for taking care of deceased relations have evolved over innumerable generations. Importantly, Indigenous laws are living legal systems that can adapt to changing circumstances, including developing repatriation processes to guide Survivors, Indigenous families, and communities as they make decisions about if, when, and how to repatriate the missing and disappeared children.

Key Elements of a Repatriation Framework

Existing legislation is inadequate to support the repatriation of the missing and disappeared children. Without a coherent legal framework designed to support repatriation and affirm Indigenous leadership and control over search and recovery efforts, Indigenous families and communities attempting to bring their children home must navigate a, "patchwork of conflicting laws, legislation and policies enacted by various levels of government."[546] The same maze of ad hoc, piecemeal approaches and conflicting requirements that exist in the search for records and in the efforts to access, search, and protect burial sites is also a barrier

to repatriation. The following key elements should guide the development of a repatriation framework for the return of the remains of the missing and disappeared children.

Repatriation must be:

- **Indigenous-led.** Indigenous leadership of this work is an essential reflection of sovereignty and self-determination. It is also essential to ensuring that repatriation processes and outcomes meet the needs of Indigenous families and communities. As part of supporting Indigenous leadership, Indigenous communities must be provided with information, training, and education to navigate the complex scientific and practical issues associated with repatriation.

- **Informed by a human rights approach, respecting international law and principles, and aligned with the *UN Declaration on the Rights of Indigenous Peoples*.** A human rights approach requires recognition of Indigenous Peoples' rights to self-determination, culture, property, spirituality, religion, language, and traditional knowledge.

- **Governed by Indigenous laws and cultural protocols.** Indigenous Peoples have always been guided by laws and protocols regarding the care and protection of the dead. These laws and protocols must be respected in all aspects of repatriation, from decisions about exhumation and identification to those regarding relocation, memorialization, and ongoing care of burial sites.

- **Sustained by adequate and ongoing funding.** Repatriation is costly, imposing expenses that are a barrier to repatriation, as well as an unjust imposition on Indigenous families and communities that are already bearing heavy burdens from the loss of their children. Funding structures must recognize the realities of repatriation, taking into account the needs of many families and communities to return their children home, the lengthy time periods required for repatriation processes, and the types of expenses associated with repatriation.

- **Coordinated among jurisdictions through national repatriation legislation and policy as well as a strategy and action plan for implementation.** Depending on the location of a grave or burial site, repatriation may fall under the jurisdiction of a federal, provincial, or

territorial government. Provincial and territorial governments will remain responsible for many legal aspects, such as laws related to cemeteries and heritage designations. As well, where decisions are made to relocate the remains of a child, families and communities may need to navigate more than one jurisdiction. It is therefore important that a repatriation framework ensures coordination among jurisdictions. Building on *NAGPRA* and Bill C-391 to develop new legislation and policy that is compliant with the *UN Declaration* and a national repatriation strategy and action plan for implementation would be a critical first step in establishing a more holistic, seamless repatriation process.

- **Provide effective supports for Indigenous families and communities navigating the repatriation process.** Quebec's *Communication of Personal Information Law*, with its provision for financial, legal, practical, technical, emotional, and spiritual support for families, much of it flowing through an Indigenous-led organization, is a starting point for developing a meaningful framework of supports.

Every Child Matters wreath at a monument honouring the children who died at the Cross Lake (St. Joseph's) Indian Residential School, August 29, 2023 (Office of the Independent Special Interlocutor).

The Indian Residential School System has interrupted the ability of Survivors, Indigenous families, and communities to maintain their relationships with the missing and disappeared children and to treat them with the honour, respect, and dignity that they deserve. There is an urgent need to find the children, ensure that their deaths have been marked with the proper ceremonies, and to bring them home—whether physically or spiritually.

Indigenous families and communities have a right to the repatriation of their children under the *UN Declaration*. Repatriation is also an element of the right to truth

under international human rights law. Yet, up to this point in time, Canada's legal and policy frameworks have neither recognized nor facilitated the realization of these rights. Indigenous families and communities continue to struggle against a myriad of obstacles in their determination to recover their children. The development of a coherent, sustainable, and Indigenous-led legal framework for repatriation is an essential element of reparations to bring justice to Survivors, Indigenous families, and communities and most of all, to the thousands of missing and disappeared children who have yet to be returned home.

THE FOURTH ELEMENT OF A REPARATIONS FRAMEWORK: SUPPORTING INDIGENOUS-LED HEALING AND COUNTERING SETTLER AMNESTY

Resilience as Resistance: Indigenous-Led Healing and State Reparations

> You carry intergenerational trauma but [you also] carry the strengths of your ancestors. How do you awaken that?
>
> — Elder Eleanor Skead[547]

The forced removal of Indigenous children from their families and communities, the suppression of cultural practices and languages, and the egregious physical, mental, and sexual abuse in Indian Residential Schools caused acute physical, mental, emotional, and spiritual harms to the missing and disappeared children and Survivors. This trauma has been passed down through generations and across communities. Families and communities have also been traumatized by the loss of loved ones who were never returned home, and by the intergenerational impact of these losses. For Survivors, the search for and recovery of the missing and disappeared children and unmarked burials involves revisiting painful experiences, a seemingly endless search for answers, traumatic encounters with media, and confrontations by denialists who question their veracity. While search and recovery efforts provide important and necessary opportunities to access and share truth, they can also be retraumatizing for Survivors, Indigenous families, and communities.

Participants across National Gatherings stressed the magnitude of the trauma, grief, and loss associated with the Indian Residential Schools System. They also emphasized the strength, resistance, and resilience of Indigenous Peoples. Many participants spoke about the strength

drawn from their ancestors in surviving the genocidal actions of government. Their resistance is evident in the ongoing struggle for the right to truth, accountability, and justice and the revitalization of Indigenous governance and legal systems, cultures, spirituality, languages, histories, and identities. Indigenous resilience is strong as Elders and Knowledge Keepers guide Survivors, Indigenous families, and community members through the search and recovery process, following Indigenous laws, cultural protocols, and ceremonies to heal while honouring, grieving, and remembering the children.

Indigenous-Led Healing in the Context of Reparations

Resilience-based approaches to healing are an integral element of an Indigenous-led Reparations Framework that is governed by Indigenous laws, cultural protocols, and ceremonies.

The 2005 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law* identify a duty upon States to provide compensation to victims of mass human rights violations and recognize victims' right to health.[548] Redress for physical, emotional, and psychological harms must include the, "costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Rehabilitation should include medical and psychological care as well as legal and social services."[549]

Survivors and Indigenous political leadership are reframing the international human rights language of "victimhood" into a counter-narrative of healing as political resistance and a pathway to self-determination and sovereignty.[550] The TRC concluded that, "Self-determination is a foundational right, without which Aboriginal [P]eoples' rights cannot be fully realized.... The Commission believes that community well-being and healing from the trauma of [R]esidential [S]chools will only be achieved through Aboriginal self-government and self-determination."[551] This statement is consistent with Canada's obligation to implement Articles 21, 23, and 24 of the *UN Declaration* to support Indigenous-led health and wellness initiatives to address trauma that is the direct result of State-imposed assimilative and genocidal laws, policies, and systems.

What Is Trauma?

Trauma is an emotional response to a terrible event like an accident, crime, natural disaster, physical or emotional abuse, neglect, experiencing or witnessing

violence, death of a loved one, war, and more. Immediately after the event, shock and denial are typical. Longer-term reactions include unpredictable emotions, flashbacks, strained relationships, and even physical symptoms like headaches or nausea.[552]

For Indigenous Peoples, trauma is personal, collective, and intergenerational. The trauma resulting from the Indian Residential School System manifests in multiple, overlapping, ongoing, and interconnected systems of settler colonial violence and oppression.[553]

Because trauma is embedded in personal, collective, and intergenerational memory, the experiences of abuse and systemic violence in the Indian Residential School System are not limited to Survivors themselves but are passed down through the generations that follow. In a study of the intergenerational effects of Indian Residential Schools, Anishinaabe scholar Amy Bombay and co-authors Karen Matheson and Hymie Anisman found, "consistent evidence of the enduring links between familial IRS [Indian Residential School] attendance and a range of health and social outcomes among [their] descendants ... [and concluded that] there appear to be cumulative effects."[554]

Trauma can interfere with one's ability to form and maintain healthy family relationships, manage negative emotions, or resolve conflict constructively.[555] The intergenerational trauma related to the missing and disappeared children and unmarked burials is layered onto other forms of colonial trauma. Niibin Makwa (Derek J. Nepinak), Chief of the Minegoziibe Anishinabe (Pine Creek First Nation) points out that:

> The system of isolation and disconnection led to great harms, including the death of a significant number of children in our community [and] great trauma that transcended the time and place where it occurred. Today the legacy of the schools impacts our families through unresolved trauma which lives in the genetic memory of our people.[556]

There may be a biological aspect to the transmission of trauma. Recently, scientists have been examining the possible role of epigenetics in the intergenerational transmission of trauma. Epigenetics is the study of cellular variations that are caused by external, environmental factors that "switch" genes "on" and "off." This can result in changes to the way that genes are expressed, without making changes to the underlying DNA sequence. These effects have been observed in the children of traumatized parents.[557]

Survivors who are engaged in search and recovery efforts such as walking the grounds and providing oral history testimony about cemeteries and unmarked burials at former Indian

Dr. Marcia Anderson, MD, presenting at the National Gathering held in Winnipeg, Manitoba (Office of the Independent Special Interlocutor).

Logo of the Southern Chiefs' Organization's Mino-si-toon Wichozani Survivors' Healing Gathering, in Treaty 1 territory, February 27 and 28, 2023.

Residential Schools and associated institutions can be retraumatized as they relive difficult memories from their childhood. Retraumatization can worsen existing symptoms of trauma, which include increased risks of health problems and illness. Both vicarious trauma and secondary trauma are indirect trauma; they occur when someone is a witness to another person's trauma.[558] At the Winnipeg National Gathering Cree-Anishinaabe physician and scholar, Dr. Marcia Anderson, MD, discussed how vicarious trauma can affect Healers, helpers, and others involved in search and recovery processes. Vicarious trauma can emerge and re-emerge in different ways.[559]

Health problems may be both a product and source of trauma. There is a growing field of study examining the impact of adverse childhood experiences (ACEs), such as witnessing or experiencing violence, abuse, or neglect. ACEs can have lasting and serious negative effects on health and wellness, not only in childhood but throughout the course of a person's life. The adverse health impacts of Indian Residential Schools that were transmitted through generations are part of the broader harms associated with settler colonialism. The TRC found that:

> It is not always possible to chart health impacts that are tied directly to the intergenerational impacts of the residential schools as opposed to other factors. However, it is indisputable that many of the recognized social determinants of health—income, education, employment, social status, working and living conditions, health practices, coping skills, and childhood development—were themselves impacted by attendance at residential school. As a result, there can be no doubt that residential schools have had a lasting impact on the health of former students, their families and their communities. And whatever the cause, negative social and health conditions pose a serious obstacle to healing the wounds left by the residential schools.[560]

Speakers and participants at the Winnipeg National Gathering spoke of how traumas resulting from the Indian Residential School System continue to be ineffectively addressed by non-Indigenous health-care systems. Sometimes interacting with public health institutions and staff can retrigger or worsen existing trauma. To heal, Survivors, families, and communities require access to care that is trauma-informed, anti-racist, and culturally respectful and responsive. Despite the shift towards trauma-informed care, non-Indigenous health-care systems and interventions are often ineffective and can cause further harm.

Silencing was a key element of the traumas that children experienced at the Indian Residential Schools. As Rocky James, an intergenerational Survivor of the Kuper Island Indian Residential School noted:

> Silence played such a key role in how people were abused. If you tell anybody, I'm going to hurt you.... If you tell anybody, I'm going to kill you.... Silence is still the most persistent aspect of the intergenerational trauma. And so, I've had Survivors from my community tell me this past summer, I can't talk about it. That's how I've survived.[561]

The trauma inflicted by Residential Schools and other institutions has silenced the voices of many Survivors and their families. The silence can impose its own loneliness and suffering. Truth-telling that releases long-suppressed suffering can be a powerful source of healing.

Truth-telling is a very difficult process. Not all Survivors choose to talk about their Indian Residential School experiences, and their choice must be respected. George E. Pachano (Cree Nation of Chisasibi), who acts as the Residential School Response Coordinator in Chisasibi,

George E. Pachano, Survivor of St. Phillip's Indian Residential School in Fort George, Quebec, presenting at the National Gathering held in Edmonton, Alberta, September 14, 2022 (Office of the Independent Special Interlocutor).

Quebec, said that some members of the community are hesitant to actively engage in search and recovery work or to volunteer information. Pachano emphasized that it is necessary to prepare the community prior to information gathering and to support people as they decide whether to share what they know.[562] The act of sharing their testimonies undoubtedly has significant impacts on the emotional and physical well-being of Survivors. It is therefore essential that Elders and Knowledge Keepers are available to provide culturally appropriate supports and that members of search and recovery teams interviewing Survivors and families are trained to use trauma-informed statement gathering protocols and practices.

Historical Trauma, Grief, and Loss Are Products of Genocide and Settler Colonialism

> Historical trauma is a serious issue in our community, and it has become one of the leading contributing factors to the well-being of our people. Missing children and possible unmarked graves are recognized by our community leaders as a number one priority in healing.
>
> — Niiban Makwa (Chief Derek J. Nepinak)[563]

Many participants at the National Gatherings spoke of how the Canadian government's genocidal policies and actions, including the Indian Residential School System, have contributed to the trauma experienced today. As Dr. James Makokis, MD, a Nehiyô (Plains Cree) family physician, pointed out at the Winnipeg National Gathering, Indian Residential Schools are only one genocidal element of colonization. Settler colonial policies of land dispossession, the *Indian Act*, and forced child removals designed to destroy Indigenous Peoples' political and governance structures and family life were, in effect, policies of elimination.[564]

In 1998, Lakota scholar Maria Yellow Horse Brave Heart and co-author Lemyra M. DeBruyn published a path-breaking article in which they argued that Native Americans were victims of genocidal violence that has been transmitted across many generations. They outlined a theory of historical unresolved grief—"a legacy of chronic trauma and unresolved grief"—that has contributed to the contemporary health and social ills impacting the lives of Native Americans.[565] They found that historical trauma and unresolved or disenfranchised grief stems from the genocidal impacts of colonization, including land dispossession and the forced removal of children to Indian Boarding Schools.[566] Applying the concept of historical trauma to Indian Residential Schools not only contributes to creating more culturally effective treatments to address its impacts at the individual level, but learning about and understanding historical

trauma can support healing for Survivors, families, and communities. Canadians can also develop a better understanding of how this history impacts the health and well-being of Indigenous Peoples today.[567]

While significant work is being done to address the direct and intergenerational trauma associated with Indian Residential Schools and other genocidal harms targeting Indigenous Peoples, the Sacred work to recover the missing and disappeared children and unmarked burials can introduce new traumas and reinvoke existing ones. As Survivors work with search and recovery teams to locate unmarked burials on the sites of former Indian Residential Schools and other institutions and hear news about ground searches in their own community or in others, many Survivors relive their trauma. Some remember holding the hand of a friend who died, while others relive the horror of burying other children. Painful memories amplify the ongoing cycle of compounding trauma.

Survivors, Indigenous families, and communities have so many unanswered questions about the fate of children who were taken away to Indian Residential Schools and never returned. This lack of closure has often meant years or decades of fruitless searches for answers. As documented in *Sites of Truth, Sites of Conscience*, when children were transferred between multiple institutions, their families were often not notified. Records were lost, destroyed, or never maintained at all. Where records exist, they may be dispersed across many locations or institutions. Families may encounter bureaucratic delays, procedural barriers, reluctance, or outright resistance to gaining access to this information. The search consumes energy and time, but more than that, it can also be traumatic. Removing the barriers to accessing answers is an essential first step to healing for Survivors, Indigenous families, and communities.

A lack of answers following the disappearance of a loved one has long been recognized as a source of prolonged grief and trauma that has profound consequences for those left behind.[568] Disenfranchised grief occurs when the loss of a loved one is not acknowledged or accepted as legitimate by the society around us. As explained in *Sites of Truth, Sites of Conscience*, Canadians' disregard for the dignity and care of Indigenous children before and after their deaths signifies what Judith Butler describes as "ungrievable lives"—lives that are dehumanized and devalued both in life and in death.[569] Within the Indian Residential School System, the ungrievability of Indigenous children's lives was evident in the denial of grief. Not only were parents and families often not informed of children's deaths or burial places, but Indigenous children were either not told of a death in their family or not permitted to attend the funeral, thereby denying them an opportunity to grieve.[570] Losses that are not socially supported, publicly mourned, or openly acknowledged denies human dignity to the people who died and their relatives.[571]

Those seeking answers also suffer a sense of ambiguous loss that comes with not knowing the circumstances of their loved one's death, where they are buried, or whether unidentified human remains that are found belong to their child. The 2021 *Report of the Independent Civilian Review into Missing Persons Investigations* evaluated how the Toronto police investigations into missing persons, particularly those from LGBTQ2S+ and other marginalized communities, including Indigenous people, have been conducted. The report highlighted the additional suffering and trauma associated with ambiguous loss, emphasizing, "the unending pain of not knowing what happened. Without closure, loved ones cannot move on. Many become preoccupied by the search for their loved ones, worrying that something else should be done in their eternal hope of finding answers."[572]

EMERGING PRACTICE: THE NANILAVUT INITIATIVE—"LET'S FIND THEM"

The Nanilavut Initiative is led by the Inuvialuit Regional Corporation and is aimed at helping Inuit families find information on loved ones sent away during the tuberculosis epidemic from the 1940s to the 1960s. Nanilavut means "Let's find them" in Inuktitut. People of all ages were taken to sanatoria by government and never returned home. Part of the work of the Nanilavut Initiative is to trace the transfers of each missing loved one, including Inuit children at Indian Residential Schools and Federal Hostels.

In August 2022, Rebecca Blake, who is Inuvialuit and an ordained Anglican deacon, travelled with family members to Edmonton to visit the burial sites of their loved ones that had been missing to them and conducted Remembrance and Celebration of Life Ceremonies. Each of the missing loved ones were taken by the government to a tuberculosis sanatorium. They then died while in the care of the State and were never returned home. When a child died, parents were often not notified of their child's death or about the location of their child's burial.

As they travelled to visit the burial sites, they found that some of the burials were unmarked; some were in segregated sections of cemeteries only for Indigenous people, which were often too small for the number of people buried there; some were buried in graves with other people because the government would not pay for individual burials; and one grave was even in a ditch next to a busy highway.

At the Winnipeg National Gathering, Deacon Rebecca Blake reflected on the importance to the families of finding the burials of their loved ones. She said:

> At every gravesite, [families] were saying "finally we have found you. And we have so missed you and we have always, always loved you." [Finding the graves] lifted the burden of not knowing—that now we can allow our loved ones to rest; that these were just their carrying cases that were left behind in a foreign land, but their Spirits can now soar free.[573]

At every National Gathering, participants including Elders, Survivors, and Indigenous political leaders, spoke about the devastating impacts of government and church attacks on Indigenous spirituality, cultural traditions, and languages. Both the TRC and the Missing and Murdered Indigenous Women and Girls National Inquiry (MMIWG National Inquiry) concluded that through laws and policies of land dispossession, forced child removal, and suppression of spirituality, languages, and cultures, Canada inflicted significant harms on Indigenous Peoples, including spiritual and cultural violence and trauma. The collective historical and cultural trauma caused by harms inflicted on Indigenous Peoples restricts their ability to access their own cultural resources that support community healing and protect health and well-being. This in turn perpetuates ongoing intergenerational trauma and health disparities.[574]

Youth brought their voices to every National Gathering, providing important perspectives on how intergenerational trauma affects them and how Elders and Survivors are teaching them about resilience-based healing. Participants recognized that the Indian Residential School System was designed to break the connections between Elders and youth. These connections are essential to learning, upholding, and transferring Indigenous traditions, culture, and history, which is why they were a target of Canada's settler colonial genocide.

Testifying before the Standing Senate Committee on Indigenous Peoples, Cree Survivor, educator, and author Dr. Edmund Metatawabin emphasized the importance of spending time with youth to teach them about all aspects of their history:

> When we talk about what we need for the future of our young people, it's the ability to continue telling our story in a good way, to talk about this dark chapter that we're talking about today and to have it included

> in our story. We have a long story that we can tell of our people, a story that started long before the arrival of the settlers, a story that has been shared by our Elders who talk about the legends and what it was like long ago. Language is an important component to proper socialization into one's society. If you can communicate with the senior members of your clan, then you possess the rules and guidelines that help you to understand your culture. If you hear about your history and your heroes, mythical or real, and if you can name the creeks, rivers and lakes in your traditional area in their original form, you have found your home.[575]

The Standing Senate Committee on Indigenous Peoples adopted Metatawabin's recommendation that an Elder's teaching house be established to support Elder-youth learning and recovery from intergenerational trauma.[576]

Indigenous-Led, Resilience-Based Sources of Healing in Search and Recovery Processes

> We are inherently resilient. When we talk about our challenges, we cannot forget about our resilience.
>
> — Dr. Cornelia (Nel) Wieman (Anishinaabe), MD[577]

Indigenous-led, resilience-based approaches to healing are not new. As the MMIWG National Inquiry's Final Report observes, "The link among cultural teachings, identity, and resilience was fractured through the process of colonization—but not broken. The fact that ceremonies, teachings, and languages do survive today is a testament to those women, those cultural carriers who, along with male, female, and gender-diverse Elders, continue to carry the ancestors as a potential path forward toward healing and safety."[578] Indigenous legal scholar Michalyn Steele (Seneca Nation) identifies key Indigenous principles embedded in political, governance, and legal systems that, although damaged by colonial governments, continue to sustain Indigenous Peoples' core identities as distinct sovereign and self-determining peoples, able to adapt to changing circumstances over time. Indigenous Peoples' survival is, "a real-world study in resilience ... [and] [I]ndigenous resilience has its roots in [I]ndigenous traditions,... principles, and values ... [that] have been tested in the cauldron of colonization."[579]

Indigenous-led, resilience-based healing is critical to search and recovery work. Participants and speakers at each of the National Gatherings discussed how healing supports to address

the trauma related to the missing and disappeared children and unmarked burials must draw on sources of health and well-being found in the distinct cultural and legal traditions of each Indigenous Nation. These supports must be tailored to meet the needs of each person and community accordingly.

At the National Gatherings, participants shared the foundational principles of the Sacred Work across communities. These include:

- **Courage:** continuing to do the work, even when it is difficult and efforts are met with resistance;
- **Kindness:** demonstrating kindness to each other and to the land where search and recovery work is being conducted;
- **Choice:** respecting everyone's right to make an informed decision about whether to participate in search and recovery work and designing oral history testimony protocols and practices accordingly;
- **Balance:** establishing balance between Traditional Healers, Knowledge Keepers, and Western-trained mental health clinicians to achieve better outcomes using a holistic approach to taking care of one's mind, body, and Spirit while experiencing trauma or retraumatization;
- **Belonging:** strengthening relationships and relying on family, kin, and community as a source of support and healing;
- **Safety:** accessing safe spaces, processes, and interventions when necessary to take care of one's health and Spirit, and to make the Sacred work sustainable over long periods;
- **Joy:** using joy and laughter as a way to heal from trauma and grief; and
- **Love:** loving one another, within and across families and communities.

Elders, Knowledge Keepers, and Indigenous Healers are vital to addressing the trauma associated with the search for the missing and disappeared children and unmarked burials. Their lived wisdom and substantive knowledge of Indigenous approaches to healing deepens their ability to guide those who are experiencing trauma associated with search and recovery work. As one participant in the National Gathering in Iqaluit emphasized, "I want to be with my Elders. I want to get healing from them. I feel that the Canadian government should be recognizing our Elders as certified ... because I need counselling. I need healing."[580] In order to

guide others, Elders, Knowledge Keepers, and Indigenous Healers must also be cared for and have access to supports to meet their own wellness needs. Those who work to emotionally support others are at risk of vicarious trauma, retraumatization, burnout, PTSD, and exhaustion. They also must have access to their Medicines and ceremonial items. Finally, the expenses associated with ceremonies create additional barriers that limit the amount of work that Indigenous Elders, Knowledge Keepers, and Indigenous Healers can do to address trauma.[581] They must have adequate pay and supports to do their work effectively.[582]

The Winnipeg National Gathering also focused on the importance of Indigenous healing practices associated with (re)connections to land, language, and one's physical body. For example, Dr. Makokis spoke about addressing trauma through Indigenous cultural practices, such as moose-hide tanning. Singing and drumming are also powerful healing practices that bring people back to their bodies and help to address trauma. Search processes are trauma-informed when they nurture belonging at each stage and for each person. Survivors, Indigenous families, and communities leading search and recovery efforts shared the various ways that they are incorporating Indigenous healing practices into this work, including:

- Feasting;
- Conducting ceremonies before, during, and after searches;
- Lighting, tending, and visiting Sacred Fires;
- Singing, fiddling, and drumming;
- Participating in land-based activities;
- Visiting Sacred sites;
- Connecting with loved ones and relations; and
- Learning and speaking Indigenous languages.

Throughout the National Gatherings, Survivors repeatedly said that an important part of their motivation for reliving their trauma and sharing their experiences is to heal the wounds within their own families and communities. Survivors want to ensure that the generations that come after them understand what happened. They want to plant the seeds of hope—hope for healing and a better way ahead—for the young people in their communities and across the country. The presence of youth at the National Gatherings was intentional and important to all participants.

Participants emphasized the difficulty of healing intergenerational historical trauma, disenfranchised grief, and ambiguous loss in search and recovery processes and demonstrated their resolve to overcome these challenges. Resilience is at the heart of the wisdom and knowledge they shared about Indigenous approaches to healing that have sustained generations of Indigenous Peoples in the face of settler colonial violence and oppression. As one participant said, "it's not just trauma that is passed down through our bloodlines."[583] Intergenerational resilience as resistance manifests in Indigenous Peoples' ability to protect and continue to practise the distinct cultural and legal traditions that shape their identities as self-determining sovereign Nations and support healing. The history of Survivors' persistence in pursuing truth, justice, and accountability for the harms perpetrated against them in the Indian Residential School System stands as a testament to intergenerational resilience.

At the National Gatherings, many participants spoke about the importance of love—love for the missing and disappeared children, and love and support for themselves and each other as they come together to build a national community of Indigenous people engaged in search and recovery processes.

Canada's Response to Calls for Equity-Based Health-Care Reform

While Indigenous-led, resilience-based healing is essential, this does not absolve federal, provincial, and territorial governments and health-care systems of their fundamental responsibility to make substantive health-care reforms to provide equitable health care for Indigenous Peoples. To do otherwise places an unjust burden on Survivors, Indigenous families, communities, and leaders. The TRC and the MMIWG National Inquiry adopted similar approaches to health-care reform to address the traumatic impacts associated with systemic abuse, racism, and violence directed at Indigenous Peoples (TRC Calls to Action 18–24; MMIWG National Inquiry Calls for Justice 3.1–3.7 and 7.1–7.8).[584] Both called on Canada to recognize and protect Indigenous Peoples' right to health and equitable health care as a human right under international law.[585] Both emphasized the importance of providing stable, equitable, adequate, and ongoing resources to meet the health-care needs of individuals and communities dealing with trauma. They identified the following key reformative actions as urgent priorities:

- Eliminate systemic racism in health-care systems;
- Recognize and respect Indigenous people's right to access their own healing practices, including access to Elders and Indigenous healers in the health-care system;

- Support Indigenous-led initiatives for health care and healing;
- Provide education and cultural competency training for health-care professionals; and
- Ensure that health and wellness programs and services available to Indigenous people are culturally appropriate, equitable, accessible, and holistic.

Both Final Reports highlighted the ineffectiveness of federal, provincial, and territorial governments' short-term, ad hoc, and piecemeal approaches to First Nations, Inuit, and Métis health-care policies, programs, and funding that perpetuates ongoing health-care crises and the need for costly crisis interventions.

Canada's responses to the TRC's Calls to Action have been tracked by various organizations.[586] There is a consensus that governments have failed to make substantive progress on fully implementing the seven directives on reforming health-care inequities. As of May 2024, the Canadian Broadcasting Corporation's (CBC's) tracking monitor found that while all were in progress—four had projects that were just started and three had projects already underway—none are yet completed.[587] The Indigenous Watchdog tracking monitor reported similar results in July 2024; of the seven Calls to Action on health, two are stalled, five are in various stages of progress, and none have been completed.[588]

Progress on the overall completion of the MMIWG National Inquiry's Calls for Justice, including those that are health related, have been similarly slow. In June 2023, the CBC issued a progress report on implementing the MMIWG National Inquiry's Calls for Justice on Health and Wellness, concluding that:

> Most of these calls for justice—six out of seven—are not started, despite commitments to do so. Indigenous health legislation—designed to enshrine and elevate the rights and equitable access to culturally appropriate health and wellness services—has not been created. Governments have not ensured that all Indigenous communities are receiving immediate and necessary resources for permanent, no-barrier, preventative, accessible, holistic, wraparound services. This is despite the fact that federal government research confirms Indigenous peoples continue to have reduced access to physical and mental health care compared to other Canadians.[589]

As a signatory to the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*), Canada has committed to the following rights of Indigenous Peoples with respect to health:

- The improvement, without discrimination, of social and economic conditions, including their health (Article 21);
- To be actively involved in developing and determining health programs affecting them and, as far as possible, to administer such programs through their own institutions (Article 23);
- To their traditional medicines and the maintenance of their health practices, including the conservation of their vital medicinal plants, animals, and minerals (Article 24);
- Access, without any discrimination, to all social and health services (Article 24); and
- The enjoyment of the highest attainable standard of physical and mental health as a right of progressive realization (Article 24).

The *Federal UNDA Action Plan* commits the federal government to build on and complements the recommendations of the Royal Commission on Aboriginal Peoples, the TRC, and the MMIWG Inquiry.[590]

Fulfilling Canada's existing health-care obligations is not a substitute for reparations. While these long-overdue reforms are a form of reparation, it must also be pointed out that providing equitable health care has always been one of Canada's legal obligations to Indigenous Peoples. Fulfilling this fundamental responsibility should not be conflated with providing dedicated health-related reparations to Survivors, Indigenous families, and communities for specific harms and trauma suffered as a consequence of genocide and mass human rights violations under international law. While providing equitable health care is of course a vitally important goal, this will not address the public health emergency associated with search and recovery work identified by the Chief Medical Officer for the First Nations Health Authority in British Columbia, Dr. Cornelia (Nel) Wieman.

Consistent with Articles 21, 23, and 24 of the *UN Declaration*, Canada has an international obligation to support Indigenous-led, resilience-based healing and health care for those experiencing trauma or re-traumatization during search and recovery processes. These health-related reparations must be understood as such by both recipients and the public. Equity-based

health reform by governments remains an urgent priority that should complement these reparations. To avoid an ad hoc, piecemeal approach, an Indigenous-led, resilience-based, and holistic national healing strategy to address the particular health and wellness needs of those conducting investigations is required, supported by sufficient, long-term government funding. This may include, for example, building First Nations, Inuit, and Métis healing lodges and centres that can address the trauma relating to the missing and disappeared children and unmarked burials and supporting Indigenous Elders, Healers, and health-care workers to provide culturally safe supports and services.

Pursuing Accountability and Justice through Apology

> Apologies, accountability, and action for the harms that occurred at other institutions of assimilation and genocide are long overdue. These include federal, provincial, and religious entity apologies for harm, neglect, abuse, and assimilationist tactics which were the foundation for treatment of patients and prisoners at Indian Hospitals, juvenile detention centers, psychiatric facilities, sanatorium, Day Schools, boarding homes, orphanages, and provincial schools.
>
> — Anishinabek Nation, OSI Submission[591]

June 11, 2008, the day that then Prime Minister Stephen Harper stood in the House of Commons to deliver an official apology to Survivors of the Indian Residential School System, Indigenous families, and communities was a day that hundreds of now elderly Survivors had fought for years to make happen. Sadly, thousands more did not live to see this day, including the missing and disappeared children who died in these institutions and whose burial sites remain unknown to their families. The apology included just one short sentence acknowledging that, "tragically, some of these children died while attending residential schools and others never returned home."[592] It would take another 13 years for Canada to begin confronting the full horror of this short statement. While Canada's apology in 2008 was significant, it only acknowledged a partial truth, and the same can be said about the apologies made by the churches and the Royal Canadian Mounted Police (RCMP).

Apology as a Form of Reparation: Emerging Anti-Colonial Criteria

Public apology is one of the essential elements of reparations for victims of mass human rights violations, as is affirmed by the United Nations (UN) Human Rights Commission. A UN General Assembly study issued in 2019 by the UN Special Rapporteur on the promotion

of truth, justice, reparation and guarantees of non-recurrence issued recommendations for public apologies.[593] Apologies should:

- **Be based on consultations with those to whom the apology is addressed**, so that the apologizer can establish what victims want and need to hear and what they do not want to hear.
- **Include consultation within the apologizing constituency**, to ensure that the apology is meaningful and is not subsequently qualified, rescinded, or undermined.
- **Name and acknowledge the harm deliberately or negligently inflicted**, including the nature, scale, and duration of the harm inflicted, and the direct and indirect impacts of the harm on different categories of victims should be acknowledged.
- **Truthfully admit individual, organizational, or collective responsibility**, accept blame for the infliction of the harm, and avoid attempts to justify, explain, rationalize, or contextualize the harm.
- **Include a clear statement of remorse and regret related to the wrongful acts or omissions** that is unqualified and unreserved.
- **Be delivered in a context designed to maximize the potential of the apology**, ideally identified in consultation with the victims.
- **Be delivered by those with the credibility and authority to speak for the State**, organization, or institution responsible for the harm.
- **Be delivered with due respect, dignity, and sensitivity to the victimized**, recognizing that the manner in which an apology is delivered is centrally important.
- **Include a credible promise of non-recurrence**, including the practical steps that have been taken to ensure that the apologizing individual, organization, or institution will not inflict the same harms again.
- **Be accompanied by appropriate compensation or reparations**, designed to assist those affected by past harms.
- **Ensure non-regression**, by being integrated into a State policy that is sustained and reaffirmed over time.

- **Contribute to reconciliation processes**, as well as being accompanied by a comprehensive transitional justice strategy.

Beyond these fundamentals, there are additional considerations for public apologies in the settler colonial context. The TRC emphasized that:

> Official apologies offered to Aboriginal peoples by the state and its institutions must not only meet the criteria of Western-based political and legal cultures but must be measured by Indigenous criteria as well. Indigenous peoples document their histories through oral-based traditions, including the official recording of apologies and restitution made in order to rectify harms. In doing so, they rely on their own culturally specific laws, ceremonies, and protocols.[594]

While political apologies can foster reconciliation, they cannot do this in isolation. Rather, an apology must be linked to other reparations measures that together can repair damaged trust through actions that produce transformative political change.[595] Former Special Rapporteur on truth, justice and reparations and guarantees of non-recurrence Pablo de Greiff argues that, "reconciliation ... presupposes that both institutions and persons can become *trustworthy*, and this is not something that is merely granted but *earned*."[596] An official apology must publicly acknowledge that as a settler colonial society, we have committed acts of wrongdoing that must be redressed.

For official apologies in the settler colonial context to be meaningful, they should fully recognize historical injustices, including the connected patterns and systems of genocide. The Indian Residential School System was integrally linked to a broader, ongoing, deliberate strategy to dispossess Indigenous Peoples of their land and to eliminate them as sovereign Nations with their own cultures, languages, spirituality, governance systems, and laws.

An apology should be a catalyst for anti-colonial action, advancing Indigenous self-determination rather than serving the assimilationist goals of settler colonial nation-building.[597]

Applying Anti-Colonial Criteria to Apologies

Canada's Apologies

In describing the impact of Canada's apology to Survivors on June 11, 2008, the TRC noted that, "Many spoke of the intense emotions they had when they heard the prime minister acknowledge that it had been wrong for the government to take them away from their families

for the purpose of 'killing the Indian in them.'... Survivors and their families needed to hear those words."[598] Yet the apology was also controversial, "The many references to the apology heard by this Commission showed that some saw it as an important step toward individual, community, and national healing, whereas others viewed it as nothing more than some well-crafted words designed to make the government look good."[599]

Canada's 2008 apology failed to acknowledge that the Indian Residential School System was only one element of the overarching settler colonial goal of eliminating Indigenous Peoples as distinct peoples within Canada through genocidal processes of forced assimilation, land dispossession, forcible relocation, and the forced removal of children from their families. Further, Canadian studies scholar Eva Mackey argues that Canada's apology was carefully worded to limit the scope of wrongdoing that was being acknowledged, attributing the harms not to the broader systemic violence that extends beyond Indian Residential Schools, but to specific incidents of abuse and the misguided attitudes of those involved in operating these institutions.[600]

Not only did Canada seek to limit its liability by narrowing the scope of harms acknowledged, but it further narrowed this scope by excluding certain groups of Survivors from the *Indian Residential School Settlement Agreement* (*IRSSA*), including Day Scholars and Indian Day School Survivors,[601] Métis Survivors, and Survivors in Newfoundland and Labrador. The TRC found that not only had Survivors from more than one thousand other so-called unrecognized institutions been denied compensation, but they also felt, "excluded from the apology and from the process of reconciliation."[602]

On November 24, 2017, Prime Minister Justin Trudeau apologized to some, but not all, of the Survivors of the residential and boarding schools run by the International Grenfell Association and the Moravian Church in Newfoundland and Labrador.[603] Trudeau made his apology following the federal government's 2016 settlement of litigation with Newfoundland and Labrador Survivors.[604] Although this apology was aimed at Survivors excluded from the earlier *IRSSA*, it ironically created new exclusions. Because it was linked to the settlement of litigation, it only included those members of the class action that were part of that litigation; it therefore excluded Survivors who were placed in the institutions prior to Newfoundland and Labrador joining Confederation in 1949, those who attended the institutions only during the day and those who did not stay in dormitories.[605] Due to the partial acknowledgement of the harm perpetrated by the federal government on Innu communities, the Innu Nation refused to accept Trudeau's apology.[606]

Métis children were taken to both recognized and unrecognized Indian Residential Schools. Two unrecognized institutions include the Île-à-la-Crosse Indian Residential Boarding

School, which operated between 1820s and the mid-1970s,[607] and the Timber Bay Children's School, which operated between 1952 and 1994 in Saskatchewan. Métis Survivors of the Île-à-la-Crosse are still waiting for compensation from Canada and the province of Saskatchewan that also funded the institution at various times.[608] There has been no apology.

No title [Boy on a small boat in front of the Île-à-la-Crosse Indian Residential Boarding School], 1925 (Deschatelets-NDC Archives).

In March 2019, Prime Minister Trudeau apologized to the Inuit for the management of the tuberculosis epidemic from the 1940s to the 1960s.[609] The prime minister publicly acknowledged specific wrongs, including forced relocations, inequitable health care, failure to obtain consent, disappeared family members, deaths, unmarked burials, forced child removals, family relocation, land dispossession, and denial of traditional livelihood. Unlike earlier apologies to Survivors of the Indian Residential School System, Prime Minister Trudeau framed these wrongs in the context of human rights violations, noting the discrepancy between Canada's position on human rights at the international level versus its actions domestically. The prime minister committed to specific actions, such as the Nanilavut Initiative, the collaborative effort to find and honour Inuit who went missing during the tuberculosis epidemic. Prime Minister Trudeau also spoke about other government initiatives to eradicate tuberculosis in the North by providing funding to Inuit Tapiriit Kanatami for an Inuit-led plan to eliminate the disease across Inuit Nunangat by 2030 and working through the Inuit-Crown Partnership Committee to address poverty, food insecurity, and inadequate housing because tuberculosis is, "a disease that cannot be cured by medicine alone."

Canada has not yet made an official apology to Indigenous Peoples regarding the disappeared children and unmarked burials. However, beginning with the announcement by Tk̓emlúps te Secwépemc in 2021, Trudeau has issued several statements in the media or through government press releases posted on the official website of the Prime Minister's Office. These statements must be distinguished from official apologies, as their purpose and function are different.

Church Apologies

As previously described, the churches, as religious institutions, were deeply complicit in systems and processes of settler colonialism and genocide. The European legal foundation for claiming sovereignty over and seizing Indigenous lands is found in fifteenth-century papal bulls or decrees issued by the Roman Catholic church, theological concepts known as the Doctrine of Discovery and *terra nullius* (lands belonging to no one),[610] a doctrine founded in notions of racial superiority that continues to be deeply embedded in colonizing cultures, laws, institutions, and litigation strategies.[611]

The role of the Christian churches in advancing settler colonialism extends beyond land dispossession. Through their involvement in the Indian Residential School System, the churches, working in tandem with government officials, vigorously attacked Indigenous spirituality, languages, and culture. In addition, church officials of all the religious denominations successfully lobbied the federal government to bring in laws banning Sacred ceremonies such as the Potlatch on the Pacific coast and the Sun Dance in the prairies.[612] The TRC concluded that by forcibly converting Indigenous children to Christianity in the Indian Residential School System, the churches committed spiritual violence, "Across the country, Survivors described how school staff demonized, terrorized, and punished them into accepting Christian beliefs."[613] They taught the children that they were inferior, as were the spiritual beliefs of their parents and ancestors.[614]

The consistent attack on Indigenous spirituality by churches and governments over time not only targeted Indigenous children in life but continued after their deaths, as can be seen in the forceful imposition of Christian beliefs about death, funerary practices, and ceremonies associated with burials and the memorialization of the dead. While Christian burials were the norm at most Indian Residential Schools,[615] some children were buried with no ceremony at all.[616] Often, children were buried in the absence of family members who were denied the opportunity to mourn and grieve their loved ones in accordance with their own spiritual beliefs, laws, and customary burial and memorialization practices. This remains the case

today as Survivors, Indigenous families, and communities try to trace the missing and disappeared children and locate their burial sites.

The United, Anglican, and Presbyterian churches of Canada have all issued apologies. Rather than framing the atrocities perpetrated in the Indian Residential School System as genocidal human rights violations, these apologies remained primarily focused on acknowledging the harms of abuse. Despite initial resistance to hearing the truth about atrocities and fear of legal and financial liability, to varying degrees all three churches developed overarching principles of consultation and transparency with Survivors and Indigenous leaders regarding the wording of the apologies, collaborated with Indigenous church members in addressing internal institutional barriers to apology, and identified and implemented concrete reparative actions involving access to archival records and various repatriation and commemoration initiatives. However, progress in terms of the protection and maintenance of burial sites, access to archival records, and provision of funding remains slow in some cases.

The result of over three decades of advocacy by Survivors and Indigenous leadership, the 2022 apology issued by Pope Francis in Canada was historic. For many Survivors, the pope's words of apology were healing, while others viewed them as completely inadequate. Analyzing the apology using the criteria of the UN Special Rapporteur and against the TRC's Call to Action 58 reveals the limitations of both the apology and the apology-making process itself. For example, consultation leading up to the apology was sporadic, and communications were problematic.[617] In their meetings with the Canadian Conference of Catholic Bishops and with the pope at the Vatican, Survivors and Indigenous leaders identified specific harms that must be acknowledged and specific actions of redress and restitution that must follow. Yet in the apology, there was no recognition of the well-documented sexual abuse that occurred in Catholic-run Indian Residential Schools. While the pope said that there would be a, "serious investigation into the facts of what took place in the past," Pope Francis offered no particulars. There was no acknowledgement of the Catholic church's complicity in creating the Indian Residential School System or its responsibility for the magnitude of atrocities perpetrated on Indigenous children in Catholic-run Indian Residential Schools. Rather, the focus remained on individual abusers within that system. There were no commitments to release records, return artifacts, or renounce the Doctrine of Discovery. Although Pope Francis told the media afterwards that the harmful actions acknowledged in the apology amounted to genocide,[618] the pope made no such admission in the official apology itself. Pope Francis' apology fell short of what Survivors, Indigenous families, and communities told Catholic officials was required for the apology to meet their criteria.

Although Indigenous Peoples have advocated for many years for the Doctrine of Discovery and *terra nullius* to be repudiated and the TRC called for this in 2015, the Vatican did not do so until March 30, 2023.[619] While it did rescind the doctrine, it did so with a carefully worded qualification that limited the Catholic church's responsibility.[620]

RCMP Apology

Survivors' childhood memories of the RCMP run counter to a deeply ingrained myth in Canadian national history that taught Canadians that the Mounties were national heroes who brought law, order, and peace to the settling of the Prairie West, establishing relationships with Indigenous Peoples and protecting them from unscrupulous American traders.[621] The North-West Mounted Police (NWMP) and subsequently the RCMP worked with the Department of Indian Affairs officials and church officials to suppress Indigenous resistance through surveillance and control.[622] The police enforced the various laws and policies of the *Indian Act*, including forcibly removing Indigenous children from their homes and taking them to Indian Residential Schools. Beginning in 1927, all Mounted Police officers were appointed as truant officers to return runaway children to the Indian Residential Schools. Parents who did not return their children could be prosecuted for refusing to comply.[623] For many years in the North, the RCMP were the main federal government representatives.[624] The Qikiqtani Truth Commission documented the role of the RCMP in forced relocations of Inuit families and the killing of qimmit, or sled dogs. Police officers also forcibly removed Inuit children from their families, taking them to hostels or to Indian Residential Schools or tuberculosis sanitoria in the south.[625]

"Royal Canadian Mounted Police Constable W. Yakemishin with a young Inuit boy in the Federal Day School at Tuktoyaktuk, Northwest Territories," March 1956 (Library and Archives Canada / e010975685).

The RCMP has offered only very limited apologies for their central role in the Indian Residential School System. RCMP Commissioner Bob Paulson's apology, delivered at the Truth and Reconciliation Commission's 2014 National Event in Alberta, included only a limited acknowledgement of the role of the RCMP, before sharing a brief and distanced expression of sorrow for, "what has happened to you and the part my organization has played in it." The speech then turned its focus to the future, and to opportunities for Indigenous people to join the police force.[626]

Provincial Apologies

Even though many provinces were directly involved in the administration and operation of the Indian Residential Schools—for example, by tracking down and returning children who ran away, providing per student grants to churches operating these institutions, or sending provincial inspectors to them—only a few provinces have issued apologies. These include Manitoba, Alberta, Ontario, and Newfoundland and Labrador.

The apologies for Manitoba,[627] Alberta,[628] and Ontario[629] emphasized the limited role of the provinces in the institutions, focusing on their failure to challenge the system.

The apology of Newfoundland and Labrador reflects the unique history of these institutions in this province, which did not join Confederation until 1949. At that time, the federal government and the province agreed that the Inuit in Labrador did not fall under the jurisdiction of the *Indian Act*. The province did not make an effort to actively provide services in Labrador so missionary organizations continued to establish and administer Indian Residential Schools in Labrador to Inuit and Innu children.[630] The federal government provided funding in lesser amounts than it did in other provinces and territories for Indian Residential Schools, and the province administered this funding.[631] Based on this different history, Survivors in Newfoundland and Labrador were excluded from the *IRSSA*. In September 2023, Premier Andrew Furey made the first of a series of apologies on behalf of the province for Indian Residential Schools in the province.[632] Furey's apologies are framed with language that obscures the province's decisions not to provide services to communities in Labrador, which led to missionary organizations doing so, placing the responsibility for the harm almost solely with missionary organizations."[633]

Top: "The Wilfred T. Grenfell School at St. Anthony," 1930, International Grenfell Association photograph collection (Fred Coleman, The Rooms). Bottom: "St. Anthony School," [between 1928 and 1931], International Grenfell Association fonds (Beatrice Bull Albums, The Rooms).

Settler Amnesty, Truth-Telling, and the Limits of Apology

In tracing the histories of official apologies, it must be acknowledged that Canada, the churches, and the RCMP, to varying degrees, have apologized for enforcing laws and policies of assimilation that removed Indigenous children from their homes and for inflicting horrendous abuses on the children in the Indian Residential School System. Critiques of these apologies do not negate the fact that this formal recognition of wrongdoing and harm is very important to many Survivors, Indigenous families, and communities and must be honoured and respected.

However, despite reports from the Royal Commission on Aboriginal Peoples, the TRC, and the MMIWG National Inquiry, all of which made comprehensive findings and recommendations on how to acknowledge wrongdoing and provide restitution and reparations, settler resistance to the whole truth about the harm Canada has perpetrated on Indigenous Peoples persists.

When viewed together through an anti-colonial lens and in the context of centuries-old injustices, the history of apology-making by federal and provincial governments, churches, and the RCMP is an example of settler amnesty. They are partial acknowledgements based on careful political and legal calculations made in response to the demands of Survivors and Indigenous leadership for accountability and justice. Their overall shortcomings are evident even when measured against international principles, guidelines, and criteria for apology that are based on Western political and legal cultures. They fail even more so when measured against Indigenous political and legal criteria.

These apologies fail to fully acknowledge the depths of harms suffered or establish an accurate public record of the historical injustices and ongoing harms of genocide, colonization, and mass human rights violations that the enforced disappearances of Indigenous children and the existence of marked and unmarked burials reveals. They remain partial. They aim to limit legal liability. They perpetuate settler amnesty and a culture of impunity. And they fail to meaningfully acknowledge the massive scale of human rights abuses against Indigenous children who are missing and were disappeared and their families and communities.

As a State, Canada (including all levels of government, churches, and the RCMP) must make full apologies and provide other forms of reparations. In the context of the missing and disappeared children and unmarked burials, Canada and Canadians must do so with humility and a willingness to listen and learn from Survivors, Elders, Knowledge Keepers, Indigenous families, and communities about how to do so in respectful, principled, and practical ways in accordance with Indigenous laws.

Fighting Denialism: Reframing Collective Memory, National History, and Commemoration

> Some individuals say that that the term genocide is appropriate only to convey the complete destruction of a race. Ironically, given that we Indigenous Nations have inconveniently survived by the threads of our own spirituality, resilience, and courage, these same individuals used our survival to deny the truths of our history whether or not it is called genocide.
>
> — Theodore Fontaine, Survivor[634]

The Truth and Reconciliation Commission cautioned that, "Today we live in a reality created by the [Indian] [R]esidential [S]chool [S]ystem ... a dark and painful heritage that all Canadians must accept as part of our history."[635] Post-TRC, many Canadians now understand that the collective memory they share and the national history that they have been taught is distorted. This distortion has marginalized Indigenous Peoples' histories and experiences, enabling profoundly disrespectful and damaging views of Indigenous Peoples to persist in ways that support settler colonial society.[636] It is encouraging that a growing number of Canadians are calling on Canada to fully disclose its culpability and make comprehensive reparations for the historical and ongoing injustices associated with the missing and disappeared children and unmarked burials. Yet there is a core group of Canadians who continue to defend the Indian Residential School System. Most recently, they are challenging the veracity of Survivors' oral history accounts of the missing and disappeared children and unmarked burials and discrediting the public confirmations made by Indigenous communities of burial sites. They refuse to believe that Canada has perpetrated genocide against Indigenous Peoples and say that making such claims is an unwarranted slur on Canada's humanitarian reputation.

Indian Residential School denialism is, "not the outright denial of the Indian Residential School (IRS) system's existence, but rather the rejection or misrepresentation of basic facts about residential schooling to undermine truth and reconciliation efforts.... The end game of denialism is to obscure truth about Canada's IRS system in ways that ultimately protect the status quo as well as guilty parties."[637] There are several key elements of this definition that should be emphasized:

- It is not the *existence* of the Indian Residential School System that is being denied: it is the intent, outcomes, and impacts of the System.

- This form of denialism relies on rejecting or misrepresenting the well-established facts about the System. It relies on the techniques of historical research and analysis and falsely presents itself as a correction of the historical record.
- This denialism is not a simple misunderstanding of the facts: whether consciously or unconsciously, denialists are working towards the accomplishment of psychological, practical, or political goals.
- Indian Residential School denialism must be taken seriously because it puts at risk the important work of truth and reconciliation. It should not be dismissed as a harmless fringe phenomenon.

The Right to Truth and the Duty to Remember

In February 2005, the United Nations issued the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, also widely known as the UN *Joinet-Orentlicher Principles*.[638] Principle 3 on the duty to preserve memory states that:

> A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

What Is Historical Negationism?

Historical negationism[639] is not recognized as a legitimate form of historical inquiry by academic historians. It is a methodology used to support an argument by falsifying or distorting the historical record for political or ideological purposes in the present. This is done by manipulating, misinterpreting, or omitting evidence and questioning the validity of documents or oral history accounts of an event.

What Is Historical Revisionism?

Historical revisionism is the widely accepted process of reinterpreting and rewriting academic history based on new evidence or by reinterpreting the motives and actions of individuals or groups involved in historical events, for example, through an anti-colonial lens. Those who disagree with these new interpretations argue that historical revisionism is presentist—that is, it judges the past unfairly through the political, cultural, and moral lens of the present. Negationist forms of historical revisionism attempt to discredit new historical evidence or interpretations that contradict more conservative or nationalistic accounts of history using flawed historical methodology.

The Inter-American Commission on Human Rights's (IACHR's) 2019 *Principles on Public Policies on Memory in the Americas* emphasize the need for States to establish public policies on collective memory to confront negationist revisionism and denialism, "as an important part of efforts to restore and recognize historical truth."[640] The IACHR highlighted the central role of sites of public memory and educational and public history institutions, such as archives and museums, in protecting memory to uphold victims' right to truth as an essential measure to restore their human dignity and prevent the recurrence of mass human rights violations.[641]

The Office of the UN High Commissioner for Human Rights concludes that the right to truth applies not only to individual victims of mass human rights violations but also, more broadly, to society as a whole.[642] To prevent the recurrence of mass human rights violations, all citizens must know the truth about what happened and why. From this perspective, the right to truth and the duty to remember human rights violations as part of a nation's collective memory and history is an antidote to denialism. The State has an ethical duty to ensure that Canadians learn about and remember the history of the Indian Residential School System not only through education in schools and universities but in public history institutions and through public commemoration.[643]

Collective Memory, History, and Identity in the Settler Colonial Context

History can be used for purposes good or bad—for example, to comfort, to shape identity, to label or diminish opponents, to shame or pressure others, or to create and sustain nations. In this sense, history is as much about the present and the future as it is about the past.[644]

History is connected to, but separate from, "collective memory," the shared memories, knowledge, and information that are connected to the identity of a social group.[645] At the national level, these shared memories are an important aspect of how a country understands itself.[646] These memories are embedded in our landscape, our rituals, and our institutions—in our monuments and our heritage markers, our celebration of national or community holidays, our school textbooks, and our shared culture. Like history, collective memory has an implicit connection to the future: a shared identity becomes a basis for a vision of a shared future.[647]

At the Vancouver National Gathering in January 2023, Kristin Kozar, executive director of the Indian Residential School History and Dialogue Centre said that, "The ability to create collective memory and collective identity is directly linked to confronting and interpreting a community's own past. Collective memory can include not only written records, but also oral traditions, public commemorations, artifacts, etc."[648] Collective memory is also transmitted from individual to individual through conversations that reinforce both collective remembering and forgetting.

Kristin Kozar, Executive Director of the Indian Residential School History and Dialogue Centre, presenting at the National Gathering in Vancouver, British Columbia, January 17, 2023 (Office of the Independent Special Interlocutor).

Collective memory is often particularly charged where there is "unmastered history,"[649]—that is, a past that, "involves the commission of a historic injustice—an act of war, genocide, or political oppression—that has been remembered differently by, and has caused discord between, the original perpetrators, victims, and their respective descendants."[650] Communities that have been the targets of violence or genocide are deeply impacted by this history and this shared memory: attempts to deny or minimize it are experienced as an attack on the memory of those lost and a continuation of the genocidal process, thereby disrupting the process of mourning. For perpetrator communities, on the other hand, these painful memories can be experienced as a threat. Communities have a powerful desire to think well of themselves, and this positive identity is affirmed through collective memory. They can therefore turn to denial, not only to evade accountability, but to expunge a dark past from collective memory.[651]

The settler populations in Canada, the United States, and Australia are examples of this dynamic, whereby celebratory national narratives both create and deny aspects of the colonial past.[652] It has been pointed out that denialism is part of the fundamental logic of settler societies. The implicit goal is to create a post-colonial condition in which colonialism is a thing of the past, settler colonies are "settled," and Indigenous rights and claims are repressed, co-opted, and extinguished.[653] Collective memory in the context of settler amnesty and impunity involves as much forgetting as it does remembrance, and our identity is defined as much by what we choose to forget together as what we choose to remember together.

Canada's denialist narrative is aimed at constructing a comforting myth that characterizes settler Canadians as what have been described as, "benevolent peacemakers ... who collaborated together in various ways to negotiate treaties and implement Indian policy intended to bestow upon Indigenous people the generous benefits or gifts of peace, order, good government and Western education," in contrast to the violent settlement of the United States.[654] Accepting the realities of the Indian Residential School System requires a painful rethinking of old assumptions and the development of a new national historical narrative, one that can no longer be centred in what Eva Mackey describes as, "a mythology of [W]hite settler innocence."[655]

Recognizing Denialism

> The more that residential schools are in the headlines, the more backlash we seem to be facing. There are people out there who continue to deny this truth, who don't want to admit that the schools inflicted these harms on Indigenous

> peoples and that the schools were purposely designed to do that.... These deniers ignore the established facts about residential school history, including the documented reality that most children who died in the schools were never returned to their families. Instead, the deniers called the search for unmarked burials "fake news." ... These residential school deniers are not representative of most Canadians. We know this. Denialism is a fringe movement, but it includes individuals with power and influence to be quoted in the media and abroad.
>
> — Survivor Barbara Cameron[656]

Denialists attempt to influence public discourse on the Indian Residential School System, focusing their most recent efforts on challenging the veracity and historical accuracy of accounts relating to the missing and disappeared children and unmarked burials. Notably, denialism is often promoted in the words and actions of prominent leaders, who explicitly or tacitly undermine the testimonies of Indigenous people. This has included a member of the Canadian Senate,[657] a Canadian political scientist and academic,[658] Catholic priests,[659] and an influential political commentator and advisor to a former prime minister,[660] among others. Indian Residential School denialism exists across key institutions, including religious institutions, the academy, political institutions, and the media. The Canadian Archaeological Association has issued a joint statement expressing concern about the rise of Indian Residential School denialism in the media, including instances in the *National Post* and the *New York Post.*[661]

While denialism has deep roots in Canada's colonialist narratives and in the stories that were propagated when these institutions were operating, it has become more visible and organized following the release of the TRC's Final Report, and more recently, with the investigations of unmarked graves and burial sites at former Indian Residential Schools. There appears to be a growing and organized campaign to deny or minimize the truth about the Indian Residential School System, and in particular to dismiss the existence of unmarked burial sites and of missing and disappeared children.

Denialism centres on a number of persistent myths, including that:

- The harms of the Indian Residential Schools have been overstated and the positive aspects downplayed;
- The experiences at Indian Residential Schools, including deaths, were typical for the time period;
- We do not know the truth about the deaths at Indian Residential Schools;

- There is a conspiracy to exaggerate deaths at the institutions in order to push a political agenda and enrich Indigenous leadership; and
- That what occurred does not amount to genocide.[662]

It is not the purpose here to rebut each of these myths: the TRC's Final Report documents at length the historical record of the Indian Residential School System. Rather, the aim is simply to identify the types of myths that are repeatedly promoted to minimize or deny the impacts of the Indian Residential School System, and in particular the deaths of children.

Strategies, Methodology, and Tools of Denialism

Denialist claims are being absorbed into culture war narratives that drive political debate between liberal and conservative groups, as well as being broadcast beyond Canada. While many of the affected institutions noted earlier have taken steps to address the cases that have come to public attention, these examples demonstrate that no institution is immune from denialism and that it is not solely a fringe phenomenon.

Indian Residential School denialism shares commonalities with other forms of misinformation and disinformation and is nourished in the broader context of growing conspiracism, political polarization, the breakdown of trust in institutions, and the rise of digital media.

An additional risk factor for the circulation of misinformation and disinformation about Indian Residential Schools is the long history of harmful and stereotypical coverage of Indigenous people, subjects, and stories in the media. This reinforces public acceptance of stereotypical or inaccurate narratives about Indian Residential Schoolsand heightens the importance of ethical, thoughtful, and careful media reporting on the missing and disappeared children and unmarked graves.

There are certain strategies denialists frequently employ while trying to discredit and spread inaccurate information. These strategies include denying facts, minimizing and recontextualizing widely accepted information, and reversing the role of the victim and perpetrator in their narratives. This is seen prominently through the dissemination of false narratives relating to the missing and disappeared children and unmarked burials, including online mass grave hoaxing. In addition, denialists often engage in a methodology of historical negationism, commonly misusing photographic and archival evidence to cast doubt on the credibility of Indigenous historical counter-narratives and perpetuate settler colonial collective memory, identity, and national history. Such strategies of reversal, doubt, and false moral equivalence create confusion not only about what the truth is, but whether the truth can be known at all. It also re-victimizes those who have already suffered.[663]

Developing Historically Literate Citizens: Public History Education, Memorialization, and Commemoration

Creating a more truthful and inclusive national history to counter the denialism of settler amnesty and impunity requires acknowledging that genocide and mass human rights violations against Indigenous Peoples are part of Canada's history. Governments have an important and ever-growing role in shaping and preserving collective memory, identity, and national history[664] through both informal and formal education about a nation's past, including:

- Civic celebrations and commemorations, such as public holidays and days of remembrance;
- Designating and preserving "sites of memory," such as heritage sites, archives, cemeteries, and museums;
- Funding cultural productions, such as Canada's "Heritage Minutes";
- Developing and overseeing educational curricula; and
- Funding scholarly research.

The work of the TRC in Canada can be understood as an effort to build a new collective memory for Canadians, thereby transforming Canadian identity and history. The TRC concluded that:

> Reshaping national history is a public process, one that happens through discussion, sharing, and commemoration. As Canadians gather in public spaces to share their memories, beliefs, and ideas about the past with others, our collective understanding of the present and future is formed.[665]

The TRC's Calls to Action emphasized a collective responsibility to understand and come to terms with the truth of the Indian Residential Schools System as a foundation for the work of reconciliation.

The spread of Indian Residential Schools denialism reinforces the importance of fully and immediately implementing the TRC's Calls to Action 62 and 63 regarding public history education on the Indian Residential School System, Treaties, and Indigenous Peoples' contributions to Canada. In addition, educational curricula for schools, colleges, and universities should include resources for addressing denialist myths, and educators should be provided with training to assist them in responding to denialism when it arises in their classrooms.

Unfortunately, while some action has been taken in the years since the TRC issued these Calls to Action, progress has been too slow.[666]

The ongoing process of reframing collective memory and rewriting national history also happens more informally through acts of memorialization and commemoration. The TRC issued Calls to Action 79–82 on commemoration that must be implemented in collaboration with Survivors and Indigenous communities and organizations.[667] While an in-depth examination of Canada's progress on implementing these Calls is beyond the scope of this Final Report, it is important to acknowledge the work that has been done. In response to Call to Action 80, the federal government passed legislation to establish a National Day for Truth and Reconciliation as a federal statutory day, and the first National Day was recognized on September 30, 2021.[668] However, progress on implementing the other Calls to Action on commemoration have been slow. As just one example, Call to Action 81 called for the federal government to commission and install an Indian Residential Schools National Monument in Ottawa to honour Survivors and all the children who were never returned home. Funding has been allocated, a site only recently selected, and a process to determine the monument design is finally underway.[669] Call to Action 82, which called on provincial and territorial governments to install an Indian Residential Schools Monument in each capital city, has been even slower and more sporadic. As of October 2023, only Manitoba and the Yukon have done so, while in Ontario, Alberta, and Saskatchewan, plans are still in progress.[670] It is unclear what actions, if any, other provinces and territories are taking.

In 2020, the federal government announced that the Indian Residential School System is now designated as a national historic event under the National Program of Historical Commemoration.[671] Four former Indian Residential Schools have been designated as national historic sites.[672] It should be noted that having this designation does not necessarily mean that there will be memorials or commemorations to the missing and disappeared children or unmarked burials or whether the lands where they are located will be protected.[673] Designation is honorific and commemorative and does not, "affect ownership of the site or provide protection against destruction."[674]

Anishinaabe journalist and author Duncan McCue has noted that:

> The Truth and Reconciliation Commission made recommendations about … [commemoration], but I think last summer really brought to the fore the fact that every community where there is a school needs and wants to have some kind of memorial, some kind of marker, some kind of place that they can say: "our children came here, and they didn't come home. They died here, or they died shortly after they left this place."[675]

As Survivors, Indigenous families, and communities are locating and recovering the missing and disappeared children who died, they are mourning and memorializing them in accordance with Indigenous laws, ceremonies, protocols, and spiritual practices. Indigenous-led commemoration restores human dignity to the children and protects their burial places as commemorative sites of truth and conscience for all Canadians. National public commemorations enable Indigenous and non-Indigenous people to remember the children together, exposing the unvarnished truth about Canada's history in the process. For Indigenous people, commemorations are healing acts of collective remembrance, self-determination, and anti-colonial resistance; for non-Indigenous people, they are anti-colonial acts of truth recognition and reparation.

Creating a Framework to Fight Denialism and Decolonize Public History Education and Commemoration

While the anti-colonial reframing of collective memory and national history through public education and commemoration are essential forms of reparations, so too is legal and policy reform. Consistent with its commitment to implementing the *UN Declaration on the Rights of Indigenous Peoples*, Canada has a responsibility to uphold Article 15, which affirms that:

- 15.1: Indigenous [P]eoples have the right to dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information; and
- 15.2: States shall take effective measures, in consultation and cooperation with the [I]ndigenous [P]eoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations between [I]ndigenous [P]eoples and all other segments of society.

Combating Negationism, Denialism, and Online Hate

Combating the spread of misinformation and disinformation is a society-wide and ongoing challenge. Many sectors are struggling with the effects of a polluted media landscape that not only allows but encourages falsehood and polarization to flourish. This is a challenge for all institutions: there are no easy answers, and approaches are still evolving and being tested.

The Internet has not only radically changed the context for the dissemination of negationism and denialism, but it has also transformed the context for the application and enforcement of the law. The key legal regimes for addressing nefarious online content—defamation law and hate laws—were both largely developed in the pre-Internet era and are based on now

antiquated assumptions about how we communicate, who has legal responsibility for monitoring communications, and how the law can be enforced.[676] Certainly, online platforms and the Internet are, "being used to spread hate, and to radicalize, recruit and incite people to hate."[677] Online communications, with their broad reach and easy access, are seen as central to the rise of hate and hate-fueled discrimination. The dissemination of Indian Residential School denialism is a case in point.

The gaps in the regulatory environment affect many communities that are targeted by hate and negationism. Representatives of several communities have advocated for Canada to create a regulatory framework for online platforms, effectively setting rules for how such platforms manage hateful content.[678] There are international examples of such regulatory frameworks emerging in other jurisdictions to address this growing problem.

It is important to remember that online hate, including Indian Residential School denialism, has real-life consequences. At National Gatherings, Survivors and Indigenous leaders have described how their communities have been targeted by a wave of online hatred and harassment after making public announcements about their search and recovery efforts. This is retraumatizing for Survivors and has serious impacts on the health and well-being of the whole community that can overwhelm community health-care resources. Communities may be targeted by trespassers, some of whom arrive bearing shovels and intending to disturb burial sites.[679] Although the major online platforms have internal policies and processes regarding hateful conduct and hate speech, it is widely acknowledged that serious problems remain and that these platforms do not consistently identify and remove hate speech in a timely and effective manner. For example, there are no clear mechanisms for addressing the websites that have sprung up for the purpose of propagating denialist versions of the history of Indian Residential Schools.

There have been a number of efforts and initiatives at the federal level aimed at addressing online hate. Most recently, on February 26, 2024, Bill C-63, an *Act to Enact the Online Harms Act*, was tabled in the House of Commons. The proposed legislation would create a new Digital Safety Commission and a Digital Safety Ombudsperson and make changes to the *Criminal Code* and the *Canadian Human Rights Act*.[680]

Through its efforts to update the existing legal framework for online hate, the federal government has acknowledged that the status quo is ineffective for addressing the combination of a rising tide of hatred and the complexities of the online environment. However, as Bill C-63 currently stands, it makes no provision to address the very real harms associated with the growing levels of denialism about Indian Residential Schools, including the missing and disappeared children and unmarked burials. My Interim Report released in June 2023

identified the need for legal mechanisms to address denialism, including implementing criminal and civil sanctions, and urged the federal government to take concrete actions on this issue.[681]

An Indigenous-Led, Anti-Colonial Commemoration Law

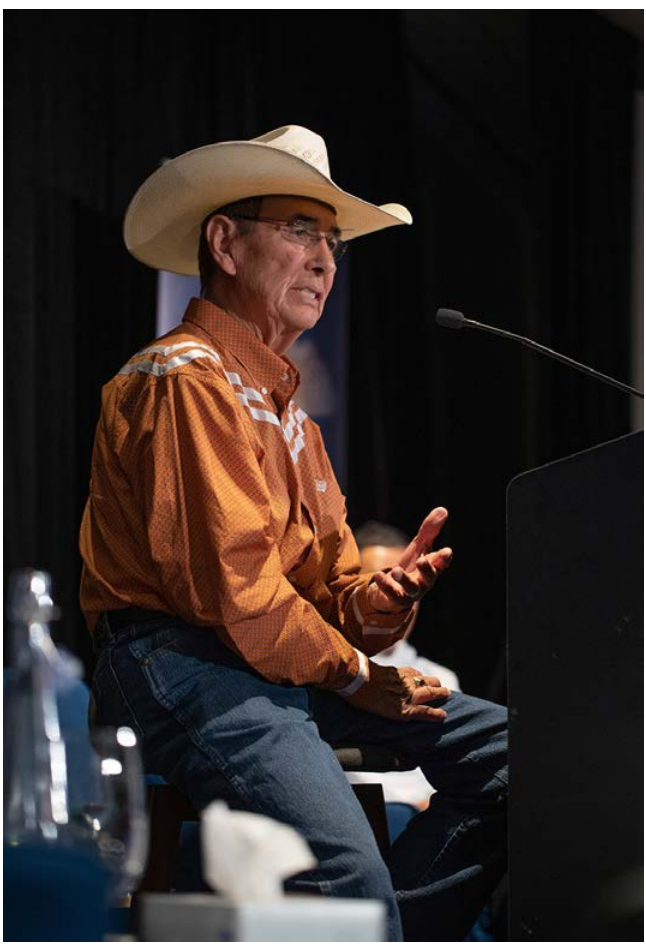
Much of the debate over Canada's proposed hate crime legislation, some of which focuses on Indian Residential School denialism[682], mirrors the controversial nature of human-rights oriented memory laws that originated in Western Europe in the 1990s to counter Holocaust denial and then spread to Eastern Europe in the 2000s. During this same time period, Spain and several other European countries enacted memory laws to address war crimes and atrocities associated with civil wars and fascist regimes that are vigorously opposed by some.[683] Similarly in Canada, where supporters of such legislation argue that these are necessary mechanisms for accountability and justice for victims of hate and mass human rights violations, opponents claim that they infringe on citizens' rights to freedom of expression.[684] Critics of memory laws raise concerns that State legal intervention in collective memory oversteps the appropriate boundaries of law,[685] risks disrupting the collective dialogue and engagement that creates and sustains shared memory and values,[686] and perhaps even risks undermining democratic norms.[687]

Importantly, while memory laws may include measures to protect collective memory against historical negationism and the spread of hatred towards targeted groups, they can also be much broader in scope. There may be legal provisions for tracing and identifying missing victims, conducting exhumations, and protecting cemeteries and other sites of memorialization. Legislation may also include symbolic forms of reparations such as regulating educational curricula, establishing dedicated public history institutions such as archives and museums, and creating national days of commemoration.[688] Commemorative laws set rules of public conduct for these events or at memorial sites. In so doing, they also reflect and shape the narrative of the past that is being commemorated.[689] The symbolic commemorative elements of memory laws have been described as the "long route" to upholding memory because this type of law invites a cultural process of constructive dialogue and moral reflection and the development of a shared, civic conscience.[690]

While Canada has made some progress on implementing and supporting commemoration initiatives relating to the Indian Residential School System, there is, as of yet, no holistic and comprehensive legal and policy framework for commemoration that is consistent with international legal principles, respects Indigenous self-determination, and upholds Indigenous laws, oral histories, and memory practices.

Survivors, Indigenous families, and communities are best placed to identify individual and collective memorialization and commemoration initiatives, which may include events, gatherings, private and public ceremonies, cairns, monuments, public art projects, and the placing of individual grave markers.

They hold unique knowledge as living witnesses to the children who disappeared or died in the Indian Residential School System and the sites where potential unmarked burials might exist. Memory laws that are respectful of Indigenous legal memory have the potential to decolonize and reframe collective memory, national history, and commemoration to counter settler amnesty, impunity, and denialism; strengthen truth, accountability, and justice; and advance reconciliation. Creating a commemoration law relating to the missing and disappeared children and unmarked burials cannot be based on Canadian law alone; Indigenous laws must inform the legislative process.



Dr. Chief Wilton Littlechild delivering Keynote Address at the National Gathering in Winnipeg, Manitoba, September 13, 2022 (Office of the Independent Special Interlocutor).

Survivors and Indigenous families and communities can be supported in this work through the sharing of information and expertise. For example, the Nanilavut Initiative, the Last Post Fund Indigenous Veteran Initiative, and the Commonwealth War Graves Commission can be important sources of policy, program, and technical expertise.

International bodies such as the UNESCO Memory of the World Register and the International Coalition of Sites of Conscience also have an important role. International designation of cemeteries and unmarked burial sites of the missing and disappeared children at former Indian Residential Schools and associated institutions would commit

Canada to additional international legal obligations and accountability for the protection of these sites. As well, these organizations can be sources of educational, training, and funding resources to assist Indigenous communities and organizations in attaining these international designations.

At the Edmonton National Gathering in September 2022, Dr. Chief Wilton Littlechild spoke about the importance of memorialization, stating that as Canadians across the country began to hear Survivors' accounts of the missing and disappeared children and unmarked burials, "the children were heard to be saying, 'They're finally hearing us. They're finally seeing us.' So that's why it's important to commemorate."[691] Indigenous-led commemoration activities illustrate the power of Indigenous acts of remembering, mourning, healing, truth-sharing, and resistance; they call Canada to account for the missing and disappeared children and unmarked burials in highly visible ways that demand an ethical response.

Expanding the Circle: Settler Alliance and Solidarity in an Indigenous-Led Reparations Framework

> When we released the [TRC's] Summary Report and Final Report, I said our ambition here is to arm the reasonable, and by that I meant to give to people the tools that they need to carry on this fight. I point out that we didn't call them recommendations for a reason. We called them Calls to Action because a recommendation is a word that people can say, "that's nice," and ignore it. But a Call to Action has more force to it, has more of a sense of urgency about it, has more of a motivation to it in the sense that we're saying to people "you can do something about this, and here's something you can do, so we're calling upon you to do this."
>
> — Honorable Justice Murray Sinclair, former Senator and Chair, Truth and Reconciliation Commission of Canada[692]

"Arming the Reasonable" to Support an Indigenous-Led Reparations Framework

Countering settler amnesty and impunity not only requires systemic and structural legal, policy, and institutional reform but also anti-colonial, transformative societal change. The TRC understood that for reconciliation based on the *UN Declaration* to be sustainable over time, a majority of Canadians must be willingly engaged in the process. Determining the truth about the fate of the missing and disappeared children, and fully understanding

why Canadians were so indifferent to their deaths, is essential to breaking recurring cycles and patterns of ongoing colonial violence and mass human rights violations against Indigenous Peoples. There is an urgent need to "arm the reasonable," that is, to develop a critical mass of historically literate citizens who understand that for a democracy to flourish, it must be willing and able to confront and redress the historical injustices that continue to impact Indigenous-settler relationships today.

Memorial Circle at former grounds of the Cecilia Jeffrey Indian Residential School, July 12, 2024 (Office of the Independent Special Interlocutor).

Shifting from Bystander to Upstander

It is crucial to understand what motivates bystanders to remain silent or make only token gestures to acknowledge wrongdoing. Harvard law professor Martha Minow explains that, "bystanding is easier than upstanding. Passivity is easier than action. Yet there are deeper and more complex reasons. These include peer pressure, fear for the safety or reputation of oneself and others, denial, worries about being overwhelmed by the work and repercussions of standing up, and traditions that put the burden on individual heroism rather than shared

responsibility."[693] However, as Minow observes, these fears can be mitigated by, "engag[ing] in collective efforts to build policies and communities that support upstanding and in so doing make it easier for individuals to act without having to summon extraordinary courage."[694] Establishing new networks of allyship is essential for there to be a paradigm shift from a culture of impunity towards a culture of accountability. However, this cannot be done in isolation but rather in dialogue with Indigenous people.

Decolonizing Allies and Allyship

It is not up to Indigenous people to decolonize settlers. Rather, as Paulette Regan, the former director of research for the Truth and Reconciliation Commission, points out, settlers must do their own work and, "risk interacting differently with Indigenous people—with vulnerability, humility, and a willingness to stay in the decolonizing struggle of our own discomfort. What if we were to embrace [Indian Residential School] stories as powerful teachings—disquieting moments in which we can change our beliefs, attitudes, and actions?"[695] The TRC's Final Report noted that Elders and Knowledge Keepers repeatedly emphasized that Indigenous and non-Indigenous people carry different responsibilities for reconciliation that are nevertheless interconnected.

To fulfill these responsibilities, each must do their own personal and political healing and decolonizing, "in ways that honour the ancestors, respect the land, and rebalance relationships."[696] There is an urgent need for Indigenous and non-Indigenous people to take the time and make the effort to establish and maintain constructive working relationships if we truly want to transform Canadian society.[697] Those who wish to be allies must avoid working in ways that simply replicate colonial relationships, systems, structures, and institutions, engaging in shallow, performative gestures of reconciliation that ultimately maintain their power and privilege as beneficiaries of colonization.[698] Andrea Sullivan-Clarke, a scholar from the wind clan of the Muskogee Nation of Oklahoma, identifies overarching ethical principles to guide anti-colonial allyship:

> A decolonial ally is one who 1) recognizes the self-determination and sovereignty of Indigenous people, 2) is humble and acknowledges their privilege as someone who benefits from colonialism, and 3) takes their cue to act from the people they seek to serve. In Indigenous communities, relationships are important; they provide a guide for how to act (how to be in the world).[699]

Developing an Anti-Colonial Settler Ethics of Caring

Learning about and from the history of the missing and disappeared children and unmarked burials requires allies to deal with unsettling emotions in ways that are decolonizing, not recolonizing. The TRC acknowledged that learning about the history and ongoing legacy of the Indian Residential School System is difficult. While this can:

> bring up feelings of anger, grief, shame, guilt, and denial ... [it] can also shift understanding and alter worldviews.... [D]eveloping respect and empathy for each other ... will be vital to supporting reconciliation in the coming years.... Educating the heart as well as the mind helps young people to become critical thinkers who are also engaged, compassionate citizens.[700]

Developing an anti-colonial ethics of care requires settlers to actively engage with and decolonize deeply embedded colonial forms of empathy. The TRC found that:

> Although societal empathy for Aboriginal victims of abuse in residential schools is important, this sentiment alone will not prevent similar acts of violence from recurring in new institutional forms. There is a need for a clear and public recognition that Aboriginal peoples must be seen and treated as much more than just the beneficiaries of public goodwill. As holders of Treaty, constitutional, and human rights, they are entitled to justice and accountability from Canada to ensure that their rights are not violated.[701]

The TRC's caution is well-founded. There is a problematic history of colonial forms of empathy that pathologize Indigenous people by focusing primarily on their victimization rather than on their legitimate political claims as rights holders entitled to accountability, reparations, and justice.[702] Political theorist Jasper Friedrich observes that while Survivors and their families, as victims of violence in the Indian Residential School System, have a need for and a right to healing, governments have strategically adopted the rhetoric of trauma and healing for their own political purposes. He points to the wording of Canada's apologies that focus on responding to Survivors' need for the harms they have suffered to be recognized to support healing and closure rather than on acknowledging that their human rights have been violated.

Towards an Ethics of Recognition: Acknowledging Genocide and Strengthening Accountability

Since the TRC's Calls to Action were issued almost a decade ago, a growing number of Canadians may be developing a collective, "understanding, awareness, recognition, and appreciation" of why reconciliation is necessary.[703] The TRC's report on the missing and disappeared children and unmarked burials, having received minimal public response in 2015, became a renewed focus of nation-wide attention in 2021. The catalyst was not a change in government, but the actions of Indigenous communities making public confirmations of potential unmarked burials of Indigenous children on the sites of former Indian Residential Schools. This news gripped the nation, sparking an emotive wave of outrage and empathy from Canadians.

The public confirmations reignited public dialogue as some Canadians vehemently denied that this was further evidence of genocide. Others, however, are recalibrating their understanding of genocide—a process that has been ongoing since the TRC first announced its finding of cultural genocide. A poll conducted after the Tk'emlúps te Secwépemc's public announcement indicates that not only were a majority of Canadians recognizing that the Indian Residential School System was genocide, but a growing number also want criminal investigations into the actions of Canada and the churches as potential crimes against humanity.[704] More Canadians are joining Indigenous people to demand truth and accountability from the State for the children who went missing, were disappeared, or died in the Indian Residential School System while in the care and custody of the State.

The Canadian government has taken important first steps to formally recognize the genocide, crimes against humanity, and mass human rights violations that Indigenous Peoples within Canada have experienced at the hands of successive governments and the churches, acting on behalf of the State. However, as Natan Obed, president of Inuit Tapiriit Kanatami, told participants at the National Gathering in Iqaluit in January 2024, we must continue to push the country to do better, "It's up to us to keep that momentum going. And to exchange the empathy and the worry and the concern with clear direction on what we do about it.... This work is part of an overarching story in this country about disrespect and lack of justice in life and in death."[705]

Contrasting Visions: State versus Indigenous Approaches to Reparations

Broadly speaking, States and Indigenous Peoples have contrasting visions of the purpose and function of reparations. In the America context, Yacqui legal scholar Rebecca Tsosie notes

that the State views reparations primarily in terms of providing monetary compensation for narrowly defined harms associated with the loss of a specific piece of land or the cultural harms of forced child removals to Indian Boarding Schools or enabling the repatriation of Indigenous human remains and cultural artifacts. These are attempts to close off the past by redressing historical injustices in strictly legal terms. However, as Tsosie argues, the historical and ongoing harms suffered by Native Americans in the United States, "are simultaneously legal and moral in nature" and include both political and cultural harms.[706]

Indigenous Peoples on both sides of the settler colonial border in North America take a much broader and longer view of reparations. From their perspective, the loss of Sacred Indigenous lands, bodies, and cultural objects is inseparable from the loss of Indigenous political identity and the violation of their inherent rights as self-determining sovereign peoples. From this perspective, "the concept of reparations for Native peoples MUST include recognition of their right to self-determination."[707] Tsosie concludes that to be effective, reparations must be based on a holistic approach that upholds Indigenous rights, strengthens accountability and structural change, and promotes intercultural justice and intergroup healing between Indigenous and settler people.[708]

Designing and Implementing a Holistic Indigenous-Led Reparations Framework

The Indigenous-led Reparations Framework and search and recovery processes must be governed by Indigenous laws and the *UN Declaration*. It must strengthen truth-finding and accountability mechanisms, structures, and policies in government departments, church administrations, educational institutions, and other organizations. Keeping in mind that the search and recovery process itself is as important as the outcome, the design and implementation of the Indigenous-led Reparations Framework must be carefully considered.

The Reparations Framework draws on the work of international legal scholar and restorative justice practitioner Eric Yamamoto.[709] Drawing on a multidisciplinary approach, Yamamoto's holistic framework for *social healing through justice* first sets out six preconditions or working principles that are prerequisites for effective social healing. These principles coalesce into an analytical framework of the 4Rs—*recognition, responsibility, reconstruction, and reparation*—"that stand as shorthand for the analytical inquiries generated by a *social justice through healing framework* that aims to shape, assess, and recalibrate social healing initiatives to foster the kind of reparative justice that heals."[710]

Preconditions and Working Principles for Social Justice through Healing

Working Principle 1: Participants in the process and society more generally must share an interest in peaceable and productive group relations in a reconstructed society even though challenging and difficult.[711]

Working Principle 2: Reparative justice or social healing for historical injustices must not supplant contemporary justice advocates' efforts to dismantle oppressive systems, structures, and institutions of oppression, but should inform and catalyze these efforts.[712]

Working Principle 3: Social justice through healing must occur simultaneously at individual and collective levels and address both emotional and material aspects of redress, including opportunities for Survivors to share their experiences, State acknowledgement of harms, community capacity-building, and financial support.[713]

Working Principle 4: There must be changes in social structures by restructuring social, economic, and political relationships to prevent the recurrence of the injustice. The focus is on institutional reordering through legal and political changes that build democratic checks and balances into the exercise of government power.[714]

Working Principle 5: This principle is linked to principle 4 and emphasizes the practical importance of generating a real-world collective sense that justice has been done, not just in words but by actions. This requires the pragmatism that comes with recognizing that, "what may be ideal theoretically may not be fully achievable practically" in the short term. Achievable goals and workable processes must be flexible to adapt to changing political and economic circumstances that may impact reparations processes.[715]

Working Principle 6: This principle is cautionary. It points to the need for participants to understand the, "dark side of [the] reparative justice process." It requires interventions to call the involved parties to account for stalled initiatives that are attempts to deflect or subvert organizing efforts for substantive changes in systemic power structures. The limitations of tort-based reparations must be kept in mind and, "pushback and recriminations for ideological, financial, political or

> other reasons" must be anticipated. This, "highlights the importance of community organizing, public education and political struggle along with acknowledgement of justice inaction—continuing mistrust or enmity, social divisions, a failure of social ideals and damage to societal stature."[716]

The framework centres on four key concepts: recognition, responsibility, reconstruction, and reparation that together can generate social justice through healing.

Recognition: There are two aspects of recognition: (1) the need to identify and assess the scope of the historical injustice that must be addressed with a view to understanding its ongoing impacts today and (2) the need to recognize the depth of harm and foster empathy. When governments ignore the totality of the injustice perpetrated by the State by attempting to limit reparations to a singular event and a narrowly defined scope of harms, victims' sense of injustice is heightened. In Canada, Indigenous Peoples do not view unjust child removal laws and policies as separate from other unresolved historical injustices stemming from territorial land dispossession and denial of Indigenous self-determination. Rather, these are all manifestations of genocide perpetrated by successive settler colonial governments. Although Canada has acknowledged the abuses perpetrated in the Indian Residential System, apologized, and made tort-based reparations, and there has been the MMIWG National Inquiry, both the TRC and the National Inquiry found that Canada has still only partially recognized the full scope and depth of harms and mass human rights violations.

Responsibility: Responsibility asks participants to, "carefully assess the dynamics of group power" that impact reparations and reconciliation processes.[717] Yamamoto observes that acknowledging and accepting responsibility for harms caused by the abuse of power not only applies to those who participated directly in the abuse, but to those who were complicit because they knew about the abuse and did nothing to address it. Those who have benefited indirectly (for example, through land acquisition or career advancement) from the violations of others' human rights, and citizens who are the group beneficiaries of such violations, are also responsible.[718]

Reconstruction: Reconstruction involves, "acting on the words of *recognition* and *responsibility*. It means interactively engaging in concrete ways that promote individual and community healing by rebuilding relationships and remaking institutions."[719] A first step in reconstruction is the offering of apologies, but, to be judged as sincere, formal apologies must be followed with action.[720] These may include commemorative actions such as the construction of memorials, museums, and educational facilities, and public messaging

about the lessons learned about the historical injustices.[721] Finally, there must be institutional restructuring to implement significant changes in the legal, political, educational, health-care, business, and media sectors of society to prevent recurrence.

Reparation: Yamamoto observes that, *"Reparation* links closely to *reconstruction*.... It speaks to transformation.... [A]cts of *reparation* (and *reconstruction*) by governments or groups must result over time in a restructuring of the institutions and relationships ... that produced the underlying justice grievances. Otherwise, the reparative initiative cannot be effective in addressing the root problems of power abuses, particularly the maintenance of oppressive systemic structures."[722] Countering the tendency of government or private groups to twist reparations in ways that maintain existing power relationships requires ongoing advocacy and collaboration across all sectors of society.

Weaving Together Indigenous and Western Approaches to Reparations and Reconciliation Processes

For allies to work effectively in an Indigenous-led process, they must understand the principles that guide it. While the specific elements of various processes will differ according to the Indigenous laws, protocols, and practices of the Indigenous community, Tribal council, political territorial organization, or other representative body involved, certain overarching principles are applicable to all. Article 18 of the *UN Declaration*, which affirms the right of Indigenous peoples to participate in decision-making in matters that would affect their rights, is the key principle from which all others flow. An Indigenous-led process should be guided by the following principles:

- Decisions about what steps are required leading up to, during, and after searches, including which outside experts to involve, must be made by Survivors, Indigenous families, and communities;
- Governments, churches, archives, museums, universities, and other institutions must respect and uphold Indigenous Peoples' right to oversight and decision-making in the search and recovery process. This requires colonial institutions to cede power/control to Survivors, Indigenous families, and communities to develop, implement, and evaluate initiatives and collaborative agreements at community, regional, and national levels. This is so even if these colonial institutions/organizations are providing the funding to support search and recovery effort; and

- Where national or regional policies or laws are being considered, Indigenous sovereignty must be respected. All levels of government must consult in good faith with Survivors, community leadership, Indigenous national/provincial/territorial political organizations, and Indigenous bodies with the required expertise with respect to any decisions being made that impact search and recovery efforts.

Expanding the Circle: Identifying Reparation Gaps and Emerging Practices of Alliance and Solidarity

While much of the focus of the Indigenous-led Reparations Framework is necessarily on legislative and government policy reform, key public institutions such as universities, churches, the media, and civic society organizations also have an important role in supporting the Indigenous-led Reparations Framework. Any institution where Indigenous children were forcibly transferred to or whose members were complicit (either directly or indirectly) in the mistreatment of Indigenous children in these institutions, has a responsibility to investigate and account for their role by taking reparative action. There is much to be learned from the collaborative arrangements and practices that have emerged over the past two years.

Universities: Allies in Education, Bystanders to Truth-Finding and Accountability

Universities, to varying degrees, are implementing the TRC's Calls to Action on education, and several have issued apologies acknowledging their role as one of many colonial institutions that supported and failed to speak out against the Indian Residential School System.[723] Professors from various faculties are establishing collaborative relationships with Indigenous communities to support search efforts to locate, recover, and commemorate the missing and disappeared children and unmarked burials.[724]

However, universities have not yet fully investigated their complicity in the Indian Residential School System and the deaths of children at these and associated institutions. Their histories as institutional bystanders who reaped the benefits of active complicity in supporting the Indian Residential School System and other institutions such as hospitals, juvenile reformatories, and orphanages is not well understood. Universities established reputations of research excellence, and individual professors advanced their careers conducting public policy research for governments on health, education, social welfare, and criminal law relating to Indigenous people. Some of these research studies involved medical experiments on Indigenous children at Indian Residential Schools and other associated institutions.[725]

The fact that many universities gained substantial institutional wealth from owning lands where Indian Residential Schools and other institutions were sometimes built is often overlooked. Yet as the legal actions taken by the Kanien'kehá:ka Kahnistensera (Mohawk Mothers) to halt McGill University's redevelopment of the Royal Victoria Hospital grounds indicate, the ongoing impacts of Indigenous land dispossession is part of the history of the missing and disappeared children.[726] There may be unmarked burials on the grounds of many universities, including those with teaching hospitals.[727] Importantly, McGill and other universities are becoming more transparent about this untold aspect of their history.[728] For universities, thoroughly examining their institutional histories with a view to investigating, understanding, and sharing knowledge about their direct and indirect role in the Indian Residential School System and Indigenous land dispossession is an important act of truth-finding and accountability.

Sacred Covenant between Tk'emlúps te Secwépemc and the Catholic Church

On June 27, 2024, Tk'emlúps te Secwépemc Kukpi7 Rosanne Casimir and Archbishop of Vancouver J. Michael Miller, CSB, held a joint press conference to provide details of the *Sacred Covenant between Tk'emlúps te Secwépemc and the Roman Catholic Archdiocese of Vancouver and the Roman Catholic Diocese of Kamloops.*[729] The goals of the *Sacred Covenant* are for the signatory parties to share the historical truths regarding the Kamloops Indian Residential School, for the dioceses to acknowledge their role in the Indian Residential School System and build on official Catholic teachings supporting the rights and freedoms of Indigenous people, and for the signatories to establish a shared path to healing and reconciliation.[730] The document sets the harms perpetrated by the Catholic church, in partnership with Canada, in the Indian Residential School System in the broader historical context of coerced or forcible child removal laws and policies, Indigenous land dispossession, and the denial of Indigenous rights of sovereignty and self-determination.

The Sacred Covenant sets out Commitments to Action, including commitments to memorialization, information sharing towards determining the truth, provisions of mental health support and counseling for families and others whose loved ones may be buried on the site of the former Kamloops Indian Residential School, and provision of technical and scientific expertise and services to answer the questions raised by the ground-penetrating radar survey. In addition, the Covenant commits to a collaboration towards the implementation of the TRC's Calls to Action regarding the missing and disappeared children and unmarked burials, a renewal of commitments to support a fair and just recognition and implementation of First Nation jurisdiction and title, and more.[731]

Media: Decolonizing Truth-Finding and Strengthening Accountability

Media has tremendous power to sway public opinion.[732] It is therefore essential to hold media accountable for its broader role in shaping Canada's relationship with Indigenous Peoples. There has been some progress in implementing the TRC's Calls to Action aimed at the media in terms of increasing Indigenous news coverage and jobs and improving education in journalism schools.[733]

However, media institutions have failed to investigate or apologize for their complicity in settler colonialism that has perpetuated harms against Indigenous Peoples. Nor have they thoroughly examined the benefits they have reaped from this reporting over many years. It is important for the public and media institutions to recognize the ways in which the media has failed Indigenous people and communities. This requires media institutions to take concrete action to investigate their own past because as Les Couchi, a member of the Nipissing First Nation, points out, "the foundation of today's racism can be found in the mainstream press of the past."[734] Performing audits and studies of their media coverage relating to Indigenous Peoples is an essential first step to understanding the media's role in supporting settler colonialism and denying or limiting truths about the Indian Residential School System, including the circumstances surrounding the disappearances, deaths, and undocumented burials of Indigenous children. This will establish a foundation for reframing media accountability to ensure appropriate reparations are forthcoming. Among other actions, this may include making apologies.

The need to do so is evident in the troubling dynamics that have emerged around media reporting over the past two years. Indigenous communities across the country have been publicly confirming the results of ground searches and other aspects of search and recovery work through the media. At the National Gatherings, many have shared information about their negative experiences with the media. They have offered insights and guidance to participants about how to protect Survivors and their communities as well as the cemeteries and potential burial sites they are searching from the onslaught of media. While initially communities were ill-prepared to deal with the media, there has been a gradual shift as they take a more proactive approach to managing communications. Many communities are now better prepared in advance to share information with the community first and exercise their right to decide what information will be kept confidential from the public.[735]

The Canadian Association of Journalists (CAJ) issued a statement reaffirming that, "Newsrooms should make educating their reporters on how to cover Indigenous communities with care and respect their largest priority as these graves continue to be uncovered. It is long overdue and shameful that it has not happened."[736] In reporting on this Sacred work in Indigenous

communities, the tenet to minimize or do no harm, as adopted by the Society of Professional Journalists' *Code of Ethics*,[737] becomes paramount. News organizations can actively work to minimize harm by being conscious of how news stories are framed and by supporting journalists, both financially and through training opportunities, to ensure they are reporting in a way that is trauma-informed. Journalists must also be accurate in their use of terminology to avoid fueling Indian Residential School denialism that has unfortunately become commonplace in some media outlets.[738]

Allies Standing Up and Standing Together: Unmarked Burials at Other Institutions

Over the past two years, there have been many examples of non-Indigenous people who have taken action to support efforts to locate and commemorate Indigenous children who died and were buried at an Indian Residential School or one of the many other institutions where they were sent. Whether they were sent directly from an Indian Residential School or apprehended from their families and placed in an orphanage, hospital, or reformatory, all these children were victims of State-imposed child removals that violated their human rights. Some Indigenous and non-Indigenous Survivors of these institutions, or groups representing them, are working together to locate the burial sites of all the children, many of whom grew to adulthood in places where they were kept for years. This includes the efforts by the Mohawk Mothers and the Duplessis Orphans' Committee to protect and investigate potential burials at the site of the former St. Jean de Dieu Hospital in Montreal,[739] the efforts by the volunteers of the Lakeshore Asylum Cemetery Project and various Indigenous organizations to identify the unmarked graves of Indigenous children there and to determine which communities they were taken from, and the tenacious advocacy of David McCann, who is fighting for an investigation of potential unmarked burials of Indigenous children at the site of the former St. Joseph's Training School for Boys in Alfred, Ontario.[740]

Permanent Peoples Tribunal: An Alliance of Civic Society Organizations for an International Investigation

The Permanent Peoples Tribunal (PPT), based in Rome, Italy, is an international opinion tribunal composed of human rights experts that was established in 1979, following the world-wide adoption of the UN Universal Declaration of Peoples' Rights in 1976. The PPT's mandate is to, "[consider] requests made by community representatives, minorities, peoples, civil society who have been and/or are subject to serious systematic violations of their human and peoples' rights, by governments, institutional and private actors, and who are unable to find a response in national, regional or international court proceedings."[741] While

the Tribunal has no legal power to compel witnesses or enforce its judgments, it sheds light on human rights cases that might otherwise be unheard because existing international legal mechanisms are unavailable in practice. It promotes civic society's understanding of international human rights law and has a critical role in highlighting the shortcomings and failures of the current international legal system.[742]

On November 28, 2023, two non-profit organizations—the Native Women's Shelter of Montreal and Resilience Montreal—together with human rights NGO Amnesty International, sent a formal request to the PPT, asking officials to activate an investigative procedure review regarding the missing and disappeared children and unmarked burials in Canada.[743] They took action based on the recent report of the UN Special Rapporteur on the Rights of Indigenous Peoples that, "points to numerous failures on the part of both the Canadian government and the churches to collaborate with Indigenous Nations to provide the necessary information and documentation, and to provide support in setting up Indigenous-led investigations,"[744] noting that the June 2023 Interim Report, "encourages Indigenous Peoples to explore alternative avenues of investigation, including the pursuit of international legal remedies."[745]

On February 14, 2024, the PPT informed the Native Women's Shelter of Montreal, Resilience Montreal, and Amnesty International that their request meets the criteria of its mandate. The Tribunal will now work collaboratively with them to prepare the investigative process and necessary next steps.[746]

CONCLUSION AND OBLIGATIONS

Implementing an Indigenous-Led Reparations Framework for Truth, Accountability, Justice, and Reconciliation

In meeting with Survivors, Indigenous families, and communities over the past two years, and gathering in-depth information about the substantive barriers they are encountering in search and recovery work, it became apparent that, to be effective, the new legal framework requires more than minor tinkering with existing legislation. Despite the many barriers, Survivors, Indigenous families, and communities are exercising their sovereignty as they establish rights-based, trauma-informed processes based on Indigenous laws to search for, recover, and commemorate the missing and disappeared children and their burial sites. Bearing witness to these emerging truth-finding processes affirms that Indigenous people must lead this work. Canada has ongoing international legal obligations to determine the truth and hold perpetrators accountable for what happened to the children, their families, and communities and to make reparations. Yet Canada, as the perpetrator of atrocity crimes and mass human rights breaches, cannot investigate itself. To do so creates a fundamental conflict that is unacceptable to Indigenous Peoples.

There is an urgent need for an independent search and truth recovery mechanism that incorporates other forms of reparation to create a robust, comprehensive, and cohesive Indigenous-led Reparations Framework in Canada.[1] Building on the TRC's vision of an Indigenous rights-based reconciliation framework governed by the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) and Indigenous laws, and its emphasis on the critical role

of reparations, this new Reparations Framework must be developed through an anti-colonial lens that highlights the importance of Indigenous laws, international human rights and criminal law, and the *UN Declaration*.

International human rights principles, norms, and standards on the rights of victims, Survivors, families, and communities to seek and obtain truth, accountability, and justice through various forms of reparations—restitution, compensation, rehabilitation, satisfaction, and the guarantee of non-repetition—inform the Final Report. State reparations relating to the missing and disappeared children and unmarked burials must support not only legal and policy reform but also the memorialization, commemoration, and repatriation of the children; the return of lands; the reclamation and revitalization of Indigenous cultures, languages, spirituality, laws, and governance systems; apology; the rewriting of national history; and public education. While the federal government and the churches have partially acknowledged responsibility and apologized for some of the atrocities of the Indian Residential School System, they have done so primarily in response to litigation by Survivors. Despite the participation of the federal government and church officials at the proceedings of the TRC, full disclosure of the truth has still not happened. Instead, the federal government has adopted a de facto, unlimited, unconditional, blanket self-amnesty—a "settler amnesty"—to evade accountability at the international and domestic level. This has created and maintained a culture of institutional and individual impunity, perpetuated by racist settler colonial beliefs and attitudes about Indigenous Peoples.

The importance of combating impunity cannot be overstated. In Canada, settler amnesty and a culture of impunity has impeded accountability and justice for Survivors, Indigenous families, and communities. Canada has legal and moral obligations to ensure a full investigation is conducted into the disappearances and deaths of the children in the care of the State and churches at Indian Residential Schools and other institutions. This would combat the impunity that continues to protect the State, its agents, and those who operated the institutions from justice and accountability. Even where criminal justice for these atrocities is no longer possible, the evidence gathered becomes part of the historical record.[2] Canada is obligated to disclose and remember its own disreputable past by rewriting national history to accurately reflect this reality.

Hoop Dancer, Shantae King, at the National Gathering in Vancouver, British Columbia, January 16, 2023 (Office of the Independent Special interlocutor).

THE NEED FOR AN INDIGENOUS-LED SEARCH AND TRUTH RECOVERY MECHANISM

It is essential for all Canadians to understand that Indigenous-led search and recovery work is not just another "program" or "partnership" between the federal government and Indigenous communities. Funding supports or access to records with government and church officials are

only the first steps towards a full range of reparations that the federal government must make to Indigenous Peoples for violating their rights so profoundly for well over a century. International experts point out that:

> enforced disappearances occur when people are deprived of liberty by State actors, or by organized groups or private individuals acting on behalf of, or with the support, consent, or direct or indirect acquiescence of, State officials; and when this deprivation of liberty is followed by a refusal to disclose the fate or whereabouts of the persons concerned, and/or a refusal to acknowledge the deprivation of their liberty.[3]

Canada deprived Indigenous children of their liberty and subjected them, including their families and communities, to mass human rights violations. Survivors, Indigenous families, and communities have the right to a rigorous, highly credible process to find and disclose the whole truth about what happened to the missing and disappeared children, locate their burial sites, and ensure that those responsible for their deaths are held accountable. All Canadians have a role and responsibility to support reparation measures in ways that advance truth, accountability, justice, and reconciliation.

EVOLVING INTERNATIONAL APPROACHES FOR EFFECTIVE SEARCH AND TRUTH RECOVERY MECHANISMS

Reparations programs are not substitutes for search and truth recovery mechanisms needed to investigate what happened to persons who are missing or were disappeared by the State and its agents. Accountability and access to justice are themselves key forms of reparation that can only be advanced through full investigations and truth-finding. Searches for the disappeared in several Latin American countries were previously conducted primarily through the criminal justice system where the focus is on identifying those responsible for atrocities rather than on meeting the needs of victims and their families. More recently, however, there is growing emphasis on the equally important need to search for information to provide answers to families and communities about their loved one's fate and where they are buried.[4] Several States across the globe have established non-judicial search and truth recovery mechanisms to investigate enforced disappearances. Whereas judicial investigations are conducted through the criminal justice system, non-judicial mechanisms, such as offices or commissions of investigation, are created through legislation or by presidential decree. They are mandated to investigate missing persons and enforced disappearances where the State or its agents have been responsible.[5]

The diversity and complexity of the circumstances leading to the creation of a search and truth recovery mechanism in vastly different countries with different political histories, governance structures, and legal systems demonstrates the need for an investigative body to be tailored specifically to the Canadian context. The United Nations (UN) Committee on Enforced Disappearances' *Guiding Principles for the Search for Disappeared* Persons, a report issued in 2020 by the UN Working Group on Enforced or Involuntary Disappearances[6] on standards and public policies for an effective investigation of enforced disappearances,[7] and various studies by other international experts can inform the creation of a search and truth recovery mechanism in Canada. Together, they provide important understandings into the practicalities of designing and implementing independent offices or commissions of investigation established by the State.

Empty Chair at Sahkahjewaosa: Bigii Weh Wok – They Are Coming Home Gathering in Sault Ste. Marie (Office of the Independent Special interlocutor).

KEY ELEMENTS OF AN INDIGENOUS-LED REPARATIONS FRAMEWORK FOR TRUTH, ACCOUNTABILITY, JUSTICE, AND RECONCILIATION

At the Toronto National Gathering in March 2023, participants shared how Indigenous laws are being upheld in the Sacred work of searching for the missing and disappeared children and unmarked burials, including how:

- It unites many Indigenous Nations in shared purpose, and diverse legal orders are working together to advance it;
- Indigenous laws establish specific obligations and practices for the care of children and those who have died, and how these laws are meeting family

and community needs in responding to the genocidal harms inflicted on Indigenous Peoples;

- Indigenous leaders, Knowledge Keepers, Elders, Matriarchs, and communities are upholding and practising their laws within, beyond, and despite the Canadian legal system;
- Communities are caring for the children's bodies, Spirits, and burial places according to their own laws;
- The application of Indigenous laws can advance accountability and justice and rebuild responsible relations across societies;[8] and
- As Indigenous Peoples exercise their sovereignty and adapt and apply Indigenous laws, they are decolonizing and moving beyond mere participation in leading these investigations.

International approaches also emphasize the importance of family and community participation. However, more than mere participation is needed. These approaches must be tailored to support investigations into the missing and disappeared children and unmarked burials in the Canadian context, which includes a history of atrocities and genocide. These tailored approaches must:

- Consider how the *UN Declaration* should be integrated into investigations;
- Reflect Indigenous Peoples' sovereignty as self-determining peoples and holders of inherent, Treaty, and constitutional rights within Canada;
- Be governed by Indigenous laws relating to grieving, death, burial, and memorialization, with appropriate respect for Indigenous ceremonies and protocols in all aspects of the investigation process; and
- Examine the systemic patterns of genocide and crimes against humanity perpetrated against Indigenous Peoples within Canada.

In his July 2023 report on Canada, José Francisco Calí Tzay, the UN Special Rapporteur on the Rights of Indigenous Peoples, made several findings and recommendations relating to the missing and disappeared children and unmarked burials. He concluded that a particular approach is needed to reflect the Canadian context:

> The negative legacies of colonialism and history of abuse and discrimination have left [S]urvivors and their families with a deep

> mistrust of Canadian institutions. First Nations, Métis and Inuit peoples want to lead the repatriation of the remains of their children in a culturally relevant way with adequate financial support from Canada to cover the costs of forensic investigation, exhumation and/or commemoration, healing and wellness.[9]

He recommended that Canada:

> Fully support Indigenous Peoples' calls for **[S]urvivor-centred, Indigenous-led investigations** into residential school burial sites, including those located on private lands, to mitigate against further harm in accordance with Truth and Reconciliation Commission Call to Action 76, and **respect Indigenous Peoples' laws and protocols** related to grieving, death and burial practices in any investigation of residential school burial sites.[10]

This Final Report examined four elements of reparation that when woven together form the foundation of an Indigenous-led Reparations Framework for truth, accountability, justice, and reconciliation:

1. Activating and enforcing international obligations;
2. Implementing Indigenous laws and decolonizing the Canadian legal framework;
3. Finding truth, rematriating lands, and repatriating the children; and
4. Supporting Indigneous-led healing and countering settler amnesty.

Implementing each of these four elements into the new framework is essential and can be achieved by adherence to the obligations identified below.

OBLIGATIONS

Many mandates of federal commissions of inquiry or Orders in Council appointing officials direct that "recommendations" be made in final reports. The Mandate and Terms of Reference for my position as the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites Associated with Indian Residential Schools are no different, directing me to, "identify areas of improvement in Canadian law and make recommendations for a new federal legal framework." However, too often governments and other

institutions do not implement the "recommendations" made. As such, I have opted to not make recommendations but, rather, to identify the legal, moral, and ethical obligations that governments, churches, and other institutions have to support Indigenous-led search and recovery work. These obligations must be fulfilled in accordance with the *UN Declaration*, Indigenous laws, international human rights and criminal law, and Canadian constitutional law.

The greatest and most important obligation that we all have is to the Survivors. They must be honoured and acknowledged for their courage, determination, and advocacy to raise public awareness about the truths of unmarked burials of children who died at Indian Residential Schools and other associated institutions. Survivors have shared these truths for decades, but, for far too long, their testimonies have been dismissed or ignored. Survivors continue to be at the forefront of holding the federal government accountable for these harms. They are the living witnesses of what happened to the missing and disappeared children. Many Survivors have been reliving their trauma in walking the sites of former Indian Residential Schools and associated institutions to help find the missing and disappeared children. They hold the collective memory of the harms perpetrated against them and other children. Their testimonies, about each institution and across institutions, reveal the systemic patterns of genocide and the crimes against humanity perpetrated by Canada against Indigenous children and families. Survivors are aging, and there is urgency to gather their truths and testimonies. Indigenous communities are best placed to do this important truth gathering. Given this urgency, the federal government must comply with Canada's international legal obligations.

Survivors Are the Living Witnesses

1. The federal government must provide continued and ongoing sufficient funding to support Survivor Gatherings at the national, regional, and community level and for the recording of Survivor truths.

Establishing a National, Indigenous-Led Commission of Investigation into Missing and Disappeared Indigenous Children and Unmarked Burials

2. The federal government, in consultation and collaboration with Survivors, Indigenous families and communities, and Indigenous Leadership, must establish through legislation an independent, Indigenous-led national Commission of Investigation into Missing and Disappeared Indigenous

Children and Unmarked Burials (see Appendix A). In creating this Commission, the federal government must adopt the human rights-based forensic investigation principles set out in the 2019 UN Committee on Enforced Disappearances' *Guiding Principles for the Search for Disappeared Persons*.

TRC Calls to Action

3. All levels of government in Canada, along with church entities, must fully implement the TRC's Calls to Action 71–76.

4. Call to Action 73 must be expanded to include cemeteries and burial sites associated with the other institutions to which children were taken or transferred (see Appendix B).

Long-Term, Sufficient, Flexible Funding

5. The federal, provincial, and territorial governments, and church entities, must fully support Indigenous families and communities' right to truth under international law and provide long-term, sufficient, and flexible funding for Indigenous-led investigations into the missing and disappeared children and unmarked burials at all Indian Residential Schools and associated institutions. Funding must support search and recovery efforts for any purposes deemed necessary by Indigenous communities or organizations leading investigations (see Appendix C).

6. Where disputes arise as to which level of government should provide funding in relation to investigations, a Jordan's Principle approach should be applied. The first level of government contacted must provide the funding requested, and any disputes about responsibility or apportionment of funds be subsequently resolved.

International Obligations

7. The federal government must provide full reparations, including compensation, to families of the missing and disappeared children, including their living descendants.

8. The federal government must publicly acknowledge that many of the Indigenous children who were taken to Indian Residential Schools, and other associated institutions, are not just missing. They are victims of "enforced disappearance" as defined by international law.

9. Canada must sign and ratify the *American Convention on Human Rights* and accept the jurisdiction of the Inter-American Court on Human Rights.

10. Canada must sign and ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*. Canada must also explicitly codify enforced disappearance as a crime under the *Criminal Code* as well as the *Crimes Against Humanity and War Crimes Act*.

11. Canada must refer the enforced disappearance of children, as a crime against humanity, to the International Criminal Court (ICC). Where other individuals or organizations request that the ICC investigate, Canada must not oppose or interfere with such requests.

Upholding Indigenous Laws

12. Federal, provincial, and territorial governments must fully support and respect Indigenous Peoples' inherent right of self-determination, including their right to apply Indigenous laws and legal systems in relation to finding, repatriating, and commemorating the missing and disappeared children and their burials. This requires that governments adhere to the Supreme Court of Canada's guidance on how the *UN Declaration on the Rights of Indigenous Peoples* can be incorporated into Canadian law, including ways to uphold Indigenous legal orders.

Protecting Indigenous Burial Sites

13. The federal, provincial, and territorial governments, in consultation and collaboration with Indigenous Peoples, must amend or enact legislation that creates an "Indigenous Burial Site" designation to protect these sites. Associated regulations, policies, processes, and effective enforcement mechanisms must also be implemented.

Indigenous Data Sovereignty

14. The federal government, in consultation and collaboration with Indigenous Peoples, must establish a National Indigenous Data Sovereignty Strategy and Action Plan. This must be in accordance with Articles 11 and 31 of the *UN Declaration on the Rights of Indigenous Peoples*, the recommendations of UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and the *Joinet-Orentlicher Principles*.

15. All institutions, including federal, provincial, territorial, and municipal departments and archives, church entities and universities, and other organizations that hold records relating to Indigenous Peoples must:

    - Create a proactive plan to search their record systems and archives for information about the missing and disappeared children and unmarked burials and create a public, transparent, and accessible inventory of these records;
    - Work to transfer these records to Indigenous Peoples, in compliance with First Nations, Inuit, and Métis Indigenous data sovereignty principles; and
    - Provide education and training for archivists and staff on international human rights laws and principles, including the *UN Declaration on the Rights of Indigenous Peoples* and the *Joinet-Orentlicher Principles*.

Federal Right to Truth Legislation

16. The federal government, in consultation and collaboration with Indigenous Peoples, must enact federal legislation creating a statutory requirement for all individuals, governments, churches, universities, and organizations that hold records relating to children at Indian Residential Schools and associated institutions to register their holdings in a National Records Registry. This Federal Right to Truth legislation must:

    - Specify a time frame for the registration of holdings;
    - Require federal departments and agencies, including Library and Archives Canada and the Royal Canadian Mounted Police (RCMP),

to provide notice to Indigenous families and communities if they wish to destroy records that relate to them. No records shall be destroyed without their consent;

- Create an offence for destroying or altering such records;
- Include penalties for failing to abide by the time frame and requirements set out in the legislation; and
- Include appropriate enforcement powers and mechanisms.

The preamble should state that, consistent with the right to the truth, the *UN Declaration on the Rights of Indigenous Peoples*, and the *Joinet-Orentlicher Principles*, it is in the collective public interest that all records relating to Canada's treatment of Indigenous Peoples be preserved.

Moratorium or Prohibition of Destruction of Records

17. Federal, provincial, territorial, and municipal governments—as well as organizations, institutions, and other entities who hold records that may contain information relating to the death of a child while in the care of Indian Residential Schools and other associated institutions—must place immediate moratoriums on record destruction. These moratoriums must include health and dental records, court files, police records, and various government departmental records, including those relating to education, child welfare, juvenile detention, and corrections.

18. The federal government must create an inventory of records relating to Indigenous Peoples that have already been destroyed and provide the dates of, and reasons for, their destruction. This inventory must be made available to those leading search and recovery work and the Commission of Investigation into Missing and Disappeared Children and Unmarked Burials, once it is established.

Access to, and Protection of, Records

19. The federal government, in consultation and collaboration with Indigenous Peoples, must review, amend, and modernize the federal access to information

system, including by amending the *Access to Information Act* and the *Privacy Act*. Such amendments should:

- Recognize Indigenous Peoples' collective rights;
- Implement a "public interest" override that specifically recognizes Indigenous Peoples' interests;
- Create independent oversight to ensure full and timely access and disclosure of records relating to Indigenous Peoples, including the missing and disappeared children; and
- Align with the *UN Declaration on the Rights of Indigenous Peoples*, the *Joinet-Orentlicher Principles*, and the right to truth.

20. Federal, provincial, and territorial governments, in consultation and collaboration with Indigenous Peoples, must review and amend existing laws, policies, and procedures on the access, retention, and destruction of records. Indigenous Peoples should determine what government records are of "historical" value and ought to be preserved. No government records relating to Indigenous Peoples should be destroyed without their consent.

Support for Families and Communities to Obtain Records

21. All provinces and territories must enact new legislation to establish a permanent office to provide support for families and communities of missing and disappeared children. These offices can draw on the successful aspects of Bill 79, *An Act to Authorize the Communication of Personal Information to the Families of Indigenous Children Who Went Missing or Died after Being Admitted to an Institution*, in Quebec.

Independent Assessment Process Records

22. The federal government, in consultation and collaboration with Indigenous Peoples, must immediately appoint independent reviewers to review the records and testimonies of the Independent Assessment and Alternative Dispute Resolution processes. The scope of the review is to gather and report on information relating to the deaths and burials of any children prior to the court-ordered destruction date in 2027.

Return of Records

23. The federal government must immediately seek the return of all records that are outside Canada that relate to Indian Residential Schools and associated institutions, and work to transfer these records to Indigenous Peoples.

24. Churches must immediately return all records that contain information about Indian Residential Schools and associated institutions to Canada and work to transfer these records to Indigenous Peoples.

Ensuring Ethical and Professional Standards for Site Searches

25. The federal government, in consultation and collaboration with Indigenous Peoples, must work with provinces and territories and relevant professional organizations to establish rules and regulations for professionals that are utilizing search technologies to find unmarked burials, including:

    - The creation of regulatory bodies to provide policy statements and guidelines as appropriate, including with respect to reasonable fees

for work performed and the collection of data in accordance with best practices and scientific methods;

- The establishment of ethical guidelines, criteria, and standards that respect Indigenous sovereignty, including Indigenous data sovereignty, and Indigenous laws and protocols;
- The establishment of a specialized certification process for technicians, archaeologists, anthropologists, forensic specialists, and any other individual or entity contracted to search for unmarked burials;
- The inclusion of powers to investigate complaints about unethical conduct, hold hearings, and issue written decisions;
- The establishment of penalties and revocation of certifications where appropriate; and
- Ensuring that enforcement powers are both sufficient and timely to address breaches of the established regulatory requirements.

Rematriating Lands

26. The federal government, in consultation and collaboration with Indigenous Peoples, must appoint an independent panel of experts to conduct a full investigation to trace the history and legality of the land transfers relating to the former Indian Residential School properties, cemeteries, and other associated sites. This panel of experts must provide a report of their findings and make recommendations for the rematriation of these lands.

Repatriation of the Children

27. The federal government, in consultation and collaboration with Indigenous Peoples, must enact an Indigenous Repatriation Act and develop an Action Plan for implementation. The Indigenous Repatriation Act must align with the *UN Declaration on the Rights of Indigenous Peoples*.

28. Provincial and territorial governments, in consultation and collaboration with Indigenous Peoples, must review and amend existing laws, or enact new laws, to support the repatriation of Indigenous human remains to align with the *UN Declaration on the Rights of Indigenous Peoples*.

Supporting Indigenous-Led Healing

29. The federal government, in consultation and collaboration with Indigenous Peoples, must establish additional healing lodges and centres in Indigenous communities to fulfill the State's international legal obligations to provide meaningful reparations for the mass human rights violations committed.

30. Federal, provincial, and territorial governments must provide, without discrimination, sufficient health and wellness supports for Survivors, Indigenous families, and communities impacted by the search and recovery efforts for the missing and disappeared children. This requires the development and implementation of distinctions-based, trauma-informed health supports within existing health-care systems.

Apology and Action as Reparations

31. Federal, provincial, and territorial governments, churches, the RCMP, universities, and any other organizations that supported and/or operated Indian Residential Schools and associated institutions must apologize for the multiple harms they committed against the missing and disappeared Indigenous children, their families, and communities. For these apologies to meet the criteria of Indigenous Peoples and the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, they must:

    - Establish a full and accurate public record of the historical injustices and ongoing harms of genocide, colonization, and mass human rights violations; and
    - Commit to further substantive material and symbolic reparations and actions in accordance with international human rights law.

Memorialization and Commemoration

32. Federal, provincial, and territorial governments, in consultation and collaboration with Indigenous Peoples, must enact commemoration laws for the missing and disappeared children and their burials. To be consistent with international legal principles, these laws should include provisions that:

    - Respect Indigenous self-determination, and uphold Indigenous laws, oral histories, and memory practices;
    - Protect collective memory against historical negationism and the spread of hatred towards Indigenous people and communities;
    - Set rules of public conduct for commemorative events or at memorial sites;
    - Regulate educational curricula; and
    - Establish dedicated programs to support individuals and families to attend the burial sites of their missing or disappeared relatives, and to place grave markers, cairns, and monuments at these sites.

33. Federal, provincial, and territorial governments, in consultation and collaboration with Indigenous Peoples, must review and amend existing heritage legislations to provide protection for, and expedite the designations of, former Indian Residential Schools and associated sites as heritage and/or historic sites.

34. Federal, provincial, and territorial governments, in consultation and collaboration with Indigenous Peoples, must explore the viability of establishing a national or regional cemetery for the missing and disappeared children who are exhumed but cannot be identified.

Fighting Denialism and Rewriting Canada's History

35. The federal government must combat Indian Residential School denialism by:

    - Tracking the dissemination of disinformation and misinformation about Indian Residential Schools, missing and disappeared children, and unmarked graves and burial sites;

- Regulating and requiring search, social, and digital companies to stop and immediately remove the dissemination of misinformation, disinformation, and falsehoods about Indian Residential Schools, missing and disappeared children, and unmarked graves and burial sites;
- Providing support for Indigenous people and communities that have been subjected to online hate and harm; and
- Establishing penalties, effective monitoring, and enforcement mechanisms.

36. The federal government must include provisions in Bill C-63: *An Act to Enact the Online Harms Act* to address the harms associated with denialism about Indian Residential Schools, including the missing and disappeared children and unmarked burials.

37. The federal government must amend the *Criminal Code*, making it an offence to wilfully promote hatred against Indigenous Peoples by condoning, denying, downplaying, or justifying the Indian Residential School System or by misrepresenting facts relating to it.

Reparations from Media, Universities, and the Medical Profession

38. Media organizations must make reparations for their role in supporting settler colonialism and by denying and limiting truths about the Indian Residential School System. These should include:

- Establishing investigations into their past complicity in mass human rights violations against Indigenous Peoples;
- Performing audits and studies relating to their media coverage of Indigenous people and communities;
- Issuing apologies;
- Respecting Indigenous community protocols and confidentiality agreements;

- Developing and implementing ethical standards for trauma-informed reporting about Indigenous people and communities; and
- Any other reparation measures, identified in consultation with Indigenous Peoples.

39. Universities must make reparations for their role in supporting settler colonialism and perpetrating harms against Indigenous Peoples, including children at Indian Residential Schools and other associated institutions. These should include:

    - Establishing investigations into their past complicity in mass human rights violations against Indigenous Peoples;
    - Performing audits and studies relating to their research, reports, and academic publications on Indigenous people and communities, including medical experimentations;
    - Identifying the professional benefits accrued to the university and individual academics and professors;
    - Issuing apologies for human rights breaches and their involvement in State-sponsored crimes against humanity; and
    - Any other reparation measures identified in consultation with Indigenous Peoples.

40. Medical organizations and professional associations must make reparations for their role in supporting settler colonialism and perpetrating harms against Indigenous Peoples, including children at Indian Residential Schools and other associated institutions. These should include:

    - Establishing investigations into their past complicity in mass human rights violations against Indigenous Peoples;
    - Performing audits and studies relating to their involvement in medical experimentations;
    - Identifying the professional benefits accrued to the medical institutions and individual medical practitioners;
    - Issuing apologies for human rights breaches and their involvement in State-sponsored crimes against humanity; and

- Any other reparations measures identified in consultation with Indigenous Peoples.

Implementation and Monitoring

41. The federal government, in consultation and collaboration with Indigenous Peoples, must immediately establish an Implementation Committee to provide oversight on the implementation of all Obligations in this Final Report.

42. The federal government must provide annual reports to Parliament, and to National Indigenous Organizations, on its progress in implementing the Obligations contained in this Final Report.

APPENDIX A

Commission of Investigations into Missing and Disappeared Indigenous Children and Unmarked Burials

Implementing Obligation 2

> The federal government, in consultation and collaboration with Survivors, Indigenous families, and communities, and Indigenous Leadership, must establish through legislation an independent, Indigenous-led national Commission of Investigation into Missing and Disappeared Indigenous Children and Unmarked Burials.

Internationally, efforts to locate and identify missing and disappeared persons are often referred to interchangeably as "search mechanisms" or "truth recovery mechanisms." Both these terms emphasize the importance of revealing the truth of what happened to the missing and disappeared as a key part of reparations. Search and truth recovery mechanisms such as commissions of investigation are set up to oversee and conduct forensic investigations and truth-finding processes. There is an urgent need in Canada for an independent search and truth recovery mechanism. In establishing the Commission of Investigation into Missing and Disappeared Indigenous Children and Unmarked Burials (Commission of Investigation), the following key considerations regarding the potential governing legislation, mandate, and potential areas of investigation are offered to support the consultation and engagement process.

Key Considerations for the Legislation

Key considerations for the legislation may include:

- Upholding Indigenous sovereignty and laws by explicitly recognizing that Survivors, Indigenous families, and communities can freely choose whether to work with the Commission of Investigation or conduct their own independent investigations;
- Clarifying that the Commission of Investigation is mandated to act in service to Survivors, Indigenous families, and communities in accordance with their free, prior and informed consent to identify, locate, repatriate,

memorialize, and commemorate the missing and disappeared children and unmarked burials;

- Providing the Commission of Investigation with full access to records and powers to compel the production of records, witness testimony, and any other information deemed relevant to its investigations;
- Providing the Commission of Investigation with powers to secure and access sites for investigative purposes, including forensic investigations and to coordinate approaches with domestic and international criminal justice investigations;
- Providing the Commission of Investigation with stable, sustainable, and flexible federal funding for 20 years, with an option for extension; and
- Establishing the mandate, structure, and function of the Commission of Investigation independent of government.

Key Considerations for the Mandate

Key considerations for the mandate may include:

- A flexible mandate, which may initially focus on investigating the disappearances and deaths of Indigenous children and then expand to include investigations into other missing and disappeared Indigenous people;
- Developing distinctions-based and collaborative approaches to support the search and recovery of the missing and disappeared First Nations, Inuit, and Métis children;
- Establishing a specialized police taskforce to investigate the circumstances that led to the deaths of missing and disappeared children or the desecration of any burial sites of these children. Priority should be given to staffing this police taskforce with Indigenous police officers;
- Facilitating the appointment of a Special Prosecutor to prosecute cases relating to the death of Indigenous children while in the care of the State and churches at Indian Residential Schools and associated institutions;
- Providing forensic human rights investigation services into the missing and disappeared children to those individuals leading search and recovery efforts;

- Tracing the missing and disappeared children through a review of the records at the request of Survivors, Indigenous families, and community members;
- Establishing a National Tracing System Database to support its work;
- Analyzing the results of investigations to determine the circumstances surrounding individual deaths and burials as well as the systemic patterns of genocide and crimes against humanity perpetrated against Indigenous children at Indian Residential Schools and associated institutions;
- Investigating governments, churches, and other institutions that participated in the neglect, mistreatment, and criminal acts that caused children's deaths at Indian Residential Schools and other associated institutions;
- Developing and sharing information, expertise, and emerging practices on all aspects of search and recovery work;
- Educating the public about the missing and disappeared children and unmarked burials, Indigenous-led investigations, and the work of the Commission of Investigation;
- Liaising with government, churches, and other institutions to remove barriers for Indigenous-led investigations;
- Making submissions to international organizations, bodies, special procedures, mechanisms and working groups and pursuing international legal remedies and monitoring mechanisms, as appropriate; and
- Researching and producing public reports on the Commission of Investigation's work, including new areas of investigation into the individual circumstances as well as the systemic patterns of the deaths and disappearances of Indigenous children.

Potential Areas of Investigation

In the past two years, several areas emerged as requiring further investigations in relation to the atrocities committed against Indigenous people and children. The following four areas have been identified for investigation:

1. The deaths and burials of Indigenous children at health institutions, including Indian hospitals, sanatoria, and psychiatric institutions;
2. The deaths and burials of Indigenous children at other institutions, including orphanages, institutions for children with disabilities, homes for unwed mothers, reformatories, and juvenile detention centres;
3. The human experimentation on Indigenous people, including children; and
4. The deaths and disappearance of babies born at Indian Residential Schools and other associated institutions.

APPENDIX B

TRC Call to Action 73

Implementing Obligation 4

> Call to Action 73 must be expanded to include cemeteries and burial sites associated with the other institutions to which children were taken or transferred.

The Truth and Reconciliation Commission of Canada's Call to Action 73 called on the federal government to work with churches, Survivors, and Indigenous communities to establish and maintain an online registry of Indian Residential School cemeteries. As demonstrated in *Sites of Truth, Sites of Conscience*, children were taken or transferred to various other associated institutions where they died and may be buried. The expanded online registry should include:

- Site plans;
- Plot maps;
- Aerial photos; and
- Other information that may support search and recovery efforts.

Independent researchers, on behalf of families and communities, should be able to submit information to be added to this registry as it is gathered. Long-term, sustainable funding is needed to ensure that this online registry is updated regularly and remains available to all Survivors, Indigenous families, communities, and their representative organizations who are leading searches and investigations. The online registry should be maintained by the Commission of Investigation into Missing and Disappeared Indigenous Children and Unmarked Burials, once it is established.

APPENDIX C

Funding

Implementing Obligation 5

> Funding must be flexible and support search and recovery efforts for any purposes deemed necessary by the Indigenous community or organization leading the search.

States that have violated their international legal obligations, resulting in substantive harms, have political, legal, and ethical obligations to make reparations. Reparations are most effective when they include both material and symbolic measures. Material measures relating to the search and recovery efforts for the missing and disappeared children and the unmarked burials necessarily include the provision of funding to Indigenous communities and organizations. This funding must be provided for, but not be limited to, the following purposes:

1. For national, regional, and community gatherings to be held so that those conducting searches can exchange knowledge and emerging practices and create networks of support;
2. For the revitalization of Indigenous laws generally, and, specifically, for Indigenous laws relating to funerary and burial practices and to support internal and inter-Nation decision-making;
3. To engage researchers or research services to provide support navigating privacy and access to information processes and to review and analyze archival records;
4. To hire professionals to translate French records;
5. To hire experts to conduct site searches, including to create site search plans, to review and analyze results both at first instance and for secondary or peer review, and/or to review site search plans and quotes to assess reasonableness;
6. For exhumation, DNA testing, forensic analysis, and repatriation of the children for reburial, where desired;
7. For legal advice and services;

8. To hire communication staff or consultants to create communication plans, including to negotiate media protocols that include confidentiality requirements and restrictions on the capturing of video, photographs, and drone imagery at burial sites;

9. To hire culturally competent and respectful security personnel to safeguard sites before, during, and after searches;

10. For the maintenance of former Indian Residential School cemeteries and associated sites where the burials of Indigenous children are located;

11. For the memorialization and commemoration of the missing and disappeared children and their burial sites, including:

    - National, regional, and community gatherings to honour the missing and disappeared children;
    - Placing grave markers and/or burial cairns;
    - Public art or commemorative monuments; and
    - Funds for Indigenous family members to travel to visit their loved one's burial sites.

12. To provide trauma-informed, culturally relevant health and wellness supports for Survivors, Indigenous families, and communities and search teams. Funding must be prioritized for Indigenous organizations and Indigenous Elders and Healers;

13. For the establishment and ongoing operation of First Nation, Inuit, and Métis healing lodges and centres that can develop culturally relevant, trauma-informed services for Survivors, Indigenous families, and communities searching for the missing and disappeared children and burials;

14. To train and increase the number of Indigenous data analysts, archaeologists, anthropologists, engineers, technicians, and related positions to support search and recovery efforts and investigations. Funding must be made available to universities, colleges, and technical institutes, working in partnership with Indigenous communities leading the searches, to develop and offer a dedicated program for Indigenous people to receive training and certification in remote-sensing technologies and data interpretation.

APPENDIX D

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Preface

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UNGAOR, 61st Session, Supplement no. 49, UN Doc. A/61/49, September 13, 2007.

Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada

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Conclusion and Obligations: Implementing an Indigenous-Led Reparations Framework for Truth, Accountability, Justice, and Reconciliation

1 Internationally, efforts to locate and identify disappeared persons are often referred to interchangeably as "search mechanisms" or "truth recovery mechanisms." Both these terms emphasize the importance of revealing the truth of what happened to the disappeared as a key part of reparations. Here, "search and truth recovery mechanisms" is used to describe an institution, such as an office or commission of investigation, set up to oversee and conduct forensic investigations and truth-finding processes.

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