Indian Residential Schools were a crime and Canada's criminal justice system could not have cared less: the IRS criminal court cases

Thomas L McMahon[1]

"so far as the victims of the accused in this matter are concerned, the Indian Residential School was nothing but a form of institutionalized pedophilia, and the accused … was a sexual terrorist"[2] *– re: Arthur Plint at Alberni Residential School*

"I am a celibate man." – Bishop Hubert O'Connor, "accountant" at Williams Lake Residential School (St. Joseph Mission IRS)[3]

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[1] Former Executive Secretary, Manitoba Aboriginal Justice Inquiry; former Department of Justice Canada lawyer; former General Counsel, Truth and Reconciliation Commission of Canada. This paper borrows greatly from the final report of the Truth and Reconciliation Commission. This paper focuses as much as possible on the details of the actual prosecution and reported court decisions we know about. The TRC report discusses criminal behaviour in a more historical, and personal fashion with less emphasis on the court decisions. Anyone wishing a full understanding of the criminal acts within Indian residential schools should also read the final report of the TRC, and in particular, *The History, Part I, Origins to 1939* and *The History, Part 2, 1939-2000*, and especially chapters on Truancy, Discipline and Abuse in both volumes. This paper does not report about how the police were used as truant officers and how the criminal law was used to intimidate parents and students, to force children into the schools and how the law allowed the hitting of children. For those methods of using the criminal law, see McMahon, Thomas L., 'We Must Teach the Indian What Law Is': The Laws of Indian Residential Schools in Canada (April 18, 2017). Available at SSRN: https://ssrn.com/abstract=2954877

[2] *R. v. Plint*, [1995] B.C.J. No. 3060 (BCSC) para. 14

[3] *R. v. O'Connor*, [1996] B.C.J. No. 1663: "[46] When Ms. P. became pregnant with his child, he arranged for her to go to Vancouver for the pregnancy. In his letter to the Catholic Children's Aid Society, while he made references to her pregnancy, no reference is made to the fact that he was the father of her unborn child. Similarly, when the child was placed for adoption he filled out documents which were clearly misleading. He left the name of the putative father blank and listed the occupation of the putative father as an "accountant". In his evidence he steadfastly refused to admit the obvious lack of candour and honesty in these responses. During cross-examination by Mr. Macaulay, he was asked whether one of the complainants was wearing a nightgown or a negligee. His reply was self-righteous to say the least, when he said he did not know because, "As you know, I am a celibate man." It is with considerable regret that I must make these comments relating to his credibility."

1. Introduction

This paper tells the story of the criminal prosecutions relating to Indian residential schools. The single most important conclusion is this: there were almost no criminal prosecutions for abuses in residential schools. The criminal justice system provided almost zero protection for children in Indian residential schools. The first convictions for abuse at a residential school were in 1939 against two indigenous schoolgirls for beating up a third school girl. Another conviction was in 1945 against a mother for assaulting a supervisor when she and her husband tried to remove their daughters from a residential school.

The second most important conclusion is this: the convictions that did happen had no effect whatsoever in changing the Indian residential school system. They were never seen to be part of a pattern and they never they sparked broader investigations, inquiries or wider interviews with the students and parents. Never did they cause new policies to be implemented. No one could even be bothered to keep track of the criminal charges and convictions arising from Indian residential schools. This is Canada's legal system inaction for indigenous peoples. Only when the IRS system came to an end, and only under strong pressure from indigenous communities, did the RCMP re-open and broaden investigations. Too little, too late.

Only closing the schools, after more than a century of operation, stopped the abuses within the schools. The schools were not closed because of abuses; they were closed because a labour tribunal ruled that IRS staff were federal employees and would have to be paid accordingly, which Canada did not want to accept.

So far as I know, no Canadian law school, department of Canadian history, human rights, criminology or native studies, and no police training ever taught the history of how the criminal law was used and not used in connection with the Indian residential schools. I am confident the reason is because no one ever thought it was something important to teach (or research).

Is there anything about the criminal cases of the Indian residential schools system that will be useful background for the Inquiry into Missing and Murdered Indigenous Women?

This paper quotes extensively from the final report of the Truth and Reconciliation Commission (TRC). In many ways, this paper is simply trying to put a focus on the specific criminal charges and convictions that are included in the TRC's broad historical sweep, and to present that information in a more chronological fashion (chronological according to when the convictions occurred, not when the offences occurred, often decades earlier). The TRC's report presents the information according to provincial and territorial jurisdiction and specific school. While I encourage any reader to go directly to the TRC report and read its chapters on discipline, abuse and student victimization of other students, I thought it might be helpful to present a paper that is limited to the criminal charges and convictions. I have not included the TRC's citations; they can all be found in the TRC report.

In addition, in this paper I provide an extensive history of the only criminal case to reach the Supreme Court of Canada, and the case involving the highest ranking official ever charged in connection to residential schools abuse: Roman Catholic Bishop Hubert O'Connor. The

O'Connor case became one of Canada's most important cases about the privacy of rape victims generally. I also provide citations to the few IRS criminal cases whose court judgments were published. For most of the IRS criminal cases, the TRC had to rely on internal memos that summarized court cases because the various original court documents were brief, unpublished and lost within the record-keeping systems of courts across the country.

It is also my hope that this paper can be an example of how other researchers can dig into the TRC report on specific topics, perhaps a topic that weaves its way through various TRC chapters, consolidate the TRC materials on a specific topic and shine a light on the TRC's report on that specific topic, perhaps in a slightly different method of presenting the materials, perhaps with additional information added. For example, the criminal cases involving IRS are not presented in a single chapter or in a chronological order or even added up in the TRC report. That is not a criticism of the TRC because there are so many organizational and thematic choices to make when producing a report. There are good reasons for any number of choices.

The TRC report details many examples where complaints of criminal abuse remained within the schools, churches, Indian Affairs and even if they reached the police, charges were not forthcoming, and where a few charges were laid, they resulted in acquittals. I have not included these incidents in this paper. Later in this paper, I discuss some of the challenges and obstructions presented to the TRC in obtaining information about the criminal charges relating to the residential school system.

The TRC report includes chapters on discipline used against the students. The report gives numerous examples of physical abuse over and above the routine abuse of separating children from home, community, parents, siblings, languages, traditional beliefs; removing their clothing and any possessions they brought to school with them; cutting off their hair; giving them new names and numbers. The TRC report explains how the government and churches never articulated clear standards or policies for administering physical "discipline," never communicated the few attempts at articulating guidelines widely, never inspected or enforced them, and virtually never brought criminal charges for excessive physical abuse. To see how the criminal law was used to create and enforce the residential school system, to force children into the schools and keep them there, to permit the ongoing hitting of children, to charge children and parents with criminal offences in order to intimidate them and enforce the residential school system, see McMahon, Thomas L., " 'We Must Teach the Indian What Law Is': The Laws of Indian Residential Schools in Canada" (April 18, 2017). Available at SSRN: https://ssrn.com/abstract=2954877 .

This paper tells the story of the amazingly few criminal prosecutions that occurred. I do not believe that a proper search within the Government of Canada was ever conducted for records relating to criminal prosecutions in Indian residential schools. I have no confidence that the TRC uncovered every criminal charge that arose from Indian residential schools (including charges against parents and students). So this paper is limited to providing information about the prosecutions and court decisions the TRC was able to discover.

2. Criminal law at Indian residential schools before 1945

The TRC found evidence of only approximately 33 IRS staff members with criminal convictions for all of the abuse that occurred within residential schools. With the passage of time, with the state of the laws then and now, with the RCMP's complicity in enforcing residential schools policies, there can be no doubt: unknown numbers of crimes were committed in Indian residential

schools and the legal system utterly failed to protect the children. Later in this paper I discuss some of the challenges and obstructions presented to the TRC in obtaining information about the criminal charges relating to the residential school system.

It is natural to want to know when the "first" residential school case came to court.

The Truth and Reconciliation Report notes the following case, which occurred before the government involvement in residential schools had begun. The TRC does not state whether convictions resulted.

> Each of the denominations had to deal with both alleged and actual sexual misbehaviour involving missionaries and young people in their care. Methodist minister James Evans was obliged to leave Norway House in the wake of allegations that there had been improper relations between himself and young women boarding at his house. One of the Oblate missionaries to the Far North, Émile Petitot, became involved in sexual relationships with adolescent First Nation boys. Although he was disciplined for this behaviour, he continued, both as a missionary and with his sexual activities, for nearly a decade. In reaction to the projected Catholic school at Fort Providence, Anglican priest William Bompas constructed a school and orphanage on Great Bear Lake in 1865. The school closed in 1868 after the teacher, Murdo McLeod, was charged with sexually abusing two of his students.[4]

It is also is important to recall the 1885 Riel Rebellion, a protest against the violations of the 1870 *Manitoba Act* and the living conditions of indigenous peoples on the prairies. Without going into the details of the Riel Rebellion, here is how the TRC reported the criminal law was used after the rebellion.

> In private correspondence, Prime Minister Macdonald noted that the prospect of an Indian war had been intentionally allowed to "assume large proportions in the public eye. This has been done however for our own purposes, and I think wisely done." The federal purposes were simple: the First Nations leaders were portrayed as traitors in order to justify a suppression of First Nations governments. With this knowledge, and in order to more effectively suppress their leadership, the federal government chose to treat the First Nations' actions as treason. Over eighty First Nations people were put on trial for their activities in the spring of 1885. The translation at the trials was usually inadequate or non-existent, the cases were often circumstantial, and the sentences were excessively punitive. Even though Dewdney was aware that there was little evidence to link Pitikwahanapiwiyin and Mistahimaskwa to the rebellion, he expressed satisfaction at their conviction on charges of treason-felony. In 1885, a court in Battleford convicted eleven First Nations men of murder; three had their death sentences commuted, and the other eight were executed on November 27, 1885. Macdonald believed the public executions would "convince the Red Man that the White man governs." To press home the message, Dewdney arranged to have First Nations people present at the hangings. The witnesses kept the memory of the event alive, speaking of the courage displayed on the gallows and the anger the community felt over the government refusal to release the bodies for a traditional burial.
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> In the wake of 1885, there was no more talk of letting First Nations people choose whether they wished to live like white people. They were to be assimilated, and if they chose not to be

[4] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part One, Origins to 1939," p. 95 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf .

> assimilated, their children would be taken from them and assimilated. In 1887, John A. Macdonald expressed the government position bluntly, stating that the "great aim of our legislation ... has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change."[5]

Let's read about a particularly odd criminal case in 1892 reported by the TRC:

> Paul Durieu, who had come to the west coast as a priest in 1854, played a central role in the development of Catholic missions and schools in what was to become British Columbia. He worked in Esquimalt and Kamloops before being made the assistant to Bishop Louis-Joseph d'Herbomez at New Westminster in 1864. There, he served as the director of St. Mary's Mission. He was appointed Bishop of New Westminster in 1890, holding the position until his death in 1899.
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> Durieu has been credited with the establishment of what has been termed the "Durieu System," a form of church-run government of First Nations communities. The system, which was not original to Durieu, was in fact an Oblate effort to follow the Jesuit *reducciones* in North America. The reducciones were church-governed communities intended to separate Indigenous people from their traditional ways of life and from settlers, who were viewed as sources of corruption. It was a hierarchical model, in which the missionary was in total control of the reduccione.
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> Fellow Oblate E. M. Bunoz credited Durieu and his system with creating "an Indian state ruled by the Indian, for the Indian, with the Indian under the directive authority of the Bishop and the local priests as supervisors." It was, in reality, far from being an Aboriginal government. In the communities in which Durieu and the Oblates established this system, the laws were "the commandments of God, the precepts of the Church, the laws of the state when in conformity with the laws of the Church, the Indian Act, [and] the bylaws enacted by local Indian government." The local priest presided over the court that enforced these laws, with punishment ranging from "the lash, the fine, black fast [a highly rigorous fast] up to a short prayer." The chief elected under the provisions of the *Indian Act* was viewed as being merely an honorary chief, with real authority resting with the "Eucharistic Chief" appointed by Durieu—and whom Durieu could depose. Others involved in administering the system were appointed sub-chiefs, watchmen, catchecists, police officers (in some cases), and bell-ringers (referred to as "cloche men"). These officials kept undesirable colonists, particularly liquor traders, away from the community and enforced discipline on First Nations community members. According to Bunoz, under the system,
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> > late rising was not tolerated. They were all up at the first bell and at the second bell they all went to Church to say their morning prayer. Then breakfast and they went to their respective work. In the evening the bell called them again for their prayer in common. Later on at a proper hour, according to the season, the curfew was sounded; and all lights went out in a few moments.
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> The Durieu System's authority was called into question when, in 1892, the church-sponsored court on the Lillooet Reserve sentenced a young man and woman to a public flogging for having engaged in intercourse outside of marriage. The sentence was approved by an Oblate priest, Eugène-Casimir Chirouse. The young woman was flogged a second time shortly afterwards, this time for leaving the reserve with a group of young men and women. The case

[5] *Ibid.*, p. 126

> was reported to the local magistrate, who had the court members and Chirouse arrested. All were convicted at a trial in county court. Chirouse was sentenced to a year in jail, the chief of the court to six months, and the rest of the court to two months. After a campaign led by Catholic Bishop John Lemmens, federal justice minister John Thompson dismissed all the charges. Durieu's successor as Bishop of New Westminster, Augustin Dontenwill, questioned the effectiveness of the system, which he viewed as being overly harsh. As a result, the system—whose efficiency was in all likelihood exaggerated by its supporters—fell into decline. Chirouse's career, however, did not. He became principal of the Mission school in the 1890s and remained involved in the school's operation until the 1920s. Durieu also supported the establishment of residential schools at Catholic missions.
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> The first of these schools opened at St. Mary's Mission in 1863. The principles of the Durieu System structured the students' daily life. Although the forty-two boys the school initially recruited were given an introduction to reading, writing, and arithmetic, they spent much of their time in the fields, gardening and farming. The punishments employed included additional school work, being required to kneel for a period of time, confinement, isolation, humiliation, and corporal punishment. Rewards were given for good behaviour—these might be prizes or honours, such as the right to be referred to as the "Captain of Holy Angels." From the late 1860s onwards, the school had a brass band, which was used in part to impress Europeans with the capability of First Nations students.[6]

So this 1892 case (not arising within a residential school context) resulted in flogging an indigenous man and woman followed by charges and convictions against their abusers that were dismissed by the Canadian Minister of Justice. The local priest who had been sentenced to a year in jail in this case went on to be principal of the Mission school and remained involved in its operation for decades to come. The legal system's control and punishment of indigenous women is in full display here. It is simply part of a pattern that began before confederation and continues today. There has not been a single day during Canada's history that the law has not discriminated against indigenous women, usually in multiple ways.[7]

The criminal justice system was used in other ways:

> Restrictions were also placed on Aboriginal spiritual practices during this period. Ceremonies such as the Potlatch in British Columbia and the Thirst Dance (usually called the "Sun Dance" by government officials) on the Prairies played an important role in the lives of Aboriginal people. Such ceremonies served to redistribute surplus, demonstrate status, cement and renew alliances, mark important events such as marriages or the assumption of position, and strengthen the bond with spiritual forces.
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> Missionaries attacked them as 'pagan rites,' and government officials objected to the fact that they undermined the accumulation of private property, took people away from agricultural pursuits, brought together bands they were trying to keep separate, and strengthened the status of traditional leaders and Elders. Those missionaries involved in residential schooling played a central role in lobbying for the suppression of the Potlatch and the Sun Dance, arguing that the ceremonies undid much of the work that had been accomplished in the schools. The Reverend Albert H. Hall at Alert Bay in 1896 framed the debate with the succinct "It is school versus potlatch." To Archdeacon J. W. Tims, who ran an Anglican

[6] *Ibid.*, pp. 98-100
[7] McMahon, Thomas L., "Canada's Legal System Hates Indigenous Women" (October 18, 2016). Available at SSRN: https://ssrn.com/abstract=2852544

boarding school in Alberta, the Sun Dance was "that great heathen festival." On his first encounter of it, he recalled, "If I ever felt the hopelessness of a task set me to do it was then."

An 1884 amendment to the *Indian Act* first banned the Potlatch, and Prairie "give-away dances," as they were often termed by government officials, were banned in 1895. Government officials were instructed to prosecute only as a last resort. But they often came under pressure from missionaries to take action. In 1897, five people were arrested at the Thunderchild Reserve in what is now Saskatchewan for holding a give-away dance. Three were sentenced to two months in jail. The commander of the Mounted Police at Battleford thought the jail terms too harsh and worked to secure early releases for the men, who were all elderly. In 1897, the Blackfoot agreed to shorten the number of days devoted to the ceremonies and to not include some of the practices, such as ritual piercing, that were specifically banned by legislation. Indian Commissioner Amédée Forget, however, would not abandon the department's requirement that the tongues of slaughtered cattle be either removed or split, making them unavailable for consumption at the ceremonies, which he viewed as being immoral and heathen.

From the 1880s onward, the federal government acted decisively to jail First Nations leaders, disarm them, control their movements, limit the authority of their governments, ban their spiritual practices, and control their economic activities. It also chose to intervene decisively in family life through the establishment of residential schools. It was in 1883, the same year that the government cut rations on the Prairies, that the first of a series of residential industrial schools opened its doors, operated by a government-and-church partnership. Those schools, modelled on schools for delinquent and criminal youth, represented a betrayal rather than a fulfillment of the Treaty promises to provide on-reserve education. Their story is the darkest, longest, and most chilling chapter in the history of the colonization of Aboriginal peoples. The federal government's determination to have as cheap an Indian policy as possible, coupled with the church's drive to enrol and convert as many children as possible, meant that the schools were sites of hunger, overwork, danger and disease, limited education, and, in tens of thousands of cases, physical, sexual, and psychological abuse and neglect.[8]

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In 1903, Qu'Appelle school principal Joseph Hugonnard, who had been in office since 1884, called on the federal government to eliminate the "pagan habits, customs, superstitions and mode of life," that still held sway on the reserve. These "habits and customs," he wrote, "must be eradicated, or at least suppressed." He challenged those who might think this harsh to visit a dance where they could see former students "nearly nude, painted and decked out in feathers and beads, dancing like demented individuals and indulging in all kinds of debauchery." In his opinion, Indian A airs must adopt a strong uniform policy, "totally prohibiting dancing and its attendant pow-wows."[9]

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In 1876, Chief Peyasiw-awasis (Thunderchild), along with Mistahimaskwa (Big Bear) and a number of other chiefs, rejected Treaty 6, which covered parts of central Alberta and

[8] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part One, Origins to 1939," pp. 130-131 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf .
[9] *Ibid*., p. 166

> Saskatchewan. However, after the collapse of the buffalo hunt, he signed the Treaty in 1879. He was a strong advocate of First Nations' Treaty rights and traditional cultural practices. He was against having a Roman Catholic school on his reserve, and eventually led a movement to tear the school down. He was not an opponent of schooling, but wanted it to be within First Nations control. Under government pressure, he allowed the Catholics to re-establish the school. He was jailed in 1897 for participating in a give-away dance. In later years, the government threatened to depose him for his support of traditional practices.[10]
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> The federal government's First Nations education policy was devised and put in place by men who already made regular use of compulsion in their dealings with First Nations people. When he was the Indian commissioner, Edgar Dewdney used compulsion and the withholding of rations to disrupt a First Nations campaign to negotiate Treaty revisions and establish a First Nations homeland. Dewdney used the 1885 North-West Rebellion as a pretext for persecuting much of the First Nations leadership, despite the fact that the vast majority of First Nations leaders and their people did not participate in the uprising. When he was the assistant Indian commissioner, Hayter Reed advocated and implemented the pass policy. Under this policy, which had no legal authority, First Nations people on the Prairies had to seek government permission to leave their reserve. In the absence of a legal basis for the policy, the government charged individuals who left their reserve without a pass with "trespass." In other cases, it denied rations to those who did not comply with the pass policy. Amendments to the *Indian Act,* which banned the traditional Potlatch ceremony on the west coast as well as various sacred dances on the Prairies, are other examples of the policy of compulsion. Between 1900 and 1904, there were at least fifty arrests and twenty convictions for violations of the laws against dancing. One of the convicted, Chief Piapot, then in his mid-eighties, was sentenced to two months in jail.[11]

The criminal justice system was used to enforce attendance at Indian residential schools. The TRC reports:

> Section 12 of the regulations adopted under the 1894 amendments to the *Indian Act* gave Indian agents and justices of the peace the authority to issue a warrant for the return of truant residential school students. The warrants could be granted to "any policeman or constable, or to any truant officer appointed under these regulations, or to the Principal of any industrial or boarding school, or to any employee of the Department of Indian Affairs."[12]
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> In 1920, this authority was incorporated directly into the *Indian Act*.[13] Amendments gave

[10] *Ibid*., p. 178
[11] *Ibid*., p. 250
[12] In 1908, *Regulations Relating to the Education of Indian Children* removed "police powers" from truant officers, (it had been determined that the *Indian Act* did not provide the authority to grant such powers) but of course police officers continued to have police powers. Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part One, Origins to 1939," p. 261 (2015)http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf
[13] Section 3: "Any parent, guardian or person with whom an Indian child is residing who fails to cause such child, being between the ages aforesaid [between the ages of seven and fifteen years], to attend school as required by this section after having received three days notice so to do by a truant officer shall, on the complaint of the truant officer, be liable on summary conviction before a justice of the peace or Indian agent to a fine of not more than two dollars and costs, or imprisonment for a period not exceeding ten days or both, and such child may be arrested without a warrant and conveyed to school by the truant officer."

> truant officers the authority to "enter any place" where they believed there to be a truant child. Truant officers were to investigate cases "when requested by the Indian agent, a school teacher or the chief of a band." A truant child could now be arrested without a warrant and returned to school. Parents or guardians who did not comply with the order of a truant officer faced fines of "not more than two dollars and costs, or imprisonment for a period not exceeding ten days or both." In 1927, Duncan Campbell Scott announced that under the authority of the *Indian Act,* all Royal Canadian Mounted Police officers and constables were appointed truant officers. This was formalized by an amendment to the *Indian Act* in 1933.[14]
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> From [1927] on, the RCMP was with increasing regularity called upon to return runaway students and to compel parents to send their children to residential schools. In 1928, an Indian agent had a parent from the Blood Reserve jailed for refusing to send his children to school.[15]
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> Running away was not in itself a crime. However, most students were wearing school-issued clothing when they ran away. In 1894, the North-West Mounted Police annual report stated, "In several cases pupils who have deserted have been charged with the theft of their clothing, which is the property of the government. This has had a salutary effect in checking desertions from these institutions." In coming years, principals occasionally sought to have runaways prosecuted for theft. Red Deer principal C. E. Somerset had lost control of the school in 1896. He said there was, among the students, "a spirit of insubordination manifest and several desertions have taken place." To assert his authority, he identified one boy as "the ringleader," and had the Mounted Police arrest him and charge him with "leaving with clothing belonging to the Indian Department." The police held the boy for two nights and one day before returning him to the school. That same year, the principal of the Mohawk Institute tried without success to have boys prosecuted for the theft of the clothes they were wearing when they ran away.
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> One girl ran away from the Sandy Bay, Manitoba, school on three different occasions in 1933. The third time, she took some school clothing with her: a dress, a hat, and a pair of pants. School principal O. Chagnon had her charged with "theft and truancy." She was located by the Mounted Police and taken to court. Because the items of clothing were returned, Chagnon asked that no further action be taken. The case was adjourned indefinitely; as the police report noted, this meant that "in the event of this girl giving further trouble, she could then be dealt with in this connection also."[16]

Remember: as soon as children arrived at the school, the school took away their clothes and any other belongings from home and replaced them with school clothes. The schools took their hair. The schools took their names. The schools took their languages and their religions. The schools took their innocence. The schools took the children. The schools took the lives of thousands of children. No one ever charged the schools, the churches or the people of Canada with theft.

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[14] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part One, Origins to 1939," p. 578 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf

[15] *Ibid*., p. 285

[16] *Ibid*., pp. 581-582

The RCMP was in a monumental conflict of interest. They were agents of the state, required and used to force children to go to school, at the beck and call of school principals and Indian agents, while they were ostensibly also to protect those children from crimes within the schools.

Many students of Indian residential schools will be familiar with the description of Indian residential schools as being "a national crime". This phrase refers to a 1922 publication by Dr. Peter Bryce.[17] In turn, the 1922 publication is primarily about health inspections of residential schools carried out by Bryce and especially his report of 1907. Anyone who wishes to summarize or comment on Bryce's work needs to know the most detailed and accurate review of his work, how it was publicly reported in 1907, the details of Bryce's career and the specific details of what he found and said (his report has been badly misquoted and misunderstood in certain aspects in subsequent publications). The most detailed and accurate review of his work is in the TRC's final report.[18] Further, lawyer Samuel H. Blake, a lawyer conducting a review of Anglican mission work, who was an influential force in the negotiations, characterized the situation in the schools for the Minister, Frank Oliver, in the most blunt fashion: "The appalling number of deaths among the younger children appeals loudly to the guardians of our Indians. In doing nothing to obviate the preventable causes of death, brings the Department with unpleasant nearness to the charge of manslaughter."[19]

In any event, the phrase "national crime" is not a reference to the IRS criminal cases, although the choice of the title by Dr. Bryce is a strong allegation of criminal negligence causing death and failure to provide the necessaries of life. Of course, neither of these charges were ever laid against anyone.

Perhaps the first case to get to court was in 1914, but it was not a criminal prosecution. Instead, it was a civil lawsuit for damages. In this case, 13 year old Ruth Miller was punished for running away from the school called the Mohawk Institute. The court awarded $100 to her father because she had been placed in a cell at the school, 3 feet by 6 feet, with no light, no bed, no chair and remained there for three days, getting bread and water on Sunday. Her hair was cut off on Monday. She ran away again and was whipped 13 times on her back with a birch. The court awarded $300 to the father for the physical punishment.[20] I will discuss the civil lawsuits in a separate research paper, forthcoming.

The first criminal case identified by the TRC was also from 1914 and involved a school farm instructor H. Everett who confessed to the school principal that Everett had been having sex with some of the female students. (He confessed after a co-worker discovered this.) The principal told Everett to leave town on that night's train. However, students complained to their parents who reported it to the police and a warrant was issued for Everett's arrest, who was no longer in the area by that time. There is no further information about this case.[21]

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[17] Peter Henderson Bryce, "The story of a national crime being an appeal for justice to the Indians of Canada ; the wards of the nation, our allies in the Revolutionary War, our brothers-in-arms in the Great War." (Ottawa: James Hope and Sons Ltd., 1922) https://openlibrary.org/books/OL7110699M/The_story_of_a_national_crime

[18] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part One, Origins to 1939," http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_1_English_Web.pdf pp. 401-412 (2015)

[19] John S. Milloy, *A National Crime*, p. 77 in Chapter 5 "The Charge of Manslaughter": Disease and Death, 1879 to 1946, (Winnipeg: University of Manitoba Press, 1999)

[20] *Ibid.,* pp. 537-539

[21] *Ibid.*, p. 564

Here is another example of how the criminal law worked to enforce the residential schools system.

> After the death of a student at the Elizabeth Long Home in Kitamaat in 1922, parents withdrew their children from the school, which was operated by the Methodist Church. According to a Mounted Police investigation, virtually every member of the community signed a petition demanding the dismissal of the entire school staff. The petition claimed that the children "had been compelled to eat rotten fish and oat meal with worms in it." The principal, Ida Clarke, acknowledged "it was often impossible to obtain fresh meat or fish; but the children always have sufficient food to eat." At a public meeting held on the issue, an Indian Affairs official said that the parents had no right to withdraw their children, having signed a contract "for them to remain there." The First Nations people responded that "the contract with the school was to the effect that the children would be well cared for, provided with sufficient clothing, food etc." At the end of the meeting, the parents agreed to return their children to the school on the condition that the principal "sign her name to a paper before us that she would see that the children got all the food they wanted, that they would be well cared for, and be supplied with sufficient clothing." She signed the paper and the conflict was defused. In this instance, resistance came at a price: John Adams, who had protested, was convicted, in the words of the Indian agent, of "having used insulting language" to one of the school staff. His sentence was stiff: two months in jail or a fine of $20. He paid the fine.[22]

The first criminal prosecution for abuse at an IRS seems to have occurred in 1928. A 17 year old student, Albert Many Fingers, had an ongoing conflict with the school gardener, Edwin Smith, at the Roman Catholic School in Cardston, Alberta. When Smith asked the principal to deal with the matter, the principal refused. Smith decided to challenge Many Fingers to a fight and punched him a number of times in the face, causing a bloody nose. The police magistrate convicted Smith of assault and gave Smith the choice of paying a $10 fine or spending 10 days in jail. Smith appealed the conviction and the judge hearing the appeal acquitted Smith.[23]

In 1930, the principal at the Birtle, Manitoba school was "honourably acquitted" at his trial for "immoral conduct". Two of his accusers were given prison sentences and a third one had her teaching certificate removed.[24]Another prosecution occurred in 1931 against the principal of the school at Norway House, Manitoba. Again, this involved a punch to the head with a fist. The principal was acquitted.[25]

Other examples of how the criminal law was used in the first half-century of residential schools:

> The boy who attempted to burn down the Shingwauk Home in 1889 was sentenced to a year at the reformatory at Penetanguishene, Ontario. Three of the boys involved in setting the fires at the Mohawk Institute in 1903 were sent to the Mimico, Ontario, industrial school for between three and five years. A fourth boy was sentenced to the Kingston, Ontario, penitentiary for three years. …
>
> According to a report written three decades after the fact, the boys who had been charged with burning down the Saint-Paul-des-Métis school in 1905 were pardoned. The boy who set

[22] *Ibid.*, p. 507
[23] *Ibid.*, pp. 547-548
[24] *Ibid.*, p. 564
[25] *Ibid.*, p. 550

> fire to the Mount Elgin school barn in 1908 was turned over to the authorities for prosecution. Two students who admitted to setting re twice to the Crowstand, Saskatchewan, school were sent in 1913 to the Manitoba Industrial School for Boys (a home for delinquent boys operated by the Manitoba government). One of the students who attempted to burn down the Duck Lake school in 1917 was sent to a reformatory school. The two boys who set fire to the Anglican school in Onion Lake, Saskatchewan, were sentenced to five months in jail.
>
> In 1930, the Roman Catholic church at Pine Creek, Manitoba, was destroyed by fire, and four attempts were made to burn down the nearby Pine Creek school. Two boys confessed to setting the fires, although one of them did not do so until he had been promised that, aside from being expelled from the school, he would not be punished. Thomas Baird, the Indian Affairs official investigating the case, decided that "no good purpose could be gained by laying a charge of arson" and recommended the matter be left to "church authorities to deal with the boys as they may see fit." Despite the promise that no action would be taken, the Oblates requested that one of the boys be prosecuted. In the end, both were charged. The principal arranged for the release of one boy, but the other boy, who had been told he would not be prosecuted, was convicted and given a two-year suspended sentence. The principal thought the sentence was too lenient and inquired if he could be prosecuted a second time.
>
> Two students were convicted for their roles in the 1930 fire at Cross Lake, Manitoba, that left thirteen people dead. One student was convicted of conspiracy and given what was described as a "short term of imprisonment." The other student was a minor at the time the Cross Lake re was set. His case was transferred from juvenile to adult court. He pleaded guilty to the charge of arson and was given a life sentence. Indian Affairs declined to appoint a lawyer to represent him, saying this was done only in "charges of murder." In 1939, eight years after his conviction, Indian Affairs also declined to support his application for parole, saying he had served only "a comparatively short" portion of his sentence.[26]

In 1939, two female students were charged with assaulting a third girl at the Mount Elgin school so badly that she was confined to bed for a week. The girls pleaded guilty and each received a two-year suspended sentence.[27] It would seem that the first criminal convictions relating Indian Residential Schools were imposed against two indigenous school girls. See how Canada's legal system protects children?

The TRC confirms: "no staff member was prosecuted or convicted for abusing students at residential schools during this period (from 1867 to 1939), it is clear that such abuse took place."[28]

In 1944, the farm instructor at the Cluny, Alberta school was charged with assault for punching a student in the face causing his nose to bleed. The instructor pleaded not guilty and was acquitted.[29]

In 1945, a female student at the Grayson, Saskatchewan school tried to slip out of the school to meet some boys. For punishment, her hair was cut. The girl's parents came to the school to

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[26] *Ibid.*, p. 485-486
[27] *Ibid.*, p. 574
[28] *Ibid.*, p. 559
[29] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 374 (2015)
http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

remove their daughter and her two sisters. An altercation arose between the mother and one of the supervisors. The mother was convicted of assault and fined $1 plus $4.50 in costs; the father was convicted under the *Indian Act* provisions regarding truancy and fined $1 plus $4.75 in costs.[30] Once again, note how Canada's legal system treats indigenous women.

3. Gordon school convictions: 1945, 1947, 1955, 1972, 1988, 1993

In 1945 there was the first conviction of a staff member of an Indian residential school, a man named Holfeld.[31] This coincides fairly neatly with the year that the Canadian legal system began its excruciatingly slow process of becoming gradually civilized, a process that is still ongoing.[32]

The Anglican run Gordon Residence in Punnichy, Saskatchewan was one of the worst schools in the entire Indian residential school system. It did not close until 1997. Here I quote at length from the report of the TRC, which describes the long series of abuses and prosecutions at the Gordon school. (Note again that I have omitted the TRC's citations, which can be found in the TRC's full report.)

> In January 1945, Reverend J. H. Corkhill, the acting principal of the Gordon's school, raised concerns about the influence that the school engineer, E. Holfeld (given in other documents as "Schofeld" and "Holdfeld"), was having on the older boys. Corkhill wrote, "His craving for intoxicants is such that it is difficult to keep him here for many full days at a time." The principal said that he did not want to give Holfeld his notice until a replacement had been found. Corkhill was so worried about being left without an engineer that he had not even threatened Holfeld with dismissal. Drinking was not the only problem. In a letter, Corkhill referred obliquely to what he called Holfeld's "worst habit," saying "there are also several other things in his makeup which are quite bad for one mixing with young children as he does." By the spring of 1945, the situation was far more dire. Holfeld had been convicted of having committed common assault on one of the female students. Despite this, he still was not fired. There was more to come. In July of that year, Holfeld was convicted on two charges of buggery and one of attempted buggery, and sentenced to two years in jail. The record does not indicate who the victims were, but the complainant in the case was the new Gordon's school principal, D. L. Dance.
>
> Holfeld's legacy was devastating. In 1947, a student at the Gordon's school was diagnosed with venereal disease. Under the questioning of a Mounted Police officer, he revealed that he had been sodomized by the boys' supervisor, William McNab, a nineteen-year-old former student. McNab was arrested, tried, and sent to jail for six months. McNab claimed that, in the past, he had been abused by Holfeld. Indian agent R. S. Davis was of the opinion that "this thing has been going on in the school for years." He had taken statements from some of the boys and concluded that "the whole school is poluted [sic] with it." The church authorities, he wrote, "have fallen down badly in the upbringing of these children, by engaging people who are misfits." He thought the problem might "date back to the time when Mr. Frayling was Principal. It might have been found out by one of the principals and hushed

[30] *Ibid.*, p. 374

[31] It appears that Holfeld's conviction may have occurred earlier in 1945 than the above noted conviction of the mother trying to remove her daughters from an Indian residential school, but the TRC citations are not precise on the actual dates of convictions.

[32] McMahon, Thomas L., "Why Did It Take So Long for Indian Residential School Claims to Come to Court? The Excruciatingly Gradual Civilization of Canada's Legal System." (October 5, 2016). Available at SSRN: https://ssrn.com/abstract=2844543

up, until today." Frayling had served as principal from 1930 to 1944. (At the time of his retirement, he was seventy-four years old.)

In responding to the criticism, H. A. Alderwood, the superintendent of the Anglican Indian School Administration, pointed out the difficulties in recruiting qualified staff. All around Gordon's school, he wrote, "rural teachers are receiving twice as much as we have been able to offer. I have personally interviewed a number of applicants and have done my utmost to secure them for this school, but our low salary scale has apparently discouraged them from joining our staff."

Through the mid-1950s, Gordon's was consumed by controversy. On April 30, 1955, a new principal was appointed. That same day, two young girls ran away and spent the night with two young men on the Gordon's Reserve. The men were arrested, prosecuted for contributing to juvenile delinquency, and jailed for four months. The girls were expelled. The principal blamed the problems at the school on the previous administration.

> Since both girls are now free at home the general opinion in the school is that we can do nothing of any importance to anyone who disobeys school rules. This does not have any serious effect on morale for it is difficult to imagine any school with less discipline than existed here on May 1st as a result of the two year policy of 'free expression' on the part of the children.

In November 1955, the principal catalogued some of the school's recent problems. A school supervisor, Kenneth McNab, had impregnated a student, an act for which he had been prosecuted and fined. (The principal's letter does not indicate the specific offence for which the individual was convicted.) Another school employee had been fired for bringing men from the reserve into her room at the school at night. The school's farm instructor not only ran a bootlegging establishment out of his home, but he had also facilitated his son's affair with one of the teachers, by helping her slip in and out of the school without detection. The affair resulted in her becoming pregnant. Another male supervisor, named Courtney, had been sent to jail for "tampering with some of the Indian boys in his charge."

In January 1956, three girls alleged that the Gordon's principal had touched them improperly. He denied the charges, reported them to the bishop, and demanded an investigation. It was carried out by the head teacher, who concluded that the allegations were unfounded. The Truth and Reconciliation Commission's file review has not located any documents indicating that the allegations, or the teacher's investigation and report, were ever further reported to either Indian Affairs or the police. After being cleared by the member of his staff, the principal announced his resignation. In doing so, he expressed his frustration with Aboriginal people, saying he had long since concluded that they "do not want to be helped and every effort I have made has been blocked on the reserve. They want their children clothed and fed at no cost to themselves and they are not very interested in whether they get an education or not." There was "no low trick to which Indians will not subscribe to further their own ends."

In the month that he announced his resignation, the principal had to report on the case of a student who, he said, was "imposing himself sexually upon little boys in the school." He wrote that he had noticed a significant change in the boy's behaviour over the previous six months, saying he had become "morose and sullen and his work in class has fallen off. He has isolated himself from all his former friends among the boys and seems to always be keeping himself aloof."

It also appears that an employee who was suspected of developing an inappropriate relationship with students was allowed to transfer to a different school. In 1957, a supervisor at the Gordon's school asked to be sent to the Carcross school in the Yukon. Henry Cook, the superintendent of the Anglican Indian School Administration, helped arrange the move. At the time, he wrote to the staff member, saying that he had spoken with the principal about the problems the staff member had recently encountered at the Gordon's school that had led to his request for a transfer. Somewhat cryptically, Cook wrote,

> All I can say is that it is unfortunate but understandable. One can, at times, be too easy with youngsters for their own good. Having once established an easy-going routine with a group of lads it is impossible to successfully alter things. The only worthwhile result from an unsuccessful experiment is knowledge not to repeat the same procedure and at your next appointment you'll know to be strict perhaps from the very first.

After the staff member left for Carcross, J. J. Johnstone took over as principal of Gordon's. He concluded that the staff member had been having "immoral relationships with some of the boys" at Gordon's, and passed on his information to Cook. As a result, the Carcross administration was instructed to make sure that the staff member "was removed from direct contact with boys and his Principal was warned to watch out for any signs of his resuming his homosexual practices." Given the concerns that existed at the time, this measure was inadequate.

The employee in question was dismissed from Carcross by 1961 and placed on the Anglican Church's "confidential character code listing as being unfit for further employment with the administration." In writing about the issue in 1961, Principal Johnstone said there had been two reasons for not taking legal action in relation to the employee's behaviour at the school: the hearsay and circumstantial nature of the evidence, and the "resultant unfortunate publicity and effects upon the children concerned." The Truth and Reconciliation Commission's file review has not located any documents indicating that the employee's behaviour was communicated to either Indian Affairs or the police. There is also no record that any services were provided to the students who had been abused.

Principal Johnstone faced ongoing problems at the school. In 1958, he sought treatment for a fourteen-year-old boy who had been caught on three occasions "attempting a form of intercourse with younger boys." Johnstone thought the boy either was hoping to be discovered or did not care if his activities were discovered.

In 1968, William Peniston Starr was appointed director of the Gordon Residence. It was a position he held until 1984. Starr had previously been the principal of the Anglican school at Fort George in Québec, and on the staff of the Anglican school in Cardston, Alberta. In 1956, he had worked as a physical training instructor at the Gleichen school in southwestern Alberta. He left the school after an unidentified conflict arose between him and the senior boys. According to a letter from Indian Affairs official W. P. E. Pugh, the conflict centred on the activities of the "gymnasium tumbling team he had been training." The conflict was resolved by transferring Starr to another school. During his residential school career, Starr collected numerous positive evaluations. An Anglican assessment of his work from early 1954 noted, "Nothing but good reports of this worker from Mr. Pugh, the Bishop and the Cadet authorities. Under his leadership the Cadets did remarkably well at the Annual Inspection in Strathmore and his gymnasium team goes all over the country putting on demonstrations." Later that year, it was thought that it "might be a good move to make him Vice-Principal or Assistant Principal when a new man is appointed." Under Starr's

administration at Gordon's, the residence became well known for its cultural and sporting organizations. The Gordon Dancers, for example, travelled across Europe. The school also had a highly regarded boxing team. Starr resigned in December 1984. At the final meeting of the Gordon Student Residence Advisory Board, he was thanked by the chair of the board for "his many years of hard work." He, in turn, thanked the board for its "moral support."

Throughout his time at the school, Starr had been using his position to sexually exploit students. He instituted a system of bribery and intimidation to establish a regime under which he could sexually assault students. Those who refused to participate were punished through the denial of privileges. He was arrested on March 5, 1992, on twelve charges relating to sexual and child abuse, all arising from the years that he worked at the Gordon Residence. According to an internal government document at the time, "the department had not received any complaints relating to sexual or other abuse" during the time that Starr was employed at the residence. On February 2, 1993, Starr pleaded guilty to ten counts of sexually assaulting ten boys between the ages of seven and fourteen while he was the administrator of the Gordon Residence. He was sentenced to four and a half years in jail.

Under Starr's administration, there had also been continual staff and student problems. In 1972, a thirteen-year-old boy who had been convicted of indecent assault was committed to the care of the Saskatchewan Minister of Social Services for a one-year period, with the understanding that he "be sent to the Gordon's Residential School to be with his brother and sisters." In 1975, Starr reprimanded a residence employee, instructing him not to take students out of the residence, "whether it be for weekend visits, days off or miscellaneous activities," without his approval. The employee was also forbidden to have students in his private staff room. Starr had issued these orders in light of "unfavourable gossip" regarding the staff members' "drinking and homo- sexual activities" among students in the Yorkton area.

The problems that Starr had fostered at Gordon's continued after his resignation. In October 1988, a girl complained that the night watchman had made improper sexual advances to her while she was suspended from the school. He was suspended from his job and convicted of touching a person under the age of fourteen for sexual purposes and setting traps to cause bodily harm. He was fined $300.[33]

There were ongoing problems with staff members' losing control of their tempers in dealing with students in the residence. Between November 1990 and March 1991, one staff member cuffed two boys on the back of the head for running away; grabbed a boy by the neck and pushed him down into a sofa for deliberately missing the school bus; struck a boy on the side of the head with a closed hand; and slapped two boys in the head, pushing one into a locker. He was sent a disciplinary letter and required to seek assistance through the employee assistance program. In April 1991, a father complained of the way one of the child-care workers was treating students. He claimed that the staff member was using the bigger boys to physically discipline the smaller ones; was speaking of the boys' parents, particularly their mothers, in disparaging terms; had come to work intoxicated and attempted to get some of the students drunk; and had refused to let students play pool unless they were willing to play for

[33] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf , p. 457 reports a man named Cyr was convicted of these charges and received this sentence in Saskatchewan in 1988

> money. In another incident, a staff member hit a student with his crutch.[34]

In the above passage we see criminal convictions of Holfeld (1945), William McNab (1947), Kenneth McNab (1955), Courtney (1955), student convicted of indecent assault (1972), Cyr (1988), Starr (1993) (for offences between 1976 and 1980). These convictions all arose in a single school. As the TRC notes above, there were many other incidents at this school that did not result in charges or convictions. Starr's activities generated a number of lawsuits for damages, which will be discussed in my forthcoming paper on IRS civil cases.[35]

4. Edmonton conviction: 1960

Returning in time now to 1960 and the Indian Residential School in Edmonton, Alberta, school, where James Ludford was arrested and pled guilty to acts of gross indecency with one other person between February 1 and June 30, 1960. He was given a one-year suspended sentence. But that is only a small part of the story. The TRC continues:

> In the middle of September a United Church missionary, the Reverend Earl Stotesbury, accompanied a number of students from Saskatchewan to the Edmonton school. Stotesbury became suspicious of the relations between the school chaplain, James Ludford, and a number of the male students. Stotesbury took affidavits from a number of the students, the content of which confirmed his suspicions that Ludford was having sexual relations with some students. Concerned for the safety of the students he had brought to the school, he arranged alternate accommodations for them. He also alerted a number of church officials about his concerns. When they failed to act with the speed he thought the matter required, he called the police. When he saw that Ludford had packed his bags and was preparing to leave the school, Stotesbury felt obliged to physically detain him—leading to a violent encounter between the two men.
>
> Ludford was arrested and pled guilty to acts of gross indecency with one other person between February 1 and June 30, 1960. He was given a one-year suspended sentence. He was to report to the Provincial Mental Hospital and not participate in activities with individuals under the age of twenty-one.
>
> Dwight Powell, the superintendent of Home Missions of the United Church for Alberta, informed Indian Affairs that in his opinion that the only a small number of students, most of whom had left the school by then, had been involved. The names of the student were not provided to school principal, Oliver Strapp, who announced that he was resigning as of the end of the year.
>
> The issues was hushed up within the church—the minutes of the Edmonton school committee held on October 27, 1960, merely stated that Ludford had become ill and had to leave the school and that Strapp would be retiring at the end of the school year.
>
> On November 30, 1960, L.C. Hunter of Indian Affairs in Alberta informed R.F. Davey, his superior in Ottawa, that "at least one other staff member had been involved of sexual

[34] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 444-449 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf.

[35] The most recent of these cases was *H.L. v. Canada (Attorney General)*, 2005 SCC 25 http://canlii.ca/t/1k864

deviation." According to Hunter that staff member had resigned "ostensibly for other reasons." According to Hunter Reverend MacMillan, the chairman of the Edmonton United Church Presbytery, and Dwight Powell had the details of the cases but did not disclose them to Indian Affairs. Hunter did report to Davey "we have every reason to believe that the over-all situation at the Edmonton Residential School is far from being wholesome." Both MacMillan and Powell agreed with Hunter that Strapp should be dismissed immediately since his "continuation as principal may prove to be exceptionally embarrassing to the United Church and irreparably damaging to the students."

Church officials continued to be concerned with covering up the problem. On November 25, 1960, Dwight Powell, the superintendent of Home Missions of the United Church for Alberta, wrote to E.E.M. Joblin, the United Church's Associate Secretary for Home Missions, about the situation in Edmonton. Reminding Joblin of the "difficulty that the Rev. J. C. Ludford got himself into," he went on to say that "similar things have been said about a Mr. Thompson who was on the staff until every recently." Powell said that Strapp was defending Thompson's reputation. Powell, however, believed that "there certainly seems to us to be more to these things that are being said that [sic] just an effort to discredit someone wrongfully."

Powell also reported that boys had been getting into the girls' dormitories at night: Strapp blamed the problem on Hunter, who had insisted that he stop locking the dormitory doors. Powell had also reached the conclusion that Strapp had "little of love or charity in his attitude to the Indian child. We hear of corporal punishment being meted out with the buckle ends of belts, severe enough to raise welts on bodies; Mr. Strapp says that has put a stop to that. But our feeling is that there is too much of slapping and physical force in punishments." While Strapp had originally indicated he would leave at the end of December, he had concluded that not to work until June would be an admission of failure.

Two days later, Strapp wrote to Joblin, noting that the school had been a "trouble spot through the year," saying that the health of one previous principal, J.F. Woodsworth, was broken when he left, while another, A.J. Staley, had taken medication for ulcers during this latter years at the school, Strapp said he thought he would be ill if he stayed longer. As a result, he was prepared to go as soon as possible. He was replaced in January 1961 by the recently retired A.E. Caldwell, who had been the principal of the Alberni School since 1944.

At the end of January 1961, Caldwell wrote a scathing assessment of the staff, wondering how "Strapp managed to aggregate such a bunch of cripples." He said there was only one of the women on staff worth keeping. One had a serious heart problem, one had fainting spells, one was a "Sectarian fanatic," while he previously dismissed another, who he termed "brainless," when she had worked for him at the Alberni school. He concluded by noting that "from numerous statements I have unearthed, it would seem that Strapp had another "homo" on the staff from last March to November, a man by the name of Thompson. This appears to have been kept strictly under cover." It is not clear that measures Caldwell took in Thompson's case, but it is apparent he was opposed to his continued employment.

James Ludford, however, was allowed to continue his "Indian work" with the United Church. From 1960 to 1964, he worked at the Fraserdale, Ontario mission and from 1964 to 1970, he worked at the Parry Sound, Ontario Mission, retiring in 1970. Ludford died in 1990.[36]

5. Grollier Hall convictions: 1962, 1979, 1995, 1998, 2004, 2013

The next conviction occurred in 1962, concerning Martin Houston who was a dormitory supervisor at Grollier Hall in Inuvik, Northwest Territories (NWT). Grollier Hall was also one of the very worst of the residential schools. The TRC reports on Grollier Hall and follows with reports of criminal activity in other residential schools in the Yukon, NWT and Nunavut:

> Grollier Hall opened in September 1959. As the Roman Catholic hostel in the newly established community of Inuvik in the Northwest Territories (NWT), it had an initial capacity for 240 students. It was administered by the Roman Catholic Church until 1985. The NWT government administered it until 1997, when it ceased to operate as a residence for public school students, and was transferred to Aurora College.
>
> The following men worked at Grollier Hall as student supervisors:
>
> - Joseph Jean Louis Comeau: 1959 to 1965
> - Martin Houston: 1960 to 1962
> - George Maczynski: 1966 to 1967
> - Paul Leroux: 1967 to 1979
>
> While they were employed at Grollier Hall, each of these men sexually assaulted students who were living in the residence. Their collective employment records make it clear that there was at least one sexual abuser on staff for each of the residence's first twenty years of operation. The first of these men to be prosecuted was Martin Houston. On August 15, 1962, Martin Houston was arrested in Ottawa on a charge of distributing obscene literature (handwritten notes that he left in public washrooms, soliciting sexual partners). He told the police he was a teacher at a federal day school in Inuvik. In fact, he was a dormitory supervisor at Grollier Hall. He pleaded guilty to the charge and was sentenced to twenty-one days in jail. In the course of their investigation, police discovered that he was staying in a hotel in the company of a fifteen-year-old boy from the Northwest Territories. The police investigation revealed that the boy had been enrolled at Grollier Hall. Houston had been sexually abusing the boy since December 1960. Prior to returning to his home community for the summer of 1962, Houston had convinced the boy to meet him in Norman Wells, Northwest Territories. From there, the two had travelled to Ottawa. Further investigation indicated that Houston had been sexually abusing a number of boys for at least two years.
>
> Houston pleaded guilty to charges of buggery and gross sexual indecency, involving five students, in 1962. That same year, he was declared a dangerous sex offender and given an indefinite sentence. . . .
>
> In reviewing the case, Ben Sivertz, director of the northern administration branch of the federal Department of Northern Affairs and National Resources, wrote:

[36] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 418-420 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

> I find it difficult to believe that this could take place in such close proximity to a group of young teenage boys without arousing suspicion and comment that would come to the attention of the hostel administrator—if the administrator was exercising the kind of supervision over the officers of the hostel we have a right to expect.

The administrators of Grollier Hall had been suspicious of Houston, who had come to work at Grollier Hall in the fall of 1960 as the senior boys' residence supervisor. Oblate Father Max Ruyant stated that he had decided to dismiss Houston in June 1962, having concluded Houston was "not a good influence on the boys." During the Royal Canadian Mounted Police investigation, Ruyant told the police that Houston had "dealt out excessive punishment for minor behaviour which punishment usually consisted of strappings." Ruyant also suspected Houston had "carried on indecently with the senior boys." On two occasions, boys had been found to be in his room past midnight. The boys were supposed to have been in their own beds at 10:15. The Sister of Charity responsible for the junior boys had complained to Ruyant several times that she believed Houston had been "acting indecently with the senior boys." On one occasion, she said, she had heard Houston apparently taking a bath with a boy. It should be noted that despite these concerns, Houston was allowed to work at the residence until the end of the 1961–62 school year. In his statement to the police, Houston said that, rather than being fired, he had resigned from the school because "I thought I was becoming too friendly with the boys and did not want to keep on the relations with them because I realized then the mistake it was and the damage it could do to the children." The Truth and Reconciliation Commission's file review has not located any documents demonstrating that Houston was actually dismissed or had resigned prior to his being arrested. The evidence in this case makes it clear that the school administrators were aware that Houston was engaged in unacceptable behaviour, although they may not have known the extent of it. Despite this knowledge, they failed to intervene in a timely and effective manner.

In the summer of 1962, Northern Affairs official Sivertz instructed a departmental official to meet with Bishop Paul Piché of the Roman Catholic mission at Fort Smith to discuss the situation at Grollier Hall. Sivertz's instructions for this meeting under-scored the fundamental weakness of the government position in relationship to the churches. While the government expected that qualified people would be employed and that they would be well supervised, it was not prepared to provide the funding needed to make sure that its expectations were met. Since the churches were prepared to manage the hostels for less money than it would cost the government to operate them, the government was unwilling to place too many demands on the churches. Sivertz warned the government official investigating conditions at Grollier Hall that:

> Care must be taken in your examination of this problem, particularly in discussions with the Church authorities to avoid any action or suggestion which would alter, or appear to alter, the degree of responsibility which rests with the management (Church authorities) for the proper operation of contract hostels. In the first place we do not have the resources to look after the details involved in day to day operations. Secondly, and perhaps more important, is the fact that it would be unreasonable to expect the Church authorities to manage the hostels in an efficient manner unless they are permitted considerable flexibility in matters of detail such as the recruitment and hiring of hostel staff. On the other hand, the hostels are an integral part of our school system. They are owned by the government and all reasonable operating expenses are paid by the government.

David Searle, a lawyer in private practice who prosecuted Houston on behalf of the federal government, recommended that, to ensure that "single, male homosexuals" were not hired as

supervisors, only married couples should be hired to work in these positions. If that was not possible, he recommended that the Mounted Police conduct a background check "on each and every single man and woman who accepts such a position of authority over youngsters." While Searle was correct in drawing attention to the need for improved screening, his letter reveals the limitations of official thinking of the era. At the time of his writing, all homosexual acts in Canada were illegal, and those people suspected of being homosexual had difficulty finding and keeping employment as teachers. But Searle—and others—was making no distinction between homosexuality and pedophilia. His preference for hiring married couples reveals a naïve belief that married individuals would not abuse children (or, more likely, a belief that married men would not abuse male children). The focus on homosexuals suggests that homosexual abuse of children was viewed as being worse than heterosexual abuse. In reality, the threat to students came from the behaviour of those who preyed sexually on children—pedophiles of any sexual orientation.

According to Ruyant, there had been a limited background check on Houston: he had received a recommendation from the Oblate father provincial in Winnipeg and from a former schoolteacher. Houston was born in the Pine Falls region of Manitoba in 1937 and educated in Powerview, the community that borders the Fort Alexander Reserve in Manitoba. According to Houston, in his youth, he had been sent to a reform school. There, he told the police, "the older lads had committed indecent acts on him." He later attended the Oblate-run St. John's Junior Seminary on the Fort Alexander Reserve from 1956 to 1958. The Oblate *Indian Record*, a publication that reported on Oblate work among Aboriginal people, indicated in November 1957 that the twenty-year-old Houston was a "Non-Treaty" Grade Nine student at the seminary.

The seminary had opened as a boarding school in 1954. Despite its name, St. John's was not a seminary, but, in fact, a private high school for Aboriginal students, run by the Oblates in the rectory on the Fort Alexander Reserve. Indian Affairs had been initially unwilling to provide funding to the school, but from the mid-1950s to the early 1960s, it did provide tuition supports for First Nations students at the school.

After leaving St. John's, Houston went to work at the Oblate-run residential school in Kamsack, Saskatchewan, as a supervisor of young boys for the 1958–59 school year. From there, he went to Grollier Hall.

The Royal Canadian Mounted Police (RCMP) investigation conducted after Houston's arrest in 1962 concluded that while he was a student at St. John's, Houston had, to use the words of one investigator, engaged in "homosexual conduct." The report is not clear as to whether Houston was being abused by either staff or students, was abusing fellow students, or was engaging in consensual relations with fellow students at St. John's. However, of his later time at Kamsack, the RCMP concluded that Houston was "known to have instigated and carried out acts of gross indecency and buggery with at least three Indian youths, two of whom were 15 at the time and one 18 years of age at the time."

The Truth and Reconciliation Commission of Canada's file review has not located any documents indicating that there was further investigation into these allegations. Neither has it located any documents to suggest that counselling was provided to any of the students who would have been abused by Houston at the Kamsack school.

Searle, the lawyer who prosecuted Houston, believed that if a proper investigation had been carried out prior to Houston's hiring, his "previous homosexual conduct would have been

easily uncovered." It is clear that there was no significant screening process in place. In the fall of 1962, psychiatric examinations were conducted on five of the Grollier Hall boys who had been abused by Houston, but no documents have been located that demonstrate that the students or their families were provided with counselling after those assessments. However, the fact that they were assessed demonstrates that by 1962, there was recognition that such abuse could have serious traumatic impact on the victims.

After his conviction in 1962, Houston spent nine years in jail and was released on full parole in 1971. In 1975, he violated his parole and was convicted of three counts of indecent assault (these assaults did not have a residential school connection). He was given two years' supervised probation and was hospitalized in the Selkirk, Manitoba, mental hospital for seven months. In later years, he made two unsuccessful attempts to become a Roman Catholic priest. On both occasions, he was asked to leave the seminary in which he was studying, due to what were described as "behaviourial issues." However, his third attempt was successful. Against the advice of Catholic orders in Alberta and the Northwest Territories, he was accepted into a seminary in Manitoba. He was ordained in 1990. When Northwest Territories Bishop Denis Croteau discovered that Houston had become a priest, he contacted Manitoba Bishop Antoine Hacault to see if he was aware of Houston's past. According to Croteau, Hacault told him "he was aware of it but that 'we cannot hold someone prisoner of his past if he has not done anything reprehensible in the past 25 to 30 years.'" In Manitoba, Houston served as a priest in Lac du Bonnet and Carman. In both communities, he generated numerous complaints from parishioners, who found him unstable and verbally abusive. He resigned from his position with the Carman parish when the *Edmonton Journal* publicized his background in 2002.

Two years later, he was back in court, facing charges that stemmed from his time at Grollier Hall. In 2004, Houston pleaded guilty to one count of sodomy and two counts of indecent assault at Grollier Hall in the early 1960s. The forty-two-year delay between the acts of abuse and the convictions underscores the failure of Northern Affairs, the Roman Catholic Church, and the Mounted Police to conduct a thorough investigation in 1962. Houston was sentenced to three years' probation, the Crown attorney taking the position that the 1962 assaults would not have added to his earlier sentence if they had been included in the earlier prosecution. He died in Winnipeg in August 2010.

Joseph Jean Louis Comeau worked alongside Martin Houston. Comeau, who worked as a bank manager during the day, was a part-time supervisor at Grollier Hall from 1959 to 1965. Although concerns had been raised after Houston's arrest about the need to ensure proper supervision at Grollier Hall, Comeau's abuse of students was either undetected or tolerated. It was not until 1998, thirty-three years after he left Grollier Hall, that he pleaded guilty to two indecent assaults that took place between 1962 and 1963. The victims had been eleven and thirteen years of age at the time. Shortly before his 1998 conviction for the assaults in Inuvik, he had been convicted of committing similar assaults in British Columbia (although not in a residential school). For the Inuvik assaults, he was sentenced to one year in jail on each charge, to be served concurrently at the completion of his two-year sentence for the British Columbia offences. In 2003, Comeau was once more arrested and charged with five counts of sexual assault. Comeau died that year, before he could be brought to trial on these final charges.[37]

[37] *Ibid*., 431-435

In 1998, the judge sentencing Comeau said "this case must be kept in perspective. This accused is not to be sentenced for the wrongs of the residential school system. He is one man who is to be sentenced for the specific criminal acts that he committed." (para. 5) The judge said there was no risk of re-offending at his age and health, but "The public must know that perpetrators of these types of crimes will be held accountable."[38]

The year after Comeau left Grollier Hall, George Maczynski went to work at the residence. In his career, he worked at both Grollier Hall and the Lower Post school in northern British Columbia. He started at Lower Post, which drew much of its enrolment from northern British Columbia and Yukon. Maczynski worked as an instructor there from 1956 to 1958. He then worked as a welfare officer for the Yukon government. In 1964, he was in a car accident that left him permanently injured. He returned to work with the Yukon government, but his performance was found to be unsatisfactory. He was reportedly prone to "violent emotional outbursts and generally behaved in a very unprofessional manner." He was suspended from his job in October 1965. By 1966, he had found employment at Grollier Hall as a supervisor. He appears to have lasted there only one year. The last payroll record the Truth and Reconciliation Commission of Canada could locate for Maczynski was from 1967.

In 1973, Maczynski returned to the Lower Post area, where he had worked in the 1950s. There, he organized a summer camp for young boys. Later that year, Maczynski was convicted and sentenced to two years in jail for "molesting" boys at the camp. This is the first record the Truth and Reconciliation Commission has located of his being prosecuted. After serving ten months in jail, Maczynski was paroled, and he returned once more to Lower Post in August 1974. After consulting "with several professional colleagues," E. Morriset, the administrator of the Lower Post residence, hired Maczynski in September 1974 to work as the residence's night watchman. He stated that Maczynski was on-site only from ten in the evening until six in the morning, and residence staff members were in the dormitories during those hours. In October 1974, Harry Lavallee, the field supervisor for Native Courtworkers in British Columbia, protested and drew the hiring to the attention of Indian Affairs. Morriset defended his decision, writing that Maczynski now lived by himself in a cabin about a mile (1.6 kilometres) from the residence. He had returned to the community and done "a great amount of volunteer welfare work for the local Indians." Maczynski resigned from this position in November 1974.

In 1993, he was charged with sexually assaulting students when he worked at the Lower Post school in the 1950s. Two years later, he was convicted and sentenced to sixteen years in jail for committing and attempting to commit indecent assault and buggery on students at Lower Post. In 1996, he was given a seven year sentence for sexual assaults committed on two Dawson City children in the Yukon in the 1960s. The assaults would have been committed when he was a social welfare officer. The sentence was to be served concurrently with the Lower Post sentences. In 1997, Maczynski pleaded guilty to additional charges of indecent assault, gross indecency, and buggery arising from the period in the mid-1960s when he worked at Grollier Hall. He was sentenced to four years of incarceration. That sentence was to be served after the original sixteen-year sentence had been served. Maczynski died in jail in 1998.

Maczynski was not the only person on the Lower Post staff to be charged with sexually abusing students. Oblate Brother Ben Garand worked as a boys' supervisor at the school in the 1950s. In June 1993, he was charged with four counts of sexually assaulting male

[38] *R. v. Comeau*, [1998] N.W.T.J. No. 34 (NTSC)

> students. At the time of his arrest, Garand was already in jail. He had been convicted and jailed in 1993 on a variety of non–residential school charges of sexual assault. Garand died in jail before he could be tried on the charges relating to his time at Lower Post.
>
> There are reports that in the 1950s, complaints about Maczynski's and Garand's abuse of students had been made to the principal of the school, Yvon Levaque. According to the complainants, no action was taken at the time.[39]

The last conviction of Jerzy Maczynksi is publicly reported. According to the RCMP report, Maczynski was originally convicted in 1973 on two counts of gross indecency and sentenced to two years less one day in jail time.[40] Maczynski was later convicted in 1995 of 29 counts of sexual assaults and sentenced to a total of 16 years in jail. He was also convicted in 1996 to offences committed in the Yukon, and sentenced in 1997 for other offences in the Northwest Territories. In total, his sentences were for 20 years. He appealed the sentences of 16 years from the 1995 convictions, asking for a reduction to 12 years. His lawyer acknowledged he was likely to die in prison whether the sentence was 16 or 12 years. The sentencing judge said Maczynski could not be ruled out as a possible re-offender, even at 67 years of age, and his poor health, and that he exhibited no remorse and no understanding of the horrific nature of his crimes. The B.C. Court of Appeal upheld the sentences of 16 years. Maczynski died in prison.[41] The TRC report continues:

> Maczynski left Grollier Hall in 1967. That same year, Paul Leroux started work there as the senior boys' supervisor. He remained at the hostel until 1979. Prior to that time, he had worked at the Beauval, Saskatchewan, school. (His time at that school is discussed elsewhere in this chapter.) While he was living in Inuvik, Leroux also served as a justice of the peace and a judge in the family juvenile court, coached numerous sports teams, and volunteered as a Big Brother. He was, in short, a person of some authority in the community.
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> In 1979, Leroux was convicted of having a two-year-long sexual relationship with a fifteen-year-old male resident of Grollier Hall and sentenced to four months in jail. He later sought and received a pardon for that offence. The Truth and Reconciliation Commission has not encountered any evidence to indicate that after this conviction, any further investigation was carried out at that time to determine if he had assaulted other students at either Grollier Hall or the Beauval school. It is reasonable to expect that such investigations should have been made. Certainly, such investigations were carried out more than a decade earlier, after the arrest of Martin Houston in 1962.
>
> By 1980, Leroux had found work with the Employment Development Branch of the federal government. He left that position in 1981 to take a position with the Canadian Human Rights Commission. He worked with the commission until 1997. In that year, complaints from former Grollier Hall residents led to a police investigation. When police searched Leroux's Vancouver residence, they found a large collection of child pornography. He was arrested in June 1997 and charged with thirty-two sexual assaults involving fifteen victims between the

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[39] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 435-437 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

[40] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf, p. 460

[41] *Ibid*., p. 456 and *R. v. Maczynski*, 1997 CanLII 2491 (BCCA) http://canlii.ca/t/1dzbw

> ages of fourteen and eighteen. Leroux was convicted of attempted buggery, attempted indecent assault, three counts of indecent assault, and four counts of gross indecency. He was given a ten-year sentence. He was paroled after serving less than four years of his sentence. In 2003, he was arrested and charged with eleven additional counts of indecent assault and gross indecency. The Crown stayed the prosecution on these charges in 2004. The rationale for this decision provided to the Mounted Police was the reluctance of certain complainants to testify at the preliminary inquiry and a "re-assessment of the prospects of conviction."
>
> There is evidence to suggest that students did complain about Leroux's behaviour while he was still working in the school. In the 1990s, a former Grollier Hall resident stated that when he was living at the hall in the 1970s, he had informed a guidance counsellor at Samuel Hearne Secondary School that Leroux was taking nude photographs of students living at the residence. No records made available to the Truth and Reconciliation Commission of Canada indicate that the individual reported such information, if he received it, to authorities. According to the student, the counsellor instead instigated a sexual relationship with him. The counsellor was tried twice on these charges, but in both cases, the juries were unable to agree on a verdict.[42]

The TRC reported about Leroux's activities at the Beauval school in northern Saskatchewan as follows:

> From 1959 to 1967, Paul Leroux worked as a supervisor at the school. There, he directed a boys' choir; played a key role in the development of intramural hockey, and competitive fastball and softball teams; and coached the Beauval Warriors to a regional hockey championship. The choir, known as the "Beauval Indian Boys," recorded an album under Leroux's direction.
>
> In September 2011, Leroux was charged with abusing boys during the time that he worked at Beauval. In November 2013, he was convicted of molesting fourteen boys at the school on charges of indecent assault and gross indecency. He was sentenced in December 2013 to three years in prison. He was paroled in February 2015.[43]

There are four reported court decisions on Leroux. The first court decision concerned a plea by Leroux on two of the 40 charges he was facing in 1998. He pleaded that for two of the charges, he had already been tried and convicted in 1979. The judge noted the lack of a trial transcript from 1979 and the difficulties in knowing exactly which acts were included in the 1979 charges. This decision provides a reasonable amount of detail about the 1979 conviction, including that Leroux was sentenced to four months jail at that time. The judge concluded that one of the two 1998 charges that Leroux challenged in this way should be dismissed.[44]

The second court decision was whether to permit the Crown to use "similar fact evidence" against Leroux. That is, to allow the evidence of one victim to be heard and considered when considering the evidence of other victims, for the purpose of confirming the credibility of each victim. Leroux asked to have the various counts severed from each other, so that he could pick and choose which counts he might want to testify about, and which counts he wanted to be immune from being questioned about. Although originally charged with 44 counts, Leroux pleaded guilty to 9 counts, pleaded not guilty to 12 counts, and the remaining counts were dismissed or not proceeded with.

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[42] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 437-438 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

[43] *Ibid*., pp. 449-450

[44] *R. v. Leroux*, [1998] N.W.T.J. No. 138 (NTSC)

The judge held that the 9 counts to which he pleaded guilty would be dealt with as separate matters; any of those that Leroux did not wish to testify about, the Crown would provide evidence as to the facts and they would be considered proven. With respect to the not guilty pleas, the judge said that all 12 counts would proceed as one indictment; in other words, Leroux would have to choose between not testifying at all or testifying and being subject to cross-examination on any or all of the 12 counts.[45]

The third court decision about Leroux was whether the Crown had proved a lack of consent by the child victims. According to the provisions of the *Criminal Code* applicable to the incidents, if a complainant was 14 years or older and consented to the sexual activity, then there was no criminal act. The law has since changed so that consent does not matter if the child is under 18 years of age. The judge found that, with one exception, there was no evidence to show Leroux used force or threats; instead he used "enticement, encouragement and what he called affection". (para. 11) For one of the students, P.R., the accused was charged with both indecent assault and incitement to commit buggery. As for indecent assault, the judge stated it was up to the Crown to prove beyond a reasonable doubt that the student did NOT consent. "Considering the long-term nature of that relationship and notwithstanding the fact that the accused was in a position of trust, I am not satisfied beyond a reasonable doubt as to proof of non-consent." (para. 35) However, the judge amended the "incitement" charge to "attempt" to commit buggery, for which consent is not a defence, and found Leroux guilty of that charge. The entire decision is a very difficult read; the judge recites summary facts and his impression of the reliability of the witnesses on 40 charges of different kinds of sexual abuses of students at the school. The judge dismissed 7 counts and convicted on 14 counts (which includes the 9 that Leroux pleaded guilty to). The judge stated: "A criminal trial is certainly not a healing process. It is badly equipped to heal the victims of crime. Victims can only be healed through their own efforts, through the assistance of their family and friends, and through the work of an entire community." (para. 87)[46]

The fourth decision concerning Leroux was his sentencing to prison for a global term of 10 years. The decision makes important comments about consent, the legacy of the offences on the victims, and the context of the criminal charges against Leroux against the larger residential school background.

> [4] Most of his victims acquiesced in these activities but, of course, their involvement, while technically consensual, has to be viewed in the context of the significant power imbalance between the accused as supervisor, and the victims, as the ones being supervised. Clearly, he was in a position to take advantage of his authority, and he did so. In these situations, we know that the sexual abuse of young people is an act of violence, both physical and profoundly psychological.
>
> [6] There are 14 different victims. They are all grown men now. But even though these incidents occurred over 20 years ago, and in some cases almost 30 years ago, many of them still bear significant psychological wounds. Some of them have had serious difficulties in their own lives, and now are trying to make sense of their past. [The court reviewed] victim impact statements from nine of the victims. All of them spoke of the serious harm caused to them by the accused's actions.
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> [27] Finally, I want to address something hinted at by defence counsel during his submissions: The accused is not here as a scapegoat for the abuses of the residential school

[45] *R. v. Leroux*, [1998] N.W.T.J. No. 139 (NTSC)
[46] *R. v. Leroux*, [1998] N.W.T.J. No. 140 (NTSC)

> system. He is here as one individual who is being called to account for his specific crimes, and only for those crimes. They were a gross abuse of trust and for that he must be punished.[47]

Leroux was paroled after serving less than four years of his sentence. In 2003, he was arrested and charged with eleven additional counts of sexual assault.[48] The Crown stayed the prosecution on these charges in 2004. The rationale for this decision provided to the Mounted Police was the reluctance of certain complainants to testify at the preliminary inquiry and a "re-assessment of the prospects of conviction."[49] Of course, the abuses at Grollier Hall imposed tragic consequences.

> In late 1997, the victims of sexual assault at Grollier Hall formed a support group, under the leadership of Harold Cook and Lawrence Norbert. Cook, who had been a star athlete at the school and a member of the Territorial Experimental Ski Training program, referred to the school as "Sing Sing," saying he "skied to get away from the residence." He said the students had remained silent for so many years for two reasons: shame and doubts that anyone would believe them.
>
> The impact of the abuses of the 1960s never went away. In a letter to the court, one of Martin Houston's victims wrote, "Every day since this happened, I remember what he did to me. I drink to try to forget what happened to me, but drinking only makes me angry." One former victim wrote in his victim-impact statement that he had often contemplated suicide. The victim said that the memory of the abuse had led others to kill themselves.[50]

To sum up, in the above passages, we learned of convictions of Houston (1962 and 2004), Leroux (1979 and 2013), Garand (charged in 1993 but died before trial), Maczynski (1995 and 1997) and Comeau (1998; and charged in 2003 but died before trial).

As the above long section began with Martin Houston's conviction in 1962, this paper will now try again to proceed chronologically.

6. More convictions: 1963, 1964, 1970

The next conviction concerned the school at Morley, Alberta. In May 1963, the school principal

> suspected one of the staff members, Robert G. Pooley, of "homosexual activities." An Indian Affairs report noted that there was no evidence to substantiate the allegation, adding that the principal was "watching Mr. Pooley very carefully." Three weeks after the Indian Affairs report was written, Pooley resigned his position at the school. The Mounted Police arrested him on June 3, 1963. According to A. MacKinnon, the school's supervising principal (the principal was responsible to a supervising principal), Pooley was charged with having engaged in "homosexual activities with young boys." MacKinnon believed the evidence came from "boys in the school." After pleading not guilty before a magistrate, Pooley was

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[47] *R. v. Leroux*, [1998] N.W.T.J. No. 141 (NTSC)
[48] Jennifer McPhee, "More Grollier Hall Charges," *Northern News Services*, 21 April 2003, http://www.nnsl.com/frames/newspapers/2003-04/apr21_03sex.html, accessed 17 April 2012
[49] Royal Canadian Mounted Police files, Noel Sinclair to Sidney Gray, 7 September 2004 (pages 2–5 of 117 page portable document file). RCMP-907781
[50] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 438 (2015)
http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

> sent to the Ponoka, Alberta, mental institute to determine if he was fit to stand trial. He was convicted in the fall of 1963. While correspondence from Indian Affairs officials reported that he was convicted of contributing to the delinquency of a juvenile, newspaper accounts of the day stated that he was convicted of indecently assaulting a fifteen-year-old boy. Pooley, who maintained his innocence, was given a one-year sentence, to be served at a provincial mental institute.
>
> The assistant director of education for Indian Affairs, R. F. Davey, found it impossible to get Alberta regional staff to provide him with definitive information on the case. A number of church and government officials appear to have believed that Pooley's conviction was a miscarriage of justice. Despite his conviction, Pooley was determined to continue his career as a teacher and sought work with school boards in Ontario and Alberta. In doing so, he used Indian Affairs officials as references. In his response to a query about Pooley from a school board, M. Brodhead, the Indian Affairs district school superintendent for southern Alberta, made no mention of his arrest or conviction. In one letter, Brodhead wrote, "I would not hesitate in recommending him for employment in your district." Pooley got the job; by October 1964, he was teaching in the Spirit River School Division in Alberta. When, earlier that year, he had sought employment with Indian Affairs as a teacher, R. F. Davey recommended against hiring him.[51]

Two convictions in 1964:

> In two unrelated events, two men who worked at Fleming Hall, the Anglican hostel in Fort McPherson, Northwest Territories, were convicted of having inappropriate relations with young people who attended the local day school. The Northern Canada Power Commission (NCPC) operated the power and heating plants at Fleming Hall. The company had an agreement to board engineering staff at the hostel. In May 1963, NCPC employee William Hamilton apparently was staying at the hostel. At some time between then and March 1964, Hamilton was arrested, charged, and convicted of engaging in sexual acts with male students attending the local day school. He was sentenced to three years in jail.
>
> Donald Perdue started work as the cook at Fleming Hall in Fort McPherson in January 1963. On March 12, 1964, he was convicted of contributing to the delinquency of juveniles—he had been found swimming naked with a number of juveniles. Initially, Anglican Church officials who operated the residence took the position that there were "extenuating circumstances" that justified keeping Perdue on staff. David Searle, the lawyer who had prosecuted Martin Houston, wrote a letter of complaint to the Justice Department, recommending that it seek to have Perdue dismissed. He said that, based on police reports and "statements from the girls [likely the juveniles Perdue was swimming with] Mr. Perdue has tendencies towards sexual exploration with young girls." After reviewing the evidence presented at the trial, T. E. Jones, the Anglican director of residential schools, concluded that Perdue should never have been hired. According to his application for employment with the federal Department of Transport in 1965, he left work at the hostel in July 1964.[52]

The next conviction was in 1970, relating to the Alert Bay, British Columbia school.

> In February 1970, the power engineer at the Alert Bay school, Harry Joseph, was dismissed because he had "entered the senior girls dormitory without authorization and endeavoured to

[51] *Ibid*., p. 421
[52] *Ibid*., p. 438

> persuade a fourteen year old female student to leave the dormitory with him. When the girl refused, Mr. Joseph then interfered with two other girls by removing bed covers and fondling them." The matter was referred to the Mounted Police. Joseph pleaded guilty to a charge of indecent assault on May 13, 1970. At the trial, the school principal testified to Joseph's previous good behaviour. Joseph was given a suspended sentence.[53]

In the 1970s, the churches stopped administering the schools and the Government of Canada took over. Over the next 25 years or so, there was a process of closing some schools and transferring administration of other schools to local First Nations groups, until the last ones closed in the 1990s.[54]

That was the end of the residential schools prosecutions for abuse until 1987.

7. Convictions in 1987, 1988, 1989, 1991, 1994-2000, 2004, 2005, 2013

A series of prosecutions occurred between 1987 and 2005. By this time, almost all of the schools had been closed. It was only in this late period that Canada's legal system began to think that children might deserve to be protected by law and that child abuse could be a serious problem. It was only beginning in 1987 that indigenous people began to think they had a chance to win Indian residential school civil cases in Canada's court.[55]

As you review the prosecutions in this late era, notice how much time passed between when the offences occurred and charges were laid. Notice how many ways the abuses were known or should have been known at the time they were happening and how the abuse was hushed up; notice how many children were abused and the leniency of the sentences. This is the Canadian legal system in action, failing to protect children or to ensure equality of the law for indigenous peoples.

A conviction in 1987.

> Keavin Amyot was appointed to a position with the federal Department of the Secretary of State in February 1966. At some time in that year, he was convicted in Ottawa of committing an act of gross indecency on a child. In that case, he assaulted a neighbour's child he was babysitting. He received a suspended sentence on August 30, 1966. A month and a half later, on October 12, 1966, Guy Voisin, the executive secretary of the Oblate Indian and Eskimo Welfare Commission, wrote a letter to the principals of Oblate residential schools, recommending Amyot for employment as a supervisor. Voisin informed the principals, "He seems to me to have good principles of education and personal life." Voisin noted that Amyot was working for the federal Secretary of State, but was prepared to accept a pay cut to work in the missionary field. Voisin's recommendation appears to have been successful: by November, Amyot was working as a supervisor at the Qu'Appelle, Saskatchewan, school. He worked eight months at the Qu'Appelle school, starting in November 1965. In the fall of 1966, he went to work at the Mission, British Columbia, school. An undated document from the Mission school indicates that he worked there as a supervisor for at least two years. He resigned his position at Mission in July 1969. Three years later, he was convicted of indecent

[53] *Ibid*., p. 424
[54] *Ibid*., chapter 32
[55] McMahon, Thomas L., "Why Did It Take So Long for Indian Residential School Claims to Come to Court? The Excruciatingly Gradual Civilization of Canada's Legal System." (October 5, 2016). Available at SSRN: https://ssrn.com/abstract=2844543

> assault on a child in Edmonton. He was again given a suspended sentence.
>
> Almost twenty years later, in April 1987, Amyot pleaded guilty to sexually assaulting four Inuit boys in Sanikiluaq, Northwest Territories. The assaults took place in 1985 and 1986, while Amyot was employed as a social worker by the government of the Northwest Territories. He was sentenced to two years less a day in jail, followed by three years on probation. In British Columbia, former students of the Mission school informed the RCMP Residential Schools Task Force that they had been abused by Amyot at that school in the 1960s. Amyot died in 2003 before charges against him with regard to those allegations could be finalized.[56]

In 1988, Cyr was convicted in Saskatchewan for touching a person under the age of fourteen for sexual purposes and setting traps to cause bodily harm. He was fined $300.[57]

Derek Clarke (1988 and 1996), Anthony Harding and the Lytton School

In 1988, Derek Clarke was convicted. He had worked at the Anglican St. George's Indian Residential School in Lytton. Before explaining his specific offences, it is useful to provide the background context at the Lytton school.

In this paper, I have chosen not to repeat or discuss in any length how "discipline" was used in the residential schools. My focus in this paper is on criminal convictions that arose. However, just to give a flavour of what you will find when reading the TRC report's chapters on "discipline," I include a passage about discipline at Lytton here.

> In 1957, Helen Clafton, an ex-dormitory supervisor, wrote that at the Lytton school, "the 'strap' is altogether too much in evidence." There did not appear to be any limit on who could administer such punishment: "The child can be punished, nagged, pounced upon or threatened by anybody and this is carried to fantastic lengths."
>
> In that same year, Betty-Marie Barber, an employee of the Social Welfare branch, led a two-page report on problems at the Lytton school. Three children were complaining of the discipline at the school. Two said their teacher hit them in the face and strapped them. A third said that although she liked her teacher, she could hear children being strapped in another classroom.
>
> Barber also passed on concerns that had been presented to her by the staff of the public high school in Lytton, which the older students from the residence were attending. A home economics teacher had asked Barber to see if she could do anything "about children who were being beaten." One boy had come to school with his face and eyes so badly beaten that he could hardly open his eyes. When questioned by Barber, he said he had been beaten by other boys at the school. Barber thought this was possible, but not likely. Six teachers from the high school told Barber that they were worried about the conditions at the Lytton residence. Students came to school tired, with their work not done, and exhibiting a "poor attitude." They said that the students had told them that the Lytton principal, C. F. Hives, had told them "they are dirty stinking Indians and no one has any respect for them." The students

[56] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 428 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

[57] This case is included above in the longer discussion of abuse at Gordon's school

> also reported that when the high school issued report cards, the principal inspected each student's report in front of the assembled students and disciplined those with poor reports. The teachers said the students were fearful at report time, and some returned to the school with black eyes several days after the reports were issued.
>
> Barber met with two boys from the residence at the high school on November 28, 1957. They both had "severely swollen black eyes," but were not willing to talk about what had happened to them. That same day, she met with Miss Cameron, a teacher who had been hospitalized for a rash she developed while working at the Lytton residential school. "She has verified the fact that the children are continually called dirty Indians and told that they are not respected by the rest of the country, nor are their parents any good." She also said that the principal had announced in chapel that he would punish anyone caught speaking to a girl who become pregnant while a student at Lytton. "Miss Cameron also states that the older boys and girls who step out of line or make any remarks to their teachers while walking down the halls are usually struck or slapped in the face as they do so." Three of the teachers at the school were leaving the school by the end of the year.[58]

Just to emphasize: nothing in the above passage gave rise to reports to police, police investigations, charges or convictions.

The TRC report also provides specific, documented examples of how various child abusers groomed their victims. Here is the passage concerning Derek Clarke:

> At the Lytton, British Columbia, school, Derek Clarke initiated his abuse of a student by fondling him under the blankets in the morning. The excuse given was that he was checking for "things." He provided boys he was abusing with small treats or favours such as chocolate, soda pop, gum, or access to his record collection. He would also take them, with the principal's permission, on weekend field trips. He took advantage of this additional level of control and privacy to abuse many of the boys who accompanied him. The boys who had been abused often became the object of ridicule in the school, being referred to as "Clarke's boys."[59]

The TRC report then proceeds to discuss Clarke's offences specifically.

> The prosecutions at the Lytton school reveal a callous pattern of behaviour in which abuse was excused and covered up in an e ort to protect both the system and the perpetrators. In February 1966, Principal Anthony Harding accepted the resignation of a staff member. He thanked the staff member for his past services and wrote that he trusted that he would "soon find a type of employment that will give greater scope to your undoubted abilities." In reality, Harding had forced the man to resign after finding him in bed with a thirteen-year-old female student. Harding had previously warned him and the student about the dangers of the emotional attachment that he thought was forming between them. In this instance, the girl said the staff member had forced "her (while he was under the influence of alcohol) to have intercourse with him." Principal Harding informed the British Columbia director of student residences for Indian Affairs of the manner in which he had handled the matter. There is no record to indicate that the police were contacted. The Truth and Reconciliation Commission's

[58] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 384-385 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf
[59] *Ibid*., p. 415

file review has not located any documents in which Indian Affairs took issue with Harding's approach in this case.

A few months before this individual was fired, Derek Clarke started working at the Lytton school. Clarke had completed Grade Eight and had spent one term as a student in the St. Christopher's School for Emotionally Disturbed Children in North Vancouver. Prior to coming to Lytton, he had been a child-care worker at another Anglican Church institution (the source documents do not name the institution). He had been asked to leave that institution because of his lack of qualifications, but, even as he was letting Clarke go, his supervisor arranged for him to get a job in a similar position at the Anglican-run residential school in Lytton. In what may have been a reflection of the difficulty that residential schools had in recruiting staff, the Lytton administration hired Clarke without a job interview or a review of his references. This was in 1966, when the Anglican Church was already well aware of the risks in hiring employees who had not been screened; as noted earlier, the church had already initiated its own 'do-not-hire' list in 1960.

At Lytton, Clarke was the junior/intermediate boys' supervisor. He used his authority and control over the dormitory to initiate a reign of sexual terror. In May 1973, a teacher at the local elementary school attended by students from the Lytton residence overheard a group of boys talking about a supervisor "doing things to boys." She took the information to her principal, Joseph Chute. He contacted Anthony Harding, who was then the Lytton residence administrator. Harding and Chute questioned a number of boys, who spoke of the sexual abuse they had been subjected to by Clarke. Because the abuse had taken place at the residence, which was supervised by Harding, and not at his school, Chute said he did not believe he had a responsibility to report it to the police.

Harding confronted Clarke, telling him that if he did not resign, the case would be turned over to the police. On May 20, 1973, Derek Clarke resigned his position at the Lytton residence as a child-care worker. In his letter of resignation, he stated that his reasons for resigning were "personal to myself." In accepting the resignation, Harding wrote, "Your past services in the field of practical Child Care have been appreciated and we trust that your personal problems will soon be cleared up." Clarke eventually found work as a janitor at the Central City Mission in Vancouver.

Harding never contacted Indian Affairs or the police. Harding did inform Anglican Church officials of Clarke's behaviour and of the action he had taken in response. The boys' parents were not informed of what had happened, and no attempt was made at the time to provide the boys with any form of counselling or support.

Fifteen years would pass before Clarke would be held to account for the abuse he inflicted. In April 1988, he was convicted on eight counts of buggery and six counts of indecent assault, all committed while he was a dormitory supervisor at the Lytton school. He also pleaded guilty to three charges of buggery committed at the Central City Mission. He was given a twelve-year prison sentence. The trial judge concluded that Clarke was responsible for at least 140 illegal sexual encounters. The total number, he said, might be as high as 700. The victims were between nine and eleven years of age. One of his victims committed suicide months before the trial started. Additional allegations about Clarke's behaviour at Lytton emerged in 1995. The following year, he was charged on four additional counts and given an additional two-year sentence.

The year after Clarke's 1988 conviction, Anthony Harding, the former administrator of the

> Lytton residence, who had been informed of Clarke's behaviour and had forced him to resign in 1973, went on trial himself. He was charged with three counts of gross indecency and one charge of buggery. The charges related to events that were alleged to have occurred between 1969 and 1976. One of the assaults was alleged to have involved a former student, who said that he had lived in Harding's home under a fostering arrangement in 1975. Among other things, it was alleged that Harding had assaulted a student after the student informed Harding of the sexual abuse of boys at the school by Clarke. Harding was acquitted.
>
> In a 1998 civil case in which former students sued Canada and the Anglican Church for damages, witnesses testified that Harding, who lived in rooms adjoining the Lytton residence, had also provided senior students with access to alcohol in his room before sexually assaulting them. Justice Janice Dillon of the British Columbia Supreme Court noted that although Harding had been tried and acquitted on sexual assault charges, she accepted the evidence regarding Harding's behaviour. She further suggested that the evidence explained Harding's decision not to report Clarke to the police or to Indian Affairs. (Harding had died in 1992.)[60]

I have written a separate paper describing all of the civil court cases relating to Indian residential schools, including the above cases about Clarke's and Harding's activities.[61]

Williams Lake convictions: 1989, 1991, 2000

Convictions relating to the residential schools at Williams Lake and Kuper Island, British Columbia.

> Four separate sets of charges were eventually laid against former staff members of the Williams Lake, British Columbia school. Harold McIntee was an Oblate priest who was appointed to work at the school in 1959. He, along with other Oblates, was quartered on the fourth floor of the building. While he was at the school, he sexually abused male students. After four years, McIntee left the Williams Lake school to serve as the parish priest in Duncan, British Columbia. When a thirteen-year-old Aboriginal boy who had been sexually abused at a local Catholic school came to McIntee for counselling, McIntee established a sexual relationship with the youth that lasted for two years. He left the priesthood in the 1970s, but returned to it in the 1980s and served as a parish priest in British Columbia. During this period, he committed or attempted to commit a number of sexual assaults on young men he met through his ministry.
>
> McIntee's activities came to light only in 1988, when the Mounted Police conducted an investigation into allegations of abuse allegedly committed by a boy who had been abused by McIntee at Williams Lake. As the judge presiding over McIntee's trial noted, the officer investigating that case "came to realize he had opened a veritable Pandora's box: Father McIntee's name kept jumping out." McIntee was convicted in 1989 on charges of sexually assaulting seventeen Aboriginal and non-Aboriginal boys over a period of twenty-five years.[62] Thirteen charges related to assaults committed at the Williams Lake school. He was

[60] *Ibid*., pp. 424-426

[61] McMahon, Thomas L., "The Horrors of Canada's Tort Law System: The Indian Residential School Civil Cases" (June 9, 2017). Available at SSRN: https://ssrn.com/abstract=2983995

[62] "At the Williams Lake, British Columbia, school, boys' supervisor Harold McIntee would slip into the third-floor boys' dormitory at night. There, he would fondle them in their sleep. Some boys would object and force him to stop. When they objected, he said that he was simply checking them for lice. The older

sentenced to two years on each charge, to be served concurrently, and three years of probation.

Glenn Doughty joined the Oblate order in 1960. By 1964, he was listed as working at the Williams Lake school. He later went to work at the Kuper Island school. Doughty resigned his position as the child-care worker for the senior boys there in December 1972, citing personal reasons. He was arrested in 1990 and charged with five counts of indecent assault and five counts of gross indecency. At the time of his arrest, he was the chaplain of Lakehead University, in Thunder Bay, Ontario. In 1991, he pleaded guilty to four charges of gross indecency arising from his treatment of students while he worked at the Williams Lake school. He was sentenced to one year in jail. Four years later, he pleaded guilty to charges of indecent assault and gross indecency arising from his abuse of students at the Kuper Island school. He was sentenced to another four months in jail. In 2000, thirty-six more charges were laid against him for the abuse of students at both the Williams Lake and Kuper Island schools. He was sentenced to an additional three years in jail.

Edward Gerald Fitzgerald worked as a dormitory supervisor at both the Fraser Lake and Williams Lake schools in British Columbia between 1965 and 1973. Twenty-one charges were laid against him in 2003. He was charged with ten counts of indecent assault, three counts of gross indecency, two counts of buggery, and six counts of common assault. At the time that he was charged, Fitzgerald was living in Ireland. Because there is no extradition treaty between Canada and Ireland, he had not, as of 2006, been returned to this country to stand trial. At that time, Mounted Police spokesperson Mike Pacholuk said that even if there were an extradition process in place, getting the then eighty-two-year-old Fitzgerald back to Canada before his death would be unlikely. In 2011, the RCMP believed that Fitzgerald was still alive.

Hubert O'Connor was principal of the Williams Lake school from 1961 to 1967. By 1969, he was responsible for Oblate relations with Indian Affairs officials in British Columbia. In 1971, he was elevated to the position of Bishop of the Diocese of Yukon. He later became Bishop of Prince George in northern British Columbia. In 1990, O'Connor was charged with two counts of rape and two counts of indecent assault.[63]

O'Connor's case is the one case with the most court decisions, most controversy and the only residential schools criminal case to make it to the Supreme Court of Canada. I discuss the O'Connor case in detail later in this paper.

Claude Frappier convicted in 1990.

In the 1960s, Claude Frappier worked as a child-care supervisor at the Assumption School in Assumption, Alberta.[64] According to one Indian Affairs document, he was working there in 1967 and had four years' experience. He went to work at Coudert Hall, the Roman Catholic residence in Whitehorse, Yukon, in 1970. Just one year later, the federal government

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boys were aware of McIntee's activities and taunted him." Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 384-385 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf, p. 415

[63] *Ibid*., pp. 428-430

[64] "At Coudert Hall in Whitehorse, Yukon Territory, Claude Frappier bribed students with candy and threatened to take away privileges and to disclose to others that they had engaged in sexual activities." *Ibid*., p. 415

> dismissed Frappier after conducting an investigation into allegations of sexual assault on hostel residents. Government officials did not inform police or parents about the findings of the investigation. It was not until 1990 that he was charged and convicted on thirteen counts of indecent assault on boys ranging in age from eight to eleven. He was given a five-year sentence. After his conviction, an internal Indian Affairs review of its files could find no "written investigation" into the events surrounding his dismissal, and neither could Indian Affairs locate any information on "whether or not the RCMP were notified at the time."[65]

Frappier's is a rare residential schools criminal case that resulted in the court decision being published: *R. v. Frappier*, [1990] Y.J. No. 163 (QuickLaw).

A conviction in 1994 that was not for sex abuse.

> In May 1965, the nurse at the Kamsack, Saskatchewan, school reported that that least seven students had been burned by the boys' supervisor, an R. Jubinville. The burns were on their arms and hands and had been inflicted with a lighter. The school principal, E. Turenne, concluded that "these incidents reveal a definite sign of sadism on the part of this man" and recommended that he be discharged. Jubinville was discharged the day after the incident was drawn to the principal's attention. Indian Affairs official K. Kerr discussed Turenne's actions with a member of the local Mounted Police detachment, who "agreed with the action taken." At the time, the police took no further action. However, in the 1990s, complaints from former students led the police to revisit the case. According to the Mounted Police, Jubinville was convicted on three charges of assault causing bodily harm and fined $500.[66]

A conviction in 1995.

> Between 1976 and 1983, George Zimmerman, the husband of a dormitory supervisor at the Prince Albert Indian Student Education Centre, sexually assaulted nine girls living at the residence. In 1995, Zimmerman was convicted on nine counts of indecent assault, one count of attempted sexual intercourse, and two counts of sexual intercourse. He was given a five-year sentence.[67]

Criminal activity of a "baker".

> In May 1951, Martin Saxey, a member of the Cheeleshat Band in British Columbia and a former residential school student, was convicted of manslaughter for killing a man after an argument over a driftwood log. After his imprisonment, his wife and children were allowed to live at the Christie school on Meares Island, on the coast of Vancouver Island. Upon Saxey's release from jail in 1955, the school administration hired him to work as a baker, boat driver, and maintenance worker. While he was working at the school, Saxey sexually abused children. In the case of at least one boy, the abuse continued for five years, from 1957 to 1962. The victim did not report any of these incidents to the police until 1995. By then, Saxey had been dead for nearly ten years, so no criminal charges were laid. However, a civil court confirmed that Saxey had abused students while he was at the school.[68]

In fact, Saxey had originally been convicted of murder and sentenced to death before the courts

[65] *Ibid*., pp. 450-451
[66] *Ibid*., p. 391
[67] *Ibid*., p. 450
[68] *Ibid*., p. 427

ordered a retrial and he was subsequently convicted of the lesser charge of manslaughter.[69] Although Saxey was not charged or convicted, his activities led to a civil suit that reached the Supreme Court of Canada, probably the last residential schools civil case that will ever be decided by the Supreme Court.[70] In many ways, the Supreme Court decision in the civil case is a travesty of justice that might endanger children in the future. I will discuss this case in detail in a forthcoming paper on civil lawsuits. In the meantime, a former Dean of the University of Ottawa Law School wrote an excellent paper on this and other cases, called "The baker did it."[71]

Investigations in Nunavut in the 1990s but no charges

During the residential school period, Nunavut was still part of the Northwest Territories. In the 1990s, there was an extensive police investigation into abuse at the Roman Catholic Turquetil Hall in Igluligaarjuk (formerly Chesterfield Inlet), which had closed in 1960.

Turquetil Hall

In the summer of 1993, approximately 150 former students of the Turquetil Hall residence attended a reunion in Chesterfield Inlet, Northwest Territories. The event had been organized by three former students: Piita (also known as "Peter") Irniq, Jack Anawak, and Marius Tungilik. In 1991, at a hearing in Rankin Inlet of the Royal Commission on Aboriginal Peoples, Tungilik had spoken about his experience of being sexually abused at the Chesterfield Inlet residence. He was one of the first former students to speak out publicly about such abuse. In a later memoir, he wrote:

> I was really undecided as to whether I should openly speak about it because it was not done. I was tormented inside because I knew it was the right thing to do and I felt I did not have the courage or the strength. I felt I was going to die if I said anything publicly. But luckily I was able to spend some time out on the land, not by choice. I got lost out on the land for three days just by myself. I was okay. It was in the late fall, November. But those three days alone gave me enough time to make up my mind. Yes, I'm going to do this no matter what.

According to Irniq, the three former students decided to hold a reunion because they felt they "had to do something to restore our health and history and pride."

Also in attendance at the reunion were representatives of the government of the NWT, and members of the Oblates and the Sisters of Charity, the two Roman Catholic orders that had been involved in the operation of the residence and the day school associated with it. Many of the people at the reunion spoke of the physical, sexual, and emotional abuse they had experienced at the residence. According to news reports, Bishop Reynald Rouleau said that it was "undeniable" that sexual abuse had taken place at the school. The reunion led forty-nine former students to petition the government of the Northwest Territories to hold a public inquiry into the operation of the facility.

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[69] *B. (E.) v. Order of Oblates*, 2001 BCSC 1783, http://canlii.ca/t/4wgs at para. 8

[70] *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60 http://canlii.ca/t/1lvtq

[71] Feldthusen, Bruce, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did it" (2007), 22 *Canadian Journal of Law and Society* 61; available at SSRN: https://ssrn.com/abstract=2431786

Although no public inquiry was held, Yellowknife lawyer Katherine Peterson was appointed to carry out an investigation. At the same time, the Mounted Police undertook a criminal investigation into the school. Two officers spent over a year investigating 115 allegations of physical assault and 78 allegations of sexual assault. Petersen spoke with fifty-five former students in Igloolik, Kangiqliniq (Rankin Inlet), Churchill, and Yellowknife, and by telephone. She also held community meetings.

She concluded that "serious incidents of physical abuse occurred at the Chesterfield Inlet school. These incidents of abuse exceeded reasonable measures of discipline, even should one take into account the time during which the school was in operation and the differing views accorded to discipline appropriate to that time." It was also her opinion that successful prosecutions on charges of physical assault might be unlikely because, in some cases, the students could not identify the assailant with certainty. In other cases, the assailants were either dead or not "available for prosecution."

Students stated that they had been sexually assaulted by both male and female staff. According to Peterson, "The allegations of abuse include fondling of the breast areas of female students, the genital areas of female students, the genital areas of male students and inappropriate sexual exhibition. An aura of fear, confusion and silence appears to surround the students' experiences at the time."

She said that many students felt "powerless to prevent repeat occurrences." It was her own conclusion that "serious incidents of sexual assault did in fact occur at the Chesterfield Inlet school during its years of operation."

Peterson reported that she understood that "two prosecutions of physical assault are potential or may be recommended to the Federal Department of Justice." As a result of the barriers to prosecution noted above, it was expected that "approximately 3 counts of indecent assault on a male, and 2 counts of indecent assault on a female may result in prosecution."

Peterson made ten overall recommendations. The first was that former students be given financial assistance in exploring the extent to which "civil legal relief is available in the form of an action in tort or negligence." She felt that "due to the fact that class actions involve rigid guidelines of what constitutes a 'Common Interest,'" this avenue should not be seriously explored. She called on the government of the Northwest Territories to negotiate with the federal government and the Roman Catholic Church to identify resources that could be "committed to healing, therapy and counselling services for former students and their families." More directly, she called on the Northwest Territories government to provide counselling and support services to former students. She felt that a public inquiry into the events at the school should be held only if "negotiations with the Church and federal government do not proceed satisfactorily."

In June 1995, the Mounted Police announced that the Department of Justice had decided that "the evidence and circumstances do not support criminal charges."[72]

Arthur Plint, sexual terrorist at the Port Alberni school: 1995 and 1997

[72] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 439-440 (2015)
http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

Arthur Pint was convicted in 1995 and 1997. The TRC reported:

> Arthur Plint first went to work at the Alberni residential school as a dormitory supervisor in 1948. He left in 1953 to become a postal worker. In 1963, he returned to the school as a supervisor and remained there until 1968. He sexually abused students at the school during both periods of his employment.[73]
>
> …
> At the Alberni school in British Columbia, Arthur Plint employed bribes, threats, and physical force in his ongoing campaign of sexual terrorism. One of his victims was ten-year-old Willie Blackwater. In 1964, shortly after Blackwater had arrived at the school from his home on the Kispiox Reserve in northern British Columbia, Plint called him into his room, claiming that Blackwater's father was on the phone. Once the boy was in his room, Plint sexually assaulted him. Several days later, he assaulted him once more. When Plint discovered that Blackwater had told his father of the assaults, Blackwater says, Plint beat him so badly that he had to be treated in the school infirmary.[74]
>
> …
>
> In 1995, Plint pleaded guilty to eighteen counts of indecent assault and was sentenced to eleven years in jail. In sentencing Plint, Justice D. A. Hogarth wrote that "so far as the victims of the accused in this matter are concerned, the Indian Residential School System was nothing but a form of institutionalized pedophilia, and the accused, so far as they are concerned, being children at the time, was a sexual terrorist." In 1997, Plint pleaded guilty to an additional seventeen charges of abuse arising from his years at the school. He was sentenced to serve eleven years concurrent to his original sentence. Plint was granted day parole in 2003. At the time, he was eighty-five years old.[75]

Arthur Plint's was one of the few cases that produced a published legal decision, in *R. v. Plint*, [1995] B.C.J. No. 3060 (BCSC).

The judge said that Plint [31] "used any and all kind of methods" over the children, [32] "[s]ome were threatened. Some were bribed. Some were outrightly forced to participate. … [33] … They [the abuses] did not occur just once or twice with one particular boy or another boy, they were repetitively occurring from time-to-time and through-out almost all stays of these children in the residential school. In almost all cases there was the threat of violence, or the actual use of violence, and particularly the threat or the actual use of violence if anybody had the courage to decide to complain."

The judge continued:

> [37] The statements and the evidence given are not some wild vengeful exaggerations … They indicate paradigms of personality disfunction that this kind of offence causes children, no matter when it occurred or where it occurs. … a lack of personal self-esteem, a hostility and aggressiveness towards all person in authority. There is alcoholism, there is drug addiction, and what is really worse is that there is a tendency of such persons who have been

[73] *Ibid*., pp. 423-424
[74] *Ibid.,* p. 415
[75] *Ibid*., pp. 423-424

> inflicted with this kind of conduct to take out on other persons exactly what has been administered to them.
>
> [38] There is nothing new in what I heard, but I have never heard it expressed with such eloquence. The effect of the imposition of aggressive sexual misconduct on children by an adult during the course of the child's early sexual development is devastating and destroys many of the fundamental traits of human existence. They are deprived of the right to an adequate and appropriate sexual response during one's lifetime.

Plint's actions led to a civil lawsuit that ultimately reached the Supreme Court of Canada. It is one of the most important cases in Canadian legal history because it led to the Indian Residential Schools settlement agreement.[76]

There were two other convictions relating to the Alberni school.

> Charges were laid against two other former employees of the Alberni school. One of them was Bruce Donald Haddock. Like Plint, Haddock went to work at the Alberni school in 1948. While he was there, he committed sexual assaults against both male and female students. He was charged for these offences in 2003, convicted on four counts of indecent assault, and sentenced to twenty-three months in jail in 2004. In addition to working at the Alberni school, Haddock also worked as a supervisor at the Anglican school at Alert Bay, British Columbia, a position he left in 1952.
>
> David Forde worked as a boys' supervisor at the Alberni school from 1959 to 1960. In 2003, he was charged with four counts of sexual assault, dating back from his time at the school. When he was charged, he was living in Puyallup, Washington. He died in April 2005 before his case came to trial.[77]

Leonard Hands (1996) and Sioux Lookout

The conviction of Leonard Hands in 1996. The TRC report states:

> Leonard Hands served as a counsellor and substitute teacher at the La Tuque, Québec, school from 1964 to 1966. He went to work at the Sioux Lookout, Ontario, school in 1966. He resigned from his position at the Sioux Lookout school in the fall of 1971 to take a position with the Anglican Church in Red Lake, Ontario. While he was at Sioux Lookout, Hands worked as a boys' dormitory supervisor, where he sexually abused male students. One of them was Garnet Angeconeb. Hands started abusing Angeconeb in 1968, when he was eleven years old, and continued until Angeconeb left the school the next year.
>
> Phil Fontaine's public disclosure of the abuse that he had experienced at the Fort Alexander school inspired Angeconeb to talk about his own experiences. He attempted to contact Hands, who was then an Anglican priest working in Kingston, Ontario. At first, Hands refused to speak with him. Angeconeb pursued the matter with Anglican Church officials. Eventually, Bishop Tom Collins arranged a meeting between Angeconeb and Hands at the Sioux Lookout school site. Angeconeb later recalled that meeting: Hands not only denied having abused

[76] *Blackwater v. Plint*, 2005 SCC 58 http://canlii.ca/t/1lsvn
[77] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 424 (2015)
http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

> Angeconeb, but he also accused Angeconeb of trying to blackmail him.
>
> Angeconeb took his complaint to the Ontario Provincial Police. The police force had already received a complaint from another former student, Brian Brisket, and would receive eighteen more complaints about Hands. In 1996, Hands pleaded guilty to nineteen counts of indecent assault and was sentenced to four years in jail.[78]

Hands' conviction is reported in *R. v. Hands*, [1996] O.J. No. 264. The sentencing judge said at para. 6:

> The Supreme Court of Canada has recognized the extreme emotional trauma that befalls victims of this kind of conduct. It is well documented that many victims of sexual abuse feel themselves somehow responsible for what occurred. Some feel that they contributed to what happened. It is to your credit Mr. Hands that in this courtroom and before these people you acknowledged full responsibility for these crimes. It is to be hoped that these young men will as a result of your acknowledgement no longer feel confused about themselves or indeed blame themselves for what occurred in their young lives.

Fort Albany (St. Anne's IRS) convictions

The Fort Albany, Ontario (St. Anne's Residential School) convictions in 1998 and 1999.

> In 1992, former students of the Fort Albany school organized a reunion that attracted 300 people. Thirty of them spoke to a special panel about the physical and sexual abuse they had experienced at the school. The report of the panel stated:
>
> > Of the 19 men who gave testimony, 10 were sexually abused. Almost all of them were physically abused in other ways; spiritually abused, humiliated, strapped, hit with rulers, hair pulled and dragged by the hair, stabbed with a pencil, made to eat their vomit, etc. etc.
> >
> > Of the 11 women who gave testimony, 2 were sexually abused. Almost all of them were physically abused in a variety of ways, including strapping, being made to sit in the electric chair, being made to eat their vomit, being made to kneel on concrete floors, locked away in dark basements, being wrongly punished for things they did not do, etc. etc.
>
> One of the organizers of the reunion, Mary Anne Nakogee-Davis, later told the media that she had been sexually abused by a priest when she had been a student at the school.
>
> The reunion report also made reference to the use of an electric chair at the school. Several people talked about the electric chair that was used in the girls playroom. It seems odd how an electric chair can find its way into a Residential School; however, it seems to have been brought to the school for fun. Nevertheless, all the people who remembered the electric chair do not remember it in fun, but with pain and horror.
>
> Edmund Metatawabin spoke of how he and other students at the Fort Albany school had been punished by being placed in what students referred to as the "electric chair." According to Metatawabin, this was a metal-framed chair with a wooden seat and back. After students

[78] *Ibid*., pp. 442-443

were buckled into the chair, an electric current from a hand-cranked generator was run into their bodies. The chair had been constructed by Brother Goulet, the school's electrician, and had apparently been used initially as an entertainment. However, it came to be used as an instrument of punishment. Metatawabin said he had "sat on the electric chair three times." Mary Anne Nakogee-Davis told the *Globe and Mail*, "They would put children in it if they were bad. The nuns used it as a weapon. It was done to me on more than one occasion. They would strap your arms to the metal arm rests, and it would jolt you and go through your system. I don't know what I did that was bad enough to have that done to me." Andrew Wesley recalled that the chair was originally used for community events: "I remember my father sitting on it one time, just competing with other men to see who would last longer sitting in it. It was an entertainment. But eventually, somehow somebody got a hold of it in the basement and started using it to do discipline, especially on the girls."

After the reunion, Metatawabin, who was then the chief of the Fort Albany First Nation, asked the Ontario Provincial Police to investigate complaints of the treatment that students received at the school in the 1950s and 1960s. In 1997, seven former staff members were charged with a variety of offences.

One of the nuns at the school, Sister Anna Wesley, was convicted in the spring of 1999 of three charges of administering a noxious substance and five counts of assault. Judge Robert Boissoneault imposed no sentence on the seventy-two-year-old woman, saying that in her case, the conviction was punishment enough. Jane Kakeychewan, a nun, was convicted of assault in 1998 and given a conditional sentence. Marcel Blais was convicted on one charge of indecent assault but did not serve time in prison. John Rodrique pleaded guilty to five counts of indecent assault and was sentenced to eighteen months in jail. Claude Lambert pleaded guilty to indecent assault and was sentenced to eight months in prison. Charges against Claude Chenier were dropped because the complainant did not appear in court. John Cushing was acquitted of indecent assault. None of the documents made available to the Truth and Reconciliation Commission of Canada indicate that charges were ever laid in relation to the use of the electric chair.[79]

A conviction in 2004.

In 2004, Norbert Dufault, the former principal of the Beauval school, was sentenced to two years in jail for sexually assaulting eight young girls during the 1950s and 1960s. The assaults took place when the Oblate priest was the parish priest at the remote Dene community of Dillon, Saskatchewan.

Dufault became the principal of the Beauval school in 1963. Many of the girls he had assaulted in Dillon were also sent to Beauval. When one of these girls discovered that Dufault had arranged to have her younger sister see him after class, she confronted him. She told him that if he assaulted her sister, she would publicize the assaults that had taken place at Dillon. The girl's stand saved her sister from assault, but led to her own dismissal from the school, cutting short her education.

When he left Beauval in 1965, Dufault continued to work in northern Saskatchewan and Manitoba. In the later years of his career, he worked in southern Manitoba and in Winnipeg. In 1990, an Oblate superior confronted him with allegations regarding his activities at Dillon in the 1950s. According to Dufault's lawyer, the priest acknowledged the allegations to be

[79] *Ibid*., pp. 441-442

> true. At this point, again according to Dufault's lawyer, the Oblates removed him from active duty and placed him in a residence in Lorette, Manitoba. He lived there until his trial in 2004. In 2011, the Oblate publication *Info Lacombe* published a two-page profile on Dufault that mentioned the years he spent in Dillon and Beauval, emphasizing the personal sacrifices he had made in his career. No mention was made of his convictions.[80]

According to a news report of his 2004 trial, when Dufault was the priest he would invite girls into the church rectory and "place the girls on a table, hike up their dresses, remove their panties, place a pillow on their stomachs and fondle their vaginal areas. Some of the children were as young as six." Dufault became the principal of the Beauval school in 1963. Many of the girls he assaulted were sent to the school.[81]

The problem did not end with his leaving town to take over the residential school in Beauval. One of the victims told Bruce Slusar, her lawyer, that after a road was finally built into the isolated community of Dillon in the 1980s, she contacted the RCMP to complain about what happened when she was a child, only to be told Manitoba was outside their jurisdiction.[82]

The above is an example of an individual convicted of sexually assaulting young indigenous girls, but the specific connection is not tied directly to the residential school. When trying to identify the known sexual abusers who worked at residential schools, should Dufault be categorized as a case involving an Indian residential school?

A conviction in 2005. The TRC states:

> There is only one recorded prosecution for the abuse of residential school students in Manitoba. In 2005, Ernest Constant, who had attended the Dauphin school in the early 1960s and worked there in the late 1960s as a supervisor, was convicted of indecently assaulting seven Dauphin students. He was sentenced to two years less a day.[83]

Gerald Moran's conviction in 2004 and acquittal in 2009.

> Gerald Moran, who worked at both the Mission and Kamloops schools, was convicted of twelve charges of sexual abuse and given a three-year sentence in 2004. Prior to his trial, he had been living in a monastery in Saskatchewan. The Truth and Reconciliation Commission of Canada has not been able to determine the complete period of time that Moran had worked at residential schools. A letter from 1961 indicates that Moran had previously worked under the direction of M. D. Kearney, who was principal of the Mission school from 1960 to 1963. Undated documents say that Moran worked at the Mission school when H. F. Dunlop was principal. Dunlop held that position from 1964 to 1973.
>
> In 2002, a warrant was issued for the arrest of a former Mission school dormitory supervisor. He faced charges of indecent assault and gross indecency. In 2006, he was arrested in Thailand and returned to Canada. He made his first court appearance in March 2007. In September 2007, a pretrial hearing for his case was set for October 18, 2007. His trial was set

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[80] *Ibid*., p. 449
[81] Gerry Klein, "Priest jailed for sex assaults," *The Saskatoon Star Phoenix*, 10 January 2004
[82] "Time to stress abuse victims not to blame," *The Saskatoon Star Phoenix*, 13 January 2004
[83] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 430 (2015)
http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

for January 21 to January 24, 2008, in Abbotsford, British Columbia. One of the men he was accused of having abused died in the summer of 2007. He was acquitted on all charges in March 2009. Justice Grist said the case had not been proved beyond a reasonable doubt, pointing to discrepancies in the evidence.[84]

8. Summary of IRS convictions

Let's review. In the first 100 years that Indian residential schools operated (they began, as part of government policy, in 1883), the first criminal convictions relating to abuse in residential schools were of two school girls (1939) and a mother who was trying to take her girls out of a residential school (1945).

The first conviction for staff abuse at Indian residential schools was of Holfeld in 1945, William McNab (1947), Kenneth McNab (1955), Courtney (1955), Ludford (1960), Houston (1962), Pooley (1963), Hamilton (1964), Perdue (1964), Joseph (1970) and Leroux (1979). Eleven convictions of residential school staff over the entire first century of Indian residential schools and none in the first half century.

To sum up again: Houston was convicted in both 1962 and 2004, Amyot in both 1972 and 1987, Leroux in both 1979 and 2013.

Once the residential school era was basically over, more convictions followed: Amyot (1987), Cyr (1988), Clarke (1988), McIntee (1989), Frappier (1990), Doughty (1991 and 2000), Starr (1993), Jubinville (1994), Zimmerman (1995), Hands (1996), Plint (1997), Kakeychewan (1997), Blais (1997), Rodrique (1997), Lambert (1997), Comeau (1998), Wesley (1999), Fitzgerald (2003), Haddock (2003), Houston (2004), Moran (2004), Dufault (2004), Constant (2005).

That is how the criminal prosecution of abuses at residential schools ends. It started with acquittals of residential staff (1928, 1930, 1931). Convictions started with two school girls (1939) and a mother trying to get her girls out of a residential school (1945). 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 indigenous children.

It is also important to remember that Indian residential schools were not the only places or contexts where indigenous children were being abused. Ralph Rowe is just one example of how pedophiles have preyed on vulnerable indigenous children over the years. "A 2012 guilty plea brought Rowe's tally of convictions to nearly 60 sex crimes". He served less than five years for his crimes.[85] This is only one example of these kinds of convictions. More research is needed to compile the history of these non-IRS convictions.

9. Bishop Hubert O'Connor fights for nine years and goes to the Supreme Court

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[84] *Ibid*., pp. 427-428

[85] Jody Porter, "Survivors of ex-priest pedophile say he deserves more prison time
Ex-Anglican priest, scoutmaster spent about 5 years in prison after abuses on Ontario First Nations," CBC News, May 11, 2015 http://www.cbc.ca/news/canada/thunder-bay/survivors-of-ex-priest-pedophile-say-he-deserves-more-prison-time-1.3068735

"I am a celibate man." – Bishop Hubert O'Connor,
"accountant" at Williams Lake Residential School (St. Joseph Mission IRS)[86]

The case of Bishop Hubert O'Connor is an important case for many reasons: what it shows about how the legal system dealt with sexual assaults, indigenous women and Indian Residential Schools; the fact that the case involved the highest ranking member of the Catholic church ever to be charged with an offence relating to Indian Residential Schools; and the fact that the case gave rise to a very important Supreme Court of Canada decision about privacy of victims of sexual assaults, which Canadians and Parliament found so appalling that Parliament almost immediately enacted a new law to implement the reasons of the *dissenting* Supreme Court justice. (Soon afterwards, the SCC upheld the new law that Parliament enacted.)

When you read about the *O'Connor* case, try to imagine yourself as one of the complainants. What impression would you form of Canada's legal system in this case? What light did this case provide to the issue of Indian Residential Schools? Why would any victim expose themselves to this kind of a system? In what way does the *O'Connor* case demonstrate equality or respect for indigenous peoples or victims of sexual abuse, primarily women?

While the years of litigation continuously debated fairness fair Bishop O'Connor, there is almost no discussion of fairness for the complainants, except with respect to their privacy interests in records about the complainants that are held by persons such as doctors, psychiatrists, psychologists, counsellors and so on.

Where is the concern about fairness for victims in having competent and diligent prosecutors; in the interests of victims in having a speedy and conclusive trial; in the interests of a trial about abuse at a residential school being held in the community where the residential school was located?

Ultimately, the allegations against Bishop O'Connor were never resolved. Preliminary motions concerning document production went to the Supreme Court of Canada, which was followed by a second trial. O'Connor was convicted of two counts and served six months in jail pending an appeal of his convictions. The appeal was heard and the B.C. Court of Appeal upheld the appeal and ordered another trial. The trial ordered by the BC Court of Appeal never occurred. Instead, an indigenous sentencing circle was held. This, after nine years and approximately 20 separate court rulings and numerous appeals, and after the BC Court of Appeal made it clear that the position of authority of the priest, principal and employer could not be taken into account when considering whether the complainants had consented to sexual activities with the then-priest. O'Connor did not deny sexual relations with P.B. and M.A.B., his defence was that they had consented.

[86] *R. v. O'Connor*, [1996] B.C.J. No. 1663: "[46] When Ms. P. became pregnant with his child, he arranged for her to go to Vancouver for the pregnancy. In his letter to the Catholic Children's Aid Society, while he made references to her pregnancy, no reference is made to the fact that he was the father of her unborn child. Similarly, when the child was placed for adoption he filled out documents which were clearly misleading. He left the name of the putative father blank and listed the occupation of the putative father as an "accountant". In his evidence he steadfastly refused to admit the obvious lack of candour and honesty in these responses. During cross-examination by Mr. Macaulay, he was asked whether one of the complainants was wearing a nightgown or a negligee. His reply was self-righteous to say the least, when he said he did not know because, "As you know, I am a celibate man." It is with considerable regret that I must make these comments relating to his credibility."

During the course of this prosecution there would be a seemingly endless procession of pre-trial motions and applications for the charges to be dismissed for procedural reasons, findings that the lawyers presenting the victims' case were incompetent, orders against the complainants that they must authorize their therapists, counselors and doctors to release 20 years of their confidential records to the court and ultimately to O'Connor so that O'Connor could "test" their credibility to ensure he would not be unfairly convicted; two trials, and a reversal of his convictions because the trial judge erred when he took into consideration the position of authority had over the complainants when trying to assess whether the complainants had consented to the sexual actions of O'Connor.

The allegations

O'Connor was a priest and principal of St. Joseph's Residential School at Williams Lake, BC in the 1960's. This is the same school where priest Harold McIntee and Brother Glenn Doughty committed the sexual abuses for which they were eventually charged and convicted in 1989 and 1991 respectively.[87]

The original complaints to the police were made in 1990. Bishop Hubert O'Connor was charged with indecent assault and rape. A preliminary inquiry was held in Williams Lake on July 3 and 4, 1991.

There were four complainants against O'Connor.

A.S. first entered the school in grade 1. After leaving the school in grade 10, she became a practical nurse and returned to the school as an employee. Her allegations occurred when she was 20 years of age.

R.M.D. attended the school from age 10 to 19. She was a student at the time of the alleged sexual assault.

M.A.J. (later, she changed her name to M.A.B.) entered the school at the age of 6 and remained there for nine years. Two years later she returned as an employee. She was 19 at the time of the alleged sexual assault.

P.B. entered the school when she was 8 years old and stayed until she was 16. She then returned as an employee. The alleged sexual assault of her occurred when she was either 21 or 22. O'Connor impregnated P.B. and arranged for the adoption of the child. It appears from the trial decision that he probably also impregnated M.A.J. (later known as M.A.B.):

> [33] Ms. B. went on to say that her grandmother was a strong Catholic and that she was taught to respect and obey the nuns and priests who were authority figures. Ms. B. went on to testify that she had sexual intercourse with Father O'Connor between 6 and 12 times after that incident. She also travelled with him. In November 1967 she learned she was pregnant.[88]

[87] See McMahon, Thomas, "Indian Residential Schools were a Crime and Canada's Criminal Justice System Could Not have Cared Less: The IRS Criminal Court Cases" (May 4, 2017). Available at SSRN: https://ssrn.com/abstract=2906518

[88] *R. v. O'Connor*, [1996] B.C.J. No. 1663

On December 23, 1991, O'Connor applied for a transfer of the trial from Williams Lake to Vancouver. The Crown agreed for the reason that that Crown believed it would be possible to obtain an earlier trial date in Vancouver, and the witnesses to be called would find Vancouver more convenient than Williams Lake. Hutchison J. agreed to move the trial to Vancouver.

The original order to disclose records about the victims to Bishop O'Connor

On June 4, 1992, O'Connor applied for, and obtained, an order from Campbell A.C.J. requiring the complainants and their counselors to disclose to O'Connor the entire medical, counseling and school records of the complainants (in other words, more than 20 years of records, because the offences dated 20 years earlier).

O'Connor justified his disclosure request on the need to test the complainants' credibility, as well as to determine issues such as recent complaint and corroboration. The court order reads as follows:

> THIS COURT ORDERS that Crown Counsel produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists who have treated any of the complainants with respect to allegations of sexual assault or sexual abuse.
>
> THIS COURT FURTHER ORDERS that the complainants authorize all therapists, counsellors, psychologists and psychiatrists who have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

At the time this order was made, the Crown did not have in its possession any files of any persons who had treated any of the complainants in relation to allegations of sexual assault or sexual abuse.

Notice was not given to the complainants or the persons who had the records before the order was made. No arguments were heard by the judge from the complainants or the persons who had the records.[89]

The order was issued without any form of inquiry into the relevance of those records, let alone a balancing of the privacy rights of the complainants and the accused's right to a fair trial. The entire Supreme Court of Canada ultimately agreed that this order was wrong.[90]

[89] *R. v. O'Connor*, 1995 CanLII 51 (SCC), para. 39
[90] *R. v. O'Connor*, 1995 CanLII 51 (SCC), para. 91

On July 10, 1992, the Crown applied before Low J. of the British Columbia Supreme Court for directions regarding the disclosure order and for the early appointment of a trial judge. The court was informed that the complainants were not prepared to comply with the order of Campbell A.C.J., and the Crown wished to argue the point before the trial judge.

On September 21, 1992, the Crown made an application before Oppal J. to change the venue of the trial back to Williams Lake. It was the Crown that requested the venue be moved from Williams Lake to Vancouver, but after the indigenous community expressed their displeasure, the Crown applied to have the venue changed back to Williams Lake. The judge said he was impressed by the affidavit of Chief Charleyboy of the Alexis Creek Band and that the indigenous communities around the St. Joseph's Residential School had a vital interest in the trial. However, Oppal J. ruled that "The interests of the accused clearly dictate that the trial be held in Vancouver. That is a governing factor in my reaching a decision." I repeat for emphasis: "the interests of the *accused* clearly dictate …"

In the course of its submissions on this matter, the Crown noted that it intended to argue before the trial judge that the therapists' notes subject to the disclosure order of Campbell A.C.J. ought not to be disclosed on public policy grounds. The court expressed surprise at the fact that the order of Campbell A.C.J. was not being complied with.

O'Connor makes five separate requests to have the charges dismissed

Thackray J. was subsequently appointed the trial judge. O'Connor made five separate applications for a judicial stay of proceedings to Thackray J.

On October 16, 1992, O'Connor made his first application for a judicial stay of proceedings before Thackray J. on the basis that pre-charge delay made it impossible to make full answer and defence. Thackray J. released written reasons dismissing this application on October 22, 1992.[91]

> During the hearing I repeatedly suggested that the application might be premature in that no Crown evidence had been heard. I also asked if the war crime trials including holocaust actions had dealt with the problems faced by long pre-trial delays. Counsel provided nothing other than the cases to which I have referred.

At the same time, the Crown sought directions from the trial judge regarding the disclosure order of Campbell A.C.J. By this time, however, many of the impugned records had come into the Crown's possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. Thackray J. was provided with the clinical notes of Dr. Ingimundson, the psychologist treating P.P. He reviewed these notes and they were provided to O'Connor's counsel. Crown counsel further informed the court that the therapist for M.B. had been instructed to forward all records to the Crown.

On October 30, 1992, O'Connor made a second application for a stay of proceedings of one of the charges on that basis that there no evidence supporting the charge given at the preliminary inquiry. On November 5, 1992, the trial judge released written reasons dismissing O'Connor's application. During the course of those proceedings, the Crown produced the notes of M.B.'s therapist, Dr. Cheaney, to the court for review. The Crown requested, however, that the court not

[91] *R. v. O'Connor*, 1992 CanLII 904 (BC SC)

release the records to the defence before hearing an application on that point from Crown counsel Wendy Harvey. The trial judge agreed to this request.

At the conclusion of the hearing of October 30, 1992, O'Connor's lawyer asked if the judge had received any letters touching upon the charges. The judge said no, but when he reviewed the file, he found a letter in the file that had not been submitted by counsel.

The letter was from the chiefs of the Cariboo Tribal Council. They indicated concern over 'further delays, or even worse, a staying or dropping of the charges'. The balance of the letter was much in the form of a victim impact statement.

> I issued supplementary reasons on November 10, 1992, in which I informed the chiefs that such out-of-Court communications were inappropriate and that the case, and any motions therein, would be decided upon evidence and submissions made in the courtroom.[92]

On November 19, 1992, O'Connor applied for a third stay of proceedings on the basis that the indictment did not allow him to identify with precision the dates of the alleged offences nor the places where the offences allegedly occurred. This application was dismissed by Thackray J. in reasons filed November 24, 1992. O'Connor also once again raised the issue of the non-disclosure of the medical records of M.B. The Crown opposed the disclosure of the records on the ground that they were not relevant, but Thackray J. ordered that they be disclosed to O'Connor forthwith. O'Connor's lawyer also requested disclosure of the diary of the complainant R.R., for which the lawyer had already been provided with a synopsis. The trial judge took possession of the diary for review and expressed concern that the Crown was taking so long to comply with the order of Campbell A.C.J., given that the trial was scheduled to commence in 10 days.

On November 26, 1992, O'Connor made a fourth application for a judicial stay of proceedings based on the basis that the Crown had failed to disclose several items, including the following: the medical records of the complainants, the transcript of an interview between Crown counsel and the complainant M.B., the transcript of an interview between Crown counsel and witness M.O. containing statements contradictory to testimony given by the complainant M.B. and corroborative of the evidence of the appellant, and the diary of the complainant R.R.

In oral reasons delivered Friday, November 27, 1992, Thackray J. dismissed the application for a judicial stay, finding that the failure to disclose the records of Dr. Hume, R.R.'s physician, had been an oversight. He further found that M.O.'s evidence had been known to O'Connor for some time and that no prejudice to O'Connor had been demonstrated by its non-disclosure. Thackray J. declined to disclose the complete diaries of the complainant R.R. on the basis that the summaries provided to O'Connor, as well as the excerpts already in his possession, were sufficient. Thackray J. noted, however, that the letters written by Ms. Harvey to the counselors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records not being disclosed to the defence until after November 26. Thackray J. stated:

> In giving judgment I did not deal lightly with Ms. Harvey's failure to disclose documents. I found her excuses 'limp' and not to be condoned. I found her limiting of the order of the Associate Chief Justice to be inappropriate. I found that there was incompetence by the

[92] *R. v. O'Connor*, [1992] B.C.J. No. 2569

> Crown in the matter of disclosure. However, I found that there was not a 'grand design by the Crown to conceal evidence.'[93]

Over the weekend of November 28, in light of the difficulties encountered during discovery, Crown counsel agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them. This agreement contemplated giving O'Connor copies of documents which ordinarily would not be disclosed, including Crown counsel's personal notes and work product, some of which were on computer. At the pre-trial conference held that Monday, Ms. Harvey informed the trial judge that O'Connor's lawyers were now in possession of all the notes that she had prepared in connection with the case.

The trial began on Wednesday, December 2, 1992. The Crown's first witness was Dr. Van Dyke, a socio-cultural anthropologist. Its second witness was Margaret Gilbert, a former student at St. Joseph's Mission School. Her evidence dealt primarily with the layout of the school. On the second day of the trial, the Crown called the complainant P.P. In the course of direct examination, the Crown sought to have the witness give her evidence by drawing. O'Connor's counsel objected. Discussions revealed that the witness had, during the course of witness preparation that weekend, made a drawing for Crown counsel that had not been disclosed to O'Connor's counsel. That drawing was obtained from the Crown office and O'Connor took the position that it represented a materially different version of this complainant's allegations. The Crown disagreed with that assessment. The trial judge refused to allow the witness to testify through the use of drawings. At the end of the day, the Crown had not yet completely finished its examination-in-chief of this witness. O'Connor made his fifth application for a judicial stay of proceedings on December 4, on the basis of the Crown's failure to disclose and that the Crown could not assure him that he had all of the documents to which he was entitled.

When the trial resumed the following day, O'Connor's counsel informed the court that, at the conclusion of the previous day's proceedings, the Crown had provided O'Connor with another eight sets of drawings prepared by the various complainants in the presence of Crown counsel. Crown counsel Wendy Harvey was not present in court, and no explanation was given for her absence. Court was adjourned for one hour. When the trial resumed, Ms. Harvey was still not present. O'Connor's counsel made another application for a judicial stay of proceedings based largely on the fact that the senior prosecutor, Mr. Jones, was still unable to guarantee to the appellant that full disclosure had been made. Over the objection of O'Connor's counsel, the trial judge granted Mr. Jones' request for a further adjournment until the afternoon session.

When court resumed that afternoon, Wendy Harvey was present. The Crown submission, however, was put forward by Mr. Jones. He acknowledged that the binders which had been provided to O'Connor's counsel as a result of the agreement reached over the weekend of November 28 were not complete, and that the staff had omitted to download Ms. Harvey's computer files. One of the undisclosed documents was the complete version of a Crown interview with P.P. which had been partially disclosed to O'Connor on November 25. After reviewing some of the undisclosed notes, the Crown indicated that it did not believe that the notes revealed anything "new". Mr. Jones then indicated to the court that Ms. Harvey's complete computer files were in the process of being downloaded but that, in light of what had just happened, he could not guarantee that everything had been appropriately disclosed to the appellant at that time. He took the position, however, that the undisclosed notes contained nothing material, and encouraged the trial judge to engage in an inquiry of their materiality.

[93] *R. v. O'Connor*, [1992] B.C.J. No. 2569

Thackray J. stated: "It was difficult to get Mr. Jones to state the Crown's position on the motion [for a stay of proceedings]. As best I can understand it, it *almost amounted to a concession or an invitation to the court to grant a stay of proceedings*. [my emphasis] Nevertheless, the Crown did not enter a Crown stay of proceedings but rather left it to this Court to make the determination as to whether or not this court should proceed."

Thackray J. indicated that he would give judgment on December 7 on defence counsel's motion for a stay of proceedings. Although he indicated he would give counsel the opportunity to make further submissions if any other developments occurred, no further submissions were made by either side. On December 7, 1992, Thackray J. handed down a judicial stay of proceedings on all four counts.[94]

Thackray J. distinguished this application for a stay of proceedings from the previous applications that he had rejected on the basis that the trial was now under way and witnesses had already been called by the Crown and cross-examined by the defence. Thackray J. found that had the diagrams of the complainant P.P. been disclosed prior to testimony, they might have affected the preparation of the case by the defence. While P.P. had not yet been cross-examined, Thackray J. found it unacceptable that defence counsel was put in the position of preparing the cross-examination without all the relevant documents. He therefore concluded that the accused had suffered prejudice, although he conceded that the extent of this prejudice could not be measured. He noted the constant intervention required by the court to ensure full compliance with the order of Campbell A.C.J. and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. He stated:

> This is now 'one of the clearest of cases'. To allow the case to proceed would tarnish the integrity of the Court. The Court is left with no alternative but to order a stay of proceedings on all four counts.
>
> In doing so I recognize that the decision will not be readily acceptable to all segments of our society. It will certainly not be popular with many people. I can only encourage such people or groups to carefully consider the reasons for the decision.
>
> Every citizen is entitled to the protection of the law, and to have the law meticulously observed. The obligation upon the Crown in criminal matters is especially onerous. The Crown has admitted to failing in its legal obligations in this case. Those who will be angered or saddened by the outcome of this case must strive to put themselves in the position of an accused person. They would expect the Crown to fulfil its role to the standard required by law.

To summarize, Thackray J. was asking the complainants and the indigenous communities to put themselves in the position of Bishop O'Connor, and to understand that allowing the prosecution against Bishop O'Connor to proceed would hurt the integrity of the court. This, after Oppal J. had refused to allow the prosecution to take place in Williams Lake and after Thackray J. had chastised the chiefs for writing a letter expressing their concerns about delays and a possible stay of proceedings.

Thackray J. was lecturing sexual assault complainants that "every citizen" – by which he meant every accused abuser – "is entitled to the protection of the law" and that anyone who might be

[94] *R. v. O'Connor*, [1992] B.C.J. No. 2569

upset by a dismissal of the charges "must strive to put themselves in the position of an accused person".

The BC Court of Appeal's first decision: new trial ordered

The British Columbia Court of Appeal allowed the Crown's appeal and directed a new trial.[95] On May 16, 1994, the Court of Appeal released additional reasons.[96] In those reasons, it set out guidelines governing applications for production of medical records of potential witnesses, which are not in the possession of the Crown.

The Court of Appeal reviewed the case law on abuse of process and concluded that there was no settled view on whether the common law doctrine had or had not been subsumed within s. 7 of the *Canadian Charter of Rights and Freedoms*. It noted, however, that the focus of the common law doctrine of abuse of process had historically been on maintaining the integrity of the court's process whereas the focus of the *Charter* was on the rights of the individual. It also noted the seemingly different standards of proof and remedies under the two regimes. It therefore concluded that the common law doctrine of abuse of process continued to exist independently of s. 7 of the *Charter*, although there may be significant overlap between the two.

After noting that some ambiguity remained as to the required elements of abuse of process, the Court of Appeal concluded that in order to establish an abuse of process, as opposed to a "mere" violation of a *Charter* right, an accused must demonstrate conduct on the part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus to undermine the integrity of our judicial process. It further noted that the discretion to order a stay may be exercised only in the "clearest of cases," meaning that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process.

The court then turned to the scope and extent of the Crown's obligation to disclose information. It concluded that the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence and that disclosure is not, itself, a constitutionally protected right. As such, a simple non-disclosure, in and of itself, would not necessarily be a *Charter* violation. A *Charter* violation would only be made out when the accused demonstrated that a document which should have been disclosed (i.e. there was a reasonable possibility that it could assist in making full answer and defence) had on a balance of probabilities prejudiced or had an adverse effect on the accused's ability to make full answer and defence. In some circumstances, the only appropriate remedy for such non-disclosure might be a stay of proceedings. The Court of Appeal further held that a material non-disclosure, without more, could never amount to a common law abuse of process. In its view, only when non-disclosure was motivated by an intention on the part of the Crown to deprive the accused of a fair trial could an abuse of process arise.

Applying these principles to the O'Connor case, the Court of Appeal concluded that the trial judge erred in failing to inquire into the materiality of the non-disclosed information before ordering the stay of proceedings. As such, it could not be said that a violation of O'Connor's rights under s. 7 of the *Charter* had occurred, nor that the conduct of the Crown amounted to an abuse of process.

[95] *R. v. O'Connor*, 1994 CanLII 6415 (BCCA)
[96] *R. v. O'Connor (No. 2)* (1994), 30 C.R. (4th) 55 (BCCA)

The court concluded that there was no evidence that the Crown's inept handling of the case was motivated by an intention to deprive O'Connor of a fair trial. As such, the trial judge had erred in entering a stay of proceedings on the basis of the common law abuse of process.

Since it did not appear that any permanent or irremediable damage had been done to O'Connor's ability to make full answer and defence as a result of any non-disclosures or late disclosures that were in fact material, O'Connor's rights could have been protected by an adjournment, by recalling witnesses who had already testified, or by declaring a mistrial if those would not suffice.

The Supreme Court decision: new trial ordered; new rules for producing victims' information to Bishop O'Connor

O'Connor appealed to the Supreme Court of Canada. He asked the court to reinstate the stay of proceedings issued by the trial judge. On December 14, 1995, the Supreme Court of Canada rejected O'Connor's appeal.[97] Six of the Supreme Court judges refused to reinstate the stay of proceedings, and therefore a new trial was required and O'Connor's appeal was dismissed.

The main focus of the Supreme Court case revolved around what rules apply to requests by the accused to see records about the complainants that are (a) in the possession of the Crown; and (b) in the possession of third parties, such as counselors, doctors, and others. All judges agreed that records that are relevant to whether the accused was guilty or not must be produced.

Five judges agreed that therapeutic records about the complainant that come into the possession of the Crown must be disclosed to the accused. The fact that the complainants provided the records to the Crown creates a presumption that the records are relevant to whether or not the accused is guilty. Four judges said the issue was not part of the appeal and was not even argued before the court, and so it was inappropriate to rule on whether privacy interests disappear once the records are in the hands of the Crown.

Chief Justice Lamer and Sopinka J. wrote that when the accused asks the court to order production to the judge of the complainant's or witness' therapeutic records that are in the possession of the Crown, the judge does not have to consider the privacy interests of the alleged sexual assault victim or witness because

> [8.] … concerns relating to privacy or privilege disappear where the documents in question have fallen into the possession of the Crown. … In our view, it would be difficult to argue that the complainant enjoys an expectation of privacy in records that are held by the Crown.
>
> [9.] … Obviously, fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence. …
>
> [10.] … Clearly, one could make the argument that the complainant would not have turned the documents over to the Crown had he or she been aware that the accused could be given access to the records. However, this problem is easily solved by placing an onus upon the Crown to inform the complainant of the potential for disclosure. …

[97] *R. v. O'Connor*, 1995 CanLII 51 (SCC)

With respect to whether records about the complainants that the accused wants to see and that are held by third parties, all judges agreed that there must be a two-stage approach. The first stage the judges called "disclosure" – whether records should be disclosed to the judge for review. The second stage the judges called "production" – whether records that the judge has reviewed should be disclosed to the accused. In the first stage, the accused must ask for the records and convince a judge that the records are "likely relevant" to the case. The accused must convince the judge that the records "may" be helpful to the defence.

The judges disagreed about what the accused needs to prove to get the records disclosed to the judge and what factors the judge must take into account before ordering the records to be disclosed to him. The judges disagreed about what factors the judges must take into account before ordering the records to be produced to the accused. With respect to determining whether records are "likely relevant," the dissenting judges would hold that the burden of proof on the accused is a significant one that must be based on evidence, whereas the proof required by the majority appears to be significantly lower.[98]

The majority judges ruled that the trial judge, at the disclosure stage, does not have to take into account competing interests, such as the privacy rights of the complainants, before deciding to order the records to be disclosed to the judge. The majority judges ruled that at the disclosure stage, the trial judge should not take into consideration society's interest in encouraging victims of sexual assault to report the offences and to obtain treatment or the effect of production on the integrity of the trial process. The dissenting judges disagreed with these views.[99]

One of the ways that records "may" be helpful to the accused is if the accused finds statements in the records that the accused can use to cross-examine the complainant to say that the complainant is not reliable or trust-worthy or credible. The method of attacking sexual assault victims on the witness stand in open court is generally a traumatic experience for the sexual assault victims and is generally not confined to cross-examination to establish the specific facts of the specific date or offence alleged against the accused.

It has been a long "tradition" of the "civilized" Anglo-Canadian court system that the sexual history of sexual assault victims is put on trial for the purpose of attacking the credibility of the victims. Many observers over the years have noted that this ordeal makes it extremely difficult for sexual assault victims to report crimes against them to the police and the courts.

To give victims some protection against this kind of attack, Parliament enacted a "rape shield" law in 1982. However, the Supreme Court of Canada ruled that the "rape shield" law that Parliament enacted was too broad and struck it down in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577. In *Seaboyer*, L'Heureux-Dubé J. sensitively discussed why she rejected the use of the term "rape shield" – it suggests that its purpose is to protect women from cross-examination, when in fact, its true purpose is to exclude evidence that is used primarily to invoke any number of myths about female complainants of sexual assault, myths that were paraphrased earlier in this chapter.

In 1992, Parliament enacted new "rape shield" legislation to replace the legislation over-ruled by the Supreme Court and re-defined the definition of consent.

[98] *R. v. O'Connor*, 1995 CanLII 51 (SCC), para.'s 142-146
[99] *R. v. O'Connor*, 1995 CanLII 51 (SCC), para.'s 151 and 157

In 1995, in *O'Connor*, the Supreme Court again struck down Parliament's attempt to limit what evidence about sexual abuse victims could be produced to the accused and brought to trial.

The majority judges listed several example of cases where it said that fairness to the accused may require the sexual history of sexual assault victim to become evidence at the trial: an accused's honest belief in the complainant's consent may be based on sexual acts performed by the complainant at some other time or place; a pattern of past conduct may be used to infer consent to subsequent conduct; other sexual activity may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease -- evidence which may go to consent; other sexual activity may be relevant to show that the complainant was biased or had motive to fabricate the evidence against the accused; for young complainants where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, other sexual activity by the young complainant may be relevant to show the youth acquired detailed knowledge of the sexual act in another way. The court held that other rules of evidence are sufficient to ensure that irrelevant evidence of a complainant's sexual history is excluded from trial, and the court provided its own set of guidelines for when judges can exclude such evidence.

In the entire Supreme Court judgment, there is no discussion of the context of the case: a residential school, complainants who grew up in the school, and the position of the authority of the priest, principal and employer at that school. There is a mere single passing reference in the lead dissenting decision to the offences occurring at a "native" residential school (para. 38).

The majority did not mention equality rights although both the Attorney General of Ontario and the Attorney General of Canada argued that disclosure of confidential records in sexual assault cases infringed the equality rights of the complainant in addition to her rights to privacy and security of the person.[100] The dissenting judges expressly discussed equality rights, but limited that discussion to the equality of women and children. They did not extend the discussion to indigenous peoples or the residential school context, which of course is what this case was about. Nonetheless, the point being made by the dissenting judges was that the privacy of women and children are especially likely, and unequally, to be violated by forcing disclosure of their therapeutic records. Women and children are especially likely to be victims of sexual abuse. Women and children are especially likely to be subject to myths that give rise to unequal assumptions about whether the testimony of women and children can be believed. Women and children are especially likely to be subjected to detailed attacks on their credibility based on their behaviour that is unrelated to the facts of the alleged crime under trial.

All of these equality concerns apply with even more force with respect to indigenous women and children.

The Ontario Women's Justice Network makes it clear:

> First Nations women, Métis women, women with disabilities, criminalized women and women with lower incomes are particularly likely to have personal and third-party records that can be used against them because of the over-involvement of the state in the lives of these women.[101]

[100] "Trial by Ordeal," Marilyn MacCrimmon, (1996) 1 *Canadian Criminal Law Review* 31-56 http://faculty.law.ubc.ca/MacCrimmon/trial1.html

[101] "Evolution of the law about 'third party records'," posted 2008, updated May 2016, http://owjn.org/owjn_2009/legal-information/criminal-law/269-sexual-assault--can-the-accused-get-my-

The simple fact is that being poor, and especially being indigenous and poor, results in a massive, life-long invasion of privacy from every "helping" agency the state can throw at a person. Being a poor, indigenous woman, subjected to numerous forms of discrimination, results in hard times, dangerous places and people, and severe stresses and trauma. A poor indigenous person is so much more likely to have extensive "third party records" and records in the Crown's possession than anyone else.[102]

I was working in the Department of Justice's Human Rights Law Section when the Supreme Court's decision in *O'Connor* was released. One of the duties of the Section is to write a briefing note telling other lawyers in the Department of Justice (and our bosses) about new Supreme Court of Canada human rights cases. Before writing a briefing note, we met as a small group and discuss the new case among ourselves. As I recall, there was no discussion of the residential school or indigenous aspect of the case. We discussed *O'Connor* as a case involving women as sexual assault victims generally. We were full of sympathy for sexual assault victims but also alert to the importance of fairness to accused persons. The specific context of indigenous women and residential schools was removed from view. I guess this is what they mean when they say justice is blind.

In the above convoluted way, the Supreme Court offered relatively little protection for the privacy of any of the therapeutic records of residential school survivors and other sexual assault victims, omitted any discussion of the residential school context, while still dismissing O'Connor's appeal, and ordering a new trial on the conditions of disclosure of therapeutic records as set out in the Court's decision.

The Supreme Court's forced disclosure of therapeutic records about complainants and witnesses simply on the assertion by the accused that the therapeutic records may likely be useful to their defence tactics of damaging the credibility of the complainant. This created the clear risk, and Supreme Court approval, of putting sexual assault victims through an ordeal of cross-examination on their sexual history and their private medical therapy, and putting medical and counseling professionals through the ordeal of having to decide whether to create records in the first place and whether to produce them if ordered to do so by a court.

Various studies have shown that sexual assaults are most often suffered by women and that young women and indigenous women are particularly at risk. We know that young people in institutional residential settings are exceptionally at risk. Further, sexual assault victims whose mental health histories have been extensively documented due to their interaction with government agencies would suffer the greatest invasions of privacy and be most exposed to attacks on their credibility based on their therapeutic records. Clearly, these factors show that indigenous women in a residential school setting were among the most likely to be affected by the Supreme Court's decisions (the precise context in the *O'Connor* case) yet the unequal impact of the IRS context goes without mention. Here again we have the example of formal equality of the law (the same rules apply to all sexual assault victims) but those formal equality rules have a deeply discriminatory impact on indigenous women, who are by far the most likely to bear the

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personal-records-and-my-third-party-records

[102] The Supreme Court of Canada gives a passing acknowledgement of this fact in *R. v. Mills*, 1999 CanLII 637 (SCC) http://canlii.ca/t/1fqkl at para. 92

brunt of decisions affecting their privacy and affecting their willingness to bring their claims of abuse to court for protection and justice.[103]

Second trial: Bishop O'Connor is convicted; consent

In 1996, O'Connor's second trial took place. Much of the trial decision is concerned with assessing credibility and Oppal J. found that there were inconsistencies in the various statements of the complainants between what they told police and what they testified at court and that the offences had to be proved beyond a reasonable doubt. The charge of indecent assault relating to A.H. was dismissed. As for the charge of rape of P.B., Oppal J. found O'Connor not guilty. O'Connor agreed he and P.B. had intercourse over several years. P.B. also became pregnant. The allegations of A.H. and P.B. were not upheld because of conflicting evidence and the Crown had not proved the allegations beyond a reasonable doubt.

The charge of indecent assault relating to R.M.D. resulted in a conviction. O'Connor denied the assault occurred, but Oppal J. was persuaded by R.M.D.'s evidence. The charge of rape of M.A.J. revealed that M.A.J. stated she had intercourse with O'Connor between six and 12 times and in 1967 she learned she became pregnant (the trial judge does not expressly say that O'Connor was the father). Oppal J. said O'Connor did not deny the sexual relations. The sole issue was whether M.A.J. consented. Oppal J. found there O'Connor guilty. Thus, O'Connor was convicted of one count of rape and one of indecent assault.[104]

On the issue of consent, Oppal J. said:

> [37] I am unable to conclude that there was any genuine consent on her part to having sex with Father O'Connor … The complainant went to a residential school when she was 6 years old. As a Catholic, she was taught to respect and obey the priests who were authority figures. Father O'Connor was not only her priest but was also her employer. Father O'Connor was highly respected by the students and former students. As Ms. S. said, "We knew our place." In the circumstances it would have been extremely difficult for her to resist his demands.
>
> [38] … his position as a priest is clearly relevant on the issue of consent. He was clearly a dominant figure in any relationship with his students and staff. There is no air of reality to his defence of consent. His explanation that she consented to having intercourse with him is simply not believable.
>
> [45] … For the most part, the complainants were credible witnesses. They did their best to recollect and testify to events which took place many years ago. Moreover, they generally explained apparent inconsistencies of conduct and testimony satisfactorily. On the other hand, I found the evidence of the accused at times to be disturbing and not entirely believable in a number of different areas. In dealing with the charges of rape, he maintained throughout that

[103] See for example "Bill C-46: Records Applications Post-*Mills*, A Caselaw Review," Susan McDonald, Andrea Wobick, and Janet Graham, http://www.justice.gc.ca/eng/pi/rs/rep-rap/2006/rr06_vic2/rr06_vic2.pdf and "Confidential Records and Sexual Assault Complainants Post-*Mills*: Still Vulnerable?," Lise Gotell, paper presented to the National Association of Women and the Law Biennial Conference: Women, the Family and the State," Ottawa Congress Centre, March 7-10, 2002 .http://www.nawl.ca/en/newlibrarypage/jurisfemme/71-jfvolume21summer2002/341-confidential-records-and-sexual-assault-complainants-post-mills-still-vulnerable.

[104] *R. v. O'Connor*, [1996] B.C.J. No. 1663

> his relationship to the complainants was one of equals. He maintained this position in spite of overwhelming evidence of the apparent exalted position that he held in that community and in that school, particularly in relation to his students and employees. It defies common sense and logic to conclude that theirs was a relationship of equals.
>
> [46] When Ms. P. became pregnant with his child, he arranged for her to go to Vancouver for the pregnancy. In his letter to the Catholic Children's Aid Society, while he made references to her pregnancy, no reference is made to the fact that he was the father of her unborn child. Similarly, when the child was placed for adoption he filled out documents which were clearly misleading. He left the name of the putative father blank and listed the occupation of the putative father as an "accountant". In his evidence he steadfastly refused to admit the obvious lack of candour and honesty in these responses. During cross-examination by Mr. Macaulay, he was asked whether one of the complainants was wearing a nightgown or a negligee. His reply was self-righteous to say the least, when he said he did not know because, "As you know, I am a celibate man." It is with considerable regret that I must make these comments relating to his credibility.

Oppal J. sentenced O'Connor to two and a half years in jail. In the sentencing decision, the judge stated:

> [31] After careful consideration I have concluded that a conditional sentence is not appropriate for the following reasons: The accused was in a position of trust. He held an exalted position in the community where he committed these of fences. His victims were helpless. They were young native persons who attended a residential school and who held him in high esteem. He was a priest, a school principal and an employer. The complainants in the circumstances were extremely vulnerable.[105]

Parliament says the SCC was wrong to order so much disclosure to abusers

In May 1997, the Parliament of Canada enacted amendments to the *Criminal Code* that over-rode the majority judgment of the Supreme Court of Canada and enacted the views of the dissenting judges in *R. v. O'Connor*.[106] Parliament required that privacy be included in the factors that the judge was required to consider BEFORE ordering the documents to be produced to the judge. Parliament listed several factors that it said could not, together or by themselves, on assertion by the accused, justify an order that the records be produced to the judge. Thus, just because an accused asserts that the therapeutic records of a complainant or witness might discuss the specific incident, might contain inconsistent statements, might reveal a different person named by the complainant, might be useful to attack the person's credibility or might relate to the person's sexual reputation, these assertions will not be sufficient to justify an order of production to the judge. Parliament required that there be some evidence to justify a finding of "likely relevance". Further, if therapeutic records are ordered to be produced to the judge, the judge cannot order their production to the accused unless the judge first takes into consideration several factors: the extent to which the record is necessary for the accused to make a full answer and defence; the

[105] *R. v. O'Connor*, [1996] B.C.J. No. 2784

[106] It is important to note that *O'Connor* was only one of a number of Supreme Court cases that exposed complainants of sexual assault and their therapeutic service providers to being forced to disclose their therapeutic records. Other similar and important decisions were: *R. v. Osolin*, [1993] 4 S.C.R. 595; *L.L.A. v. A.B.,* [1995] 4 S.C.R. 536 (decision released at the same time as *O'Connor*); *R.v.Carosella*, [1997] 1 S.C.R. 80

probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on a discriminatory belief or bias; the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; society's interest in encouraging the reporting of sexual offences; society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and the effect of the determination on the integrity of the trial process. When the new provisions of the *Criminal Code* were subsequently challenged before the Supreme Court, this time, finally, the Supreme Court upheld the legislation,[107] although some have argued there is ambiguity in the reasons that did so.

Second BC Court of Appeal decision; new trial ordered on the basis that the authority of the priest/principal/employer is not relevant to consent

O'Connor appealed his conviction by Oppal J. to the BC Court of Appeal. O'Connor applied to be released on bail while waiting for the appeal to be decided. O'Connor served six and a half months before being released on bail pending the appeal.[108]

In 1998, the B.C. Court of Appeal changed O'Connor's conviction on indecent assault to an acquittal and ordered a third trial on the rape of M.A.J. on the grounds the trial judge did not correctly understand the law of consent.[109] According to the Court of Appeal, "The trial judge did not find it necessary to determine whether the complainant had actually consented or not to sexual intercourse with the appellant because he accepted that consent could be vitiated by the exercise of authority. We have decided that he was wrong in that conclusion." and: "If the trial judge found that the complainant consented or if he had a doubt that she did, then he should have acquitted the appellant. It was incumbent on the trial judge to resolve the question of consent. He did not have the benefit of the extensive arguments that were made in this Court. *He did not resolve the issue of consent*."[110] (my emphasis)

Go back and read what Opal J. said in paragraphs 37, 38, 45 and 46, quoted above. Re-reading the trial decision, it seems impossible to agree with the Court of Appeal's statement that the trial judge did not determine or resolve the issue of consent. Oppal J. clearly determined that there was no consent. The appeal decision is really saying that regardless of whether the trial judge believed there was consent, the trial judge had to imagine that authority plays no role in consent and then make a decision on that imaginary basis, because that pretense is what the law required during the time of the residential schools (but now the law knows better, starting with the amendment to the *Criminal Code* in 1982 noted earlier).

No third trial; prosecution gives up; indigenous healing circle; no admission of offence by Bishop O'Connor

[107] *R. v. Mills*, 1999 CanLII 637 (SCC); *R. v. Darrach*, 2000 SCC 46
[108] *R. v. O'Connor*, 1996 CanLII 8393 (BC CA) (refusing to grant bail pending appeal); *R. v. O'Connor*, 1996 CanLII 3348 (BC CA) (holding that the application for a review of the decision to refuse to grant bail pending appeal was not frivolous and ordering a review of that decision); and *R. v. O'Connor*, 1997 CanLII 4071 (BC CA) (granting bail pending appeal)
[109] *R. v. O'Connor*, 1998 CanLII 14987 (BC CA)
[110] *R. v. O'Connor*, 1998 CanLII 14987 (BC CA), para. 5 and 74

Following the Court of Appeal's decision ordering a third trial to be held on the basis that authority plays no role in consent, the complainant, her community, the Crown and the defence agreed to an indigenous healing circle as an alternative to yet another appeal or another trial. O'Connor never admitted to raping M.A.J. but acknowledged it was wrong to have a sexual relationship with her when she was only 18, working in the school office, and he was her boss and previous school principal.

Conclusion

The O'Connor trials show the kinds of ordeals the criminal justice system can put victims and indigenous communities through. The original complaint came forward in 1989. It took nine years and approximately 20 separate court hearings and rulings and approximately 20 different non-indigenous judges whose collective result was to order 20 years worth of therapeutic and other records of the alleged victims to be produced to their alleged abuser, and a new trial to be held on the basis that a new judge had to ignore the residential school context and imagine that a priest's, principal's and employer's authority over students and junior employees was not relevant to consent to sexual relations during the residential school years, even though the law has since changed to say that exercise of authority can and does vitiate "consent".

If the O'Connor case had proceeded to a third trial, and if there had been a conviction, would the victim impact statement have included a statement about impact that the non-indigenous court process had on the victims and on the local indigenous community in addition to whatever O'Connor had done?

How many times is a victim supposed to go through the ordeal of having to relive their experiences, to tell their story, to be cross-examined on that story in an alien, adversarial courtroom environment far removed from her community? What privacy, what dignity, what respect for such individuals does our legal system show?

If ever there was a case designed to intimidate complainants, and to prove to them just how impossible it is to obtain any kind of justice in a reasonable period of time without being subject to constant requirements to restate and submit to cross-examination of some of their most difficult memories, to produce their most private and privileged records, and to be told time and again that the matter is never concluded, this was the case.

"After being required to give her testimony at a preliminary hearing and two trials, Belleau, her voice breaking with emotion, said she had had enough of 'being victimized by the courts. They can be cold and calculating.' She added: 'It was nice to get out of the control of the court system and out of the control of O'Connor himself'."[111]

After seeing this case, who could believe that the criminal justice system offers any kind of reasonable protection for victims of crime? This case showed an abusive process. It is not a civilized process in any way. The views of the indigenous community and indigenous victims, and the context of the residential schools, were continuously trivialized and ignored.

11. Record-keeping and document production challenges

[111] "Bishop O'Connor Diverted," *Vancouver Sun*, June 18, 1998, http://www.rapereliefshelter.bc.ca/learn/news/bishop-oconnor-diverted (accessed June 20, 2013)

The TRC's mandate required and empowered the TRC to:

- "acknowledge Residential School experiences, impacts and consequences"
- "promote awareness and public education of Canadians about the IRS system and its impacts"
- "identify sources and create as complete an historical record as possible of the IRS system and legacy"
- to report on "the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools"
- "build upon the work of past and existing processes, archival records, resources and documentation"
- "the Commission should reasonably coordinate with other initiatives under the Agreement and shall acknowledge links to other aspects of the Agreement"
- "conduct such research, receive and take such statements and consider such documents as it deems necessary for the purpose of achieving its goals"
- "Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission"
- "insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes".[112]

Further, Justice Goudge ruled in *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684[113] that Canada and the churches would not be allowed to state an arbitrary date after which records would be deemed to be irrelevant. Doing so "would be incompatible with the mandate extending to "the ongoing legacy" of the residential schools" (para. 89); "Canada is obliged to provide to the TRC the documents it has that are reasonably required to tell the story of the IRS legacy, including its health aspect" (para. 91); Canada's obligation to provide all relevant records is broader than a requirement to provide records about the "policy and operations" of the residential school system (para. 92).

Despite the above, the TRC's ability to tell the full story of the residential schools was limited in important ways. The Indian Residential Schools Settlement Agreement (the Settlement Agreement)[114] stated that the TRC shall not:

- hold formal hearings
- act as a public inquiry
- conduct a formal legal process
- possess subpoena powers or powers to compel attendance at any TRC activity
- make "any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person

[112] http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf
[113] http://canlii.ca/t/fvwvt
[114] http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf

or organization, unless such findings or information about the individual or institution has already been established through legal proceedings."

- "name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual."
- "duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement."

Reporting on the court cases involving residential schools is difficult. Bearing in mind that the TRC was prohibited from identifying anyone whose name was not previously "established through legal proceedings," and had no power of subpoena, the TRC wrote to the Commissioner of the RCMP, the Deputy Minister of Justice and the Deputy Minister of Aboriginal Affairs requesting, among other things, that Canada provide to the TRC:

> every record of criminal conviction and finding of civil liability that is in the possession or control of the Government of Canada, or can be retrieved through a search of the Government's databases or litigation reports, relating to any civil or criminal misconduct against any residential school student or that occurred in a residential school or in a residential school context and/or any civil action that arose from such contexts. In addition to a list of names, charges, date of conviction/finding of civil liability, sentence imposed or damages awarded and a summary of circumstances of the events, we ask for production of all documents that relate to these events and the court proceedings.[115]

Canada did not provide any response to the above request. Although Canada agreed in the Indian Residential Schools Settlement Agreement to provide all relevant records in its possession or control, Canada refused to provide information about misconduct that has been established through legal proceedings. The TRC made similar requests to the Government of Canada in various working groups and direct staff-to-staff communications. The TRC reported:

> Canada's response was that it did not maintain a list of convictions. In the 2013 court proceedings that considered claims in relation to the St. Anne's residential school at Fort Albany, Ontario, it became apparent that Canada does, in fact, maintain records relating to residential school convictions.[116]

Finding out about persons convicted or found liable for residential school abuse is made more difficult by the state of the RCMP record-keeping. RCMP record-keeping relating to complaints about abuse in residential schools, about investigations into abuse of students, about charges laid and convictions or acquittals was virtually non-existent before 1980. Records were routinely destroyed, and were not kept in a manner that was specific to residential schools in any event.[117]

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[115] Letter from Justice Sinclair dated May 2, 2012, copy to the Clerk of the Privy Council and the Minister of Justice

[116] Truth and Reconciliation Commission's Final Report, volume 1, *Canada's Residential Schools: The History*, Part Two, 1939 to 2000," p. 412 (2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_1_History_Part_2_English_Web.pdf

[117] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://www.cbc.ca/news/pdf/RCMP-role-in-residential-

In 1994, members of the Nuu-Chah-Nulth Tribal Council met with the RCMP. The Tribal Council reported that it had interviewed more than 100 former residential school students alleging physical and sexual abuse at several residential schools across the province.

The Provincial Residential School Project was created to provide culturally sensitive victim support services to former students and their families. The Project later changed its name to the Indian Residential School Survivors Society.

In December 1994, the RCMP created a Native Indian Residential Schools Task Force in B.C. to investigate complaints of historic physical and sexual abuse at residential schools. The sole mandate was to investigate every allegation of physical and sexual abuse that occurred at each of the fifteen residential schools that operated within the province of British Columbia.[118] The B.C. Task Force found this support for complainants provided by the Indian Residential Schools Survivors Society to be very valuable.[119]

In addition, the Task Force hired a private, civilian researcher to locate historical records, Christine Mellema. She was able to locate documents that researchers employed by Indian Affairs and Justice Canada were unable to. "In fact, it is quite common for the Task Force files to contain more information that either of those agencies, despite having much more restricted access to these records." Nonetheless, the Crown Attorney's office and the Task Force opposed all applications for access to the Task Force files arising from civil lawsuits.[120]

Fifteen schools were under investigation. The RCMP investigated 974 separate offences, 515 were sexual offences involving 374 victims. Another 435 allegations of physical assault involving 223 victims (many of whom are included in the 374 victims of sexual abuse). One-third of alleged abusers were deceased by the end of the investigation. The RCMP reported 14 individuals were charged with offences in connection to Indian Residential Schools (including charges laid prior to the creation of the Task Force).

We may never know whether the RCMP considered opening similar task forces in all provinces and for all Indian residential schools or why this did not occur. To be sure: there was no lack of information and allegations about abuse at residential schools, and no reason to believe abuse was limited to the north and to British Columbia.

Corporal Mike Pacholuk wrote a report about the B.C. Task Force. The Task Force operated between 1994 and 2003. Even in such recent times, the investigation was plagued with numerous challenges. If criminal investigations in the 1990s were this hampered, at a time when the country believed itself to be capable of dealing with complaints of abuse against indigenous persons in a serious, determined manner, we can only shudder to imagine how the police reacted to reports of abuse in earlier times.

Anyone who wishes to understand the history of residential school "claims" and how Canada responded to them needs to read the Pacholuk report.

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school-system-Oct-4-2011.pdf (accessed 21 February 2013), see, for example, comments on p. 6, 13, 14, 20, 33, 43-44, 46, 47 and 111 re: missing records

[118] "Final Report of the Native Indian Residential School Task Force," Constable M.W. Pacholuk, (E Division Major Crime, c.2003), p. 1

[119] *Ibid*., p. 14

[120] *Ibid*., p. 15

The Task Force was almost immediately hit with government-wide budget cuts. Task Force members were asked to take on non-IRS files. "The end result was they had little time to devote to this file, a problem that would plague the investigation for years to come." (p. 17) There was confusion between whether individual detachments or the Task Force would investigate; there was lack of communication between individual detachments and the Task Force; detachments regarded IRS claims as low priority given the age of the offences and difficulty in obtaining evidence; members of the Task Force were continually re-assigned to homicide investigations and "seldom had any time for NIRS". Of the allegations of physical assault, almost all fell within the category of "common assault" and were well past applicable limitation periods.

A private researcher was hired to search historical records on each known suspect. The United Church of Canada gave her free access to all its publicly accessible files, but requested that the Task Force contact its lawyer for restricted files such as pension records. The Sisters of the Child Jesus worked at four of the schools and were consistently generous in their provision of information and assistance. Both the Oblates and the Sisters of St. Anne refused access to their records. The B.C. Regional Office of the Department of Indian Affairs was very cooperative, but the Indian Affairs headquarters "refused to provide any assistance whatsoever." Other than the above exceptions, "neither the Churches nor the federal government were willing to allow investigators access to their archival records, either due to privacy laws or out of fear that these records would in turn be provided to one of the other parties in the multitude of civil suits filed against them." (p. 19) So much for the search for truth and justice and transparency to former residential school students. The RCMP served numerous search warrants in order to obtain information that parties would not voluntarily provide.

While refusing to provide records to the RCMP in case the records might be used against the government, the government of Canada was simultaneously demanding access to the records the RCMP had collected so that Canada could use any such records to defeat civil lawsuits launched by former students against Canada.

Canada's requests began by seeking copies of the criminal records of the former students who were filing civil lawsuits against Canada. (p. 27) Canada has failed to provide to the TRC any information about the various criminal records of persons convicted of committing abuse against former students.

At one early point, while the RCMP still trusted Justice Canada, Justice Canada were allowed to come to RCMP premises to copy the records. The RCMP later learned that

> the DOJ employee had taken much more than had been agreed upon, including files relating to on-going investigations and privileged correspondence between the Task Force and Crown. Compounding this was the discovery that DOJ investigators had been approaching victims and witnesses mentioned in RCMP files. This was a huge concern to the Native community and raised questions as to whether the RCMP could be trusted. The RCMP reacted to this news by suspending all disclosure requests and demanding that the documents taken by DOJ be returned immediately. DOJ refused. (p. 29)

The RCMP considered that Canada had a clear conflict of interest: giving legal advice to the RCMP and defending Canada in the civil lawsuits. Justice Canada did not agree that it was in a conflict of interest. "DOJ was the only organization to hold this view." (p. 21) In the summer of 1999, the RCMP ignored Justice Canada advice and hired its own external lawyer. It was the Justice Canada request for RCMP records that ultimately forced the RCMP to move the

investigation into a higher priority, so that the investigation would no longer be "on-going" and disclosure could be made to Justice Canada without risk of harming the investigation.

The RCMP hired lawyer Michael Code. Justice Canada ordered the RCMP to fire Code because Code was in a conflict of interest: his law firm had been hired by Canada to provide advice on an unrelated residential school matter. Justice Canada argued that Code would be in a conflict of interest if he gave legal advice to the RCMP while his law firm was giving advice to another part of the Government of Canada on residential school matters. This was of course the exact conflict of interest that Justice Canada was in, but which it had previously denied.

The RCMP then hired another external lawyer, but Justice Canada issued the letter of appointment which expressly named a Justice Canada senior official as the instructing officer and expressly prohibited the external lawyer from giving any advice to the RCMP relating to the "any claim of independence of the RCMP". (p. 31)[121]

A full court hearing was held in September 2000 where the RCMP, joined by the B.C. Attorney General, argued against an obligation to disclose records to former residential school students. The defendant Canada relied on the documents for a number of purposes, including to draft its pleadings in these actions. The plaintiffs had access to extensively edited versions of the documents only.

On December 21, 2000, Justice Dorgan ruled against the RCMP and held that the plaintiffs were entitled to all relevant documents that Canada had already obtained. Negotiations began on the drafting of the Court Order. Following extensive negotiations, a final wording was agreed on that provided safeguards for third parties and addressed all of the RCMP's concerns. The court decision is: *PJ et al v. The Attorney General of Canada et al,* 2000 BCSC 1780.[122]

In July 2001, the parties involved in the Kuper Island civil suits reached an out of court settlement, bringing the entire civil disclosure issue to an abrupt conclusion. Other disclosure requests were filed by plaintiffs' lawyer relating to the Kamloops residential school, but they ultimately withdrew their application. All subsequent disclosure requests were simply requests from plaintiffs for copies of their own statements.

Between budget cuts and reacting to demands for RCMP records both from Canada and plaintiffs' lawyers, by the summer of 1999, "the investigation had effectively ground to a halt."

And all of the above was only an investigation into 15 of the Indian residential schools!

The RCMP provided an internal research report to the TRC in October 2012, the Lebeuf report.[123] The Lebeuf report stated that the RCMP undertook three major investigations: one in Nunavut from 1993 to 1995; one in Northwest Territories from 1996 to 1998; and one in British Columbia from 1994 to 2003. In 1994, DIAND requested a review by the RCMP of 69 cases of possible abuse. In December 1996, DIAND requested the RCMP to review an additional 22 cases. The

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[121] It is important to recall at this stage that the RCMP and Department of Justice were in a clear conflict of interest when Indian residential schools were being created and were operating: they were agents of the state designated to enforce the government policy of forcing indigenous children to attend these schools.
[122] http://canlii.ca/t/1fm7j
[123] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf

RCMP did not disclose its records from these investigations to the TRC.[124] The RCMP noted that many investigations did not result in charges because the accused was dead by this time.[125]

According to that report, "excluding historical files" there were 369 criminal charges laid. This number is made up of 35 charges for gross indecency; 106 for indecent assault against a male; 190 for sexual assault; 25 for buggery; 2 for contributing to juvenile delinquency; 1 for touching a person under the age of 14 for sexual purposes; 1 for "traps" to cause bodily harm; 1 for sexual interference and 8 for assault cause bodily harm.

The report did not state how many separate victims or accused persons there were, or how many convictions or what the sentences were. It appears that numerous charges were laid against a much smaller number of accused. The report did not say what the results were for the criminal charges.[126] The report included Appendix X which summarizes 871 separately numbered incidents; the heading of Appendix X is "RCMP Law Enforcement Activities in Government Archives Files."[127] Appendix XI is headed "RCMP Investigations and Files Reviewed." My count of the investigations listed in this Appendix comes to 66. The Appendix only included 6 investigations from Alberta, 5 from Yukon, 26 from Saskatchewan, 5 from Northwest Territories, 1 from Nunavut, 10 from Manitoba, 9 from British Columbia and 4 from "DIAND files."

Relating only to the B.C. investigation, we have seen RCMP documents reporting different numbers:

- the investigation found 219 suspects of sexual and physical abuse, 378 victims of sexual assault, and 223 victims of physical abuse, resulting in 172 instances where charges were recommended.[128]

- the investigation identified 330 victims and 180 suspects, 148 convictions of sexual assault, 11 convictions for physical assault. It is clear that these are convictions on individual "counts" of assault, without saying how many separate individuals were charged and convicted.[129]

- the investigation included 974 separate offences, 515 being sexual offences involving 374 victims. Another 435 allegations of physical assault involved 223 victims (many of whom are included in the 374 victims of sexual abuse). One-third of alleged abusers were deceased by the end of the investigation. The RCMP reported 14 individuals were charged with offences in connection to Indian Residential Schools (including charges laid prior to the creation of the Task Force). The only outstanding arrest was that of Edward Fitzgerald, Lejac Roman Catholic Residential School, charged with 21 sex and common

[124] *Ibid.,* see, for example, comments on p. 6, 13, 14, 20, 33, 43-44, 46, 47 and 111 re: missing records, p. 13
[125] *Ibid*., p. 111 and 162
[126] *Ibid.,* p. 115
[127] *Ibid*., Appendix X begins at p. 259
[128] "The Royal Canadian Mounted Police and Indian Residential Schools in Canada", Alice Glaze of Contentworks Inc., May 24, 2012, for the TRC, p. 39, citing "Final Report of the Native Indian Residential School Task Force," Constable M.W. Pacholuk, (E Division Major Crime, c.2003)
[129] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf , p. 111-112

assault related offences, believed to be residing in Ireland.[130]

- over 376 victims were interviewed involving 957 separate offence, resulting in fourteen individuals being charged. Dozens more will never be charged, either because of death or a lack of evidence.[131]

The report that the RCMP provided to the TRC was reviewed by a research contractor for the TRC, Alice Glaze. Glaze reported:

> None of the documents is cited in the report; all use an internal numbering system that refers to the copies collected by the RCMP researchers for Dr. LeBeuf. To date (May 2012), no other researchers have been given access to the copied material, most of which comes from the files of the RCMP, Aboriginal Affairs and Northern Development Canada and the archives of Roman Catholic orders. The listings are cross-referenced to the RCMP, document date, document type, school, RCMP detachment, student, and the position of the person who initiated the action or contact with the RCMP, but it is unstated whether the summaries are drawn from the content of a letter or memo, from marginalia or from file names." Further, "The use of partial quotations from anonymous interviews makes it impossible to fully understand the context of the quotation and its regional, school and individual context." "It is unstated whether individuals were denied the opportunity to have their names included in the report. (p. 51)
>
> The researchers had no access to RCMP records still held by the RCMP or under access restrictions at the Library and Archives Canada. Access to the restricted records held by Aboriginal Affairs and Northern Development Canada (AANDC) at Library and Archives Canada was only granted in early May 2012, long after research was completed. To a certain extent, some of these records were found in the AANDC Summation Database, which Contentworks accessed over several days. (p. 6)
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> Based on discussions with Dr. Marcel-Eugène LeBeuf and on a review of his report *The Role of the Royal Canadian Mounted Police During the Indian Residential School System* (Royal Canadian Mounted Police, 2011), it was found that relevant RCMP files exist on the subject of police interaction with residential schools, but that access was not granted for this project. (p. 8)

Glaze's report included several citations as follows: "LeBeuf, *The Role of the RCMP*, [then Glaze noted the page number in the LeBeuf report]. LeBeuf's report only provided a summary of this case and did not include citation information, so no further research into this case was possible."

The RCMP did not provide to the TRC any of the records specifically examined LeBeuf, other than to tell the TRC to look at the documents in the national archives itself. The RCMP refused to provide any of the audio recordings, notes or transcripts of the more than 200 people that LeBeuf interviewed for his report, telling the TRC that all of these interviews were confidential, and it did not matter what the Settlement Agreement said about producing all relevant records to the TRC.[132]

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[130] RCMP press release: http://rabble.ca/babble/aboriginal-issues-and-culture/residential-school-arrest-kinney-extradited-thailand

[131] "Final Report of the Native Indian Residential School Task Force," Constable M.W. Pacholuk, (E Division Major Crime, c.2003), p. 122

[132] I plan to write a separate paper about the TRC's challenges in obtaining access to records

Modern record-keeping and databases have dramatically improved, and in recent decades, the RCMP and the Department of Justice were heavily involved in receiving complaints about abuse at residential schools, investigating those complaints and responding to claims about abuse. However, even as recently as 1994, the RCMP noted there a request to the Punnichy Detachment to investigate various cases of abuse at St. Philip's Residential School, with the notation: "File Purged."[133]

In 1997, the Minister of Justice of Canada asked the Law Commission of Canada to prepare a report addressing processes for dealing with institutional child physical and sexual abuse. By this time, child abuse at Mount Cashel Orphanage, residential schools, and several other institutional settings[134] had created a sense of national shame and the need to do something.

Notice that the Minister's request was limited to physical and sexual abuse. The request made no mention of the abuse caused by forced separation of children from families, underfunding leading to unhealthy living conditions and inadequate education, and loss of language, culture and parental ties. Nonetheless, one of the responses of the Law Commission was to ask Goldie Shea to undertake a study of criminal and civil cases of institutional child abuse in Canada. This remains one of the only sources of information about early residential school prosecutions and civil actions.[135]

The Independent Assessment Process created by the Settlement Agreement received more than 38,000 claims by former students alleging that they suffered serious abuse while at residential schools and in almost all cases, the IAP process found evidence of abuse and has paid more than $3 billion to former students.[136] It should be noted that the IAP does not accept claims for loss of language or culture or forcible confinement, and compensates only for serious physical or sexual abuse or other wrongful acts proven to have caused serious psychological consequences for the claimant without other serious physical abuse. To date, the TRC, the National Centre for Truth and Reconciliation, Library and Archives Canada and the public have not received any IAP records and have no way of knowing how many of the 38,000 cases had any history of police investigations, charges or convictions. The IAP, contrary to the Settlement Agreement, never

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[133] *The Role of the Royal Canadian Mounted Police during the Indian Residential School System*, Marcel-Eugène LeBeuf on behalf of the RCMP, 2011, http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf, p. 457

[134] See the bibliography in the Law Commission's report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Law Commission of Canada, 2000. Among the residential and institutional settings where abuses occurred and were investigated are the Westfield Diagnostic and Treatment Centre (Alberta), Jericho Hill School for Deaf Children (British Columbia), confinement of Doukhobor children (B.C.), "Children of Duplessis" (Quebec), Thistletown Regional Centre (Ontario), Batshaw Youth and Family Centres (Quebec)

[135] Law Commission of Canada, "Institutional Child Abuse in Canada: Criminal Cases" G. Shea (Ottawa: Law Commission of Canada, 1999) http://dalspace.library.dal.ca/bitstream/handle/10222/10442/Shea%20Research%20Criminal%20Cases%20EN.pdf?sequence=1 and "Institutional Child Abuse in Canada: Civil Cases", G. Shea (Ottawa: Law Commission of Canada, 1999).http://dalspace.library.dal.ca/bitstream/handle/10222/10441/Shea%20Research%20Civil%20Cases%20EN.pdf?sequence=1

[136] Indian Residential Schools Adjudication Secretariat, Statistics from September 19, 2007 to November 30, 2016, http://iap-pei.ca/information/stats-eng.php

gave IAP survivors a choice about what should happen with their IAP records and the IAP has been strenuously arguing in court that no one should ever know what is in the IAP records.[137]

How many criminal investigations, charges and convictions arose from abuses at residential schools? The TRC does not know for sure. The TRC found documents suggesting 33 individuals were convicted of abuses in Indian Residential Schools. That is a vast difference from the 369 criminal charges laid cited in the RCMP report and the 38,000 allegations from the residential school students who were still alive in 2005. The cases the TRC identified were almost exclusively charges for child sexual abuse. There appear to be almost no prosecutions or convictions for obstruction of justice, physical assault, assault with a weapon, uttering threats, unlawful confinement, kidnapping, withholding the necessities of life, causing death by criminal negligence, manslaughter, or other criminal and provincial offences.

Given the above, it is no wonder that former students and their lawyers lost faith in the criminal justice system and began exploring ways to see if the civil justice system would be of any benefit to them. It was long past the time when the civil justice system might have offered them some protection from residential school abuse.

A complete number of how many complaints of abuse were received by the RCMP (let alone by police agencies generally), how many investigations were begun, how many charges were laid, how many convictions resulted from these charges, from what schools, with respect to which victims, what were the sentences – these are questions that the RCMP and Justice Canada have never answered.[138]

11. Conclusion

Crimes occurred within Indian residential schools from the very beginning. The crimes included theft of children's property, forcible confinement, criminal negligence causing death, physical assault and sexual assault. The criminal justice system was used to intimidate (terrorize?) parents and children, deprive them of basic freedoms, charge them with ridiculous offences such as theft of government clothing for trying to run away. The police were agents of the Indian residential school, there to enforce government policy and law. The criminal justice ignored the crimes that were happening at the schools. On the rare occasions when the criminal justice system got involved, charges were not laid; when charges were laid, acquittals were common; when convictions were secured, obscenely lenient sentences were given; investigations were kept as narrow as possible; no one kept track of the complaints, charges or convictions; no one retained the original documents of charges and convictions. Once it came time to have a Truth and Reconciliation Commission, the RCMP and Justice Canada stonewalled and refused to conduct an adequate search for relevant records and refused to provide the documents they knew about to the TRC. This was done in knowing disobedience of the binding court order, which is what the Indian Residential Schools Settlement Agreement was, to provide the TRC with all relevant documents.

[137] A full discussion of the attempts by the IAP to prevent anyone from learning what is in their records is found here: McMahon, Thomas L., "The Final Abuse of Indian Residential School Children: Deleting Their Names, Erasing Their Voices and Destroying Their Records after They Have Died and without Their Consent," (October 27, 2016). Available at SSRN: https://ssrn.com/abstract=2812298

[138] Anyone with more information about criminal prosecutions relating to Indian residential schools is asked to contact the author at tom.mc (a) mymts.net

All students of Canadian history, criminal law, human rights, indigenous rights and criminology need to know this history.

The Inquiry into Missing and Murdered Indigenous Women is about to begin. That Inquiry will examine how the criminal justice system chose to investigate or ignore complaints and reports of missing persons; whether the criminal justice system kept track of these reports in a coordinated fashion; whether the criminal justice system pursued the complaints and reports in a diligent fashion. And we will find out if the RCMP, Justice Canada and provincial police and government agencies will be willing to provide the Inquiry with all relevant documents. At least the Inquiry was established under Part I of the federal *Inquiries Act* and has the power of subpoena, unlike the TRC. Why was the TRC denied the power of subpoena? Why did the RCMP and Justice Canada refuse to comply with the binding court order to produce all relevant records? Why did Canada argue before the courts that the TRC had no right to go to court to seek all relevant records? Why wouldn't the courts enforce its own court order? Was it because too much truth gets in the way of reconciliation?