TRUTH COMMISSIONS AND PUBLIC INQUIRIES: ADDRESSING HISTORICAL INJUSTICES IN ESTABLISHED DEMOCRACIES

by

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ABSTRACT

In recent decades, the truth commission has become a mechanism used by states to address historical injustices. However, truth commissions are rarely used in established democracies, where the commission of inquiry model is favoured. I argue that established democracies may be more amenable to addressing historical injustices that continue to divide their populations if they see the truth commission mechanism not as a unique mechanism particular to the transitional justice setting, but as a specialized form of a familiar mechanism, the commission of inquiry. In this framework, truth commissions are distinguished from other commissions of inquiry by their symbolic acknowledgement of historical injustices, and their explicit “social function” to educate the public about those injustices in order to prevent their recurrence. Given that Canada has established a Truth and Reconciliation Commission (TRC) on the Indian Residential Schools legacy, I consider the TRC’s mandate, structure and ability to fulfill its social function, particularly the daunting challenge of engaging the non-indigenous public in its work. I also provide a legal history of a landmark Canadian public inquiry, the Mackenzie Valley Pipeline Inquiry, run by Tom Berger. As his Inquiry demonstrated, with visionary leadership and
an effective process, a public inquiry can be a pedagogical tool that promotes social accountability for historical injustices. Conceiving of the truth commission as a form of public inquiry provides a way to consider the transitional justice literature on truth commissions internationally along with the experiences of domestic commissions of inquiry to assemble strategies that may assist the current TRC in its journey.
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INTRODUCTION

This project began with a question: why do we not see truth commissions in established democracies? Although the Canadian Truth and Reconciliation Commission (TRC) on the legacy of the Indian Residential Schools (IRS) was then under negotiation as a part of a legal settlement agreement, it was the first state-sponsored body called a “truth commission” in an established democracy. Despite widespread historical injustices in established democracies, truth commissions are simply uncommon. My initial question led to another: what do established democracies have instead? That is, what legal mechanism does an established democracy use to address historical injustice instead of a truth commission? The answer, it seemed to me, was the commission of inquiry (commonly known as the public inquiry). At the time, the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 and the Ipperwash Inquiry were underway, while the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar was just wrapping up. These inquiries were part of Canada’s legal response to questions surrounding significant injustices that concerned Canadians.

When I began to think about the role of the public inquiry in the Canadian legal order my thoughts repeatedly turned to the landmark Mackenzie Valley Pipeline Inquiry run by then...
Justice Tom Berger in the mid-1970s in Canada’s North (the “Berger Inquiry”). Berger’s inquiry had addressed a question of public importance by visiting affected communities, commissioning independent research, communicating the issues to the wider Canadian public, and making bold recommendations to the government. Although not envisioned as such by the government of the day, the Berger Inquiry explored a deep and abiding societal divide between indigenous peoples of the North and non-indigenous Canadians of the South.

Berger was appointed by the federal government in March 1974 in the wake of a 1970 proposal for a natural gas pipeline from the Beaufort Sea in the Arctic to Alberta and on to the United States. Berger’s mandate was to examine the social, environmental and economic impact of the planned pipeline and energy corridor (for oil was expected to follow gas) across the North. He interpreted his mandate to include issues of Aboriginal title and self-determination, thus taking an inquiry into a specific issue and situating it within the social, legal, political and cultural context within which it would exist. Berger traveled throughout the western Arctic, meeting with Dene, Inuit, Métis and white residents of the region. Formal hearings were held in Yellowknife, where business consortiums and experts testified. One of Berger’s innovations was to have community-based hearings, “held in tents and log cabins, sometimes outdoors, with many of them ending with traditional drum dances and … cookouts.” After three years of hearings and research, he issued a report in April 1977 in Ottawa. The Report was entitled Northern Frontier, Northern Homeland to reflect the opposing views of the business and indigenous communities affected by the pipeline.

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4 The Berger Inquiry will be discussed at length in Chapter Four, below.
5 Throughout the dissertation I generally use the following terms: “indigenous” when referring to the original inhabitants of what is now Canada; “Aboriginal” when referring to concepts in Canadian law such as “Aboriginal title”, “Aboriginal self-government”, or “Aboriginal rights”; “Aboriginal” and “First Nation” when referring to court or government descriptions of indigenous people(s) or concepts related to them where the terms refer to legal constructs applied to indigenous peoples; and “Indian” where that is the term used in legislation or policy.
6 Unlike many public inquiries that are struck to analyse a past problem, the Berger Inquiry’s mandate was prospective (i.e. to look at a proposed project). Nonetheless, Berger’s view was that to look to the future in the North, Canada would first need to acknowledge and consider the past: “The North has become our frontier during the past few decades; it has been the homeland of the Dene and Inuit peoples for many thousands of years.” Thomas R. Berger, Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry, rev. ed. (Vancouver: Douglas and McIntyre, 1988) at 41.
proposal. His Report “shocked the government that appointed him, and was heralded by some as ‘Canada's Native Charter of Rights.’” The Report educated the Canadian population about a land and its peoples that were largely viewed as far away and unimportant.

The Report did conclude that a pipeline could be built, but not across the northern Yukon, only after further study, and only after settlement of Aboriginal land claims in its path. The government accepted Berger’s recommendation for a 10-year moratorium. The impact of the Report was enormous, both for its extraordinary interpretation of the role of a public inquiry and for its illumination of the issues facing the North. In many ways, the Berger Inquiry looked like a precursor to the truth commissions that began to appear in other countries in the years that followed – travel to affected communities, less formal community-based hearings, more formal expert hearings in a large centre, civil society involvement, an assessment of the larger structural and institutional considerations for the problem, and a report with practical and comprehensive recommendations. The concern for the peoples that would be affected by the pipeline, the interest in getting a holistic view of the issues, the focus on educating the wider public about the matters in question – these aspects of the Berger Inquiry heralded a new way of running the commission of inquiry. Hundreds of commissions of inquiry have been held in Canada and many of them simply determined ‘who did what to whom’ without concerning themselves with the broader public. But Berger showed that commissions of inquiry can be an opportunity to address broader social problems by setting out a factual record and making policy recommendations in a way that educates the public about the issues. Canadians learned that a public inquiry could be truly public, both through encouraging public participation in the process, but also opening up issues for public debate.

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11 I acknowledge that the term “land claims” is problematic in that it suggests that indigenous peoples must seek title to their territory from the ‘rightful’ owner (the Crown); whereas from an indigenous perspective it is the Crown who is making the land claim. As Frank Calder has stated: “This is our land. We don’t have to go and thank The Queen for giving us this land. This is our land.” “Frank Calder and Thomas Berger: A Conversation” in Hamar Foster, Jeremy H. A. Webber, & Heather Raven, eds. Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights (Vancouver, UBC Press, 2007) 37 at 40.
and ultimately for developing policy consensus. An inquiry’s process can be as important as its result. However, as we will discover, its success very much depends upon factors that include the inquiry’s scope, leadership, process and media exposure.

Over the years in what is now Canada, the government has frequently utilized commissions of inquiry to address aspects of its policies toward indigenous peoples. The commission of inquiry was a favoured tool of settler societies in the Victorian era. For example, between 1828 and 1858, six commissions of inquiry – all conducted in response to what was becoming known as the “Indian problem” – laid the foundation for Indian policy before Confederation. Commissions of inquiry continued to be used by federal and provincial governments to address various aspects of the “Indian problem”. The degree to which the recommendations of each inquiry have been implemented has varied but government has

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14 D. H. Borchardt, Commissions of Inquiry in Australia: A Brief Survey (Bundoora, Vic.: La Trobe University Press, 1991) at 7. See discussion below, text accompanying note 25.

The first report was somewhat rushed and rudimentary and was prepared in 1828 by Major General Darling, military secretary to the governor general, Lord Dalhousie. It covered both Upper and Lower Canada and led to the establishment of the reserve system as official policy. The second was prepared by a committee of the Lower Canada Executive Council in 1837 and essentially followed the recommendations of the earlier Darling report. In 1839, the third report was prepared by Justice James Macauley and dealt with conditions in Upper Canada. It too generally supported the reserve and civilization policies of the time. A committee of the Upper Canada Legislative Assembly prepared the fourth report in response to Lord Durham’s report on conditions in the two Canadas, arriving at conclusions similar to those of the preceding report by Justice Macauley. The fifth, and by far the most important, was the 1844 report of Governor General Sir Charles Bagot, which covered both Upper and Lower Canada. Its recommendations gave a direction to Canadian Indian policy that has endured in many respects right up to the present. A sixth report was prepared in 1858 by Richard Pennefather, civil secretary to the governor general. It too covered both Canadas and was the most thorough report on Indian conditions to that point.

16 For example, a dispute between British Columbia and the federal government over allocation of reserve lands to settlers was referred to a joint federal/provincial commission in 1876, but little progress was made. In 1912 a further joint federal/provincial commission, the McKenna McBride Royal Commission, was appointed to review the same issue, with similarly disappointing results for indigenous peoples: see Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship vol. 2 (Ottawa: Supply and Services Canada, 1996) [RCAP Report, vol. 2], part 2, c. 4 “Lands and Resources”. See also Mary Haig-Brown, “Arthur Eugene O'Meara: Servant, Advocate, Seeker of Justice” in Celia Haig-Brown & David A. Nock, eds. With Good Intentions: Euro-Canadian and Aboriginal Relations in Colonial Canada (Vancouver: UBC Press, 2006) 258 at 259: “[the Royal Commission’s] focus quickly became reducing the current acreages of reserves and substituting valuable land with less valuable land.”
continued to resort to the public inquiry mechanism when faced with difficult issues related to indigenous peoples.

Each decade since the Berger Inquiry has brought at least one major inquiry addressing some aspect of the troubled relationship of indigenous and non-indigenous people in Canada. The largest in scope and breadth was the Royal Commission on Aboriginal Peoples (RCAP) that provided a comprehensive picture of Canada’s relationship with indigenous peoples, including the IRS system. Several other inquiries revealed racism as a pervasive factor in indigenous and non-indigenous relations. In 1989, the Royal Commission on the Donald Marshall, Jr., Prosecution, created in response to the wrongful conviction of a Mi’kmaq man for murder in 1971, made 82 recommendations aimed at improving the administration of justice in Nova Scotia, particularly with respect to racialized communities. The Aboriginal Justice Inquiry of Manitoba provided a historical, cultural and legal review of the relationship between the Manitoba justice system and the indigenous peoples of that province in its 1991 report. The 2004 Neil Stonechild Inquiry addressed the practice of Saskatoon police of dropping off young indigenous men on the outskirts of the city in the middle of winter and leaving them to freeze to death, known as “Starlight Tours”, and the racism ingrained in the police force that allowed such a horror to become a practice. The Ipperwash Inquiry investigated the death of Dudley George, shot by Ontario Provincial Police while he participated in a protest by indigenous people with respect to a land dispute.

Despite the developments in the field of public inquiries since the Berger Inquiry, negotiators for survivors of the IRS system specifically sought a truth commission, rather than a public inquiry, as part of the settlement of their class action lawsuits against the federal government.

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and the churches that ran the schools for over 100 years. These negotiations occurred in the context of a long struggle by survivors to achieve redress for the harms suffered by them and their communities as a result of the IRS system. The legal mechanisms engaged with respect to IRS over the past two decades included criminal prosecution, civil litigation, alternative dispute resolution and commissions of inquiry. In one way or another, each mechanism had proven to have limitations in its ability to address the IRS legacy.  

With Canada about to launch its first truth and reconciliation commission, I queried whether the way in which Berger ran his Inquiry might have some useful strategies for the fledgling TRC. After all, Berger conducted his process in indigenous communities in a manner that was considered respectful and he showed how the process itself could educate the wider public and create positive change. By the time his Inquiry reported, Canada had experienced a national consciousness-raising process about indigenous peoples and their northern homeland. This use of the commission of inquiry process is precisely what the TRC must adopt if it is to succeed in its mandate. It is common for states preparing to host a truth commission to look at examples of other truth commissions that have occurred in other countries to glean practices for their own process. However, it is important for a truth commission process to be tailored to the context of the state in which it will occur. While the Canadian truth commission can no doubt benefit from international experience with truth commissions, I argue that it can also benefit from commissions of inquiry that have been conducted in Canada with respect to the indigenous/non-indigenous relationship. In  

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21 This dissertation looks at legal mechanisms being utilized in the Canadian legal order to address the IRS legacy. While I use the term “survivors” throughout to refer to former IRS students I acknowledge that IRS survivors and their relations are not a homogenous group. Indeed, there are those that view the TRC and the discourse of reconciliation as illegitimate: see, for example, Roland Chrisjohn & Tanya Wasacase, “Half-Truths and Whole Lies: Rhetoric in the ‘Apology’ and the Truth and Reconciliation Commission” in Gregory Younging, Jonathan Dewar & Michael DeGagné, eds. From Truth to Reconciliation: Response, Responsibility and Renewal – Canada’s Truth and Reconciliation Journey (Ottawa: Aboriginal Healing Foundation, 2009) 217. For that matter, there are those who view Canada and its legal mechanisms as illegitimate: see, for example, indigenous philosopher Alfred’s assessment of Canada as an “imperial enterprise ... operating in the guise of a liberal democratic state [that] is, by design and culture, incapable of just and peaceful relations with Indigenous peoples.” Taiaiake Alfred, “Restitution is the Real Pathway to Justice for Indigenous Peoples” in Younging, Dewar & DeGagné, ibid., 179, at 184. While I personally respect and in many ways concur with those perspectives, this dissertation analyses the Canadian case as it stands today and proceeds on the basis that the TRC is the vehicle currently being used to address the IRS legacy.
particular, I argue that the Berger Inquiry can provide essential strategies for the Canadian TRC as it embarks upon its five-year mandate.

Chapter One of the dissertation explores the history and development of the commission of inquiry and the truth commission mechanisms. I review the important social function that a commission can have to educate the public about the issues before it. I argue that, by virtue of certain distinguishing features, the truth commission is actually a specialized form of commission of inquiry. Possible reasons for the reluctance of established democracies to adopt the truth commission are explored, as are possible motivations for IRS survivors to seek a truth commission in Canada.

Chapter Two provides an overview of the historical background to the IRS system. Legal mechanisms that have been utilized until now to address the harms experienced by survivors and their descendants are reviewed. Specifically, the chapter surveys the use of criminal prosecution, civil litigation and alternative dispute resolution. The perceived difficulties or limitations of these forms are examined, along with their useful aspects. In addition, I explore RCAP’s important role in the IRS narrative.

Chapter Three describes the negotiations leading to the IRS Settlement Agreement (the Settlement Agreement) of which the Canadian TRC is a part. I review the mandate and structure of the TRC and consider its ability to fulfill its social function, assessing its leadership and its potential as a process. I assess the latter by considering the challenges and possibilities in interpreting and implementing its mandate, including how the TRC’s form may counter the concerns the survivors had with other legal mechanisms that previously addressed the IRS legacy, how it may engage and educate the public, and its potential for promoting national reconciliation. Comparative information from international examples of truth commissions supplements the analysis of the TRC.

I conduct an extensive exploration of the Berger Inquiry in Chapter Four, providing a legal history of a landmark inquiry that has been widely discussed in Canada but rarely analysed by legal scholars. I distill the important strategies that this Inquiry can provide for our current
TRC and for future commissions of inquiry in Canada. These strategies principally lie in the innovations that Berger brought to the commission of inquiry model, but also in his approach as a lawyer and a judge. His acute knowledge of the uses and pitfalls of the adversarial model found in the courts enabled him to structure his Inquiry such that legal strictures did not hinder his search for the fullest possible view of the issues before him.

The concluding chapter sums up the basic themes of the dissertation: that the truth commission is a special kind of commission of inquiry that arises in circumstances where the usual legal mechanisms are not adequate to the task of addressing historical injustices; and that whether the social function of a commission is fulfilled depends upon its leadership and the process employed to implement its mandate. I suggest that an important aspect of the social function of a commission lies in shaping the national narrative. As demonstrated by the Berger Inquiry, a commission can be a pedagogical tool that promotes social accountability for historical injustices. I draw out the implications of this analysis for the immense task that lies ahead of the TRC.
1. TRUTH COMMISSIONS IN ESTABLISHED DEMOCRACIES

In this chapter, I suggest that the truth commission is a specialized form of public inquiry that has developed over the last three decades as a response to historical injustices. In order to understand this development, I first explore the two mechanisms that are the focus of this dissertation: the truth commission and the public inquiry. I review the history of the public inquiry as it has developed in Canada, and the international development of the truth commission. Finally, I consider some of the reasons why truth commissions may now be sought as a response to historical injustices in established democracies.

Commissions of Inquiry

Royal Commissions may be traced from at least the Domesday Book of 1086, while commissions of inquiry date back to at least the 12th century with the exercise of the royal prerogative to appoint citizens to perform duties on behalf of the Crown. Thus, a Royal Commission referred to the Royal Warrant or Letters Patent issued under the authority of the monarch. After a decline in the use of inquiries in Australia in the late 18th until the end of the 18th centuries, their use was revived during the reign of Queen Victoria.

Today the title of a commission does not denote any particular status; the terms “royal commission”, “commission of inquiry”, and “public inquiry” are often used interchangeably. Federal public inquiries in Canada are governed by the Inquiries Act,

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23 Borchardt, supra note 14 at 6-7.
24 Ibid. at 6.
25 Ibid. at 7.
26 Salter notes that: “Almost everyone agrees that the significance of terminology – inquiries versus Royal Commissions – is of little consequence.” Liora Salter, “The Complex Relationship Between Inquiries and Public Controversy” in Allan Manson & David J. Mullan, eds. Commissions of Inquiry: Praise or Reappraise? (Toronto: Irwin Law, 2003) 185, at 187 [footnote omitted]. This observation echoes that of the Ontario Law Reform Commission: “It would appear that less emphasis is now given to terminology, and to formal and technical distinctions between royal commissions and other forms of public inquiry.” Ontario Law Reform Commission, Report on Public Inquiries (Ontario Law Reform Commission: Toronto, 1992) [OLRC Report], at 144. While Royal Commissions “are one of the oldest institutions of government”, Hallett determines that in the Australian context, boards of inquiry were directly related to colonization. He posits that Boards of Inquiry evolved from the Courts of Inquiry used by early naval and military colonial governors: Hallet, supra note 22.
which authorizes the cabinet to “cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof”. According to d’Ombrain, royal commissions and commissions of inquiry are both established identically as public inquiries under Part I of the *Inquiries Act*, with the same powers and privileges. The decision to call one a royal commission and the other a public inquiry is based on the subject matter of the inquiry, although in practice the press release announcing the inquiry will determine its status as one or the other. “The Canadian practice has been to reserve the title ‘royal’ for commissions that are inquiring into matters of policy, loosely defined.” Hallett distinguishes “Royal Commissions of Inquiry” and “Boards of Inquiry” from other government appointed advisory bodies because they cease to exist when they make their reports.

The public inquiry mechanism is used in Canada very frequently. In his review of the history of Canadian public inquiries, d’Ombrain states that most of the over 350 public inquiries since Confederation have focused on narrow issues, although between the 1930s and the 1960s, governments appointed inquiries to gain advice on significant issues of public policy such as dominion-provincial relations and the establishment of the Bank of Canada. The Diefenbaker and Pearson administrations brought another round of important national policy inquiries, including those on health, bilingualism and the status of women, but since then d’Ombrain asserts that there have been few significant policy inquiries. He comments: “The one major policy inquiry launched by the Mulroney administration, the Dussault-Erasmus commission on aboriginal peoples [i.e. RCAP], was more a gesture of puzzled goodwill than a clear-sighted initiative.” He states that the Chrétien administration “received the report of the commission on aboriginal peoples but with little evident enthusiasm for the ideas contained therein.” While the government’s enthusiasm for significant policy inquiries may

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at 16. This relationship between the development of the inquiry mechanism and colonization may warrant further study. There may be a parallel to the rise of truth commissions in circumstances where ordinary courts are not a workable option.

27 R.S. 1906, c.I-13, s. 2.
28 D’Ombrain, *supra* note 12 at 90.
29 Hallett, *supra* note 22 at 1.
30 D’Ombrain, *supra* note 12 at 87 [footnote omitted].
31 *Ibid.* at 89.
have declined since the 1960s, the public inquiry is still a prominent tool for investigating incidents that create public concern. As noted above, in recent years the Air India disaster, and the rendition and torture of Maher Arar eventually resulted in commissions of inquiry.\textsuperscript{33}

Public inquiries are useful for gathering wide ranging information through their broad investigative abilities in order to provide a comprehensive picture of the facts surrounding an issue or event.\textsuperscript{34} They are an effective mechanism for tackling large and pressing concerns of institutional and policy reform. Their independence from government and other parties enables them to credibly assess the evidence and report upon their conclusions. An additional trait makes public inquiries a critical legal mechanism for addressing pressing social issues. Former Supreme Court of Canada Justice Gerald Le Dain’s influential discussion of public inquiries articulates the part that inquiries play in shaping societal attitudes:

In an inquiry of this kind a commission becomes very much aware of its relationship to the social process. It has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. … The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.\textsuperscript{35}

Echoing Le Dain’s social function thesis, Centa and Macklem note the investigatory, informative, educational, and social functions of commissions of inquiry. They state that the independent and non-partisan nature of commissions enable them to consider social causes and conditions in a broader fashion than is available to judicial or legislative bodies, thus performing a valuable function in terms of defining public policy. These attributes promote government accountability to the citizenry and help to explain why the public inquiry remains part of the legal order.\textsuperscript{36} As Le Dain noted, although an inquiry is accountable to the

\begin{footnotes}
\item[33] See note 3, and accompanying text, above.
\item[34] Borchardt, \textit{supra} note 14 at 11, identifies three types of inquiry:
1. investigatory – appointed to establish the facts of a situation and to make recommendations to government on matters of policy;
2. inquisitorial – set up to determine, in the manner of the police, the facts of an incident or of events in the past;
3. advisory – to formulate the basis of government policy.
\end{footnotes}
government, it is ultimately accountable to the public, and must speak to the public in its report to government.\textsuperscript{37}

This ability to promote accountability is an important aspect of the commission of inquiry’s social function.\textsuperscript{38} Unlike a legislative or courtroom process, the public inquiry is not driven by interested parties. Through its hearings and investigative activities, the public inquiry process can precipitate attitudinal change. The public becomes aware of officially recognized problems and begins to seek answers. The inquiry can create pressure on individuals and organizations to account for their acts or omissions, even if they are not legally obliged to do so. “This form of accountability is especially important because it can affect perceptions and behaviour long after the inquiry has ended.”\textsuperscript{39} Public inquiries can engage in organizational reform through their “greater capacity to engage in quasi-legislative activity by openly articulating new standards of proper conduct and applying them to past events.”\textsuperscript{40}

These attributes sometimes provoke criticism. A common critique of public inquiries is that they are used as a means of deferring a political problem, given that they may take years to hold public hearings, conduct research, and complete a report.\textsuperscript{41} In addition, an inquiry’s recommendations are merely proposals for which there is no guarantee of implementation by government. Commissions of inquiry have no powers to sanction actions of the past, unlike the courts who can issue sanctions against wrongdoers for their actions. Another political concern related to commissions of inquiry is that whereas governments may be able to distance themselves from an issue by referring it to a commission, a government may equally refrain from creating a commission. The existence of a commission depends upon a government decision to establish it in the first place. While public inquiries are independent

\textsuperscript{37} Le Dain, supra note 35 at 82. He states that an inquiry’s “function is to inform the public, to clarify the issues, and to promote understanding of a problem.”

\textsuperscript{38} Roach refers to this as “social accountability”: Kent Roach, “Canadian Public Inquiries and Accountability” in Philip C. Stenning, ed. Accountability for Criminal Justice: Selected Essays (Toronto: University of Toronto Press, 1995) 268 at 269.

\textsuperscript{39} Ibid. at 274.

\textsuperscript{40} Ibid. at 272.

\textsuperscript{41} Ibid. at 268. See, however, John C. Kleefeld & Anila Srivastava, “Resolving Mass Wrongs: A Command-Consensus Perspective” (2005) 30 Queen's L.J. 449, who note at 487 that there are also disincentives to calling an inquiry, “such as loss of direction over the inquiry, including its costs and timeline and the surrender of the ability to shape public opinion about a matter under investigation”.
of government once established, they are dependent upon government for their existence. This means that they are at the mercy of the exercise of political discretion in one crucial sense.\(^4\) Indeed, some commentators have voiced concern that governments appear increasingly reluctant to establish commissions of inquiry when a public crisis might demand it or to grapple with major policy directions that require more time and focus than can be afforded by politicians concerned about election cycles.\(^4\)

Another significant concern with commissions of inquiry relates to procedural fairness, particularly with respect to the coercive powers accorded to some inquiries in their operations (i.e. power of subpoena, power to require testimony under oath). That is, even if a commissioner might wish to run an inquiry in a manner less adversarial than a court, the parties to the inquiry may feel obliged to participate with an eye to the possible legal consequences to them of the inquiry’s findings.\(^4\) An inquiry’s investigations or proceedings may unearth information or hear unproven evidence that could mean harm to a party’s reputation, and/or provide fodder for future criminal or civil proceedings. Sometimes, inquiries have overstepped the bounds of their mandate and become court-like in their process without ensuring the due process protections available in a courtroom.\(^4\) In general, policy-oriented inquiries raise few of the due process concerns of the more investigative inquiry.\(^4\)

All commissions of inquiry, whether investigative or policy-oriented, may give rise to criticisms with respect to their cost. The Krever Inquiry into the contamination of the


\(^{43}\) Centa & Macklem, in Manson & Mullan, supra note 26 at 81.

\(^{44}\) D’Ombrain, supra note 12 at 104-105:
Looking back over the sweep of policy inquiries, from Rowell-Sirois to Macdonald, there is no doubt that Canadians have been well served by developing processes that bring Canadians together to examine and develop new ways to deal with known problems. Official Ottawa has benefited from the fresh air and broader view that the inquiry process brings to bear on the policy process. It is disquieting to think that the landmark policy inquiry may be falling into disuse. It cannot be because Canada no longer has need of new ideas.

\(^{45}\) Salter, “Two Contradictions”, supra note 13 at 175.

\(^{46}\) See for example Starr v. Houlden, [1990] 1 S.C.R. 1366 in which the Supreme Court of Canada found that a provincial inquiry amounted to a substitute for criminal proceedings.

national blood supply with Hepatitis C and HIV is often used as an example of the problems with public inquiries. The inquiry ran over time (it was supposed to take one year and took almost five) and over budget (instead of the $2.5 million initially assigned, it spent $17.5 million), embattled by strenuous legal challenges from those that worried its conclusions would expose them to massive damages in negligence actions. Justice Krever did not report until the last of the challenges to the Supreme Court of Canada had run their course. The government decided to make changes to the blood system before the report’s release due to the urgency of the matter, rendering the report of questionable value.

While financial costs should be an important consideration, it is also vital to ask what the social costs would be of not fixing and ensuring the safety of our blood system, of not ensuring the safety of a community’s drinking water, or of not investigating the government’s complicity in the denial of fundamental human rights. As noted by Justice Gomery: “The criticism that commissions cost too much is valid if one takes the position that a price can be put upon the search for truth and justice”.

Despite the criticisms outlined above, the public inquiry is a useful legal mechanism. Even if its recommendations are ignored, the process of holding a public inquiry opens the possibility for dialogue about issues of public importance, and prepares the way for attitudinal change and policy development. As previously noted, public inquiries have important features that

49 Trebilcock and Austin, ibid. at 29.
50 Ibid. at 24.
52 See for example the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar (Ottawa: Public Works and Government Services Canada, 2006), mentioned in text accompanying note 33, above.
53 Gomery, supra note 48 at para. 34. Justice Gomery ran the Commission of Inquiry into the Sponsorship Program and Advertising Activities, established by Prime Minister Paul Martin in February 2004.
Some inquiries have been controversial; others have been almost totally ignored. Some have had a substantial impact on government policy; the recommendations of others have been seemingly ignored,
include the ability to consider an issue in its larger context, to use broad investigative powers to assemble a comprehensive factual portrait, and their position as an independent, non-partisan body. Along with their educational potential and their ability to promote accountability, public inquiries are a valuable public policy tool.

**The Development of the Truth Commission**

It is the ability of the commission of inquiry to ‘search for truth and justice’ that made it suitable for adaptation to the human rights context. The commission of inquiry form has qualities that are valuable for a truth-seeking commission as well: independence, openness and visibility, the opportunity for the creative framing of issues, a flexible political dynamic through the appointment of commissioners, the focus on social causes and conditions, and their “social function”. The ideas suggested in Le Dain’s account of the social function of the public inquiry in Canada in the 1970s certainly influenced how some public inquiries were subsequently conducted in Canada. These inquiries began to incorporate elements that mirror features of the truth commissions that arose in the decade that followed. Indeed, the evolution of the commission of inquiry form seen in Canada in the 1970s appears prescient when one considers the subsequent development of the truth commission.

The international phenomenon of the truth commission arose largely in the 1980s and certainly by the 1990s it had become a significant new mechanism in the law’s search for accountability for past human rights abuses. A truth commission’s very purpose is to have an effect on perceptions, attitudes and behaviour – it is not merely meant to shed some light on a dark period in the country’s history but also to help ensure that the mistakes of the past are not repeated in a society. It does so through making recommendations for institutional or structural change and through educating the public with respect to the abuses that occurred. In this way, “social influence” is the raison d’être of the truth commission. This aspect is akin to the social function of commissions of inquiry as described above, yet while many commentators discuss the truth commission, very few explicitly connect it to the commission

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although they may have had indirect effects difficult to assess. But it is significant that much of the history of Canada could be interpreted through the work of commissions of inquiry.

55 See OLRC Report, *supra* note 26 at 11-12.
of inquiry mechanism. Those commentators that do make the connection try to distinguish the truth commission as a unique mechanism.\textsuperscript{56} However, as I discuss in more detail below, the truth commission is better understood as a specific type of commission of inquiry – it arises in a specific context of addressing human rights violations and both its process and its goals manifest its social function.

Why did this type of commission of inquiry, the “truth commission”, arise? Following World War II, international law moved toward a focus on individual criminal accountability for violations of the laws of war and the development of international human rights law. Human rights advocates created new ways to address human rights violations. Initially, their innovations took the form of the International Military Tribunal trials in Nuremberg\textsuperscript{57} and Tokyo, the formation of the United Nations, and of non-governmental organizations such as Amnesty International.\textsuperscript{58} The difficulty in securing accountability for more than a few people and the cumbersome nature of war crimes prosecutions, among other factors, gradually led to a search for other mechanisms that might address human rights abuses in the past more broadly. The field of transitional justice developed within this legal discourse.

Transitional justice broadly refers to legal mechanisms that address past crimes or abuses in states moving from authoritarian to democratic rule, and/or from conflict to post-conflict. That is, the commonly understood notion of transitional justice relates to the desire to battle impunity for human rights violations in countries experiencing profound political upheaval.\textsuperscript{59} The late part of the twentieth century saw a debate about the desirability and practicality of accountability in societies recovering from regimes that inflicted massive human rights

\textsuperscript{56} See Mark Freeman, \textit{Truth Commissions and Procedural Fairness} (Cambridge, New York: Cambridge University Press, 2006) at 124, discussed below.
\textsuperscript{57} While Nuremberg is viewed by some as a prime example of victors’ justice, it is also the initial model for an international attempt to hold individuals accountable for the horrors perpetrated upon civilians during World War II.
\textsuperscript{58} Martha Minow, “Innovating Responses to the Past: Human Rights Institutions” in Nigel Biggar, ed. \textit{Burying the Past: Making Peace and Doing Justice After Civil Conflict} (Georgetown University Press: Washington, D.C., 2003) 87, at 88. More recently, ad hoc international tribunals such as those for the former Yugoslavia and Rwanda, and the permanent International Criminal Court, were developed to respond to mass human rights violations.
violations. The discussion of non-prosecutorial options for addressing gross human rights violations arose due to the “political and practical challenges to employing prosecutorial mechanisms”. These non-prosecutorial options included a new form of commission – the truth commission – that shifted the focus from punitive justice to “achieving accountability through truth and acknowledgement”.

The 1970s saw a wave of nascent democracies arising out of authoritarian rule. These emerging democracies had to decide how to deal with the human rights violations of the past. A desire by new governments to achieve legitimacy, and a growing movement to support the rule of law and the dignity of victims combined to create a situation where governments could not simply ignore the past. The search for politically viable responses and the increasing tendency to seek accountability became the focus of the transitional justice field. While punishment was still a major focus for many commentators and policy makers in the field of transitional justice, the truth commission model was beginning to gain ground as a valid mechanism for dealing with the past. How a government uses law to frame questions about past injustices shapes how a society formulates its response to the shadows of its past. According to Minow:

As a public instrument dealing with the past, law affords lessons about what produces memories for a community or a nation. Legal actors and those who influence them determine what past harms should give rise to a claim and what past violations should constitute a crime.

The truth commission became a viable option due to its less punitive approach to achieving accountability for historical human rights abuses. While many would prefer that human
rights violators be prosecuted and punished, the weakness of incoming democratic regimes (for example in post-Pinochet Chile) often did not allow for a Nuremberg-like response. Another legal mechanism was required to ensure that the search for accountability did not sacrifice the new democracy.\textsuperscript{66} When political conditions made trials impossible, truth commissions began to be chosen over prosecutorial responses. In such a situation: “the decision to forgo ordinary legal process is not the result of a detached comparison of the merits of one institutional structure against another.”\textsuperscript{67}

At first, prosecutorial and truth commission mechanisms were viewed as an either/or proposition, but increasingly they came to be seen as complementary.\textsuperscript{68} Truth commissions did often reflect a compromise between punishment and impunity,\textsuperscript{69} but as they gained credibility, it was argued that they could be a “complex and principled compromise between justice and unity in which central elements of both values are retained.”\textsuperscript{70} Further, such commissions can provide a “more useful truth”\textsuperscript{71} than a trial court in that the picture may be more complete due to an examination of the larger historical context rather than focusing on guilt or innocence in an individual case. Truth commissions can serve many of the same purposes as prosecutions in countries with a history of massive human rights abuse, including “providing a mandate and authority for an official investigation of past abuses” and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{69} Teitel, \textit{supra} note 59 at 81. See also Barahona de Brito, Gonzalez-Enriquez & Aguilar, \textit{supra} note 59 at 320ff.
\item \textsuperscript{70} Allen, \textit{supra} note 66 at 352.
\item \textsuperscript{71} Ratner & Abrams, \textit{supra} note 60 at 238.
\end{itemize}
\end{footnotesize}
establishing a basis for compensation of victims or punishment of perpetrators.\textsuperscript{72} Such commissions are viewed as more adept than trials at advancing restorative justice goals such as acknowledging the suffering of victims.\textsuperscript{73}

In countries with limited resources where the legal system may be in disarray, commissions can carry out their mandate relatively quickly in comparison to the criminal justice system.\textsuperscript{74} Although truth commissions are ultimately not viewed as able to replace the criminal trial for “a true judicial determination of responsibility”,\textsuperscript{75} they do enable states to benefit from a detailed historical account of past abuses and recommendations about how institutions may be restructured to avoid such abuses in the future. According to Kritz, “Establishing a full, official accounting of the past is increasingly seen as an important element to a successful democratic transition.”\textsuperscript{76}

Another reason for the rise of the truth commission was the sheer scale of the human rights violations in many emerging democracies. Prosecutions of all perpetrators would have crippled the legal systems of countries that often lacked the resources to adequately fund their police, courts and penal systems. Teitel remarks upon the “advent of the so-called truth commissions” as useful when the scale of the abuses is overwhelming to the criminal justice system:

\begin{quote}
The commission of inquiry thus emerges as the leading mechanism elaborated to cope with the evil of the modern repressive state, since bureaucratic murder calls for its institutional counterpart, a response that can capture massive and systemic persecution policy.\textsuperscript{77}
\end{quote}

Thus, the commission of inquiry form became adapted to the context of mass human rights violations in the latter half of the twentieth century, and the developing mechanism became known as the truth commission.

\textsuperscript{73} See further discussion of restorative justice at note 486, and accompanying text, below.
\textsuperscript{74} Ratner & Abrams, \textit{supra} note 60 at 238-239.
\textsuperscript{75} \textit{Ibid.} at 239.
\textsuperscript{77} Teitel, \textit{supra} note 59 at 78.
The first historical inquiry referred to as a truth commission occurred in Uganda in 1974.\(^{78}\) Idi Amin established it under that country’s public inquiries legislation with an eye to warding off international criticism of human rights abuses under his rule. The report was not published; its recommendations were not implemented. Despite this inauspicious start for truth commissions, later commissions began to have more in common with what we now think of as truth commissions, including increased transparency and effectiveness. The next truth commissions appeared in the 1980s as a wave of democratization passed through Central and South America. There were truth commissions in Bolivia in 1982, Argentina in 1983 and Uruguay in 1985. Commissions in Chile in 1990 and El Salvador in 1992 followed. A second truth commission occurred in Uganda, as well as commissions in Chad and Zimbabwe in the 1980s and into the 1990s.

It was not until the mid-1990s that the use of truth commissions came to significant international attention with the South African Truth and Reconciliation Commission, chaired by Bishop Desmond Tutu. The South African TRC is the best known example of a truth commission to date, created as part of the transition from apartheid to democracy. In 1994, South Africa held its first multiracial elections. The African National Congress candidate, Nelson Mandela, was elected President. South Africa’s Interim Constitution called for reconciliation and amnesty, and Parliament passed the *Promotion of National Unity and Reconciliation Act* in response.\(^{79}\) The South African TRC began operations in 1995 with the aim of producing a report that would document the human rights violations that occurred between 1960 and 1994. The TRC had three divisions: the Human Rights Violations Committee (responsible for collecting statements from victims and witnesses and recording the violations), the Reparations and Rehabilitation Committee (to design a reparations program), and the Amnesty Committee (to process and decide amnesty applications).

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\(^{78}\) This section relies upon Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001) [Hayner, *Unspeakable Truths*].

Controversial and wrenching, the South African TRC brought the truth commission mechanism onto the world stage.\textsuperscript{80}

Also, in the 1990s, truth commissions simply became much more common: “Between March 1992 and late 1993, six truth commissions were established.”\textsuperscript{81} Transitional justice as a field of legal study also gained traction during the 1990s.\textsuperscript{82} Particularly with the South African Truth and Reconciliation Commission, the truth commission has become accepted as an appropriate possibility for transitional states that seek to address a history of abuses. While a desire for retributive justice for the most heinous of crimes may still create a preference for prosecution instead of a truth commission in some cases,\textsuperscript{83} by the end of the 1990s truth commissions had found a place among the array of accountability mechanisms available to emerging democracies.\textsuperscript{84}

Transitions toward the end of the 20\textsuperscript{th} century differed from those in earlier decades due in part to the influence of the human rights movement and the concomitant growth of human


\textsuperscript{82} Although as noted there were instances of truth commissions prior to the 1990s, transitional justice did not become a significant focus of scholarly attention until the explosion of literature and scholarship that accompanied the South African TRC, established in 1995. See Barahona de Brito, Gonzalez-Enriquez & Aguilar, supra note 59 at 315-351. Barahona de Brito’s thorough bibliographical survey notes that the first book to focus on transitional justice was published in 1982 (ibid. at 316, citing John H. Herz, ed. \textit{From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism} (Westport, Conn.: Greenwood Press, 1982)) but shows that the vast majority of scholarship on the subject commenced in the 1990s. As is evident from Kritz's comprehensive multi-volume set in 1995, transitional justice literature had become a substantial area of scholarship. By then there had been a considerable number of truth commissions and other transitional justice mechanisms which provided case studies: Kritz, \textit{Transitional Justice, supra note} 76.


\textsuperscript{84} Ratner & Abrams, \textit{supra} note 60 at 319 with respect to their discussion of Cambodia and the Khmer Rouge. See also Hayner, \textit{Unspeakable Truths, supra} note 78. Hayner's book on truth commissions was the first major text to focus on truth commissions, and may be seen as an indication of the growth of their use by 2001. Her book illustrates the degree to which truth commissions had become an accepted mechanism for addressing human rights violations, but does not speculate on their utility for established democracies. Aside from providing a definition of a truth commission that is frequently referenced by virtually all other transitional justice scholars, the book provides a case study of 21 such commissions and explores the questions then being commonly asked by scholars about the best way to deal with cases in which there are thousands of victims and thousands of perpetrators; whether it is best to simply forget the past and move on, or if not, how best to address the past and the debates regarding amnesties, truth versus justice, whether truth commissions should name names, and the conflicting choice between truth commissions and trials.
rights organizations. Not only was there increased pressure to demonstrate accountability for
past abuses, but also the methods used were increasingly scrutinized for their accord with
international human rights instruments.\textsuperscript{85} The international community has largely accepted
that past abuses must be addressed by at least one of a variety of mechanisms and now “the
challenge is to fine-tune and better coordinate the options”.\textsuperscript{86} There has also been a trend
toward universal jurisdiction with respect to human rights violations and thus an expansion
of accountability to the international arena: “The drive to curb impunity for massive abuses
of human rights has manifested itself not only within countries in transition, but
internationally as well.”\textsuperscript{87}

Thus, increased attention to dealing with historical injustices in the last few decades has
given rise to this innovation of the commission of inquiry form. The truth commission shares
attributes of the public inquiry, such as the ability to look at the larger context and promote
social accountability about an issue. However, it also has a symbolic quality that aligns with
its explicit social function of public education about human rights violations. As I discuss in
the next section, the truth commission is a new variation on an old legal mechanism, the
public inquiry.

\textit{Truth Commissions and Public Inquiries}

At a June 2007 conference on the then upcoming Canadian Truth and Reconciliation
Commission, National Chief Phil Fontaine adamantly stated that the Canadian commission
was not modeled on the South African Truth and Reconciliation Commission. He also stated
clearly that the Canadian commission was not a public inquiry.\textsuperscript{88} Prof. Emmanuel Gyimah-

\textsuperscript{85} Neil J. Kritz, “Where We Are and How We Got Here: An Overview of Developments in the Search for
Justice and Reconciliation” in A. Henkin, \textit{The Legacy of Abuse} (New York: The Aspen Institute and NYU
\textsuperscript{86} \textit{Ibid.} at 21. See also \textit{ibid.} at 43: while truth commissions are “a relatively recent experiment”, their presence
over the last two decades means that we “are now entering a period in which retrospective studies are possible
in order to begin to evaluate the effect of truth commissions.”
\textsuperscript{87} \textit{Ibid.} at 29.
\textsuperscript{88} Phil Fontaine, “The Long Journey to Justice: The Personal as Political” (Lecture presented at “Preparing for
the Truth Commission: Sharing the Truth about Residential Schools. A Conference on Truth and Reconciliation
as Restorative Justice”, University of Calgary, June 15, 2007) [Calgary Conference, 2007] [unpublished].
Boadi, Executive Director of the Ghana Center for Democratic Development, speaking with respect to Ghana’s National Reconciliation Commission, stated that the Commission did not realize at first that it was not a public inquiry. In his opinion, things improved for the Ghanaian Commission once it began to act like a truth commission. These comments by Fontaine and Gyimah-Boadi suggest that there is something qualitatively different about a truth commission when compared to a public inquiry. This is because when a truth commission is sought, something more is wanted than a recitation of the facts and recommendations for future policy, which is what a public inquiry does in its basic form. Establishing a truth commission gives rise to an expectation that historical injustices will be acknowledged and redressed. For those seeking redress, the truth commission cannot be a rote legal exercise; it must be a societal reckoning. In arguing that a truth commission is actually a form of public inquiry, I in no way seek to diminish this impulse toward a more expansive role by a truth commission. Rather, I seek to enlarge our understanding of what a public inquiry can do in an established democracy. My point is simply that both mechanisms can perform the social function of acknowledging historical injustices and educating the public to prevent their recurrence. The difference is that a truth commission is explicitly expected to perform this function, while the public inquiry has the latent possibility to do so.

The desire to distinguish between the two mechanisms stems from a perception of the public inquiry as a formal legal mechanism that fails to fulfill its social function, a function that is critical in the context of addressing historical injustices. However, I argue that the truth commission is really a commission of inquiry with certain distinguishing features and objectives, as will be explored further in this section. In particular, a truth commission is a specialized form of public inquiry, distinguished by its symbolic acknowledgement of

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90 As noted in the discussion “Truth Commissions in Established Democracies”, below, such states are typically reluctant to have bodies called “truth commissions”.

91 See discussion in Chapter Three, text accompanying note 432, below.
historical injustices and its explicit social function of public education about those injustices. The scholarly definitions of each mechanism suggest important similarities. Consider this definition of a truth commission:

A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their correction and future prevention.\(^92\)

Compare this definition to that of a public inquiry:

[A public] inquiry is any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations.\(^93\)

Both conduct a review of an incident or incidents in a nation’s past and contribute toward a policy solution for the country’s future. Both are temporary bodies that investigate, hear, and report. Both are intended to create a historically accurate public record of their topic and both are expected to make recommendations for redress of the wrongs investigated and to ensure the wrongs are not repeated in the future. However, while they are alike, the two mechanisms can be distinguished by the explicit social function assigned to the truth commission, as will be discussed further below.

Some scholars endeavour to differentiate truth commissions as a unique mechanism. Freeman attempts to distinguish truth commissions from various types of commissions of

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\(^92\) Freeman, *supra* note 56 at 18, citing the Report of the UN Secretary-General’s definition of a truth commission: “Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years.” Report of the Secretary-General, *supra* note 68 at 17, para. 50. See also Priscilla Hayner’s influential account of truth commissions: Hayner, *Unspeakable Truths*, *supra* note 78, at 14, [emphasis hers]:

(1) truth commissions focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).

inquiry. While he acknowledges that: “the Commonwealth commission of inquiry is the closest functional equivalent to a truth commission, and may sometimes be characterized as one even if it is not so titled”, he continues that: “there are many significant differences between a truth commission and a typical Commonwealth commission of inquiry.” In particular, Freeman notes that truth commissions are victim-centred while commissions of inquiry adopt a “more lawyer-driven approach”. While commissions of inquiry focus on a specific event or theme, the mandate of truth commissions often addresses “thousands of individual cases committed over broad expanses of time and geography”. However, the factors that he lists as distinguishing truth commissions from public inquiries (less lawyer-driven, deals with acute violence in the recent past, and focuses on victims) are not necessarily sustainable. Some truth commissions have had significant legal involvement, some have dealt with abuses that are not terribly recent, and some cannot be said to have been victim-centred. Hayner contrasts truth commissions with other official inquiries into past human rights abuses that she calls ‘historical truth commissions.’ Historical truth commissions investigate past abuses that occurred many years earlier in order to clarify historical truths and pay respect to previously unrecognized victims or their descendants. Hayner states that such a government-sponsored inquiry is usually established to investigate practices that affected a minority group about which the wider population was unaware. Thus, such commissions can “have a powerful impact despite the years that have passed.”

Hayner lists as examples the Australian Human Rights and Equal Opportunity Commission’s inquiry into the state’s assimilatory practices against aborigines, culminating in the 1997 Bringing Them Home report; the U.S. Advisory Committee on Human Radiation Experiments; and the U.S. Commission on War-Time Relocation and Internment of Citizens

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94 Freeman, supra note 56 at 56-57.
95 Ibid. at 124.
96 Ibid.
97 See Hayner’s comment regarding the difficult and cumbersome process undertaken by the South African TRC to ensure due process for participants: Hayner, Unspeakable Truths, supra note 78, at 130.
98 Ghana’s National Reconciliation Commission had the authority to investigate any event in the period from 1957 to 1993, and was not inaugurated until 2002.
99 See the description in Hayner, Unspeakable Truths, supra note 78, of the sixteen lesser known truth commissions – many did not appear to focus on victims at all.
100 Hayner, Unspeakable Truths, supra note 78, at 17.
101 Ibid.
in 1982.\textsuperscript{102} She identifies the Royal Commission on Aboriginal Peoples (RCAP) in Canada as a historical truth commission.\textsuperscript{103}

This overlap suggests that rather than trying to draw a sharp distinction between the truth commission and public inquiry mechanisms, it may be more useful to think of the truth commission as a specialized form of commission of inquiry given that it has some distinctive features. The most consistent distinguishing features of the truth commission are that they are only struck in the context of addressing human rights violations, and they focus on a pattern of human rights abuses over a number of years in the past, rather than an isolated, recent incident.\textsuperscript{104} While some commissions of inquiry may have these features, truth commissions are expected to have them.\textsuperscript{105} Other features associated with some truth commissions may be

\textsuperscript{102}Ibid. at 17-18.

\textsuperscript{103}Hayner, \textit{ibid.}, suggests that a historical truth commission is a public inquiry into the past but not a truth commission, and Freeman, \textit{supra} note 56, agrees. Yet, the National Reconciliation Commission of Ghana fits Hayner's description of historical truth commissions, given that it was inaugurated a decade after the end of unconstitutional rule, after a peaceful transfer of power, with a mandate to investigate a period reaching back to independence in 1957. It is surprising then that neither Hayner nor Freeman question that the Ghanaian Commission was a truth commission. Canada's Royal Commission on Aboriginal Peoples came at the same time as Australia's human rights inquiry into its residential schools history. While Hayner describes RCAP as a "historical truth commission" (18), Freeman calls RCAP a "thematic commission of inquiry" (56). Such commissions of inquiry are not truth commissions in his opinion because they examine controversial "social policy issues" such as racial discrimination (56), and focus more on policy than on victims. Leaving aside the possibility that indigenous people may view the issue of "racial discrimination", particularly on the scale exercised under colonization, as much more than a "social policy issue", the implication seems to be that public inquiries address less egregious situations than do truth commissions. Further, their work is "not necessarily focused on the examination of violations committed during periods of abusive rule or armed conflict" (56). Had RCAP been more victim-centred, would Freeman have defined it as a truth commission? Or if indigenous peoples had violently resisted the abuses suffered on a larger scale, would that have prompted Freeman to lend the moniker of "truth commission" to RCAP? Intrinsic in this, is there a failure to recognize that an established democracy such as Canada could be capable of "violations committed during periods of abusive rule"?

\textsuperscript{104}Thus a truth commission can comment on systemic patterns rather than simply pronouncing upon guilt in individual cases: Kritz, "Coming to Terms", \textit{supra} note 72. Freeman states that truth commissions focus on severe acts of violence or repression; they primarily focus on acts that occurred during recent periods of repressive rule or armed conflict; they focus on violations committed in the sponsoring state; and they operate within the country that establishes them: Freeman, \textit{supra} note 56 at 14-17.

\textsuperscript{105}Ratner & Abrams review non-prosecutorial options for gaining accountability for human rights violations, including investigatory commissions, civil suits and immigration measures. With respect to investigatory commissions, they state:

\begin{quote}
Many nations that have endured serious human rights violations have pursued accountability by establishing an investigatory commission, often referred to as a truth commission or a commission of inquiry. Speaking generally, these panels investigate a past period of human rights abuses (or, in fewer cases, humanitarian law-based crimes) in a particular country, in the end producing an official report. [The authors list Hayner’s criteria for a truth commission.] Aside from these common threads, panels have varied widely; and many of a commission’s attributes will depend on its historical, political, and security context.
\end{quote}

Ratner & Abrams, \textit{supra} note 60 at 228-229 [footnote omitted].
shared by commissions of inquiry, depending on how the inquiries are run.\textsuperscript{106} For example, a truth commission may be expected to focus on victims, rather than perpetrators. Such a focus reinforces the objective of finding a less punitive way to achieve accountability than a criminal law mechanism that focuses on individual accountability of perpetrators. A truth commission has the prerogative to hear from victims, not as witnesses for the primary purpose of determining guilt or innocence of a perpetrator, but to listen as a method of acknowledging the victim’s experience. Commissions of inquiry may also choose to hear from victims in order to assist the commissioner with assembling a public picture of a tragedy.\textsuperscript{107} Another feature often associated with truth commissions is that they are frequently led by multiple commissioners, while a sole commissioner (often a judge) usually – though not always – heads a public inquiry.\textsuperscript{108} Appointment of multiple commissioners provides an opportunity for representation of different perspectives or, in some cases, societal factions on the panel.

Two main aspects distinguish truth commissions from other commissions of inquiry. First, truth commissions involve a state or society trying to repair itself in some way; they “seek to provide an overarching narrative of the historical periods under consideration”.\textsuperscript{109} Their objectives include encouragement of societal reconciliation; and consideration of commemoration and reparations. The objective of encouraging societal reconciliation is not commonly within the ambit of a public inquiry. Promoting reconciliation in a society is a complex process, and while both commissions of inquiry and truth commissions can provide

\textsuperscript{106}Peter Aucoin, “Contributions of Commissions of Inquiry to Policy Analysis: An Evaluation” in Christie, Yogis & Pross, \textit{supra} note 13, 197 at 200, states that:  
[C]ommissions of inquiry are well suited as institutional mechanisms for policy analysis if the following conditions are met:  
- multi-member commissions rather than single member commissions;  
- multi-disciplinary staff;  
- a mixture of experienced administrators and outside expertise;  
- a public hearings process;  
- a diffused and decentralized operational system for research, discussion and deliberation; and  
- public dissemination of studies as well as report.

\textsuperscript{107}See note 906, below, and accompanying text noting the Air India Inquiry’s decision to devote the first three weeks of testimony to hearing from the families affected by the bombing.

\textsuperscript{108}For example, the Manitoba Aboriginal Justice Inquiry, \textit{supra} note 18, was led by co-commissioners.

\textsuperscript{109}Freeman, \textit{supra} note 56 at 15.
acknowledgement of past harms that may sow the seeds of future reconciliation, it is usually only truth commissions that are mandated to promote this goal.\(^{110}\)

The second aspect of a truth commission that distinguishes it from a public inquiry is that inauguration of a truth commission has a symbolic value. That is, calling a commission a “truth commission” is an explicit acknowledgement that an injustice has occurred within the state, and that the commission’s task will be to explore and then educate the public as to the extent of that injustice. The very existence of a truth commission suggests there is a truth to be discovered or at least one that needs to be voiced aloud. It is true that a commission of inquiry is only called when a government is faced with a problem that needs to be addressed independently. Still, calling a commission a “commission of inquiry” acknowledges an issue – not necessarily an injustice – and only suggests that it be investigated. We signal something different by naming a truth commission than we do by striking a commission of inquiry. A truth commission has an explicit social function: education of the public about historical injustice in order to prevent its recurrence. A commission of inquiry may well fulfill this social function, and Le Dain’s discussion of the social influence of public inquiries is frequently cited by commentators on public inquiries.\(^{111}\) However, as we shall discover with the later discussion of the Berger Inquiry, whether a commission of inquiry emphasizes this social function depends very much on two key factors: the person leading it, and the process utilized to achieve its mandate. And while a commission of inquiry may proceed with a conscious determination to fulfill a social function, this will only become apparent once the commission is underway. Inaugurating a truth commission signals to the populace an intention to acknowledge and redress past injustices from its inception. Similarly, calling a body a “truth commission” suggests a more weighty concern for the issues before it as well as the possibility that the truth has somehow been obscured in the past, deliberately or otherwise.\(^{112}\) It is this symbolic role that can distinguish truth commissions from most public

\(^{110}\) Generally, truth commissions tasked with this mandate are referred to as truth and reconciliation commissions. Not all truth commissions are “truth and reconciliation” commissions: see Hayner, *Unspeakable Truths*, supra note 78, at 30. While some emphasize this aspect of their mandate by having “reconciliation” in the name of the commission, others set truth-seeking as their mandate without attempting to overtly seek national reconciliation.


\(^{112}\) These sorts of institutional design decisions were noted by the Ontario Law Reform Commission:
inquiries. However, like a public inquiry, whether a truth commission succeeds in fulfilling its social function will also depend on its leadership and its process.

The conceptual framework that I propose here is to recast the truth commission mechanism not as a unique mechanism particular to the transitional justice setting, but as a specialized form of a familiar mechanism, the commission of inquiry. Established democracies may be more amenable to addressing historical injustices that continue to divide their populations if they can utilize a mechanism that does not suggest, by its very invocation, that they are a human rights pariah. The truth commission is expected to do explicitly what a commission of inquiry is capable of doing but which it is not obliged to do: to acknowledge the existence of the historical injustices and to embark upon a process that educates the public about those injustices in order to prevent any recurrence. My suggestion is that whichever form is used, both are capable of fulfilling this social function.

**Truth Commissions in Established Democracies**

Most commentators address the use of truth commissions “at a transition point in a society” emerging from autocratic rule. Truth commissions in these circumstances are viewed as demonstrating a new era of respect for human rights, national reconciliation and/or new political legitimacy, symbolizing a new regime’s commitment to the rule of law. But what

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When a government appoints an independent public inquiry with highly respected commissioners to examine a social problem, it does something qualitatively different than when it appoints a less independent task force or advisory body to examine the same problem.

OLRC Report, *supra* note 26 at 13. I also acknowledge that the idea that there is one truth that constitutes “the truth” in any given circumstance is not feasible.

113 Ratner & Abrams, *supra* note 60 at 229, citing Hayner, “Fifteen Truth Commissions”, *supra* note 81 at 604. Ratner & Abrams conclude at 240 by noting that: “The task of investigatory commissions is further complicated by their lack of institutional history and credibility from which well-functioning judicial mechanisms benefit.” In my view, had they related truth commissions to the longstanding history of commissions of inquiry, this criticism would fail. This concept that truth commissions are unique to “transitional justice” has been questioned by some commentators: see David Dyzenhaus & Mayo Moran, eds. *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005) at 6. See also Levinson, *supra* note 67 at 211; David Dyzenhaus, “Review Essay: Transitional Justice” (2003) 117:3 Harv. L. R. 762. The authors state at 763 that: “legal and political transitions lie on a continuum, of which regime transitions are merely the endpoint.”

114 See Allen, *supra* note 66 at 319: “Truth commissions are thought to play the symbolic role of making a decisive break with the official sponsorship of human rights violations that characterized the past. They are also intended to demonstrate the importance of justice and respect for the rule of law.”
of truth commissions in established democracies? Despite histories of slavery, colonialism, racism, and other injustices, established democracies have not generally chosen truth commissions as the mechanism for addressing the human rights violations in their pasts. Perhaps established democracies resist using the truth commission since it advert to the possibility that their democratic stability may have come at a cost to oppressed peoples in their midst and suggests an unwelcome commonality with acknowledged oppressive regimes.\footnote{See Rose Weston, “Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States” (2001) 18:3 Ariz. J. Int’l. & Comp. L. 1017 at 1051. Weston advocates for the establishment of a truth commission in the United States to create an official record of human rights abuses and violations by the U.S. toward Native Americans that would enable public acknowledgement of the harms. She notes that such an acknowledgement and any resulting apology would allow the U.S. to avoid the hypocrisy of viewing itself as a defender of human rights in the world community when it has not honestly assessed its own violations on its own territory.}

As is evident from the German, Irish and Australian examples discussed below, the institutions that are typically created in established democracies to address injustice are human rights commissions and ad hoc investigations such as royal commissions or public inquiries. In the American context, Levinson notes that while they do not have bodies called “truth commissions”, their “functional equivalent can be found in investigatory hearings held by certain administrative agencies” and in congressional investigations.\footnote{Levinson, \textit{supra} note 67 at 216. At 212, he cites as an example the United States Commission on Civil Rights, created under legislation passed in 1957 to investigate and report to Congress upon the civil rights situation in America. The commission held hearings throughout the American South with respect to voting discrimination.} Thus, while it is true that “truth commissions … have their counterparts in societies that are both stable and democratic”,\footnote{Dyzenhaus, \textit{supra} note 113 at 174, citing Ronald C. Slye, “Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process” in Rotberg & Thompson, \textit{supra} note 67, 170 at 170, and Levinson, \textit{supra} note 67 at 211.} it appears that there is a general reluctance in established democracies to call these counterparts “truth commissions”.\footnote{See Hayner, \textit{Unspeakable Truths}, \textit{supra} note 78, Appendix 1, chart 1 at 305ff. Of the twenty countries Hayner identifies that held truth commissions (as opposed to historical truth commissions) only one was an established democracy (Germany – Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany, 1992-1994) – and it was inquiring into an authoritarian regime. Most of the bodies in established democracies were named on some variation of “commission of inquiry”, and none used the title of “truth commission”: Appendix 1, chart 2 at 312-13. These commissions were: the Commission on Wartime Relocation and Internment of Civilians (U.S.) 1981-1982 created by Congressional Committee on Interior and Insular Affairs; the Royal Commission on Aboriginal Peoples (Canada) 1991-1996 created by the federal government; the Advisory Committee on Human Radiation Experiments (U.S.) 1994-1995, established by the U.S. energy secretary; and the National Inquiry into the Separation of Aboriginal and Torres Strait
Nonetheless, truth commissions – or bodies that look much like truth commissions – have begun to appear in established democracies. Rather than set up mechanisms explicitly called truth commissions, in recent years Germany, Ireland and Australia have framed commissions of inquiry that, in their operations, acknowledged periods of historical injustice and educated the public on these dark periods. After the reunification of Germany, the German parliament created the Commission of Inquiry for the Assessment of History and Consequences of the SED [Socialist Unity Party] Dictatorship in Germany, in operation from 1992-1994. The German Parliament created the commission in 1992 to investigate and document human rights violations under the East German government between 1949 and 1989. The commission held public hearings at which testimony was received by selected witnesses and research papers were presented. The papers were included in the 1994 report of the commission, received by many as more of an academic report than one intended to engage the public.\textsuperscript{119} Prosecutions were also carried out against former East German officials. Further, as part of the transition to a unified German state, the “Gauck Commission” also known as the “Gauck Authority” was created. Parliamentarian and former dissident Joachim Gauck was named the director of the Federal Authority on the Records of the Former Ministry for State Security of the German Democratic Republic. From 1990 to 1993, this Commission managed access to the massive archive of surveillance records that the Stasi had kept on citizens, and enabled the citizens to learn who had informed upon them.

Ireland has had two truth commission-like processes, the Report of the Independent Commission on Policing for Northern Ireland, and the Commission to Inquire into Child Abuse. The Independent Commission on Policing commenced in June 1998, having arisen from the April 1998 “Good Friday Agreement” - an agreement reached in the multi-party negotiations between the UK Government, the Government of Ireland and numerous parties representing the communities of Northern Ireland.\textsuperscript{120} Its task after broad consultations was to make recommendations for future policing arrangements in Northern Ireland. The

\textsuperscript{119} Ibid. at 62. Hayner identifies the German Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany as a truth commission, \textit{ibid.} at 61.
Commission to Inquire into Child Abuse was mandated in 2000 to inquire into abuse of children in industrial schools. It was to hear from the victims of abuse in the schools, to investigate the abuse, and to make a report to the public, which it did in 2009.\textsuperscript{121}

In Australia, a Human Rights and Equal Opportunity Commission was mandated to investigate removal of indigenous children from their families. Like Canada, Australia’s policy had been in place from the late 1800s to the latter half of the 1900s. The Commission’s mandate was to examine past laws, practices and policies that led to the forced removal of indigenous children (known as the Stolen Generation) from their families, and to examine current laws, practices and policies that needed to change to prevent such separations.\textsuperscript{122} The Commission was established in 1995 and held hearings in both major cities and smaller communities. The Commission’s 1997 report recommended various measures for redressing the harms suffered because of the state’s removal policy. The government of John Howard, elected in 1996, largely rejected the approach recommended by the Commission.\textsuperscript{123}

These examples show that processes with features associated with the truth commission model have found some expression in established democracies. What might be the reasons for seeking such features for a commission in an established democracy? Perhaps the human rights culture of the last few decades has moved some states to address historical injustices more openly than in the past.\textsuperscript{124} The social function of a truth commission holds promise: the tasks of creating an incontrovertible historical record and public education are intended to


\textsuperscript{123} Robert Milliken, “No apology to the Australia’s stolen generation” \textit{The Independent} (17 December 1997), online: <http://www.independent.co.uk/news/no-apology-australias-stolen-generation-1289242.html>.

\textsuperscript{124} See Jonathan Simon, “Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror” (2005) 114:6 Yale L. J. 1419 at 1454:

The generally positive global media attention to the truth and reconciliation process in post-apartheid South Africa may have increased the aspiration of commissions in stable liberal regimes, including the 9/11 Commission, to achieve new forms of relevance to the democratic process.
contribute to prevention of future abuses. The circumstance that Levinson states generates a truth commission is: “the presence within a given social order of deep divisions over basic political questions.” If there are societal issues stemming from past injustices, it may be desirable to find a way to put the past to rest in order to improve relations in the present. In the Canadian context, where indigenous peoples still experience the effects of colonization, the TRC may assist with the process of building respect for Canadian institutions. This process underscores the distinguishing feature of a truth commission mentioned above: the explicit mandate of reconciliation.

Truth commission-like features may be sought in an established democracy if other legal mechanisms have proven themselves inadequate to the task of addressing historical injustice. Levinson notes that: “The key question is surely whether local institutions, judicial or otherwise, prove willing to address the kinds of issues that are the staple of truth commissions.” In Canada, there have been numerous IRS lawsuits, but the scale of the claims, the cumbersome nature of judicial proceedings, inconsistent rulings and the awkward fit of the IRS claims with common law doctrines made the court system an inadequate tool for addressing the complex and multi-generational nature of the harms resulting from the IRS experience. The government had repeatedly avoided a public inquiry into the IRS issue.

125 A truth commission is expected to educate the public on what human rights violations happened in a society, and in its very operation it is also expected to emulate a lawful institution, respectful of human rights. This educational value forms an important part of the mandate of a truth commission: Allen, supra note 66 at 319. Truth commissions arise in emerging democracies where a state finds it important to demonstrate the importance of respect for the rule of law. Re-establishing the rule of law is not the concern for established democracies.

126 Levinson, supra note 67 at 220.


128 The Ontario Law Reform Commission’s report states that: “[O]ne of the most important roles of large-scale public inquiries is their social function. Part of this social function is to help restore faith in the integrity of government and to influence the attitudes and opinions of both policy-makers and citizens.” OLRC Report, supra note 26 at 187, citing Le Dain, supra note 35, at 79.

129 Levinson, supra note 67 at 219 [emphasis his].

130 Although Canadian precedent allows for historical sexual abuse claims, the statute of limitations for other torts prevented many former students’ claims from being addressed in civil actions. Further, significant claims for loss of culture, language and spirituality did not find an easy home in the common law. The limitations of civil litigation for addressing residential schools harms will be discussed further in Chapter Two: see text accompanying note 281, below.

131 As will be discussed in Chapter Two below, the RCAP Report, vol. 1, supra note 15, includes a chapter on the legacy of the IRS, recommending that a public inquiry be held with respect to the IRS (see Appendix 1 of this dissertation). This proposal was ignored by the government. See text accompanying note 224.
In addition to the inadequacy of other legal mechanisms, there is another consideration for why indigenous peoples sought a truth commission to address the legacy of IRS. Generally, truth commissions are created in states where the citizenry has a well-founded distrust of the past regime’s ability to conduct a fact-finding endeavour with transparency, honesty and legitimacy. The history of unfulfilled promises by the Canadian government toward indigenous people is perhaps behind the call for a truth commission, as is the widespread ignorance among non-indigenous Canadians about the IRS system and its profound effect upon former students and their families. A truth commission’s educational aspect can have “unintended secondary effects that result in positive benefits for victims” by increasing public awareness and understanding about the trauma suffered by the victims of human rights abuses. With respect to the Canadian TRC, one of the main objectives set out in the mandate is to: “Promote awareness and public education of Canadians about the IRS system and its impacts.” This mandate ties in with the idea that the truth commission has an explicit social function.

With the Canadian TRC, a body formally called a truth commission was sought in an established democracy. While I have described reasons why a process with features associated with a truth commission may be sought in an established democracy, it is rare that

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132 See Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001) at 19: “Truth commissions are one of the main ways in which a bureaucratic elite seeks to manufacture legitimacy for state institutions, and especially the legal system.”


Bob Watts, the commission's interim executive director, said he hopes the commission will make residential schools a well-known part of Canadian history.

“There's never been a forum to allow people to talk about their history and their experience — and this will be that forum that will allow that to happen,” he said.

“You can check most school history textbooks and you'll find little to no reference on residential schools,” said Watts. “But when you look at the impact on aboriginal communities in Canada, the impact has been severe.”

See also *R. v. Poucette*, [1999] AJ No. 46 (QL), in which Reilly Prov. Ct. J. recounts the harms to indigenous communities from IRS (at para 52ff) in his judgment because he believes most Canadians do not know about IRS. He states that he had been a judge for 12 years before he knew about IRS. He has become a controversial judge due to such decisions as *R. v. Twoyoungmen* (1998) 51 C.R.R. (2d) 88 that challenged prosecutorial policies with respect to the Stoney Nation in southern Alberta. See Peter Cheney, “Alberta judge upholds judicial independence: Critic of native reserves cannot be disciplined for controversial rulings, appeal court says” *The Globe and Mail* (6 September 2000).


135 Settlement Agreement, *supra* note 2, Schedule N, section 1(d).
an established democracy seeks a body called a truth commission. The desire by survivors of IRS for a process that explicitly addresses the historical injustice of the IRS system resulted in the TRC.

**Conclusion**

The reluctance on the part of established democracies to adopt the truth commission model suggests a confidence (by government) in the existing institutional model – generally, the public inquiry – for addressing injustice. It may also represent the belief that established democracies are not human rights abusers; such things as massive human rights violations may occur in other places (by implication, less “developed” democracies) but not here. So although such established democracies are content to recommend, support, fund and advocate for truth commissions to be adopted by emerging democracies, the reluctance to adopt the model for themselves suggests the view that their own institutions are fine – while truth commissions are for others. However, as former commissioner on the South African Truth and Reconciliation Commission Bongani Finca stated with reference to Canada’s Indian residential schools legacy: “No nation can live a lie forever.” He then told an audience that included residential schools survivors that while South Africa is sketched as a huge human rights catastrophe and Canada is cast as a minor one, “the reality is that we carry in our bodies the scars.”

Established democracies have a comparatively privileged opportunity to make considered decisions with respect to institutional design of mechanisms to address deep societal problems. As an established democracy Canada has a functioning parliament and justice system, a constitution that includes a *Charter of Rights and Freedoms*, an independent judiciary, thousands of trained legal professionals, an active civil society and a rights-conscious culture. These factors can facilitate an institutional design process that is responsive to survivors of historical injustice. However, it was a legal settlement agreement that produced a body called a truth commission in Canada. Survivors called for the truth

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commission after years of seeking redress through other legal mechanisms; a truth commission was not the government’s choice of how to proceed. As will be discussed below, representatives of survivors negotiating the IRS Settlement Agreement had the opportunity to benefit from the considerable review of the IRS legacy made by the Royal Commission on Aboriginal Peoples and its recommendation for a public inquiry. They also received recommendations by the Canadian Bar Association and the Assembly of First Nations for a truth commission. Advisors provided comparative international information from previous truth commissions. A unique mechanism (the TRC) has been inaugurated that is intended to fit the Canadian context.

I have argued that the truth commission is a specialized form of commission of inquiry; one that is distinguished by its symbolic acknowledgement of historical injustices, and its explicit social function of public education about those injustices. In doing so, I have suggested that truth commissions need not be viewed as exceptional mechanisms only to be used during times of massive political upheaval. If they are considered a specialized form of the more recognizable commission of inquiry mechanism, established democracies may be more open to their utilization for addressing difficult and persistent societal issues. In the chapter on the Berger Inquiry, below, I suggest that some public inquiries have the features now associated with a truth commission and can fulfill the social function expected of a truth commission. By creating a body called a truth commission in Canada, the negotiators signaled an intention to ensure that this social function is explicitly fulfilled by the TRC. The next chapter explains some of the reasons for this turn of events.

137 The proposal for including a truth commission in the Settlement Agreement did not come from the government; it came from the survivors of the schools: Rick Mofina, “‘Truth commission’ urged: Hearings may satisfy victims of residential school abuse without assigning blame” The [Saskatoon] Star Phoenix (6 June 2000) front page.

138 See text accompanying note 332, below.
2. **THE INDIAN RESIDENTIAL SCHOOL SYSTEM**

“Canada's greatest national shame”.  

To understand why residential schools are now the subject of a truth commission, it is necessary to know some of the history of the Indian Residential Schools (IRS) system. For over a century, the Canadian government sought to assimilate indigenous children into the non-indigenous culture by promoting and then requiring their attendance at church-run schools. Children were removed from their families and communities and sent away to schools where they were forbidden to speak their languages, practice their spirituality or express their cultures. The impacts of this policy as manifested through IRS have echoed down the generations. Indigenous people who never attended an IRS have nonetheless suffered from the harms inflicted there due to the interruption of traditional cultural transmission and parenting skills, the loss of skills enabling traditional life on the land, the pathologies and dysfunction now endemic in many indigenous communities and the loss of language, culture and spirituality. It is only in the last few years that the government has acknowledged that its assimilation policy was harmful. As will be discussed below, it has done so only in response to overwhelming legal pressure. The following historical overview of the IRS system and evaluation of legal mechanisms engaged specifically to address the

139 Adrienne Clarkson, “Her Excellency the Right Honourable Adrienne Clarkson Address at the University of Toronto Faculty Association's C.B. Macpherson Lecture” (31 March 2004), online: Governor General of Canada <http://www.gg.ca/media/doc.asp?lang=e&DocID=4158>.


141 According to Pamela O’Connor, “Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment” (2000) 28 Int’l J. Legal Info. 232 at 236, the federal government only recently admitted that the policy purpose of IRS was one of assimilation rather than education. See her note 15: 
In 1997 John Watson, the highest ranking federal Indian Affairs official in British Columbia, reportedly made a statement that he described as “the first time that the federal government has acknowledged that the purpose of residential schools was one of assimilation”: Stewart Bell, “Ottawa Vows Action on Native School,” *Vancouver Sun* June 27, 1997.
IRS legacy sheds some light on why Canada is now having a truth and reconciliation commission.

**Historical Overview of the Indian Residential School System**

Many Canadians might think that a history of the Indian Residential Schools in Canada would begin after Confederation in 1867. However, the roots of the relationship in Canada between indigenous communities and non-indigenous Canada that led to the schools and continues to this day commenced after contact between settlers and indigenous peoples. After their initial dependence upon indigenous peoples, followed by a period of economic and political alliances between them, settlers gradually were able to exert power over those that lived here before them. The IRS system is one manifestation of this, reflecting the history and legacy of colonization and, in particular, a government policy of assimilation:

The object of [government] policy, baldly stated in 1920 by Duncan Campbell Scott, Superintendent of Indian Affairs, was “to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question and no Indian Department”.

This policy was asserted through various pieces of legislation, culminating in the *Indian Act* passed by Parliament in 1876. Still in place today, the *Indian Act* is a key feature of the

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143 Georges Erasmus, Third LaFontaine-Baldwin Symposium Lecture (Vancouver, 2002). Published as “Conversation Three” in Rudyard Griffiths, ed. A Dialogue on Democracy in Canada: Volume 1 of the LaFontaine-Baldwin Lectures (Toronto: Penguin Canada, 2002). Scott’s statement was: I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone… Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill. Ottawa, National Archives of Canada, (RG 10, vol. 6810, file 470-2-3, vol. 7, at 55 (L-3) and 63 (N-3)).

144 The *Indian Act* consolidated laws related to “Indians” and designated the Minister of the Interior as the Superintendent-General of Indian Affairs: *Indian Act*, S.C. 1876, c. 18 (39 Vict.), s. 2. Prior legislation included *An Act for the Better Protection of the Lands and Property of Indians in Lower Canada* S.C. 1850, c. 42,
relationship between indigenous and non-indigenous peoples in Canada. It defines a person’s “Indian status” when they are born and governs an astonishing amount of their life until administering their estate upon death. The *Indian Act* charted the policy adopted toward indigenous people of assimilation.  

Long before the government instituted the full IRS system, various schools were built for indigenous children, mainly by churches, beginning with a school near Quebec City operated by missionaries from 1620-1629. In 1831, a Mohawk IRS opened in Brantford, Ontario, and remained open until 1969. In 1842, the Bagot Commission recommended residential schooling in agriculture, while in 1847, Egerton Ryerson recommended religious-based, government-funded industrial schools for indigenous children. However, it was following the passage of the *Indian Act* that government policy focused its efforts in schools, and on the removal of indigenous children from their families.

Together with expansionist noises south of the international boundary, the pressure of settlement moving ever westward in the latter half of the 19th century prompted the negotiation of treaties between representatives of the Crown and indigenous nations. Additional factors such as disease, warfare, the fur trade, the whisky trade, and the disappearing buffalo shaped the treaties signed in the western prairies during the 1870s. These treaties are referred to collectively as the “numbered treaties”. In several of the numbered treaties, the government agreed to provide education to the children of indigenous communities. In particular, the government was to provide salaries for teachers to educate the...
children.\textsuperscript{151} The “Report of Commissioners for Treaty No. 8” also indicated that certain assurances concerning education rights were required:

As to education, the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children, and that the law, which was as strong as a treaty, provided for non-interference with the religion of the Indians in schools maintained or assisted by the Government.\textsuperscript{152}

Indeed, in recognition of the changing economy and society that came with the settlers, some indigenous people did voluntarily request schools from the government by the latter part of the 1800s.\textsuperscript{153} They sought day schools on the reserves to provide skills training for their children; they wished to be able to communicate through print and telegraph, learn English, and to read and write, and they anticipated that eventually their children would become teachers.\textsuperscript{154} Historians have argued that western missionaries saw the treaty clauses requiring provision of education as an opportunity to spread their Christian beliefs and began to pressure the government of Sir John A. Macdonald to allow them to operate schools for indigenous children.\textsuperscript{155} In 1879, Macdonald assigned Nicholas Flood Davin\textsuperscript{156} the task of reviewing the American experience with industrial schools and reporting upon their applicability in Canada.

\textsuperscript{151} See Hugh Dempsey, Treaty Research Report: Treaty Seven (1877) (Treaties and Historical Research Centre, Comprehensive Claims Branch, Self-Government, Indian and Northern Affairs Canada, 1987). See also Dennis F.K. Madill, Treaty Research Report - Treaty Eight (1899) (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), at 38: Treaty 8 provided that the Dominion government was committed to pay the salaries of teachers of Indian children “as the government may deem advisable.”

\textsuperscript{152} Madill, \textit{ibid.} at 38, citing Canada, Treaty No. 8, at 6.


\textsuperscript{154} Miller, \textit{Shingwauk’s Vision, supra} note 140 at 98-100.

\textsuperscript{155} \textit{Ibid.} at 143.

\textsuperscript{156} Member of Parliament for Assiniboia West (now consisting of ridings in both Alberta and Saskatchewan), Davin was also a journalist, and founder and editor of the Regina \textit{Leader}, the first newspaper in Assiniboia. See Lee Gibson, “Nicholas Flood Davin”, online: Canadian Encyclopedia <http://www.canadianencyclopedia.ca/index.cfm?PgNm=TCE&Params=A1ARTA0002152>.
Davin reported that the preferred option would be industrial boarding schools in order to mitigate the “influence of the wigwam”\(^\text{157}\). The schools would satisfy the goal of the churches by giving them access to children whom they could save from the “degenerating influence of their home environment”\(^\text{158}\). They would meet the government’s goals by “civilizing” the children thus preparing them for participation in the non-indigenous economy and relieving a financial burden upon the state\(^\text{159}\). Frank Oliver, the minister of Indian Affairs in 1908, stated that the schools would “elevate the Indian from his condition of savagery” and “make him a self-supporting member of the state, and eventually a citizen in good standing.”\(^\text{160}\)

The first Indian residential schools opened in the 1880s in western Canada and expanded into the North and east to Ontario, Quebec and Nova Scotia\(^\text{161}\). Eventually, they operated in every province and territory except Prince Edward Island, New Brunswick and Newfoundland. The system was at its height in the 1920s with compulsory attendance under the Indian Act and over 80 schools in operation\(^\text{162}\). Most Indian Residential Schools were run by entities of the Catholic church\(^\text{163}\), with others run by the Anglican, Presbyterian, Methodist and later the United churches.


\(^{158}\) Milloy, supra note 140, at 27.

\(^{159}\) Ibid. at 36-38.

\(^{160}\) RCAP Report, vol. 1, supra note 15, part 2, c. 10, at text accompanying note 4. See also c. 10, s. 1 “The Vision and Policies of Residential School Education”, 1.1 “The Vision”:

The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification for removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.

\(^{161}\) See Miller, “Troubled Legacy”, supra note 153 at 361ff.

\(^{162}\) Miller, Shingwauk’s Vision, supra note 140, at 142. RCAP Report, vol. 1, supra note 15 , part 2, c.10, text accompanying Table 10.1: “In 1931 there were 44 Roman Catholic (RC), 21 Church of England (CE), 13 United Church (UC) and 2 Presbyterian (PR) schools. These proportions among the denominations were constant throughout the history of the system.”

\(^{163}\) 70 per cent of the schools were run by orders of the Catholic Church. The church is not organized as one central body, but rather as individual orders. See Canadian Conference of Catholic Bishops, “Apology on Residential Schools by the Catholic Church”, online: <http://www.cccb.ca/site/content/view/2630/1019/lang,eng/>: “The Catholic community in Canada has a decentralized structure. Each Diocesan Bishop is autonomous in his diocese and, although relating to the Canadian Conference of Catholic Bishops, is not responsible to it.”
For most of their long history, certain circumstances were prevalent in the IRS system. When indigenous children were sent to the schools, they were separated from their families and communities, and the cycle of seasonal hunting and gathering was replaced with the Christian calendar. Upon arrival at the schools, their hair was shorn, and their clothes replaced with European-styled clothing. The Department of Indian Affairs ordered that the use of English (or French) be insisted upon and the use of indigenous languages was forbidden. Christianity would replace indigenous spirituality, the expression of which was banned. Throughout the history of the system there was widespread use of corporal punishment for children who spoke their native tongues.

Part of the purpose of the schools was to give the students skills as labourers. For the first few decades, education was limited to half the day, while the balance of the day was spent performing chores that enabled the schools to operate – chopping wood, doing laundry, milking cows, cleaning, sewing and cooking. Due to the remote location of many of the schools and the low pay, qualified teachers were difficult to attract and retain. The half-day system and the lack of qualified teachers combined to cause dismal levels of student academic achievement, with only a tiny minority of students graduating from the schools. An additional barrier to learning was that both the curriculum and the pedagogy employed failed to take into account the culture of the indigenous students. Designed by non-indigenous people for non-indigenous children, the schools failed to engage the interest of indigenous children.

In addition to the generally poor quality of education provided, the schools themselves were chronically underfunded and there was inadequate departmental oversight of the conditions at the schools. Poor construction, including inadequate heating, lighting and ventilation,
was compounded by poor maintenance of the residential school buildings.\textsuperscript{169} When combined with poor nutrition and clothing, lack of sanitation and overcrowding, these conditions were ideal for disease, particularly tuberculosis, which became endemic at the schools.\textsuperscript{170} The department was aware from early in the operation of IRS of health reports documenting very high death rates because of these conditions.\textsuperscript{171} Children died in the western schools at a shocking rate of between 24 and 47 per cent in the early 1900s.\textsuperscript{172} The department was aware of the mortality rates and the causes thereof. Indeed, as early as 1907, its own chief medical officer, Dr. P.H. Bryce, provided a detailed report, the findings of which were reported and deplored in the national press.\textsuperscript{173} Despite this, the department and the churches did nothing to address the problems, prompting Dr. Bryce to publish a pamphlet in 1922 calling their administration of IRS a “national crime”.\textsuperscript{174}

The systemic issues arising from chronic underfunding signify another aspect of IRS: a lack of caring for indigenous children that ranged from neglect to outright abuse. This was a context marked with widespread mental, physical and sexual abuse of the children in the schools. Reports of abuses were known to the department throughout the period of IRS operation.\textsuperscript{175} Not only were there many documented incidents of excessive punishments and brutality suffered by the children, there were also attempted suicides, and hundreds of children who ran away from schools to escape their abusers.\textsuperscript{176} Many of these children died of exposure before they could reach their home communities.

All of the source materials relied upon here cite a litany of abuses suffered by children throughout the IRS system that are truly appalling to read and relay. While it is true that there were caring individuals among the teachers and workers at some of the schools, and some children did receive an education, the overwhelming narrative of the schools reveals the

\begin{itemize}
\item \textsuperscript{169} Ibid. at 79ff.
\item \textsuperscript{170} Ibid. at 83ff; RCAP Report, vol. 1, supra note 15, part 2, c.10, text accompanying note 154; Miller, \textit{Shingwauk’s Vision}, supra note 140 at 133.
\item \textsuperscript{171} RCAP Report, \textit{ibid.}, text accompanying note 155; See also Miller, \textit{Shingwauk’s Vision}, \textit{ibid.}, at 304.
\item \textsuperscript{172} RCAP Report, \textit{ibid.}, text accompanying notes 162 and 163.
\item \textsuperscript{173} Miller, \textit{Shingwauk’s Vision}, supra note 140, at 134. See also RCAP Report, \textit{ibid.}, text accompanying note 161.
\item \textsuperscript{174} RCAP Report, \textit{ibid.}, text accompanying note 169.
\item \textsuperscript{175} Ibid., text following note 285.
\item \textsuperscript{176} Ibid., text accompanying note 250.
\end{itemize}
violence inherent in the policy behind the IRS system: to “kill the Indian [to] save the man”. Those that escaped physical or sexual abuse still suffered the loneliness of separation from family, the confusion of being taught their culture was inferior, and the loss of their language and spirituality.

In addition to Dr. Bryce, various people over the decades attempted to bring the conditions in the schools to the attention of both church officials and the Department of Indian Affairs. The complaints were met with denial and cover-up. Some of the complaints were brought by a Department official. William Morris Graham, Inspector of Indian Agencies for South Saskatchewan, complained to senior department officials on multiple occasions about poor teaching, lack of academic studies, terrible sanitary conditions, and neglect, cruelty and abuse toward children in IRS. The department refused to act on his complaints “in order to avoid confrontation with politically influential churches.”

Indigenous communities in British Columbia voiced concerns in the early 1900s, requesting that day schools be established in their villages so that students could return home at the end of each day. Although a Royal Commission heard testimony along these lines in 1915-1916, it made no recommendations with respect to education. A joint Senate and House of Commons committee on the Indian Act between 1946 and 1948 heard from indigenous peoples that they wanted reform of the schools. By that time, the government knew that

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177 J.A. Macrae, Department of Indian Affairs Inspector of Schools for the North West in the 1880s, quoted in Milloy, supra note 140, at 27.
178 Miller, Shingwauk's Vision, supra note 140, at 328.
179 E. B. Titley, The Indian Commissioners: Agents of the State and Indian Policy in Canada's Prairie West, 1873-1932 (Edmonton: University of Alberta Press, 2009) at 193. Graham made his complaints known in the first three decades of the twentieth century.
181 The McKenna McBride Commission of 1915, struck to review reserve allocations in British Columbia, inquired into schooling of reserve children in the course of its hearings. The commissioners asked only three questions: how many children attended school; what school did they attend; if they did not attend, why not. See Archibald, ibid. at 99.
182 Miller, “Troubled Legacy”, supra note 153 at 379. See also RCAP Report, vol. 2, supra note 16, part 2, c. 4, s. 5.1: The special committee recommended the creation of an independent administrative body to deal with Indian grievances, to be modelled on the U.S. Indian Claims Commission, which had begun operations in 1946. The Department of Indian Affairs rejected the recommendation.
the schools were not successful tools of assimilation. This knowledge, combined with shifting ideas about integrated education, led to the gradual phasing out of the schools starting in the 1950s. From the 1950s to 1970s, the federal government adopted a new policy of educating indigenous children alongside non-indigenous children in provincially run schools. The process of adopting the policy was decidedly slow, however, as the government did not withdraw from the partnership with the churches until 1969. At that point, the government took over the IRS and began to transfer control to Indian bands. In 1970, Blue Quills was the first IRS to be transferred to band control. In 1972, the National Indian Brotherhood released its Indian Control of Indian Education policy, emphasizing an approach to education that did not strip the children of their cultural heritage, and that stressed indigenous parents’ control of their children’s education. The majority of residential schools were closed by the mid-1980s, with a few remaining until the last closure in 1996.

**The Search for Redress**

As the schools began to close, various factors combined to enable a search for redress. In general, the 1980s saw an increased rights-based consciousness in Canada with the adoption of the *Charter of Rights and Freedoms* in 1982 and the ensuing rise of rights-based litigation. By the late 1980s, this rights-based focus included the situation of children, as heralded by the 1989 adoption by the United Nations General Assembly of the Convention on the Rights of the Child. Awareness of child sexual abuse in Canada was increased in the 1980s, though not due to a focus on indigenous children in IRS. The Badgley Report of 1984 and

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186 Milloy, *supra* note 140, at 237.
189 Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children in Canada: Report of the Committee on Sexual Offences Against Children and Youth* by Robin Badgley (Ottawa: Supply and Services Canada, 1984) [Badgley Report].
the Rogers Report\textsuperscript{190} of 1990 both indicated a widespread problem of child sexual abuse in Canada. The Rogers Report of 1990 did not specifically refer to IRS but it did note that there must be considerable attention to the “serious and pervasive”\textsuperscript{191} problem of child sexual abuse in indigenous communities.\textsuperscript{192}

Despite earlier press reports\textsuperscript{193} and several criminal investigations by police in the late 1980s,\textsuperscript{194} the IRS issue did not garner national attention until 1990, when, in the wake of the Mount Cashel Orphanage scandal, Phil Fontaine, then Grand Chief of Manitoba Chiefs, went public with his own IRS experience of abuse.\textsuperscript{195} He called for an apology from the government and the churches. Fontaine’s public revelations are considered an important milestone in the history of IRS. Church authorities in Manitoba were investigating allegations of sexual improprieties among their priests and Fontaine called for the investigation to include IRS abuses.\textsuperscript{196} Fontaine’s call opened the door for other survivors to begin to share their experiences. Later in 1990, the Federation of Saskatchewan Indian

\textsuperscript{190} Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse, \textit{Reaching for Solutions: The Summary} by Rix Rogers (Ottawa: Supply and Services Canada, 1990) [Rogers Report].

\textsuperscript{191} \textit{Ibid.}, c. 2.

\textsuperscript{192} \textit{Ibid.}; Recommendation 70:

That the federal government appoint an Aboriginal Expert Advisory Committee on child abuse with a mandate to develop a five-year action plan to address child abuse and related issues in aboriginal constituencies. The Expert Advisory Committee should be made up of aboriginal representatives, including band councils, aboriginal associations, aboriginal workers, child abuse experts and representatives from appropriate government jurisdictions. The Expert Advisory Committee should hold national and/or regional consultations with representatives of aboriginal communities to ensure that the emerging plan reflects the realities and concerns of local communities. [footnotes omitted]

Rates of sexual assault and violence are considerably higher on reserves than in non-indigenous communities, a fact understood to result from a confluence of factors, including the effect of IRS: see Native Women’s Association of Canada, \textit{Violence Against Aboriginal Women in Canada: Backgrounder}, online: Native Women’s Association of Canada <http://www.nwac-hq.org/en/documents/Backgrounder-Violence.pdf>.

\textsuperscript{193} See for example: Maureen Brosnahan, “Indians recall bitter school days” \textit{Winnipeg Free Press} (22 June 1982), at 21.

\textsuperscript{194} Miller, \textit{Shingwauk’s Vision}, supra note 140, at 329, citing investigations at Williams Lake and Lytton, British Columbia.

\textsuperscript{195} Assembly of Manitoba Chiefs, “Residential Schools: A Chronology”, online: Assembly of Manitoba Chiefs <http://manitobachiefs.com/issue/residential.html>. In 1989, the government of Newfoundland and Labrador established the Royal Commission of Inquiry into the Criminal Justice System (known as the Hughes Inquiry) to examine allegations of cover-up in a police investigation of the sexual abuse of boys living in the Mount Cashel Orphanage in St. John’s, run by the Christian Brothers of Ireland in Canada: \textit{Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints}, S.H.S. Hughes, Commissioner (St. John’s, 1991), online:<http://www.lewisday.ca/ldf_files/pdf/Mt.Cashel%20vol%201.pdf>.

\textsuperscript{196} Miller, \textit{Shingwauk’s Vision}, supra note 140, at 328.
Nations called for a federal government inquiry into abuses at the schools.\textsuperscript{197} The Minister of Indian Affairs stated that an inquiry was not necessary.\textsuperscript{198}

Following Fontaine’s revelation, Aboriginal organizations began to organize and publish on the subject of IRS abuses. For example, the Cariboo Tribal Council published a book on IRS in 1991 that interviewed survivors of a Williams Lake school, with a significant number reporting having experienced abuses at the school.\textsuperscript{199} The First National Conference on Residential Schools was held in Vancouver, in June 1991.\textsuperscript{200} The Assembly of First Nations published a First Nations Health Commission report cataloguing the damage to indigenous communities as a result of the IRS.\textsuperscript{201} In general, Canadians began to hear stories in the early 1990s of the abuses of IRS and these stories were given credence with the apologies of the Oblates of Mary Immaculate, the Anglican Church and the Presbyterian Church for their role in IRS in 1991, 1993, and 1994 respectively.\textsuperscript{202} Heightened awareness in Canada of child sexual abuse in particular due to the Mount Cashel orphanage scandal generated calls for the IRS issue to be addressed. The extent of the IRS legacy became known with the establishment of the Royal Commission on Aboriginal Peoples (RCAP).\textsuperscript{203} RCAP was established in 1991, and during the course of 178 days of public hearings in 96 communities, many survivors of the schools gave emotional and troubling testimony recounting the abuses they had suffered, thus bringing wider attention to the IRS legacy.\textsuperscript{204} It is to this commission of inquiry, and its role in the IRS narrative, that I now turn.

\textsuperscript{197} Ibid., note 45, citing reports in The Globe and Mail and the Saskatoon Star-Phoenix (11 December 1990).
\textsuperscript{198} Ibid., note 46 citing The Globe and Mail (10 November 1990).
\textsuperscript{200} Chrisjohn, Young & Maraun, supra note 140 at 21.
\textsuperscript{201} Assembly of First Nations, Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nation Individuals (Ottawa: Assembly of First Nations, 1994).
\textsuperscript{203} Miller, “Troubled Legacy”, supra note 153 at 381.
\textsuperscript{204} Canada, Indian Residential Schools Resolutions Canada, “Backgrounder: Indian Residential Schools” (Ottawa: Indian Residential Schools Resolutions Canada, 2005).
In 1990, an armed stand-off between Mohawks of the Kanesatake Reserve and Quebec police arose at the town of Oka due to the Club de Golf Oka Inc.’s desire to renew the lease and expand its golf course on traditional lands of the Mohawk nation. The lands contained a sacred grove and burial grounds of spiritual importance to the nation, and covered an area over which the Mohawks advanced a claim for two centuries.\textsuperscript{205} When the town of Oka moved to expand its golf course, members of the Mohawk Nation set up road blocks and a tense standoff began. The situation lasted for several months. The army was called in and a police officer was shot dead by a Mohawk protester. Scenes of townspeople pelting Mohawk women and children with rocks stirred up considerable anger amongst indigenous people across the country.\textsuperscript{206} Scenes of Canada turning its military might on its own people stirred up considerable attention from the international community.\textsuperscript{207} The Canadian government deployed more than 4,000 troops to support the Sureté du Québec (Québec’s police force); there were 60 people behind the barricades at Kanesatake: 27 aboriginal men, 16 aboriginal women, a teenager, six children and 10 reporters.\textsuperscript{208}

\textsuperscript{205} A Mohawk chief presented documents evidencing the dispute at both the 1946-48 and 1959-61 Joint Senate and House of Commons committee hearings into Indian Affairs. RCAP Report, vol. 2, \textit{supra} note 16, part 2, c. 4, s. 5. The lands had been the subject of a claim rejected in 1977 under the federal comprehensive land claims policy on the basis that the Mohawks could not prove their continuous occupation since time immemorial. Their specific claim was then rejected in 1986 as not properly falling under the oft-criticized Specific Claims Policy.

\textsuperscript{206} In searching for details about exactly what happened at Oka, I turned to the RCAP Report, \textit{supra} note 17, on the assumption that the incident that prompted the commission’s founding would have made a full report about what happened at Oka. Curiously, the events at Oka are glossed over in the report and there is no detailed description of the background or events of that summer. One commentator theorizes that this stemmed at least in part from the fact that four of the seven commissioners were high-profile leaders of Aboriginal organizations who “came to prominence as elected politicians in federally funded and federally sanctioned Native organizations.” See Anthony Hall, “RCAP's Big Blind Spots” in Aboriginal Rights Coalition, \textit{Blind Spots: An Examination of the Federal Government's Response to the Report of the Royal Commission on Aboriginal Peoples} (Ottawa: Aboriginal Rights Coalition, 2001), [Aboriginal Rights Coalition, \textit{Blind Spots}] 66 at 78. Hall suggests at 74 that they might have been put in a conflict of interest situation with respect to their leadership activities during the crisis, and notes that many Aboriginal people were highly critical of the federally-funded Aboriginal organizations that they viewed as having sold out under the \textit{Indian Act} system.

\textsuperscript{207} See for example, John Best, “Troops used in Mohawk dispute” \textit{The Times} (10 August 1990); Judith Gaines, “1500 Police Besiege Quebec Mohawks” \textit{The Boston Globe} (14 July 1990); Christine Tierney, “Mohawk Warriors Brace for Canadian Army Invasion” \textit{Reuters News} (28 August 1990), noting the presence of an international observer mission from the International Federation for Human Rights at Kahnawake; Associated Press, “Canadian Troops Move In at Mohawk Settlement in Canada” (1 September 1990). The RCAP Report states: “The sight of Canada's army pitted against its own citizens received attention around the world. Canada's reputation on the international stage, one of promoting human rights and the well-being of Aboriginal peoples, was badly tarnished.” RCAP Report, vol. 1, \textit{supra} note 15, part 1, c.7, “Stage Four: Negotiation and Renewal”.

\textsuperscript{208} Linda Goyette, “Natives seen through a kinder lens” \textit{Kitchener-Waterloo Record} (7 December 1996) A19.
In the aftermath, the Mulroney government asked former Chief Justice of the Supreme Court of Canada Brian Dickson to conduct nation-wide consultations with indigenous leaders and communities to make recommendations to respond to indigenous concerns. In his report, Dickson identified sixteen areas requiring attention, and based on these areas the government ordered a public inquiry with “possibly the broadest [mandate] in the history of Canadian royal commissions.”\(^{209}\) The order-in-council of August 1991 asked the Royal Commission on Aboriginal Peoples to look into the history, health, education, self-government aspirations, land claims, treaties, economies, cultures, living conditions, language, spirituality, relationship with the justice system, and the situation of indigenous people in general in Canada. On the recommendation of Dickson, four of the seven commissioners were indigenous. “[RCAP] was likely the most extensive inquiry into indigenous relations ever conducted on a partnership basis in a settler society.”\(^{210}\) Co-chaired by Justice René Dussault of the Québec Appeal Court and former national chief of the Assembly of First Nations Georges Erasmus, it worked for five years to address the sweeping mandate.

RCAP held 178 days of public hearings across the country, heard briefs from over 2000 people, and commissioned more than 350 research studies. Public hearings were opened in 1992 in Winnipeg, chosen because of its history as a gathering place for trade between indigenous peoples, and the fact that it now has one of Canada’s largest urban indigenous populations.\(^{211}\) RCAP’s research agenda was extremely broad, and more than 350 research projects were commissioned.\(^{212}\) The research plan identified areas adequately researched and those that represented gaps in knowledge. Guidelines were developed for researchers in order to ensure respect for indigenous knowledge, and extensive consultation with indigenous peoples and governments was undertaken.\(^{213}\)


\(^{210}\) Peter H. Russell, Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism (Toronto, University of Toronto Press, 2005), at 338.


\(^{212}\) Ibid. at 300.

\(^{213}\) Ibid. at 300-301.
Processes adopted by RCAP for the conduct of the commission echo those employed by the earlier Berger Inquiry (discussed in Chapter Four, below); it is therefore no surprise that Commission members consulted Berger at the outset on how to organize and run RCAP.\textsuperscript{214} Similarities in procedure include the fact that prior to the public hearings, the Commission held informal consultations with indigenous leaders, organizations, and federal and provincial politicians responsible for Aboriginal affairs on the mandate, how it would be pursued, and to encourage involvement in the public consultation processes of the Commission.\textsuperscript{215} Indeed, RCAP emphasized public consultation, and utilized various media formats in multiple indigenous languages to encourage such participation.\textsuperscript{216} A program to provide funding and resources to indigenous groups to facilitate their ability to research and write briefs for the Commission was implemented.\textsuperscript{217}

While RCAP engaged in some public education by producing videos, reports and CD-ROMs of its materials, there does not appear to have been a media strategy to keep the Commission in the public eye throughout its work.\textsuperscript{218} Thus, despite some response to interim research reports, the immense project that was this Commission, stretching as it did over a five-year period, was not a media event and passed unnoticed by much of the Canadian population during its operation.\textsuperscript{219}

The five volume, 3,500-page RCAP Report covers 500 years of history between non-indigenous and indigenous peoples in what is now Canada. The Commissioners make 440 recommendations calling for comprehensive changes in the relationship between Canada’s

\textsuperscript{214} Interview of Thomas Berger (18 December 2007) Vancouver, BC [Berger interview #1].\textsuperscript{215} RCAP Report, vol. 5, \textit{supra} note 209, Appendix C, at 297.\textsuperscript{216} \textit{Ibid.}\textsuperscript{217} \textit{Ibid.} at 298.\textsuperscript{218} \textit{Ibid.}, Appendix C.\textsuperscript{219} Bradford W. Morse & Tanya M. Kozak, “Gathering Strength: The Government of Canada’s Response to the Final Report of the Royal Commission on Aboriginal Peoples” in Aboriginal Rights Coalition, \textit{Blind Spots}, \textit{supra} note 206, 32, at 32. Morse and Kozak state that some of RCAP’s interim reports were “highly influential”, citing the self-government report as having an impact on the Beaudoin-Dobbie Parliamentary Committee (the committee that called for constitutional reform, including Aboriginal self-government, saying Aboriginal participation was required, the committee triggered the Charlottetown round of constitutional negotiations), and they say the 1994 report on High Arctic relocation of Inuit families in the 1950s “led directly to the negotiation of a settlement between the affected families and the federal government”. As for media interest, a search of the Factiva database of major North American newspapers produced 229 articles on RCAP in the five years of its operation. The highest proportion of articles was published in the two months following release of the Report.
indigenous and non-indigenous peoples. The central recommendation calls for a complete restructuring of the relationship between indigenous and non-indigenous peoples in Canada. There were major recommendations with respect to treaties, governance, restructuring of federal institutions, lands and resources, family, health, healing, housing, education, arts and culture. The fifth volume of the Report lays out a 20-year plan for renewing the relationship between indigenous and non-indigenous peoples in Canada.

The Royal Commission on Aboriginal Peoples and Indian Residential Schools

An entire chapter of the RCAP Report is dedicated to the residential schools issue.\textsuperscript{220} The Report notes: “No segment of our research aroused more outrage and shame than the story of the residential schools.”\textsuperscript{221} The chapter on IRS is a detailed review of the history of the schools, and the government policy behind them. The Commission looks at education policy and its development throughout the period of IRS. It reviews the locations, staffing, operations and conditions of the schools, and identifies causes and manifestations of systemic neglect with a thorough review of administrative and financial aspects of the schools. The chapter discusses widespread disease, malnutrition, abuses and death tolls at the schools. It examines the impact of IRS on students, their families, their communities and their descendants and the resulting legacy of the schools.

Despite its own relatively thorough review of the issue, RCAP recommended that a public inquiry into IRS be created to examine the origins, purposes and effect of residential school policies, to identify abuses, recommend remedial measures, and begin the process of healing.\textsuperscript{222} The Report notes that there were previous calls for a public inquiry into IRS from indigenous leaders and parliamentarians that went unheeded by the government.\textsuperscript{223} Indeed, in 1992 Indian Affairs Minister Tom Siddon stated: “I am deeply disturbed by the recent

\textsuperscript{220} RCAP Report, vol. 1, \textit{supra} note 15, part 2: “False Assumptions and a Failed Relationship”, c.10 “Residential Schools”.

\textsuperscript{221} Ibid., part 2, c. 13 “Conclusions”.

\textsuperscript{222} Ibid., part 2, c. 10, s. 5 “The Need for a Public Inquiry”, Recommendation 1.10.1. See Appendix 1 of this dissertation.

\textsuperscript{223} Ibid., part 2, c. 10, section 4 “Epilogue”, text accompanying notes 320, 321.
disclosures of physical and sexual abuse in the residential schools. However, I do not believe that a public inquiry is the best approach at this time.”

RCAP’s call for a public inquiry came after a review of government response to the IRS issue that simply put the burden of addressing the IRS legacy back onto indigenous people and communities. The Report noted that the government left it to individuals to seek prosecution of perpetrators and failed to consider that “the system itself constituted a ‘crime’.” The Commission expressed concern that the government’s approach tended to direct attention away from the source of the legacy, the government policies that produced the IRS system, and toward the future. By contrast, RCAP suggested that a review of the past was necessary in order to move into the future: “Only by such an act of recognition and repudiation can a start be made on a very different future.”

The Report’s dissatisfaction with the government’s attitude regarding existing legal mechanisms presages later developments. RCAP concluded that mechanisms that simply focused on individual experiences were insufficient. The Report noted that the government was also avoiding responsibility for IRS by expecting that survivors would take the initiative to deal with their abusers. RCAP recommended a mechanism that would explore the past with an eye to the system as a whole in order to assist with healing individuals, communities, and the nation in the future. This sounds much like the mandate of the TRC. Indeed, RCAP called for a public inquiry but seemed to seek specific features that suggest a truth commission.

Response to the Royal Commission on Aboriginal Peoples

By the time the Report was released, Mulroney’s government had been decisively defeated and Jean Chrétien, the Minister of Indian Affairs when the White Paper of 1969 was tabled

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224 Ibid., text accompanying note 328.
225 Ibid., text accompanying notes 330-332, 335.
226 Ibid., text following note 333.
227 Ibid., text following note 336.
228 Canada, Statement of the Government of Canada on Indian Policy, 1969. The White Paper followed two years of conferences in which the government consulted with indigenous representatives with respect to
and when the Berger Inquiry was established, was now Prime Minister. Chrétien himself did not respond to the Report upon its release, or at all. His Indian Affairs minister Ron Irwin suggested that the price tag to implement the Report’s recommendations was too steep given the competing demands on the government’s purse. The government may have been emboldened in its lackluster response to the Report by the results of a poll conducted in August 1996. The poll, to determine Canadians’ level of interest in RCAP’s findings, found that fewer than 20 per cent of Canadians thought that RCAP would find solutions to the problems of indigenous peoples. “The findings of this poll may have given comfort to the Liberal government as it distanced itself from the final report of the most expensive royal commission in Canadian history as soon as it was released”.

The government could afford not to act on the Report given that RCAP had not built up public support in order to create pressure to support their recommendations. One way to do this would have been through a media strategy. RCAP did attempt to attract media attention to its Report and recommendations but these attempts were too little, too late, since they were not part of a sustained media strategy throughout the life of the Commission. The RCAP executive sought assistance from interest groups including the national churches to educate the public about the Report. The Aboriginal Rights Coalition produced a resource kit restructuring their relationship in order to remove discrimination and improve services and programs. The White Paper recommended the eventual removal of specific references to Indians in the Constitution; the short-term goal was the repeal of the Indian Act. The termination policy under the Liberal Trudeau government was bound up with the liberal idea that distinctions based upon race should form no part of a democracy. However, this failed to take into account the fact that, while seeking increased autonomy, indigenous peoples strongly felt that they must maintain their Indian status as the alternative appeared to be assimilation and concomitant loss of culture, language and land. The response to the White Paper was immediate and unequivocal: Aboriginal organizations felt betrayed because the policy did not reflect the substance of the consultations in which they had participated for the previous two years, and further, because it recommended what were perceived as assimilationist solutions to their many concerns. According to Weaver, supra note 150 at 5: “Indians responded to the policy with a resounding nationalism unparalleled in Canadian history.” By spring 1971, the policy was formally withdrawn by Chrétien. The White Paper was a major turning point in Aboriginal policy in Canada, prompting an unprecedented politicization of indigenous peoples in the country.

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229 See Scott Feschuk, “Natives call for PM’s reaction to report Chrétien has to say where he stands on royal commission’s findings, Blondin-Andrew says” The Globe and Mail (6 December 1996) A4.
about the Commission’s findings and used it to conduct workshops across the country. The National Association of Friendship Centres held panel discussions about the Report, and other national Aboriginal organizations responded to the Report. However, the non-indigenous public’s response was one of disinterest. Reasons for this are suggested by Land, who was chair of the Aboriginal Rights Coalition during RCAP. These include a decline in public sympathy for indigenous issues due to high profile land disputes\(^{234}\) and the rise of more conservative political movements\(^{235}\) that emphasized the need to treat indigenous peoples the same as other Canadians, an approach that RCAP “had emphatically shown had been a policy disaster in the past”\(^{236}\).

Part of the social function of inquiries is to educate the public and using the media is an important strategy for achieving this aim. It is clear that the level of education of the general Canadian public achieved by RCAP was lacking. As noted by Maurice Switzer, a former editor and publisher at five daily newspapers and member of the Elders’ Council of the Mississaugas of Rice Lake First Nation in Ontario, unless the RCAP Report could generate considerable media attention, it would be relegated to a quiet shelf in history:

> Indian people did not need a royal commission to understand that, statistically, their children stand a greater chance of going to jail than of graduating from high school, or that their [teenagers] are five times more likely to commit suicide than just about anyone else's around the globe. …

> But if this is stale news to Indians, their partners in the Canadian confederation need a steadier dose of headlines to awaken them to the reality of what passes for life in Indian country. How else can one hope to overcome the abject ignorance

\(^{233}\) The successor organization to Project North, formed in 1975 to work with Aboriginal communities affected by the Mackenzie Valley Pipeline proposals. It is an ecumenical coalition of churches and grassroots groups across Canada.

\(^{234}\) For example, the Gustafson Lake Standoff in September 1995, where Shuswap people held a sun dance at a sacred ancestral site 350 km north of Vancouver that was also part of a rancher’s land. 400 police officers held a 31 day siege in one of the largest police actions in Canada’s history: Robert Matas, “Film Suggests Dosanjh Manufactured a Crisis” *National Post* (29 April 2000) A6. Also in September 1995 was the protest by members of the Stoney Point band at Ipperwash Provincial Park, during which Dudley George was shot and killed by Ontario Provincial Police.

\(^{235}\) For example, Preston Manning’s Reform Party, which won 60 seats, all in the western provinces, in the 1997 federal election and formed the official opposition.

indicated in a recent survey showing that fully 40 per cent of Canadians think Native people enjoy a standard of living as good as or better than theirs? Nothing short of a massive information campaign is required to make Canadians aware that nearly 30 per cent of their indigenous peoples live in homes without running water, hot or cold.237

Not only did a “massive information campaign” not ensue, the federal government’s eventual response to the Report addressed only a narrow range of the recommendations, and certainly did not adopt its central proposal for a complete restructuring of relations.238 Rather, the government “continued to conduct its relations with Aboriginal peoples primarily through the top-down, imperialist machinery of the Indian Act.”239

The government’s narrow response to RCAP was embodied in a new policy with respect to Aboriginal issues entitled Gathering Strength – Canada’s Aboriginal Action Plan, released in 1998.240 The policy set out four general objectives that characterized the government’s new approach to Aboriginal policy.241 The policy also outlined a four-point strategy for addressing residential schools issues: apology, healing, litigation strategies and a dispute resolution framework.242 Of these four, only the strategy with respect to healing has received

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237 Maurice Switzer, “How the news of the aboriginal report is relayed: It's not enough to publish the report of the Royal Commission on Aboriginal Peoples. People have to be told about its analyses, about the full reality of native life in this country” The Globe and Mail (28 November 1996) A23 [Switzer, “How the news of the aboriginal report is relayed”].

238 Assembly of First Nations, Royal Commission on Aboriginal Peoples at 10 Years: A Report Card, online: Assembly of First Nations <http://www.afn.ca/cmslib/general/afn_rcap.pdf> [RCAP Report Card]. One of the Report’s recommendations was that the government call a First Ministers Conference within six months of the Report’s release. The government failed to do so, and the provincial governments’ lack of response reinforced the federal government’s failure to address key aspects of the Report. The government did not meet the fiscal targets recommended by RCAP in order to build self-sustaining indigenous communities, nor did it replace Indian and Northern Affairs Canada (INAC) with a Ministry of Aboriginal Relations, a recommendation key to the goal of creating a partnership relationship to replace the colonial relationship embodied by the Indian Act and INAC.

239 Russell, supra note 210 at 339-340.

240 Canada, Gathering Strength: Canada’s Aboriginal Action Plan (Indian Affairs and Northern Development: Public Works and Government Services Canada, 1997) [Gathering Strength].

241 Ibid.: (1) “renewing the partnerships” – the government states that this includes the need for reconciliation and healing, and the government offered a “Statement of Reconciliation” for this reason. This portion of the policy also discusses treaty renewal, federal/provincial/territorial/Aboriginal partnerships, and other aspects of institution building; (2) “strengthening Aboriginal governance” – refers to creating accountable Aboriginal institutions and negotiating land claims; (3) “developing a new fiscal relationship” – improving financial arrangements between federal and Aboriginal governments; (4)“supporting strong communities, people and economies” – includes strengthening Aboriginal economic development.

a generally positive assessment from the Assembly of First Nations.\footnote{See Assembly of First Nations, RCAP Report Card, supra note 238. The Report Card suggests the Aboriginal Healing Foundation was created in lieu of the government implementing RCAP’s recommendation for a public inquiry into IRS.
} One of the major initiatives created out of the new policy to address the IRS recommendations of RCAP was the establishment of the Aboriginal Healing Foundation in response to RCAP’s recommendation for action to address the loss of languages and culture caused by the IRS. Set up as a non-profit corporation to be run by a mainly indigenous board of directors, the Aboriginal Healing Foundation was allotted $350 million for an 11-year mandate ending March 31, 2009, to support community-based indigenous directed healing initiatives that address the legacy of physical and sexual abuse suffered in the IRS system, “including intergenerational impacts”.\footnote{Aboriginal Healing Foundation, “Frequently Asked Questions”, online: Aboriginal Healing Foundation <http://www.ahf.ca/faqs>.} As discussed in Chapter Three, below, the mandate was extended under the terms of the IRS Settlement Agreement.\footnote{See note 372, below, and accompanying text. The Harper government opted not to renew the AHF’s funding in the March 2010 federal budget: see CBC, “Women Protesting Aboriginal Program Cuts Arrested” CBC News Online (29 March 2010), online: CBC News < http://www.cbc.ca/politics/story/2010/03/29/aboriginal-protesters.html>.} Regarding the other aspects of the four-point response, as we will discover in the discussion of litigation and dispute resolution below, the government’s approach created frustration, time delays and burdensome procedures. With respect to the apology, the federal government made what it called a “Statement of Reconciliation”.\footnote{Gathering Strength, supra note 240, “Statement of Reconciliation: Learning from the Past.” Statement read by Hon. Jane Stewart, Minister of Indian Affairs and Northern Development (7 January 1998).} Minister of Indian Affairs Jane Stewart delivered the statement but for many it fell short of an apology.\footnote{Antonio Buti, “Responding to the Legacy of Canadian Residential Schools” (2001) 8:4 Murdoch U.E.J.L. 8 (4) at para. 36, citing Law Commission of Canada, Minister’s Reference on Institutional Child Abuse: Discussion Paper (1999) at 15.} The statement referred to the damage caused by attitudes of racial and cultural superiority to the overarching relationship between Canada and indigenous peoples. With respect to IRS, the government acknowledged its role in administering the schools and noted that some students experienced “the tragedy” of physical and sexual abuse. The statement said: “To those of you who suffered this tragedy at residential schools, we are deeply sorry.” That is, the statement apologized to those students who had suffered physical and sexual abuse at the schools, but not to those students who had experienced other harms (such as psychological, cultural,
spiritual, or linguistic harm or loss). Further, it was read by the Minister as opposed to the Prime Minister, and it was not read in the House of Commons. The Native Women’s Association of Canada formally refused to accept the government’s Statement as an apology, and the Inuit Tapirisat of Canada found the Statement to be incomplete since it failed to address the wider range of injustices that IRS perpetrated. At the time, as will be discussed below, the government was vigorously defending itself in law suits brought by survivors, insisting that the churches, and not the government, were responsible for abuses in the schools. Observers suggest that the government did not issue a full apology for fear it would be viewed as an admission of liability that would weaken its legal position in the various court claims being brought by IRS survivors. By contrast, the United Church of Canada issued an “Apology to First Nations” in 1986, and several other church entities followed in their footsteps.

National and international human rights bodies such as the Canadian Human Rights Commission, the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Human Rights Commission criticized the government’s failure to adequately respond to RCAP’s recommendations. Ten years later, the Assembly of First Nations issued the federal government a failing grade on implementation of the recommendations. In the late 1990s, though, the failure of the government to adequately respond to RCAP, and in particular, to adequately address the recommendations on IRS, created enormous frustration amongst survivors and dashed any hopes of a political resolution to the issue:

248 Morse & Kozak, in Aboriginal Rights Coalition, Blind Spots, supra note 206 at 36.
249 Ibid. at 46.
It is fair to say that Indian people did not place much faith or hope in the federal response to the Royal Commission’s report…. There is no evidence of a new approach to change the wrongs of the past because the federal government expects Indian people to make the changes, but is not itself prepared to do the same. All the old colonial-style extinguishment and assimilationist policies are still dictating the federal government’s relationship with Indian peoples.253

This frustration with the lack of a political response prompted IRS survivors to turn to legal responses in an effort to seek redress in the courts for the harms they suffered, a strategy that ultimately led to a negotiated solution (as will be discussed in Chapter Three).

Legal Responses to the Indian Residential Schools Legacy

In this section, I survey some of the major mechanisms used in the Canadian legal system to address IRS, such as criminal prosecution, civil litigation, and alternative dispute resolution.254 An exploration of the forms and limitations of these mechanisms reveals some of the challenges that survivors faced in gaining redress for the legacy of IRS, and helps us to understand why negotiators sought a different mechanism in the form of the TRC.

As noted above, a major turning point for Canadians was the Mount Cashel Orphanage scandal of 1989. Several of the Christian Brothers who ran the orphanage were criminally charged for physically and sexually abusing the children in their care. Although the orphanage was not an IRS, the scandal brought considerable national attention to the issue of institutional child sexual abuse and opened the way for indigenous claimants to turn to the law with respect to their IRS experiences.

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Both of these documents avoid any commitment to fundamental change in the relationship between Aboriginal peoples and the Crown. Instead, they offer incremental change, based on pre-existing federal policies and programs: the very policies and programs which the Royal Commission so thoroughly discredited.

254 Other mechanisms not discussed here include criminal injuries compensation programs, ombudsperson offices, children’s advocates and community-based responses. Also, as a non-indigenous scholar, I have focused on legal mechanisms under Canadian law. I have not attempted to explore mechanisms that may be available under indigenous law for addressing broad societal problems.
Criminal Law

The first significant legal response to IRS abuses came in the form of criminal prosecutions. Criminal charges were laid beginning in the 1980s against former IRS staff for the sexual abuse of indigenous children. There are few reported decisions, but a relatively early example is R. v. Maczynski. In that case, the appellant sought a reduction in sentence on 29 convictions of indecent assault, buggery, and gross indecency committed upon students when the appellant was a supervisor at an IRS in British Columbia from 1952 to 1961 and from 1965 to 1967. He was sentenced to concurrent and consecutive sentences totaling 16 years; his appeal was dismissed. The Court of Appeal noted that the appellant had also been convicted of similar offences in the Yukon Territory and the Northwest Territories, and sentenced to four years in prison. Thus, there was a long period between the offences and the punishment – Maczynski was sentenced thirty years after his employment at a British Columbia IRS ended.

Such lengthy timelines are among the difficulties posed for criminal prosecutions in IRS cases. The challenges that often can be encountered in the criminal prosecution process are illustrated in the saga of R. v. O’Connor. Bishop Hubert Patrick O’Connor was charged in 1991 with four counts of indecent assault and rape of former students at Cariboo Indian Residential School near Williams Lake, British Columbia, where he was a Roman Catholic priest and school principal in the 1960s. Procedural wrangling characterized the case. The 1992 trial decision outlines four motions previously brought by the defence seeking a stay of proceedings of the charges against the accused. A fifth application for a stay was brought

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257 Ibid. at para. 3.
258 This discussion is drawn from the decision of Thackray J. in R. v. O’Connor (1992), 18 C.R. (4th) 98 (BCSC). One motion alleged that there had been an unreasonable delay in bringing the matter to trial, thereby impeding the right of full answer and defence. Another application for a stay had alleged that the indictment did not contain sufficient particularity. At the hearing of that application, Crown counsel supplied the diary of one of the complainants to the Court, and substantial portions of it were eventually disclosed to the defence. The fourth application for a judicial stay of proceedings alleged abuses of the Court process, that the administration of justice has been brought into disrepute, and that the public would be outraged by the conduct of the Crown and the prejudice created to the accused if the charges were not stayed. This application was also denied. During pre-trial motions, the (female) Crown counsel had at one point suggested that the public would rather be appalled by the disclosure order for all the records of the complainants, and attempted to raise a report on
after the trial commenced, and after one complainant had commenced her evidence in chief. This time the trial judge accepted a defence argument and stayed charges on the basis that the accused had not received full disclosure by the Crown of all therapy records of the complainants. The Crown had disclosed records related to the specific incidents, but the accused had gained an initial order for access to the women’s complete medical, therapy and school records. That is, the defence sought the files of third parties who had treated the complainants. Neither the complainants nor the third party record holders had received notice of the application.259

Upon appeal of the 1992 decision to stay the charges, the Court of Appeal ordered a new trial.260 O’Connor unsuccessfully appealed that decision to the Supreme Court of Canada. In a second Court of Appeal decision, the Court addressed the issue of disclosure of records.261 This too was appealed to the Supreme Court of Canada.262 A majority of the Court upheld the Court of Appeal decision overturning the stay of proceedings, finding that the non-disclosure had not violated O’Connor’s right to full answer and defence.263

At the new trial in 1996, O’Connor was convicted of two counts (rape and indecent assault) and sentenced to two and a half years of imprisonment. He then appealed the convictions. O’Connor ultimately served six months in jail before being released on bail.264 In 1998, the indecent assault conviction was overturned, and the Court of Appeal ordered a new trial on

gender inequality in the criminal justice system. However, the (male) judge was greatly irritated by the suggestion of gender bias and took a recess, instructing the Crown to reconsider her argument: see John McInnes & Christine Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995) 29 U.B.C. L. Rev. 341, at note 12.


263 Ibid. The majority at the Supreme Court was differently constituted on the disclosure aspect of the decision, and varied the Court of Appeals’ procedure with respect to applications for disclosure of complainant and third-party records. These decisions were heavily criticized and eventually led to legislative action in the form of Bill C-46, An Act to Amend the Criminal Code (production of records in sexual offence proceedings), S.C. 1997, c. 30. The Bill added ss. 278.1 to 278.91 to the Criminal Code, R.S.C. 1985, c. C-46. See discussion in Jennifer Koshan, “Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe” (2002) 40 Alta. L. Rev. 655 at para. 20ff.

the count of rape.\footnote{R. v. O’Connor (1998) 159 D.L.R. (4th) 304 (BCCA), at paras. 4,9.} The Court of Appeal ordered a new trial based on its finding that the trial judge erred when he determined that consent could be vitiated by the exercise of authority. The trial judge had therefore not made a finding as to whether the complainant had herself consented to sexual intercourse.\footnote{Ibid. at para. 5.} The Court of Appeal dismissed the other charge because the complainant testified that the indecent assault had occurred on a date after the appellant had proved he was no longer at the school.\footnote{Ibid. at para. 9.} The case was finally resolved by diversion out of the courtroom. The complainants, one of whom had been impregnated by O’Connor, attended a traditional healing circle with O’Connor, representatives of the church, and government officials, at a community in the traditional territory of the Esketemc people. With the agreement of the complainants, and an apology from O’Connor, the Crown agreed to drop the final charge against him.\footnote{See Tom Hawthorn, “Disgraced BC bishop dead of a heart attack” The Globe and Mail (27 July 2007); Douglas Todd, “O’Connor Appeal Dropped After Healing Circle” Vancouver Sun (18 June 1998).} After seven years of hearings, trials, and appeals, in which the complainants had to give evidence at a preliminary hearing and two trials, this avoided a likely second appeal to the Supreme Court of Canada and a potential third trial.

While not all other criminal prosecutions have given rise to the kind of prolonged proceedings seen in \emph{O’Connor}, aspects of \emph{O’Connor} illustrate the limitations shared by many criminal cases.\footnote{See for example: R. v. Frapper (1990) YJ No. 163 (Y. Terr. Ct.) (QL), R. v. Plint (1995) BCJ No. 3060 (BCSC) (QL), R. v. Maczynski (1997) 120 C.C.C. (3d) 221 (BCCA), R. v. Leroux (1998) NWTJ No. 141 (NWTSC) (QL).} The multitude of pre-trial applications brought by the defence in \emph{O’Connor} indicates the lengthy and adversarial nature of the criminal process for all parties.\footnote{As noted by the Law Commission of Canada: “the criminal justice process is still essentially adversarial, reactive and punitive.” Law Commission of Canada, \emph{Restoring Dignity: Responding to Child Abuse in Canadian Institutions} (Ottawa: Law Commission of Canada, 2000) [\emph{Restoring Dignity} at 134.} They also indicate the vulnerability of complainants to having deeply personal aspects of their lives exposed in court. Unlike a truth commission process where voluntariness is central to victim participation, a criminal process subjects victims to essentially coercive disclosure of private information.

\begin{flushright}
266 Ibid. at para. 5.
267 Ibid. at para. 9.
270 As noted by the Law Commission of Canada: “the criminal justice process is still essentially adversarial, reactive and punitive.” Law Commission of Canada, \emph{Restoring Dignity: Responding to Child Abuse in Canadian Institutions} (Ottawa: Law Commission of Canada, 2000) [\emph{Restoring Dignity} at 134.
\end{flushright}
The criminal law is the only legal mechanism that can provide retributive justice in the form of sentences for the convicted perpetrators. However, the impact on complainants is another key problem with the criminal process, as illustrated by O’Connor. The survivors are not parties to the criminal prosecution, but rather witnesses who may be retraumatized under cross-examination by defence counsel. Further, the trials can be lengthy and stressful for all involved. One of the complainants who had been victimized by O’Connor when she was 18 years old stated at the age of 51 that: “she had had enough ‘of being victimized by the courts’”.

Prosecutions deal only with aspects of IRS harms that can be captured within the ambit of criminal law: sexual or physical abuse. Criminal law is not able to address the range of other harms that IRS survivors endured, including loss of culture, spirituality, family, language and community ties. Also, the criminal law cannot compensate IRS survivors in any substantial way for these larger losses they suffered. For financial compensation, IRS survivors are obliged to launch civil actions for damages. In addition, the criminal justice system deals with cases against individual perpetrators for limited abuses and is incapable of viewing the IRS system as a whole as a crime. The O’Connor case shows a system that focuses on the accused and on the credibility of the complainants. While verdicts convicting individual perpetrators may bring the specific abuses proven in court to the attention of the wider Canadian public, the criminal justice system cannot provide public education on the broader issues and consequences of the IRS legacy.

Another difficulty with criminal prosecution as a legal response to the IRS legacy arises with the inherent difficulties with prosecuting historical institutional child abuse, including the fact that many of the perpetrators are elderly or have died, and the evidence is that of complainants who were children at the time of the abuse. The evidence is likely decades old, there are problems with memory recall and with finding corroborating witnesses. The accused is of course presumed innocent, and the highest standard of proof is applied (beyond a reasonable doubt) before he or she is found guilty. Thus, there have been few reported

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prosecutions. These factors likely discourage Crown counsel from directing their resources into pursuing charges and may explain why IRS survivors redirected their energies into the civil litigation process.

Civil Litigation

The first civil litigation claims against the federal government and the churches for abuse in residential schools were filed in the early 1990s. By 1996, 200 such claims had been received. As of May 1, 2000, a total of 6,324 individual plaintiffs had filed civil suits against Ottawa and the churches. In 2003, there were about 12,000 civil cases filed. Initially, the civil claims made by survivors related to what may be viewed as standard tort claims, that is, the claims were for harms that civil courts are accustomed to hearing: physical assault and sexual assault claims as a result of negligence and breach of fiduciary duty.

Among the earliest claims was *F.S.M. v. Clarke*, filed in 1993 by survivors from St. George’s Residential School in Lytton, British Columbia. Derek Clarke was a dormitory supervisor at the school. By the time of the civil suit, Clarke was in prison, having been convicted of multiple sexual assaults on multiple students. The civil trial judge, Dillon J., noted: “This case is not about him.” Rather, the civil case was about who was “on watch” at the school; that is, as between the federal government, the Anglican Church of Canada, and the Anglican Diocese of Cariboo, who should have had responsibility for the children in the school. The plaintiffs alleged negligence, breach of fiduciary duty, and vicarious liability against the defendants. By the time of the judgment, damages had been agreed. The decision was about apportionment of damages, since the church and the

In May 2006, it was estimated that 80,000 IRS survivors were still alive. See Indian and Northern Affairs Canada, *Backgrounder - Indian Residential Schools* (Indian Residential Schools Resolution Canada, May, 2006). A search of reported cases reveals minimal cases prior to 1990 and a few cases per year in the 1990s.


*F.S.M. v. Clarke*, [1999] 11 W.W.R. 301 (BCSC) per Dillon J. The decision was released on my first day as her law clerk, 30 August 1999.


government each denied responsibility, and alleged that the other was liable for the entirety of the damages. Dillon J. found that both the church and government had failed to protect the plaintiff, and that both were vicariously liable.\textsuperscript{278} She attributed 60 per cent of negligence damages to the Anglican Church.\textsuperscript{279} She allowed the Crown’s third party claim against the Diocese.\textsuperscript{280}

One of the most prominent IRS civil cases, \textit{Blackwater v. Plint}, was filed in 1996 by 27 former residents of the Alberni Indian Residential School due to harms inflicted by a dormitory supervisor.\textsuperscript{281} A case history usefully illustrates the way in which the civil litigation system handled an IRS action and provides an example of how such actions were likely to be problematic for addressing the IRS legacy. The civil case followed criminal prosecution of Plint, who pled guilty in 1995 to sixteen counts of indecent assault committed by him on male former students between the years 1948 and 1953, and (upon his return to the school after an absence of a decade) between the years 1963 and 1968.\textsuperscript{282} Hogarth J., the British Columbia Supreme Court judge who sentenced Plint, at the age of 77, to 11 years of imprisonment, stated:

\begin{quote}
I do not hesitate to say … 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.\textsuperscript{283}
\end{quote}

After the criminal prosecution, victims of Plint sued him, the school principals during the relevant periods, the United Church that operated the school and the federal government, on whose behalf the Church ran the school for most of its later history.\textsuperscript{284} The plaintiffs were

\begin{footnotes}
\item[278] Dillon J. relied at para. 135 upon \textit{Blackwater v. Plint}, a 1998 decision from the same court with respect to her finding of vicarious liability: \textit{Blackwater v. Plint} (1998), 161 D.L.R. (4th) 538. Clarke was filed several years prior to \textit{Plint} but the trial did not proceed until 1998, thus the first \textit{Plint} decision was released ahead of the decision in \textit{Clarke}.
\item[280] Ibid. at para. 204.
\item[281] \textit{Blackwater v. Plint} (1998), 161 D.L.R. (4th) 538 (BCSC) per Brenner J. (as he then was); 2003 BCCA 671; [2005] 3 S.C.R. 3.
\item[282] He was also convicted of additional counts in 1997 and sentenced to an additional year: see \textit{Blackwater v. Plint}, (BCSC), \textit{ibid.} at para. 11.
\item[284] The school had been founded in the late 1800's by the Presbyterian Church. In 1925, the Presbyterian Church combined with two other denominations to form the United Church of Canada. The United Church then ran the
\end{footnotes}
between the ages of 5 and 19 when they attended the IRS in Port Alberni where Plint worked as a dormitory supervisor. Almost all of the assaults occurred in the dormitory where the children lived, or in Plint’s adjacent bedroom. At the civil trial, additional victims of Plint – other than those in respect of whom there had been criminal charges – testified as to the abuses they had suffered from him. The defendants did not object to their evidence and the judge accepted that each former student who testified had been assaulted at least once by Plint.

The civil trial was split into two parts. The first part, heard over February, March and April of 1998, addressed the issue of whether the Crown and the Church were vicariously liable for the assaults upon the plaintiffs. In order to prove that the employers of Plint were vicariously liable for the assaults, the plaintiffs had to prove that Plint had authority over the children and that his ability to assault them was connected to his employment. The Crown and the Church each said that the other was solely vicariously liable for the assaults; that is, each alleged that the children were in the care and control of the other. Brenner J. (as he then was) of the British Columbia Supreme Court, found that Plint acted in the role of a parent to the children, and had that authority conferred upon him. He woke the children each morning, prepared them for school, met them upon their return, supervised their homework, “and in all other respects functioned as their parent”. Brenner J. also found that the connection test had been met. Then the plaintiffs had to prove that the defendants employed Plint. The Church and the Crown each said that the other was Plint’s employer. To determine the identity of Plint’s employer, Brenner J. had to embark upon a lengthy review of the agreements between the Church and Canada, as well as the IRS legislation and the law on vicarious liability. In the end, Brenner J. determined that Canada and the United Church were jointly and vicariously liable for assault.

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286 Ibid. at para. 26.
287 Ibid. at para. 151.
In an interim ruling, Brenner J. dismissed an application by plaintiffs’ counsel to admit evidence by John Milloy, an academic expert on the history of the IRS system.288 At the time of the trial, Milloy had completed a large research project that formed the basis of the IRS chapter of the Royal Commission on Aboriginal Peoples Report.289 Plaintiffs’ counsel averred that Milloy would assist the court by situating “the Church and Canada's policies on residential schools in relation to their overall policy of assimilation”, and that his evidence would help the plaintiffs establish that Canada and the Church had knowledge of the abuses occurring in the IRS system prior to Plint's being hired.290 Brenner J. noted the difference between a commission of inquiry’s task to understand the entire IRS system versus a court’s much narrower task to decide what harms are compensable in law after hearing evidence based on material facts set out in the pleadings.291 He declined to admit Milloy’s report or to hear his evidence.

The second part of the trial was heard over multiple weeks in late 1998, spring and fall of 1999, and throughout 2000 (by this time Brenner J. had been made Chief Justice of the British Columbia Supreme Court). The second part of the trial addressed the remaining liability issues. These included the vicarious liability of the Church and Canada for perpetrators other than Plint, negligence or direct liability of the defendants, fiduciary duty, non-delegable statutory duty, limitation defences and the third party claims advanced by the Church and Canada against each other, and the amount of damages recoverable by the plaintiffs.292 By the time of the second part of the trial, most of the plaintiffs had settled their claims. Only seven of the initial 23 plaintiffs remained.293 Three years after the first trial decision, the Court released the judgment on the second part of the trial.

In that judgment, Brenner C.J. found that the Church and Canada were each vicariously liable for the damages proved by six of the remaining plaintiffs. He dismissed the claim of

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290 *Blackwater v. Plint*, *supra* note 288 at paras. 4, 6.  
293 *Ibid.* at para. 3.
one plaintiff. The claims against the defendants for negligence and breach of fiduciary duty were dismissed, and all claims for damages for specific abuses (except those of a sexual nature) were statute-barred.\footnote{That is, the \textit{Limitations Act} R.S.B.C. 1996, c. 266 governing the other causes of action had a limitation period that had already expired before the case went to court.} He awarded non-pecuniary and aggravated damages for sexual abuse to the remaining plaintiffs in amounts ranging from $10,000 to $145,000\footnote{\textit{Blackwater v. Plint}, supra note 292 at para. 933.} and apportioned liability at 75 per cent to Canada and 25 per cent to the Church.

Canada and the United Church appealed to the British Columbia Court of Appeal. The appeal was heard in January of 2003 and the judgment was released in December of that year.\footnote{\textit{Blackwater v. Plint}, 2003 BCCA 671.} The Court of Appeal largely maintained the damage awards made by Brenner C.J. However, on the issue of liability, the Court of Appeal applied a doctrine of charitable immunity, exempting the Church from liability and finding Canada liable for 100 per cent on the basis of vicarious liability.\footnote{\textit{Ibid.} at paras. 42-50.} Speaking for the Court on that issue, Esson J.A. found that because the plaintiffs could make a full recovery from the Crown, the Church as a non-profit charitable organization could escape a finding of vicarious liability. This part of the Court of Appeal’s decision was set aside by the Supreme Court of Canada in its unanimous 2005 decision reinstating Brenner C.J.’s apportionment of liability.\footnote{\textit{Blackwater v. Plint}, [2005] 3 S.C.R. 3, at para. 73, per McLachlin C.J. for the Court.}

The Supreme Court also did not interfere with Brenner C.J.’s decision regarding the plaintiffs’ arguments that harms resulting from loss of language and culture should be recognized. At trial, Brenner C.J. had dismissed this argument:

\begin{quote}
There is simply no evidence of dishonesty or intentional disloyalty on the part of Canada or the United Church towards the plaintiffs which would make it permissible or desirable to engage the law relating to fiduciary obligations. I include in this conclusion the more general complaints of the plaintiffs relating to linguistic and cultural deprivation. In my view the plaintiffs have failed to demonstrate that either Canada or the Church were acting dishonestly or were intentionally disloyal to the plaintiffs.\footnote{\textit{Blackwater v. Plint}, supra note 292 at para. 247.}
\end{quote}
The Court of Appeal stated that the loss of culture claim was not properly pleaded and could not be raised at that stage.\textsuperscript{300} Thus, it is unclear how the Court would have dealt with the argument had it in their view been properly brought before it.\textsuperscript{301} The Supreme Court of Canada acknowledged these arguments in their 2005 decision in \textit{Blackwater v. Plint} but noted that the arguments had not been made at trial “other than as contextual background to the circumstances and events at the school”, and were brought before them by interveners, based on materials not tested by the courts below.\textsuperscript{302}

The case history of \textit{Blackwater v. Plint} illustrates some of the difficulties faced by IRS survivors in attempting to use civil litigation to address IRS harms. The civil litigation process ended at the Supreme Court of Canada almost a decade after the plaintiffs filed their civil suit, and a full decade after Plint was convicted of sexual assault. The plaintiffs who did not settle out of court ended up with a relatively modest amount of money to compensate them for harms inflicted three to six decades before.\textsuperscript{303} The painful experiences of the abuses suffered were recounted in graphic detail by the plaintiffs in court, but only one type of harm that they suffered (sexual abuse) was ultimately compensated. Most of the arguments made were technical arguments about liability and immunity; one imagines that these arguments did not address the pain suffered by survivors. The defendants aggressively fought the case at every stage; there were appeals and cross-appeals, and an extraordinary expenditure of resources in time and legal representation.

Toward the end of the first decade of IRS claims, courts began to receive more civil suits that included claims for cultural harm, loss of language and intergenerational harm as a result of IRS. These were novel arguments in the field of tort law. There are very few mentions of loss of culture or intergenerational harms in the decided IRS cases. One exception though is

\textsuperscript{300} \textit{Blackwater v Plint}, (BCCA), supra note 281 at para. 76ff.
\textsuperscript{301} In its decision in \textit{Blackwater v Plint}, the Supreme Court of Canada recognized at para. 74 that “[u]ntangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong”. The defendant is liable to the plaintiff for the full extent of the damage that his actions actually caused. He is not required to compensate the plaintiff for “the debilitating effects of the other wrongful act that would have occurred anyway” (para. 80). The Court cites \textit{Athey v. Leonati}, [1996] 3 S.C.R. 458, at para. 32, which was argued before the SCC by Tom Berger for the plaintiff.
\textsuperscript{302} \textit{Blackwater v. Plint}, (SCC), supra note 298, at para. 62.
\textsuperscript{303} See text accompanying note 295, above.
Bonaparte v. Canada,\textsuperscript{304} heard in 2001. This was an action brought by 56 plaintiffs who attended two residential schools near Spanish, Ontario, between 1934 and 1960. These primary plaintiffs were survivors of the schools and made claims for a range of abuses suffered. However, there was also a large group of “secondary plaintiffs” who were the children of the primary plaintiffs, not yet born when their parents attended school. These plaintiffs claimed that the government and the churches breached their fiduciary duty to protect their Aboriginal rights, including the protection and preservation of their language, culture, and their way of life. In addition, the secondary plaintiffs alleged they were denied the opportunity to receive their culture from their parents and therefore denied a healthy family life due to their parents’ forced attendance at the schools.\textsuperscript{305} These 189 secondary plaintiffs claimed damages for breach of fiduciary duty, cultural deprivation and loss of care, guidance and companionship pursuant to section 61 of the \textit{Family Law Act}. The Court acknowledged that it was only passage of this law in 1978 that made the action possible since there was no common law cause of action available to relatives for loss of care, guidance and companionship resulting from death or injury suffered by a family member.\textsuperscript{306}

The defendants (the government and relevant church bodies that operated the schools in question)\textsuperscript{307} brought a motion to strike the statement of claim and the motions judge struck the secondary plaintiffs’ claim, agreeing with the defendants that they had no reasonable cause of action. The Court of Appeal did allow the secondary plaintiffs to proceed with their claim against the Crown for breach of fiduciary duty, finding that it would be inappropriate to decide whether the fiduciary duty extended to the secondary plaintiffs without the benefit of an evidentiary record.\textsuperscript{308} There are no further reported decisions in this case. Still, the Court of Appeal opened the door for arguments about loss of culture to be made should the case proceed. A gloss on this issue is found in a conditional assent to the ratification of the IRS Settlement Agreement in Principle. Chief Justice Brenner of the B.C. Supreme Court

\textsuperscript{304} \textit{Bonaparte v. Canada} (2002) O.T.C. 25 (Ont. Sup. Ct.)
\textsuperscript{305} \textit{Ibid.} at para. 4.
\textsuperscript{306} \textit{Ibid.} at para. 9.
\textsuperscript{308} \textit{Bonaparte v. Canada} (2003) 64 O.R. (3d) (Ont. CA) 1 at para. 36.
(who had penned the trial decision in *Blackwater v. Plint*) stated with respect to the class action cases:

A repeated theme in these cases is the effect that attendance at Indian Residential Schools had on the language and culture of Indian children. These were largely destroyed. However, no court has yet recognized the loss of language and culture as a recoverable tort. Even if such a loss was actionable, most claims would now be statute barred by the *Limitation Act*…. The [Common Experience Payment]\(^{309}\) can therefore be viewed, at least in part, as compensation for a loss not recoverable at law. In my view, this represents an important advantage to the class.\(^{310}\)

Thus, Brenner C.J. thought that the Settlement Agreement provided acknowledgement of harms for which it would be difficult to recover if the class action proceeded to trial.\(^{311}\) This exposes both a weakness and a strength of civil litigation for IRS survivors: some of their losses are not recognized as harms for which they could recover damages, yet but for the pressure of litigation, they would not have received payments (in the form of the Common Experience Payment) acknowledging those harms.

Alongside the various individual claims made by survivors were a growing number of class action lawsuits across the country. These claims alleged physical, mental and sexual abuse but also sought to recover for the loss of language, culture and spirituality that class members experienced due to IRS.\(^{312}\) Eventually, a National Consortium of Residential School Survivors launched a class action in Ontario on behalf of all survivors of the IRS system across the country, as well as parents and children of survivors. The plaintiffs in *Baxter v. Canada* sought damages for harms including physical, emotional, psychological and sexual abuse; loss of language and culture; deprivation of love and guidance from their families; inadequate education and living conditions. The class action named the federal government

\(^{309}\) This lump sum payment is made to each student who shows they attended IRS, as part of the Settlement Agreement. It is intended to acknowledge that simply attending the schools caused a harm. See discussion in Chapter Three, text accompanying note 364, below.


\(^{311}\) This is echoed in *Ammaq v Canada*, 2006 NUCJ 24, the Nunavut Court of Justice decision ratifying the Agreement in Principle. Kilpatrick J. notes at para. 45 that: “It is argued [by the Defendants] that the common law to this point has not recognized loss of culture or language as giving rise to a legal claim of any kind.” Kilpatrick J. finds that this is one of the “significant risks” facing the Plaintiffs in bringing the class action and therefore finds that the settlement is advantageous rather than facing the uncertainties of litigation (para. 49).

who then named over 80 church organizations as third parties. Had it proceeded to trial, factors such as the sheer number of defendants, and the fact that the period relevant to the class spanned 75 years, would have meant an extremely lengthy and complicated trial. Even to get to trial, a class action must be certified in order to allow it to proceed. Baxter was filed in 2002. Third party notices were filed in 2003. The court ruled in 2005 on a motion by the plaintiffs seeking a hearing of the certification motion prior to a multitude of other motions brought by the defendants and third parties. The delays inherent in the process would have meant that many of the elderly plaintiffs would not have lived to see it go to trial. The class action was certified and the settlement of it approved, with conditions, in 2006.

Thus, where settlement or success at trial results in recompense for plaintiffs, civil litigation has some positive outcomes. It is capable of achieving monetary awards for survivors of IRS in a process that they initiate in a forum that possesses safeguards of procedural fairness. An important aspect of the civil process is that it allows for more agency on the part of victims than does the criminal justice system. In a criminal trial, the parties are the Crown and the accused; victims may be called only as witnesses but do not initiate proceedings or instruct counsel. In addition, in a civil case there is more scope for novel arguments given that both common law and statutory frameworks can be employed. Civil litigation can achieve a degree of perpetrator accountability because the proceedings and the judgment are matters of public record. However, the process is expensive, lengthy and emotionally draining. Even though the class actions launched with respect to IRS ultimately produced a settlement for the individual litigants, their families, communities and descendants were also affected by the IRS legacy. Litigation is unable to adequately capture the broader harms the IRS inflicted. Although the IRS Settlement Agreement acknowledged losses beyond physical harm, such as the loss of culture, language and spirituality that many agreed were the aim and the result of the schools, it is not clear that the courts would have done so.

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313 Baxter v. Canada, [2005] O.T.C. 391 (Ont. Sup. Ct.) per Winkler J. (as he then was).
314 Baxter v. Canada (2006) 83 O.R. (3d) 481 (Ont. Sup. Ct.) per Winkler J. The class action purported to represent 79,000 survivors who resided at an IRS in Canada between 1 January 1920 and 31 December 1996, and who were living as of 30 May 2005. This settlement is discussed in Chapter Three, “The IRS Settlement Agreement”, below.
Further, the litigation process itself can inflict harms. A decision in an IRS case exempting the case from mandatory mediation noted the pain and suffering produced for survivors of being in the same room as their abuser.\textsuperscript{315} The judge noted that forcing the plaintiffs to discuss the abuse in mediation would be unfair given that there was no reasonable likelihood that the mediation would produce a settlement, and given that they would also be required to provide details of the abuse during examinations for discovery, and again at the trial if the matter proceeded to trial.\textsuperscript{316} In addition, as illustrated by the case history of \textit{Blackwater v. Plint}, litigation can be a lengthy and convoluted process that ultimately produces limited awards on narrow grounds.

Class action lawsuits, while relieving some of the ongoing costs that individual litigants would need to pay, have also resulted in unseemly behaviour by some law firms who sought to increase the numbers in the class action membership without due concern for the psychological repercussions that might be triggered by provoking IRS memories. For example, the Law Society of Saskatchewan has sanctioned Tony Merchant, one of the primary litigators of IRS class actions, after fielding multiple complaints for the manner in which he actively recruited large numbers of survivors for his cases.\textsuperscript{317} Lawyers obtained school class lists and band lists, and hired people on reserves to organize meetings at which forms were handed out to impoverished survivors, asking them to remember the worst things that happened to them with the promise of financial compensation.\textsuperscript{318} These activities can revictimize and exploit vulnerable survivors. Such tactics prompted rule changes by the Law Society of Saskatchewan with respect to lawyers pressuring vulnerable potential clients.\textsuperscript{319}

\textsuperscript{316} \textit{Ibid.} at para. 6.
\textsuperscript{318} Jane O’Hara, “Residential Church School Scandal” \textit{Macleans} (26 June 2000).
\textsuperscript{319} Law Society of Saskatchewan, “Rule re: solicitation and marketing activity where prospective client of ‘weakened state’” (1999). Assembly of First Nations Chief Phil Fontaine contacted law societies across Canada in 1998 to raise concerns “about the manner in which some lawyers have aggressively solicited First Nations clients who are the survivors of residential school abuse, and about insensitivity shown by some lawyers over the impact of abuse on survivors”: Law Society of British Columbia, \textit{Benchers Bulletin} (August-September
Civil litigation can provide some opportunity for public education about an issue by bringing institutional defendants’ culpability to the fore in a way that criminal law does not. Still, as with the criminal process, civil litigation can find fault against individual parties but cannot rebuke an entire system. Nonetheless, the civil suits brought by survivors created the financial pressure on the federal government and churches that ultimately forced them to negotiate a larger settlement for the IRS legacy. According to the Assembly of First Nations, the sheer volume of claims would have taken the courts an estimated 53 years to conclude, at a cost of $2.3 billion to litigate.\textsuperscript{320}

\textit{Alternative Dispute Resolution}

Given this enormous volume of civil lawsuits filed by IRS survivors, and the staggering projected costs of that litigation, the federal government began to search for ways to alleviate the costs of defending the cases. In 1998, the government began consultations with survivors and church representatives on how to address the IRS issue. In response to these “Exploratory Dialogues”,\textsuperscript{321} the Government established a number of alternative dispute resolution pilot projects across the country.\textsuperscript{322} In 2000, the Law Commission of Canada released a report on institutional child abuse that included recommendations with respect to resolving IRS claims.\textsuperscript{323} In 2001, the federal government formed the Indian Residential Schools Resolutions Canada (IRSRC) unit “to centralize resources that are focused on resolving Indian residential school claims, addressing the legacy associated with the schools

and encouraging healing and reconciliation. IRSRC was tasked with creating an alternative dispute resolution process for the mounting number of survivors seeking redress for their IRS experiences. In December 2002, the government announced the creation of a National Resolution Framework, the centerpiece of which was an Alternative Dispute Resolution process to administer and settle sexual and physical abuse claims as an alternative to litigation. IRSRC launched its Alternative Dispute Resolution process in 2003, the same year as the Court of Appeal decision in Blackwater v. Plint. IRSRC made agreements on apportionment of liability with the Anglican and Presbyterian churches that same year. It was not until early 2004 that the government began receiving applications for Alternative Dispute Resolution.

The Alternative Dispute Resolution process contained two streams for claimants. Category A was for physical abuse that caused harms lasting longer than six weeks, required hospitalization or serious medical treatment and sexual abuse or both. There was a points system – the more severe the abuse, the higher the points allotted, in turn resulting in higher compensation. Category B was for claims of wrongful confinement, abuse that caused harms lasting less than six weeks, and abuse that required hospitalization or serious medical treatment. Once the points were calculated, compensation was awarded based on the total amount, the location of the school where the child was abused, and whether the abuse was committed by a person whose religious group had entered into an indemnity or cost-sharing agreement with Canada.

In an alternative dispute resolution process, complainants participate in a less adversarial process than litigation, with a more flexible approach to evidence and proof. Such processes are intended to deal with claims more quickly and with less cost and stress than litigation. Unfortunately, the Alternative Dispute Resolution process set up by the federal government

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326 Blackwater v. Plint, (BCCA), supra note 281.
327 This information is drawn from the Assembly of First Nations, ADR Report, supra note 320 at 14-15.
328 Ibid. at 15. If the church responsible for the abuse had an indemnity agreement, then the victim would receive 100 per cent compensation; if not, he/she would receive only 70 per cent.
for IRS claims provoked many criticisms. Both the Assembly of First Nations and the Canadian Bar Association published reports critiquing the Alternative Dispute Resolution process as slow, bureaucratic, traumatizing and costly. Settlements were unequal (depending on location of the victim’s school and whether the church had an indemnity agreement) and focused on injuries rather than the consequences of the injuries. The costs of administering settlements was triple the amount of the compensation being paid. Like criminal prosecution and civil litigation, the process addressed individual cases. The outcomes of mediated agreements are usually subject to confidentiality agreements so the opportunity for public education about the broader harms of IRS was not present with Alternative Dispute Resolution. In addition to the costs, the Assembly of First Nations and the Canadian Bar Association alleged that the process did not adequately address cultural and intergenerational harms. In order to better address the bigger picture signified by these harms, both organizations recommended that the government establish a truth and reconciliation process in addition to revising the Alternative Dispute Resolution process.

In 2005, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development concluded upon an examination of the Alternative Dispute Resolution process that the process was “an excessively costly and inappropriately applied failure”. The Committee went on to list its reasons for declaring the Alternative Dispute Resolution process a failure. It also set out criteria for a settlement of the IRS legacy. Indeed, by 2005,

329 Ibid.; Canadian Bar Association, The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors (Canadian Bar Association, February 2005) [CBA Report].
330 Assembly of First Nations, ADR Report, ibid. at 15.
331 Ibid. at 14.
332 Ibid. at 36; CBA Report, supra note 329 at 9.
334 Legislative committees are another method by which a government may seek to investigate a particular issue. However, these are unsatisfactory for wronged groups due to the partisan nature of the mechanism, the lack of transparency, the lower opportunities for participation, and the reduced ability to advocate in the legislative arena. The role of paid lobbyists for certain parties may also make for an uneven playing field if aggrieved groups lack the resources to access such avenues. According to the Law Reform Commission report on commissions of inquiry, due to time constraints and partisan considerations, parliament is not always best placed to give complex issues the time or the objectivity they may need, nor is a parliamentary mechanism always the best means for gathering a full range of public opinion: Law Reform Commission, Working Paper 17, supra note 54 at 14-15.
the Alternative Dispute Resolution process had proved to be utterly flawed: from early 2004
when it began receiving applications to July 2005, 1,992 applications had been filed and were
awaiting hearing and only 147 claims had been settled by the process; meanwhile 12,455
litigation claims had been filed and several class actions were pending by September 5, 2005.335

**Conclusion**

The profound effect of the IRS system upon survivors and their families and the more than
one hundred years of its operation resulted in a legacy experienced in indigenous
communities across most of Canada. Legal structures such as those set up under the Indian
Act disempowered those communities from seeking redress during most of the period of IRS
operation.336 When at last the survivors’ voices began to be heard with respect to the abuses
they suffered at the schools, the IRS system was nearly at the end of its operation. Forums
such as that provided by RCAP began the process of educating the public about the IRS
legacy but failed to provide redress to survivors. The legal mechanisms survivors turned to
included criminal prosecution, civil litigation, and Alternative Dispute Resolution. Criminal
prosecution resulted in some retributive justice with respect to a few individual aging
perpetrators of sexual abuse, but could not address systemic issues and harms of IRS. Civil
litigation also resulted in some damage awards for a few survivors, but the process was
lengthy and again the harms acknowledged by the courts were limited. Alternative Dispute
Resolution was an attempt to remedy the difficulties of the civil litigation system but it too
ultimately failed to fulfill the goal of having a streamlined and effective process to address
survivors’ needs. Thus, each mechanism offered a measure of assistance in bringing the IRS

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335 International Center for Transitional Justice, “Where We Work: Canada”, online:

336 The Indian Act also restricted the ability of indigenous peoples to challenge in the courts the legal structure
under which they suffered. After 1880, ‘Indians’ could not access their own band funds without federal
government approval. Thus their ability to travel and meet with one another was hampered: RCAP Report, vol.
1, supra note 15, part 1, c.7, s.2 “The Role of the Courts”. This would in turn make it difficult to formulate a
legal strategy. Freedom of association was restricted by Criminal Code provision in 1892. It was an indictable
offence for more than three “Indians, non-treaty Indians or half-breeds” to meet together to make demands upon
civil servants in a riotous or disorderly manner. The Indian Act was amended in 1926 to make it illegal for a
lawyer to received fees to represent an Indian or a band to commence claims against the Crown. See Manitoba
Aboriginal Justice Inquiry Report, supra note 18 at 70. Between 1927 and 1951 the Indian Act prohibited the
soliciting of funds to advance ‘Indian claims’ of any kind without official permission.
legacy to public attention, but each mechanism failed to adequately address the historical injustices created by the IRS system.

The combination of the failure of Alternative Dispute Resolution approach, attention to the issue from international human rights bodies, calls for a form of commission of inquiry, and, perhaps most importantly, the pressure of the ongoing ever increasing tide of civil litigation combined to cause the federal government to sit down with the parties in 2005 and negotiate a settlement of the IRS issue. Given the inadequacies of criminal prosecution, civil litigation and alternative dispute resolution discussed in this chapter, the TRC may be viewed as a response to the failure of ordinary legal mechanisms for addressing historical injustices. The next chapter describes the negotiations leading to the IRS Settlement Agreement and sets out its component parts, including the TRC.

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337 Internationally, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, were adopted by the UN Commission on Human Rights (UNCHR) on April 19, 2005 (HR Res. 2005/35). These principles were then reinforced by the adoption on April 20, 2005 of a UNCHR resolution recognizing a right of victims to truth about the causes and conditions of gross violations of international human rights law, and encouraging states to consider the use of truth and reconciliation commissions for investigating and addressing gross human rights violations and serious violations of international humanitarian law (HR Res. 2005/66). In a December 2004 report, the Special Rapporteur on Indigenous issues suggested that Canada’s response to the IRS legacy was inadequate, noting in particular a failure to address intergenerational harms from loss of culture, identity and parenting. The report suggested that the continuing IRS impacts on indigenous community life may be factors in the high rate of indigenous adolescent suicide: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, by Rodolfo Stavenhagen, “Mission to Canada” E/CN.4/2005/88/ Add.3 (2 December 2004) at para. 61.

338 These will be discussed in Chapter Three, “Negotiations Leading to the TRC”, below.

339 Also in 2005, then-Justice Minister Irwin Cotler called the IRS system “the single most harmful, disgraceful and racist act in our history.” Misha Warbanski, “Truth and Forgiveness” The McGill Daily (24 January 2008).
3. CANADA’S TRUTH AND RECONCILIATION COMMISSION

Survivors and indigenous representatives in the Indian Residential Schools (IRS) settlement negotiations sought a truth commission, as opposed to a public inquiry, as part of the settlement. That is, they wanted more than what might be expected from an ordinary public inquiry. They wanted a commission that would acknowledge and witness the IRS system and its impacts, and that would also increase awareness of – and create a public record of – the system and the impacts. I suggested that the call for a truth commission may be due to the history of broken promises by the Canadian government toward indigenous peoples and the widespread ignorance among non-indigenous Canadians about the IRS history and legacy. Acknowledgement of an injustice, creation of a historical record, and public education about the injustice to prevent its recurrence are objectives that make a truth commission a specialized form of public inquiry. The previous chapter outlines the inadequacy of various existing legal mechanisms to address the IRS legacy. The frustration survivors experienced with the lack of an adequate political response to the recommendations of the Royal Commission on Aboriginal Peoples (RCAP) fuelled their turn to the courts and contributed to the desire of survivors to seek something other than ‘another public inquiry’.

In this chapter, I provide an overview of the negotiations that produced the Truth and Reconciliation Commission (TRC), as well as the other aspects of the IRS Settlement Agreement (the Settlement Agreement). I review the mandate and structure of the TRC to assess its ability to fulfill the objectives of a truth commission. I note that the question of leadership is critical to a truth commission’s success and consider the challenges the TRC has so far experienced on that front. I suggest ways in which the TRC might engage the public in its work, which in my view is key to its ability to fulfill its mandate. Comparative information from international examples of truth commission processes is considered.

_Negotiations Leading to the Truth and Reconciliation Commission_

As discussed in Chapter Two, above, although RCAP itself did not garner much press, testimony before RCAP about IRS did attract some national media attention and the attention
of the non-indigenous public. IRS was one of the few areas covered by RCAP to gain a response from the federal government. In 1996, RCAP made its recommendation calling for a public inquiry into IRS. No public inquiry was established, but that year, Indian and Northern Affairs Canada (Indian Affairs) founded its IRS unit. In 1997 Phil Fontaine was elected National Chief of the Assembly of First Nations and commenced negotiations with the churches and the federal government for a settlement for IRS survivors. As noted above, from September 1998 to June 1999, exploratory dialogues\textsuperscript{340} were held across the country between the Department of Justice, Indian Affairs, survivors of residential schools abuse, indigenous leaders, and churches' representatives. Out of these dialogues the parties agreed upon “Guiding Principles” for their settlement discussions.\textsuperscript{341} In the meantime, the courts started to decide some of the first IRS civil cases – including decisions such as the 1998 trial decision in \textit{Blackwater v. Plint}\textsuperscript{342} that apportioned liability 75/25 between the government and the church. These decisions began to impact settlement discussions.\textsuperscript{343} The government released its \textit{Gathering Strength} response to RCAP in 1998. In addition, litigation activities by IRS survivors continued the pressure on negotiators, including \textit{Cloud v. Canada (Attorney General)}, a class action lawsuit launched in Ontario in 1998. Additional class action lawsuits soon followed.\textsuperscript{344}

In 2000, Matthew Coon Come was elected as National Chief of the Assembly of First Nations. He took a less conciliatory approach to the government than Fontaine, but like Fontaine, called for a Truth and Reconciliation Commission on the IRS experience.\textsuperscript{345} Also in 2000, the Law Commission of Canada reported on the various possible responses to

\begin{footnotes}
\item[340] Canada, Reconciliation and Healing, supra note 321.
\item[341] Ibid.
\item[342] \textit{Blackwater v. Plint}, (BCSC), supra note 281.
\item[343] The government made agreements with various churches in and around 2003 apportioning liability roughly in the same proportion: Marites N. Sison, “Church eligible for better residential schools deal” \textit{Anglican Journal} (1 January 2006).
\item[344] In addition to the \textit{Cloud} class action in Ontario, supra note 312, there were four others within a few years: the \\textit{Dieter} class action of students in the western provinces, the \textit{Straightnose} claim from Saskatchewan, and the \textit{Baxter} and \textit{Pauchay} national class actions: Canada, \textit{Notice of Class Actions} (Indian Residential School Alternative Dispute Resolution Process), online: Assembly of First Nations <http://www.afn.ca/residentialschools/PDF/Notice_of_Class_Actions.pdf>.
\end{footnotes}
in institutional child abuse in Canada.\textsuperscript{346} The Law Commission’s mandate was not specifically on IRS but its report did discuss IRS as a special case.\textsuperscript{347} The Law Commission concluded that the IRS system not only harmed former students, it harmed their families and communities. Further, in suggesting the importance of redressing these harms, the report stated that any approaches to redress must be able to appropriately address “this broader range of harms and this broader range of persons suffering these harms.”\textsuperscript{348} In its recommendations, the Law Commission set out conditions that would need to be respected if a public inquiry into IRS were chosen by the government as an appropriate response.\textsuperscript{349} Its recommendations with respect to a truth commission indicated that such a commission must have the power to compel production of government and institutional evidence, that the information-gathering process must be respectful of survivors, and that it should encourage meaningful apologies.\textsuperscript{350} Parties to the IRS negotiations were calling upon the federal government to establish a truth commission at that time.\textsuperscript{351}

The desire for a mechanism that differed from a public inquiry in the eyes of survivors was driven by perceptions of public inquiries as ineffectual. This is not surprising given the magnitude of the findings produced by RCAP and the relative lack of response by the government and by the public to those findings. RCAP’s 1996 Report had been followed by that of the Krever Inquiry in 1997, an inquiry that heightened the criticisms lodged against public inquiries with respect to procedural delays and legal infighting.\textsuperscript{352} Although I argue that the truth commission is a form of public inquiry, it is clear that the usual form of public inquiry would not satisfy IRS survivors. They sought the features more obviously associated

\begin{footnotesize}
\begin{enumerate}
\item In November of 1997, federal Justice Minister Anne McLellan requested that the Law Commission of Canada conduct research and provide advice on the available processes for addressing institutional child abuse. Law Commission of Canada, Restoring Dignity, supra note 270, Appendix A at 425-426.
\item \textit{Ibid.} at 51-70.
\item \textit{Ibid.} at 67.
\item \textit{Ibid.} at 259.
\item \textit{Ibid.} at 279.
\item Mofina, \textit{supra} note 137. In a 2002 article, Llewellyn suggested a restorative justice approach through a truth commission or public inquiry in order to demonstrate that IRS affected whole communities and was not simply an individual issue, as denoted by torts litigation: Jennifer J. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice” (2002) 52 U.T.L.J. 253, citing “A Truth commission is the place to start” \textit{Toronto Star} (10 November 2001).
\item See discussion, above, text accompanying note 48.
\end{enumerate}
\end{footnotesize}
with a truth commission form of public inquiry – symbolism, a focus on victims, public education and the goal of reconciliation.

As noted above, following the launch of multiple class action lawsuits, the federal government formed the Indian Residential Schools Resolutions Canada (IRSRC) department in 2001 to institute the Alternative Dispute Resolution program. However, while settlement discussions continued, the Assembly of First Nations signed a Memorandum of Understanding with a National Consortium of Residential School Survivors to pursue a national class action lawsuit on behalf of all residential school survivors and their families to seek compensation for survivors of sexual, physical, psychological and cultural abuse:

“The Assembly of First Nations Survivors Working Group takes the position that, although litigation is the least appealing option in the path to healing for those who suffered in these schools, litigation has become the only option as there is a complete absence of any political will by the federal government to properly deal with this issue which includes the issue of cultural genocide,” said Vice Chief Ken Young.

The Memorandum of Understanding supports the promotion of a national solution for resolving residential school claims and to develop a fair and expeditious method of determining compensation for residential schools survivors.

This press release displays continued frustration with the lack of a political solution; nonetheless, settlement discussions continued and began to gather momentum. A consensus developed around the Assembly of First Nations’ recommendations in its 2004 report which called for a lump sum reparations payment, additional compensation for specific abuses, expedited payments for the sick and elderly, and a truth-sharing and reconciliation process. The Assembly of First Nations report referred to the need for a national mechanism to facilitate reconciliation and healing among the government, churches, survivors and their communities. The report envisioned a process designed by the stakeholders to enable survivors to tell their stories, to create public awareness and a public record of the IRS


354 See Letter from Indigenous Bar Association to Frank Iacobucci (17 October 2005), on file with the author.
system and its legacy, to create a plan for healing of relationships, to prevent recurrence of a “state-committed atrocity”, and to acknowledge and support the need for healing.\textsuperscript{355}

Then in May 2005, the federal government signed a “Political Agreement” promising negotiations on a package with the elements contained in the Assembly of First Nations 2004 report as well as compensation for legal fees.\textsuperscript{356} In May 2005, the federal government appointed former Supreme Court of Canada Justice Frank Iacobucci to negotiate a settlement on its behalf. On August 5, 2005, the Assembly of First Nations launched a class action lawsuit against the federal government seeking billions of dollars in general, special and punitive damages for the residential schools system. National Chief Phil Fontaine stated that: “The Accord has provided a political vehicle to move forward, but a legal vehicle is required to finalize the process with the Assembly of First Nations in a central and representative role, which this action now provides.”\textsuperscript{357} In November 2005, the parties reached an Agreement in Principle in the dying days of Paul Martin’s minority Liberal government.\textsuperscript{358} In October 2005, one month before the Agreement in Principle was reached, the Supreme Court of Canada gave its decision in \textit{Blackwater v. Plint}.\textsuperscript{359} The unanimous Court reinstated the trial judge’s assessment of damages and apportionment of liability for IRS abuses (75 per cent to the government, 25 per cent to the church), and upheld the Court of Appeal’s increase of a damage award for one of the plaintiffs. Given that the Court of Appeal had relieved the churches of liability, the Supreme Court’s decision meant that the churches were definitively

\textsuperscript{355} Assembly of First Nations, ADR Report, \textit{supra} note 320 at 36.  
\textsuperscript{356} Letter from Anne McLellan, Deputy Prime Minister, to National Chief Phil Fontaine (30 May 2005), online: <http://www.afn.ca/residentialschools/PDF/05-05-30_IRS_Accord.pdf>.  
\textsuperscript{357} That is, the class action would ensure that the Assembly of First Nations would have standing to negotiate a settlement. Assembly of First Nations, “Assembly of First Nations National Chief Files Class Action Claim Against the Government of Canada for Residential Schools Policy” (3 August 2005), online: <http://www.afn.ca/article.asp?id=1632>.  
\textsuperscript{358} The 38th Parliament ended on 29 November 2005. Also in November 2005, the federal government, provinces and Aboriginal organizations reached agreement on the Kelowna Accord, committing the government to spend $5 billion over 10 years on education, employment, housing and other living conditions of indigenous peoples. The Accord followed 18 months of negotiations and was considered an important achievement in process and result. After the Liberal government fell in January 2006, the Harper government refused to honour the Accord, dismissing it as merely a press release with no substance as an agreement, and non-binding on the government as the funds were not committed to in the budget. See Canadian Press, “Tories to Avoid Parliament’s Kelowna Accord Vote” (22 March 2007), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070321/kelowna_vote_070321?s_name=&no_ads>.  
\textsuperscript{359} \textit{Blackwater v. Plint}, (SCC), \textit{supra} note 298.
required to accept responsibility for their role in IRS, thus solidifying the necessity of their participation in the settlement process.

The Agreement in Principle was finalized in May 2006, and approved by the courts later in the year.\textsuperscript{360} After the opt-out period passed, the Settlement Agreement came into effect September 19, 2007. By the time of the Settlement Agreement, 14,903 survivors had filed claims against the government. Only 2,805 claims had been resolved through litigation or the ADR process, with damage awards upwards of $110 million.\textsuperscript{361}

\textit{The Indian Residential Schools Settlement Agreement}

The IRS Settlement Agreement is the largest class action settlement in Canadian history\textsuperscript{362} and has well over 100 signatories. The Settlement Agreement sets aside $1.9 billion for the approximately 80,000 living survivors of the IRS schools. Survivors who did not wish to join the Settlement Agreement and who did wish to retain their right to sue the government and the churches had to formally opt-out of the agreement by the opt out deadline of August 20, 2007. Had more than 5,000 survivors opted out of the Settlement Agreement, the settlement would have been void.\textsuperscript{363} There are ongoing regional and national administration committees to oversee its implementation.

The Settlement Agreement comprises several mechanisms of redress for survivors of IRS. The Common Experience Payment provides for a lump sum to each person who attended an IRS. An Independent Assessment Process is available for those claiming damages for harms beyond those suffered by simply attending IRS (apart from what the Common Experience

\textsuperscript{360} See for example the 15 December 2006 decision \textit{Quatell, supra} note 310, per Brenner C.J.; and \textit{Baxter, supra} note 314, per Winkler J. (as he then was).

\textsuperscript{361} Canada, “Backgrounder: Indian Residential Schools”, \textit{supra} note 204.

\textsuperscript{362} Indian and Northern Affairs Canada, “Backgrounder - Indian Residential Schools Settlement Agreement” (2008), online: <http://www.ainc-inac.gc.ca/ai/rqpi/info/nwz/2008/20080425b_is-eng.asp>.

Payment compensates). The Settlement Agreement also includes a fund for commemorative projects, and a fund for healing projects. Finally, the Settlement Agreement provides for the establishment of the Truth and Reconciliation Commission.

The Common Experience Payment\(^ {364} \) is available to those former students who were alive on May 30, 2005 (the day settlement negotiations were initiated) who show that they attended a residential school. The Common Experience Payment is $10,000 for the first year a person attended IRS and $3,000 for each additional year. Applicants for the Common Experience Payment need not show that they were abused in order to receive payment. The payment is symbolic and intended to acknowledge the fact that simply attending an IRS was a harm. That is, the Common Experience Payment is aimed at redressing the cultural, spiritual and psychological harm of the schools. As noted in Chapter Two, this part of the Settlement Agreement acknowledges harms for which it would be difficult to recover in the course of litigation.\(^ {365} \) These include loss of language and harms caused by interruptions in cultural transmission. Further, the common law could not compensate survivors even for some of the harms that it recognizes, such as physical harms, because of the application of limitation periods.\(^ {366} \) Thus, the Common Experience Payment is intended to redress these widespread harms of the IRS system that are not clearly compensable under the common law system. Accepting the Common Experience Payment means releasing the government and the churches from all further liability for IRS claims, with the exception of those falling under the Independent Assessment Process described below.

As of December 15, 2009, the government had received 99,364 applications for the Common Experience Payment since it began receiving claims in September 2007. Of these, 95,434 had been processed and 75,004 payments had been issued. 24,074 applications for reconsideration were received, of which 2,982 remained in process.\(^ {367} \) The government also had an Advance Payment program for survivors who were 65 years or older on May 30, 2005, in acknowledgement that the elderly may not live to see the finalization of the

\(^{364}\) Settlement Agreement, Schedule N, Art. 5.
\(^{365}\) See judgment of Brenner C.J., supra note 310 and accompanying text.
\(^{366}\) Ibid.
Settlement Agreement. Applications received and verified between May and December of 2006 were eligible for an $8,000 advance payment on the Common Experience Payment. As of December 2006, an estimated 13,400 elders were eligible to apply for the advance payment.\textsuperscript{368} 10,326 applications were verified and processed.\textsuperscript{369}

For the harms that are ordinarily compensable in the tort system, such as serious physical and sexual abuse, there is an Independent Assessment Process. Those survivors who wish to be compensated for these harms can make a claim under the Independent Assessment Process, which has a schedule of monetary compensation for a range of abuses depending on their severity.\textsuperscript{370} The Independent Assessment Process essentially replaces the Alternative Dispute Resolution system that IRSRC previously operated, in that it incorporates positive elements of dispute resolution discussed in Chapter Two above, such as providing a more speedy, less adversarial process than litigation. The crucial difference between the Independent Assessment Process and the government Alternative Dispute Resolution program is that it is independent and adjudicative, and more respectful of survivors.

The Settlement Agreement also makes provision for commemoration.\textsuperscript{371} This is a $20 million fund for activities that commemorate the children and communities affected by the schools. The fund is intended for projects suggested by survivors or their families and communities. Schedule J states that proposals will be submitted to the Truth and Reconciliation Commission who will then make recommendations to IRSRC on which ones to implement.

The Settlement Agreement provides for an additional $125 million over five years to support the projects of the Aboriginal Healing Foundation.\textsuperscript{372} In addition, $94.5 million was allocated for the Indian Residential Schools Resolution Health Support program to provide former IRS students and their families with access to “emotional health and wellness support

\textsuperscript{368} Assembly of First Nations, “Bulletin: Indian Residential Schools Update” (18 December 2006), online: <http://www.afn.ca/residentialschools/PDF/06-12-20_AFN_IRS_Survivors_Update_Fe.pdf>.
\textsuperscript{370} Settlement Agreement, \textit{supra} note 2, Schedule D “Independent Assessment Process”.
\textsuperscript{371} Settlement Agreement, \textit{supra} note 2, Schedule J.
\textsuperscript{372} Settlement Agreement, \textit{supra} note 2, Schedule M, s. 3.03.
services”.373 This program acknowledges that survivors who engage in claiming redress available under the Settlement Agreement may experience retraumatization and require health services as a result of disclosing the abuses and impacts caused by IRS. Although not part of the Settlement Agreement, as will be discussed below, the government delivered an official apology with respect to IRS.374

The Truth and Reconciliation Commission

The final part of the Settlement Agreement is the TRC inaugurated on June 1, 2008. Schedule N of the Settlement Agreement sets out the TRC’s mandate. A preamble notes that the TRC process is part of a “holistic and comprehensive response” to the IRS legacy and a “profound commitment to establishing new relationships”. Finally, it states: “The truth of our common experiences will help set our spirits free and pave the way to reconciliation.”375 Schedule N provides the TRC’s terms of reference in the form of seven goals.376 These are acknowledgement of the IRS experiences, impacts and consequences; provision of a holistic, culturally appropriate and safe setting for survivors, their families and communities; truth and reconciliation events at national and community levels;377 public education of Canadians about IRS and its impacts; creation of a historical record of the IRS system and its legacy; and support of commemoration of survivors. Finally, the TRC is required to produce a report including recommendations to the government with respect to the IRS system, experience and ongoing legacy.378 These recommendations are further delineated in a footnote: “The Commission may make recommendations for such further measures as it considers necessary for the fulfillment of the Truth and Reconciliation Mandate and goals.”379

374 See text accompanying note 496, below.
375 Settlement Agreement, supra note 2, Schedule N, preamble.
376 Ibid., Schedule N, s. 1.
377 These are described further in ibid., Schedule N, s. 10.
378 Ibid., Schedule N, s. 1(f).
379 Ibid., Schedule N, s. 1(f), footnote 3.
The principles upon which the TRC will operate reflect the “Guiding Principles” developed in the exploratory dialogues. These principles include: accessibility, victim-centredness, confidentiality (if required by the former student), transparency, accountability, comprehensiveness, and inclusiveness. The process is expected to do no harm, to have concern for the health and safety of participants, to be open, honourable, educational, holistic, just and fair, representative, respectful, voluntary, flexible, and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.

There are two timeframes for the TRC. The first is a two-year timeframe within which the TRC must complete all national events, and produce its report and recommendations. The second is a five-year timeframe for the completion of community events, statement taking, closing ceremonies and establishment of a research centre. Schedule N also describes the Secretariat and its duties for the operation of the TRC and calls for the establishment of an Indian Residential School Survivor Committee to assist the TRC in accomplishing its tasks.

Like other truth commissions, as noted above, the TRC mandate includes the creation of a historical record and the making of recommendations. However, aside from the unique mandate and structure that reflect the national context in which the TRC is taking place, the TRC is distinctive in that it is the only truth commission to be created out of litigation. In other contexts in which truth commissions have arisen, they have been instigated by a new regime to look into the abuses of a past regime, as in Argentina, Peru and Chile. Occasionally, a truth commission arises as part of a peace accord brokered between parties to a conflict, as in El Salvador, Guatemala and Sierra Leone. In Canada, the TRC is a result of

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380 See note 341 above and accompanying text. These exploratory dialogues were undertaken to guide the settlement discussions.
381 Settlement Agreement, supra note 2, Schedule N, “Principles”.
382 Ibid., Schedule N, s. 8.
383 See ibid., Schedule N, s. 10(c).
384 See ibid., Schedule N, s. 10(d).
385 See ibid., Schedule N, s. 12.
386 Ibid., Schedule N, s. 6.
387 Ibid., Schedule N, s. 7.
negotiations between multiple parties of class action lawsuits. This means that the TRC will be faced with the need to prompt Canadians to invest in and take ownership of a process that they did not instigate. That is, the TRC was not created out of a groundswell of concern about IRS survivors by the public; rather it was agreed to by their government’s legal advisers in order to settle costly litigation.

A legal settlement is necessarily a compromise with inevitable costs and benefits for each party. The Settlement Agreement has court-supervised implementation, and the Commission is therefore subject to judicial oversight. Thus if an aspect of Schedule N is being neglected or a party to the Agreement disagrees with its implementation, the party has recourse with the courts. While other truth commissions have also been subject to litigation, the courts have an obligation to oversee the implementation of the Settlement Agreement. Although this in some ways presents a challenge for the TRC, given the potential for threats of judicial review by the parties, it may also assist the TRC by enabling it to turn to the courts if the parties disagree with its approach. The TRC can then deflect onto the courts criticism of decisions that prove unpopular with one or more of the parties.

The TRC is like other truth and reconciliation commissions in that it is an official, temporary, non-judicial fact-finding body set up to investigate a pattern of abuses of human rights committed over a number of years. That is, it is a government-sponsored commission, with a five-year mandate, intended to investigate the IRS system and its legacy. Fitting the definition of a truth commission and substantively fulfilling the goals and function of a truth commission may not be the same thing. The remainder of the chapter analyses how the TRC might fulfill its goals through a discussion of such topics as leadership, process and social function. Comparative information from other truth commissions is included to help with the assessment.

389 Based on the definition set out in Chapter One: Secretary-General, supra note 68, para. 50 at 17.
The Truth and Reconciliation Commission’s Leadership

I noted in Chapter One that a commission of inquiry can emphasize its social function, but that whether it does so depends on two key factors: leadership and process. By ‘process’ I mean the interpretation and implementation of its mandate. As a specialized form of public inquiry, these aspects are certainly important for a truth commission. The TRC’s potential for conducting its process in a way that fulfills its social function will be discussed further below, but first, a discussion of its leadership.

As noted in Chapter One, a common feature of truth commissions is the appointment of multiple commissioners. Schedule N requires that the TRC have three commissioners – a chairperson and two co-commissioners – and provides guidelines for the selection process.\footnote{Settlement Agreement, supra note 2, Schedule N, s. 5.} The mandate directs that “[c]onsideration should be given to at least one of the three members being an Aboriginal person” and requires that the appointments be made out of a pool of candidates nominated by the constituencies represented in the Settlement Agreement.\footnote{Ibid., Schedule N, ss. 5(a) and (b).} The decision to have multiple commissioners indicates that the negotiators of the TRC thought it important to have people with different perspectives to lead the TRC and to hear from those that appear before them. While they required that at least one commissioner be indigenous, by not requiring that all three be indigenous, they also implied that it is important to have a non-indigenous commissioner as well. The IRS legacy cannot be understood through only indigenous or only non-indigenous eyes. It is a part of Canada’s shared history, and therefore the leadership of the TRC must reflect that by having representation from both indigenous and non-indigenous communities. This contributes to the ability of the TRC to fulfill its social function – having commissioners who are both indigenous and non-indigenous embodies the fact that both communities have a stake in the TRC’s work.

Leadership of a truth commission is critically important to its effectiveness: “Composition counts. The actual identity of decision makers, including those charged with deciding the

\footnote{Settlement Agreement, supra note 2, Schedule N, s. 5.}
\footnote{Ibid., Schedule N, ss. 5(a) and (b).}
truth of contested matters and the consequences that should follow, matters.” 392 One can imagine that the South African TRC would have been very different without Bishop Desmond Tutu at the helm; his leadership was integral to the shape taken by the South African process. 393 In Argentina, leading novelist and well respected author Ernesto Sábato chaired the National Commission on the Disappeared in 1983. The El Salvadoran commission members were chosen as part of United Nations brokered peace negotiations and all three commissioners and the staff were non-Salvadoran because it was thought that no one from El Salvador could be sufficiently unbiased to conduct the commission’s work. 394 The commissioners included the former president of Colombia, Belisario Betancur, and a former president of the Inter-American Court, Thomas Buergenthal. Hayner notes that in that context, “one of the most important qualities of any commissioner is having sufficient personal authority to be able to pick up the phone and get through to almost anyone at any time.” 395 Whoever leads a commission must be a well respected, well known person of integrity so that the country can trust that the person has the best intentions in undertaking this weighty task. Indeed, Schedule N reflects an understanding of this by requiring that the chairperson and commissioners be “persons of recognized integrity, stature and respect.” 396 Finally, the mandate requires that the Assembly of First Nations be consulted in the final decision as to the appointments. 397 The TRC has now had two sets of commissioners. Unfortunately this is due to the first set having resigned a few months into their mandate, after failing to resolve internal differences between the chair and the two commissioners.

First Panel

Ontario Court of Appeal Justice Harry LaForme, a member of the Mississaugas of New Credit First Nation, was appointed as the TRC’s first Chairperson. Justice LaForme was the

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392 Levinson, supra note 67 at 223. The executive director is also a crucial position. See Hayner, Unspeakable Truths, supra note 78 at 215: “Perhaps more than any other single factor, the person or persons selected to manage a truth commission will determine its ultimate success or failure.”

393 Elizabeth Kiss states that South Africa was fortunate to have someone of Tutu’s “moral caliber and authority” leading the TRC: Elizabeth Kiss, “Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice” in Rothenberg & Thompson, supra note 67, 68 at 91.

394 Hayner, Unspeakable Truths, supra note 78 at 220.

395 Ibid. at 216.

396 Settlement Agreement, supra note 2, Schedule N, s. 5.

397 Settlement Agreement, supra note 2, Schedule N, s. 5(c).
unanimous choice of the selection committee co-chaired by Tom Berger and Marlene Brant Castellano.\textsuperscript{398} Called to the bar in 1979, Justice LaForme initially practiced law at a large downtown Toronto firm, but soon decided to practice Aboriginal law.\textsuperscript{399} He was appointed Commissioner of the Indian Commission of Ontario in 1989.\textsuperscript{400} In 1991 the federal cabinet appointed Justice LaForme as Chair of the Royal Commission on Aboriginal land claims.\textsuperscript{401} In January 1994, Justice LaForme was appointed a judge of the Ontario Court of Justice (General Division), now the Superior Court of Justice, Ontario. At the time of his appointment he was one of only three indigenous judges ever appointed to this level of trial court in Canada.\textsuperscript{402} He was appointed to the Ontario Court of Appeal in November 2004, and became the first (and to date only) indigenous person ever appointed to an appellate court in Canada. Justice LaForme says that he was asked by then Grand Chief Phil Fontaine to lead the TRC based on his life experience as an Aboriginal person and based upon the worldview he would bring to the position.\textsuperscript{403} He did not attend a residential school.

The two co-commissioners appointed in 2008 were Claudette Dumont-Smith, a member of the Algonquin First Nation, and Jane Brewin Morley, a British Columbia lawyer. They were on a list of eight or ten names for the co-commissioner positions.\textsuperscript{404} Dumont-Smith was Senior Health Advisor to the Native Women’s Association of Canada at the time of her

\begin{itemize}
\item \textsuperscript{398} Interview of Tom Berger (1 April 2009), Toronto, ON [Berger interview #2]. The selection committee chose LaForme from 300 nominations that were narrowed down to 50 prospects, of which 16 candidates were interviewed: Joe Friesen, “Residential schools panel struggles to find new chair. Truth and reconciliation always a difficult balance, expert says” \textit{Globe and Mail} (30 October 2008). Marlene Brant Castellano was the Co-director of Research for RCAP. See also CBC, “‘Top-level’ panel to pick new truth commission head: lawyer” CBC News Online (14 December 2008), online: <http://www.cbc.ca/canada/story/2008/12/14/commission-iacobucci.html>.
\item \textsuperscript{399} Harry LaForme, (Lecture presented at the Ethics at Ryerson Speaker Series, Toronto Arts and Letters Club, 13 November 2008) [unpublished].
\item \textsuperscript{400} The Indian Commission of Ontario was mandated to assist the governments of Ontario, Canada and First Nations within Ontario to identify and mediate problem issues of mutual concern such as land claims, policing and education.
\item \textsuperscript{401} This was known as the Indian Claims Commission, established to determine the validity of Aboriginal land claims.
\item \textsuperscript{403} LaForme, supra note 399.
\item \textsuperscript{404} \textit{Ibid}. The same selection committee process was used to produce a list of names for chair and for the co-commissioners. These names were forwarded to Minister Chuck Strahl and Assembly of First Nations Grand Chief Phil Fontaine for final determination.
\end{itemize}
appointment to the TRC. Morley was hired as an adjudicator in the Independent Assessment Process under the Settlement Agreement in 2007.

The Chair of the TRC, Justice Harry LaForme, resigned on October 20, 2008, citing strife between himself and the two co-commissioners arising from at least two sources. First, Justice LaForme stated there was an “incurable problem” that led him to conclude that the TRC “as currently constituted” will fail. This problem was that the two co-commissioners wanted the TRC run by a simple majority, and would not recognize his ultimate authority as chair to chart the TRC’s course and shape its objectives. He said that despite his efforts, the two co-commissioners were insisting on majority rule “thereby ensuring that their restricted vision will be the one consistently sustained.” This was not just a case of competing visions, he said, but entailed a compromise in the TRC’s independence due to the influence on the co-commissioners of certain parties to the Settlement Agreement. This led to the second problem, which was a fundamental difference in how the commissioners viewed the mandate. According to Justice LaForme, he placed more emphasis on the reconciliation aspect of the mandate, whilst the two co-commissioners were more focused on the truth-telling aspect. This fundamental difference in vision for the TRC ended in his resignation.

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405 Dumont-Smith was a former community health nurse, a member of the Aboriginal Circle of the Canadian Panel on Violence Against Women, Co-Commissioner on the National Aboriginal Child Care Commission and a member of the Domestic Violence Death Review Committee for Ontario. Truth and Reconciliation Commission on Indian Residential Schools, “Meet the Commissioners”, online: <http://www.trc-cvr.ca/commissioners.html> Accessed 19 May 2009.

406 Ibid. Morley practiced civil litigation for over 20 years until the mid-1990s when she became a mediator and arbitrator. She has held various posts with public organizations such as the Law Foundation of B.C., the College of Physicians & Surgeons of British Columbia, the Legal Services Society, the BC Mediator Roster Society, and the BC Dispute Resolution Practicum Society. From 1996 to 2001, she was Chair of the Jericho Individual Compensation Panel, a redress program for victims of institutional sexual abuse at the Jericho School for the Deaf and Blind. From 2003 to 2006, she was the Child and Youth Officer for British Columbia.

407 This was less than a week after the Conservatives won a successive minority government. The election was held on 14 October 2008.

408 Canadian Newswire Group, Press Release, “Justice Harry S. LaForme resigns as Chair of the Indian Residential Schools Truth and Reconciliation Commission” (20 October 2008), citing LaForme’s letter to Minister of Indian Affairs and Northern Development Chuck Strahl.

409 Ibid.

410 Ibid. According to Kevin Libin, “Chairman's exit leaves panel in disarray. Native abuses commission rudderless” The National Post (28 October 2008): “associates of Judge LaForme say he had in mind one political agent in particular: the country’s most powerful aboriginal group, the Assembly of First Nations”.

411 Ibid.
Justice LaForme’s resignation was an enormous blow to the TRC.\textsuperscript{412} The parties to the Settlement Agreement began meeting soon after his resignation in order to determine next steps, with retired Justice Frank Iacobucci acting as facilitator of their confidential discussions.\textsuperscript{413} A new selection committee was finally announced on January 30, 2009.\textsuperscript{414} On that day, after calls for their resignation,\textsuperscript{415} the two co-commissioners resigned, clearing the way for a new panel to be struck. Although they stayed on with the Commission until June 1, the commissioners did not conduct any Commission work other than writing a memorandum for their replacements.\textsuperscript{416} The selection committee set out a new structure with clear definitions of the roles for the commissioners to clear up some of the concerns flagged by Justice LaForme in his resignation.\textsuperscript{417}

Although then acting Executive Director Aideen Nabigon issued a statement after Justice LaForme’s resignation claiming that it was “business as usual” at the TRC,\textsuperscript{418} this proved not to be the case. The Commission’s first national event was scheduled to occur in Vancouver in January 2009. However, the event was cancelled given the uncertainty over the leadership at the TRC. As noted by one commentator, it is common for a truth commission to experience difficulties in its start-up period, and despite a rough start, it is possible for the TRC to succeed.\textsuperscript{419}

\begin{footnotes}
\footnotetext[412]{Ibid.}
\footnotetext[415]{Ontario’s Anishinabek Nation, the Congress of Aboriginal Peoples, and the National Residential Schools Survivors’ Society called on the commissioners to resign: Friesen, supra note 398.}
\footnotetext[416]{Christine Spencer, “Panel tab tough to reconcile: Aboriginal abuse commission will cost $3.4M before hearings even begin” \textit{Edmonton Sun} (26 February 2009).}
\footnotetext[418]{Truth and Reconciliation Commission on Indian Residential Schools, “It is ‘business as usual’ at the Truth and Reconciliation Commission (TRC)”, online: <http://www.trc-cvr.ca/indexen.html> Accessed 13 November 2008.}
\footnotetext[419]{Eduardo Gonzales, “Residential Schools: Give truth a chance, Canada” \textit{Globe and Mail} (4 November 2008), online: <http://www.theglobeandmail.com/servlet/story/LAC.20081104.COTRUTH04/TPStory/?query=harry+laforme>. For example, the National Reconciliation Commission in Ghana got off to a bad start due to a parliamentary walkout by the opposition party over the commission’s legislation but ultimately managed to fulfill its mandate in a reasonably successful manner. The South African TRC faced multiple court challenges. A commission in}
\end{footnotes}
After its difficult start, the TRC now has a new slate of commissioners, and their leadership will be critical to the TRC’s ability to fulfill its mandate. The three new commissioners were appointed to the TRC one year after its inauguration. The new Chief Commissioner is Justice Murray Sinclair. When he was appointed Associate Chief Judge of the Provincial Court of Manitoba in March of 1988, he was the first indigenous judge appointed in Manitoba. He was subsequently appointed to the Court of Queen's Bench of Manitoba in January 2001. He is the son of an IRS survivor.\(^{420}\)

Justice Sinclair was appointed (along with Court of Queen's Bench Associate Chief Justice A. C. Hamilton) as Co-Commissioner of the Manitoba Public Inquiry into the Administration of Justice and Aboriginal People. The inquiry was appointed to investigate, report and make recommendations respecting the relationship between the administration of justice and Aboriginal peoples in Manitoba. In particular, the inquiry was created to investigate all aspects of the deaths of Helen Betty Osborne and J.J. Harper.\(^{421}\) The inquiry reported in 1991, providing a thorough discussion of Aboriginal concepts of justice, a history of Aboriginal contact with non-Aboriginal law, and a discussion of treaty rights. The inquiry also reviewed Aboriginal over-representation in the criminal justice system, a discussion of the court system, Aboriginal justice systems, court reform, juries, jails, alternatives to jail, parole and policing. In the course of its hearings, the inquiry heard testimony from many indigenous people about their IRS experience, and wrote about its far-reaching effect in their

\[\text{Nepal was dissolved soon after it was appointed in 1990 when the two co-commissioners resigned in protest over the appointment of a chair who was viewed as a collaborator with the prior regime: Hayner, Un} \text{speakable Truths, supra note 78, at 57.}\]

\(^{420}\) University of Winnipeg, “Justice Murray Sinclair On Campus” (Television broadcast, UWinnipeg.tv, 22 September 2009).

\(^{421}\) Helen Betty Osborne was a young indigenous woman who was brutally murdered in 1971 in The Pas by four non-indigenous men. It took until 1987 for a criminal trial to occur, at which only two of the men were tried, despite the identity of all four having been widely known in the community shortly after the murder. J.J. Harper was executive director of the Island Lake Tribal Council. He died following an encounter with a Winnipeg police officer, who was immediately exonerated by a police department internal investigation. Both incidents had prompted calls for a judicial inquiry into how Manitoba’s justice system was failing indigenous people.
The report suggests that Justice Sinclair had a sense at that time of the need to attract broader attention to indigenous issues:

The report ... went beyond holding organizations accountable and stressed a sense of social responsibility for the treatment of Aboriginal people. ... Although many of the commission’s recommendations were directed at “provincial and federal governments,” they were in another sense directed at everyone in Canada in an attempt to make known the injustices of the past and create support for Aboriginal self-government in the future.423

In addition, this quote suggests that Justice Sinclair and his co-commissioner saw the inquiry as an opportunity to promote social accountability, a feature of the social function of commissions of inquiry discussed in Chapter One, above. This experience should be of significant assistance to Justice Sinclair at the TRC. He was also appointed in 1994 as commissioner for a pediatric heart surgery inquiry, which investigated the deaths of twelve children at Children’s Hospital in Winnipeg.424 Justice Sinclair is a member of the Three Fires Society, and a Third Degree Member of the Midewiwin (Grand Medicine) Society of the Ojibway, which is responsible for passing on traditional knowledge from generation to generation. When it bestowed on him an award in 1994, the National Aboriginal Achievement Awards committee noted he is respected in both indigenous and non-indigenous worlds for his ability to balance a successful career in the Canadian legal and judicial system “while at the same time maintaining a reverence for the traditional teachings of the Ojibway people”.425

Justice Sinclair’s two co-commissioners are Marie Wilson and Wilton Littlechild. Wilson brings a wealth of experience as a journalist and broadcaster, having worked for 25 years for the Canadian Broadcasting Corporation in radio and television as regional and national reporter, television program host, and Regional Director for northern Quebec and the northern Territories. At the time of her appointment she was Vice President of Operations at

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422 Manitoba Aboriginal Justice Inquiry Report, supra note 18 at 512ff.
423 Roach, in Stenning, supra note 38 at 288.
the Workers’ Safety & Compensation Commission of the Northwest Territories and Nunavut. She is married to former Northwest Territories Premier and former leader of the Dene Nation Stephen Kakfwi, who first garnered national attention before the Berger Inquiry in the 1970s when he organized Dene opposition to the proposed pipeline. Kakfwi is a residential school survivor.426

Wilton Littlechild is a regional chief of the Assembly of First Nations from Hobbema reserve in Alberta. A lawyer, he served as the Chairperson for the Commission on First Nations and Métis Peoples and Justice Reform, mandated in 2002 to review the justice system in the province of Saskatchewan.427 Littlechild has experience in elected federal politics, having served as a Progressive Conservative Member of Parliament from 1988 – 1993 for the riding of Wetaskiwin-Rimby. He was a parliamentary delegate to the United Nations, and has served two terms as the North American representative to the UN Permanent Forum on Indigenous Issues. He is an IRS survivor.428

All three commissioners thus exhibit the qualities sought in Schedule N. More than that, their demeanour and actions to date suggest that they possess the intangible qualities that make leadership such an important factor in a truth commission’s progress. Justice Sinclair’s public speeches have displayed an ability to discuss difficult subjects with an engaging combination of respectful solemnity and intelligent humour. His evident knowledge, compassion and deep commitment to the IRS issue complements a charismatic personality that should widen the audience for the TRC’s work. Without leadership of considerable profile, political acumen and media savvy, the TRC cannot hope to readily fulfill its public education mandate. While indigenous Canadians are well aware of the IRS legacy, non-indigenous Canadians will need to be educated by the TRC about the policy enacted by our government and the damage it has

wrought upon individuals and communities. The new panel of commissioners exhibit considerable combined experience with public inquiries, politics (elected, international and Canadian Aboriginal), and the media, all of which should position them well for the enormous task ahead.

**The Truth and Reconciliation Commission’s Process**

The remainder of this chapter considers the TRC’s structure and mandate as it appears in Schedule N, the ways in which the TRC may substantively fulfill its goals as a truth commission, and some of the challenges it faces. The goals discussed here follow from the reasons suggested in Chapter One for why a truth commission might be sought in a country such as Canada. These reasons included the inadequacy of prior legal mechanisms, and a desire to set the country on the path to reconciliation. They also included the impulse to compile a complete historical record, and the wish to educate the public about historical injustices. The latter two reasons are related and will be discussed under a section exploring the ways in which the TRC can fulfill the public education mandate of a truth commission.

As noted in Chapter One, one of the reasons that people seek a truth commission in an established democracy is that the usual legal mechanisms have proven to be inadequate. In response to survivor experiences with the criminal and civil litigation processes, it appears from Schedule N that the Settlement Agreement negotiators sought to establish a body that would not mimic a legal proceeding such as a trial. Schedule N specifies the powers, duties and procedures of the TRC, including receiving statements. The Schedule also sets out what the TRC may not do in pursuit of its mandate; it shall not hold formal hearings, have subpoena powers, or name names, as discussed below. The TRC’s responsibilities with respect to methodology and procedure are enumerated. The factors the TRC must take into account in exercising its duties are set out, including a direction that the commissioners:

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429 This is not to say that indigenous peoples would not have an interest in learning the full truth of what happened to their families under IRS. Rather it refers to the ignorance of many non-indigenous Canadians about the IRS legacy. See Frank Stirk, “Residential schools: truth, reconciliation -- but no apology yet” [CanadianChristianity.com](http://www.canadianchristianity.com) (27 September 2007), online: [http://www.canadianchristianity.com/nationalupdates/070927residential].

430 Settlement Agreement, *supra* note 2, Schedule N, s. 2.

431 *Ibid.*, Schedule N, s. 3.
“shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process”. Although the mandate says that the TRC is not to function as a public inquiry, this is based on a conceptual idea of a truth commission as separate from a public inquiry. However, as I have argued, a truth commission is better understood as a specialized form of public inquiry. Here, the focus should be on the mandate’s expression of a desire not to have a “formal” legal process. With this wording, the negotiators of the Settlement Agreement likely were trying to stress their intention for the TRC not to duplicate criminal or civil court proceedings or the Independent Assessment Process. Nor is the TRC to repeat the perceived difficulties encountered with public inquiries in the past, where adversarial processes overtook the substance of the inquiry. This section of the mandate can be read as eschewing a formal legal process for the TRC, and by formal, it seems to refer to adversarial processes. Schedule N emphasizes that the TRC is to be part of a holistic process of reconciliation and healing, with a focus on survivors that is respectful of indigenous oral and legal traditions.

As discussed in Chapter Two, one of the difficulties with the criminal and civil legal mechanisms is the hardship that they cause to survivors. In criminal proceedings, the victims of IRS abuse might be called as witnesses, but they are not parties to the proceedings and therefore have no agency with respect to the process. They cannot instruct Crown counsel, and they may simply be sidelined in the court. In civil litigation, the victims as plaintiffs have more agency but they are still subject to an adversarial process that must fit the abuses suffered into specific legal boxes. The process can drag on for years, with procedural wrangling over legal minutiae overshadowing the search for accountability and redress. This can leave survivors feeling retraumatized, exhausted and disillusioned.

In response to this negative experience in Canadian courts, the TRC appears to be structured so that the survivors of IRS are central to the TRC’s activities. The guiding principles state at the outset of the mandate that the TRC will focus on being victim-centred, and respect the health and safety of participants. The establishment of a Survivor Committee to provide advice to the commissioners signals the importance of survivor involvement in the TRC’s

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432 Ibid., Schedule N, s. 2(b).
433 Ibid., Schedule N, ss. 4(e), (a) and (d) respectively.
work. The TRC’s mandate requires national and community events, signaling an intention to focus on the community level as well as the broader national community. The mandate stresses that communities themselves will design the community events. In addition, health supports are provided to participants in order to assist them with the difficult process of providing their histories to the TRC. The aspects of the mandate focusing on victims and communities are aimed at assisting the TRC to fulfill this central aspect of a truth commission’s work. These aspects acknowledge that previous legal mechanisms have caused grief and pain to survivors, and attempt to avoid duplication of that occurrence.

Another drawback of criminal prosecution and civil litigation for IRS survivors is the adversarial nature of the proceedings. Court-based legal mechanisms necessarily involve lawyers, and the quality and quantity of legal counsel is central to how these legal processes unfold. Cross-examination by defence counsel, or tactics such as multiple motions to dismiss the survivors’ cases or to seek medical and therapeutic records, all make for a highly combative environment that can take a huge toll on survivors. The TRC was sought as a mechanism that would operate in a non-adversarial manner. In other contexts, truth commissions have been expected to be less ‘lawyer-driven’ than other legal mechanisms. While all truth commissions do involve lawyers in their activities to varying degrees, the idea that negotiators in Canada gleaned from international examples is to emphasize the focus on victims, and reduce the focus on the skill of legal counsel to shape the information gained. This reduced focus on legal personnel arose because sometimes truth commissions are established in environments where the legal system may be in disarray, with few lawyers and judges left in a country (either alive, or who are not part of the prior regime). It may also be because the number of violations is so large that the prosecutorial system is overwhelmed and another mechanism is necessary to seek accountability. A truth commission may also be sought in order to elicit truth-telling in an environment where the adversarial approach of a trial, with its tools such as cross-examination, would be inappropriate.

434 Ibid., Schedule N, s. 7. The IRS Survivor Committee was established on July 15, 2009, as announced by Minister of Indian Affairs Chuck Strahl. The Committee has ten members: seven First Nation, two Inuit and one Métis. Truth and Reconciliation Commission on Indian Residential Schools, News Release (15 July 2009), online: <http://www.trc-cvr.ca/index_e.html>.
435 Ibid., Schedule N, s. 10(b).
436 See Freeman, supra note 56 at 124, discussed in Chapter One, above.
In Canada, where the government and the churches have acknowledged that abuses occurred and that the IRS system was harmful, the evidence that is presented to the TRC will not be for the purposes of convincing the Commissioners that the abuses occurred. The TRC is occurring separately from the reparations process and other elements of the Settlement Agreement. The purpose of having the TRC as a separate body allows for a focus on its distinctive goals: acknowledging and witnessing the IRS experience, promoting awareness of the IRS system and its impacts, and creating a public record of the IRS legacy. These goals suggest a desire for a less adversarial process than the court process. While in some ways the mandate seems to strive for the goal of being a less formal legal process, it is unclear whether the TRC will succeed at being less ‘lawyer-driven’ than other legal processes. This is because there will need to be significant involvement of lawyers to ensure that the Schedule’s provisions are respected. For example, the Commissioners are required to:

… perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and recommendations without making 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 or organization, unless such findings or information about the individual or institution has already been established through legal proceedings.

Thus the TRC, like other public inquiries, cannot make findings of criminal or civil liability. The difficulty that public inquiries have encountered is that, despite not being able to make such findings, they have faced legal challenges by those who wish to protect themselves in other legal processes that might be influenced by negative findings of a commission.

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437 See Settlement Agreement, supra note 2, Schedule N, “Mandate for the TRC”, s. 1.
438 Ibid., Schedule N, s. 2(f).
439 Trebilcock & Austin, supra note 47 at 22.
Schedule N’s broad requirements seeking to avoid findings of misconduct or statements about liability will presumably require legally trained persons to monitor them for compliance. The same applies to a further requirement that the Commissioners:

…shall not 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.\footnote{Settlement Agreement, \textit{supra} note 2, Schedule N, s. 2(h).}

Further, \textit{in camera} sessions must be used to take any statement that contains names where wrongdoing is alleged unless the person being named has been convicted.\footnote{\textit{Ibid.}, Schedule N, s. 2(i).} Given that there have been few successful prosecutions relative to the number of potential perpetrators from over 100 years of the IRS system,\footnote{See discussion of criminal law response to IRS in Chapter Two, above, at text accompanying note 272.} this will mean that virtually all statements that allege wrongdoing against particular perpetrators will need to be conducted \textit{in camera}. The Commission must gain the express consent of an individual to “provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person”.\footnote{Settlement Agreement, \textit{supra} note 2, Schedule N, s. 2(j).} This is a very broad protection that could trigger any number of legal actions. Further, the Commission “shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding”.\footnote{\textit{Ibid.}, Schedule N, s. 2(k).}

For a commission that is intended to be less adversarial in nature, there are significant aspects of the mandate that will require monitoring by lawyers, and may well provoke court applications by parties who feel aggrieved by the proceedings. This is not to say that the involvement of lawyers necessarily undermines a truth commission, since most truth commissions have considerable involvement of lawyers in their operations. However, there is a potential for the non-adversarial goals of the TRC to be negatively impacted by the protections for alleged perpetrators set out in the mandate. The proceedings may be considerably delayed by procedural wrangling over whether a person can tell their story...
without identifying someone, or by having to proceed in camera at a moment’s notice. Such delays were inherent in the IRS litigation, and part of the reason for the search for a different legal mechanism to respond to the IRS legacy. Of course the decision not to name names may also be an attempt to avoid due process concerns (the presumption of innocence unless proven guilty is a fundamental tenet of due process) that can themselves cause delays.\footnote{Not naming names also means that people who may be viewed as perpetrators are denied the opportunity to clear their names, at least before the TRC (they may have the opportunity in the Independent Assessment Process). While it is true that Schedule N does not explicitly provide for immunity from prosecution, it does so implicitly through the parts of s. 2 set out above, text accompanying note 440. The possibility of prosecution arises only through the admission or public disclosure by the individuals themselves. There is no protection against self-incrimination in the TRC mandate.} Another possibility is that the lack of these powers may be indicative of the fact that the TRC results from a carefully negotiated settlement, with lawyers vetting every clause to ensure their clients are protected. After all, the last school closed in 1996, so some of the people responsible for the system or for specific harms must still be alive.

The decision not to allow the naming of names may assist with garnering participation from presumed or alleged perpetrators before the TRC, though this is far from certain: “It has been repeatedly illustrated that truth commissions do not entice those known to be responsible for brutal activities to tell their stories.”\footnote{Elizabeth Stanley, “What Next? The Aftermath of Organised Truth Telling.” (2002) 44:1 Race & Class 1 at 3.} Alleged perpetrators have no incentive to participate in the TRC but perhaps they may be more willing to engage in the process if they know that they will not be subject to any legal proceedings as a result of their participation. A truth commission is intended to promote public accountability and combat impunity for human rights violations, so a refusal to name names where there is clear evidence of culpability may attract criticism. On the other hand, while most truth commissions have the power to name perpetrators, few have done so.\footnote{Hayner, Unspakable Truths, supra note 78, at 107.} And in the Canadian context, the institutional nature of the main “perpetrators” – the government and the churches – alters the dynamic. Many of the people who staffed the schools or directed government IRS policy are dead, thus there will be more participation of present day government and church institutional representatives than of individuals who were directly involved with the IRS. As parties to the Settlement Agreement, there is an expectation that the institutions will participate in the TRC process. Given that...
most of their representatives will not themselves have been perpetrators of specific abuses, it is perhaps not surprising that the TRC has neither subpoena power nor the power to name names, two commonly allocated powers for truth commissions.

Schedule N provides that “Canada and the churches will provide all relevant documents in their possession and control” to the TRC subject to privacy and access to information legislation, as well as solicitor-client privilege. This clause suggests that due to the cooperation of the parties with respect to document production, subpoena powers for the TRC are unnecessary. Truth commissions that have powers of subpoena, search and seizure do not typically use them, but the fact that they have those powers gives their requests for document production some weight. Truth commissions that have not had these powers, such as the Guatemalan Commission, have been described as “extremely weak”. Hayner includes Argentina, Chile and Haiti in the list of truth commissions that had weaker powers of investigation, and suggests that broader powers make a truth commission more effective. However, the decision not to provide such powers to the TRC is presumably in keeping with the decision not to emulate a “formal” legal process. Further, as noted by former Chairperson LaForme, the fact that the courts oversee the Settlement Agreement adds weight to the provisions requiring document production. Presumably if a party considers that an aspect of the Settlement Agreement is not being implemented as envisioned, it can petition the court for review. And of course, as mentioned above, the churches and government have an obligation to “provide all relevant documents”. The negotiators eschewed the powers of search and seizure in favour of a less adversarial process.

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448 Settlement Agreement, supra note 2, Schedule N, s. 11.
450 Hayner, Unspeakable Truths, supra note 78, Appendix 1, Chart 8 “What Works Best?” at 336.
451 Harry LaForme, (Remarks presented at the Assembly of First Nations 29th Annual General Assembly, Quebec City, Quebec, 15 July 2008) [unpublished]: [T]he … commitment [of the parties to the Settlement Agreement] to the truth and reconciliation process has been given legal affect through court judgments. This gives real force to the commitment of the government and churches to provide access to their Indian residential school archives.
452 Settlement Agreement, supra note 2, Schedule N, s. 11, above, text accompanying note 448.
453 Even some commissions of inquiry have been unwilling to use their subpoena powers. Several scholars wrote an open letter to urge RCAP to use its judicial powers to advance its research objectives, noting that its
aspects have been framed as befitting the guiding principles of voluntariness and “do no harm” that informed the negotiations.

As the above discussion suggests, the TRC’s mandate provides a number of opportunities to differ from past legal mechanisms and fulfill the goal of being a less adversarial, more holistic process. However, the TRC must rely upon the cooperation of the parties to assist with realizing its potential to avoid the pitfalls of past legal mechanisms.

Creating a Historical Record, Educating the Public

I noted in Chapter One that a further reason that survivors sought a truth commission in the IRS negotiations was the widespread ignorance amongst non-indigenous Canadians about the IRS system and its profound and continuing effect on indigenous communities. The advantage of a truth commission for combating such ignorance is the ability to create an incontrovertible historical record and enable significant public education. This section considers the challenges and possibilities for the TRC in fulfilling these goals.

Creating a Historical Record

The TRC is tasked with creating a record of the IRS system and its impacts. One of the most important things that truth commissions do is report on what they have heard. A truth commission, by setting out a historical record in its report, makes it very difficult to challenge the occurrence of the human rights violations detailed in the report. Such reports provide official acknowledgement of abuses that thereafter cannot be denied. They also serve as an important tool for public education, creating wide knowledge of the events chronicled therein. Truth commissions study the overall patterns in the information that they collect through testimony and research. Unlike a criminal trial, they are not focused on what happened in individual cases so much as on how individual cases form pictures of systemic

willingness to do so “will certainly be seen as an important test of RCAP’s degree of commitment to pursue unrelentingly the basic truths essential to the fulfillment of its extensive mandate.” The Commission refused to publish the letter in its newsletter. The signatories included Patricia Monture-Okane, John Milloy, Brian Slattery, Marvin Storrow, and Blair Stonechild. See Hall, in Aboriginal Rights Coalition, Blind Spots, supra note 206 at 71-72.
situations. For example, in Argentina, the commission amassed and reviewed the torture complaints of political prisoners to produce a report on the military regime’s practices over a fifteen-year period. The Argentinian report, *Nunca Mas (Never Again)* was an immediate best-seller, became one of the best-selling books in the country’s history, and has been reprinted over twenty times. The Chilean report was released by then President Aylwin, on a televised address to the nation, while the publication of the El Salvadoran report was considered a major political event. Over two thousand people, “with most in the audience in tears from the impact of hearing the truth finally and authoritatively spoken”, attended the public release of the Guatemalan report.

While gaining the truth about IRS for non-indigenous people may be educational, it may be re-traumatizing for survivors. In addition, the truth will be different for each person depending on their experiences. Some survivors and church or government representatives will resist the idea that the IRS system was wholly negative, preferring to focus on the fact that some children did receive an education and that some survivors look back to their teachers with fondness. Still, the truth that the IRS system existed and that it has been largely devastating for indigenous peoples is already known to indigenous peoples, but this truth is not well known to the majority of Canadians:

Consensus that residential school experience was injurious in itself, not just in instances of physical and sexual abuse, is shared by only a small proportion of Canadian citizens, in contrast to the view of most First Nations, Inuit and Métis people.

There are significant gaps between the knowledge and understanding of the IRS system that many non-indigenous people may be expected to have as compared to that of many

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455 *Ibid.*, at 34.
458 I acknowledge that there is no one truth to be found or uncovered, but rather a narrative to be constructed based on the information gathered by the truth-seeking process.
indigenous people. These gaps arise from longstanding beliefs about the history and intentions of government policy, and the legacies of such policies such as cycles of dependency and negative social indicators. In other contexts, truth commissions have attempted to create a more complete historical record of a tragic period in a state’s history by rounding out the state’s version of events with information gained from investigation, records and testimony.

As with other truth commissions, it is not that the TRC is likely to expose facts that were previously unknown; rather, it will “make an indispensable contribution in acknowledging these facts”. In Canada, the factual truth about IRS may be publicly available, but that truth is still resisted in the dominant narrative. This dominant narrative says that the schools were created and run with the best intentions and that in hindsight some of the methods used and some of the individuals involved may have been overly harsh or abusive. At variance with that narrative is a conflicting account that views the schools as one attempt at obliterating the indigenous cultures in what is now Canada. Some view the IRS system as only one component of a larger colonial project that is embodied in many aspects of the Indian Act. However, non-indigenous Canadians will largely be unaware of the systemic

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461 This is not to suggest that all the learning will be on the non-indigenous side; rather, it is just to note that more non-indigenous people will have more to learn than non-indigenous people since the IRS system is generally better known in indigenous communities. For polling information on the latter point, see Environics Research Group, Final Report: 2008 National Benchmark Survey (Prepared for Indian Residential Schools Resolution Canada and the Truth and Reconciliation Commission, 2008) [Environics, Benchmark Survey], at 13ff.

462 The differing perceptions are evident in the stereotypes that are visible in mainstream media coverage of the Settlement Agreement. See for example Jack Branswell & Ken Meaney, “Residential school cash has deadly fallout; Suicides, drug abuse attributed to compensation” Calgary Herald (26 January 2009) A7; Canadian Press, “Racist overtones surround residential school payments: national chief” Guelph Mercury (20 September 2007) A6.


464 Chrisjohn, Young & Maraun, supra note 140 at 4-5. The authors describe the dominant narrative as a “standard account” of the IRS system and the conflicting narrative as an “irregular” account. By “irregular” the authors appear to mean the dissident or minority account.


Almost every dimension of indigenous life has been shaped, and limited by the colonial encounter and by a post-colonial history of dispossession, racism, exclusion, betrayal, and forced assimilation. …the residential school system is a narrow slice of the outstanding issues that bedevil the relationship between aboriginals, the Canadian government, and non-Aboriginal Canadians.
aspect of the IRS legacy.\textsuperscript{466} In the Canadian case, the fact that the government has issued an unequivocal apology may help to refute the myth held by many non-indigenous Canadians that IRS was akin to a bad boarding school, where individual teachers were abusive. The apology acknowledged that IRS was intended to force assimilation of indigenous children – “to kill the Indian in the child”.\textsuperscript{467} The importance of the work the TRC must do, at the outset, to address these differing narratives cannot be underestimated if the reconciliation aspect of the mandate is to have any chance of success.\textsuperscript{468}

There is a way that viewing the IRS system as only one component of a larger colonial project may make the TRC’s mandate more manageable. Perhaps RCAP was unable to garner and sustain interest due to the massive scope and overwhelming weight of its mandate, activities and findings. Canadians may find that a commission addressing the legacy of residential schools provides a manageable way to learn about and understand the larger causes of the policy under which IRS was created. Still, given that the TRC will not be able to identify perpetrators in its report, and further that it will not be permitted to enable survivors to identify anyone by name, the truth it tells about IRS will necessarily be incomplete. The TRC report will therefore need to address the broader truth about the IRS system itself, identifying the structures and institutions that created and perpetuated the toll upon indigenous peoples. The ability to focus on the larger picture can then be a strength of the TRC.

\textsuperscript{466} A poll conducted for Indian Residential Schools Resolution Canada and the TRC in May 2008 found that six in ten Canadians were unable to cite any long-term consequence for survivors of having gone through the IRS system: Environics, \textit{Benchmark Survey}, supra note 461 at 20.
\textsuperscript{468} Erin Daly & Jeremy Sarkin, in \textit{Reconciliation in Divided Societies} (University of Pennsylvania Press, 2007), note at 145 [emphasis in original] that:

[W]here there is no consensus on the morality of the fundamental questions (\textit{Was it a war or a genocide? Was everyone equally guilty of excess or can the victim class be reliably distinguished from the perpetrator class? Was torture widespread or was it exceptional?}), then the truth that is officially revealed is unlikely to bring people together. Instead, it may foster deeper divisions.
Public Education

One of the most important things a truth commission can do is to engage the wider public with its work. The utility of the commission is lessened if it compiles a history that is destined to silently land on a library shelf.\footnote{Kritz, “Where We Are”, supra note 85 at 38.} Truth commissions are tools for educating a society about a chapter of its past in order to raise awareness and decrease the likelihood of human rights violations being repeated. The public education mandate of a truth commission is central to its social function, particularly its ability to foster social accountability for a shared past. In order to fulfill this social function, the process requires public support. Gaining public support requires public awareness of a commission’s work. A commission must create a narrative that may form the basis of national reconciliation, but the commission must first “manage to penetrate the collective consciousness of the people.”\footnote{Daly & Sarkin, supra note 468 at 110.}

How can this be achieved? Hayner and Freeman set out factors that are likely to improve the chances of a truth commission being effective. In particular, they note the importance of public support for the establishment of a truth commission; the presence of a vigorous and engaged civil society (and in particular of strong victims’ groups, human rights groups, religious leaders and intellectuals); widespread social identification with the victims of the abuses; vocal and independent media; and persistent international attention and pressure.\footnote{Priscilla B. Hayner & Mark Freeman, “Truth-Telling’ in International Institution for Democracy and Electoral Assistance”, Reconciliation After Violent Conflict: A Handbook (Stockholm: International IDEA, 2003) [IDEA Handbook] 122 at 128-9.}

The Canadian TRC has not yet attained all of these factors. It is unclear how wide public support was for its establishment since the Canadian public at large was not formally consulted in the IRS negotiations. While Canada has strong civil society organizations, there is not yet any organized coalition (outside the parties to the Settlement Agreement) vocally supporting the TRC’s work. There has been some positive media coverage but the TRC is yet to be ubiquitous in the press, either domestic or international. Two areas that the TRC can focus upon in order to achieve the kind of support that Hayner and Freeman describe are media engagement and civil society support.
Media Engagement

As acknowledged by one of the TRC staff members, although IRS affected many indigenous people, most Canadians are ignorant of this reality, so: “One of the big challenges is to raise awareness. We’re going to have to be a bit of a megaphone.” Unfortunately so far the commissioners have mainly come to the attention of Canadians in the process of stepping down. The new Commissioners must be relentless in gaining media and community attention in order to promote the aims of the TRC. Certainly with a country as large as Canada, the media will be an important tool in engaging people not able to participate in the TRC’s national events because the events are distant from where they live. The new Commissioner, Marie Wilson, should be able to use her considerable journalism experience to good effect in this endeavour.

An unusual aspect of this TRC is that its mandate does not direct that it will hold hearings. Rather, Schedule N refers to receiving “statements”, holding “sessions”, “consultations” and “public events”. As noted above, the mandate states that the TRC: “shall not hold formal hearings”. While this is no doubt in part to protect the privacy of survivors, it also shields the government and churches from scrutiny by the public. It means that the TRC will not hold an activity that is virtually a hallmark of truth commissions elsewhere. This aspect of the TRC’s mandate must be explained to and by the media for the public to understand, since most people associate truth commissions with the South African TRC, which held public hearings, and people may thus reasonably expect a truth commission to hold hearings. Alternatively, this could be an opportunity to interpret the mandate advantageously – the emphasis could be on the word “formal” so that the TRC can still hold hearings in whatever manner may work best for it while avoiding holding “formal hearings”.

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472 Warbanski, supra note 339. Warbanski cites then TRC staff member Seetal Sunga.
473 See text accompanying note 407, above.
474 The Environics poll conducted in April and May 2008 found that most Canadians who had heard about the Settlement Agreement had done so due to mass media: Environics, Benchmark Survey, supra note 461, at 27. Overall, awareness among Canadians of the Settlement Agreement was “fairly low” – only four in ten had heard of the Common Experience Payment, and two in ten or fewer had heard of the other elements of the Settlement Agreement: ibid., at 25.
475 Settlement Agreement, supra note 2, Schedule N, s. 2(b).
Truth commissions in the last decade or more have often had televised hearings. In South Africa, public hearings of the TRC were broadcast for over two years. In Ghana, there was daily television and radio coverage of the National Reconciliation Commission hearings. This sort of consistent, national coverage provides the public with the opportunity to see and hear testimony. The International Center for Transitional Justice, a New York-based non-governmental organization, has offered media training workshops in various countries undertaking truth commission processes. Such workshops are intended to raise the level of media literacy with respect to the truth commission process and the more victim-centred approach of a truth commission as opposed to a court proceeding. People may expect public hearings with scenes of confrontation between victims and perpetrators rather than the less adversarial process negotiated for the TRC here. Media training also can sensitize members of the media to the issues to be heard by the commission, appropriate treatment of victims and the role of the media in public education.

The Greensboro Truth and Reconciliation Commission, a non-governmental project to address a racist incident in Greensboro, North Carolina, held sensitivity training workshops at which guidelines were developed for media outlets planning to cover the Commission’s proceedings. \(^{476}\) The Greensboro Commission also had a half-hour weekly talk show on its proceedings. \(^{477}\) In Ghana, the Civil Society Coalition on National Reconciliation organized media workshops on coverage of the national reconciliation process, including one for media owners and regulators, out of which guidelines were developed for coverage of the process. \(^{478}\) The Canadian TRC could benefit from these other experiences.

Other truth commissions have held institutional hearings to focus on the issues arising in certain sectors of the public service or society at large. For instance, South Africa had hearings on the legal profession and the judiciary, while Ghana had institutional hearings with respect to the security sector, media, prisons, as well as the legal profession and the

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judiciary. The purpose is to reveal the structural and institutional nature of the human rights violations that occurred in order to recommend ways in which to prevent future recurrences, regardless of the individuals who may be in charge of or working for those institutions. It is too early to know whether the TRC will hold any such hearings, yet institutional hearings with respect to government policy in different areas of indigenous people’s lives may be useful and important for preventing recurrences of abuses such as IRS. There is no requirement for a report at the end of the five-year mandate of the TRC, but such a report would be useful in order for the TRC to have the opportunity to assess the material it has reviewed and heard to identify structural or systemic issues. Both institutional hearings and a final report are vehicles with important potential for public education by the TRC.

Civil Society Involvement

The mandate as set out in Schedule N of the Settlement Agreement frames the TRC as part of a process of “rebuilding and renewing … the relationship between Aboriginal and non-Aboriginal Canadians”, requiring “commitment from … the people of Canada”. In order to work toward reconciliation of the Canadian society as a whole, there needs to be active, sustained and significant outreach to civil society beyond the parties to the Settlement Agreement. Such processes of dialogue and consultation help to generate awareness and then cultivate ownership of the national reconciliation process.

The involvement of civil society such as student organizations, unions, faith-based groups, cultural organizations, arts groups, political and human rights organizations is critical to the success of any truth commission, and particularly important for any commission that also purports to be a reconciliation commission. Civil society organizations represent diverse segments of the population and have grassroots networks that can lend useful assistance to a truth commission. Involving civil society is important for gaining citizen participation and

479 See for example Edward John, “From Apology to Action: A Response to the Residential Schools Apology” Vancouver Sun (12 June 2008):

Today we find that over 50% of all children in government care are aboriginal and in the north region of the province the percentage is a staggering 77%. … It is estimated that there are three times the number of children in government care now than there were children in residential schools at the height of their operations.

Edward John is Grand Chief, Tl'azt'en Nation and an elected member of the First Nations Summit.
support in a truth and reconciliation process. In Ghana, the draft National Reconciliation Commission bill was circulated publicly. The Civil Society Coalition on National Reconciliation, consisting of a broad spectrum of religious, community, academic and other public interests, was formed to support the reconciliation project. The Coalition and others held a conference to discuss comparative situations in order to determine what Ghana could learn from international experiences and what would be important to include in the Ghanaian context. As in South Africa, in Ghana wide consultations were also held across the country to gain input on the Commission’s draft legislation before its passage in the Parliament, and certainly before the Commission’s inauguration.

In Canada, a previous example of civil society engagement in a commission of inquiry process is the Coalition for a Public Inquiry into Ipperwash, formed on December 10, 1997, by a broad base of indigenous and non-indigenous partners including cultural, political, religious, labour, human rights, student and First Nations organizations and activists. This Coalition advocated for a public process to seek the truth about the events surrounding the death of Dudley George, killed by police during a 1995 unarmed protest at Ipperwash Provincial Park in Ontario. The Coalition garnered international attention from organizations such as Amnesty International and also from UN bodies.

While the Canadian TRC is a result of a legal settlement that includes parties that represent some components of civil society, they are by no means broadly representative of Canadian society as a whole. Although some of the major Aboriginal organizations are involved in the TRC process, not all Aboriginal organizations are parties to the Settlement Agreement. Large

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480 I was an Official Observer of the Ghana National Reconciliation Commission on behalf of the Civil Society Coalition in 2003.
swaths of the non-indigenous public have no involvement in the TRC so far. When asked about his goal for the TRC, Justice Sinclair stated:

At the end of the day I want the survivors to be able to say that they were heard. I want the public to say that they heard them. And I want the general society, I want Canadian society, to be able to say that now they know what they can do about it. 483

Achieving this goal will be easier if civil society organizations, beyond the parties to the Settlement Agreement, get involved and support the work of the TRC. This could be instigated by outreach from the TRC itself, but given its limited resources, it would be useful if the parties to the Settlement Agreement could take the initiative. Church groups and survivor groups could collaborate and contact other civil society organizations to form a broad-based coalition to support and to increase awareness of the TRC’s work.

The Truth and Reconciliation Commission and National Reconciliation

The final reason discussed in Chapter One as to why a truth commission may be attractive in an established democracy is the possibility of encouraging societal reconciliation. In Canada, indigenous legal institutions and systems have often been ignored and devalued. 484 The TRC must proceed with an acute awareness of this history and adopt the advice of RCAP on the concept of respecting the systems of traditions of the peoples whom it hopes to reconcile. 485

Reconciliation is a concept often discussed under the rubric of restorative justice. 486 Whereas retributive justice emphasizes punishment of perpetrators, restorative justice focuses on

485 See Marlene Brant Castellano, “Renewing the Relationship: A Perspective on the Impact of the Royal Commission on Aboriginal Peoples” in Aboriginal Rights Coalition, Blind Spots supra note 206, 1 [Castellano, “Renewing the Relationship”] at 12.
repairing a harm done: “a key defining element of restorative justice is its privileging of reconciliation over retribution.” 487 Truth commissions, with their focus on victims and communities, are particularly suited to restorative rather than retributive justice approaches to addressing human rights violations. 488 Restorative justice focuses on harms to relationships: “The goal of restorative justice is not a return to the past but rather the creation of a different future founded on relationships of equal concern, respect, and dignity.” 489 Respect is an important ingredient if reconciliation is the goal, as noted by Castellano:

When violations involve segments of the same society who are destined to go on living together, the goal of reconciliation raises the large issue of relationship between peoples and the establishment or re-establishment of dignity and mutual respect. 490

This focus of restorative justice on healing the relationship between peoples finds a reflection in the TRC’s mandate. 491 In the transitional justice context, mechanisms such as apologies, commemoration, reparations, and truth commissions are viewed as means for achieving restorative justice principles. Restorative justice is a multifaceted process and often, as with
South Africa, truth commissions are expected to address all of its elements. Canada’s TRC is not asked to do all the work of redress because the elements of commemoration and reparations are structured as different parts of the Settlement Agreement. This means that the focus of the TRC’s work need not be to determine the compensation that survivors should receive or to duplicate the commemorative work that is already being done by the Aboriginal Healing Foundation. An additional element critical to the reconciliation process that the TRC does not have to address is that of an apology.

An apology from the federal government for IRS was not part of the Settlement Agreement though Chief Justice Brenner of the British Columbia Supreme Court took the unusual step of suggesting in his reasons for decision approving the Settlement Agreement that an apology would be appropriate:

Although I am making no order and I am issuing no directions, I would respectfully request counsel for Canada to ask that the Prime Minister give consideration to issuing a full and unequivocal apology on behalf of the people of Canada in the House of Commons.  

Many who called for an apology noted the fact that IRS survivors were dying at the rate of five a day and would not live to see a post-TRC apology. As noted in the discussion of RCAP in Chapter Two, above, the “Statement of Reconciliation” offered by the government in 1998 was not viewed as an apology by many survivors. A minister, rather than the Prime Minister offered the apology; it was offered at a press conference, not in the House of Commons; and it acknowledged only victims of physical and sexual abuse, rather than the entirety of the harms inflicted by the IRS system. In contrast, incoming Prime Minister of Australia, Kevin Rudd, offered an official apology to the Stolen Generations as the first official order of business in the new Parliament on February 13, 2008. Outgoing Prime Minister John Howard had steadfastly refused to apologize. The symbolism of an official apology is enormous. The person who offers it, where, and when are all imbued with meaning.

492 Quatell, supra note 310, at para. 35.
The role of apologies in truth and reconciliation processes is complex. A government or executive may offer apologies after a truth commission has reported, as in Chile. There, the new regime accepted responsibility for the violations committed by the prior regime. Such apologies indicate the assumption of public accountability for atrocities, or may be part of a process of repairing the moral reputation of a state as well as the victims whose reputations had been attacked by the state under the prior regime.\textsuperscript{494} Apologies may be offered as symbolic reparation to victims of atrocity. Apologies may be withheld in circumstances where a government may fear opening itself to liability for past actions, and may only be offered once most victims of state oppression are long dead, as in Canada with respect to the internment of Ukrainian Canadians during World War I, the imposition of the head tax on Chinese immigrants in the late 19th and early 20th century, or the internment of Japanese Canadians during World War II.

After years of refusal by different administrations, the federal government finally decided to offer a formal apology for the IRS legacy in Parliament. The minority Conservative government of Stephen Harper, elected in January 2006, had resisted making the apology prior to the Settlement Agreement coming into effect. An April 2007 motion by Liberal Member of Parliament Gary Merasty calling upon Parliamentarians to apologize preceded a May 1, 2007, vote in the House of Commons issuing an apology for IRS. Still, in June 2007, at a conference on the TRC at the University of Calgary, then Minister of Indian Affairs Jim Prentice obliquely indicated that the government would apologize only once the TRC concluded its mandate. Quoting Desmond Tutu, he stated that: “You cannot forgive what you do not know.”\textsuperscript{495}

The Settlement Agreement was finalized in September 2007, and the TRC was inaugurated on June 1, 2008. On June 11, 2008, the government gave its long-awaited apology to

\textsuperscript{494} Teitel, \textit{supra} note 59 at 140.
\textsuperscript{495} Jim Prentice, “Truth and Reconciliation as Nation Building” (Lecture presented at the Calgary Conference, \textit{supra} note 88, June 14, 2007) [unpublished].
survivors of the IRS.\textsuperscript{496} In contrast to the 1998 “Statement of Reconciliation”\textsuperscript{497} offered by the Minister of Indian Affairs at a press conference, the Prime Minister gave this apology in the House of Commons. Many were present in the gallery of the House of Commons and many others watched live coverage of the event across the country. The leaders of the other federal parties represented in Parliament also gave an apology. The leaders of five national Aboriginal organizations responded from the floor of the House. The apology received a generally positive response from survivors and the public\textsuperscript{498} and marked a rare moment of awareness in the general Canadian population. A poll taken just after the apology found an unusually high level of awareness: 83 per cent of those surveyed were aware of the apology.\textsuperscript{499} Thus, the singular moment of the government offering an apology to survivors of the schools managed to attract the attention of a majority of Canadians. The value of the apology as a public education tool was considerable, a fact suggesting the media attention provided to the apology was an effective support to the government’s message. The apology was covered live on national television and widely reported in radio, television, online and print media. The apology also provided the TRC with a good start: the government acknowledged the truth of the IRS system’s harms, enabling the TRC to commence its work without having to convince the country that the IRS legacy existed. This allows the TRC to focus upon creating the historical record of the IRS system and educating the public to ensure that such an injustice is not repeated.

As noted above with regard to the other elements of restorative justice, truth commissions are often expected to make recommendations with respect to appropriate reparations for the

\textsuperscript{496} Harper, “Statement of Apology”, supra note 467. The minority Conservative government was evidently spurred on by the leader of the New Democratic Party of Canada, Jack Layton, whose efforts to achieve the apology were acknowledged by Prime Minister Harper in his speech. Also members of Harper’s own caucus convinced him that an apology would help with their party’s initiatives on Aboriginal matters: Bill Curry & Brian Laghi, “Mounting sense of urgency was apology’s catalyst; Pleas by two cabinet ministers, a senator and NDP Leader persuaded Harper that statement should preceed work of commission” \textit{The Globe and Mail} (13 June 2008) A4. See also Jung, supra note 465 at 16: Jung refers to the pressure on caucus to pass Bill C-44, the \textit{Act to Amend the Canadian Human Rights Act} (the amendment would remove the exemption shielding federal and indigenous governments from human rights complaints).

\textsuperscript{497} See discussion above in Chapter Two, text accompanying note 246.


victims such as compensation that may enable the victims to improve their quality of life. These recommendations are adopted to varying degrees by the state. In the Canadian context, the reparations have already been determined in large part through the Common Experience Payment and Independent Assessment Process. The federal government made an apology prior to commencement of the TRC’s substantive work. What if the TRC makes determinations that go far beyond what the reparative mechanisms of the Settlement Agreement encompass? What can be the response to the TRC’s findings if the apology and reparations have already been meted out? These are challenges that may arise given the ambitious structure of the Settlement Agreement. It is too early to tell whether these matters will arise, but they are possibilities that the TRC can contemplate in determining its process.

The fact that the IRS negotiators decided to have a TRC in addition to and separate from these other aspects of the settlement suggests that there is something to be gained from having the TRC process itself. That is, something is expected from the TRC that is different from the usual truth commission results of making recommendations for commemoration, apology and reparation. There is something about the process itself that is valued here; something unique to the Canadian context. It remains to be seen if separating the truth-seeking process from the reparations process is an appropriate way of proceeding. Again, this is one of the reasons why it will be so important for the TRC to actively educate the public as to its operations and goals.

How well a truth commission educates the public about its work will determine its ability to garner public support. A high level of public support can bolster a commission’s credibility and thus its reputation, which can in turn smooth the way for the commission to access information and address the needs of victims. Also important for maintaining its own credibility is a truth commission’s management of public expectations about its work. This is another task that does not appear in any written mandate for a truth and reconciliation commission. The TRC will need to be extremely conscious of the expectations that it may
arouse in survivors of IRS. These expectations will be of an order entirely different and more complex than those of the non-indigenous public. Truth commissions have often raised expectations of victims that there will be some resolution to their situation because the very existence of a commission suggests that its presence will make a difference. Expectations may be even higher when the commission seeks not just truth but also reconciliation as a central goal.

Another challenge for the TRC relates to the likelihood that most of the testimony it receives will come from survivors. This may create the appearance that the TRC will rely upon the survivors to do the work to be reconciled or perhaps reintegrated (or conciled/integrated) into Canadian society. The TRC must be careful not to reinforce the idea rejected by RCAP: that the government avoided responsibility by expecting IRS survivors to do the work to heal themselves. The means of reconciliation include truth telling, acknowledgement of past wrongs, reparations for the victims, addressing the structural causes of the wrongs, and a rebalancing between societal groups to prevent the harms recurring. The TRC must find a way to include the non-indigenous public such that they acknowledge the IRS system is everyone’s problem to address. Restorative justice provides a framework for reconciliation, but achieving reconciliation at a societal level rather than a community level is a significant challenge. How can the truth commission mechanism assist in achieving the goal of reconciliation?

One way for the TRC to assist with reconciliation in the Canadian context would be to reframe the discussion with respect to who needs to do the reconciling. Although a “hazy” concept, reconciliation in the transitional justice realm refers to repairing “torn

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Perhaps one overall lesson to be learnt from the [South African] TRC from a victim perspective is the importance of being realistic and clear from the beginning about possible achievements for victims, and ensuring that victims are made aware of the limitations of what a truth commission can accomplish.

501 See discussion of RCAP, Chapter Two, above, note 225 and accompanying text.


503 Hayner, Unspeakable Truths, supra note 78 at 6.
relationships between ethnic, religious, regional, or political groups, between neighbours, and between political communities. In short, societal healing”. The ‘societal healing’ form of reconciliation found in transitional justice literature is quite different than the form that has entered Canadian legal discourse as articulated by the Supreme Court of Canada. The Court developed a concept of reconciliation as a legal process of balancing the fact that indigenous peoples lived in the territory now called Canada prior to settlers arriving with de facto Crown sovereignty. This approach to reconciliation is referred to by Walters as “a one-sided or mechanical way or as just another way of balancing competing interests.” However, this concept of reconciliation becomes woven into further judgments of the Court in the ensuing years. Despite one scholar’s view that the Court’s conception of reconciliation as enunciated in Delgamuukw should be imported into the transitional justice framework, there is much in these decisions that warrants caution. The later “duty to consult” cases such as

504 Ibid. at 133.
505 R. v. Van der Peet, [1996] 2 S.C.R. 507. This was one case in a trilogy of cases related to Aboriginal commercial rights. The other two cases were R. v. NTC Smokehouse Ltd., [1996] 2 S.C.R. 672 and R. v. Gladstone, [1996] 2 S.C.R. 723. In Van der Peet, at para. 31, Lamer C.J. also discussed the purpose of s. 35 (the section of the 1982 Constitution recognizing “existing Aboriginal and treaty rights”):

[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

Delgamuukw was before the courts for 13 years and was finally decided by the Supreme Court of Canada in 1997: Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010. The case was brought by 38 Gitksan Houses and twelve Wet’suwet’en Houses seeking ownership and self-governance of 58,000 square kilometres of land in British Columbia. The Court’s judgment addressed Aboriginal title but did not allocate ownership. Instead, it called for a new trial. Lamer C.J. wrote at para. 186:

By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and settle their dispute through the courts …. Ultimately it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.


507 Walters notes that the Court’s introduction of “reconciliation” into its Aboriginal rights decisions coincided with the release of the Royal Commission on Aboriginal Peoples Report in 1996: “the Royal Commission reintroduced reconciliation into Canadian political discourse”. Ibid. at 176.

508 Jung, supra note 465, at 23, states that: “the Supreme Court has interpreted reconciliation as an obligation to reconcile Canadian and aboriginal legal systems.” This is perhaps too generous a view of the Court’s decision. Rather, the Court saw reconciliation as a process of recognizing that indigenous societies pre-existed Crown sovereignty, but that they are now part of a broader society, and therefore their rights are subject to limits that make them consistent with the goals of that larger Canadian society. See Delgamuukw, supra note 505, per Lamer CJ, at para. 165. For a thoughtful analysis of the Court’s conception of s. 35 rights and the limits of its
*Haida Nation* and *Taku River* provide a more positive approach to reconciliation insofar as they seem to suggest that it is not simply that indigenous peoples must reconcile themselves to the assertion of Crown sovereignty, but rather that Crown sovereignty may not be legitimate unless the indigenous and non-indigenous peoples in question have made a treaty. If the concept of reconciliation found in the Supreme Court’s jurisprudence is to inform the TRC process in any way, it is the approach found in these later cases, emphasizing elements of respect, mutuality and reciprocity, which would be a more fruitful basis for discussions of reconciliation. The reconciliation process must be framed by the TRC as a mutual process to be engaged in by indigenous and non-indigenous peoples alike; it should not be a one-sided process.

While the Settlement Agreement negotiators emphatically sought to distinguish the TRC from the South African version, it is important to glean from the comparative experience some realistic guidance about what this TRC can achieve. Not all truth commissions have framed their goal as reconciliation of the country, but “[t]hose that have – including South Africa’s TRC and the National Commission on Truth and Reconciliation in Chile – have

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509 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74. In these cases, the Supreme Court developed the concept of the honour of the Crown and deepened the government’s duty to consult with First Nations about land use in their traditional territories. In *Haida Nation*, the Crown argued that there is no legal duty to consult or accommodate a First Nation with respect to land use until the scope and content of their Aboriginal title is finally determined. This argument was rejected by the Court. The judgment of a unanimous Court was delivered by McLachlin C.J., who stated at para. 32:

> [T]he duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.


511 Walters suggests that this form of “reconciliation through negotiation” is “about establishing the legal and moral authority of the Canadian state”: Walters, “The Jurisprudence of Reconciliation”, *supra* note 506 at 186. Jung, *supra* note 465 at 23, states that: “one implication of reconciliation is negotiation among equals, which has been interpreted as a duty to consult that imposes on the Canadian government an obligation of good faith.” She suggests that this aspect of the Canadian courts’ form of reconciliation may be useful in the transitional justice context.
found it to be a very difficult mission.”

Reconciliation may or may not occur on an individual or national level; calling the exercise “truth and reconciliation” sets up both concepts as a goal, but no one can declare a person or nation to be reconciled. In addition, it is possible that truth (a slippery concept at the best of times) and reconciliation will be viewed completely differently depending upon who is asked. Some may see that these objectives have been achieved while others will dispute that perception. The latter may be concerned that those in power have appeared to support reconciliation for their own political purposes:

In a political context, those who want nothing done may cynically plan reconciliation merely as a smokescreen. Victims, on the other hand, may perceive and condemn it as a code word for simply forgetting. For those who have to live with their own pain and trauma, the term is indeed extremely sensitive. As a victim of apartheid told the South African Truth and Reconciliation Commission (TRC), “Reconciliation is only in the vocabulary of those who can afford it. It is non-existent to a person whose self-respect has been stripped away and poverty is a festering wound that consumes his soul”.

This sentiment could be expressed by an IRS survivor given the chronic poverty and other negative socio-economic indicators for many indigenous peoples. Further, the term “reconciliation” implies that the parties were once whole, experienced a rift, and now must be made whole again. But in colonial settings, this is not the case. The relationship between indigenous and settler peoples in Canada was one of nations encountering nations, where one gradually oppressed and marginalized the other. Indigenous peoples never agreed to the denial of their sovereignty, cultures or identities. Thus, in the Canadian context, reconciliation must refer to “transformative” as opposed to “restorative” reconciliation.

One commentator notes that reconciliation on a national level must be at least in part a

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513 IDEA Handbook, supra note 471 at 22, para. 2.1.3.

514 Indeed, as noted by McLachlin C.J.C. in Haida Nation, supra note 509 at para. 25: “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”

515 Kymlicka & Bashir, supra note 506, “Introduction” at 19, describe these two modes of reconciliation: “The restorative dimension seeks to restore and heal a pre-existing ‘we’, by closing up a temporary breach, while the transformative dimension seeks to create a new ‘we’, which requires opening up new possibilities that did not exist before.”
political process that includes acknowledgement of political and legal rights of indigenous peoples.\textsuperscript{516} This highlights the difficulty with public expectations that can be created when a body called a “truth and reconciliation” commission is created. The TRC cannot reasonably be expected to reconcile on its own the entire relationship between indigenous and non-indigenous peoples in Canada. On the face of it, the TRC’s mandate is limited to the IRS system: to create a historical record of the IRS system and to educate the public about the IRS legacy.

The Australian context is instructive given the parallels between that country’s treatment of its indigenous peoples and Canada’s circumstances. The Howard government largely rejected the report on the Stolen Generations, though the Rudd government changed course and offered an apology. Daly and Sarkin assert that the truths revealed in Australia with respect to the Stolen Generations have “resulted in greater understanding among white Australians of the past experiences of Aboriginals and of their present claims for cultural identity (and social support).”\textsuperscript{517} Like Canada, Australia has social factors that might favour reconciliation: the indigenous population is small, the public is generally liberal, many of the perpetrators are dead, and most people think that racial oppression is unacceptable.\textsuperscript{518} But these same factors can work against reconciliation, because continued power imbalances will make it difficult for a reconciliation process to truly take root.\textsuperscript{519} When he was Lieutenant Governor of Ontario, James Bartleman, a member of the Chippewas of Mnjikaning First Nation, warned that unless Canadian society as a whole signals that it is serious about according equal economic and social rights to indigenous Canadians, the TRC’s Commissioners will find that “they have been shod with shoes of clay. There can be no true reconciliation and Canada cannot claim it is a just and equal society unless economic and social equality is accorded to Aboriginal people.”\textsuperscript{520}

\textsuperscript{516} Cunneen, \textit{supra} note 502 at 90.
\textsuperscript{517} Daly & Sarkin, \textit{supra} note 468 at 146.
\textsuperscript{518} \textit{Ibid.} at 146.
\textsuperscript{519} \textit{Ibid.} at 146.
\textsuperscript{520} James Bartleman, “The Importance of Truth Telling in a Just Society” (Lecture delivered June 15, 2007, at the Calgary Conference, \textit{supra} note 88) [unpublished].
How can the TRC contribute to a broader sense of reconciliation in a society that is only prepared to address these power imbalances in an incremental way? As Llewellyn observes, the TRC’s mandate does not provide much detail with respect to the reconciliation aspect of its work. Castellano recalls the observation in RCAP’s report that in the search for reconciliation between peoples, the leadership of public institutions in adopting a more respectful stance is extremely important. The fact that the mandate does not provide much detail does offer an opportunity for the TRC to broadly interpret its possibilities. While the TRC must exercise caution with respect to what it can reasonably accomplish in the five years it has been granted, perhaps the IRS system can be a springboard for the exploration of broader issues in indigenous/non-indigenous relations in Canada. After all, there is a distinction to be made in the TRC’s mandate – the TRC is expected to address the IRS system, but it is also expected to address the IRS legacy. The IRS system is something that can be quantified with respect to how many schools, where they were in operation, for how long, and under what government directives. The IRS legacy is a much more amorphous question. The TRC can complete an effective historical study of the IRS system while exploring broader political questions in its discussion of the IRS legacy. This may include situating the IRS legacy within colonialism, making connections between IRS and socioeconomic conditions for indigenous communities, consideration of the levels of violence, criminalization, marginalization and discrimination experienced by indigenous people, or a myriad of other possible avenues of investigation. Again, in addition to the importance of leadership, the process employed in the interpretation of the mandate will be critical to the TRC’s success.

521 Indeed, indigenous people that do not support the IRS settlement and TRC process view the concept of “reconciliation” as a way for the Canadian government to appear to address an issue without actually addressing it. See Chrisjohn & Wasacase, supra note 21 and see Alfred, supra note 21. The TRC must be prepared to encounter this cynicism since it is based on a long history of mistrust between indigenous peoples and the government.

522 Llewellyn, “Bridging the Gap”, supra note 489, at 186.

523 Castellano, “Renewing the Relationship”, supra note 485, at 12.

524 See discussion at text accompanying note 955, below, with respect to interpretation of the mandate.
Conclusion

In this chapter, I have outlined the IRS Settlement Agreement and the negotiations that produced it. I assessed the mandate and structure of the TRC and how it might substantively fulfill its goals and functions, keeping in mind some of the reasons that a truth commission may be sought in an established democracy: the inadequacy of other legal mechanisms, a desire to create a historical record and in the process to educate the public and foster national reconciliation. Gonzales lists advantages Canada has compared to other states in holding a truth commission, including the government’s apology, the presence of “sophisticated advocacy institutions” that have assisted survivors, and the Settlement Agreement on reparations and truth-telling. He also claims that Canada’s efforts with respect to the IRS legacy have garnered “enormous international attention and support”.

Gonzales states that unlike most societies seeking to inaugurate a truth commission, Canada is not emerging from a period of prolonged or significant violence that has left legal and governance institutions in disarray. Nonetheless, even if Canada does have certain advantages compared to other countries establishing truth commissions, it has some challenges ahead:

Reconciliation in the context of Indian residential schools presents some unique challenges. … Multiple violations of the human dignity of Aboriginal peoples over generations and their relative powerlessness in the face of public institutions have created distrust that public dialogue can bring about change. Past experience in peacemaking and restorative justice provides tools for bringing parties together to engage in dialogue, but the chemistry that transforms encounter into mutual, hopeful engagement remains mysterious.

The survivors sought a new legal mechanism than those that have been tried so far in Canada to address the legacy of IRS. In its mandate, the TRC is designed to fulfill the goals of the parties. However, as with any public inquiry, much will depend on how the commissioners interpret and implement that mandate. The TRC differs from the typical public inquiry model

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525 Gonzales, supra note 419. Gonzales is a senior associate with the International Center for Transitional Justice, and has consulted for the TRC.
526 Jung, supra note 465 subtitles her 2009 article “Transitional justice for Indigenous people in a non-transitional society”. This assessment may not accord with perspectives of indigenous communities whose legal and governance institutions have been severely damaged by colonization and who may consider that a transition is underway.
in several ways. It has multiple commissioners, one of whom is not legally trained. The structure includes an advisory committee composed of survivors. It lacks the powers of search, seizure and subpoena. In addition to compiling a factual record, its mandate focuses on reconciliation and healing. In this, it is able to build upon the apology, as well as the reparations and commemoration aspects of the Settlement Agreement. The TRC explicitly foregrounds its social function as an institution designed to explore the truth of the IRS system and educate the public on its legacy.

How the TRC proceeds to interpret and implement its mandate will be critical to its success. I have argued that there is room in the mandate for the commissioners to make connections to the broader picture of indigenous/non-indigenous relations beyond the IRS system itself. I argue at the close of the next chapter that the TRC can benefit from the strategies of the Berger Inquiry. Berger took a broad approach to his mandate, and he proceeded with the kind of historical knowledge and respect for indigenous cultures that is required of the TRC. He also recognized that political agreements would be needed in order to truly address the issues between the parties.

The next chapter reviews the Berger Inquiry with a view to identifying strategies that may assist the TRC in fulfilling its mandate and some of the specific challenges that mandate poses, as noted here. The discussion includes the way in which leadership that exhibits qualities of humility, openness and respect can positively shape a commission; and the importance of a sustained media strategy for gaining public interest in the commission’s work and educating the public about the issues before it. Berger paid attention to the importance of process in structuring the operations of his Inquiry so that people who were directly involved in the pipeline question and members of the larger public all took an interest in its development. An in-depth consideration of the Berger Inquiry may take some of the mystery out of the chemistry needed for the TRC to work.
4. The Berger Inquiry

The Truth and Reconciliation Commission (TRC) on the Indian Residential Schools (IRS), by its very genesis in an agreement between representatives of indigenous peoples and government, might be anticipated to have a significant impact on relations between indigenous and non-indigenous peoples in Canada. The Mackenzie Valley Pipeline Inquiry (the Berger Inquiry) had an unanticipated impact on those relations. The two commissions are very different in purpose, topic, and time, but they are related. The Berger Inquiry is an example of a public inquiry that laid the groundwork for the TRC. Survivors sought a truth commission rather than a public inquiry to address the IRS legacy, thus prompting a review of international examples of truth commissions to glean information on how to proceed. However, it is important not to ignore an example from our own history that in many ways prepared the way for the dialogue that has occurred between indigenous and non-indigenous Canada over the last thirty years. In his interpretation of his mandate, his methods, his focus on communities and his demeanour, Berger turned the public inquiry into something meaningful and educational not just for the people that appeared before him but also for the Canadian public. The concerns that give rise to a truth commission in an established democracy – inadequacy of prior legal mechanisms, the absence of a historical record, ignorance of the general public about an injustice, and the need for societal dialogue to promote social accountability – are met by the Berger Inquiry. Examining the methods and structures of these two commissions facilitates a consideration of Canada’s potential for using legal mechanisms to address its deeply troubled relationship with indigenous peoples.

In this chapter, I argue that the Berger Inquiry mattered – for the history of Canadian public inquiries, to the people who appeared before it, to the people who worked on it, and to the course of Aboriginal rights in Canada. The indigenous and non-indigenous inhabitants of this country have a long history of negotiating agreements, but this history is marred by the failure of the Canadian government to live up to its side of the bargains. Numerous promises

528 As I discussed in Chapter Three, the truth commission is a specialized form of public inquiry, but this conceptual framework would not have been forefront in the minds of the Settlement Agreement negotiators. They sought a non-adversarial mechanism that would avoid the pitfalls of prior legal mechanisms in addressing the IRS legacy.
have been made to indigenous peoples and then broken by the Crown. When the government struck the Berger Inquiry, it expected a short perfunctory inquiry that would quiet the concerns of indigenous opponents and allow government and industry to get on with the pipeline. Berger interrupted that pattern by enabling indigenous peoples to be heard, and then by insisting that honourable agreements needed to be made with them.

In order to understand why the Berger Inquiry is so important for the TRC’s work and for the improvement of how Canada conducts public inquiries in the future, I provide an overview of the historical context out of which the Berger Inquiry arose. I also provide a detailed look at Berger himself, as well as the people who influenced him and those that he influenced. I review the important innovations that Berger introduced to the public inquiry model in Canada, and note the criticism his Inquiry attracted. The impact of the Berger Inquiry on later commissions of inquiry, both domestically and internationally, is charted. While my primary purpose in this chapter is to discern the strategies available to us from the Berger Inquiry for addressing historical injustice in Canada, I also set out here a legal historical picture of the Berger Inquiry due to its profound impact on the landscape of commissions of inquiry in Canada and elsewhere.

**Background to the Berger Inquiry: Historical Context**

The Berger Inquiry was shaped by the context out of which it was created. In addition to the groundswell of indigenous activism surrounding the rejection of the 1969 White Paper, the

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529 See Castellano, “Renewing the Relationship”, supra note 485 at 18: “The history of the relationship between Aboriginal and non-Aboriginal peoples is littered with failed promises.” See also, for example, Report of the Ipperwash Inquiry, supra note 20, vol. 1 “Conclusion”, at 685: “Unfortunately, the issues that were at the heart of the Ipperwash occupation remain unresolved by the federal government, to this day. This inexcusable delay and long neglect, by successive federal governments, are at the heart of the Ipperwash story.” Maurice Switzer refers to “decades of broken treaties and dozens of unresolved land claims” in “How the news of the aboriginal report is relayed”, supra note 237. For more on broken treaties, see D. J. Hall, “‘A Serene Atmosphere’? Treaty 1 Revisited.” (1984) 4:2 Can. J. Native Studies 321, who notes that there were numerous complaints lodged by non-indigenous priests who witnessed the treaty negotiations to the Crown charging them with outright misrepresentation. See also the classic work of René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1975) at 94.

530 See discussion above, note 228.
1960s and early 1970s were “a time of tremendous intellectual ferment in Canada”. Canadian literature became increasingly known and studied while universities expanded and graduated people who challenged previous ideas. It was a time of intellectual debate and dissent into which the environmental movement and the indigenous rights movement flowed.

Environmental awareness and activism arose after the publication of *A Silent Spring* by Rachel Carson in 1962. The political activism of the 1960s saw the beginning of Indigenous rights organizations. Independence movements were sweeping colonies in Africa, and anti-colonial sentiment was burgeoning. Legal cases being argued at that time were also seeking to establish a bedrock of Aboriginal rights. *Calder* acknowledged for the first time the possibility that Aboriginal title had not been extinguished. The White Paper had focused the nation’s attention on “Indian” issues. Pierre Trudeau had introduced the country to a leadership style that departed from the staid formalism of prior prime ministers. Quebec nationalism was at a peak with the October Crisis in 1970 and the Quiet Revolution. The Quebecois desire for nationhood intensified at a time when indigenous leaders had similar sentiments for their own nations.

**Energy**

In 1969, a large reserve of oil and gas was identified at Prudhoe Bay in Alaska. This reserve was part of a series of finds that made the Western Arctic the focus of significant oil industry attention. The question was how to get the oil and gas to the southern market. Federal

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534 Weaver, *supra* note 150 at 171. Despite the fact that *Calder* was beginning to wend its way through the courts at the time, the Paper gave only cursory attention to the issue of land rights: “Aboriginal claims to land … are so general and undefined that it is not realistic to think of them as specific claims capable of remedy”: White Paper, *supra* note 228, cited in Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1981) [Berger, *Fragile Freedoms*], at 243. Indeed, Prime Minister Trudeau famously commented upon Aboriginal rights in Vancouver on August 8, 1969: “Our answer is no. We can’t recognize Aboriginal rights because no society can be built on historical ‘might have beens’”. Quoted in Berger, *Fragile Freedoms*, at 243. Note that Berger had a transcript of Trudeau’s speech: see Transcript of the Prime Minister’s Remarks at the Vancouver Liberal Association Dinner (Seafort Armories, Vancouver BC, 8 August 1969), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, Box 19 - 3 miscellaneous basic documents 1969-1977 [Folder one of two]).
governments of both Canada and the United States welcomed resource industry proposals. These discoveries were occurring in the context of the “energy crisis” in which North America’s increasingly oil-dependent lifestyle was threatened. Industry and government contributed to public concern that a natural gas shortage was imminent; a gas industry consortium “warned Canadians that they could ‘freeze to death in the dark’ if the pipeline were not built.” Energy prices around the world increased in the early 1970s, so having a domestic source of oil was considered very important to combat the perceived crisis.

**Sovereignty**

Also during the period 1968-1970, there was the “sovereignty crisis” in Canada in response to the American decision to navigate the Northwest Passage with its supertanker the Manhattan in order to determine the feasibility of transporting oil by tanker from the North Slope to southern ports. Canada viewed the Northwest Passage as part of its internal waters while the U.S. treated it as international waters. The diplomatic tension created by the exercise affected Canadian-American trade relations and certainly affected Canadian resource policy in the North.

**Aboriginal Organizations**

Northern indigenous communities had not to that point figured prominently in Canadian political life. Indeed, the indigenous activist movement in Canada was at that time in its nascent stages, in no small part due to the legal restrictions on their participation in Canadian political life. Until 1960, enfranchisement regulations had required status Indians to abandon their legal status in exchange for the right to vote. Not surprisingly, this was a significant deterrent to political participation. It was only in 1965 that indigenous women acquired the

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537 Weaver, *supra* note 150, at 45.
vote and up until 1951, the *Indian Act* had forbidden indigenous communities to retain legal counsel for asserting their legal interests.\(^{538}\)

However, national Aboriginal organizations were beginning to form and to make their voices heard. The protest provoked by the White Paper included indignation at the exclusion of indigenous peoples from its preparation after apparently meaningless consultations. The government responded by providing significant funding to national and provincial Aboriginal associations that it had previously attempted to suppress.\(^{539}\) Thus between 1969 and 1973, northern indigenous peoples began to organize in order to ensure their collective voices were heard in Ottawa. These organizations included the Committee for Original Peoples’ Entitlement (COPE), the Indian Brotherhood of the Northwest Territories (later the Dene Nation), the Métis Association of the NWT (later the Métis Nation of the NWT), and the Inuit Tapirisat of Canada.\(^{540}\) This was part of an international trend marked by the first Arctic Peoples’ Conference at Copenhagen in 1973. George Manuel, the president of Canada’s National Indian Brotherhood, worked to establish a worldwide organization of Indigenous peoples, and in 1975 the World Council of Indigenous Peoples had its founding meeting on Vancouver Island in British Columbia.\(^{541}\)

\(^{538}\) Further, prior to 1951, the *Indian Act* required Aboriginal peoples to relinquish their Indian status if they were to pursue higher education, thus preventing many Aboriginal peoples from entering university and considering legal education. Charles C. Smith, “Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education” (Paper presented at Race Policy Dialogue Conference, Ontario Human Rights Commission, December 2004), online: <http://www.ohrc.on.ca/en/issues/racism/racepolicydialogue/ccs>. The first Aboriginal lawyer born in the Northwest Territories, Nick Sibbeston, was called to the bar in 1976. He went on to become Premier and later Senator Sibbeston. The first Aboriginal woman lawyer born in the Northwest Territories, Carol Roberts, was called to the bar in 1986. Charles Hunter is the first Inuvialuit lawyer in the Northwest Territories and he was called to the bar on January 19th, 1999: John U. Bayly for Premier Stephen Kakfwi, “Visions for the Future” (Closing Address, Indigenous Bar Association 13th Annual Conference, 23 October 2001), online: <http://www.daair.gov.nt.ca/resources/speechItem.asp?id=40>. Judge Alfred Scow was the first Aboriginal person to graduate from law school in British Columbia (1961), the first Aboriginal lawyer called to the Bar in BC and the first Aboriginal legally-trained judge appointed to the Provincial Court in BC (1971): National Aboriginal Achievement Awards, “Judge Alfred Scow” (1995), online: <http://www.naaf.ca/program/92>.

\(^{539}\) Alain M. Cunningham, *Canadian Indian Policy and Development Planning Theory* (New York: Garland, 1999) at 83.

\(^{540}\) *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities* vol. 4 (Ottawa: Supply and Services Canada, 1996) [RCAP Report, vol. 4], c. 6 “The North”, s. 6.4.3.

\(^{541}\) Russell, *supra* note 210 at 182; and see also 184: “The first UN activity dealing directly with Indigenous peoples was a study on the ‘Problem of Discrimination against Indigenous Populations,’ launched in 1971 by the UN’s Sub-commission on Prevention of Discrimination and Protection of Minorities.”
Meanwhile, in December 1968, the federal government had formed the Task Force on Northern Development that adopted a pro-development stance without any means for indigenous people to provide input with respect to its policy decisions. During the same period that the federal government was issuing its Guidelines for Northern Pipeline Development, it also issued Canada’s North 1970-1980: Statement of the Government of Canada on Northern Development in the ‘70s. The latter stated the government’s objective was to “provide a higher standard of living, quality of life and equality of opportunity for northern residents by methods which are compatible with their own preferences and aspirations.” However, there was a disconnect between the stated objective of consultation with indigenous people and the actions of the government, given that “there was simply no scope for meaningful dialogue.” The development framework for resource and pipeline decisions was determined “in confidence between private executives and senior officials in Ottawa…. In few areas of public policy in Canada was the discrepancy between the official line and the actual events as remarkable.” The 1970 Northern Pipeline Guidelines cleared the way for government cooperation in the pipeline project, and the Expanded Guidelines for Northern Pipelines tabled in the House of Commons on June 28, 1972 were issued to address concerns about native people and the environment, to avoid environmental protection legislation such as that passed in the U.S. (the National Environmental Policy Act, 1970), and to elaborate upon the national interest with respect to sovereignty, energy, and land and water use. The Guidelines were essentially a pre-emptive action by the Task Force in hopes of smoothing the way for a pipeline application to reach the National Energy Board. For, “[d]espite Trudeau’s and Chrétien’s retractions of the White Paper, the government’s denial of Aboriginal rights as a basis for claims settlement remained unchanged.”

542 Dosman, supra note 536, at 25.
544 Dosman, supra note 536, 114-115.
545 Ibid.
546 Ibid., at 120.
547 Ibid., at 126-127.
548 Weaver, supra note 150 at 187.
Public Interest Groups and Politics

During the same period since the Task Force was formed, a number of public interest groups also formed. For example, the Canadian Arctic Resources Committee assembled experts in such areas as economics, law, engineering, native rights, environment, and demography to assess existing knowledge and priorities at a May 1972 meeting at Carleton University in Ottawa. Before 1973, the pipeline was expected to proceed based on industry and government support of the project, but opposition by environmental and indigenous groups gained momentum. Then came the October 1972 election in which Trudeau lost his majority. He led a minority government from 1972 until 1974, during which time the New Democratic Party (NDP) held the balance of power.\textsuperscript{549} The NDP’s party platform going into the election had included a plan to cancel the Mackenzie Valley Pipeline.\textsuperscript{550} The party won a seat representing the NWT in the election.\textsuperscript{551} The election coincided with a U.S. energy shortage in the fall of 1972, and this energy crisis caused Canada to think about whether it had enough of its own energy supplies, causing public interest in northern development to increase.\textsuperscript{552} While opposition to the pipeline before 1972 had centred on social and environmental questions, “the first serious questions about the financial and economic wisdom of the project surfaced within Government circles rather than from outside pressure groups”.\textsuperscript{553} In the circumstances, the Task Force needed a way to restore confidence in the government’s northern policy, and hearings under the \textit{Territorial Lands Act}\textsuperscript{554} were proposed.\textsuperscript{555}

\textsuperscript{549} At dissolution, the Liberals held 103 seats to the Progressive Conservatives’ 98. The NDP had 29 seats, Social Credit 15 and there was 1 independent: Parliament of Canada, 29th Parliament, online: <http://www2.parl.gc.ca/Parlinfo/Files/Parliament.aspx?Item=acc81fb9-ef30-4972-b442-36ae73edc693&Language=E&Section=MembersOfHouseOfCommons>.
\textsuperscript{551} Dosman, \textit{supra} note 536, at 183.
\textsuperscript{552} \textit{Ibid.}, at 184.
\textsuperscript{553} \textit{Ibid.}, at 177.
\textsuperscript{554} \textit{An Act respecting Crown lands in the Yukon Territory and the Northwest Territories} R.S.C. 1970, c. T-6 [\textit{Territorial Lands Act}].
\textsuperscript{555} Dosman, \textit{supra} note 536, at 192.
Litigation

Also in 1973, chiefs representing the peoples covered by Treaties 8 and 11 in the Northwest Territories filed a caveat over their lands to protect them from development. Justice Morrow of the Northwest Territories Supreme Court heard the application in April 1973. The Crown initially caused a delay in the proceedings and even went so far as to seek Morrow J.’s removal from the case by filing a writ of prohibition in Federal Court to prevent him from proceeding. Morrow J. stated:

To me this represents a policy decision by the Government which can only be interpreted as an affront to my Court and to me as the Judge of that Court. … I am certain that this is the first time in the history of Canadian jurisprudence, the first time since Confederation, when one superior Court Judge has been placed under attack by another superior Court Judge of equal status.

The Federal Court judge determined that Morrow J. could properly proceed. When the proceedings recommenced in the Supreme Court of the Northwest Territories before Morrow J., the Crown chose not to appear. Morrow J. appointed independent counsel to assist the Court as amicus curiae in their absence. After a thorough review of the evidence before him and the authorities (including Calder), Morrow J. decided that the indigenous people seeking the caveat were “prima facie owners of the lands covered by the caveat — that they have what is known as Aboriginal rights”, that the government had a “clear constitutional obligation” to protect their legal rights, and that the Aboriginal rights asserted constituted an interest in land that could be protected by caveat under the Land Titles Act.

Although his decision was overturned on appeal, it was on the grounds that unpatented Crown lands in the Northwest Territories in respect to which the Crown has conveyed no interest is not land within the operation of the Land Titles Act, so no caveat could be applied;

556 That is, they applied to have the Land Titles registry protect their interest in the land over which they claimed Aboriginal title from having any instruments registered upon it until their assertion of rights was settled. The caveat would forbid the transfer of any of the lands until the matter was dealt with. Lands in the area that were already subject to fee simple title were excepted.
557 Re Paulette’s Application (1973) 6 W.W.R. 97 (NWTSC), at paras. 6, 8.
558 Canada (Attorney General) v. Morrow (Judge) (1973) 39 D.L.R. (3d) 81 (FCTD), per Collier J.
559 Re Paulette and Registrar of Titles (No. 2) (1973) 42 DLR (3d) 8 (NWTSC) at 39-40.
the appeal was not decided with respect to the arguments about Aboriginal title. Calder had opened the door to Aboriginal title and indigenous groups were beginning to organize opposition to development on their land base. Morrow J.’s decision in the interim proceedings in April 1973 to issue a restraining order freezing development of 400,000 square miles of land in response to a petition from representatives of the NWT’s 7,000 Treaty Indians was a significant wake up call for the government.\footnote{Dosman, \textit{supra} note 536, at 193.} His follow up decision in September 1973 added to the discomfort at the Department of Indian Affairs with respect to pipeline development in the Western Arctic. Although the government planned to appeal, the Aboriginal court actions had gained some unexpected traction, forcing a new era of policy considerations for the government.

While the litigation approach did not result in a clear victory for the indigenous peoples seeking to protect their Aboriginal title, it did prompt the government to take their position seriously. This circumstance demonstrates how litigation, while not in itself successful for indigenous litigants, can produce pressure that moves a government toward establishing a commission of inquiry.

\textit{An Inquiry is Called}

Combined with all the other factors that mounted in 1972-73, the federal Cabinet decided in January 1974 that the Department of Indian Affairs and Northern Development (Indian Affairs)\footnote{The ministry that was the precursor to Indian and Northern Affairs Canada (INAC).} should order an inquiry into the effect of the anticipated pipeline, under the auspices of the \textit{Territorial Lands Act}.\footnote{The pipeline applicants sought a right of way over Crown lands under the administration of Department of Indian Affairs and Northern Development pursuant to s.19(f) of the \textit{Territorial Lands Act, supra} note 554. \textsection{19} provides that: 19. The Governor in Council may ... (h) make regulations or orders with respect to any question affecting territorial lands under which persons designated in the regulations or orders may inquire into a question affecting territorial lands and may, for the purposes of such inquiry, summon and bring before them any person whose attendance they consider necessary to the inquiry, examine such person under oath, compel the production of documents and do all things necessary to provide a full and proper inquiry.} The federal government had tabled a pipeline plan and Canadian Arctic Gas Pipeline Ltd. (Arctic Gas), a consortium of 27 Canadian and
American producers that included Exxon, Gulf, Shell and TransCanada Pipelines, had eagerly taken up the opportunity to bring northern oil and gas to southern markets. Arctic Gas proposed what would have been the longest pipeline in the world, from Alaska, across the northern Yukon to the Mackenzie Delta and then south to Alberta. The scale was enormous:

Nine construction spreads and 6,000 construction workers will be required North of 60 to build the pipeline. Imperial, Gulf and Shell will need 1,200 more workers to build the gas plants and gas gathering systems in the Mackenzie Delta. There will be about 130 gravel mining and borrow operations, and about 600 water crossings. There will be about 700 crawler tractors, 400 earth movers, 350 tractor trucks, 350 trailers and 1,500 trucks. There will be almost one million tons of pipe. There will be aircraft, helicopters, and airstrips. Arctic Gas propose to use about 20 wharf sites; and plan to build about 15 STOL airstrips of 2,900 feet each and five airstrips of 6,000 feet each. Carson Templeton, Chair of the Environment Protection Board, has likened the building of a pipeline in the North in winter to the logistics of landing the Allied forces on the beaches of Normandy.\(^{564}\)

The Arctic Gas proposal was later followed by the proposal from Foothills Pipe Lines Ltd, formed by Alberta Gas Trunk Line (NOVA) and Westcoast Transmission, who proposed a shorter, all-Canadian route from the Mackenzie Delta to Alberta.\(^{565}\) While industry had garnered political support in southern Canada for the Arctic Gas pipeline proposal, there was no such support from the northern indigenous communities that would be affected. Further, southern support was beginning to waver, as signaled by former Liberal Cabinet Minister and economics professor Eric Kierans when he spoke at a public forum in Toronto in January of 1973. After Canadian Arctic Gas Pipeline chairman William Wilder and Minister of Energy, Mines and Resources Donald Macdonald talked about the urgent need for a northern pipeline, Kierans questioned a pipeline development he felt was rushed, flawed and dangerous.\(^{566}\)

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In this context, the Berger Inquiry was established. This inquiry has cast a long and important shadow on the Canadian landscape, particularly the northern landscape and the indigenous people who make it their home.

**The Commissioner: Leadership Matters**

As discussed throughout this dissertation, the leadership of a commission of inquiry is critical to its effectiveness, and the Berger Inquiry plainly illustrates this point. The Trudeau government appointed then British Columbia Supreme Court Justice Tom Berger as commissioner. It is impossible to understand why the Berger Inquiry became the profoundly important exercise that it did without understanding the man who led it.

The law is the means by which we struggle towards an end – the achievement of justice. I didn’t set out, at the age of twenty-four when I was called to the bar, to do these kinds of cases. But I was animated by a belief – and now it is a profound belief – that the law as enforced in the courts can move us incrementally towards a just society.567

With these words, Berger provides some insight into the motivation behind his long career in the law. Now in his seventies, and still practicing law in Vancouver, he has had a profound influence on the Canadian legal landscape. He was the son of a Royal Canadian Mounted Police officer, Ted Berger, who had emigrated from Sweden when he was 22 years old. Early in his career, Ted Berger worked for many years in northwestern British Columbia, in communities largely populated by indigenous peoples.568 His belief that the law should apply equally to everyone569 no doubt had some influence on his son. Certainly his father’s admiration for those who acted with the courage of their convictions did influence Tom Berger. Berger recounts something his father told him when he was a boy that stayed with him ever since. During World War II, Canada interned Japanese Canadians in camps, having taken them from their homes and seized all of their possessions. Only one Member of Parliament protested their treatment in the House of Commons; a decidedly unpopular

position to take during that time. He was a Vancouver Co-operative Commonwealth Federation (CCF) Member of Parliament named Angus MacInnis, and Berger remembers his father’s admiration for MacInnis. A willingness to stand up in the face of injustice became a hallmark of Berger’s life. He states that throughout his legal career, he was “engaged in a search for justice”.

Berger went to law school at the University of British Columbia in Vancouver. He spent his summers working at a North Vancouver sawmill, a member of the International Woodworkers of America, Local I-217. Upon graduation, he articled with a small litigation firm, Shulman, Tupper, Southin and Gray, where he learned the ropes of criminal defence work. Called to the bar in 1957, he also represented unions against management, including Local I-217, until his appointment to the bench in 1971.

Down the hall from the firm where he was a junior associate was the office of Tom Hurley, a “hard-drinking, Irish defence lawyer of legendary wit and charm”. Hurley’s wife Maisie was a tireless advocate for indigenous people at a time when such advocates were extremely rare. She published The Native Voice, which in 1946 was the first paper in Canada to focus attention on indigenous grievances. It was 1948 when indigenous men in British Columbia won the right to vote and 1960 before they were able to vote in a federal election. Tom and Maisie Hurley had an enormous impact on the young Tom Berger. Maisie introduced him to the idea of Aboriginal title, a concept that had not been discussed at law school and was relatively unknown at the time. She was convinced that indigenous people were unfairly treated by the legal system and by government, and she gave Berger a lot to think about.

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570 The Co-operative Commonwealth Federation (CCF) was the precursor to the New Democratic Party (NDP).
572 Berger, One Man's Justice, supra note 567 at 37.
573 Swayze, supra note 568 at 66.
574 Ibid., at 67.
575 In a 2009 interview with CBC Television’s The Nature of Things, Berger stated:
I went to law school in the 1950's, which is about 50 years ago and we were not taught anything about these folks. I mean there was no course entitled ‘the rights of the Aboriginal People’. Nobody asked us the question, as law students, all these bright inquiring minds, ‘well, did ya ever think about how it is that we, of European descent acquired title to this country? Why we govern it? Did ya ever think about
Tom Hurley and Berger relied on the then new *Bill of Rights*\(^{576}\) in 1963 for their indigenous client, Gonzales, who had been convicted of possession of liquor off reserve, which was then prohibited by the *Indian Act*. They argued that “the right of the individual to equality before the law … without discrimination by reason of race, national origin, colour, religion or sex” was violated by the relevant section of the *Indian Act* since it applied only to Indians.\(^{577}\) That is, a non-Indian off reserve was not prohibited from possessing alcohol. Due to Tom Hurley’s declining health, Berger argued the case at the Court of Appeal. The Court held that the *Bill of Rights*’ guarantee of equality meant only that the law should be applied equally to those to whom the law applied. Since the law in question was the *Indian Act*, the Court decided that there was no discrimination because the *Indian Act* was applied equally to all Indians.\(^{578}\)

When Tom Hurley died in 1963, Maisie told Berger in no uncertain terms that her husband’s indigenous files were now his responsibility:

> After Tom Hurley died, Maisie Hurley appeared at my office, leaning on her cane. She was in her seventies but still a commanding figure. She announced, “Now, Tommy, *you* will have to defend the Indians.” She was not a woman to argue with. Thus did I become a lifelong defender of Aboriginal causes.\(^{579}\)

In the 1963 election, the Liberal party under Lester Pearson’s leadership promised an Indian Claims Commission to address grievances with respect to treaties. The claims commission bill had its first reading in the House of Commons in December 1963, after which it was sent out for comment to every Indian community and to interested organizations.\(^{580}\) According to Weaver, while the response from indigenous people was immediate and negative, the “most
pointed criticism came from British Columbia” because the bill did not provide for claims based on Aboriginal title, and therefore it appeared that such claims would be ineligible for submission to the Commission. She noted in particular Berger’s submission on behalf of the Native Brotherhood in British Columbia. His analysis went further than those of the other parties, raising complicated jurisdictional and constitutional questions, and insisting upon the federal government’s responsibility under the British North America Act “to ensure fair land dealings with Indians”. His submissions created a stir in the Indian Affairs Branch, causing them to seek outside counsel and leaving them unsure of how to proceed.581 These insights by Weaver with respect to the effect of Berger’s advocacy within the Indian Affairs Branch show his work with respect to Aboriginal title was well underway by the time he argued the pioneering case of Calder (discussed in detail below) before the Supreme Court of Canada in late 1971.

**Berger the Litigator**

Five years after he graduated he was setting legal precedents. He became British Columbia’s leading native rights lawyer. He defended Indian bands over reserve rights to timber, hunting and fishing. He represented Métis and Indian trappers of the Athabasca Delta in dispute with BC Hydro over muskrat hunting grounds. He defended Aboriginal rights of Nishga Indians all the way to the Supreme Court of Canada, pushing his case that the Nishga Indians had Aboriginal title to their land when white men arrived and still have title to it. A split decision of the Supreme Court went against him but the judgment remains a major legal basis for native rights in Canada.582

**White and Bob**

The first major Aboriginal rights case that Berger argued was *White and Bob*.583 A magistrate had convicted White and Bob, two men from Vancouver Island, of hunting during the closed season, but they had the right to appeal to the trial court for a new trial.584 Berger discovered

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583 *R. v. White and Bob* (1964) 50 D.L.R. (2d) 613 (BCCA); aff’d (1965), 52 D.L.R. (2d) 481 (SCC).
584 This section relies upon Berger, *One Man’s Justice*, supra note 567 at 87ff.
that the two men lived in territory covered by a treaty. If Berger could show that the men had hunting rights pursuant to a treaty, they would have a defence. The trial judge acquitted the two men on the basis that they were hunting legally due to the presence of the treaty. Berger’s alternative argument had been that, in the absence of a treaty, Aboriginal title had not been extinguished and therefore nor had the Aboriginal right to hunt on the land. At the Court of Appeal, Berger won a 3-2 decision on the basis that the treaty existed. The concurring decision of Justice Norris, in its exploration of Berger’s alternative argument, laid the groundwork for the cases to come by finding that the Aboriginal rights advanced by Berger had never been extinguished or surrendered. The Supreme Court of Canada has since adopted the definition of a treaty set out by Justice Norris.

White and Bob went to the Supreme Court of Canada. The Court decided the case on the basis that there was a treaty, therefore it did not rule on the question of Aboriginal rights. That question came before them again a few years later, when Berger argued on behalf of the Nisga’a that their Aboriginal title to the Nass Valley of northwestern British Columbia had never been extinguished.

585 The case attracted significant interest among the indigenous peoples of Vancouver Island and prompted the formation of the Southern Vancouver Island Tribal Federation, who along with the Native Brotherhood of BC, supported the men in their appeal of the magistrate’s decision. The case also attracted media attention, and this in turn attracted the Law Society of British Columbia’s scrutiny. In a letter to the Secretary of the Law Society in 1964, Berger denied that he attempted to influence the court by giving an interview about the White and Bob case:

It is true that I referred during the interview to the Royal Proclamation of 1763 and that the Proclamation is not referred to in the Notice of Appeal, but I would have thought that mentioning the Proclamation in connection with a discussion of Indian rights was just about as trite as mentioning Magna Carta in a discussion of civil liberties.


586 Berger, One Man’s Justice, supra note 567 at 103. Justice Emmett Hall’s minority judgment on this point has been adopted unanimously by the Supreme Court: Correspondence from Berger to the author (8 October 2009).


588 Berger’s junior was Douglas Sanders who went on to teach Aboriginal law at the University of British Columbia.

589 White and Bob, supra note 583.
Maisie Hurley’s view that indigenous people in British Columbia had never ceded their land to the Crown had prompted Berger to think about the question long before he acted for the Nisga’a people in their case against the provincial government, known as *Calder*. But when he was elected to the BC legislature in 1966, he served along with Frank Calder, who was then president of the Nisga’a Tribal Council and the first indigenous person in Canada to hold elected office in a provincial legislature. Calder and four chiefs of the Nisga’a people arrived in Berger’s Vancouver law office that same year to hire him as their counsel in their lawsuit in which they alleged that their Aboriginal title had never been extinguished. Berger attributes their choice of counsel not just to their collegial relationship in the legislature, but more so to his having won *White and Bob* in 1965.

The *Calder* case opened in March of 1969 in BC Supreme Court in front of a gallery of spectators and media. The government argued that Aboriginal title did not exist and never had. Further, if any such title had existed, it had been extinguished no later than when BC had entered Confederation in 1871. Gould J. dismissed the case without deciding whether Aboriginal title had existed. The BC Court of Appeal was in substantial agreement with Gould J.’s decision and dismissed the appeal in 1970.

Seven justices of the Supreme Court of Canada heard the case and they rendered a split decision in 1973. Three found in favour of the Nisga’a; three found in favour of the government. The seventh and deciding vote was based on a technicality that favoured the
government. Despite the loss, the minority decision had accepted Berger’s arguments about Aboriginal title not having been extinguished; the dissenting judges agreed that the Nisga’a retained title to their lands. Further, all six had acknowledged that the concept of Aboriginal title existed in Canadian law. It was a breakthrough that set the stage for the years of Aboriginal litigation over land that followed. *Calder* was the threshold case that changed the legal landscape for indigenous peoples in Canada. In the period following the decision, the all party Standing Committee on Indian and Northern Affairs passed a motion urging the settlement of native claims, and the federal government announced a policy of settling claims in areas where no treaties had extinguished Aboriginal title.

**F.R. Scott, Ivan Rand and Emmett Hall**

To understand the leadership qualities that Berger embodied, it is worth noting the leadership of others he admired. Berger was greatly influenced by a Canadian lawyer of mythic proportions: F.R. Scott. Scott was a constitutional law scholar, a poet, and an early stalwart of the CCF. He became dean of McGill Law School in 1962 after stepping down from party politics. The deanship had been refused to him during his tenure as chair of the socialist CCF party from 1942 to 1950. He famously argued the successful defense of D.H. Lawrence’s novel, *Lady Chatterley’s Lover*, against charges of obscenity in the Supreme Court of Canada. He less famously argued one of the early Aboriginal land rights cases, in which the people of the Caughnawaga reserve outside Montreal challenged the ability of the federal government to expropriate their reserve lands. They relied on an original grant of the land by Louis XIV and on decisions of the United States Supreme Court. The arguments failed but

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598 Berger states: “I believe that the Supreme Court’s decision in *Calder* was instrumental in changing the course of Canadian history.” Berger, *One Man's Justice*, supra note 567 at 126. He bases this bold statement on the events that followed, including a “land claims movement” that developed out of *Calder* and led to multiple settlements for First Nations and Inuit, and changes in the legal profession which now employs many Aboriginal rights specialists.


they paved the way for later successful arguments and in the meantime succeeded in getting

In the early 1960s, when Berger was a young lawyer, Berger juniored for Scott on a British Columbia Federation of Labour case before the Supreme Court of Canada.\footnote{Swayze, \textit{supra} note 568 at 36 and Berger, \textit{One Man's Justice}, \textit{supra} note 567 at 63-64. The case was \textit{Oil, Chemical and Atomic Workers v Imperial Oil}, [1963] S.C.R. 584.} Berger was “delighted” because Scott “was a hero” to him for his poetry, his constitutional scholarship, his involvement in the CCF and his civil liberties arguments before the Supreme Court of Canada.\footnote{Berger, \textit{One Man's Justice}, \textit{supra} note 567 at 62.} They lost the case 4-3, but they became friends and Berger’s admiration for Scott is apparent from Berger’s references to him in speeches and texts over the years. He details the impact of Scott’s stance on civil liberties in his book \textit{Fragile Freedoms: Human Rights and Dissent in Canada}.\footnote{Berger, \textit{Fragile Freedoms}, \textit{supra} note 534.}

Berger suggests that it was Scott’s legal academic articles in the 1940s on human rights and fundamental freedoms that “provided the building blocks out of which the Supreme Court of Canada … assembled its greatest judgments of the 1950s.”\footnote{Thomas R. Berger, “F.R. Scott and the Idea of Canada” in Djwa and St. St. J. Macdonald, \textit{supra} note 602, 179 at 184.} Justice Ivan Rand, who Berger considered to be “the greatest judge of that era”, penned many of these judgments.\footnote{Ibid.} F.R. Scott and Berger both admired Rand as one of the great justices of the Supreme Court of Canada, not least for his judgment in two of the famous cases argued by Scott.\footnote{Swayze, \textit{supra} note 568 at 37.} In \textit{Roncarelli v. Duplessis}, Scott braved the wrath of the premier of Quebec, who had cancelled the liquor licence of Frank Roncarelli, a Jehovah’s Witness restaurant owner who was putting up bail for Jehovah’s Witnesses arrested by police.\footnote{\textit{Roncarelli v. Duplessis}, [1959] S.C.R. 122. Roncarelli retained lawyer A.L. Stein to represent him. “Stein accepted the case and approached other lawyers to act with him. Every one of them turned him down out of fear of Mr. Duplessis and the political consequences that might ensue. Mr. Stein was at last joined by McGill University law professor Frank R. Scott.” See “Protecting the Public through an Independent Bar: The Task Force Report” in L. Sossin, \textit{et al}, eds. \textit{In the Public Interest: The Report and Research Papers of the Law}} The Supreme Court ordered Premier

603 Swayze, \textit{supra} note 568 at 36 and Berger, \textit{One Man's Justice}, \textit{supra} note 567 at 63-64. The case was \textit{Oil, Chemical and Atomic Workers v Imperial Oil}, [1963] S.C.R. 584.
604 Berger, \textit{One Man's Justice}, \textit{supra} note 567 at 62.
605 Berger, \textit{Fragile Freedoms}, \textit{supra} note 534.
607 Ibid.
608 Swayze, \textit{supra} note 568 at 37.
609 \textit{Roncarelli v. Duplessis}, [1959] S.C.R. 122. Roncarelli retained lawyer A.L. Stein to represent him. “Stein accepted the case and approached other lawyers to act with him. Every one of them turned him down out of fear of Mr. Duplessis and the political consequences that might ensue. Mr. Stein was at last joined by McGill University law professor Frank R. Scott.” See “Protecting the Public through an Independent Bar: The Task Force Report” in L. Sossin, \textit{et al}, eds. \textit{In the Public Interest: The Report and Research Papers of the Law}}
Duplessis to pay Roncarelli $33,000 in damages. In *Switzman v. Elbing* (the “Padlock Case”), the Supreme Court struck down the *Padlock Act* that had allowed the police to close any premises suspected of disseminating Communist propaganda. Berger describes Rand J.’s judgment in the case as “the clearest affirmation of freedom of speech that has ever been handed down from Canada’s highest court.”

Former Supreme Court of Canada Justice Emmett Hall was another influence on Berger, not least because of his judgment in *Calder*. Berger states that in that judgment “you will find that sense of humanity – that stretch of mind and heart – that enabled [Hall] to look at the idea of Aboriginal rights and to see it as the Indian people see it.” Berger also admired Hall’s work as a commissioner of an inquiry on the Royal Commission on Health Services (1961-1964). Hall’s recommendations led to medicare expanding beyond Saskatchewan to become a national program. The other two men discussed in this section also conducted public inquiries: Rand with the Royal Commission Inquiry into Labour Disputes (1968) and Scott with the Royal Commission on Biculturalism and Bilingualism (1963-1971).

**Berger the Politician**

Although Berger was briefly involved with the Young Liberals in the late 1950s, his involvement in party politics was mainly with the CCF and the NDP. He was elected as an NDP Member of Parliament in Vancouver-Burrard in June of 1962, and defeated in 1963, at which point his career in federal politics came to an end. Berger returned to legal practice, but after a few years he tried his hand at provincial politics. He was elected to the British
Columbia legislature for the NDP in 1966, representing Vancouver-Burrard, and was elected leader of the provincial NDP in April 1969 the week after arguing *Calder* in the BC Court of Appeal.\textsuperscript{615} In August 1969, the NDP lost the provincial election, Berger lost his own seat, and in September he resigned as leader. He states that: “the fact that my political career, such as it was, had crashed and burned freed me to devote myself to the appeal for the Nisga’a [in *Calder*].”\textsuperscript{616}

**Justice Berger**

Liberal Justice Minister John Turner called Berger to canvass his interest in an appointment to the bench in late 1971 when he was preparing to argue *Calder* before the Supreme Court of Canada.\textsuperscript{617} Berger was sworn in as a justice of the BC Supreme Court in February of 1972. At 38, he was the youngest superior court judge of the 20\textsuperscript{th} century in British Columbia.\textsuperscript{618} By his own assessment, his twelve years on the bench did not make a profound contribution to jurisprudence: “My contribution as a judge to the development of the law, my few pages in the volumes of law reports filling the stacks and shelves of every legal library, might as well have drifted down a legal black hole.”\textsuperscript{619}

As a judge, there is no question that his major contribution was his work as a commissioner of three public inquiries, including the Berger Inquiry.

**Berger’s Work as a Commissioner**

In 1972, Berger watched from the bench as the NDP under Dave Barrett ended twenty years of W.A.C. Bennett and the Social Credit party’s grip on the province. The following year,

\textsuperscript{615} Swayze, *supra* note 568 at 103.
\textsuperscript{616} Berger, *One Man’s Justice*, *supra* note 567 at 120.
\textsuperscript{617} Ibid. at 123.
\textsuperscript{619} Berger, *One Man’s Justice*, *supra* note 567 at 164. One of the few cases decided by Berger J. that is cited in legal literature is *Mathias v. Findlay*, [1978] 4 W.W.R. 653. See Richard H. Bartlett, “Indian and Native Rights in Uranium Development in Northern Saskatchewan” (1980/81) 45:1 Sask. L. Rev. 13, at 29, note 65: Berger J. declared that the “idea of usufruct … was never regarded as a means of defining, even by analogy, the tenure of Indian bands to reserve lands.”
pursuant to the *Public Inquiries Act* of British Columbia, Berger was appointed to head the British Columbia Royal Commission on Family and Children’s Law, effective December 3, 1973. Berger stated that: “This commission will be one that works in public. We will be thinking out loud.” Based upon their investigations, research and province-wide hearings, the Commission produced thirteen reports, each focusing on a different aspect of their mandate, including one devoted to “Native Families and the Law.” Berger was appointed by the federal Liberal government to his next commission, the Berger Inquiry, just after the second of the thirteen reports were released in the family law commission, thus for awhile he was serving on both commissions.

The third appointment to a commission for Berger was in 1979 under the short-lived Conservative government of Joe Clark. The commission focused on Indian and Inuit health care programs and Berger recommended greater consultation with Indians and Inuit regarding program delivery. When the Conservative government fell, Monique Bégin, the new Liberal Minister of Health adopted Berger’s recommendations.

After he left the bench, Berger was a commissioner on at least three more inquiries and one informal investigation.

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620 B.C. Reg. 477/73 (filed December 12, 1973) Order-in-Council 4043. His fellow commission members were the Honourable Ross Collver, then of the Provincial Court of BC (I clerked for Justice Collver at the BC Supreme Court in 1999-2000, the year before his retirement), Dr. Sydney Segal, a pediatrician, and social workers Reta MacDonald and Mish Vadasz. Lawyer Ian Waddell, later Berger’s special counsel on the Berger Inquiry, was a consultant.

621 Swayze, *supra* note 568 at 132.


624 Swayze, *supra* note 568 at 217. In 1981, the United Nations Environment Program approached Berger to head an inquiry into whales and dolphins, following upon his recommendation in the Mackenzie Valley Pipeline Inquiry report that a whale sanctuary be established to protect whales from oil production and shipment in the North. However, the inquiry did not proceed.

The Mackenzie Valley Pipeline Inquiry

Whatever the deeper political motivations behind the appointment [of Berger by the Liberal government], there could not have been a better man to conduct such an inquiry.

Pierre Trudeau appointed British Columbia Supreme Court Justice Thomas Berger, as he then was, to head the Mackenzie Valley Pipeline Inquiry in March 1974. Jean Chrétien, then Indian and Northern Affairs Minister, recommended Berger’s appointment to cabinet. An appendix to the Indian and Northern Affairs communiqué announcing Berger’s appointment sets out his biography, including that he “successfully argued” White and Bob in which the Supreme Court of Canada upheld Aboriginal hunting rights, that he argued Calder, and that he was an NDP Member of Parliament, Member of the Legislative Assembly and leader.

As noted above, the NDP campaigned during the 1972 election on a platform that opposed a Mackenzie Valley pipeline. Trudeau’s Liberals won the election, but with a parliamentary minority. In order to retain power, the Liberals had to rely upon the NDP to support the government. The appointment of Berger as the commissioner, a man who had represented the NDP in both Ottawa and Victoria prior to his appointment to the bench, was expected to please the NDP. The appointment created concern in industry quarters and garnered what was then the world’s largest water project, the Sardar Sarovar Projects – a dam and canal in India. Bradford Morse, former head of the United Nations Development Program, was appointed as chair. The review was to look at the measures adopted for the resettlement of villagers affected by the projects and to assess the projects’ environmental impacts. Berger says that when he was in India working on the dam inquiry, some of the activists opposing the dam had copies of the Mackenzie Valley Pipeline Inquiry report – they had done their research on him: Berger interview #2, supra note 398. In 2003, the City of Vancouver appointed Berger to head a commission to determine what form of electoral democracy the city should have: Commission on Neighbourhood Constituencies and Local Democracy, A City of Neighbourhoods: Report of the 2004 Vancouver Electoral Reform Commission (8 June 2004), online: <http://vancouver.ca/erc/pdf/vere_report.pdf>. In 1993, Berger was appointed as special counsel by British Columbia’s Attorney General to conduct an investigation into abuses at the Jericho Hill School, a residential school for deaf children. His report in 1995 recommended compensation for the victims by the provincial government. See T. R. Berger, “Canadian Commissions of Inquiry: An Insider’s Perspective” in Manson & Mullan, supra note 26, at 24-28.

627 Berger interview #1, supra note 214.
628 Indian and Northern Affairs, Communique 1-7378, “Commissioner Appointed for the Mackenzie Valley Pipeline Inquiry” (22 March 1974).
629 François Bregha, Bob Blair’s Pipeline : The Business and Politics of Northern Energy Development Projects (New ed.) (Toronto: J. Lorimer, 1979) at 46; Page, supra note 531 at 92.
praise from indigenous and leftist quarters from the outset. Some queried how he could hold an impartial inquiry “when it seems that he is a quiet but determined exponent of so-called ‘native rights’ in Canada”. While Berger’s appointment may have been a surprising choice by a Liberal government, Chrétien says “Berger was his personal choice, approved by Trudeau and by Energy Minister Donald Macdonald. Others say Trudeau was impressed with Berger’s arguments on behalf of the Nishga.”

Page argues that the Liberal government was also seeking to regain some of the credibility that it had lost with Aboriginal organizations as a result of the White Paper. Berger’s

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630 Page, supra note 531 at 92-93.
631 Dick Turner, Sunrise on Mackenzie: a Northerner Speaks Out (Saanichton, B.C.: Hancock House, 1977) at 54, noting his own concerns and those of many “northerners”, as well as the pronouncement by conservative columnist Barbara Amiel in a Macleans article:

[In a recent issue of Macleans Magazine, Barbara Amiel has won my heart with her clever and honest assessment of the whole issue of the Berger Enquiry. She says, in part, “A man of impeccable personal integrity and distinction on the bench, he nevertheless has built his career as an advocate of native land rights arguing landmark cases on the issue up to the Supreme Court of Canada. As one-time provincial leader of the British Columbia N.D.P. Party, he clearly came to the hearings with more than a casual affiliation to a party whose stand on control of resource development, multinational corporations (and evils thereof) was a matter of public record.”


In Canada … the Supreme Court’s 1973 decision in Calder resuscitated the common law doctrine of native title. This judicial decision received a positive response at the political level. The government of Pierre Trudeau, the same Trudeau who had told a Vancouver audience in 1969 that ‘we won’t recognize Aboriginal rights,’ launched a new policy of negotiating ‘comprehensive’ land claims agreements with Aboriginal groups whose ‘rights of traditional use and occupancy had been neither extinguished by treaty nor superseded by law.’ From an Aboriginal perspective, the new federal policy left much to be desired. … The government would decide who would have access to the land claims process and when access would be granted. [footnotes omitted]


Prime Minister Trudeau and Jean Chrétien, who was then Minister of Indian and Northern Affairs, turned to their legal advisors and asked who was right, Mr. Justice Hall or his opposing colleagues on the Court? Had Aboriginal title been extinguished in these non-treaty areas of Canada? Gérard LaForest later disclosed at a Conference in Victoria celebrating the thirtieth anniversary of the Calder case, in 2003, that he was the chief legal advisor to the Department of Justice on this question, and that he concluded Mr. Justice Hall was right. Prime Minister Trudeau decided it was necessary to enter into land claims agreements wherever no treaties had been signed in Canada.

Berger was also surprised by his appointment. After setting out his background as an NDP MP and defender of native rights, CBC Radio host Michael Enright asked Berger in a December 1974 interview, “Were you surprised that the federal government chose you to head … the inquiry?” Berger laughed and said, “Well, I may have been a little bit surprised, but I thought that they chose the right man.” CBC, “Justice Berger prepares for his inquiry” This Country in the Morning (5 December 1974), online: CBC Digital Archives <http://archives.cbc.ca/emissions/emission.asp?IDLan=1&IDEmission=753&IDClip=1547&page=1> [CBC, “Justice Berger prepares for his inquiry”].
reputation as a litigator and “defender of Maisie’s people” made him someone respected by indigenous people. The government needed someone to head the Inquiry whose recommendations would be heeded by Aboriginal organizations: “In its careful negotiations with the Americans, Ottawa wanted no native militancy that might scare off the Americans from accepting the Canadian route.” The Inquiry would be set up to hold its hearings in Yellowknife, away from southern media and activists, while the industry-friendly National Energy Board (NEB) hearings would occur in Ottawa:

Thus the NEB hearings, where the government felt more comfortable, would remain front and centre in Ottawa and prepare public opinion for acceptance of the project while most of the critics, hopefully would be lost in the wilds of the Northwest Territories.

Berger had never been to the North, and to get a handle on the place, he spent a summer with his wife crisscrossing the western Arctic and visiting communities small and large. While there was in the Canadian imagination a fascination with the North, the country was in the midst of the energy crisis and had a pipeline proposal on the table. Berger reflects that “Aboriginal rights” was almost a dirty word when he went up there. But all of that was to change. No one was prepared for how Berger would run the Inquiry.

**Berger’s Innovations: Process Matters**

I only venture to tell you something of what we are doing because we may be doing some things a little differently from the way they have been done in the past.

As discussed in Chapter One, the process employed by an inquiry through the interpretation and implementation of its mandate determines whether and how well an inquiry fulfills its

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633 Page, supra note 531 at 92-93.
634 Ibid. Page discusses the differences between the Berger Inquiry and the National Energy Board process at 142, 152, 319-320. The NEB hearings commenced in October of 1975 and ran parallel to the Berger hearings. See also Edward L. Knowles & Ian G. Waddell, eds. Preliminary Materials (Yellowknife, N.W.T.: Mackenzie Valley Pipeline Inquiry, 1975) at 237.
635 Berger interview #1, supra note 214.
social function. The way in which Berger directed the Berger Inquiry to fulfill its mandate was unprecedented in the history of Canadian public inquiries or royal commissions. The scope of the Inquiry due to Berger’s interpretation of his mandate, the procedures he adopted, particularly with respect to hearings and commission staff, his use of the media to generate interest in the Inquiry, and his decision to provide financial support to interveners – it is an understatement to say that all of these were done “a little differently” from the way they had been done in the past. Innovations that Berger brought to the public inquiry adopted by later public inquiries include: traveling to communities to hear from directly affected persons, reduction of adversarial evidence-gathering techniques, the public education mandate, media strategy (including coverage in local languages), and accessible reporting of the commission’s findings.637 The following pages describe in detail how Berger ran his Inquiry, the developments he brought to the legal mechanism of the commission of inquiry, and why it is such an important legal landmark. This in depth exploration of the Berger Inquiry serves to facilitate a discussion at the end of the chapter of how his innovations to the public inquiry model can assist Canada in its attempts to address historical injustices, most immediately through the TRC.

Berger believed that a public inquiry should be public, both in terms of operating in public view and with respect to involving the public in the Inquiry’s issues and work. This was evident from the beginning with his decision to hold preliminary hearings and consult the parties with respect to the procedures with which the Inquiry would operate:

Rarely in the history of national commissions of inquiry had such an explicit attempt been made to dispel preconceptions as to how the investigation was to proceed, what would be examined, and how conclusions would be arrived at.638

637 Although I cannot draw a direct connection between Berger’s innovations and the operation of truth commissions internationally, the innovations I discuss here do begin to appear in truth commissions as they developed in the 1980s and 1990s. Recent truth commissions such as those in Sierra Leone, Peru and East Timor have exhibited combinations of these aspects.
His courting of the media, his decision to hold community hearings, and his insistence that all reports by all parties be made available to the Inquiry and to each other, all heralded a new way of conducting a public inquiry:

We have sought to make this an Inquiry without walls... We have sought to bring the Inquiry to the people. This has meant that it is the Inquiry, the representatives of the media accompanying it, that have been obliged to travel, and not the people of the North. ...

Too often in the past there has been a tendency to treat the work of a Royal Commission or a public Inquiry as a private affair. ...

This is a public Inquiry.

In the early 1970s, Canada did not have a long history of public participation in decision making. Freedom of information legislation was not yet enacted and government operations were much less transparent, with government information being treated as confidential unless its release was expressly authorized. Still, Trudeau had campaigned in 1968 on a platform of “participatory democracy”, so Berger’s approach was part of a change in approach to public policy making and indeed in society, where public interest groups now proliferated. His decision to hold hearings in multiple places that would ensure the public could attend, and to require disclosure of all relevant documents from all parties, including the government, was very unusual at the time. Further, he objected swiftly to the territorial government’s perceived attempt to limit testimony before the Inquiry by its civil servants.

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639 Interview of Ian Waddell (18 December 2008) Vancouver, BC [Waddell interview].
640 Berger, Corry Lecture, supra note 636 at 15.
641 OECD & Nichols, supra note 638 at 9.
642 Page, supra note 531 at 28.
643 At the first community hearing in Aklavik, the Territorial Government sent a telex to its employees that they could not testify without approval of the Territorial Government: C.H. Templeton, “The Great Pipeline Debate of 1977” (Speech delivered at the Canadian Conference on Public Participation at Banff, Alberta, 5 October 1977) Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 8 – 5, Articles - comments - re Berger report, file 1, 1977-1982 [Folder one of four]), [Templeton, “The Great Pipeline Debate”] at 7-8. Templeton was Chairman of Templeton Engineering Company, Chairman of the Alaska Highway Pipeline Panel and Former Chairman of the Environment Protection Board of the Mackenzie Valley Pipeline Route. Though note that Stu Hodgson, Commissioner, Government of Northwest Territories, wrote to Berger on 8 April 1975 to explain that there has been a misunderstanding regarding the instructions by the territorial government to its employees about testifying before the Inquiry – the point was supposed to be that staff views would be their own and not those of the territorial government but the intent was miscommunicated and this was then compounded by communication...
Berger simply took the approach that transparency in commission proceedings was the most effective way to proceed. Indeed, Berger set the tone from the beginning. In a December 1974 interview, he stated:

This is a public inquiry. It’s not a private kind of session for lawyers and judges and experts. And to enable the people of the North, native and white, to participate fully in this inquiry we’re going to have to do everything we can to make sure what’s going on at the inquiry is plain to them. It’s an ambitious thing to go ahead on this basis but I don’t suppose the government would have asked me to do it if they didn’t wish to have a full and complete inquiry, and that’s what I’m trying to do.

It is clear that this was a strategic decision on Berger’s part, one shared by his commission counsel, Ian Scott. In a draft memorandum from Scott to Berger toward the end of the hearings, Scott baldly states that liberal relevance parameters were applied and an emphasis on creating public awareness of the issues was adopted as a deliberate strategy both to ensure that the Inquiry was a public exercise but also to strengthen the Inquiry’s ability to ward off attacks.


See Templeton, “The Great Pipeline Debate”, ibid., at 20:

Berger … established at the outset … that everyone would get a fair hearing, in the open – no secret deals, no back room negotiation. Every decision had to be made in public and the person making it was publicly accountable for what he said. This openness followed right through all the hearings right to the doors of Parliament. Parliament, having heard the ground swell behind, went along with most of the recommendations of the reports. It is interesting to speculate as to whether the decision would have gone the way it did if the Hearings had not been so open and the public so deeply involved. Political deals are not made in public.


Note that it is unknown if this memo was ever sent to Berger. Draft undated memo from Ian Scott to Tom Berger, at 1-2, in response to a memo from Tom Berger to Ian Scott (14 June 1976) Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry funds – Mackenzie Valley Pipeline Inquiry, RG 126, vols. 72-77, Operational and administrative records created by the MVPI between 1970 – 1977, Textual records, box 74, Subfile: Hearings - Commission Counsel Notes, in further subfile “I of II RG 126 Vol. 73”).
Independence of the Inquiry

“My only client is the truth.”

As noted in Chapter One, independence is a valued attribute of commissions of inquiry since it enables them to credibly assess an issue without partisan interests shaping the process. Berger viewed independence as one of the two important reasons for appointing judges as commissioners of inquiry (the first being that they have the time to devote to a single project over a sustained time). He made the statement about his only client being the truth at the hearings in order to emphasize that he was independent of the federal government and all the interested parties, seeking neither political reward, nor, as a judge, legal business. He acknowledged that a judge will view things through the lens of his or her own experience and thus he “would search for the truth as I might see it”, but opined that: “recommendations of royal commissions may be good or bad, but they should be the result of a truly independent examination of the issues.”

According to Bregha, “At various times throughout its existence, the Pipeline Inquiry faced the thinly-disguised hostility of the government that had created it.” The Globe and Mail reported in November 1974, that Energy Minister Donald Macdonald stated that if the Berger Inquiry tried to force government disclosure of “sensitive” pipeline documents the Government “might have to change [the Inquiry’s] terms of reference”. The Minister demurred: “Mr. Macdonald told reporters there never was any ‘serious suggestion’ of changing the terms of reference of the inquiry.”

Mitchell Sharp, acting Prime Minister when the Inquiry began hearings in March 1975, suggested the government need not wait until it had received Berger’s report before making a

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647 Berger, One Man’s Justice, supra note 567 at 145.
648 See discussion in Chapter One of Centa and Macklem, supra note 36 and accompanying text.
649 Berger, One Man’s Justice, supra note 567 at 145.
650 Bregha, supra note 629 at 117.
652 Ibid.
decision on the pipeline. Minister of the Environment, Jeanne Sauvé, agreed her ministry would cooperate with the Inquiry but noted “no development would ever take place if all environmental questions had to be answered first”. On March 12, just after the Inquiry’s hearings began, Judd Buchanan, who succeeded Jean Chrétien as Minister of Indian and Northern Affairs, said his department would do an internal review of construction of gas processing plants in the Mackenzie Delta (an integral part of a Mackenzie pipeline), rather than refer them to the Berger Inquiry.

Despite the political manoeuvres, Berger interpreted his role as a commissioner as truly autonomous from those by whom he had been appointed. He was not simply going to rubber stamp the pipeline as a foregone conclusion. He viewed his role as totally independent of all the parties involved in the pipeline issue. Whether or not industry representatives viewed Berger as independent is debatable, but he was certainly viewed as independent of the government. Even Trudeau acknowledged this when he and Berger met for lunch in Ottawa after the commencement of the Inquiry. When Berger discussed with him the criticisms arising that the Inquiry was taking too long and costing too much, Trudeau advised him to “take the time to do a proper job”. Trudeau said: “I wanted you … because I knew you would not be a patsy.” No doubt this would have bolstered Berger’s sense of independence. Indeed, according to Swayze, all public grumbling by government representatives ceased after Berger’s lunch with Trudeau.

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653 Bregha, *supra* note 629 at 117.
654 Ibid., at 117.
655 Ibid., at 118.
656 Berger, *One Man’s Justice, supra* note 567 at 145.
657 Swayze, *supra* note 568 at 149. She also writes that it was at this lunch that Trudeau told Berger he had travelled the Mackenzie River with a man both of them admired: F.R. Scott. After the trip, Scott wrote the poem “Fort Smith”. The figure in the poem that strips and wades into the river is Trudeau:

Standing white, in whiter water,
Leaning south up the current
To stem the downward rush,
A man testing his strength
Against the strength of his country.

**Mandate of the Inquiry**

Any discussion of a public inquiry’s work must first look at the mandate provided to the commissioner, but how the commissioner interprets that mandate will determine the scope of the inquiry. As discussed in Chapter One, the commissioner’s interpretation of the mandate is one of the critical factors in whether an inquiry fulfils its social function. One of the controversial aspects of Berger’s conduct of his Inquiry is his interpretation of his mandate as set out in the order-in-council. Critics say that he wildly expanded the mandate to include Aboriginal rights and land claims, while others saw his broad interpretation of the mandate as a necessary way to achieve a holistic view of the issues involved in determining a pipeline’s impact.

The official mandate of the Inquiry, per the order-in-council, appointed Berger:

...to inquire into and report upon the terms and conditions that should be imposed in respect of any right-of-way that might be granted across Crown lands for the purposes of the proposed Mackenzie Valley Pipeline having regard to

(a) the social, environmental and economic impact regionally, of the construction, operation and subsequent abandonment of the proposed pipeline in the Yukon and the Northwest Territories, and

(b) any proposals to meet the specific environmental and social concerns set out in the Expanded Guidelines for Northern Pipelines as table in the House of Commons on June 28, 1972 by the Minister.  

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In a letter to Berger, Chrétien outlined the terms of reference in the draft order-in-council and set out his expectations of the Inquiry. He noted that it would be the National Energy Board’s task to determine if the project as a whole should be approved, so the Inquiry’s task would be to make recommendations on terms and conditions to be imposed with respect to social, economic and environmental impacts if approval were granted. He further noted that: “It is not the intention … that the Commission be asked to negotiate a settlement of the Indian Claims.” 659 Amongst other materials, he did include the Expanded Guidelines for Northern


659 Letter from J. Chrétien to T. Berger (7 March 1974), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 – 6 Correspondence with the Department of Indian Affairs and Northern Development [file] #1 1974-1975 [Folder two of two]) at 2.
Pipelines “against which the application must be reviewed.”\textsuperscript{660} He anticipated that the inquiry process would take a minimum of nine months to complete.

In reply, Berger stated that he was prepared to accept appointment as commissioner for the inquiry and that the terms of reference in the proposed order-in-council “are sufficiently wide to include all the issues that come within the pipeline guidelines.” He also noted that he thought the order-in-council’s reference to the commissioner’s power to prescribe inquiry procedures was “sufficiently flexible”.\textsuperscript{661}

In his Preliminary Rulings of July 12, 1974, Berger stated that the scope of the Inquiry was defined in the order-in-council and in the Expanded Guidelines for Northern Pipelines: “It is a study whose magnitude is without precedent in the history of our country. I take no narrow view of my terms of reference.”\textsuperscript{662} He concluded his reasons for interpreting his mandate more broadly, and stated his conviction that the Inquiry “must be fair and it must be complete. We have got to do it right.”\textsuperscript{663} He further stated that merely studying the pipeline company’s proposal without considering the background against which it was made “would be to nullify the basis on which this Inquiry was established.”\textsuperscript{664}

Berger’s interpretation of the mandate is articulated in the introduction to his Report. He noted that the Inquiry was appointed to consider the social, environmental and economic impact of an energy corridor across the northern territories, but he stated that:

Today, we realize more fully what was always implicit in the Inquiry's mandate: this is not simply a debate about a gas pipeline and an energy corridor, it is a debate about the future of the North and its peoples.

\textsuperscript{660} \textit{Ibid.}, at 1.
\textsuperscript{661} Letter from T. Berger to J. Chrétien (11 March 1974) Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 – 6 Correspondence with the Department of Indian Affairs and Northern Development [file] #1 1974-1975 [Folder two of two]).
\textsuperscript{663} \textit{Ibid.} at 169.
\textsuperscript{664} \textit{Ibid.}
There are two distinct views of the North: one as frontier, the other as homeland.665

Berger’s interpretation of what was “always implicit” in the mandate appears now to be a radical departure from what might have been expected by Cabinet:

It seems clear now that the federal cabinet thought Berger would examine the financial and technical problems facing pipeline builders, look into the economic impact for Canada, and make some kind of motherhood statement on the environment and the impact on native peoples. Then he would meekly recommend a pipeline.666

Chrétien apparently regrets his appointment of Berger now: “His mandate was to build a pipeline – not to stop a pipeline”.667 Chrétien’s displeasure with Berger’s conduct of the Inquiry may explain why policy inquiries were scarce under his tenure as prime minister.668 Berger interpreted his mandate to ask ‘what is the context in which a pipeline would take place?’ What will the effect be on what and on whom? He made the Inquiry into something no previous inquiry had been. His approach was to go to the places and people who would be affected by the pipeline, rather than expecting them to come to him. He recognized that the pipeline consortiums had the resources to attend hearings with legal representation, hire experts, and make their case for the pipeline having a minimal negative impact and largely positive impact on the North. He knew there was a political, economic and social context to the question, and he sought a multi-faceted contextual answer to the question set out by Cabinet.

At the time there were many critics of my recommendations. Some said I had exceeded my terms of reference. I would concede, if pressed, that I gave them a liberal interpretation. But, as Emmett Hall told me at the time: “Tom, if they don't accuse you of exceeding your terms of reference, you haven't done your job.”669

665 Berger Report, supra note 8 at 1.
666 Hamilton, supra note 632 at 182.
667 Ibid., at 180.
668 D’Ombraint, supra note 12, at 89. Dodek also states that Chrétien had “a strong animus for public inquiries and, for the most part, succeeded in avoiding them” when Prime Minister: Adam Dodek, “Thanks, but no thanks” The National Post (27 October 2008).
669 Berger, One Man’s Justice, supra note 567 at 143
During the preliminary hearings the pipeline consortium attempted to limit the scope of the Inquiry, particularly with reference to Aboriginal land claims. Counsel for pipeline applicant Arctic Gas stated that determining terms of use in the proposed energy corridor would be no infringement on the rights of indigenous peoples “so long as the compensation for that use is paid to them if it is determined they have rights.” He insisted that since the question of land claims was not explicitly included in the Inquiry’s order-in-council, it should not be included in the proceedings. The submissions by interveners at the preliminary hearings made it apparent that Aboriginal organizations sought to make submissions regarding land claims before the Inquiry. Indeed, every Aboriginal organization that appeared at the preliminary hearings took the position that no right of way should be granted for the pipeline until their land claims were settled. To Arctic Gas, this represented an unwelcome and unacceptable expansion of the Inquiry’s terms of reference.

Chrétien was appointed President of the Treasury Board after the Inquiry began. Judd Buchanan succeeded him as Minister of Indian Affairs. Criticism of Berger’s perceived expansion of his mandate should perhaps have been directed at Indian Affairs. Archival records show that the Minister and Deputy Minister of Indian Affairs met with Berger in August of 1974 and indicated that they were looking to the Inquiry to bring credibility to their efforts to settle land claims and also to provide guidance in determining how to settle land claims. A few months later, however, Buchanan sought to limit Berger’s exploration of Aboriginal land claims in the Inquiry:

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671 In a letter from Berger to Chrétien dated 13 August 1974, Berger congratulates Chrétien on his appointment as President, Treasury Board and thanks him for his work as Minister, Department of Indian Affairs and Northern Development (DIAND), particularly for funding native organizations that will enable them to “develop leadership of native people by native people for native people”, and for “persuading the Federal government to recognize the Aboriginal rights of our native people. It has always seemed to me that this lay at the heart of developing a policy in native affairs that would take us beyond the welfare state and enable our native people to strike out in new directions on their own.” Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 - 6 Correspondence with the Department of Indian Affairs and Northern Development [file] #1 1974-1975 [Folder two of two]).

672 Memo from Ian Roland to Stephen Goudge regarding various matters on inquiry (30 August 1974), Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977, vol. 73, Subfile: Re Cameron, Brewin and Scott – General Office file) at 3:
I suggest you make the native associations aware of the limitation and purpose of your hearing in the claims question so that they will not be tempted to devote most of their energies to pursuing claims matters before your Inquiry.  

Buchanan was no doubt addressing the first set of Preliminary Rulings in which Berger discusses the scope of the Inquiry. In that section, Berger addressed the submissions made by the parties with respect to native claims. He stated that the order-in-council did not limit him to a review of the Pipeline Guidelines and Arctic Gas’s plans to meet them. Rather, he was required to consider the social, economic and environmental impact of the construction of a pipeline, which he said required consideration of the position argued by the indigenous organizations with respect to government policy. This meant taking the Inquiry beyond the Pipeline Guidelines and the requirements the government might impose on Arctic Gas. Berger noted that he made no determination as to whether the indigenous position was well-founded, but rather decided that it was a position they were entitled to present to the Inquiry.

Less than a fortnight after receiving Buchanan’s letter seeking to limit his mandate with respect to Aboriginal claims, Berger issued his second set of Preliminary Rulings. In them, he acknowledged that it was not for the Inquiry to decide upon the legitimacy of Aboriginal land claims. However, given that the position of the Aboriginal organizations was that their land claims must be settled before a pipeline could be built, Berger stated that the pipeline supporters should have an opportunity to show that the pipeline could be built without prejudice to the Aboriginal land claims. Accordingly, he decided that the Aboriginal

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The Judge also talked to me about the land claims issue. Apparently he had lunch yesterday with the Minister and Deputy Minister of [DIAND]; who are committed to settling the Native land claims and are looking to the Inquiry for two reasons:

1. To give credibility to land claims issue;
2. To determine how the land claims should be settled.

The Judge therefore intends to get into this whole issue in a big way, and he therefore wants evidence like the following: [lists evidence wanted like maps with traplines, hunting, fishing areas, to show native land use].

673 Letter from Judd Buchanan, Minister, Department of Indian Affairs and Northern Development, to Berger (18 October 1974), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 - 5 Correspondence with the Department of Indian Affairs and Northern Development [file] #1 1974-1975 [Folder one of two]) at 4.


675 Ibid. at 164.
organizations should indicate the nature and extent of their land claims. Berger’s expansive interpretation of the mandate illustrates another way in which he consistently asserted the Inquiry’s independence from the government.

**Operations**

As discussed in Chapter One, the ability of a public inquiry to fulfill its social function depends in large measure on the process used by the commissioner to implement the inquiry’s mandate. The major innovations of the Berger Commission are found in how the Inquiry operated. The usual settings and format for a public inquiry were altered to fit Berger’s vision for the commission. However, he was able to work within the form of an established legal mechanism to achieve broad results, in large part because of how he shaped the process itself. Aspects of the operations that showed significant innovations are discussed below.

**Hearings**

Berger understood that you cannot move into the future without knowing the past. In order to know what effect a pipeline would have, he needed to know what it would affect. He needed a picture of the context. This would mean hearing from experts in biology, geology, and pipeline construction. It would also mean hearing from the people who had long lived on the land through which a pipeline would pass.

**Preliminary Hearings**

Berger’s innovative approach to running an Inquiry was evident from the beginning, when he sought input from the parties on practice and procedure for the Inquiry. After his appointment, Berger wrote to Arctic Gas, the governments of the Northwest Territories and the Yukon, Aboriginal organizations, environmental organizations and the Northwest

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Territories Chamber of Commerce and the Northwest Territories Association of Municipalities to advise them of the Inquiry and to request their submissions as to how the Inquiry should be conducted. He then held preliminary hearings in April and May of 1974 in Yellowknife, Inuvik, Whitehorse and Ottawa to hear submissions from interested parties with respect to determining the scope and procedures of the Inquiry. Various stakeholders made arguments with respect to the timing of the Inquiry, funding of interveners, access to government and industry information, location and type of hearings, and the nature of the terms of reference and the order-in-council.

During the preliminary hearings, the Aboriginal and environmental organizations were clear that they required more time and resources to prepare for the Inquiry’s main hearings. Meanwhile, Arctic Gas argued that the hearings should be expedited due to the parallel attempt by El Paso Natural Gas Company to seek permission from the United States Federal Power Commission to build a pipeline for gas from Prudhoe Bay across Alaska. The concern was that if El Paso received approval ahead of the Mackenzie Valley inquiry process being complete, Arctic Gas’s pipeline proposal would no longer be economically viable. The Northwest Territories Chamber of Commerce and the Northwest Territories Association of Municipalities stated that they would need funds to facilitate their participation in the main hearings. Another major issue raised amidst the thirty-seven submissions was the need for rules of disclosure with regard to production of information possessed by government, industry and all interested parties.

Berger issued rulings on July 12, 1974 and October 29, 1974 that defined his mandate and set out procedural matters for the Inquiry’s operation. These rulings defined the parties to the Inquiry, set out the timeline for the commencement of hearings, provided rules of disclosure for relevant information, and allowed for intervener funding. His decision not to rush the process was supported by one of the men he greatly admired, Justice Emmett Hall:

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678 Knowles & Waddell, supra note 634, at 3.
From every standpoint you appear to have undertaken a project of vast implications and one that will take some time to accomplish. I think you are absolutely right in not rushing the matter merely to accommodate the Pipeline Project people.\footnote{Letter from Emmett Hall to Berger upon receipt of Berger’s Preliminary Rulings (26 August 1974) Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977, vol. 73, subfile General Correspondence).}

In his Preliminary Rulings, Berger decided that there would be “Formal Hearings” with testimony and cross-examination of expert witnesses from all parties. In addition, there would be more informal “Community Hearings” to enable the people living in each of the various Mackenzie Delta, Mackenzie Valley and Yukon communities likely to be affected by the pipeline to inform the Commission of their views on the proposed pipeline.\footnote{Knowles & Waddell, supra note 634, at 3-4.}

\textit{Formal Hearings}

The formal hearings were held in Whitehorse, Yellowknife and Ottawa, beginning on March 11, 1975, although overview hearings began on March 3, 1975 with opening statements from the parties and presentations by experts on general subjects of interest to the Inquiry that did not require cross-examination.\footnote{Berger Report, supra note 8, vol. 1, “Appendix: The Inquiry and Participants”, at 203.} Commission Counsel presented these witnesses and they provided general evidence about the geography, history, culture, flora, fauna, climate, terrain, resources, geology and economy of the Mackenzie Valley and the Western Arctic.\footnote{Berger Report, supra note 8, vol. 2, “Appendix 1: The Inquiry Process”, at 226.}

Although Berger “made it clear that he wanted all evidence presented in language that could be understood by laymen”,\footnote{Page, supra note 531, at 155 [footnote omitted].} the formal hearings were conducted in the way that public inquiries are typically conducted. One observer noted that they looked much like a trial: “with lawyers from each side and technocrats from each side and cross-examinations and witnesses struggling against a tide of jargon and obfuscation.”\footnote{O’Malley, supra note 582, at 23.} Experts testified and were cross-examined by counsel for the other parties. The hearings were held in formal settings such as hotel meeting rooms. All the parties were represented (though not all by lawyers) and
all had the opportunity to call their own expert witnesses and to cross-examine those of other parties. In these ways, the formal hearings resembled many other public inquiries. One difference was that the hearings were translated into local languages, though sometimes this was challenging, as noted by interpreter Tadit Francis: “It is a tongue twister,” he said. “You’ve got to have some sort of visual way to say it. There is no way I can explain natural gas and gasoline for the people. There is no word for natural gas.”

These hearings were divided into four phases: (1) Engineering and Construction of the Proposed Pipeline, (2) Impact of a Pipeline and Mackenzie Corridor Development on the Physical Environment, (3) Impact of a Pipeline and Mackenzie Corridor Development on the Living Environment, (4) Impact of a Pipeline and Mackenzie Corridor Development on the Human Environment. There are 32,353 pages of transcripts in 204 volumes from the formal hearings, in addition there are 906 exhibits. Most public inquiries would be satisfied that the relevant information necessary for fulfillment of their mandate could be

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687 Ibid. at 72.
688 Information in this section is drawn from the Berger Report, supra note 8, as well as O’Malley, ibid. at 118.
689 These hearings addressed issues such as pipeline size, location, and timing of construction. Engineering experts testified with respect to how to bury a pipeline in permafrost, transport chilled natural gas and cope with frost heave and river crossings.
690 This phase included hearings on the effect of permafrost, river crossings, slope stability and the impact of pipeline construction on land, air and water. Experts addressed issues such as revegetation, snow roads, gravel pits, and aircraft strips.
691 These hearings addressed the impact on plant and animal life, the impact of the construction and operation of a pipeline on whales, birds, fish, caribou, moose, reindeer, bears – on rare and endangered species such as the golden eagle and peregrine falcon.
692 In this phase, the Inquiry heard evidence regarding social and economic impact of pipeline construction. Evidence on the social impact included testimony regarding expected increases in crime, violence and sexual exploitation in communities along the pipeline construction route, impacts on health and health services, welfare rates, and alcohol use. Berger also heard evidence about social inequalities between indigenous and non-indigenous residents of the North. He commented upon the loss of self-esteem among indigenous peoples related to the pervasive social problems catalogued before the Inquiry: Berger Report, supra note 8, vol. 1, at 159. Evidence on the economic impact included information on the traditional economy – reliant upon hunting, trapping and fishing – as well as the industrial-based economy. “On the first day of the fourth phase, oil and gas experts were talking about great career opportunities for natives if the pipeline is built along the Mackenzie Valley”: O’Malley, supra note 582 at 118. Anthropologist Peter Usher testified with respect to the fur trade and the renewable resource economy. This phase also contained “controversial” evidence introduced by the Indian Brotherhood of the Northwest Territories: Hamilton, supra note 632 at 194. This evidence (referred to by critics as having “militant” overtones: Stabler & Olfert, supra note 550 at 382) included that of political economist Mel Watkins. Gray states that some southern advisers were brought in to testify in furtherance of a vision for a northern Marxist state: Earle Gray, Super Pipe: The Arctic Pipeline, World's Greatest Fiasco? (Toronto: Griffin House, 1979), at 174ff.
obtained from the formal hearing process. However, Berger thought that important information could be gleaned from other sources in addition to the formal hearings.

In his opening statement to the Inquiry on March 3, 1975, Commission Counsel Ian Scott echoed Berger’s opening remark that the Inquiry was unique in Canada’s history, and pledged openness in its process:

> A great judge of the territory once said that justice must be taken to every man’s door and that to a marked extent has been the watchword of our preparation as your counsel. The inquiry will be long; it will be detailed; it will be arduous. But we pledge that it will be open.\(^{694}\)

Pierre Genest, counsel for Arctic Gas, stated the “hard facts” that many northerners no longer wish to live off the land and that there is not enough industry to sustain the population without further economic development.\(^{695}\) Glen Bell, counsel for the Indian Brotherhood stated that the issue would be a struggle between different concepts of economic development: the pipeline companies represented a “colonial” philosophy of development, while opposed to that was a “‘community’ philosophy of development as exemplified by the native land claim.”\(^{696}\)

From the beginning, it was apparent that the visions of the North held by each party would be sought and that they would be expressed. It was also clear from the beginning that Berger had ideas about how the legal process could be used to facilitate this expression. He showed that the framework of a public inquiry is actually quite flexible and can be tailored to the situation at hand.

**Community Hearings**

Berger decided that the people living in the proposed pipeline corridor should have “an opportunity to state in their own languages and in their own way their views about the gas

\(^{694}\) O’Malley, *supra* note 582 at 1.


pipeline and the development that it will inevitably bring in its wake.”\textsuperscript{697} This decision to expand hearings to the community “was absolutely unheard of in the history of government commissions.”\textsuperscript{698} To that point, public inquiries would typically have been held in Ottawa or a major centre. They would have been formal, and conducted more like a courtroom than a public meeting. Berger’s decision to hold community hearings was an innovation. Although he did hold hearings in major centres such as Yellowknife, he also took the commission on the road to every community in the Western Arctic. He held hearings in log cabins, village halls, beside rivers, and in hunting and fishing camps.\textsuperscript{699} There are 8,438 pages of transcripts in 77 volumes and 662 exhibits from the community hearings.\textsuperscript{700} The first community hearing was held in Aklavik in early April 1975 and the last in Detah in August 1976.\textsuperscript{701}

Further, Berger signaled that the community hearings were not somehow “lesser” hearings than the formal hearings. He stated that he wanted indigenous people to “bring their whole experience before the Inquiry” in order to advise him on the impact of industrial development on the land, environment and wildlife, and that this experience would not only be appropriate to hear in the community hearings, but would also be valuable in the formal hearings: “It is my conviction that the formal hearings and the community hearings should be regarded as equally important parts of the same process, and not as two separate processes.”\textsuperscript{702} Not only did the community hearings provide Berger with the candid views of the people who lived along the proposed pipeline route about the pipeline proposal, they also provided valuable information about subjects covered by experts at the formal hearings: “In many cases it was the native people, not the scientists, who knew well the habits of whales or other animals upon which they depended for living.”\textsuperscript{703} Berger also invited pipeline company representatives to accompany him to the community hearings in order that they would gain

\textsuperscript{697} Knowles & Waddell, supra note 634, at 160.
\textsuperscript{698} Hamilton, supra note 632 at 187.
\textsuperscript{699} CBC News, “In Depth”, supra note 7; Berger interview #1, supra note 214.
\textsuperscript{700} Berger Report, supra note 8, vol. 1, “Appendix: The Inquiry and Participants”, at 203.
\textsuperscript{701} Ibid.
\textsuperscript{702} Berger, “Preliminary Rulings I”, supra note 662 at 161.
\textsuperscript{703} Lewis Auerbach, “The Berger Report Sets an Important Precedent in Assessing Technology's Effects” in Keith & Wright, supra note 42, 128 at 129. See also Page, supra note 531 at 113, who notes that the testimony at community hearings included details about hunting and trapping that supplemented the testimony by biologists that Berger heard at the formal hearings.
an understanding of the communities that their proposal would affect. Berger understood that formal legal processes tend to exclude voices unrepresented by counsel and they tend to create a hierarchy of information. In the realm of legal actors, sworn testimony in the courtroom is weighted more heavily, and thus in a sense valued, above unsworn submissions before a public inquiry. His insistence on valuing the formal hearings and the community hearings equally is therefore innovative.

Berger appointed Professor Michael Jackson, a law professor at the University of British Columbia, as his Special Counsel for Community Hearings. Jackson created a committee of the counsel and representatives of interested parties to determine the format of the community hearings. One issue the committee had to negotiate amongst the interested parties was the cross-examination of witnesses. The object of the community hearings was to encourage testimony, and there was a concern that participation would be affected if witnesses were going to be cross-examined by counsel. The committee addressed the concern in several ways, one of which was to invite representatives of the pipeline companies to make a presentation to the Inquiry if it appeared that witnesses were misinformed or if the companies thought there was a mistaken view of their proposals. This enabled the Inquiry to balance the parties’ interests with the comfort level of the community members without formally restricting the right to cross-examination. Berger expected that the format might differ depending on the community. In any event, the community hearings were to avoid being adversarial:

I have wanted the people in the communities to feel that they can come forward and tell me what their life and their experience leads them to believe the impact of the pipeline will be. I don’t want them to worry about lawyers asking them questions or tripping them up.

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705 Ibid.
706 Berger, “Preliminary Rulings II”, supra note 676 at 224.
707 Thomas Berger, Speech at Southern Alberta Institute of Technology graduation exercises in Calgary (20 September 1975), reproduced in Knowles & Waddell, supra note 634, at 232. Stephen Goudge recalled that, as assistant commission counsel, he attended less than half of the community hearings “just at the back of the room”; there were very few lawyers there and they made a conscious effort that the community hearings would not be lawyer-driven: Interview of Stephen Goudge (6 November 2008) Toronto, ON [Goudge interview].
The process of testifying was already foreign, given that many people did not speak English and were testifying through interpreters, so Berger adopted a flexible approach to admissibility of evidence. He saw that the rules required in civil and criminal trials are not necessary at a public inquiry. Rather, “[w]hat is essential is fairness and an appropriate insistence upon relevance.”

As Special Counsel for Community Hearings, Jackson was tasked with going to live in the Western Arctic for several months in advance of the commencement of the hearings in order to have a sense of the appropriate way for the Inquiry to proceed. Chief George Kodakin of Fort Franklin had requested at a preliminary hearing that Berger live in his village for six months in order to understand the peoples’ perspective. Berger sent Jackson in his stead. Jackson lived in Fort Franklin with his wife and child for three months in advance of the hearings. Jackson organized the community hearings and timed them to avoid conflict with local activities on the land. He then traveled to the communities ahead of the Inquiry reaching them in order to educate the population about the pipeline proposal and the inquiry process. Aboriginal organizations, chambers of commerce and community representatives also visited the communities in advance. Outreach workers from the Aboriginal organizations “explained pipeline issues from permafrost damage and threat to game to the impact on land claims. For the first time, the elders who spoke no English were made aware of the true implications of a megaproject.” While engineering problems dominated the formal hearings in Ottawa and Yellowknife, political and social issues were aired in the community hearings, including some confrontations, such as that in Good Hope between Bob Blair (Chief Executive Officer of pipeline applicant Foothills Pipe Lines Ltd.) and Chief Frank T’Seleie.

The Sah’tu chief, sitting shoulder to shoulder with Blair, told the Foothills boss:

There will be no pipeline because we have plans for our land. There will be no pipeline because we no longer intend to allow our land and our future to be taken away from us so that we are destroyed to make someone

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708 Letter from Thomas Berger to Drew-Ann Wake, supra note 704.
709 Swayze, supra note 568 at 145.
710 Page, supra note 531 at 112.
711 Hamilton, supra note 632 at 188-189.
else rich. There will be no pipeline because we, the Dene, are awakening; to see the truth of the system of genocide that has been imposed on us and we will not go back to sleep.\textsuperscript{712}

The Inquiry eventually visited every community in the western Arctic to hold hearings. Berger told each community that he would stay and listen until everyone that wanted to speak had been heard. In some places virtually everyone over 15 turned out.\textsuperscript{713} It was unprecedented to patiently give access to people unrepresented by counsel, on their timeframe, in such a manner. Indeed, not everyone had Berger’s patience for the pace of the community hearings. At a hearing in Inuvik, NWT, on February 16, 1976, Berger responded to a complaint about the hearing pace from a witness during a hearing on a Sunday afternoon. He noted that the inquiry was sitting mornings, afternoons and evenings, Saturdays and Sundays. He stated that the point of the Inquiry was to ensure that the government would have the information upon which to make an intelligent decision about the future of Canada’s North: “So let’s do it right and let’s not be stampeded into making a hasty and ill-informed judgment on a matter of great importance to the north and to our country”.\textsuperscript{714} Again, Berger was using a familiar legal mechanism in a way that may have been unfamiliar to people who appeared before him.

Inquiries are typically scheduled and formal affairs, with legal representatives making most of the submissions. The hearing transcripts captured and recorded the testimony of dozens of elders and community members of the North, creating an invaluable record for researchers and the public today. Their voices had not been heard previously and would not be heard today were it not for this rich archive. The Berger Inquiry has been “hailed as a major innovation in creating a new kind of public space for hearing from individual citizens and particularly from marginalized peoples”.\textsuperscript{715}

Both Page and O’Malley noted that Berger showed enormous patience throughout the community hearings, frequently sitting for twelve or more hours to hear often repetitive

\textsuperscript{712} Ibid. at 190.
\textsuperscript{713} Berger interview #1, supra note 214.
\textsuperscript{714} O’Malley, supra note 582 at 168-169, citing Berger’s response to witness Richard McNeely.
testimony, before adjourning and participating in a drum dance.\textsuperscript{716} The communities responded: “They crowded into the community halls and school gymnasiums and in Slavey, Dogrib, Chipewyan, Loucheux, Hareskin, Inuksuit, English and sometimes even French they put their fears and hopes on record.”\textsuperscript{717}

\textit{Hearings in Southern Canada}

In his October 1974 preliminary rulings, Berger announced his intention to hold hearings in major southern centres to enable southern Canadians who could not appear in the North to express their views.\textsuperscript{718} Hearings were also held in southern Canada throughout May and June of 1976, in ten cities from Vancouver to Halifax, including Calgary, Regina, Toronto, and Charlottetown, to enable people and organizations from southern Canada to participate. The Inquiry received many written submissions and requests to participate from southerners\textsuperscript{719} and four hundred briefs were submitted by individuals and groups that included priests, bishops, unionists, housewives, students, professors, company executives, politicians, doctors, Quakers, nuns, missionaries and organizations.\textsuperscript{720}

Though little new evidence was presented in the southern hearings,\textsuperscript{721} they attracted considerable press coverage: “Some described the southern swing as the political arm of the inquiry, a shrewd, deliberate attempt to strike a high profile so that the inquiry will be impossible to shelve.”\textsuperscript{722} The southern hearings served as a significant opportunity for public education about the issues facing the North. Berger himself described the southern hearings as a “traveling teach-in”.\textsuperscript{723} The hearings got under way in Vancouver at the Hyatt Regency Hotel ballroom, with nearly five hundred people in attendance. O’Malley wrote that Berger was surprised: “I expected a good turnout,” he said, “but I didn’t think it would be anything

\textsuperscript{716} Page, \textit{supra} note 531 at 113. O’Malley, \textit{supra} note 582 at 15.
\textsuperscript{717} O’Malley, \textit{ibid.} at 15.
\textsuperscript{718} Berger, “Preliminary Rulings II”, \textit{supra} note 676 at 224.
\textsuperscript{720} O’Malley, \textit{supra} note 582 at 229-230.
\textsuperscript{721} OECD & Nichols, \textit{supra} note 638 at 77.
\textsuperscript{722} O’Malley, \textit{supra} note 582 at 222-223.
\textsuperscript{723} Bregha, \textit{supra} note 629 at 118.
like this.” The media coverage generated by the southern hearings stimulated a “generally supportive attitude to the environmental and native rights concerns” expressed before the Inquiry and served to “[counter] the slick and expensive public relations campaign of the pipeline company to sell its project. Arctic Gas frequently complained that its critics got much better coverage than its own spokesmen.”

The southern hearings were also an opportunity for Berger to encourage social accountability amongst non-indigenous Canadians: it would be their gas and oil consumption that would drive the need for a pipeline in the Mackenzie Valley. These hearings served to raise awareness of the impact of their consumer and life choices on peoples they had never seen or spoken to prior to the Inquiry.

The media coverage received by the Berger Inquiry in the southern hearings was not by accident. The southern hearings were intended to raise awareness of the Inquiry and educate southern Canadians about the issues of the North. However, the southern hearings were later in the process. In fact, Canadians had already been told about the northern hearings in great detail because of unprecedented coverage accorded to the northern hearings.

**Media Outreach**

“We have sought to make this an Inquiry without walls.”

In addition to his innovative approach to hearings, Berger also broke new ground with respect to engaging the media to inform the public about the Inquiry’s work. His approach was that the Inquiry was a public inquiry not just in the sense that the public could attend its hearings, but also in the sense that it should inform the public who did not attend the hearings about its work. The information age was just beginning, and Berger engaged the media in an unprecedented manner:

There have been hundreds of royal commissions and inquiries since Canada became a nation, and Berger’s was neither the longest nor the most expensive.

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724 O’Malley, supra note 582 at 221.
725 Page, supra note 531 at 101.
726 Berger, “Preliminary Rulings II”, supra note 676 at 232.
But it was the first one in the age of Marshall McLuhan, the first to be planned and executed with the media in mind. Among other things, Tom Berger is one of the greatest communicators of his era.\(^\text{727}\)

Berger had a media strategy from the outset of the Inquiry, orchestrated by his Chief Information Officer, Diana Crosbie.\(^\text{728}\) Crosbie continuously contacted radio, television and print media outlets to provide information about the Inquiry’s progress. Commission Counsel were instructed by Berger to brief the editorial boards of major newspapers and maintain a good rapport with reporters.\(^\text{729}\) The *Edmonton Journal* and the *Globe and Mail* assigned writers to cover the proceedings on a regular basis. Crosbie and Michael Jackson spoke with Martin O’Malley of the *Globe and Mail* to convince him to come north to cover the community hearings. At the time, he was writing articles that shaped the news of the country. “We had to get him [to cover the hearings],” says Crosbie.\(^\text{730}\) They did get him, and he eventually wrote a book about his experience.\(^\text{731}\) Rather than grant interviews in the South once the Inquiry was underway, Berger would tell reporters that the Inquiry was in the North and they had to come north to see it.\(^\text{732}\) The idea was that the reporters would come and hear what northerners were telling him, and in turn report what they heard to the South.

Berger’s approach was that the issues before the Inquiry did not only concern northerners, but all Canadians. Accordingly, he thought that all Canadians should know what was going on in the northern hearings. Berger and Special Counsel Ian Waddell met with the Head of CBC Northern Service in Ottawa\(^\text{733}\) to arrange for the CBC Northern Service to cover the hearings not just occasionally, but each evening. Berger also wanted the coverage to be not

\(^{727}\) Hamilton, *supra* note 632 at 181.

\(^{728}\) Waddell interview, *supra* note 639.

\(^{729}\) Bregha, *supra* note 629 at 118. See also a memorandum from T. Berger to Ian Scott, Steve Goudge, Ian Waddell, Michael Jackson, and Diana Crosbie (28 January 1975) suggesting that witnesses could be interviewed post testimony “to liven up what might otherwise be pretty dull broadcasting” and suggesting that “counsel themselves might be interviewed … from time to time about what they are seeking to establish”. Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977 Textual records, box 72, subfile: CBC) [CBC subfile].

\(^{730}\) Interview of Diana Crosbie (21 November 2008) Toronto, ON [Crosbie interview].

\(^{731}\) O’Malley, *supra* note 582.

\(^{732}\) Crosbie interview, *supra* note 730.

\(^{733}\) Memorandum from T. Berger to I. Waddell, M. Jackson re: November 1, 1974 meeting with Andrew Cowan (5 November 1974), National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds), CBC subfile, *supra* note 729.
just in English but in the local languages so that information about the Inquiry would be received in the communities before Berger arrived so that all northerners would know what was being said (in their own languages) and what he was hearing. He gained agreement that the Northern Service would provide an hour of nightly primetime coverage in the Mackenzie Valley of the day’s hearings in English and for the first time ever, in the languages of the Western Arctic.\(^{734}\) A team of indigenous reporters covered the sessions: Louis Blondin in Slavey for middle Mackenzie Valley communities and Haressin for Fort Good Hope in upper middle Mackenzie Valley; Joe Tobie in Dogrib for lower Mackenzie Valley communities; Jim Sittichinli in Loucheux for Northern Mackenzie Valley communities and some communities in the Mackenzie Delta; Joachim Bonnetrouge in Chipewyan in Fort Liard; and Abe Okpik in Western Inuktitut dialect (Inuvialuktun) for Inuvialuit communities in Mackenzie Delta and Beaufort Sea and in Eastern Arctic Inuktitut dialect (Inuktitut) for Eastern Arctic communities - now in Nunavut.\(^{735}\) This extraordinary innovation did not find favour with the Yellowknife City Council, which heard a motion to condemn this use of prime time on the first night of the coverage.\(^{736}\) Berger also contacted the National Film Board about making a documentary about the Inquiry.\(^{737}\) Ian Waddell, Berger’s Special Counsel, produced a film designed to explain the Inquiry to southerners at the beginning of the southern hearings. It was innovative in 1975 to use a film to explain an inquiry to people.\(^{738}\)

\(^{734}\) Press Release, “MVPI – CBC Northern Service Coverage” (6 February 75), National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds), CBC subfile, \textit{ibid.}:

The CBC Northern Service will provide extensive coverage of the MVPI…. The plans are to cover the hearings from beginning to end, as fully as possible, in seven native languages and dialects as well as in English, on radio and television throughout the North. They will also be covered for the rest of Canada in English and French. The CBC regards the MVPI as a matter of major national concern because of the importance of the proposed pipeline to the whole of Canada and particularly to the people of the North.

\(^{735}\) O’Malley, \textit{supra} note 582 at 109; telephone conversation with Diana Crosbie (24 November 2009) [Crosbie conversation], and e-mail correspondence from Diana Crosbie (26 November 2009). See also Lyn Hancock, “CBC North Celebrates 35 Years” \textit{Above and Beyond Magazine} (30 April 2008), online: CBC <http://www.cbc.ca/aboriginal/2008/04/cbc_north_celebrates_35_years/>.

\(^{736}\) Berger interview #1, \textit{supra} note 214.

\(^{737}\) Letter from Thomas Berger to Sidney Newan, Commissioner, NFB (2 October 1974), National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds), CBC subfile, \textit{supra} note 729: Berger advises Newan of his appointment, of the Inquiry’s mandate, and asks him to consider if the NFB might wish to make a film about the issues coming before the Inquiry. He suggests such a film might be of use if it could be shown in the communities before or at the hearings in the communities. His stated concern is to enable people living in the Mackenzie Valley communities to participate effectively in the work of the Inquiry.

\(^{738}\) Waddell interview, \textit{supra} note 639.
The fact that the hearings were broadcast in indigenous languages as well as English also meant that other communities could hear that their views were not unique – virtually all of the indigenous participants opposed the pipeline and expressed concerns for its negative effect on their land, culture and people. Berger recognized the importance of engaging the media to convey the proceedings across the Western Arctic, but also in the rest of Canada. Every major news outlet in Canada covered the Inquiry, sending reporters to the community hearings, without ever having sent anyone north to cover anything before. Prior to the Inquiry there had been virtually no coverage of northern issues, either in print, on radio or television. For the first time, many Canadians saw footage of the North. Canadian Press assigned a reporter to the northern hearings and many news outlets in the country picked up the wire reports. Whit Fraser, assigned by Andrew Cowan of CBC Northern Service to organize their reporting of the hearings, was remarkable for assembling the team of indigenous reporters and setting up the schedule that would see them report in their languages each night. He also continuously filed reports to the southern CBC national desk for broadcast on national radio, and someone from CBC attended every day of the hearings. The extent of the media coverage across the country was completely unprecedented preceding the southern hearings, which were then widely covered as well.

The media strategy continued right through to the reporting stage of the Inquiry. The Report was sent under lock and key to financial capitals in the United States and to all Canadian capitals in advance for a simultaneous release. There was a lock-up in Ottawa to which all the national press gallery came, in order that they would be briefed to begin reporting as soon as the Report was released. The Report was released on a Monday in order that it would not compete in the news cycle with hockey playoffs then in progress, and it garnered a special two-hour program on CBC radio while CBC TV devoted an hour to its analysis that

739 Crosbie conversation, supra note 735. The rest of the paragraph relies upon this conversation.
740 In addition, camera man Pat Scott and technician David Porter were important members of Fraser’s team. Porter went on to become deputy premier of Yukon and founding chair of Northern Native Broadcasting Corporation. In 2002, he was elected Chair of the Kaska Dena Council. See First Nations Summit, “About First Nations Summit Executive”, online: <www.fns.bc.ca/about/d_porter.htm>.
741 Crosbie conversation, supra note 735.
742 Ibid.
same evening.\textsuperscript{743} In addition, it received front page press coverage and immediately became a best-seller that had to be reprinted only a few days after its publication.\textsuperscript{744} Crosbie’s phenomenal effort from the outset of the Inquiry to fulfill Berger’s vision of educating the wider public was successful: “no royal commission in Canadian history received such sustained media attention in spite of its remote location.”\textsuperscript{745}

The extraordinary attention paid to the Inquiry generated public interest in the pipeline proposals and in the North. The sustained media attention as well as the number and variety of participants in the southern hearings alerted government to the political currency acquired by the Inquiry:

The release of the Berger report brought into focus the split in the Cabinet over the northern pipeline. When the Berger Inquiry had been set up, the Mackenzie Valley pipeline had been received religion in Ottawa. The pipeline hearings had helped to change these attitudes. In fact, the media had an impact not only on the public but on ministers and civil servants too. They had read about the hearings in the Globe and Mail, they had heard reports on the CBC about the pipeline’s apprehended impacts, they had seen statements made on television by the native people in their villages and they had been affected by all these things. By the time the Berger report was handed down, many ministers and their deputies had moved a significant distance away from the consensus that had existed in 1974 in favour of the pipeline.\textsuperscript{746}

The need for an organized and sustained media strategy and its potential effectiveness is clearly demonstrated by the Berger Inquiry.

\textit{Independent Research}

When he announced the Inquiry, Jean Chrétien also assembled a Pipeline Application Assessment Group (PAAG), consisting of experts in different departments of the civil service

\textsuperscript{743} Bregha, \textit{supra} note 629 at 122.
\textsuperscript{744} \textit{Ibid.} A Press Release (27 May 1977) announces a second printing of 20 000 copies of the report has been ordered due to the first run of 24 000 copies selling out within days: Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977 Textual records, box 76, Mackenzie Valley Pipeline Inquiry Subfile: English Press Releases) [English Press Releases].
\textsuperscript{745} Page, \textit{supra} note 531 at 100.
\textsuperscript{746} Bregha, \textit{supra} note 629 at 126-127.
under the direction of Dr. John Fyles of the Geological Survey of Canada. PAAG’s mandate was to review the application of Arctic Gas against the Expanded Guidelines for Northern Pipelines. In its November 1974 report, PAAG identified and assessed major environmental and socio-economic effect and concerns that might arise from building a pipeline as proposed by the applicant. PAAG made multiple requests for additional information as to how the application would address various aspects of the Expanded Guidelines for Northern Pipelines.\(^{747}\) Berger further endeavoured to ensure public access to the evidence presented by the companies and other parties. He ordered that PAAG’s report be filed with the Inquiry and that it be made public. He also ordered that any requests for information by PAAG to Arctic Gas and any responses from Arctic Gas be made available to the public.\(^{748}\)

In a letter to Judd Buchanan, Minister of the Department of Indian Affairs and Northern Development, on September 30, 1974, Berger stated the importance of Dr. Fyles’ group to the Inquiry and requested their secondment to the Inquiry and the cooperation of other experts within the civil service as their work proceeded. He argued that their continuing participation was critical to a multidisciplinary assessment of the pipeline proposal, and in particular that their analysis of the pipeline applicants’ evidence was necessary for a full and complete inquiry. Berger stated that not only would their participation be in the public interest, the government would benefit from having a first rate team of experts on northern pipelines.\(^{749}\)

PAAG was disbanded upon completion of its report. Some members were then absorbed into the “Inquiry Appraisal Team” of government experts and independent advisers to advise commission counsel on technical aspects and details of evidence before the Inquiry and on

\(^{747}\) Pipeline Application Assessment Group, *Mackenzie Valley Pipeline Assessment: Environmental and Socio-economic Effects of the Proposed Canadian Arctic Gas Pipeline on the Northwest Territories and Yukon* (Ottawa: Department of Indian Affairs and Northern Development, 1974).

\(^{748}\) Knowles & Waddell, supra note 634 at 162.

\(^{749}\) Letter from Tom Berger to Judd Buchanan, Minister of the Department of Indian Affairs and Northern Development (30 September 1974), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, box 18 - file 6 Correspondence with the Department of Indian Affairs and Northern Development [file] #1 1974-1975 [Folder two of two]).
areas relevant but not presented on by other participants. According to Ian Waddell, Berger’s policy of openness was evident at the outset. During an initial meeting with the PAAG members, Berger told them what the Minister said to him about the arrangement regarding their research for the Inquiry. Waddell said you could see the surprise on their faces that they were being told anything from such a meeting – it was highly unusual to share such information but “that's how Berger did things”.

Berger also required that all reports be shared. As noted by Special Commission Counsel Ian Waddell, prior to the Inquiry, the pipeline companies had spent more than $50 million on engineering and socio-environmental studies conducted over five years. The government had spent $15 million. Universities had also produced a wealth of knowledge on issues relevant to the Inquiry. “We …tried to ensure that no study or report that dealt with the work of the Inquiry would be hidden from view” or, for that matter, that no such study would gather dust on a shelf. This requirement met with initial resistance from government and the pipeline companies, unaccustomed to the idea that information should be shared among all parties. At the preliminary hearings, Arctic Gas argued for limited disclosure. Expecting a formal type of inquiry, they sought to simply list studies and reports to accompany the testimony of each witness. But Berger stated in his Preliminary Hearings that he thought the most fruitful way to proceed would be to ensure that all relevant information would be available to all parties and to the Inquiry. He directed that all of the participants, including Arctic Gas, provide a list of all studies and reports in their possession or power relating to this Inquiry. Each party was then able to request whatever it wished from the other parties.

751 Waddell interview, supra note 639.
752 Ian Waddell, “Public Participation in Decision-Making – Commission of Inquiry: The Berger Commission” [undated paper], Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 – 8 Inquiry process [Folder one of three]). See also Knowles & Waddell, supra note 634 at 84.
753 Knowles & Waddell, supra note 634 at 228.
754 Ibid. at 85.
755 Ibid. at 228.
Berger also had subpoena powers to access necessary information. Thus the powers attributable to the public inquiry form would have enabled him to access information if it was not forthcoming to the parties. Berger generally created an atmosphere of open disclosure though that would not necessitate the use of such tools. Their use would tend to create an adversarial environment that would not complement Berger’s approach.

**Intervener Funding**

During the Inquiry’s Preliminary Hearings, the existence of PAAG prompted calls from public interest groups to have funding to mount their own assessments of the applicant’s assertions and evidence. They reasoned that the government and the pipeline consortium had an interest in seeing the project proceed, and independent research was necessary. Berger agreed, and secured funding for non-governmental organizations to hire researchers and experts to review the evidence. He applied five criteria in deciding whether to allocate funding. The potential intervener had to show that: (1) it had a clear interest that ought to be represented at the Inquiry; (2) a separate representation of that interest would make a necessary contribution to the Inquiry; (3) it had an established record of concern or demonstrated commitment to the interest they sought to represent; (4) it had inadequate financial resources to adequately present the interest; (5) it had to make a clear proposal on how it would use the funds and it had to account for the funds.

Berger wanted to ensure that he had access to all stakeholder communities, through oral and written submissions. He therefore acceded to requests by interveners for funding to assist

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757 Berger notes that: “There was at the time no precedent for funding interveners. I put these five criteria together on a flight to Ottawa and handed them to Mr. Chrétien; he went to the Treasury Board and obtained the funding.” Letter from Berger to Drew-Ann Wake, *supra* note 704.

758 It appears that Berger sought precedent from Australia with respect to his plan to provide funding to parties intervening at the inquiry. He wrote to Justice Ted Woodward, who conducted a previous inquiry into drilling in an ecologically sensitive area of the Great Barrier Reef, to request details about the funding of conservation groups to obtain legal and expert assistance to appear before the inquiry “in an adversary way against the oil companies”. He also inquired about Woodward’s then current inquiry into Aboriginal rights. “As you can see, the Commission I am undertaking really partakes both of some of the issues that no doubt you considered in the
them to prepare for and appear before the Inquiry. He explained his reasons for this as follows:

These groups are sometimes called public interest groups. I supposed that is because they represent interests that the public believes ought to be considered before a decision is made. They represent identifiable interests that should not be ignored, that indeed it is essential should be heard. They do not represent the public interest, but it is in the public interest that they should participate in the Inquiry.759

Environmentalists and other interested groups sought to participate in the hearings as well. As noted by Page, at that time the government had very limited environmental impact assessment processes. The Ministry of Environment was in its infancy and “the responsibilities for the northern environment were still retained by the pro-development Department of Indian Affairs and Northern Development.”760 Canadian Arctic Resources Committee (CARC), an Ottawa-based nonprofit environmental group, applied for intervener status and funding at the preliminary hearings. CARC had formed in the early 1970s and assembled experts in fields that included economics, law, engineering, Aboriginal rights, environment, and demography, to assess existing knowledge in order to identify priorities with respect to northern development.761 CARC’s organizers cited the limited quality of government and industry environmental assessment processes and “the need for an ‘honest broker’ in the process”.762 Berger directed CARC to establish a steering committee to represent public environmental interests under one budget. “Although this umbrella concept is often used today, it was a pioneering step then, for the first time allowing smaller voices to be heard through a professional, well-organized approach”.763 CARC was the only environmental group to appear before the Berger Inquiry, an intervention “made possible

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759 Berger, Corry Lecture, supra note 636.
760 Page, supra note 531 at 38.
761 Dosman, supra note 536 at 172.
762 Page, supra note 531 at 38.
763 Swayze, supra note 568 at 146.
only as a result of Berger’s decision to provide limited funds to parties who would not have been able to participate otherwise.”

The churches, that had long had a difficult relationship with the indigenous peoples of the North, also became involved. The harrowing tales of residential schools were just beginning to be told — indeed Berger spends a section of his report on the topic — and the churches were beginning to see that they had been an active participant and instrument of assimilation and colonialism. The churches founded the Inter-Church Project on Northern Development to co-ordinate their research and advocacy work. This coalition, called Project North, intervened vigorously on behalf of the indigenous communities that opposed the pipeline. Indeed, the coalition appeared before the Inquiry to stress that land claims must be settled before any pipeline or other energy projects proceed in the North. The coalition’s participation also had the effect of attracting interest from church members in the south of Canada, which helped to lay the groundwork for the hearings Berger held in the South.

As noted in Chapter Three, the involvement of civil society is a crucial factor in the success of a truth commission. For public inquiries, citizen participation would not have been common prior to the Berger Inquiry. Berger’s approach of allowing such participation opened up the prospect of a more open process for future commissions. Berger did not merely allow civic participation; he actively facilitated it. When the people who lived

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764 Bregha, supra note 629 at 194.
• It was a genuine effort to engage citizens in making critical decisions about their future (many of them were, of course, highly motivated);
• It provided the resources to ensure their views were heard;
• It provided the resources to research and prepare community evidence;
• It strengthened the communities that took part and contributed to their political empowerment;
• Its conclusions were not predetermined;
• The government of the day, for whatever reason, accepted the political risks of an open-ended process; and
along the proposed pipeline route learned that the Inquiry was coming, they requested time to organize and gain representation. Berger extended the timeline for the Inquiry to accommodate these requests. At the outset, both Indian Affairs Minister Chrétien and Berger had thought the Inquiry would be wrapped up in under a year. However, it was a year before it could even start because indigenous people who would be affected by the pipeline wanted time to prepare. Berger’s accession to requests for more preparation time, as well as to fund groups seeking to appear before the commission, facilitated unprecedented community involvement in a public inquiry. In addition to his other innovations to encourage participation: “he legitimized the practice of using state resources to fund disadvantaged voices that would not otherwise be heard.”

Not everyone agreed with the decision to provide funds to communities in order to level the playing field with “big oil”. This aspect of the Inquiry’s operation has been attacked. In the propaganda war that erupted as the Inquiry became increasingly well known, and the pipeline's approval became less certain, proponents of the pipeline accused the outside interest groups of manipulating the indigenous people for their own ends. Dene Nation leader Georges Erasmus, who noted that they hired advisers but that they made up their own minds, rejected this notion. Indeed, Berger noted that these allegations were not made by anyone who had actually attended the community hearings.

* The evidence provided to the Inquiry by the people of the North and others clearly influenced the government's eventual decision. And, of course, we shouldn't downplay the vital role Justice Berger himself played: as a proponent of an inclusive process and of funding for interveners, as a tireless and respectful listener, as a thoughtful adjudicator, and as an advocate for his conclusions.

768 See, for example, the transcript of James Wah-Shee’s testimony on 6 May 1974 at the Preliminary Hearings, in Knowles & Waddell, supra note 634 at 90.
769 Berger interview #1, supra note 214.
771 See Stabler & Olfert, supra note 550 at 382.
772 Hamilton, supra note 632 at 189-190. As noted by Gray, supra note 692 at 197, Berger addressed these accusations in the second volume of the Inquiry Report:

Such allegations, advanced in order to discredit the leaders of the native organizations, lose their force when measured against the evidence of band chiefs and band councilors from every community in the Mackenzie Valley and western Arctic, and against the evidence of the hundreds of native people who spoke to the Inquiry.

773 Thomas Berger, “Commissions of Inquiry and Public Policy” (Address to the School of Public Administrative, Carleton University, Ottawa, 1 March 1978), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, boxes 19-2, 71-9), at 18. Copy on file with author.
The Report

“[The Berger Report is] a charter of Indian rights, the best statement on native rights since the Europeans came to Canada.”

Berger’s Report, entitled *Northern Frontier, Northern Homeland,* was issued in April 1977 in Ottawa. It became the best-selling publication of the Canadian government and has been described as “an international classic on indigenous-white relations”, “a landmark in Canadian literature, clearly written, well organized, and often visionary”, and “ahead of its time”. “As a royal commission report, it is unique for its hundreds of photographs, its maps and diagrams, and its clear, eloquent prose.”

Unlike previous public inquiry reports printed on plain paper in black and white, its format was engaging and colourful. Its design has been likened to a “coffee table book” – the top of each page has photographs of people and places in the North who had been part of the Inquiry. No one had put photos in a Royal Commission report before and the format “helped ensure a wider readership and discussion of the Report than is usual for Royal Commissions”. In the introduction to the revised edition of the Report, Berger stated that he sought a way to bring Canadians to the North without them going there so they could understand the situation before him. The Report was designed to educate readers about the land, people and issues involved in the Inquiry; to show southern Canadians what the North looks like and who the people testifying were. It provided a clear picture of the places

See also Gray, *supra* note 692 at 197-198, for a 1978 interview with Michael Jackson, Special Counsel to the Inquiry, who remarked upon how the openness of the proceedings prevented such manipulation: “it’s very difficult to stage manage a whole village.”

780 Page, *supra* note 531 at 117.
through which the proposed pipeline would be constructed, of the terrain and the animals, and helped to make clear the scale of the proposed project. To make it accessible to all who might wish to read it, the Report was published in multiple indigenous languages, and Berger had a copy sent to each person who testified. The Report is the first to be simultaneously translated. So as not to delay its publication, Berger had translators working alongside him so that as he completed pages of the Report they went straight to the translators. According to Berger, *Le Devoir* called the French version of the Report “La poésie véritable.”

The Report was produced in two volumes. The first volume addressed the social, economic and environmental impacts that a pipeline and energy corridor would have in the Mackenzie Valley and the Western Arctic. The second volume set out recommendations for terms and conditions to be imposed if a pipeline were to be built. Volume One first described the North and its peoples before moving on to explain the corridor concept. The engineering challenges of building a pipeline along with the implications of its construction were set out. Environmental considerations, along with a discussion of wilderness preservation, and concerns with respect to the sensitivity of the northern Yukon and its inhabitants preceded a discussion of the Mackenzie Delta and the Beaufort Sea region. This explored the need to protect whale calving grounds and habitat, and offshore concerns such as oil spills. The Report then detailed the potential impacts on the Mackenzie Valley. Lengthy discussions of cultural, economic and social impacts for indigenous peoples and other northerners followed. Finally, Berger devoted a section to native claims to land, renewable resources and to self-determination. He explored the negative impact of residential schools, evident at that time, on the indigenous population.

Volume Two reviewed the technical evidence presented to the Inquiry in detail. Part One set out the social and economic concerns for northerners should a pipeline proceed. Berger described the need for balanced development. He assessed the renewable resource economy and its potential. He identified concerns with respect to labour demand and supply for pipeline construction and the implications of this for northern communities. Part Two

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782 Berger interview #1, *supra* note 214.
addressed the considerations necessary with respect to environmental protection of land and wildlife, having regard to sensitive terrain, noise pollution and water and air quality. Detailed information with respect to various animal species, fish and fowl was included. Part Three addressed considerations with respect to pipeline construction, including construction scheduling, geotechnical considerations (such as frost heave, thaw settlement, and slope stability), terrain issues (snow roads, drainage, erosion, blasting), river and stream crossings, and management of water, waste and hazardous materials. Aircraft control was addressed and proposals were made for project regulation and review. Part Four was an Epilogue that addressed the reaction to Berger’s views expressed in Volume One with respect to Aboriginal land claims.

Some lauded Berger’s Report as a landmark in the evolution of impact studies because of the openness of the Inquiry and the degree of public participation that was achieved. Critics, however, claimed that Berger’s Report favoured “nostalgic remembrances” by indigenous witnesses over economic “evidence” and further that the Report was “fraught with methodological errors, omissions of hard evidence, and the substitution of assertions for systematic investigation.” Perhaps predictably, given the recommendations in favour of indigenous arguments before the Inquiry, George Erasmus, president of the Indian Brotherhood, called the Report a great victory because the views of the Dene and the Inuit were heard.

Although he is criticized as having advocated for Aboriginal rights with the Report, Berger’s recommendations proposed a compromise solution. He suggested a ten-year moratorium on pipeline construction. He did not say that the pipeline could not proceed but rather that it could not proceed immediately. Time would be needed for additional assessments and in order to address the land claims asserted along the proposed route.

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785 Ibid., at 383, without citing sources.
786 Ibid., at 382-3 citing The Yellowknifer (26 May 1977).
In any event, the accessibility of the Report, both in format and due to its wide circulation, sets it apart from previous commissions of inquiry. The terrain covered by the two volumes is considerable, and much of it proved prescient with respect to issues that continue to be relevant today, such as land claims, wildlife and wilderness protection, climate change, and of course, residential schools. The Report can also be contrasted with later commission reports, notably that of RCAP, for its concise and readable format. RCAP’s five volumes spanned over 3,000 pages, while the revised edition of Berger’s Report is a small paperback of fewer than 300 pages. There is significant value in the dramatic and succinct commission report that can continue to educate the public long after a commission has shut its doors.

Role of Commission Counsel

The traditional role of commission counsel is to act as the legal adviser to the commission – to clarify any evidence that may be unclear and to provide personal legal advice to the commissioner. Berger changed this by making Commission Counsel Ian Scott independent of the Commissioner and his office, with the expectation that he would analyse the information that the parties were presenting before the Inquiry and determine where the gaps were. Scott’s job was to present evidence to fill those gaps and ensure that the Inquiry gained as complete a picture as possible of the situation. He could call his own witnesses and cross-examine any others if he deemed it necessary to do so.

At the Preliminary hearings, Scott set out the vision for his role as independent counsel. He said he intended to take an active role in ensuring that the Inquiry would be full and fair. He stated his intention to cross-examine witnesses, develop evidence and make submissions, and underlined his view that his submissions should not be weighted any more heavily than those

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788 See Page, supra note 531 at 101, who describes Berger’s decision to adopt an “American-style counsel” system and notes that “for some on the corporate side this interventionist approach was a disturbing deviation from the norm, for it increased their problems in protecting their witnesses”.
of other parties before the Inquiry. He emphasized that he saw his role as independent both of the Commissioner and of the other parties.  

Also unique was Berger’s decision to have Commission Counsel provide his report at the close of the formal hearings to all parties so that they would have access to the advice that Berger received from his staff. The report was provided at the close of formal hearings in October 1976, to afford the other parties the opportunity to comment upon the report during their closing arguments scheduled for a further week of hearings in mid-November. Berger was clear that counsel’s recommendations were not binding upon him. According to an Inquiry press release: “Judge Berger said, ‘I want Mr. Scott’s best judgment of the evidence but I am not bound in any way by what Mr. Scott and his staff propose.’” After the hearings had ended and Berger embarked upon writing his report, he commented upon his decision to have Scott publicly present his report:

> My direction to Commission Counsel to make public the advice that he and his staff proposed to give me, was I think a good idea. It exposed the weaknesses, where they existed, in the staff’s submissions. What is equally important, it forced everybody else to concentrate a little harder on just what they really did think about the proposed pipeline and related issues.

Berger showed that commissioners can shape and define the role of commission counsel to assist them in novel ways, and to fulfill an independent role if applicable.

**Effect of Lawyers on the Inquiry’s Operation**

The way in which Berger brought innovation to the role of commission counsel leads to a larger point about the involvement of lawyers in the Inquiry. It is precisely because Berger was a lawyer and a judge that he was able to see how the role of commission counsel could be adapted to increase the fairness of the process. Further, given his background as an

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790 Bregha, *supra* note 629 at 119.
792 Letter from Tom Berger to Stu Hodgson, Commissioner, Government of Northwest Territories (2 December 1976), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 18 - 4 “Commissioner's Correspondence 1975-1976”) [Commissioner’s Correspondence].
Aboriginal rights litigator, Berger was uniquely qualified to take the Berger Inquiry in the direction that he did. But not every lawyer or every judge will grasp the limitations of various legal mechanisms in the way that Berger did. As discussed throughout this dissertation, leadership matters. The Berger Inquiry would have been very different had it not been headed by Berger:

[W]e shouldn't downplay the vital role Justice Berger himself played: as a proponent of an inclusive process and of funding for interveners, as a tireless and respectful listener, as a thoughtful adjudicator, and as an advocate for his conclusions.

While the government of the day knew that Aboriginal issues would come into play during the Inquiry it appears obvious now that they never anticipated the direction in which the Inquiry would go. Even though they selected Berger as a commissioner with full knowledge of his background they clearly got more than they bargained for. Chrétien believes Berger took away the indigenous peoples’ bargaining chip by recommending against a pipeline: “I warned Berger about it … but he got carried away with being a lawyer and a judge.” This comment reveals a difference in how a politician may view the role of a commissioner from how a legally trained person might view it. Chrétien sought an answer that was pragmatic in political terms, while Berger pursued an answer that accorded with his sense of justice.

Why was Berger picked to lead the Inquiry? “Asked that question today, Chrétien just shakes his head angrily and admits he made a very bad mistake.” Berger acknowledges, in retrospect, that his life experience informed his actions as commissioner: “the views of

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793 Russell, supra note 210 at 38 notes an apt comparison between Berger and Justice Woodward in Australia: Like Berger, who had represented the Nisga’a in the Calder case, Woodward, as legal counsel for Milirrpum and other Yolngu people in the Cape Gove case, had learned a good deal about the traditional relationship of native people to their land and the impact of industrial development on native societies. He knew how difficult it would be to find the instruments through which the views of traditional land owners could be authentically expressed. The very concept of ‘owning land’ was alien to the culture of Aboriginal peoples in the Northern Territory.

The two judges corresponded about their respective inquiries, both evidently seeking a way to decrease the legal formalities of the proceedings.

794 Puxley, supra note 767 at 11.

795 Swayze, supra note 568 at 159.

796 Hamilton, supra note 632 at 180.
judges, like those of everybody else, reflect their life experience”.

Had the government chosen a different person as commissioner, the Inquiry would have been conducted differently. There is no question that Berger’s ideas, experiences and integrity shaped his work as a commissioner.

As noted by O’Malley:

Many who followed the inquiry say the process of the inquiry is more important than any final report. Already there has been considerable consciousness-raising in the north, and in the south about the north. It has become an inquiry that won’t go away, that won’t turn gray. What makes it so irritating for those who wanted to cool the situation is that after nearly two years with the inquiry the judge’s credibility is as solid as ever. He guards it jealously, always avoiding useless controversy, measuring his words, tactfully complimenting the federal government on its wisdom in setting up the inquiry.

This comment that the process is more important than the final report is certainly instructive for current and future commissions. It displays the importance of structuring a commission in a way that reaches toward fulfilling its goals. The inquiry process itself is a malleable one that allows for scope that is unavailable to a courtroom judge or to a politician or even to a negotiator. Berger prominently featured the “public” element of the public inquiry through the process he chose to use. As a courtroom lawyer he keenly understood the advantages and the limits of an adversarial forum and chose elements of that process for the technical hearings.

He also understood that in a judicial setting, the judge often receives only the

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797 Berger, *One Man’s Justice*, supra note 567 at 143.
798 Berger’s background as a union-side labour lawyer also formed part of his views:
… I appreciate your speaking up for the Inquiry. I hope that we can demonstrate by the time the Inquiry is over that this is the best way to go about determining the impact of large scale development on the frontier.
I know that some trade union leaders … are hostile toward the native people, because their demonstrations and road blocks and so on are interfering with the lives and the work of trade unionists.
What [they] forget is that the native people in a sense are where the trade unions were twenty-five or thirty years ago. I suppose they feel they have to shake things up to get anywhere at all.
Letter from T. Berger to S. Hodgson, Commissioner, Northwest Territories (23 July 1975), Commissioner’s Correspondence, supra note 792. According to Berger, Stu Hodgson was well-known in the British Columbia labour movement before becoming Commissioner of the Northwest Territories. Hodgson was the secretary-treasurer of IWA Local I-217, the union to which Berger belonged when he worked at the North Vancouver sawmill during his summers at university. As mentioned above (see note 572 and accompanying text), after he was called to the bar, Berger occasionally represented Local I-217, and got to know Hodgson: correspondence from Berger to the author (8 October 2009).
799 O’Malley, *supra* note 582 at 8.
800 According to Ed Weick, Socio-Economic Advisor to the Berger Inquiry, the public inquiry is still modeled on the adversarial process of the courtroom, but Berger “was able to make the adversarial process work for him precisely because he knew its flaws”: Ed Weick, “The Mackenzie Valley Pipeline Inquiry and the Methodology
information that the parties choose to put before him or her. The evidence is shaped and determined by the parties to the matter. In a criminal trial, the victim has no official role in the case (unless called as a witness). In a civil case, other parties that may be affected must apply for standing or intervener status in order to be heard. Berger saw the needs of a public inquiry as distinct from those of a court, and noted that the need for strict observance of evidentiary rules in trials was not the same in an inquiry: “A too rigid observance of the legal rules of evidence can squeeze the life out of the evidence. … What is essential is an appropriate insistence upon relevance.”

Still, the Inquiry was run by a judge and staffed with a team of lawyers. The parties were all represented, for the most part by lawyers. O’Malley, who covered the Berger Inquiry for the Globe and Mail, began his book about the experience with the first day of the Berger Inquiry hearings in Yellowknife on March 3, 1975, and the prominent role that lawyers played, describing the opening submissions of the three lawyers – “all from Toronto” – who framed their approaches to the issue before the Inquiry. As described above, these were Commission Counsel Ian Scott, Arctic Gas counsel Pierre Genest, and Native Indian Brotherhood counsel Glen Bell.

Nonetheless, with regard to the community hearings, Berger was clearly concerned with ensuring a non-adversarial environment for testimony: “The object is to give the people, native and white, an opportunity of expressing their concerns without worrying about what they might well regard as harassment by lawyers.” For the time, Berger displayed an unusual level of understanding of what is now referred to as “access to justice”. This generally manifests itself in the financial inability of interested parties who are not large corporations or government to participate in a legal proceeding. In explaining his efforts to gain intervener funding for public interest groups, Berger stated:

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801 Berger, Corry Lecture, supra note 636 at 12, 14.
802 O’Malley, supra note 582 at 1.
803 Berger, Corry Lecture, supra note 636 at 12, 14.
I suppose all this sounds very legal. But the fact is that we have sought to avoid turning the Inquiry into an exclusive forum for lawyers and experts to do their thing. Unless you let outsiders in, an Inquiry can become a private, clubby kind of proceeding.  

The Inquiry took place at a time when public interest advocacy centres, government sponsored court challenges programs, or constitutional rights to legal aid were not yet well-established. Community legal assistance and legal aid were still relatively new. Indeed, his Special Counsel, Ian Waddell, was working in British Columbia’s first community legal assistance office when Berger asked him to work on the Inquiry. Berger was aware that the parties to the Inquiry who were not well-versed in the law would require some advice on how to prepare their submissions for the Inquiry. At the close of phase I of the Inquiry, he advised the participants to prepare a written list of terms and conditions at the end of each phase that they intended to urge should be imposed if any right of way is granted. He stated that these terms and conditions should be supported by written argument and advised them on the importance of providing appropriate references to the evidence that supported their submissions. He noted that he had instructed Commission Counsel and his staff to follow this procedure, and recommended it to all the parties: “It is, I think the fairest way to proceed and the most useful to me; it may even lead to agreement on all sides on certain terms and conditions.”

Another aspect of the impact of Berger’s legal background in Aboriginal law came into play with respect to his interpretation of his mandate. As noted in Chapter One, the Berger Inquiry “illustrated how the language used, in the mandate or by the Commissioners, could expand or delimit the problem to be addressed.” Berger would have known, from his extensive research to prepare the Calder case on Aboriginal title and sovereignty that the wording of the order-in-council would itself have been controversial for indigenous people who would dispute that the land in question was “Crown land”. A commissioner without his

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804 Ibid. at 11.
806 See discussion of the Inquiry mandate, above, at note 658 and accompanying text.
807 See text accompanying note 6, above.
808 Salter, “Two Contradictions”, supra note 13 at 181.
background in Aboriginal law would not have even questioned the assumptions implicit in that wording by the government.

Berger also had a canny ability to navigate the political side of the Inquiry due perhaps to his background as a politician.\footnote{Waddell interview, supra note 639.} His southern hearings were considered a master stroke in the public relations aspect of the Inquiry’s success. His deal to ensure significant daily media coverage was also a savvy move to keep the Inquiry in the public realm. With southerners and northerners engaged in the process and the media reporting on it throughout the life of the hearings, the political players were loath to ignore it. The public response meant that their political representatives could not afford to ignore it.

His Report bears the hallmarks of good legal writing – his points are made with clarity, persuasively backed up with evidence:

The fine legal distinctions that are the everyday tools of the courtroom lawyer and jurist were present in that opening paragraph of the first volume: from the very start, Berger drew a sharp distinction between the rights of the indigenous population and the privileges of the whites in the North. He drew attention to the “homeland” of the Dene, Inuit, and Métis and to the “home” of the “white people who live there.”

Berger started most of his chapters with brilliantly written essays providing overviews of whatever subject he was considering. He went far beyond pipeline questions: his vision encompassed the future of Canada as a whole. Often he was analytical; sometimes he was argumentative; once in a while he was didactic. The report thus became a tour de force dealing not only with the use of natural and manufactured resources, but also with the motivation behind approaches to human and economic rights.\footnote{Hamilton, supra note 632 at 193-194.}

And, as noted by Bregha, by splitting his report into two volumes, Berger reserved for himself the right of rebuttal.\footnote{Bregha, supra note 629 at 122.} This is particularly evident in his Epilogue to Volume Two in
which he essentially defends himself against criticisms of his exploration of Aboriginal land claims in Volume One.  

Although the confluence of events in the 1970s with respect to the energy crisis, Aboriginal rights and minority governments had a strong hand in shaping the choice to hold an inquiry (and indeed, in the choice of commissioner), the man himself, shaped by his legal training and experiences, had the most impact on the way the Inquiry ultimately went. Further, Berger’s choices of commission counsel were, in retrospect, extraordinary. All four of his counsel went on to have careers of significant public service, and clearly the Berger Inquiry had a profound effect on them. Issues that came to prominence at the Inquiry weaving through the fabric of the men’s careers – in how they conduct future inquiries, in how they contribute to public life, in decisions one pens as a judge – and through the Canadian legal framework.

When Berger appointed Toronto lawyer Ian Scott as Commission Counsel, Scott had already been commission counsel on one federal inquiry (Kingston Penitentiary Inquiry) and

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813 Following his work on the pipeline Inquiry, Berger’s Special Counsel Ian Waddell entered federal politics and served as an NDP Member of Parliament for 14 years, first elected in 1979. In January 1981 he was part of the negotiating team that drafted what would become section 35 of the Constitution Act, 1982 – the Aboriginal rights section: Ian G. Waddell, “The Labouried Birth of Section 35” (2008) 66:6 The Advocate 891 at 893-4. Berger’s Assistant Commission Counsel Stephen Goudge taught the University of Toronto’s first course on Aboriginal law, “Native Rights”, beginning in 1974. Appointed in 1996 to the Ontario Court of Appeal, he penned the unanimous decision of the Court in Cloud v. Canada that the class action by residential school survivors could proceed: Cloud, supra note 312. The conduct of his own recent inquiry that probed the failings of Ontario pathologist Charles Smith suggests the effect of working on the Berger Inquiry has stayed with him throughout his long career. For example, the Goudge Inquiry visited indigenous communities in northern Ontario and a section of the report was lauded by Aboriginal groups for having considered their plight with respect to a lack of coroner services in their communities and a culturally insensitive service when present: Tracey Tyler, “Goudge report applauded by First Nations leaders” Toronto Star (1 October 2008). Justice Goudge also adopted a practice used by Berger, to circulate draft Rules of Procedure and Practice for the inquiry he would run, inviting comments from parties with standing, before finalizing the Rules in advance of the hearings: “Opening Statement by Commissioner Goudge” (18 June 2007), online: <http://goudgeinquiry.ca/>, at para. 37. Since he was Special Counsel for Community Hearings on the Inquiry, Prof. Michael Jackson of the University of British Columbia’s Law Faculty has continued to focus upon Aboriginal rights, particularly, but not exclusively, in the criminal justice system. He has been counsel in several landmark Aboriginal cases before the Supreme Court of Canada, including the Delgamuukw and Haida Nation cases. In Delgamuukw, supra note 505, he was co-counsel for the appellants, the Gitksan Hereditary Chiefs et al. In Haida Nation, supra note 509, he was co-counsel for the respondents, the Haida Nation.

814 Scott was not his first choice of commission counsel; that was Duncan Shaw of Vancouver’s Davis & Company, now Justice Shaw of the BC Supreme Court, but when Shaw was unable to accept the appointment,
one provincial inquiry (Legal Aid Inquiry in Ontario that established the basic legal-clinic system in Ontario). As Scott noted: “I discovered that I had a taste for the making of public policy through commissions of inquiry.” This awareness of the potential for using the commission mechanism for shaping public policy is an important insight into the way that Scott saw his role.

Berger took Scott on a tour of the North and mapped out his strategy for how he wanted to run the Inquiry. Scott recalled: “Part of my job was to keep the oil and gas and pipeline companies from filing and winning procedural motions against the way Berger proposed to run the commission.” In his memoir, Scott described Berger’s approach of exploring the needs of indigenous peoples and explaining those needs to the majority of Canadians who had no experience of the North: “One of Berger’s great insights was that the commission could be used as a giant exercise in democracy”. Scott described the ingenuity of holding the majority of the hearings in the North instead of Ottawa, and how this drew the media north to hear what elders and others had to say. He described the “major reservations” of the oil companies with the Inquiry process, particularly their concerns about testimony untested by cross-examination and discovery in the community hearings, which would lack the procedural safeguards of the judicial system. Scott saw that his job included ensuring that the testimony of elders in the community hearings would be “treated as seriously as the testimony of the oil-company executives in more formal hearings, where the usual rules of evidence applied.” Scott described how the Inquiry had brought environmental issues to the fore and broken ground in requiring corporate responsibility where economic

Berger appointed Scott. See letter from Berger to Duncan Shaw, Davis and Co, of Vancouver, (23 May 1974) thanking him for considering the post of commission counsel, with regret that Shaw could not accept the position, and advising he has appointed Ian Scott, as highly recommended by Mr. Justice Hartt of the Law Reform Commission: Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977, vol. 73 Subfile General Correspondence).

Letters from Berger to Yves Fortier, Ogilvie Cope and Co, of Montreal (22 May 1974), thanking him for his advice regarding whom to hire as commission counsel and advising he has appointed Ian Scott: Ibid.

Scott, To Make a Difference, supra note 626 at 55.

Ibid. at 57-58.

Ibid. at 57.

Ibid. at 58.

Ibid.

Ibid.
development threatened the livelihood of indigenous peoples.\textsuperscript{822} He noted that the Report “changed forever the way in which Aboriginal and indigenous peoples are treated in Canada”.\textsuperscript{823}

Page noted that during the Inquiry hearings, the pipeline companies had often resorted to technical language in order to obscure potential flaws in their applications.\textsuperscript{824} He credits Scott with requiring the applicants to provide detailed information about the assumptions upon which their assertions were based in order to enable the Inquiry to properly assess their evidence. Indeed, Scott “had always believed that one of the chief functions of lawyers was to even up the sides”\textsuperscript{825} so he met a like-minded person in Berger. Perhaps most telling in Scott’s recollections of the Berger Inquiry are his observations about the process adopted by Berger to run the Inquiry. Scott was by then a well respected barrister, adept in the courtroom and enamoured of the cut and thrust of litigation. Berger introduced him to a world where things ran a little bit differently:

\begin{quote}
I learned so much from Tom Berger. He had a great gift for listening. He also had a gift for eliciting information from people unaccustomed to talking in formal settings. The concept at the heart of the Anglo-Saxon judicial process, that truth will emerge from an adversarial process, was completely foreign to the northern people’s way of thinking.\textsuperscript{826}
\end{quote}

Scott returned to his law practice after the Berger Inquiry, but a few years later decided to enter politics. He was elected in 1985 to the provincial legislature. Scott was Attorney General of Ontario and Minister Responsible for Native Affairs in the Liberal Peterson government for its five-year duration. His government work with respect to Aboriginal rights prompted Supreme Court of Canada Justice Ian Binnie to remark upon “his formative experience in native rights” with the Berger Inquiry.\textsuperscript{827} Binnie J. noted that Scott had

\textsuperscript{822} Ibid. at 59.
\textsuperscript{823} Ibid. at 63.
\textsuperscript{824} Page, \textit{supra} note 531 at 155.
\textsuperscript{825} Scott, \textit{To Make a Difference}, \textit{supra} note 626, at 55.
\textsuperscript{826} Ibid. at 63.
\textsuperscript{827} Ian Binnie, “Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat” (2004) 22:4 Advocates' Soc. J. 4, at para. 80. See also para. 31 where Binnie J describes Scott’s task of having elder’s testimony in informal settings taken as seriously as testimony of oil company executives at formal hearings: “This, in 1973, was cutting-edge stuff. In some circles, it still is.”
changed the course of government relations with the indigenous population by acknowledging that they had legal rights and engaging in self-government negotiations. Scott himself acknowledged that his experience at the Berger Inquiry affected how he ran things as Attorney General of Ontario in the late 1980s, and as head of the first Native Affairs ministry, where treaties had been treated as symbolic rather than substantive. He instituted negotiation of land claims and sought to build up in-house expertise on indigenous issues. He credits Berger with his practice of occasionally visiting indigenous leaders in their home territories: “My experience with Mr. Justice Berger was invaluable here. He taught me a lot about respecting the customs of the groups I met with.”

Scott had been re-elected in the 1990 election that brought Bob Rae’s NDP to power, but resigned his seat after two years to return to legal practice. Scott suffered a devastating stroke in 1993 from which he never fully recovered, however, he continued to have a close association with the colleagues of his extraordinary career, including Justice Goudge. His memoir, To Make A Difference, was published in 2001. In the final passages of the book, he states:

Of all the people I met, I especially admire Tom Berger. The commission he led paved the way toward taking Aboriginal rights seriously in Canada. Ironically, many of the young First Nations people who worked for the commission are now in positions of power in the Yukon and Northwest Territories governments, and are competing for the right to build a pipeline. We bought them twenty-five years. If there is a pipeline now, at least it will be at their behest, not the oil companies.’

Berger assembled an extraordinarily talented staff who dedicated themselves to achieving the kind of inquiry that he envisioned. It is clear that the process employed by Berger affected the people who worked on the Inquiry and those that appeared before it. The effect manifests itself in a variety of ways. The people who worked on the Inquiry were crucial to the impact the Inquiry had, but the Inquiry also had an enormous impact on those people. In the words of Diana Crosbie when presenting a collection of media clippings of the Inquiry to Berger as a souvenir: “You always maintained that the Inquiry was the experience of a lifetime and you

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828 Scott, To Make a Difference, supra note 626 at 161-162.
829 Ibid. at 242.
were right. But it had as much to do with working for you as the job and experience themselves.” Commission Counsel Ian Scott noted in a memorandum to Berger during the later hearings stages of the Inquiry that the staff was “extremely loyal to you” and, in his memoir, he wrote of his good fortune in being part of “one of the most influential commissions of inquiry in Canadian history…. The commission was one of the most satisfying and interesting things I have ever done.”

In my interviews with people connected to the Inquiry there is no question that working on the Inquiry was a highlight of all of their exceptional careers: “When you think about it they were a very young crew to work on something so huge. They would all say that it’s the most important thing they have worked on in their careers.” Many people associated with the Berger Inquiry turn up as staff or contributors to RCAP and other inquiries.

**Criticism of Berger**

While Berger may have been satisfied with the outcome of his Inquiry, and while many have lauded his approach to the public inquiry and his innovations to the public inquiry model, Berger’s methods and conclusions did not escape criticism.

During the southern hearings, Rod Sykes was typical of those that opposed Berger’s approach and focus. As mayor of Calgary, a city dependent on oil and gas resource extraction, Sykes was highly critical of the Inquiry when he testified at its southern hearing in Calgary. He stated that the Inquiry was exploiting the fears of “simple people” who will grow to distrust public consultation because they will think that the views they express will ultimately effect decisions. This would result in “shocking disillusionment and great

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830 Cover letter from Diana Crosbie (18 Sept 1978), Selected press clippings, supra note 651.
831 Ottawa, National Archives of Canada (Mackenzie Valley Pipeline Inquiry fonds – RG 126, vols. 72-77 Operational and administrative records created by the MVPI between 1970 - 1977 Textual records, box 74, Subfile: Hearings - Commission Counsel Notes, subfile “Ian Scott Assorted Notes (from notebook) Phase #1” “II of II RG 126 Vol. 73” and subfile “I of II RG 126 Vol. 73”).
832 Scott, To Make a Difference, supra note 626 at 55-56.
833 Goudge interview, supra note 707.
bitterness”. Not only would the Inquiry destroy public confidence in the ability of science and technology to cope with the construction problems of the North, it would also undermine public confidence in the “good faith and integrity of private enterprise in a country which depends upon private enterprise for survival”. According to Page, the southern hearings revealed the “profound misgivings” within industry about Berger’s approach. “These feelings were particularly strong in Alberta and the oil industry, where pipeline critics were equated with communism.” For Calgary Mayor Rod Sykes, the Berger Inquiry was “a disastrous and costly mistake” that threatened Canadian unity by pitting the special rights demanded by one group against the interests of all Canadians. Such a prospect was an economic threat to those Canadians “who work and save and stand on their own feet.” As noted by Nichols: “Some of the harshest criticisms of the Berger Report came from those people who had the most to gain from the immediate construction of a pipeline.”

John Gray (Department of Economics, University of Manitoba) and Patricia Gray (Department of Sociology, University of Manitoba) critiqued Berger’s impact assessment methodology. After praising the Inquiry’s participatory process and the Report’s clarity and the care with which it was written, they stated: “Berger is incorrect in attributing all future

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835 Page, supra note 531 at 115.
836 Ibid. at 114.
837 Ibid. at 113.
838 Ibid.
839 Ibid. at 115. Two books were published in the aftermath of the inquiry that were heavily critical of Berger and his Inquiry: Donald Peacock, People, Peregrines and Arctic Pipelines: The Critical Battle to Build Canada's Northern Gas Pipelines (Vancouver: J. J. Douglas, 1977); Gray, supra note 692. Both were authored by people associated with the pipeline companies, and indeed, pipeline applicant Alberta Gas Trunk Lines funded Peacock to write and publish his book: see Peacock, at ix. Gray was the former head of public affairs for the other applicant. Their two books prompted Trent University professor Robert Page to write his book Northern Development: The Canadian Dilemma, supra note 531. Page participated in both the Berger inquiry and the National Energy Board hearings and suggests that Berger was a scapegoat for the critics when the pipeline applications did not proceed. Although the National Energy Board reached similar conclusions to Berger, it was Berger alone who was the subject of attack in the books: Page, at xi. Berger’s Chief Information Officer, Diana Crosbie, said that Gray and Peacock never went to the North with the Commission. She had liked Gray, and worked with him during the Commission period, and was surprised to hear about his book and its critical tone. Crosbie interview, supra note 730.
840 OECD & Nichols, supra note 638 at 101.
environmental or social deterioration to the pipeline and corridor.” University of Toronto (Scarborough) ecologist J.C. Ritchie also criticized Berger. Ritchie alluded to concerns about the environmental aspects of the Inquiry’s proceedings but concentrated on Berger’s use of the media, which he argued contributed to a “post-literate society” where balanced comments from scientists are “too cautiously couched in tentative terms to make ‘news’”. Ritchie averred that ecologists should stay out of the political and philosophical realms, where “[o]bjective judgment is sacrificed in the interests of a particular political view”. He stated that Berger exceeded his mandate, and that his Inquiry contributed to a more general trend toward lowered credibility and independence of scientists. Ritchie referred to an article by University of Alberta botanist L.C. Bliss who suggested that the Berger Inquiry may have heard scientific opinion rather than scientific fact in part because of an inability of scientists to make themselves understood outside their own disciplines. Bliss concluded that lawyers trained in the environmental sciences were needed in order to avoid wasting time on irrelevant issues.

Bliss expressed these concerns at a conference organized by Berger Inquiry participant the Canadian Arctic Resources Committee, after the Reports were published. Other participants acknowledged these concerns but also noted that the Inquiry “is generally regarded as a considerable achievement both as a public participation process and in terms of its impact on the substantive northern pipeline decisions.” Consider the observations Page makes from his statistics comparing the Berger Inquiry to the concomitant National Energy Board hearings conducted for the same pipeline project. While evidence from corporate applicants constituted 48 per cent of the evidence before Berger, such evidence constituted 80 per cent of the evidence before the National Energy Board. Evidence from Aboriginal

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843 Ibid. at 72.
845 Ibid. at 134.
846 Lucas & Peterson, supra note 42 at 80. Lucas and Peterson are not critical of Berger per se but note concerns such as those of Bliss regarding hearings in general. They state that flexibility of process is the key, as demonstrated by Berger’s approach of having formal hearings, community hearings and southern hearings: 81.
847 Page, supra note 531 at 319.
organizations contributed 20 per cent of the evidence before Berger, but only one per cent before the National Energy Board. Twelve per cent of the evidence before Berger came from public interest groups, and this was double the 6 per cent heard by the National Energy Board. While none of the evidence heard by the National Energy Board was sourced by National Energy Board counsel, 17 per cent of the evidence before Berger was presented by commission counsel, who called their own witnesses in areas “where they considered the record incomplete or contradictory.” Thus evidence from industry was balanced out by other groups before the Berger Inquiry, but this was not so much the case before the National Energy Board. The latitude that a public inquiry has to employ a more open process with a greater range of participants provides an opportunity to create more informed decision-makers who can then generate more nuanced public policy.

With respect to the Report’s principle recommendations, while most indigenous groups were pleased, some Métis were concerned that the call for a moratorium on pipeline construction would decrease their bargaining power for settling land claims as the pressure would be decreased. The Legislative Assembly of the Northwest Territories (NWT) reacted angrily to the Report, releasing a polemical pamphlet that accused Berger of wanting to convert the NWT into racial states along indigenous lines: “Frankly, support Mr. Berger and you have to support South Africa and its policy of apartheid – separate development for each of its founding races.” The Assembly argued that Berger’s recommendations would mean ten years of increased unemployment in NWT, higher fuel prices, an energy crunch, the division of NWT into racial states, a pipeline in Alaska and thus the United States getting all the benefits, and a stagnant NWT economy.

Lewis Auerbach, Science Advisor of the Science Council of Canada in 1978 spoke at the CARC conference noted above at which the Berger Report was debated. He defended the Report as groundbreaking, fair and balanced. He agreed that: “To scientists, it may be galling

848 Ibid. at 319.
850 Northwest Territories Legislative Assembly, You've Heard from the Radical Few About Canada's North – Now Hear from the Moderate Many (Yellowknife: The Assembly, 1977).
851 Ibid. at 6.
852 Ibid. at 25.
853 Auerbach, supra note 703 at 128-131.
that Berger has made judgments on matters about which scientists themselves cannot agree” but noted that Berger equally challenged indigenous people and their supporters, as well as industry representatives before the Inquiry.\(^\text{854}\) Auerbach opined that Berger received a high quality of evidence from all participants and that negative reactions to his Report reflected the fact that in “his conclusions Berger has … taken issue with much of the current science and environmental policy at present pursued in Canada”.\(^\text{855}\) In an oblique reference to the pamphlet issued by the Northwest Territories Legislative Assembly, Auerbach stated that: “The point has been reached where the Council of the Northwest Territories has become an adversary of northern native peoples.”\(^\text{856}\) He suggested that Berger did not ignore white residents of the territories, but neither did he privilege their position over the indigenous residents.\(^\text{857}\) Auerbach concluded:

The Berger report has been criticized by some as unbalanced and by others as negative. This is a complete distortion of a report that is both balanced and positive. …[T]he process could hardly have been more balanced. In so far as the conclusions are concerned, it is hardly surprising that those who have benefited most from the previous imbalances and who have the most to gain from the immediate construction of a pipeline for U.S. gas through the Mackenzie Valley should now complain that the report is unbalanced.\(^\text{858}\)

While I cannot evaluate the critiques of Berger’s methodology with respect to the scientific evidence, it appears that, notwithstanding the critiques noted above, there is general agreement over the worth of Berger’s model for a public inquiry.

**The Outcome of the Inquiry**

The two main recommendations in Berger’s Report were that there should be a moratorium on pipeline construction for ten years in order to allow Aboriginal “land claims”\(^\text{859}\) to be

\(^{854}\) *Ibid.* at 128.

\(^{855}\) *Ibid.* at 129.

\(^{856}\) *Ibid.* at 131.

\(^{857}\) *Ibid.*

\(^{858}\) *Ibid.*

\(^{859}\) As noted above, at note 11, while this term was commonly in use at the time, it is not favoured by many indigenous people who see “land rights” as a more accurate term, disagreeing with the characterization of their
settled, and that no pipeline should be built through the ecologically sensitive northern Yukon. The government publicly accepted the first recommendation[860] although a smaller scale pipeline was in fact constructed through a portion of the Mackenzie Valley within the ten-year period.[861] In the wake of the Report, the federal government did reassess its land claims priorities and embark upon a project to settle land claims throughout the region.[862]

With respect to the second recommendation above, when Berger spoke with Trudeau about the North that day they lunched at 24 Sussex (the Prime Minister’s residence),[863] Berger told him about the spectacular caribou migration. Trudeau had been to the North but he had not witnessed the caribou migration. Berger encouraged him to go. When Berger saw that after he released his Report Trudeau had taken his sons on a trip to see the migration, Berger turned to his wife, Bev, and said, “It’s all over”. He believed that once Trudeau saw the majesty of that migration, he would never allow a pipeline across the northern Yukon.[864] Trudeau indeed accepted this recommendation.

It is also true that the end of the Inquiry coincided with a fall in oil prices, thus relieving some of the “energy crisis” pressure. Oil and gas exploration activities in the North slowed. An alternative recommendation made by Berger that the government look at the Alaska position as a “claim” only. See Georges Erasmus, Third LaFontaine-Baldwin Symposium Lecture, supra note 143.

[860] Prime Minister’s Office, Press Release “Northern Pipeline Statement” (8 August 1977), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, box 19 - 3 Subfolder “Miscellaneous basic documents 1969-1977” [Folder one of two]). The press release announces the government’s decision after hearing from Berger and the NEB; it states that a northern pipeline passing through the southern Yukon would be in Canada’s national interest, assuming appropriate conditions and safeguards. See also House of Commons Debates, 2nd session, 30th Parliament (Hansard) vol. 120, no. 172, (4 August 1977), and no. 173 (5 August 1977).

[861] In 1985, an oil pipeline from Norman Wells to northern Alberta, running about half the length of the Mackenzie Valley, was completed: Olive Patricia Dickason, Canada’s First Nations: A History of Founding Peoples from Earliest Times (Toronto: McClelland & Stewart, 1992), at 406. See Hon. Allan J. MacEachen, Deputy Prime Minister, “Notes for Remarks on Second Reading of the Northern Pipeline Bill” (13 February 1978), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, box 19 - 4 “Miscellaneous basic documents 1978” [Folder two of two]). The Notes refer to Bill C-25 to enable a pipeline to be built.

[862] See discussion in “Land Claims Settlements” section, below, text accompanying note 869.

[863] See text accompanying note 656, above.

[864] Berger interview #1, supra note 214.
Highway pipeline proposal became the subject of the Lysyk Commission, which also advised a delay in pipeline construction and settlement of land claims along the proposed route.  

The Impact of the Berger Inquiry

“Nobody expected the inquiry’s impact.”

The Berger Inquiry formed part of a complex sociopolitical context, making its impact difficult to quantify. There is no question, however, that the Inquiry had a far-reaching impact. It was the first public inquiry report to become an overnight bestseller and “the huge sales of the volume and its use in many university courses gave it a wide influence on public opinion and some influence on public policy.”

The Inquiry’s innovations affected how subsequent inquiries were run. Berger’s recommendations with respect to settling land claims emboldened indigenous peoples to pursue their rights over their traditional lands. A new national park was created in the northern Yukon based on Berger’s recommendation to protect the sensitive ecological environment there. Canadians were more educated about the peoples of the North. Environmental assessment processes became more thorough for proposed development projects. Public participation in inquiries increased. Intervener funding became increasingly common. Perhaps predictably, Berger expressed satisfaction with the outcome of the Inquiry and the opportunity it provided to take steps to protect the northern environment and to settle indigenous land claims in the Mackenzie Valley and the Western Arctic. Whether or not industry and government would have agreed with Berger’s opinion on the correctness of the decision, steps in the direction described by Berger did indeed take place.

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866 Berger interview #1, *supra* note 214.
867 Page, *supra* note 531 at 122.
868 Letter from T. Berger to Minister Hugh Faulkner (23 March 1978), enclosing the Berger Report, vols. 1 & 2, Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, box 18 - 7 Correspondence with the Department of Indian Affairs and Northern Development [file] #2 1975-1978).
Land Claims Settlements

It is clear that the Berger Inquiry’s Report had a significant impact on subsequent land claims negotiations for indigenous peoples in the Mackenzie Valley and beyond. In late 1977, following the release of the Berger Report, the Inuit Tapirisat presented their revised claim to the federal government. This claim included an assertion of a right to self-determination and called for the creation of Nunavut.\(^{869}\) In a recent Federal Court decision, Phelan J. noted the conclusion of the Berger Report that land claims settlements should precede development before cataloguing some of the subsequent results. These include negotiated land claims settlements between the federal government and the Inuvialuit, the Gwich’in, and the Sahtu, as well as the new regulatory agencies created by the agreements that enable these peoples to have ongoing input with respect to land use, including the Inuvialuit Game Council, the Gwich’in Land and Water Board, the Sahtu Land and Water Board, and the Mackenzie Valley Environmental Impact Review Board.\(^{870}\)

The Inquiry’s process of giving voice to indigenous peoples who were arguing for the settlement of land claims, as well as the Report’s impact on the political landscape, significantly contributed toward creating conditions under which land claims agreements would be achieved. “Since the Berger Report, there are now community councils in every

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\(^{869}\) Richard Gwyn, “A showdown with the Indians looms” *Vancouver Sun* (20 December 1977), Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subfiles, box 8 - 5 “Articles - comments - re Berger report”, file 1 1977-1982 [Folder one of four]). The eastern part of the Northwest Territories became Nunavut on April 1, 1999.

\(^{870}\) *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, at paras. 64-6. Application by the Dene Tha’ First Nation for judicial review of a decision respecting the construction of the Mackenzie Gas Pipeline (MGP). The Dene Tha’ alleged that the Government of Canada, through the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister of Indian and Northern Affairs and the Minister of Transport, breached its constitutionally entrenched duty to consult and accommodate First Nations people adversely affected by its conduct. See also RCAP Report, vol. 4, supra note 540, c. 6.5:

Since 1990 two regional claims agreements have been concluded in Denendeh: one between the federal government and the Gwich’in of the Mackenzie Delta, the other between the federal government and the Sahtu Dene and Métis. The Gwich’in negotiated title to 22,332 square kilometres of land, subsurface rights to 93 square kilometres, compensation of $75 million, and a share of resource royalties. The Sahtu Dene and Métis secured title to 41,437 square kilometres of land, subsurface rights to 1,813 square kilometres, compensation of $75 million, and a share of resource royalties. Provision was also made for joint management of wildlife and land-use planning. Dogrib are currently negotiating their own regional claim. Dene in the rest of Denendeh want to pursue land and government issues in relation to implementation of the treaties.
community of the North.”  

The Report’s recommendations vindicated the position of indigenous peoples that there must be no pipeline without land claims agreements, and set them on the road to achieving those settlements.

Berger stressed that the indigenous peoples who would be affected by the pipeline route must have their land claims settled before a pipeline could proceed. This position entailed an inherent recognition of their claim by Berger, but it also signaled to Canadians and in particular, to the Canadian government, that these claims were legitimate and merited attention. The Inquiry and Report thus contributed to a dialogue that has continued for thirty years.

**Environmental Protection**

Berger set out future needs of the land and the people. The recommendation to set aside habitat for the caribou and other wildlife included an acknowledgement that those animals and lands were integral to the subsistence of the Indigenous population in the region. Berger had recommended that a national park be created to protect the calving grounds of the Porcupine Caribou herd. Eventually, a wilderness park called Ivivvit was established in the northern Yukon in 1984, and one called Vuntut was established in 1995. Since they were established as part of the Inuvialuit and Vuntut Gwich’in land claims settlements, “both parks are constitutionally entrenched: their character and their boundaries cannot be altered except by constitutional amendment.”

Berger’s Report had recommended a whale sanctuary for the Beaufort Sea. Six years after the Berger Inquiry, the Task Force on Northern Conservation was established to provide advice to the Department of Indian and Northern Affairs for creating a comprehensive conservation policy for northern Canada. The Task Force recommendations emphasized the need for marine conservation management and planning initiatives developed with local

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871 Keith & Wright, supra note 42. Comment by Dick Hill (Arctech Resource Management Services, Inuvik) at closing plenary, at 455.
872 Berger, *One Man’s Justice*, supra note 567 at 143-144.
knowledge and uses of the area.\textsuperscript{873} As recently as 2003, the federal government was considering establishing a Marine Protected Area in the Mackenzie Delta-Beaufort Sea region in order to protect the beluga whale breeding grounds.\textsuperscript{874}

\textit{Political Empowerment}

One of the lasting and significant impacts of the inclusion of indigenous peoples in the public inquiry process by Berger was their increased political participation and empowerment. Although Aboriginal rights organizations were forming and indigenous peoples were becoming politicized in the late 1960s and early 1970s, particularly in response to the federal government’s White Paper of 1969,\textsuperscript{875} the Berger Inquiry process also significantly contributed to the development of political leadership in northern communities. Leaders came to prominence through the media coverage garnered by the Inquiry, such that people within and outside their communities came to know of their activism. They gained confidence by having solidarity with other communities along the proposed pipeline route. Several of the vocal opponents of the pipeline went on to become involved in politics at the local and regional level:

As a result of its unique procedures, its conscientious efforts at stimulating broad participation and the pervasive importance of the issues the pipeline brought into focus, the inquiry became a giant consciousness-raising exercise and a milestone in the political development of the Dene and the North itself.\textsuperscript{876}

Some would say that the empowerment of indigenous people before the Inquiry was actually a setback for their struggle for self-determination because their militancy and demands translated into higher projected costs of development for the pipeline companies.\textsuperscript{877} The

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\textsuperscript{874} G.S. Gislason & Associates Ltd, “A Marine Protected Area for the Beaufort Sea: Multiple Account Evaluation” (Paper prepared for the federal Department of Fisheries and Oceans, March 2003), online: <www.dfo-mpo.gc.ca/Library/319130.pdf>.

\textsuperscript{875} See above, note 228.

\textsuperscript{876} Bregha, \textit{supra} note 629 at 117.

\textsuperscript{877} Cunningham, \textit{supra} note 539 at 99, citing the decidedly conservative, pro-industry Albertan publication \textit{Western Report}.
\end{footnotesize}
companies’ calculations of these costs, in concert with changed market conditions, caused their interest in building a pipeline to wane.\textsuperscript{878}

There is no doubt, however, that the Inquiry had a profound impact on some of the indigenous youth who participated and have since become the Aboriginal and provincial leadership in the North.\textsuperscript{879} For example, Nellie Cournoyea, a member of the Committee for Original Peoples’ Entitlement and a resident of Inuvik as the Inquiry began, was elected as a Member of the Legislative Assembly for the Western Arctic in 1979 and eventually became premier of the Northwest Territories from 1991 to 1995. She is now the Chief Executive Officer of the Aboriginal Pipeline Group.\textsuperscript{880} Frank T’Seleie, who as a young chief famously challenged the Foothills Pipe Lines CEO in a community hearing before Berger,\textsuperscript{881} eventually became a proponent of a pipeline.\textsuperscript{882} After studying at Trent University, he returned to Fort Good Hope. In his second term as chief, “he became a strong advocate in the new push for a gas pipeline up the Mackenzie, now that most land-claim obstacles have been cleared.”\textsuperscript{883}

Stephen Kakfwi was a vocal opponent of the pipeline and organized the Dene nation's presentations to the Berger Inquiry. He became president of the Dene Nation in 1983. Kakfwi guided the Dene-Métis land claims discussions and spearheaded the creation of the Dene Cultural Institute and Indigenous Survival International.\textsuperscript{884} He was first elected to the

\begin{footnotes}
\item[878] \textit{Ibid.}
\item[880] See “The Mackenzie Valley Pipeline Process – Thirty Years Later” section, below, text accompanying note 926.
\item[881] See above, text accompanying note 712.
\end{footnotes}
Legislative Assembly of the Northwest Territories in 1987, representing the constituency of Sahtu. In 2000, he became premier of the Northwest Territories and voiced his support for construction of a Mackenzie Valley pipeline. Kakfwi retired from political office in 2003. He became a member of the National Round Table on the Environment and Economy, and represented Sahtu communities in 2005 in negotiations with Imperial Oil over the construction of the Mackenzie Valley pipeline. Kakfwi was dropped from the negotiating team over his proposal that indigenous communities be allowed to levy property taxes on the pipeline. An IRS survivor, Kakfwi is married to Marie Wilson, one of the TRC’s co-commissioners.

James Antoine was the 26-year-old chief of the Fort Simpson Dene (now known as Liidli Kue First Nation) when he spoke to the Berger Inquiry in 1975. He assisted in the development of the Dehcho Regional Council and the Dehcho Tribal Council, now called the Dehcho First Nations. Antoine was elected as the Member of the Legislative Assembly for Nahendeh in 1991, and became a member of cabinet in 1995. From 1998 to 2000, he was premier of the Northwest Territories, during which time the Northwest Territories was divided to enable Nunavut to form. In 2003, Antoine retired from politics.

Georges Erasmus appeared before the Inquiry as a young leader of the Indian Brotherhood of the Northwest Territories (later renamed the Dene Nation). He wrote a piece entitled “We, the Dene” that addressed much of what he had been presenting to the Inquiry:

> The main issue facing the Dene is not the proposed Mackenzie Valley pipeline or some such other colonial development. The issue facing us today is the same issue that has confronted us since the first non-Dene arrived in our land. The issue is

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International is “an international alliance of Indigenous nations and organizations from Canada, Alaska and Greenland, formed in 1984 in response to the threat to trapping posed by outside interests.”


887 See Chapter Three, “Second Panel” section, text accompanying note 426.

888 See Dehcho First Nations, Member Communities, Fort Simpson, online: <http://www.dehchofirstnations.com/members/fort_simpson.htm>.

recognition of our national rights, recognition of our right to be a self-governing people.\footnote{Georges Erasmus, “We the Dene” in Mel Watkins & University League for Social Reform, Dene Nation: Colony Within (Toronto; Buffalo: University of Toronto Press, 1977) at 177-179.}

Erasmus ran for the NDP in the 1979 federal election in the Western Arctic riding. He served two terms as national chief of the Assembly of First Nations from 1985 to 1991, after which he served as co-chair of the Royal Commission on Aboriginal Peoples. He then chaired the Aboriginal Healing Foundation. Erasmus is chief negotiator for the Dehcho First Nation in its pursuit of a land and self-government agreement. It “is the sole aboriginal group in the territory not to announce public support for the latest attempt to build a Mackenzie Valley pipeline.”\footnote{Canadian Press, “Georges Erasmus Receives Northern Medal from Governor General” (22 January 2009), online: <http://www.canadaeast.com/search/article/548456>.}

The power dynamic of the North has shifted at least in part because of the opening that the Berger Inquiry provided for indigenous peoples to make their case for self-determination. Berger stated:

The truth came out because in every village I said “I’m here to listen to you and will stay as long as you want”.

Because Aboriginal people could speak for themselves and be broadcast, the truth about people in their midst got home to white folks – this went beyond stereotypes. ... We can’t imagine the North now without land claims, influential Aboriginal organizations and Aboriginal peoples leading northern governments.\footnote{Berger interview #1, supra note 214.}

The government essentially agreed to Berger’s recommended moratorium on the pipeline’s construction, as requested by the indigenous peoples who called the proposed route their home. Today, the pipeline is back on the agenda, but under decidedly different circumstances than those of three decades ago. Indigenous peoples have strong involvement now in the territorial government and institutions. The territory of Nunavut has been created as the homeland of the eastern Arctic Inuit and is controlled by them.
It is not just the degree of political representation that has changed since the Berger Commission; the political and legal position of affected indigenous peoples has changed. This change has been effected through the negotiation of land claims agreements and changes in government policy. In the *Constitution Act, 1982*, section 35 recognized Aboriginal rights. Berger eventually resigned from the bench due to his outspoken intervention in the constitutional debate in 1981 in order to ensure that s. 35 remained in the Constitution.

**Impact on Later Commissions**

Elements of the Berger Inquiry’s procedures were soon adopted by subsequent commissions such as the Royal Commission on the Northern Environment in Ontario, the West Coast Oil Ports Inquiry in British Columbia, and the Alaska Highway Pipeline Inquiry in Yukon. The Berger Inquiry process made consideration of native claims a potential and even expected part of public inquiries. Experts in environmental design noted the unique procedures utilized by Berger and stated that:

> [I]t is certain that from this point forward, the process of public hearings and depth of participation on environmental matters in Canada will be profoundly altered. There can be no going back, and for this reason alone, planners would be well advised to study the procedural methods and communicative devices employed in this landmark hearing.

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894 See Berger, *One Man's Justice*, *supra* note 567 at 146ff.
895 See Lucas & Peterson, *supra* note 42 at 80.
897 See for example Bartlett, *supra* note 619. Bartlett critiques the Key Lake Inquiry in light of the Berger Inquiry and states that its terms of reference could have been interpreted in similar fashion, and that it would have been appropriate for the Key Lake inquiry to consider native claims as part of their mandate, per the Berger Inquiry.
Community hearings became an accepted mechanism for Canadian inquiries. For example, the Manitoba Public Inquiry into the Administration of Justice and Aboriginal People (Aboriginal Justice Inquiry) held community hearings in 36 indigenous communities including 20 remote communities, seven other Manitoba communities, and five provincial correctional institutions, with over 1,000 people making informal presentations.\textsuperscript{899} The community hearings were open to the public, written submissions were not required, and witnesses were not required to testify under oath, nor were they subjected to examination by Commission counsel or cross-examination.

We took this approach after considerable deliberation. We believed that Aboriginal people already were alienated from, and intimidated by, the formal court system. We wanted to utilize a process that would encourage frank and open expressions of opinion.\textsuperscript{900}

The commissioners sought to learn about the legal system from the people who had contact with it, rather than to make determinations of fact in particular instances.\textsuperscript{901} This is precisely the kind of approach that Berger introduced to the commission of inquiry mechanism. The Aboriginal Justice Inquiry decided not to have lawyers at the community hearing level. It also produced a video, in addition to its written reports, produced in English, Cree, Ojibway, Island Lake dialect, Dakota and Dene in order to make the report more accessible to indigenous peoples.\textsuperscript{902} The Aboriginal Justice Inquiry was mandated to inquire into the “the state of conditions with respect to Aboriginal people in the justice system in Manitoba”\textsuperscript{903} yet it gave these terms of reference a broad interpretation – the inquiry’s report devotes an entire chapter to Aboriginal and Treaty Rights, including discussion of land claims and natural resources.\textsuperscript{904}

By the time that the Royal Commission on Aboriginal Peoples was in operation in the 1990s, Berger’s public consultative model was the standard. The explicit approach of the Ipperwash

\textsuperscript{899}Manitoba Aboriginal Justice Inquiry Report, supra note 18, vol. 1, at 5. This inquiry’s co-commissioner, Justice Murray Sinclair, is now the chief commissioner of the Canadian TRC.

\textsuperscript{900}Ibid. See also Roach, supra note 38 at 286.

\textsuperscript{901}Manitoba Aboriginal Justice Inquiry Report, supra note 18, vol. 1, at 5.

\textsuperscript{902}Ibid. at 14.

\textsuperscript{903}Ibid., Appendix II, “Schedule: Terms of Reference” at 763.

\textsuperscript{904}Ibid., c. 5, 115-212.
Inquiry into the death of indigenous protestor Dudley George was to include indigenous history and the historical context of the dispute over the provincial park at the centre of the protest. The inquiry had a clear public education mandate on these topics.\(^905\) Outside of the Aboriginal context, the focus on “victims” has been front and centre in the Air India Inquiry into the worst terrorist bombing against Canadian citizens prior to 9/11.\(^906\) The involvement of public interest groups in inquiry processes as interveners became increasingly common. The Canadian Arctic Resources Committee (CARC) remained active, taking on diamond mining in the North in the 1990s\(^907\) and the renewed pipeline activity in this decade.\(^908\)

**International Impact of the Inquiry**

Following the Berger Inquiry, Berger was invited to speak before the U.S. Senate Committee on Energy and Natural Resources, which was holding hearings with respect to development in Alaska.\(^909\) He was also invited to speak about the Report while in Australia.\(^910\) The Berger


\(^906\) Commissioner John Major devoted the first three weeks of the hearings at the Commission of Inquiry into the Bombing of Air India Flight 182 to hearing the stories of the bombing’s victims: Commission of Inquiry into the Bombing of Air India Flight 182, “Witness List”, online: <http://www.majorcomm.ca/en/witnesslist/>.

\(^907\) Letter to Christine Stewart, Minister of Environment from Robbie Keith & Kevin O’Reilly, Canadian Arctic Resources Committee (22 July 1999) providing CARC’s submission in response to a call for public comment on the Comprehensive Study Report concerning the proposed Diavik Diamonds Project, online: <http://www.carc.org/alerts/diamond_alert/diavik.htm>:

For CARC, diamonds in the Slave Geological Province are the 1990s equivalent to the 1970s oil and gas discoveries that led to the Berger Commission. The Commission’s environmental assessment of the proposed Mackenzie Valley pipeline project provides critical guidance for a future panel review.

- For a project initially characterized as merely a ribbon across the vast north, the Commission concluded there were major project impacts upon vast northern caribou migrations.
- For a project initially characterized as bringing billions of dollars of wealth from finite northern resources, the Commission concluded there were inadequate northern socio-economic benefits and inadequate protection of traditional, sustainable local economies.
- For a project initially characterized as having clear technical feasibility, the Commission concluded there were major technical failures to address complex northern conditions.
- For a project referred for a public inquiry, the Commission came to its environmental assessment conclusions through a combination of broad community meetings and intense quasi-judicial hearings that continue to provide a model of rigorous yet fair public review of a private sector proposal.

On many grounds, CARC has found that the 1990s approach to diamond development is failing to heed the lessons of the 1970s. Indeed, CARC believes we are losing ground.

\(^908\) Canadian Arctic Resources Committee, “Return of the Pipeline” (2001) 27:1 Northern Perspectives 1.

Inquiry has been described as having “[set] an international standard for critical and cross-cultural public assessment of proposed development options.” According to Ian Waddell, the Vancouver lawyer who was special counsel to the Berger Inquiry, the Inquiry “[gave] Canada a worldwide reputation as a country that honestly tried to struggle with the implications of development on the frontier.” I would add that the Inquiry showed that such an ‘honest struggle’ can occur when a legal mechanism is carefully implemented by someone with a vision for how a problem can be addressed.

A concrete example of this lesson and of the impact of the Berger Commission internationally may be found in New Zealand. The Waitangi Tribunal was created in 1975 in response to Maori land claims under the Treaty of Waitangi. Initially it was little-used and not particularly successful, in part because its initial mandate was not to redress past violations of the Treaty, but rather to make recommendations on the future application of the Treaty’s principles. Further, the initial chair of the Tribunal took a rigidly formal legal approach that was scorned by the Maori and thus the Tribunal was little used at first.

However, in 1980, Justice Taihakurei Eddie Durie was appointed chair of the Tribunal. Years earlier, in anticipation of a future role with the Tribunal, Justice Durie had learned about the Berger Commission’s unique approach in the Mackenzie Valley. He visited

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Vancouver, UBC Special Collections (Thomas Berger Fonds – Mackenzie Valley Pipeline Inquiry subject files, box 8 - 6 Articles - comments - re Berger report, file 1 1977-1982 [Folder two of four]).

Thomas Berger, “Memorandum Re Trip to Australia and NZ and Misc. Remarks re Condition of Indigenous Peoples there” (1978) Vancouver, UBC Special Collections (Thomas Berger Fonds – Subject files regarding Aboriginal peoples, the Arctic, and the north, box 88 – 3 Australia : aborigines [Folder two of two]): “The Berger Report has made an impression on Australia. As a result I was invited while in Sydney to Canberra by the Institution for Aboriginal Studies.” Berger spent a day at the Institution and most of the 50 attendees of his talk had read the Report and felt it offered native people an opportunity to express themselves in a way that never happened in Australia.


Berger, One Man’s Justice, supra note 567 at 154.

Russell, supra note 210 at 176.

E-mail correspondence from Hon. Sir E.T.J. Durie (1 April 2008) [Durie e-mail].

See Andrew Sharp, Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s (Auckland: Oxford University Press, 1997), at 77: “When … E.T.J. Durie became Chief Judge of the Maori Land Court, the tribunal found itself in the hands not only of a Maori, but of a very capable judge, a brilliant and subtle advocate, and a man of marked political skill.” Now retired, his title is The Honourable Sir Edward Taihakurei Durie KNZM, but I will refer to him by his then title of Justice.

Durie e-mail, supra note 914.
Berger in Vancouver and then flew and canoed to some of the northern communities that Berger had visited, including Inuvik and Aklavik, meeting with such figures as Sam Raddi, Georges Erasmus, and René Fumoleau. From them and from “other locals, especially those at the Spring camp” to which he traveled by plane and then canoe from Aklavik, he “gained some real insights into how Tom had been handling matters, from the point of view of the indigenous groups, and sensed a very positive reaction to his approach.”

Once appointed to the Waitangi Tribunal in 1980, DuRie incorporated some of Berger’s innovations into the Tribunal’s operations – more community-based hearings, less formal structure – and revitalized its usefulness:

[Prior to my appointment] the Tribunal had ceased to operate, but with a new appointee, one group of Maori thought to file another claim. I think it was only the third or so claim to have been filed. By then I had been long convinced to adopt the Berger approach, modified by the fact that I did not have resources nearly equal to those that he had for the pipeline inquiry. It helped that the Waitangi Tribunal was not established as a Court but as a permanent commission of inquiry. I resolved that there should be a minimum of legal protocol to restrict the filing of claims and that claims should be heard at marae, amongst the people, with all the formality of customary processes, but little or none of the legal formality except when hearing legal arguments.

Frankly, it worked. The Tribunal was inundated with claims (it now has 1,264) and the customary process for claim hearings became the norm. Indeed, the Tribunal soon became a notable part of the New Zealand legal and constitutional scene.

Justice Durie’s belief that he was able to accomplish the revitalization of the Waitangi Tribunal in part because it was set up as a permanent commission of inquiry rather than a court is notable. His adoption of Berger’s less rigidly legal approach that was more respectful of indigenous customs made the Tribunal a success in that it gained credibility with Maori people.

917 President of the Committee for Original People’s Entitlement, an organization representing Inuit of the Western Arctic.
918 Leader of the Indian Brotherhood of the Northwest Territories, later the Dene Nation.
919 An Oblate priest who arrived in the Northwest Territories in 1953 and has lived among the Dene people ever since, he is the author of *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, supra note 529. He testified before Berger with respect to the treaties covering the area.
920 Durie e-mail, supra note 914.
921 Ibid.
people. The Tribunal records past injustices but also makes pragmatic, future-oriented recommendations.\textsuperscript{922} It has been referred to as a transitional justice mechanism for New Zealand\textsuperscript{923} and as “one of the world’s leading exercises in restorative justice”.\textsuperscript{924} Robert Joseph states that the Tribunal “is New Zealand’s Truth and Reconciliation Commission.”\textsuperscript{925}

**The Mackenzie Valley Pipeline Process – Thirty Years Later**

Today, a Mackenzie Valley pipeline project is indeed underway again,\textsuperscript{926} and Scott’s hope for a more empowered position for indigenous peoples has evidently been fulfilled. The consortium of resource companies (Imperial Oil, Shell, Exxon, etc.) this time includes a partnership with an “Aboriginal Pipeline Group”, representing the interests of indigenous peoples in the Northwest Territories, and chaired by Nellie Cournoyea. The Memorandum of Understanding intends that there will be “real and lasting benefits for the people of the North” from the pipeline.\textsuperscript{927} The pipeline’s website homepage provides project summaries in Slavey, Gwich’in and Inuvialuktun languages. The homepage states: “We are committed to respecting the people of the North and the land and environment that sustains them.”\textsuperscript{928}

A Joint Review Panel was established in 2004 to assess the environmental and socio-economic impacts of the proposed pipeline.\textsuperscript{929} The panel held community-based hearings that were described as “less formal than typical courtroom proceedings”.\textsuperscript{930} The stated goal was

\textsuperscript{922} Russell, supra note 210 at 235.
\textsuperscript{923} See Richard Boast, “The Waitangi Tribunal and Transitional Justice” (2006) 4 Human Rights Research Journal 1: Using the Guatemalan TRC as a starting point, the author reviews ways in which the Waitangi Tribunal may be thought of as a transitional justice mechanism for NZ.
\textsuperscript{924} Russell, supra note 210 at 235.
\textsuperscript{926} The project started with a feasibility study in 2000. A memorandum of understanding was reached with Aboriginal groups in 2001: Mackenzie Gas Project, online: <http://www.mackenziegasproject.com/moreInformation/newsArchive/index.asp>.
\textsuperscript{927} Mackenzie Gas Project, online: <http://www.mackenziegasproject.com/whoWeAre/APG/APG.htm>.
\textsuperscript{928} Mackenzie Gas Project, supra note 926.
\textsuperscript{930} Joint Review Panel for the Mackenzie Gas Project, online: <http://www.jointreviewpanel.ca/faq.html>.
to structure the hearings such that public participation would be maximized, and to conduct
the hearings “in such a manner that anyone who wants to comment in person can do so in a
setting that is open, comfortable, effective and respectful.”

Further, the panel stated that it would “[encourage] the submission of traditional knowledge, including oral history, in its
proceedings”. It appears that the process utilized by Berger and the recommendations he
made with respect to indigenous participation influenced the way in which this new round of
pipeline discussions has proceeded. As Berger observed: “If the Inquiry has had an impact on
public policy, it is, I think, in considerable measure as a result of the process of the
Inquiry.”

Looking Back, Looking Forward – the Berger Inquiry and the Truth and Reconciliation
Commission

What does this discussion of a public inquiry that occurred in the 1970s have to do with the
TRC now underway in Canada? Aside from recording a legal history of an important
Canadian commission, my purpose in providing this exploration of the Berger Inquiry is to
glean the institutional design strategies from the Canadian experience that may assist with the
current TRC and future commissions of inquiry. My examination of the Berger Inquiry
provides a view of the possibilities of a commission process in the Canadian context,
particularly with respect to indigenous issues. The Berger Inquiry is a domestic example of
how a commission of inquiry can successfully achieve some of the objectives of a truth
commission. As I noted, the Berger Inquiry inspired a New Zealand commission of inquiry to
conduct its proceedings in such a way that the Waitangi Tribunal is now viewed as a
transitional justice mechanism. Given that a New Zealand institution addressing
indigenous grievances has been so successful after adopting Berger’s model, it stands to
reason that a Canadian truth commission could similarly profit from this example. The
Canadian commissions of inquiry that adopted Berger-like processes are additional models

\footnote{Ibid.}

\footnote{Ibid.}

\footnote{Berger, “Commissions of Inquiry and Public Policy”, supra note 773 at 28.}

\footnote{See above, text accompanying note 914.}
the TRC can look to for victim-centred, less adversarial approaches that assist with healing communities affected by trauma.935

Returning to the defining characteristics of a truth commission as a specialized form of public inquiry discussed in Chapter One,936 it may not be immediately apparent that the Berger Inquiry should be related to a truth commission. The Berger Inquiry admittedly has some differences. It was run by a single commissioner, it was not struck to investigate a pattern of human rights abuses that occurred over a number of years, and it was established to investigate a prospective issue rather than a retrospective issue. However, the manner in which Berger conducted his Inquiry reveals features now associated with the truth commission. Berger broadly interpreted his mandate to enable him to analyse the overarching narrative of the problem before it, including a consideration of the past. That is, he allowed testimony with respect to indigenous “land claims” on the basis that the peoples that would be affected by the pipeline should be permitted to argue that such a pipeline would interfere with their assertions of Aboriginal title. He devised a schedule of community hearings to hear directly from people who would be affected by the pipeline in each community of the western Arctic. These hearings were conducted with a minimum of legal actors, without cross-examination, in the peoples’ home communities, and in their own languages. Berger listened with patience and treated people with respect. He observed and participated in their ceremonies. He ensured that the hearings were broadcast and that the larger public was aware of the issues being discussed. He encouraged understanding between non-indigenous and indigenous people by facilitating education about the issues that were before him. Instead of choosing to view his mandate narrowly and focus just on the direct effect of a pipeline, he looked at the larger picture of the ways in which such a project would directly and indirectly affect a way of life.

In short, Berger’s approach was to fulfill the social function of a commission that I described in Chapter One: to educate the public about historical injustice in order to prevent its recurrence. He did so by creating awareness of and public support for the inquiry process that

935 See above, text accompanying note 895.
936 See above, text accompanying note 104.
In turn prompted social accountability with respect to the issues before him. He showed how government disregard of the northern indigenous peoples’ way of life and aspirations had already created injustices, and warned against repeating the same mistakes in the future. As a result, he recommended the ten-year moratorium in order that the government would take the opportunity to settle land claims along the proposed route prior to commencing the pipeline project. All of these decisions create a picture of a commission that differed greatly from prior legal mechanisms, that created a historical record, that educated the wider public, that promoted social accountability for the issues and the outcomes, and finally that fostered a new dialogue between indigenous and non-indigenous peoples in Canada. Thus, the Berger Inquiry addressed the factors that I have identified in this dissertation for why a truth commission is generally sought in established democracies.

Like the TRC, the Berger Inquiry was preceded by litigation brought by indigenous peoples frustrated that a political solution was not forthcoming to the injustices they saw as perpetrated against them. Both commissions were ultimately created at least in part due to the pressure of litigation. The inadequacies of the litigation model for achieving redress for historical wrongs are evident in both cases. In the 1970s, Canadian courts had only begun to acknowledge the concept of Aboriginal title, and the government did its best to obstruct the claim by Treaty 8 and 11 chiefs – first arguing that the judge could not hear the case, then refusing to appear in court when the case was heard.937 The chiefs were forced to bring their action for a caveat under the land title system, a system entirely created under the presumption of Crown sovereignty. Fitting their assertion of indigenous sovereignty into the legal box of the land titles system is akin to fitting the harms done by the IRS system into the confines of tort law. Neither finds an accommodating solution in the courts. However, in both circumstances, the dissatisfaction with the courts fuelled calls for a political response, and ultimately, a political response came about.

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937 See discussion of *Re Paulette and Registrar of Titles (No. 2)*, *supra* note 559 and related cases, above, *text accompanying* note 556.
Berger included a paper entitled “The Inquiry Process” as Appendix I to Volume Two of his Report. In this paper he notes an “emerging function” of the public inquiry discussed by Gerard Le Dain in his reflections as chair of the Royal Commission on the Non-Medicinal Use of Drugs, a few years prior to Berger. This function was the opening up of issues to public discussion and providing a forum for the exchange of ideas. Berger suggested that: “commissions of inquiry have become an important means for public participation in democratic decision-making as well as an instrument to supply informed advice to government”. This is of course a part of the social function that I argue Berger’s Inquiry performed so well. The fuller interpretation that I attribute to Le Dain’s social function is a process that educates the public such that political will is created to ensure that an injustice is not repeated; that is, a process of creating social accountability. The commission of inquiry form is flexible enough that, given leadership seeking to do so, a public inquiry can fulfill the social function in a manner more commonly expected of a truth commission. The difference is that truth commissions are explicitly mandated to fulfill the social function, whereas whether public inquiries do so will depend on their leadership and the processes adopted.

This social function accords with the mandate of the TRC set out in Chapter Three: acknowledgement of the IRS experiences, impacts and consequences; provision of a holistic, culturally appropriate and safe setting for survivors, their families and communities; truth and reconciliation events at national and community levels; public education of Canadians about IRS and its impacts; creation of a historical record of the IRS system and its legacy; support of commemoration of survivors; and production of a report. As I noted in Chapter One, acknowledgement of an injustice, creation of a historical record, and public education about the injustice to prevent its recurrence are objectives that make a truth commission a specialized form of public inquiry.

Commissions of inquiry, in their basic form, investigate an issue by gathering a broad spectrum of information in order to see the larger context giving rise to the problem. They

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939 Ibid.
940 Ibid. at 224.
941 Settlement Agreement, supra note 2, Schedule N, s. 1.
then make policy recommendations to prevent recurrence of the problem. As discussed in Chapter One, sometimes a commission, in addition to these essential functions, also performs a social function. This involves a process whereby the commission involves the wider public than those people directly affected by the issue at hand, openly acknowledges the harm done, fosters a sense of societal identification with the victims, establishes an incontrovertible record, and makes recommendations to prevent the injustice’s recurrence. Such a process encourages a form of social accountability as I described above. As demonstrated by Berger, the public inquiry form affords the scope for a commissioner to fulfill this social function. Despite the fact that many of his innovations were incorporated into subsequent inquiries, intervening negative experiences with public inquiries and frustration with an inadequate political response to commission of inquiry recommendations caused IRS negotiators to seek a body called a “truth commission”. That is, they sought a commission of inquiry that would be specifically mandated to perform this social function. As discussed in Chapter One, the symbolism of calling a commission a “truth commission” makes this social function an explicit part of the mandate. The increasing presence of truth commission-like bodies in established democracies is related to the desire for a process that engenders social accountability.

I noted above\(^\text{942}\) that survivors sought this specialized form of public inquiry in an effort to avoid the negative experience associated with some public inquiries in the past, where adversarial processes overtook the substance of the inquiry. The negotiators purposely hived off the TRC from the reparations aspects of the Settlement Agreement, signaling a desire to emphasize the victim-centred, non-adversarial nature of the process in order to facilitate healing and reconciliation. As I stated in Chapter Three, having the TRC as a separate process from the other aspects of the Settlement Agreement signals that there is something important about the TRC process itself. Separating the TRC process from the reparations process is also part of the effort to avoid creating a “formal” legal process. I suggested the TRC may encounter difficulties with achieving its goal of being a less formal legal process given the potential need for significant involvement of lawyers to ensure that the Schedule’s

\(^{942}\) See text accompanying note 432, in Chapter Three, above.
provisions are respected.\textsuperscript{943} I noted that while the TRC has the opportunity to conduct itself in a less adversarial, more holistic process than prior legal mechanisms have done, its success on this front will largely depend upon the cooperation of the parties.

The Berger Inquiry managed to gain the cooperation of the parties before him by operating in a non-adversarial manner. Berger’s background as an Aboriginal rights litigator clearly informed his views as the commissioner of the Berger Inquiry, yet as a former litigator and as a judge, his approach was in some ways significantly less “lawyer-driven” than might have been expected. Still, while the format of the community hearings was informal and did not incorporate legal representation in a dominant manner, behind the scenes Berger made considerable use of legal counsel in order to achieve the Inquiry’s goals.\textsuperscript{944} Thus, while an open, informal image is often projected of the Inquiry, it was still a process bounded by the law and legal actors. The TRC is expected to avoid resembling a “formal” legal process, yet two of its three commissioners are lawyers by training and the parties can be expected to monitor the proceedings with their legal representatives. However, the TRC can adopt the Berger model of keeping the lawyers in the background as much as possible. For example, the TRC can hold regular meetings between counsel for the parties to discuss in advance events or hearings so that potential legal objections are dealt with as much as possible by agreement rather than having counsel make objections during an event or hearing itself. This was how Berger’s Special Counsel, Jackson, addressed issues that arose with respect to the community hearings, and it was very effective in keeping those hearings informal and non-adversarial in nature.

I have argued that the TRC’s genesis in a legal settlement agreement poses a challenge in that the TRC was not created out of a wave of concern by Canadians for IRS survivors; rather it was agreed to by their government’s legal advisers in order to settle costly class action lawsuits.\textsuperscript{945} While at the TRC’s outset the apology from the Prime Minister was a critically

\textsuperscript{943} Settlement Agreement, \textit{supra} note 2, Schedule N. See text accompanying note 438, in Chapter Three, above.
\textsuperscript{944} These included Michael Jackson, Special Counsel to Justice Berger for Community Hearings, Stephen Goudge as Assistant Commission Counsel, Ian Scott as Commission Counsel, Ian Waddell as Special Counsel for administrative matters: Knowles & Waddell, \textit{supra} note 634, at 243. See discussion of these lawyers, above at note 813.
\textsuperscript{945} See text in the paragraph following note 387, in Chapter Three, above.
important step for survivors and for bringing the IRS legacy to the attention of non-indigenous Canadians, it was only a step. There may be a sense that giving the apology should finish the matter.\textsuperscript{946} According to one national editorial about the TRC:

Looking beyond the ennobling word “reconciliation,” the function of the whole exercise seems to be to render one giant, authoritative \textit{mea culpa} so that white politicians can stop apologizing, and natives can move on from the victimology of yesteryear.\textsuperscript{947}

The TRC must invite Canadians to engage with a process that they did not instigate in a climate that, as illustrated by this editorial opinion, is not wholly receptive to the aims of the Settlement Agreement. This circumstance presents a significant challenge for the TRC. However, the experience of the Berger Inquiry can be helpful. The Berger Inquiry process generated broad-based public interest in the issues such that the government could not quietly shelve the Report. The TRC must similarly attract the attention and support of a wider public than those already interested in the IRS issue. Berger succeeded in educating the public in many respects through both the operation of the Inquiry and its Report: “[T]he Berger Inquiry became a national ‘teach-in’ and a turning-point in national consciousness. Most importantly it introduced many Northern indigenous voices and their needs to the Canadian public.”\textsuperscript{948} The Inquiry did this even as it worked within the already existing legal framework of the commission of inquiry. The conscious decision to make his Inquiry a truly public inquiry paid dividends in its ability to fulfill a social function. The TRC must be strategic in its work throughout its five years of operation to ensure it maintains a positive public profile and to guard its credibility. Berger’s credibility was unimpeachable throughout his Inquiry due to his commitment to openness and transparency.

\textsuperscript{946} This perception may be compounded by such statements as that made by Prime Minister Stephen Harper at the G20 meeting in Pittsburg on Friday, September 25, 2009: ”'We are one of the most stable regimes in history. ... We are unique in that regard,’ he added, noting Canada had enjoyed more than 150 years of untroubled Parliamentary democracy…. ‘We also have no history of colonialism.’” Reuters, “Every G20 nation wants to be Canada, insists PM”, (25 September 2009), online: Reuters <http://www.reuters.com/article/idUSTRE58P05Z20090926>. This suggests that over a year after he gave the IRS apology, the Prime Minister failed to acknowledge the larger picture with respect to the government policy under which the IRS system operated.

\textsuperscript{947} “The truth about reconciliation” \textit{The National Post} (27 October 2008).

\textsuperscript{948} Jull, \textit{supra} note 777, at 7.
Berger’s insistence on transparency of proceedings is notable for any commission of inquiry in Canada. A recent inquiry’s decision to conduct many of its proceedings in camera attracted concern from human rights organizations although it was an “internal inquiry” and not a public inquiry.949 The potential for many in camera hearings by the TRC, given the restrictions in naming names in its mandate, may prompt a careful evaluation by the commissioners of how to balance privacy and transparency. Further, Berger’s creation of an atmosphere of open disclosure of all relevant information from the beginning of the Inquiry forward prompted considerable cooperation by the parties with respect to disclosing documents to the Inquiry. Berger did not resort to using his subpoena powers; in addition to promoting an ethos of transparency and openness, as noted above, he fostered a non-adversarial environment. This approach is useful for commissions like the TRC that are relying upon the principle of voluntariness in order to garner the information they need from the parties before them.

The decision to combine different types of hearings (preliminary, community, formal, southern) was very effective and Berger clearly set out what types of evidence would be heard, from whom, and how it would be weighed. The community hearings focused on listening to members of the communities that would be directly affected by the pipeline. Berger treated the evidence he heard in the community hearings with the same respect and gravity with which he heard the expert evidence in the formal hearings. Also, Berger decided not to have cross-examination by lawyers in the community hearings, instead preferring to keep legal counsel in the background in order that the community members would feel unfettered in their ability to speak before the Inquiry. The holding of hearings in the South was an important public education tool, as was the media coverage generated by the hearings in the North. Berger comments that there were “huge turnouts – people wanted to respond to what they had heard from the northern peoples”.950 This shows how a commission can create


950 Berger interview #1, supra note 214.
dialogue between different parts of a society. The effectiveness of Berger’s different hearing formats may be of note to the TRC. While its mandate calls for national and community events, the ways in which Berger was able to educate the larger Canadian public as well as the communities through his “teach-ins” are instructive. In addition, his media strategy, brilliantly directed from the beginning to capture a broad audience and to hold their interest throughout the Inquiry, was totally directed toward fulfilling a public education mandate. Public education leads to understanding and acknowledgement of the reality of different communities’ existences. The dialogue created in this process is critical to any hopes of national reconciliation. Any commission, but certainly the TRC with a national mandate that specifically includes public education and healing, should consider adopting such an approach.

The Berger Inquiry process educated the indigenous population about the scale of the proposed pipeline and its ramifications, while the southern population became educated about the existence and perseverance of the peoples of the North. The evidence with respect to the environmental impacts of a pipeline educated people about the impact on the land, the wildlife and the northern peoples. The evidence with respect to the social and economic impacts of a pipeline on the indigenous peoples of the North educated people about the fact that progress should not just be measured in terms of industrial development or non-renewable resource extraction. Public education creates awareness that in turn can foster political will for implementing policy change. Berger’s recommendation about the need to settle land claims had weight behind it at least in part because people became educated about the issues faced by indigenous northerners. “Berger’s report quickly became an international classic on indigenous-white relations.” The legitimacy attributed to indigenous peoples’ views through the Berger process is instructive for the TRC. The process that it undertakes could substantially assist its goal of healing and reconciliation. Further, the approach taken by Berger, if adopted in any measure by the TRC, may provide a similar opportunity for political empowerment of indigenous peoples.

951 See above, note 948.
952 Jull, supra note 777 at 13.
As I noted in Chapter Three, the TRC faces a challenge and a possibility due to the fact that the IRS system was only one component of a larger colonial policy to assimilate indigenous peoples into the settler state. On the one hand, it may be difficult to adequately address the continued disadvantage of indigenous peoples through a process that deals with only one aspect of the historical injustices they have suffered. On the other hand, Canadians may be more receptive to learning about the bigger picture of those injustices through a commission that presents them with one (albeit complex) issue in a way they can understand. While this may be accomplished to some extent by the process utilized by the TRC, an effective, accessible report can contribute to the learning process over the longer term. The accessibility of the report format used by Berger contributed to its becoming a bestseller. A concise, readable report is an important virtue for the TRC and other commissions of inquiry to emulate. As noted in Chapter Three, not only does a truth commission report set out a historical record, but it can also be an extremely effective tool for public education and for shaping national narratives.

Even if it produces a best-selling report, the TRC’s mandate to promote national reconciliation is enormously challenging and it cannot be expected to address the entire spectrum of the indigenous and non-indigenous relationship in Canada. Nonetheless, the TRC may be able to position its exploration of the IRS system as a catalyst for better understanding of the disparities between indigenous and non-indigenous peoples. The interpretation of the mandate is an important discretion of the commissioners, as Berger’s example shows. As discussed in Chapter Three, the TRC commissioners can decide to limit the scope of their work more closely to the IRS system, or expand it by incorporating broader questions under the rubric of discussing the IRS legacy. If they choose to expansively interpret the mandate, there is another way in which Berger’s example is important. The TRC is operating under a Conservative government that has not had a history of strong support for broader political and economic equality for indigenous peoples. The Berger Inquiry

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953 See text following note 468, above.
954 See text following note 523, above.
955 For example, the Harper government refused to honour the Kelowna Accord, supra note 358, a $5.1-billion program for indigenous health, education and housing, negotiated in 2005 and ignored a House of Commons vote requiring the government to fulfill its obligations under the Accord. The Harper government also reversed Canada’s position and refused to endorse the United Nations Declaration on the Rights of Indigenous Peoples.
operated under a government that had little interest in acknowledging Aboriginal title, yet Berger rejected the Minister of Indian Affairs’ advice to refuse permission for testimony on the subject of Aboriginal title before the Inquiry. Berger also succeeded in having his recommendations accepted at least in part because of the public support the Inquiry was able to garner as a result of how Berger conducted the commission process. Public education is of course critically important for the TRC if it is to accomplish its goal of encouraging national reconciliation. Berger’s success on the public education front can provide practical tools for the TRC to implement, particularly with respect to his open and transparent approach, comprehensive and effective media strategy and broader civil society involvement.

As discussed throughout this dissertation, the ability of a public inquiry to fulfill its social function will depend in large part on the inquiry’s leadership and the process used for the implementation of the mandate. Berger’s leadership was instrumental in making the Berger Inquiry a landmark inquiry in Canada. He took an inquiry model that had been around for centuries and made it a process that was truly independent and truly public. His innovations to the public inquiry model provide an insight into the qualities that Berger brought to the public inquiry model, including openness, patience, humility, clarity of vision, and respectfulness. As discussed above, the TRC has had a complete change in leadership and this will undoubtedly affect the character of the TRC, but the new panel can also look to Berger’s example to chart the course of its work in a positive way. They share the attributes of a lawyer, politician and judge that Berger happened to bring to the commissioner role. The new panel members each bring life and work experiences that can strengthen the TRC’s potential for success. Further, they may do well to carefully consider their choice of key staff given the enormous contribution made to Berger’s effectiveness by the strong choices he made in his hiring of staff. Although the Berger Inquiry differed from truth commissions in having a single commissioner, the way that he ran the Inquiry, with independent commission

The General Assembly adopted the declaration by a vote of 143 to 4 on September 13, 2007: General Assembly, News Release: “General Assembly Adopts Declaration On Rights Of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights For All, Says President”, UNGAOR, 61st Gen. Plen., 107 & 108th mtgs., UN Doc. GA/10612 (13 September 2007). Although the apology was given by the Harper government, it may have been more open to making the apology given that it was leading a minority Parliament. See Curry & Laghi, “Mounting sense of urgency was apology’s catalyst”, supra note 496.

956 Letter from Judd Buchanan, supra note 673.
957 See text accompanying note 417, above, in Chapter Three.
counsel, independent research advisers and vast public hearings may have served to mitigate the fact that he sat as a sole commissioner. The independent role of his commission counsel and others enabled them to assess the evidence before the Inquiry and seek to fill the gaps that Berger himself might not have recognized. The strong role played by his Special Counsel in organizing the community hearings, as well as the important role played by his Chief Information Officer in implementing the media strategy, provide an image of a closely knit team working with Berger to forward his vision for the Inquiry.

Berger’s innovations reflect a desire to have a more complete picture than can be provided in a strictly formal adversarial environment when dealing with large complex policy issues and wide-ranging human rights questions. He adopted a contextual approach that is suited to answering a broadly worded mandate respecting a complex problem, at a time when civic participation was viewed as increasingly important. There may also have been some reflection of an increasing awareness of Canada’s multicultural realities in the format, including the fact that many northern inhabitants do not speak English as a first language. The Berger Inquiry is an example of how a public inquiry can utilize legal, scientific and social expertise to synthesize complicated issues. Individual litigation battles can only investigate the evidence the parties choose to present and reach conclusions within the confines of the common law system. Government departments can research issues within the silo of their own jurisdiction and expertise. Berger took advantage of the public inquiry’s ability to look beyond the boundaries of any one process or department to explore the causes and nature of a broad issue. He was then able to communicate the process in an extremely effective way to the affected parties and the broader national community. In a paper entitled “Commissions of Inquiry and Public Policy”, Berger considered the choice that government made in opting for a public inquiry rather than deciding to study the impact of a pipeline in house. He suggested that the choice of instrument meant that the issues were publicly canvassed, challenged and tested, and that northerners were consulted.958 The ability of the public inquiry to make its own rules and procedures and to consult a broad range of sources for the information upon which it will base its conclusions sets it apart from other legal mechanisms available in Canada. Adapting the model that Berger initiated for its own

purposes may assist the TRC with its goal of operating differently from other legal mechanisms previously used to address the IRS legacy.

Finally, Berger’s use of the commission of inquiry form displays its flexibility as a legal mechanism for addressing broad social questions. This expansion of an existing legal mechanism is a useful lesson for established democracies that may need to tackle a difficult problem but wish to do so without creating a new institution: an existing mechanism may be used in a new way to better address a problem. As I noted in Chapter Three, the TRC’s mandate prohibits it from acting as a public inquiry. This requirement should be respected, but again it should be viewed in the context of the whole phrase that also warns against emulating a “formal legal process”. This part of the mandate was a caution against repeating past mistakes such as engaging in an adversarial process that revictimized survivors by failing to listen to them, and that failed to view the larger picture of the IRS system and its legacy. These concerns reflect the set of features that mark a truth commission as a specialized form of public inquiry. The negotiators of the TRC cannot have been thinking of the Berger Inquiry when they rejected the public inquiry as a model for the TRC. The Berger Inquiry demonstrates the possibilities inherent in the legal mechanism of a commission given visionary leadership and a considered process. Berger blazed a trail that continues to provide useful strategies for institutional design of legal processes, including the TRC.

The TRC has an enormously challenging path ahead, given the expectations that survivors may have of a body that is mandated to set the country on a healing journey, and the skepticism with which its work is viewed by some indigenous people and some non-indigenous people alike. It follows decades of other attempts to redress the injustices

959 See text accompanying note 432, above.
960 I acknowledge here, as I did in my introduction, that the very idea of reconciliation through the TRC as it has been discussed throughout this dissertation is rejected by some indigenous scholars. Alfred states: “I see reconciliation as an emasculating concept, weak-kneed and easily accepting of half-hearted measures of a notion of justice that does nothing to help Indigenous peoples regain their dignity and strength.” Alfred, in Younging, Dewar & DeGagné, supra note 21, 179, at 181. Non-indigenous views expressing skepticism about the TRC include: Libin, “Chairman's exit leaves panel in disarray”, supra note 410, quoting Tom Flanagan, University of Calgary political science professor who was an architect of Stephen Harper’s 2004 and 2006 election campaigns, as saying that the TRC is “mostly ‘political theatre’”; R. A. Clifton, “Residential Schools: Another View; ‘Most of these students at least learned modern skills that would help them participate more fully in both aboriginal and Canadian society’” The National Post (31 May 2008) A25.
produced by the IRS experience. The TRC must rebuild confidence in its work after the resignation of the first panel of commissioners. If the TRC adopts – and adapts – the commission model developed in the Berger Inquiry, it is possible that the process can build momentum and support through its operations and fulfill its social function of educating the public. However, a failure to engage the non-indigenous public in the TRC’s process will impede the TRC’s ability to fulfill this social function. Many survivors have been engaged in the Settlement Agreement process⁹⁶¹ and may therefore be presumed to know about the TRC. They must each decide whether the potentially traumatizing cost of participation in the TRC’s process is worth the potentially healing benefit. Will most non-indigenous Canadians make the same calculation for their own participation? What will prompt them to do so? No part of the Settlement Agreement has involved vast numbers of non-indigenous Canadians thereby causing them to personally pay attention to the process. They may not see that the process has anything to do with them. Without a very significant effort being made by the TRC to engage them, the wider public may not realize that there is a benefit to participating in the TRC process and a cost to ignoring it – helping to reconcile the relationship between indigenous and non-indigenous peoples or consigning it to the heap of failed promises and unresolved issues that litter our shared history. As noted in Chapter Three, the TRC must heed the caution voiced by RCAP against relying upon survivors to do the work of reconciliation.⁹⁶² If indigenous people participate and see that nothing changes in terms of the relationship with non-indigenous peoples, then the TRC will have failed with respect to its reconciliation mandate. The final chapter discusses the necessity of shaping a narrative that engages indigenous and non-indigenous people in a shared process.

⁹⁶¹ See text accompanying note 367, above, that shows almost 100,000 people applied for the Common Experience Payment.
⁹⁶² See text accompanying note 225, above.
5. CONCLUSION

In Chapter One, I discussed the features that mark a truth commission as a specialized form of public inquiry. Aside from dealing exclusively with human rights and focusing on a pattern of human rights violations rather than an isolated incident, the main distinguishing feature of a truth commission is its symbolic value in acknowledging a historical injustice by its very inauguration. I noted that this symbolic value is operationalized by truth commissions having an explicitly social function of educating the public about the historical injustice in order to prevent any recurrence. I have argued throughout this dissertation that whether a commission (a public inquiry or a truth commission) fulfills the social function of public education about a pressing societal issue depends upon its leadership and process.

Chapter Two explored the limitations of other legal mechanisms in addressing the (Indian Residential Schools (IRS) legacy. In particular, the inability of civil litigation, criminal prosecution, or alternative dispute resolution to capture the systemic nature of the IRS harms prevented these mechanisms from adequately assessing the consequences for people and communities. This hinders the ability of these mechanisms to promote social accountability for the IRS legacy. The Truth and Reconciliation Commission (TRC) may be seen as a response to the failure of the usual legal mechanisms to effectively acknowledge the harms to survivors.

I noted in Chapter Three that one of the most important challenges that the TRC faces is the task of constructing a narrative in Canada that acknowledges IRS as part of a larger government policy toward indigenous peoples, rather than as a collection of boarding schools with some abusive teachers. Such a narrative would contemplate broader harms (cultural, spiritual, linguistic, intergenerational) wrought by the IRS system, rather than simply the incidents that happened at certain schools to certain individuals. The point is not to adopt one view to the exclusion of all others but rather to acknowledge the harms that have occurred in order that Canadian society cannot deny their existence. In this way, a truth commission can promote social accountability. This construction of a national narrative is a critical part of the TRC’s mandate of national reconciliation. If Canadians can continue to deny or be ignorant
of the IRS legacy, it will be very difficult to move forward to a respectful future. Thus, the task of creating a national narrative is part of the social function of the TRC.

One of the strongest impacts of the Berger Inquiry was its redefinition of Canada’s national narrative about the North. The very title of the Report – *Northern Frontier, Northern Homeland* – sought to show how the Canadian idea of the North as a vast, empty wasteland of snow and ice belied the fact that it has been the home of diverse and vibrant cultures for far longer than Canada has existed. Berger stated: “We possess a terrible self-centredness, even arrogance, as a people…. History is what happened to us. We dismiss as a curiosity what has gone before”.\(^{963}\) It was not just his Report but also the process he engaged that addressed the competing narratives brought by the parties:

To Berger, the journey had all along seemed more important than the destination…. From the very beginning, the inquiry had become the focus for the discussion of social, ethical and political issues, as well as environmental and engineering problems. This was because it represented in a microcosm the clash between two cultures, two sets of values, two definitions of progress.\(^{964}\)

There are two significant narratives that the Berger Inquiry and Report address. The first is the mythology surrounding Canada as a northern nation that is deeply rooted in our vision of ourselves as a country. As illustrated by our national anthem, this vision of Canada is as “the true North, strong and free”. Page, a participant in the Inquiry, acknowledges:

> I came to realize that a romantic vision of the North was deeply implanted in the national consciousness and this vision was a potent political factor surrounding the Berger Inquiry. It was impossible to define because it had been slowly emerging for a century. It was also impossible to appreciate the nature of the southern response to Berger without first trying to understand the myth of the North lurking within the Canadian identity.\(^{965}\)

Berger’s Report identified the nation-building mythology of non-indigenous southerners that saw the North as a frontier, just as the West had been seen a century earlier. The Report countered this image with the perspective of northern peoples who saw themselves as nations

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\(^{963}\) O’Malley, *supra* note 582 at 13.

\(^{964}\) Bregha, *supra* note 629 at 116.

\(^{965}\) Page, *supra* note 531 at 2.
too, and who had their own ideas of how to build their nations.\textsuperscript{966} The Report begins this way:

We are now at our last frontier. It is a frontier that all of us have read about, but few of us have seen. Profound issues, touching our deepest concerns as a nation, await us there.

The North is a frontier, but it is a homeland too, the homeland of the Dene, Inuit and Métis, as it is also the home of the white people who live there. And it is a heritage, a unique environment that we are called upon to preserve for all Canadians.

The decisions we have to make are not, therefore, simply about northern pipelines. They are decisions about the protection of the northern environment and the future of northern peoples.\textsuperscript{967}

Berger was clearly addressing the non-indigenous public here, a strategy that I argue is crucial to any progress to be made in a mechanism attempting to address historical injustice. In doing so, he confronts a second strand of Canadian mythology, relating to our image of ourselves as a bastion of tolerance and respect for human rights.\textsuperscript{968} This passage of Berger’s Report addressed Canadians who simply did not see themselves as a nation marked by systemic human rights abuses and a deep societal rift. Canadians at that time would have seen themselves in the image of Lester B. Pearson’s Canada – the peacekeeping nation who claimed as its own the drafter of the \textit{Universal Declaration of Human Rights}, a nation with a Bill of Rights,\textsuperscript{969} a nation on the side of freedom and democracy during the Cold War, the “just society” of Trudeau’s vision. Berger’s Inquiry was the first indication for many people

\textsuperscript{966} Kymlicka & Bashir, \textit{supra} note 506, observe at 15 that: [F]or some commentators, nation-building is the cause of historical injustice towards indigenous peoples, not the solution to it. It was precisely in the name of building modern unitary nations that injustices were committed against indigenous peoples, stripping them of their lands, cultures, and self-governing institutions.

\textsuperscript{967} Berger Report, vol. 1, \textit{supra} note 8.

\textsuperscript{968} This approach was evident at the opening of the southern hearings of the Inquiry, as cited by O’Malley, \textit{supra} note 582 at 222: Judge Berger takes his place at the front and explains what the inquiry is about, “a pipeline along the route of Canada’s mightiest river, a pipeline costlier than any in history …” “We Canadians think of ourselves as a northern people, so the future of the North is a matter of concern to all of us,” the judge continues. “It is our own appetite for oil and gas and our own patterns of energy consumption that have given rise to proposals to bring oil and gas from the Arctic. It may well be that what happens in the North and to northern peoples will tell us what kind of people we are.”

\textsuperscript{969} \textit{Canadian Bill of Rights}, S.C. 1960, c. 44.
that indigenous peoples did not have the same view of the Canadian myth or ethos as non-
indigenous peoples. The views of indigenous peoples were passionately articulated before
Berger by people such as Phillip Blake who testified at Fort Macpherson on July 9, 1975:

We are a nation. We have our own land, our own ways, and our own civilization. We do not want to destroy you and your land. Please do not destroy us. …

Where is your great tradition of justice today? Does your nation’s greed for oil and
gas suddenly override justice? What exactly is your superior civilization? How is it
that it can so blindly ignore the injustice occurring continually over one-third of the
land mass in Canada?

One-third of Canada is under the direct colonial rule. Yet you seem willing only
to talk of igloos, polar bears and snow when you talk about the north. One has to
read about South Africa or Rhodesia to get a clear picture of what is really
happening in Northern Canada. While your newspapers and television talk about
sports fishing up here, we as a people are being destroyed. And it barely gets
reported in your TV or newspapers.970

These sentiments would have shocked many non-indigenous Canadians at the time they were
spoken before Berger, and might even do so today. They reveal a rupture in the Canadian
identity as a human rights defender and a champion of minority rights that values a diverse
society of many cultures. These sentiments were echoed by dozens of people through
multiple communities along the proposed pipeline’s route. The work of indigenous activists
to disrupt these national myths at the time of the Inquiry has continued. Georges Erasmus, in
a speech in Vancouver in 2002 stated:

Creating and sustaining a national community is an ongoing act of imagination,
fuelled by stories of who we are. The narratives of how Canada came to be are
only now beginning to acknowledge the fundamental contributions that
Aboriginal people have made to the formation of Canada as we know it.971

The Inquiry coincided with a time when indigenous organizing with respect to self-
determination was developing in Canada and when the concept of public consultation was

970 “Statements to the Mackenzie Valley Pipeline Inquiry” in Watkins, supra note 890, at 6-7. Of course, as
described above in Chapter Four, these sentiments began to be reported in the southern media for the first time
with testimony such as this before Berger.
971 Georges Erasmus, Third LaFontaine-Baldwin Symposium Lecture, supra note 143.
becoming increasingly accepted. It marks a time when people started to question “progress” and the costs of progress. Concern for the environment began to resonate with non-indigenous peoples. While the Inquiry enabled voices to be heard that would otherwise have gone unheard, the Inquiry itself occurred at the whim of a Canadian political system that, during a minority Parliament situation, enables voices to be heard that might otherwise go unheard. A different political balance might have produced a different commissioner. A different commissioner would undoubtedly have produced a different report. The significant impact achieved by the Inquiry clearly surprised the pipeline’s advocates. The idea that the Inquiry might have represented “some unavoidable explosion of ‘truth’” reinforces the perception that something larger than anticipated from a public inquiry took place.

Why is Berger’s Inquiry so important? The Inquiry represents many aspects of Canada’s nationhood. The Report acknowledges the mythologizing by southern, non-indigenous Canadians about the North, as well as the pioneering spirit of the explorers – this time for resources in the ground, rather than upon it. The Globe and Mail’s observer of the Berger Inquiry, O’Malley, notes the powerful effect of the Inquiry in countering the accepted narrative of Canada’s North:

[ Berger] described the inquiry in Toronto as “a traveling teach-in” and there is no doubt that, whatever he recommends in his final report, much has been accomplished already by massive consciousness-raising, both in the north and in the south about the north. Not even John Diefenbaker’s rhapsodic “northern vision” of 1958 measures up (even though it inspired the greatest political landslide in Canada’s history).

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972 Puxley, supra note 767.
974 O’Malley, supra note 582 at 223. His reference to Diefenbaker’s speech is somewhat ironic. The campaign speech, “A New Vision”, delivered in Winnipeg on 12 February 1958, outlined his vision of the North as the new frontier, ripe for development: online: Michael Byers on Politics, “Who Owns the Arctic?”, “John Diefenbaker’s Northern Vision”, <http://byers.typepad.com/arctic/2009/03/john-diefenbakers-northern-vision.html>. Diefenbaker went on to win the largest landslide to that date in Canadian political history, winning 208 out of 265 seats: CBC, “Total Triumph” (6 April 1958), online: <http://archives.cbc.ca/politics/prime_ministers/clips/10963/>. It was Diefenbaker who began construction of the Dempster Highway. He was also the Prime Minister who introduced the Bill of Rights and extended voting rights to Aboriginal peoples.
The idea that an inquiry can be a “teach-in” illustrates the pedagogical potential of the commission of inquiry form. It is this potential that must be tapped by the TRC. Teaching all Canadians not just the history of the schools but their legacy, not just the stories of the children (important as they are to hear), but the context in which they arose where indigenous peoples were viewed as an “Indian problem” rather than partners to be accorded equal dignity and respect; this is the TRC’s monumental task. It is through this process of “massive consciousness-raising” that the national narrative can be reshaped. The process is the key. The Berger Inquiry is important for showing the possibilities of an existing legal mechanism, the commission of inquiry, to address a broad societal issue. The public inquiry showed itself to be malleable and adaptable under the leadership of someone committed to building a complete picture of the issues before him. The process utilized by Berger engaged the people immediately affected by the pipeline but also engaged the public, enabling education and awareness to result. This engagement enabled the Inquiry to contribute to a dialogue in Canada about respectful relations between non-indigenous and indigenous peoples that continues to this day in the form of the IRS Settlement Agreement and the TRC.

Over the thirty years since the Berger Inquiry, truth commissions have become a commonly used mechanism in addressing deep rifts in societies around the world. Rarely have established democracies employed them. But now Canada is embarking upon a truth commission to address the legacy of the Indian Residential Schools. The issue of the schools was raised in a critical way, quite possibly for the first time, by Berger in his Report since in every community he visited in the North, the effect of the schools entered into the testimony he witnessed. He became convinced that Aboriginal control over education of children would be crucial to the settlement of land claims. Twenty years later, the Royal Commission on Aboriginal Peoples dedicated a chapter of its monumental report to IRS and called for a public inquiry into the schools. Another decade passed before the TRC was negotiated. The thread that links these commissions displays the value that public inquiries have in the Canadian legal fabric. Berger’s Inquiry was not about residential schools, but his report began to lay the groundwork for their legacy to be discussed in public life.

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As discussed in Chapter One, the public inquiry process can promote social accountability in a way that the courts cannot. A commission can encourage citizens to reflect upon their society and acknowledge their own responsibility in creating a greater democratic good. With respect to RCAP, Miller stated:

It is fitting that a royal commission operating in the name of the people of Canada is looking into the issue because in a fundamental sense the party that bears most responsibility for the residential school story is the people of Canada. Churches and federal bureaucracy no doubt were the instruments that carried out specific acts or neglected to do what needed to be done in particular cases. But behind both the churches and the government stood the populace, who in a democracy such as Canada ultimately are responsible.  

This desire for broader social accountability is part of the TRC’s genesis. Courts can only provide solutions on individual cases and order remedies between parties to the litigation; they are unable to address the collective pain that survivors and their communities endure as a result of the IRS system. The costs of litigation for individuals, both in financial and emotional terms, can be prohibitive. The trial process is plagued with delays, often resulting from arguments about minutiae that do not touch upon the heart of the case. There may be tactical arguments by defence counsel to delay the process or discourage the plaintiffs from proceeding. The totality of the harms experienced by the plaintiffs may not fall into compensable legal categories, or the time elapsed since the harms occurred may bar recovery due to the expiry of limitation periods. There may be no recognition of ongoing, intergenerational harms. Courts are unable to promulgate societal responsibility for the policies of which the IRS were a part. The TRC was negotiated because survivors sought a response that the courts could not provide. In the face of mass human rights violations, the courts may not be able to deliver justice. Some measure of healing may result if there is an acknowledgement through the TRC process of the injustice the IRS system has caused for survivors and their communities. The TRC has the opportunity to engage Canadians in ideas about what it means to live in society with one another.

977 Miller, Shingwauk’s Vision, supra note 140 at 434.
Berger pointed out the two overarching narratives in the North with respect to the pipeline, and in doing so opened peoples’ eyes about how they viewed this country. Some of the work of the TRC may involve simply teaching Canadians that they have a worldview shaped by their own cultures that may not accord with that of their neighbours. To even contemplate reconciliation there must be an understanding that the parties before the TRC may view things fundamentally differently. It is in this process of public education regarding past injustices that Canada may be able to reach forward to a future that includes a more just relationship between indigenous and non-indigenous peoples.

I have not spoken at length about justice in this dissertation, though in many ways the entire project is about what justice looks like depending upon the legal mechanism employed to respond to a grave injustice. The response to past injustice must surely include some kind of justice. The basic impulse behind the concepts of transitional justice and restorative justice is a search for a means of redress for past human rights violations that will acknowledge the harms done and work to prevent their recurrence. At the beginning of a speech in Vancouver in 1984, Berger quoted Northrop Frye: “man must seek his ideals through social institutions”978. Although a speech about the constitution and his idea of Canada, Berger indicated that his approach to our legal framework is one that links outcomes to process. If you want the country to exhibit certain values, then your institutions must reflect them. If we are to seek our ideals through social institutions then a truth and reconciliation commission presents a unique opportunity to do so.

One narrative of Canada tells us we are a nation of explorers, and immigrants, of multiculturalism, and of tolerance. This standard narrative of Canada may not be shared by the indigenous inhabitants here. Canada is currently embarking upon a voyage into a new frontier: the Truth and Reconciliation Commission on the Indian Residential Schools legacy may be an opportunity to formulate a new narrative. The TRC is not a public inquiry in the form so familiar to Canadians. Nor is it entirely like other truth commissions the world has

known. Still, the Berger Inquiry shows us how we might navigate the journey into this frontier with strategies charted closer to home.
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APPENDIX 1

Royal Commission on Aboriginal Peoples Recommendation for a Public Inquiry on Residential Schools

We believe that a public inquiry into residential schools is an appropriate social and institutional forum to enable Aboriginal people to do what we and others before us have suggested is necessary: to stand in dignity, voice their sorrow and anger, and be listened to with respect. It has often been noted that public inquiries perform valuable social functions. In the words of Gerald Le Dain, a public inquiry has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can affect the problem are of profound importance. Given the range of subjects contemplated by our terms of reference, it was not possible for the Royal Commission to perform these social and investigative functions to the extent necessary to do justice to those harmed by the effect of Canada's residential school system. We hope that this chapter of our report opens a door on a part of Canadian history that has remained firmly closed for too long. In our view, however, much more public scrutiny and investigation are needed. A public inquiry into Canada's residential school system would be an indispensable first step toward a new relationship of faith and mutual confidence.

Recommendations

The Commission recommends that

1.10.1
Under Part I of the Public Inquiries Act, the government of Canada establish a public inquiry instructed to
(a) investigate and document the origins and effects of residential school policies and practices respecting all Aboriginal peoples, with particular attention to the nature and extent of effects on subsequent generations of individuals and families, and on communities and Aboriginal societies;
(b) conduct public hearings across the country with sufficient funding to enable the testimony of affected persons to be heard;
(c) commission research and analysis of the breadth of the effects of these policies and practices;

(d) investigate the record of residential schools with a view to the identification of abuse and what action, if any, is considered appropriate; and
(e) recommend remedial action by governments and the responsible churches deemed necessary by the inquiry to relieve conditions created by the residential school experience, including as appropriate,
• apologies by those responsible;
• compensation of communities to design and administer programs that help the healing process and rebuild their community life; and
• funding for treatment of affected individuals and their families.

1.10.2
A majority of commissioners appointed to this public inquiry be Aboriginal.

1.10.3
The government of Canada fund establishment of a national repository of records and video collections related to residential schools, co-ordinated with planning of the recommended Aboriginal Peoples' International University (see Volume 3, Chapter 5) and its electronic clearinghouse, to
• facilitate access to documentation and electronic exchange of research on residential schools;
• provide financial assistance for the collection of testimony and continuing research;
• work with educators in the design of Aboriginal curriculum that explains the history and effects of residential schools; and
• conduct public education programs on the history and effects of residential schools and remedies applied to relieve their negative effects.
APPENDIX 2

Mandate of the Mackenzie Valley Pipeline Inquiry

Whereas proposals have been made for the construction and operation of a natural gas pipeline, referred to as the Mackenzie Valley Pipeline, across Crown lands under the control, management and administration of the Minister of Indian Affairs and Northern Development within the Yukon Territory and the Northwest Territories in respect of which it is contemplated that authority might be sought, pursuant to … the Territorial Lands Act, for the acquisition of a right-of-way;

And Whereas it is desirable that any such right-of-way that might be granted be subject to such terms and conditions as are appropriate having regard to the regional social, environmental and economic impact of the construction, operation and abandonment of the proposed pipeline;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minster of Indian Affairs and Northern Development, is pleased … to designate the Honourable Mr. Justice Thomas R. Berger … to inquire into and report upon the terms and conditions that should be imposed in respect of any right-of-way that might be granted across Crown lands for the purposes of the proposed Mackenzie Valley Pipeline having regard to

(a) the social, environmental and economic impact regionally, of the construction, operation and subsequent abandonment of the proposed pipeline in the Yukon and the Northwest Territories, and

(b) any proposals to meet the specific environmental and social concerns set out in the Expanded Guidelines for Northern Pipelines as table in the House of Commons on June 28, 1972 by the Minister.

His Excellency the Governor General in Council is further pleased hereby

1. to authorize Mr. Justice Berger
(a) to hold hearings pursuant to this Order in Territorial centers and in such other places and at such times as he may decided from time to time;
(b) for the purposes of the inquiry, to summon and bring before him any person whose attendance he considers necessary to the inquiry, examine such persons under oath, compel the production of documents and do all things necessary to provide a full and proper inquiry;
(c) to adopt such practices and procedures for all purposes of the inquiry as he from time to time deems expedient for the proper conduct thereof;
(d) …to engage the services of such … technical advisers, or other experts … and also the services of counsel to aid and assist him in the inquiry ….

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