6

Canadian Redress

6.1 Background

Canada's residential school system developed during the nineteenth century. Religious orders operated most schools, which primarily housed 'status Indian'[1] children. These culturally genocidal institutions sought to eliminate Indigenous cultures by removing their children (The Truth and Reconciliation Commission of Canada 2015e: 1; MacDonald 2019). The schools were also systemically abusive. In 2006, the Indian Residential Schools Settlement Agreement (IRSSA) initiated three monetary redress programmes – the Common Experience Payment (CEP) and its ancillary Personal Credits programme, alongside the Independent Assessment Process (IAP). IRSSA also committed Canada to provide CDN$125 million for the Aboriginal Healing Foundation; CDN$60 million to research and preserve the experiences of the survivors; CDN$20 million for commemorative projects; and CDN$60 million for the Truth and Reconciliation Commission (2009–2015). These initiatives were complemented by the prime minister's 2008 parliamentary apology (Harper 2008).

Although they were independent processes, as composite parts of a single agreement, the three monetary redress programmes shared a common background, stakeholders, eligible populations, and some administrative and support provisions. The CEP redressed the collective experience of structural injuries, including the loss of language and culture. The Personal Credits programme provided in-kind redress, while the IAP redressed individually experienced, often interactional injuries,

[1] 'Indian' is a prejudicial term for Indigenous Canadians: it is also a legal status. Canada's Indian Act (1876) defines who is recognised as an 'Indian' and entitled to the rights and responsibilities associated with that status ('Indian Act' 1876 (1985)). Many Indigenous persons and peoples, such as the Métis and Inuit, were, for various reasons, not recognised as 'status Indians' and generally excluded from the Act's benefits and disabilities until 2016.

https://doi.org/10.1017/9781009082662.008 Published online by Cambridge University Press

including consequential damages. The programmes were very large. The CEP had more than double as many applicants (105,530) as the second largest exemplar – the IAP. Both the IAP's 38,276 applicants and the 30,042 initial Personal Credit applications greatly exceeded those in the largest non-Canadian exemplar, Ireland's RIRB (16,649). Canada's programmes were as expensive as they were big.[2] The CEP and Personal Credits cost over CDN$1.9 billion. IAP payments totalled CDN$3.2 billion (Independent Assessment Process Oversight Committee 2021: 88). This chapter will focus first on the CEP and its ancillary Personal Credits programme. I then address the IAP.

6.2 Common Experience Payments

Indigenous parties co-developed and implemented IRSSA, with the Assembly of First Nations (AFN) occupying a central position. Canada[3] assumed administrative responsibility for redress, but the courts had oversight responsibility, the administrative aspects of which were managed by an *amicus curiae*, Crawford Class Action Services. Developing and delivering such large and complex programmes required coordinating the work of several government departments and stakeholder groups along with hundreds of local agencies. This created problems (Dion Stout and Harp 2007: v). The National Administrative Committee (NAC) was the peak administrative body for all three programmes. It comprised seven representatives of the settling parties.[4] The NAC was responsible for regulatory interpretation. It could issue some decisions based on a majority of five, but it usually sought consensus, which meant it was slow-moving. For example, negotiations over the CEP application

[2] The churches bore some of IRSSA's costs, with a formula apportioning their financial contributions to their degree of involvement in the schools system. The monies involved for the United and Anglican churches were not significant and paid promptly. The Catholic Church was the largest church contributor and its CDN$79 million share was not paid in full. After sustained litigation, the Catholic Church was released from its obligation in 2015. At the time of writing, this remains a significant political issue.

[3] For simplicity, I use 'Canada' to refer to both the department-level state agency and the state generally.

[4] The seven parties were: Canada, churches, the AFN, the National Consortium (representing nineteen law firms), the Merchant Law Group, Inuit Representatives, and Independent Counsel (who represented law firms outside the National Consortium).

form continued until 6 September 2007, two weeks before the programme was launched (Strategic Policy and Research Branch 2013: 15).

Service Canada (a government agency) was one of the shopfronts working with survivors, receiving applications, ensuring their completeness, inputting information into the database, and confirming applicants' identity. Service Canada would also issue CEP payments. The *amicus curiae*, Crawford Class Action Services, operated a parallel client-facing email/telephone 'CEP Response Centre'. Crawford mediated between the programme and survivors, administered the CEP appeal process, and operated the IRSSA website. Donna Cona, an Indigenous service business, also ran a helpline.

Behind those outward-facing agencies, Canada's Department of Indian Affairs and Northern Development ran the primary administrative body – Indian Residential Schools Resolution Canada (IRSRC[5]). In 2007, Canada estimated that IRSSA would require around 600 full-time staff (Indian Residential Schools Resolution Canada 2007a: 5). At the time, IRSRC had 317 staff, mostly permanent civil servants supplemented by contractors (Audit and Assurance Services Branch 2015: 21). The programmes struggled to recruit and retain staff. IRSRC experienced significant turnover, with three deputy heads succeeding one another during 2006–2007. The 2008 global financial crisis led to a hiring freeze. Staffing challenges degraded capacity, decreased morale, and contributed to delays (Audit and Assurance Services Branch 2015: 37). IRSRC's host ministry was renamed and reorganised several times over the programmes' duration, aggravating morale problems.

Within IRSRC, the CEP had two key sub-units, the CEP Coordination Unit, responsible for administration, and the National Research and Analysis Unit (NARA), which researched and validated CEP applications. Operational and staffing costs for the CEP from 2006 to 2013 were CDN$101 million (Audit and Assurance Services Branch 2015: 9). Service Canada spent a CDN$36 million (Strategic Policy and Research Branch 2013: 36). Health Canada provided significant funding, of around CDN$55 million per year, in health and counselling support, but that figure includes funding for the IAP and the TRC (Office of Audit and Evaluation 2016: 1).

The visibility of redress benefitted from Canada's largest-ever advertising campaign, with information packages conveyed through and to

[5] IRSRC was known by several names but the changes are not important.

around 140 local and Indigenous organisations in English, French, and a variety of Indigenous languages (Audit and Assurance Services Branch 2015: 9). Advertising synchronised with IRSSA deadlines, with 98 per cent of survivors each seeing an average of 14 advertisements (Indian Residential Schools Adjudication Secretariat c2013). Because IRSSA extinguished the survivors' right to sue, a 150-day opt-out period enabled them to decide, both individually and collectively, if they wished to lose those rights. As many as 1,288 opted out before the 20 August 2007 deadline (Strategic Policy and Research Branch 2013: 5, fn 21). IRSSA would have been discontinued if that figure had exceeded 5,000.

***

The CEP addressed collective and structural injuries experienced by those residing in the residential schools. Survivors received CDN$10,000 for the first year (or part thereof) of residence in a scheduled institution, then CDN$3000 for every subsequent year of residence (or part thereof) prior to 31 December 1997. Eligible applicants needed to be alive on 30 May 2005, not have opted-out, and to apply before 19 September 2011. That deadline was extended to 19 September 2012 for those who experienced hardship or exceptional circumstances. Posthumous applications were accepted for survivors who died after 30 May 2005.[6] Applicants who were sixty-five years or older on 31 May 2005 and applied by 31 December 2006 were eligible for advance payments of up to CDN$8,000. A total of 13,547 applications resulted in around 10,300 advance payments (Audit and Assurance Services Branch 2015: 5).

The short CEP application form asked applicants to provide identity documents and to state if they were status Indian, non-status, Métis, Inuit, or Inuvialuit. The survivor could select payment by direct deposit or cheque and needed to consent to Canada verifying their identity and duration of residence. The key evidence concerned which school(s) the survivors attended and the dates of attendance. A schedule of eligible institutions was appended to the form. A school was included if Canada was responsible for it and it provided overnight accommodation. The schedule should have included all such schools; however, exclusions

[6] The conditions of eligibility vary slightly for members of different claimant groups. For example, survivors who attended the Mohawk Institute and who died on or after 5 October 1996 were eligible.

occasioned widespread and bitter complaints (The Truth and Reconciliation Commission of Canada 2012: 9; Reimer et al. 2010: 34; Logan 2008: 84). IRSSA specified that institutions might be added if they fit the criteria for inclusion. Applications by 9,471 survivors requested the addition of 1,531 institutions (Indigenous and Northern Affairs Canada 2018). Most requests were denied. Canada accepted seven additions and the courts added three more – the last, when appeals ended in July 2018, brought the total number of scheduled institutions to 140.

Survivors could submit CEP applications by mail, however, 63 per cent of applications were submitted in person at a Service Canada Centre or at a local outreach session. Outreach visits by Service Canada staff leveraged local Indigenous agencies and support for applicants (Reimer et al. 2010: xiv). Because on-site support catered to reserve-based applicants, greater challenges were encountered with off-reserve, urban, and transient applicants. Service Canada created special communication conduits with federal (but not provincial) prisons (Strategic Policy and Research Branch 2013: 19 fn46).

In 2006, Canada estimated that there were 78,994 eligible survivors (Audit and Assurance Services Branch 2015: ii). This proved accurate: there were 79,309 CEP payments. However, Canada was prepared neither for the large number (over 25,000) of ineligible applications, nor the initial high volume. There were 38,475 applications in the first two weeks and around 80,000 after six weeks – a number that was originally expected would take a year to reach (Audit and Assurance Services Branch 2015: 48; Indian Residential Schools Resolution Canada 2007b: 34). There were 105,530 applications in total. Those high numbers reflected the programme's visibility and the good work of local support services, but they also exacerbated delays. IRSSA required most applications to be processed within thirty-five days and 80 per cent to be paid within twenty-eight days. Only 28 per cent met that standard (Strategic Policy and Research Branch 2013: 30). The ensuing scandal led the government to mandate the completion of 53,000 applications by 22 December 2007. Still, the overall throughput is noteworthy. The programme processed 78,186 applications between September 2007 and March 2008 (Strategic Policy and Research Branch 2013: 36).

When applications had missing information, Service Canada attempted to contact applicants informally. If that failed, Service Canada posted formal notices of incompleteness: the 13,477 such notices represent 13 per cent of the total applications. As this figure does not include informal efforts, it understates the extent of the challenge posed

(Strategic Policy and Research Branch 2013: 29). In the end, 2,294 applications were withdrawn or too incomplete to process.

The CEP sought to reduce the potential for retraumatising survivors by minimising contact with them. Documents provided the primary form of evidence. NARA would attempt to validate residential duration using a computer-assisted research system to search its database of over one million records (Audit and Assurance Services Branch 2015). Developed in-house, the automated software included common spelling errors and phonetic variations and covered records spanning ten years before and after the applicant's stated period of attendance. However, problems emerged during the critical September–October (2007) period (Audit and Assurance Services Branch 2015: 41). The automated validation rate of 44 per cent was significantly lower than the expected 65 per cent, contributing to delays (Indian Residential Schools Resolution Canada 2007b: 2).

The standard of evidence was the balance of probabilities. If the automated software did not validate the application, or validation was uncertain, there was a manual review. Minor uncertainties regarding residential duration were resolved in favour of the claimant. Gaps in the primary records would be interpreted as a period of residence when their duration was less than the number of years that could be verified (Indian Residential Schools Resolution Canada 2007b). Greater uncertainties required further documentary evidence. Verification could also depend on the quality of available records; if the records were generally good, they were given greater weight. Where there was doubt, the programme could ask applicants questions designed to elicit confirmation of residence. Applicants might provide affidavits, photographs, or other relevant documentary evidence; however, many applicants had incomplete or inaccurate memories of their school attendance (Fabian 2014: 255). The programme rejected 23,927 applications (23 per cent) (Aboriginal Affairs and Northern Development 2012: 5). Some applicants were duplicates, others intentionally provided inaccurate information; however, most rejections happened when the applicant did not reside at a scheduled institution or the records were inadequate. Strict validation protocols meant some claims were rejected in whole or in part despite researchers believing the applicant (Fabian 2014: 248).

Appeals by unsuccessful applicants created another backlog. There were 27,798 internal reconsideration requests managed within IRSRC, with 9,771 increased payments averaging CDN$8,363 (Indigenous and Northern Affairs Canada 2018: 5; Aboriginal Affairs and Northern

Development 2012: unpaginated). Should the applicant remain unsatisfied, they could appeal to NAC. There were 5,259 appeals to NAC, 1,164 of which resulted in increases averaging CDN$7,655 (Indigenous and Northern Affairs Canada 2018; Aboriginal Affairs and Northern Development 2012: 5). Unhappy with NAC's response, 741 applicants appealed to the courts, 7 were successful (Indigenous and Northern Affairs Canada 2018).

***

Many survivors found the application process difficult, and most sought help (Reimer et al. 2010: 95; Dion Stout and Harp 2007: xii; Strategic Policy and Research Branch 2013: 23). As previously mentioned, three agencies, Donna Cona, Crawford Services, and Service Canada ran helplines providing advice. Large call volumes created long wait times: Service Canada received over 100,000 calls in November 2007 (Strategic Policy and Research Branch 2013: vi).

The Resolutions Health Support Program (RHSP) supported survivors and their families. Delivered by Health Canada, RHSP funded three specific roles: cultural support workers, health support workers, and professional counsellors. The largest cohort provided cultural support. Cultural support workers might be locally based Elders, healers, or others with cultural knowledge who helped survivors access ceremonies, workshops, prayer, or simply offered personal assistance. Local cultural support recognised that community healing is as important as individual processes (Castellano 2010: 26). Although locally provided services led to some privacy and confidentiality problems, 95 per cent of cultural support users reported that they felt their privacy was respected (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 30).[7]

Health support workers provided professional mental health support during the application process. These workers had some tertiary education, experience with mental health assistance, and needed to be culturally competent – many were survivors. Because their work with survivors was short-term, often only the day of the IAP interview (discussed in Section 6.4), one of their key functions was to ensure that survivors had appropriate post-interview care (CA Interviews 1 & 6). In the third form

[7] Admittedly, the distrustful would be less likely to be users, and consequently excluded from a service-user survey.

of support, the RHSP funded professional counselling services – providing survivors and family members with an initial two-hour assessment. Normally, the counsellor would develop a treatment plan of up to twenty hours, with more available upon request. As part of its counselling services, Health Canada also maintained the 'Indian Residential Schools Crisis Line' – a telephone service. The programme's need for large numbers of counsellors created problems and their high turnover challenged survivors, who struggled to develop relations with a number of different counsellors (Reimer et al. 2010: 70).

In 2006, the RHSP had CDN$94 million funding over six years (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009: 44). High demand meant the programme was over-budget by 2011. Health Canada then spent another CDN$284.7 million between 2010 and 2015 on the RHSP (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 6). Counselling and transportation services consumed roughly 23 per cent of Health Canada's budget, 4 per cent went to civil service salaries, leaving 73 per cent for emotional, cultural, and counselling services, much of which went to Indigenous organisations (CA Interview 6; Office of Audit and Evaluation 2016: 1). The bulk of this support capacity did not emerge until after the CEP, but by 2012 there were 286 health support workers and 403 cultural support workers (Green 2016: 190–91).

The IRSSA required Canada to settle all associated legal fees incurred prior to May 2005 and prohibited anyone charging further legal fees for CEP applications. This effectively detached CEP applicants from legal support and created a two-tier system. Survivors who had engaged lawyers prior to IRSSA not only had their fees paid by Canada, they often had a professionally compiled claim dossier and access to their personal care records. Survivors who entered the process afterwards received neither legal assistance nor help accessing their records. Instead, Canada undertook responsibility for record searches. By 2007, Canada had created a database that aspired to be a complete list of all status Indians who had resided in scheduled institutions. However, as intimated above, the lack of records and their inaccuracy hindered many applicants (Fabian 2014: 256). Many records had been destroyed (Reimer et al. 2010: 29). In 2007, an audit of NARA's database indicated significant gaps, particularly for non-status Indians, and significant inaccuracies due to input and scanning errors (Audit and Assurance Services

Branch 2015: 24, 33). These problems contributed to delays, frustrations, and public criticism.

The CEP increased pressure on general services for health, counselling, and policing (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009: 36). One survivor was reported as saying that

> a physician on my reserve indicates that he has never seen things so bad, that the stress resulting from the reliving of these past experiences has brought about suicides, attempted suicides, depression, alcoholism/drug abuse and violence within the community. (Stimson 2009: 72)

In response, the Aboriginal Healing Foundation funded healing circles, workshops, and other local services. Similarly, family members, volunteers, band councils, and First Nations helped survivors, and Canada funded additional Indigenous support programmes. In 2008–2009, that funding totalled CDN$4 million, with the three largest recipients being the AFN (CDN$535,000), the Indian Residential School Survivors Society (CDN$370,000), and the National Residential School Survivors Society (CDN$474,000) (Indian and Northern Affairs Canada 2009: 19). Some large Indigenous organisations were excluded, such as the Congress of Aboriginal Peoples, which represents Métis and off-reserve Indigenous persons. There were persistent and significant differences in the on- and off-reserve support available (Reimer et al. 2010: 32–33; CA Interview 5).

***

Canada paid 79,309 CEP settlements (Crown-Indigenous Relations and Northern Affairs Canada 2019). These payments should not have affected survivors' tax assessments or eligibility for benefits. Direct deposit was preferred for security and privacy reasons, as there were concerns that physical cheques could be lost and many rural locations were served by (non-private) community mail bags (Strategic Policy and Research Branch 2013: 15). A computer system produced generic decision letters, which informed survivors of their right to appeal (Audit and Assurance Services Branch 2015: 42).

The 79,309 payments totalled CDN$1.622 billion, with a mean average of CDN$20,457 (Crown-Indigenous Relations and Northern Affairs Canada 2019). The average processing time during the first two years was 74.8 days (Strategic Policy and Research Branch 2013: 41). With the

majority of payments made in 2008, the CEP brought a 'massive and sudden influx of money into Aboriginal communities across Canada' (Dion Stout and Harp 2007: xi). Potential problems associated with that influx were anticipated and sources often attribute serious problems to the receipt of CEP payments (Reimer et al. 2010: 44; Jung 2009: 15 fn49; Fabian 2014: 258; Miller 2017: 168–69; Edelman 2012: 77; Audit and Assurance Services Branch 2015: 42). As the negative effects of the CEP are a prominent theme, it is interesting that a contemporary study of survivors does not provide strong evidence of the phenomenon (Reimer et al. 2010: 168–70). Indeed, a comprehensive reflexive study suggests that money from IRSSA was not widely misused (National Centre for Truth and Reconciliation 2020: 38–39).

6.3 Personal Credits

IRSSA committed Canada to spend CDN$1.9 billion on the CEP and stipulated that any underspend would be used to benefit survivors. When individual payments left nearly CDN$300 million unspent, CEP recipients became eligible for a non-cash 'personal credit' of up to CDN$3,000. Credits could be used for educational, personal development, or ceremonial services. Credits could be assigned to immediate family members and posthumous applications were welcome. Crawford Class Action Services began administering personal credits applications in January 2014. The administrative costs of the programme (around CDN$24 million) were paid out of the remaining funds – Crawford would receive CDN$15.7 million, Canada CDN$3.4 million, and Indigenous agencies would split most of the remaining administrative budget (Indigenous and Northern Affairs Canada 2016: 4).

Applicants had to specify how the credits would be used and monies would be transferred directly to the service provider. Indigenous organisations assisted applicants and provided services upon which the credits could be spent. The conflict of interest is obvious. Still, by working with Indigenous agencies the Personal Credits programme could benefit

> . . . not only individuals, but their families and, in some cases, their whole communities should they pool their credits for language programmes or cultural programmes that may be appropriate to re-building what they have lost through residential schools. (Charlene Belleau in Assembly of First Nations 2014)

The application process had two steps. First, the survivor needed to apply for a credit for a specific service, then, once approved, apply

through that service provider to redeem their credit(s). The original application deadline was 31 October 2014, but only a few applications were received initially (Indigenous and Northern Affairs Canada 2016: iv). As of 8 January 2015 only around 24,500 survivors had made an initial application (Assembly of First Nations 2015). The advertising emphasis on using credits to pay for college and university education was unattractive to older survivors (CA Interview 1). Later communications emphasised the use of credits for group and cultural activities, traditional knowledge and skills development, and cultural or healing ceremonies. In late 2014 and early 2015, there was a concerted effort that included CDN$2.3 million in outreach funding for the AFN and CDN$1.2 million for Inuit organisations, and the application deadline was extended to 9 March 2015.

Applications received only a cursory review. Nevertheless, around 11 per cent (3,240) were initially denied, usually for incompleteness (Indigenous and Northern Affairs Canada 2016: 13). As of 31 March 2016, survivors had submitted 30,042 initial applications and 23,774 redemption forms for a total value of CDN$57 million (Crown-Indigenous Relations and Northern Affairs Canada 2019). All credits had to be used by 31 August 2015, with extensions for survivors of institutions added to IRSSA's schedule of institutions after that date. The primary cause for redemption requests being refused was that they were submitted after the deadline (Indigenous and Northern Affairs Canada 2016: 14). After the personal credits were disbursed, IRSSA specified that remaining funds would go to the National Indian Brotherhood Trust Fund (NIBTF) and the Inuvialuit Education Foundation (IEF) according to the proportion of CEP applicants served by each.

6.4 Independent Assessment Process

When compared to the other two programmes, the IAP provided larger payments, redressed interactional and individual injuries, and was much more comprehensive. IRSSA established three key administrative bodies for the IAP: the Independent Assessment Process Oversight Committee (the Oversight Committee); the Indian Residential Schools Adjudication Secretariat (the Secretariat), which reported to the Oversight Committee, and served as the IAP's administrative manager; and the Settlement Agreement Operations Branch (SAO), representing Canada.

Responsible for policy development and interpretation, the Oversight Committee comprised representatives from IRSSA's parties, plus an independent Chair. The Oversight Committee reported to the NAC, but the NAC rarely involved itself in IAP operations (CA Interview 4). The SAO researched applications, provided background information on residential schools, and organised payments. The key SAO figure was the 'Resolution Manager', the lawyer who represented Canada at evidentiary interviews and when negotiating settlements. Resolution managers received four months of training. Some were seconded from the Department of Justice, and most were young and recently articled (CA Interview 4). SAO had 220 staff members by 2015.

The Secretariat was the central IAP agency and was responsible for outreach, receiving applications, liaising with counsel, organising interviews, coordinating medical and psychological assessments, hiring and training adjudicators, and communicating payment offers. Led by the chief adjudicator, the Secretariat required a large and well-trained staff with a variety of skills. Again, there were significant staffing problems. In 2006 Canada estimated that the IAP would require 445 staff to manage 2,500 applications per year (Estimates reported in *Charles Baxter Sr. & Elijah Baxter et al.* v. *Attorney General of Canada et al.* 2006). It had 241 employees at its peak in 2013, when it resolved 6,251 applications (Indian Residential Schools Adjudication Secretariat 2014: 10). In addition, the Oversight Committee contracted around 120 adjudicators. Adjudicators assessed claims and determined settlement values. Again, there were persistent staffing difficulties and IRSRC ran four hiring rounds for adjudicators, the last concluding in 2011.

The IAP originally expected 12,500 applications (Oversight Committee 2011: 3). It received 38,276. Application forms must have been postmarked before 19 September 2012 and late applications were only accepted in exceptional circumstances. Crawford Class Action Services received applications and conducted an initial eligibility review (Indian Residential Schools Adjudication Secretariat 2019: 6). Crawford admitted 33,867 applications. Most preliminary rejections concerned unscheduled institutions or claims that had already been settled. Between 2008 and 2011, there were approximately 430 applications per month. That rate doubled in 2012, with 7,670 in the final month of September 2012. Men submitted around 51, women 49 per cent of applications (Independent Assessment Process Oversight Committee 2021: 57). Most were Canadian residents, only 338 expatriates applied.

The IAP accepted posthumous applications for those who died after May 2005.

The Secretariat worked with Indigenous organisations to make outreach material comprehensible and culturally appropriate (CA Interview 7). Secretariat staff attended over 350 conferences, workshops, meetings, First Nations assemblies, TRC events, and powwows (Indian Residential Schools Adjudication Secretariat 2013a: 8). All CEP applicants were sent a letter inviting them to apply for an IAP. In 2009, the Secretariat conducted analysis to ensure that further outreach would target populations generating lower-than-expected numbers (Indian Residential Schools Adjudication Secretariat 2010: 6).

Eligible injurious experiences included any form of sexual abuse, serious physical abuse, abuse leading to serious harms and, in addition, consequential damage. Eligible injuries could be inflicted by school staff, peers, or other adults associated with a scheduled institution. The IAP shared the CEP's schedule of residential schools, although non-residents could claim for injuries experienced when participating in an authorised activity at a scheduled institution. Applicants were asked for identifying information and the schools they attended. The application form then asked for details about their injurious experiences, the names and positions of those involved and whether staff knew, or should have known, about the abuse. This information could be provided in tabular and narrative forms. The application asked for specific aggravating factors, such as racial abuse or the betrayal of trusting relationships, presented as tick boxes. The Secretariat's comprehensive guide helped survivors code their experiences (Indian Residential Schools Adjudication Secretariat 2018b).

To claim for consequential damage, applicants needed to describe, in free text, how injuries affected their lives and any treatment they had received. Applicants were prompted to assess their harms' severity using a five-step matrix. The form probed the survivor's education and work history, again asking the applicant to assess the severity of any impairment using a matrix. In addition, claimants could apply for actual income lost as a result of abuse-in-care, such as having lost a job. All claims for severe consequential damage required supporting evidence, such as a medical report, but claims for actual income loss were particularly difficult to sustain. Only eighteen applicants (0.04 percent) were successful (Galloway 2017). Looking forward, applicants were also asked to outline a post-settlement treatment plan and its costs. The last parts of the form concerned the applicant's preferences regarding the

forthcoming evidentiary interview, including the gender and ethnicity of adjudicators and the presence (or absence) of church parties; a declaration that the application is truthful; and consent for Canada to share information and access relevant records.

The IAP expedited claims from very elderly applicants and those with serious health problems. That expedited process allowed interviews to occur before documentary evidence was collected. Otherwise, applications went through one of three processes: standard, complex, or court. There were only three 'court track' applications (CA Interview 4).[8] The main work of the IAP was conducted in the standard and complex processes. These processes differed according to the types of injury and the corresponding standards of evidence. Most claims went through the standard process. These claims concerned redress for specified forms of abuse and consequential harms, and the standard of evidence was the balance of probabilities: abuse needed to be more likely to have happened than not and redressable harms needed to be plausibly linked to those acts of abuse. However, higher value settlements tended to require more and better evidence, including professional reports (Canada et al. 2006: Schedule D, Appendix VII).

A small proportion, 3 per cent, of claims (968) used the complex process, which included redress for serious psychological harms caused by 'other wrongful acts' and for the actual income losses mentioned above. 'Other wrongful acts' were injuries not enumerated on the IAP's list of compensable abuses and needed to have caused severe damage (Indian Residential Schools Adjudication Secretariat 2009b: 2). The redress of damage on the complex track used a higher evidentiary standard wherein survivors needed to prove causation.

Most applications were submitted incomplete and the Secretariat held the case files as parties progressively added documents (Independent Assessment Process Oversight Committee 2021: 43). Specific documents were mandatory for certain claims. For example, if the survivor sought redress for an ongoing medical disorder, they needed a report from a medical professional attesting to their illness. Excepting priority cases, interviews could not proceed until all mandatory documents were provided. The Secretariat prioritised applicants whose age or failing health would impair their ability to participate in the programme, alongside those going through the 'group process' (discussed below). Applications

[8] A claim would be moved to the court track only if its complexity meant that the IAP could not reasonably accommodate the claim.

could include thousands of pages, including medical, police, departmental, employment, welfare, and corrections files. As thousands of applicants sought their records, many agencies became overwhelmed by the demand, leading to further delays (Independent Assessment Process Oversight Committee 2021: 43; Indian Residential Schools Adjudication Secretariat 2011: 20). Professional reports could be challenging to obtain in rural communities, and the Secretariat experienced ongoing difficulties in retaining competent professionals. And when IAP assessment was treated as non-urgent, applicants could experience long waits for an appointment with busy medical professionals (Indian Residential Schools Adjudication Secretariat 2011: 22–23).

To help with consistency, the Secretariat developed a secure searchable online database of exemplar IAP decisions. Beginning in December 2013, the Secretariat also began to hold claims that would benefit from information gathered in other cases. The SAO compiled a list of around 2,200 affected claims and identified 647 that might provide beneficial evidence (Indian Residential Schools Adjudication Secretariat 2014: 21). This encouraged a batching of related applications and adjudicators developed expertise with specific geographical groupings of schools (CA Interview 7).

Adjudicators usually received the applicant's file in the weeks prior to the interview (Bay 2013: 3). The claim would then proceed through a negotiated settlement or interview. The negotiated process was faster, and dispensed with the evidentiary interview if the claimant and SAO agreed on a settlement value. The negotiated process developed over time, before 2010 the SAO would only negotiate with claimants who had previously sworn evidence (Indian Residential Schools Adjudication Secretariat 2011: 15). As the SAO became more accommodating, 4,415 claims were settled through negotiation (Independent Assessment Process Oversight Committee 2021: 50).

The majority of cases proceeded to interviews. Interviews were private and confidential and adjudicators, with assistance from the Secretariat, were responsible for ensuring they were located in safe, accessible, and convivial locations. Vancouver and Winnipeg had specially designed hearing rooms, but adjudicators travelled to communities across Canada to hold interviews in community halls, council offices, hotels, and friendship centres. Both their lawyer and an assigned health support worker met with the survivor prior to the interview. Translators were available if the survivor wished. If requested, a cultural support worker would attend and might perform a ceremony. The Secretariat would fund

the travel costs of two personal support people. Because interviews forced friends and family to confront details of the abuse experienced by their loved ones, most survivors proceeded with only their legal representative (Bay 2013: 3).

The adjudicator presided over the inquisitorial interview, which could last several hours. The adjudicator would explore the survivor's life in detail, working through their life before the residential school, their experiences at the school, and what happened to them afterwards. In general, survivors found the interviews very difficult (Morrissette and Goodwill 2013: 548; Bombay, Matheson, and Anisman 2014: 133; Miller 2017: 180). 'For some survivors, the act of sharing their testimony was one of the hardest things they have ever had to do in their lifetime' (Petoukhov 2018: 106). Some applicants read prepared statements, but they were warned that might affect their credibility. The interview was designed to be a place where the applicant related what had happened to them in 'their own words'.

> [D]o they have a ring of truth, right? That's what adjudicators are looking for. So, there are a lot of times where in the absence of documentation, they have the ring of truth and that ring of truth overtakes and overcomes any weakness and compensation is awarded by adjudicators. (CA Interview 4)

Protracted interviews were punctuated by regular breaks for the survivor's comfort. The SAO and church parties could use those breaks to suggest question topics to the adjudicator. Without the adjudicator's explicit permission, no one else could address the survivor directly. The interview process could be iterative. If survivors disclosed new injurious experiences, they might need to get new reports, or the Secretariat might need to contact newly alleged perpetrators. The adjudicator would then reconvene the interview.

Interviews were attended by right by the adjudicator, the claimant, their lawyer, the SAO, and a church representative. Most churches would only attend if invited by the survivors (Independent Assessment Process Oversight Committee 2021: 30 fn86). Although rare, some interviews involved witnesses. If called by the survivor, witnesses might testify at the survivor's interview, but if called by the SAO, church, or alleged perpetrator, they would have a separate hearing. Alleged individual perpetrators were notified and could make a submission, but they could not attend the survivor's interview without the survivor's consent. Canada provided alleged perpetrators with CDN$2,500 for legal advice, plus costs for their

attendance. Although alleged perpetrators rarely attended interviews, nevertheless, the fact that they were notified that they had been named as perpetrators created significant difficulties: many alleged perpetrators were family members or fellow survivors living in the same community (Bombay, Matheson, and Anisman 2014: 17; Independent Assessment Process Oversight Committee 2021: 76).

The large numbers of independent adjudicators with differing backgrounds and experiences raised quality and consistency concerns. Differences emerged as some adjudicators were more therapeutic and others more forensic. Each adjudicator received five days of initial training, supplemented by annual workshops. By 2009, there were eight deputy chief adjudicators working with groups of adjudicators to promote good practice and review decisions. Claimants could request an Indigenous adjudicator, which could make 'a big difference' to the survivor's experience (Hanson 2016: 12). But hiring Indigenous adjudicators proved difficult, contributing to delays (Miller 2017: 176). Not only are Indigenous lawyers underrepresented in Canada, many had potential conflicts of interest.

At the end of a (good) interview, the SAO representative would ask if they could thank the survivor, say that they believed the survivor's account, and offer an apology letter. Participants might discuss a future care plan: adjudicators could award up to CDN$10,000 for treatment, counselling, or traditional healing or CDN$15,000 for psychiatric treatment. After 2010, the parties could opt for a 'short form' decision if all parties agreed on a settlement value and wished to waive their rights to a written decision (Indian Residential Schools Adjudication Secretariat 2011: 11). Short-form decisions were not available to self-represented claimants who were thought vulnerable to pressure into accepting an unfavourable settlement at the end of a long and difficult interview. Around 38 per cent of all decisions were issued in short-form (Indian Residential Schools Adjudication Secretariat 2016: 17).

After the interview(s) concluded and all the evidence was collected, the adjudicator would take final submissions during a conference call between the adjudicator, the SAO, and the applicant's lawyer (CA Interview 4). At this point, the survivor and SAO could make recommendations. The adjudicator would then begin their assessment. Standard adjudicator decisions usually took around 160 days after the interview (Miller 2017: 175). However, they could 'easily' take up to a year (CA Interview 7).

***

IAP applicants were eligible for support through the RHSP, the Secretariat, and from legal counsel. The RHSP provided applicants with the counselling and cultural support described above; however, the IAP accentuated the role of the health support worker. Health support workers helped with logistics for interviews, met with the applicant beforehand, and attended the interview if the survivor wished.[9] However, high caseload numbers and Canada's challenging geography often meant that health support workers only met survivors on the day of their interviews (Petoukhov 2018: 109; CA Interview 2). Cultural support was used by 28,918 survivors during the peak IAP period of 2010–2015 (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 23).

The Secretariat managed interview arrangements, including the presence of Elders or translators. The Secretariat would also arrange ceremonies requested by survivors. Its website contained helpful information about IAP procedures, including a useful and straightforward video on the interview process. To provide additional support and outreach work, the Secretariat partnered with Indigenous organisations. For example, the Secretariat funded Indigenous organisations to provide financial planning workshops (CA Interview 7).

Legal representation was strongly recommended. To protect survivors from the associated costs, IRSSA capped contingency fees at 30 per cent of the survivor's settlement. Canada would pay half of that fee, plus any reasonable disbursements. Canada was also represented by lawyers, but they were not to defend their client. Instead, the SAO assumed several survivor-oriented responsibilities. This included compiling records about alleged perpetrators, including peer abusers, and conveying any known admissions from criminal trials or prior settlements. The SAO subsumed NARA and its database and provided dossiers on each residential school. These dossiers were a summary compendium that might include a chronology of infrastructure projects, administrative changes, and significant events such as disease outbreaks or temporary closures. The dossiers described school sports and outings and population figures (where known), along with known cases of assault and complaints, a list of staff members, and their periods of employment.[10]

[9] The worker would wait outside if the applicant did not want them in the interview room.

[10] The National Centre for Truth and Reconciliation archived some school narratives. As of 20 January 2022, they were available at: https://archives.nctr.ca/IAP-School-Narratives.

Legal representation emerged as one of the most significant problems in the IAP. The SAO's control over documentary evidence, including individual health, employment, and correction files; institutional staff lists; and the school narratives created conflicts of interest (Smith 2016). That conflict was apparent in the case of St. Anne's Residential School in Fort Albany, Ontario where a 1992 police investigation identified seventy-four suspects and charged seven people, leading to five convictions for assault and indecent assault (Barrera 2018). Despite repeated requests, the SAO did not provide the results of that investigation to the Secretariat (and through it, to survivors) until it was compelled by a 2014 court decision. This high-profile case reflected badly on the SAO's reputation for fairness.

Turning from the SAO to counsel for survivors, the IAP confronted the strategic challenge that many lawyers did not have IAP-specific expertise. In response, the Secretariat ran training seminars and circulated seven editions of the *Desk Guide for Legal Counsel*, first published in 2011 (Indian Residential Schools Adjudication Secretariat 2019). The *Desk Guide* introduced counsel to their role in the process and was supplemented in 2012 by the *Expectations of Legal Practice in the IAP*, amended in 2013 (Indian Residential Schools Adjudication Secretariat 2013b).

Many lawyers worked hard with claimants, with some renouncing all fees from survivors and contenting themselves with the government's contribution. Still, the actions of some tarnished the good work of many. Delays occurred when lawyers took on too many clients, while others, with their fees guaranteed, de-prioritised IAP claims (Indian Residential Schools Adjudication Secretariat 2012: 8). Lawyers arrived at interviews unprepared, without meeting survivors beforehand, and obstructed survivors' access to support services. Venal lawyers exploited vulnerable clients. Some overcharged their clients by not discounting Canada's contribution. Between 2007 and 2009, adjudicators reviewed 50 per cent of cases, and reduced legal fees in around 80 per cent of those reviewed (Indian Residential Schools Adjudication Secretariat 2010: 17). Worse lawyers provided survivors with usurious loans, secured against forthcoming settlements. Others encouraged their clients to use 'form filler' agencies to complete their applications with generic information. Those agencies charged survivors for the service, then with much of the paperwork done for them, the lawyer would charge their full fee nevertheless. Unconscionable lawyers recruited survivors, then pushed them into using form-filler agencies in which the lawyers themselves had an

interest. Although only a minority of lawyers engaged in malpractice, their adept harvesting of clients affected large numbers (Miller 2017: 179). One firm headed by David Blott represented more than 5,600 survivors, all of whom had to get new representation after Blott was disbarred in 2012.

A better result emerged from the 'group process' wherein survivors were funded to collaborate with and support each other. Groups needed to share a salient attribute, which might be attendance at the same school or residence in a shared community. Interviews remained individuated but the funding supported traditional ceremonies, such as sweats or powwows, community workshops with therapists or Elders, and personal development such as financial literacy or parenting training. The Secretariat received applications and awarded funding to groups. The number of group IAPs steadily increased throughout the programme. By 2017–2018 twenty groups comprised of 285 claimants had been approved for CDN$997,500 in funding to help navigate the challenging IAP process in a more culturally appropriate mode (Indian Residential Schools Adjudication Secretariat 2018a: 26).

***

Reflecting on the database of prior decisions, adjudicators assessed claims using four matrices prescribed by IRSSA. Each calculation was independent and the results were then aggregated. The first step scored acts of abuse according to severity (Appendix 3.8). Here, importantly, the scoring of injurious acts was not cumulative, instead the scores reflected the most severe injury described. Next, the adjudicator assessed harmful consequences (Appendix 3.9). The third step assessed aggravating factors, including, for example, the use of racist insults or violence in the course of abuse (Appendix 3.10). The total aggravating factors would then inflate the point total derived from abuse and consequential harms as follows: *(Act Points + Harm Points) x (Aggravating percent x 100)*. The final step concerned 'loss of opportunity', defined as an inability to obtain and retain employment and to undertake or complete education (Appendix 3.12). The final settlement value (plus any funding for future care) was derived from the sum of the four assessments (Appendix 3.13). The maximum total available points was 123 and the maximum settlement value was CDN$275,000 (excepting actual income claims). Both applicants and the SAO could appeal to the chief adjudicator on

procedural questions. Survivors could appeal on errors of fact for review by a second adjudicator. Any party could appeal to the courts; however, the courts heard these cases with caution (Coughlan and Thompson 2018). Their hesitancy was strategic, IRSSA was to replace, not stimulate, litigation.

After thirteen years of operation, the IAP closed on 31 March 2021. IRSSA committed Canada to process 2,500 IAP claims per year. But although higher-than-expected numbers contributed to initial delays, the IAP met that target between 2007 and 2016, with a 2012 high of 4,677 decisions and negotiated settlements. The average claim took twenty-one months (Miller 2017: 175). Originally budgeted for CDN$960 million, the IAP paid CDN$3.23 billion to 27,846 survivors, issued by cheque to

Table 6.1. *Number of adjudicator settlements* by CDN dollar value*

Compensation Points	Compensation ($CDN)	Number of IAP Claims
1–10	$5,000–$10,000	76
11–20	$11,000–$20,000	565
21–30	$21,000–$35,000	1308
31–40	$36,000–$50,000	1836
41–50	$51,000–$65,000	2543
51–60	$66,000–$85,000	3325
61–70	$86,000–$105,000	3623
71–80	$106,000–$125,000	3682
81–90	$126,000–$150,000	2319
91–100	$151,000–$180,000	1368
101–110	$181,000–$210,000	581
111–120	$211,000–$245,000	166
121 or more	Over $245,000	36
Total		21,428*

* This data excludes all negotiated settlements and court process claims. It also excludes the few claims settled after 25 October 2018.

Source: (Private Communication, Michael Tansey of the Secretariat, 31 January 2021).

https://doi.org/10.1017/9781009082662.008 Published online by Cambridge University Press

the survivor's counsel (Independent Assessment Process Oversight Committee 2021: 8, 88). The success rate of received applications was 82 per cent. The mean average payment was CDN$91,478.

In total, the IAP cost Canada around CDN$4 billion (Independent Assessment Process Oversight Committee 2021: 60). That figure excludes monies spent by state bodies other than IRSRC.

***

Canada's IRSSA created a flexible set of three very different programmes that engaged the same survivor population through an overlapping set of institutions. These programmes were large, expensive, and high profile. A common implementation theme is the importance of local support and services. That local focus, and its Indigenous character, stands in sharp contrast to the New Zealand's Historic Claims Process, addressed in the next chapter.