Finding a Sense of Self in the World: A Process for Overcoming Personal and Collective Alienation after Institutional Abuse

Seetal Kaur Sunga

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FINDING A SENSE OF SELF IN THE WORLD: A PROCESS FOR OVERCOMING PERSONAL AND COLLECTIVE ALIENATION AFTER INSTITUTIONAL ABUSE

by

Seetal Kaur Sunga

Submitted in partial fulfillment of the requirements for the degree of Masters in Law

at

Dalhousie University
Halifax Nova Scotia
April 2001

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Dated: April 10, 2001

Supervisor: Professor Richard L. Evans 9/4/01

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Dedication

This thesis is dedicated to my mother, Harinder Jit Kaur Sunga and my late father, Preetom Singh Sunga. They have given me all their love, and they protected me from the various forms of unloving behaviour that exists in the world, until I became more able to deal with it myself.
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Abstract

Power imbalance in dispute resolution processes affects both the legitimacy of the process and the ability of the parties to articulate and achieve their interests. In cases where power imbalance is both the subject matter of the dispute and a procedural issue, the management of power is even more material. In the common law tradition, judicial processes provide precedents and a structure for allocating power between the parties. In an alternative process that does not involve the participation of a third party adjudicator, the parties themselves are responsible for developing power to assert their interests. The higher degree of responsibility in alternative processes brings with it greater possibilities for the parties to change their power relationship. If no attention is given to the responsibilities and the possibilities that accompany empowerment, then alternative processes may result in a reaffirmation of the original power imbalance.

The author examines three aspects of dispute resolution involving cases of physical and sexual abuse in institutions and other environments. She focuses on judicial and alternative processes that deal with identity formation, empowerment and monetary compensation. She argues that sexual abuse and physical abuse create specific harms to the identity and power of abused persons. These harms should be addressed through a process that can allow for identity-formation and re-configuration of the power relationship between the parties. The author concludes that judicial processes recognize identity formation that occurs outside the legal arena, and are capable of recognizing the power of the testimony of abused persons. However, judicial processes depend upon the approval of status quo experts before acknowledgment of identity and empowerment occurs. The author explores the capacity of non-judicial processes to allow abused persons to develop identity and to bring their subjective understanding of abusive experiences to the broader world. She concludes that non-judicial processes have a greater capacity to allow identity-formation and empowerment that is unmediated by objectifying discourses. However energy and attention must be given to maintaining the integrity of abused persons' subjective experiences throughout the process in order to avoid having their interests defined by pre-existing understandings of abuse. The author explores judicial and non-judicial treatments of monetary compensation. She concludes that judges have ready access to a forum for expressing the non-commodifiable aspects of compensation. Alternative methods have the capacity to recognize subjective harm, but they must articulate such recognition in order to avoid the hegemonic objectification that can accompany the distribution of monetary compensation.
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Many people have contributed to my growth and professional development. I would like to take this opportunity to acknowledge specific people who have supported me throughout my graduate studies.

First I would like to thank my family for their constant support and encouragement. In particular, I would like to thank my mother for always encouraging me to pursue my dreams. My late father has played an enormous role in my intellectual development. If he were here, I would thank him for his constant love, encouragement and belief in my abilities. My brothers Paul and Lyal, and my sister Sharon and sisters-in-law Nyla and Ilaria have provided me with encouragement and inspiration, as well as acting as role models. I would also like to thank my cousin, Dr. Jaswant Bains, for supporting me and for suggesting that I read key pieces of psychiatric literature.

I would like to thank my friends who have listened to me, discussed ideas with me and encouraged me. In particular, Mandra Zweig has been supportive and encouraging. Her sharp critical analysis has assisted my thinking, especially on the issue of subjectivity. Reva Barewal has acted as a source of inspiration for me as I watched her proceed through her own graduate work. I would like to thank Anne Malo and Luc Leblanc for our stimulating conversations about power, identity and psychology. Colin McKenzie has broadened my perspectives on dispute resolution and he has encouraged me to pursue graduate studies in that area. Donna Ashamock, and other members of the communities of Moosonee and Moose Factory, have given me a richer understanding of the meaning of identity and political empowerment. Paul Lantz has provided me with support, encouragement and friendship throughout this project and beyond it.

The academic community at Dalhousie University has provided me with support in various ways. I would like to thank Professor Richard Evans for reading and providing comments on my thesis. Professor Devlin has provided guidance and support throughout the project. I am grateful to Professor Sue Campbell of the Philosophy Department for her interest in my project. Four fellow graduate students have provided support both with their friendship and their intellectual acuity. I have always learned much from my discussions with Elizabeth Judge. Fran Trippett’s keen and flexible mind has furthered my own thinking considerably. Drago Vidovic has encouraged me in my efforts. Ola Malik has been supportive and, despite his own work, was kind enough to proof-read my thesis. Finally, I must thank Professor Murphy for helping to keep this thesis project alive. She took the time to discuss with me various theoretical issues related to my thesis topic. Her energy, enthusiasm, support, and keen critiques have enabled me to reach further than if I had been left to ponder my thesis topic on my own.
CHAPTER 1 - INTRODUCTION

When Gamini finished surgery in the middle of the night, he walked through the compound into the east buildings, where the sick children were. The mothers were always there. Sitting on stools, they rested their upper torso and head on their child's bed and slept holding the small hands. There were not too many fathers around then. He watched the children, who were unaware of their parents' arms. Fifty yards away in Emergency he had heard grown men scream for their mothers as they were dying. 'Wait for me!' 'I know you are here!' This was when he stopped believing in man's rule on earth. He turned away from every person who stood up for a war. Or the principle of one's land, or pride of ownership, or even personal rights. All of those motives ended up somehow in the arms of careless power. One was no worse and no better than the enemy. He believed only in the mothers sleeping against their children, the great sexuality of spirit in them, the sexuality of care, so the children would be confident and safe during the night.¹

The spectre of institutionalized children from decades past, sexually and physically abused by those in institutions² responsible for their care and custody, is one which has haunted Canadian society for at least the past ten years. Thousands of claims for damages arising from historic institutional abuse in Indian residential schools have emerged.³ Adults who


²Three distinct types of institutional abuse have been identified: physical, sexual or emotional; program abuse; and system abuse. Program abuse occur when a program operates below standards or relies upon harsh techniques and system abuse occurs when the system improperly assesses, diagnoses, defines the length or treatment or removes a child because of inadequate resources: See, Law Commission of Canada, Review of the Needs of Victims of Institutional Child Abuse (Background Paper) by the Institute for Human Resource Development (Ottawa: Law Commission of Canada, 2000) at Appendix II, p. 5. In this thesis I will only focus on sexual and physical abuse although I recognize that program and system abuse may contribute to the likelihood of the other two forms of abuse.

³R. Mofina, “Truth commission could probe residential-school abuse cases” The Ottawa Citizen (6 June 2000): This article states that as of June 6, 2000, the federal government was facing lawsuits from 5,900 individuals; if seven (then) pending class-action
were residents in provincial institutions as children have commenced actions across the country. Some of these cases have been processed through the court system. However, partially because of the high numbers of plaintiffs associated with the various institutions, as well as the high monetary and non-monetary transaction costs associated with litigation, provincial governments and parties have sought to design non-court processes and remedies that can better address the needs of the parties.5

A. Context

In the late 1980's and early 1990's there was growing awareness of the vulnerability of children who were placed in total institutions6. In 1989 the media reported that there were suits were to be accepted by the courts, the number could jump to 8,900.

S. Simmie, “Churches reap harvest of residential school abuse” The Toronto Star (26 August 2000): In this article officials from the Department of Indian and Northern Affairs project that the number of lawsuits concerning residential school abuse could reach 15,000 over the next decade.

4High transaction costs include the actual fee for retaining lawyers, court and judicial services and other related items, but it also includes the high psychological costs associated with proceeding through the legal system. Adult plaintiffs making claims for child sexual abuse are often in fragile emotional health and not likely to proceed with potentially legitimate claims if the psychological barriers of the process are too high. For example, having to publicly describe intimate details of sexual abuse in an open courtroom and then cross-examined on those details may prevent a legitimate plaintiff from engaging a process. Only those who are emotionally capable of facing challenges to their testimony are able to sue.


allegations of abuse against Christian Brothers at the Mount Cashel Orphanage. Subsequent
criminal convictions of the various Christian Brothers were reported in the national media and triggered widespread recognition of institutional abuse. In 1990 the RCMP commenced an investigation into allegations of abuse at the New Brunswick Training School at Kingsclear. In 1991 Karl Toft was arrested and charged with committing numerous criminal offences relating to abusive acts in that institution. In 1992, the Royal Commission on Aboriginal Peoples received testimonials about treatment in Indian residential schools. These testimonials described the destructive effects on individuals and communities arising from the following: forceful separation of children from their families; prohibitions on speaking Aboriginal languages; prohibitions on exercising their spiritual and cultural customs; and physical and sexual brutality.

Their encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure that is often built right into the physical plant, such as locked doors, high walls, barbed wire, cliffs, water, forest, or moors.


9Supra note 5 at 26-28.

10Law Commission of Canada, Needs and Expectations for Redress of Victims of Abuse (background paper) by SAGE (Ottawa: Law Commission of Canada, 2000) at
While the Mount Cashel cases were going through the criminal courts, investigations of alleged incidents at the Nova Scotia School for Girls and the Shelburne School for Boys were underway. In 1992 George Moss, a former counselor at the Nova Scotia School for Girls, was convicted of indecent assault upon a resident of the School and sentenced to one year imprisonment. Soon after, Douglas Hollett, another former counselor at the Nova Scotia School for Girls, was convicted of having intercourse with a female between the ages of 14 and 16. In 1993 Patrick MacDougall was convicted of 11 counts of sexual misconduct while he was a counselor at the Shelburne School for Boys.

Soon after the convictions, complainants from the criminal trials brought civil claims against the abusers and the Nova Scotia government. In the first and only case to go through the entire litigation process before the commencement of the Compensation Program, the defendant Hollett was found to have enticed the plaintiff to run away from the school on his last day of employment and to live with him. He subsequently kept the plaintiff hidden at

Appendix 3.

11In 1985 the name of the school was changed to the Nova Scotia Residential Centre. The facility is now a co-educational treatment centre for emotionally and behaviourally disturbed children aged 10-16 years. See Department of Justice Nova Scotia, Report of an Independent Investigation in respect of Incidents and Allegations of Sexual and other Physical Abuse at Five Nova Scotia Residential Institutions by the Hon. Stuart Stratton, Q.C. (Halifax: Nova Scotia Department of Justice, 1995) at 38.

12R. v. Moss, (9 October 1992), Colchester 296219 (N.S. Prov. Ct.).

13R. v. Hollett (5 February 1993), Halifax N.S.J. no. 76 (N.S.Prov.Ct.).

14R. v. MacDougal (6 July 1993), Shelburne 372598, 372600, 372602, 372604, 400582 (N.S.S.C.); R. v. MacDougal (17 February 1993), Shelburne 330201 (N.S.Prov.Ct.).

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his home and sexually and physically abused her from October 1976 until she was apprehended and returned to the School in May 1978. The trial judge found the government of Nova Scotia liable in negligence for failing to terminate the abusive employee when complaints initially arose about his conduct with the girls.\textsuperscript{15} The plaintiff appealed the trial judge’s decision to not award punitive damages. The government of Nova Scotia cross-appealed on the issue of liability and on the award of aggravated damages. On appeal, the Court upheld the findings of liability and a $50,000 award for general damages. However, the Court of Appeal overturned the trial judge’s award of $25,000 for aggravated damages and found that punitive damages of $35,000 were warranted.\textsuperscript{16}

\textit{Roose v. Hollett et al.} was the first case that the government litigated concerning the existence and extent of government liability for the actions of employees\textsuperscript{17}. The Court of Appeal upheld the trial judge’s finding of liability in negligence for the damages to the appellant, even though the abuse started after he had been terminated and even though Roose had run away from the institution. Further, in awarding punitive damages, Pugsley J.A. found that the employer’s failure to terminate Hollett’s employment was “inexcusable, outrageous, callous and reprehensible”\textsuperscript{18}. Therefore punitive damages were required to


\textsuperscript{17} \textit{Ibid.} at 189. The Crown brought a cross-appeal on the issue of liability. Crown counsel argued that there is no substantial connection between the failure to dismiss Hollett and the appellant’s injuries; Roose’s act of running away and taking up residence is enough to sever any connection that might exist.

\textsuperscript{18} \textit{Ibid.} at 211.
indicate condemnation. Flinn J. A. agreed that punitive damages were warranted but on the narrower grounds that the conduct of the employer was reckless and blameworthy.\textsuperscript{19} On November 1, 1996, the Attorney-General of Nova Scotia filed an application for leave to appeal to the Supreme Court of Canada on the issue of punitive damages, pre-judgement interest and costs. This application was denied.\textsuperscript{20} Around the time the case was concluded, the government of Nova Scotia opted to explore the possibility of setting up a non-judicial process for dealing with claims of abuse.

The Nova Scotia government decided on a three-pronged approach to deal with the emerging claims of abuse. Viki Samuels-Stewart was commissioned to investigate existing residential institutions to ensure that abuse was not currently occurring and that there were proper safeguards in place to protect residents from abuse.\textsuperscript{21} The former Chief Justice of New Brunswick, Stuart Stratton, was asked to investigate allegations of physical and sexual abuse, practices and procedures for detecting abuse, and employee action or inaction in dealing with any abuse that occurred.\textsuperscript{22} The government indicated that if Stratton found that there was

\textsuperscript{19}\textit{Ibid.} at 212-3.


\textsuperscript{21}Department of Justice Nova Scotia, \textit{'In Our Care: Abuse and Young Offenders in Custody - An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre - Waterville} by Viki Samuels-Stewart (Halifax: Department of Justice of Nova Scotia, 1995).

\textsuperscript{22}The terms of reference of the Stratton Report are as follows:

"investigate the incidents of sexual and other physical abuse of residents that occurred or are alleged to have occurred at the institutions;

investigate and determine the practices and procedures in place at the institutions that either
abuse in the institutions, it was prepared to follow Stratton’s recommendations to engage in an Alternative Dispute Resolution [hereinafter “ADR”] process to deal with claims of abuse.

On June 30, 1995 Stratton released his report. In it he concluded that there were 89 victims of sexual and physical abuse at three of the five institutions investigated. He recommended that the government engage in an ADR process with the survivors of abuse for the purpose of compensating them.

The idea of an alternative process and remedy was not new; the Ontario government had announced its intention to compensate victims of abuse with relation to the St. Joseph’s Training School for Boys and the St. John’s Training School for Boys. In 1992 the Ontario government had authorized the use of an ADR process to address abuse claimed by former residents of the Grandview Training School for Girls. In 1995 the New Brunswick government had approved ADR as a way to deal with claims of former residents of the New

permited or hindered the detection of abuse of residents; investgate and determine whether any employees in the institutions or any public of/ficials were aware of abusive behaviour of staff toward residents; and
investigate and determine what steps, if any, were taken by employees or officials in reference to any such abuse.” Supra note 11 at iv-v.


25Supra note 5 at 129.
Brunswick Training School at Kingsclear. The Nova Scotia government took the opportunity to initiate a non-judicial process to deal with claims of historic child abuse.

The Nova Scotia government responded quickly to the Stratton Report and announced that it would negotiate with the group or groups of survivors of abuse via their chosen lawyer whose fees would be paid by the government. Negotiations occurred in early 1996 and an agreement was reached between the parties in mid-1996. The negotiations did not end up being between the government and one lawyer who represented a group of survivors; rather, the claimants were each represented by a lawyer of choice and these lawyers together negotiated with the government.

The meetings between the Nova Scotia government and the lawyers for individual claimants

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26 Ibid. at 142.

27 I use the term historic child abuse to refer to abuse that happened when the adult claimant or plaintiff was a child.


29 The reader may note that I use the term “survivor” and “claimant” to describe a person who has suffered from abuse and who is involved in a non-judicial dispute resolution process. The term “survivor” has entered the lexicon of terminology to counteract the passivity of the word word “victim”. Both refer to people whose experiences of abuse are not doubted. The term “claimant” describes a person who is making an allegation of abuse for the purpose of qualifying for compensation. I use the word “claimant” when referring to persons within the Nova Scotia process as there is currently some controversy about the degree of abuse that occurred in Nova Scotia institutions. When speaking of court processes, I will use the terminology used by the court. When I am speaking of a person outside of any process I will refer to her as an “abused person”, “victim” or “survivor”. For an explanation of my use of gendered pronouns, see note 42.
resulted in a Memorandum of Understanding\textsuperscript{30} [hereinafter "MOU"] which outlined the process for compensating abuse claimants.\textsuperscript{31} Among the provisions in the MOU were the following:

AND WHEREAS the Province has agreed to compensate Survivors of Physical and Sexual Abuse through a compensation process that is principled, respectful, timely and consistent with the following principles:

\begin{quote}
\begin{itemize}
  \item THAT the physical and sexual abuse of children by adults in positions of power and trust is a fundamental betrayal that operates to deny a child’s dignity and autonomy;
  \item THAT the fundamental purposes of this compensation process are:
  \begin{itemize}
    \item to acknowledge moral responsibility for the Physical and Sexual Abuse experienced by the Survivors which was perpetrated, condoned, or directed by employees of the Province during the time the Survivors were resident in the Institutions;
  \end{itemize}
\end{itemize}
\end{quote}

\begin{footnote}
\textsuperscript{30}"Memorandum of Understanding Regarding Compensation for Survivors of Institutional Abuse": see Appendix ‘A’.
\end{footnote}

\begin{footnote}
\textsuperscript{31}This Memorandum of Understanding was subsequently changed by the government following a suspension of the Compensation Program on November 1, 1996. As stated in the December 6, 1996 press release, the Minister of Justice suspended the Program because of the large number of claimants who came forward and also because old records providing historic information had just been discovered. The Compensation Program resumed on December 16, 1996 with the following changes, among others: the government has 120 days instead of 45 days to assess the claims; internal investigation is not only of government employees for disciplinary purposes but also of the claims themselves; and the statements taken from the claimants will now be used for investigative purposes (criminal, disciplinary) and for the Child Abuse Registry: see Department of Justice - Nova Scotia, News Release, "Justice Compensation Program Moves Ahead" (6 December 1996).
\end{footnote}
• to affirm the essential worth and dignity of all of the Survivors, who were residents of the Institutions;

• to assist the Survivors, in a tangible way, with the healing process;

• to affirm to the Survivors that they were not responsible in any way for the Physical and Sexual Abuse perpetrated, condoned, or directed by employees of the Province while the Survivors were resident in the Institutions; and

• to implement financial compensation and other benefits to Survivors in a principled, respectful and timely fashion.

These provisions outline worthy goals and purposes. Yet to this day, there is controversy surrounding the Compensation Program. One of the sources of controversy is the fact that former and current employees of the institutions were not included in the negotiation process. The government opted for a process that could provide compensation quickly, without first conducting an extensive investigation into the conduct of the employees. Instead of having the employees respond to allegations of abuse, management level government officials negotiated the MOU and a separate internal process was set up to investigate current employees. As the numbers of claimants grew and the stories of abuse came out in the media, past and current employees32 protested that the claims were exaggerated or false. They claimed that it was unfair that they were not able to face the accusations made against

32Current and past employees have distinct interests in this situation and belong to two separate advocacy groups. In 1997 and 1998 the current employees were represented by their Union in a policy grievance against the government. As a result of the grievance a Memorandum of Agreement was developed to address the employment and human resources problems facing current employees as a result of the Compensation Program.
them; even if they faced no monetary loss, they were facing loss of reputation and dignity.\textsuperscript{33}

As noted in the \textit{Globe and Mail} newspaper, former employees found themselves accused of abuse but had no forum to challenge the claims.\textsuperscript{34} They contended that the Compensation Program was set up in such a way as to muddy the distinction between true claims of abuse and false ones.\textsuperscript{35}

Throughout the process and to the present day, lawyers and representatives of the employees have stated in the media that the majority of claims were exaggerated or false\textsuperscript{36}. The lawyers for the claimants and the claimants themselves have asserted that the abuse did happen and

\textsuperscript{33}K. Cox, "Workers in Nova Scotia feel vindicated as inquiry says lure of compensation led to many false charges at Shelburne" \textit{The Globe and Mail} (16 September 2000) A21. In this article Cameron MacKinnon, a lawyer representing some of the employees, is quoted as saying that "(t)heir lives have been ruined by the way the government cast them as perverts and pedophiles. The insidious nature of this has left them ruined spiritually, physically and psychologically".

D. Jobb, "Ex-Shelburne worker's family 'torn apart' by allegations" \textit{The Halifax Herald} (28 September 2000).

\textsuperscript{34}K. Cox, supra note 33, para. 10. In cases where allegations of sexual and physical abuse are made, it may be argued that the nature of the wrong is so serious and so public that any allegations should have been dealt with by way of criminal proceedings. That way, persons named in allegations can access procedural protections more readily than is possible within employment law processes. For more on the criminalization of wrongs, see: S. E. Marshall & R. A. Duff, "Criminalization and Sharing Wrongs" (1998) 11 Can. J. L. & Jur. 7.

\textsuperscript{35}D. Jobb, "Hamm refuses inquiry into payouts of abuse victims" \textit{The Halifax Herald} (27 October 2000).

\textsuperscript{36}D. Jobb, "Compensation triggered false abuse claims - report" \textit{The Halifax Herald} (12 September 2000).

R. Boomer, "Keating wants details of his alleged abuse: Ex-School for Boys supervisor asks for info to clear name" \textit{The Daily News} (30 January 2001).
the majority of claims were true\textsuperscript{37}. There are various possible reasons why this process upset past and current employees whose interests were affected by the claims. One can speculate that the lack of legitimacy was in part related to the absence of a validation method that was satisfactory to all parties affected by the claims of abuse.

The newly elected government pledged to address the various concerns expressed about the Compensation Program. On November 30, 1999, the Minister of Justice appointed former Quebec Court of Appeal Judge Kaufman\textsuperscript{38} to do the following: determine whether the process upheld the rights of both the claimants and the accused; determine if the response to institutional abuse has been appropriate, fair and reasonable; document and describe the government’s response to allegations of abuse; assess the appropriateness of the response in light of the interests of claimants, the public interest, the interests of staff and former staff of the institutions; and assess the implementation of each element of the government’s response to allegations of abuse in provincial institutions.\textsuperscript{39}

Until the Kaufman Review completes its research and analysis, the public will not have a

\textsuperscript{37}D. Jobb, “Claimants’ lawyer insulted by abuse report” \textit{The Halifax Herald} (27 October 2000).


\textsuperscript{38}I am currently assisting the Institutional Abuse Response Inquiry with its work. However, the views throughout this thesis are entirely my own and do not reflect the position, work, or opinions of the Institutional Abuse Response Inquiry.

global description of the government of Nova Scotia’s response to allegations of historic child abuse. However with the information that is publicly available about this Program and with the use of other instances of abuse, I will explore the capacity of judicial and non-judicial processes to achieve the specific remedies required to deal with the particular forms of damage that result from institutional abuse.

B. Thesis inquiry

Through the MOU the parties expressed recognition that abuse “is a fundamental betrayal that operates to deny a child’s dignity and autonomy”\(^\text{40}\). The Minister of Justice further stated that the “ADR process . . . empowers survivors by giving them control--an essential component of the healing process--by giving them an opportunity for input into the negotiation of the framework agreement”\(^\text{41}\).

The provisions the MOU and the Minister’s statement assume two things: that abuse goes to the core of a person’s identity by denying dignity, and it affects the ability of the person to exercise autonomous power. In my thesis I will examine the impact that abuse has upon identity and empowerment. I will examine the possibility that abuse involves a process whereby the abuser either reinforces or imposes the sense that a person’s body is for the use of another. The consequent loss of integrity or wholeness diminishes the abused person’s

\(^{40}\text{MOU, supra note 30.}\)

\(^{41}\text{Department of Justice, supra note 28.}\)
sense of his\textsuperscript{42} ability to assert his own idea of what is meaningful in the discursive arena. I will argue that if the parties want to remedy the core harms to abused persons, they must focus upon damages to identity and damages to power that are inflicted through the abusive relationship. In this thesis I explore the possibility that this fundamental form of damage can be addressed through a dispute resolution mechanism. Further, I will explore the possibility that the parties' ability to control the design of a dispute resolution process may provide some remedial effects for the parties. Although addressing these damages through various substantive remedies is vitally important, I would like to explore the capacity of the parties to achieve a healing or transformative result through participation in the design of the process itself.\textsuperscript{43}

One of the key problems that arises when parties attempt to design a process is that they rely on the idea that ADR processes contain 'free spaces' wherein the parties can exercise agency to create a process \textit{ex nihilo}. This idea may be somewhat illusory. Discourse exists within

\textsuperscript{42}Throughout the thesis I will alternate between masculine and feminine personal pronouns when speaking of abused persons. However as 95% of abusers are male, I will use the masculine pronoun to refer to individual abusers: see J. Neeb & S. Harper \textit{Civil Liability for Childhood Sexual Abuse} (Toronto: Butterworth, 1994) at 22.

\textsuperscript{43}In recognizing the potential of the process to address substantive concerns, I acknowledge the questions put by Bruce Feldthuelsen in his article "The Civil Action for Sexual Battery: Therapeutic Jurisprudence" (1993) 25 Ottawa L. Rev. 204. Feldthuelsen examines the possibility that civil actions for sexual battery cases are therapeutic for the victims of sexual assault. He concludes that although a tort action may have many therapeutic benefits, costs and other barriers to litigation will likely be prohibitive. Further he states that it is worth considering whether legitimate therapeutic needs might be addressed more efficiently to the benefit of more victims outside the tort system. In this thesis, I am not only exploring whether or not a conflict resolution process has therapeutic potential, I am exploring the possibility that the process can effect a re-configuration of power relationships between a disenfranchised group and a group in authority or dominance.

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ADR spaces also, although they are perhaps not of the same nature as the discourses that exist in the legal arena. If the space for agency to operate in ADR is possibly illusory, is agency itself an illusion perpetuated by discourses? This question will also be examined in the body of the thesis.

In much of the negotiation literature and in the discourse of dispute resolution, power is conceived alternately as the ability to inflict damage or the ability to influence the decision of others.\textsuperscript{44} The latter view, which is promoted by advocates for the Harvard model of principled negotiation, focuses the analysis of power upon the discrete manifestations of power in the microcosm of the negotiation itself. The model does not address issues of systemic power imbalance.\textsuperscript{45} In mediation, power is perceived as a problematic variable that must be re-distributed or controlled by an intervenor such as a mediator.\textsuperscript{46} Power is something that can be re-distributed by the mediator, with the agreement of the parties. Self-empowerment is not as important as an equitable distribution of power.

\textsuperscript{44} B. Mayer, "The Dynamics of Power in Mediation and Negotiation" in J. Macfarlane, ed., \textit{Rethinking Disputes: the Mediation Alternative} (Toronto: Emond Montgomery, 1997) at 77.


\textsuperscript{46} M. Coyle, "Defending the weak and fighting unfairness: can mediators respond to the challenge?" (1998) 36 Osgoode Hall L. J. 625.

Existing alternative dispute resolution literature focuses heavily upon the ability of the
parties to exercise their autonomy to control the process and the outcome of the process.47
These are the key features that distinguish alternative dispute resolution processes from
judicial processes, which rely upon the authority of a third party who acts within the bounds
of an existing process.

In relying upon autonomy, negotiation and alternative dispute resolution theorists are
assuming that people exercise power autonomously in a relatively fluid power environment.
Although a party may not have as much negotiating power as the other party in the
negotiation arena, there are ways to increase power through the manipulation of various
aspects of one’s situation.48 This perception of power relies upon a liberal conception of
personhood that tends to maximize autonomy and freedom. However, it may minimize the
richness of the relationship and power dynamics that may limit the degree to which
negotiating parties can exercise power.

In my thesis I will locate the actual possibilities for self-actualization that exist in alternative
dispute resolution processes as opposed to assuming an automatic license for the exercise of
autonomy. My analysis focuses on the benefits and potential pitfalls of a bilateral, non-
judicial process where the parties may have a degree of control over process design and
outcome, and the benefits and pitfalls of a judicial process where the process and outcome

47Supra note 46 at 626.

48Supra note 45 at 97-106, 177-89.
are controlled by a third party official.49

Before determining whether a process that requires agency has more remedial capacity for abused persons than a more structured judicial process, I will first examine the capacity for the self to exist subjectively and with volition. If a person is simply an effect of power and is completely socially constructed such that the subjective self is illusory, then the agency of such a person is severely limited, or in fact is non-existent, vis-a-vis the constructs of knowledge and power the exist in dispute resolution processes. In this view, as pointed out by Benhabib, knowledge is power and it generates access to knowledge thus creating a self-perpetuating basis for legitimacy.50 On the other hand, if knowledge is, as Benhabib states, "in the service of the subject; its goal . . . not the legitimation of power but the enabling of empowerment"51, then there is greater potential for agency and manifestation of potency in a dispute resolution process that is in the control of the parties. In chapter two I will explore some of the issues surrounding liberal, post-modernist, and relational conceptions of the self for the purpose of locating a conception of the self that accurately reflects the situation of abused persons.

Throughout my thesis, I want to recognize the embodied nature of the experience of abuse.


50S. Benhabib, Situating the Self: Gender, Community and Post-Modernism in Contemporary Ethics (New York: Routledge, 1992) at 204.

51Ibid. at 205.
In an article about judicial decision-making, Nedelsky explores the importance of the body and emotion in the process of arriving at a judgement.\textsuperscript{52} I would like to recognize the importance of bodily and emotive experience to the recovery process of an abused person, in judicial and non-judicial processes. In focusing upon the abuse survivor’s description of their physical and emotional reactions, the foundational nature of physical experience is not neglected in the examination of aspects of abuse and recovery.

The tension between a conception of selfhood that is objectified by discourse and one that is self-actualizing manifests itself in other ways throughout my thesis. In my work, I will rely upon theory but also upon the actual experiences of abused persons, as articulated in various literature, in order to illustrate my argument. Although I recognize the importance for reflection and theoretical knowledge, I am concerned about the potential for expert theoretical knowledge to overwhelm the physical knowledge that abused persons have of their experiences. Both this tension, and the earlier problem of agency existing within a discursive world, have at their source concern about the subjugation of the self. In exploring various facets of processes that deal with institutional abuse, I hope to illuminate some approaches to these issues.

Another area of tension within my thesis is the stress between dominant and dominating discourses. The source of the stress is the degree to which a person is capable of exercising agency to benefit from discourse and yet be able to resist being subjugated by it. Throughout

the analysis, it will become apparent that dominant discourse can have a liberating effect for those close enough to be captured and named by it, but it can also dominate and prevent the emergence of meaning for those whose experiences are not yet named. Dominant discourses and forms of knowledge do not necessarily have a negative impact upon those who are trying to assert power from a position of subjugation. In many instances, both in the court system and elsewhere, the ability of a subjugated person to locate some aspect of dominant existence that resonates with their experience provides that person with an access point for expression.

The prime concern that I raise is the tendency of dominant discourses to over-master and suppress new meaning that may arise from the experiences of the subjugated person. When this occurs, dominant discourses become dominating and oppressive to the new and emerging knowledge form. The carriers of dominant discourses are experts who are recognized as understanding the structure and meaning of the particular discourses of their expertise. Experts themselves are not necessarily oppressive. However, in exercising their expertise to provide meaning for a particular phenomenon, they should not invalidate the knowledge of the person who has experienced the phenomenon. Thus, in my paper, I am concerned with the boundaries of discourse and the capacity of the subject to assert her own meaning in the discursive arena.

C. Location of analysis

My thesis inquiry is primarily targeted at the areas around the process itself. I am concerned with the ability of a disenfranchised party to form and assert his interests. Consequently,
I am primarily concerned with the development that must occur after there is willingness to engage in a non-judicial remedy of some sort, but before that engagement actually takes place. In chapter 2 the analysis is located in the space before the parties must articulate their interests, even their interests in determining the type of process for resolving their dispute.

In chapter 3, I am interested in examining the events around interest formation before engagement in a non-adjudicated process that is designed by the parties. The rest of my analysis is concerned with preserving identity formation in the conceptualization of one substantive remedy - monetary compensation.

I am interested in the transformative potential that exists for disenfranchised parties who are considering engaging in an non-judicial dispute resolution process. If the abused person is able to develop into someone who can know her own experiences and express her will in the world, there is greater possibility for the expression of new knowledge, the exercise of negotiation power, and the achievement of effective remedies when the parties engage in a dispute resolution process.

D. Outline

Before developing a method for maximizing the ability of a disenfranchised party to assert negotiation power, it is important to describe the nature of the self and its capacity to exercise power. In chapter 2 I will examine the nature of identity, especially as it pertains to the experience of abuse. I will assert that the common law legal system relies upon a particular conception of identity and corresponding procedures to achieve the goal of justice.
Once the parties step outside the procedures of the legal system, there is the possibility that other conceptions of identity can be asserted. When parties in conflict agree to attempt resolution outside traditional legal processes, they have greater potential to assert a conception of identity, and corresponding processes, that emphasizes what they find important. Although a disenfranchised party may favour a conception of identity that exists within another powerful discourse in order to advance their interests, this strategy may fail to acknowledge the full significance of the abusive act. Consequently, the more disruptive aspects of the experience will remain unknown in discourse and in the dispute resolution environment.

In order to truly address the core harms of abuse - namely the imposition of identity, disenfranchisement, and harmful privacy - a party must be able to assert her own meaning for the abusive experiences. An abused person must know herself apart from the meanings provided by the abuser, in order to be able to assert the power to advance her interests. A person may find that they require validation of their experience of abuse through psychotherapeutic discourse. This discourse, however, may still not capture the full significance of the experience of abuse for the abused person. Her ability to convey the meaning of her experiences may still be limited by non-legal discourses.

In chapter 3 I will examine the conditions that are likely to maximize the potential for new meaning to survive in the public arena. Assuming that the abused person has broken the false privacy imposed by the abuser and has established his own identity apart from the one imposed by the abuser, how does the abused person establish the legitimacy of his testimony
such that it has the strength to resist pressure from discourses that are potentially dominating in nature?

I will argue that public speech falls into different categories of testimony depending upon the purpose of the speaker and the purpose of the listener. Legal testimony demands a fairly high level of external validation as does historic testimony; both are for the purpose of establishing a level of truth for the parties affected by the claims. Therapeutic testimony requires much less external validation for it to be legitimate as it is primarily concerned with the subjective aspect of the speech. I will examine the forms of testimony given in judicial and non-judicial processes. I will argue that in order to retain the subjective aspect of speech, survivors should establish their own group that can internally validate their speech. Political testimony is the speech asserted in the public realm by a representative of a group. Political groups have the responsibility for ensuring that the speech of its representatives reflects the true experiences of group members. In doing so, survivors can assert the legitimacy of their previously subjugated knowledge and resist the pressure from dominating discourses. I will argue that political organization is instrumental in establishing the negotiation power of the parties and for enabling the parties to assert their interests.

The way in which political testimony is asserted affects whether the individual testimony of the claimants will survive once it is in the public realm. A political body, formed on the basis of shared experiences and similar meaning, is required in order for the disruptive testimony of the individual to resist the pressure of dominating discourses. However, where the political group asserts further goals and interests that affect members of other groups,
truth-claims will have to be validated to the satisfaction of the parties affected by the claims.

Finally, in chapter 4 I will discuss the necessity of conceptualizing substantive remedies in the negotiation process such that they reflect and protect the subjective experience of the abuse survivor. I will focus on the benefits and limitations of purely monetary compensation that is provided as a remedy to abuse survivors through a non-judicial compensation program. I will argue that it is easy to conceptualize monetary compensation as a remedy for a commodified injury. In order to prevent the objectification of the survivor's injury, compensation must recognize the subjective aspect of the harm. I will examine judicial monetary compensation remedies to evaluate whether they recognize the subjective aspect of harm. In examining non-judicial remedies, I will evaluate whether subjective harm is recognized where a grid is used to administer monetary awards. I will suggest that in order to resist this dominant and hegemonic conception of monetary compensation, it is necessary to explicitly articulate the symbolic nature of the remedy such that the abuse survivor is not objectified and fragmented at the end of a process that was initially designed to promote the self-actualization of the abuse survivor.

E. Methodology

In order to better understand the issues of identity and power in a non-judicial process, I examine some aspects of these issues as they arise in judicial decisions. As the parties can resort to court processes instead of an alternative process, it is important to understand which process can best address their needs. In speaking generally about processes, I do not define
which type of dispute resolution mechanism will be engaged by the parties. My analysis focuses on the pre-negotiation preparation that will help the parties negotiate the non-judicial process and the meaning of a particular form of redress that may arise from the process. My analysis also refers to other situations besides institutional abuse where other forms of abuse of power have resulted in physical or sexual harm. For example, I refer to incest survivors, oppression in Guatemala, Holocaust survivor testimony, and adult sexual assault survivors among others. I examine certain legal decisions that demonstrate the capacity within judicial processes to deal with the issues at hand.

Throughout my thesis the main purpose is to examine the situation where there are large numbers of abused persons who have disputes with institutional authorities such as the government or churches. I am not suggesting re-configuration of the power relationship or identity through re-engagement between an individual abused person and his abuser. In individual cases, there are strong arguments to be made for a severance of the abusive relationship instead of an attempt to heal the relationship. I will not deal with those considerations in this thesis.

This thesis is the beginning of an inquiry into theoretical aspects of alternative dispute resolution practices. In law, the movement toward alternative processes that may involve non-justice goals has not been adequately explored, especially with respect to the power held by the parties. In all disputes there will be power differentials. In examining a situation where the power differential is both the subject matter of the dispute and a matter of procedural fairness, I hope to illustrate some of the mechanisms available in a non-
adjudicated and non-judicial process that may not be available where there is a third-party decision-maker. I also hope to point out some of the pitfalls inherent in a process which is developed anew by the parties in each dispute. In comparing the relative rigidity of the judicial process to a party-controlled process, I may find that the structure of the judicial process provides some safeguards against the influence of potentially dominating discourses. Although my thesis topic touches upon a fairly broad range of disciplines, philosophical areas, and legal issues, in the interests of developing recommendations for parties who wish to design a process that can recognize significant power imbalances I have tried to keep to a fairly narrow analytical path. Although I would like to explore all the various trails leading from my main argument, I will not be able to do so in this thesis.

53 In this thesis I deal with legal, economic, political, and psychotherapeutic discourse although I recognize that there are many other disciplines that are relevant.
CHAPTER 2 - IDENTITY

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the vis-a-vis of power; it is, I believe, one of its prime effects. The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation.  

Why didn’t my uncle just stay away? I wish he were dead . . . She’s not family and that makes a difference. I can talk to her and she listens. She doesn’t try to change the truth like some of the family try to do. Why do I keep coming up with locked doors that need to be opened before I can be Pauline? 

A. Introduction

Abuse affects a person’s identity on at least two different levels. On the physical level, abuse breaches a person’s sense of wholeness or integrity through the use of coercion or outright force. In “Standing for Something”, Cheshire Calhoun defines loss of integrity as

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55 P. Mantley with Marjorie Willison, Silent Cries (Lockport: Community Books, 1999) at 95. Mantley’s courageous account of her childhood sexual and physical abuse at the hands of uncle and her journey through the legal system is described in this book. Her description of what occurred to her creates a visceral emotional impact on the reader that is beyond intellectual understanding.

56 I use the term physical instead of individual in order to focus the reader on the centrality of physical existence as the primary site for individual experiences.
the "failure to regard one’s own judgment as one that should matter to others". Calhoun also examines the view that "integrity . . . is intimately tied to protecting the boundaries of the self - to protecting it against disintegration, against loss of self-identity, and against pollution by evil." Abuse breaks down the integrity of the abused person such that they cannot protect their boundaries against disintegration and they fail to recognize that their judgment should matter. On a collective level, abusers prey on the pre-existing social powerlessness of the abused person which exists by virtue of their identity as a member of a disenfranchised group and create a new subgroup of disenfranchised persons. Abusers also impose a false privacy around the abusive relationship. This privacy precludes the abused person from identifying with other abused persons for the purpose of acting in concert to end the abuse. The abusive act has an insidious effect upon the abused person’s ability to act in the world. Chapter 3 will focus on addressing the problem of asserting identity and interests that are not defined by the abuser in the public arena. In this chapter I will concern myself with the establishment of identity and interests that are defined by the abused person and not by the abuser.

Before determining how to remedy damages to identity, it is necessary to examine the nature of identity and how it is affected by abuse. In this chapter I will argue for a conception of identity that is neither entirely constructed by relations of power, nor entirely autonomous or individuated as conceived by liberal philosophy. I will assert that one of the prime effects

57(1993) 92 J. of Phil. 235 at 258.
58Ibid. at 254.
of abuse on identity is the inability for the abused person to attribute her own meaning to her own physical experiences. In order to remedy the violence inflicted upon the abused person's identity, I will argue that it is necessary to provide a space in a dispute resolution process for the emergence of new meaning for the abusive experiences that is created by the abused person.

In this chapter I will analyze the capacity of the traditional common law litigation system to accommodate new meaning within its parameters. I will examine the capacity of an alternative dispute resolution process to accomplish the same purpose. I will conclude with recommendations on how to promote identity formation that does not rely upon dominating discourses.

B. The Nature of identity

Identity formation at any particular moment is the act of finding a particular experience or set of experiences meaningful. This definition presupposes some ability of the person to exercise agency or volition in the determination of what is meaningful. In post-modernist understandings of the individual self, however, there is not much room for the exercise of agency among the operation of social discourses.

\[59\]

59I have come to this definition of identity after years of pondering what it means to be a member of a visible minority in Canada. I am aware that I am often identified on the basis of several personal features, and yet I am also aware that my own sense of identity is not confined to those identities attributed to me and they are not always as meaningful as other aspects of my selfhood. Consequently, I see self-conscious identity as derived from those experiences that I find meaningful at any given moment.
In the quote at the beginning of the chapter, Foucault asserts that the individual is one of the prime effects of power and is also the point of its articulation. In his conception, the individual is not the source of a substantive form of power as is suggested by many contemporary ADR proponents. Rather, as he states:

(I)n any society, there are manifold relations of power which permeate, characterize and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operate through and on the basis of this association.60

Power is a fluid force that operates throughout the social network and sets the conditions for establishing what is to count as truth and knowledge.61 Discourses provide the medium for the operation of power and at the same time provide constructions of social meaning that allow for the manifestation of the individual self. Although Foucault’s analysis of knowledge and power provides a rich understanding of the importance of social constructions in the formation of identities, there is little room for recognition of the subject as a source of resistance from discursive constructions of the self.62

60 Supra note 54 at 93.
Foucault’s critics,

Foucault’s claim that subjects are constructed by power (is fallacious because) in fact there would be no power, no relation of authority, force, or discipline, if there were no subjects whose acts of subordination or insubordination in regard to each other produce or elicit power.63

In effect, Foucault ‘vanishes’ the subject and neglects to recognize the provocative or dangerous aspect of resistance to the positivity of discourse. If Foucault’s characterization of the subject self is fallacious, then what is its nature? Is it fully autonomous and operating within a void or do Foucault’s discourses provide some basis for understanding selfhood?

Liberal conceptions of the self provide a much fuller sense of individuality. A liberal person has the power to act autonomously for the purpose of self-actualization in an arena with other, equally self-actualizing agents.64 In various iterations of the liberal model, autonomy is a key feature that allows individuals to achieve actualization. But autonomy indicates an a priori ability to exist separately and free from the interference of others. This assumption fails to recognize the level of inter-dependence that exists for all humans, both on a social level and on a physical level. The individual does not act in a void but rather from within

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a relational matrix⁶⁵ that supports physical and social existence. I would assert that the individual cannot physically survive without the support of physical relationships⁶⁶ and cannot construct meaning independently from relationships with others.⁶⁷ As outlined by Ryan in his critique of Foucault, post-Structuralist schools of psychology describe the self in the following way:

Relations to others shape the self through care or abuse in childhood, as well as through the social processes of aggression, shaming, friendship, eroticism, and the like in adult life. . . . Relations assume different configurations and there is no identity outside such relations. The self, in other words, is made up of image surfaces that demarcates identity from alterity and are the

⁶⁵The concept of a relational matrix must be distinguished from the more impersonal and less interactive concepts of external environments or social constructs. It is not simply that an external agent acts upon a person, but rather that a person dynamically interacts with other people to produce and internalize “worlds” (as Lugones would say) of meaning: infra note 72.

⁶⁶In a recent book, three psychiatrists argue that emotional existence is fundamental to human existence. Emotions cause us to inter-relate from the moment we are born and thus ensures a child-mother bond that serves to teach the child physical survival. From the beginning, our physical existence is predicated on a relationship of expressiveness. The authors quote the results from studies of children who were raised in sterile environments away from their mothers. Psychoanalyst Rene Spitz reported that 75 to 100 percent of the children, who were physically cared for but not emotionally nurtured, died.: See T. Lewis, M.D., F. Amini, M.D. & R. Lannon, M.D., A General Theory of Love (Toronto: Random House of Canada Ltd., 2000) at 69-70.

⁶⁷In chapter IV of Interpreting the Personal: Expression and the Formation of Identity (Ithaca: Cornell University Press, 1997), Professor Campbell develops a model for understanding how meaning is attributed to emotional affect. Although her project deals primarily with non-linguistic, emotive expression, it provides an interesting philosophical discussion that is relevant to this paper. At page 133 Professor Campbell states that “the expression of feeling is the attempt to form the personal meaning or significance of some experience or occasion”. Finding meaning requires an interaction or attempted communication between two persons. Professor Campbell also explores the political consequences of her theory. Although relevant, I am not able to do justice to her work by providing an in-depth analysis of the philosophical issues that she raises within the scope of this thesis.
synapses of the self’s constitutive social relations.\textsuperscript{68}

And so, as between a Foucaultian conception of discursive power that seems to prelude the existence of a subject that has agency, and the liberal conception of the autonomous individual who is relatively independent of the influence of others, is there a conception of selfhood that can capture agency within a relational existence?

\textit{(a) Relational identity}

In outlining a relational understanding of rights, Jennifer Nedelsky argues that to conceptualize autonomy as freedom from intrusion is deeply misguided; instead dependence upon others should be understood as a pre-condition to the exercise of autonomy.\textsuperscript{69} This view of autonomy recognizes that self-actualization cannot occur in a vacuum but requires a social and relational context within which to operate. Nedelsky’s analytical project is to reframe concepts used within our legal system in terms of a relational as opposed to a liberal understanding. In doing so, she injects relational theory into rights discourse. This serves her purpose of overcoming the problem of individualism without discarding the existing legal tradition, but it does not adequately theorize the nature of conflict resolution that occurs outside the arena of rights-based litigation. Nedelsky’s re-conceptualization of rights and autonomy does not sufficiently acknowledge the importance of relationships in identity

\textsuperscript{68}Supra note 63 at 164-5.

\textsuperscript{69}J. Nedelsky, “Reconceiving Rights as Relationship” (1993) 1 Rev. of Const. Studies 1 at 7-8.
formation. For an analysis that embraces the significance of social existence, it is tempting
to return to Foucault’s description of knowledge and the role of discourse in the construction
of social matrices. However to do so would be to cede the subjective self as an agent for
identity formation.

Maria Lugones provides a description of identity that is rich in its recognition of our location
within various relational matrices and modest in its conception of agency. Lugones gives
up the idea of a unified subject in favour of an understanding of personhood that is
pluralistic. As she states:

... the cases of bicultural people . . . provide(s) me with examples of
people who are very familiar with experiencing themselves as more than one;
having desires, character, and personality traits that are different in one reality
than in the other, and acting, enacting, animating their bodies, having
thoughts, feeling the emotions, etc., in ways that are different in one reality
than in the other.70

Though a person is plurally constituted, in her conception there is the possibility of
exercising some liberatory function or agency. As Lugones states:

the liberatory experience lies in this memory, on these many people one is
who have intentions one understands because one is fluent in several
'cultures,' 'worlds', realities. One understands herself in every world in
which one remembers herself . . . All oppressive control is violent because
it attempts to erase selves that we are that are dangerous to the maintenance
of domination over us.71

70 M. Lugones, "Structure/Antistructure and Agency under Oppression" (1990) 87 J.
of Phil. 500 at 503.
71 Ibid. at 504-5.
A person's awareness of her various selves contributes to a liberatory understanding of oppression in the worlds that she inhabits. Further, a subject exercises agency through traveling to a place between realities, called the 'limen', where it is possible to become aware on one's multiplicity and to form intentions not contained within oppressive worlds.

In another illuminating essay, Lugones explores the concept of loving world-travel or the ability to move within the world of another subject and "witness her own sense of herself from within her world". World-traveling is the "experience of being a different person in different 'worlds' or cultures and yet of having memory of oneself as different without quite having the sense of there being an underlying 'I'". Lugones sees a world-traveler as having authenticity, in that they are not pretending to be another person: "one is someone who has that personality or character or uses space and language in that particular way". Lugones states that we do not have to be completely aware of the act of traveling but she states that the traveling can be done willingly. With Lugones' understanding of identity, there is the possibility of inter-subjectivity that is non-dominating and also loving in nature. Later in this chapter, a similar understanding of inter-relatedness will form the basis for the movement of an abused person from injury to recovery.

Lugones' term 'worlds' seems similar to the discursive areas described by Foucault.


73 Ibid. at 283.

74 Ibid.
Lugones defines ‘worlds’ as possibly “an actual society given its dominant culture’s description and construction of life, including a construction of the relationships of production, of gender, race etc.”. But she also provides for the possibility of non-dominant worlds and worlds that are constructed negatively, in contradistinction to other worlds. This conception is perhaps paralleled to some extent by Foucault’s understanding of subjugated knowledges, except that Foucault’s definition of these non-dominant areas is more negatively defined vis-a-vis dominant knowledges. Foucault describes subjugated knowledges as forms of knowledge that are “beneath the required level of cognition or scientificity”.

Although Lugones recognizes the fixative nature of oppressive worlds, she also refuses to negate the power potential within an oppressed existence. In fact, her description allows for a level of richness and plurality in the identity of those who exist outside the mainstream that is lacking in Foucault’s description of knowledge, power and discourse. Foucault’s geneology of knowledge, however, does provide useful descriptions of the dynamics of power and knowledge for the purposes of describing abuse. As an example, Foucault states that undifferentiated knowledge, perhaps what Lugones would call an incomplete or negative world of existence, “owes its force only to the harshness with which it is opposed by everything surrounding it”. The speech of institutional abuse survivors is perhaps such a form of subjugated knowledge that is disruptive to the existing knowledge structures that

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75 Supra note 72 at 281.
76 Supra note 54 at 82.
77 Ibid.
surround it.

Throughout this analysis, I will use a conception of personhood that closely relates to Lugones’ description of the ‘world-traveler’ or a person who has identities depending upon their orientation within their relational worlds. I will also rely upon Foucault’s understanding of the dynamics of power and knowledge through the operation of discourse. These two theoretical conceptions provide the most useful tools for understanding the dynamics of an abusive relationship and the potential for recovery in dispute resolution processes.

To return to my initial definition of identity with the benefit of Lugonesian terminology, conscious identity formation is the act of finding meaning within particular experiences within socially constructed ‘worlds’. These worlds consist of relational matrices that to some degree fix the person in certain positions of power. These positions are not fixed, they

78 This definition refers to conscious or active identity formation and not acts of survival which although necessary for the self to exist, are not necessarily exercises of the conscious will. Psychotherapists who deal with historic child abuse survivors witness patients who have used unconscious mechanisms for survival. In his book, *Soul Murder: The Effects of Childhood Abuse and Deprivation* (New Haven: Yale University Press, 1989), L. Shengold, states on page 26 that “to maintain the overwhelming stimulation and bad parental image - means annihilation of identity, of the feeling of the self. So the bad has to be registered with the good. This is a mind splitting or mind-fragmenting operation. To survive, such children must keep in some compartment of their minds the delusion of good parents and the delusive promise that all the terror, pain, and hate will be transformed into love.”

79 Lugones recognizes that we are not always aware of the worlds which we inhabit through the perceptions of others. Nor are worlds always completely defined, understood, or accepted by the traveller. In my definition I am concerned with the ability to actively locate meaning among worlds for the purpose of identity formation.
are capable of fluctuation. The relationships of power can be both restrictive and expansive for the individual. As we shall see in the next chapter, the fluctuation in these power relationships is not sustained by the individual but rather by the political group that can protect assertions of disruptive meaning in the dominant discourse. The individual, however, is not completely passively governed by the variety of constructs and relationships within which she operates. Rather, as proposed by Maria Lugones, individuals participate in world-traveling and can move among various socially constructed worlds.

As stated by Susan Brison, the self is “related to and constructed by others in an ongoing way, not only because others continue to shape and define us throughout our lifetimes but also because our own sense of self is couched in descriptions whose meanings are social phenomena.”80 Christine Koggel, in asserting a relational theory of equality states that “persons give meaning to and shape their lives only in relationships with others in social contexts”.81

I would suggest that we feel some experiences have personal significance; the meaning of that significance can only be articulated through interaction with others. An inchoate feeling that something important has happened can only be capable of expression once the concept is articulated in linguistic terms. At the point when a concept exists in language a person might exclaim, “Aha! That’s exactly what happened to me and I know what you are


81 Supra note 64 at 84.
The concept captures the previously inchoate experience and resonates with the subjective person.

But how does one convey the physical experience of what has previously been left unexpressed? How can a person explain a new experience that has not been imagined and has thus not been reflected back, even from a loving matrix of relationships?

(b) The problem of conveying new meaning

A person may speak but be effectively isolated either because his words cannot be recognized within the dominant discursive arena or because his trauma is too disruptive to the status quo. As noted by Alcoff and Gray, to the extent that survivor discourse cannot be subsumed within a given discourse, it will be disruptive and will at least point out the

82 As an example, psychological syndromes are developed in order to describe a series of phenomena experienced by individuals. The source or etiology of these symptoms may be unknown but scientists name the malady, thus enabling the patient to attribute some meaning to their problem. In other words, the patient can identify their experience of pain or ill-health. Where this is not possible, people often feel that they do not have a legitimate experience or they do not characterize their experience entirely within the four squares of the syndrome named by the expert. This may lead to a distortion and repression of the experience as the person strives to attach a societal meaning to experiences that cannot be entirely captured by the negative definition provided by the expert. Disruptive speech is necessary to dislodge inaccurate understandings of patients' experiences. There is a question raised by pain psychologists about whether or not social constructs in the form of pain syndromes actually stimulate physical pain phenomena. Although I am very interested in pursuing the question of whether physical pain has a social etiology, I will not be able to pursue that question in depth in this thesis. To read an interesting article on this issue see: Atul Gawande, "The Pain Perplex" The New Yorker (21 September 1998) 86. For further information on pain phenomena, see: R. Melzack and P. Wall, The Challenge of Pain (New York: Penguin Books, 1991) and R. Melzack and P. Wall, Textbook of Pain (New York: Churchill Livingston, 1999).
possibility of a different set of formation rules. The barrier that must be overcome is the imposed privacy of marginalization. One way to escape a marginalized existence is to bear witness, both to one’s own life experiences and to the experiences of others who have been the victims of acts of oppression. Bearing witness and testifying seem to be crucial acts that have the potential to create new discursive terms for abuse. In moving from the act of testifying towards developing new meaning, the potential exists for manifestations of political power.

In breaking into the dominant discourse, the speaker faces the difficulty of trying to translate experiences into existing language. As noted by Lea Fridman Hamaoui in an article about testimony and the Holocaust:

(e)xtremity strains beliefs and exceeds the experience, expectation and capability of the reader to re-imagine the event told. Such events are without analogy, in the sense that we lack the mental construct and reference points to make sense of them. In a certain sense, they cannot ‘exist’ for us because they lack a lexicon of words and forms into which they might be translated.


84 As noted by Alcoff and Gray, “(s)peaking out serves to educate the society at large about the dimensions of sexual violence and misogyny, to reposition the problem from the individual psyche to the social sphere where it rightfully belongs, and to empower victims to act constructively on our own behalf and thus to make the transition from passive victim to active survivor”. They also note that survivor disclosure of trauma and testifying is the principle tactic used by the survivors’ movement. Ibid. at 261-2.


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Events such as the Holocaust of World War II gave rise to witness accounts that are difficult to fathom through direct language. We need to have our parameters of understanding reconfigured in some dramatic, emotional way so that new meaning can be stretched and pulled out of the experiences into language. Symbolic acts, art, literature and other demonstrative media help to establish the room for a new discourse to emerge.\textsuperscript{86} Again, the

\begin{quotation}
\textsuperscript{86}The necessity of using symbolic, emotional acts to create the space for bearing witness and collecting political power has manifested itself in interesting ways in different countries. In Argentina, the mothers of the ‘disappeared’ demanded information about the whereabouts of their children. They demonstrated in silence on a weekly basis with the names and date of disappearance of their loved ones embroidered on kerchiefs that they wore around their heads. Their silent insistence was a symbol of resistance to fascism; their cause was of such universal and immediate concern to all parents that the significance of the physical representation of their loss could not be readily ignored: Law Commission of Canada, \textit{An International Perspective: A Review and Analysis of Approaches to Addressing Past Institutional or Systemic Abuse in Selected Countries} (Background Paper) by M. Gannage (Ottawa: Law Commission of Canada, 2000) at 79-80.
\end{quotation}

In Guatemala, the widows of disappeared persons insisted that the government find mass graves and provide genuine burials for victims. By forcing the government to focus on the bodies of the victims, the widows provided a visceral, real, and emotional focus for their audience. A demand for a burial is in some ways a politically humble demand; it is not a call for reform or revolution. It does, however, create a significant political impact because of its emotional weight and relation to physicality and core human relationships. This allows for the development of a solid foundation for political empowerment: See Rigoberta Menchu, \textit{Crossing Borders} (New York: Verso, 1998) at 163-4.

Both examples involve speaking or demonstrating the effects of a violent breach of close emotional and physical bonds. The universality of the physical bond and the emotion that accompanies the breach provides a perfect vehicle for communication. There is no third party description of the pain and no objectification of the loss. These women lost parts of themselves in the disappearances, massacres, and acts of oppression; their testimony reflects that very immediate impact. Although the act of expressing themselves may not have been intended to be part of a broader political movement when each individual first spoke of their loss, the collective act of expression in itself is a very active political gesture. Instead of choosing the silence of oppression, where the importance of their loved ones would remain guarded within themselves, these women were choosing to bring their experiences into the open - in some cases despite great danger of reprisals from the perpetrators of the original

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body and the immediacy of physical needs act as the source of these communications. Hamoui examines the literature of two Holocaust survivors and the account of their experiences. She notes that "description (of extremity) thus continually moves in the direction of the body since human awareness, under acute physical threat, is continually forced back to the threatened and tenuous existence of that body". The body becomes the focus of description, perhaps because of the fundamental relevance of physical survival, and the reader is able to ground some understanding of the extreme experience in a corporal existence that we all share in common. The physicality of the extreme experience becomes immediate and relevant when described in the language of the body. The visceral impact of such communications creates a link based on our common physicality.

The links that emerge from such types of communication provide for the emergence of new meaning and some recognition in discursive arenas of new types of experiences, and new types of people. Koggel explains that certain categories of people only come into being when the category itself is being developed socially. In the case of institutional abuse, the term itself was put forward as a social problem by David Gil in 1975. He noted that inadequate definitions and guidelines regarding abuse lead to inadequate reporting of abuse. crimes. They used their genuine and unassailable experiences to carry their claims forward into the political arena. Once spoken of and repeated by others, the murders, disappearances and massacres began to enter a new space in the discourse and create a new history of events.

87 Supra note 85 at 257.
88 Supra note 64 at 31.
89 Supra note 2 at Appendix II, p. 5.
Only when the rules that guided meaning within the discourse of the social sciences failed to correspond to a physical experience did the new term emerge. With new terminology came an expressive tool for those who experienced abuse. Where there had been no previous understanding that persons in institutions were capable of being abused, there was now a new kind of person - an institutional abuse victim or survivor. This does not mean, of course, that the experience of abuse did not happen previous to the concept emerging in discourse. The experience was always there and may have had personal significance but there was no readily available meaning that could communicate the personal significance within the discursive arena until the social concept of institutional abuse was developed within a disciplinary context.

As asserted above, although disciplines operate as carriers of discourse and meaning, a person may assert agency in their own identity formation. A person may choose to find meaning and personal significance in the term “institutional abuse survivor” or she may not. As an example, a person who has suffered abuse in the past may know that abuse happened and that it was a significant event in her life. She may, however, choose to find no meaning in the acts perpetrated against her in the abusive relationship. She will not identify with those acts and will choose not re-enter the world of abuse. This act of detachment resists against

90 Supra note 54 at 106.

91 Detachment is a very effective tool for asserting one’s will against dominant discourse. In refusing to participate, a person or group deprives the other party the opportunity to engage in an oppressive relationship. Although I would like to explore the act of detachment in identity formation and empowerment, this thesis is focused on situations where the parties are engaged in a relationship for the purpose of resolving a dispute. My analysis is concerned with the re-configuration of the power relationship once the parties are
identification as an abused person.

(c) Summary

I have thus far developed a definition of identity that fixes a person in a flexible matrix or grid of relationships. Within this grid, power is somewhat fixed but does fluctuate. The grid of relationships provides an individual with a variety of environments within which to operate. For example, by virtue of the experiences that a person has undergone, he may exist in relationship to others who either have or have not shared those experiences. A person can exercise agency within this grid in two ways: he may select which clusters of relationships produce concepts that have meaning for his experiences. A person can also travel among the worlds or clusters of relationships that have meaning for him. Thus, from within the matrix of power-bound relationships, a person can exercise agency in order to form his identity.

Now that we have an understanding of identity, the remaining questions that require answers in this chapter are as follows:

1) What is abuse?
2) What happens to a person's identity when she has been abused?
3) What type of remedy is needed to address the effects of abuse upon identity?
4) How effective are the judicial and non-judicial dispute resolution mechanisms in engaged and not with the accrual of power through absence.
achieving this remedy?

5) What is required for a dispute resolution mechanism to be effective in achieving the remedy?

C. Definition of abuse

Dr. Shengold, a psychotherapist who deals primarily with child abuse victims, defines child abuse in contradistinction to deprivation. He states that "child abuse means that the child has felt too much to bear; child deprivation means that the child has been exposed to too little to meet his or her needs."92 Dr. Shengold is describing child abuse primarily from the effects on the child. In the context of this chapter, I propose another definition of abuse that is more broadly about the abuse of power. Abuse is the imposition of the abuser’s will or power over another being for the purpose of gaining or expanding the abuser’s sense of ego, power, or will, to the detriment of the other person’s integrity and sense of self.93 This is an abusive act. The other side of abuse is love. A loving act94 is having the power to impose one’s will but only exercising it with recognition, respect and even to the benefit of the other person’s

92Supra note 78 at 1.

93In this definition, neglect could be seen as the exercise of the will of the abuser for the purpose of effecting detachment from the relationship for the purpose of depriving the other person of their needs.

94A loving act need not be so overt and demonstrative as making love to someone; it is quite simply knowing one’s power in relationships but not acting for one’s own benefit to the detriment of the less powerful person. This type of loving act may be as mild as knowing that I have the capability to have someone disciplined for negligent behaviour but not exercising that power in the interests of allowing the person to remedy their behaviour.
sense of self and integrity.\textsuperscript{95}

Dr. Shengold asserts that there are combinations of overstimulation and neglect in everyone's development but abuse and deprivation only exist if intensity, and duration cause enough psychic damage to result in "soul murder". Shengold defines soul murder as follows:

(soul murder) is neither a diagnosis nor a condition. It is a dramatic term for circumstances that eventuate in crime - the deliberate attempt to eradicate or compromise the separate identity of another person. . . . (I)t depriv(es) the victim of the ability to feel joy and love as a separate person.\textsuperscript{96}

In the definition that I propose, there should also be recognition that although abuse of power occurs in everyday transactions, not all of these result in damage to the object of the act. Although the intent of the action may be to gain power at the expense of others, the actual expense or damage does not always manifest itself.\textsuperscript{97} When damage does occur from the abuse of power such that there is attempted "soul murder", what are these effects?

D. Effects of abuse

\textsuperscript{95}In her description of her relationship with her mother, Lugones uses a similar love/abuse dichotomy. \textit{Supra} note 72 at 276-81.

\textsuperscript{96}\textit{Supra} note 78 at 2.

\textsuperscript{97}Repression or dissociation, and non-reporting of abuse should not, however, be mistake for lack of damage. Many people who suffer psychological damage do not report abuse. In "Victims of Sexual Assault: Psychiatric Profiles" in The Canadian Institute, \textit{Civil Liability for Sexual Assault in an Institutional Setting} (Toronto: The Canadian Institute, 1993) at Tab VI, Dr. H. Armstrong cites a study where 28% of those surveyed did not report sexual abuse prior to the survey.
(a) Abuse

Clinical observations of the effects of child abuse list the following psychological impacts: depression, increased fears, sexual problems, feelings of isolation, anxiety, guilt, distrust, anger, low self-esteem, self-destructive behaviours, nightmares, sleep difficulties, nervousness, tendency to be revictimized, phobias, substance abuse, becoming easily startled, re-enactment of trauma, and aggression. Other more general terms such as “re-experiencing”, “avoidance”, and “arousal” describe physical memories forcing their way through into consciousness, the tendency to develop coping strategies to avoid stimulus, and the symptoms whereby a person is hyper-alert, respectively. These last three terms refer generally to the psychological syndrome known as Post-Traumatic Stress Disorder. These clinical observations and diagnoses depend upon recognition of behaviour by experts. They are useful for understanding which experiences have been recognized and given meaning within disciplinary and common discourse. They also allow for the expression of the abusive experience to a caring listener. What are the specific effects of abuse upon identity? The specific effects are best described by abuse survivors themselves.

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100 For a comprehensive description of the psychological effects of child abuse, see supra note 42 at 3-45.
who, even though they may use the language of the discourses around them, are still able to judge whether those discourses correspond to their subjective experiences.\(^{101}\)

From the above observations of the effects of abuse, it seems apparent that abuse affects the physical and psychological well-being of a person.\(^{102}\) The subjective description of the survivor and the inter-subjective observations of a psychoanalyst provide immediate descriptions of what happens to identity and self-hood after suffering from abuse. Although recognized by therapeutic discourse, these particular descriptions are not generalized to the point of losing their connection to the bodily experience of abuse.

\* \* \*

I just blocked out what my uncle had done, and thought it would never happen again. I remember a dream I had about that time. I dreamed I was dead in my coffin, looking at myself, but not knowing it was myself lying there. I now feel that I separated myself from my childhood then. I realized dead people didn't hurt, so I feel that Pauline, the child, died at ten years of age... I started to leave my body to cope with the pain he was putting me through.\(^{103}\)

\(^{101}\) S. Madigan, "The Application of Michel Foucault's Philosophy in the Problem Externalizing Discourse of Michael White" (1992) Journal of Family Therapy, online: Massey University Homepage<http://www.massey.ac.nz/~i75202/lect1a/frev.htm> (date accessed: 17 March 2001). In this article, Madigan examines White's therapeutic technique of helping people to be free from totalizing descriptions of themselves so that they can construct alternative stories that make sense of the unique outcomes of their experiences.

\(^{102}\) J. Neeb & S. Harper, state that "sexual abuse affects the relationship adult survivors have with their own bodies. The sexual invasion of the child's physical boundaries is a profound violation of her sense of self. The child's first sense of competency and trust has a physical base...Her body is used by the perpetrator as a vehicle for his sexual pleasure leaving the victim overwhelmed and betrayed by her body": supra note 42 at 18.

\(^{103}\) Supra note 55 at 37-8.
In Jehu’s article, the author quotes a patient’s description of dissociative behaviour. The patient states the following:

though I was physically present during the abuse I remember feeling nothing other than the initial revulsion when I would first touch his penis and . . . he first touched me. In between, I felt or thought about nothing. I was gone.104

Further in the article he quotes another patient:

I also became aware of the frequent tendency to separate myself and to become the observer. I really had to work at sticking with myself and to feel and to know what I was doing. I became aware that my head was separate from my body . . . it was . . . some sort of overseer making sure that everything was alright but not involved.105

Abuse forces a dissociative breach between the mind and body on an abused person. The inability to effect a physical escape from one’s tormentor triggers an internal escape from the body.

In her article “Outliving Oneself: Trauma, Memory and Personal Identity”106 Susan Brison explores the impact on identity of trauma from the perspective of a rape survivor and as a philosopher. Her analysis incorporates not only her personal and physical expertise as a

104 Jehu, supra note 99 at 231.

105 Ibid.

106 Supra note 80.
survivor of rape but also her theoretical knowledge of the constructs of identity. She describes the aforementioned phenomenon of re-enacting trauma as being a sensory memory as opposed to a narrative memory of what happened. Re-enactment involves remembering the smell of the abuser's after-shave lotion, the texture of skin or hair, and other sensory stimuli associated with the act of abuse. The assault on the body results in an intrusion into the physical memories that the body carries; it affects the abuse survivor's subjective perception of the world around her.

After being raped, Brison became aware that she perceived that her body had betrayed her by being vulnerable to the rape. She found that her mind could not simply carry on independently of the new turmoil concerning her body. Her physiological reactions of hyper-vigilance and physical stress were not psychological insomuch as physical. Brison lost her sense of ease and safety in the world and her sense of her own power vis-a-vis others in her relational worlds diminished. Brison's descriptions capture is the sense of violence and contravention of will that accompanies abuse. Her description of her body as betraying her self gives a sense of the separation between her will and her body's ability to defend her against the imposition of will by the rapist. Her ability to identify with her body was compromised. Her sense of physical identity has therefore been shifted as a result of the rape.

(b) Child abuse

\[^{107}\] Supra note 80 at 16-17.
He killed the animals to show me how easy it would be for him to kill my younger brothers and sisters if I talked. I couldn’t live with the guilt, knowing it would be my fault if he killed my family because I told on him.\footnote{supra note 55 at 40.}

* * *

Child abuse victims have the additional challenge of going through abuse in their formative years. The psychoanalyst Shengold states that child abuse deprives the victim of the ability to feel joy and love as a separate person.\footnote{supra note 78 at 2.} The victim’s knowledge of herself as capable of having emotional experiences as an individual distinct from the abuser is compromised. The abuser affects her basic ability to have experiences, over and above the control that the abuser has over the meaning of those experiences. Shengold later states, “victims of attempts at soul murder...often cannot properly register what they want and what they feel, or what they have done and what has been done to them”\footnote{supra note 78 at 3.}. An abused person cannot process or give meaning to what has been done to her. Shengold quotes psychoanalyst Ferenczi: “When the child recovers from [the adult’s sexual] attack, he feels enormously confused, in fact, split - innocent and culpable at the same time - and the confidence in the testimony of his own senses is broken”\footnote{supra note 78 at 29.}. This confusion resulting from the violent act of abuse can even be filled with meaning by the abuser. The abuser may convince the abused person that she is being loved and therefore the abuse is okay. In some situations the abuser may convince

\footnote{Supra note 55 at 40.}
\footnote{Supra note 78 at 2.}
\footnote{Supra note 78 at 3.}
\footnote{Supra note 78 at 29.}
the abused person that she has special sexual skill that could be valuable to others who would pay for it. Thus the abuser may cause the abused person to over-identify with her sexual ability.

* * *

He would keep pounding me so hard that I would be in a daze and not know what the hell was going on. The scariest part of it all was not knowing what caused him to go off.\textsuperscript{112}

* * *

But even where the abuser does not explain the abuse for the purpose of perpetrating the abusive relationship, the lack of meaning for the abuse itself is damaging. Viktor Frankl, a psychoanalyst who survived the Holocaust understood that the meaningless and arbitrariness of physical abuse creates a situation where the ability to find some meaning either within or beyond the abusive experience is what sustains the will to survive.\textsuperscript{113}

* * *

He used various expressions and signs to make me go where he wanted, and to control what I said or did. For instance, he'd make a coughing sound, or clear his throat a certain way, to get my attention. Then he'd indicate with his eyes where I was to go...\textsuperscript{114}

By this time in my life I had no friends. When I went to school, I couldn't stop to talk to anybody because I had to get right home. My uncle timed me..... I never went anywhere unless my uncle was with me. He also had codes for me with his eyes, as to where to go in the house, to satisfy his needs, so no one could see the goings on.....I became a very skillful liar for him. There was so much terror, sadness, loneliness and isolation, but I acted

\textsuperscript{112} Supra note 55 at 48.


\textsuperscript{114} Supra note 55 at 28

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as if things were fine and normal.\textsuperscript{115}

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On top of the imposition of will upon the physical being of another, the false privacy imposed by the abuser perpetuates the damage to the abused person. In order for the abuser to maintain the abusive relationship, he must create silence and privacy around the acts of abuse. This prevents the abused person from accessing relationships beyond the abusive one and thereby insulates the abused person from understanding what is going on and learning about loving relationships\textsuperscript{116}. It also prevents the abused person from developing meaning for the abusive acts from other relationships. Because of the false privacy\textsuperscript{117}, the abused

\textsuperscript{115}\textit{Supra} note 55 at 56.

\textsuperscript{116}For an important description and analysis of the extreme privacy imposed by a batterer upon a spouse see: K. Fischer, Neil Vidmar and Rene Ellis "Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases" (1993) 46 S.M.U. L. Rev. 2117. In this article the authors describe the relationship between batterers and their victims as involving idiosyncratic communications that only have meaning to the two parties. They call this the culture of battering. This communication is a form of private language and private culture that insulates the victim of abuse against intrusion. In this way, the abuser maintains control over the victim. This article provide an effective argument against the use of mediation in situations where there is a culture of abuse. They argue that the culture of abuse is incommensurable with the ideology of mediation, based as it is upon the re-establishment of the relationship for the purpose of reaching agreement.

\textsuperscript{117}By false privacy I mean the privacy imposed by the abuser for the purpose of protecting himself from outside censure and for the purpose of maintaining the abusive relationship. Professor Campbell distinguishes the private from the personal, and the public from the social in the following way:

"1. Public meaning: meaning accessible (knowable, interpretable) to others
2. Social meaning: meaning determined by shared rules, conventions, norms and so on.
3. Private meaning: meaning inaccessible to others
4. Personal meaning: meaning not determined by shared rules, conventions, norms and so on." \textit{supra} note 67 at 139.
person may feel to blame for the abuse or she may not understand that there is an alternative to the abusive relationship.

(c) Institutional child abuse

In an institutional setting, there is a further level of privacy imposed upon the residents of the institution. In institutions such as the Nova Scotia School for Boys, the physical isolation of the school from the familial homes of the residents meant that the boys did not have easy access to their pre-existing relationships. Even where there were some opportunities to communicate, speaking about abuse during brief visits would not have been easy. Some residents of the Nova Scotia Youth Training Centre may have faced additional barriers to communication by virtue of being persons with disabilities. In addition, 

118 The Nova Scotia School for Boys (presently the Nova Scotia Youth Centre) was located in Shelburne, Nova Scotia which is a small community about 2 to 2 ½ hours drive from Halifax. On page 4 of his report, Justice Stratton notes that the isolated nature of the school made it difficult for parents to visit their sons: supra note 11 at 4.

119 The Stratton Report describes the situation of a resident of the Dartmouth Children’s Training Centre. The resident was a severely mentally and physically challenged woman who is completely blind and has limited cognitive and verbal skills. There was concern that this woman had been sexually abused. There was an extensive police investigation but it was eventually terminated. As set out in the Stratton Report, the police officer wrote:

Tracey Bartlett, unfortunately, is the perfect victim. If in fact she was sexually assaulted, she would be unable to in any way, shape or form be able to testify against any such person(s). Without the corroborating evidence of an eye witness, a prosecution in this matter would be impossible.: supra note 11 at 67.

This quote indicates the difficulties associated with obtaining information and testimony from persons with severe disabilities. Note that in this case, it was not at all clear that Ms

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emotionally troubled children may have required educational resources not available at the institution. The resulting low level of literacy would have contributed to disenfranchisement both while a resident of the school and in later life.\textsuperscript{120}

On a broader systemic level, the concept of abuse in institutions may not have registered on the collective social psyche. In an institutional environment, the concept of abuse of authority is less easy to grasp than in an environment where control is not socially sanctioned. Institutional authorities are expected to have control over the residents in their care. Institutions are designed so that the authorities are able, and in fact are required, to impose their wills over the residents. In giving this power to authorities, there is already social acceptance of the imposition of the will of authorities over the residents. In an institutional setting, part of the privacy is imposed by the institution itself which controls the rules of conduct, communication, and fulfilment of the physical needs of the residents.\textsuperscript{121} People who are abused in an institutional setting may feel doubly disenfranchised: they are isolated by the abuser who has authority over their well-being, and they are unlikely to be listened to by virtue of the stigma associated with institutionalization\textsuperscript{122}. For someone to

\textsuperscript{120}Complainants in the Stratton Report made various comments on their lack of education. For example "Y.T.C. 7 said that the only education she received was at the Centre and she ‘did not learn anything there’. She added that today she finds it ‘very difficult to read and write because of this’: \textit{supra} note 11 at 85. Stratton further notes that there was a failure of the residents to complain of the abuse to the authorities. If there was a complaint, no corrective action was taken: \textit{supra} note 11 at 86.

\textsuperscript{121}\textit{Supra} note 6 at 1-12.

\textsuperscript{122}\textit{Supra} note 83 at 268.
overcome abuse, they must break the privacy and reach out to speak of their experiences.

(d) Summary of Injuries

From this analysis, the following core injuries result from abuse:

1. The violent imposition of will upon the physical body of another causes some objectification or fragmentation for the abused person. A person’s may dissociate from the physical experience of the abuse.

2. There is an intrusion into the physical, sensory memories of the abused person. This affects their subjective perception of the world around them.

3. There may be a sense of betrayal and a corresponding loss of a sense of ease and safety in the world. The abused person has lost power vis a vis her relationships with others in her relational matrix.

4. The lack of meaning may cause a feeling of personal vulnerability. The imposition of abusive meaning to the acts can distort a person’s sense of identity and relationships.

5. For children abused during their formative years, there is an inability to feel joy as a separate person. The child does not learn to identify their own experience of joy and love. Abusiveness supplants an understanding of love.

6. A child may not have the capacity to know or register what has happened. They may find it hard to be responsible for their mental pictures of themselves and the world around them.
7. Especially in an institutional setting, the imposition of a false privacy to maintain the abusive relationship diminishes the ability of the abused person to establish empowering relationships.

What are the remedies for these types of damages?

E. Remedies for damage to identity

Damages to identity are difficult to address, partly because they occur deeply within the personal space of the abuse survivor. It is not easy for a third party such as a judge or a third party to access this space and to address the subjective nature of the harm. For this reason, a two-party process may be better suited to provide a remedy because the abuse survivor can potentially exercise greater authority over the process. However, before being able to articulate her interests in shaping any process, the abused person needs to know herself.

(a) Identity formation

There are various substantive remedies that can contribute to the healing and well-being of survivors of abuse. The prime effect of abuse is to compromise a person’s sense of separate identity from the abuser, and to effect a corresponding lack of empowerment. This damage is effected through a relationship with the abuser. In order to address these damages, a dispute resolution process must include some way to assist the abuse survivors in asserting a non-dominated identity in relation to the abuser with whom the survivor is dealing with,
either directly or indirectly, in the negotiation. If the process can address this issue, then it might be possible for a previously isolated and identity-compromised abuse survivor to articulate and assert interests in the public realm that are distinct from the abuser.

* * *

There was a social worker at the home who had suspicions about the abuse I had gone through and did something about it. Mrs. Muriel Baxter, God love her, worked on me for quite a while and gradually gained my trust.123

* * *

Involvement with counselors and close relationships with loving people can help to emotionally re-orient an abused person and teach them to be in loving relationships and to identify with loving experiences. It is these acts of love and new relationships that enable an abused person to emerge from the silence and privacy of the abusive situation. The extension of tendrils of care from a loving person to an abused person provides the abused person with a relationship that has a context outside of the abusive relationship. Once a person emerges from the false privacy of the abusive experience, once he speaks to another who recognizes him in his own capacity, there is the nucleus for undertaking personal political action. Political action is the derivation of strength from sharing experiences with another person and manifesting inner reality by doing some act in the outer worlds.

The act itself can be minute in scope. An abused woman may, for the first time in her life, buy a book without getting previous consent from her abusive husband. An abused child may refuse to speak to the abuser. These are political acts of resistance. This person has realized,

123 Supra note 55 at 70.
from watching or interacting or remembering a past loving relationship, that the abuse is not
who they are and they do not have to identify with it or accept the meaning provided by the
abuser. Although a person requires a relational existence to find meaning within collectively
developed constructs, she can choose orientation to relationships that give meaning to her
experiences. The act of breaking out of the status quo relationship with the abuser and
establishing a connection with an outsider\textsuperscript{124} who can at least listen in a loving way, is an act
of power\textsuperscript{125} and a political act. It is the seed of political action.

If emotional re-orientation through involvement in loving relationships is the way to emerge
from the imposed privacy of abuse, then a procedural remedy must provide the time and
space to allow for the development of new, loving relationships. The emergence from the
abusive relationship is the necessary condition to being able to assert interests in a dispute
resolution environment. Without being able to define herself apart from the abuser, it would
be difficult for an abused person to identify the substantive remedy that is necessary for her
recovery. It would be difficult to assert power in the negotiation if she was still under the
influence of the abuser.

\(b\) Assertion of will

\textsuperscript{124}The implications of bearing witness and giving testimony about one's experiences
is explored in a later chapter.

\textsuperscript{125}"Power is always, as we would say, a power potential and not an unchangeable,
measurable, and reliable entity like force or strength. While strength is a natural quality of
an individual seen in isolation, power springs up between men when they act together and
vanishes the moment they disperse." H. Arendt, \textit{The Human Condition} (Chicago: University
In 1964, it was out of the question to mention child sex abuse, let alone discuss it openly. I felt I had one good thing going for me - the fact that I would not allow anyone to feel they could ever take control of me.\textsuperscript{126}

Abuse has the effect of overcoming the will of the abused person and leaving him with a sense that there is no longer a seamless link between his sense of self or will and his physical being. There is a degree of objectification and fragmentation that occurs when the abuser used the abused person’s body for the abuser’s purposes. The abused person becomes aware of his body as an object for another person. A person whose power and control over their physical being has been taken away by force should be given an opportunity to recover that power in order to become whole again. If there is recognition that persons who have been abused have had power taken away from them at a core physical level then personal self-actualization and re-integration may be one goal of the process. Further, as they were often institutionalized initially because they were socially disenfranchised\textsuperscript{127}, the development of social and political power within the broader web of relationships may be another goal of the process.

As stated earlier, identity exists in a relational matrix; therefore re-orientation in this matrix is part of the solution for identity formation. The relational matrix is constructed and maintained by relationships of power, on both inter-personal and broader societal levels.

\textsuperscript{126}Supra note 55 at 74.

\textsuperscript{127}For a discussion of the relationship between disenfranchised minority groups and the institutionalization resulting from eugenics policies in Alberta, see infra note 215.
In order for the abused person to re-configure identity on individual and societal levels, it is necessary to exercise will and power in the relationship with the abuser, and with the actors who maintain dominating discourses that re-enforce existing disenfranchising relationships.

(c) Survivor’s meaning for abusive experiences

Once a sense of self is developed independently from the actors who maintain the false privacy around the abuse survivor, she can find meaning for the experience of abuse that does not give a sense of fragmentation. That is, if the meaning given to the experience of abuse can be integrated into the person’s whole sense of self without objectifying some part of being, then there is the possibility of recovering a sense of control over the self.

Meaning can best be developed among other people who have also experienced abuse. By situating herself in a matrix of people who can identify with her experience of abuse, there is greater chance of being understood and of developing a conceptual framework that will make sense of the experience. For example, if I try to explain to someone who has never had a seizure, what it is like to have a seizure, I can only do so by trying to locate some experience of his that can approximate the feelings of having a seizure. This attempt may be entirely unsatisfactory because I may not be able to locate such analogous occurrences and because the focus of the meaning becomes more reliant on his experience than on mine. If I am speaking to someone who has had the same type of seizure\textsuperscript{128}, then he knows of what

\begin{footnote}
\textsuperscript{128}I recognize that this sounds somewhat circular as we will not know if we have the same type of seizure before the communication. What I am describing is the discovery of
\end{footnote}
I speak because it corresponds to his bodily experience. Together we discover if our physical sensations are similar and we can find some meaning in the experience of having seizures.

For abuse survivors, it is preferable for meaning to be developed from among a group of survivors who can identify with each other. That is, they can find a common meaning from similar experiences of abuse that do not force them to describe the experiences in the terms of non-survivors. The survivors will therefore be able to define meaning based upon their subjective experiences as opposed to having meaning imposed by an objectifying discourse that may not correspond to their physical knowledge. In developing his own meaning among fellow survivors, the individual survivor will have greater potential for control over the meaning attributed to his experience of abuse and will not succumb at this early stage to objectification by non-survivors.

(d) A brief word about the truth

So far, the discussion has assumed the validity of the experience of abuse. There is, however, the possibility that the abuse did not happen. I submit that at the stage in the process when a person is first speaking about abuse but has not yet decided whether or not to speak publicly, there should be no judgement about whether or not he is truthful. I similarity between sensations felt in two people. If there is no corresponding sensation in the other person, he will not know what I am describing. Thus I will have to wander farther from a direct description of my sensation and I will have to try to find an analogy closer to his experience.
propose that the only relevant type of truth determination that occurs before a party enters the dispute resolution arena, is the internal validation provided within the group of survivors. External validation of truth claims may become relevant once the parties are actually engaged in speaking 'publicly' about their claims and when they are speaking for the purpose of asserting their interests. Members of the group should expect tests of the legitimacy of their claims once they speak in the public arena. The parties who are affected by the allegations of abuse will likely assert their own understanding of the truth. Depending upon the remedy and the goals of the process as defined by the parties, different levels of validation and truth-determination will be required. The issue of validating public testimony will be explored further in the next chapter.

F. Identity in judicial processes

In a judicial process, the parties are limited in their ability to control the process by at least the following two things: 1) the existence of binding precedents and legislation; and 2) the binding decision of a third-party judge who interprets and applies these pre-existing doctrinal rules. In a judicial process, the parties are limited in the exercise of self-actualization and recovery. If these activities occur, they happen outside the legal arena, and within other disciplinary frameworks.

Although substantive remedies may symbolize societal recognition of the re-integration of selfhood, the negotiation process itself can be a vehicle for the recovery of self-actualization and self-determination. Where two parties are engaged in dispute resolution efforts outside
the boundaries of a system of pre-existing rules and authority, there is much greater possibility for them to exercise power and control over the process. This can allow for space for the development of new meaning that is not captured by dominant discourses, thus promoting recovery.

However, if the parties do not recognize the potential for allowing new meaning to emerge in this space, then there is the possibility that pre-existing dominant meaning will prevail, simply through lack of attention in the design of the process. Also, if the subjugated party does not have the power to assert new meaning, then it will be difficult to maintain the subjective nature of their interests in the face of the more powerful party.\(^{129}\)

The legal system does not claim to promote identity formation. A person who wishes to enter the legal arena must be prepared and be able to face opposition and prove his claim. The legal system does, however, allow for procedural accommodation for psychological condition of a historic sexual abuse plaintiff.

In *M. (K.) v. M. (H.)*\(^{130}\), the issue was whether or not a victim of child sexual abuse could be statute barred from bringing her claim because the limitation period had expired. The appellant had been abused by her father at a young age. Initially he fondled her. When she turned 10 or 11, he initiated sexual intercourse with her. He used threats to maintain her

\(^{129}\)This point will be explored in more detail in chapter 4 where I discuss the hegemony of commodification with respect to monetary compensation.

silence and rewarded her with treats in order to secure her cooperation. Like the patient in Jehu's article, the appellant would dissociate while going through the abuse. As noted by the Supreme Court of Canada, she would imagine herself as an inanimate object. The appellant tried to break out of the silence of the false privacy by obliquely mentioning an aspect of the abuse to her mother. Her mother did not pick up on her cues or chose not to pursue the matter. M. tried several other times to communicate about the abuse and finally, when she was 16 years old, told a counselor at school who sent her to a psychologist. M. stated at trial that she did not at that point know that abusive acts were wrong but only that she did not like it. She felt that the psychologist did not believe her. In any event, her father re-imposed his abusive privacy when he forced her to recant her story.

The appellant got married but soon experienced depression and sexual difficulties with her husband. She sought therapy for her psychological difficulties but the new psychologist did not encourage her to speak of her incest because it did not seem related to her current problems. She subsequently became engaged to a new man and told him about her abusive experiences. After this disclosure she joined an incest victim self-help group. Her involvement with this group enabled her to see that she was not responsible for the abuse and that her father was responsible. She continued therapy with a family therapist who later testified at trial that M. only became aware of the connection between her psychological problems and the incest when she could recognize her father's responsibility for his abusive acts.

131 Ibid. at 21.
The trial judge found that the plaintiff was able to prove the legal elements of her case. However, she was barred from bringing her action because her claim was brought after the statutory limitation period had expired. The Court of Appeal of Ontario dismissed her appeal and she therefore appealed to the Supreme Court of Canada. The Court decided that limitations legislation does apply to sexual abuse cases but that the appellant’s claim only arose when she was reasonably capable of discovering the wrongful nature of the abusive act and the connection between the act and the harm. The Supreme Court recognized the patent unfairness of allowing the defendant to escape responsibility by virtue of his own harmful acts. As stated by the Court, if the claim were statute barred, “sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused”.

(a) Evaluation of judicial process regarding identity formation

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132 Note that since M. (K.), Nova Scotia has amended its limitations period legislation to recognize the application of the discoverability rule for child sexual abuse. Section 2 (5) of the Limitations of Actions Act, R.S.N.S. 1989, c. 258 as am. by S.N.S. 1993, c. 27, s. 1 provides the following:

In any action for assault, menace, battery or wounding based on sexual abuse of a person,

(a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that persons physical, mental or psychological condition resulting from the sexual abuse.

133 Supra note 130 at 32.
In this case the Supreme Court explicitly recognized that the appellant should be given the time to develop an understanding of herself, of the acts she endured, and of the harm to herself, outside of the imposed privacy of the abuser. It would therefore seem that a rights-based judicial process can indeed recognize the need for historic child sexual abuse survivors\footnote{Although the ruling in \textit{M. (K.)} referred specifically to incest survivors, it was successfully used at trial in \textit{G.B.R. v. Hollett} (1995), 143 N.S.R. (2d) 38 to apply the discoverability rule to this institutional abuse case. Consequently, G.B.R.'s claim was not statute barred.} to form their own sense of identity apart from the abuser.

This fact situation in M.'s case fits well with the description of abuse provided earlier in this chapter. M. was unable to know whether the abuse was wrong or not; nor was she able to register what had happened. She was coerced into privacy by her father with threats and rewards for her silence. Her abuser imposed a false privacy around the abusive relationship in order to perpetuate the abuse. M. testified that she would imagine herself as an inanimate object when the abuse occurred. Her sense of self was fragmented as she dissociated from her body. As she tried to express what had happened to her, social silence on the issue of child abuse either contributed to her mother not to understanding or not hearing her account of what had happened to her. She did not as yet have access to a relationship matrix with those who could provide meaning from the context of empathetic or loving listeners. When she again tried to speak with the school-referred therapist, her father used his parental authority and abusive relationship to re-impose silence. A subsequent attempt by M. to speak to another therapist was again unfruitful. The new therapist decided that it was not necessary to deal with the abuse that had occurred.
Both therapists were entrenched in a disciplinary discourse that did not fully recognize the depth of M.'s experience and needs. Time after time, her knowledge of the abusive experience was not reflected in the discourse around her and she could therefore not find speech that meaningfully expressed her experience. Predominant conceptions of the legitimacy of male parental authority contributed to the school's acceptance that her father was more credible than M and that his authority was more legitimate than her disruptive speech. The second therapist was also not able to recognize M.'s need to speak because he let his expert opinion override her needs. As outlined in the model earlier in the chapter, she was only able to be heard and develop the strength to form more loving relationships in her support group once she had a sympathetic or loving listener. It was only upon telling her fiancé that she was able to begin to form supportive relationships with those who could help her find the meaning and words to express what had happened to her.

What is striking about this case is the degree to which it fits within the established understanding of abuse and recovery. Point by point, the fact situation outlined by the Supreme Court describes a classic situation of historic child sexual abuse as defined by the contemporaneous dominant understandings of abuse within psychotherapeutic discourse.135 Prior to this case, incest was not easily recognized in society or by the courts. In M. (K.) LaForest J. states the following:

\[\text{\ldots one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos}\

135The trial judge relied upon various child abuse experts in the psychotherapeutic fields to describe the damages caused by incest: supra note 131 at 26-28.
surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity.¹³⁶

Further, therapists’ understanding of incest in earlier years did not accurately reflect the abused person’s experiences. When M. did speak, therapists were not willing to accept her account and they denied recognition of the significance of her experiences. Their ability to recognize her experiences within their discourse was limited and the dominant understanding of abusive experiences prevailed over her account of the abusive experiences. If the then dominant understanding of incest had been accurate for her case, M’s experiences would not have been minimized by the school authorities and therapists who failed to make the connection between the incest and her injuries.

This point illustrates how dominant understandings of abuse or other phenomena can enable empowerment if one’s situation is reflected by discourse but can also be dominating if it is not so reflected. Although the dominant knowledge of experts was eventually able to recognize the situation of incest victims, the knowledge of psychologists at the time when M. was seeking help did not capture her experiences. Therefore, it had the effect of suppressing or ignoring the importance to M. of her incestuous relationship with her father.

I would suggest that this form of suppression may also exist with respect to current phenomena that have not yet been widely recognized. For example, inter-resident sexual and physical abuse in institutions is not widely recognized as compensable. Consequently, the

¹³⁶ Supra note 130 at 32.
people affected remain excluded from the system. Though the abuse they suffered at the hands of fellow residents may have significant meaning for them, the issues surrounding abusive acts perpetrated by persons who are themselves vulnerable have not been widely addressed in discursive arenas.

The court system relies upon experts from other disciplines to articulate existing knowledge within their disciplines. If existing knowledge does not accurately reflect a particular

137 Vulnerable people might include abuse victims, children, disenfranchised minority members, battered women or others who are themselves victims of abuse of power. It is difficult to deal with issues surrounding the responsibility and liability of abused persons who perpetrate abuse, partially because responsibility flows back to those who have contributed to the disenfranchised position of the vulnerable perpetrator. For example, white condemnation of violence in African-American culture is complicated by the fact that it may be that violent oppression by white Americans during the slave era and after contributed heavily to the existence of violence in African-American communities. see: R. T. Takaki, Violence in the Black Imagination: Essays and Documents (New York: Capricorn Books, 1972).

138 Two Supreme Court of Canada cases demonstrate a recent trend to limit the circumstances in which expert evidence in sexual abuse cases can be admitted. In R. v. D. D., [1994] 2 S.C.R. 9 [hereinafter “D. D.”] the Court considered the expert evidence of a psychologist who testified that a child’s delay in alleging sexual abuse does not support an inference of falsehood. The psychologist did not testify about the particular child in the case but rather provided evidence that delay is not determinative of truth or falsehood. At trial the judge considered the test in R. v. Mohan, [1994] 2 S.C.R. 9 for the admission of expert evidence. The test provides that the party seeking to admit expert evidence must establish that the evidence is relevant, there is necessity for the evidence, there is a lack of any other exclusionary rule and that the expert be properly qualified. The trial judge determined that all four criteria were met in this case. The Court of Appeal, however, found that the evidence of the psychologist was neither relevant or necessary. The Court of Appeal held that the expert evidence was relevant to the complainant’s credibility and not to a fact in issue; therefore it could not be admitted as it would result in oath-helping. The Court of Appeal also found that the evidence was not necessary as it dealt with a matter within the ordinary knowledge of the juror. Although the whole panel of judges agreed that the appeal should be dismissed in D. D., McLachlin, L’Heureux-Dube and Gonthier JJ. dissented on the merits. Writing for the majority, Major J. examined closely the dangers associated with the admission of expert evidence. Primarily, his analysis focused on the dangers of
phenomenon, then it will not be accepted by the courts. Thus, M.’s ability to overcome the limitations barrier was only possible after her experience of abuse was understood by experts. The experiences of the appellant have been represented to the Court in terminology that is accepted in dominant discourse and convincing to the decision-makers by virtue of its congruence with dominant conceptions of abuse survivors in psychotherapeutic discourse. Further M. needed to depend upon the Court to give her the right to assert her claim. Thus, the Court bestows power through rights only if she has enough existing power to establish that her claim falls close to or within the bounds of doctrine. For example, the doctrine introducing extra-legal knowledge in a forum where it is not possible to evaluate that knowledge. He noted that because experts have impressive credentials, the triers of fact may abdicate their role and attorn to the opinion of the expert, despite the expert’s limitations. He further noted that expert evidence can distort the fact-finding process because terms of art and scientific language can create impressions that the evidence is infallible. Also, expert evidence is difficult to cross-examine; even if another expert cross-examines the first, the evidence is difficult for the trier of fact to evaluate. The expert from another discipline may thus have inordinate influence on judicial proceedings than is actually warranted by their actual expertise. The Court determined that as the statement of principle given by the expert in this case reflected the current state of Canadian law, the trial judge should have included it in the instruction to the jury. There was no need for the expert in this case.

In R. v. J.-L. J. (9 November 2000) file no. 26830 (S.C.C.) the Supreme Court of Canada found that a new application of an existing psychiatric tool is not a well-enough established scientific method and therefore will tend to distort the fact-finding exercise. In this case, the expert sought to use the penile plethysmograph, which is normally used for assessment, as a forensic tool for the purpose of determining whether the offence in question was probably committed by the member of a “distinctive group” of individuals - pedophiles and psychopaths. The expert evidence was not well-accepted as a matter for determining disposition and tended to be strongly exculpatory. Thus the evidence hindered the fact-finding process more than it assisted. In this case, the Court was concerned that the unproven application of a scientific tool, wrapped in the cloak of the discourse of another discipline, could result in a construction of identity that distorts the fact-finding process.

Note that legal doctrine itself can preclude recognition of particular phenomena. For example at one time, the rape of a woman by her husband was not recognized because in law, a husband had the right to sexual access to his wife: supra note 83 at 268.
of discoverability was expanded to apply to her case, only after experts on child abuse could establish that she could not be expected to discover the connection between her injuries and the abusive acts until well after they had been inflicted. In M. (K.) LaForest J. states the following:

in my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitation period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes... What is more, I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse.¹⁴⁰

Before the point when the effects of abuse were recognized in scientific and psychotherapeutic circles, child sexual abuse survivors would not have been able to rely upon judicial authority to bring their claims forward years after the limitations period had expired.

M.(K.) is a good example of both the positive and negative aspects of expert discourse. On the one hand, M. (K.) was able to access a dominant understanding of abuse within psychotherapeutic disciplines that reflected her experience. The Supreme Court recognized the legitimacy of her claim and awarded her damages. On the other hand, several incest victims before her would not have been able to assert their claims because the state of dominant discourse was such that incest was unrecognized or the particular nature of their

¹⁴⁰ Supra note 130 at 35. For further discussion on this topic see supra note 42 at 63-70.
injuries prevented them from bringing their claims forward in time. In a judicial process there is little room for the assertion of meaning by the abused person that is not supported or recognized by some type of expert. This circular recognition of power that already exists does not allow for disenfranchised abused persons to contribute new meaning through discourse. If M. had not been able to overcome the various barriers to her speech, then she would not have been able to assert her claim.

I would now like to examine if the barriers to identity formation and speech are as formidable in a non-judicial process where a disenfranchised group may initiate political power without relying upon the other side or a third-party bestower of rights.

Prior to 1992 the majority of civil proceedings involving child sexual abuse had to do with custody and access, and child protection law. As stated by N. DesRosiers in "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992) 9 C.F.L.Q. 43 at 43, "Few actions are brought by victims of childhood sexual abuse, and even fewer are met with success. In addition to the psychological and financial difficulties of bringing such an action, the most difficult legal obstacle preventing victims of childhood sexual abuse from suing their aggressor is the limitation period."

Leading up to M. (K.) which is the key authority recognizing the effects of child abuse on discoverability and reporting, there were few cases of plaintiffs seeking damages for historic sexual abuse. It was only around 1991 and 1992 that courts started to recognize the specific nature of child sexual abuse and the delays in reporting that are typical. In one case, Gray v. Reeves (1992), 64 B.C. L. R. 275 a plaintiff brought an action for sexual abuse suffered at the hands of her uncle. In that pre-M.(K.) case, the court found that it was possible that the injuries suffered by the victim would not be recognized by the victim until well after the assault had taken place. In the criminal arena, courts had found that "lengthy delay in making accusations of sexual abuse, while it may affect the likelihood of conviction, does not in itself lead to an unfair trial": R. v. D. (E.) (1990), 73 O.R. (2d) 758 (C.A.) at 769-70. In R. v. L. (W. K.), [1991] 1 S.C.R. 1091 the Supreme Court of Canada held that delay in reporting sexual abuse does not contravene the accused’s right to a fair trial under ss. 7 and 11(d) of the Charter. The Court recognized that non-reporting, incomplete reporting and delay in reporting are common in sexual abuse cases.
G. Identity in non-judicial processes

In a non-judicial process there is a need for personal space or time in order for the person to be able to establish her sense of self and assert her interests. Once in the negotiations, it is assumed that the parties are able to assert their interests. In a non-judicial process the need to participate in identity formation can be articulated either before pre-negotiation process discussions or during process discussions with the other side. The difference between a judicial and non-judicial process is that the parties in a non-judicial process need not depend upon a third party adjudicator for recognition of their need to establish an identity. Further, the identity that is eventually formed can be expressed in the negotiation process without having been filtered through doctrine or disqualified by experts. The discounting of new identity and the survivors’ account of the abusive experiences may eventually happen in the negotiation arena. However in having the opportunity to develop a sense of what is meaningful at the outset, survivors will be better able to assert their interests in their negotiations with the other party. They will not be limited in their initial articulation of interests by a third party adjudicator or by the other party.

Negotiation has the potential for allowing identity formation by the parties and it has enough flexibility to allow for the recognition of political power that is unmediated by doctrine or the approval of a decision-maker. In institutional abuse cases governments may wish to encourage the accurate articulation of substantive interests in order to increase the political legitimacy of the remedies for all parties and the public, and to encourage the development of individual and collective remedies that cannot be obtained in a costly litigation process.
Non-judicial processes do not operate within a legal vacuum. It could be said that the abuse claimants in the Nova Scotia Program were able to engage the Nova Scotia government in negotiations precisely because the ruling in *M. (K.)* established that historic sexual abuse cases are not necessarily statute-barred by virtue of limitation periods. Although the negotiation process allows for the re-engagement in a relationship, it is situated within the parameters of a rights-based system. The strength of the ability to assert one’s rights in a legal claim gives a party the ability to detach from the relationship. Thus, judicial and non-judicial systems are not entirely distinct but interact with each other. It also means that the ability to assert identity in a negotiation process is dependent upon recognition within the legal system of the needs of abused persons. Although a non-judicial process can encompass and recognize the importance of identity formation, the actual engagement in the dispute resolution relationship is dependent upon the same legitimated understanding of abused persons as exists within the court system. What is different, then, with a non-judicial process?

The difference is that although the government may choose to rely upon limitation periods that reinforce dominant conceptions of identity, they do so at the risk of facing political opposition in and around the negotiation environment. A judicial process is to some degree protected from such influences and operates within a relatively fixed political environment. A non-judicial process create an opening for the development of a new understanding of what occurred in institutions, based upon the direct assertions of the parties. In other words, a non-judicial process provides the fluidity in the relational matrix or 'world' of the parties...
such that a reconfiguration of power is possible.

Where there are allegations of institutional abuse in a particular jurisdiction, the use of a technical limitations period by a government or institutional authority might be seen as morally and politically unacceptable. Consequently, institutional authorities may chose to develop a pro-active program that allows still-silent abused persons to emerge from their privacy. By not engaging in a civil litigation process, the government or other institutional authority can exercise some control of the process and the remedies. On their part, claimants can assert the need for access to counseling as part of the process in order to assist them with identity formation and with coping with the process itself.

Whereas the parties in a judicial process must rely on a third party to interpret doctrine, a process that need not rely upon authority can incorporate more pro-active mechanisms to respond to subjective experiences and conceptions of identity. Courts are bound by doctrinal rules and procedures that embody existing dominant conceptions of identity, whilst the parties in a non-judicial process are not so bound. If the claimants had been able to effectively assert further aspects of institutional abuse that are not yet widely recognized in dominant discourse, then the parameters of the MOU might have captured these experiences.

(a) *Evaluation of a non-judicial process regarding identity formation*

As briefly mentioned above, in the Nova Scotia Compensation Program, the MOU provided
interim funds for counseling while the claimants’ cases were being assessed.\textsuperscript{142} In doing so, the government provided assistance in identity formation at the outset, as long as a person identified himself as abused. The government also provided assistance through the Family Services Association, an arm’s length organization that helped find appropriate counselors for the claimants.\textsuperscript{143} This aspect of the Nova Scotia Program could be said to be well designed to meet the needs of abused persons to access non-abusive, safe relationships.

Without this assistance and recognition, the process of finding a sympathetic listener can be discouraging and difficult. Recall that in \emph{M. (K.)} the appellant did not receive the validation she needed either from her mother\textsuperscript{144} who could or would not understand her new speech or from expert therapists whose dominant conceptions of abuse victims crowded out her speech. If the process is initially designed so that there is maximum opportunity for allowing testimony about all experiences related to abuse, then there is a much greater chance that a new understanding of abuse can be developed that challenges the discursive \textit{status quo}. In \emph{M. (K.)} this new speech was only articulated when she encountered sympathetic non-experts\textsuperscript{145} in her incest survivor self-help group.

\begin{flushleft}
\textsuperscript{142} \textit{Supra} note 30 at paras. 28, 29.
\textsuperscript{143} \textit{Supra} note 28.
\textsuperscript{144} For her mother, M.’s disclosure of abuse may have been so disruptive to the status quo of her relationship with her husband that she could not listen or hear about the abuse. This is a microcosm of the broader social inability to hear difficult, disruptive accounts of experiences.
\textsuperscript{145} When I use the term “non-expert” to refer to self-help group members I am not intending to derogate from their basic expertise as survivors. I am only referring to the fact that the knowledge they carry is what Foucault would refer to as “low-ranking knowledge”
\end{flushleft}
H. Conclusions

In this chapter I have asserted that a person forms a sense of identity by finding meaning and significance for certain experiences. I argued that identity itself is relational in nature. Although the person can choose meaning, meaning and thus identity is only available from within the matrices of relationships or 'worlds' in which the person exists. Based on evidence provided by abused persons both on their own behalf and through psychoanalysts and therapists,146 I have outlined various effects that abuse has on identity. The abused person may not be able to process what is happening to him. As a consequence he may dissociate or become fragmented from his bodies. Meaning for the abusive acts may be imposed by the abuser. Further, the abuser will impose a false privacy around the abusive relationship so that the abused person cannot derive meaning from a context outside the abusive relationship. In order to overcome the effects on identity, I have argued that a person must be able to derive meaning from relationships outside the abusive one. I suggest that exposure to a listener in a loving relationship may enable an abused person to break the silence of abuse. Forming new relationships with other survivors of abuse will allow for the development of an identity separate from the abuser. Identity would be formed among others who, having experienced abuse, would be best able to help the abused person find accurate meaning for his experiences.

or “popular knowledge” that is subjugated by the dominant discourse: supra note 54 at 82.

146 These experts may derive their theoretical understanding from a dominant discourse but in conveying the effects of abuse in the words of the survivor, they are not dominating and subjugating the knowledge of the abused persons.
I have argued that both judicial and non-judicial dispute resolution processes may acknowledge the need of an abused person to develop identity separate from the abuser. In *M. (K.)*, the Supreme Court acknowledged that it would have been impossible for the appellant to have brought her claim before knowing that the abuser and not she was responsible for the abuse. The difference between the two processes is the fact that judicial processes require a third party to affirm the meaning of the abused person's experiences, and in so doing, may possibly exclude facets of the abusive experience that are significant to the abused person. A two-party process can allow for the emergence of meaning based upon the fullest understanding that the abused person has of her experience. In a non-judicial process involving several individual claimants and the government, the claimants may either undergo identity formation in the personal space that they devise, or once the commitment to negotiate is made they can assert the need for time and space for identity formation before negotiations commence. If the government wants to be able to respond to the needs of abuse claimants, it will either acknowledge or initiate this creation of space so that the claims may be dealt with comprehensively.

To recap, judicial processes allow abuse survivors to assert the required space and time necessary to establish an identity apart from the abuser. This space, however, is only won if the survivor can establish legitimacy within an existing discourse and can convince a third party adjudicator who is bound by disciplinary rules that reinforce dominant discourse, of the legitimacy of her claims. A claimant in a non-judicial process also requires a certain amount of legal power in order to engage the abusive party in the negotiation process. The difference is that the players in a non-judicial process are not bound by existing rules and
concepts of identity. Parties can assert the significance of experiences in an arena where the disruptive force of new speech can lead to the establishment of political and negotiating power. Further, in the interests of dealing with all possible claimants, a government may decide to encourage identity formation in those who have not yet completely broken the privacy imposed by the abuser and reinforced by society.

I. Recommendations

Where a government or any institutional organization is committed to entering a non-judicial dispute resolution process, space for identity formation should be provided. Survivors of abuse should assert the need to establish the significance of the abusive acts among themselves or among others who have experienced abuse. The emerging sense of identity should not be fettered by external agents or by doctrines at this stage. Validation will occur later once the interests of survivors are asserted against the other party in the public space of the dispute resolution arena. Therefore at the preliminary stage when there is a commitment on the part of institutional authorities or governments to engage in a dispute resolution process, the abuse claimants should assert the following:

- the need for assistance to access therapists who can listen to the accounts of abuse as they emerge;
- the need for survivors to meet with each other to arrive at some meaning for their experiences;
- allow time before the dispute resolution process is commenced for the abused
persons to understand what has happened to them; and,

- funds to provide for counseling for the period of time before survivors of abuse form a political body.
CHAPTER 3 - EMPOWERMENT

The power. We are a natural part of the earth. We are an extension of the earth; we are not separate from it. We are part of it. The earth is our mother. The earth is a spirit, and we are an extension of that spirit. We are spirit. We are power. They want us to believe that we have to believe in them, that we have to assume these consumer identities and these racial identities. They want to separate us from our power. They want to separate us from who we are. Genocide. . . . . We must not become confused. We must not become confused and deceived by their illusions.\textsuperscript{147}

The bourgeoisie is interested in power, not in madness, in the system of control of infantile sexuality, not in the phenomenon itself. The bourgeoisie could not care less about delinquents, about their punishment and rehabilitation, which economically have little importance, but it is concerned about the complex of mechanisms with which delinquency is controlled, pursued, punished and reformed. . . . \textsuperscript{148}

A. Introduction

In the previous chapter I concluded that judicial process does recognize the need for historic child abuse survivors to form an identity and speech separate from their abusers. The only problem is that the new speech must first be recognized within a dominant discourse and then it must be accepted by a third party adjudicator who makes a decision outside the control of the parties. A non-judicial dispute resolution process has the space for identity


\textsuperscript{148}Supra note 54 at 102.
formation within the parameters of an alternative process. It allows the parties to have control over the development of identity and to assert their sense of what is significant without obtaining the approval of a third party. However, with the freedom to assert identity without first obtaining third party recognition, there is a risk that the survivors of abuse will be overpowered by the other party. There is also the risk that pre-existing notions within dominant discourses will overwhelm the new identity of the survivors which is based on the meaning they attribute to the abusive experiences. In addition, the new knowledge of survivors is at risk of being subjugated by other forms of knowledge that are considered to be more legitimate within dominant discourses.\[^{149}\] Although dominant discourses can empower survivors by providing an initial recognition of experiences, survivors must be aware of the possibility that survivor speech will relent to the normalizing pressures of the status quo. Testimonials of abuse are never easy to listen to and they are frequently accompanied by and evoke emotions that are difficult to manage. People who accept dominant knowledge about abuse and discourse derive stability from the relationships that reinforce that understanding; these people are less likely to want to hear about abuse.\[^{150}\]

Public speech or testimony is necessary in order for parties in a dispute resolution relationship to articulate their interests and goals. In this chapter I argue that once speech

\[^{149}\] Recall that when M. disclosed to the second psychotherapist that she had been a victim of incest, the therapists’ theoretical knowledge overwhelmed M.’s own sense of the importance of the incest. His expert knowledge about her experience was considered more legitimate than her sense of the impact of the abuse on her life.

\[^{150}\] Again, recall M.’s mother who could not or would not listen to M’s claim that she had been sexually abused by her father. As noted before, if the mother listened to M. then she would have allowed the disruption of her relationship with her husband.
enters into the public space it falls within a particular category of testimony, depending upon
the identity of the listener and depending upon its purpose. The speaker loses a degree of
control over the testimony and must contend with the power of other stakeholders in the
testimonial arena. I will describe the disciplinary categories of testimony that are used in the
context of a judicial process and within the context of a non-judicial process. Each form of
testimony requires a different level of validation in order to be considered legitimate within
the environment in which it is given. I will note that in the Nova Scotia Program, testimonial
purpose changed in a way that perhaps reflected a change in the goals of the Program
itself.\textsuperscript{151}

Also, I will suggest that if survivors of abuse form a group that can assert common interests
based upon their identity, they will be better able to assert the power required to resist
pressure from other parties and other discourses to normalize or negate the speech of their
members. They will also be able to develop a consistent purpose\textsuperscript{152} or interests with the
knowledge that if these interests are to be met, a certain level of validation must be achieved.

\textsuperscript{151}In this paper I am not concerned with the ability of the institutional authority to
develop a consistent purpose. However, all parties in a process benefit from consolidating
goals and interests before entering the process. Before any government action is taken, there
are many internal stakeholders to be consulted and many different policy choices to be made.
Like private parties, before coming to the negotiating table, governments and other
organizations should be clear on their legal parameters and their most significant interests.

\textsuperscript{152}Although the individual claimants in Nova Scotia may have had very strong
advocates who could promote certain interests, these advocates could not claim to be
promoting the collective interests of a single group as there was no single group; there were
only a number of individuals bringing similar claims. If they had joined together to
determine and assert claims as a group, then they might have been able to establish a new
form of knowledge that is internally validated by the group members.
If the survivors have the power to assert the interests of its members on its own behalf, any
government dealing with claims may have be more able to assert its interests and define the
limitations of possible remedies.

I argue that the formation of a group of people who have experienced institutional abuse and
who can develop a common purpose, will be better able to articulate interests in a non-
judicial process than if each member acts alone. I will argue that in order for the subjective
aspect of speech to be protected, the survivor should affiliate himself with others who have
common goals before engaging with the other party in a process to develop remedies. If this
does not happen, the individual may not be able to resist the pressure from status quo
advocates who wish to resist the potency of the new speech. If a political group is formed,
it can create the space for the assertion of individual testimony in the public arena. It can
also provide the structure for the development of interests to be asserted in the negotiation
arena. Depending upon the goals of the survivors and their ability to assert the importance
of their interests, a method of validation for testimony can be agreed upon by the parties in
the negotiation.

The problem arises of how this group can assert itself politically against the status quo while
maintaining the subjective core and integrity of the testimony. That is, how can a political
group assert its legitimacy without having to obtain approval from those status quo actors
who are challenged by the testimony arising from the group of abuse survivors? The
problem with popular political testimony is that it can easily be undermined and invalidated
by experts within disciplines whose knowledge has higher ranking in the hierarchy of
knowledge and discourse. For example later in this chapter I will explore how David Stoll, a social scientist, has attempted to invalidate the testimony of Rigoberta Menchu, a popular political leader of the Indigenous movement in Guatemala. I will argue that legitimation of political speech should receive validation from within the political group. Popular political knowledge should not require external validation when other discursive forms of knowledge are validated from within their respective disciplines. I will argue that internal political invalidation is not likely to be any less effective than external political validation. Further it will not allow for upholders of the status quo to resist or normalize the popular knowledge.

153 I would be interested in exploring the question of whether pure science can truly claim to be distinct in character from arts. Although I cannot pursue this question within the scope of this thesis, I find Thomas Kuhn’s “Comments on the Relations of Science to Art” at page 341 in T. Kuhn, The Essential Tension: Selected Studies in Scientific Tradition and Change (Chicago: University of Chicago Press, 1977) interesting and on point. In the hierarchy of knowledge, scientific claims have more power than political ones because of the assumption of objectivity. In asserting that the study of social phenomena is scientific and rooted in objectivity, the social scientist places his legitimacy closer to that of the pure scientist who is assumed to be relatively free from subjective bias, and consequently higher on the hierarchy of knowledge. Thus, the social scientist asserts truth claims that will subjugate claims derived from lower knowledge forms such as those rooted in physical experience. Stoll’s claim to legitimacy rests upon his qualifications as a social scientist who is able to objectively view a political situation. What he does not acknowledge is the political content of his so-called scientific assertions.

154 For each type of truth claim, there is an internal method of validation established within the discipline. The strength of scientific discourse is provided by its apparent openness to new truth and the ability of the scientist to shift from a status quo position. Science seeks to challenge existing understandings of the world whereas other disciplines examine pre-existing ideas. However, in claiming to be scientists, other disciplines seek to establish that they can objectify their area of study for the purpose of establishing truth apart from their pre-conceptions and political stance. See M. Foucault, “Discipline and Punish” in P. Rabinow, ed., The Foucault Reader (New York: Pantheon Books, 1984) at 237: N. Tomes, “Feminist Histories of Psychiatry” in M. Micale and R. Porter, eds. Discovering the History of Psychiatry (New York: Oxford University Press, 1994).
of the group of abused persons through invalidation of its membership. Only in being able to resist normalization by maintaining the integrity of this speech will the formerly disenfranchised group be able to take a place within the discursive arena and manifest its power. Beyond the political purpose of speech, however, external validation will become relevant.

B. Pre-testimony survivor speech

Lugones states:

. . .merely remembering ourselves in other worlds and coming to understanding ourselves as multiplicitous is not enough for liberation: collective struggle in the reconstruction and transformation of structures is fundamental.155

By itself, having the strength to speak about one’s experiences does not ensure that the words will be accepted and absorbed into common knowledge. Before her words are accepted, a survivor of abuse of power may go through several instances of describing the event of abuse where she is disbelieved, discounted, ignored or even silenced. These are methods that effectively keep the subjective experiences of the survivor internal and invisible to those around her and to those who operate within the dominant discourse156.

155 Supra note 70 at 507.

156 In their article previously mentioned, Alcoff and Gray applied a Foucaultian analysis to modern-day uses of confessions and experts in talk-shows. They describe the situation of survivors of trauma who confess their experiences in a talk-show format with the
As mentioned in the previous chapter, the privacy barrier of abuse is only overcome once someone listens in a loving or empathetic way to the abused person. As a bridge forms through the interaction of the speaker and the empathetic listener, the speech of the abused person enters an external safe space that is outside the safety of silence. This listener may not fully comprehend the meaning of the abuse, but he is prepared to hear the account and provide encouragement and support for the purpose of acknowledging the inherent legitimacy of the subjective experience. Slowly, the abused person is taking steps to fully enter the public realm where political action and negotiation can take place. Once a person breaks the privacy of the abusive relationship, it may take years of establishing a safe personal space with sympathetic, non-judgmental listeners before he is willing or ready to enter a dispute resolution process for the purpose of obtaining a remedy from those responsible for the abuse. As noted in the previous chapter, establishing the truth of speech is not important at this stage. It is only when speech enters the public realm for a particular purpose that truth and validation become important. Even then, the level of validation will depend upon the purpose of the speech and the truth-claim being asserted.

The safety in speaking to an empathetic listener comes from the control that the abused person has over the fate of the speech. Although this new personal space is not private, it is later involvement of an expert at the end of the show. The expert is in the dominant position and has the power to validate or invalidate the survivor’s testimony or confession. The expert is the gate-keeper who determines whether or not the survivor’s speech is absorbed into the hegemonic dominant discourse. The expert transforms the survivor’s testimony from a subjective, experiential description to an objectified exhibition that serves to reinforce their power as an expert: supra note 83 at 275. Speech, as Foucault has said, is itself the site and object of conflict and power struggles Ibid. at 260.
not yet entirely public either. Although not completely assured of confidentiality, the empathetic listener generally gains their position of trust through compliance with conditions set out by the speaker. Thus, the speech to an empathetic listener is not truly in the public arena. In order to assert one’s interests - based on one’s sense of what is meaningful - it is necessary to speak in the public realm.

But it is not enough to speak. In order to break the silence about abuse in the public arena it is necessary to be heard. Power is required in order to be heard in an environment where pre-existing meaning dominates discourse. However, if an abused person decides to speak outside this personal space, she loses a sense of control over the fate of the speech. Once in the public realm, the intent of the listener and the intent of the speaker determine the type of testimony and the disciplinary framework that will guide its path.

(a) Normalization of survivor speech

In “Survivor Discourse: Transgression or Recuperation?” Gray and Alcoff inquire whether survivor discourse is co-opted and used in a manner that diminishes its subversive impact. By subversive, the authors are referring to the assertion of a non-dominant discourse that

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157 Supra note 83.

158 By survivor speech the authors are referring to the discourse of those who have survived rape, incest, and sexual assault: Ibid. at 261.
dismantles constructions that exist within dominant discourse. Alcoff and Gray assert that the empowering capabilities of speaking of abusive experiences can be co-opted, subverted or recuperated by the dominant discourse through subjugation of the disruptive aspect of the testimony. According to the authors, one way in which disruptive speech is neutralized is by experts who legitimate or ignore those aspects of speech which do not fit well within the existing discursive framework. That is, experts define the language and conceptual framework that are available for providing meaning for abusive experiences. Alcoff and

\[\text{For example, in } D. D. \text{, the Court considered the expert evidence of a psychologist who testified that a child's delay in alleging sexual abuse does not support an inference of falsehood. The Supreme Court did not see the need for the dismantling of a myth because they felt that the myth about late disclosure had already been dismantled in legal discursive arenas. But this dismantling only occurred because experts, who themselves are entrenched within a dominant discourse within their own professions, used their voices to legitimate the experience of alleged abuse victims. This case describes the test that is used to determine when experts are to be called upon to assist the court. It outlines that experts are required when there is new accepted knowledge within their discourse; they are not required to confirm existing knowledge. The Court does not go so far as to say that experts are not required where the testimony of the abuse victim challenges status quo knowledge. It appears that in those cases, experts entrenched within a dominant discourse are required to legitimize the new speech of the survivor. Although the expert in } D. D. \text{ was not dominating, the test outlined by the Supreme Court does not recognize the ability of survivor testimony to stand alone when it challenges existing conceptions of abuse: supra note 138.}

\[\text{Alcoff and Gray describe the confessional format used by television talk show hosts. They describe an actual interview with a rape survivor who was attempting to emphasize a particular aspect of the experience that had meaning for her. Her goal was to focus on the normality of the situation prior to the assault and to say something useful for other women who may not know what to do in a similar situation. The host of the show wanted to focus on the act of rape itself and wanted to know if she had provoked the rapist. The survivor attempted to refocus her response to focus on men's responsibility for rape but again the host of the show emphasized women's responsibility to avoid rape. At this point an expert on 'rape prevention counseling' was brought in to re-iterate the host's focus on female responsibility for male violence. In this case, the speech of the rape survivor was too disruptive for the television host who wanted to maintain pre-existing concepts about rape. The survivor was circumvented and the expert legitimated existing discursive frameworks: supra note 83 at 275-6.}

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Gray do not deny the usefulness of theoretical knowledge that is held by experts. Their main concern is with theoretical experts who override and undermine the words of those who have undergone the traumatic experience. Ideally, those who help the abused person find meaning are those people who have experienced abuse and who have theoretical knowledge of the phenomena surrounding the trauma.

I would argue, therefore, that when listening to new speech at the identity-formation stage, the listener should not judge or validate the emerging speech. Their purpose at this stage is to simply act as a loving person, thereby re-orienting the abused person within a new relationship matrix. At this point, the speech is not public, it exists within a personal space between two people.

However, when the abused person seeks to find meaning for their experiences, they will most easily be able to do so within a matrix of people who have also experienced abuse. Other abused persons will know what has been experienced and will best be able to help find the concepts that accurately reflect the experience of abuse. At this stage, the membership of the group of survivors will be determined by whether or not the members can identify with each other. This type of group is akin to the incest survivor self-help group that M. joined in her search to bring some meaning to her experiences of incest. Through her connection with her group, she was able to speak to others who could provide her with a sense of a new world or construct defined by survivors.

\[161\] The listener could be a counselor, a friend, a close relative, a lover or any other person who can allow the abused person to speak.
This type of group only exists insofar as the members share experiences and meaning. It will cease to exist as a group of survivors if its members have no commonality of experience and meaning. At this point, the primary purpose of the group is to assist its members find meaning. It does not have a further political goal of asserting this meaning in the world outside of the one it has constructed. When a group forms in order to assert meaning in the world for the purpose of achieving a goal, the speech of its members will be subject to some level of validation, depending upon the goal of the group. The goal could be simply to assert their understanding of abuse in dominant discursive arenas. In asserting a sense of what happened according to them, there is no need to validate their claims. It is clearly based upon a subjective understanding of their experiences and is only asserted with that understanding.

When the group asserts interests and justifies the legitimacy of those interests with claims of truth, then there will be a need for some form of validation, as agreed upon by the parties. The level of validation required depends upon the interests affected by the claims. For example, if they are seeking remedies based on injury, then the validation standard agreed upon by the parties may more closely approximate legal validation methods, if both parties agree that the interests of the alleged abuser are important. Because validation methods are agreed to by the parties, as the testimony of the claimants moves towards affecting the interests of others, the ability of the group to assert the importance of its claims becomes more important. If the survivor's group is able to assert the importance of its interests in the negotiation arena where other interests are represented, then it will more able to agree upon a validation method that recognizes the significance of its members' claims.
C. Political empowerment

Foucault defines the relationship between power and discourse:

in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse.¹⁶²

Further he advises that we must study power at the point “where it installs itself and produces its real effects”¹⁶³.

In a dispute concerning institutional abuse, power manifests in two ways: it forms the subject matter of the conflict as it was exercised abusively against residents of institutions who are now seeking redress, and it operates in the negotiation to perpetuate an existing discourse that excludes the abused persons or maintains them in a position of subjugation. In order to re-configure the power relationship in the dispute resolution environment so that the initial abuse can be addressed and so that the existing power imbalance does not perpetuate itself, it is essential that the abuse survivor be able to assert a voice and contribute to discourse. Silence only perpetuates isolation within a space defined by the abuser.¹⁶⁴ Testimony, or

¹⁶² Supra note 54 at 93.

¹⁶³ Ibid. at 97.

¹⁶⁴ If the abused person has enough strength to detach from the relationship without using detachment for communicating the effect of the abuse upon her, then she has much strength but not much political power. In her act of detachment, she is not communicating her interests for the purpose of achieving a goal such as the re-configuration of her
public speech, is an important way through which a person conveys her sense of what is important to the rest of the world.

By political power I do not mean to imply the involvement of formal political organizations in the negotiation process. It means the power that a group has to bring their experiences into the public realm. Further, it means the power to assert the meaning of those experiences, and the material interests that flow from these experiences, in the domain of the negotiation process. Speaking about one’s experiences to another person or to a group of people who have had the same experience creates a form of consciousness of commonality. If the members of the group derive similar meaning from their experiences, then that group has an identity. If the group wishes to act together to achieve a common goal, then the group has a political aspect. Speech that is intended to further its goals, as they arise from their common experience, is political testimony.

relationship with the abuser. Rather, she is disengaging from the relationship entirely. This may be entirely appropriate and it may contribute to the eventual political power of the survivor. However it is not material for the purposes of discussing the re-configuration of power relationships that is possible when a dispute resolution process is engaged.

165 The act of bringing experiences into the public realm can also be seen as an act of self-assertion. At any given moment, a person may identify themselves with a particular experience. In bringing an experience into the public consciousness, the person creates a particular socially constructed identity based on the experience. For example, the experience of pain may be constructed as a particular culturally constructed syndrome in order for the person to identify with their bodily experience in a socially accepted way: see supra note 82.

166 Section 715.1 of the Criminal Code, R.S.C. 1985, c. C-46 formally recognizes the difficulty experienced by victims or survivors of abuse who are required to testify in court. This section facilitates the emergence of a private experience into the public realm. This section is discussed in L.(D.O.), infra note 169.
In a non-judicial dispute resolution process, the operation of political testimony is not restricted within the parameters of the explicit process set out by the parties or the remedies sought by the parties. If the parties are politically organized, political testimony operates before the negotiation takes place: it permeates the negotiation process itself, and it operates after the negotiation and remedies are concluded. As long as there is an identifiable group whose members share a common experience, political testimony has a role. Insofar as a negotiation process leads to the development of the group, the negotiation itself is part of the empowerment process. Empowerment, however, is a much broader and more dynamic event than the particular negotiation process that may have served as a catalyst.

D. Types of testimony

In a dispute, testimony serves a variety of purposes for the speaker: it is a form of communication for therapeutic assistance before and during the process; it is the tool through which the group can articulate the interests of its members to the other parties in a negotiation; it provides a record of the events that occurred; and in a judicial proceeding it allows the speaker to present his account of the abuse before a decision-maker. However, these various fora for testimony are not simply for the speaker; they are also designed to achieve particular disciplinary goals.

Within disciplines, testimony has different meanings and is used for different purposes.
Testimony\textsuperscript{167} is a term of art for legal practitioners; the use of testimony in legal proceedings is bound by statutory and common law rules of evidence. Its purpose in the legal arena is to assist the decision-maker with establishing as true a picture as possible in order to reach a just decision.

(a) Testimony in a judicial proceeding

Within the courtroom testimony serves the purposes of the justice system. The fundamental goals of the law of evidence are the search for truth, efficiency in the trial process, and fairness in the trial process.\textsuperscript{168} Common law rules have developed incrementally over the years to produce fundamental values of justice. Evidentiary rules however, can be applied in a flexible, principled way to accommodate the particularities of each case.


\textsuperscript{167} For the purposes of this thesis, I will use the term “legal testimony” to refer to the act of providing sworn testimony in a court of law. I will use the term “testimonial statement” and “testimony” to refer to the act of speaking of one’s experiences to another person for non-legal, as well as legal, purposes.

\textsuperscript{168} J. Sopinka, S. Lederman, A. Bryant, eds., \textit{Law of Evidence in Canada} (Toronto: Butterworths, 1999) at 3-5.

\textsuperscript{169} Although this case deals with the criminal law, it is being used to outline the basic rules of evidence in adversarial, judicial proceedings. The author recognizes that criminal rules of evidence operate within a context where the court is seeking to find guilt beyond a reasonable doubt for allegations of public wrongdoing, and that civil actions engage in fact-finding for the purpose of assessing pecuniary and non-pecuniary damages for private wrongs. However, in the context of discussing the nature of legal testimony in judicial
testimony of children in child sexual abuse cases. She examined section 715.1 of the Criminal Code which is designed to accommodate the needs of young victims of sexual abuse. In particular, the section provides that early videotaped evidence can be adduced in court so that trauma is reduced for adolescent complainants while at the same time maintaining the integrity of evidence. L'Heureux-Dube J. considered the accused's arguments that the admission of videotaped evidence offends the right of the accused to a fair trial because it limits the right to cross-examination and admits hearsay evidence. The main argument in support of this position was stated by the judge at the Manitoba Court of Appeal in the decision below:

Section 715.1 clearly offends the common law evidentiary rule that precludes the admission in evidence of previous consistent statements. . . . The legislation ignores two fundamental elements of the criminal trial process which have developed in our judicial system over the centuries:

1) the general principle that evidence must be presented in a public courtroom, in the presence of the accused, accompanied by some formality; and

2) the right of a accused to be present when evidence is presented or recorded in order to have the opportunity to test the evidence by cross-examination of the witness.170

L’Heureux-Dube J., for the majority, found that section 715.1 did not offend these long-proceedings as opposed to non-judicial proceedings, the difference between civil and criminal evidentiary rules is not material.

170 Ibid. at 433-434
standing common law rules because “truth cannot be attained in a vacuum”\textsuperscript{171}. Rather, she advocated a contextual approach. Particularly she found that “the innate power imbalance between the numerous young women and girls who are the victims of sexual abuse at the hands of almost exclusively male perpetrators cannot be underestimated when ‘truth’ is being sought before a male-defined criminal justice system”\textsuperscript{172}. She aptly quoted another legal scholar who stated, “(t)he fundamental question remains: how can ‘truth’ be an outcome of a process which restricts and actively denies the experiences of one of the major players?”\textsuperscript{173} L’Heureux-Dube found that section 715.1 preserves evidence in such a way as to assist in the discovery of truth in the trial process by allowing for the inclusion of the evidence of a crucial party.

In this case, the Supreme Court gave serious consideration to changing the rules of testimonial evidence in order to facilitate truth determination while recognizing the need for contextuality. Goals of legal testimony remain intact to ensure that the court can determine the legitimacy of truth-claims made by the parties. Fact-finding, and the pursuit of truth regarding a series of past events remain at the core of the judicial process. Experts from within the dominant discourse were relied upon by the Supreme Court in a manner which enabled the speech of a non-dominant actor to be heard. The rules of legal discourse proved to be flexible enough to accommodate the influence of another dominant discourse.

\textsuperscript{171}Ibid. at 446.

\textsuperscript{172}Ibid. at 441.

\textsuperscript{173}Ibid. at 444.

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(b) Non-legal forms of testimony

In an historical setting, the giving of testimony is for the purpose of establishing an accurate record of events, according to the personal experiences of the people who witnessed or were involved in the events. Historians and other social scientists insist upon

174 Given the historic nature of institutional abuse, I wonder if historians may have the appropriate skills and methodology to determine the facts around events that would have occurred between 10 and 60 years ago. However, with historic testimony there is the same problem of particular discourses dominating over others. For example, written documentation often provides historians with the factual foundation. However those with oral traditions or who do not have access to records will be excluded from the historical account. Although in R. v. Delgamuukw, [1997] 3 S.C.R. 1010 the Supreme Court of Canada recognizes that oral histories are admissible for the purposes of determining the intentions of Aboriginal treaties, Canadian courts would not necessarily recognize the oral history of parties with no cultural or traditional practice of establishing an oral history. Also, those who dominate often control the historical account provided for posterity. As stated by Edward Said "the power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them": E. Said, Culture and Imperialism (New York: Alfred A. Knopf: 1994) at xiii. Of further interest, a researcher for the United Church has done an historical study of Indian residential schools and asserts that the schools were not as detrimental as claimed by many Aboriginal people. In effect he is using historical validation methods to delegitimate the claims made by former residents of the schools. Quaere whether his historical method and research was geared towards reaching his conclusion or whether it was open to discovering the opposite conclusion: see R. Foot, “Researcher Defends Residential Schools” The National Post (17 March 2001).

175 With respect to historical testimony, the Reconciliation agreement between the primary victims of George Epoch and the Jesuit Fathers of Upper Canada provided for a recorder's report of the abusive events. The recorder states that the purpose of the report is the following:

to 'outline the relevant history of the Epoch abuse'. It is to make known people's ' observations of the impact of Epoch's abuse, upon the victims themselves and upon the community as a whole'.

The provision of a recorder serves a therapeutic and historic function. It is therapeutic
verifiability in order to lend credibility to the stories provided through testimonies. In the psychoanalytic environment, testimony of trauma given by the analysand and heard by the analyst enable the analysand to re-externalize the event and thus commence to therapeutic process. In this arena there is an acknowledgment of the highly subjective nature of the testimony. Unlike where testimony is given for historical purposes, in a therapeutic setting the fact of the testimony itself is significant as opposed to the verifiability of the facts represented by the testimony. The health professional is not placed to doubt the patient’s account of events but rather to deal with sequelae that arise from the subject’s reaction or involvement in the reported events. In the political environment, testimony is used for political mobilization and consciousness raising to establish a common group identity and group cohesion. A person who recounts a significant personal experience can, in the act of sharing it with others, contribute to political conviction and activism. Again, external

because the act of testifying about one’s own trauma before a witness for the purpose of making it public allows for the significant personal experience of abuse to be acknowledged and legitimated by broader society. It is historic in that is establishes a record of a significant societal event in the words of the survivors: see Marion L. Mussell, “Recorder’s Report Written for the Survivors: ‘In the Spirit of Healing’” (Reconciliation Implementation Committee: October 1995) at 1.


177 Ibid. at 69.

178 Ibid. 62.

179 Although Shengold states the following: “I believe patient and analyst must strive for both narrative and historical truth - falling back on narrative when the historical recedes, but a narrative supplied whenever possible by the patient, not the analyst”: supra note 78 at 35.
verifiability\textsuperscript{180} is not essential as it is within the legal or historical arenas because the subjective experience and its relevance to the collective reality of a group is what lends legitimacy and force to political empowerment\textsuperscript{181}.

E. Conflicting Testimonial Purposes

So far, I have tracked survivor speech from its emergence from the imposed privacy of the abuser, through the safe, non-judgmental, personal space of the listener, to its eventual development into a form of testimony. I have argued that once a group has a purpose, it becomes political in nature. The speech of the group and its members is political testimony. I have argued that all forms of public speech or testimony require some degree of validation, depending upon its purpose. Political speech that is for the purpose of the establishment of the group requires validation from within the group. This form of testimony is necessary for defining group identity before the assertion of interests in a negotiation to develop remedies for abuse. If the testimony of group members is asserted outside the group for the purpose of obtaining a remedy, then the level of validation may be different, depending upon the other interests of other parties who are affected by the claims. I have examined the treatment of testimony in the legal arena and the ability of the court to change its rules while still

\textsuperscript{180}By external verifiability, I mean the verification of political testimony from outside the group which is represented by the testimony. Political testimony requires verification from within the group but not beyond it.

\textsuperscript{181}bell hooks, \textit{Talking back, thinking feminist, thinking black} (Toronto: Between the Lines, 1988). hooks notes that confession and memory enable men and women to talk about personal experience as part of a process of politicization. She notes the importance of theorizing personal experience so as to place it within the context of a collective reality.
maintaining justice goals. I have also set out the various testimonial types depending upon
the purposes of the listener and the speaker. In the next section, I will explore some of the
difficulties that can occur when there are two purposes for the same testimony.

(a) Therapeutic and Historical Testimony

Different testimonial purposes operating in the same space sometimes conflict in a manner
that creates doubt about the legitimacy of the testimony. For example, a witness of
Holocaust events whose testimony is viewed by historians and psychoanalysts creates
completely different impressions upon these two types of professionals. Psychoanalyst Dori
Laub describes a Holocaust witness testifying about a prisoner revolt at Auschwitz. \(^{182}\) The
witness recalled a significant event where prisoners had blown up part of the Auschwitz
prison camp. In her testimony she stated that four chimney stacks had been blown up when
in fact only one had been blown up. The historians who reviewed the case felt that the
discrepancy made her eye-witness account hopelessly incomplete - in other words, unreliable. A psychoanalyst who reviewed the case felt that the woman was testifying to a
more radical event - the reality of the unimaginable event of a prisoners' revolt that broke
the status quo framework of life at Auschwitz. The exaggeration or mistake in her testimony
did not invalidate her testimony. Rather, the discovery of the knowledge of the patient was
an event in its own right. As Laub states, it was "the very process of her bearing witness to

\(^{182}\) Supra note 176 at 59-63.
the trauma she had lived through, that helped her now come to know the event"183. The difference between disciplinary approaches and norms is noticeable in this instance. Where actors in one discipline discounted the testimony, actors in another discipline accepted and legitimated her account.

(b) Therapeutic and legal testimonies in non-judicial processes

This type of conflict about the meaning and import of testimony will likely arise in dispute resolution arenas where there is lack of clarity about the purpose of the process. In a judicial decision-making process, only legal testimony is admissible for the purposes of resolving the dispute. The legal decision relies on the judge’s determination of the appropriate legal doctrine or standard to be applied and the correct application of that doctrine given the specific circumstances of the case. In a negotiation process, however, there is room for the parties to have goals other than the achievement of justice. Persons can “testify” about their experiences for a variety of purposes. As negotiation processes may be specifically agreed upon by the parties for the particular dispute at hand, the use and meaning of testimony can be tailored to the needs of the parties.

In a negotiation, justice is not the only goal and may not be paramount over other goals such as healing or the establishment of a record of events. The various parties seek an agreement that is advantageous to their interests. In a non-judicial conflict resolution setting, both the

183Ibid. at 62.
rules for admission of evidence to support truth-claims, facts, and the norms used to reach agreement are potentially much more varied and less rule-bound. Precedents do not bind the parties as the rules have been previously agreed upon by the parties for the specific program. Conflict resolution programs potentially also allow for the interplay and involvement of various disciplinary discourses\textsuperscript{184} in a manner agreed to by the parties.\textsuperscript{185} Thus, the contribution of psychotherapists or social historians can have a broader impact on the program than would be the case within judicial proceedings where their information would have to meet the strict requirements of expert testimony in order to be admissible.

Before the Compensation Program was negotiated, complainants had a chance to tell their stories of abuse to Justice Stratton and his investigators. One of the stated purposes of the Stratton Inquiry was to investigate incidents of sexual or physical abuse of residents of provincial institutions.\textsuperscript{186} Stratton states that he and his investigators had very little opportunity to test the credibility of what was being told, testimony was not sworn, there was little corroborative evidence and the investigators did not use adversarial methods of cross-examination. Nevertheless he was prepared to generally accept the reliability of what he was

\textsuperscript{184}As Foucault states "disciplines have their own discourse. They engender . . . apparatuses for knowledge (savoir) and a multiplicity of new domains of understanding": \textit{supra} note 54 at 106.

\textsuperscript{185}The conflict between a system of dispute resolution that is highly rule bound by normative rules versus a system that allows for rules to be developed and based on sociological fact is discussed at a philosophical level by Jurgen Habermas in \textit{Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy}, trans. William Rehg (Cambridge: MIT Press, 1996).

\textsuperscript{186}\textit{Supra} note 11 at iv.
told. In describing their statement taking methods he states,

we adopted the practice of taking down in long-hand and in their own words, the statement of those who came forward to speak to us....residents should feel encouraged to tell fully their stories ...in their own words...without intimidation and without any fear that we would try to shape or colour that which they wished to report.

In addition, he states later in the Report that he wants the complainants to know that, “we have listened with care to their stories and have sympathy for them.” Further, in order to encourage the complainants to speak, they were promised that their stories would be kept confidential and their names not disclosed. Thus, there was some privacy or personal space for the complainant and the testimonial statements provided at this stage were not fully public.

The amount of control over the statement-taking process, the lack of challenge or verification of testimony, and the promise of privacy point to the conclusion that Justice Stratton was closer to being a sympathetic listener than an evaluator of testimony. This may have been appropriate at this state given that the government wanted complainants to come forward so the possible extent of the abuse could be determined.

Once the Compensation Program was set up, the same investigators who had assisted Justice

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187 Ibid. at at 100.
188 Ibid. at 99.
189 Ibid. at 103.
Stratton were hired to take statements for the Compensation Program. Initially the Program seemed geared toward providing the abuse claimants with an opportunity to heal. In one of the first press releases the Minister stated the following:

The ADR process has been carefully chosen because it is designed to protect the privacy of the victim. The process is an alternative to civil litigation. It is driven by a victims' advocacy group. It empowers survivors by giving them control—an essential component of the healing process—by giving them an opportunity for input into the negotiation of the framework agreement.

In addition, one of the MOU’s stated goals was “to assist the Survivors, in a tangible way, with the healing process”. This is consistent with the head of the Victims’ Services office of the Department of Justice being responsible for running the Program. As further evidence of recognition within the Program for the need for therapeutic healing, the government provided interim counseling awards to enable claimants to obtain therapy before their claims were assessed and the government provided a set counseling amount over and above the amount of the compensation award, depending upon the category of the compensation.

The Program itself, though, arose within the parameters of the civil tort system.

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190 Although the initial intention as stated by this press release was to have a single advocacy group, in actuality the negotiations were between the lawyers retained by individual claimants, and government officials. Although the claimants’ lawyers may have worked together, the claimants themselves did not form a single advocacy group.

191 Supra note 28.

192 See the preamble section of the MOU: supra note 30.

193 Please see, schedule A of the MOU for the counseling amounts that were provided once the claims were assessed: supra note 30.
After being in operation for six months, the Program was suspended by the Minister of Justice on October 31, 1996\textsuperscript{194}. When the Program resumed\textsuperscript{195} several changes had been made unilaterally and announced by the government. Of particular interest the following changes were outlined in the press release:

- the internal investigation unit (IIU) was to expand its investigation from discipline of current employees to investigation of compensation claims;
- a statement protocol was to be developed between the RCMP, IIU and Facts Probe Inc. (the independent investigation firm hired to obtain statements from victims for the Stratton Report). All three organizations were to share information, and investigations were to be coordinated, recognizing the independence of police investigations; and,
- victims were now to be advised that all statements provided for the purpose of compensation would be used for investigative purposes (whether criminal or disciplinary) or the Child Abuse Registry.\textsuperscript{196}

The Minister stated in his press release that "(w)e understand it has been difficult for people to come forward, and their wish for confidentiality, but we have a moral and legal obligation

\textsuperscript{194} Supra note 23.

\textsuperscript{195} Supra note 31.

\textsuperscript{196} Supra note 31.
to bring perpetrators of abuse to justice . . ."197

After December 6, 1996 the primary goal was no longer therapeutic. It seems that justice goals became paramount and the method for taking claimant statements changed to accommodate the new goals. Also, the testimonial audience changed from being the Stratton investigators to now being the RCMP and the Internal Investigation Unit officials. The problem, of course, is that the claimants themselves may not have foreseen the shift in approaches at the time of the initial negotiation. Earlier testimony was taken for therapeutic purposes, and hence the interviewer may not have challenged or tested the testimony against the accounts of those who were alleged to have committed the abuse. They also may not have taken the testimony in accordance with the methodology of legal investigators. That is, the original statement would not have been subject to the validation required for a statement in a legal or quasi-legal process. The change in testimonial purpose would lead the later testimonial audience to wonder whether their need to establish the reliability of the statements was addressed by the original statement-taker.

If there had been a bifurcation of the therapeutic aspect of the program from the other forms of redress, then the different levels of validation required at each stage would have been understood at the outset. If the survivors had known that their claims would be subjected to higher scrutiny as they affected the interests of others, then the parties would not have

197 Ibid.
confused the validation required at different stages in the process. Beyond that, if the claimants had formed a group that could have asserted the importance of their interests with a sufficient degree of political power, the government may have been more able to assert its own interests and limitations at the outset. The validation method for assessing testimony could therefore have more accurately reflected the real interests of the parties.198

As it is, there is still controversy over the design and implementation of the Program, as evidenced by the establishment of the Institutional Abuse Response Inquiry. Perhaps the confusion around the validation method and the purposes of testimony contributed to the existing controversy and questions about the legitimacy of the Program.

In the Grandview Agreement in Ontario, the survivors did form a group which attended the negotiations. The agreement to compensate was ratified by 80% of the group’s membership.199 A validation method that served the interests of all parties was included in the agreement. This agreement and the resulting program did not seem to create the same degree of controversy with the parties or the public as the Compensation Program did in Nova Scotia. Although there are probably many reasons for this, I would suggest that the

198 In any process where the government is a party, it is important for the government to clearly articulate the full extent of limitations upon its ability to negotiate. For example, there is some argument to be made that any compensation program administered by a government automatically falls within the parameters of administrative law. Therefore the government is not like a private party who is free to negotiate a legal contract; rather there are public law considerations to be taken into account.

199 Supra note 5 at 129-130.
formation of a political group that had significant input into the design of the process played a role in developing an enduring solution through a process that was clear and consistent for all the parties involved.

I further suggest that if the claimants in Nova Scotia had formed a political group before the negotiations and had been given a chance to develop political testimony, they may have been able to establish their interests and negotiate the requisite level of validation required to assert these interests in the public, negotiation arena. For example, if they wanted to pursue a purely therapeutic goal in the negotiation with the government, they could assert a relatively low validation level commensurate with that goal. This level of validation may more easily be accepted by the other party as the subjective nature of the claims affect them less than legal claims. If they wanted to seek monetary compensation, then they may have faced a validation level proposed by the other party that establishes a level of truth commensurate with their interests. If they wanted to develop a restorative process or establish quasi-criminal guilt, then a higher level of validation may result from the fact that criminal sanctions are considered to seriously affect the interests of alleged abusers. As the goal affects the interests of others in more invasive ways, the level of validation increases.

In consistently promoting the formation of a political group that could define its own interests, it would be easier for any government to consolidate and represent its own interests and limitations.

(c) Summary
Public speech about one’s experiences is characterized by the intent or purpose of the speech, the type of process and the nature of the listener. Testimony in the legal arena is for one particular purpose, it is heard within the bound of specific rules and is verified through established procedures. Other forms of testimony may be admitted, but only within the bounds of legal rules that ensure that the goal of justice remain paramount. In a negotiation environment, there is room for other forms of testimony depending upon the goals articulated by the parties. However, if these goals are not clearly articulated, the parties will be confused about the type of testimony that is being provided. The speaker may intend for testimony to be closer to therapeutic testimony. However, since the process still exists within the legal discourse, the testimonial form within the process may become more legal. Therefore, confusion about the goals of the process can have the negative effect of confusing or invalidating the testimony provided by claimants once they are in the process.

In the legal arena, at least the parameters that limit testimony are clear from the outset. In a non-judicial dispute resolution process designed by the parties, it is easier for survivor speech to be shut down if the goals of the process are not clear, and the limitations inherent in the process are also not clear. Although it is not always possible to prevent a unilateral shift in the goals of a particular process, the parties should at least ensure that their goals are clearly defined before they design the process.

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Lawyers for the claimants did bring a *mandamus* application to compel the Nova Scotia government to comply with the terms of the original MOU. This application was dropped before going to court. See: *D.K.A. et al v. The Minister of Justice for the Province of Nova Scotia* (April, 1997), Halifax S.H. 137031(N.S.S.C.).
In a case like the one in Nova Scotia, where there were many individual claimants, the formation of a group that can develop common interests before the negotiation may be the only way to effectively assert survivor speech and validation methods against dominant discourses. It is therefore important that the survivor speech be articulated in a public forum where its subjective nature is legitimated by others who share the same purpose. This form of speech is political testimony.

F. Pre-negotiation testimony

Throughout my thesis, my concern is primarily with the events around an actual dispute resolution process - both the preparation for the process and the conceptualization of the remedy. In the previous section of this chapter, I described some of the ways in which the Nova Scotia Program operated. I did so for the purpose of illustrating the importance of having clear goals for the process so that the testimony of the claimants is not undermined. For a previously disenfranchised group, testifying about traumatic experiences may result in a window of opportunity that allows for the exercise of political power.

However this window is created among the long-standing and pre-existing knowledge of the dominant discourse. Society may only be willing to listen to parts of the group's experience; only certain voices will be acceptable and only certain testimony will be understood. Within this small window of opportunity, a disenfranchised group is faced with the daunting task of exercising power in such a way that it is preserved. If the power of the group is preserved,
the interests of the group can be asserted so that their collective experiences can enter the knowledge base of society. Thus, the previously disenfranchised group can contribute a popular form of knowledge to the already accepted forms of knowledge within the discursive arena.

G. Political testimony

The problem of asserting political testimony is described by Foucault's description of popular or disqualified, low-ranking knowledge which is incapable of unanimity and which "owes its force only to the harshness with which it is opposed by everything surrounding it". He places the local knowledge of psychiatric patients, delinquents and others in this category of disqualified knowledges. Foucault argues that in establishing an historical record of these subjugated knowledges he does the following:

entertain(s) the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes a science and its objects.

Foucault is questioning the tendency of non-scientific knowledge forms to absorb subjugated knowledges and then characterize themselves as scientific or pseudo-scientific in order to

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201 Supra note 54 at 82.

202 Supra note 54 at 83.

203 In "Feminist Histories of Psychiatry", Nancy Tomes states the following: "to justify this process of expulsion (removal of the disturbing presence of the mentally ill from
appropriate some of the power lent by appearances of scientific objectivity.

The physical knowledge of persons who have been abused in institutions is precisely a form of subjugated knowledge which potentially becomes suppressed by disciplinary discourses that use scientific method to objectify and re-interpret the experiences of abuse. In order for abused persons to assert a new knowledge form based on their physical experiences of abuse, it is important that they do not become lost under the objectifying discourses of experts. That is, their knowledge of what occurred should not be overridden by the theoretical knowledge of experts who ignore those who have experienced abuse. Where the abuser once took control of the abused person and imposed meaning within a false private space, it is within the capacity of experts to use a dominating discourse to maintain the privacy of the abusive experience by not hearing the speech of the abused person. Experts who do not recognize the validity of experience can perpetuate a form of subjugation upon abused persons who are attempting to create new meaning for their experiences.

For example, recall the psychologist to whom M. first disclosed her incestuous relationship with her father. His disciplinary training either prevented him from hearing the significance of her speech or from understanding the new meaning that she was trying to convey. If he

the community) psychiatry has obligingly provided a “medical model” of insanity, which gave its practitioners tremendous power and social rewards. But, in fact, as the labeling theorists were determined to show, the psychiatric ‘science’ of diagnosing and treating mental illness was a thinly disguised form of social control.”: see N. Tomes, supra note 154 at 354. This statement affirms Foucault’s view of the dominating effect of scientific discourse.
had been able to recognize, *prima facie*, that as someone who had experienced incest, she was an expert with respect to the effects of the abuse on her physical and emotional self, then he might have been able to hear the import of her speech. As it was, his lack of attention to the significance of her speech served to acquiesce to her father's re-imposition of privacy around the abusive relationship.

(a) *Nova Scotia*

In the Nova Scotia Program, the testimonials of abuse provided to the Stratton Inquiry, along with the criminal and civil cases that had already been concluded, opened up a brief window or space in the web of dominant knowledge about institutions in Nova Scotia. During the period when testimonies were heard, the claimants negotiated with the government to develop a compensation scheme. As noted earlier in this paper, the employees who were affected by the allegations of abuse made claims in the media that the level of validation was not sufficient to protect their interests. At this point in time, there is great uncertainty about both the legitimacy of the testimonials and the legitimacy of the employees' protests of innocence.

As seen in the Nova Scotia Program, new disruptive speech, coming from a disenfranchised person who is speaking about the conditions of disenfranchisement, is almost certainly going to produce some form of resistance from those who are entrenched in a social world steeped in dominant discourse. The claimants' stories seem to have been initially accepted as being
true. The existing fabric of knowledge in the world was initially unsettled by new knowledge with the latent political power that exists in proportion to the degree to which it was repressed. When former employees asserted that there was no possibility that the abuse was as widespread as alleged, public opinion seemed to shift toward believing the claims of hard-working counselors and former counselors who had been care-givers for sometimes difficult children. Both claims are as yet unsubstantiated or validated according to a mutually accepted standard.

If the disruptive claims of abuse survivors are asserted through a political group, then there is at least some political power to provide the space for the assertion of the new speech. However, even with the protection of a group, there is still the risk that the group itself will be challenged as to its validity. That is, in its attempt to achieve social empowerment by reconfiguring the relationship of the group to other groups in society, a political group will face pressure to conform to the pre-existing situation of powerlessness. How can a political group deal with pressure from status quo actors who carry pre-existing legitimacy?

H. Validate political testimony

The difficulty in asserting a popular political form of testimony against the status quo may be explored through the controversy surrounding Rigoberta Menchu’s testimonial account of her political struggles and the efforts to invalidate her testimony by social anthropologist, David Stoll.
Menchu won the Nobel Peace Prize in 1992 for raising awareness of human rights abuses in Guatemala. In 1983, when Menchu was 23 years old, she dictated her experiences to a writer who transcribed the tapes into the book, *I Rigoberta Menchu*. The book chronicled her life from a very young age and described a series of tragic events in her life such as the murder of her brother, father, and mother. The testimonial nature of the account in her book contributed to her political cause and also gave her a political profile that enabled her to become a candidate for the Nobel Peace Prize. In 1999 an American anthropologist by the name of David Stoll published a book outlining the results of his investigation into the veracity of the testimony in *I, Rigoberta Menchu*. Stoll claims that although the extent of abuse by the Guatemalan regime is very real, some crucial personal accounts provided by Menchu are not. Stoll believes that Menchu's book carries more authority than is warranted on the issues of why the killings began and the nature of the popular struggle in Guatemala. As he states:

(I)n 1982 she presented herself as an eyewitness to the mobilization of her people. There is not a stronger claim to authority... Rigoberta told her story well enough that it became invested with all the authority that a story of terrible suffering can assume. From the unquestionable atrocities of the Guatemalan army, her credibility stretched farther than it should have, into the murkier background question of why the violence occurred. The result was to mystify the conditions facing peasants, what they thought their problems were, how the killing started, and how they reacted to it.

(The problem)... also extends into the international apparatus for reporting human rights violations, reacting to them, and interpreting their implications for the future...(H)ow do the gatekeepers of communication deal with the


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mixture of truth and falsehood in any movement's portrayal of itself, including those we feel morally obliged to support.\textsuperscript{205}

Stoll cannot easily be dismissed as a reactionary with a racist agenda. He is a serious scholar who is grappling with his role as a social scientist in the face of post-modern skepticism about the possibility of objective knowledge\textsuperscript{206}. He understands the effect of colonialist thought upon peoples who are studied by anthropologists and sees the reasoning behind deferring to the perspective of those same peoples. What Stoll is trying to wrestle with is how to defer to the perspective of subordinate peoples without mythologizing particular voices at the expense of others. He questions the role of academics who choose to privilege voices that are more compelling and attractive than the voices of others which, although genuine, lose the battle for the academic or popular stage.

He relies on the empirical and scientific method located within his social-scientific discourse to bolster his version of the truth. He plays the role of the legitimating expert who objectifies the experience of survivors of trauma. He has the authority of credentials that are rooted in a dominant discourse to back his claims. But Stoll's critique is based on the assumption that Menchu is attempting to represent the truth through an objective discourse when she is in fact representing her subjective experiences as a member of a group.\textsuperscript{207} The key supporting

\textsuperscript{205}D. Stoll, \textit{Rigoberta Menchu and the story of all poor Guatamalans} (Boulder: Westview Press, 1999) at x.

\textsuperscript{206}\textit{Ibid.} at 12.

\textsuperscript{207}This is not to say that her subjective account is not truthful; only that she is claiming validity based on her actual experiences and the experiences of her people as
statement whereby she provides the intention of her speech is as follows:

This is my testimony. I didn’t learn it from a book and I didn’t learn it alone. I’d like to stress that it’s not only my life, it’s also the testimony of my people. It’s hard for me to remember everything that’s happened to me in my life since there have been many very bad times but yes, moments of joy as well. The important thing is that what has happened to me has happened to many other people too: My story is the story of all poor Guatemalans. My personal experience is the reality of a whole people.208

Her method of speech brings more focus upon the intent of the speaker as opposed to the intent of the listener. Menchu establishes in this statement that through her speech, she is representing the experiences of many other people in her group.

Not only does he claim that Menchu’s version of events is untrue. He also claims that she misrepresented the political concerns of her people. According to Stoll, peasants saw guerillas and soldiers as enemies whereas Menchu characterizes guerillas as freedom fighters who had the support of peasants. He asserts that the prewar conditions described by Menchu were not the same as the conditions described by the peasants. According to Stoll, leftist guerillas were responsible for igniting violence against the peasants209. In other words, he claims that Menchu distorted her testimony in order to gain the political stage.

208 Supra note 204 at 1.
209 Supra note 205 at 9.
Stoll does not recognize the inherently political nature of the testimonies that he collects to challenge Menchu's story. Menchu and her group were asserting their subjective account of what occurred in Guatemala against the existing knowledge, or lack of knowledge, of the impact of the government's action upon her people. Their knowledge, based upon physical experiences of oppression, cannot automatically be negated by another group whose truth-claims have no higher source than physical experience.

But Stoll does interview other Guatamalans who claim that Menchu's account of her physical experiences were not accurate. It is not clear, however, why he assumes that the "peasants" that he interviews have no political affiliation and do not benefit from propagating a particular version of events. Stoll sought out testimonies of people who, even if they had no political agenda, had only one perspective within the group. Why does he believe that their political perspective on the cause of violence and the nature of the enemy has more credence than Menchu? Stoll's position as a social scientist illustrates my earlier point about non-scientific disciplines that adopt the trappings of scientific discourse to validate their truth-claims. I would argue that Stoll's claim to political neutrality is false as his action have the political impact of validating status quo understandings of the limited legitimacy of popular political groups.

Stoll is attempting to undermine Menchu's political legitimacy from outside the political group. His words have the effect of exerting pressure from the arena of dominant discourse upon the political group that supports Menchu. I would argue that Stoll is a member of a dominant group, not only by virtue of the fact that he is a North American and thereby
economically and politically privileged, but also by virtue of his academic credentials and position. His academic peer group and his collective group have helped to establish his legitimacy as a scholar. Perhaps he would not easily accept attacks on his expertise easily from people outside of his peer group or his cultural milieu.

If Menchu truly does not reflect the experiences or the identity of the group, then it is up to the group to invalidate her speech. Claims that Menchu's testimony does not reflect the genuine experience of the people she says she represents can only really be made by the people themselves. They are the only ones who truly know the significance and meaning of their own experience and whether it is reflected by the individual speaker. I argue that it is up to the group to decide whether Menchu accurately portrayed the collective experience of the group with her political testimony. It is not up to some from an external group, who may have dominant status, to decide whether or not her testimony is legitimate. Popular knowledge should not be subject to external validation when academic disciplines such as anthropology do not require external legitimation. The knowledge derived from the physical experience of having lived through oppression in Guatemala should be recognized as a form of expertise for the purpose of validating the testimony of a member or leader of the group.

I would suggest that it is more daunting to make false claims of oppression where one must receive validation from people who have experienced abuse of power than it is to make false claims to someone who has not.

Menchu and the Auschwitz survivor were recounting subjective accounts of significant events; these acts of oppression happened. For the Auschwitz survivor, the meaning of the
experience was very personal; the act of giving therapeutic testimony was important in itself for the purpose of survival\textsuperscript{210} and did not require verification. For Menchu, speaking of her experiences of abuse by the Guatemalan regime brought significant personal events into the collective psyche for the survival of the political group. Her political testimony requires verification, but only within the group that she represents. Speaking of her personal experiences of trauma brings them into the collective psyche and demands recognition within the dominant discourse. Within the political arena, an intentional liar will only discredit the legitimacy of the political group insofar as it is unrepresentative of the experiences of the collective.\textsuperscript{211} Presumably if the group does not have members who derive meaning from a common experience, then the group will have no cohesion.

\textbf{I. Conclusions}

\textsuperscript{210}Supra note 176 at 78.

\textsuperscript{211}The problem inherent in validating political speech is the fact that internal political struggles will influence which speakers will be privileged with the right to represent the group. I would suggest that if the speaker who represents the group does not adequately represent the political interests of the individual, then that individual will have to assess whether it is worth trying to form another group that more closely reflects the meaning of her experiences. The downside of course is the weakening of political power through fragmentation of the group. Stoll seems to be doubting the extent of Menchu’s support within her group. I would still assert, however, that it is up to the group members to extract themselves from the political group rather than having an outsider correct the power base and membership. In the Scotia situation, the group of claimants was not homogeneous. Both males and females claimed abuse, claimants came from various geographic communities as well as racial groups, there were claimants with disabilities, and claimants who had resided in different institutions. Although they may have had different experiences, various claimants could still have formed groups to assert their respective interests. See J. Packer, “On the Content of Minority Rights” in J. Raikka, ed., \textit{Do We Need Minority Rights?} (Netherlands: Kluwer Law Int’l, 1996).
Once an abused person decides to bring her experiences into the public realm, she will lose some control over the fate of her testimony. Her speech will fall within a particular disciplinary realm where the rules and methods of the listener will attribute meaning to her speech. The meaning that the speaker intends, will be mediated by the listener’s disciplinary filter. For example, in the legal arena, testimony has meaning only insofar as it furthers the purposes of the justice system. Although courts may be willing to accommodate the needs of the witness, as legitimated through another disciplinary discourse, the goals and principles of justice remain paramount and testimony must exist within those parameters. In a non-judicial dispute resolution process, there may be a multiplicity of goals that are related to different disciplines.

One problem with having various goals within one process is that there is a risk that the nature of the testimony and the required level of validation will not be clear. To illustrate this assertion, I examined the shift in statement-taking protocols and purposes in the Nova Scotia Compensation Program as described by the government in its press releases. I suggest that lack of clarity in the program design jeopardized its legitimacy. The lack of legitimacy of the process also leads to loss of legitimacy of the testimony in the process. So conflicting purposes in a process can lead to challenges to the testimony of claimants.

In order to protect survivor speech, there needs to be a new form of validating discourse that can retain the subjective nature of speech. The best way for this to be done is through a group of survivors where the members validate the testimony through their own “expertise”. Once in the more public space of the dispute resolution process, different validation levels
will reflect the relative importance of the interests forwarded by the parties. The ability of the parties to assert the importance of their interests will influence the degree to which they can assert a validation method for their testimony. A group of survivors that can create space for individual testimony and that can use the power of the group to assert the importance of testimony will be better able to contribute to the determination of validation methods in the negotiation arena.

However, even when a group forms and asserts its voice, its popular political nature will be challenged by disciplines which are more highly situated in the hierarchy of knowledge than the subjugated group within the dominant discourse. To illustrate this point, I examined the controversy surrounding the legitimacy of Rigoberta Menchu’s testimonial account of oppression in Guatemala. Stoll, an anthropologist, situated in a discourse with its own methodology and validation techniques, questions the legitimacy of Menchu’s account of her experiences. He also doubts her political legitimacy within her group. I argue that Menchu’s legitimacy as a political speaker should not be determined by experts from a discourse external to her own. In the same way that Stoll gained legitimacy as an anthropologist from others within his discipline, so too should Menchu be able to gain legitimacy from within her own group of “experts”. Only in this way will the group retain legitimacy and integrity with its membership. In maintaining connection to the subjective experiences of the individuals in the group, the group itself will be able to protect survivor speech while resisting pressure from dominating discourses.

J. Recommendations
1) When the person has been able to reach beyond the imposed privacy of the abusive relationship and is speaking to a loving or sympathetic listener about the experience of abuse, the role of the listener is to listen and not to judge.

- The best way to ensure that the abused person’s account of his experience is provided with non-dominant meaning is for the listener to have survived abuse herself. This way, there will be greater likelihood of the abused person being able to establish a non-dominant and disruptive meaning that closely corresponds to his experience.

- After an abused person has entered into the public arena for the purpose of seeking a remedy for abuse, her testimony should be heard within a group of fellow survivors who share the common purpose of seeking a remedy. At the point before there is engagement with the other party in the dispute resolution arena, her testimony should be validated by her peers within the group to see if she has had similar experiences and has derived similar meaning from them. If there is groups cohesion based on common experience and meaning, then the members of the group can together develop the interests that they will pursue in the dispute resolution arena. These interests will be derived from the needs arising from the individual experiences of abuse within the group.

- In the dispute resolution arena, the parties should assert the importance of their testimony and negotiate a validation method that reflect that importance. Although a survivor group may have to recognize the interests of other parties and have
testimony subjected to a higher level of validation, at least they will have articulated the significance of their experiences in the negotiation arena. Where the other party is powerful, it is in that party's political interests to face an empowered opponent. In facing a party who has enough power to assert their interests effectively, a government benefits from greater political approval and legitimacy when it asserts its interests in the negotiation. In other words, a government will not look like a bully when it puts forward its legitimate interests and expectations against the interests of a powerful group.
CHAPTER 4 - MONETARY COMPENSATION

. . . is power always in a subordinate position relative to the economy? Is it always in the service of, and ultimately answerable to, the economy? Is its essential end and purpose to serve the economy? Is it destined to realise, consolidate, maintain and reproduce the relations appropriate to the economy and essential to its functioning? . . . is power modelled upon the economy?212

A. Introduction

Institutional abuse cases involve significant personal injuries both at the psychological level and at the physical level. These cases are difficult to address through a judicial process or a negotiated process because any remedy must try to respond to injuries that are highly personal and not easily commodifiable for the purposes of awarding monetary damages213. As I have argued in the previous chapters, the preparation before a process plays a vital role in empowering a survivors of abuse so that they can assert their identity in the negotiation process. In developing a sense of who they are, and what is significant to them, survivors can enter a dispute resolution process knowing what they want to achieve. In many cases, monetary compensation is a significant remedy for the survivors of abuse. In this chapter I will assert that the actual significance of monetary remedies must be articulated by the survivors of abuse. In the absence of such articulation, the existing conception of monetary

212 Supra note 54 at 89.

213 They are also difficult cases because there are usually a large number of injured persons as well as a significant period of time between the act or acts that caused the injury and the claim for damages.
compensation is heavily influenced by an economic paradigm in both judicial decisions and negotiated compensation programs. A conception of compensation that relies upon commodification of all aspects of human personality threatens to become the only way we understand compensation, especially where no alternative conception is provided. Further, a conception of compensation that relies upon commodification runs the risk of fragmenting the identity of abuse victims. This can be especially problematic for institutional abuse cases where the fragmentation of identity is one result of the injuries suffered by the survivor of abuse. Dispute resolution of deep personal injuries requires congruence in the process as well as the outcome of the process. Where the process is designed to remedy the fragmentation and injury suffered by survivors of abuse, the compensation awarded should also be conceived such that fragmentation of personal identity is not perpetrated upon the survivors.

In this chapter I intend to explore some of difficulties that arise when an overarching and highly commodified view of compensation is used to address the injuries of persons who have suffered from institutional abuse. In exploring compensation for abuse, I will highlight a fundamental inconsistency that exists within a conception of personhood that is overly objectifying. Briefly, this inconsistency lies in the fact that radical commodification results in every aspect of personhood being alienated and defined by monetary values. This narrows the scope of self-definition to the limited meanings attached to money. So instead of creating freedom for self-actualization, commodification results in a narrowing of the meanings that can possibly be attributed to the self.
First I will provide a brief summary of the points from previous chapters that will be relevant to this analysis. I will describe the difficulty in awarding monetary compensation for subjective personal harms such as the psychological injury that results from institutional abuse. I will then describe how institutional abuse has been remedied by the courts by examining Muir. v. Alberta\textsuperscript{214}, a case involving a woman who had been sterilized by the Alberta Eugenics Board. I will also examine how the Nova Scotia Compensation Program distributed its monetary awards through a grid or scalar system. After evaluating how the two systems deal with monetary damages, I will make some recommendations for overcoming the hegemonic effect of commodification when monetary awards are used to address damages arising from institutional abuse.

B. Summary - identity and empowerment

In the second chapter, I established that one of the key harms inflicted upon a person when he is physically or sexually abused, is a fragmented sense of identity and loss of control over identity formation. That is, the abuser imposes his own physical needs upon the person; this imposition subdues the abused person’s sense of having control over his body. The abuser also affects the meaning of the experiences. The abused person may believe that the abuse is an expression of love, or he may not be able to attribute any meaning to random acts of violence or sexual predation. Thus, his sense of identity is controlled by the abuser. Abuse fragments a person’s will or agency from his body. Things are being done to him that he

\textsuperscript{214}(1996), 132 D.L.R. (4\textsuperscript{th}) 695 [hereinafter “Muir”].

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cannot control. Survival of his psyche may rely upon his ability to separate himself from his body. In the chapter on identity I argued that a dispute resolution process must provide space for identity formation to be initiated by the abused person. Only when a person can connect with others who can provide him with a loving relationship matrix can he begin to assert an integrated sense of self that is not defined by the abuser.

In the chapter on empowerment, I asserted that this new identity and sense of the significance of the abuse must be protected against the resistant force and dominating tendencies of dominant discourses. Otherwise the new speech will be subjugated by existing knowledge. I argued that the way to do this is to promote the development of a political group of survivors who will internally legitimate the experiences of its members. In doing this, the survivor speech can be validated without having to lose the subjective nature of the testimony and without having to resort to external legitimation from dominant discourses. The group also acts as a vehicle for the assertion of interests in the negotiation environment.

Throughout the previous chapters of this thesis, the focus has been on asserting a survivor-focused subjective identity through an empowering dispute resolution process. Presuming that the interests of the abused person are articulated in the dispute resolution process, and that the process results in a remedy, how is that remedy to be conceptualized? In a judicial setting, civil institutional abuse cases result in a monetary award. Apology, access to specialized counseling, creation of an historic record and other forms of remedy that are not
in monetary form\textsuperscript{215} are not available to the court. A non-judicial dispute resolution process may provide for these types of remedies should the parties so choose. Monetary compensation, however, often is still the core remedy for survivors of abuse in a non-judicial process. In this chapter, I would like to examine some of the problems with existing conceptualizations of monetary awards. If an award objectifies the injury and does not recognize the subjective nature of the harm, does it perpetuate a sense of fragmentation of identity? After establishing and preserving a non-dominant sense of identity throughout the process, it would defeat the purpose of the process if the remedy re-objectified the experiences of the abused person.

C. The difficulty with monetary compensation

With the advent of a large number of institutional abuse cases, governments have been and continue to be faced with a prime opportunity to develop non-court based processes that can meet the interests of the parties in an efficient manner. Although these cases are an opportunity for process reform, they also present a significant challenge at the substantive level. Both the decision-maker in a judicial process and the parties in a non-judicial conflict resolution processes have to determine how to compensate persons whose injuries affect the core of their being and identity in a very personal, and sometimes collective way.

\textsuperscript{215}A court can award a monetary amount for counseling but cannot provide a counselor for the abuse survivor. In \textit{A. (C.) v. C. (J.W.)} (1997), 35 B.C.L.R. (3d) 234 at 300 the court awarded survivors of institutional abuse amounts for future counseling. For further details on the extent of remedies available to civil litigants, please see: J. Berryman et al, \textit{Remedies: Cases and Materials}, 2\textsuperscript{nd} ed., (Toronto:Emond Montgomery, 1992).
A process that does not explicitly use conceptual language that creates space for the subjective self may end up inappropriately objectifying facets of the victims' identity. In the absence of any alternative definition, compensation itself will tend to be conceptualized in terms of some form of economic analysis. This will happen for two reasons. First, the main tool for awarding compensation is money. Money is also the prime tool used to exchange goods on the marketplace and signifies that goods are fungible and that their value is transferable. *Prima facie*, money indicates the existence of a marketplace and commodification of objects. Where money is used to compensate, it is easy to conceptualize damages as things which are exchanged for money. The second reason is the fact that resolution in both the civil litigation system and a non-judicial compensation program can be reached by way of a negotiated agreement. Negotiations and other private mechanisms of dispute resolution rely on the parties to raise and recognize non-commodifiable values in the negotiation process. However, it can be difficult for the parties to recognize subjective harm in the first place, let alone find a way to acknowledge it in a negotiation where money is often the prime universalizing negotiating tool. Where the negotiation involves reparations or compensation for serious wrongs such as physical and sexual abuse it is easy to lose sight of the subjective quality of the harm in the attempt to achieve agreement with the other side.\(^{216}\) In attempting to reach a workable agreement for both sides, the subtleties...

\(^{216}\) For an insightful discussion on the public nature of serious wrongs, see *supra* note 34. For a discussion on the incompatibility between the ideology of mediation, which is a variation on negotiation, and the culture of battering in domestic violence cases, see *supra* note 116. In this article, Fischer, Vidmar and Ellis explore the difficulty of using a process that is geared towards achieving agreement and maintaining relationships when agreement and continuing relations may be antithetical, and even extremely dangerous, for the victim of battering.
of how compensation for abuse should be conceptualized can be lost among the more prominent targets of achieving a monetary solution. And so, even with these tailored and negotiated processes, parties and the public are in danger of falling into the same type of objectifying discourse that the alternative processes are supposedly designed to avoid. In fact, without the explicit recognition of subjective needs that is sometimes contained in judicial decisions, survivors of abuse can feel that they have simply been paid off and that somehow yet again, the other party and society have missed the point of their loss.217

D. An alternative conception of monetary compensation

Margaret Radin in her analysis of the hegemonic properties of market-based economic discourse, asserts that a rhetoric that commodifies personal attributes has a culture-shaping function. Radin argues that law is a powerful rhetorical and discursive force which has the ability to shape culture and our understanding of the world. As she states:

> when we live in a world in which many or most things people need and want are routinely traded as commodities, and when we see dollars systematically being paid to people after they are injured, and in some way “for” or “on account of” the injury, we are likely to come to conceive of freedom from injury as another commodity bearing exchange value, even if we do not now conceive of it that way.218

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To illustrate, Radin considers a topic frequently debated among law and economic theorists: does simply speaking of babies in terms of market rhetoric have a real effect on culture despite the fact that baby-selling is not a widely sanctioned practice in our culture? She argues that a widespread conceptual scheme that has effectively infiltrated our discourse will in fact shape the nature of our relationships with our children. So, although we may feel that children have an intrinsic value that is incommensurable with dollars, a hegemonic market-based conceptual scheme that hypothetically allows for trade of children for dollars will infiltrate our understanding such that it is possible to conceive of children as commodities for various purposes. If we apply Radin’s theory of the culture-shaping function of legal rhetoric to the situation of compensation for institutional abuse cases, we can perhaps understand why abuse claimants may have felt that the money they received was “blood money.”

Radin’s analysis focuses on the limitations of a Posnerian economic analysis that uses dollar value as its base and that reduces all human choices to market choices between commodities. The traditional law and economics approach to compensation does not easily lend itself to a compassionate view of the law that recognizes the subjective and personal nature of harm. Economics, as we have come to understand it, is associated with

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219 Supra note 2 at 19.

220 Supra note 218 at 2-4.

221 Ibid. at 184.
classical liberal theory, extreme individualism, and wealth maximization. This particular understanding of economics requires a high degree of objectification so that wealth maximizing choices can be made between comparable, or commensurable objects.\textsuperscript{222} Without de-subjectifying goods, it is impossible to alienate them to the extent required by the market-place. In seeing the law through this particular economic lens, one is tempted as Judge Posner has been, to discuss all characteristics of humanness as if they are commensurable and fungible.\textsuperscript{223}

E. Dilemma of liberal economic theory

Ironically, though the liberal conception of the person envisages the attainment of maximum autonomy and expression of self, in the economic arena the opposite can occur. The self is expressed through the physical being and the physical world. If the physical being and the physical world is completely alienable, and if all alienable things are defined in monetary terms, then self-expression becomes limited to monetary terms. Thus, radical alienation has a limiting effect on self-expression.

Without specific clarification of the meaning of compensation for abuse survivors, a process that uses the tools of the market and a structure that indicates commodification of personal injury will absorb the hegemonic analysis of a reductionist classical economic theory. The

\textsuperscript{222}\textit{Ibid.} at 8.

\textsuperscript{223}\textit{Ibid.} at 2-15.
discourse of classical economic theory requires a radical degree of objectification. When this objectification is applied to the realm of our identity, then the resulting alienation creates a dilemma for liberal theorists. Although the conception of personhood in liberal theory envisions a high degree of autonomy and personal power, in objectifying all aspects of human personality, liberal economic theory in fact destroys the physical integrity of identity that is required for the manifestation of empowerment.

This analysis of the liberal dilemma presupposes a conception of personhood where identity is fundamental to well-being and alienation of fundamental aspects of identity through commodification is inimical to well-being. For instance, in this view, placing a woman’s reproductive capacity in the marketplace strips her of an important aspect of her identity as a woman; it does not represent her ultimate expression of will.

(a) Avoiding the dilemma

But perhaps it is not necessary to entirely reject economic analysis if it proves flexible enough to embrace a more holistic, subject-oriented focus. Economics is not necessarily only about wealth maximization. It can be more generally about well-being, sustainability and needs fulfillment\(^\text{\textsuperscript{224}}\). If an economic model is expanded so that it recognizes these values that relate directly to human personality as opposed to the indirect and abstract value of

\(^{224}\text{M. Morris, Measuring the Condition of the World's Poor: The Physical Quality of Life Index (New York: Pergamon Press, 1979) at 94. In this book the author explores the possibility of moving away from measuring growth and production and moving toward measuring social welfare and needs-fulfillment in macro-economic analysis.}\)
wealth-maximization, then the nature of the economic inquiry changes fundamentally. It becomes more focused on the subjective experiences of economic agents and less upon the choices that they should, theoretically be able to make. It re-orientates the focus of economic activity such that the subject's role is not only to decide between an artificial array of economic choices; the economic actor also has a contextual content that is affected by and affects economic decision-making. The liberal model, on the other hand, depends heavily on an abstract and highly stylized concept of human personhood.

An economic focus on needs and well-being provides the opportunity to incorporate the realities of persons instead of relying upon theoretical abstractions. An economic model that relies upon well-being and well-fare of groups and individuals can more easily recognize values that are denied by Posnerians and raised as problematic by Radin. Amartya Sen succinctly points out the limits of a narrow economic theory in the following way:

> It is not my purpose to argue that simplification can never be justified. Economics - indeed any empirical discipline - would be impossible if simplifications were to be ruled out. The point concerns the need to recognize distinctions which are important for the purpose of the study at hand. What is objectionable in the economic theorizing that identifies widely different concepts of self-interest, motivations, etc., is not the fact of simplification itself, but the particular simplification chosen, which has the effect of taking a very narrow view of human beings (and their feelings, ideas and actions), thereby significantly impoverishing the scope and reach of economic theory.\(^{225}\)

And so, it is not necessarily that an economic analysis of the law of compensation is

inadequate but rather that an economic analysis based solely on market maximization and capital growth will lead to a conceptualization of human personality and choice which is overly narrow. Instead, economic analysis can perhaps recognize incommensurable values as having value, although not capable of being traded on the market.

F. Compensation in the Courts

Institutional abuse involves the objectification of the person through the initial abusive acts. This proposition can be illustrated through a specific case involving the decision of the Eugenics Board in Alberta to sterilize a woman who was resident in a provincial institution. The practices and policies of the Alberta Eugenics Board and the effect that it had on certain groups of people provides a particularly poignant and sad example of the relevance of identity. In *Muir v. Alberta*, the plaintiff became a resident of the Provincial Training School for Mental Defectives. Ms Muir was placed in the institution, notwithstanding evidence that she had behavioural problems and was not “defective” as her mother had the institutional authorities believe.\(^{226}\) Despite the fact that some officials doubted whether or not Muir had a mental deficiency, she was labeled as a mental defective and a moron. She became

\(^{226}\) *Supra* note 214 at 705. Shortly after being admitted a psychiatrist examined Muir and found that she had behavioural problems and there was doubt about whether or not she had a primal mental deficiency. Muir had a very difficult relationship with her mother who showed little interest in taking care of her child. There is evidence to the effect that Muir’s mother appears to have told the authorities that Muir was older than she really was. Thus her psychometric tests would indicate that she was mentally deficient and she would be admitted to the school. There is also evidence that Muir had been neglected at home. At one point, Muir was considered abandoned by her family as they moved out of province without notifying her.
identified as a moron and as recognized by the trial judge in her lawsuit against the Province of Alberta, this had a severe lifelong impact on her sense of self and her abilities. Muir herself believed that she was deficient and suffered psychological damage because of this particular form of objectification. In fact, Ms Muir is exemplar of how we all incorporate external and socially constructed concepts of identity into our ideas of selfhood. If Muir had been in an environment where her mental abilities or lack thereof were not the prime focus of her social identity, then perhaps she would have had a broader, more forgiving and positive vision of herself. However, not only did labeling have a severe impact on her self-image but the Eugenics Board focused and relied on this particular, imposed identifying characteristic of Ms Muir, and sexually sterilized her against her knowledge and without her consent. Her identity as a moron not only objectified her as being primarily defined by her mental acuity, but it also identified her to those in authority as a less worthy person who must be stopped from procreating.

Identity is relevant in a second very important way in Muir. There is some evidence to support the fact that the eugenics movement was also influenced by the desire of certain policy makers to maintain the purity of the dominant racial group in Alberta and in British Columbia. So not only was Muir’s personal subjective identity affected by the objectifying labeling of the Eugenics Board, so too was the identity of the group to which she belonged. An expert witness in the case, Professor Robertson, testified that eugenics practices in the

early 20th century were geared toward establishing racial purity and breeding out mental
defectives. The prevalent beliefs among the middle class contributed to the popularity of
eugenics. There was a belief that feeblemindedness is a menace to society and contributes
to crime, prostitution, drunkenness and other social problems. At the same time, racist
beliefs were rampant and there was a high degree of suspicion of immigrants from Southern
Europe, Eastern Europe and the Orient. Claims were made that foreigners were
responsible for the (perceived) high degree of crime. Fear of non-British, non-White, and
non-Protestant immigration led such stellar political characters as Emily Murphy, Nellie
McClung and J.S. Woodsworth (who later recanted these beliefs) to advocate eugenics
practices. In addition to the popular social climate in the early part of the century,
scientists were disseminating theories linking feeblemindness to crime. Belief in scientific
method and the advent of modernity bolstered questionable theorems about large groups of
people. Articles were written by doctors such as Dr. Morris Siegel in 1934 who claimed that
"the female morons grow up to be irresponsible women, falling deeply into the abyss of
prostitution, alcoholism and addiction to narcotic drugs." The authority of these
statements from prominent medical practitioners and scientists fueled middle-class fears and
justified the objectification of certain classes of people as less than worthy of the same

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228 T. Caulfield, ibid. at at 69.

229 Ibid. at 69.

230 Ibid. at 61.

231 Ibid. at 67-68.

232 Ibid. at 67.
privileges as the dominant classes.

At the height of the eugenics movement in Alberta society, the Sexual Sterilization Act was passed. The Act established a board which was empowered to authorize the sexual sterilization of individuals about to be discharged from a mental hospital to prevent the procreation of people with disabilities. After amendments in 1937, the powers of the board were expanded to allow the sterilization of people with neurosyphilis, epilepsy with psychosis or mental deterioration, and Huntington’s Chorea. Consent was only required for psychotic persons and was not required for the sterilization of so-called mental defectives. During the forty-four years of its operation, the Eugenics Board sterilized 2,822 people.\textsuperscript{233} Studies show that the Act was administered in such a way that it had disproportionate impact on females, the unemployed, people of minority ethnic backgrounds and the poor.\textsuperscript{234}

The dominant group in society, British immigrants, sought to maintain control of their vision of the ideal citizen by limiting the population and power of those who did not reflect their cultural image. The eugenics belief that criminality was caused by an inherited feeble-mindedness that could be remedied through sterilization allowed the powerful middle-class to ignore possible structural economic causes of social ills.\textsuperscript{235} The explicit purpose of the

\textsuperscript{233}Supra note 214 at 745.

\textsuperscript{234}Supra note 227 at 61.

\textsuperscript{235}A. McLaren, \textit{Our Own Master Race: Eugenics in Canada, 1885-1945} (Toronto: McLelland and Stewart, 1990) at 37.
Sexual Sterilization Act\textsuperscript{236} was to limit the reproductive capacity and sexuality - both being fundamental, defining characteristics of humans - of particular groups of people. It allowed for social engineering that could change the face of Alberta society so that it reflected the so-called desirable visage projected by dominant members of society. Thus the dominant, objectifying group benefitted from the chauvinistic isolation that it imposed. Members of the dominant class held the reigns of control and maintained a distinct group identity\textsuperscript{237} that had exclusive access to social privileges simply because of membership in the group. This articulation of desirability is one of the most arrogant and blatant\textsuperscript{238} examples of a dominant class wielding power to maintain the subjugation of groups that are excluded from setting the terms of the dominant discourse.

\textsuperscript{236}Sexual Sterilization Act, supra note 227.

\textsuperscript{237}The social construction of racial identity has reinforced the disenfranchisement of various oppressed groups. People have been categorized as Black, Jewish-Semitic, etc for the purpose of imposing different levels of privilege for those who are in the categories and those who are in the dominant categories. For an in-depth examination of the social construction of racial identity, with specific reference to Jewish people, please see: L. Nochlin & Tamar Garb eds., \textit{The Jew in the Text: Modernity and the Construction of Identity} (London: Thames and Hudson Ltd., 1995).

\textsuperscript{238}In its imposition on the physical well-being of particular group, the eugenics movement is an obvious and easily recognizable oppressive force. What are more insidious, however, are the more subtle mechanisms for social control that today re-inforce the same exclusivity underlying the eugenics movement of the early 20\textsuperscript{th} century. As an example, please note the widespread use of Ritalin for controlling the behaviour of children: see A. Brown, “Mind-Control Drug Threat for Children” \textit{The Guardian Unlimited} (27 February 2000) online:<http://www.guardian.co.uk/Distribution Redirect_Artifact/0,4678,0-141145,00.html> (date accessed: 20 March 2001); and, “Drug to control children’s behaviour ‘overused’” BBC Online Network (23 February 1999) online:<http://news.bbc.co.uk/hi/english/health/newsid_284000/284466.stm> (date accessed: 20 March 2001).
A third way that the Eugenics Board affected Ms Muir's sense of self was the impact that its decisions had upon her physical integrity. This caused specific effects on her psyche and identity as a woman. The attack on her physical self is not the same as the socially and institutionally constructed labeling mentioned above. The act of sterilization was an insidious form of assault that undermined her sense of physical being. This fundamental type of interference with personhood is qualitatively different from the psychological damage inflicted upon her through labeling. This is not to say that there is a hierarchy of damage; however, her body, as a foundational source of her being, was invaded and altered. One could say that her body was the last frontier that fell under the onslaught of the Eugenics Board and by extension, the dominant society in Alberta.

Although we know that there are varying degrees of control that we have over our social identity and labels that are attached to us throughout life, we at least think that we have control over the imposition of acts against our bodies. Our laws give us protection against non-consensual touching and medical procedures precisely because as a society, we consider physical integrity to be of prime importance. And yet, the Sexual Sterilization Act allowed for a breach of physical integrity that goes to a core aspect of our physicality - the ability to reproduce. The sterilization imposed a severe physical limitation upon a core aspect of Muir's physical being. In the act of irreversibly affecting her body without the concurrence of her will, the Eugenics Board created distance between Ms Muir's sense of self and her reproductive capacity. When we will our hands to type something out, the act is a seamless manifestation of our will to do so; we do not notice that our hands are separate from ourselves. When, however, someone takes control of our hands without our will, we are
aware of our hands at some distance from our will and selfhood. In this way, Muir’s sexual capacity, something taken for granted by many, was separated from her, both physically and psychologically.

After years of searching for answers about the procedures that were performed upon her, Ms Muir brought her case before the courts. After determining liability, the judge was faced with the daunting task of addressing Ms Muir’s loss of reproductive capacity and the injuries that she suffered. Ms Muir’s loss was not easily equated to dollar values. She did not lose a car or even wages, to a significant degree. The bulk of her losses related to the loss of part of herself. How a court characterizes this loss\(^{39}\) depends heavily on how compensation is conceptualized.

\((a)\) Summary

In examining Muir one can better understand that institutional abuse affects personal and collective identity by forcefully fragmenting foundational aspects of personhood and taking control of them. Ms. Muir was artificially categorized as a “moron” by the Eugenics Board. She did not have control over the social construction of her identity; the Eugenics Board did. Ms Muir came from an economically disadvantaged Eastern European family; the Eugenics Board systemically targeted persons from this group for the purpose of limiting their power.

\(^{39}\) As stated by R. Abel, “the commodity form has been extended from goods, labor and care to all forms of human experience - everything can (and increasingly must) be bought”: supra note 217 at 448.
in society. Dominant society was composed of persons with particular characteristics such as place of origin, religion and gender; these attributes were used to identify groups who were the targets of eugenics policies. Fragmentation of her social identity was bolstered by theories that criminality was more prevalent among certain groups. Thus persons in Alberta society were objectified and sterilized based on the fragmentation of their social identity into categories of race, religion and gender. Finally, Ms Muir’s physical integrity was fragmented by the act of sterilization itself. Sterilization without consent created a distance between Ms Muir and her personal sovereignty over her body and her reproductive capacity. Her ability to reproduce was objectified by the Board when they decided to sterilize her against her will.

(b) The meaning of compensation in torts

Radin recognizes that we have some difficulty reconciling the incommensurability of market rhetoric that is sometimes associated with compensation for the very subjective pain and suffering of a plaintiff. She explores how market rhetoric impacts on our culture and understanding of identity and she proposes that there are some aspects of tort injuries that we consider incommensurable with commodification. Some injuries are closer to our sense of self and thus are less easily placed on par with commodities on the market place. Other aspects of ourselves may be more easily objectified, or put at a distance from our subjective selves, and are consequently easier to commodify and place in the marketplace for exchange. As Radin notes, compensation for personal injury is one area where the contested meanings
of market commodification can most easily be examined.\textsuperscript{240} Specifically in personal injury cases, the use of dollars to remedy both pecuniary and non-pecuniary losses can create confusion around the meaning of compensation.

In a pure deterrence model of commodified compensation\textsuperscript{241}, an economically rational tortfeasor would implement safety features if these safety features cost less than paying damages for accidents. For example in \textit{Muir}, the government would evaluate the damages that might be payable to Muir and then decide whether or not to sterilize her. The \textit{Muir} case demonstrates many problems with the pure deterrence model. First, perfect knowledge of the potential costs of their action is required for the government to make an accurate judgement of whether or not to sterilize Muir. Second, the tortfeasor must understand that their acts are actually inflicting an injury upon someone. At the time that the government enacted the \textit{Sexual Sterilization Act}, there was no understanding that their actions were harmful or were in fact inflicting damages upon Muir.

Radin points out that many who are sympathetic to economic reasoning do not adopt a pure version of the deterrence model. Rather, although economic efficiency is a goal, rights associated with bodily integrity are also recognized. This mixed view also engages a commodified conception of compensation as the payment of damages is in exchange for the rights that were violated. Ideally compensation makes the victim whole again. Thus, injury

\textsuperscript{240} Supra note 218 at 184.

\textsuperscript{241} Ibid. at 186.
and the payment of damages are treated exactly as if the victim sold a commodity that she owns.\textsuperscript{242} In the \textit{Muir} case, for example, this view would hold that the plaintiff had accepted damages in exchange for the loss of her reproductive capacity. In this conception of compensation she is deemed to have owned her capacity to have children and because it was taken away from her, she is entitled to receive money in exchange for it. In order to compensate her, the court would have had to assessed the worth of her loss by evaluating the value of her right to reproduce and then ordered government to pay for taking it away from her. As Radin states, in this view the damage award makes the victim whole again as she is indifferent with respect to being harmed and getting the payment of damages.\textsuperscript{243} 

In the \textit{Muir} case, someone who is sympathetic to this kind of analysis might perceive that the Alberta government paid a sum of money for Ms Muir’s reproductive capacity. However, because the judge clearly delineated his intention to recognize her non-pecuniary losses, there is less opportunity of her monetary award being attributed to commodified injuries. The judge in \textit{Muir} clearly states that “(m)oney will not allow Ms Muir to conceive; it can only provide succour for the pain that she has suffered during these past decades.”\textsuperscript{244}

Succour is a response to Ms Muir’s emotional needs and pain; this is something that the judge recognizes, in accordance to our society’s understanding of this type of pain, as being incommensurable with a market economic analysis. In this instance, money symbolizes recognition of pain; it does not signify an exchange of goods.

\textsuperscript{242} \textit{Ibid.} at 187.

\textsuperscript{243} \textit{Ibid.} at 186-187.

\textsuperscript{244} \textit{Supra} note 214 at 193.
Radin categorizes this understanding of compensation as a non-commodified conception of compensation that attempts to provide solace to the plaintiff. She argues that within the judicial system we have a non-commodified understanding of compensation that allows for the centrality of other values beside dollars and markets. For example, principles of corrective justice seek to restore the moral balance between the parties. Thus, right and wrong, concepts that are incommensurable with market values, are used for determining compensation in the form of punitive damages. Radin argues that compensation for injury should be viewed as redress of the harm done to the victim and as recognition of the fault of the defendant. Money, should be a symbolic, but not empty gesture of recognition. As she states, “redress means showing the victim that her rights are taken seriously. It is accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights.”

I would suggest that Radin’s understanding of compensation can also be interpreted in terms of the relational nature of identity, as discussed in chapter two. In providing compensation that is a symbol of respect and is for the purpose of re-establishing moral balance between the parties, there is a recognition of the re-configuration of the relationship. The tortfeasor

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245 Supra note 218 at 189.

246 This point is raised by R. Abel who states that “tort law has turned to the language of economics, replacing moral fault with the efficient allocation of resources, a concept that appears scientific and apolitical.” Abel points out that although cloaked in the guise of neutrality, economic discourse itself has an inherent normative point of reference - namely efficiency: supra note 217 at 451.

247 Supra note 218 at 188.
acknowledges the harm inflicted upon the plaintiff and in doing so contributes to the new construction of the plaintiff’s identity as a respected person. The relationship matrix has been slightly altered and power has been shifted within the matrix.

These examples of Radin’s taxonomy of compensation reveal that our understanding of compensation is informed by various conceptual paradigms. She also asserts that in some instances, the values that are recognized by the courts are incommensurable with an economic rhetoric that assumes commodification and fungibility of all aspects of personhood. Compensation can mean many things. Alongside our economic conceptualization are bubbles of incommensurable values which must be acknowledged through compensation, but not reduced to commodities that are alienable from the person.

In describing both the commodified and non-commodified versions of compensation, Radin is exposing our conflicting ideas of the meaning of compensation. We recognize that something of value has been lost or damaged but we have differing ideas of how the address the loss.\textsuperscript{248} Some prefer a simple, overarching economic conceptualization. Others see that there is complexity associated with different types of harms, complexity which cannot be addressed by one single conceptualization based on economic theory.

\textsuperscript{248} Note that I do not deal with the possibility of not compensating injured parties where their injury is incommensurable with commodification. In my view, recognition of value must be at least symbolized through money because society recognizes money as being valuable. In her book, Radin does discuss the possibility of not compensating injured parties. She notes that if one recognizes the incommensurability of pain with compensation, it becomes easier to argue that pain should not be compensated at all. Radin notes that this argument is used in the context of tort insurers who wish to limit the discretion that juries have to make awards at their expense. Radin argues that proponents of this argument often do not go so far as to argue against all damage recovery but use it in a limited way. For a further discussion of this issue, see \textit{ibid.} at 195-200.
(c) Evaluation of judicial treatment of compensation

Up to this point, an examination of the Muir case has revealed that the abuse of power in an institutional setting had an objectifying effect upon key aspects of Ms. Muir's identity. Further, we have examined how economic theory tends to have a hegemonic culture-shaping effect that leads us to a commodified conception of compensation. In institutional abuse cases like Muir it was crucial for the judge to recognize the incommensurability between Muir's loss of reproductive capacity and a market-based conception of compensation. He recognized that monetary damages for non-pecuniary loss have the symbolic effect of providing succour for Ms Muir's loss. In making this distinction in his decision, the judge has explicitly refused to objectify an aspect of Ms Muir's subjective loss.

G. Non-judicial compensation programs and institutional abuse

Where there is a compensation program in place and no explicit explanation of how compensation is to be conceived, there is a danger that compensation will be understood in a way that further objectifies people who have already been objectified through the institutional abuse. Many governments and institutions across Canada saw the emergence of these potentially expensive and difficult cases as a prime opportunity to implement formalized alternative dispute resolution mechanisms. Governments could use non-judicial processes to reduce the transaction costs, such as time and expense, that all parties would incur to their mutual detriment through the civil litigation process. Lengthy civil proceedings have severe cost implications cost for both parties; the claimant often bears a...
greater relative burden because of a lack of initial resources for the payment for legal fees. Governments could also address the stresses of litigation on claimants by implementing a mechanism that does not force claimants to face their abusers. If an alternative process is designed well, the abused person who has already experienced psychological trauma will not be re-victimized by the process. Further, dispute resolution mechanisms can provide a process that is geared toward healing the victim as opposed to simply determining causal damage and recognizing loss through monetary awards. Alternative mechanisms can also allow for a greater range of solutions than is available through formal legal proceedings. It is possible for the parties to negotiate for monetary compensation, apologies, non-monetary awards for psychological therapy and other treatments, an opportunity to establish a record of the stories told by victims, public education about abuse, support for families of victims, career counseling, and interim awards to assist claimants. Thus, a negotiated solution can be more easily tailored to suit the subjective needs of the parties involved in the negotiation and the process itself can deal with the specific relationship between the parties.

The Nova Scotia Compensation Program provided non-monetary remedies that are not available through a judicial process. There were provisions for an apology letter from the Minister of Justice, interim and long-term counseling, a list of government services available to the claimants, an independent recorder of a public report of Survivor’s testimonials, and payment of legal fees and disbursements. The most significant and contested remedy,

[249] Supra note 2 at 30.

however, was the monetary compensation paid out to claimants.

Various mechanisms have been used across the country to provide monetary compensation for people who had been abused while residents of provincial and federal institutions. In Kingsclear, the government of New Brunswick provided compensation up to $120,000 for sexual abuse suffered at the New Brunswick Training School at Kingsclear.\(^{251}\) Compensation was paid for pain and suffering, educational benefits, loss of past earnings and the loss of future opportunity.\(^ {252}\) In Ontario, the Helpline Reconciliation Agreement provided compensation up to $25,000 for pain and suffering, with additional amounts of $3,000 for medical needs and vocational rehabilitation, and $5,000 for counseling.\(^ {253}\) Compensation was provided to eligible persons who suffered acts that met the definition of injury in the *Compensation for Victims of Crime Act*\(^ {254}\). In the Grandview Agreement, monetary compensation was provided for both physical and sexual abuse depending upon the category of the abusive act.\(^ {255}\) The maximum amount that could be received was $60,000 for acts falling within the most serious category plus individual and group benefits for counseling, educational upgrading, tattoo removal and other needs.

\(^{251}\) *Supra* note 5 at 142.

\(^{252}\) *Ibid.*

\(^{253}\) *Ibid.* at 137.

\(^{254}\) *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C. 24, s. 1. This section defines injury as “actual bodily harm”.

\(^{255}\) *Supra* note 5 at 130-1.
The Nova Scotia Compensation Program set out a grid or scalar format similar to the one used in the Grandview Agreement. However the maximum award in Nova Scotia was higher and the grid had more categories. In the Nova Scotia Program, there were twelve categories ranging from the most serious “Severe Sexual Abuse and Severe Physical Abuse” category to the least serious “Minor Physical and/or Sexual Interference”. If a claimant’s statement alleged acts that fell within the most serious category, he could receive $120,000 plus a $10,000 counseling allotment. Guidelines were provided to assist Compensation Program assessors with categorizing the claims of abuse. For example, the category “severe sexual abuse” includes anal intercourse, vaginal intercourse and oral intercourse that was repeated and persistent such that it could be characterized as chronic. Severe physical abuse was abuse that resulted in broken bones or other physical trauma with evidence of hospitalization or permanent disability. The assessor also had to consider aggravating factors such as verbal abuse or racial acts when determining the appropriate level of compensation.

Whereas the Kingsclear model and the Helpline Reconciliation Agreement focused on pain and suffering, the Nova Scotia scalar model placed emphasis on the act instead of the subjective effect of the act. The problem is that the categories in the grid may have no definite correlation to the actual damage suffered by the claimant. Institutional abuse is

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256 Supra note 30 at Schedule “B”.

257 Ibid.

258 Ibid. at Schedule “C”.

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experienced in a very subjective way. As has been argued herein, the injury in abuse cases are a result of the imposition of power over the will of the abused child; consequently the claimant suffers from significant psychological damage. Psychological literature does not support the assertion that injury from abuse can be purely correlated to the number of occurrences or the severity of the act. The physical damage is important but the psychological damage contains a significant subjective aspect that has a quality that cannot be evaluated by objective means. Loss of power and destruction of identity are not things that can be quantified because the nature of the damage is holographic; it cannot be excised and valued because it affects all aspects of personhood. Although these aspects of damage can be addressed through empowering features of the process as discussed in previous chapters, they should also be recognized, but not quantified, through a substantive remedy.

Where money, a concept which is very closely related to commodification, is distributed through a grid or scalar model, it is easy to conceptualize the compensation as commodifying the actual injury. Because commodification is likely to dominate out understanding of compensation, it will provide meaning, especially where there is no alternate understanding of why compensation is being awarded. Where the structure of the distribution mechanism in itself indicates that the injuries have been objectified, there will be even more reason to believe that the subjective aspect of harm has not been recognized. Sadly, the lack of an articulated statement about the meaning of compensation can be crucial where a program has been developed to address the specific well-being of the claimants. In order to achieve

259 Supra note 2 at 38.
a healing result, an ADR mechanism and remedy should explicitly recognize the specifically subjective nature of abuse. There is no statement in the MOU that the monetary compensation is for pain and suffering. There is no indication of recognition of subjective harm in the awarding of money amounts. In the absence of any statement to the contrary, the grid and the guidelines themselves lead me to believe that the scalar model of compensation employs an objective standard for the award of damages. In doing so, the model reinforces the commodification of sexual and physical abuse. A claim of chronic anal intercourse is more valuable than a claim of repeated instances of oral intercourse, no matter what the subjective effect was for the particular victim. In effect, the government is evaluating the worth of the objective act and not valuing the subjective harm.

In a survey done of various survivors of institutional abuse in Canada, the following was stated:

While most women appreciated the financial award and felt that it was very important, others said that it felt like ‘blood money’. Several women added that there was no amount of money that could make up for what they experienced at Grandview.260

From this quote it is apparent that monetary compensation has multiple meanings for survivors of abuse. At one level it is appreciated, at another it is resented. This ambivalent relationship with money appears in another survey done by the same authors:

Several respondents expressed the view that financial compensation should have been tied to claimants’ participation in education and upgrading, job

260 Supra note 2 at Appendix 1, p. 19.
skills and life skills training 'so they could improve their lives'. Others were adamant that survivors of institutional abuse deserve direct financial compensation for the abuse, harm and suffering they endured.\textsuperscript{261}

There is some evidence that the meaning of compensation is partially derived from the process used to determine the level of compensation to be awarded to various members of the group that was abused. Again, in reference to the survey of survivors:

any objected to the use of categories to define and rate their childhood abuse experiences. . . . 'its like they were labeling beef'\textsuperscript{262}

This statement points to the crux of the problem of trying to achieve a healing result with the use of money. The survivors of abuse, who have already faced fragmentation through the acts of abuse perpetrated on them by persons in authority, again face objectification through the process that was supposedly designed to create some wholeness and provide redress for their experiences.\textsuperscript{263} A person who has been sexually abused by a person in authority has had their sexual autonomy forcibly overridden. He has become aware that some aspect of his sexuality and body is being used by another. Sexuality and the body is an object for someone else's will. When being compensated, the aspects of selfhood that were originally objectified during the abuse, are compensated through the grid; the core of the subjective experience is left unrecognized. So despite the provision of apologies and other non-monetary awards, the manner in which the compensation is determined, explained, and

\textsuperscript{261}Ibid. at Appendix 1, p. 12.

\textsuperscript{262}Ibid.

\textsuperscript{263}Supra note 30.
processed can lead to commodification, in the same way that beef is prepared for sale. In other words, the worth of their subjective injury is simply being derived through a process with little reference to their understanding of their pain. Because the compensation process itself seems to commodify the injuries, and because no explanation was given to the contrary, the hegemony of market rhetoric creates the impression among claimants that they were “labeled like beef” and were receiving “blood money”. The reactions of the claimants indicates the degree to which market rhetoric permeates our understanding of economics. The abuse that they went through is again somehow separate from them while at the same time reflecting on their value as a person.

(a) Evaluation of non-judicial treatment of compensation

In negotiating a remedy for institutional abuse the parties can address a broad range of issues including the development of a process that contributes to their health and well-being. Unfortunately, if no thought is given to the meaning of compensation, the meaning attributed to the compensation by the parties and the public may achieve opposite results from the original healing goals envisioned in the alternative dispute resolution process. Although not perfect, judges can at least refer to jurisprudence on non-pecuniary damages in order to provide a non-commodified meaning to compensation. This at least gives the claimant recognition of a form of subjectivity that is beyond the reach of the market place. The judicial decision\(^{264}\) that provides a non-objectifying explanation of damages has the potential

\(^{264}\) The author recognizes that the judicial process itself can be daunting and damaging to the psychological well-being of the plaintiff. This chapter, however, focuses on the
to preserve the integrity of the victim’s identity.265

Non-judicial programs that do not articulate the meaning of compensation cannot rely on some precedential meaning to fill the gaps. The beauty with non-judicial processes is that it is possible for the parties to design a process that is tailored to the needs of the parties. The problem is that the parties have the responsibility to articulate the meaning of remedies in order to ensure that their intentions are clear in the agreement and throughout the administration of the program.

For example, in the Nova Scotia Compensation Program, the purpose of monetary compensation is not outlined in the agreement. This was a shortcoming of the dispute resolution process because it failed to explicitly recognize the subjective aspect of injuries arising from abuse. In the absence of any other articulation, the grid format used for distributing compensation indicates that claimants were compensated based upon the acts of abuse and not upon the subjectively-felt effects of abuse such as pain and suffering. The grid format suggests that the party responsible for the abuse is using an objectifying gaze and not recognizing the subjective nature of the abused person. This effectively denies the abused

necessity of providing meaning for compensation once liability has been determined.

265 Although I have focused on the Muir case, there are other cases where the judge has explicitly recognized the nature of non-pecuniary compensation. For example, please see S.M.A.B. v. J. N., [1991] B.C.J. no. 3940, online: QL (CJ) where the Thackray J. stated the following in awarding compensation for child sexual abuse: “no amount of money can replace the lost years. No amount of money can totally overcome the damage that has been done.... The money is designed to try and give solace to the victim and to try in some way to compensate for what has been lost.”
person an opportunity to receive recognition of her whole person, as opposed to simply a recognition of the act of abuse. Any attempts to develop identity and empowerment through the process will be diminished if the meaning of the remedy does not reflect the re-configuration of the abuser/abused relationship.

H. Conclusions

Claims of institutional abuse have been dealt with in a variety of ways. Damages have been awarded by courts for personal injury inflicted by institutional authorities. Where there are many cases of abuse in one jurisdiction, compensation programs and other alternatives have been developed by governments to pay awards to abuse claimants. These programs have the potential for satisfying the various needs of the parties in institutional abuse cases. Negotiations conducted by parties who are aware of their needs can assert that the agreement must include a healing component and must recognize the integrity of the participants. These all too human needs must not be lost in the negotiations when money become the prime discursive tool for achieving agreement. Although monetary compensation is often the core component of the agreement, integrity and healing can still be incorporated into the meaning of the compensation that is awarded. However because of the hegemonic nature of commodification in our discourse, parties must actively provide an alternative conception of compensation that recognizes aspects of human personality that cannot be objectified from one's sense of self. Compensation must be conceptualized and articulated in a way that recognizes the subjective content and integrity of human personality.
I. Recommendations

Although the remedy itself must emerge from the expressed goals and interests articulated in the dispute resolution process, I would suggest that the parties involved in designing a non-judicial compensation program should consider articulating the meaning of compensation. Such an articulation might contain the following:

- monetary compensation is symbolic recognition of the pain and suffering inflicted upon the person;
- monetary compensation is acknowledgment that those responsible for the abuse have listened to testimonials about the impact of abuse; and,
- monetary compensation acknowledges the shift in power and the ability of abused persons to contribute their understanding of abuse in social discourses.
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(the) self is both autonomous and socially dependent, vulnerable enough to be undone by violence and yet resilient enough to be reconstructed with the help of empathic others.266

I can go anywhere and do anything I like. Nobody controls me. I can be who I really am. People helped me find that freedom, and nobody can ever take it away again. I am truly, truly free.267

The purpose of this thesis has been to discern ways for people who have been socially alienated to contribute their understanding of their experiences in the broader world. To discuss this, I have examined the situation of persons who have been abused as children in institutions and the dispute resolution processes used to address their injuries. I have chosen this group because abused persons have experienced radical disenfranchisement through the overpowering of their bodies. Also, their claims have recently been dealt with through the judicial system and through ADR processes.

Institutional abuse in Canada has emerged as a significant phenomenon over the past ten years. Before that time, there was little recognition of institutional abuse or historic child abuse in remedial processes. Over the past decade courts in Canada have come to recognize the various facets of the abusive experience. Judges have responded by acknowledging that there are bona fide reasons for delay in reporting of child abuse, by allowing the rules of testimony to accommodate the needs of abuse survivors, and by recognizing the subjective

266 Supra note 80 at 12.

267 Supra note 55 at 169.
aspect of the injuries resulting from abuse. However, regardless of the ability of the courts to recognize certain aspects of abusive experiences, the sheer number of cases that has arisen has prompted institutional defendants to move toward developing alternative dispute resolution processes.

In this thesis I have argued that the move toward ADR provides the opportunity for abuse survivors to achieve a relational remedy. Harms to identity inflicted through the relationship with the abuser can be remedied through healthy identity formation in the dispute resolution process. The abuser’s act of rendering the survivor powerless in the abusive relationship can be remedied through a non-judicial process by a re-configuration of the power relationship. The substantive remedy of monetary compensation can be conceptualized in such a way as to recognize the subjective nature of the harm and the abuse survivor’s new power to assert himself in the world.

In undertaking this project I first explored the nature of identity. I found that a post-modernist conception of identity fails to provide the abused person with the agency to exercise control in the remedial process. A liberal conception of identity, however, fails to appreciate the relationships of power that give rise to socially constructed identities. The most accurate description of identity that recognizes both our social nature and the ability to exercise volition arises from a relational notion of identity. In exploring theories of relational identity, I found that Lugones’ understanding of the plurality of existence and her notion of a thin, liminal self, provided a useful description of identity. However, I did not discard post-modernist notions of power and in fact I relied upon Foucault’s description of
the inter-relationship between power, knowledge and discourse to fill out my analysis.

My next task in this project was to describe abuse and the various effects of abuse. I concluded that abuse fragments a person's sense of connection with her body, supplants her understanding of who she is, and overcomes her sense of volition or will. For institutionally abused persons, these harms can be addressed through a process where they can exercise agency to recuperate these lost faculties. An ADR process where there is the possibility of exercising power directly with the other party provides such forum.

The problem that arose was that in order for the abused person to exercise his will in the negotiation to develop an ADR process, he must first face the daunting task of overcoming the privacy initially imposed by the abuser. In order for this to occur, the abused person must have the opportunity to re-orient himself so that he can access a loving listener. This is the first step on the journey before seeking a remedy in the public arena.

The second task was to find a way for the person to find meaning for the abusive experiences that is distinct from the meaning imposed by the abuser. By speaking to others who have experienced abuse, the survivor will more easily find meaning that corresponds to her subjective experience of abuse. Once this has been accomplished, the survivor has a foundation for selfhood that is grounded in a 'world' or relational matrix that is loving and non-abusive. In this personal space, the abuse survivor can gather the strength to speak in the public arena about the abusive events.
When a person speaks publicly, the nature of the testimony will be defined by the purpose of the speaker and the listener. I described legal testimony, therapeutic testimony, historic testimony, and political testimony. I examined the situation where different testimonial purposes have been attributed to the same speech. I have determined that one of the problems that arises where there are different or unclear testimonial purposes is that the resulting confusion may lead to the invalidation of survivor speech.

In order to protect survivor speech, a group that has an identity stemming from common experiences of abuse must be able to assert the subjective knowledge of the survivors' abusive experiences. In asserting this common goal beyond the group, the group develops a political aspect. With respect to validation of speech, the validation method chosen in a negotiation will reflect the importance of the various parties' interests. If survivors wish to seek a form of remedy from the government, they should assert the importance of their understanding of abuse for the purpose of determining a validation method. If they have the power to assert the significance of their experiences in the negotiation arena, then ideally a validation method will emerge that will recognize the interests of all parties affected by the allegations of abuse.

Depending upon the interests developed by the parties, the actual dispute resolution process may take many forms. Parties may develop a restorative process, a public inquiry, a compensation program or some permutation of an existing process. If they choose to develop a compensation scheme that provides a monetary remedy, there must be some articulation of the meaning of monetary compensation so that abuse survivors are not re-
objectified by the remedy. For judges, the process dictates that they turn their mind to the meaning of compensation and address it in their decisions. Consequently, judicial decisions can expressly recognize the subjective nature of harm. Although there is the possibility that parties in a non-judicial process will articulate the meaning of compensation, if they fail to do so, an objectifying mechanism for distributing compensation may lead one to believe that subjective harm has been ignored.

Throughout this thesis, I have come to the conclusion that non-judicial processes can encompass and recognize identity formation and political empowerment more readily than judicial processes. Because the parameters of judicial processes are not as flexible as non-judicial ones and because a third party provides the ultimate decision, there is less ability to accommodate innovative mechanisms for advancing the subjugated knowledge of the abuse survivors.

However, with the higher degree of control in non-judicial process comes an increase in the level of responsibility for the parties. They must actively design a process that protects the subjective aspects abuse and recovery, lest they be overtaken by dominating discourses. If no attention is paid to developing process mechanisms to achieve a particular purpose, then that purpose will not necessarily be achieved. If the parties want to have a process that will heal the abuse survivors, on collective and individual levels, the process must be able to create a space within existing discourses for this goal to be achieved. On the issue of the meaning of compensation, I have concluded that judicial decisions are more likely to recognize the subjective nature of the harm inflicted upon abused persons. Unless non-
judicial processes actively articulate the meaning of compensation, there is a risk that the method of distribution will provide a commodifying meaning to the monetary award.

In working through my analysis various themes have emerged. I have focused on abuse as being relational and not simply a compilation of discrete abusive acts. The abusive relationship fixes the person in a damaging and unloving environment just at that period in a person's life when she is developing her sense of individuality. The theme of imposed privacy has arisen throughout the thesis. I have looked at privacy that is imposed upon an individual and upon groups as being counter-productive to their ability to participate in the world. The importance of speech has been emphasized, especially in the assertion of interests. Although I recognize the power of detachment and disengagement, in this thesis I have been primarily concerned with the achievement of a remedy through the re-engagement of a relationship between abuse survivors and the governmental authorities responsible for institutional abuse.

In this thesis I have focused on the potential for a process to achieve substantive remedies such as empowerment and identity formation. I have asserted that the process governing the re-engagement of the relationship itself can remedy the damage initially caused by the abusive relationship. I have emphasized the subjective understanding of the experience of abuse as opposed to potentially objectifying expert knowledge. Throughout the thesis, there has been an emphasis on physical experience and the emotional harm that results from damages to the physical self. We do not exist without our bodies; our sense of self is affected by abuse to our bodies. As a source of our understanding of the world, we cannot
lose sight of our physicality in asserting meaning and interests in the world around us. Consequently, I have tried to shift the focus from the intentions of the listener to the intentions of the speaker when an abused person is speaking about her experiences. I have focused on the physical experiences of abuse and their immediate meaning to the abused person instead of focusing on abstractions. Further, I have asserted that love and loving relationships are the fundamental force in the recovery process of abused persons.

I have made these efforts in order to try to address the alienation that results from physical forms of abuse. Abuse alienates a person from her own body. It alienates her from her immediate social environment. It alienates her from the world. The nucleus of a return to the world begins with an abused person coming to an understanding of physical existence that does not depend upon the abuser. From there, barriers to participation can be overcome, however it is not an easy journey. In clarifying the nature of the barriers, I have attempted to locate places in dispute resolution processes where there are possibilities for the emergence of identity and power.

A. Further Inquiry

I leave the task of designing an appropriate process to the parties and to other theorists. They will be better able to define the parties’ interests and to explore the potential of restorative justice, public inquiries, special counsel and other such processes to meet their needs.

The question of the subjugation of intra-group minorities must be addressed in order to

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perfect the sustainability of this model of empowerment. Specifically questions surrounding
the relationship between individual self-actualization and collective empowerment might
serve as fodder for further graduate studies in law, philosophy, politics, or any other
discipline where this is relevant.

Hopefully this paper has clarified some of the pitfalls that may stand in the way of an abused
person who is trying to bring her experiences and the meaning of those experiences into the
public realm. As more people enter well-designed processes, it will be easier for them to
find a sense of self and overcome alienation in the world and worlds that non-abused persons
take for granted.
Appendix ‘A’
MEMORANDUM OF UNDERSTANDING

REGARDING

COMPENSATION FOR

SURVIVORS OF INSTITUTIONAL ABUSE
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**SCHEDULE "A":** File Reviewers  
**SCHEDULE "B":** Compensation Categories and Counselling Allotments  
**SCHEDULE "C":** Guidelines  
**SCHEDULE "D":** Release
MEMORANDUM OF UNDERSTANDING
REGARDING
COMPENSATION FOR SURVIVORS OF INSTITUTIONAL ABUSE

PREAMBLE

WHEREAS the Province of Nova Scotia operated the Nova Scotia School for Boys (Shelburne Youth Centre) from 1947 to date, and the Nova Scotia School for Girls (Nova Scotia Residential Centre) from 1967 to date; and the Nova Scotia Youth Training Centre from 1927 to date;

AND WHEREAS individual Survivors have come forward at various times disclosing the Sexual and Physical Abuse that was perpetrated against them and other residents at the Institutions;

AND WHEREAS the efforts of individual Survivors to bring their abusers to justice have led to internal disciplinary and police investigations concerning abuse at the Institutions, which investigations are continuing;

AND WHEREAS the Minister became aware of allegations of Sexual and other Physical Abuse at the Institutions;

AND WHEREAS the Minister recommended a process whereby an independent investigation into the events that took place would be ordered to determine what had happened, who was involved, who knew what was happening and what actions were taken in response by those in authority; and further, that if such investigation revealed that Abuse had occurred, an alternate dispute resolution mechanism was to be put in place to determine appropriate compensation for the Survivors of the Abuse;

AND WHEREAS pursuant to the recommendation of the Minister and the direction of the Executive Council of the Province, the Honourable Stuart G. Stratton, Q.C., was appointed to carry out an investigation, the terms of his reference for engagement being to:

(a) investigate the incidents of Sexual and other Physical Abuse of residents that occurred or are alleged to have occurred at the Institutions;

(b) investigate and determine the practices and procedures in place at the Institutions that either permitted or hindered the detection of Abuse of residents;
(c) investigate and determine whether any employees in the Institutions or any public officials were aware of abusive behaviour of staff toward residents; and

(d) investigate and determine what steps, if any, were taken by employees or officials in reference to any such Abuse.

AND WHEREAS after conducting the investigation, the Honourable Stuart G. Stratton, Q.C., determined, inter alia, that Sexual and Physical Abuse had taken place at the Institutions and that staff of the Institutions and officials in the Department of Community Services were aware the Abuse was taking place but, at least until the mid-1970s, no positive steps were taken to end the Abuse;

AND WHEREAS the Province agreed to employ an alternate dispute resolution mechanism to determine compensation for Survivors of Physical and Sexual Abuse and entered into discussions with the legal representatives of Survivors;

AND WHEREAS the Province has agreed to compensate Survivors of Physical and Sexual Abuse through a compensation process that is principled, respectful, timely and consistent with the following principles:

THAT the Province recognizes that the Survivors were all minors in the care and custody of the Province during the periods of time they were committed to the Institutions;

THAT Abuse of children can never be condoned and can only be condemned;

THAT the physical and sexual abuse of children by adults in positions of power and trust is a fundamental betrayal that operates to deny a child’s dignity and autonomy;

THAT the fundamental purposes of this compensation process are:

- to acknowledge moral responsibility for the Physical and Sexual Abuse experienced by the Survivors which was perpetrated, condoned, or directed by employees of the Province during the time the Survivors were resident in the Institutions;

- to affirm the essential worth and dignity of all of the Survivors, who were residents of the Institutions;

- to assist the Survivors, in a tangible way, with the healing process;

- to affirm to the Survivors that they were not responsible in any way for the Physical and Sexual Abuse perpetrated, condoned, or directed by employees of the Province while the Survivors were resident in the Institutions; and
to implement financial compensation and other benefits to Survivors in a principled, respectful and timely fashion.

**DEFINITIONS**

1. In this Memorandum of Understanding:

(a) "Demand" means a letter from a Survivor to the Province which states the amount of compensation sought by the Survivor in accordance with Schedules "B" and "C" and which is accompanied by a Statement;

(b) "Department" means the Department of Justice of the Province of Nova Scotia, unless another Department is specifically named;

(c) "Institutions" means the Nova Scotia School for Boys, the Nova Scotia School for Girls and the Nova Scotia Youth Training Centre;

(d) "Minister" means the Minister of Justice of the Province of Nova Scotia;

(e) "Physical Abuse" means any act of physical assault which was a violation of the provisions of the *Criminal Code*, as that legislation existed at the time the act took place;

(f) "Province" means the Province of Nova Scotia;

(g) "Racist Acts" means, in the list of aggravating factors contained in Schedule "C", acts of discrimination based on race which occurred in connection with Physical or Sexual Abuse for which compensation is awarded;

(h) "Response" means the Province's written response to a Survivor's Demand indicating the Province's acceptance, rejection, or compromise offer and which, in the event of a rejection or compromise offer, shall include written reasons and all information or materials in the possession or control of the Province upon which the Province relied in making its rejection or compromise offer;

(i) "Sexual Abuse" means:

(i) acts of oral, vaginal or anal intercourse; masturbation; fondling; digital penetration; and acts of sexual interference, which may include inappropriate watching or staring, comments and sexual intimidation; and includes any sexual act which was a violation of the *Criminal Code*, as that legislation existed at the time the act took place; and/or

(ii) attempted acts of oral, vaginal or anal intercourse, masturbation, fondling, or digital penetration, which were a violation of the *Criminal Code*, as that legislation existed at the time the act took place;
(j) "Statement" means a written statement detailing the Physical and/or Sexual Abuse experienced by a Survivor, taken by Facts-Probe Inc., the Department's Internal Investigation Unit, or a police agency, and signed by the Survivor;

(k) "Survivor" means an individual who alleges that he or she was a victim of Physical and/or Sexual Abuse at one or more of the Institutions from the years referred to in the Preamble until the present; and

(l) "Verbal abuse" includes any comments which would be a violation of the Nova Scotia Human Rights Act.

PROCESS

General

2. Survivors, through their legal representatives, have resolved a process and parameters for compensation for the Physical and Sexual Abuse they experienced while resident in the Institutions. It is expressly acknowledged among the parties that neither the terms of this Memorandum nor the process which led to its creation constitute an admission of liability, vicarious or otherwise, on the part of the Province. For further certainty, the parties agree that this Memorandum shall not be introduced as evidence in any existing or future legal proceedings.

3. Survivors whose claims are determined to be valid either through negotiation or file review shall be compensated for Sexual Abuse and Physical Abuse perpetrated, condoned, or directed by employees of the Province during the time the Survivors were resident in the Institutions.

4. Survivors shall only be eligible for the compensation and other benefits identified in this document where it is established, through negotiation or file review, that Physical and/or Sexual Abuse occurred.

5. Compensation determined under this Memorandum of Understanding, whether through negotiation or file review, shall be determined by reference to Statements and, at the option of either the Survivor or the Province, medical records of any of the Institutions. Reference may be made to medical reports prepared for the purpose of establishing Physical Abuse, physical injury or physical disability where no other independent records exist. No monetary compensation shall be made for any psychological consequences of Abuse.

6. Statements given by a Survivor and reduced to writing or recorded on videotape or audiotape with a view to validating the Survivor's claim for compensation shall be used only for purposes of this process and shall not be released to the public without the prior written consent of the Survivor.
7. Survivors shall have access to:

(a) any written statement taken by Facts-Probe Inc. or the Department’s Internal Investigation Unit from the Survivor himself or herself or which the giver of the statement has consented in writing to release; and

(b) any medical, educational, social work or probation files kept or maintained by the Institutions in respect of the Survivor personally and not related to others.

8. Any dispute with respect to the truth of the allegations of Abuse or quantum of compensation shall be resolved either through negotiation between the parties (during which corroborative evidence may be introduced) or, if such dispute cannot be so resolved, through the file review process established in this Memorandum of Understanding.

MAKING A CLAIM

9. A Survivor who chooses to participate in the process outlined in this Memorandum shall make a Demand upon the Province.

10. The Province shall provide its Response to the Demand within 45 days after receipt. If the Demand is accepted by the Province, then payment in full shall be made within 20 days of the acceptance, and in any event not later than 65 days from the date of the Demand, upon receipt by the Province of a Release in the form attached as Schedule "D", signed by the Survivor.

11. If the parties have not concluded an agreement through negotiation within 45 days of the Demand, or such further time as the Survivor may agree, the Survivor may continue negotiation with the Province or give notice to the Province that the Demand will be submitted to file review in accordance with this Memorandum. Only written materials referred to in this Memorandum of Understanding, and which have been exchanged by the Survivor and the Province during negotiations, shall be included in the file as either Demand or Response materials for file review.

FILE REVIEW

12. The parties acknowledge that the Survivors have chosen the list of file reviewers attached as Schedule "A", and the Province has accepted the list.

13. The Survivors (as a group) and the Province shall each select interview statements taken by Facts-Probe Inc. which, in their opinion, are representative of the categories contained in Schedule "B" (to a maximum of four statements per category for each of the Province and the Survivors). Upon a file reviewer agreeing to conduct a particular file review, that person shall be provided with the volumes of statements. All names and dates in such statements shall be blanked out for the purposes of their inclusion in the volumes. No interview statement shall be included in any volume without the prior consent of the person who gave the statement. The file
reviewers shall review all of the statements so submitted prior to conducting any file reviews under this Memorandum.

14. If a Survivor chooses to submit a Demand to file review, the Survivor shall give written notice of file review to the Province, indicating the Survivor’s choice of file reviewer from the list attached as Schedule "A". Concurrent with the notice of file review, the Survivor shall execute a Release in the form attached as Schedule "D" and deliver it to the Province. The Province shall only reject the Survivor’s choice of file reviewer in the case of a conflict of interest, and shall provide written confirmation of acceptance or rejection of the file reviewer within 10 days of receipt of the notice. If necessary, the Survivor shall then have 10 days to choose another file reviewer. This process may continue until a file reviewer has been appointed, at which time the Survivor shall forward the Demand to the file reviewer and shall at the same time provide a copy of the Demand to the Province.

15. File review shall take place within 30 days of the Survivor submitting the Demand to the file reviewer. If the file reviewer chosen by the Survivor is not available within the time limits prescribed herein, then the Survivor and the Province may agree to waive the time limits for purposes of having the matter reviewed by that particular person or, if both parties are not agreeable to waiving the time limits, the Survivor shall choose a person from the list who can conduct a review within the time limits described. The file reviewer ultimately chosen shall not have the power to adjourn or recess a proceeding beyond the time limits prescribed without the consent of both parties.

16. The Province shall have 20 days from the date the Survivor submits the Demand to the file reviewer to forward its Response to the file reviewer.

17. Concurrently with the Survivor’s forwarding of the Demand to the file reviewer, the Survivor shall be entitled to request an appearance before the file reviewer to support his or her Demand. The Province shall be notified in writing by the Survivor at the time such request is made. The Survivor shall be entitled to appear before the file reviewer either personally or by way of videotape, audiotape or telephone. The Survivor may appear without counsel, in which case the Survivor will be the sole party to appear before the file reviewer. The Survivor may appear with counsel to make representations, in which case the Province may also appear and make representations.

18. Should the Survivor make allegations which are not already contained in the Statement when appearing before the file reviewer, the file reviewer shall explain the following options to the Survivor and ask the Survivor to choose one of them:

(a) Immediately adjourn the file review, upon which the Survivor shall be required to give a further Statement and make a further Demand upon the Province as outlined in paragraph 9; or

(b) Disregard the new allegations when deciding the Survivor’s quantum of compensation.
19. The Province undertakes to treat all Survivor information it holds or receives in respect of a Survivor’s claim for compensation pursuant to this Memorandum of Understanding in accordance with its obligations under the Freedom of Information and Protection of Privacy Act.

20. Should the Survivor choose to give a further Statement and submit a further Demand to the Province as outlined in paragraph 18(a), the Survivor shall be responsible for his or her legal costs incurred from the date of the adjournment.

21. The file reviewer shall render a written decision to the Survivor and the Province within 30 days of the later of the Province’s submission or the appearance before the file reviewer. The file reviewer shall be provided with this Memorandum of Understanding and shall issue a decision that accords with Schedule “C”, having regard to the Statement Volumes provided by counsel for the Province and counsel for the Survivors, and which does not exceed the monetary limits set forth in Schedule “B”.

22. Should the file reviewer fail to render a written decision within the time limit outlined in paragraph 21, $100 shall be deducted from the file reviewer’s fee for every day the decision is late.

23. The decision of the file reviewer is final and not subject to appeal or other form of judicial review. The file review is not a submission to arbitration under any legislation, nor is it a submission under any other legislative enactment dealing with alternative dispute resolution mechanisms and providing for some right of appeal.

COMPENSATION

24. Where compensation becomes payable as a result of negotiation or a file reviewer’s decision, the Province shall pay such amount to the Survivor within 20 days of the amount being decided.

25. All compensation awards shall be paid to the lawyer representing the Survivor, in trust, and shall only be paid upon the Province’s receipt of a written direction to pay signed by the Survivor.

SOCIAL ASSISTANCE WAIVER

26. A social assistance waiver will be provided to Survivors who receive compensation pursuant to this Memorandum of Understanding, the effect of which will be to deem the amount of compensation received by the Survivor not to be income for purposes of the laws of the Province of Nova Scotia. However, any income which a Survivor earns in a year, whether it be income generated from the compensation amount or otherwise, shall be treated as income and may disqualify the individual from social assistance in accordance with the applicable standards or regulations under the applicable legislation.
27. The Province undertakes to request the other provinces and territories of Canada to enact reciprocating policies or legislation to provide similar waivers.

COUNSELLING

Interim

28. Survivors acknowledge that the Province has made interim psychological counselling available to them since July 20, 1995, to a maximum of the earlier of one year’s counselling or $5,000 in expenditure for counselling.

29. A Survivor shall be entitled to continue interim counselling until:

   (a) compensation becomes payable to the Survivor pursuant to this Memorandum of Understanding;

   (b) a file reviewer determines that no compensation is payable to the Survivor; or

   (c) the Survivor chooses to actively pursue legal action against the Province in respect of the alleged Abuse.

Long-term

30. Upon an amount becoming due to a Survivor as compensation pursuant to this Memorandum of Understanding, all interim counselling shall be terminated and the Survivor shall become entitled to receive counselling in accordance with Schedule "B".

31. The counselling allotment so awarded may be applied to the cost of employment counselling, psychological counselling, and/or financial counselling, at the option of the Survivor.

32. A Survivor may transfer any portion of the value of his or her psychological counselling to his or her spousal partner or children, and the cost of such counselling shall be deducted from the Survivor’s counselling allotment.

33. The Province shall be entitled to require that all counsellors be accredited in accordance with the Province’s initial agreement to provide interim counselling in order to qualify for service provision to Survivors pursuant to this Memorandum.

OTHER BENEFITS

35. The Province shall provide Survivors and/or their counsel with a list of programs available in Nova Scotia through the Drug Dependency Services division of the Department of Health.

36. The Province shall facilitate and fund the preparation by an independent recorder of a public report of Survivors’ testimonials.
LEGAL FEES

37. Legal fees incurred by Survivors shall be paid by the Province in accordance with the following Sections.

38. Legal fees shall be paid in accordance with the following tariffs:

(a) Senior counsel (10+ years' practice): their usual hourly rate to a maximum of $175 per hour.

(b) Intermediate counsel (5 to 9 years' practice, inclusive): their usual hourly rate to a maximum of $150 per hour.

(c) Junior counsel (less than 5 years' practice): their usual hourly rate to a maximum of $125 per hour.

(d) Articled clerks: their usual hourly rate to a maximum of $75 per hour.

39. Time spent by counsel's office staff shall be considered to be included in the above hourly rates.

40. Disbursements shall be charged at the actual rate incurred, and may include the usual disbursements paid in relation to the preparation and advancement of a Survivor's claim (i.e., photocopying, postage, long-distance telephone calls).

41. Counsel's travel shall be paid, where the distance travelled exceeds 50 kilometers, in accordance with the following tariffs:

(a) Where travelling is done between the hours of 8:00 a.m. and 7:00 p.m., counsel's time shall be charged in accordance with the hourly rates established in paragraph 38.

(b) Where travelling is done outside the hours of 8:00 a.m. and 7:00 p.m., counsel's time shall be charged at one-half the hourly rates established in paragraph 38.

(c) Airfare shall be paid at the actual amount incurred (receipts required).

(d) Mileage, where travel was by car, shall be paid at $0.29 per kilometer.

(e) Hotel room rates, exclusive of room service, shall be paid at the actual amount incurred (receipts required).

(f) Actual cost of two meals per day shall be paid, to a maximum of $40.
Memorandum of Understanding Meeting Fees

42. Counsel may submit an account for legal fees, travel and disbursements incurred, from July 20, 1995 to the signing date of this Memorandum, in the course of discussions with the Province to develop this Memorandum of Understanding, exclusive of time, travel and disbursements incurred in connection with services provided to a particular client's civil claim.

43. Accounts for legal services rendered in accordance with paragraph 42 may only be submitted on or after the signing date of this Memorandum of Understanding.

44. The Province shall, within 60 days after receipt of an account for legal services rendered in accordance with paragraph 42, respond in writing to the lawyer who submitted the account, indicating the Province's acceptance or rejection of the account as rendered. If the Province fails to respond within 60 days of receiving the account, then the amount set forth in the account shall be deemed to be rejected by the Province.

45. Should the Province reject the account as submitted, counsel who submitted the account shall either negotiate with the Province to establish, in writing, an account which is mutually acceptable to the Province and counsel; or shall notify the Province in writing that the account may be submitted to taxation in accordance with paragraphs 59-63.

46. Once the final amount of the account has been determined through acceptance, negotiation or taxation, the amount so determined shall become payable within 30 days after the determination of the amount of compensation payable to that counsel's first client to receive compensation.

47. Counsel shall not be entitled to submit accounts in respect of any Memorandum of Understanding meetings which they did not personally attend.

Litigation Fees

48. Counsel may submit an account for legal fees, disbursements and travel incurred in furtherance of a particular Survivor's civil case, from the date counsel was retained by the particular Survivor to the signing date of this Memorandum of Understanding, which account shall be exclusive of time spent: in preparation for, correspondence regarding, or attendance at media interviews; and in respect of lobbying the Province for a public inquiry.

49. Accounts rendered in accordance with paragraph 48 shall be submitted on or after the date of signing of this Memorandum of Understanding.

50. The Province shall, within 90 days after receipt of an account for legal services rendered in accordance with paragraph 48, respond in writing to the lawyer who submitted the account, indicating the Province's acceptance or rejection of the account as rendered. If the Province fails to respond within 90 days of receiving the account, then the amount set forth in the account shall be deemed to be rejected by the Province.
51. Should the Province reject the account as submitted, counsel who submitted the account shall either negotiate with the Province to establish, in writing, an account which is mutually acceptable to the Province and counsel; or shall notify the Province in writing that the account may be submitted to taxation in accordance with paragraphs 59-63.

52. Once the amount of the account has been determined through acceptance, negotiation or taxation, the amount so determined shall be paid within 30 days of the date of determination of the compensation payable to that particular Survivor. For further certainty, if there is a final determination that no compensation is payable to the Survivor, then no litigation fees shall be payable in respect of that Survivor.

Process Fees

53. Counsel may, on receipt of compensation funds for a particular Survivor, submit an account for legal fees, disbursements and travel incurred on behalf of that Survivor after the date of signing of this Memorandum of Understanding.

54. Such account shall not exceed 10 hours' representation.

55. The Province shall, within 30 days after receipt of an account for legal services rendered in accordance with paragraph 53, respond in writing to the lawyer who submitted the account, indicating the Province’s acceptance or rejection of the account as rendered. If the Province fails to respond within 30 days of receiving the account, then the amount set forth in the account shall be deemed to be rejected by the Province.

56. Should the Province reject the account as submitted, counsel who submitted the account shall either negotiate with the Province to establish, in writing, an account which is mutually acceptable to the Province and counsel; or shall notify the Province in writing that the account may be submitted to taxation in accordance with paragraphs 59-63.

57. Once the final amount of the account has been determined through acceptance, negotiation or taxation, the amount so determined shall become payable within 20 days.

Contingency Fees

58. The parties agree that once a Survivor has signed a Release in the form attached as Schedule "D" all contingency fee agreements previously entered into between counsel and the Survivor shall be revoked, and no further contingency fee arrangements shall be entered into between counsel and the Survivor in respect of compensation payable under this Memorandum of Understanding.

Taxation

59. (1) Notwithstanding any provincial legislation respecting taxation of legal accounts for services, the parties agree that Robert W. Wright, Q.C., shall act as a taxing master in respect of any accounts for services rendered in accordance with this Memorandum of Understanding.
(2) Upon receipt of a written request for taxation, Robert W. Wright, Q.C. shall, within 30 days of receipt of the request, set the matter down for a hearing on a date which is acceptable to both parties, but in any event the hearing shall be held within 90 days of receipt of the request.

60. Notwithstanding paragraph 59, counsel and the Province may agree in writing to submit an account to the provincial Taxing Master appointed in accordance with provincial legislation, where Robert W. Wright, Q.C., is in a conflict of interest position in respect of that counsel or a particular Survivor.

61. The decision of Robert W. Wright, Q.C., or the provincial Taxing Master in respect of a particular account shall be final and shall not be subject to appeal.

62. Taxation of a particular account may be conducted by telephone conference or in person, and counsel whose account is being taxed and the Province shall be entitled to participate in the taxation.

63. The Province shall be responsible for payment of the fees of either Robert W. Wright, Q.C., or the provincial Taxing Master.

ADDITIONAL

64. The effective date of this Memorandum of Understanding shall be June 17, 1996.

65. After the effective date of this agreement, if a Survivor who has given a Statement and is eligible for compensation pursuant to this agreement dies, then the lawful heirs/estate of the Survivor shall be entitled to make a claim for compensation under this Memorandum of Understanding.

66. The Minister, on behalf of the Province, shall, within 30 days of the effective date of this agreement, convey a public apology to the Survivors and families of Survivors for the Physical and Sexual Abuse the Survivors experienced while resident in the Institutions.

67. Following the conclusion of settlement of any individual claim hereunder, the Minister shall, by personal letter addressed to the Survivor, convey an apology to the Survivor.

68. A Survivor who is entitled to compensation hereunder may, at the Survivor’s option, have all or part of the compensation paid by way of structured settlement on such terms and conditions as may be agreed upon.

69. To be eligible for compensation hereunder, a Survivor must, within six months of the effective date of this Memorandum, give written notice of the Survivor’s intention to make a Demand upon the Province, and must submit a Demand within six months of giving such notice.

70. The parties, by their signatures below, agree that this Memorandum of Understanding constitutes all of the terms discussed among them, and further agree that there are no other
written or verbal terms which have been negotiated outside of this Memorandum of Understanding.

71. The parties agree that this Memorandum of Understanding may be executed in counterparts, by facsimile signature or otherwise, and that such counterparts shall form part of the Memorandum, and shall be as effective as if the original Memorandum had been signed by each party.

CONSENTED TO AS TO FORM as of the 15th day of May, 1996.

THE PROVINCE OF NOVA SCOTIA

COUNSEL FOR SURVIVOR

Per: ______________________________ Per: ______________________________

Per: ______________________________

Per: ______________________________

Per: ______________________________
SCHEDULE "A"

FILE REVIEWERS

(List to be Provided by June 17, 1996)
## SCHEDULE "B"

### COMPENSATION CATEGORIES and COUNSELLING ALLOTMENTS

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<td>Category 3</td>
<td>Severe Sexual and Minor Physical</td>
<td>$60,000 - $80,000</td>
<td>$7,500</td>
</tr>
<tr>
<td></td>
<td>Severe Physical and Minor Sexual</td>
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<td>Category 4</td>
<td>Severe Sexual</td>
<td>$50,000 - $60,000</td>
<td></td>
</tr>
<tr>
<td>Category 5</td>
<td>Severe Physical</td>
<td>$25,000 - $60,000</td>
<td></td>
</tr>
<tr>
<td>Category 6</td>
<td>Medium Physical and Medium Sexual</td>
<td>$50,000 - $60,000</td>
<td></td>
</tr>
<tr>
<td>Category 7</td>
<td>Minor Sexual and Medium Physical</td>
<td>$40,000 - $50,000</td>
<td>$10,000</td>
</tr>
<tr>
<td></td>
<td>Minor Physical and Medium Sexual</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Category 8</td>
<td>Medium Sexual</td>
<td>$30,000 - $50,000</td>
<td></td>
</tr>
<tr>
<td>Category 9</td>
<td>Minor Sexual and Minor Physical</td>
<td>$20,000 - $30,000</td>
<td>$5,000</td>
</tr>
<tr>
<td>Category 10</td>
<td>Medium Physical</td>
<td>$5,000 - $25,000</td>
<td></td>
</tr>
<tr>
<td>Category 11</td>
<td>Minor Sexual</td>
<td>$5,000 - $30,000</td>
<td></td>
</tr>
<tr>
<td>Category 12</td>
<td>Minor Physical and/or Sexual Interference</td>
<td>$0 - $5,000</td>
<td></td>
</tr>
</tbody>
</table>
SCHEDULE "C"

GUIDELINES

The following guidelines are not intended to be exhaustive, but examples of the type and frequency of abuse that would merit inclusion in a particular category. The number of incidents may not be determinative of category, but may offer guidance to determine category. Cases shall be evaluated in the context of Statements available for review. After determining which category a Survivor shall be placed in, a file reviewer shall consider any aggravating factors present and may, on the basis of the aggravating factors, move the Survivor up within the range of that category. The absence of aggravating factors in any particular situation shall not preclude a Survivor from being placed at the top of a category range.

For purposes of clarity, any act which constituted sexual assault or attempted sexual assault under the Criminal Code, as it existed at the time of the act, as well as sexual interference as outlined herein, shall be considered to be Sexual Abuse.

SEVERE SEXUAL:

Type of Abuse:
- anal intercourse
- vaginal intercourse
- oral intercourse

Duration/Number of Incidents:
- repeated, persistent, characterized as "chronic", "severe"

Aggravating Factors:
- verbal abuse
- withholding treatment
- long-term solitary confinement
- Racist Acts
- threats
- intimidation

SEVERE PHYSICAL:

Type of Abuse:
- physical assault, with broken bones (i.e., nose, arm, etc.), or other serious physical trauma, with or without hands (i.e., objects), with evidence of hospitalization/treatment or permanent partial disability

Duration/Number of Incidents:
- repeated, persistent, characterized as "chronic," "severe"
SEVERE PHYSICAL, cont'd:

Aggravating Factors:
- verbal abuse
- withholding treatment
- long-term solitary confinement
- Racist Acts
- threats
- intimidation

MEDIUM SEXUAL:

Type of Abuse:
- anal intercourse
- vaginal intercourse

Duration/Number of Incidents:
- one or more incidents
- shorter duration

Type of Abuse:
- oral intercourse
- masturbation/
  fondling
- digital penetration

Duration/Number of Incidents:
- numerous incidents
- repeated, persistent

MEDIUM PHYSICAL:

Type of Abuse:
- physical assault, with broken bone or bones (i.e., nose,
  arm, etc.), or other serious physical trauma, with or
  without hands (i.e., objects), with evidence of
  hospitalization/ treatment if available
- chronic beatings, over significant period of time

Duration/Number of Incidents:
- one or more incidents
MEDIUM PHYSICAL, cont'd:

**Aggravating Factors:**
- verbal abuse
- withholding treatment
- solitary confinement
- Racist Acts
- threats
- intimidation

**MINOR SEXUAL:**

**Type of Abuse:**
- fondling
- masturbation
- oral intercourse
- digital penetration

**Duration/Number of Incidents:**
- fewer incidents
- short duration

**Aggravating Factors:**
- verbal abuse
- threats
- intimidation
- withholding treatment
- Racist Acts
- solitary confinement

**MINOR PHYSICAL:**

**Type of Abuse:**
- physical assault, with or without hands (i.e., objects)
  (a.k.a. common assaults)

**Duration/Number of Incidents:**
- isolated incidents
- short duration

**Aggravating Factors:**
- verbal abuse
- threats
- intimidation
- Racist Acts
- solitary confinement
SEXUAL INTERFERENCE: Type of Abuse (must be of a sexual nature):
- watching
- comments
- intimidation

Duration/Number of Incidents:
- repeated/persistent
- numerous incidents

Aggravating Factors:
- verbal abuse
- threats
- intimidation
- Racist Acts
SCHEDULE "D"

RELEASE

______________________________, called the "releasor," on behalf of my heirs, executors, administrators, successors and assigns, do hereby acknowledge that:

I am a Survivor of physical and/or sexual abuse experienced while I was a minor in the care and custody of the Province at one or more of the Institutions, as defined in the Memorandum of Understanding dated as of the 15th day of May, 1996.

I have received, read and understand the Memorandum of Understanding. I understand that the Memorandum of Understanding represents the full range of benefits to which I might be entitled and sets out the criteria or conditions that I must meet to access those benefits. There are no written or verbal representations outside of that Memorandum of Understanding that I am relying on.

I understand that the purpose of the process under the Memorandum of Understanding is to certify my claim and to determine the range of benefits to which I am entitled and which will provide the most benefit to me under the Memorandum of Understanding, having regard to the terms of the Memorandum of Understanding.

I further agree and understand that provision of any benefit to me under the Memorandum of Understanding is made without any admission that her Majesty the Queen in Right of the Province of Nova Scotia or her servants and/or agents were negligent or in breach of any duty towards me or that they were in any way responsible for my injuries or damages and that any liability is denied.

IN CONSIDERATION of the provision to me of the benefits under the Memorandum of Understanding and in accordance with its terms and by which I now agree to be bound, and subject my rights arising under the Memorandum of Understanding:

I hereby release and forever discharge Her Majesty the Queen in Right of Nova Scotia and her present and former servants, agents, employees or officials who were in any way involved in the administration of the Institutions, whether involved in direct supervision or management, from all manners of action, causes of action, claims or demands which as against any of the above I had, now have or may hereafter have for any cause, matter or thing whatsoever arising out of my attendance at any of the Institutions, and without limiting the generality of the foregoing, by reason of any injuries and damages which I experienced as a result of abuse or mistreatment otherwise actionable at law while I was a minor in the care and custody of the Province at any or all of the institutions;
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Gray v. Reeves (1992), 64 B.C. L. R. 275.
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