Resolving Claims of Abuse in Native Residential Schools: The Court's Role in Canada's Settlement Process

Delivered to the IX th Biennial Conference of the International Association of Women Judges

March 2008

Patricia Hennessy, Justice, Superior Court of Justice of Ontario, CANADA

In the 1800's during the French and British settlement in Canada, the government and the Christian churches established a residential school system for aboriginal children.

The goal was to provide a basic education, introduce Christianity and assimilate the younger generation of native people in a homogenous society with the new settlers. From 1884 attendance at these schools was mandated by law. Many families, remote and isolated across the country, did not accept this plan, and their children were forcibly removed from their families and brought to the residential schools. Many native children lived in these schools for a number of years, away from their families.

The residential school experience had a lasting and profound impact on the native people of Canada.

In the 1990's the Churches and the Federal Government formally and publicly apologized to the Native people of Canada for many of the abuses which occurred in these schools. This short talk will trace how we went

from mandatory attendance to public apology and Reconciliation process. I will touch on the history of the Residential Schools in Canada and a look at how aboriginal people have pursued judicial claims for compensation from the Churches and Government and finally at a Court sanctioned and monitored resolution for the assessment and payment of individual claims and the establishment of a Truth and Reconciliation Commission and a Healing Fund.

The History

"For over 100 years, Canada pursued a policy of requiring attendance of Aboriginal children at Residential Schools which were largely operated by religious organizations under the supervision of the federal government.

The children were required to reside at these institutions, in isolation from their families and communities. This policy was formally terminated only in 1996 with the closing of the last of the residential schools and has now been acknowledged as a seriously flawed failure." *Baxter v. Canada (Attorney General)*, 2006, at para. 2.

The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by those who attended the schools.

I will refer to them as survivors of residential schools.

The Royal Commission on Aboriginal People by our former Supreme Court of Canada Judge Bertha Wilson found that the children were removed from their families and communities to serve the purpose of carrying out a

concerted campaign to obliterate the habits and associations of Aboriginal languages, traditions and beliefs… in order to accomplish a radical re-socialization aimed at instilling the children instead with the values of Euro-centric Civilization.

The impact on Aboriginal women was especially devastating.

Many writers link the devastating social consequences of the residential schools with the higher than average rate of domestic violence involving native women. A study published by Statistics Canada in 2006 reported the following:

- 21 % of Natives reported being victims of spousal violence in 2004; this is three times the rate for non-Natives.
- Native women are eight times more likely than non-Native women to experience spousal homicide.

The Statistics Canada report summarized their study:

- Rates of spousal violence are higher among Aboriginal women than Aboriginal men or non-Aboriginal people. Many risk factors associated with violence for Aboriginal people have been cited, including lower educational achievement, higher unemployment rates, alcohol abuse, experiences of colonization, feelings of devaluation among Aboriginal people, and a history of abuse in residential schools. Although data on sexual assault are limited, police statistics show that rates of sexual assault and other types of violence are many times higher on reserves than in non-reserve

areas. Spousal violence experienced by Aboriginal women is more severe, including a higher risk of homicide.

As reported by Statistics Canada in 2004-2005, Aboriginal adults represent:

- 3 % of the total Canadian adult population – (2001 Census)
- 22 % of admissions to provincial/territorial sentenced custody
- 17 % of admissions to federal prisons
- 21 % of male prisoner population
- 30 % of female prisoner population

The Claims for Compensation

The process of litigating and compensating former students for the damages they sustained in Native residential schools has taken on numerous forms over the past two decades. Beginning as traditional civil law suits, these claims then evolved into class actions which soon transformed into a National Settlement Process. Each of these successive processes was designed to achieve an efficient, fair and more accessible system for native people to pursue their claims for compensation against the government and the religious institutions which ran the schools.

Individual Law Suits

In the early 1990's a wave of residential schools litigation began. Slowly, former students began to file individual or group civil law claims seeking damages for the harm they have suffered as a result of their experience in residential schools. These claims were primarily focused on

physical and sexual abuse as both intentional torts and negligence. The actions included claims of breach of fiduciary duty, asserting vicarious liability of the churches and the federal government for the wrongs committed by individual caregivers.[1] The courts were responsive to these claims; successful plaintiffs were awarded damages in a variety of forms including general, aggravated, and punitive damages, and amounts for loss of past and future income and past and future care. In some cases, these damages were apportioned between the federal government and the churches and in most cases the parties were found jointly and severally liable.[2]

By 2007 the residential schools were the subject of approximately 15,000 claims being advanced in traditional court litigation and some through a government operated Alternative Dispute Resolution process. This litigation included a few certified class actions. In addition to the claims for damages for physical and sexual abuse, many survivors further claimed that the government and Church organizations deliberately set about to cause them to lose their language and culture. They claimed compensation for these losses against both the federal government and the Churches.

The claims pursued in the traditional litigation stream resulted in a number of Judgments against both the federal government and individual Churches or religions orders. The average compensation for physical and

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[1] See for example, *M.(F.S) v. Clarke*, [1999] 11 W.W.R. 301; *D.W. v. Canada (Attorney General) and Starr* (1999), 187 Sask. R. 21; *Blackwater v. Plint*, [2005] 3 S.C.R. 3; *A.(T.W.N.) v. Clarke* (2003), 235 D.L.R. (4th) 13; *P.(V.) v. Canada (Attorney General)*, [2000] 1 W.W.R. 541.

[2] *Blackwater v. Plint*, [2005] 3 S.C.R. 3; *P.(V.) v. Canada (Attorney General)*, [2000] 1 W.W.R. 541; *D.W. v. Canada (Attorney General) and Starr* (1999), 187 Sask. R. 21; *A.(T.W.N.) v. Clarke* (2003), 235 D.L.R. (4th) 13.

sexual abuse was $47,000. There were some larger damage awards including; an award of $165,000 for general and aggravated damages and future income loss and $25,000 in punitive damages in the case of *Blackwater v. Plint* [2005] 3 S.C.R. General damages, aggravated damages and punitive damages of $260.000 were awarded in *A. (T.W.N.) v. Clarke* (2003), 235 D.L.R. (4th) 13.

Class Actions

Litigation of each individual claim quickly became an expensive and inefficient process for all of the involved parties. As an attempt to ameliorate the issues of access to justice for Native peoples, some former students joined together and filed a Class Action suit. The underlying objective of the class action is to provide a mechanism to enable the court system to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered wrongs from the same or similar experiences. Class actions avoided unnecessary duplication in the fact-finding and legal analysis and made the claims more economical to prosecute and defend. In this way, more native claimants had access to the courts to prosecute their claims.

In Canada, five class actions were filed with regard to Native residential schools claims:[3]

[3] Indian Residential Schools Resolution Canada, "Notice of Class Actions", online: http://www.irsr-rqpi.gc.ca/english/dispute_resolution_class_action_notice.html. This source is also available in French: http://www.irsr-rqpi.gc.ca/francais/reglement_extrajudiciaire_avis_recours.html.

The aboriginal community was frustrated with the number of claims in the system, the time it took each case to go through the system and the fact that the group of survivors, was aging and dying. By 2005, there were approximately 80,000 survivors of the residential school system. Within 18 months, 1000 of those had died.

The government, Churches and Aboriginal communities began negotiating an Alternative Dispute Resolution mechanism in 2001. By that time, some Churches and the federal government had already issued public and formal apologies in various Statements of Reconciliation. The Alternative Dispute Resolution process ran parallel to the claims in the litigation stream. At the same time, a number of class actions were beginning to make their way through the various provincial civil systems.

In Ontario, Canada, the case of *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, was certified as a class action in 2004. This action represented 1400 survivors of a single school, the Mohawk Institute in Brantford, Ontario, who claimed compensation for abuse and the failure of the school to protect them from harm.

The Court found that the class action method was preferable to single or group claimant litigation. It achieved a great measure of judicial economy and most importantly it provided greater access to justice for the Plaintiffs.

The court found that a class action was the preferred approach in this case:

> I think that a singe trial of the commons issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. […] a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents. […] Access to justice would also be greatly enhanced by a single trial of the common issues. […] In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure.[4]
> […]

An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class members. Together these assertions comprise the common issues that must be assessed in relation.

The issues for each of the Aboriginal Plaintiffs were the same:

- The way the Government/Churches ran the schools;

[4] *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 86-88.

- Policies of excessive physical discipline;
- Failure to have preventative policies and practices with respect to hiring, supervision;
- Students endured brutality and abuse while at school;
- Government and Churches sought to destroy the native language, culture and spirituality of the aboriginal children.

Although the certification of this action for 1400 students was a great improvement on the process of individual litigation claims, all parties knew that this was still an ineffective and inaccessible means for the approximately 80,000 survivors who remained. During this time, one group began to seek certification on behalf of all the survivors across Canada.

In parallel to the litigation, the Government, Churches and Aboriginal Leaders began negotiating a process for the resolution of all claims. In November 2005, the parties signed a Settlement in Principle for the compensation of all survivors of the Residential Schools in Canada. It is valued at $4 Billion dollars, representing the longest and most comprehensive settlement in Canadian history. It is described as a holistic and comprehensive settlement to compensate for wrongs of the past and to allow for future healing and reconciliation. It includes five distinct elements:

1. **The Common Experience Payment**
   - The Agreement provides for a “common experience payment” (or C.E.P.) to all survivors who were alive on May 31, 2005. Canada has committed $1.9 Billion for this purpose.

- It provides $10,000 for the first school year in attendance, and $3,000 for every additional year, or part thereof.
- The average survivor attended school for 5-6 years and will receive about $24,000.
- The common experience payment will be administered by Canada, overseen by the Regional Administration Committee, consisting entirely of survivors' representatives.
- The purpose of the C.E.P. is to compensate for the "Common Experience": loss of language and culture, and loss of family life.
- It is NOT meant to compensate for sexual or serious physical or psychological abuse, harms for which additional compensation will be available.

2. Independent Assessment Process

- For Plaintiffs who claim sexual, severe physical or severe psychological abuse.
- Includes:
  - Adult on student abuse;
  - Student-on-student abuse;
  - Severe psychological harm; and
  - Injuries unique to sexually abused women (pregnancies and related consequences).
- Straightforward claims will be decided without a hearing ("paper process").
- Survivors may represent themselves in the hearing or bring an agent, if they do not wish to take a lawyer.

- Survivors will have access to the courts if they feel that the ADR cannot compensate them properly.
- The maximum cap is $500,000+.
- Within the new ADR there is a right to appeal to another adjudicator.

3. Truth and Reconciliation Commission

- Commission funded with a budget of $60 million to be headed by Justice Harry Laforme, an aboriginal member of the Ontario Court of Appeal.
- Report will be comprehensive and document involvement of churches, and government, as well as impact on individuals, families and communities.
- Creation of a historical record and archiving it for future generations. Canada and the churches agreed to provide all relevant documents subject only to the privacy interests of individuals.
- The end result will include the creation of a national archive and research centre.

4. Commemoration Fund

- A fund of $20 million is available for commemoration events, activities, memorials, and projects at both the national and community levels.

5. Healing Fund

- An endowment of $125 million to the Aboriginal Healing Foundation to support its activities and provide healing activities to address the harms of the residential schools.

Role of Court in this Settlement

Noting the obligation of a court once a class action has been certified, Justice Winkler recognized that:

> In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA [*Class Proceedings Act*].[5]

In his analysis for certification of the class action Justice Winkler focused on the role of the courts, repeatedly recognizing that "the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected."[6]

Ultimately, the Agreement was approved with some adjustments. The first was the manageability of the claims procedure. With approximately 79,000 potential claims, there must be careful consideration of how to administratively manage these and what resources will be used to carry out

[5] *Baxter v. Canada (Attorney General) et. al.,* 2006 CanLII 41673 at para. 12.
[6] *Baxter v. Canada (Attorney General) et. al.,* 2006 CanLII 41673 at para. 26, see also para. 35, 44, 47, 84.

the plan.[7] Some administrative deficiencies were also recognized, including the potential conflict of interests in which the federal government may find itself in its role as an administrator and a continued litigant. Therefore, the Court recommended that:

> The administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. […] the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. […] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. […] The administration of the settlement will be under the direction of the courts and they will be the final authority.[8]

The Supervisory Board approved by the Court will have the authority necessary to direct the administration of the plan, to communicate with the Courts and to be responsible to the Courts. The administration of the settlement will be under direction of the Courts and they will be the final authority.

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[7] *Baxter v. Canada (Attorney General) et. al.*, 2006 CanLII 41673 at para. 31.
[8] *Baxter v. Canada (Attorney General) et. al.*, 2006 CanLII 41673 at para. 38-39.

Conclusion

The role played by Canadian Courts in the development and continued oversight of the settlement of Native residential schools claims has been constant and evolving. In the early stages of the settlement process, the courts acted as decision makers in both traditional single plaintiff civil litigation actions and in the certification of class actions. Now, the courts will continue to act as the decision makers in civil litigation claims that are brought by those who chose to opt-out of the Settlement Agreement, as well as provide a supervisory role in the administration of the Settlement Agreement. The courts are charged with the responsibility of resolving complex and complicated claims that are taken out of the adjudication process established within the federal government.

In an apology to the native people of Canada, the federal government said:
"Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike." (Statement of Reconciliation)

Since this paper was delivered in Panama, Prime Minister Stephen Harper delivered a new apology to the survivors of the Residential Schools on June 10th 2008 in Parliament. A full text of this apology is attached at Appendix “A”.

APPENDIX "A"

Text of Stephen Harper's residential schools apology

Updated Wed. Jun. 11 2008 8:47 PM ET

Delivered

Text of Prime Minister Stephen Harper's residential schools apology Wednesday:

Mr. Speaker, I stand before you today to offer an apology to former students of Indian residential schools.

The treatment of children in Indian residential schools is a sad chapter in our history.

In the 1870s, the federal government, partly in order to meet its obligation to educate aboriginal children, began to play a role in the development and administration of these schools.

Two primary objectives of the residential schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.

These objectives were based on the assumption aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, `to kill the Indian in the child.' Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

Most schools were operated as `joint ventures' with Anglican, Catholic, Presbyterian or United churches.

The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities.

Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities.

First nations, Inuit and Metis languages and cultural practices were prohibited in these schools.

Tragically, some of these children died while attending residential schools and others never returned home.

The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.

While some former students have spoken positively about their experiences at residential schools these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children and their separation from powerless families and communities.

The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered.

It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the government of Canada.

The government recognizes that the absence of an apology has been an impediment to healing and reconciliation.

Therefore, on behalf of the government of Canada and all Canadians, I stand before you, in this chamber so central to our life as a country, to apologize to aboriginal peoples for Canada's role in the Indian residential schools system.

To the approximately 80,000 living former students, and all family members and communities, the government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this.

We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this.

We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow and we apologize for having done this.

We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you.

Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government, and as a country.

There is no place in Canada for the attitudes that inspired the Indian residential schools system to ever again prevail.

You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey.

The government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly. We are sorry.

In moving towards healing, reconciliation and resolution of the sad legacy of Indian residential schools, implementation of the Indian residential schools settlement agreement began on September 19, 2007.

Years of work by survivors, communities, and aboriginal organizations culminated in an agreement that gives us a new beginning and an opportunity to move forward together in partnership.

A cornerstone of the settlement agreement is the Indian Residential Schools Truth and Reconciliation Commission.

This commission presents a unique opportunity to educate all Canadians on the Indian residential schools system.

It will be a positive step in forging a new relationship between aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.

God bless all of you and God bless our land.