The Logical Next Step:

Reconciliation Payments for All Indian Residential School Survivors

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law and the National Alternative Dispute Resolution Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

The Logical Next Step:

Reconciliation Payments for All Indian Residential School Survivors

I. OUR CONCERN

Canadian Bar Association members are all too aware of the legacy of the Indian Residential School system. Many of us have clients who were students at an Indian Residential School or whose parents or grandparents or further ancestors were. Some of our colleagues were also part of the residential school system.

We acknowledge that Indian Residential Schools had a deliberately destructive effect on Aboriginal First Nations communities and cultures. The negative consequences of removing Aboriginal children from their parents and communities and forcing them to attend schools where they were raised in "an atmosphere of fear, loneliness and loathing"[1] and where they were forbidden from telling their ancestor and creation stories and from participating in traditional ceremonies and practices are still being felt today. Punishing children for speaking the language of their birth and ridiculing their cultural and spiritual traditions caused profound damage. Their identity, their sense of belonging, and their self-respect were taken from them.

We recognize the harm done to children who attended the schools, not only the incidents of physical and sexual abuse but also the violation of their rights as children to be provided with adequate food and clothing, safety, an education,

1 Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* - Volume 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 377, quoting Chief Ed Metatawabin of the Fort Albany First Nation.

health care, and access to their families, their language, their culture and their traditions. Students of residential schools were systematically denied the opportunity to flourish.[2]

In our view, there is a direct correlation between the policies of oppression and inequality at Canada's Indian Residential Schools and the challenges Aboriginal individuals, families, their communities, and their Nations continue to face in this country in 2005. With Aboriginal offenders representing 40% of Canada's prison population, with Aboriginal peoples experiencing the highest suicide rates in the country, with Aboriginal communities struggling to deal with poverty, substance abuse, and illness, it is clear that Canada has not yet faced the truth. "The effect of the Indian residential school system is like a disease ripping through our communities".[3]

We believe that Canada – its government and all its citizens – must find a way to help to restore the health, vitality, pride, and culture of Aboriginal communities. The Government of Canada must acknowledge that Indian Residential Schools and their policy to destroy Aboriginal languages and cultures caused significant and profound harm to the students of these schools and to their families and Nations. It is in the interests of every person in Canada to take the next logical step in the necessary healing and reconciliation process.

At our Annual Meeting in August 2004, the National Council of the Canadian Bar Association passed this resolution:

> *Whereas* several comprehensive studies, including the Royal Commission on Aboriginal Peoples and the Law Commission of Canada report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, have documented the immediate individual harm and the long term

2 Canada's Statement of Reconciliation says "Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values". See also, Jennifer J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (Summer 2002) 52:3 University of Toronto Law Journal 253. Professor Llewellyn notes, at 280, that, "residential school claims are fundamentally about the destruction of relationships and the perpetuation of relationships of oppression and inequality".

3 *Supra,* note 1 at 376, quoting Grand Chief Edward John.

> collective harm caused by Canadian government efforts to eradicate Aboriginal language and culture by placing Aboriginal children in Indian Residential Schools;
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> *Whereas* the Government of Canada and the Canadian Bar Association have recognized the extreme vulnerability of survivors of residential schools, and the potential for further harm in seeking to resolve their claims through litigation;
>
> *Whereas* the Government of Canada has established a dispute resolution process to give survivors an alternative to the litigation process, but have limited that process to claims of physical and sexual abuse only;
>
> *Whereas* the Canadian Bar Association supports alternatives to litigation in appropriate cases.
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> *BE IT RESOLVED THAT* the Canadian Bar Association urge the Canadian government to broaden the scope of the Residential Schools Dispute Resolution process to include automatic base compensation for loss of language and culture, and for minor physical and sexual abuse, for all claimants proving attendance in a residential school, with provision for additional compensation in cases of serious physical and sexual abuse.[4]

A reconciliation payment by the Government of Canada to all surviving students of Canada's Indian Residential Schools would have a multitude of positive effects on the Aboriginal students; on their families, communities and Nations; on the relationship between the Canadian government and Aboriginal peoples; on communities across the country; and on efforts to acknowledge the past and move on to a better future for everyone.

The reconciliation payment must be made in a spirit of generosity and respect. And, it must be coupled with improvements to the existing dispute resolution program and with a national truth and reconciliation process. A reconciliation payment is the logical next step but it is not the only step towards a resolution of the Indian Residential Schools' catastrophe.

4 Canadian Bar Association Resolution 04-08-A.

II. THE CURRENT DISPUTE RESOLUTION PROGRAM

The current dispute resolution program seeks to offer an alternative to civil litigation to those students of Indian Residential Schools who experienced sexual abuse, physical abuse, or wrongful confinement at a residential school. While there are some positive features to this plan, including the privacy it offers victims of abuse and the more sensitive, less adversarial context for giving evidence,[5] the Assembly of First Nations has carefully documented many of its problems.[6] We would like to focus on four key failings.

A. The Dispute Resolution Program Is Grounded in a Tort Approach to Justice.

The tort notions of harm, wrongdoing, and compensation are reflected in every aspect of the program and particularly in the requirement for an applicant to provide intimate details of every act of physical and sexual abuse that took place and in the structure of the compensation amounts. For example, the more than 40-page application form asks when, how many times, and over what time period abuse occurred and requires information about the events surrounding the abuse and the individual(s) involved.[7] The compensation amounts are based on a point system, with fixed amounts being paid depending on the number of points awarded by the decision-maker and where a person lives.[8] The approach is an attempt to ensure that compensation under the dispute resolution program mirrors court awards for similar situations in each jurisdiction.

Professor Jennifer Llewellyn refers to tort litigation as a "corrective justice" approach and notes that the "theory of justice underlying the system is unable to

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5 Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: AFN, 2004) at 16.

6 *Ibid*., at 14-17. See also, recommendations 3-19 and 21-29.

7 Indian Residential Schools Alternative Dispute Resolution Process Application Form, Indian Residential Schools Resolution Canada, Government of Canada, see section 4 at 10, and section 6 at 16.

8 Guide for the Alternative Dispute Resolution Process, Indian Residential Schools Resolution Canada, Government of Canada at 45-49.

provide an adequate remedy for the harms caused by the schools" and "will do nothing to address the deeper problems created by the legacy of the abuses suffered in and from the residential school system".[9] She suggests that "the system of tort law … appears ill equipped in both its structure and its underlying concepts of justice to respond to the intangible harms at issue in residential school cases".[10]

B. The Dispute Resolution Program Does Not Address the Full Range of Harms Experienced by Students of Indian Residential Schools.

The punishment of children

Clearly, the government has carefully constructed a claims scheme that addresses only already firmly established and narrow grounds for tort claims. For example, Appendix C of the Application Guide begins "[i]n some cases, the decision-maker will have to decide whether the physical force used by the person you claim abused you was abusive or within acceptable discipline of the day".[11] The two-page explanation of what might be considered "acceptable" in a legal sense includes a chart to clarify that, for instance, excessive strapping of the hand was not acceptable after 1960 and that inflicting a punishment on a part of the body other than the hand was not acceptable after 1970.

This "standard of the day" test may satisfy those anxious to protect the Crown from new areas of potential liability[12] but it undermines the credibility of any program seeking to resolve the residential schools' legacy.

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9 *Supra,* note 2 at 274.

10 *Ibid*., at 275.

11 *Supra,* note 8, Guide, Appendix C at 50–51.

12 Wendy Cox, "Government paper warns of risks of apologizing for residential schools" *Ottawa Citizen* (27 July 1998), cited in Rhonda Claes and Deborah Clifton, "Needs and Expectations for Redress of Victims of Abuse at Native Residential Schools" (Research Paper prepared for the Law Commission of Canada, 1998 - Appendix 4 at 140).

It is important to remember that the "standard of the day" for Aboriginal children at the beginning of the residential school system was to live in a community where corporal punishment was not practiced. Willie Blackwater relates how the best years of his life were the first ten that he spent being raised by his grandparents in the village or Kispiox. He describes how they taught and corrected him without ever raising a hand or voice; "If I did something wrong, my grandfather would tell me a long story, and I had to figure out for myself its meaning and what it told me about what I had done".[13]

As well, the dispute resolution system fails to take into account that the frequent repetition of an "acceptable" punishment could make it unacceptable. For example, while strapping a child on the hand might have been acceptable by the "standard of the day", it was never acceptable to strap a child every day, day in and day out.

> I remember those horrifying years as if it were yesterday. There was one nun, Sister Gilberta, she always passed out the punishment. Every day, she would take me into the bathroom and lock the door. She would then proceed to beat me thirty times on each hand … She would count to thirty out loud, each time she hit me. It is an awful way to learn to count to thirty.[14]

Furthermore, the "standard of the day" test is inadequate to respond to the types of punishments that were inflicted on Aboriginal students at residential schools. Dr. Jim Miller carefully researched the experience of students at Indian Residential Schools. He describes "favourite punishments" used at schools such as "forcing children to kneel in a public place with arms outstretched for hours, hair cutting and head shaving, and lengthy confinement in dark closets on bread and water."[15]

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13 *Supra,* note 12 at 21, quoting from Suzanne Fournier and Ernie Crey, *Stolen from Our Embrace*: *The Abduction of First Nations Children and Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre Ltd., 1997) at 64.

14 *Supra,* note 12, Claes and Clifton at 37, quoting from Isabelle Knockwood, *Out of the Depths: The Experiences of Mi'kmaw Children at the Indian Residential School at Shubenacadie, Nova Scotia Lockeport* (Halifax: Roseway Publishing, 1992) at 81.

15 *Supra,* note 12, Claes and Clifton at 28, quoting from J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools*, (Toronto: University of Toronto Press, 1996) at 322.

Ongoing poor conditions

Although the range of harms at Canada's Indian Residential Schools did not go unreported they were allowed to continue unabated. A 1908 inspection of Alberta schools found the majority to be "quite unfit".[16] A review of the whole residential school system in 1918 determined that the schools were generally "badly built, poorly maintained and overcrowded" and that their "deplorable conditions were a dreadful weight that pressed down on the thousands of children who attended them" and were "undoubtedly chargeable with a very high death rate among the pupils".[17]

"Hunger was a permanent reality".[18] "Neglect … became a thoughtless habit".[19]

Quality of education

The quality of education was poor. Substantial time was spent every day on unpaid maintenance and housekeeping tasks. The use of corporal punishment and the context of brutality is well documented.

> We were forcibly disconnected from everything our parents and elders had taught us, and everything new was learned in an atmosphere of fear.[20]

Vulnerability

The students of Indian Residential Schools were vulnerable in many different ways.

> Although there were caring and conscientious staff, not every principal, teacher or employee was of the desired moral character; outside the gaze of public scrutiny, isolated from both Aboriginal and non-Aboriginal communities, schools were opportunistic sites of abuse.[21]

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16 *Supra,* note 1 at 356.

17 *Supra,* note 1 at 356, with the ending quote attributed to a memorandum from Duncan Campbell Scott to Arthur Meighen, January 1918. The *Royal Commission on Aboriginal People's* Report also quotes Mr. Scott as writing that "fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein", and a *Saturday Night* article (23 November 1907) that concludes "even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards" (at 357).

18 *Supra,* note 1 at 359.

19 *Supra,* note 1 at 365.

20 *Supra,* note 12, Claes and Clifton at 25, quoting Isabelle Knockwood, *supra,* note 14 at 56.

21 *Supra,* note 1 at 367.

A policy to stamp out Aboriginal languages and cultures

There is no dispute that the government's original policy purpose for Indian Residential Schools[22] was to "kill the Indian in the child"[23] and that, as a consequence, children "throughout the history of the system were beaten for speaking their language".[24]

> One man recounts the story of a priest who strapped T-H-O-U S-H-A-L-L N-O-T S-P-E-A-K C-R-E-E, one stroke for each letter until he reached twenty-one.[25]

A person's language is an intrinsic part of that person's identity and culture. As the Royal Commission on Bilingualism and Biculturalism recognized:

> …culture is a way of being, thinking and feeling. It is a driving force animating a significant group of individuals united by a common tongue, and sharing the same customs, habits and experiences.[26]

The purpose of the Canadian government's policy for Indian Residential Schools was documented in the Report of the Royal Commission on Aboriginal Peoples.

> [T]he entire residential school project was balanced on the proposition that the gate to assimilation was unlocked only by the progressive destruction of Aboriginal languages. With that growing silence would come the dying whisper of Aboriginal cultures. To that end, the department [of Indian Affairs] ordered that "the use of English in preference to the Indian dialect must be insisted upon".[27]

Psychological and spiritual abuse

Forbidding children at school to communicate with their siblings and other children from their communities in their first language and punishing them for speaking their language was profoundly harmful to them.

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22 For example, *supra,* note 12, Claes and Clifton at 14, quoting E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1988) at 75, stating that "the destruction of the children's link to their ancestral culture and their assimilation into the dominant society were the main objectives".

23 *Supra,* note 1 at 365.

24 *Supra,* note 1 at 342.

25 *Supra,* note 12, Claes and Clifton at 37, quoting Agnes Grant, *No End of Grief: Indian Residential Schools in Canada*, (Winnipeg: Pemmican Publication Inc., 1996) at 194.

26 Report of the Royal Commission on Bilingualism and Biculturalism, *Book 1, The Official Languages* (Ottawa: Government of Canada, 1967). See, in particular, "General Introduction", paragraph 38.

> Not every child experienced sexual and physical abuse, but every child experienced the devaluing of parents and culture. Psychological and spiritual abuse were institutionalized, no child could escape the debilitating consequences of being victimized and brainwashed … since the children were taught to abhor how their parents lived, no more diabolical plot could have been conceived to destroy the harmony … and effectiveness of the culture … .[28]

It is ironic to note that in 1967 the Royal Commission on Bilingualism and Biculturalism, whose task was to examine the status of English and French in Canada, reminded the Canadian government of the importance to Canada of the very Aboriginal cultures its policies had been trying to destroy.

> [T]he Commission considers it a duty to remind the proper authorities that **everything possible must be done to help the native populations preserve their cultural heritage, which is an essential part of the patrimony of all Canadians**. The commission also feels that the Canadian government, in close co-operation with the provinces concerned, should take the necessary steps to assist the survival of the Eskimo language and the most common Indian dialects.[29] [emphasis added]

Intergenerational negative impacts

Finally, the negative effects of residential schools had an immediate impact on a child's family and a long-term impact on future generations.

> [The greatest harm] consisted of the mental and psychological abuse which destroyed the bond between children and their parents, culture and language. The children suffered the loneliness of being separated from their parents, and the parents were devastated at the loss of their children. Many knew they were sending their children to a place where they would be abused in every way; parents, however, were unable to intervene.[30]

Students returned to their communities or lived elsewhere bringing with them the baggage of what they had witnessed and what had been done to them and without having experienced love and parenting at school. As a result, the children of

27 *Supra,* note 1 at 341, quoting a memo to H. Reed from the Deputy Superintendent General, 24 August 1890.

28 *Supra,* note 12, Claes and Clifton at 27, quoting Agnes Grant, *supra*, note 25 at 224-255 and 272.

29 *Supra,* note 26, "General Introduction," paragraph 23.

30 *Supra,* note 12, Claes and Clifton at 40, quoting Agnes Grant, *supra*, note 25 at 272.

parents who attended residential schools also suffered the effects of that environment. At school, their parents had not learned how to nurture a child.[31] They often turned to alcohol or drugs to dull the pain of their school experience and they responded with violence in the way they had learned at school, rather than with the caring non-violence typical of Aboriginal cultures.

The Indian Residential School experience began a cycle of shame, violence, and abuse that has spread from generation to generation.[32]

> My husband didn't go to the residential school, and I really notice the difference between us in how he cared for our son in infancy. There was that precious closeness, he was raised the same way. I don't recall my mother ever once telling me she loved me … [33]

The point of this cursory and non-exhaustive review of some of the harms experienced by Aboriginal peoples as a result of the Indian Residential Schools system is to illustrate the extent to which a dispute resolution process that only responds to verifiable cases of physical and sexual abuse and wrongful confinement is destined to fail to be a meaningful step towards reconciliation.

And, we must remember that:

1) the Government of Canada had a fiduciary relationship to Aboriginal children who attended an Indian residential school, and

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31 *Supra,* note 1 at 373, quoting the Bishop of Keewatin's 1960 description of the Pelican Lake school:

> The Pelican Lake [school] has over the past years suffered a somewhat unhappy household atmosphere. Too rigid regimentation, a lack of homelike surroundings and **the failure to regard the children as persons capable of responding to love**, have contributed at times to that condition. Children unhappy at their treatment were continually running away. [emphasis added]

32 *Supra,* note 1 at 379, quoting from a June 6, 1992 memorandum to the Deputy Minister of Indian Affairs from J. Cochrane:

> Persons who attended these schools continue to struggle with their identity after years of being taught to hate themselves and their culture. The residential school led to a disruption in the transference of parenting skills from one generation to the next. Without these skills, many survivors had had difficulty in raising their own children. In residential schools, they learned that adults often exert power and control through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential school system often inflict abuse on their own children. These children in turn use the same tools on their children.

33 *Supra,* note 12, Claes and Clifton at 44, quoting Rosalyn Ing, "The Effects of Residential Schooling on Native Child-Rearing Practices" (Vancouver: University of British Columbia Master's thesis, 1990) at 134 (also, Rosalyn Ing, (1991) 18 Supp. Canadian Journal of Native Education at 65-118.

2) children were required by law to attend Indian Residential Schools and their parents could be arrested for refusing to send them.

The Government of Canada had control over, and responsibility for the children who attended Indian Residential Schools.

Courts have already held the Government of Canada liable for the physical and sexual abuse that individual students experienced at an Indian Residential School. In our opinion, it is just a matter of time before a court finds the Government of Canada liable for at least some of the broad range of harms and human rights violations that all students experienced.

> In reviewing the long administrative and financial history of the system – the way the vision of residential education was made real – there can be no dispute: the churches and the government did not, in any thoughtful fashion, care for the children they presumed to parent. While this is traceable to systemic problems, particularly the lack of financial resources, the persistence of those problems and the unrelieved neglect of the children can be explained only in the context of another deficit – the lack of moral resources, the abrogation of parental responsibility. The avalanche of reports on the conditions of children – hungry, malnourished, ill-clothed, dying of tuberculosis, overworked – failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action.[34]

C. The Dispute Resolution Program May Be Causing Additional Harm to Survivors of Indian Residential Schools.

It is well known that telling their story and having to relive, in detail, hurtful and degrading moments of their past may cause extreme emotional reactions and further trauma for people who have experienced physical and sexual abuse. It is a painful road that no one wants to travel again; doing so takes enormous courage and personal sacrifice.

34 *Supra*, note 1 at 364.

In fact, the Indian Residential Schools Resolutions Canada web site opens with a warning to readers:

> The web site deals with subject matter that may cause some readers to trigger (suffer trauma caused by remembering or reliving past abuse). The Government of Canada recognizes the need for safety measures to minimize the risk associated with triggering.
>
> A National Indian Residential School Help Desk has been set up to provide general information on the Resolution Framework and ADR process. You can access emotional and crisis referral services. You can also get information on how to get other health supports from the Government of Canada.
>
> Please call the Help Desk at 1-800-816-7293 if you or someone you know is triggered while reading the content on this web site.[35]

While reliving past traumas has inherent risks, the dispute resolution process should not add to them or cause further harm.[36]

The Assembly of First Nations in its *Report on Canada's Dispute Resolution Plan* says that the current 40-page application form is "causing distress among survivors".[37]

> They report that it is confusing, intimidating and very difficult, especially for older survivors, to understand. They also feel it is impersonal and reduces their experiences at residential school to a bureaucratic exercise.[38]

We agree with the AFN that the 40-page application form is problematic. We also share the view that the dispute resolution process "takes too long".[39] We are concerned by the Report's conclusion that "there is a real fear that the present system of compensation is causing additional harms to the survivors".[40]

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35 http://www.irsr-rqpi.gc.ca/english/.

36 According to the Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions - Executive Summary* (Ottawa: Government of Canada, 2000) at 10, one of the five principles that must be respected when survivors of institutional child abuse seek redress is, "The process should not cause further harm to survivors. The process must acknowledge that confronting a painful, even traumatic past is far from easy".

37 *Supra,* note 5, AFN Report at 28, section 18.1.

38 *Supra,* note 36.

39 *Supra,* note 5, AFN Report at 2.

40 *Supra,* note 5, AFN Report at 40.

The treatment of 88-year-old Flora Merrick by the dispute resolution process is especially disturbing. Flora Merrick began attending the Portage la Prairie Residential School when she was 5. She was still attending the school at 15 when her mother passed away and her father and grandfather came to the school to pick her and her sister up so that they could attend the funeral. Flora Merrick described what happened next in an interview last fall.

> The principal said, "We don't allow that." I don't know why he said that. My dad went away disappointed, and my little sister and I cried so much, we were taken away and put in a room, away from the rest of the school.[41]

When they were allowed out of the room two weeks later, Flora Merrick ran away to go home. Her lawyer, Dennis Troniak, explains, "[s]he was apprehended and was taken back and was strapped quite severely on the hands and forearms. They say less than ten times but the strapping left red marks and then bruising".[42]

An adjudicator for the dispute resolution process found that the strapping was within the standards of the day and therefore not physical abuse. However, he noted the "arbitrariness in the whole matter" and the fact that Merrick's memories "of this harsh incident during this most traumatic of times ... bother her greatly to this day" and awarded her $1,500 compensation.[43]

The government appealed the adjudicator's decision arguing that the dispute resolution process is only meant to compensate for physical abuse and not for physical punishment that was acceptable by the standards of the time when it occurred. Elder Merrick has decided to take her claim to court.

As lawyers, we may understand the legal motives for the Canadian government's decision to appeal, but as lawyers we are also deeply distressed by the government's actions and by this situation. It is glaringly apparent that the dispute resolution process has failed Flora Merrick. This is not a step towards

41 As reported in a CanWest News story by Richard Foot, *The Leader-Post* (Regina) (14 September 2004) at A3.

42 From the transcript of a CBW-AM Radio Noon (Winnipeg) interview broadcast on September 16, 2004.

reconciliation with Flora Merrick. For the survivors of Indian Residential Schools, this case makes the words and apology in the Statement of Reconciliation meaningless.[44]

D. The Dispute Resolution Process Is Not Working.

On September 22, 1988, the Government of Canada signed an agreement offering redress to Japanese Canadians for the injustices inflicted upon them by the government during and after World War II. Applications for the $21,000 *ex gratia* payment began arriving in the fall and the first redress claim was paid in December 1988. A year later, the Japanese Canadian Redress Secretariat had received 17,500 applications and issued 12,000 cheques. When the Secretariat closed after five years of operation, it had processed 18,534 applications, paying all but 586 of them.[45]

In contrast, Indian Residential Schools Resolution Canada reports that, as of December 6, 2004, only nine claims have been settled through the dispute resolution process.[46] The program has been running for over a year and only 900 people have applied to it.[47]

During the last several years, the government has received approximately 13,000 Indian Residential School claims and resolved 1,809 of them, meaning that only

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43 *Supra,* note 41.

44 The seventh paragraph of the Statement of Reconciliation, *supra,* note 2, reads:

> The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. **To those of you who suffered this tragedy at residential schools, we are deeply sorry**. [bold in the original]

45 *The Japanese Canadian Redress Legacy, A Community Revitalized* (Winnipeg: National Association of Japanese Canadians, 2003) at 191.

46 http://www.irsr-rqpi.gc.ca/english/statistics.html

47 As reported in a CanWest News Service story by Richard Foot, *The Kingston Whig-Standard* (6 November 2004).

7% of claimants have chosen the dispute resolution process and less then .005 % of all claims have been settled that way.[48]

The media have reported that last year the government spent $61 million running the Office of Indian Residential Schools Resolution Canada and paid out only $16.5 million in claims. One headline read: "Native claims agency administrative fees four times the settlement costs".[49]

To summarize:

- Few survivors are choosing to apply to the dispute resolution process,
- The dispute resolution process is slow,
- The vast majority of claims remain in the court system, and
- The costs of administering the dispute resolution program far outstrip the compensation paid.

We believe that the dispute resolution process is flawed. However, in spite of these and other shortcomings, the dispute resolution option should remain. It must be improved as we outline later, but it does provide an alternative to the court system for survivors of sexual abuse and the most extreme cases of physical abuse so that they can use a less adversarial process to receive the compensation to which they are entitled.

Nevertheless, overall, the dispute resolution process is failing. It is failing the Aboriginal people who attended residential schools, it is failing to make real the Statement of Reconciliation, and it is failing the people of Canada who are "burdened by past actions"[50] and are looking for reconciliation with Canada's First Nations peoples.

48 *Supra,* note 46.

49 *Supra,* note 47.

50 *Supra,* note 2, Statement of Reconciliation, fourth paragraph.

> … we can never be a united nation until the rights and concerns of the true founding peoples … are addressed and settled.[51]

III. RESTORATIVE JUSTICE

The Indian Residential Schools reality transcends the corrective justice model. It calls for a restorative justice approach.

Blame and faultfinding, harm, wrongdoing and compensation are part of the corrective justice model. These concepts inform tort law. They are not conducive to reconciliation.

As Jennifer Llewellyn points out:

> The abuse suffered by residential school students was the result of a relationship of inequality, oppression and disrespect between the Canadian government, its citizens, the churches, and Aboriginal peoples. The restoration of this relationship to one of mutual concern, respect and dignity is what victims seek first and foremost, and any process must have this as its goal or it will not resolve the conflict between the parties and may, in fact, make it worse.[52]

We will, therefore, never achieve reconciliation between the people of Canada, the Government of Canada, the churches, and Aboriginal peoples if we continue to address only individual claims of physical and sexual abuse and wrongful confinement and to rely solely on a corrective justice model.

It is critical to the restorative justice process that the Government of Canada acknowledge responsibility for the harm done to all students of Indian Residential Schools.

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51 Citizens' Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Government of Canada, 1991) at 74. It is worth noting that the authors of the report preface this quote with, "Forum participants were highly concerned and virtually unanimous in their discussion of aboriginal issues. Their comments were urgent".

52 *Supra,* note 2 at 281.

IV. RATIONALE FOR A RECONCILIATION PAYMENT

It is entirely within the purview of the Government of Canada to offer a reconciliation payment to the survivors of Indian Residential Schools. Here are 10 reasons to do so:

1. **The Assembly of First Nations recommends it**

   After a careful review of the dispute resolution program and after consulting with 200 participants at the National Residential Schools Legacy Conference (March 2004) and a distinguished task force of 18 experts in the fields of law, equality, human rights, redress, and recovery, the Assembly of First Nations recommended that a "lump sum award be granted to any person who attended an Indian Residential School".[53]

   We agree with this recommendation and we believe that implementing it – respecting what Aboriginal people are telling us – will be another important step towards reconciliation.

2. **The Law Commission of Canada recommends *ex gratia* payments for survivors of institutional abuse.**

   In its report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, the Law Commission of Canada considers a range of processes that may provide redress to former residents of institutions, from criminal prosecutions and civil actions to public inquiries and truth commissions. With respect to *ex gratia* payments the Commission recommends:

   > GOVERNMENTS SHOULD REVISE POLICIES on providing compensation by way of *ex gratia* payments to include classes of persons who suffered harm, directly or indirectly, as a result of policy decisions later found to have been inappropriate, even when others are potentially liable in a civil action.

53 *Supra,* note 5, AFN Report at 18.

> Considerations:
>
> > Normally governments are not civilly liable for damages flowing from policy, planning or executive decisions. Where a misguided policy opens the door to, or facilitates the commission of a civil wrong by others, *ex gratia* payments should not be excluded as a means to acknowledge the wrongful policy.
> >
> > *EX GRATIA* PAYMENTS should be offered in cases where an otherwise meritorious and provable claim cannot be pursued because it falls outside a limitation period, or where liability is uncertain and it is not in the public interest to defer compensation until litigation has concluded.
> >
> > *EX GRATIA* PAYMENT OFFERS to individuals should include reimbursement for the costs of seeking professional advice in order to make an informed decision about whether to accept the offer.
> >
> > GOVERNMENTS SHOULD REVISE POLICIES on paying compensation so as to provide a mechanism for expedited, interim and "without prejudice" *ex gratia* payments.[54]

It is worth noting that the Law Commission also recommended that redress should recognize that:

- residents of institutions where physical and sexual abuse were pervasive may have suffered psychological and emotional damage even when they were not the direct victims of the abuse
- residents of institutions where the culture of the resident population was consistently undermined may have suffered long-term harms as a result, and
- being deprived of an adequate education is also a basis for redress.[55]

3. The National Consortium of Residential School Survivors Counsel supports a lump sum compensation payment for all residential school survivors.

The Consortium is a group of 20 law firms across Canada that represents more than 5,000 residential school survivors. The Consortium launched the Baxter National Class Action and member law firms are involved in the Cloud class action (the Government of Canada has appealed

54 *Supra*, note 36 at 22 and 23.

55 *Supra*, note 29 at 28.

certification to the Supreme Court of Canada), the Blackwater case (the Supreme Court of Canada is to hear the appeal this spring), and the Alberta test cases set for trial in January 2006.

The Consortium has been highly critical of the dispute resolution process and agrees with the Assembly of First Nations' lump sum payment recommendation. The Consortium has publicly complained about the amount of waste and red tape in the government's existing approach to settlement. "The existing scheme is a compensation program for bureaucrats, not residential school survivors. It has to stop and the AFN report has shown the way".[56]

4. Lawyers across the country believe a lump sum payment to all residential school survivors is appropriate.

Frankly, lawyers personally probably stand to gain more financially if they represent individual clients and class action groups in litigation. It is therefore significant that lawyers, individually and through the CBA as their national professional organization,[57] are calling for a lump sum settlement for all survivors of Indian Residential Schools.

Why? Because lawyers see first-hand the damage done by the Indian Residential School system and we recognize that a tort-based approach to the residential school legacy will, ultimately, cost taxpayers more. We know the current system is not fair, and we have a duty to advocate for our clients' best interests.

56 Quote by Jon Faulds, a spokesperson for the National Consortium of residential school lawyers in a News Release titled "National Consortium Applauds AFN's Call for Compensation to all Residential School Survivors" (17 November 2004).

57 *Supra,* note 4.

5. The age of the Indian Residential Schools survivor population demands immediate action.

It is estimated that the average age of Indian Residential School survivors is 57. The life expectancy of an Aboriginal person in Canada today is 61. And, every day, five residential school survivors pass away.[58] Time is running out[59] on the opportunity to offer a meaningful gesture to the remaining students of Indian Residential Schools towards "peace and comfort",[60] healing and reconciliation.

6. The failure to act justly brings more disgrace on the Canadian government and the people of Canada.

Canada's Indian Residential Schools and the treatment of the Aboriginal children who attended them are a painful wound that will not heal until justice is done and seen to be done.

It is time for Canada to act honourably and with respect. We regret to say that it brings shame on all of us when a dispute resolution system tries to withdraw $1,500 compensation given to an 88-year-old woman who was not allowed to go to her mother's funeral when she was 15 years old, confined to a room for two weeks, and then strapped because she ran away from the school to go home and who still feels pain from the events and their consequences. There are legal arguments and there is justice. It is time for justice.

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58 In a news release issued on December 20, 2002, the Government of Canada said that there were approximately 90,000 students of Indian Residential Schools still alive (www.irsr-rqpi.gc.ca/english/news_20_12_02.html.). On January 31, 2005, the government web site provides Statistics Canada data reporting that there are 85,975 students of Indian Residential Schools still alive (www.irsr-rqpi.gc.ca/english/statistics.html). Over a 110-week period, it is therefore estimated that 4,025 surviving students died. This is an average of 5 people a day.

59 On December 20, 2002, when the Government of Canada announced the national resolution framework, the Honourable Ralph Goodale, Minister then responsible for Indian Residential Schools Resolution Canada, stated "[t]ime is running out for the elderly claimants and those in ill-health".
http://www.irsr-rqpi.gc.ca/english/news_20_12_02.html.

60 Speaking at the News Conference to present the Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools, November 17, 2004, National Chief Phil Fontaine said that the residential school experience "continues to deny the peace and comfort that people seek to this day"(From transcript prepared by Media Q for Indian Residential Schools Resolution Canada at 1).

7. The current predominantly litigation-based approach to redress and reconciliation risks clogging Canadian courts for at least a decade.

Lawsuits are expensive for the government and for taxpayers, who, ultimately, pay for government lawyers, court administration, and court time. For plaintiffs taking on the government and large institutions, a lawsuit requires enormous personal energy; being a plaintiff is time-consuming, stressful, and costly.

Survivors of Indian Residential Schools are unlikely to be pursuing personal or class action claims because they enjoy litigation and hope to get rich. They are angry. They are hurt. They are looking for justice.

Survivors of situations of institutional abuse are known to seek:

- "an acknowledgement of the harm done and accountability for that harm
- an apology
- access to therapy and to education
- financial compensation
- some means of memorializing the experiences of children in institutions, and
- a commitment to raising public awareness of institutional child abuse and preventing its recurrence".[61]

We believe that a fair reconciliation payment coupled with a truth and reconciliation process will provide most Indian Residential School survivors with the peace and comfort they desire and will satisfy their quest for justice.

61 *Supra*, note 36 at 3.

8. A reconciliation payment would be made through an administrative process away from issues of blame and fault.

To apply for the reconciliation payment a person would only need to provide personal identifying information and some information about the school attended and the period of time there: a simple one-page form. (See the Appendix for a sample.) Government records could, in almost all cases, be used to confirm the information and determine the payment amount quickly and efficiently.

The payment system is straightforward. No one judges how much pain a person felt. No one decides how hard a whipping had to be to be legally accepted as physical abuse. No one assigns a rating to your suffering or its consequences in your life.[62] The process is neutral and the decision-making objective – you were at residential school for this long and so we will pay this much in recognition of the harms suffered.[63] The reconciliation payment does not ask a person to prove that he or she was a victim. It recognizes a person as a survivor.

In our view, a reconciliation payment would be restorative and a positive and welcome step towards healing and reconciliation.

It is worth noting that the $21,000 per person *ex gratia* payment and the $12,000,000 community development fund contribution made by the Government of Canada to Japanese Canadians in relation to their treatment during and after World War II had an extremely positive effect on a community that had been devastated by the government's actions.[64]

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62 *Supra,* note 8. See, for example, "Levels of sexual and physical abuse and compensation points" in the dispute resolution process Guide at 45, "Levels of harm and compensation points" at 46, and as well as tables at 47 and 48.

63 This is consistent with recommendation 20, AFN Report, *supra,* note 5.

64 *Supra,* note 45, Japanese Canadian Redress Legacy: "The process [of deciding on building projects] itself has led to the rejuvenation of interest and involvement of community members and certainly aided in developing community spirit and cohesion" at 69.

9. The Indian Residential Schools situation justifies a restorative response because of the unique legal relationship between Aboriginal peoples and the Canadian Government.

In 1867, the *British North America Act* made Indian education a federal government responsibility. Treaty provisions also required the government to provide schooling. In 1876, Aboriginal people became wards of the federal government under the terms of the *Indian Act*. In 1920, mandatory education for children seven to fifteen was brought into effect increasing the number of students at residential schools. In 1930, 75% of native children were in residential schools. In 1950, over 40% of residential school staff had no professional training.[65]

The Government of Canada does not have an equivalent relationship with any other group.

10. Making a reconciliation payment to all Indian Residential School survivors is a wise, necessary, and appropriate action.

V. DETAILS OF THE PAYMENT SCHEME

A. Eligibility

We have already noted the negative intergenerational impact of attendance at Indian Residential School. Ideally, we would like to see a payment scheme that recognizes the effect a parent's attendance at a school had on his or her child's life and that allows an estate's claim for the deceased's time at a school. We are, however, concerned that anything that complicates the application process or raises issues about which there may be argument will just create another bureaucracy, add more delays and undermine the restorative value of the program.

65 *Supra,* note 12, Claes and Clifton, "Chronology of the Development of Residential Schools" at 11-13.

We believe everything must be done to keep this payment scheme straightforward, objective, and efficient.

For that reason, we suggest that the reconciliation payment be for students who attended an Indian Residential School and who were alive on January 7, 1998, the day when the Government of Canada issued the Statement of Reconciliation and unveiled *Gathering Strength, Canada's Aboriginal Action Plan*.[66] We recommend that, as part of a truth and reconciliation process, a reparation fund be put in place, which could respond to the intergenerational impact of attendance at residential schools and the arbitrariness of this date.

Indian Residential School students who have already settled claims must be eligible for the reconciliation payment, whether or not the settlement documentation or court decision specifically considers the possibility of a future claim for loss of language and culture.

B. Payment Amount

The Assembly of First Nations recommends that the payment amount be the subject of future negotiations and proposes as a reference point that a student receive a base amount of $10,000 for having attended an Indian Residential School and $3000 for every year at the school.[67] We think that these amounts are modest, and hope that discussions about the final dollar figures go quickly so as not to delay the process unnecessarily. We hope the payment system will be up and running by September 1, 2005, with the first cheques issued before the end of this year.

We have written earlier in this paper that the government must make the reconciliation payment in a spirit of generosity and respect. This means not being

66 http://www.irsr-rqpi.gc.ca/english/historical_events.html.

67 *Supra,* note 5 at 19.

miserly in the payment calculations. For example, if a student went to a residential school for any part of a school year that should be considered a year.

Pro-rating a year is likely to give rise to conflicts about record-keeping and questions of proof, defeating the purpose of the reconciliation payment.

The payment scheme should be such that a person can easily know what amount he or she will receive without having to use a calculator or hire an accountant to check the government's calculations.

C. Proof of School Attendance

We understand that the government has comprehensive school records that can be used to verify a student's school attendance so, in most cases, checking an application and the number of years a student attended a school should be a simple administrative matter.

The guiding principles should be:

- believe the applicant
- do everything possible to find the necessary information for the applicant, and
- communicate promptly and clearly with the applicant to confirm information or request documents.

Here are the possibilities and a suggested way to handle them:

Action by the survivor	Documentation	Action by the government
• application shows school name and attendance dates	• records confirm dates	• send letter to confirm dates and amount • send cheque
• application shows school name and no or incomplete attendance dates	• records show attendance dates	• send letter with dates and amount; ask for confirmation • send cheque after receiving confirmation or in 6 weeks

Action by the survivor	Documentation	Action by the government
• application does not have school name or attendance dates	• records show school and attendance dates	• send letter with school name and dates and amount; ask for confirmation· • send cheque after receiving confirmation or in 6 weeks
• application shows school name and attendance dates	• no or incomplete records available	• send letter with available information asking for documents, photos, etc. that would help to confirm school and dates • send letter to confirm information received • come to an agreement on dates· • send cheque
• application has no school name or attendance dates	• no records available	• send letter asking for documents or photos that would help to confirm school and dates • no or inadequate information received· • initiate follow-up contact (telephone, band office, etc.) to try to find required information

It is incumbent on the government to do everything it can to find and confirm information about school attendance. When there are no school records or when the records show that a student attended a school but there is uncertainty about the number of years, the government should initiate a discussion with the applicant and try to come to an agreement on a reasonable compromise. There should be a Review Committee to resolve disagreements.

Again, we reiterate our concern that the process to apply for and receive the reconciliation payment remain simple and objective and not get mired in any wrangling.

If, before discussions about the payment amounts and after a review of government records, it becomes apparent that, in many cases, there will be difficulties in verifying the exact number of years a student was in school, we suggest that a different payment scheme be discussed with the Aboriginal community. This is one possibility:

> $ 10,000 for the applicant's removal from his or her parents and community (any time spent at an Indian Residential School)
>
> *plus*
> 1 to 4 years at school = $ 10,000
> 5 to 9 years at school = $ 20,000
> 9 or more years at school = $ 30,000

It is central to the restorative value of the reconciliation payment that it is made with respect and without argument. However, the government has a responsibility to survivors and to taxpayers to ensure that payments are only made to eligible applicants.

D. Review Process

The reconciliation payment is intended for students who attended residential schools and linked to the number of years spent there. Inevitably, there will be some situations where the government and an applicant do not agree.

Disagreements may arise over:

- the applicant's eligibility for the reconciliation payment, and
- the number of years the applicant attended school.

We suggest that a Review Committee[68] be put in place to address the disagreements that may arise. A possible model would be for the Committee to have five members, at least two of whom are women:

- one senior manager from the Indian Residential Schools Resolution Canada Office

68 A Review Committee was part of the Japanese Canadian redress process. It handled applications that "fell through the cracks" and decided how to interpret the redress settlement in cases of ambiguity. It was comprised of the head of the Japanese Canadian Redress Secretariat, two other members of the Secretariat and two representatives of the National Association of Japanese Canadians (from a telephone interview with Arthur Miki, January 12, 2005).

- one official from the Office with a strong knowledge of the residential schools system and of the record-keeping that was done
- one member of a church community which ran a residential school
- one representative from the Assembly of First Nations
- one Aboriginal person with a background in counselling, community health, or restorative justice (this person should be selected in consultation with the Aboriginal community).

The Review Committee would have the mandate to decide the appropriate reconciliation payment and to deny payment of an application. It would also have the mandate to respond to complaints about any delays in the payment process and to follow up on any issues that arise.

E. Taxes and Payment Schedule

The reconciliation payment should be tax-free and should not have any impact on any social assistance or other benefits or insurance that the person is receiving.[69] The Government of Canada must, as part of the reconciliation payment process, negotiate with provincial and territorial governments to ensure that recipients of the reconciliation payment will not lose part or all of it in clawbacks.

It should be paid as a lump sum unless the applicant requests differently. It is our view that an applicant should have the option of receiving the payment over a period of time, for example, in monthly payments over a two-year period or in two payments six months apart. We recognize that this creates an additional bureaucratic process for the government but we believe providing a few payment options shows respect for the applicant.

The timing of the payment could be established when the government sends correspondence confirming an applicant's eligibility and the payment amount.

69 *Supra,* note 5. This is consistent with AFN recommendation 17.1 at 28.

F. Applications for people who lack legal capacity to manage their affairs and people who died after January 6, 1998

A separate application form should be available for applications made on behalf of a deceased or by a person with a power of attorney or sufficient reason to act for an applicant. In these cases, documentation to prove the person's authority to apply on behalf of the applicant must be provided.

We have some concerns about applications made on behalf of a person who died after January 6, 1998. If the person left a will, the payment should be made according to the terms of the will. If the person did not leave a will, the policies currently followed by Indian Affairs in intestate situations should apply. If a deceased residential school student left no descendants, the money should be paid into an appropriate Aboriginal community fund.[70]

G. The Release

The reconciliation payment recognizes the broad range of harms experienced by all students who attended an Indian Residential School. A payment recipient would accept the payment in exchange for not pursuing a claim for the loss of language and culture, loss of parental care, pain and suffering, and other harms related to being a student at an Indian Residential School. The recipient would not be eligible to be a member of a class action suit that covers these harms.

However, receipt of the reconciliation payment must in no way compromise a survivor's right to seek compensation for physical or sexual abuse or wrongful confinement through litigation or the dispute resolution process.

The government must resist the temptation to draft a complex release riddled with "legalese". The legal requirements of a release can be met while respecting the

70 *Supra,* note 5. This is consistent with AFN recommendation 20.4.

profound meaning and importance of the reconciliation payment for recipients (see the Appendix for a Sample Release form).

H. Program Timeline

We recommend that applications be accepted over a five year period from the day the Office is set up to receive applications, perhaps from September 1, 2005 to December 31, 2010.[71] The Review Committee would continue in operation until all applications have been processed.[72]

We believe it is advantageous to have a time limit for the reconciliation payment to focus visibility in the community and so that there is an incentive on the part of the government to act expeditiously. We believe during a five-year period everyone will have an opportunity to find out about the program and everyone who is interested will have the time to apply to it.

I. Negotiations

Negotiations must not be a protracted process. Further delay will poison the government's position, as it will appear that the government is stalling while more survivors die.

The government must come to the table ready to accept responsibility for the harms caused by Indian Residential Schools and seeking agreement on the payment amount and the program particulars. We are hopeful that this paper will provide the focus for preliminary discussions and that a two-day meeting in the spring can confirm the details. Time is of the essence.

J. Program Promotion

We suggest that the reconciliation payment program be launched with ceremony. Every effort must be made to let every residential school survivor know that the program is there for them and that they are encouraged to apply to it. The

71 *Supra,* note 5.This is consistent with AFN recommendation 26.

72 The Japanese Canada Redress Secretariat officially opened in December 1988 and closed in the spring 1995. The final deadline for receiving redress applications was September 1993. *Supra,* note 45 at 191.

government should use its contacts with Aboriginal organizations to spread the word about the availability of the reconciliation payment. Advertising should be placed in appropriate media.

The launch of the program will also be an occasion to educate Canadians about what happened in Canada's Indian Residential Schools and the consequences of these events on survivors and Aboriginal communities, and to explain why the government believes it is important to take this step towards reconciliation.

Every six months, the government should review the number of applications it has received from which parts of the country and determine what other measures should be taken to make the program more visible and accessible if applications are below the expected numbers or not being received from some members of the community (for example, women or residents of Nunavut).

VI. POLICY CONSIDERATIONS

A. Priority Applications

Usually, a program like this would operate on a first come, first served basis with files being processed in order of arrival. Given the age and declining health of some residential school survivors, we recommend that applicants have the option of requesting expedited attention to their application. Receiving the payment from the government may be very important to their peace of mind and the quality of care they receive during the final days of their lives.

Again, the experience with the Japanese Canadian redress settlement is helpful. After the settlement agreement was signed on September 22, 1988, it was recognized that "individual compensation was clearly the most urgent priority,

especially for the elderly".[73] The first redress cheque was issued on December 15, 1988 to an 86 year old Japanese Canadian from Ontario.[74]

B. The Definition of Student

Indian Residential Schools were intended for Treaty Indians and Indians under the *Indian Act*. The federal government paid a *per capita* grant to the churches that ran the schools based on the number of Indian children in attendance. However, Métis children were sometimes at the schools, too, without being named on the school register.

> … dependent Métis children were often accepted covertly by the churches; sometimes they were kept solely as labourers, not allowed meals, but rather dependant on scraps from staff tables.[75]

We recommend that Métis children who lived at a residential school also be eligible for the reconciliation payment. They were exposed to the same atmosphere of racial and cultural superiority, experienced the same fear and violence, and lived in the same poor conditions.

C. Excluded Members of the Aboriginal Community

The reconciliation payment recognizes that Aboriginal children who were forced to leave their families and their communities to attend a residential school suffered harm. The payment therefore excludes Aboriginal children who attended day schools and were not residents at a school.

The authors of a paper for the Law Commission of Canada did extensive research on the history of residential schools. They report:

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73 The Japanese Canada Redress Secretariat officially opened in December 1988 and closed in the spring 1995. The final deadline for receiving redress applications was September 1993. *Supra,* note 45 at 191.

74 *Supra,* note 36 at 33.

75 *Supra,* note 12, Claes and Clifton at 13, referencing correspondence with Gene Rheame, Board of Directors, Aboriginal Healing Foundation, September 1998.

> From the mid 1800s to 1970, up to one third of all Aboriginal children were confined in residential schools, many for the majority of their childhood.[76]

Although a declining and, by now, relatively small percent of the Aboriginal community attended an Indian Residential School, everyone in an Aboriginal community felt and is still feeling the effects of their experience. It is our view that the reconciliation payment is appropriately directed to survivors of residential schools. However, we believe, a fund should be set up to support reparation initiatives identified through the truth and reconciliation process that would benefit Aboriginal communities.

D. The Cash Payment

Some government representatives have expressed concern that the Aboriginal people who receive a cash payment may not spend the money wisely and may end up harming themselves or causing harm. It is true that when low-income people win lotteries, they are likely to spend the money within a year. But, the government does not stop selling lottery tickets because of this. Nor does the government ever try to take charge of litigation when it suspects that the plaintiff may be overwhelmed by the size of the court award.

Yes, there is a possibility that some recipients of the reconciliation payment will spend the money on alcohol or drugs. And, there is a possibility that some recipients will spend the money on a new car; give the money to their children; go on a trip; or give the money to a charity. The point is that it is their choice and it is paternalistic to interfere. It is outrageous to think that this would be used as a reason not to make the reconciliation payment at all.

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76 *Supra,* note 12, Claes and Clifton at 13, referencing Suzanne Fournier and Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and Restoration of Aboriginal Communities* (Vancouver: Douglas and McIntyre, 1997) at 50.

We offer some suggestions of actions the government could take to address its concerns:[77]

- The letter sent to applicants confirming the payment amount could include options on how the recipient would like to receive the payment. For example:
    - direct deposit to a bank account on the first day of the month for two years
    - payment in four equal cheques over a one year period
    - payment in one lump sum
- Financial planning information could be included on the Indian Residential Schools Resolution Canada web site.
- The government in collaboration with the Assembly of First Nations could organize a meeting with representatives of the financial services sector to open communications about how Canada's financial institutions might best provide service to Aboriginal communities. Recipients of a reconciliation payment must have other options besides turning to cheque cashing agencies to get their money. They should be able to access high quality, professional financial advice.
- Funds could be made available to an Aboriginal organization to set up a toll-free financial counseling service.

E. Role of the Churches

It is important for the churches that operated the Indian Residential Schools to accept responsibility for the harms that occurred there and for their failure to protect and adequately provide for the children in their care. Nevertheless, the Government of Canada should assume 100% liability for the reconciliation payment. As the Assembly of First Nations says in their Report, "the [government's] goal of sharing liability ought not to be pursued to the disadvantage of survivors".[78]

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77 Subsection 13(8) of the *Irish Residential Institutions Redress Act, 2002* authorizes the Residential Institutions Redress Board to make instalment payments or other arrangements when requested by the applicant or when the applicant is found to be incapable of handling the monetary settlement. http://www.rirb.ie/documents/act_13_2002.pdf.

78 *Supra,* note 5 at 26.

There is inherent unfairness in the dispute resolution program because some claimants are receiving 100% of their claim awards, while others are only receiving 70%. This has occurred because the church that ran their school has not signed an agreement with the federal government and they live outside British Columbia and cannot benefit from the court decision there that held the federal government 100% liable. We hope that this problem is corrected in revisions to the dispute resolution program. The reconciliation payment must not follow this path.

There is a public interest in making a reconciliation payment to survivors of Indian Residential Schools and the Government of Canada must therefore take full responsibility for making it.

We believe the churches must have a role in the truth and reconciliation process.

F. Public Perception

As always, the public reaction to the payment is likely to fall into three categories, positive, neutral, or negative.

- Positive:
  - it's about time
  - what happened was horrible
  - good: we don't want to hear about another Flora Merrick
  - good: $4 administration for $1 in claim payments is unacceptable
  - we are ashamed and are glad the government is acting

- Negative:
  - another handout to Aboriginal people
  - the churches should pay too
  - they're just going to blow the money anyway
  - now everyone who has had something bad happen to them will want something.

We believe that when members of the public learn more about what happened in Indian Residential Schools, they will be convinced that the government's action is wise, necessary and appropriate. Until now, the focus of media attention, to the

extent that there has been any recent coverage of Indian Residential Schools, has been on the physical and sexual abuse.

The Canadian public has not been asked to think about the consequences of forcing children to leave their families and communities to attend a residential school where their parents were ridiculed, their language prohibited, and their culture denigrated. It has not considered that children raised without parents do not learn how to parent. It has not thought about the intergenerational consequences of the residential school experience on Aboriginal communities. We have not connected the dots.

As a country, we have been in denial. We are critical of Aboriginal people and Aboriginal communities but we fail to admit how our actions, through our government, created the situation.[79] We do not value the personal strength and courage of the survivors of the residential school legacy. We do not celebrate the reviving of Aboriginal cultures.

We do not acknowledge how we started a disease that continues to ravage communities. We have not admitted that we did harm.

There is no shortage of ways to position this payment so that the majority of the Canadian public will understand that it is the right thing to do.

G. Legal Fees

There are two concerns:

(1) Before signing the release, an applicant should get legal advice about the meaning of the release and the consequences of signing it. We recommend that the government pay a set fee of $500 to the lawyer advising a client about the release. This would provide time for the lawyer to talk to the client about his or her residential school experience, to confirm that the

79 See for example, Caroline L. Tait, *Fetal Alcohol Syndrome Among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2003).

payment amount correctly reflects the attendance dates, and to discuss the litigation and dispute resolution avenues still available to someone who experienced physical or sexual abuse at an Indian Residential School. A pamphlet about the truth and reconciliation process could also be made available to lawyers to give to clients.

(2) There are several outstanding court claims and class action suits in the court process. One class action has been certified and others may be. It is hoped that the reconciliation payment will offer justice to litigants seeking compensation for the broad range of harms they experienced at residential school. They will accept the payment because they have achieved their goal and their lawsuit is no longer necessary. The lawyers who have represented clients in individual litigation and in the class action suits that are seeking compensation for the broad range of harms caused by residential schools should receive fair payment for their work without it coming out of the reconciliation payment. Legal fees should be part of the negotiations on the reconciliation payment amount and should be paid separately, as they were in the Hepatitis C settlement.

H. Trust

A reconciliation payment cannot be a half-hearted gesture put forward as a lure to entice litigants away from individual court claims and class action applications. It must be and, as importantly, it must be seen to be a genuine, irrevocable offer of compensation from the government accepting responsibility for what happened at Indian Residential Schools.

The federal government's history in its dealings with Canada's Aboriginal peoples does not inspire trust.

We believe the federal government must demonstrate in a clear, tangible, and symbolic way that the reconciliation payment is a real offer that will not be altered or tinkered with after it is made. An Order in Council that can be changed will not be sufficient. We suggest the government consider asking the Governor General of Canada and the Chief Justice of the Supreme Court of Canada to witness the signing of the government's reconciliation payment commitment.

The government's offer of a reconciliation payment must not foreclose Indian Residential School survivors from pursuing a claim through the existing processes. They must retain their options to litigate or to use the dispute resolution process. Acceptance of the reconciliation payment would, of course, preclude the recipient from subsequently pursuing litigation for the harms covered by the payment.

VII. PROPOSED IMPROVEMENTS TO THE DISPUTE RESOLUTION PROGRAM

The dispute resolution program is an important part of redress for Indian Residential School survivors. It provides a workable out-of-court option for survivors who were physically or sexually abused or wrongfully confined.

We generally support the recommendations about ways to improve the dispute resolution process made by the Assembly of First Nations in its November 2004 Report. We highlight the need for improvements in four areas:

1. The Application Process

The application form and Guide should be reviewed, in light of the experience Indian Residential Schools Resolution Canada has had processing and adjudicating applications, to determine what information is essential to the application process. The form should require only this information.

Instead of having to write out the details of the abuse, applicants should be able to submit a videotape or audio recording of their story (see Recommendation 21.2 of the Assembly of First Nations Report).

As well, we would like to offer a different approach than Recommendation 22.1 of the Report, which suggests that an application for the reconciliation payment and an application for dispute resolution for compensation for physical and sexual

abuse and wrongful confinement be on the same form. We would prefer the reconciliation payment application form to be a simple one-page form such as the model in the Appendix. As we discussed earlier, the reconciliation payment process is an administrative one. It would be best, in our opinion, to keep it separate from the dispute resolution process, which has an adjudicative component.

Nevertheless, we agree with the process suggested in Recommendation 22 that allows for the adjudication of a claim for compensation for physical or sexual abuse or wrongful confinement without a hearing.

We suggest that the need for the Model B compensation approach be re-examined during negotiations concerning the reconciliation payment.

2. Eligibility for Legal Aid

The 40-page application form is, in essence, a statement of claim. Applicants should have the advice of a lawyer when they complete it and before they submit it to the government.

We recommend that legal aid be immediately and automatically made available to survivors of Indian Residential Schools who are considering making a claim through the dispute resolution process. This will lead to increased fairness and greater efficiency in the dispute resolution process.

3. Compensation Points and Amounts

The government must readjust the compensation points and amounts to reflect recent court decisions and to put an appropriate dollar value on the loss of the opportunity to work. The global awards under the dispute resolution process must

be comparable to the awards being won in similar cases in court, both by survivors of Indian Residential Schools and by plaintiffs in other similar cases.[80]

4. Appearance of Bias in Favour of the Government

The government appears to have a conflict of interest with respect to claims made through the dispute resolution process. It acts as the gatekeeper to claims, screening them and deciding when they should be sent on to adjudication and it has access to information about the adjudicators' decisions that is not available to applicants or the legal community generally.

We propose these solutions:

- when the government receives a dispute resolution application form it must forward it to the Adjudication Office. The Office will set a date for the hearing after discussions with the applicant and the government. This gives the parties the same opportunity to be part of the process to determine when a hearing will occur.

- when an adjudicator makes a decision, a system must be put in place to publish a report on the decision, without identifying information. We recognize that the privacy of the dispute resolution process is an important feature. However, it is not fair for the government to have information about the results of the adjudications and for other applicants, potential claimants, the legal community, and the public to be kept in the dark.

VIII. THE NEED FOR A TRUTH AND RECONCILIATION PROCESS

In its report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, the Law Commission of Canada listed the range of official redress processes that can respond to survivors who have been abused in an institutional setting. It noted that although truth commissions in countries such as South Africa, Chile, and Argentina have had diverse mandates and powers, they have all

80 *Supra,* note 5, recommendation 9 at 23.

"served to denounce a past in which government-sanctioned human rights violations took place".[81]

> Truth commissions attempt to balance the interests of the country and the individual needs of survivors. They are not arbiters of justice, but provide a forum for the acknowledgement of suffering and a starting point for reconciliation.
>
> The Commission concluded that a truth commission would probably only be suited to cases of past institutional child abuse that affected not only individual children, but also whole communities and even peoples, and which caused significant intergenerational harm.[82]

Professor Llewellyn also considers the role of a truth and reconciliation process in the Indian Residential School context. She notes that a truth and reconciliation process is part of a restorative justice approach and advocates learning from the experience of the South African Truth and Reconciliation Commission to develop an appropriate model for Canada's residential schools situation. Her suggestions include:

- a national process to capture issues that would be lost or obscured by individual or unconnected processes and to contribute to a more complete picture of the events of the past.
- a public process where members of the public can participate both as witnesses and speakers to create awareness in society of what happened, who was harmed, and who was responsible.
- a government-funded process to make it clear that this is not a tort matter between private parties but a public issue that deserves public attention and the expenditure of public funds.
- a comprehensive process that addresses all the harms resulting from residential school experience even those that have no legal history, such as cultural and spiritual abuse.
- a respectful process that does not imitate the adversarial dynamics of a courtroom setting but offers a neutral forum (seats in a circle in a community centre rather than tables on different sides of a room).[83]

81 *Supra*, note 36 at 7.

82 *Ibid*.

83 *Supra*, note 12 at 296–298.

Professor Llewellyn says that one of the many goals for a truth and reconciliation process is the restoration of relationships. "Care should be taken to ensure that the individuals and institutions responsible for the abuse have an opportunity to participate in repairing the harm they caused".[84]

After reiterating the need to compensate individuals for the harm they suffered, Professor Llewellyn suggests that a truth and reconciliation process must go beyond material reparations to individuals.

Out of the process should come recommendations for community reparations and other non-material or symbolic reparations needed in order to restore relationships and address the harms caused by residential schools. Those responsible for the abuses ought to contribute to the cost of reparations. However, the process should leave room for the parties to decide on other means of participation by these groups towards reparation. Such measures might include apologies, education programs, community development processes, therapy for victims and their families, and participation in healing circles.[85]

Whether the process is called a "truth and reconciliation process" or a "comprehensive truth telling mechanism" as suggested by the Assembly of First Nations Report, we believe that such a process is essential to a restorative justice approach.

We recommend that, as soon as possible, the government discuss with Aboriginal leaders how to initiate and structure a truth and reconciliation process so that it will run parallel to the reconciliation payment process.

84 *Ibid.*, at 299.

85 *Ibid.*, at 300.

Finally, we suggest that the government create a special truth and reconciliation fund that will be available to finance reparation measures identified by participants during the truth and reconciliation process.

We support Recommendation 30 of the Assembly of First Nations Report calling for the continued funding of the Aboriginal Healing Foundation. We note, however, that the Foundation's mission relates to "healing processes that address the legacy of physical abuse and sexual abuse in the residential school system, including intergenerational impacts".[86]

Funding must be available in the context of the truth and reconciliation process to support reparation and reconciliation initiatives that respond to the broad range of harms and hardships related to attendance at Indian Residential Schools.

IX. CONCLUSION

The members of the Canadian Bar Association urge the Government of Canada to provide a reconciliation payment to all survivors of Indian Residential Schools. We offer our support in taking the next steps to make this happen. Once a plan is in place, we would be pleased to assist in communicating to lawyers across the country about the reconciliation payment and how to assist their clients in accessing it.

We believe a reconciliation payment is the logical next step to reconciliation with the survivors of Canada's Indian Residential Schools. We will do what we can to help the Government of Canada to take it.

86 http://www.ahf.ca/newsite/english/about/values.shtml.

Sample reconciliation payment application form

To all students of Indian Residential Schools
We Apologize

The Government of Canada acknowledges that Indian Residential Schools were harmful to the students who attended them, to their families, to their communities, and to their Nations. Please fill out this form to apply for the reconciliation payment that recognizes the hardship of the time that you spent at residential school living away from your parents and community.

Your name:

First name Middle name(s) Last name

What name were you known by in residential school? ☐ same as above or

First name Middle name(s) Last name

Address where you would like us to send your mail:

Number, street, apartment number, P.O. Box, R.R.

Town/City/Reserve Province/Territory Postal code

Telephone number: day time: evening: cell:

E-mail (optional):

Birth date: ☐ Male ☐ Female
day/month/year

Current First Nation or Band name (if you are a member):

Indian Registration (Status) Number of Inuit Disk Number (if you have one):

Residential school attended:

Time spent in school:

We will process all applications as quickly as possible. If you have health concerns and would like us to treat your application as urgent, please check here. ☐

The Help Desk can answer your questions and help you find the name of the school you attended. We also provide counselling assistance 24 hours a day.
Help Desk: 1-800-816-7293.

Date Signature

Sample Release

I accept your apology and compensation for wrong.

I, [name of reconciliation payment recipient] am a survivor of the Indian Residential School system. I accept the apology of the Government of Canada for the harms done to me, my family, my community and my Nation because of these schools.

I acknowledge the compensation you are offering to me for my suffering. I will not ask for more money from the government or the churches for these harms. I understand that I may still ask for compensation for physical abuse, sexual abuse, and wrongful confinement.

May we go forward in peace.

Date

Signature of reconciliation payment recipient

Signature of the lawyer advising the recipient

Interviews

Charlene Belleau, Assembly of First Nations

Alan Borovoy, Canadian Civil Liberties Association

Jennifer Llewellyn, Professor of Law (Dalhousie)

Lubomyr Luciuk, Professor of Political Geography (Royal Military College of Canada)

Kathleen Mahoney, Professor of Law (Calgary)

Darcy Merkur, Thomson Rogers

Art Miki, National Association of Japanese Canadians

Dylan Thomas, Assembly of First Nations

Resources

Application Form for the Indian Residential Schools Alternative Dispute Resolution Process, Government of Canada web site: http://www.irsr-rqpi.gc.ca/english/dispute_resolution_application_form.html

Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: Assembly of First Nations, 2004).

Jane Chartrand, Kimberley Dawn, and Danny Schur, *Healing Jane* (Winnipeg: Sunrise Records, 2004).

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Roy Miki and Cassandra Kobayashi, *Justice in Our Time, The Japanese Canadian Redress Settlement* (Winnipeg: National Association of Japanese Canadians, 1991).

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Caroline L. Tait, *Fetal Alcohol Syndrome Among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2003).

Also, a variety of newspaper clippings and web sites, including:

- Editorial, "The Harm Inflicted by Douglas Brown", *The Globe and Mail* (8 January 2005) A18.
- News Conference Transcript, Assembly of First Nations (17 November 2004) (Ottawa: Media Q Inc., 2004).
- Richard Foot, "Native claims agency administrative fees four times the settlement costs", *The Kingston Whig-Standard* (6 November 2004) 16.
- James Gordon, "Merchant mariners to get their due", *The Kingston Whig-Standard* (1 September 2004).
- Vaughn Marshall, "The Argument for Compensating Cultural Genocide, A Calgary Lawyers Makes the Case", *Calgary Herald* (22 March 2004) A11.
- Deana Driver, "Former Judge heads ADR secretariat on residential schools", *The Lawyers Weekly* (22 August 2003) 7.

Aboriginal Healing Foundation:
www.ahf.ca

Assembly of First Nations:
www.afn.ca

Indian Residential Schools Resolution Canada:
www.irsr-rqpi.gc.ca

Kimberley Stolen Generation Committee:
www.kimberleystolengeneration.com.au

Law Commission of Canada:
www.lcc.gc.ca