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April 7, 2005

Mario Dion
Deputy Minister
Indian Residential Schools Resolution Canada
90 Sparks Street, Room 341
Ottawa, ON K1A 0H4

Dear Mr. Dion,

I write on behalf of the National Aboriginal Law Section of the Canadian Bar Association (the CBA Section) to thank you for again meeting with us last month.

At that meeting, you asked for further detail on a few issues raised in the CBA's Report, "The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors". In the report, the CBA urges the government to make a base compensation payment to all survivors for the loss of language and culture, and related harms.

You asked us to consider various issues that may arise in light of the class action litigation brought against the government for related residential schools claims. You also questioned the level of specificity in the Sample Release Form appended to our Report.

The CBA Report stressed that:

- "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." (p. 24)

- "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." (p. 29)

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- "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." (p. 29)

In keeping with these principles, we would summarize the desired objective as a fair and efficient system that both prevents double recovery and ensures an expeditious process to satisfy losses for which there has been no previous compensation.

Issues with members of a class action could arise in the context of a reconciliation payment scheme where:

- a survivor has joined a class action but wishes instead to accept a reconciliation payment as full compensation;

- a survivor in a class action wishes to accept a reconciliation payment as base compensation for the loss of language, culture, parental care, or pain and suffering, but also wishes to remain in the class action to pursue compensation for abuse and wrongful confinement; or

- a survivor accepts a reconciliation payment, but then wishes to join a class action suit to pursue compensation for abuse and wrongful confinement.

As a starting place to address such issues, we suggest that:

1. Application forms for reconciliation payments could contain a box in which to indicate whether the applicant has joined or plans to join a class action suit. The Sample Release in our Report was drafted to be simple, and to convey the spirit of generosity and respect that our Report recommends. In our view, that Release would adequately protect the government. However, the government could require survivors to sign a more detailed release that expressly indicates that the Reconciliation Payment provides basic compensation for the loss of language and culture, loss of parental care, and general pain and suffering endured at an Indian Residential School and that such losses can no longer be compensated through the class action law suit or through other avenues. Such a release should also state that the survivor would still be entitled to pursue a claim for physical abuse, sexual abuse and wrongful confinement through the class action or any other means.

2. A sub category could be created within existing and future class action law suits to separate litigants who have not applied for a reconciliation payment and who are litigating for all damages suffered, from litigants who have accepted reconciliation payments and are only seeking compensation for abuse and wrongful confinement. These sub-classified litigants would clearly seek compensation only for abuse and wrongful confinement.

3. Alternatively, a sub category within class actions could be created for the purpose of awarding different damages to litigants who have accepted a reconciliation payment. The amount of their damage award could be adjusted by subtracting the amount received for a reconciliation payment from the overall damage award.

4. A sub-classification available for litigants in a class action who have accepted reconciliation payments enables survivors to join class action suits in a manner that clearly delineates the type of harm for which they seek compensation. This prevents double recovery, yet serves the need for compensation for harm done.

You also questioned a reference suggesting that ADR compensation amounts were generally lower than amounts awarded by courts for comparable claims. Professor Kathleen Mahoney, for the AFN, has conducted legal research comparing estimates of what the IRSRC has set aside per case with court awards for institutional sexual abuse of aboriginal and non-aboriginal children. The outcome of that research supports the reference in our Report, and we have relied on the AFN's work on this point.

I trust that this additional information addresses your questions, but please feel free to contact me should you wish to discuss these issues further.

Yours truly,

(Original signed by Gaylene Schellenberg on behalf of Jeffrey Harris)

Jeffrey Harris
Chair, National Aboriginal Law Section