THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

December 24, 2009

The Honourable Robert Nicholson, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister Nicholson,

Re: Expanded Dispute Resolution Process for Aboriginal Students

I am writing to continue the discussion we began in Dublin at the 2009 Canadian Legal Conference, concerning current omissions from the Indian Residential Schools Dispute Resolution process. Since 2000, the CBA has continually advocated for a just and fair resolution for former students of Indian Residential Schools.[1] We recognize the important steps that the federal government has taken to apologize to, and compensate former students, but we are concerned that some have, to date, been left out.

In light of this, the CBA urges the federal government to expand the scope of the Residential Schools Dispute Resolution Independent Assessment and Common Experience Payment processes to include, or alternatively to establish separate but materially similar dispute resolution processes for, other persons who lost language and culture or suffered physical, sexual or psychological abuse while compelled to attend schools for Aboriginal children. Our concern is that the sad legacy of Indian Residential Schools has been only partially addressed by the court-approved Indian Residential School Settlement Agreement (the Agreement). There are former students who suffered similar harms because of the same government policies as have been recognized, but who have so far been left out of the Agreement.

Who is left out?

1. **Arbitrary time limits as to when schools listed are considered Indian Residential Schools**

   The Agreement designates several schools as Indian Residential Schools, without any particular time restrictions. The federal government has determined that some of those

[1] See, 00-04-A, Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools; 02-02-A Residential School Claims; 04-08-A, Scope of Residential Schools Dispute Resolution Process; 07-09-M, Guidance for Lawyers Acting for Survivors of Indian Residential Schools.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | toll free/sans frais : 1.800.267.8860 | fax/téléc : 613.237.0185 | info@cba.org | www.cba.org

schools were only Indian Residential Schools during a particular period, although the schools may have operated for decades beyond the designated period. In other cases, the Agreement itself contains specific time frames during which a school is considered an Indian Residential Schools. These various restrictions can arbitrarily exclude some former students who should be awarded compensation. Examples include:

Lac la Biche (Alberta) – The Agreement contains no time limit for this school, but the federal government has argued that as it stopped funding the school in 1898, students attending after that period are not covered by the Agreement. However, the school continued to operate for many years under the same name, and Aboriginal students continued to be sent to that school. Hundreds of claimants who attended this school have been refused a Common Experience Payment.

St. Augustine's (Alberta) – As above, the federal government's position is that because it stopped funding the school at a certain point, students attending after that point are ineligible, although the school continued to operate.

Coqualeetza (British Columbia) – This school was converted to a federal tuberculosis hospital, and several students from other Indian Residential Schools were sent to it for treatment, and then educated there. The claims of students who attended following the change have been denied.

Some former students have spent significant time and money trying to prove their attendance at a school, without knowing that the school is not considered an Indian Residential School during the relevant period, although listed in the Agreement. This has caused significant anger and frustration within Aboriginal communities.

2. Boarding Homes

In some cases, children were shipped from remote communities to an Indian Residential School, but the school's residence was full. They were then housed in boarding homes while still attending the school. Under the Agreement, the Common Experience Payment is available only to those who fall within a narrow technical definition requiring that they resided in the Indian Residential School itself. Students housed in boarding homes and similar situations have been denied the payment.

3. Tuberculosis Hospitals and Day Schools

No compensation has been made available for former students assimilated through compelled attendance at Day Schools. Often those students experienced similar experiences as former students of Indian Residential Schools. To truly resolve past injustice because of federal government policies to assimilate Aboriginal people, the experience of these students should also be recognized, either in the existing Agreement (by consent) or through the creation of a new Agreement specifically for Day School students.[2]

Independent Assessment Process for Sexual or Serious Physical Abuse

In addition to the categories of students excluded from the Common Experience Payment discussed above, consideration should be given to extending the Independent Assessment Process to Day School students with claims of sexual abuse or serious physical abuse. This

[2] We note that a class action has begun to argue for adding Day Schools for the purpose of the Common Experience Payment.

change should be independent of Day School students becoming eligible for the Common Experience Payment.

Conclusion

Apart from a separate new Agreement for Common Experience Payments for Day School students, we believe that our suggestions could be implemented within the present Agreement at minimal cost. Of the $1.9 billion that the federal government set aside for the costs of the Common Experience Payments, funds remaining may well be sufficient to compensate all students of schools listed in the Agreement, as well as those placed in boarding homes or hospitals when there was no room at Indian Residential Schools. These funds have already been agreed by the federal government and approved by the courts.

Further, using the Independent Assessment Process for Day School students' claims of sexual abuse or serious physical abuse would be cost-effective for the federal government by avoiding costs associated with traditional litigation. In addition to being less expensive for both parties than litigation, it would be less traumatic for former students. The same legal principles are involved as for other former students housed in actual Indian Residential Schools.[3]

There has been understandable frustration within Aboriginal communities because of the current federal government policy of denying these claims. At the CBA's 2009 CLC, we were heartened to hear you say that you were committed to exploring these issues further. We believe that Canada's reputation with Aboriginal communities would be enhanced by offering Common Experience Payments to a broader category of former students and creating an expeditious process for victims of sexual abuse or serious physical abuse while attending Day Schools. It would show the federal government's genuine desire to achieve reconciliation by addressing serious wrongs done to Aboriginal children during this period of history. Many of these children were subjected to the same policies of abuse and assimilation as those attending Indian Residential Schools.

I thank you for your consideration and urge you to expedite the matter for the benefit of those who have been wronged.

Sincerely yours,

(Original signed by D. Kevin Carroll)

D. Kevin Carroll, Q.C., L.S.M.
President

cc: The Honourable Chuck Strahl, Minister of Indian and Northern Affairs

---

[3] We note that some of the religious institutions involved are prepared to utilize the IAP model to resolve such claims in Day Schools operated by that institution. The federal government could incorporate this process as well. It will ultimately save costs for both the government and former students.