

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.

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Executive Summary

At its Annual Meeting in August 2004, the Canadian Bar Association adopted a resolution¹ calling for the government to go beyond the existing Indian Residential Schools Dispute Resolution process to provide a base payment to all survivors of Indian Residential Schools. The CBA recognizes the tragic legacy of Indian Residential Schools and the failure of the current options of either litigation or the dispute resolution process to resolve the situation. The harms caused by Indian Residential Schools are still profoundly felt by the individual students who attended the schools, as well as their families, communities and Nations.

The CBA recommends that, as the next logical step towards reconciliation and restoration of the health, vitality, pride and culture of Aboriginal communities, the Government of Canada make a reconciliation payment to all students of Indian Residential Schools who were alive on January 7, 1998. January 7, 1998 is the date the government made its Statement of Reconciliation and unveiled *Gathering Strength, Canada's Aboriginal Action Plan*.² One element of the Action Plan was to establish a dispute resolution program as an alternative to civil litigation for students who experienced physical abuse, sexual abuse or wrongful confinement at a residential school.

Unfortunately, although the dispute resolution process has some positive features, it is not attaining its objectives. There are many reasons for this. The dispute resolution system is

1 Canadian Bar Association Resolution 04-08-A.

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

based on the narrow grounds of tort law and related notions of harm, wrongdoing and compensation. Applicants to the dispute resolution program must complete a daunting 40-page application form and provide intimate details of every act of abuse that happened to them as a child. Compensation is provided according to a grid system, offering higher awards to claimants from some jurisdictions to reflect local court decisions. Awards also vary depending on the government's agreement with the religious community that ran a school, so that some applicants receive only 70% of a claim, while others receive 100%.

The Assembly of First Nations reports that the program is causing further harm to claimants.³ In fact, the first page of the government's own web site contains a warning that information on the site about making a claim may cause a reader to "trigger" ("suffer trauma by remembering or reliving past abuse") and provides a crisis referral telephone number.⁴

The most telling failure of the current dispute resolution program, however, is that there have been very few applications to it and only a handful of settled cases. The fact that program administration costs are four times settlement amounts also reflects badly on how the program is achieving its intended result.⁵

Loss of language and culture and other harms

The current dispute resolution program does not address the fundamental harms suffered by Aboriginal peoples as a result of the Indian Residential School system that was expressly established to eradicate Aboriginal languages and culture and to "kill the Indian in the child".⁶ The government's strategy for achieving its policy objective involved removing children from their families (by force if necessary), punishing them for speaking their language, denying them the right to follow their spiritual teachings and traditional celebrations, and failing to provide them with an adequate education. Indian

3 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) at 28, section 18.1.

4 www.irsr-rqpi.gc.ca.

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

6 Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* - Volume 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 365.

Residential Schools were chronically underfunded and poorly maintained and the children attending them were not provided with adequate food, clothing or medical attention. Student deaths were not uncommon.

The use of punishment at the schools and the vulnerability of the Aboriginal students attending them is well-documented.⁷ The overall atmosphere has been described as one of “fear, loneliness and loathing”.⁸

The consequences of school attendance on subsequent generations are apparent. Children raised without love and without their parents and families were denied the opportunity to learn about nurturing and positive family relationships. The residential school experience began a cycle of shame, violence and abuse that has spread from generation to generation. The long-term detrimental impact on Aboriginal communities is still a reality today.

Restorative justice

In our view, the blame and fault-finding approach of the corrective justice model that has, so far, been the government’s response to the Indian Residential School legacy, is inadequate. Rather, the government should use a restorative justice approach that is conducive to reconciliation and healing and may ultimately be able to provide Aboriginal peoples with the “peace and comfort”⁹ they seek.

The reconciliation payment

The Law Commission of Canada in its investigation of child abuse in institutional settings¹⁰ recommended that the government consider *ex gratia* payments “to include

7 *Supra*, note 6 at 353 to 376.

8 *Supra*, note 6 at 377, quoting Chief Ed Metatawabin of the Fort Albany First Nation.

9 Speaking at the News Conference to present the Assembly of First Nation’s *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).

10 Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions - Executive Summary* (Ottawa: Government of Canada, 2000).

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 civil action”.¹¹ The Assembly of First Nations has also called for a “lump sum award [to] be granted to any person who attended an Indian Residential School”.¹²

The CBA agrees that a reconciliation payment would be restorative. The payment would not require a person to prove that he or she was a victim, but rather would recognize a person as a survivor of an injurious program for which the government of Canada is responsible.

The average age of residential school survivors is now 57 and it is estimated that every day five survivors die.¹³ The CBA believes that it is incumbent upon the government of Canada to take immediate action to produce a just and expeditious remedy.

Payment details

The CBA offers the following suggestions for the reconciliation policy:

- the payment scheme should be straightforward, objective, and efficient.
- the application form should be clear and simple (one page).
- the government should do everything possible to find the necessary information for the applicant in government records (name of school, years at school).
- the reconciliation payment should start with a base amount for any time spent at school (for example, \$ 10,000) and add an amount for each year at school (for example, \$3,000).¹⁴
- a review committee should be established to address disagreements that may arise. The committee could, for example, have five members: two government officials, one church representative, one representative from the Assembly of First Nations, and one

11 *Ibid.*, at 22-23.

12 *Supra*, note 3 at 18.

13 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 works out to an average of 5 people a day.

14 *Supra*, note 3 at 19, footnote 19.

Aboriginal person with a background in counseling or community health, selected in consultation with the Aboriginal community. Two of the committee members should be women.

- the reconciliation payment should be tax free and not result in a claw back of social assistance or other benefits or insurance an applicant is receiving. The government should negotiate appropriate arrangements with its provincial and territorial counterparts.
- all residents of residential schools alive on January 7, 1998 should be eligible for the reconciliation payment even if they have already settled a claim for physical or sexual abuse or wrongful confinement. Estates will be able to make a claim on behalf of a school survivor who died after January 6, 1998.
- recipients of the reconciliation payment should maintain their right to make a claim through the dispute resolution program or the courts for damages relating to the physical abuse, sexual abuse, or wrongful confinement that they experienced.
- applicants for the reconciliation payment should receive free legal advice about the consequences of accepting it. The government should pay for this advice (for example, \$ 500 for the consultation).
- a settlement of fees must be negotiated with lawyers representing clients in individual litigation or class action law suits who drop their claims and accept the reconciliation payment.
- every effort should be made to have the program up and running by September 1, 2005 and completed by December 31, 2010.
- the reconciliation payment program should be launched with ceremony and be used as an opportunity to educate Canadians about what happened in Canada's Indian Residential Schools and the consequences of these events on students, their families, and Aboriginal communities.
- the government must accept 100% liability for the reconciliation payment.
- the government should put in place a reparation fund as part of a truth and reconciliation process to respond to the intergenerational impact of attendance at residential schools. This is a way to recognize the tens of thousands of Indian Residential School students who have already passed away and whose descendants and communities suffered the consequences of their school experience.
- the reconciliation payment must be seen as a genuine irrevocable offer of compensation from the government.
- the reconciliation payment should be made in a spirit of generosity and respect.

Improvements to the dispute resolution program

While the goal is that the reconciliation payment will offer justice to survivors of the residential school experience, they must still have the option of pursuing a claim for physical abuse, sexual abuse, or wrongful confinement. For this reason, the CBA believes that improvements to the current dispute resolution program are also required.

The CBA generally supports the recommendations made by the Assembly of First Nations in its November 2004 Report¹⁵ and has four additional recommendations.

The Application Form and Guide to the dispute resolution program 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 only require this information and applicants should also be able to submit a videotape or audio recording as a way to provide details of the abuse.

Legal aid should be available to applicants. The 40-page application form is, in essence, a statement of claim requiring the advice of a lawyer before being submitted to the government.

The compensation points and amounts being paid must be revised to reflect what is currently being awarded by judges in comparable cases.

The government must address the appearance of bias in the dispute resolution program, in which it acts as both the defendant and the administrator. An application received by the government should be immediately sent to the Adjudication Office where both parties to the dispute can discuss a suitable hearing date. As well, adjudication decisions should be made available, without identifying information, to other applicants, potential claimants,

¹⁵ *Supra*, note 3 at 19-35.

the legal community and the public. It is unfair for the government alone to have access to this information.

A truth and reconciliation process

A truth and reconciliation process goes beyond material reparation to individuals and gives everyone affected by a situation an opportunity to tell their stories, learn and restore damaged relationships. This restorative justice process should be national, public, government-funded, comprehensive and respectful.

Conclusion

The CBA believes that survivors of Indian Residential Schools are extremely unlikely to be pursuing personal or class action claims because they enjoy the litigation process. Rather, we believe that they are simply looking for the justice that they deserve.

It is in Canada's interests to settle these claims through an administrative process, rather than through protracted and expensive court battles. It is time for Canada to act honourably and with respect, by creating a just and efficient process to attempt to redress an historic wrong.

We believe that a reconciliation payment is the logical next step towards reconciliation with First Nations peoples.