THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 20, 2011

Via email: Minister@ainc-inac.gc.ca

The Honourable John Duncan, P.C., M.P.
Minister
Aboriginal Affairs and Northern Development
House of Commons
Ottawa, ON K1A 0A6

Dear Minister,

Re: Boarding Homes in Residential School Settlement

I am writing on behalf of the Canadian Bar Association's National Aboriginal Law Section to follow up on previous correspondence (attached for your convenience) concerning the Indian Residential School Settlement. Please let me extend my good wishes for your continued portfolio with Aboriginal Affairs and Northern Development. We look forward to working with you and your officials.

The CBA has called upon Canada to expand the scope of the Indian Residential Schools Settlement to include additional categories of claimants, both for the Common Experience Payment (CEP) and the Independent Assessment Payment (IAP). One of those categories is the students who were placed in boarding homes or alternative residences while attending Indian Residential Schools.

Students were placed elsewhere often simply because the residence at the school was full. This was a less costly way of housing them than physically expanding the residences. Usually, more senior students would be boarded with local families after a number of years at the school's residence.

Residential school survivors are entitled to the Common Experience Payment for the years spent actually living in the dormitory at a residential school, but not for any years they were boarded with families while they continued to attend the same school.

All but one party to the Indian Residential School Settlement is agreeable to amending the Settlement to include individuals residing elsewhere than in the schools themselves, while being compelled to attend the schools. The only party to the Settlement not agreeable is Canada.

This reluctance is difficult to understand, as including this group of individuals would be budget neutral. The amount set aside for the CEP is fixed. If not disbursed to satisfy CEP claims, it will be divided between the Assembly of First Nations and the Inuit representatives for their use. All parties, with the exception of Canada, agree that it would be appropriate to use the CEP money to

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**

compensate survivors for the years they spent away from their families at Indian Residential Schools, though perhaps not residing in the schools themselves. Finally, expanding the CEP to include years spent in boarding homes would avoid the costs, including the cost to Canada and to Canadian taxpayers, of additional litigation to settle those claims.

As the deadline for applications to the CEP portion of the Settlement approaches, we ask that you reconsider Canada's position on this issue at your earliest possible convenience.

Yours truly,

(original signed by Gaylene Schellenberg for Bradley D. Regehr)

Bradley D. Regehr
Chair, National Aboriginal Law Section

Encl. (2)

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.

Dispute Resolution Process for Aboriginal Students

WHEREAS comprehensive studies, including the Royal Commission on Aboriginal Peoples and the Law Commission of Canada's *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, have documented the immediate individual harm and the long term collective harm caused by Canadian government efforts to eradicate aboriginal language and culture by placing aboriginal children in Indian Residential Schools;

WHEREAS the Canadian Bar Association has recognized the extreme vulnerability of survivors of Indian Residential Schools, and the potential for further harm in seeking to resolve their claims through litigation;

WHEREAS, under related government policies, other aboriginal children lost language and culture and were abused physically, sexually and psychologically while compelled to attend school in other settings, such as Indian Day Schools or hospitals and sanatoriums, or in boarding and foster homes associated with Indian Residential or Day Schools;

Processus de règlement de conflits pour les étudiants autochtones

ATTENDU QUE des études approfondies, dont celle menée par la Commission royale sur les peuples autochtones et l'étude de la Commission du droit du Canada intitulée « La dignité retrouvée : la réparation des sévices infligés aux enfants dans des établissements canadiens », ont apporté la preuve du préjudice personnel direct ainsi que du préjudice collectif à long terme qui ont été causés par les efforts du gouvernement canadien visant à éliminer la langue et la culture autochtones en plaçant les enfants autochtones dans des pensionnats indiens;

ATTENDU QUE l'Association du Barreau canadien reconnaît la vulnérabilité extrême des survivants de pensionnats indiens, et la possibilité qu'ils subissent davantage de souffrances en tentant de faire redresser par voie de poursuite judiciaire les torts qu'ils ont subis;

ATTENDU QUE, en vertu de politiques gouvernementales connexes, d'autres enfants autochtones ont été privés de leur langue et de leur culture et ont subi des sévices physiques, sexuels et psychologiques alors qu'ils étaient contraints à fréquenter l'école dans d'autres contextes, tels que des externats indiens, hôpitaux ou sanatoriums, ou dans des pensions ou familles d'accueil associées aux pensionnats ou externats indiens;

Resolution 09-02-A **Résolution 09-02-A**

WHEREAS the Government of Canada has established dispute resolution processes to give Residential School survivors an alternative to the litigation process, but those who experienced the same harms in other settings have been barred from resolving their claims in this manner;

ATTENDU QUE le gouvernement du Canada a mis en œuvre un processus de règlement de conflits afin de donner aux survivants des pensionnats indiens une option autre que les procédures judiciaires, mais que ceux qui ont subi les mêmes types de sévices dans d'autres contextes n'ont pas le droit de se prévaloir de cette option;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada 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.

QU'IL SOIT RÉSOLU QUE l'Association du Barreau canadien exhorte le gouvernement du Canada à augmenter la portée du Processus d'évaluation indépendant de règlement des conflits impliquant les pensionnats indiens et du Processus de paiement d'expérience commune, ou bien à mettre en œuvre un processus de règlement de conflits distinct mais en substance semblable pour les personnes qui ont été privées de leur langue et leur culture ou qui ont subi des sévices physiques, sexuels ou psychologiques alors qu'elles étaient contraintes à fréquenter des écoles pour enfants autochtones.

Certified true copy of a resolution carried as amended by the Council of the Canadian Bar Association at the Annual Meeting held in Dublin, Ireland, August 15-16, 2009

Copie certifiée d'une résolution adoptée, tel que modifiée, par le Conseil de l'Association du Barreau canadien, lors de son Assemblée annuelle, à Dublin, Irlande les 15 et 16 août 2009.

John D.V. Hoyles
Chief Executive Officer/Chef de la direction