EDUCATION FOR SUBORDINATION:

REDRESSING THE ADVERSE EFFECTS OF RESIDENTIAL SCHOOLING

Denise G. Réaume and Patrick Macklem

Faculty of Law
University of Toronto

June 1994

TABLE OF CONTENTS

INTRODUCTION [1]

Residential schooling has featured prominently in the formal education of Aboriginal peoples from before Confederation until it was phased out in the 1960's - 1980's. Throughout this period, many Aboriginal people have complained about many aspects of their treatment in many of these schools. Ultimately the schools were eliminated, but these complaints have yet to be adequately addressed. At a minimum, there has been no firm acknowledgement[2] of the harm done by the residential school system. A close examination of the system reveals many injustices which have had lasting effects upon Aboriginal people and their communities. In light of these injustices, the object of this study is two-fold. First, we seek to examine the history of the residential school system from the point of view of the law of fiduciary obligation and assess the legality of the conduct of those responsible for its design and operation. The point is not to examine any particular case or cases, nor to assess the likelihood of success in actual litigation. Rather it is to apply the legal principles of fiduciary obligation to the establishment and operation of residential schools to ground an argument that serious legal wrongs have been committed over the course of that history. This may open the door to actual individual or community claims against the government or Churches. Whether it does so or not, the premise of this study is that an examination of the lawfulness of the conduct of the residential schools is essential to our ability as a society to come to terms with this part of our

---

[1]* We are grateful to John Milloy, Brian Slattery, and Susan Vella for comments on an earlier draft of this study.

[2] Partial exceptions are the apologies issued by the Anglican Church, and by the Oblate Conference of Canada on behalf of the Missionary Oblates of Mary Immaculate ministering in Canada. See the Brief of the Anglican Church, presented to the Royal Commission on Aboriginal Peoples at the Special Consultation with the Historic Mission Churches, Nov. 8-9, 1993, and Royal Commission on Aboriginal Peoples, *Exploring the Options: Overview of the Third Round* (Ottawa: Minister of Supply and Services Canada, 1993) at 21.

past.

Our second object is to consider possible paths of extra-legal redress that might be pursued. Even if liability could be established through the courts, there are substantive and practical reasons for preferring a comprehensive settlement of these issues rather than pursuing case by case adjudication. However, the residential school experience may be too little known and its aftermath too little understood by policy makers and the general Canadian public to make such a settlement politically possible. We will therefore consider the merits of a public inquiry to investigate the operation and effects of the residential school system. Assuming that such a thorough airing of the issues would help make the case for a comprehensive, negotiated settlement with those individuals and communities who have suffered and continue to suffer, we will conclude by briefly examining the lessons revealed by the experiences of other communities and groups in attempting to negotiate compensation packages for historic injustices.

When dealing with the possible legal wrongs arising out of more than one hundred years of daily operation of hundreds of schools, it is impossible to present a detailed account of the facts. Some wrongs will have been committed in some schools and not others; some perpetrated against some residents of a particular school and not others; in some cases the links necessary to establish institutional responsibility for the acts of individual teachers will be present and in others not. Every possible cause of action that might have arisen over this period cannot be identified and treated individually. In addition, much more research needs to be done into the historical record before any firm conclusions could be drawn about particular cases and individuals or institutions. This study undertakes a preliminary analysis of the relevance of the law of fiduciary obligations in light of the information currently available. We will focus primarily on harms arising out of the design of the system itself and the main forms of abusive

behaviour that have surfaced in published accounts of survivors. In other words, the law will be analyzed against the backdrop of certain `typical' harms as drawn from the secondary literature.

This study is divided into three parts. Our discussion of the legal issues and extra-legal remedies requires that we set the scene with a brief overview of the history of residential school policy and of the operation of the schools and the conditions within them. This overview forms Part I. Part II is concerned with the applicability of the law of fiduciary obligation. Finally, we turn to a consideration of the usefulness of a public inquiry and the prospects for a negotiated redress package in Part III.

PART I: HISTORICAL BACKGROUND

A. The Official Philosophy and the Experience of Residential Schooling

i) Early Beginnings

Residential schools for Aboriginal people began in Upper Canada in the mid-nineteenth century as an offshoot of the missionary activities of the Wesleyan Methodist Missionary Society. These early schools were called manual labour schools and were prototypes for the industrial schools developed during the last quarter of the century.[3] With the advent of Confederation, the federal government took on a regulatory role with respect to the education of Aboriginal peoples. In the meantime the Roman Catholic, Anglican, and Presbyterian Churches began to get involved in Aboriginal education[4], and two types of schools began to develop: boarding schools, which were typically on or very near to the reserve that they served, and industrial schools, which were at some distance from reserve lands, usually near some centre of white population.[5] The early boarding schools were commonly built, staffed, and maintained entirely by the Churches.

By the late 1840's, colonial educators had become interested in the industrial school model, developed in Britain for poor and orphaned children, and applied in the United States to

---

3. Correspondence with John Milloy, May 13, 1994.
4. Briefs of the Anglican Church of Canada, the Permanent Council of the Canadian Conference of Catholic Bishops, the Presbyterian Church of Canada, and the United Church of Canada, presented to the Royal Commission on Aboriginal Peoples at the Special Consultation with the Historic Mission Churches, Nov. 8-9, 1993.
5. E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 77 [hereinafter *A Narrow Vision*].

the context of Indian education.[6] In 1879, under pressure from the Churches to provide funding for Aboriginal education, the federal government commissioned a report by Nicholas Flood Davin on the operation of the industrial schools for Indian children in the United States.[7] Davin's endorsement of the industrial school model solidified government preference for this model, and plans were made in the 1880's to expand the system by establishing new industrial schools in the west.[8]

Government's increasing involvement was executed by means of a partnership arrangement with the various Churches already active in this area. The Churches continued to be interested in the proselytizing function of such schools and saw an opportunity to continue their mission with the help of government funds; the government saw an opportunity to build upon existing expertise and infrastructure.[9] The Churches' religious mission was also regarded as an important `civilizing' force.[10] This partnership consisted in the government providing capital financing for the construction of new industrial schools and operational funding through a system of *per capita* grants, and the Churches providing day-to-day management and teaching personnel.[11] The government's relationship, financial or otherwise, with boarding schools seems to have been more haphazard, financial contributions being made to particular schools to

---

6 E. Brian Titley, "Indian Industrial Schools in Western Canada" in Nancy Sheehan, J. Donald Wilson, David C. Jones, eds., *Schools in the West: Essays in Canadian Educational History* (Calgary: Detselig Enterprises Ltd., 1986) at 133 [hereinafter "Indian Industrial Schools"].

7 Titley, *A Narrow Vision*, *supra* note 4 at 76.

8 *Ibid*. at 77; Jean Barman, Yvonne Hébert, Don McCaskill, "The Legacy of the Past: An Overview" in Barman, Hébert and McCaskill, *Indian Education in Canada: The Legacy* (Vancouver: University of British Columbia Press, 1986) at 6.

9 Titley, *A Narrow Vision*, *supra* note 4 at 76; Titley, "Indian Industrial Schools", *supra* note 5 at 134; Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd, 1969) at 53-54.

10 J. Donald Wilson, ""No Blanket to be Worn in School": The Education of Indians in Nineteenth-Century Ontario" in Barman *et al*., *supra* note 7 at 65-70; Jean Barman, "Separate and Unequal: Indian and White Girls at All Hallows School, 1884-1920" in Barman *et al*., *supra* note 7 at 115.

meet special needs or respond to emergencies. As industrial schools gradually fell out of government favour between 1890 and 1910, and the government began to focus more on boarding (and day) schools for the accomplishment of its educational objectives, a system of *per capita* grants developed for the boarding schools similar to that used to finance the industrial schools.[12] Indeed, by the 1920's boarding schools and industrial schools were virtually indistinguishable, and both began to be referred to as residential schools.[13]

ii) The Assimilation Objective and the Attack on Aboriginal Cultures

Initially the explicit objective of both missionaries and government was to assimilate Aboriginal peoples into white society.[14] Both missionaries and government officials held little hope that much headway could be made with adults, and therefore saw the education of the young as the most important tool of assimilation.[15] The 1881 Department of Indian Affairs annual report concluded that "the Indian youth, to enable him to cope successfully with his brother of white origin, must be dissociated from the prejudicial influences by which he is surrounded on the reserve of his band".[16] Indian Commissioner Hayter Reed articulated this strategy clearly in 1889:

> [E]very effort should be directed against anything calculated to keep fresh in the memories of children habits and associations which it is one of the main objects of industrial institutions to obliterate.[17]

---

11 Titley, "Indian Industrial Schools", *supra* note 5; Wilson, *supra* note 9 at 74.
12 Titley, *A Narrow Vision*, *supra* note 4 at 86-87.
13 *Ibid*.
14 Brief of the Anglican Church of Canada, *supra* note 1 Appendix 1; David A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs Cultural Replacement* (Waterloo: Wilfred Laurier Press, 1988) at 74ff; Barman *et al*., *supra* note 7 at 5-7; Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillicum Library, 1988) at 25, 31.
15 Wilson, *supra* note 9 at 67-68; Haig-Brown, *supra* note 13 at 26.
16 *Sessional Papers*, 44 Victoria, No. 14, 1881 at 8; see also Wilson, *supra* note 9 at 72-73.
17 Quoted in Titley, *A Narrow Vision*, *supra* note 4 at 78.

Many missionaries, too, understood the task of the schools as that of inculcating a comprehensive set of cultural norms that would replace the children's Aboriginal culture:

> The Indian Child must be taught many things which came to the white child without the schoolmaster's aid. From the days of its birth, the child of civilized parents is constantly in contact with civilized modes of life, or action, thought, speech, dress; and is surrounded by a thousand beneficent influences...He [the Indian child] must be led out from the conditions of this birth, in his early years, into the environments of civilized domestic life; and he must be thus led by his teacher.[18]

This assimilationist policy was pursued by removing children from their communities as adolescents or younger[19] and educating them exclusively according to white norms. One woman interviewed for Haig-Brown's study of student experiences at the Kamloops Indian Residential School recounted this wrenching tale of her removal from her family to attend school:

> I can remember Dad left really early that morning `cause he never, ever wanted to see us go off to school. And when he left that morning at five, I tried sneaking out with him. He was really crying, my dad was. And he told me, `No, you stay. You got to go to school.' And I just [said], `No, I want to stay with you. I want to stay with you.' And I was crying just as hard as he was. Finally, I just wrapped my arms and legs right around him and every time he went to take a step, he had to pack me with him `cause I was hanging on to him so hard. He walked back in the house and pulled me off of him and sat me on the couch and he finally yelled at me, `You sit right there and don't you move until them people come.' But he was crying. He walked out and he got on his horse and went and left. That was really hard to take, you know...
>
> When that truck did come, boy, I tell you. We had a back door and a front door and we beelined it. I didn't know exactly where they were going, but when everybody started running, I started to run too and realized that the truck was there. And they literally chased us down...
>
> And the kids that are on the truck, they're all bawling because they're seeing us, you know, screaming and yelling...Of course, they're all crying because we're crying and Mum's crying and I can remember [saying], `What'd I ever do to you? Why are you

---

18 E.F. Wilson, as quoted by Nock, *supra* note 13 at 74. Nock refers to this as a policy of "cultural replacement". See also, Haig-Brown, *supra* note 13 at 46-52 for an account of the entirely foreign regimen imposed on children at the Kamloops school, and at 57-59 for a discussion of some of the effects of religious indoctrination.

19 N. Rosalyn Ing claims that some children were removed as young as three years old, while most were between five and six: "The Effects of Residential Schools on Native Child-Rearing Practices" (1991) 18 (Supplement) Canadian Journal of Native Education 67 at 73.

> mad at me? Why are you sending me away?...She was really heartbroken.[20]

Basil Johnston[21] demonstrates how brutally insensitive the authorities could be. He recounts how they decided, without consultation with his mother and grandmother, that five children were too much for them to handle and that he and his sister would be placed in a residential school. When the agent appointed to take them to school arrived to discover that the older girl who was supposed to go was ill, he insisted - over the mother's protests - that a younger child, four years old, be taken away instead. His instructions were to remove two children and two children would be removed. Some children were terrified of being taken away from home from the outset; others, like Johnston, initially looked upon school as an adventure. Many former residents recall feelings of abandonment and intense loneliness. Johnston describes his first night at school as follows:

> In the silence and the darkness it was a time for remembrance and reflection. But thought of family and home did not yield much comfort and strength; instead such memories as one had served to inflame the feelings of alienation and abandonment and to fan the flames of resentment. Soon the silence was broken by the sobs and whimpers of boys who gave way to misery and sadness, dejection and melancholy, heartache and gloom.[22]

Once at school, the children were required immediately to conform to an entirely foreign regime. Harold Cardinal poignantly describes the school environment from the perspective of an Aboriginal child:

> Residential school was no bed of sweet balsam for the young Indian student. Often as early as the age of five, he was yanked forcibly from his parents' arms and taken scores of miles away to the residential school, where a system of harsh discipline combined with an utterly foreign environment quite literally left him in a state of shock. No effort was made to ease his introduction. He was jerked out of his bed at six o'clock in the morning, made to kneel at the side of his bed to thank God, presumably for letting him sleep until six, marched army fashion to communal washrooms, then to a chapel for morning prayers, back to a school dining hall where he had to listen to interminable Latin or English graces before he could touch the rapidly cooling gruel on the slab table before

---

20 Haig-Brown, *supra* note 13 at 43-44.
21 *Indian School Days* (Toronto: Key Porter Books, 1988) at 19-20.
22 *Ibid*. at 45.

> him. Then it was back to his room for half an hour. He hadn't been allowed to speak once up to now, and all too soon he had to march to a cold, cheerless classroom where the day started with still more prayers. So it went, daylong and day after day - march to lunch, march to play periods of half an hour each afternoon, march to bed by eight o'clock.[23]

The pursuit of Aboriginal customs was prohibited, the speaking of Aboriginal languages was punished.[24] One former resident recalled, "At the Indian residential school, we were not allowed to speak our language; we weren't allowed to dance, sing because they told us it was evil...It was evil for us to practice any of our cultural ways..."[25] The painful effects of being forbidden the use of their language and of being punished for its use is a constant theme in the accounts of former residents.

Children's hair was often cut short - sometimes, as punishment, shaved off entirely - with little sensitivity to how contrary this was to Aboriginal traditions.[26] Increasing the children's sense of alienation, in some schools little, if any, contact was allowed between the residents and

---

23 Cardinal, *supra* note 8 at 85-86. The daily regime described by Johnston and by the participants in Haig-Brown's study is remarkably similar. Johnston, *supra* note 20 at 28-47; Haig-Brown, *supra* note 13 at 54-69. See also Linda Bull, "Indian Residential Schooling: The Native Perspective" (1991) 18 (Supplement) Canadian Journal of Native Education" 1 at 17-18, 41.

24 At the hearings of the Royal Commission on Aboriginal Peoples held across the country, participants repeatedly mentioned the prohibition on and punishment for speaking Aboriginal languages. See, for example, the transcripts of the hearings in Charlottetowm, P.E.I., May 5, 1992, Eskasoni N.S., May 6, 1992, Kingsclear, N.B., May 19, 1992, London, Ont., May 12, 1993, Winnipeg, Man., April 22, 1992, Fort Chipeweyan, June 18, 1992, Fort McPherson, N.W.T., May 7, 1992, and Kispiox, B.C., June 16, 1992. See also, Nock, *supra* note 13 at 77ff; Wilson, *supra* note 9 at 76; Cardinal, *supra* note 8 at 86; Haig-Brown, *supra* note 13 at 31, 51; Titley, "Indian Industrial Schools", *supra* note 5 at 142; Bull, *supra* note 22 at 43, 44. However, not all missionaries took such a strict attitude toward the speaking of Aboriginal languages. Jacqueline Gresko recounts efforts by Father Hugonnard, the first principal of Qu'Appelle school, to provide some teaching in Cree and Sioux despite contrary instructions from Ottawa: "Creating Little Dominions Within the Dominion: Early Catholic Indian Schools in Saskatchewan" in Barman *et al*., *supra* note 7 at 93.

25 Haig-Brown, *supra* note 13 at 53.

26 Haig-Brown, *supra* note 13 at 47; Bull, *supra* note 22 at 46.

their families.[27] Correspondence between children and their parents was routinely read by staff in some schools.[28] Indeed, at some schools, little contact was allowed between siblings in the same school.[29] Some of these techniques used to distance the children from their communities can only be described as psychological abuse: the constant denigration of anything Aboriginal and the inculcation of shame. Religion was often used to this end:

> And then we marched from there down to the chapel and we spent over an hour in the chapel every morning, every blessed morning. And there they interrogated us on what it was all about being an Indian...He would just get so carried away; he was punching away at that old altar rail...to hammer it into our heads that we were not to think or act or speak like an Indian. And that we would go to hell and burn for eternity if we did not listen to their way of teaching.[30]

Similarly, Persson relates how,

> Many students from the 1930's remember the pictorial catechism used at Blue Quills: "They had two roads going up, the one going up to heaven had all white people and the one going up to hell had all Indian people." For one student, the catechism left the message that "if you stay Indian you'll end up in hell." Students were also encouraged to try to change their parents' religious attitudes...A grade 3 boy "wrote" in the school newspaper:
>
> > I will listen when Sister reads to us in school, so that I can tell my parents when I go home for holidays. We should never go to sun dances, and we should try to stop it if we can by telling our parents it is forbidden by God. We should try to give good example to the children who do not come to school yet. I will never go to a sun dance.[31]

In some schools, children were constantly referred to as savages and pagans.[32]

In short, these children were substantially deprived of the opportunity to learn the ways

---

27 Nock, *supra* note 13 at 74; Diane Persson, "The Changing Experience of Indian Residential Schooling: Blue Quills, 1931-1970" in Barman *et al*., *supra* note 7 at 153; 156-7; Bull, *supra* note 22 at 39, 41, 49-50.

28 Persson, *supra* note 26 at 161; Haig-Brown, *supra* note 13 at 79.

29 Haig-Brown, *supra* note 13 at 48-49, 81.

30 Recounted in Haig-Brown, *supra* note 13 at 54.

31 Persson, *supra* note 26 at 154, footnote omitted.

32 Linda Bull, *supra* note 22 at 47. See also, George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills: Collier-Macmillan Canada Ltd., 1974) at 63-64; Barman *et al*., *supra* note 7 at 13; Persson, *supra* note 26 at 155.

of their own peoples[33], were trained to be ashamed of those practices, and to accept and adopt white customs and habits, from language and work habits, to recreation and manners.[34] Just how deeply the residential schools failed to provide adequate emotional support and security for their charges is simply but poignantly brought out by this comment of Basil Johnston:

> To talk, as I imagine other boys our age did, about the latest adventure of Batman or the exploits of the Shadow; or to compare the relative merits of a Packard or a Studebaker; or to speculate on the earning powers of lawyers, doctors and engineers; or even to contemplate our future careers, professional or otherwise, was beyond our experience and imagination. Our sole aspiration was to be rescued or released (it didn't much matter which) from Spanish [the colloquial name for St. Peter Claver school], and to be restored to our families and homes. That was the sum total of our ambitions. Our vision did not extend beyond the horizon; our world was confined to the playground and the west wing of the building enclosed by fences and walls.[35]

School was little more than a prison for these children.[36]

Missionaries and government officials seemed to be in agreement on a policy of assimilation.[37] The expectation was that through this process Indians as separate peoples could be eliminated thereby eliminating the special federal jurisdiction over "Indian peoples". Testifying before a Special Committee of the House of Commons in 1920, Deputy Superintendent-General Duncan Campbell Scott said,

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no

---

33 For a discussion of the traditional form of education of the young in the practices of their people of one Aboriginal community, the Shuswap, see Haig-Brown, *supra* note 13 at 35-43.
34 Nock, *supra* note 13 at 78ff; Wilson, *supra* note 9 at 77; Persson, *supra* note 26 at 152.
35 Johnston, *supra* note 20 at 53.
36 Many of the former residents interviewed by Bull explicitly compared school to jail. Bull, *supra* note 22 at 41, 47.
37 For example, Nock refers interchangeably to the opinions of E.F. Wilson, in charge of the Shingwauk Home, and Department of Indian Affairs officials. Nock, *supra* note 13 at 78-79. However, Gresko, *supra* note 23, argues that at least some missionaries were more sensitive to the cultural needs of their students than government officials were. Even these missionaries, though, seemed to share the long term objective of assimilation, while adopting short term educational strategies that gave some recognition to the students' own culture.

Indian Department...[38]

iii) Education for Subordination: The Industrial School Model

The educational strategy of industrial schools was to provide students with training in certain industrial skills that would fit them for integrating into white society as labourers. As should be clear from the origins of the industrial school philosophy in Britain, the integration imagined was not one on fully equal terms with white society. It was not anticipated that Aboriginal children could aspire to anything other than a working class lifestyle.[39] The expectations for Aboriginal children were graphically illustrated by the organization of All Hallows School, which accepted both White and Aboriginal girls. Not only were the two populations segregated, the Aboriginal girls occupied the role of servants within the school.[40] Considerable emphasis was placed on the `practical' component of the children's education, such that roughly half of each day was spent, not in academic pursuits, but working.[41] A variety of skills, including cattle raising, agriculture, carpentry, blacksmithing, and shoemaking, were taught to boys; girls were trained in domestic skills.[42] This attention to practical skills meant,

---

38 Department of Indian and Northern Affairs, *The Historical Development of the Indian Act*, (1978) at 115-116.

39 Nock notes that the structure of the school day at Shingwauk was designed to replicate the conditions of the industrial work force. He also claims, however, that Wilson, himself, thought his charges were capable of the highest levels of intellectual achievement, and encouraged them to this end. Nock, *supra* note 13 at 83-84. See also, Wilson, *supra* note 9 at 79; Haig-Brown, *supra* note 13 at 61.

40 Barman, *supra* note 9 at 115-117. Despite this, Barman also notes that the Anglican bishop in charge of All Hallows and the teachers believed the Aboriginal children to be capable of the same level of achievement as the White girls.

41 Bull, *supra* note 22 at 39; Gresko, *supra* note 23 at 92-93. Haig-Brown notes, *supra* note 13 at 61, that until the 1940's children at the Kamloops school spent only two hours per day in the classroom. Johnston's description of conditions at St. Peter Claver's Indian Residential School (later the Garnier Residential School) indicates that into the 1940's a substantial amount of time each day was spent labouring rather than studying. Johnston, *supra* note 20.

42 Titley, "Indian Industrial Schools", *supra* note 5 at 135; Wilson, *supra* note 9 at 75ff; Barman, *supra* note 9 at 116.; Persson, *supra* note 26 at 151; Haig-Brown, *supra* note 13 at

of course, that the children's progress through the academic curriculum was significantly retarded.[43] There is also reason to doubt the quality of the strictly academic training that students did receive. As Harold Cardinal states,

> In plain words, the system was lousy. The curriculum stank, and the teachers were misfits and second raters. Even in my own elementary school days, in grade eight I found myself taking over the class because the teacher, a misfit, has-been or never-was sent out by his superiors from Quebec to teach savages in a wilderness school because he had utterly failed in civilization, couldn't speak English well enough to make himself understood. Naturally, he knew no Cree. When we protested such inequities we were silenced as "ungrateful little savages who don't appreciate what is being done for you."[44]

As the cost of industrial schooling rose and the government failed to see the assimilationist results it had hoped for, something of a change of purpose occurred, roughly between the turn of the century and 1920. Instead of trying to educate Aboriginal people to integrate into White society, a narrower objective was adopted of teaching these children enough to enable them to return to their reserves and be self-supporting.[45] In 1909, Duncan Campbell Scott wrote,

> The government and the churches have abandoned to a large extent, previous policies which attempted to "Canadianize" the Indians. Through a process of vocational, and to a smaller extent academic training, they are now attempting to make good Indians, rather than poor mixtures of Indians and whites. While the ideal is still Christian citizenship, the government now hopes to move towards this end by continuing to segregate the Indian population, in large measure from the white race.[46]

It was now thought implausible that Aboriginal people would be able to compete with White people in the larger economy and undesirable that they should try to do so.[47] Although

---

64-65; Manuel, *supra* note 31 at 64-65 claims that even this education was deficient, the children being required to work with substandard equipment. See also Haig-Brown, *supra* note 13 at 67.

43 Titley, "Indian Industrial Schools", *supra* note 5 at 143; Barman *et al.*, *supra* note 7 at 11; Haig-Brown, *supra* note 13 notes at 61 that students accomplished five years of schooling in eight years of residence.

44 Cardinal, *supra* note 8 at 54, 86. See also, Bull, *supra* note 22 at 39.

45 Barman *et al.*, *supra* note 7 at 8-10; Barman, *supra* note 9 at 119-122.

46 As quoted by Bull, *supra* note 22 at 13.

47 Barman, *supra* note 9 at 120.

the quality of education received by Aboriginal children in residential schools had never matched that available in the public school system, this change of objective arguably resulted in a further decline.[48] Official notions of what kinds of skills would be useful on the reserve were limited to basic carpentry and sometimes farming skills, for boys, and domestic skills, for girls. Increasingly, the children were put to work in order to maintain the school, financially and physically.[49] In an atmosphere of government cutbacks the Churches seem to have acquiesced in this further abandonment of academic objectives and reaped the benefit of the children's labour.[50] In addition, many former residents complain that not only did their academic education suffer in the pursuit of skills training, but that religious education was given greater emphasis than academic matters.[51] Again, according to Harold Cardinal,

> The priest-teachers seldom were qualified educators. Their goals didn't require that they be. All they wanted of their Indian charge was to pound a little English into his head, just enough to enable him to decipher religious materials, and to give him enough simple arithmetic to enable him to count the animals on the church farm. They didn't really care if they broke his spirit as long as they got the right responses at mass.[52]

By the mid-1920's, the original industrial school model had been virtually abandoned, and a severely impoverished educational paradigm accepted for boarding (and day) schools. This policy was in place until the 1950's, when pressure began to mount to integrate Aboriginal

---

48 Titley, "Indian Industrial Schools", *supra* note 5 at 143; Barman, *supra* note 9 at 119-122. According to Barman, officials openly voiced the view that the education Aboriginal girls had been receiving made them too smart for their own villages.

49 Already in 1892, Duncan Campbell Scott, then chief clerk of the Department of Indian Affairs and later deputy superintendent, was encouraging reductions in the *per capita* funding for industrial schools, both as a pure economy measure and out of a belief that Aboriginal children should be put to work producing food and other goods for their school because a more academic education would be wasted on them. See Titley, "Indian Industrial Schools", *supra* note. 5 at 139-140; Wilson, *supra* note 9 at 79; Gresko, *supra* note 23 at 94; Barman, *supra* note 9 at 116; Haig-Brown, *supra* note 13 at 64-68.

50 Barman, *supra* note 9 at 121-122.

51 Cardinal, *supra* note 8 at 85; See also Persson, *supra* note 26 at 161; Haig-Brown, *supra* note 13 at 105; Bull, *supra* note 22 at 29-30.

52 Cardinal, *supra* note 8 at 86.

children into the provincial public school systems. However, even as the system was beginning to be dismantled in some parts of the country, it was expanding in others. For example, after 1955, eight hostels and a series of smaller `cottage' hostels were built in the Northwest Territories. These hostels were essentially residences attached to existing day schools. Thus they were like residential schools in that children were removed from their homes and communities to attend school.[53]

The policy of industrial schooling ensured that several generations of students received only the most basic education:

> In 1930...three-quarters of Indian pupils across Canada were in grades 1 to 3, receiving only a very basic literacy education. Only three in every hundred went past grade 6. By comparison, well over half the children in provincial public schools in 1930 were...past grade 3; almost a third were beyond grade 6. The formal education being offered young Indians was not only separate from but unequal to that provided their non-Indian contemporaries.[54]

The result was to leave them effectively suspended between two worlds, educated properly neither to participate fully in their own society nor in White society[55], ashamed of their own culture, but not accepted by White society. The Report of the Mackenzie Valley Pipeline Inquiry quotes from the testimony of Roy Fabian before the inquiry on this experience:

> I'm a young native Indian. I've got an education...I went to school until I was about 16, then I quit...then about three years later I went back to Fort Smith for the Adult Education Program, and I got my grade 11...Since I was about 16-17 years old I have been travelling around trying to figure out where I'm at, what I can do for my people...I thought if I got this education, then I would be able to do something for them...
> So I come back and I find that people don't accept me as I am....They really can't accept me as I am because they either can't accept the changes I went through or it's something else. I can't understand what it is. So I'm not really accepted back into the culture, mainly because I lost the knowledge of it...and I can't really get into the white society

---

53 Correspondence with John Milloy, May 13, 1994. One interesting feature of these schools is that, being under the control of the Department of Northern Affairs rather than Indian Affairs, they combined status, Metis, Inuit, and White children in the same schools.

54 Barman *et al*., *supra* note 7 at 9. See also Haig-Brown, *supra* note 13 at 69.

55 Barman *et al*., *supra* note 7 at 9-12; Cardinal, *supra* note 8 at 87; Manuel, *supra* note 31 at 67.

> because I'm the wrong colour. Like, there's very, very few white people that will be friends with native people. Any of these white people that will be friends with native people, it's like a pearl in a pile of gravel.
> For myself, I find it very hard to identify with anybody because I have nobody to turn to. My people don't accept me any more because I got an education, and the white people won't accept me because I'm not the right colour. So like, a lot of people keep saying, "O.K., we've got to educate these young native people, so that they can become something." But what good is it if the person has no identity?...I can't really identify with anybody and I'm lost. I'm just sort of a person hanging in the middle of two cultures and doesn't know which way to go.[56]

iv) Techniques of Subordination: Abuse and Substandard Living Conditions

The full extent of physical and sexual abuse in the residential schools is not known, but there is enough evidence to say with certainty that abuse did occur on an alarming scale.[57] Stories abound of military style discipline,[58] of sexual abuse[59], of brutal punishments being imposed[60]. Punishment for speaking an Aboriginal language was particularly severe: Randy Fred recalls his father's account of having had a sewing needle pushed through his tongue for speaking Tseshaht.[61] Haig-Brown reports that her informants repeatedly mentioned the use of the strap, public humiliations, head shaving, and a restricted diet of bread and water as punishments.[62] One man also reported that his daughter had been locked in a cupboard for

---

56 Northern Frontier, Northern Homeland, Report of the Mackenzie Valley Pipeline Inquiry, vol. 1 (Ottawa: Minister of Supply and Services Canada, 1977) at 92 (the Berger Inquiry).
57 The Royal Commission on Aboriginal Peoples heard accounts at its hearings of abuse at schools across the country. See, for example, the remarks of Chief Councillor Charlie Cootes at the Port Alberni, B.C. hearings, April 20, 1992.
58 Titley, "Indian Industrial Schools", *supra* note 5 at 141; Cardinal, *supra* note 8 at 85.
59 See, for example, the "Forward" by Randy Fred in Haig-Brown, *supra* note 13 at 17; and also Haig-Brown at 75. This issue was raised at many of the hearings of the Royal Commission on Aboriginal Peoples. See, for example, the hearings at Eskasoni, N.S., May 6, 1992, Hobbema Alta., June 10, 1992, and Saskatoon, Sask., Oct. 27, 1992.
60 Persson, *supra* note 26 at 153-154; Cardinal, *supra* note 8 at 86.
61 In Haig-Brown, *supra* note 13 at 11. See also the literature cited in footnote 22, *supra*.
62 Haig-Brown, *supra* note 13 at 76-79. The accounts of the former residents interviewed by Bull, *supra* note 22 at 42ff, are very similar.

bedwetting.[63] Johnston says, "[f]or many offences punishment was swift and arbitrary, administered by means of various weapons at hand - a ruler, a rod, a bell, a pointer, the open hand, the closed fist, a leather riding boot."[64] Bull recounts stories of a child being shoved against a hot stove for burning toast[65], and of one child being hit over a hundred times with a "nail-studded strap", requiring a month's convalescence in hospital.[66] Children were also sometimes required to participate in the punishment of their friends.[67] Several authors have suggested that these severe forms of corporal punishment were that much more damaging to those Aboriginal children who came from cultures within which children were rarely if ever physically punished.[68]

Arguably another form of abuse consisted in the seriously deficient diet with which the children were provided. A constant theme in all first-hand accounts of residential schooling is the bad and meagre food. Manuel writes of being perpetually hungry throughout his period of schooling.[69] Johnston writes, "Food was the one abiding complaint because the abiding condition was hunger...".[70] He describes a typical day's meals as follows:

> In the middle [of the breakfast table] were two platters of porridge, which owing to its indifferent preparation, was referred to as "mush" by the boys; there were also a box containing sixteen slices of bread, a round dish bearing eight spoons of lard (Fluffo brand), and a huge jug of milk....
> For dinner there was barley soup with other ingredients, including chunks of fat and gristle, floating about in it...Barley soup, pea soup (not the French or Quebec variety), green and yellow, vegetable soup, onion soup, for dinner and supper...Besides the soup

---

63 Haig-Brown, *supra* note 13 at 78. See also Marie Battiste, "Micmac Literacy and Cognitive Assimilation" in Barman *et al*., *supra* note 7 at 36.
64 Johnston, *supra* note 20 at 138. Bull's informants also mentioned the use of fists on the boys in the school. Bull, *supra* note 22 at 43.
65 Bull, *supra* note 22 at 45.
66 Ibid. at 48.
67 Ibid. at 46.
68 Barman, *supra* note 9 at 115; Bull, *supra* note 22 at 51; Haig-Brown, *supra* note 13 at 43.
69 Manuel, *supra* note 31 at 65-66. See also Bull, *supra* note 22 at 43.
70 Johnston, *supra* note 20 at 137.

there was a large jug of green tea diluted with milk.[71]

The food improved only when inspectors came through.[72] The diet at the Kamloops Indian Residential School seems to have been little better.[73] The poor quality of the food the children received was in marked contrast, at least in some schools, to the fare enjoyed by the staff.[74]

Poor food, together with unsanitary living conditions and inadequate medical attention, contributed to chronic health problems in many of the schools. In 1903, Dr. P.H. Bryce, secretary of the Ontario Provincial Board of Health began to put pressure on the federal government to deal with the outbreak of contagious diseases on reservations. In 1907 and 1909, Dr. Bryce was asked to inspect the industrial and boarding schools in the prairies.[75] His investigations revealed widespread tuberculosis and other contagious diseases, contributed to by lax attention to the health of incoming students and poor living conditions within the schools.[76] In the case of one school, twenty-eight percent of the student population died of tuberculosis between 1894 and 1908.[77] Although, in response to the Bryce reports, the government introduced new regulations regarding ventilation, exercise and diet within the schools, problems persisted.[78] Titley attributes responsibility for this both to government underfunding of the schools and Church mismanagement of individual schools.[79] Former residents also recount cases of illness going untreated, which, even if not affecting the health of other students, caused unnecessary suffering.[80]

---

71 *Ibid*. at 32, 36.
72 *Ibid*. at 139-144.
73 Haig-Brown, *supra*, note 13, at 55-57, 63.
74 Randy Fred, in Haig-Brown, *supra* note 13 at 14; Johnston, *supra* note 20.
75 Titley, *A Narrow Vision*, *supra* note 4 at 83.
76 *Ibid*. at 84-88.
77 *Ibid*. at 84; Barman *et al*., *supra* note 7 at 8; Gresko, *supra* note 23 at 93-94.
78 Titley, *A Narrow Vision*, *supra* note 4 at 85-87.
79 *Ibid*.
80 Bull, *supra* note 22 at 43-44.

The formal partnership between government and Churches ended in 1969. In 1954, teachers became federal government employees, although principals remained Church employees. The unionization of federal civil servants in 1967 made any further formal role of the Churches unworkable.[81] After 1969, the Churches played only a minor role, continuing to provide chaplains, and sometimes advising on the hiring of staff.[82]

B. Identifying the Harms Caused by Residential Schooling

Out of this description of the factual background, we can distinguish four possible types of harm and potential claimants.

i) Physical and Consequent Emotional Harm to Children

Most readily recognizable by the legal system are the harms caused to the individual children who were mistreated or abused within the system. These include, in addition to the obvious physical harm of physical or sexual abuse, the emotional harm consequent upon such abuse, and harm to dignity. The psychological effects of abuse, the full extent of which needs further study, have long outlasted their physical progenitors. In the category of physical harm we also include the undernourishment suffered by some children, as well as general health problems and the exposure to disease due to unhealthy living conditions.

ii) Educational Harm

Individual children within the system were given a radically inferior education, which may have had enormous consequences for the quality of their lives. It should be noted that the leaders of many Aboriginal communities were eager for their people to learn from European

---

81 Brief of the Anglican Church, Appendix 1, *supra* note 1 at 8.

culture in so far as it would be useful to them in adapting to the presence of the settlers.[83] They did not accept that this process must necessarily be destructive of their own cultural heritages. Former residents also confirm that they enjoyed and found valuable the academic training they did receive.[84] However, no serious attempt seems ever to have been made by the Churches or the government to design an educational programme for Aboriginal children that was consistent with their own cultures. Instead, Aboriginal children received a second class education that ill equipped them to live productive lives.

iii) Loss of Culture and Language

Rather than making available to Aboriginal people the benefits of education in a way consistent with Aboriginal traditions, the residential school system was designed to do and did lasting damage to the culture, spiritual traditions, and languages of entire communities. This harm extended far beyond the individual children who attended; it encompassed their whole communities. Languages were nearly wiped out; traditions were lost. Generations of Aboriginal people were alienated from their past.

iv) Harm to Family Structures

The last type of harm has both individual, family, and communal manifestations. In removing children from their parents for long periods of time, the system had a negative impact on the normal development of parent\child relationships:

> The structure, cohesion and quality of family life suffered. Parenting skills diminished as succeeding generations became more and more institutionalized and experienced little nurturing. Low self-esteem and self-concept problems arose as children were taught

---

82 Correspondence with John Milloy, May 13, 1994.
83 See Barman *et al*., *supra* note 7 p. 5, 7, 10, 11; Haig-Brown, *supra* note 13 at 87.
84 Bull, *supra* note 22 at 40-41.

that their own culture was inferior and uncivilized, even "savage".[85]

This disruption of normal family structures is an important component of the attempted destruction of Aboriginal cultures[86], but in addition caused emotional harm to families and their individual members. The disruption entailed by separation was compounded by the cultural and religious indoctrination children received. In the words of one of Haig-Brown's informants:

> They started teaching me their religion...telling me who God was, what Hell was and what angels were...They said, `...anybody that doesn't go to church is a pagan.' I started thinking, `Hey, my parents don't go to church all the time. They must be pagans...' People that got drunk, they would really put them down. I thought, `Gee, our family is really the pits.' And I'd go home and I'd be really ashamed of my parents.[87]

One or more of these harms has touched the lives of many of the former residents of the schools and they continue to adversely affect the quality of life of many. One general note of caution is warranted, though. Because of the many contexts and ways in which many Aboriginal people experience racism, it may be difficult to establish a straightforward causal link between residential schooling and some of the long-term effects outlined above. Present day suffering may be over-determined, making it difficult for traditional social science techniques to isolate the causal role of any one factor.[88] Full exploration of these possible difficulties,

---

85 Tony Martens, Brenda Daily, Maggie Hodgson, *The Spirit Weeps* (Edmonton: Nechi Institute, 1988). It is clear from the presentations at the hearings of the Royal Commission on Aboriginal Peoples that many Aboriginal people attribute current family dysfunction to the trauma of residential schooling. See the hearings in Port Alberni, B.C., May 20, 1992, Waswanipi, Que., June 9, 1992, and Timmins, Ont., Nov. 5, 1992. See also Ing, *supra* note 18; Haig-Brown, *supra* note 13 at 111-112; Bull, *supra* note 22 at 56; Brief of the Anglican Church, *supra* note 1 at 20.

86 Ing, *supra* note 18, in particular, treats the disruption of parent\child bonds and the destruction of culture as integrally related.

87 Haig-Brown, *supra* note 13 at 58.

88 Roland D. Chrisjohn, "Community-Based Research into Residential School Effects: A Summary of the Cariboo Tribal Council Research", presentation to the Royal Commission on Aboriginal Peoples, Canim Lake, March 9, 1993. See also, R.D. Chrisjohn and C. Belleau, "Faith Misplaced: Lasting Effects of Abuse in a First Nations Community" (1991) 18 Canadian Journal of Native Education 161.

however, would be better undertaken in the context of a specific fact situation. We turn now to the question of possible redress for these harms.

PART II: AVENUES OF LEGAL REDRESS

A. Overview

The historical overview presented above, drawn from the secondary historical literature and accounts of school survivors, presents a composite picture of the types of harms that occurred through residential schooling and how they occurred. It covers a very long period, from the early beginnings of residential schools to their replacement. The point of examining this history is not to identify discrete acts of wrongdoing in respect of which a cause of action might be brought today. That would require a much more detailed account of the facts than is currently available. Furthermore, there would undoubtedly be significant evidential and procedural obstacles to litigating these issues. Since it has been over a decade since the last government run residential school was closed[89], many of the wrongs that might once have been litigated will no longer be actionable because of the deaths of all parties or because of the operation of limitation periods. This analysis will concentrate on the substantive merits of possible legal claims, abstracting from procedural issues.[90] Such an investigation will provide

---

89 Some schools were taken over by Bands and continued to operate as residential schools under community control. Correspondence with John Milloy, May 13, 1994. For an account of this transition at the Blue Quills school, see Diane Persson, "The Changing Experience of Indian Residential Schooling: Blue Quills, 1931-1970" in Jean Barman, Yvonne Hébert, Don McCaskill, *Indian Education in Canada: The Legacy* (Vancouver: University of British Columbia Press, 1986). This phase of their operation is beyond the boundaries of this study.

90 This allows us to simplify the analysis considerably. While the substantive law to be examined is the same in all of the common law provinces, the procedural rules that could have a bearing on the feasibility of an action vary considerably from province to province. For example, in Ontario there is no limitation period for equitable actions, including breach of fiduciary obligation, whereas other provinces, having included equitable actions in modern legislation on limitation periods, have imposed limits on actionability. In some of the provinces in which a statutory limitation period has been imposed, such as Alberta (*Limitations of Actions Act*, R.S.A. 1980, c. L-15, s. 4(1)), a plaintiff may nevertheless be able to bring him or herself under the generous interpretation of the discoverability condition on determining when the limitation period begins to run laid down in *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4th) 289

a sense of the legal wrongs done and the possible consequences if the system or various actors within it had been challenged from the first instance of wrongdoing, and will therefore contribute to a historical record of wrongs committed. It also helps provide a record of the magnitude of the wrongful or unlawful behaviour involved in the history of the residential school system. This is relevant to the determination of what justice requires by way of redress for these wrongs.

Many possible criminal and civil wrongs arise out of the picture painted above. The question of criminal responsibility for the more serious assaults has received a fair amount of attention as more survivors have come forward with their claims. On the civil side, there are also many different causes of action that might be considered: the intentional torts of battery and assault, negligence and, the focus of this study, breach of fiduciary obligation. While many of the individual injuries suffered by Aboriginal people could be dealt with under the rubric of intentional tort or negligence, we shall argue that breach of fiduciary obligation provides the best opportunity to consider more systematically the wrongs done. The history of residential schooling does not merely reveal a series of wrongs done to individual students; to look at it this way misses the systemic nature of the wrongs and their community-wide consequences. The possible liability of both the federal government and the Churches and responsible officials will be considered.

Pursuing the idea of responsibility for breach of fiduciary obligation is more attractive

---

(S.C.C.). In others, though, there is a special provision eliminating the limitation period in respect of actions in tort or negligence - not in equity - in respect of sexual abuse only. *Limitation Amendment Act*, S.B.C. 1992, c. 38, s. 3(3). Such legislation might be invoked to preclude the application of the *M.(K.)* discoverability doctrine in an equity action on the grounds that the legislature has determined that leeway is to be provided to plaintiffs only in tort actions, leaving the statutory limitation period for equitable actions to operate. Since this kind of provision is also limited to actions for sexual abuse, one aspect of a particular claim may be covered by this exception while other aspects fall under other limitations rules. The combinations and permutations are endless, and in the absence of a specific fact situation against

than using other possible tort actions. Especially in the case of Church responsibility, although any legal action is unlikely fully to rectify the various *collective* injustices inflicted by the residential school system, the rubric of fiduciary obligation has the greatest potential for two reasons. It has the potential to go beyond the focus on discrete acts of abuse required by the various possible applicable tort actions. Second, an action in equity may allow plaintiffs to transcend the traditional common law focus on tangible physical harm to encompass more of the significant emotional and collective harms experienced by survivors. The obligation of a fiduciary is to act in the best interests of the principal, not merely to refrain from inflicting serious bodily harm on her. The common law has historically been more adept at protecting the latter sort of interest than the former. Thus, in so far as residential schools provided an inferior education or created an atmosphere in which the self-esteem of Aboriginal children was undermined, a remedy for these harms might be sought through an action for breach of fiduciary duty, when it would be unavailable under other common law rubrics.

The analysis of the lawfulness of the operation of the residential schools will, for the sake of simplicity, be according to the law as it is in 1994. A more thorough legal history would seek to examine historical events in light of the state of the law at the time. Such a detailed analysis is beyond the scope of this study. If it is true that current principles and doctrines would not have been applied to the advantage of Aboriginal peoples if government or Church conduct had been legally challenged in the past, this seems likely because of racist attitudes which might have led judges to fail to recognize certain harms to Aboriginal people as legal harms or to recognize Aboriginal peoples as properly the beneficiaries of a fiduciary relationship. Moreover, many of the harms inflicted on Aboriginal people continue to have lasting effects on

---

which to test liability, consideration of all the limitation period complications would simply confuse rather than contribute to the analysis.

individual and collective Aboriginal identities.

i) The Relationship Between Government and Churches

As is evident from the historical overview above, the operation of the residential schools was very much a joint enterprise between the federal government and various Churches. Initially, the government largely provided funding and the Churches provided day-to-day management. Over time, the government began to impose more and more regulation on the Churches, in part in response to abuses of which it became aware.[91]

In determining the respective degrees of control exercised by the Churches and government, it is interesting to examine the statutory regime under which these schools were run and changes to it over time. Amendments to the *Indian Act* in 1894, gave the Governor in Council only the power to make regulations enforcing compulsory attendance at school and establishing industrial or boarding schools.[92] By implication, what was to go on in those schools was left to be determined by the Churches. By 1920, the *Indian Act* had been amended to give wide regulatory power to the Governor in Council to, *inter alia*, prescribe "a standard for the buildings, equipment, teaching and discipline of and in all schools, and for the inspection of such schools"[93]. Despite this appearance of total government control, however, the Churches continued to have a great deal of *de facto* power.

The government's disinterest in exercising its legislative authority during this period is illustrated by the fate of an effort in 1911 to formalize the relationship between the government and school authorities through an agreement concerning the maintenance and management of

---

91 For example, new regulations about required ventilation and acceptable numbers of students in a particular school were a direct government response to the reports of Dr. Bryce on health conditions. See text at note 77, *supra*.

92 57-58 Victoria, c. 32, s.11.

boarding schools. A comprehensive agreement[94] was drafted, detailing the government's financial obligations in respect of different kinds of schools, as well as the Churches' responsibility with respect to the maintenance of standards and conditions within the school. Although several such agreements were signed in the early `teens, they were generally for a five year term, and were never renewed after the initial five years; instead the government appears to have simply reverted to the sort of informal arrangements it had previously had with the Churches. A second such agreement was drafted and put into force in 1961, but again, its effects were short-lived, since the Churches' role in the schools was eliminated in 1969.[95]

In considering the respective responsibilities of Churches and government in light of their ambiguous relationship, it is useful to distinguish amongst different aspects of education policy. The most important distinction may be between the overarching assimilationist objectives of the policy and more mundane matters of day-to-day conditions in the schools. Church representatives could argue with some justification that *government* policy dictated the residential format of the schools and certain key aspects of curriculum, such as the insistence on the use of English with a view to achieving the government's assimilationist objectives, and that the Churches had little choice but to carry out this policy. Government policy on these issues was indeed clear, and for this it is appropriate to lay responsibility at the doorstep of the government. However, with very few exceptions, the Church officials in charge of particular schools were wholehearted supporters of this aspect of government policy. Indeed, their own religious mission was predicated on destroying Aboriginal cultures. Thus, far from being a case of passively following orders, Church policy coincided with government policy, making the Churches active and willing participants in the assimilation process. Given the enormous

---

93 10-11 George V, c. 50, s. 1.
94 Copy on file with authors.

influence the Churches had over education policy from its inception, they cannot be construed as merely passive servants of the state. Further, government policy was not so finely tuned as to dictate the myriad ways in which Aboriginal children were taught to be ashamed of their own cultures, such as are detailed in the historical literature. School officials made decisions comprehensively to disallow Aboriginal customs and practices in the schools and to denigrate those traditions as a means of bringing the children to accept and adopt white practices.

A similar picture of mutually reinforcing aims and behaviour emerges with respect to curriculum matters, that is, the inadequate education received by Aboriginal children. The industrial school model was developed by the Churches, but heartily endorsed by the government.[96] The skills orientation of this model is largely responsible for the inadequate academic training received in the residential schools. The Churches may be held primarily responsible, though, for the extent to which religious training took precedence over academic learning. They were also responsible for the selection of teachers, most of whom over most of this period were members of religious orders. To the extent that the inadequacy of the educational experience may, in particular cases, have been in part attributable to unqualified teachers, this might be connected to the Churches' greater concern for religious training. The government may also bear some responsibility here, though, since it set pay scales for those lay teachers involved in the system. Salaries were substantially below those paid in the provincial public school systems, making it harder to attract well-qualified teachers to the residential schools.

The Churches had the most control over, and therefore bear most responsibility for, general conditions in the schools. Department of Indian Affairs records indicate that the

---

95 Correspondence with John Milloy, May 13, 1994.

Churches had a great deal of *de facto* decision making power over all aspects of conditions in the schools. These conditions encompass discipline, health and nutritional standards. The government may be regarded as indirectly responsible, first, for the chronic underfunding of the residential schools[97], and second, for its failure to control the abusive excesses of those in charge of individual schools. There is plenty of recognition evidenced in Department of Indian Affairs files on the part of government officials that there were horrendous problems - inadequate conditions of all sorts - but they seemed powerless to enforce whatever standards they had prescribed.

More detailed research into archival records needs to be done to clarify the relationship between government and school officials. No doubt there are variations over time, and from school to school. The material currently available indicates that there was substantial agreement between the Churches and the government on policy and that both played an active role in decision-making. Against this backdrop, we turn to an analysis of the law of fiduciary obligation and its applicability.

B. The General Nature of Fiduciary Obligation

Much has been written about fiduciary relationships, but they are still poorly defined. La Forest J. has commented that "[t]here are few concepts more frequently invoked but less

---

96 For example, the 1911 contract designed to govern the operation of the schools clearly specified that children were to be instructed in various manual skills.

97 There is ample evidence that the Churches consistently complained that the *per capita* grants paid to the schools were inadequate to maintain them properly, and that the government was always looking for ways to spend less money on these schools. See E. Brian Titley, "Indian Industrial Schools in Western Canada" in Nancy Sheehan, J. Donald Wilson, David C. Jones, eds., *Schools in the West: Essays in Canadian Educational History* (Calgary: Detselig Enterprises Ltd., 1986) at 139-140; E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia

conceptually certain than that of the fiduciary relationship."[98] Similarly, P.D. Finn has described the term "fiduciary" as "one of the most ill-defined, if not altogether misleading terms in our law".[99] Most of the material on the topic concerns proprietary or business relationships, although new areas are developing slowly. Traditionally, the courts have proceeded to invoke this body of law by determining whether the particular relationship in issue could be classified as fiduciary. Some of the traditional categories are trustee-beneficiary, guardian-ward, directors-corporations, agents-principals, tenants-remaindermen, partners, and solicitor-client.[100] To avoid the ossification of recognized categories of fiduciary relationship, courts have long denied that the categories are closed.[101] For example, Dickson J. (as he then was), in *Guerin*, says,

> It is sometimes said that the nature of the fiduciary relationship is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[102]

However, it must also be acknowledged that not every aspect of the relationship between a fiduciary and beneficiary need be fiduciary, that is, the fiduciary nature of the relationship does not supplant all other kinds of legal relationship.[103]

Recently, Wilson J. has suggested that we should distinguish between the question of whether a fiduciary *relationship* exists and that of whether a fiduciary *duty* exists:

Press, 1986) at 79-83; Linda Bull, "Indian Residential Schooling: The Native Perspective" (1991) 18 (Supplement) Canadian Journal of Native Education" 1 at 12.

98 *LAC Minerals v. International Corona Resources* (1989), 61 D.L.R. (4th) 14 at 26 (S.C.C.)

99 P.D. Finn, *Fiduciary Obligations* (Sydney: The Law Book Company, 1977) para. 1.

100 *LAC Minerals*, *supra* note 97 at 16, *per* Wilson J.; *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 at 97 (S.C.C.), per Wilson J.

101 However, it must also be acknowledged that, traditionally, the courts have been quite cautious about recognizing new fiduciary relationships. See *Frame*, *supra* note 99, per Wilson J. at 98.

102 *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321 at 341.

> ...there are certain relationships which are almost *per se* fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and...where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary...,but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by [one or both of the parties] within the confines of the relationship.[104]

In a similar fashion, La Forest J. has distinguished between two different uses of the term fiduciary.[105] The first corresponds to the relationships which Wilson J. characterized as *per se* fiduciary. Here, La Forest J. argued, "[t]he focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way...The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present."[106] The second usage refers to situations in which a fiduciary obligation arises "as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected."[107]

All this seems to be best summarized by saying that the question is really one of the scope of the fiduciary element in a relationship.[108] The wider the scope of the fiduciary element, the more likely the whole relationship is to be classified as fiduciary: for example, the trustee\beneficiary or parent\child relationship. Even in such a case, some aspects of the relationship may still fall outside the fiduciary quality. Conversely, even if an entire

---

103 *LAC Minerals*, *supra* note 97, per Sopinka, J. at 61; per La Forest, J. at 28.
104 *LAC Minerals*, *ibid*. at 16. This distinction was foreshadowed in her dissenting judgment in *Frame*, *supra* note 99, in which she noted, at 98, that "...it may be more accurate to speak of relationships as having a fiduciary component to them rather than to speak of fiduciary relationships as such."
105 *LAC Minerals*, *supra* note 97 at 28-29.
106 *Ibid*. at 28.
107 *Ibid*. at 29.

relationship is not classified as fiduciary, this does not preclude the identification of particular fiduciary duties within it. Indeed the fiduciary aspect of a relationship can be quite minimal (as in *LAC Minerals*), but still give rise to a limited fiduciary duty. Slaight has suggested a three-stage examination process where a fiduciary breach is alleged: 1) Does a fiduciary relationship exist between the parties? 2) Does that relationship extend to the facts in issue? 3) Was there a breach of the duty?[109] This might be read as incorporating a distinction similar to Wilson J.'s between the existence of a relationship and the existence of a duty, with Slaight's second question corresponding to the latter.

Substantively, fiduciary duties are duties that the judiciary has created and enforced as against persons who are, in law or fact, empowered to act in relation to a particular matter in the interests of another person. As stated by Mason J. of the Australian High Court, in *Hospital Products Ltd. v. United States Surgical Corp.*, "the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."[110] The vulnerability of the person whose interests are entrusted to the discretion of the superior party is the reason for the creation or recognition of certain duties of fairness and good faith. As stated by Macdonald J.A. of the Nova Scotia Court of Appeal in *H.L. Misener and Son Ltd. v. Misener*, "[t]he reason such persons are subject to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals."[111]

A useful summary of the constituent elements of a fiduciary relationship or the conditions

---

108 J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can. B. Rev. 1 at 18-20.

109 Ronald Slaight, "Proving a Breach of Fiduciary Duty" [1990] Spec.Lect. L.S.U.C. 37 at 39.

110 (1984), 55 A.L.R. 417 at 454 (Aust. H.C.).

giving rise to a fiduciary duty can be found in Wilson J.'s dissenting judgment in *Frame v. Smith and Smith*.[112] After a lengthy and exhaustive study of relevant authorities, Wilson J. stated the following:

> ...there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[113]

This formulation, although written in dissent, was adopted in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, by Sopinka J. for the majority, who stated that one essential requirement for the finding of a fiduciary relationship is dependency or vulnerability.[114] However, Sopinka J. cautioned that:

> It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.[115]

Courts have also held that the content of a fiduciary duty will vary with the specific relationship which it regulates.[116] As stated by Wilson J. in *Frame*, the duty often refers to "a collection of unrelated rules such as the rule against self-dealing, the misapprehension of assets

---

111 (1977), 77 D.L.R. (3d) 428 at 440 (N.S.C.A.).
112 *Supra* note 99. In *LAC Minerals*, *supra* note 97 at 29, La Forest, J. referred to these factors as providing a useful tool in determining whether a relationship should be presumed to give rise to fiduciary obligations.
113 *Frame*, *ibid*. at 98-99.
114 *Supra*, note 97 at 63.
115 *Ibid*.

rule, the conflict and profit rules and (in Canada) a special business opportunity rule."[117] Since the duty varies so significantly from context to context and from relationship to relationship, its content cannot be pinned down with any degree of precision in the abstract. A close examination must ultimately be made of the relationship in issue.

C. The Fiduciary Obligations of Government

Two points must be kept in mind in assessing whether and to what extent the federal government, by its involvement in the residential school system, breached fiduciary obligations owed to Aboriginal individuals and communities. First, the judiciary has held that a fiduciary relationship exists between the Crown and Aboriginal communities in Canada.[118] Second, the nature and scope of this fiduciary relationship have yet to be precisely elucidated by the judiciary. Any clarity provided by the recognition of a fiduciary relationship is offset by the absence of guiding principles regarding the nature and scope of duties owed by the Crown. As the following discussion illustrates, the judiciary has recognized that, in some contexts, certain action or inaction by the Crown constitutes a breach of fiduciary duty, but it has been loath to offer general principles that would delineate the outer boundaries of the duty. Judicial reticence in this regard makes it difficult to offer an authoritative opinion on whether federal involvement in the residential school system is the type of governmental action subject to fiduciary obligations and, if so, whether governmental involvement constituted a breach of fiduciary duty. What follows is more exploratory than determinative. It attempts to extract from the few cases addressing the fiduciary relationship between the Crown and Aboriginal communities a set of

---

116 See, for example, *Canadian Aero Service Limited v. O'Malley*, [1974] S.C.R. 592.
117 *Supra*, note 99 at 98.
118 See, for example, *Guerin v. The Queen*, *supra*, note 101 and text accompanying notes 119-122, *infra*.

general principles which can be used to assess whether governmental participation in the education of Aboriginal people triggers fiduciary obligations and, if so, whether governmental involvement in the residential school system constituted a breach of fiduciary duty.

As stated, recent court decisions have imposed fiduciary duties on the Crown in its dealings with Aboriginal peoples.[119] The relationship between the Crown and Aboriginal peoples thus joins a number of relationships, including those between trustees and beneficiaries, solicitors and clients, directors and corporations, and agents and principals, identified by the judiciary as subject to fiduciary obligations. Fiduciary duties with respect to Aboriginal peoples have been recognized in at least two different contexts. First, the federal Crown is under an equitable fiduciary obligation to act in the interests of an Aboriginal community with respect to Aboriginal rights to land. Second, jurisprudence under s. 35(1) of the *Constitution Act, 1982* suggests that governmental action that interferes with the exercise of Aboriginal rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982* creates constitutional fiduciary duties on the government responsible for the interference in question. It has also been suggested that the Crown is under a generalized fiduciary obligation with respect to its relationship with Aboriginal peoples. Each of these contexts is addressed in turn.

i) Equitable Fiduciary Duties and Aboriginal Land Rights

The Crown was held to owe fiduciary duties to Aboriginal people in the landmark Supreme Court of Canada case of *Guerin v. The Queen*.[120] In *Guerin*, the Musqueam had surrendered a portion of reserve land to the federal Crown to be leased to a third party for use as

---

119 See, for example, *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), overruled on other grounds (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.); *Guerin v. The Queen*, *ibid.*

120 *Supra* note 101.

a golf club. The Crown in turn leased the land on terms not as attractive as those that the Crown had led the band to believe it would receive upon surrender. Dickson J. (as he then was), for a majority of the Court, held the Crown to be under a fiduciary obligation to act in the best interests of the Musqueam nation when dealing with third parties on behalf of the Musqueam with respect to surrendered Musqueam reserve land.

It should be noted that in *Guerin* the duty was attached to the exercise of discretion that the *Indian Act* and the common law conferred on the Crown by virtue of the usufructuary nature of both statutory rights to reserve land and common law rights to ancestral land. That is, Aboriginal people are precluded from alienating any statutory or common law interests in their land to third parties directly; they must first alienate their land to the Crown by way of surrender, and the Crown then acts on behalf of Aboriginal people with respect to third parties. In *Guerin*, the fiduciary duty was applied to this very specific element of Crown discretion created upon the surrender of reserve or ancestral land. According to Dickson J. (as he then was), due to the fact that "the relative legal positions are such that one party is at the mercy of the other's discretion,"[121] the Crown's freedom to deal with the land as it sees fit ought to be constrained by principles of justice and fairness. Upon surrender, the fiduciary obligation arises "to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."[122] In such a context, the Crown is obliged to act in the interests of, and to demonstrate "utmost loyalty" to, the surrendering party.[123]

A useful illustration of how the fiduciary obligation works in a *Guerin*-like context is

---

121 *Ibid*. at 340, *per* Dickson J., quoting E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 7.
122 *Guerin*, *supra* note 101 at 342.
123 *Ibid*. at 344.

found in the recent case of *Lower Kootenay Indian Band v. Canada*[124], in which the Lower Kootenay Indian Band had surrendered to the federal Crown land to be leased to a third party for 50 years. The lease that the Crown negotiated on behalf of the Band did not contain an escalation clause with respect to rent. The Band lobbied the government to change the lease and, in 1948, the government discovered that it had not passed an order-in-council in relation to the surrender as required by the *Indian Act*. The Band was not informed of the oversight for some 25 years and, upon the expiry of the lease, the Band commenced an action alleging *inter alia* that the Crown breached its fiduciary obligation to the Band by failing to negotiate an escalator clause and by failing to terminate the lease when it discovered that the order-in-council had not been passed. Dubé J. of the Federal Court, Trial Division agreed, stating that the Crown was under an "obligation to be reasonably prudent and provident" and should have attempted to obtain an escalator clause. With respect to the order-in-council oversight, Dubé J. held that the surrender, and therefore the lease, was void *ab initio*. The Crown breached its fiduciary duties by failing to act in light of this fact and by failing to take steps to terminate the lease.

In both *Guerin* and *Lower Kootenay Indian Band*, the surrenders in question were for a specific purpose and for a limited period. In both cases, the Indian band surrendered the land to the Crown to be leased to a third party for a definite term. In both cases, the band continued to have an interest in the land. Courts have been less willing to accept that ongoing fiduciary obligations attach to voluntary surrenders of land that do not involve a continuing Aboriginal interest in the land, such as an unconditional or absolute surrender of land to the Crown. In *Apsassin v. Canada*, for example, Addy J. held that "[w]ith the exception of any special obligations which may be created by treaty, there is no special fiduciary relationship or duty

---

124 [1991] 2 C.N.L.R. 54 (F.C.T.D.).

owed by the Crown...remaining after the surrendered lands have been transferred and disposed of subsequently."[125] In *Lower Kootenay Indian Band*, Dubé J. emphasized the fact that the case before him involved a lease of reserve land and not an unconditional surrender, and held that "the Crown's fiduciary duty was crystallized for the duration of that lease."[126] Thus, it would appear that it would be more difficult to assert that the Crown owes ongoing equitable fiduciary duties to an Aboriginal community with respect to the use of land that was once surrendered after its disposal and sale, if the surrender was akin to an outright sale.

To reiterate, *Guerin* held that a fiduciary obligation owed by the Crown is triggered by a *voluntary* surrender of Indian land. Does a similar duty attach to *unilateral* governmental action that regulates or extinguishes Aboriginal rights? If so, what is its content? An answer to this question will depend on whether the governmental action in question occurred prior to or after the enactment of s. 35(1) of the *Constitution Act, 1982*. Although s. 35(1) is addressed at greater length below, the constitutionality of post-1982 governmental action that amounts to an undue interference with an existing Aboriginal right will depend in part on whether the government responsible for the interference has met fiduciary obligations owed to affected Aboriginal people. Prior to 1982, governments were free to regulate and indeed extinguish Aboriginal rights, so long as they acted within their respective spheres of authority. However, courts may be tempted to apply principles analogous to those that govern voluntary surrenders of Indian land, and hold that fiduciary duties are owed to Aboriginal people when their rights are interfered with or extinguished by unilateral governmental action, even though such action occurred prior to 1982.

A conservative view on this subject is that fiduciary obligations are not triggered by

---

[125] [1988] 3 F.C. 20, at 46 (T.D.). See also *Gitanmaax Indian Band v. B.C. Hydro and Power Authority* (1991), 84 D.L.R. (4th) (B.C.S.C.).

unilateral governmental action prior to 1982. The justification for this stance would be that the fiduciary obligation recognized in *Guerin* attaches because of the vulnerability that Aboriginal people face vis-à-vis the Crown by virtue of the fact that they cannot deal directly with third parties. They must deal through the Crown, and when they do, they entrust the Crown with their land through the act of surrender, thereby relying on the Crown to act in their interests. The usufructuary nature of Aboriginal rights with respect to land is the source of the fiduciary obligation; the discretion that the obligation regulates is the discretion that the Crown enjoys when it is entrusted with the land for the purpose of a third party transaction. The conservative view is that the duty should not extend to govern the exercise of general legislative or executive authority with respect to Aboriginal people. Simply because Aboriginal people are vulnerable to the exercise of legislative or executive power should not entail a fiduciary relationship.

A description, if not an endorsement, of this restrictive view can be found in *Lower Kootenay Indian Band*. Dubé J. summarizes the Crown's submissions in a way that renders it unclear whether he is adopting those views:

> The Crown also advanced the argument that the fiduciary obligations owed to the Indians "do not float above in the air." They must be grounded in a dependency. They only exist where the Indians cannot, by statute, act for themselves. The obligations only crystallize when the Crown is interposed. It is only upon surrender that it is clear that the Indians cannot act for themselves, for the fiduciary obligation owed to the Indians by the Crown is sui generis. In any instance in which the Indian people can and do act for themselves in relation to this lease, there is no fiduciary obligation on the Crown to act.[127]

The stance that fiduciary obligations are not owed in relation to pre-1982 unilateral governmental actions that interfere with Aboriginal rights with respect to land rests on an extremely narrow reading of *Guerin*. Case law under s. 35 of the *Constitution Act, 1982*

---

126 *Supra* note 123 at 105.

127 *Ibid*. at 104. See also *Apsassin v. Canada*, [1988] 1 C.N.L.R. 73 (F.C.T.D.), footnotes removed.

suggests that fiduciary obligations owed by governments extend beyond the specific context of voluntary surrender. Referring to its earlier holding in *Guerin*, the Supreme Court of Canada in *R. v. Sparrow* stated the following:

> This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 [a case addressing treaty interpretation], ground a general guiding principle for s. 35(1). *That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship*.[128]

While the Court in *Sparrow* was not specifically addressing the issue of whether fiduciary obligations arise upon pre-1982 regulation of Aboriginal rights, courts may not be able to resist extending the duty at least to govern unilateral governmental acts of extinguishment whereby the Aboriginal people in question are involuntarily divested of their interests with respect to land prior to 1982.

McEachern C.J., in *Delgamuukw v. A.G.B.C.*,[129] for instance, was willing to recognize fiduciary responsibilities attendant upon at least some unilateral Crown pre-1982 extinguishments. In *Delgamuukw*, the Chief Justice held that pre-Confederation colonial enactments known cumulatively as "Calder XIII" extinguished all Aboriginal rights to the land of the colony but that the Crown promised Aboriginal people that "vacant lands could be used for aboriginal purposes, subject to the general law, so long as such lands were not dedicated to an

---

128 (1990), 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160 (hereafter cited to C.N.L.R.) at 180, emphasis added.

129 (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) (subsequent page references are to Smithers Registry publication).

adverse purpose".[130] More specifically, he stated:

> Keeping in mind the general obligation of the Crown towards Indians, and that `the categories of fiduciary, like those of negligence, should not be considered closed', it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation.[131]

McEachern C.J. defined the fiduciary obligation on the Crown with respect to Aboriginal people in the province in the following terms:

> The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land.[132]

Delgamuukw therefore provides that the provincial government owes certain fiduciary obligations to Aboriginal people with respect to unoccupied or vacant Crown land. More specifically, the Crown is obliged to permit Aboriginal people to use unoccupied or vacant Crown land for subsistence purposes until the land is dedicated to another purpose. Further, while there is no obligation on the Crown to obtain Aboriginal consent before it decides to use unoccupied or vacant Crown land for purposes adverse to Aboriginal subsistence, the Crown should engage in "reasonable consultation" with potentially affected Aboriginal people before such a decision is made.[133] The Crown should make good faith efforts to ensure that Aboriginal use for subsistence purposes is not unduly or arbitrarily impaired, and if such impairment occurs then the Crown ought to make "suitable alternative arrangements".[134] Presumably, what constitutes "reasonable consultation" and "suitable alternative arrangements" will vary depending on the nature and extent of the affected Aboriginal interests.

---

130 *Ibid*. at 246.
131 *Ibid*. at 248.
132 *Ibid*.
133 *Ibid*. at 252.

The Chief Justice's general conclusion that a fiduciary obligation attached to the Crown upon the extinguishment of Aboriginal rights occasioned by Calder XIII suggests that this fiduciary obligation started to run at the time of extinguishment, not at the time of judgment. If this is the case, then an Aboriginal community could allege that prior governmental action that arbitrarily or unduly limited Aboriginal subsistence use of unoccupied or vacant Crown land constitutes a breach of fiduciary obligation. Apart from limitation periods, whether such a claim is successful would not depend on when the governmental action occurred but on the effect of continuing subsistence use. Thus, a grant, lease or license by the Crown to a third party that unduly or arbitrarily interfered with continued Aboriginal subsistence practices potentially could amount to a breach of fiduciary obligation.

This view is supported by the fact that the Chief Justice dismissed the plaintiffs' claim for damages on the evidentiary ground that breach of fiduciary obligation *had* not been proven, not on the ground that breach *could* not be proven. In his words,

> With regard to interference with aboriginal life, the evidence is similarly sparse. There were dispossessions, and interferences, such as when beaver dams were destroyed in the Bulkley Valley, and there were other incidents. The evidence does not disclose, however, whether such interference was by the Crown or by private citizens, or under statutory authority, nor was any arbitrary interference as I have defined it established by evidence. Apart altogether from the strictly legal defences, there is insufficient evidence to conclude that the plaintiffs have established a cause of action for damages or compensation.[135]

While an alternative interpretation is possible, the above suggests that had the plaintiffs led more compelling evidence that prior interference had been arbitrary, they could have established that a breach of fiduciary obligation had occurred.

The view that the provincial Crown can be held liable for breach of fiduciary obligation for actions taken prior to the date judgment was rendered in *Delgamuukw* is also supported by

---

134 *Ibid.*

the fact that McEachern C.J. was applying and extending principles articulated in *Guerin*. That is, just as the Crown is under a fiduciary obligation to act in the interests of an Aboriginal community when it voluntarily surrenders land for third party use, so too with the case of involuntary unilateral extinguishments. Fiduciary obligations have been enforced in relation to surrenders and breaches that occurred prior to *Guerin*'s date of judgment: for example, the *Guerin* decision itself, as well as *Lower Kootenay Indian Band*. By extension, Crown actions occurring prior to judgment dedicating unoccupied or vacant Crown land to uses that conflict with Aboriginal subsistence activities could be challenged as not conforming to fiduciary responsibilities of the Crown. Limitation periods and other defenses may govern how far back one can go in alleging a breach of fiduciary obligation, but the logic of the Chief Justice's decision suggests that the Crown's fiduciary obligations began at the time of extinguishment, not at the time of judgment. This conclusion conforms to the position taken by the Attorney General of British Columbia on appeal in *Delgamuukw*, which argued in its factum that "when the Province has exercised its lawful pre-1982 powers to extinguish Aboriginal rights, it may have had a corresponding fiduciary obligation in relation to Aboriginal communities...to act in the best interests of the Aboriginal community".[136]

This lengthy review of case law on fiduciary obligations owed by the Crown in the context of surrender or extinguishment of Aboriginal rights with respect to land is relevant to an assessment of governmental involvement in the residential school system for two reasons. First, sections 114-122 of the *Indian Act*[137] create a statutory relationship between the Crown and Aboriginal communities similar in structure and effect to the relationship between the Crown and Aboriginal communities with respect to surrendered land. The Act confers on the federal

---

135 *Ibid*. at 256.
136 para. 297 of factum.

government the power: to "establish, operate and maintain schools for Indian children" (section 114(2)); to enter into contracts with provincial, territorial, educational and religious authorities to provide education to Aboriginal children (section 114(1)); to make regulations with respect to "standards for buildings, equipment, teaching, education, inspection and discipline" (section 115(a)); to require Aboriginal children to attend school (sections 116-118); and to appoint truant officers to enforce Aboriginal school attendance (sections 119-121). By the foregoing provisions, the government has conferred upon itself a great deal of discretion or power to determine the nature and extent of education of young Aboriginal people. Sections 114-122 of the Act create a relationship between the government and Aboriginal communities which shares the characteristics which Wilson J. ascribed to fiduciary relationships in *Frame v. Smith*: (1) The fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[138]

Second, as indicated by McEachern C.J.'s reasons in *Delgamuukw*, the judiciary has indicated a willingness to temper unilateral governmental action occurring prior to 1982 having an adverse effect on Aboriginal interests by subjecting such action to equitable fiduciary standards. This suggests that the fact that governmental action in relation to the establishment and maintenance of residential schools occurred prior to 1982 will not, for that reason alone, be exempt from judicial scrutiny.

These two factors lead us to conclude that it is not unreasonable to view the relationship between the Crown and Aboriginal communities through the lens of fiduciary principles. It is

---

137 15 George VI, c. 29, as amended 4-5 Elizabeth II, c. 40, ss. 28-29.
138 *Supra* note 99 at 99.

true that there is a difference between Aboriginal interests with respect to land and Aboriginal interests with respect to education. Yet this difference should not receive undue significance. If land is an Aboriginal community's link to its past, then children are an Aboriginal community's bridge to the future. Aboriginal lands and Aboriginal children are critical components of an Aboriginal community's ability to maintain and reproduce its national identity over time and in the face of colonization. Given the importance of children to a community's self-definition, it is not unreasonable to suggest that the Crown owes special duties when it arrogates to itself the responsibility of educating Aboriginal children.

Concluding that the government is in a fiduciary relationship with Aboriginal communities when it is involved in the provision of education to Aboriginal children does not end the inquiry. It must still be shown that the government breached its fiduciary duties by implementing and maintaining the residential school system. Any judicial assessment of whether the government breached fiduciary obligations owed to Aboriginal communities must await detailed and factual analysis of the effects of the residential school system on particular individuals and communities. It suffices to say, however, that governmental participation and acquiescence in the types of practices canvassed in Part I of this study is not, generally speaking, conduct which befits a fiduciary.

ii) Fiduciary Duties and the Constitution

The possibility that governmental involvement in the establishment and maintenance of the residential school system is subject to fiduciary duties receives additional support as a result of the constitutional recognition and affirmation of Aboriginal rights by section 35(1) of the *Constitution Act, 1982*. Aboriginal rights that have not been extinguished prior to 1982 are recognized and affirmed in their original, pre-regulated form by s. 35(1) of the *Constitution Act,*

1982. Aboriginal rights include those rights that Aboriginal people prior to 1982 enjoyed at common law, under the rubric of the common law of Aboriginal title, and they protect those activities that are "integral" to Aboriginal ways of life.[139] "Unreasonable" limitations on Aboriginal rights, or laws that impose "undue hardship" on the exercise of Aboriginal rights, will amount to an infringement of s. 35(1) and will be declared unconstitutional unless the Crown can justify the interference in question.[140]

It will be recalled that the Supreme Court of Canada in *Sparrow* also stated that "[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship".[141] The Court held that the way in which this special relationship manifests itself in the constitutional sphere is that fiduciary responsibilities are triggered on the showing of a violation of s. 35(1). In order to justify a s. 35(1) infringement,

> [t]he way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples".[142]

To this end, the Court in *Sparrow* required that "[t]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing".[143]

Several important principles emerge out of the Court's reasons in *Sparrow*. First, *Sparrow* is an indication that the conservative view that fiduciary obligations are triggered only upon the voluntary surrender of Aboriginal land is to be supplemented with a more expansive

---

139 *Sparrow*, *supra* note 127.
140 *Ibid*.
141 *Ibid*. at 180.
142 *Ibid*. at 181.
143 *Ibid*. at 184.

view that fiduciary obligations are also triggered upon unilateral extinguishments of Aboriginal rights. If the Crown owes fiduciary obligations to Aboriginal communities when it unilaterally interferes with the exercise of Aboriginal rights, then *a fortiori* the Crown, at least after 1982, owes certain fiduciary obligations when it unilaterally extinguishes Aboriginal rights.

Second, *Sparrow* suggests that consultation with affected Aboriginal people will be a potentially important factor in seeking to justify s. 35(1) infringements. The Court suggested that another relevant inquiry in determining whether an infringement of Aboriginal rights is justified is,

> whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented...The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[144]

The Court was careful to indicate that whether consultation was required would depend "on the circumstances of the inquiry", and to situate the need for consultation within a broader call for "sensitivity to and respect for the rights of aboriginal peoples on behalf of government, courts and indeed all Canadians".[145]

Lower court judgments after *Sparrow* have placed great emphasis on the need for consultation. For example, in *R. v. McIntyre*,[146] at issue was the constitutionality of a provincial regulation that created a road corridor game reserve on lands that Aboriginal people could otherwise exercise a treaty right to hunt. Fafard J. held that the establishment of the road corridor interfered with the exercise of s. 35(1) rights and, because there had been no consultation with affected Aboriginal groups when it was established, the road corridor cannot be

---

144 *Ibid*. at 187 *per* Dickson C.J. and La Forest J.
145 *Ibid*.
146 [1991] 2 C.N.L.R. 146 (Sask. Prov. Ct.).

justified as a legitimate exercise of governmental power. In *R. v. Nikal*,[147] Millward J. acquitted the respondent, a Wet'suwet'en Indian, of charges of fishing without a license contrary to British Columbia Fishery (General) Regulations. In holding there to have been inadequate consultation in the formation of those regulations, Millward J. looked beyond "official policy to assess "actual practice of the Crown"". Attempts that are "spasmodic and appear simply to pay lip service to the process of consultation" are insufficient to uphold s. 35(1) infringements.[148] In sum, according to post-*Sparrow* lower court jurisprudence, consultation appears to be critical to the constitutionality of laws that restrict the exercise of s. 35(1) rights.

The Court's reasons in *Sparrow* also suggest, albeit implicitly, that the Crown's fiduciary relationship with First Nations is not exhausted by requiring governments to consult with Aboriginal people in order to justify laws that interfere with the exercise of Aboriginal rights. Dickson C.J. and La Forest J., for example, stated that "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples", and defined the relationship between the Crown and First Nations as "trust-like, rather than adversarial".[149] Requiring consultation to justify laws that interfere with Aboriginal rights is in keeping with such a relationship, but the relationship may entail enforceable duties of consultation prior to and independently of any specific act of surrender, extinguishment or interference with s. 35(1)

---

147 [1991] 1 C.N.L.R. 162 (B.C.S.C.).

148 In this regard, see also *R. v. Bones*, [1990] 4 C.N.L.R. 37 (B.C. Prov. Ct.) and *R. v. Robinson*, [1991] 4 C.N.L.R. 125 (B.C. Prov.Ct.). In *R. v. Joseph*, [1992] 2 C.N.L.R. 128 (Yukon Terr. Ct.), legislation regulating fishing enacted without Aboriginal consultation and premised on the assumption that there existed no Aboriginal right to fish was held to be in violation of s. 35(1). In contrast, in *R. v. Jack*, [1992] 1 C.N.L.R. 122 (B.C.S.C.), verdicts of guilty for illegally fishing for chinook salmon were entered under the federal *Fisheries Act* against the respondents. Even though the Act interfered with the exercise of s. 35(1) rights, it was nonetheless upheld under s. 35(1) on the basis that "there was considerable consultation between the D.F.O. and the Mowachaht Band on the terms of the Indian food fishery which included a restriction on the catching of chinook salmon" (at 128).

149 *Supra* note 127 at 180.

rights. Does the Crown owe a fiduciary duty with respect to all of its dealings with Aboriginal peoples? If so, what is the content of such a duty?

There has been some judicial resistance to the proposition of a generalized fiduciary obligation. In *Apsassin v. Canada*, for instance, Addy J. of the Federal Court, Trial Division stated:

> With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, a fortiori, is there any remaining after the surrendered lands have been transferred and disposed of subsequently. The duty from that moment attaches to the proceeds of disposition. There might indeed exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law...would be applicable previous to surrender.[150]

One can understand (but perhaps not sympathize with) the resistance to a generalized duty. The more one moves away from a discrete transaction that triggers the creation of the duty, which in turn requires the Crown to act in the best interests of Aboriginal people, toward a generalized duty that requires a similar standard of review which respect to all Crown actions, the more one moves toward an extremely powerful check on governmental authority with respect to Aboriginal interests.

Nonetheless, academics have argued strenuously that this is precisely what is needed in Canadian law. Slattery has long maintained that "[t]he Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands".[151] In his view, a general fiduciary obligation is but a special instance of a general doctrine of collective trust that animates the Canadian

---

150 *Supra* note 124.

151 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 753.

Constitution.[152] In his words:

> The Crown's general duty to protect Aboriginal lands, when coupled with the statutory discretion to burden Aboriginal title, gave rise to particular fiduciary obligations controlling the exercise of the discretion. Broadly speaking, these obligations bound the Crown to strike a fair balance between the public good and Aboriginal interests in dealing with Aboriginal lands. Ideally, this balance would best be struck through voluntary agreements with the First Nations affected. Failing that, the Provincial Crown would have the power to make its own determinations, subject to the supervision of the courts, which could enforce the fiduciary duties and grant appropriate remedies.[153]

As formulated by Slattery, the source of a generalized duty would lie in (1) the fact that the Crown is under a general duty to protect Aboriginal land; and (2) the fact that the Crown has the constitutional authority to regulate Aboriginal use and enjoyment of land. The discretion enjoyed by the Crown in this regard ought to be subject to fiduciary duties which, generally speaking, would require the Crown to strike a fair balance between the public interest and Aboriginal interests. Treaty-making would be the ideal way of fulfilling the Crown's fiduciary responsibilities, but the Crown would be free to take unilateral action, subject to the supervisory authority of the judiciary. One way of reducing the chances of judicial interference with the exercise of governmental authority would be to engage in an appropriate level of prior consultation with affected Aboriginal communities. In sum, a generalized fiduciary duty potentially could contain (1) a procedural component addressing the adequacy of consultation; and (2) a substantive component addressing the fairness of any balance struck between the public good and Aboriginal interests.

The elasticity of a generalized constitutional fiduciary duty on the Crown with respect to its dealings with Aboriginal communities provides the flexibility needed to render fiduciary principles appropriate yardsticks with which to assess Crown participation in the residential

---

[152] Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261.

school system. The procedural component of this general fiduciary duty would require ascertaining whether adequate consultation occurred with respect to the design and operation of residential schools. The historical record, to our knowledge, provides no evidence of any consultation in this regard. The substantive component of a general duty would require, at a minimum, that the Crown strike a fair balance between the interests of Aboriginal peoples and the public good. At the time, government officials no doubt believed they were acting both in the interests of Aboriginal peoples and the public good. Today, sadly, we know this not to be the case.

---

153 *Ibid*. at 291-292.

D. The Fiduciary Obligations of the Churches

As mentioned above, the law of fiduciary obligations has developed largely in the context of business relationships or in situations in which one person has charge of the property of another. This means that much of the doctrine is not particularly attuned to a context in which there is no economic interest at stake. The implications of this for novel causes of action such as examined here have yet fully to be determined. In considering possible liability of the Churches for breach of fiduciary duty, it is important to distinguish two different classes of possible plaintiff. First, we may consider whether a fiduciary duty was owed to the children who went through the residential school system in respect of their treatment within that system. Second, we may consider whether a duty was owed to the parents of those children to protect the parent\child relationship while providing an education for the children. (Of course, many people will fall into both categories, having been both students themselves, and then parents to later students.)

In addition, we may distinguish between fiduciary obligations owed by individual clergymen or nuns who were teachers or supervisors, local school administrators in charge of running particular schools, and more remote parts of the Church hierarchy which may have played an overarching policy making role. The factual information about the operation of the schools currently available does not permit an exhaustive analysis of the different positions of these different actors, nor of the complicated question of institutional, as opposed to individual, responsibility. Suffice it to say that responsibility for some wrongs will be more appropriately attributed to some actors than others. For example, in a particular case, a particular teacher may have sexually abused some children without the knowledge or condonation of his or her superiors and under circumstances making it unreasonable to expect the superiors to have

uncovered the abuse.[154] Conversely, individual teachers presumably did not decide what kind of food or the quality of medical care the children would receive. This may have been within the power of local administrators, or may have been dictated by Church officials elsewhere. Similarly, important decisions that influenced the ability of children to retain and build upon their knowledge of their own cultural traditions seem unlikely to have been made at the individual school level, although the way Church policy was implemented by school administrators and teachers may have exacerbated the harm. Since the doctrine of vicarious liability does not apply in fiduciary law, imposing liability on more remote officials or institutions will require establishing their direct participation in creating or condoning the conditions giving rise to harm, or perhaps in unreasonably failing to protect children from harm.

i) Fiduciary Obligation Owed to Students

In light of the earlier overview of the law of fiduciary obligation, the first question we must address is whether the relationship of student to teacher or other school official (especially in boarding school context) could be classified as fiduciary *per se*, or one that gives rise to a presumption that it creates fiduciary obligations. If not, the further question arises whether some fiduciary duties nevertheless exist toward students. In considering the first, it may be helpful to examine whether the school official\student relationship is sufficiently like established fiduciary relationships to be brought under this umbrella. Beyond this we must assess the relationship to see if it meets the substantive tests that have been proposed, particularly in *Frame*

---

154 Cf. *Lyth v. Dagg* (1988), 46 C.C.L.T. 25, in which a claim in negligence against a Board of School Trustees for failing to prevent a teacher from sexually abusing a student was dismissed because there was insufficient proof that the Board knew or ought to have known of the teacher's propensity to make sexual overtures to students.

v. Smith[155], to establish fiduciary duty. As we have seen, these two questions tend to blur into one in all but classic cases of obvious abuse within a well-established fiduciary relationship. A conclusion that the relationship in issue is *per se* fiduciary does not determine the issue of whether a fiduciary duty was owed in these particular circumstances; the scope of the fiduciary relationship and whether it extends to the harms complained of and the behaviour causing it can only be determined by reference to the substantive criteria embodied in the case law. In other words, the considerations going into whether a presumption of the existence of a fiduciary relationship can be rebutted are essentially the same as those relevant to whether a fiduciary element exists in an otherwise not wholly fiduciary relationship.

a) A Presumptively Fiduciary Relationship?

As formulated by La Forest J. in *LAC Minerals*, the task of determining whether there exists a presumptively fiduciary relationship is one in which "the focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way."[156] In this effort, it may be helpful to analogize from recognized fiduciary relationships. The most promising comparisons are the parent\child relationship[157] and the guardian\ward relationship.[158] In respect of the former, La Forest J., writing for the Court in *M.(K.)* stated, "[i]t is intuitively apparent that the relationship between parent and child is fiduciary in nature...For obvious reasons society has imposed upon parents the obligation to care

---

155 (1987), 42 D.L.R. (4th) 81 (S.C.C.).
156 *LAC Minerals v. International Corona Resources* (1989), 61 D.L.R. (4th) 14 at 28.
157 *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.).
158 J.C. Shephard, *The Law of Fiduciaries* (Toronto: The Carswell Company Ltd., 1981) at 29-30; P.D. Finn, *Fiduciary Obligations* (Sydney: The Law Book Co. Ltd., 1977) para. 176.

for, protect, and rear their children.[159] It requires, therefore, only a "cursory examination" of the *indicia* outlined in *Frame v. Smith*[160] to see that they are applicable. "Parents exercise great power over their children's lives, and make daily decisions that affect their welfare. In this regard, the child is without doubt at the mercy of her parents."[161]

While noting that case law has most often dealt with contractual relations between parent and child and consequently with the need to protect the economic interests of children against the exercise of undue influence by a parent, La Forest J. held that this "does not limit the range of the obligations that may attach to other aspects of the parent-child relationship."[162] In *M.(K.)*, the Court held that a parent's fiduciary obligation extends to refraining from inflicting personal injuries on one's child.[163] Similarly, in the context of the obligations of guardians to wards, litigation has more frequently arisen to protect the economic interests of the ward, but the obligations of guardians are by no means so limited.[164] Indeed, it is commonly recognized that guardians stand *in loco parentis* to their wards, giving them fiduciary obligations very similar to parents. More directly, teachers have also been held to stand *in loco parentis* to students[165] and to be required to meet the standard of care of a careful or prudent parent.[166] However, legal actions against teachers have been brought in negligence or battery, not breach of fiduciary obligation. It is possible, though, that the reaffirmation of the fiduciary relationship between parents and children in *M.(K.)* will be extended to the relationship between teacher and student in

---

159 *Supra* note 156 at 323.
160 (1987), 42 D.L.R. (4th) 81.
161 *Supra* note 156 at 325.
162 *Ibid*. at 326-327.
163 *Ibid*. at 327.
164 Shepherd, *supra* note 157 at 108; Finn, *supra* note 157.
165 W.H. Giles, *Schools and Students: Legal Aspects of Administration* (Toronto: Carswell, 1988) at 90ff; A. Wayne MacKay, *Education Law in Canada* (Emond-Montgomery Publications Ltd., 1984) at 112.
166 *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21 at 31-32, *per* McIntyre J.

appropriate circumstances.

Given the virtual total control that school officials[167] had over the lives of Aboriginal children in their care, it would not seem to be difficult to argue that they were acting *in loco parentis* and therefore acquired all the obligations of a parent or guardian. Given the distance between the school and the children's home communities (in many cases), the difficulty of communication, the restrictions on visits home, and the inability of parents to visit their children, the schools were effectively making all the decisions about the care and upbringing of these children. School officials decided how they dressed, what they were fed, how much medical attention they got when needed, how they were disciplined, whether they were protected from sexual exploitation, as well as overseeing their education, both religious and secular. This degree of control seems directly comparable to the "great power" La Forest J. acknowledged in parents to affect the welfare of their children. Indeed, by the 1940's the standard admission form used by the government when a child was admitted to residential school explicitly recognized the school principal as the child's guardian.[168]

b) The Test in *Frame v. Smith*

However, as noted above, a decision that the relationship between school officials and students is presumptively fiduciary in nature does not end the matter. To determine whether the fiduciary duties of the school officials extended to the behaviour complained of we must consider the various criteria the courts have identified to justify labelling a particular duty as a

---

[167] The phrase `school officials' is used generically here and below to cover all three levels of decision-making discussed *supra* at pp. 58-59. It should be noted, though, that some of the decisions about treatment canvassed here would have been more within the control of some actors than others and that the total picture of decision-making authority might well have varied from school to school.

[168] Copy on file with authors.

fiduciary one. In this effort, the starting point must be Wilson J.'s "rough and ready guide" outlined in *Frame,* which has been approved in principle in *LAC Minerals*[169] (although the majority thought the test was not met on the facts of that case). Wilson J. identifies three general characteristics of relationships in which fiduciary obligations have been imposed:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[170]

Although these are presented as three separate characteristics, they are in fact closely interrelated, as will become clear when we apply them to the facts at hand.

It seems clear that school officials did have discretion or power over these children, exercising, as they did, daily care and supervision of them. Legal power was conferred on them by the government's recognition of their schools as "industrial" or "boarding" schools under the *Indian Act* and regulations, and was backed up, after 1920, by a legal requirement that all Indian children attend school (although not necessarily residential school) between the ages of eight and eighteen. To this must be added the *de facto* power that arose from the residential nature of the schools. The relative isolation of the children from other sources of authority, such as their parents, or government officials, gave school officials enormous control over them.

Second, there can be no doubt that decisions made about the operation of the residential schools affected the children's vital practical interests. Wilson J.'s extension of relevant interests to cover `practical' ones and not just financial ones, which, as we noted above, has been

---

169 *Supra*, note 155. See also *Canson Enterprises Ltd. v. Boughton* (1991), 85 D.L.R. (4th) 129 (S.C.C.), and the minority judgment of McLachlin J. in *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449.

170 *Frame*, *supra* note 159 at 99.

adopted by the Supreme Court in *M.(K.)*, is an important step forward in this area of law. However, it remains to be seen whether the courts will extend their protection to a sufficiently wide range of `practical' interests to cover the various interests that Aboriginal people have claimed were impaired by the residential school system. Clearly, *M.(K.)* holds that a child's physical integrity is a protected practical interest. Although that case dealt with serious and prolonged sexual abuse, La Forest J. refers more broadly to a parental obligation "to refrain from inflicting *personal injuries* upon one's child"[171], suggesting that protection from physical harm more generally may be considered a practical interest. Possibly meaning to broaden the protection further still, La Forest J. cites approvingly an American case in which an "obligation to protect [a] child's *health* and *well-being*" was found.[172] Thus it should certainly be possible to argue that the physical well-being of Aboriginal children in residential schools is a protected interest. This should include protection from sexual abuse, excessively harsh punishment, and inadequate nutrition and medical care, including protection from communicable disease. These, however, are the kinds of tangible interests with which the law is used to dealing. It is less clear that the courts will be willing to extend protection to the less tangible, though no less real, interests in emotional well-being and dignity, maintenance of cultural, spiritual, and linguistic heritage, receipt of an adequate education, and preservation of healthy family relationships also involved here.

There is relatively little judicial authority to guide our argument in respect of these less tangible interests. In *Frame v Smith*, Wilson J. argued that a non-custodial parent's relationship with his children was an interest that should be protected against a deliberate course of action by the custodial parent to deny him access to the children.

---

171 *M.(K.) v. M.(H.), supra* note 156 at 327.

> It cannot be denied that the non-custodial parent's interest in his or her child is as worthy of protection as some interests commonly protected by a fiduciary duty. For example, just as a corporation has a substantial interest in its relationship to corporate opportunities and customers that is worthy of protection...it can be said that a non-custodial parent has a substantial interest in his or her relationship with his or her child that is worthy of protection.[173]

While focusing on the parent's relationship with his children (because the action was brought by a father) Wilson J. recognized that children have a like interest in their relationship with their parents.[174] In pursuing this line of argument, Wilson J. was building upon the courts' recognition of comparatively intangible financial interests such as a corporation's public image and reputation, or a government's interest in preventing its uniform being used for corrupt purposes.[175] This is some basis for an argument that the interest of Aboriginal children in a continuing relationship with their parents, and perhaps siblings, is a kind of practical interest that the law of fiduciary obligation should protect. In light of the similarities between the degree of control exercised over the activities of a child by a custodial parent and that exercised over Aboriginal children by school officials, it could be argued that school officials owed a similar obligation to protect familial relations.

However, it remains to be seen how fully Wilson J.'s views about the status of such familial interests will be accepted. As noted above, the rest of the court decided *Frame* against the plaintiff non-custodial father on different grounds, and therefore did not directly respond to Wilson J.'s analysis of fiduciary obligation. It may be a good sign, though, that in none of the favourable mention accorded to Wilson J.'s outline of the general characteristics of fiduciary

---

172 *Ibid*. citing *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. App. 1 Dist., 1990). Emphasis added.
173 *Frame supra* note 159 at 104. Case citation omitted.
174 *Ibid*. at 101-102. Wilson J. refers to the vulnerability of both parent and child to the custodial parent's "selfish exercise of custody" and notes that the "custodial parent is expected to act in good faith not only towards the non-custodial parent but also towards the children."
175 *Ibid*. at 99.

relationships has there been disapproval expressed at her application of those criteria to protect the parent\child relationship. Similarly encouraging is the explicit approval accorded Wilson J.'s judgment by La Forest J., writing for the majority in M.(K.).[176] This approval very clearly covers the extension of the notion of `practical interests' beyond economic interests, but it remains an open question how far beyond the courts will be willing to go.

One further note of caution is appropriate. In *Frame*, Wilson J. restricts her analysis to the situation in which there has been "a sustained course of conduct designed to destroy the relationship"[177], and it might be argued that this limits its application in the circumstances in issue. In *Frame*, the custodial parent's behaviour appears to have been fully intentional, in the sense that its objective was precisely to destroy the children's relationship with their father. It might be argued that the behaviour of school officials was not as clearly aimed at destroying family relationships, but rather that this was merely an unfortunate side effect of behaviour that was well intentioned. Given the assimilationist objectives of residential school policy, however, and the evidence of attitudes, shared by the missionaries, that `civilizing' the Aboriginal populations required severing their links with their homes, it should be possible to counter this argument. Although it may be appropriate to make some allowance for standards of the time - for example, it would be wrong to criticize the schools for failing to provide the level of education available in the public schools now, or to hold school officials liable for physical punishment which, although harsh by today's standards, was common throughout the public school systems at the time - this generosity should not extend to excusing plainly racist attitudes merely because their holders thought they were doing the best for the children under their care. Further, it seems clear that Wilson J. was concerned not to open the door too widely to litigation

---

176 *Supra* note 156 at 325.
177 *Supra* note 159 at 108.

in this context because, dealing as she was with a dispute *between parents*, she was concerned with the harmful effects of such litigation on children. That concern is obviously not relevant when the fiduciary is outside the family.

It remains to consider the other interests that Aboriginal survivors of residential schooling claim were impaired by that experience. These include the interest in acquiring an education that would actually be helpful in adapting to the presence of the settlers, and the interest in maintaining their language and culture. With respect to education, there is some case law recognizing that a guardian stands in a fiduciary relationship to his or her ward in making decisions about the education of the ward.[178] These cases have frequently arisen by way of challenge to the guardian's decision at the time it is made, but the general principle that a guardian's decisions about his or her ward's education must be made in the best interests of the ward should be equally applicable in a case in which the infant cannot challenge that decision until much later, and can therefore only seek compensation for the harm caused rather than its prevention.

In *The Duke of Beaufort v. Berty*[179], the court affirmed its authority to interpose to decide whether the ward should be sent to Westminster or Eton, and Lord Chancellor Macclesfield is reported to have said that "nothing could be of greater concern than the education of infants".[180] While the choice between Eton and Westminster is a far cry from the choices made affecting Aboriginal children in residential schools, one might argue that the court's willingness to intervene to arbitrate such finely tuned educational decisions as seem to have been at stake in

---

178 *Mathew v. Brise* (1851), 14 Beav. 341; *Duke of Beaufort v. Berty*, (1721), 1 P. Wms. 704; *Roach v. Garvan* (1748), 1 Ves. Sen. 157.

179 *Supra* note 177.

180 *Supra* note 177 at 705. His Lordship went on to say that this concern for the education of the infant was especially great because of his noble status, but he does not confine this fiduciary obligation to guardians of the highly born.

Beaufort's case is an indication of how high the fiduciary standard is in the context of educational decisions. Similarly, in *Roach v. Garvan*, the Lord Chancellor criticized a mother's decision to send her daughters to a boarding school, commenting that this was inappropriate at their ages.[181] It may be possible, then, building on these old cases[182], to challenge the quality of education provided to Aboriginal children by the schools[183], arguing that their control over these children put them in a comparable position to that of a guardian. It is quite clear that the bad judgment displayed in designing the education of Aboriginal children far outstrips that involved in these cases. It is hard to see how a court could justify refusing to extend protection granted in the past to already quite privileged minors. The educational welfare of children is a value that extends across class and race lines.

The interest for which there is the least legal recognition may be the one considered most important to many of the Aboriginal survivors of residential schools, namely the maintenance of language and culture. There is no explicit recognition in the case law of this interest as the sort of practical interest attracting the protection of fiduciary law. One possible line of argument, however, would be to treat this as an aspect of education and argue that a fiduciary who stands *in loco parentis* to a child has an obligation to provide for that child an education that is consistent with the child's birth culture. This argument might be bolstered by pointing out how educationally counter-productive it seems to have been to have attempted, as the residential schools clearly did, entirely to uproot these children. The children were treated as slates that could be wiped clean of existing cultural traditions and written over with White cultural norms.

---

181 (1748), 1 Ves. Sen. 157, at 158.

182 Unfortunately, there seem to be no modern examples of such cases. Rather than reflecting on the soundness of the principles advanced in these cases, this is most likely explained by the fact that, with the advent of child welfare legislation, legislative protections became the preferred legal rubric under which children's interests were looked after.

The culture shock and alienation which resulted from the process contributed to the creation of adults who felt they had no place in either their birth communities or in white society. As *educational* policy, therefore, one might argue that `cultural replacement'[184] was a breach of fiduciary obligation.

To focus on the extreme consequences of a `cultural replacement' policy in this case might also forestall an argument that parents quite commonly, and without interference from the courts of equity, make choices for their children that result in the child's assimilation into a new cultural community. Surely, it might be argued, the courts do not want to take over the supervision of such parental authority. Parents from a minority culture, for example, might well decide that their children should be educated in the majority language[185], or that the family should change its religious affiliation. However, this kind of change usually takes place in an atmosphere that is supportive of the child's self-esteem. By contrast, in the residential schools, the change was brutally imposed through systematic denigration of the children's birth cultures. Further, one might argue that in this respect, there remains a difference between the fiduciary position of a parent and that of school officials who have *de facto* parental control, at least in a situation in which the parents had not consented to the reacculturation of the child. It remains entirely speculative, however, whether a court would accept this kind of interest as deserving of the protection of equity.

Finally, precisely because of the power exercised by school officials over these children,

---

183 Here it seems likely that local school administrators and other Church officials would bear more responsibility that individual teachers.

184 See footnote 17, *supra*.

185 For example, official language minorities, even having the choice to send their children to minority language schools, might nevertheless choose to send them to majority language schools. And, much as such a decision is lamented by those interested in the maintenance of minority cultures, it has never been suggested that it is a breach of the parents' fiduciary obligations to their children. I am grateful to Ruth Thompson for raising this point.

it seems clear that the children were peculiarly vulnerable to them or at their mercy. As we have seen, the children were totally under the control of the school officials. They were largely unable to complain to their parents or to any other officials about their mistreatment. If they did complain, their complaints, or those of their parents, went unheeded. Again, their position seems comparable to that of the father in *Frame*, who tried - to no avail - to use the legal measures available to him to enforce his access rights. It is a mark of their vulnerability that the complaints of these children were ignored. Thus, Wilson J.'s analysis of the requisite vulnerability seems fully applicable here:

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.[186]

Children went so far as to run away, trying to travel great distances to return home, to escape the oppressive conditions of residential school, only to be caught and returned, and punished for their disobedience.[187] Although school and Indian Affairs department records acknowledge the runaway problem, it was attributed to recalcitrance on the part of the children rather than seen as an act of rebellion against oppressive conditions.[188] In this context, other children quickly got the message that protest would be ineffective to improve those conditions. A more complete state of vulnerability or being at the mercy of a fiduciary can scarcely be

---

186 *Frame*, *supra* note 159 at 100.

187 The Royal Commission on Aboriginal Peoples heard many such tales during its hearings. See, for example, the hearings at Charlottetown, P.E.I., May 5, 1992, and Port Alberni, B.C., May 20, 1992. See also, Diane Persson, "The Changing Experience of Indian Residential Schooling: Blue Quills, 1931-1970" in Barman, Hébert and McCaskill, *Indian Education in Canada: The Legacy* (Vancouver: University of British Columbia Press, 1986), Linda Bull, "Indian Residential Schooling: The Native Perspective" (1991) 18 (Supplement) Canadian Journal of Native Education" 1 at 42-43; Basil Johnston, *Indian School Days* (Toronto: Key Porter Books, 1988).

188 See, for example, David A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs Cultural Replacement* (Waterloo: Wilfred Laurier Press, 1988) at 87.

imagined.

c) Other Conditions on Establishing a Fiduciary Duty

Despite the approval the *Frame* test has received, there has been some suggestion that there is more to establishing a fiduciary relationship. Maddaugh argues particularly strongly that the fiduciary must have undertaken to look after the beneficiary's interests in some way in order to be a fiduciary[189], and there is considerable support for this in the case law. Dickson J., in *Guerin* says that "where by statute, agreement, *or perhaps by unilateral undertaking*, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary."[190] Similarly, Wilson J., in *Frame* cites with approval a passage from the dissenting judgment of Mason J. in *Hospital Products Ltd. v. U.S. Surgical Corp.*[191], in which he identifies the crucial feature in fiduciary relationships as being that "the fiduciary *undertakes or agrees to act for or on behalf of or in the interests of another person* in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."[192] Although La Forest J. in *M.(K.)*, suggests that fiduciary obligations can sometimes be imposed "in some situations even in the absence of any unilateral undertaking by the fiduciary"[193], he provides no examples, remaining content to find that "being a parent comprises a unilateral undertaking".

It should not be difficult to argue that the Churches undertook, in a general way, to act in the best interests of the children in their care. This should be all that is necessary to satisfy any

---

189 Peter Maddaugh, "Definition of a Fiduciary Duty" [1990] Spec. Lect. L.S.U.C. 17. See also Finn, *supra* note 157 para. 15; J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar Rev. 1 at 7.

190 *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321 at 341. Emphasis added.

191 (1984), 55 A.L.R. 417 (Aust. H.C.).

192 *Frame*, *supra* note 159 at 100-101. Emphasis added.

requirement that the fiduciary have undertaken an obligation. Anything more precise would allow the powerful essentially to contract out of their obligations to those under their control and influence.[194]

A further difficulty may arise out of the suggestion that, although none of the cases explicitly identifies it as a necessary condition, no breach of a fiduciary obligation will be found unless the fiduciary benefits somehow through neglecting the interests of the beneficiary.[195] This line of thinking obviously arises out of the more usual context of property or other economic interests protected by equity.[196] Perhaps the paradigm case of fiduciary breach is the trustee or fiduciary who uses the beneficiary's assets for his or her own benefit rather than that of the beneficiary. There was no obviously parallel benefit to school officials arising out of their mistreatment of Aboriginal children. However, it might be argued that what is merely a typical motivational feature behind one kind of fiduciary breach should not be elevated to a prerequisite to an action in all contexts. This is merely one example of how the doctrine developed primarily in one particular context is ill-suited to other contexts. It would seem incongruous though, if self-interested violation of another's vital interests is enough to justify the imposition of fiduciary obligations, but malice or total failure to recognize the legitimacy of those interests (because the beneficiary is thought to be less than fully human) is not.

Further one might argue that there was a benefit to the school officials here: much of what was done, was done in pursuit of a programme to convert Aboriginal peoples to

---

193 *M.(K.)*, *supra* note 156 at 324.
194 Shepherd, *supra* note 157 at 68-70.
195 Standard formulations of the basic principles of fiduciary obligation commonly speak of the duty to avoid conflict of interest, or not to profit from one's position as a fiduciary. See, for example, Maddaugh, *supra*, note 188 at 27.
196 It is interesting to note that standard treatises on fiduciary obligation are almost wholly devoted to their application in business and property contexts. See for example, Shepherd, *supra* note 157; Finn, *supra* note 157.

Christianity, and to maintain that allegiance through new generations. This was the original reason for Church[197] involvement in the education of Aboriginal peoples, and it might well be seen as an interest that the Church run schools protected at the expense of their students. This is certainly true in respect of many aspects of the curriculum which was designed to alienate the children from their traditional spiritual and cultural practices. Similarly, the Churches' eventual acquiescence in the funding constraints imposed on them by the federal government, and their resort to relying in part on the labour of the children to maintain the schools may have been motivated by their interest in maintaining their opportunity to proselytize. While certainly different from the economically self-interested behaviour that the courts are more used to controlling, this interest is no less real than, for example, the interest of the father in *M.(K.)* in his own sexual gratification at the expense of his daughter, or the benefit to the mother in *Frame* of being the exclusive beneficiary of her children's filial attentions.

d) A Cause of Action of Last Resort?

One final challenge to the invocation of equity must now be considered. In recent case law coming out of the Supreme Court there has been a suggestion, especially by Sopinka J., that breach of fiduciary obligation should be a ground of liability of last resort, used only when other causes of action are inadequate to remedy the wrong. In *LAC Minerals* he commented:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary...In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.[198]

---

197 It should be noted that this is an argument that may have more applicability to the Church hierarchy than to individual clergymen and nuns.

198 *Supra* note 155 at 60-61. Note that Flanagan refers to this as an "unsupported assertion": Robert Flanagan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask.L.Rev. 45 at 64.

In that case, Sopinka J. concluded both that the element of vulnerability or dependence was missing in the relationship in issue[199], and that an action for misuse of confidential information was adequate to describe the plaintiff's claim.[200] This approach seems to involve first asking whether the behaviour complained of fits within any other legal wrong, and only if it does not, considering whether it meets the *Frame* test. Given the complexity of the harms perpetrated in this situation and the fact that if they can be covered by other causes of damage, some parts of the harm will fall under one cause of action (e.g. battery) and others under another (e.g. negligence), Sopinka J.'s approach would constitute a serious barrier to litigating these issues, if only by vastly complicating the litigation.

More worrying, however, is his adoption of the same approach in *Norberg v. Wynrib*.[201] The case involves the claim by a woman that her doctor breached a fiduciary duty owed to her by offering to provide her with a drug to which she was addicted in return for sexual favours. Contrary to the minority judgment of McLachlin J., concurred in by L'Heureux-Dubé J., Sopinka J. was of the view that the plaintiff's case could be properly disposed of under the rubric of breach of professional duty, grounded alternatively in contract or negligence, and agreed with McEachern C.J. in the British Columbia Court of Appeal that "it adds nothing to describe the breach as a fiduciary one"[202]. Sopinka J. reiterated the view that fiduciary obligation must be reserved for only those situations truly deserving of special protection.[203]

Additional grounds for concern arise out of the fact that Sopinka J. would have awarded a lower amount of damages than any other member of the court. In particular, his damage award would have been $50,000 less than that advocated by McLachlin J. Half of this difference lies

---

199 *Ibid*. at 64ff.
200 *Ibid*. at 69.
201 (1992), 92 D.L.R. (4th) 449. Sopinka J.'s judgment begins at 473.
202 *Ibid*. at 481.

in punitive damages, which Sopinka J. declined to award, and which are not peculiar to actions for breach of fiduciary duty, but the other half was made up by the amount McLachlin J. would have awarded for the doctor's sexual exploitation of his patient, and aspect of the harm to the plaintiff that McLachlin J. argued was rendered invisible by Sopinka J.'s approach.[204] While it cannot be said that Sopinka J. completely failed to consider the doctor's abuse of power in describing the harm done and in calculating damages, there is some justice in McLachlin J.'s claim that Sopinka J.'s primary focus is on the doctor's failure to provide adequate treatment for his patient's drug addiction and the consequent harm to the patient of having this addiction prolonged, rather than on his sexual abuse of her.[205] On McLachlin J.'s view, the breach of trust - the abuse of the doctor's position of power over a vulnerable patient - was a separate aspect of the harm done to the plaintiff, even if that behaviour could also be described under another legal rubric. As a separate wrong, it required assessment of damages under a separate head. This more nuanced view of the harm arising out of abuse of power and exploitation would obviously better fit the claims of residential school survivors.

Oddly enough, Sopinka J. did not press the point about using fiduciary breach only as a last resort in *M.(K.)*, even though it was possible to argue that the father's sexual abuse of his daughter was captured by battery law. In fact, this was more clearly so in *M.(K.)* than in *Norberg*. Rather, he concurred in the majority judgment of La Forest J. who explicitly agreed with McLachlin J.'s view in *Norberg* about the necessity of considering the availability of any equitable causes of action. La Forest J. said,

---

203 *Ibid*. at 480.

204 La Forest J. writing for a plurality of the Court, agreed with McLachlin J. that punitive damages were appropriate, but, deciding the case on battery grounds rather than breach of professional duty, nevertheless agreed with Sopinka J. about the appropriate amount of compensatory damages.

205 *Supra* note 200 at 500.

> In *Norberg*, McLachlin J. and I differed on the path to be followed in upholding recovery. She chose the route of the fiduciary claim whereas I preferred the route afforded by common law tort of battery because in the circumstances of that case there might be difficulties concerning the applicability of fiduciary obligations, an issue I did not find it necessary to decide. I could do this because I did not consider the common law moulds to be ill-fitting in that case. Nor, as I will attempt to demonstrate, do I think they are ill-fitting in the present circumstances. None the less, I agree with my colleague that a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims.[206]

The spirit of La Forest J.'s approach seems quite contrary to Sopinka J.'s previously expressed views.

At best, the Sopinka approach will require plaintiffs to go through all the misbehaviour of the school officials to first ask whether it constituted some other tort, and reserve breach of fiduciary obligation only for those aspects not covered by the common law. At worst, it betokens a desire to restrict recovery to the sorts of tangible legal interests traditionally protected by the common law, refusing to acknowledge the separate harm that abuse of power occasions when it touches personal rather than economic interests. Although some parts of these facts can clearly be dealt with through other rubrics (negligence or battery most obviously), it could also be argued along the lines suggested by McLachlin J. in *Norberg* that the various other torts do not fully cover the wrong done. There are two bases for such an argument. The first is that somehow adding up all the individual instances of abuse and misbehaviour does not fully capture the enormity of the wrong done. This is a case in which the whole is much more than the sum of its parts. More concretely, it is obvious that the tort of battery will only get at the instances of physical and sexual abuse, while it would seem difficult to get a court to recognize the nebulous, yet very real, damage to self-esteem, the loss of language and culture, and the educational deprivation in a negligence action.

---

206 *M.(K.)*, *supra* note 156 at 323.

This may, in fact, bring us to the crux of the matter. If we go back to the basic relationship between common law and equity (of which fiduciary duty is a part), the purpose of equity has always been said to be to mitigate the rigours of the common law.[207] In modern times, this has often come to mean providing the courts with a basis for recognizing new causes of action when they think that certain behaviour should be actionable, but is too far off from the requirements of the nearest common law action provided the new ground of liability bears some resemblance to previous interventions of equity. On this understanding the question becomes whether deliberately depriving a community of its cultural and linguistic heritage, and giving them a deficient education is a kind of wrongdoing that the courts should use their equitable powers to remedy. There is no doubt that an action for breach of fiduciary obligation in respect of the treatment of Aboriginal children in residential schools would push the boundaries of established law. In the end, success may depend on the courts' willingness to see the kinds of harm done here as serious harms and as appropriately cognizable by the legal system.

ii) Fiduciary Obligation Owed to Parents

A further argument might be made that school officials owed a more limited fiduciary obligation to parents of students: a duty not to destroy the parent\child relationship. This would be to apply directly Wilson J.'s argument in *Frame* to the situation of the removal of children from their families for the purposes of schooling. Again the test seems to be met. School officials were in a very similar position *vis-à-vis* the parents of students to that of the custodial parent in *Frame*. They had day-to-day care and control over the children under circumstances

---

207 For a recent discussion of the role of equity by three eminent jurists, see the essays by The Honourable Sir Anthony Mason, The Right Honourable Sir Robin Cooke, and The Honourable Beverley M. McLachlin, under the collective title, "The Place of Equity and Equitable Doctrines

that made it very difficult for parents to even find out what was going on in the schools, let alone intervene. And given the statutory requirement for all Aboriginal children to attend school, parents had little choice but to turn their children over to the care of the schools. Under these circumstances, one might argue that an obligation arose not to conduct the children's education in a way that was more disruptive of normal parent\child relationships than was absolutely necessary. School officials' discouragement of family visits and censorship of correspondence, as well as inculcation of shame in the children about their own traditions which they identified with their parents could be seen to fall afoul of this obligation. It must be kept in mind, however, that Wilson J.'s extension of fiduciary law to protect family relations has not yet been adopted by a majority of the Court.

iii) Summary

According to the substantive criteria of the law, a fairly strong argument could be made that school officials owed *some* fiduciary obligations to the children under their care and their parents which were breached by a variety of the policies according to which the schools were operated and by the behaviour of individual teachers and administrators. The relationship between the children and these school officials is rather closely analogous to that between parent and child or guardian and ward, both of which have been recognized as *per se* fiduciary relationships. Further, the substantive criteria developed in recent case law to identify fiduciary relationships seems readily applicable. The key criterion here is the relationship of vulnerability between the children and the school officials. Parents are on less secure ground because they cannot claim the benefit of a *per se* fiduciary relationship with the schools, and the

---

in the Contemporary World" in Donovan W.M. Waters, ed., *Equity, Fiduciaries and Trusts: 1993* (Scarborough: Carswell, 1993).

only authority bringing them within the modern tests is the dissenting judgment of Wilson J. in *Frame*.

The chief uncertainty lies in whether the courts will be willing to recognize the full range of harms caused by the residential school experience as implicating the kinds of `practical interests' for which the protection of the law of equity should be available. Bringing an equitable action should be more conducive to expanding the scope of recognizable harm than pursuing available common law routes. However, willingness to extend fiduciary law outside its traditional categories and interests, which have largely been concerned with property and economic interests, is a very recent development.

PART III: EXTRA-LEGAL AVENUES OF REDRESS

In addition to pursuing available legal avenues of redress, consideration should also be given to the advantages of seeking a public inquiry into the residential school system and to the pursuit of a politically negotiated compensation package involving both government and Churches. The moral\political argument for the establishment of some extra-legal redress mechanism to acknowledge the wrongs inflicted through the residential school system and to assist in the process of healing builds upon the more narrowly legal part of this study. The research into possible causes of action begins to demonstrate the wide variety of wrongs committed and the actors who are implicated as well as suggesting a claim for the recognition of a variety of harms to individuals and communities. Even if full legal recovery is not possible, the exploration of the arguments for such recovery should help make the moral case that a grave injustice has been perpetrated. The fact that the law may define harm too narrowly to cover the full range of actual harms done to individual Aboriginal people and their communities does not mean that those harms do not deserve moral recognition. Morally speaking, the historical record speaks for itself. There can be no justification of the treatment accorded to Aboriginal children in residential schools. The law of fiduciary obligation may help to put labels on some of the ingredients of this story that lead to a conclusion of wrongdoing - the position of trust of the Crown and the Churches, and the vulnerability of the children in the schools - but that conclusion stands without the benefit of legal support.

A moral\political argument may also draw upon more recent sources of law such as the *Charter of Rights and Freedoms*[208] and the *Canadian Human Rights Act*[209]. These human

---

208 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

rights documents may be looked to as authoritative statements of contemporary Canadian morality against which the experience of the residential schools can be judged and fair redress measured. Using the language of equality and discrimination these statutes provide another set of labels for the wrongdoing in issue. This section will therefore assume that some sort of compensation of the harms inflicted by the residential school system is appropriate, and will focus on identifying the considerations to be taken into account in pursuing that objective.

The disadvantages of pursuing recovery through legal means are significant, prompting a search for alternative mechanisms to raise the profile of the residential school issue in public consciousness, and deal with the needs of survivors. As we have seen, the legal arguments for liability are extremely complex, and in order for the law to provide full compensation, the courts would have to be willing to recognize certain `practical interests' not previously recognized. Success on this front is by no means certain. In addition, each claim[210] would have to be litigated separately, the issues in each setting and with respect to each victim being dealt with on a case by case basis, attended by the possible difficulties of individual proof of causation touched on above[211]. Such a course of litigation would take years, be extremely expensive and emotionally burdensome for plaintiffs, and in the end may not achieve full vindication for the plaintiffs. By contrast, if a settlement could be negotiated politically, substantial reparation could be achieved without the need to litigate every individual wrong, and harms may be included for compensation which would be difficult to fit into existing causes of action.

Furthermore, compensation both on an individual and communal basis can be considered

---

209 R.S.C. 1985, c. H-6.

210 This may include some class action claims bringing together groups of students who received substantially similar treatment in the same school. The feasibility of class actions has not been considered in this study. However, while this reduces the cost in time, effort, money, and emotional energy of litigating, the complexity of a comprehensive litigation strategy to compensate all victims is still daunting.

where appropriate. Liability imposed through litigation will achieve compensation payable to individual victims (even if individuals join forces in a class action).[212] Since the measures likely to be necessary to overcome the adverse effects of residential schooling will, in large part, be communally oriented, an exclusive focus on individual compensation would require individual victims to come together after receiving compensation and agree to contribute toward the collective efforts required. Moreover, individual compensation to some survivors who have already succumbed to substance abuse or other self-destructive behaviour as a result of the injury done to them may contribute to their injury rather than aiding in their recovery.

One of the biggest obstacles to a negotiated settlement is likely to be whether there exists the political will necessary to make it possible. The existence of that political will is in part a function of public knowledge about the damage caused by residential schooling. In the effort to raise public consciousness, the creation of a public inquiry may well be instrumental. Hence we begin our discussion with a look at the considerations to be taken into account in the creation and design of an inquiry.

A. Feasibility of a Public Inquiry Into Residential Schooling

i) Defining the Mandate

Academic observers have classified inquiries in a number of ways. As has been noted by the Ontario Law Reform Commission,

---

211 *Supra* pp. 24-25.

212 This assumes that there are no appropriate corporate plaintiffs on whose behalf a claim might be made, such as a Band. While there may be some cases in which a Band as a whole can make a claim in fiduciary obligation, this possibility has not been pursued here. It requires more detailed information about specific schools in specific communities and the relationship between government, Churches and Bands than is available to us. Further, such a corporate claim could only get at a portion of the harms caused, since the community as a whole is only derivatively affected by the physical mistreatment of individual children, for example.

> General classifications schemes for public inquiries abound. One scheme divides inquiries into two categories based on procedure or methodologies, distinguishing between the research inquiry and the inquiry as arbitration. Another classification scheme emphasizes functional objectives, differentiating between the determination of public policy, the review of political judgment, and the determination of guilt or innocence. A third classification system contrasts investigative and advisory commissions. It has also been suggested that the inquiry process is a policy outcome in its own right. While there are thus numerous advocates of various classification schemes, there are also numerous sceptics who, for a variety of reasons, consider the typologies deeply flawed or, at best, unreliable guides to the classification of inquiries. In their view, public inquiries constitutes a set of institutions characterized primarily by their *ad hoc* nature and diversity.[213]

A fairly constant theme in these efforts to classify is the distinction between inquiries designed to advise the government on policy and those designed to investigate conduct.[214] These various ways of categorizing the functions of inquiries should not be seen as mutually exclusive or as prescribing rigid models. Salter, for example, suggests that inquiries can be placed on a continuum according to the degree to which the functions of fact-finding and policy-making are pursued.[215]

Although the government has the power to create an inquiry with any or all of these functions in mind, thus making inquiries one of the most flexible instruments available in the development of policy, there has been debate over the sorts of task that can best be handled by public inquiry. For example, Iacobucci has argued that of the normative functions that an inquiry might be charged with, those lying at opposite ends of a continuum of such functions are not best handled through this mechanism.[216] He argues that political questions requiring a representative decision about values should ultimately be left up to Parliament, and issues which

---

213 Ontario Law Reform Commission, *Report on Public Inquiries* (1992) at 140. Footnotes omitted. [hereinafter *Public Inquiries*].
214 *Ibid*. at 146-148. See also Liora Salter, "The Two Contradictions in Public Inquiries" (1990) 12 Dal.L.J. 173.
215 Salter, *supra* note 213 at 176. See also OLRC, *Public Inquiries*, *supra* note 212 at 148-149.

are specific and factual, involving few parties and substantive issues of law are best resolved by the courts. The strength of commissions, in his view, is in defining issues and developing the information to allow them to be considered.

> [I]f government seeks to conduct a flexible, impartial inquiry on either a specific or a general topic, to range widely in developing and considering sources of information, to canvass wide ranging and innovative solutions to problems without necessarily being bound to identified or recommended courses of action, a commission of inquiry should be considered.[217]

This description of the conditions making an inquiry useful could almost have been written with the residential schools question in mind.

A government has very broad discretion in the design of the purpose and mandate of a public inquiry.[218] Section 2 of the federal *Inquiries Act* frames the power to set up an inquiry very broadly:

> The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning *any matter connected with the good government of Canada or the conduct of any part of the public business thereof*.[219]

While there are few cases in which courts have been called upon to decide what constitutes an inquiry into "any matter connected with the good government of Canada or the conduct of the public business thereof", it is clear that the cabinet's power to establish a public inquiry has been interpreted expansively.[220] In *North West Grain Dealers Association. v. Hyndman*, Cameron J.A. of the Manitoba Court of Appeal emphasized that "good government" in the federal *Inquiries Act* should be given a broad interpretation:

---

216 Frank Iacobucci, "Commissions of Inquiry and Public Policy in Canada" (1990) 12 Dal.L.J. 21 at 24-25.
217 *Ibid*. at 24.
218 *Ibid*. at 23. See also A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" (1990) 12 Dal.L.J. 29 at 34.
219 R.S.C. 1985, c.I-11. Emphasis added.

> The words in the Inquiries Act, "good government of Canada", are broad, general and designedly used, and extend to all matters and considerations that come within the Federal jurisdiction.[221]

However, the limitation to matters connected with government does place some possible constraints on the permissible mandate of an inquiry. Of particular relevance here is the feasibility of inquiring into the conduct of private parties, such as the Churches and individual officials and clergy. An inquiry may investigate the activities of individuals or organizations if such investigation is relevant to an aspect of public policy within the inquiry's mandate.[222] However, this power does not allow inquiries to be set up for the sole purpose of investigating individuals or private organizations. In *R. ex rel. v. McPhee*, a British Columbia inquiry into the invasion of privacy of a named individual and his union was brought to a halt on the grounds that,

> There is not slightest suggestion that any matter of public concern, such, for instance, as the undesirability of invasions of privacy by the use of electronic devices, is being investigated with a view to controlling such matters with legislation. Such an inquiry might be proper. But here there is only the baldest sort of order to inquire into the private affairs of a person (since deceased) and a trade union, with no suggestion that the inquiry relates to good government or will serve any public purpose.[223]

In addition, it could be argued that even a federal public inquiry does not have the power to investigate matters that are solely related to criminal wrongdoing, whether of private individuals or government employees or officials. There have been a number of provincial public inquiries that have been found *ultra vires* of provincial powers because they were investigating matters that fell within the federal government's jurisdiction over criminal law.

---

220 P. Garant, *Droit Administratif*, vol. 1, 3rd ed. (Cowansville: Editions Yvon Blais, 1991) at 511-512.

221 (1921) 61 D.L.R. 548 at 563.

222 *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 80, *per* Beetz J. See also R.J. Anthony and A.R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985) at 3.

223 (1967), 60 D.L.R. 642 at 647 (B.C.S.C.).

However, beyond the question of jurisdiction, concern has also been expressed by the courts that public inquiries should not be set up to look into matters of criminal law because they are not equipped with the procedural safeguards that have been established in criminal courts. For example, in *Re Nelles and Grange*, the Ontario Court of Appeal stated that:

> A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes...Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility.[224]

In *Nelles*, the public inquiry at issue was given the mandate to look in the circumstances surrounding the deaths of several infants at Sick Children's Hospital. The Order in Council limited the commissioner to inquiring into the deaths of the children and making recommendations with respect to how such deaths could be avoided in the future, "without expressing any conclusion of law regarding civil or criminal responsibility". In response to a request for guidance from the commissioner, the court held that revealing the names of people who were criminally or civilly responsible in the final report would turn an otherwise legal inquiry into an illegal one.[225]

Any public inquiry into residential schooling would undoubtedly cover both factual matters and policy matters, including the propriety of compensation for victims and communities, and the forms it might take. Factual matters would include not only the historical facts of what happened in various schools, but also psychological and social science evidence on the effects of past policy and behaviour on Aboriginal people. Policy matters considered could include both backward-looking ones - assessing the wisdom of past educational policy - and forward-looking ones - including, perhaps, redress and revisions to current educational policy.

---

[224] (1984), 9 D.L.R. (4th) 79. This passage was quoted favourably by Lamer J, writing for the majority in *Starr v. Houlden* (1990), 68 D.L.R. (4th) 663 (S.C.C.).

This function obviously includes both factual investigations - of a highly detailed nature - and normative judgments and prescriptions.

The mandate of any public inquiry is set out in the Order in Council creating the inquiry. Typically, the Order in Council sets out the scope of the inquiry's mandate while giving the inquiry's commissioner broad powers and discretion in carrying it out. The limits on the inquiry's mandate as set out in the Order in Council "can be enforced in courts and [is] subject to judicial review"[226]. That is, if the inquiry goes beyond the scope of the power conferred on it by the Order in Council, the inquiry's activities can be challenged in court. Thus, in order to avoid this difficulty, it is preferable to give the inquiry a broad mandate.[227]

In addition, it should be noted that the Order in Council can be used as a protective device. That is, knowing the legal pitfalls that the inquiry might face, it is possible to tailor the Order in Council in such a way as to avoid them. For example, as mentioned above, the inquiry at issue in *Nelles* explicitly instructed the inquiry to proceed "without expressing any conclusion of law regarding civil or criminal responsibility". In a discussion of this case, it has been observed that:

> The Ontario Court of Appeal stressed the importance of this limitation and interpreted it broadly to mean that the inquiry was "prohibited from naming the person responsible [for a deliberate or accidental administration of a lethal overdose of digoxin] for to do so would amount to stating a conclusion of civil or criminal responsibility". This interpretation was no doubt made in light of concerns about the constitutional limits under the division of power and the fairness of the inquiry process toward impugned individuals.[228]

---

225 *Nelles*, *ibid*. at 86.

226 OLRC, Public Inquiries, *supra* note 212 at 29.

227 However, in doing so, it is worth noting that if the inquiry's mandate is too broad, that is if the commissioner is given too much discretion, the inquiry can be challenged on the grounds that it is *ultra vires* of the government's jurisdiction in that there has been a delegation of power which should properly be left in the hands of the Governor in Council. *Ratmagobal v. Attorney-General*, [1970] A.C. 974 at 982.

228 OLRC, *Public Inquiries*, *supra* note 212 at 29.

As another example, the Order in Council setting out the mandate of the inquiry into the Paypom Treaty explicitly precluded evidence obtained during the inquiry from being used in further proceedings, thus attempting to address the concerns about self-incrimination that the inquiry might raise.[229]

Some very general guidelines can be formulated based on this discussion. In setting out the mandate of a public inquiry into residential schools, the Order in Council should not mention the names of specific individuals or religious organizations and it should state policy objectives that go beyond an investigation of the activities of individuals or specific institutions. Moreover, these policy objectives should not merely serve as a screen for an investigation into the activities of private individuals or institutions.

ii) The Politics of the Public Inquiry

Conventional wisdom identifies six main possible functions of public inquiries:

> (a) they enable the government to secure information as a basis for developing or implementing policy; (b) they serve to educate the public or legislative branch; (c) they provide a means to sample public opinion; (d) they can be used to investigate the judicial or administrative (police, civil service, Crown corporations) branches; (e) they permit the public voicing of grievances; (f) they enable final action to be postponed.[230]

The last of these may indeed motivate a recalcitrant government, but need not detain us. Although addressing the problems created by the residential schools is long overdue, our need for further information and public discussion is so great that concerns about further delay pale by comparison. Of the other functions listed, all but the sampling of public opinion could be fulfilled in some measure by an inquiry into residential schooling. In all these ways, an inquiry has the potential to move beyond the narrow focus on ascribing blame for individual acts that

---

229 *Ibid*. at 30.

230 *Ibid*. at 9. See also, Salter, *supra* note 213; MacKay, *supra* note 217 at 34.

would necessarily characterize a civil action.[231]

The most obvious benefit of holding a judicial inquiry into the operation of the residential school system would be the creation of a public space within which Aboriginal people could tell their stories and have that experience acknowledged. During its hearings, the Royal Commission on Aboriginal Peoples heard repeatedly of people's need to bring these stories out into the open as an important part of the process of healing.[232] As Marius Tungilik told the Royal Commission on Aboriginal Peoples, "We need to know why we were subjected to such treatment in order that we may begin to understand and heal".[233] In turn, this should have an important educative effect across Canadian society. This educational role of inquiries has been described by LeDain as their `social function':

> [A] commission...has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can effect the problem are of profound importance.
>
> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction...Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.[234]

---

231 OLRC, *Public Inquiries*, *supra* note 212 at 11. See also, Salter, *supra* note 213 at 186-187.

232 See, for example, the hearings at Winnipeg, Man., April 22, 1994, Toronto, Ont., June 26, 1992, and Fort Alexander, Man., Oct. 29, 1992. *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy* (the Winter Commission) (Archdiocese of St. John's, 1990) vol. 1 at ix, also remarks upon the importance of a public airing of people's feelings in the wake of revelations of several incidents of sexual abuse of children by priests.

233 Hearings at Rankin Inlet, N.W.T., Nov. 19, 1992.

234 Gerald LeDain, "The Role of the Public Inquiry in our Constitutional System" in Jacob Ziegel, ed., *Law and Social Change* (Agincourt: The Carswell Company, 1973) as quoted in OLRC, *Public Inquiries*, *supra* note 212 at 12. The OLRC Report notes the effects, in this

The potential of an inquiry into residential schooling to help shape attitudes toward Aboriginal issues generally is enormous. More pragmatically, in the presence of widespread ignorance about the policy behind, and conditions within, the residential schools, public support for some form of redress will likely be difficult to achieve. Beyond this function of setting the factual record straight and raising public consciousness, inquiries provide an opportunity to expand the discussion of public issues.[235] An inquiry can gather information from those directly concerned, and consider a range of proposals from the narrow to the broad. In addition, the independence of an inquiry from government can be an important advantage of the use of this instrument.[236]

At the same time, an inquiry reports to the government and must make its recommendations persuasive. This creates a tension between the radical potential of inquiries and the practical realities of fitting into existing policy agendas.[237] From his experience with the MacDonald commission, Simeon has argued, for example, that inquiries are inherently reformist rather than radical.[238] However, the main reason offered for this view is the obvious fact that inquiries are appointed by the government in power who tend to appoint members of established elites. That such a body, charged with reconsidering Canadian economic policy, would be unlikely to depart from received wisdom is not surprising. The policy issues likely to arise in the context of an inquiry into residential schooling, however, are unlikely to play so clearly into established ideological camps.

Salter acknowledges the conservative tendencies of most inquiries, but maintains that

---

regard, of inquiries like that into the Marshall prosecution and the abuse of children at the Mount Cashel orphanage.

235 Salter, *supra* note 213 at 174.

236 OLRC, *Public Inquiries*, *supra* note 212 at 141; MacKay, *supra* note 217 at 34.

237 Salter, *supra* note 213 at 174.

radicalism is possible, citing the Berger inquiry as an example.[239] As well as paying attention to democratic participation, it redefined "...its task to encompass the aspirations of indigenous people...[I]t shifted the government's agenda from the immediate problem of which pipeline to approve, or what measures to take to ameliorate environmental damage, to much broader social issues."[240] MacKay also remarks upon the Berger inquiry's interpretation of its mandate. His comment about Berger's use of the media is equally significant for its characterization of the vision of the inquiry:

> By involving not just the media but also those who would be most affected by a pipeline, Berger turned his inquiry into a national seminar on the dreams and nightmares of Canada's native people. By taking his deliberations to the native communities, he created a media event which was broadcast to all Canadians.[241]

This suggests that the mandate of an inquiry, its membership, and how its members interpret their mandate are crucial factors in determining the degree of innovation and imagination likely to come out of the final report. The Berger inquiry did indeed have a very wide mandate[242], giving Berger a wide interpretive latitude, which he used to put Aboriginal concerns at the centre of his analysis of the issues.[243] It is interesting to note, though, that the National Association of Japanese-Canadians, in considering how to lobby the government for a

---

238 Richard Simeon, "Inside the MacDonald Commission" (1987) 22 Studies in Political Economy 167 at 169.

239 Salter, *supra* note 213 at 177ff.

240 *Ibid*.

241 MacKay, *supra* note 217 at 44.

242 Berger's mandate was "to inquire into and report upon the terms and conditions that should be imposed in respect of any right-of-way that might be granted across Crown lands for the purposes of the proposed Mackenzie Valley Pipeline having regard to (a) the social, environmental and economic impact regionally, of the construction, operation and subsequent abandonment of the proposed pipeline...." P.C. 1974-641, reproduced in *Northern Frontier, Northern Homeland*, The Report of the Mackenzie Valley Pipeline Inquiry (Ottawa: Minister of Supply and Services Canada, 1977) vol. 2, Appendix 2. [hereinafter *Northern Frontier*]. Berger characterized his as perhaps "as wide a mandate...as any government has ever conferred upon any Inquiry...", Appendix 1 at 224.

243 Salter, *supra* note 213 at 178-180.

redress package to compensate Japanese-Canadians and their families for their internment during World War II, decided not to push for a public inquiry despite its potential as an educational tool. The NAJC worried that it would have too little influence on the membership of the inquiry or its terms of reference, and might therefore end up having to accept a package recommended by a body not of its choosing.[244]

The Berger inquiry shows that an inquiry can be an "exceptionally public process", that "can be used to solicit new kinds of public participation and to debate issues in greater detail than is possible in parliament, within government or in the normal course of media coverage".[245] The Berger inquiry perhaps constitutes the highwater mark in Canadian experience for public participation in the inquiry process - at least those members of the public affected by the pipeline proposal. Berger not only held preliminary hearings to get feedback on *how* the inquiry should be conducted[246], but also insisted on taking the inquiry to every community in the Mackenzie Valley that stood to be affected by the proposed pipeline, and allowed everyone who wished to let his or her views be known to the inquiry do so.[247]

Given the issues that would need to be dealt with by any inquiry into residential schooling, there is much to be learned about accessibility from the Berger inquiry. In addition to formal hearings held in Yellowknife, at which technical evidence requiring the testimony of expert witnesses was given, community hearings were held throughout the valley.[248] The inquiry staff were concerned not only to give everyone a chance to speak, but also to ensure that

---

244 Maryka Omatsu, *Bittersweet Passage: Redress and the Japanese-Canadian Experience* (Toronto: Between the Lines, 1992).
245 Salter, *supra* note 213 at 181.
246 Transcripts of these preliminary hearings as well as the decisions that came out of them are contained in E.L. Knowles and I.G. Waddell, eds., *Preliminary Materials*, Mackenzie Valley Pipeline Inquiry (1975).
247 *Northern Frontier* vol. 2, Appendix 1, *supra* note 241 at 226.
248 *Ibid*.

people felt comfortable speaking their minds. This entailed deviating from traditional hearing format. For example:

> One of the first matters the Committee had to deal with related to the issue of cross-examination of witnesses. The object of the community hearings was to give all people an opportunity to express their concerns without worrying about what they might well regard as harassment by lawyers. The Committee suggested a variety of ways in which the function of cross-examination could be fulfilled by procedures that would not dissuade people from testifying. One such technique was to invite representatives of both Arctic Gas and Foothills to make a presentation to the Inquiry whenever it appeared to them that people were misinformed or whenever they wished to correct what they felt was a mistaken view of their proposals. In this and other ways, without it ever being necessary formally to restrict the right to cross-examination, the community hearings were conducted, not within a procedural framework in which only lawyers felt comfortable, but within a framework which permitted northern people, native and white, to participate fully.[249]

The sensitive nature of the issues arising out of an inquiry into residential schooling would dictate that a great deal of attention be paid to these kinds of matters so that a process that is suitable to the inquiry's subject matter can be devised. In addition, because of the varying experiences of different Aboriginal communities in respect of residential schooling, it may well be necessary to adapt an inquiry's processes to the different needs of different communities.

Although part of their rationale may be public participation and debate, inquiries also have a private aspect. The writing of the final report is done in private, and more closely resembles negotiation than assessment.[250] It is conducted under time pressure and involves extensive trading of interests and concerns. At this stage the government is always in the background as a silent party, influencing the negotiations through considerations of what the government will accept.[251] Research and submissions can be radically taken out of context at this stage and simply used to buttress some argument.

---

249 *Ibid*. at 227.
250 Salter, *supra* note 213 at 183.
251 *Ibid*.

Salter also argues[252] that although inquiries are supposed to be free of the constraints of the judicial process, - indeed, this is supposed to be one of their key advantages - to the extent to which they are charged with investigating circumstances and making recommendations that may affect the legal interests of some of the participants, those participants will treat them like a trial. Thus, although an inquiry can be an opportunity to "put the state on trial"[253], the trial-like atmosphere can inhibit the inquiry's ability to explore the full range of issues necessary to identify the structural causes of a problem. Concern about the implications of the inquiry process for ultimate questions of liability can have a significant influence on the inquiry process itself. Legalistic conceptions of who has a significant interest and therefore deserves to be heard can operate; more credibility can be attached to the submissions of those perceived as having a direct interest than to advocacy groups; submissions can be focused on trying to pass the buck rather than trying to get to the bottom of the issues. Because so much of an inquiry into residential schooling is likely to delve into past conduct of particular individuals and organizations, what Salter calls the "ambiguous relationship" of the inquiry with the legal process[254] is likely to create continuous tensions and challenges for such an inquiry.

---

252 *Ibid*. at 185ff.
253 *Ibid*. at 174.
254 *Ibid*. at 185.

iii) Legal Constraints on the Design and Conduct of a Public Inquiry

a) Jurisdictional Considerations

The mandate of an inquiry cannot exceed the jurisdiction of the level of government establishing it.[255] Thus, for example, a federally created inquiry into residential schools could not be empowered to look into the effectiveness of the strategy of integrating Aboriginal students into the provincial school system if this has implications for provincial jurisdiction over education. For this reason, some care would have to be taken in phrasing an inquiry's mandate with respect to the issue of the desirability of the contribution of private parties to a compensation package, since this might be found to trench on provincial jurisdiction over property and civil rights. As noted by the Ontario Law Reform Commission, however, it is possible to create a joint federal-provincial inquiry should all relevant governments agree that there are issues crossing jurisdictional boundaries that should be explored.[256]

b) Individual Rights

The Commissioner has a common law right to determine the inquiry's procedural rules. However, there are specific statutory authorizations and specific limitations defining the scope of this power. First, there are specific provisions in the *Inquiries Act* setting out procedural rules. In addition, public inquiries fall within the scope of administrative law and, therefore, the legal principles governing procedure in administrative law apply to public inquiries. Finally, in some cases, the *Charter* will place limitations on the impact that public inquiries can have on individual rights.

Concern for individual rights will put constraints on an inquiry's operations the more it is

---

255 MacKay, *supra* note 217 at 35ff.
256 OLRC, *Public Inquiries*, *supra* note 212 at 142-3.

charged with investigating specific events which may involve individual wrong-doing. Indeed, this concern has led some commentators to suggest that it is inappropriate to assign such tasks to a public inquiry. For example, Sopinka J., in a speech given in August, 1990 had this comment to make in the wake of the Supreme Court's decision in *Starr v. Houlden*[257], which decided that certain features of a commission of inquiry set up by the government of Ontario to investigate the lobbying activities of Patricia Starr were unconstitutional:

> Public inquiries actually come in two separate breeds. One breed, the truly public inquiry, is both valuable and permissable. These inquiries are established to look into general matters of public import. The commissions generally hold hearings, weigh policy considerations, and make recommendations for the course of future legislative action...
>
> There is however, another, quite distinct breed of inquiries. They are not true public inquiries. They are criminal investigations masquerading as public inquiries. Some, of which the Starr is but one example, are in effect surrogates for the regular criminal process. Many of these inquiries are unacceptable because insufficient attention is paid to the interests of the target individual.[258]

There is sometimes a fine line to be drawn here. While it is clear that a public inquiry should not be used as a substitute for a criminal prosecution, there are cases in which specific instances of possible wrongdoing are tied to deeper structural causes which are the proper object of an inquiry.[259] The policy objectives of analyzing these structural causes in order to prescribe ways of avoiding such problems in future can scarcely be carried out without investigation of what has already gone wrong. Nevertheless, it is equally clear that the focus on specific conduct carries greater risks for the individuals subject to the inquiry's processes.

The *Inquiries Act* gives the commissioners broad powers to compel witnesses to give evidence at public inquiries:

---

257 [1990] 1 S.C.R. 1366.

258 As quoted by Mr. Justice Hughes, *Report of the Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints*, vol. 1 (St. John's: Office of the Queen's Printer, 1991) at 492-493. (Hughes Commission)

259 OLRC, *Public Inquiries*, *supra* note 212 at 10.

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5 The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of civil record in civil cases.[260]

In *O'Hara v. British Columbia*[261], the Supreme Court of Canada explicitly stated that the *Charter* applies to public inquiries. Thus, in accordance with s.11(c) of the *Charter*, the only people who cannot be compelled to testify at public inquiries are those who "have been charged with an offence and only if the proceedings are against that person in respect of the offence".[262] In addition, in *Phillips v. Nova Scotia*[263], the Nova Scotia Court of Appeal suspended the public hearings of the inquiry into the Westray mines explosion until the four people who were charged with criminal and quasi-criminal offences had gone to trial. The Court reasoned that to hold the proceedings before the criminal trials would violate the rights of the accused to a fair trial under s.11(d) of the *Charter* because of the media publicity that would probably surround the inquiry.

In addition, witnesses who do testify at public inquiries are protected against self-incrimination in accordance with s.5(2) of the *Canada Evidence Act* and s.13 of the *Charter*. While the protections offered by these two legal instruments overlap in several respects, there are some differences. S.5(2) of the *Canada Evidence Act*,

protects a witness from subsequent use of self-incriminating testimony. It is

---

260 *Supra*, note 218.
261 (1987), 45 D.L.R. (4th) 644.
262 Alberta Law Reform Institute, *Public Inquiries* (Edmonton: Institute, 1991) at footnote 63; *Starr, supra* note 256 at 697.
263 (1993), 100 D.L.R. (4th) 79.

> narrower than the *Charter* provision in that the protection is dependent upon the witness having objected to the question that produced the testimony, and upon it appearing that the witness would have had a privilege but for the *Canada Evidence Act* or a provincial evidence act.[264] It is broader, because the protection extends to evidence that might render a witness civilly liable as well as to evidence that might render the witness criminally liable, and the protection is that the evidence "shall not be used or receivable in evidence against him" in a criminal proceeding other than a prosecution for perjury.[265]

It is worth noting that s.11(h) of the *Charter*, the section dealing with double jeopardy, does not apply to public inquiries. That is, if someone is exposed as a wrongdoer by a public inquiry, this does not prevent that person from subsequently being charged with a criminal offense.[266]

An individual has a right to be protected against self-incrimination, both with respect to criminal and civil proceedings. It is interesting to note that the Hughes Commission, charged with investigating the response of the Newfoundland criminal justice system to complaints of child abuse at Mount Cashel Orphanage, decided not to call as witnesses any persons charged or chargeable in the matter of the conduct of the investigation into the Mount Cashel allegations.[267] There are also concerns about damage to reputation even if no further proceedings are brought against an individual. Individuals affected by an inquiry's proceedings have the right to be represented by counsel.[268] Anyone against whom there is an allegation of misconduct has a right to notice.[269] The danger to individual rights is exacerbated by the fact that judicial review of commission determinations is limited.[270]

---

264 At common law, a person who was asked a self-incriminating question was allowed to refuse to answer. The federal and provincial evidence acts have changed this.
265 Alberta Law Reform Institute, *supra* note 261 at 45.
266 *Ibid*. at 97.
267 Hughes Report, *supra* note 257 at 494.
268 *Inquiries Act*, *supra* note 218, s. 12.
269 *Ibid*. s. 13.

B. Redress: Possibilities and Pitfalls

Clearly, the harm caused by the residential school system was one which not only affected individuals who were abused physically sexually and emotionally, but also entire Aboriginal communities. The links of language, custom, religion and history which bound Aboriginal communities together and ensured their cultural survival were irreparably damaged by the forced removal of Aboriginal children from their families and their culture. The need for some sort of compensation to redress these harms was frequently commented upon at hearings held across the country by the Royal Commission on Aboriginal Peoples.[271] Any compensation package would have to be responsive to the range of harms suffered and how widely they have been felt throughout certain communities.

A cornerstone of any compensation negotiations must be community control and participation. To the extent that the objective is to devise ways of addressing the social harm caused by the residential schools, each affected community must decide for itself what its needs are. Redress demands, therefore, will vary from community to community, and this variability must be built into any negotiation process. For this reason, this study cannot provide a `model redress package'. Instead, its objective is to examine, selectively, the recent history of negotiated settlements in contexts not unlike the residential school situation with a view to outlining the range of options available and some of the lessons to be learned from others' experience. We have chosen three examples of such negotiations to use as case studies: the redress package negotiated by the National Association of Japanese-Canadians with the federal government; the compensation package negotiated by the advocacy group, Helpline, for the

---

270 MacKay, *supra* note 217 at 38.

271 See, for example, the remarks of Chief Councillors Kelly Dennis and Charlie Cootes at the Port Alberni, B.C. hearings, April 20, 1992, and of Ron George, President of the Native Council of Canada, at the Toronto, Ont. hearings, June 25, 1992.

victims of abuse at St. Joseph's Training School for Boys; and the package designed to compensate the communities of the Grassy Narrows and White Dog reserves for the pollution by the pulp and paper industry of the English-Wabigoon River system. These three cases collectively involve both government and private organizations, and encompass both individual and collective forms of compensation. Each of them bears some similarity to the situation faced by Aboriginal communities in trying to overcome the detrimental effects of residential schooling, either in the types of harms compensated for or the magnitude of harm the package sought to remedy. Each settlement contains elements that might be of use to Aboriginal communities seeking redress now, and each case reveals potential pitfalls or yields useful advice in pursuing this path.

In addition, we will consider the recommendations of the Winter Commission which recently reported to the Roman Catholic Archbishop of St. John's, Newfoundland on how the Church should respond to the needs of victims of abuse by members of the clergy.[272] While not a compensation package, *per se*, the Commission's report constitutes a careful and comprehensive examination of the harm inflicted and the appropriate remedies in circumstances that bear some similarity to some aspects of the aftermath of residential schooling.

i) St. Joseph's Training School for Boys

St. Joseph's Training School for Boys was established in Alfred, Ontario near Ottawa by the lay religious order, the Brothers of Christian Schools in 1920. The school operated independently of the Roman Catholic Church and closed in 1974. Between four and six hundred former students at the school have claimed they were sexually and/or physically abused

---

272 *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, vol. 1 (Archdiocese of St. John's, 1990) (the Winter Commission).

by the Christian Brothers who taught at and operated St. Joseph's and another training school run by the Christian Brothers, located in Uxbridge, north of Toronto. In 1991, after a year of investigation by the Ontario Provincial Police, one hundred and seventy-three charges were laid against twenty current and former members of the Ottawa order for sexual or physical assault against the former inmates of the school thirty years ago. Five have been convicted so far. Details of the kind of abuse suffered, including rape, fondling, and beatings with hockey sticks, have been widely publicized in the media. Twenty-four charges were laid against eight Toronto Christian Brothers from 1952-1973; however, two have been acquitted of charges so far.

Early in December 1992, Helpline, the advocacy group representing the victims of both schools, agreed to a compensation package worth an estimated $13 million, funded by the Ontario Government, the Roman Catholic Dioceses of Ottawa and Toronto, and the Ottawa branch of the Brothers of Christian Schools. (An earlier offer in August had failed, because the Toronto branch of the Christian Brothers order had declined to participate.) The package is designed to provide victims with counselling and financial compensation. Individual awards will likely vary according to the nature and extent of abuse suffered by individual ex-students.

The compensation scheme in the St. Joseph's Training School case does not provide a remedy for collective harm. It is designed, rather, to remedy the physical or sexual abuse suffered by individuals. It therefore provides only a partial model in thinking about the needs of individuals and communities affected by residential schooling. However, this case may prove instructive. The fact that a settlement was reached, and relatively quickly after the complaints of abuse began to come to light seems to indicate a heightened understanding of and sensitivity to the repercussions this kind of abuse will have upon its victims later in life. The widespread public debate surrounding the revelations of abuse at the Mount Cashel Orphanage

and the criminal charges laid against Roman Catholic clergy throughout Newfoundland has contributed enormously to this trend. One important ingredient in the success of the St. Joseph's negotiations may be that they were preceded by a comprehensive police investigation leading to many criminal charges being laid. This not only undoubtedly added credibility to the victims' complaints, but also highlighted the severity of the harm suffered. There can be little doubt that the victim of a criminal assault deserves compensation. This may suggest that Aboriginal communities would be wise to press for police investigation of abuses in the school serving their community as a way of preparing the way for later negotiations for compensation. Some criminal charges arising out of abuse within residential schools have already been laid, but no doubt much more investigation is warranted.

ii) Japanese-Canadian Redress

In 1942, approximately twenty-two thousand Japanese-Canadian men, women and children in British Columbia, seventeen thousand of whom were Canadian citizens, were uprooted from their homes and interned, and all their property confiscated and sold, despite a complete lack of evidence that anyone had been guilty of espionage or disloyalty. Some were sent to road camps, others to shacks and tents near small towns in B.C.'s interior. Many were made to work on sugar beet farms in the prairies where there were labour shortages in order to keep their families together. Others were incarcerated in prisoner of war camps in Ontario. At the end of WWII, Japanese-Canadians were forced either to be deported to Japan or to live east of the Rockies. A few were convicted and imprisoned for returning to B.C. Not until 1949, four years after the war, were Japanese-Canadians permitted to return to the west coast. A thriving Japanese-Canadian community in Vancouver was destroyed, as its members were dispersed throughout Canada. A previously thriving west coast Japanese-Canadian community

has never recovered. Thousands lost opportunities for employment and education. Families were torn apart. The federal government's dispersal policy speeded up the assimilation process. In many cases, the language and traditional customs were lost. There are several parallels here to the damage inflicted on Aboriginal communities through residential schooling. Although property loss is not an issue in the residential school situation, the lost economic opportunities, harm to families, and cultural destruction is analogous in the two cases. In both cases, not only were individual members uprooted from their communities and families, successive generations were harmed and entire communities and cultures affected.

Concerted organized attempts by the National Association of Japanese-Canadians (NAJC) to seek redress from the Canadian government officially began in 1984.[273] A study of economic losses was undertaken in 1986 at the request of the NAJC by Price Waterhouse Associates, who estimated the total economic loss at over $400 million in income and property. In 1988, the Conservative government and the NAJC reached a comprehensive settlement. The package consisted of the following elements:

- $21,000 each (tax free) for all individuals interned; (In 1987, it was estimated that there were fourteen thousand eligible survivors.[274])
- $12 million to the Japanese-Canadian community through the NAJC to undertake educational, social, and cultural activities;
- $12 million for the creation of a Canadian Race Relations Foundation (which has yet to be proclaimed in legislation) that will foster racial harmony and cross-cultural understanding and help to eliminate racism;

---

273 Maryka Omatsu, *Bittersweet Passage: Redress and the Japanese-Canadian Experience* (Toronto: Between the Lines, 1992); Roy Miki and Cassandra Kobayashi, *Justice in Out Time: The Japanese Canadian Redress Settlement* (Vancouver: Talonbooks, 1991).
274 Miki and Kobayashi, *ibid.*

- up to $3 million for the costs of administering redress;
- an official acknowledgment of the injustice of the internment;
- the granting of citizenship to those expelled from Canada and those who had their citizenship revoked, and to their families;
- pardons for those convicted for breaching restrictive internment legislation.[275]

This settlement is interesting for its combination of individual and collective compensation. With respect to the collective aspect of the package, it is also noteworthy that the NAJC has complete authority over how this money is to be spent. This degree of independence from government and Churches will likely also be an important objective of compensation for the harms of residential schooling.

A second interesting feature of these negotiations is the success of the NAJC despite having to ground its case entirely in a moral claim. Unlike the case with residential schools, there were only the weakest possible legal grounds for retroactively challenging the government's actions in interning Japanese-Canadians and confiscating their property. The government acted pursuant to validly enacted legislation.[276] This seems to have caused the most difficulties in the negotiations with respect to individual compensation. According to Miki and Kobayashi, John Crosbie, the Minister in charge of negotiating for the government at one point, resisted individual compensation precisely because individuals could make no plausible legal claim of wrongdoing.[277] Nevertheless, this objection was overcome. However, Omatsu, expressing some surprise at the NAJC's success despite its weak legal case, speculates that the government may have been induced to come to an agreement in the hopes of

---

275 *Ibid*. at 138-139.
276 *War Measures Act*, R.S.C. 1927, c. 206.

improving trade relations with Japan.[278] If this is accurate, Aboriginal peoples might be well-advised to seek similar allies, either amongst the Canadian population generally, or in the international community.

Finally, one very important issue to be learned from the experience of the NAJC concerns representation. In the NAJC case, negotiations were detrimentally affected in the early stages by infighting within the Japanese-Canadian community over the type and amount of compensation, and who represented the community.[279] The government was very nearly able to use this division within the community to derail the negotiations. Any attempt to negotiate compensation should attempt to establish a `bottom line' negotiating position by consensus within the community, and the negotiators must be prepared to resist inevitable attempts by the government or religious organizations to divide and conquer. This may be especially challenging in this context because the experience of different communities may well vary substantially, leading to different priorities in the type of compensation sought. The amount of consensus building within the community undertaken by the NAJC may also be instructive to Aboriginal communities.[280]

iii) The Grassy Narrows and White Dog Reserves Settlement

Between 1962 and 1970, a Reed Ltd. paper plant dumped ten tonnes of mercury into the English-Wabigoon river system in Northern Ontario, resulting in the decision by the Ontario government to close the system to fishing. The Aboriginal food supply was devastated, as was

---

277 Miki and Kobayashi, *supra* note 272 at 106. Miki and Kobayashi point out, at 107, that this makes the same mistake of lumping all Japanese-Canadians into a group that the original internment legislation made.
278 Omatsu, *supra* note 272 at 160ff.
279 *Ibid*. at 96-107; Miki and Kobayashi, *supra* note 272 at 87-89.
280 Omatsu, *supra* note 272 at 101ff.

the sport-fishing industry - an important source of income for the residents of these two reserves. Mercury poisoning, known as Minamata disease, has also seriously affected reserve residents.[281] Mercury poisoning causes a neurological disorder that produces facial rictus, spasms, uncontrollable tremors, vision loss, and sometimes death. These health problems, family breakups, and a rise in alcoholism on the reserves have been blamed on the pollution.

In 1987, a $16.7 million settlement was reached after a decade of negotiations. The federal and Ontario governments, Reed Ltd., and Great Lakes Forest Products, Reed's successor in title, contributed to the compensation package. A total of $2 million was to be made available to individuals who could prove individual health or economic loss due to the pollution. The remainder of the money was to be used to fund social and economic programmes for the benefit of the reserves generally. Individual claims were to be adjudicated before hearings by an eight member compensation board. This model for the distribution of individual compensation might be considered in the residential schools context. Like the compensation package for Japanese-Canadians, the Grassy Narrows package contains both individual and community compensation, with the lion's share of the package devoted to community development.

iv) The Winter Commission Report

The Commission was created in May of 1989 by the Archbishop of St. John's to consider the factors giving rise to sexual abuse by clergy of children, to investigate how this abuse went undetected for so long, as well as "to make recommendations to provide for the spiritual,

---

281 For a detailed description of these events, see Warner Troyer, *No Safe Place* (Toronto: Clarke, Irwin, 1977).

psychological and social healing of the victims and their families".[282] The public revelations of abuse began in 1987. In September, 1988, James Hickey pleaded guilty to twenty sexual offences involving children. This was followed by charges being laid against five other serving priests and two priests living in the lay state.[283] In examining the behaviour of the priests who were the direct perpetrators of this abuse the Commission concluded:

> The position the offenders occupied in the community provided them many opportunities for sexual abuse because they were given unquestioned and unsupervised access to male children. But their status as priests was used in other ways as well. Child sexual abuse is a deviant sexual act based in power and manipulation. When priests of this Archdiocese sexually abused children, they exploited special power that derived from their positions as spiritual and community leaders. In doing so, they violated their trust as pastor, their priesthood, and betrayed an important fiduciary relationship.[284]

With respect to the Church hierarchy, the Commission concluded:

> The Commission has determined that between 1975 and 1989 the Archdiocesan administration had heard rumours, reports or formal accusations of sexual misconduct between priests and children on many occasions. Nevertheless, neither the current nor the previous Archdiocesan administration took decisive or effective steps to investigate further, to halt the abuse, or to inform parishioners of the risk to their children...
>
> While weak organizational structures and poor government within the Archdiocesan Church were not direct causes of the sexual abuse of children, they allowed the abuse to continue.[285]

The events examined by the Winter Commission more narrowly concern sexual abuse rather than the comprehensive ranges of abuses we have seen reported in residential schools. Nevertheless, at least with respect to sexual abuse, the parallels between the two situations are striking. The Commission's report explores quite thoroughly the immediate and long-term effects on the victims of such abuse, as well as the indirect effects on family, and the effect of the

---

282 Mandate of the Commission, reproduced at the outset of the Commission's report, *supra* note 271.
283 *Ibid*. at 1.
284 *Ibid*. at 137.
285 *Ibid*. at 138-139.

revelations on the Church community as a whole.[286] Correspondingly, it examines a range of remedial measures designed to deal with the harm caused at each of these levels.[287] In particular it urges the development of a range of psychological, social, and spiritual services designed to help both individuals and their families.[288] In addition, it recommends:

> that the Archdiocesan Church formally acknowledge its share of guilt and responsibility, and that the Archdiocesan administration apologize in such a way as to remove any suggestion that the victims were to blame.[289]

Finally, it recommends that the Archdiocese provide reasonable monetary compensation to victims to be determined on a case by case basis by a Victims Advocacy Board.[290] Although these recommendations would be inadequate to deal with all the harms inflicted by the residential schools, they may be a useful starting point.

v) Implications for Aboriginal Communities

Extrapolating from the experience of these other cases to what we know about the needs of the individuals and communities victimized by residential schooling, there seems to be three components to any adequate compensation package. First, there is the symbolic component. As with the Japanese-Canadian redress package, and as recommended by the Winter Commission, it is important that there be an acknowledgment by wrongdoers of their responsibility. After having their reality denied for so long, Aboriginal peoples have a right to expect this kind of vindication. Ralph Phillips of the Cariboo Tribal Council, testifying before the Royal Commission on Aboriginal Peoples, has identified the symbolic importance of the federal government taking responsibility for its role in the residential school system. In his

---

286 *Ibid*. at 117-127.
287 *Ibid*. at 127-132.
288 *Ibid*. at 143-145.
289 *Ibid*. at 141.

words, [w]e have to overcome the spiritual bankruptcy that is the legacy of residential schools. We have to recover our spirituality so that we, as individuals, can trust ourselves and then each other."[291] Charlene Belleau echoed the frustration experienced by many Aboriginal people in relation to the Churches: "we have approached different churches to do different things, but...their level of denial is so deep that it is hard to get through."[292]

Second, there is the dimension of compensation on an individual basis for those who were directly abused or mistreated in the schools. This should cover the physical and emotional harm, as well as the loss of dignity and reasonable compensation for economic loss attributable to the emotional aftermath of abuse and the loss of educational opportunities. Finally, the group dimension of the harm must be recognized through compensation. That compensation might take the form of funding and development assistance (personnel, expertise, materials, etc.) for counselling or treatment for victims and their families, and for adult education, social, or cultural programmes, activities, or agencies which strengthen Aboriginal communities and traditions.[293] Such initiatives must be designed and controlled by the communities they are meant to serve. Compensation might also involve the transfer of jurisdiction over schools to local communities. This would allow for communities to devise educational systems which encourage the retention or learning of Aboriginal languages and customs. It is necessary to repeat here, however, that any redress package must meet the needs of the community it serves, and those needs must be determined by the people themselves.

Precedents have been set for compensation. Given the current awareness of the nature

---

290 *Ibid*.
291 Royal Commission on Aboriginal Peoples, *Exploring the Options: Overview of the Third Round* (Ottawa: Minister of Supply and Services, 1993) at 21.
292 *Ibid.*
293 See, for example, the submission to the Royal Commission on Aboriginal Peoples by members of the Fort Alexander Indian Band Sagkeeng Education Authority, Nov. 2, 1992.

and scope of the problems of sexual and physical abuse and of the destruction of cultural communities, it may be that any lobbying for compensation for Aboriginal communities will not be as drawn out as that leading to the Japanese-Canadian redress package. In the St. Joseph's case, the publicity from the criminal trials and convictions, the number of victims who had come forward, widespread public sympathy, and the political will on the part of the Ontario Government and Roman Catholic dioceses of Ottawa and Ottawa facilitated the negotiations for compensation. Aboriginal communities can build upon the successes of these and other groups.

CONCLUSION: THE PATH TO HEALING

At a hearing of the Royal Commission on Aboriginal Peoples in Canim Lake, B.C., Wendy Grant, Vice-Chief of the Assembly of First Nations said,

> We must carefully assess the nature, scope and intent of Canada's residential school strategy. We must carefully assess the role of the church. We must listen carefully to the survivors. We must thoroughly review the options available to Aboriginal people for restitution and redress. We must carefully consider how it might be possible to achieve justice after all that has been wrought by residential schools.[294]

This study has striven to be a first step in all of these directions. Much more remains to be done. We have brought together information from a variety of sources about the policy objectives behind the residential schools and the personal experiences of the students in them. More historical research will further illuminate the former, and efforts to collect the stories of still living survivors will add to the latter. This factual record is important to bringing home to Canadians the magnitude of the injustice wrought under the guise of bringing `civilization' to Aboriginal peoples, and the scale of the devastation in the lives of individuals and their communities that is its legacy. The information presented here, however, already makes abundantly clear that the residential school policy and much of the behaviour of individual teachers and administrators displayed no respect for Aboriginal peoples and their cultures, and indeed was premised on racist attitudes of the worst sort.

Through the rubric of fiduciary obligation, we have explored one possible legal avenue for redress. A more comprehensive litigation strategy would also consider the many other possible causes of action available. Ultimately this requires exploration in the concrete context of particular individual or community claims to test the possibilities. Our analysis suggests that at least some claims could, at least in principle, be effectively addressed through legal action.

The notion of the violation of trust that is behind fiduciary law captures to a significant degree the nature of the wrong, looked at as a whole, experienced by Aboriginal people. Government and Churches took advantage of their positions of power to attempt systematically to destroy Aboriginal culture and create a population of second class (non)citizens instead of trying to design an educational system in accordance with the wishes and ambitions of, and in consultation with, Aboriginal peoples themselves. However, litigation is not a simple or quick avenue of redress, and exclusive reliance on it would undoubtedly leave the needs of many unattended.

Much of the work of uncovering additional information and exploring alternative paths to redress could be performed through a public inquiry into residential schooling. In addition, an inquiry could provoke research into and debate about the kinds of healing services different communities and individuals need. Its ultimate objective should be to help put Aboriginal communities on the path to healing. There is no doubt the task would be mammoth. We are still far from understanding the full effects of residential schooling. And it may indeed be doubtful whether full compensation will ever be truly possible.

However, the size and complexity of the task should not deter us. That this policy was wrong is clear, however much there may still be to learn about the precise details of the thinking that led to it or its everyday operation; the human suffering it has caused is palpable. However imperfect the solutions that are arrived at after thorough investigation, they are better than ignoring that suffering and refusing to accept responsibility for it. As Linda Bull has remarked,

> It somehow seems ironic and unfitting that the responsibility of "cleaning up this mess," which was not totally of their making, should fall completely into Indian hands; in the traditional belief system the responsibility of making amends and correcting injustices that begins a healing process falls to those who have inflicted the pain and suffering. According to that belief and practice, the hand that has created the hurt and the abuse is

---

294 Hearings, March 3, 1993.

> the same hand that can begin the healing process. Yet a great deal of work being done by Indians today in confronting past wrongs and injustices will actually begin the healing process and finally re-create a truly healthy, morally advanced, and rich educational setting for out children.[295]

Bull's challenge to Canadian society as a whole to join with Aboriginal peoples in this healing process is clear. This study suggests that our response is long overdue.

---

[295] Linda Bull, "Indian Residential Schooling: The Native Perspective" (1991) 18 Supplement Canadian Journal of Native Education 1 at 59.