Squaring the circle: how Canada is dealing with the legacy of its Indian residential schools experiment

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Canada, like Australia, is belatedly confronting a problem that has long been denied and ignored. Both countries are now reckoning the social costs of past policies which sought to achieve the forced assimilation of indigenous children. In Canada, this policy was mainly implemented through laws requiring the compulsory attendance of Indian children at school. Some 100,000 children were directed to church-operated residential schools where their cultural transformation could be effected in isolation from their families and the outside world.[1] That isolation left them highly vulnerable to abuse and neglect.

In Canada, it was recent revelations of sexual abuse of children and reports of the victims' testimony in criminal prosecutions of offenders that drew public attention to the sufferings endured by many of the children.[2] While the patterns of events emerging from these accounts were of concern, it was still possible for governments and churches to dismiss them as anecdotal and exceptional while maintaining that the removal policies were benevolent in intent. It would take a wide-ranging national public inquiry commissioned by the Federal Government to expose the systematic nature of the abuse, the discriminatory purpose of the child removal policies and the harmful consequences for the children. Indigenous communities in Australia and in Canada lobbied for such an inquiry in the 1980s and early 1990.

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1 The Canadian government estimates that approximately 100,000 children attended the residential schools over the years in which they were in operation: Department of Indian Affairs and Northern Development 'Backgrounder: The Residential Schools System' September 1998.

2 Milloy J 'A National Crime: The Canadian Government and the Residential Schools System 1879 to 1986' in *Manitoa Studies in Native History*, No 11 (University of Manitoba Press, 1999) p 296. Public discussion of sexual abuse in Indian residential schools commenced in 1990 when Manitoba First Nations Chief, Phil Fontaine, spoke of the abuse he suffered as a child in one of the schools: Miller J R *Shingwauk's Vision: A History of Native Residential Schools* (University of Toronto Press, 1996) p 328.

Government inquiries

In Australia, the Federal Government responded to calls for an inquiry in 1995. The Commonwealth Attorney-General asked the Human Rights and Equal Opportunity Commission (HREOC) to conduct a national inquiry into, *inter alia*, 'the past laws, policies and practices which resulted in the separation of indigenous children from their families by compulsion, duress or undue influence and the effects of those laws, practices and policies'.[3] HREOC conducted hearings around the country, taking evidence from 535 indigenous people concerning their experiences of the removal policies.[4] HREOC's report, delivered in April 1997, detailed gross violations of human rights both incidental to and inherent in the policy of assimilation by forcible removal of Aboriginal children.

In accordance with its third term of reference,[5] HREOC made a number of recommendations relating to the forms of reparation that should be delivered, including the delivery of apologies by all Australian parliaments, police forces, churches and other non-government agencies for their respective roles in the laws, policies and practices of forcible removal, and the provision of a government run cash compensation scheme.[6]

The Australian Government has steadfastly refused to acknowledge that the policy of forced removal of indigenous children was wrong or to pay compensation.[7] Its sole response to HREOC's recommendations has been to propose a $63 million healing package over the four years from 1997 for preservation of records, language and cultural maintenance programs, family link-up services, counselling and therapy for victims and vocational training.[8]

In Canada, the Royal Commission on Aboriginal Peoples was given the task in 1991 of examining the social, economic and cultural situation of aboriginal peoples of the

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3 Lavarch M 'Terms of reference' in Human Rights and Equal Opportunity Commission *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* (hereafter '*Bringing Them Home*') (1997).

4 Lavarch, above, note 3, pp 19, 21. The Inquiry also took oral and written evidence from indigenous organisations, representatives of governments, churches and other non-government agencies, former mission and government employees.

5 Lavarch, above, note 3, the third term of reference required an examination of 'the principles relevant to determining the justification for compensation for persons or communities affected by such separation'.

6 Lavarch, above, note 3, recommendations 5a, b, and 6 pp 15-20.

7 The motion of Reconciliation passed by the Commonwealth Parliament on 26 August 1999 is discussed below.

8 'Government unveils response to stolen children report' *AAP Newsfeed* 16 December 1997.

country. As part of an inquiry encompassing many aspects of indigenous affairs, the Royal Commission examined the history, impact and policy issues arising from Canada's residential schools experiment which had its roots in the pre-confederation period and continued into the postwar era. The Royal Commission conducted sittings around the country, heard testimonies from former inmates and employees of the residential schools, commissioned extensive research into governmental and church archives, and drew upon published historical accounts by academics and first person accounts of experiences in particular schools.

The Royal Commission's report, delivered in 1996, detailed widespread sexual, physical and emotional abuse suffered over many years by children in residential schools that were funded by the Canadian Government and operated by the Roman Catholic, Anglican, Presbyterian and United Churches.[9] The Royal Commission found that 'a reign of disciplinary terror, punctuated by incidents of stark abuse — continued to be the ordinary tenor of many schools throughout the system'.[10] Many of the children were undernourished, inadequately clothed, housed in substandard and unsanitary accommodation, denied proper medical care and overworked in institutions that blended the functions of school and workhouse.[11] The Royal Commission was at pains to demonstrate that these abuses were not isolated or sporadic but systemic and sustained, and that they were known to the responsible church and government officials of the day.[12]

A key finding of the Royal Commission was that the primary purpose of the residential schools program was to assimilate indigenous children.[13] In Australia the assimilative purpose of the child removal policies had long been a matter of public record,[14] but the Canadian Government had for many years maintained that the purpose of establishing residential schools was to educate Indian children, not to

9 The proportion of residential schools operated by each of the four churches remained constant throughout the period: 55 per cent were run by the Roman Catholic church, 26 per cent by the Anglican church, 16 per cent United Church and 3 percent by the Presbyterians: Milloy, above, note 2, Appendix.

10 Report of the Royal Commission on Aboriginal Peoples (hereafter RCAP Report), (1996) Vol 1, Ch 10, p 373.

11 RCAP Report, above, note 10, pp 353-65.

12 RCAP Report, above, note 10, pp 341,353-74.

13 RCAP Report, above, note 10, Ch 10 *passim*.

14 In 1937, a national conference attended by chief protectors of Aborigines from all the Australian States (except Tasmania) and the Northern Territory adopted resolutions that committed all governments to take measures, including education, to bring about the ultimate absorption of native people into the non-indigenous population: cited in *Bringing Them Home*, above, note 3, p 32.

assimilate them.[15] As part of the strategy to absorb them into Euro-Canadian society,[16] children were subjected to denigration of their culture, and were punished for speaking their own languages.[17]

It was not just the particular abuses and tyrannies meted out to children that condemned the residential schools system. The Royal Commission pointed out that the system's objective of annihilating aboriginal cultures had 'an inherent element of savagery',[18] which found contemporary expression in phrases such as 'to kill the Indian in the child'. In Australia, HREOC concluded that the policy of cultural annihilation by forcibly removing Aboriginal children and placing them in the care of non-Aboriginals was genocide within the meaning of the United Nations Genocide Convention.[19] While similar views have been expressed in Canada,[20] the Royal Commission refrained from endorsing them. Its criticisms of the residential schools program were more circumspect, suggesting that the government should consider whether the system itself constituted a 'crime'.[21]

The Royal Commission's report discusses the traumatic effects of the residential schools experience on the former inmates, their communities and on succeeding generations. The short and long term effects are strikingly similar to those identified among the Aboriginal 'stolen children' and their communities in the *Bringing Them Home* report. As former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, remarked on reading the Royal Commission report: 'If

15 In 1997, John Watson, the highest ranking federal Indian Affairs official in British Columbia, reportedly made a statement that he described as 'the first time that the Federal Government has acknowledged that the purpose of residential schools was one of assimilation': Bell S 'Ottawa Vows Action on Native School' *Vancouver Sun* 27 June 1997.

16 The Royal Commission noted that department and churches alike understood the central importance of language as the key to cultural assimilation. It cites a government directive of 1890 that 'the use of English in preference to the Indian dialect must be insisted upon': RCAP Report, above, note 10, p 341.

17 RCAP Report above, note 10, pp 340-2. The most frequent cause of punishments for children in residential schools was speaking their native languages: Grant A *No End of Grief: Indian Residential Schools in Canada* (Pemmican Pub, 1996) p 189.

18 RCAP Report, above, note 10, p 365.

19 RCAP Report, above, note 10, pp 270-5.

20 Chrisjohn R and Young S *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (1997) pp 41-48 and other works cited above, note 10, p 125. The authors report that the term 'genocide' came up briefly a number of times at the Royal Commission hearings but the Commissioners treated the remarks as a 'rhetorical flourish': above, note 10, p 125.

21 RCAP Report, above, note 10, p 381.

you forgot it was about Canada you'd swear it's talking about Australia'.[22]

The Royal Commission heard testimony from Indian people and professional consultants detailing social maladjustment, family breakdown, suicide, alcoholism, domestic violence and loss of parenting skills.[23] These social pathologies resonate throughout communities and across generations. One consultants' report explained how the destructive effects of the residential experience replicate themselves in succeeding generations:

> The residential school system led to a disruption in the transference of parenting skills from one generation to the next. Without these skills, many survivors had difficulty in raising their own children. In residential schools, they learned that adults often exert power and control through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential schools system often inflict abuse on their own children. These children in turn use the same tools on their children.[24]

The Royal Commission did not make recommendations for any particular form of reparation. Instead it recommended that Canada establish a special public inquiry to investigate and document the origins and effects of residential school policies and practices and to recommend remedial action including matters such as apologies, compensation programs and funding for treatment programs.[25] The Canadian Government has so far declined to set up a public inquiry, although it appears not to have ruled out the provision of some public forum for victims of abuse to tell their stories of suffering in order to promote their rehabilitation.[26]

The remainder of this paper is in three parts. The first part provides a brief historical overview of the nature and purpose of the residential schools and the legal provisions used to compel parents to surrender their children to the schools. The second part traces the changing responses of the churches and Federal

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22 'Fed: Canada listens; Australia deaf on Aborigines' *AAP Newsfeed* 8 January 1998. Mr Dodson was commenting on the apology by the Canadian government to the aboriginal peoples of Canada.

23 RCAP Report, above, note 10, pp 376-80.

24 RCAP Report, above, note 10, p 379. For further references dealing with the effects of the abuses see p 316. For similar observations regarding inter-generational effects in the Australian context, see *Bringing Them Home*, above, note 3, pp 222-8.

25 RCAP Report, above, note 10, Recommendation 1.10.1. It also recommended that Canada establish a national repository of records related to residential schools and provide funding for research and public education programs on the history and effects of residential schools: Recommendation 1.10.3.

26 'Natives to get forum: Stories of abuse to be told' *The Toronto Star* 8 October 1998.

Government to the revelations concerning the residential schools. In part three, I discuss some recent legal developments, both legislative and judicial, which have opened the floodgates to lawsuits against the churches and the government. I conclude by identifying some trends and likely future responses, and reflect on the lessons for Australia.

1. Origins and purposes of Indian residential schools

Upon the creation of the new Dominion of Canada in 1867, s 91(24) of the *Constitution Act 1867* assigned to the Parliament of Canada exclusive legislative power with respect to Indians and Indian reserve lands. In contrast to Australia, where Aboriginal affairs remained an area of State responsibility, Indian administration in Canada was organised on a national and essentially uniform basis under successive *Indian Acts*.[27] The *Indian Acts* established for Indians a distinct legal status and regulatory regime. The administration of the Acts was entrusted to a Federal Government agency which after 1886 was called the Department of Indian Affairs.

In the 19th century, a consensus emerged among non-Indians that assimilation of the natives was essential to the process of nation-building.[28] Indians had been trading partners and military allies of the British in the colonial period, but the fur trade was of declining importance and the pressing national priority was to open up Indian lands in the west to settlers and agriculture.[29] Treaties were made which required the Indians to surrender most of their territory and retreat to reserves, where many lived in resentful poverty. It was assumed that Indians must abandon their ancestral culture and way of life if they were to find a place in the new nation.

The motivating causes of the assimilation policy were partly economic. The disappearance of the Indians as distinct peoples would free their lands for settlement at no financial cost to the nation.[30] The proponents also claimed that assimilation would benefit the Indians by admitting them to a higher plane of civilisation. This belief was fuelled by a powerful blend of Christian evangelism, Social Darwinism,[31]

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27 The existing colonial legislation was confirmed by the new Dominion, and in 1876 a new *Indian Act* was enacted which consolidated the existing legislation: Titley E B *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (University of British Columbia Press, 1986) p 5.

28 This was true also of the US: Getches D, Wilkinson C and Williams R *Cases and Materials on Federal Indian Law* (3rd ed, West Publishing Co, 1993) p 208.

29 Armitage A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (UBC Press, 1995) p 187-8; RCAP Report, above, note 10, p 188-9.

30 Armitage, above, note 29.

Eurocentric intolerance for the Indian way of life, and a Victorian conviction that the Europeans had a civilising mission quaintly termed 'the White Man's Burden'. At a time when the US was engaged in warfare with Indian nations to the south, assimilation was seen to offer a humane solution to 'the Indian question'.

In the latter part of the 19th century, the government came to see the education of Indian children as an essential tool in the cause of assimilation. In 1879 the Canadian Government sent Nicholas Flood Davin to report on industrial schools for Indians that were operating in the US. Davin recommended the adoption of the model in Canada. He recommended that Indian children be removed from the 'influence of the wigwam'[32] to industrial schools far from their reserves where they would be 'kept constantly within the circle of civilised conditions'.[33] There they would be trained for useful occupations and taught the values and habits that would fit them for admission to Canadian citizenship.[34]

In the following decades, the department established a network of industrial and residential schools, funded by the department but operated and staffed by the churches. This partnership served the needs of both parties. The churches grasped the opportunity to extend their missionary program with the aid of government subsidies, and the department saved itself the cost of setting up and managing its own school network.[35]

By 1920, it was apparent that industrial schools were failing in their objective. The dismal record of their graduates in obtaining employment led to most returning to their reserves and resuming their Indian ways.[36] In 1922, industrial schools were

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31 The notion that human cultures could be classified along an evolutionary spectrum from lower to higher, and that the more 'primitive' cultures could not survive in competition with the more 'advanced'. Social Darwinism was based upon a misapplication of Darwin's theory of natural selection, using his idea of the evolutionary mechanism of 'survival of the fittest' to exonerate the colonial powers' destruction of indigenous cultures.

32 '[The] influence of the wigwam was stronger than the influence of the school': Sir John A Macdonald Papers *Report on Industrial Schools for Indians and Half-Breeds* (The Davin Report) Vol 91 14 March 1879, p 1 (quoted in Milloy, above, note 2, p 24).

33 The Davin Report, quoted in RCAP Report, above, note 10, p 339. Milloy points out that while Davin's report was the genesis of the industrial schools, residential schools were already operating in Canada and elsewhere in the British dominions: Milloy, above, note 10, pp 8-9.

34 RCAP Report, above, note 10, p 342.

35 Titley, above, note 27, p 76.

36 RCAP Report, above, note 10, pp 341-3.

abandoned in favour of a reformulated model of residential schooling.[37] Residential schools, starting from only two at the time of Confederation, increased by an average of two per year to 80 at their peak in 1931.[38] The network of residential schools extended to every province except Prince Edward Island, Newfoundland and New Brunswick.[39] With the post-war penetration of government into the Arctic North, residential schools were built specifically for Inuit children.[40]

Framework of coercion

Indian communities initially supported the provision of schools for the education of their children.[41] Their support turned to disillusionment and resistance, as the harsh conditions and assimilative purpose of the schools became apparent.[42] Various measures were employed to ensure a continuing supply of students for the schools. In 1894, an amendment to the *Indian Act* authorised the making of regulations requiring the attendance of Indian children at school.[43] The choice of school was to be determined by the Minister, with the proviso that Indian children of Protestant parents should attend a Protestant school and that Indian children of Roman Catholic parents should attend a Roman Catholic school unless the parents agreed otherwise.[44] Only a neglected child could be conveyed to school by force and the regulations gave the parents a right of appeal.[45]

The department judged these provisions insufficient to ensure attendance and sought further measures of compulsion. In 1920, the Act was amended to provide for a system of truant officers and penalties to compel school attendance by Indian children between the ages of seven and 15 years.[46] The *Indian Act 1951* made school attendance

37 RCAP Report, above, note 10, p 343.

38 RCAP Report, above, note 10, pp 353, 335, 186.

39 RCAP Report, above, note 10, p 335.

40 RCAP Report, above, note 10, p 351.

41 Some of the treaties made between Indians and the Canadian Government in the western interior in the 1870s included, at the insistence of the Indians, a promise that the government would provide schools, although it appears that day schools on reserves were what the Indians expected: Miller, above, note 2, pp 96-100.

42 Miller J R *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press, 1989) p 107.

43 Titley, above, note 27, p 15.

44 *B (W R) v Plint* (1998) 161 DLR 538 at 548, where Brenner J notes that the requirements of ss 115(1) and 117 of the *Indian Act* SC 1951 (ch 29) have been in the *Indian Act* since 1894.

45 Milloy, above, note 2, p 70, referring to *Regulations Relating to the Education of Indian Children*, 1894.

46 Titley, above, note 27, p 90: *Indian Act* ch 50, s 10 as amended, 1920.

mandatory between the ages of six and 16, made parents or guardians liable to prosecution for not ensuring the attendance of an Indian child at school, and empowered truant officers to take an Indian child into custody and to convey the child to school 'using as much force as the circumstances require'.[47] These coercive powers went far beyond those used to compel school attendance of non-aboriginal children.[48]

The provisions of the *Indian Act* were in many cases ineffective to ensure the attendance of Indian children and supplementary measures of coercion were sometimes applied. The Royal Commission reports that '[t]he department did attempt to force parents to send their children by threatening to cancel rations and other 'privileges' and ... by the suspension of family allowance payments'.[49] Despite these measures, some Indian parents continued to withhold their children from the schools or refused to return them when they ran away.[50] Orphans and children whose families were fractured or unable to protect them were most at risk of being selected for and detained in residential schools.[51]

To minimise the 'influence of the wigwam' parental visits were discouraged, and department and church officials were inclined to forbid or severely restrict home leave for the children during vacations.[52] The schools were 'total institutions' in which children were to be transformed by immersion in the dominant Euro-Canadian culture. As with other 'total institutions' such as prisons and army training camps, the process of re-socialisation required that the children's individuality be repressed, and that all aspects of their lives be controlled by those in charge of the schools.[53] The metaphor of 'the circle' was invoked to describe this all-encompassing control of the children's lives for purposes of bringing about their cultural transformation.[54]

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47 *Indian Act* S C 1951, ss 115, 116 and 118.

48 Titley, above, note 27, p 92.

49 RCAP report, above, note 10, p 397, note 157. The Family Allowance was introduced in 1945 by the Federal Government as a monthly income support payment to parents: Milloy, above, note 2, p 205.

50 Milloy, above, note 2, pp 154-5.

51 RCAP Report, above, note 10, pp 348-9. It appears that by the late 19th century, a large proportion of the students attending residential schools had lost one or both parents: Manore J L 79(1) *Canadian Historical Review* 131.

52 Milloy, above note 2, pp 30-1. For details of the methods used to discourage family visits, see Grant, above, note 17, pp 153-5.

53 Law Commission of Canada *Discussion Paper on Institutional Child Abuse* undated, accessed 2 August 1999, p 7.

54 See for example RCAP Report, above, note 10, p 183; see above, note 33 for reference to Davin's 'circle of civilized conditions'; cf indigenous and non-indigenous uses of 'circle' imagery discussed in Chrisjohn and Young, above, note 20, pp 115-6.

No-one knows how many Indian children passed through the schools,[55] or how many of the former inmates are still alive. At their peak in the 1930s one-third of all Indian children between the ages of six and 15 were in residential schools.[56] Armitage estimates that the schools' impact was felt by at least one in every two Indian children.[57] The Royal Commission points out that the parents and communities from whom the children were taken have also suffered harm and should be reckoned among the victims of the residential schools.[58]

Abandonment of the residential schools model

In 1948, a joint committee of the Canadian Parliament found that, like the industrial schools before them, the residential schools had failed to achieve their objective of preparing Indian children to take their place in the labouring classes of Canadian society. The committee recommended an end to the segregation of Indian children in residential schools, proposing that Indian children be educated alongside non-aboriginal children in provincial schools.[59] The policy of integration was still driven by assimilationist thinking, as it was hoped that educating Indian children alongside non-aboriginal children would promote their cultural absorption.[60]

From the 1950s the policy of residential schooling was gradually abandoned, the remaining schools increasingly serving as part of the child welfare system for 'orphans and children from disrupted homes'.[61] Dismantling the residential school system took decades, as the churches mounted a determined opposition to each school closure. In 1969, the Canadian Government ended its partnership with the churches and took over the running of the residential schools. Closures accelerated in the next decade, with only 12 remaining in 1979. From 1972, the

55 RCAP Report, above, note 10, p 388-9, note 15. See government estimate of 100,000 (above, note 1), but others put the figure higher; eg report that an estimated 105 000 former inmates of the schools are still alive: 'Native Claims Worth Millions' (1999) 18(38) *The Lawyers Weekly*.

56 Armitage above, note 29, p 108; Miller, above, note 42, p 424. The residential schools were distributed unevenly across the country, being concentrated in British Columbia, Alberta, Saskatchewan and Manitoba: Armitage p 108.

57 Above, note 56.

58 RCAP Report, above, note 10, p 389, note 157.

59 RCAP Report, above, note 10, p 346.

60 RCAP Report, above, note 10, p 347.

61 RCAP Report, above, note 10, pp 348-9.

Government commenced the process of handing control of the residential schools to Indian communities; a process which was completed in 1986.[62]

2. Responses of the Federal Government and the Churches

Responses to the disclosures

The Royal Commission report has now put beyond dispute the general historical facts of the residential schools experiment. What is now debated is how the events should be understood, who should accept responsibility for the adverse consequences, and what reparation should be made. Chrisjohn and Young have identified two narratives which offer opposing interpretations of the events.[63] The 'Standard Account' is summarised by them as follows:

> Residential schools were created out of the largess of the Federal Government and the missionary imperatives of the major churches as a means of bringing the advantages of Christian civilisation to Aboriginal populations. With the benefit of late 20th century hindsight, some of the means by which this task was undertaken may be seen to have been unfortunate, but it is important to understand that this work was undertaken with the best of humanitarian intentions. Now in any large organisation, isolated incidents of abuse may occur, and such abuses may have occurred in some Indian Residential Schools. In any event, individuals who attended Residential Schools now appear to be suffering low self-esteem, alcoholism, somatic disorders, violent tendencies and other symptoms of psychological distress (called 'Residential School Syndrome'). In order to ... heal those individuals ... it is necessary and appropriate to ... suggest appropriate individual and community interventions that will bring about psychological and social health.[64]

This account emphasises the benevolent intention of the system's founders and exonerates churches and government for the abuse that occurred. Absent from this interpretation is any recognition of the systemic and pervasive nature of the abuse, and the oppressive nature of the assimilation policy. Instead of proposing measures for compensation, justice and redress, those harmed by the system are to be assisted in their individual healing and recovery by the provision of therapeutic services.

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62 RCAP Report, above, note 10, p 350-1.

63 Chrisjohn and Young, above, note 20, pp 1-2.

64 Chrisjohn and Young, above, note 20.

The opposing narrative, which Chrisjohn and Young call the 'Irregular Account', depicts residential schools as tools of a malevolent policy for the obliteration of Indian nations whose land and resources were coveted by settlers. All claims by the churches and government to a 'christianising' or educative purpose are dismissed as mere rationalisations intended to conceal their genocidal intent. The abuse and neglect suffered by the children were well known to government and church officials at the time and were deliberately concealed:

> The psychosocial consequences these schools would have on Aboriginal Peoples were well understood at the time of their formation ... Although there is no doubt that individuals who attended Residential Schools suffered, and continue to suffer, from the effects of their experiences, the tactic of pathologizing these individuals, studying their condition, and offering 'therapy' to them and their communities must be seen as another rhetorical manoeuvre designed to obscure ... the moral and financial accountability of Euro-Canadian society ...[65]

Until very recently, Church and Government responses to disclosures relating to the schools echoed the Standard Account. Even before the Royal Commission delivered its report, there were a number of published accounts by former inmates or based on their recollections, detailing the abuses suffered by them in residential schools.[66] This had prompted a qualified apology from the Churches in the early 1990s, but the Churches remained unwilling to acknowledge that the abuse was widespread and systemic, nor were they ready to apologise for their role in a program that had as its objective the annihilation of aboriginal cultures. The Government for its part sought to exonerate itself from blame by pointing out that the churches had assumed responsibility for the day to day operation and staffing of the schools.[67]

What was known to the Government and the Churches?

The Royal Commission's report undermined the credibility of the Standard Account by refuting the factual basis of its claims. The Royal Commission unearthed new evidence that the Churches and Government had long known that the abuses

65 Chrisjohn and Young, above, note 20, pp 3-4.

66 A lengthy list of works was considered by the Royal Commission: RCAP Report, above, note 10, footnote 276.

67 For an example of the way that the Churches and Government each tried to shift responsibility to the other, see the arguments put by counsel for the United Church and the Canadian Government by way of defence to actions in tort brought against the Church by former students of the Port Alberni residential school in British Columbia. The Church joined the Federal Government as a third party: *B (WR) v Plint* (1998) 161 DLR 538.

revealed in the accounts of former inmates were not isolated cases.[68] It demanded access to some 6000 residential school files held by the department and succeeded 'only after protracted and difficult negotiations'.[69]

The Commission's report details much contemporary evidence of abuse throughout the period the schools were operating. 'Head office, regional, school and church files are replete, from early in the system's history, with incidents that violated the norms of the day'.[70] While schools were not inspected on a regular basis,[71] the department received many reports from school inspectors detailing incidents of abuse.[72] The department was unwilling to take action in the face of opposition and denials from the churches responsible for operating the schools in which the abuses occurred. One inspector whose reports of abuse had often met with departmental inaction wrote:

> Where the Churches are concerned there is no use sending an adverse report, as the department will listen to excuses from incompetent principals of the schools more readily than to a report from our Inspectors based on the facts as they find them.[73]

The Royal Commission found the department itself guilty of neglecting the children and breaching its duty of care. Under its partnership with the Churches the department was responsible for funding the construction and operation of the schools. Throughout the history of the schools, government funding was insufficient to ensure that the children received adequate accommodation, nutrition, clothing, education and medical care.[74] The way in which grants were administered also contributed to the deplorable living conditions for children. In 1892, the Government introduced a system of per capita grants, which continued until 1957.[75] This funding method encouraged the churches to take enrolments in excess of the optimal capacity of the schools. The resultant overcrowding was a major factor in the high rates of death and disease, especially tuberculosis.[76]

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68 RCAP Report, above, note 10, pp 373-4.

69 RCAP Report, above, note 10, footnote 1.

70 RCAP Report, above, note 10, p 367.

71 RCAP Report, above, note 10, p 364.

72 RCAP Report, above, note 10, pp 368-74.

73 Graham W, 1 September 1924, quoted in RCAP Report, above, note 10, p 370.

74 RCAP Report, above, note 10, pp 353-65; Milloy above note 2 pp 109-27.

75 RCAP Report, above, note 10, p 354.

76 RCAP Report, above, note 10, p 356.

Churches and Government have a change of heart

In the face of mounting evidence of their predecessors' complicity and concealment, the Churches and Government came under increasing pressure to acknowledge the facts, to apologise and to offer some form of reparation. The Federal Government and United Church said that they dared not offer an apology for fear of inviting lawsuits.[77] This unprincipled position was untenable. By January 1998, all four churches involved in operating the residential schools had offered apologies.[78] The United Church's apology of 27 October 1998 went beyond its 1993 apology by including an acknowledgement that the residential schools system amounted to a 'cruel and ill-conceived system of assimilation'.[79] In 1998, the Primate of the Anglican Church also reissued its 1993 apology adding an acknowledgment that the assimilation policy was wrong: 'I am sorry, more than I can say, that we tried to remake you in our own image, taking from you your language and the signs of your identity'.[80]

The Canadian Government's apology finally came in a speech delivered by the Honourable Jane Stewart, Minister for Indian Affairs and Northern Development, on 7 January 1998:

> One aspect of our relationship with aboriginal people over this period that requires particular attention is the Residential School system. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in aboriginal communities to this day. Tragically, some children were the victims of physical and sexual abuse.
>
> The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse and who have carried this burden believing that in some way they must be responsible, we wish to emphasise that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.[81]

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77 Gayette L 'Cowardice Keeps United Church from Apologising' *The Toronto Star* 24 August 1997; DePalma A 'Canada's Indigenous Tribes Receive Formal Apology' *The New York Times* 8 January 1998 .

78 Howard R 'Why It's Time for Ottawa to Apologise' *Commentary* 8 July 1997.

79 News Release by the United Church of Canada, 27 October 1998.

80 Carl J Natives Sue for $1.7B. Ottawa, Anglican Church Accused of Trying to Destroy Culture at Brantford School' *The London Free Press* 28 October 1998.

81 The Honourable Jane Stewart *Statement of Reconciliation* 7 January 1998, Ottawa, Ontario.

The Minister also announced a Federal Government commitment of $350 million for community based healing for those suffering the effects of physical and sexual abuse in the residential schools.[82] No monetary compensation was to be provided for individuals.

The Minister's apology was carefully worded to avoid making specific admissions that could be used against the Government in lawsuits. The Government acknowledged that it played a role in a system in which children were abused and deprived of their families, languages and culture, but stopped short of identifying its role and responsibilities in respect of the events.

3. Legal developments

In Australia the response of the Federal Government is still conditioned by the Standard Account. The Commonwealth Government has refused to join its Canadian counterpart in tendering an apology to those who suffered under its past policies of forced assimilation of indigenous children, accompanied by an acknowledgment of the wrongfulness of those policies.

A Motion of Reconciliation moved by the Australian Prime Minister and passed by the Commonwealth Parliament on 26 August 1999 included an acknowledgment 'that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our international history'.[83] The Parliament also expressed 'its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices'.[84]

While the motion was intended to satisfy demands for a Commonwealth Government apology to 'the stolen generation', it makes no specific reference to them, nor does it acknowledge the role of the Government in formulating and executing the laws and policies under which the indigenous children were removed. The word 'apology' was deliberately avoided as the Prime Minister felt that 'the present generations of Australians cannot be held accountable ... for the errors and misdeeds of earlier generations'.[85] The Prime Minister's position is defensible to the

82 Stewart above, note 81.

83 Press Release from Office of the Prime Minister, *Transcript of the Prime Minister the Hon John Howard MP Motion of Reconciliation*, 26 August 1999.

84 Above, note 83, para (f).

85 Above, note 83, p 3.

extent that he denies that the Australian people as a whole are accountable for actions of the Executive Government about which they were largely ignorant. It is a very different matter to say that the Crown should not apologise, since the Crown is perpetual and remains accountable for its wrongs (subject to the operation of the limitation statutes).

Several justifications have been offered by the Prime Minister and senior government ministers for the Government's refusal to apologise to the 'stolen children'. The Minister for Aboriginal Affairs, Senator Herron, has said that it is not possible to judge the actions of the past by today's standards, and stressed that the child removal policy had been effected in accordance with the laws of the day.[86] The Prime Minister, John Howard, has said that an apology is not appropriate as the current generation of Australians is not collectively responsible for the actions of past generations.[87] The fear of encouraging lawsuits has been mentioned as a subsidiary reason for the refusal to apologise.[88] The Prime Minister is reported to have said: 'I have no doubt that, as occurred in Canada, that [sic] a formal government apology would not be accepted as the end of the matter ... some people would then say well if it's good enough to make a formal apology then it's good enough to pay compensation'.[89] To the extent that the Australian Government's refusal to offer an apology is prompted by fear of unleashing a torrent of lawsuits, it may interpret recent developments in Canada as confirming its apprehensions.

On 10 June 1998, *The Toronto Star* reported that since the Government's apology in January, dozens of lawsuits had been filed. It quoted Shawn Tupper, a senior policy adviser with the Department of Indian Affairs, as saying that the number of claimants with whom the department was dealing had undergone a tenfold increase, from 100 to 1000, in the 18 months to June 1998.[90] *The Lawyers Weekly* estimated that by the end of 1999, 4000 to 5000 people will have launched suits against the Government and Churches.[91] In March 1999, the Canadian Government was reported to have spent

86 Brannelly L 'Government Unveils Response to Stolen Children Report' *AAP Newsfeed* 16 December 1997. In its *Bringing Them Home* report, HREOC agreed that the events should be judged in the light of the values and standards that applied at the time: above, note 3, p 249. HREOC devoted a chapter of its report to demonstrating that many aspects of the policies and practices breached the common law of the day as well as violating customary international law and conventions to which Australia was a party: Ch 13.

87 'Howard Says Common Sense Prevents Him Apologising' *AAP Newsfeed* 15 October 1998.

88 Above, note 87; 'Government to Respond to Stolen Children Report Today' *AAP Newsfeed* 16 December 1997.

89 'PM Defends Refusal to Apologise to Stolen Generation' *AAP Newsfeed* 27 January 1998.

90 Eggleston L 'Pressure Mounts Over Abuse Cases' 10 June 1998.

91 'Native Claims Worth Millions' (1999) 38(18) *The Lawyers Weekly*.

more than $20 million settling residential school claims over the preceding four years.[92]

It would be tempting to conclude from these figures that the apologies given by the Government and the Churches have served to open the litigation floodgates. The reality is more complex. It is likely that the apology and the acknowledgement of the wrongfulness of the Government's actions may encourage prospective plaintiffs to expect that they will not be met with a blanket denial of their allegations, and that the Government may be amenable to settling claims.[93] The apology may be a factor in the litigation phenomenon, but its causative effect cannot be assessed in isolation from other developments.

Sexual abuse

It is notable that the majority of lawsuits filed by former inmates of the residential schools include allegations of sexual abuse. By June 1998, the Canadian Government had settled some 200 of these cases out of court. All of the cases involved allegations of child sexual abuse where the offender had been convicted by a criminal court.[94] This suggests that the prosecution of offenders is a factor driving the filing of civil suits.

All the provinces are committed to the investigation and prosecution of those who sexually abused children in the schools. The prosecution of child abusers is one measure on which the proponents of the 'Standard Account' and the 'Irregular Account' agree. The former emphasises individual deviance and culpability rather than institutional responsibility, while the latter demands justice and public vindication of the truth of the victims' accounts. The successful prosecution of offenders greatly improves the prospect of an out of court settlement, even if the conviction was recorded in respect of abuse on persons other than the plaintiff.[95]

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92 Sun Media 'Native Lawyers File Suit Over Residential Schools' *The Edmonton Sun* 2 March 1999 .

93 Compare with the hardline response of the Commonwealth Government in the conduct of its defence to actions brought against it in the Darwin Registry of the Federal Court by Cubillo and Gunner and others: see Manne R 'The Sacrifice of Truth' *The Age* 22 March 1999. The Government has spent $3.5 million defending the case in preliminary hearings and the Minister estimates that final cost to the Government's defence at $6 million: Milburn C 'Story of the Stolen Generation Goes to America' *The Age* 7 August 1999. The plaintiffs are relying on the services of lawyers acting *pro bono publico*.

94 'Residential Schools Devastated Indian Society, Lawsuit Claims' *The Toronto Star* 23 June 1998.

95 See for example *B(WR) v Plint* (1998) 161 DLR 538 at 542-3. In respect of the plaintiffs for whom there was no criminal conviction against Plint, the church and Canada did not dispute their claims that they had been sexually assaulted by Plint.

Where hundreds of individuals across the nation rush to litigate sexual abuse claims arising from events that occurred decades earlier, some observers react with scepticism and conspiracy theories,[96] or blame the activities of entrepreneurial lawyers.[97] A better explanation lies in the well-documented reactions of victims of child sexual abuse. Victims commonly repress their recollection of the abuse, blame themselves rather than the adult offender, and fail to recognise the causative link between the abuse and the psychological problems that they suffer in later life.[98] It is not until they receive therapy that victims realise that they are not responsible for the abuse they suffered as children. In a 1992 incest case of *M (K) v M(H),*[99] the Supreme Court of Canada said that:

> The close connection between therapy and the shifting of responsibility is typical in incest cases and creates a presumption that incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy.[100]

If the entry of victims into psychotherapy is the event that typically prompts discovery that the patient has been the victim of a civil wrong, the provision by the Canadian Government of a $350 million healing fund may have played a greater role than the accompanying apology in evoking lawsuits.

Another factor in the sudden explosion of litigation is that it is only since about 1990 that sexual abuse of children has been recognised as a major issue of public concern. In Canada, it was revelations of sexual abuse of non-indigenous children by Christian Brothers at an orphanage in Newfoundland which broke the seal of silence and prompted indigenous Canadians to speak of their experiences in residential schools.[101] Public concern was heightened by mounting research that sexual abuse suffered by children often causes severe and long-term adverse psychological effects. This was not clearly established until the 1970s. Research findings from the 1950s and

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96 See for example, 'Residential Schools 'Worthwhile Institutions' When our Media Blindfold Themselves, We Get Travesties Like the Apology for Indian Schools' *Western Report* 2 February 1998. The author argues that the Royal Commission erred in taking at face value many claims of sexual abuse.

97 See for example, Anderson E 'Lawyers Swoop To Cash In On Native Claims' *The Globe and Mail* 10 July 1999.

98 Marfording A 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221 at 222-7; Oates R K 'The Effects of Child Sexual Abuse' (1992) 66 ALJ 186 and references therein.

99 (1992) 96 DLR (4th) 389 at 312 per La Forest J.

100 Above, note 99, per La Forest J at 314 (Gonthier, Cory and Iacobucci JJ concurring).

101 Miller, above, note 29, p 328.

1960s had been interpreted to indicate that sexual activity between children and adults was not harmful to the children, and could even assist their psychosexual development.[102]

Relaxation of limitation periods

In recognition of the injustice of requiring victims of child sexual abuse to commence legal proceedings promptly after attaining their majority, some Canadian provinces have legislated to relax the limitation provisions. In 1994, Nova Scotia amended its *Limitation of Actions Act* to provide that the limitation period for sexual abuse cases does not start to run until the victim is aware of the full extent of the abuse and the injury suffered.[103] In 1994, British Columbia amended its *Limitation Act* to eliminate all limitations for causes of action 'based on misconduct of a sexual nature' or 'based on sexual assault'.[104] Prior to the amendment, a plaintiff had to initiate proceedings within two years of achieving the age of majority.

The courts have given the amendment full effect. In *P (J) v Sinclair,*[105] the British Columbia Court of Appeal said that it has the effect of reviving causes of action that had been extinguished under the old provisions. The result is that in British Columbia there is no limitation period for actions based on sexual misconduct or sexual abuse, no matter how far back the wrongs occurred. The same applies whether the action is brought against the offender or his or her employer. The Court held that the terms of the amendment were wide enough to cover an action brought against the offender's employer alleging negligence or vicarious liability in connection with the sexual assaults.[106]

Even for plaintiffs in those provinces which have not legislated to relax the limitation period for sexual abuse victims, the 1992 decision of the Supreme Court of Canada in *M (K) v M (H)*[107] has removed a major barrier to lawsuits by ruling that provincial limitation periods do not begin to run until the plaintiff is reasonably capable of

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102 Oates, above, note 98, p 187. The suggestion of beneficial effects was made by Kinsey A et al *Sexual Behaviour in the Human Female*, (Saunders, 1953).

103 *Limitation of Actions Amendment Act* RS, c 258, s 2(5); as amended by 1993, c 27, s 1. The statute can be found at <http://www.gov.ns.ca/legi/legc/index.htm>.

104 *Limitations Act*, RSBC 1979, c 236, s 3(3)(k) and (l), as amended in 1994.

105 (1997) 148 DLR 472; see also *A (R v The Children's Foundation* (1997) 93 BCAC 171.

106 Above, note 105.

107 (1996) 96 DLR 289.

discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries. This does not happen until the plaintiff understands that the abuse was not his or her fault and that psychological and emotional injuries were caused by the abuse. Five of the seven judges said that there was a presumption that plaintiffs who suffer from the symptoms typical of 'post-incest syndrome' did not make that connection until they entered psychotherapy.[108]

While *M (K) v M (H)* was an incest case, the discoverability principle on which the court based its decision is capable of extension to child sexual abuse cases generally.[109] It is not clear whether Australian courts will follow the Canadian courts in applying the discoverability principle to determine when limitation periods commence to run for causes of action based on sexual assaults.[110] Governments in Australia continue to rely on State and Territory limitation provisions as a major line of defence against claims brought by members of the Stolen Generation.[111]

Vicarious liability of residential schools for the wrongs of their employees

In cases of sexual abuse, it can be difficult to enforce a judgment against the perpetrator who may be dead, in gaol or penniless. Where the sexual abuse occurred in an educational institution in which the offender was employed, suing the employer offers better prospects of recovery. An institutional defendant is more likely to be solvent and may even be insured.[112]

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108 Above, note 107, at 306 and 314 per La Forest J (Gonthier, Cory, Iacobucci and L'Heureux-Dube JJ concurring). McLachlin and Sopinka JJ disagreed that there should be a presumption as to when the discovery occurred

109 Marfording, above, note 98, p 236.

110 In *S v G* [1995] 3 NZLR 681 the New Zealand Court of Appeal unanimously followed the Canadian decision in *M (H) v M (K)* in applying the discoverability principle to a negligence suit arising out of sexual abuse. For a full discussion of the provisions of the State and Territory limitation provisions as they relate to child sexual assaults, see Marfording, above, note 98; Buti T 'Removal of Indigenous Children from their Families: The Litigation Path' (1998) 27 *Western Australian Law Review* 203.

111 In *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 the NSW Court of Appeal by a majority extended the limitation period for common law actions brought against the NSW Government by an Aboriginal woman who had been removed from her mother as a baby. An application for extension of the limitation period is yet to be ruled upon by the Federal Court in *Cubillo & Gunner* v *Commonwealth of Australia*.

112 Some homeowners' policies include general tort coverage for the homeowner which, while they exclude coverage for criminal charges, can cover the homeowner for negligence.

Actions against residential schools and other educational institutions can be brought alleging direct liability (the institution's own negligence towards the child, breach of fiduciary duty), or vicarious liability by the institution for sexual assaults committed by an employee. Vicarious liability is imposed in the absence of any fault on the part of the employer. In cases where an employee has been convicted of sexual assaults committed while in the employ of a school, it is common for plaintiffs to sue the school alleging that the school is vicariously liable for the perpetrator's actions.

Recent court decisions in Canada have clarified the circumstances in which an educational institution is vicariously liable for assaults committed by an employee upon a child in his or her care. In two decisions handed down on 17 June 1999, *Bazley v Curry*[113] (hereafter the *Children's Foundation*) and *Jacobi v Griffiths*[114] the Supreme Court of Canada established a new approach to vicarious liability for intentional torts.

In the *Children's Foundation* the plaintiff was sexually assaulted over a three year period by a male employee of the Children's Foundation, a charitable organisation which operated residential care facilities for disturbed children. The offender, Curry, was charged with the full care of the plaintiff who was living in a Foundation home. Curry committed the offences while putting the child to bed.

The Foundation argued that it should not be held liable for the sexual assaults. It had not known that Curry was a paedophile, and had made inquiries into his suitability as an employee before hiring him. In a judgment with which all seven judges concurred, McLachlin J applied the common law test of vicarious liability known as 'the Salmond test'. Under this test, employers are vicariously liable for acts of the employee authorised by the employer and 'unauthorised acts so connected with the authorised acts that they may be regarded as modes (albeit improper modes) of doing authorised acts'.[115]

In determining whether the employee's acts were 'an unauthorised mode of performing an authorised act', McLachlin J said that courts should first consider whether there are precedents which unambiguously indicate whether the employer should be held vicariously liable.[116] In the absence of clear precedents, courts should confront the policy issues for and against holding the employer liable.[117] The

113 Unreported, Supreme Court of Canada, 17 June 1999 (1999 Can Sup Ct LEXIS 35).

114 Unreported, Supreme Court of Canada, 17 June 1999 (1999 Can Sup Ct LEXIS 34).

115 Above, note 113, para 10.

116 Above, note 113, para 15.

117 Above, note 113, paras 15, 41.

question was whether the wrongful act is sufficiently related to conduct authorised by the employer to justify holding the employer vicariously liable.[118]

McLachlin J emphasised that a mere incidental connection between the employer's enterprise and the risk of abuse will not suffice to hold the employer vicariously liable.[119] In determining whether there is a sufficient connection the court should consider various factors including the opportunity that the assignment of duties gave the employee to abuse his or her power, the extent to which the wrongful act may have furthered the employer's aims, the extent to which the wrongful act was related to the working relationship between the employee and the victim, the power conferred on the employee in relation to the victim and the vulnerability of potential victims.[120]

The Court said that there were no helpful precedents that could be used to determine liability in this case.[121] Applying the above policy considerations to the facts, the Court found that the imposition of vicarious liability on the Foundation was justified. The Foundation had placed Curry in the role of a substitute parent, giving him full power over the child and creating a relationship of intimacy and influence. It was the employer's enterprise and conferral of power on Curry that materially increased the risk of the sexual assault.[122]

The application of the second limb of the Salmond test in accordance with the test set out in the *Children's Foundation* produced a different outcome in the case of *Jabobi v Griffiths*. In that case a brother and sister sued the Boys' and Girls' Club in British Columbia for sexual assaults committed by an employee of the Club. A majority of four judges held that there were unambiguous precedents which decided the issue without having to weigh up the policy considerations for and against the imposition of vicarious liability.[123]

The case differed from the *Children's Foundation* in that the employer's enterprise had not placed the employee in a position of power, control and intimacy in relation to the children. The Club's enterprise was to offer group recreational activities for children. The offender used his position to befriend the children and then lured them

118 Unreported, Supreme Court of Canada, 17 June 1999, para 41.

119 Above, note 118.

120 Above, note 118.

121 Above, note 118, paras 16-25.

122 Above, note 118, paras 57-8.

123 Unreported, Supreme Court of Canada, 17 June 1999 (1999 Can Sup Ct LEXIS 34) per Binnie J, paras 44-66.

to his home where the assaults took place. The majority found there was no sufficient connection between the risk created by the employer's enterprise and the sexual assaults that occurred.[124]

The three minority judges thought that the precedents did not conclusively determine the issues[125] and that the policy analysis indicated that application of the test in the *Children's Foundation* justified imposition of vicarious liability. The employee's duties required him to establish bonds of trust and intimacy with the children, and this afforded him a job-created opportunity to abuse the children.[126]

While the *Children's Foundation* case arose in a non-indigenous residential institution, the test for imposing vicarious liability identifies factors that were typically present in the residential schools context: the vulnerability of victims, the intimacy of contact between staff and children, the near total control that employees had over the children, the close relationship between the aims of the schools and the conferral of that power, and the opportunity that the enterprise afforded the employee to abuse his or her power. So high was the risk of sexual abuse created by these conditions that a sentencing judge in British Columbia described the residential school system as 'nothing but a form of institutionalised paedophilia'.[127]

The vagueness in the terms of the partnership between Canada and the Churches has been used by each party to avoid accepting liability for sexual assaults by employees in the schools. A recent decision of Brenner J in the British Columbia Supreme Court has held that the Canadian Government and a church that operated a residential school have joint vicarious liability for the sexual assaults committed by an employee. In *B (W R) v Plint*,[128] former inmates of the Alberni Indian Residential School in British Columbia sued the United Church of Canada for damages arising from sexual assaults committed by Plint, a dormitory supervisor employed at the school. Plint had been convicted of a large number of sexual assaults on children.

The Church joined the Canadian Government as a defendant, alleging that the principals and the employees were employed by Canada. Canada argued that under the terms of its 1911 agreement with the Church, the Church was responsible for the hiring and supervision of the staff.

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124 Above, note 123, paras 78-86.

125 Above, note 123, para 11 per McLachlin J.

126 Above, note 123, paras 12-22 per McLachlin J

127 'Seeking Redress' *Maclean's* 12 February 1996 p 35, cited in Grant, above, note 17, p 229.

128 (1998) 161 DLR 538.

Brenner J found that the Church and Canada jointly controlled Plint's activities through the office of the principal.[129] They were engaged in a joint venture and both were Plint's employers for the purpose of determining vicarious liability.[130] The significance of the decision is heightened by Brenner J's finding that the agreement under which the Church and Canada operated from 1911 was a standard form of agreement applicable to most Indian residential schools in Canada.[131]

In a recent decision the Supreme Court of British Columbia has applied the above decisions to find the Anglican Church and the Government of Canada jointly liable, both vicariously and directly, to a former inmate of an Indian residential schools who was sexually abused by an employee.[132] The plaintiff Floyd Mowatt entered the St George's Residential School in Lytton, British Columbia, in 1969, when he was aged eight years, and remained there until 1973. He was sexually assaulted over a period of two years by Clarke, a dormitory supervisor. All the assaults occurred in the dormitory or in Clarke's adjacent room. Clarke had been convicted of sexually assaulting Mowatt and other boys at the school.

Following a report by another teacher who suspected that boys were being sexually abused, the principal interviewed Mowatt and other boys who told him about the assaults on them by Clarke. The principal took no action against Clarke and failed to notify the department or the boys' parents. Clarke was allowed to resign for 'personal reasons', receiving a favorable reference from the school. The Court inferred that the principal concealed the affair because he was personally involved in sexual abuse of boys at the school, and did not want a departmental investigation at a time when the school was resisting the department's wish to close it down.[133]

Applying the test in the *Children's Foundation* and *Jacobi v Griffiths*, the Court found the employer vicariously liable for Clarke's assaults. Justice Dillon noted that the facts in this case were closely analogous to the facts in the *Children's Foundation*.[134] Her Honour remarked that:

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129 (1998) 161 DLR 538 para 114.

130 Above, note 129, para 151.

131 Above, note 129, para 42.

132 *Mowatt v Clarke et al* (unreported, Supreme Court of British Columbia Justice Dillon, 30 August 1999, Docket No 7838).

133 Above, note 132, para 182.

134 Above, note 132, para 126.

> [T]he employer could not possibly have given an employee a greater opportunity to abuse children ... Clarke's duties as dormitory supervisor created an obvious opportunity for abuse within a relationship of absolute dependency for child and uncurtailed power for Clarke.[135]

Applying the decision of the Supreme Court of British Columbia in *B (WR) v Plint* Dillon J held Canada and the Church jointly vicariously liable for the assaults committed upon the plaintiff.

Her Honour also made findings of direct liability in negligence against the Church and Canada. Canada had assumed the guardianship of Mowatt when it exercised its statutory power to remove him from his home, and owed him a duty of care to ensure that he was in a safe and healthy environment.[136] The Anglican Church also owed him a duty of care because it had assumed a duty to provide for his care, protection and education while he was at the school.[137] Canada and the Church breached their respective duties of care in failing to ensure that the parental power given to their joint employee was exercised properly.[138] Justice Dillon apportioned fault in negligence as to 60 per cent to the Church and 40 per cent to Canada. The Church bore the greater fault because of its failure to disclose the abuse to the department.

The combined effect of the above decisions has been to clarify the vicarious liability of the Government and the Churches for the sexual assaults by employees upon children in residential schools. The Churches and Government now have a strong incentive to settle these cases out of court.

Conclusion

In his comparative study of assimilation policies in Australia, Canada and New Zealand, Armitage remarked that native policy in Australia and Canada has passed through similar phases at almost identical periods.[139] Protection of aboriginal peoples, who were assumed to be dying out, was the major policy objective from 1860 to the 1930s. Once it became apparent in the 1920s that the decline in the native population had been arrested, the assimilation of indigenous peoples became the dominant objective. The inter-generational transmission of indigenous culture was to

135 Above, note 132, para 140.

136 Above, note 132, paras 163 and 169.

137 Above, note 132, paras 171-173.

138 Above, note 132, para 174.

139 Armitage, above, note 29, pp 185-90.

be halted by the strategy of removing children from their communities and immersing them in European culture. In both countries, discriminatory laws were enacted giving government agents the authority to remove indigenous children from their parents and place them in institutions.[140]

From the 1950s, segregation gave way to integration as the preferred means of assimilating indigenous children. The 1970s saw a change of policy in the direction of self-determination. The 1990s have brought demands for acknowledgment of past wrongs and reparation for the victims as a prerequisite for reconciliation of indigenous and non-indigenous people.

Given the similarity of the two countries' policies and the effects upon native peoples, each has something to learn from the other's experiences and responses. It is therefore surprising how little Australians have heeded Canada's responses to the legacy of its residential schools program. The Canadian Government's apology of January 1998 attracted some comment here,[141] but the events which prompted the apology were not familiar to Australians, and the similarity to our own experience was not well understood.

There were differences in the way the assimilation policy was executed in the two countries, which tend to obscure the essential similarities. The Australian experience was distinguished by the forcible seizure of children, often in traumatic circumstances. There are accounts of children being rounded up in groups during raids on Aboriginal camps, and infants taken from the arms of their mothers.[142] In other cases Aboriginal parents who had trustingly brought children to hospital for medical care or placed them in the 'temporary' care of foster parents or institutions were unable to get them back.[143]

Another difference is that for many Aboriginal children, the separation from parents and family was permanent. Of the Aboriginal witnesses who gave evidence to the Human Rights and Equal Opportunity Commission Inquiry, 30 per cent had been removed from their families before the age of two, some shortly after birth, and 26

140 Armitage, above, note 29, p 205.

141 See for example, Peters D 'Canada Listens: Australia Deaf on Aborigines' *AAP Newsfeed* 8 January 1998; 'PM Defends Refusal to Apologise to Stolen Generation' *AAP Newsfeed* 27 January 1998.

142 *Bringing Them Home*, above, note 3, pp 6, 48, 108, 129; See evidence of Lorna Cubillo in the trial of her lawsuit against the Commonwealth: 'White Men on Horses Seized Me: Woman' *The Age* 12 August 1999.

143 *Bringing Them Home*, above, note 3, pp 10, 63-4, 66, 68-70.

per cent had been taken between the ages of two and five years.[144] HREOC found that 'many children were either told that their families had rejected them or that they were dead. Most often family members were unable to keep in touch with the child.' [145] Armitage compares this with the events in Canada:

> The Australian experience was particularly harsh and arbitrary, and it disrupted the families and lives of most Aboriginal adults living today. The Canadian residential schools were also harsh, but the children who attended them retained memories of the families and of the communities from which they came, and most returned to those communities when they were able to do so.[146]

While the permanence of the separation distinguishes the Australian experience from that of Canada, the culturally destructive effects of residential schools have also left many First Nations people rootless. The children found on returning to their communities that they had lost their native language and culture, and had been taught to despise their traditional beliefs and practices. They found themselves stranded between two cultures.[147] The Canadian and Australian experiences are more similar in their effects than may at first appear.

The general governmental response in both Canada and Australia, is to implement 'therapeutic' measures to promote healing and reconciliation and to interrupt the iterative cycle of abuse, suicide and family breakdown affecting former inmates and their families.

Australia's response lags behind Canada's in one respect: the Federal Government refuses to apologise and to acknowledge, on behalf of the Crown and the people of Australia, that a grievous wrong was done to Aboriginal people. That deficiency will inevitably be remedied, upon a change of government if not sooner.[148] The withholding of an apology will be ineffective to stem the bringing of lawsuits by members of the 'Stolen Generation'.[149]

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144 *Bringing Them Home*, above, note 3, p 182.

145 *Bringing Them Home*, above, note 3, p 177.

146 *Bringing Them Home*, above, note 3, p 215.

147 RCAP Report, above, note 10, pp 374-5.

148 The Australian Labor Party has said it will apologise to the Stolen Generation if it wins government: 'Beazley Blames Government for Stolen Generations Suits' *AAP Newsfeed* 13 May 1999.

149 There are some 750 pending claims lodged in the Northern Territory alone: Howell W 'NT: Stolen Generation Policy 'Unsurpassed Cruelty': Court' *AAP Newsfeed* 1 March 1999.

Neither government is willing to offer compensation out of court until its legal liability has been established in test cases before the courts. Canada's indigenous people have made more progress in obtaining settlement of their claims because the legal challenge to the residential schools has been spearheaded by sexual assault claims. Establishing liability in these cases has been aided by the prosecution of offenders, the relaxation of limitation periods and the willingness of courts to impose direct and vicarious liability on the Government and Churches for sexual assaults committed by employees in the residential schools context.

It remains to be seen whether the First Nations people will be as successful in their pursuit of compensation for other categories of damage. Grant has observed that not every child suffered sexual abuse, but no child could escape the psychological and spiritual abuse that was institutionalised in the residential schools.[150] The next wave of litigation will seek to widen the categories of damage to include assaults on the children's culture. One example is a class-action lodged by 900 former students of the Shubenacadie Indian Residential School in Nova Scotia seeking damages for cultural abuse and denial of the basic necessities of life.[151] These claims more directly challenge the very purpose of the residential schools, which was the destruction of Indian culture and the absorption of indigenous peoples into Euro-Canadian society. ●

150 Grant, above, note 17, p 223.

151 Eggleston L 'Pressure Mounts Over Abuse Claims' *The Toronto Star* 10 June 1998.