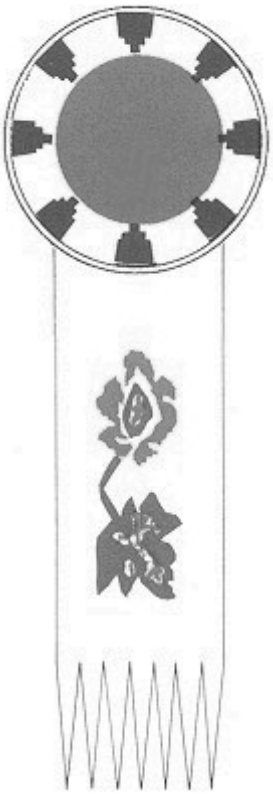
Native Women's Association of Canada



THE CLASS ACTION AS A REMEDY

FOR

ABUSE EXPERIENCED IN RESIDENTIAL SCHOOLS

~ August 1992 ~

Institutional Abuse and Public Response

A NWAC Discussion Paper

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1. Introduction

A class action is defined as a civil action brought by one or more persons on behalf of others having similar complaints. Actions may also be brought in most jurisdictions against one or more persons defending on behalf of a group of similarly situated persons.[1] Anyone who is being represented in an action is a member of the "class".

Many people believe that a class action is an action brought by a large group of individuals getting together to share the cost of a lawsuit. While that may sometimes be true, most cases involve only a handful of the identified members of a class. The rest remain unidentified or even unknown until damages are awarded for the benefit of the class. Most members of a class may even be unaware of the action because in most provinces representative plaintiffs are not required to let the other members of the class know the action is being taken.[2] In some cases, all the members of a class may never be known.

To bring a class action as a remedy for abuses experienced in residential schools provokes many complex questions. How should such an action be framed? Is a class action the best method of obtaining a remedy? If so, how should the class be structured? What damages should be argued? Who should be the representative plaintiff? Should there be more than one? Who or what would be the appropriate defendants? Which court can hear the action? Can a civil action succeed where the abuse experienced may have occurred 15, 25 or 50 years ago?

At this stage it is not possible to answer all of these questions. This paper does, however attempt to provide some clarification of the Canadian law of class actions and provides some guidance for anyone considering a class action suit. Before any form of legal action is chose further research is required, particularly to determine the factual circumstance surrounding the residential school experience. This is necessary as, to date, so little has been written or researched in this area. Historical discussions of the residential school experience focus largely on the missionary involvement in the pre-confederation period, or in the 50 years following Confederation.[3] It is, however, known that the federal government allowed church missions I continue the task of "educating" First Nations children; that the government provided funds allow its continuation; and that the federal government finally included provisions about I education of "Indian" children in the *Indian Act* in 1906.[4] It is also known that before the 1920's, day schools or industrial schools were far more common than boarding or residential schools, and that most residential schools were closed by the early 1970's. However, very little has been written which directly discusses the federal or provincial governments' involvement or direction of

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1 *Ontario Law Reform Commission, Report on Class Actions, vol 1 (Toronto: Ministry of Attorney-General, 1982) at 2.*

2 *This is not the case in Quebec, and will not be the case in Ontario once the new class action rules come into force.*

3 *J .W. Grant, Moons of Wintertime: Missionaries and the Indians of Canada in Encounter Since 1534 (Toronto: University of Toronto Press, 1984); E. B. Titley. "Indian Industrial Schools in Western Canada" in N.M. Sheehan, et al., eds. Schools in the West: Essays in Canadian Educational History (Calgary: Detselig Enterprises, 1986) at 133-154; J. Gresko. "White 'Rites' and Indian 'Rites': Indian Education and Native Responses in the West, 1870-1910" in West n Canada: Past and Present (Calgary: McClelland & Steward West, 1975) at 163-182. See also J. Barman et al., eds. Indian Education in Canada: The Legacy (Vancouver: University of British Columbia Press, 1986) particularly chapters 3-6.*

4 *These sections art now contained in R.S.C. 1985, c. 1-5, as am, ss. 114 to 122.*

residential schools within Canada. It is not clear how many children were enrolled in these schools, or whether the abuses suffered were continued within integrated provincial schools. We also do not know how many of these past students are still alive or what particular forms of abuse each suffered.

As will be discussed, although class actions are available within Canada, they are not often allowed to continue to trial. This is due to the strict interpretation of class action rules by Canadian judges. Ontario and Quebec are the only provinces which have amended their rules to make it easier to bring a class action. However, it is still uncertain whether a class action would succeed where the aim was to claim damages for the abuse experienced by past students of residential schools. This uncertainty exists not only due to the rules themselves, but because of several other factors which will also be discussed within this paper.

In summary, a class action in Canada is the most likely to succeed where the court is convinced that the relationship between each member of the class and the defendant is identical, and when the relief requested can be granted without considering each class member's claims or damages.

In the present situation, one similar feature between all the potential plaintiffs is that they attended residential schools within Canada. Beyond this fact, the individuals claims or damages vary in many ways. While most residential school students were subject to varying forms of emotional abuse (i.e. by suffering the constant devaluation of First Nations' ways of life), others suffered more particular forms of abuse. Some lost contact with their families, their communities and their traditional ways of life, including the loss of their language. These people have lost their home, their culture, and in many cases, their identity. Many others were never taught parenting skills and they have become members of dysfunctional families. As a result, it is not only the past students, but also their children, who have suffered from what the residential schools have done. Others could argue that they did not receive an adequate education. Those who are beneficiaries of Treaties may also be able to argue that their rights under the Treaties were violated. Many students were victims of physical or sexual abuse. Those who were not direct victims of this abuse, may have suffered from the fear that this could happen to them, or felt anger that this was happening to their friends or family members.[5]

This paper will attempt to answer many of the questions raised above. Particular attention will be given to:

1. the rules for bringing class actions within Canada;
2. who are potential defendants;
3. which court has the jurisdiction to hear a class action; and
4. whether there are any limitations which may make bringing an action difficult or questionable.

Examples of other actions already taken will also be considered.

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[5] *For discussion of the many forms of abuse suffered in the Kamloops Industrial Residential School. see C. Haig-Brown, Resistance and Renewal: Surviving the Indian Residential School (Vancouver: Tillacum Library, 1988).*

2. Class Actions in Canada

Class actions are allowed in Canada by virtue of the Rules of Court for each province, and within the Rules of the Federal Court of Canada. Most of these rules are based on the British rules which first authorized class actions in England. This first rule provides:

> *Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action on behalf of or for the benefit of all parties so interested.*
>
> *(emphasis added)*[6]

All the provinces, except Quebec and shortly Ontario,[7] have a class action rule that is similar to this British rule.[8] The Rules of the Federal Court of Canada are also similar. This rule reads as follows:

> *1711.(1) Where numerous persons have the same interest in any proceeding, the proceeding may be begun, and, unless the Court otherwise orders, continued, by or against anyone or more of them as representing all or as representing all except one of more of them.*

For a class action to be appropriate under these rules and those of provincial courts, there must be numerous persons with the "same interest", or a "common interest", in a matter. The first element of the rules is that numerous persons must bring the action. Courts have generally had no difficulty with this element so long as more than one person is in the class. The second, and more controversial element of these rules is the requirement that parties have the “same interest" in the action. Great uncertainty remains over what will be considered the “same interest". Courts have usually interpreted these words very narrowly.

The most widely accepted definition of what is considered the “same interest" was given in the early English case of Duke of Bedford v. Ellis. Within this case, Lord McNaughten said:

> *Given a common interest and a common grievance a representative; suit [class action] '"as in order if the relief sought was in its nature; beneficial to all whom the plaintiff proposed to represent.*[9]

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[6] *Rule 10 of the Rules of Procedure in the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (U.K.) as cited in Andrew Roman and Miller Thomson) “Background to the Ontario Legislation", in New Class Proceedings Legislation: New Horizons of Civil Liability and Litigation) (Toronto: Insight Press, 1991) at 4.*

[7] *Quebec enacted new legislation in 1978 which altered the long standing class action rules. These rules were amended again in 1982. Ontario has drafted now legislation which dramatically changes the class action rules. The Ontario amendments are currently awaiting Royal Assent. It is not known when they will be; in force. Both of these provincial rules will be discussed more fully in later sections of this paper.*

[8] *While the wording of the various rules may be slightly different, for example requiring a "common interest" rather than the "same interest", courts across Canada have generally recognized that there is no difference in substance between the case law in other jurisdictions. Report on Class Actions, supra, note 1, at 45.*

Although most courts refer to this statement, it is in many ways as vague as the test it attempts to define. Courts certainly have not uniformly determined when the "same interest" requirement is satisfied. Some courts have decided that a “common purpose" or a "common origin" must be established.[10] Some Ontario courts have determined that the "same interest" does not refer to the relationship among the members of the class, but to their "interest in the result of the action".[11] Some have also suggested that a "common success" test is sufficient to establish a common interest. This test was expressed in the following passage:

> *It appears to me that the many passages uttered by Judge's of high authority over the years really boil down to a simple proposition that a class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that Success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participation.*[12]

The "same interest" criteria has also been considered where damages are the requested remedy. Where this is the case, class actions have generally been allowed to proceed to trial only where the full liability of the defendant to the class can be determined without resort to individual proceedings. In these cases, individual damages must be established based on reliable, common proof. As a result, where lump sum damages owing to the class can be established by common evidence, the action will be allowed to continue in class form.[13] A damage class action will also be allowed where the amount claimed for each member of the class is easily determined, for example, by mathematical calculation.[14] Despite these exceptions, courts have refused to give approval to class actions where subsequent individual proceedings would be necessary to determine the amount to which each member of the class is entitled.[15] (This may prove to be a difficult barrier to overcome when suing on behalf of the students of residential schools if an action is brought outside Ontario or Quebec.)

Some courts have also determined that a class action could proceed where the remedy sought benefits all class members. Courts again do not agree on what this means, except that each member must benefit in some way from the successful prosecution of the class action, but all members need not benefit in the same way.[16]

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9 *[1901] A.C. 1 (H.L.) at 8.*

10 *For example, Markt & Co., Ltd., v. Knight Steamship Co., Ltd., [1910] 2 K.B. 1021 at 1027 and 1029.*

11 *For example, see May v. Wheaton (1917), 41 O.L.R. 369 (H.C. Div) at 371; Drohan v. Sangamo Co. Ltd., [1972] 3 O.R. 399 (H.C.J.) at 402; and Shack v. Matthews Construction Co. Ltd., [1962] O.R. 556 at 559.*

12 *Shaw v. Real Estate Board of Greater Vancouver (1973), 36 D.L,R. (3d) 250 at 253-254. See also Cobbold v. Time Canada Ltd. (1976), 13 O.R. (3d) 567 at 569,*

13 *Farnham v. Fingold [1973], 2 O.R. 132.*

14 *Cobbold, supra, note 10.*

15 *Report on Class actions, supra, note 1 at 30. See also, Naken v. General Motors of Canada, Ltd. (1983), 144 D.L.R. (3d) 385.*

16 *For example, Corbiere v. Canada (Minister of Indian and Northern Affairs) (1991), 44 F.T.R. 235; Drohan v. Sangamo Co. Ltd., supra. note 9, at 401-402, and A.E. Osler & Co. v. Solman (1926), 59 O.L.R. 368 at 372.*

The only Supreme Court of Canada decision regarding class actions was decided in 1983 in Naken v. General Motors Inc.[17] In that case, four owners of Firenza cars brought an action against GM on their own behalf and on behalf of all Ontario purchasers of 1971 and 1972 Firenzas. It was estimated that $1,000 was the loss suffered by each owner as a result of alleged breach of warranty and breach of representation. It was to be argued that the cars were not "durable, tough and reliable". This was alleged to have been warranted in partly oral and partly written warranties placed in newspaper advertisements. The plaintiffs claimed a total of $5 million in damages to be distributed so each of the roughly 4,600 owners would receive $1,000.

This action began in 1973, and was first considered by a court on a motion brought by the defendant prior to trial. The sole question for consideration was whether it was appropriate for that action to proceed under the Ontario Rules as a class action. After almost 10 years of litigation on this point alone, and after considerable expense, the Supreme Court ruled that a class action was not appropriate. The two principal reasons given for dismissing the claim were that the members of the class had varying contractual arrangements which gave rise to "different but similar claims",[18] and because Ontario's class action rule was "totally inadequate... to launch an action of the complexity and uncertainty of this one."[19]

The decision in *Naken* has meant that class actions are rarely brought in Canada, and will remain rare unless the laws governing their use are changed. The high degree of uncertainty in determining the requirements for successful class actions, and the refusal of judges to interpret these requirements broadly has lead to demands for reform in the system. To date, only Quebec and Ontario have undertaken this reform. Until all provinces and the Federal Court amend their rules, a class action will most likely be appropriate only where a representative plaintiff represents a group in which the damages requested, and the defences available against them, are the same for each member of the class.

a) Quebec's Class Action Rules

In 1978, Quebec introduced amended class action legislation to allow a person to bring an action on behalf of all individuals faced with a similar problem, with or without their consent.[20] Within this legislation, class actions are defined as a "procedure which enables one member to sue without a mandate on behalf of all the; members".[21] Class actions, then, are only available to plaintiffs. A member plaintiff must be a "natural person"; a corporation cannot be within the class.

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17 *Supra, note 15.*

18 *Ibid., at 409.*

19 *Ibid., at 410.*

20 *An Act respecting the Class Action, R.S.Q., ch. R-2.1. The following information has been taken from Simon v. Potter and J.C. René, "Class Actions - Quebec's Experience" in New Class Proceedings Legislation: New Horizons of Civil Liability and Litigation, (Toronto: Insight Press, 1991).*

21 *Art. 999, Code of Civil Procedure, as cited in "The Quebec Experience", at 3.*

Under these new rules, a court must give authorization to the representative plaintiff before a class action can be begun. To obtain this, the prospective representative plaintiff must bring a motion stating the facts of the action, and the nature of the recourse requested. There must also be a description of the group on whose behalf the representative plaintiff intends to act. The court will authorize the class action to proceed if it is satisfied that "identical, similar or related issues" apply to all members; the facts alleged appear to justify the conclusions sought; and it would be difficult or impractical to bring the action in another way. The court must also determine if the person seeking to act as the representative plaintiff can represent the other members adequately.[22]

Unlike other jurisdictions, the Quebec rules require that the members of the group being represented in the action must be notified of the action. If a member does not wish to be represented in this action, they may "opt-out" of the class according to guidelines established within the order authorizing the class action.

Quebec has also created a public fund to allow the financing of class actions in Quebec. It is currently the only fund of this kind in Canada. This funding can be obtained either before or after beginning the class action. To do so, the representative must file a written request providing certain details about the action so the Fund knows the purposes to which this money would be used.[23] The plaintiff may, however, have to reimburse the fund if it is successful at trial. It may even be necessary to provide part of any damage award to the Fund even when the Fund did not provide any assistance to the Plaintiff.

b) The New Ontario Class Action Rules

The Ontario government introduced amended class action legislation in December, 1990.[24] This new legislation, although not yet in force, dramatically changes the rules and procedures of class actions in Ontario. It is uncertain when they will replace the old regime which now requires parties have the "same interest" in a matter before a class action can proceed.

Under this new system both plaintiffs and defendants can be members of a class. To begin a class action (referred to in the Acts as a "class proceeding"), a person must obtain a court order. This order would certify the action as a class proceeding, and appoint a representative plaintiff.[25] The court will certify a class proceeding if there is a cause of action, an identifiable class, and "common issues" among the class. There must also be a finding that no better way of resolving the issues exists and the representative plaintiff (or defendant) will, among other things, fairly and adequately represent the interests of the class.[26]

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[22] *"The Quebec Experience", supra, note 20, at 4-5.*

[23] *Ibid., at 11.*

[24] *An Act respecting Class Proceedings, S.O. 1992. c. 6 (previously Bill 28); and An Act to amend the Law Society Act to provide for Funding to Parties to Class Proceedings, S.O. 1992, c. 7 (previously Bill 29). These Bills received Royal Assent June 25, 1992 and will come into force on a date yet to be established.*

[25] *S.O. 1992, c. 6, s. 2(2).*

[26] *Ibid., s. 5.*

This new rule changes the test from one requiring the "same interest" in a matter to requiring that the claims of the class members raise "common issues". "Common issues are defined in the Act as:

> *(a) common but not necessarily identical issues of fact, or*
>
> *(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts* [27]

It is presumed that by defining common issues to include issues that are "not necessarily identical", this new regime will overcome many of the problems created by previous courts' inconsistent interpretations of the “same interest” requirement. It is hoped that by clarifying the necessary interest that binds the members of a class, more class proceedings will be successful.

To make certification of actions easier for the court, the Bill bas provided that a court cannot refuse to certify a proceeding solely where it finds that damages are claimed that would require individual assessment; separate contracts are at issue; different remedies are sought for different class members; the number or identity of class members is not known; or there are sub-classes whose members have claims (or defences) that raise common issues not shared by all class members.[28] These elements had, in the past, been common reasons for dismissing a class action before trial.

The new Ontario rules will also require that the representative party must notify the class members of the proceeding. The court can, however, order that notice is not required if it is considered appropriate.[29] Any member who does not wish to be involved in the class action may opt-out under the certification order's requirements.[30]

These new rules also provide that any member, other than the named representative party can be ordered to provide evidence to the opposing party after the representative party has done so. This would only occur where a court order has been obtained to this effect.[31] Under the current Ontario rules, and those of other jurisdictions, this has never been allowed.

The new rules will also allow a lawyer to act for a representative party on a contingency basis. To be effective, a written agreement must be entered by the lawyer and the representative party providing for the payment of the lawyer’s fees and disbursements only if the action is successful.[32]

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[27] *Ibid., s. 1.*
[28] *Ibid., s, 6.*
[29] *Ibid., s. 17.*
[30] *Ibid., s. 17.*
[31] *Ibid., s. 17.*
[32] *Ibid., s. 33.*

Bill 29 (now S.O. 1992, c. 7) provides for the creation of a Class Proceedings Fund to which representative parties can apply for financial assistance to pay for their disbursements and other costs. This does not, however, include assistance for their lawyer's fees. The Fund will also make any payments to defendants regarding awards made against the representative plaintiff, if the plaintiff has already received financial support from the Fund.[33]

Once these Acts come into force in Ontario, they will likely encourage more class actions, and allow more successful actions. It will remain to be seen how lawyers use these new rules and how judges interpret them.

c) Advantages and Disadvantages of Class Actions

There arc many advantages to bringing a class action. It allows for consistency in court decisions in similar situations. Without class actions, several individual suits against the same defendant could result in different decisions. It allows action against a wrongdoer where the individual damages claimed are not large enough to warrant an individual action. Where the individual damage requests may justify bringing separate actions, class actions provide a mechanism to decrease the total amount of litigation, and therefore, the total cost.

There are also several disadvantages of class actions. All persons said to be members of a class are bound by the final decision of the court. If a person does not wish to be included in the class of plaintiffs, they must expressly withdraw themselves. This is not always possible as some provinces don't require that all class members be notified of the action. It is, therefore, possible for people to be members of a class without their knowledge. Should these people later wish to sue the same defendant(s), they would be unable to do so according to the rules of *res judicata*. The doctrine of *res judicata* has been described as follows:

> *a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies.*[34]

d) Alternatives to a Class Action

There are several ways that individual claims can be brought in combination with others. A class action is one, but “joinder” and “consolidation” are more commonly used. In Ontario, the Rules of Civil Procedure [Rules of Court] outline both alternatives. Joinder of parties allows several people who are represented by the same lawyer to join as plaintiffs or applicants in the same proceeding where:

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[33] *S.O. 1992, c. 7, s. 3.*

[34] *Spencer Bower and Turner, The Doctrine of Res Judicata, (2ed., 1969), at 1 as quoted in Report on Class Action, supra, note 1, at 81.*

5.02(1)(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

Consolidation involves the joining of separate actions that have already been started in the courts which have common issues. It also allows actions to be consolidated where the relief claimed in the actions arises from the same transaction or occurrence, or series of transactions or occurrences. The parties may not be entirely the same, and one action may be more comprehensive than another. This type or action is only possible upon receiving a court order stating that different actions will be tried together.[35]

Although consolidation may not always be available in cases of mass wrongs,[36] there are a number of decisions in Ontario which have allowed the joinder of over 100 plaintiffs.[37] In Agnew v. Sault Ste. Marie Board of Education[38] the court allowed the joinder of 365 plaintiffs. In upholding this action, the judge said:

In appropriate actions such as the one before me now the Court and the litigants are under a duty to avoid a multiplicity of proceedings with a view to one judicial investigation and one judicial determination arising out of one set of circumstances that are applicable to all claims, particularly in those cases where, as here, they are all represented by the same counsel.

There is the additional duty, both on the Court and the litigants, to expedite the determination of all the issues between them and to minimize the costs of the litigation in which they are involved.[39]

The main advantage of these options is that the requirements for bringing these types of actions arc less stringent. They do not require a "common interest" or a resulting benefit to all plaintiffs. There are, however, problems with these options. If the victims of a mass wrong are not a cohesive group, they are unlikely to be joined in one action.[40] It is also possible that victims who are not made parties to the action could later bring their own actions against the same defendant(s). This would result in a multiplicity of proceedings with the risk of inconsistent verdicts, and additional expense.

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35 *Ontario Rules of Civil Procedure [Rules of Court], Rule 6.*
36 *Report on Class Actions, supra, note 1, at 84.*
37 *Bath v. Birnstihl (1975), 11 O.R. (2d) 770 (H.C.J.).*
38 *(1976), 2 C.P.C. 273 (Ont. H.C.J.).*
39 *Ibid., at 280-81.*
40 *Report on Class Action, supra note, 1 at 85.*

Test cases are another procedural alternative to the class action. Test cases arise after many actions, based on similar facts, have been started against the same defendant. One of these actions is chosen as a test action. A test case will not be ordered unless all the plaintiffs wishing to participate agree to treat it as determining their rights against the defendant. Once this is decided, orders are made that the proceedings in all actions be stayed until after the trial of the "test" action. This will be done regardless of whether or not there might be differences of proof in each action. It docs not appear that this option has been used often as there are few reported cases using this procedure.[41]

Having considered the rules regarding class actions, the next step is to consider who or what are the potential defendants to an action.

3. Potential Defendants

Who is made a defendant will depend on who can be held responsible for the "'wrongful acts alleged within an action. To determine this, information must be collected which outlines the extent that each party was involved in the management or operation of the residential schools. What were the duties or responsibilities of the parties? Did they have knowledge of the wrongdoing? If so, what action, if any, did they take? That being the case, it is recommended that all parties who could be responsible in any way should be included as defendants in an action. It is particularly important to ensure that the defendants can afford to pay for or provide whatever remedy is sought.

In the present case, it may be advisable to bring an action against the Government of Canada, the relevant church authorities (Anglican, Roman Catholic, Methodist, United, etc.), the relevant provincial bodies (if provincial standards, inspectors, school boards or their staff were involved in the matter) and any person still living who inflicted any of the injuries.

The Government of Canada may be made a defendant in an action pursuant to the Crown Liability and Proceedings Act. This act provides that the Crown is liable in tort for the damages that it would be liable for, if it were a competent adult person:

> *(a) in respect of a tort committed by a servant of the Crown; or*
>
> *(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.*[42]

Section 2 of this Act defines "servant" as including an agent, but excludes anyone appointed or employed by an ordinance of the Yukon Territory or the Northwest Territories. Regarding residential schools, it could be argued that the Crown is responsible under the first paragraph for the acts of its servants where it is found that a Minister or a supervisor or other employee of the Crown was found negligent or abusive. Depending on the extent of the definition of "servant", this may then also include the religious organizations who undertook to fulfil the government's obligations to provide education under the Indian Act, or pursuant to Treaties.

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[41] *Report on Class Actions, supra, note 1 at 86.*

[42] *R.S.C. 1985, c. C-50, s. 3.*

It may be that the Crown can also be sued under the second paragraph regarding the ownership, occupation, possession or control of property considering that many, if not most, residential schools run by religious organizations built institutions on Crown land. Section 13(b) of the Crown Liability and Proceedings Act, however, provides that in the case of real property, no action can be brought unless the Crown or a person acting on behalf of the Crown has entered into the occupation of that property. If it can be established that religious organizations were acting on behalf of the Crown, an action under s. 3(b) could prevail.

Actions under s. 3(b) of the Crown Liability and Proceedings Act are, however, hampered by s. 12 of this Act which provides that an action cannot proceed against the Crown unless a "responsible official of the department or agency administering the property or the employee of the department or agency who is in control or charge of the property" receives written notice seven days after the claim arose. Some relief to this limitation is given in ss. 12(2). This section states that the failure to provide notice, or the insufficiency of the notice, will not stop a proceeding where a court believes that the Crown was not prejudiced and "that to bar the proceedings would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established."

Despite outstanding questions about the possible interpretation of these sections, there is no barrier to including the federal government in a class action.[43]

There is also no barrier to including a church as a defendant in a class action. Although the case did not involve a class proceeding, the Ontario Court of Appeal in Re Church of Scientology and the Queen (no. 6) has held that churches may be parties to an action by stating:

> *…the mere fact that an organization claims to be a religion does not bar the Crown or any other litigant from seeking the assistance of the court in the determination of either criminal or civil wrong."*[44]

It may be established that a provincial body or agency, such as a school board, or provincial school inspectors, or their employees were in some way responsible for the operation of the residential schools, or the abuse itself. If so, these bodies or individuals should be added as defendants. The *Proceedings Against the Crown Act*[45] provides for the liability of the provincial government for the wrongful acts committed by any of its servants or agents. Under this Act, notice of the claim must be served on the Crown at least sixty days before the action is begun.[46]

Having determined what the rules for bringing class actions are and who potential defendants might be, it is necessary to consider which court has the jurisdiction to hear a class action.

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[43] *This is said without reference to a consideration of limitation periods which may very well stop an action, but never preclude a class action brought within the relevant time periods.*

[44] *(1987) 31 C.C.C. (3d) 449 (Ont. C.A.) at 469.*

[45] *R.S.O. 1990, c. P.27, s. 5.*

[46] *Ibid., s. 7.*

4. Jurisdiction

It is often believed that where a party wishes to sue the federal government, an action must be brought in the Federal Court of Canada. This was due largely to section 17 (recently amended) of the *Federal Court Act* which had given the Trial Division exclusive jurisdiction over cases involving the Government of Canada. The extent of the Federal Court's jurisdiction under this provision has been frequently considered by courts. As a result, the Supreme Court of Canada had the opportunity to develop a three pan test of essential elements which must be met before the Federal Court has jurisdiction to hear a matter. These three elements are:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.[47]

Where there is more than one claim against a single defendant, or a single claim against many defendants, the jurisdiction of the court must be considered for each.

It is not sufficient for the Federal Court to be the most convenient court to bring an action against many defendants, even though one of the defendants (i.e. the Federal Government) is an acceptable party. Under the old provisions of the Federal Court Act, if a person wanted to sue the Federal Government and non-government parties, the person was forced to bring one action in the Federal Court against the Crown, or its agent if the above test was met, and another action in a provincial court for those parties who did not meet this test. This clearly made litigation awkward, confusing and expensive.

In February 1992, amendments to the *Federal Court Act* and the *Crown Liability Act* were brought into force.[48] One amendment has altered the Federal Court Trial Division's jurisdiction so that it is now shared with provincial courts. As a result, if a person wishes to sue parties which meet the three part test (sometimes the Government of Canada), and those that don't, that person may now bring one action in a provincial court.

According to the above three part test, it may be difficult to meet each requirement in the present situation. Jurisdiction may be within the Federal Court as against the Federal Government by virtue of the *Indian Act* as an existing federal law which places particular responsibilities on the Federal Government. Jurisdiction may also exist if there is a finding that the government owes a fiduciary duty to First Nations people by virtue of the historic relationship between the Crown and Aboriginal persons. It is necessary

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[47] *ITO-Int. Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752 at 766.*

[48] *Federal Court Act, R.S.C. 1985, c. F-7 and The Crown Liability Act (now the Crown Liability and Proceedings Act) R.S.C. 1985, c. C-50 both as am. S.C. 1990, c. 8, brought into force February 1, 1992 by SI/92-6 Canada Gazette, Part II, January 1, 1992.*

that this fiduciary duty be found to rest on an existing federal law, which can be common law.[49] Relying upon the Supreme Court of Canada decisions in *Guerin*[50] and *Sparrow*[51] may provide the required foundation.

It is, however, unlikely that a federal law exists which would extend the Federal Court's jurisdiction to include a provincial agency, church or other non-governmental body as a defendant. As a result, it is not likely that a class action against the Federal Government and others could be successfully launched within the Federal Court of Canada. Instead, an action must be begun in a provincial court.

This introduces limitations on any action brought on behalf of past residential school students. Past students suffered injury within different provinces at the hands of parties within those provinces, as well as at the hands of national bodies. To determine where such an action can be heard, it is necessary to consider when it is possible for a person to use the court in a province where that person is in another province, and where the potential defendant is also outside the borders of that province.

Under Canada's Constitutional structure, each province's laws are considered foreign to those of another province. It is implicit in the rules of court that either the party bringing, or the one defending the action, must have some connection to the jurisdiction in which an action is begun. In general, the plaintiff must either live within that jurisdiction, or have suffered damages there or the defendant must be located within that jurisdiction. This is reflected in the provincial rules regarding the service of documents issued in a court action. Each provincial court operates on the basis of different, but similar, rules of service.[52] In Ontario, if a party brings an action against someone located outside the province, they must meet the requirements under the rules for the service of documents outside Ontario. Rule 17 of the *Rules of Civil Procedure* [Rules of Court] provides that:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> …
>
> (g) in respect of a tort committed in Ontario; [or]
>
> (h) in respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed;

According to this rule, a class action begun in Ontario on behalf of all persons in Canada who attended residential schools could not meet these conditions because both the tort (or wrongful act), and the damages sustained did not occur only within Ontario.

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[49] *See D. Sgayias, et al. Federal Court Practice, 1990 (Toronto: Carswell, 1990) at 7-9.*

[50] *(1984) 13 D.L.R. (4th) 321.*

[51] *(1990) 70 D.L.R. (4th) 385.*

[52] *Garry D. Watson, et al. Canadian Civil Procedure: Cases and Materials, 3d ed. (Toronto: Emond Montgomery, 1988) at 777.*

For some, the wrongful action was committed, and the resulting damages were sustained in British Columbia, or Saskatchewan, (etc.) not in Ontario.[53]

In the current situation, those persons who were forced to attend residential schools usually did so only in one province. It is also likely that the abuse was allowed to continue largely on the basis of the negligence of provincial government bodies or their agents, or by religious organizations that operated within that province. As a result, it would be necessary to bring a class action within each province or territory on behalf of the prior students of that province's residential schools.

5. Limitations

Statutes within Canada have established various limits on how long a person has to bring an action to court, which is referred to as a limitation period. All provinces have separate statutes outlining the various limitations and there is considerable differences between the statutes.

The *Crown Liability* and *Proceedings Act*[54] provides that unless any federal statute states otherwise, the limitation of actions in force in a province will apply to any proceeding by or against the Crown where a cause of action arose in that province. In Ontario, actions in negligence must be begun within six years after the cause of action arose. Actions in assault, battery, wounding, or imprisonment must be begun within four years after the cause of action arose.[55] Generally, the cause of action arises when the means of acquiring knowledge of the cause are available.[56] Often this means that a cause of action arises when a person knows, or should have known, that there are grounds for an action. Where a person entitled to bring an action is a minor, the limitation period does not begin to run until the person becomes an adult.[57]

Other provincial limitation periods may be different. In British Columbia, the Limitation Act provides that an action for damages for personal injury must be started either within two years from the date on which the right to do so arose,[58] or two years after the person turns 19. In Manitoba, actions for assault, battery, wounding or other injuries to

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[53] *This position has been modified somewhat to accommodate for interprovincial product liability litigation. For example, in the Supreme Court of Canada decision in Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393 at 409 the court broadened the scope of the rule "where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise jurisdiction over that foreign defendant." In this case, the "foreign defendant" was a manufacturing and assembling company operating in Ontario or the United States, not in Saskatchewan where the action was brought.*

[54] *R.S.C. 1985, c. C-50, as am. S.C. 1990, C. 8, S. 31.*

[55] *Limitation Act, R.S.O. 1990, c. L15, s. 45.*

[56] *Central Trust Co. v. Rafuse (1987), 31 D.L.R. (4th) 481 (S.C.C.).*

[57] *Limitation Act, R.S.O. 1990, c. L15, s. 47. For example, in Ontario, every person attains the age of majority on turning 18 years of age: Age of Majority and Accountability Act, R.S.O. 1990, c. A.7, s.1.*

[58] *R.S.B.C. 1979, c. 236, s.3 as cited in Gray v. Reeves (1992) 89 D.L.R. (4th) 315 at 329.*

the person must also be brought either within two years after the cause of action arose,[59] or after the person becomes an adult.

Both the Manitoba and B.C. statutes provide for the postponement of a limitation period in certain cases. For example, in Manitoba, a court may grant leave to an applicant to begin or continue an action if it is satisfied that no more than 12 months has passed between the date that the application was made and the date that the applicant first knew or ought to have known all the material facts of a "decisive character" which form the basis of an action.[60] The Manitoba law also provides for an "ultimate limitation" in that a court will not grant leave to begin or continue an action if the action is begun more than 30 years after the occurrence of the actions or omissions that give rise to the cause of action.[61]

Ontario does not have any postponement clause beyond that extended to minors. Instead, reference must be made to case law to determine the flexibility of these rules. Currently, the Supreme Court of Canada is deliberating over this very question in Marciano v. Metzger. In that action, the plaintiff sued her father for sexual assaults she suffered between the ages of eight and sixteen. The last assault occurred in 1973 and the plaintiff turned 18 in 1975. Under the Ontario Act, she was required to bring her action for assault within four years of the time she turned 18 (being 1979), or within six years for any alleged negligence (being 1981). The plaintiff did not bring her action until 1985, after the limitation had expired. At trial and on appeal, the court dismissed the action finding that she was barred by statute from bringing the action. Arguments before the Supreme Court of Canada were heard in November, 1991 and the court has not yet presented its ruling. Once this decision is released, it should provide greater certainty about extending the limitation period in Ontario.

A recent decision rendered in the British Columbia Supreme Court is of interest, and at the least may be of assistance if an action is considered within British Columbia, or in other jurisdictions with postponement provisions in their Acts. In Gray v. Reeves,[62] the plaintiff sued her uncle for damages arising from his sexual assaults against her when she was between four and thirteen years of age. The last assault occurred in 1973 and the plaintiff turned 19 in 1980. According to the Manitoba limitation periods, the action should have been started by 1982, but it was not begun until 1990. Under the Manitoba Act, the plaintiff had to justify this delay. The central issue of the case was whether or not the action was commenced within the time permitted under the Manitoba Limitations Act.

After a review of cases interpreting the Manitoba provisions and similar provisions of other jurisdictions. Judge Hall states:

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[59] *The Limitation of Action Act, Continuing Consolidation of the Statutes of Manitoba, c. L150, s. 2(e). This statute was provided merely for comparative purpose. No other provincial limitation statutes have been canvassed to note differences.*

[60] *s. 14(1).*

[61] *s. 14(4).*

[62] *Supra, note 58.*

> *In the traditional type of personal injury case, if someone receives a vigorous punch to the nose or is struck by a motor vehicle, they cannot fail to appreciate forthwith that they have suffered a harmful effect from the conduct of a potential defendant. There is usually a quite dramatic cause and effect. Cases of sexual assault such as the instant cast are often quite a different matter. Here, the injuries suffered by the plaintiff (as in a great many of these cases), were not recognized and could perhaps not be recognized until long after the actual assaults had occurred. ...the simple fact is that limitation statutes were not drawn with the childhood sexual assault victim in mind and as a result they are not in all respects satisfactory. This class of cast presents the courts with new factual patterns that must, however, be addressed in the context of the existing legislative regime.*[63]

After lengthy reference to a recent English decision, particular note was made of the following passage as Judge Hall felt it “neatly crystallize[d]” the "key issue" before the court:

> *...the critical question is whether ...the plaintiff either became aware or reasonably should have become aware that she had suffered significant injury which was attributle [sic] to the sexual abuse by the defendants of which she complains.*[64]

Judge Hall then found that the plaintiff knew that the assaults were wrong from the time she was a teenager. However, he found that she did not know, and had no reason to believe, that she had suffered any material harm, mental or physical, from the assaults until after she began therapy in 1988. It was only at this time that she saw any link between the earlier sexual assaults and her depression and inability to establish satisfactory relationships with men.[65] He found that she was within the Manitoba statute and awarded her $85,000 in damages.

In this case, Judge Hall suggests that the extension of time to cases of childhood sexual assault is not guaranteed in all cases:

> *It may well be the situation under our statute, that if the facts of a case disclose serious assaultive behaviour against a plaintiff and obvious evidence of physical or mental harm that manifests itself clearly, such circumstances will militate against a court finding that a plaintiff is entitled to any postponement of the limitation period, but such is not the case here.*[66]

At this point, time limitations are the biggest barrier to bringing a successful action on the abuses suffered in residential schools. Initial problems arise due to the passing of between 15 and 50 or more years from the time the incidents of abuse occurred. The case of *Gray v. Reeves* and the expected decision in *Marciano* may help to overcome this, but any action brought to a court will likely be forced to argue this point.

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[63] *Ibid. at 347.*

[64] *Emphasis within the text. Stubbings v. Webb, [1991] 3 W.L.R. 383 (C.A.) at 393-4 as cited in Gray v. Reeves, Iibid., at 346.*

[65] *Gray v. Reeves, supra, note 58 at 346-347.*

[66] *Ibid. at 354. In this action, the sexual assaults against the plaintiff were described as being in "the minor category", as there was no sexual intercourse and no overt violence, at 355,357.*

6. Other Actions involving Abuse in Residential Schools

Only two cases were located in which any action was taken in connection with abuse suffered while the complainants or plaintiffs were within residential schools. The first case, *R. v. Frappier*[67] involved the criminal prosecution of Claude Frappier. Frappier had been a child care worker at a residence of native children from outlying communities attending school in Whitehorse in 1970 and 1971. He was fired when authorities learned of the indecent assaults he carried out against the young boys living in the residence. As an aside, the judge states "The Department of Indian and Northern Affairs conducted an internal investigation, but did not advise the police or the parents of the boys. Neither were any efforts made to support or counsel the victims." The boys involved were between the ages of eight and eleven. The accused was charged in 1990 with 13 counts of indecent assault. He entered guilty pleas in all counts and he was sentenced to five years for each count to be served concurrently.

In the second case, seven past students of the St. George's Residential School in Lytton, B.C. brought an action against the man who sexually assaulted them, as well as against the Government of Canada, the Anglican Church, the Board of School Trustees, the former principal of the school and Anthony William Harding, an employee of DIAND.[68] Seven insurance companies were listed as third parties to the action. The defendant, Derek Clark had been a former dormitory supervisor at St. Georges. In 1974, several boys complained to the principal of the school of being assaulted by Clarke. Clarke was fired, but the police were not notified.

These matters again came to light in early 1987. An R.C.M.P. investigation was completed by December 1987, and Clarke was charged with nineteen sexual offences. In early 1988, Clarke pleaded guilty to eleven counts of buggery and six counts of indecent assault. These charges involved seventeen boys, most of whom were students at St. George's School. At his criminal trial, it was held that between 140 and 700 sexual incidents had occurred between Clarke and the former students over approximately eleven years.[69] Clarke was sentenced to twelve years in prison.

The judicial decision available in this case involved a motion by two of the defendants to have the Statement of Claim struck against four of the seven plaintiffs for disclosing no cause of action. This decision does not reveal the full details of the case, or the particulars of the claims against all of the defendants. However, it appears that the School Board and the past principle of the school are being sued for their failure to take action after the initial disclosure of the assaults. It is argued that they should have determined how many boys were assaulted, and they should have provided counselling or guidance to the boys. It is not know if the action is, or will be challenged on the basis of the expiry of the limitation periods, or on what grounds the Federal Government or the Anglican Church are being sued.

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[67] *67 August 18, 1990, Yukon Registry No. 89-10001, (Terr. Ct.) Faulkner, Terr. Ct. J.*

[68] *Aleck v. Canada, June 3, 1991, B.C.S.C., Thackray, J. (judgement on an interim motion).*

[69] *As stated in the sentencing decision of Judge William Blair, cited in Geoffrey York, The Dispossessed: Life and Death in Native Canada (London: Vintage, 1989) at 28-29.*

Another case of interest was brought in 1914 by George Miller against the principal of the Mohawk Institute on the Six Nations Reserve. Miller sued for damages as a result of severe physical punishment suffered by his two daughters after they ran away from the school. Apparently the Department of Indian Affairs was asked to investigate these allegations. The Deputy Superintendent General, Duncan C, Scott, felt this was unnecessary and advised the Minister:

> *I am entirely adverse to having a formal investigation made into these charges. It is not a new things to receive complaints from Indians making various charges against the management of our schools and necessary investigations are always made by our Inspectors.*[70]

On March 31, 1914, the civil action was heard, four claims were laid against the principal, Major Ashton. The first claim requesting damages for cropping the girls' hair, was dismissed. The second involved the three-day imprisonment of the girls in a cell at the Institute. The room was without light, and they were given only water. On this claim, an award of $100 was ordered. The third claim involved the whipping of the older daughter on her bare back with a rawhide strap. This claim was awarded $300. In the last claim regarding the suffering of the girls' health due to poor food, the claim was dismissed.

In his defence, Major Ashton said that he did not make the rules, but merely carried them out. He said "It was an unwritten custom of the school for forty-three years to cut the girls' hair if they absconded."[71] He also slated that he had ordered the school's Matron to whip the girls, but had not said how this should be done. In summing up his decision, the Judge stated:

> *A School Principal has the power to punish the children in a reasonable way, but the Institute was not a penal institution.*[72]

7. Other issues

Bringing a class action on behalf of past students of residential schools will involve complex issues. This is inevitable due to the sheer number of potential plaintiffs and the range of experiences unique to each. Many will have been subjected to the same types of abuse, while many will have had different experiences. The effect of the abuse upon each of them will also likely be different. Given this, it may be of help to determine who the potential plaintiffs are and how their experiences are similar or different. One way this could be accomplished is through the creation and circulation of a questionnaire to all reserves and other First Nations communities, Friendship Centres, etc. This questionnaire could be designed to determine who was a student at a residential school, which school they attended, who ran that school, and what types of abuse or

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[70] *Public Archives of Canada, Records Group 10 (red), Vol 2771, File 154845, as cited in E.R. Daniels, The Legal Context of Indian Education in Canada, Thesis submitted to the Faculty of Graduate Studies and Research in Partial fulfilment of the Requirements for the Degree of Doctor of Philosophy in the Department of Educational Administration, Edmonton, 1973 (on file with the Assembly of First Nations) at 260.*

[71] *The Brantford Expositor, April 1, 1914, as cited in Daniels, ibid. , at 262.*

[72] *Ibid.*

damage they experienced. It may also be helpful to try to determine what their lives are like now to try to determine any long-term effects of the residential school.

Another matter which affects the complexity of the case, is the likely requirement that a body of psychological evidence would have to be obtained to prove the type and extent of damage that has been suffered by past students of residential schools. It may be possible to limit this type of evidence to that regarding the representative plaintiff(s). However, it may be necessary to provide evidence to establish the injury to all plaintiffs. One recent development may be of assistance, as psychologists have recently recognized a "residential-school syndrome".[73] Information on this syndrome should be collected and evaluated to determine its assistance in any action.

8. Negotiation as an option

It is important to note that political avenues can also be pursued to obtain a remedy for the abuses experienced in residential schools. In Kamloops, for example, Chief Ron Ignace has been lobbying the church officials to accept responsibility for the injury inflicted on past students of residential schools, and to provide restitution for that damage. Chief Ignace has been successful in getting the Bishop's commitment to provide restitution. Together, the Bishop and the Kamloops community are planning to lobby the federal government. All parties agree that the federal government must accept its responsibilities for the harm done and provide compensation to the surviving students.

Phil Fontaine has adopted another approach and has called on the federal government to hold a public inquiry into the residential schools.[74]

A recent internal report of the Presbyterian Church of Canada recommended resolutions be passed asking forgiveness of Aboriginal peoples for the way the church helped to destroy their cultures and co-operated with the federal government in its policy of assimilation. This report also said that the church should work with Aboriginal people in calling on the federal government to acknowledge the destructive effect of its policies. This report admitted that the Church co-operated with the federal government in outlawing many spiritual practices.

According to an article within the *Ottawa Citizen*, some delegates would not support this internal report. While it was admitted that the church was guilty of “major shortcomings... the proposed resolutions go too far in confessing guilt."[75] Neither the report nor the resolutions are available to the public, but the Church has begun work on a study which will be released in June, 1993 which deals with many of the issues raised in the initial report. This report will be publicly released.

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[73] *York, supra, note 69 at 37.*

[74] *"Chief recalls 'bloody experience'", Ottawa Citizen, June 19, 1992.*

[75] *" Aboriginal people deserve apology for federal assimilation policy, church says", Ottawa Citizen, June 10, 1992.*

Successful resolution of the outstanding grievances through negotiation is much more likely considering the increased public awareness, and the willingness of many churches to accept responsibility for the damage caused by residential schools. A National Councillor Task Force could be created to investigate the extent of problems for Aboriginal people as a result of the residential school experience. This national group could also have the responsibility of negotiating a compensation package for the benefit of all those hurt by residential schools.

9. Conclusion

Although doing so will not be simple, class actions may, however, be one way to obtain a remedy for the injury that has been suffered by past students of residential schools in Canada. Bringing a class action in Canada is fraught with difficulties as a result of narrowly construed class action rules and jurisdictional restrictions. Given the limited way courts have interpreted class action rules, it may be very difficult to frame a case so that it complies with these rules. It may be particularly difficult to frame an action for the abuses suffered in residential schools considering the complexity inherent in such a case.

As a result of the jurisdictional restrictions, some class actions may have a greater chance of success than others. The new rules in Ontario and Quebec are more flexible than others and a class action may be possible even though a case is very complex. Bringing an action subject to the rules of other provinces may be more complicated.

As noted before, the time limitations restricting the period of time available to begin an action may be more difficult to overcome. This issue will be made clearer upon the release of the Supreme Court of Canada's decision in *Marciano v. Metzger*. The court has stopped sitting for the summer, but will resume again in the fall. This matter must be re-evaluated again once this decision is available.

Ultimately, other options as well as class action suits are available to attempt to correct the past wrongs committed against all students of residential schools. While it must be decided which is the most acceptable method, considering the risks and the benefits of each option, it is not necessary to choose only one option. A combination of efforts may provide a greater chance of success.