

A Legacy of Assimilation: Abuse in Canadian Native Residential Schools

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Introduction

The impetus for this article stems from the author's examination of the Australian Federal Government's past policy of removing children who had one Indigenous and one non-Indigenous parent from their families and placing them in homes and institutions, a practice which is well documented.¹ This was part of the government's policy of assimilation;² the underlying idea being that the removal of these children from their families would facilitate the children's assimilation into white society.³ However, public outcry has recently ensued in Australia in response to more recent revelations about the practice. Most notably, the Australian Human Rights and Equal Opportunity Commission Report, *Bringing them Home*, tabled in the Commonwealth Parliament on 25 May 1997, led to public calls for a government apology. The relatively recent release of the film "Rabbit

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¹ Most notably, the Human Rights and Equal Opportunity Commission Report, *Bringing them Home*; Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997). See also Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (2000); Read *The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883-1969* (1982); Clarke "Case Note: *Cubillo v Commonwealth*" (2001) 25 *Melb Uni LR* 218; Manne "In Denial; The Stolen Generations and the Right" (2001) *The Australian Quarterly Essay 1*; Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000*, Fremantle Arts Centre Press, 2001; Kidd *The Way We Civilise: Aboriginal Affairs – The Untold Story*, 1997 and *Black Lives, Government Lies*, 2nd ed, 2003.

² *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084 (*Cubillo 2*) esp [1146]. See also *Cubillo 2* [2000] FCA 1084 at [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister No 2* [1999] NSWSC 843 at [88].

³ It was resolved at the first Conference of Commonwealth and State Aboriginal Authorities (21-23 April 1937) that "this conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth and it therefore recommends that all efforts be directed to that end." See the Report of the Administrator dated 28 February 1952 to the Secretary, Department of Territories in Canberra, quoted by O'Loughlin J in *Cubillo 2*, note 2 at [226].

Proof Fence”⁴ also served to heighten the awareness in the Australian public of the plight of the “stolen generation”.⁵ The term “stolen generation” is now commonly used to describe those children who were forcibly removed from their families under this policy. The film depicts the true-life account of three Aboriginal girls’ efforts to return to their homes from where they had been taken. The girls followed the rabbit proof fence as it then crossed the Australian continent, two of the girls making it back to their home in Jigalong, in outback Western Australia.

The response to the calls for an apology for this past practice was not what the public had expected. Whilst State and Territory Governments responded with an apology for such removals and the consequent hurt and distress,⁶ the Federal Parliament merely passed a motion of sincere regret.⁷ Moreover, the Australian judicial considerations of such matters have not brought any justice to the victims of this policy. Briefly, the Family Court of Australia has recognised the “devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal famil[ies] and their subsequent upbringing within a white environment.”⁸ Similarly, Brennan CJ in

⁴ Written and produced by Christine Olsen, based on the 1996 book of the same name, authored by Doris Pilkington Garimara. The author tells the story of how in the 1930’s her mother, Molly, 14, her sister, Daisy, 8, and their cousin, Gracie, 10, were taken from their homes on the instruction of the Chief Protector of Aborigines and sent to the Moore River Native Settlement 2,400km south. The girls escaped the authorities and followed the rabbit proof fence that then crossed the Continent back to their homes, located near the rabbit fence at Jigalong, on the edge of the Gibson Desert.

⁵ Apparently Read coined this term. See Read, note 1.

⁶ For example, in response the Queensland Parliament passed a resolution of regret and apology for “past policies under which [I]ndigenous children were forcibly separated from their families”: (Qld, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, pp 1947-1982). The South Australian Parliament also passed a resolution of sincere regret and apology, for “the forced separation of some Aboriginal children from their families and homes”: (SA, *Parliamentary Debates*, House of Assembly, 28 May 1997, pp 1435-1443). The Victorian Parliament apologised “for the past policies under which Aboriginal children were removed from their families and express[ed] deep regret at the hurt and distress this has caused and reaffirm[ed] its support for reconciliation between all Australians”: (Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 1997, p 10). The Assembly of the Australian Capital Territory passed a resolution of apology noting that it regarded “the past practices of forced separation as abhorrent ...”: (ACT, *Parliamentary Debates*, Legislative Assembly, 17 June 1997, p 1604).

⁷ *Hansard*, House of Representatives, 26 August 1999.

⁸ *In the Marriage of B and R* (1994-1995) 19 Fam LR 594 at 602.

*Kruger v Commonwealth*⁹ noted that the revelations “of the ways in which the powers conferred by the Ordinance [facilitating the institutionalisation of part-Aboriginal children] were exercised in many cases has profoundly distressed the nation.”¹⁰ However, in that case the High Court of Australia went on to uphold the validity of the underlying legislation. Most importantly, in *Cubillo & Gunner v The Commonwealth*¹¹ the Full Court of the Federal Court dismissed an appeal by Aboriginal claimants against the Federal Court’s¹² rejection of their claims for damages arising out of their removal under this policy. The broader factual basis of the plaintiffs’ causes of action in this case was their removal from their families, when children, and subsequent detention as part of the “stolen generation”.¹³ In addition to such removal and detention, one of the plaintiffs, Mrs Cubillo, was severely physically assaulted by one of the male missionaries at the institution in which she was placed.¹⁴ Another male missionary had sexually assaulted the other plaintiff, Mr Gunner, and other children.¹⁵

A similar policy of removing Aboriginal children from their families existed in Canada. As in Australia, some¹⁶ children suffered sexual and physical abuse and degrading acts in the Native¹⁷ Residential Schools in which they were placed. On a more general level, the

⁹ *Kruger v Commonwealth* (1997) 190 CLR 1.

¹⁰ *Kruger v Commonwealth* note 9 at 36.

¹¹ *Cubillo 3* [2001] FCA 1213, Summary at 3. See further Cassidy J, “The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian approaches to fiduciary duties” (2003) 32:2 *U of Ottawa Law Rev* (forthcoming).

¹² *Cubillo 2*, note 2.

¹³ Note, however, that the courts in this case were at pains to assert that the subject facts did not fall into the category of the “stolen generation”: *Cubillo 2*, note 2 at [3] and [65] and *Cubillo 3*, note 11, at 10. The author has rejected this view. See further Cassidy J, Case Comment: “*Cubillo & Gunner v The Commonwealth: A Denial of The Stolen Generation?*” (2003) 12:1 *Griffith Uni LRev* 114.

¹⁴ *Cubillo 2*, note 2, at [11], [30], [677], [678], [682], [705] and [729].

¹⁵ *Cubillo 2*, note 2, at [14] and [348], [899]-[905], [907]-[908], [946], [955], [960], [965], [974], [985], [989]-[990] and [992]-[994].

¹⁶ Note, it has been suggested that in some schools all children were sexually abused: “Reports of sexual abuse may be low, expert says” *The Globe Mail*, 1 June 1990 at A3 reporting the comments of Rix Rogers, special adviser to the Minister of National Health and Welfare, cited by the *Royal Commission on Aboriginal Peoples Final Report* (1996) (RCAP) p 378.

¹⁷ Note, the phrase “Native Residential Schools” is used in preference to “Indian Residential Schools” as it will be seen not all students were Status Indians; that is, persons registered as Indians under the *Indian Act*.

children were punished for speaking their Aboriginal languages and/or exercising Aboriginal customs.¹⁸ Unlike in Australia, however, some Canadian Aboriginal claimants have successfully brought actions for compensation against, *inter alia*, the Federal Canadian Government for the damages stemming from their experiences in the Native Residential Schools.¹⁹ Moreover, unlike the position in Australia,²⁰ the Canadian Federal Government's response to the revelations of such removals in the 1998 *Royal Commission on Aboriginal Peoples Final Report*²¹ (RCAP) was to apologise to those persons who suffered through the Native Residential Schools.²² As discussed below, in 2001 the Federal Canadian Government also offered to pay claimants with validated claims 70% of the agreed compensation when the subject school was conducted by both the Government and a Church entity. When the Government solely conducted the school, it offered to pay 100% of the compensation. Similarly, under the 26 March 2003 Draft Dispute Resolution Model, when the incident occurred before 1 April, 1969 Canada will pay 70% of the determined compensation, or 100% of such if the abuse occurred after that date.²³

18 See further RCAP, note 16 and *The Healing Has Begun: An Operational Update from the Aboriginal Healing Foundation*, May 2002, p 3.

19 See for example *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *M(FS) v Clarke* [1999] 11 WWR 301 (Mowatt); *A(TWN) v Clarke* (2001) 92 BCLR (3d) 250.

20 While the State/Territory Parliaments have formally apologised for the forced separation of Aboriginal children from their families (see for example Qld, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, pp 1947-1982; SA, *Parliamentary Debates*, House of Assembly, 28 May 1997, pp 1435-1443; Victoria, *Parliamentary Debates, Legislative Assembly*, 17 September 1997, p 10; ACT, *Parliamentary Debates*, Legislative Assembly, 17 June 1997, p 1604), as noted above, the Commonwealth Parliament passed a motion of sincere regret (as opposed to an apology) on 26 August 1999: *Hansard*, House of Representatives, 26 August 1999.

21 RCAP, note 16. As noted below, Chapter 10 of the Report provided detailed information regarding the Native Residential Schools.

22 See the *Statement of Reconciliation: Learning from the Past*, 7 January 1998.

23 As discussed below, in 1969 the Federal Government assumed total responsibility for the Native Residential Schools: RCAP, note 16, p 350. The acceptance of 100% liability after this date is particularly interesting given, as noted below, even after this date the churches often continued to be involved in the conduct of Native Residential Schools.

It will be seen, however, that while the plaintiffs in the leading cases, *Blackwater v Plint (No 1)*²⁴ and *Blackwater v Plint (No 2)*,²⁵ *M(FS) v Clarke*²⁶ (*Mowatt*) and *A(TWN) v Clarke*,²⁷ were ultimately successful under at least one of their heads of claim,²⁸ the approaches in these cases have not been entirely consistent. These cases are divided on whether the conduct of the schools involved a breach of the duty of care and/or a breach of fiduciary duties. Thus, in *Blackwater v Plint (No 2)*²⁹ the court rejected claims of direct liability against Canada and the United Church of Canada for breach of the duty of care. The court held that the defendants neither knew, nor ought to have known, of the sexual assaults upon the students. By contrast, in *Mowatt*³⁰ the court found that Canada and the Anglican Church, as employers, were imputed with the school principal's knowledge of the sexual assaults and breached the duty of care by failing to take reasonable supervisory precautions against sexual abuse by dormitory supervisors.³¹ Both Canada and the church were held to have failed to protect the plaintiff from harm.³² In *Blackwater v Plint (No 2)*³³ the court also relied on a line of authority reminiscent of that adopted in Australia in *Cubillo 2*³⁴ and *Cubillo 3*³⁵ to deny the claims based on a breach of fiduciary duties. In *Mowatt*,³⁶ however, the court followed the contrary line of authority, supported by the Canadian Supreme Court, and upheld the plaintiff's claims in equity against the Anglican Church.

There are also a number of issues that have not been authoritatively determined by the Canadian courts. The legal rights of those members

24 *Blackwater v Plint (No 1)*, note 19.

25 *Blackwater v Plint (No 2)*, note 19.

26 *M(FS) v Clarke*, note 19.

27 (*Mowatt*) and *A(TWN) v Clarke*, note 19.

28 For example, claims were brought for, *inter alia*, breaches of the duty of care, fiduciary duties and statutory duties.

29 *Blackwater v Plint (No 2)*, note 19.

30 *Mowatt*, note 19.

31 *Mowatt*, note 19 at 353.

32 *Mowatt*, note 19 at 353.

33 *Blackwater v Plint (No 2)*, note 19.

34 *Cubillo 2*, note 2, esp at [1299] and [1307].

35 *Cubillo 3*, note 11, esp at [463] and [466].

36 *Mowatt*, note 19.

of the Canadian “stolen generation” who were not physically or sexually abused have not been considered.³⁷ Similarly, the ability to bring “intergenerational claims”, namely actions by family members of those Aboriginal persons who were removed from their families, has not been authoritatively determined.³⁸

This article has two parts. Part One provides an overview of the key events pertaining to the Canadian Native Residential Schools. Part Two considers the issues that have been determined by the Canadian courts to date, and critically examines the four leading Native Residential School cases, *Blackwater v Plint (No 1)*,³⁹ *Blackwater v Plint (No 2)*,⁴⁰ *Mowatt*⁴¹ and *A(TWN) v Clarke*.⁴² This examination not only provides a framework through which the *Cubillo*⁴³ decisions can be critically evaluated,⁴⁴ but should also prove instructional in regard to any further consideration of the rights of the “stolen generation” both in Canada and Australia. Readers should be aware that the detail of the nature of the assaults in these cases is quite explicit, but is necessary to put the cases in their factual background.

Part One: Overview of the key events re Native Residential Schools

The establishment of Native Residential Schools pre-dated Confederation and originally they were administered by church missionaries.⁴⁵ In fact, the Native Residential Schools’ origins date back to the 1600’s, “the early days of Christian missionary

37 As noted below a class action, known as the Baxter class action, has been instigated that includes such claimants.

38 As noted below, in *Re Residential Schools* (2000) 183 DLR (4th) 552 second generation claims were held to have no basis in law, but it appears the decision did not have the benefit of counsel’s submissions to the contrary. As discussed below the Baxter class action includes such claimants.

39 *Blackwater v Plint (No 1)*, note 19.

40 *Blackwater v Plint (No 2)*, note 19.

41 *Mowatt*, note 19.

42 *A(TWN) v Clarke*, note 19.

43 *Cubillo 2*, note 2, and *Cubillo 3*, note 11.

44 In this regard see further *Cassidy*, note 11.

45 Office of Indian Schools Resolution of Canada, “The Residential School System Historical Overview”, www.irsr-rqpi.gc.ca.

infiltrations into North America”.⁴⁶ The first Native boarding Schools were established in New France between 1620 and 1680 by the Recollet, Jesuit and Ursuline religious orders.⁴⁷

In 1874 the Canadian Federal Government began to play a role in the administration of the Native Residential Schools. This involvement was spurred on by the Government’s constitutional responsibility for Indians and their lands under the *Constitution Act 1867*⁴⁸ and as part of its general policy of assimilating Status Indians⁴⁹ into the broader community.⁵⁰ The latter policy was known as “aggressive civilization” and was promoted as the “final solution of the Indian problem”.⁵¹ By 1894 the Federal Government had also assumed responsibility under the *Indian Act 1894* for the education of all “Indian children”.⁵² Thus, the Federal Government’s involvement in the schools was also tied to its obligations to provide education under the *Indian Act 1894* and in fulfilment of the education clauses of Treaties with various First Nations.⁵³ Under the *Indian Act 1894* and successive legislation⁵⁴ the Government was authorised to require attendance by Indian children at Native Residential Schools.⁵⁵ To this end, by 1920 it was mandatory for all Indian children between the ages

46 *Aboriginal Healing Foundation*, note 18, p 3.

47 Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca. See further Office of Indian Schools Resolution of Canada, “Key Events” www.irsr-rqpi.gc.ca.

48 *A(TWN) v Clarke*, note 19, at 253; *Mowatt*, note 19, at 319. See also *Blackwater v Plint (No 1)* note 19 at [91] regarding the constitutional authority under s 91(24) of the *British North America Act 1869*.

49 That is, persons registered as Indians under the *Indian Act*.

50 *RCAP*, note 16, p 335. See further *RCAP*, note 16 and *Aboriginal Healing Foundation*, note 18.

51 *Aboriginal Healing Foundation*, note 18, p 7, quoting the Deputy Superintendent of Indian Affairs, Duncan Campbell Scott. See further the *RCAP*, note 16 and *Aboriginal Healing Foundation*, note 18.

52 *Mowatt*, note 19, at 319.

53 *RCAP*, note 16, p 335. See also Office of Indian Schools Resolution of Canada, “Key Events” www.irsr-rqpi.gc.ca. For example, Treaty No. 1 includes a pledge by the Crown “to maintain a school on each reserve hereby made, whenever the Indians of the reserve should desire it.” Similar clauses are included in Treaties No. 2-11.

54 See *Blackwater v Plint (No 1)*, note 19, at [32]; *Mowatt*, note 19, at 305.

55 Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

of 7 and 15 to attend school.⁵⁶ Parents who refused to make their children available for schooling were threatened with jail or fines.⁵⁷ “Truant officers” were empowered to take any Indian child into custody so as to convey them to a school “using as much force as the circumstances require.”⁵⁸ The compulsory nature of attendance at the Native Residential Schools had the tragic consequence that in some families more than one generation was abused while attending the schools. Parents were forced to send their children to schools where they or other family members had previously been abused.⁵⁹

Given the above noted “triggers” for the Federal Government’s involvement and ultimate control of the Native Residential Schools, it is not surprising that most of the children detained in the schools were Status Indians. However, even pre-World War II, some Aboriginal students who were not Status Indians were taken from northern communities to Native Residential schools in other provinces.⁶⁰ Furthermore, in the 1950’s, as greater incursions were made into the Arctic areas, Residential Schools became more established in these areas and the number of Inuit children in such schools substantially increased.⁶¹ Moreover, as a consequence of many Metis living on

56 *Mowat*, note 19, at 305; *Blackwater v Plint (No 1)*, note 19, at [32]; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca. Similarly, under ss 115,116 and 118 of the *Indian Act* 1951 it was, *inter alia*, mandatory for Indian children between the ages of 6 and 16 to attend an Indian school: *Blackwater v Plint (No 1)*, note 19, at [34].

57 *Mowatt*, note 19, at 305; *Blackwater v Plint (No 1)*, note 19, at [34]; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

58 *Blackwater v Plint (No 1)*, note 19, at [34].

59 For example, in *A(TWN) v Clarke*, note 19, two of the plaintiffs who had been abused at the same residential school were uncle and nephew. Elijah Baxter, a plaintiff in the Baxter class action, has alleged in his pleadings that he was sodomized on more than one occasion by a member of staff at the Pelican Falls Residential School and after “having to endure such an experience, [he] was forced to send his own children to Residential School where they were also abused”: para 4 Draft Fresh As Amended Statement of Claim. His son, Charles Baxter, has also alleged in his pleadings that he was repeatedly sexually molested by dormitory supervisors and other staff and students at the Pelican Falls Residential School: para 3 Draft Fresh As Amended Statement of Claim.

60 *RCAP*, note 16, p 351.

61 See *RCAP*, note 16, pp 351-352.

reservations with Status Indians, some Metis children were also forced to attend the Residential Schools.⁶²

By 1913 there were 107 Native Residential Schools across Canada. Over time 130 schools existed.⁶³ The Federal Government estimates that up to 100 schools could be involved in current litigation.⁶⁴ It has also been estimated that 90,600 former Aboriginal students are still alive today.⁶⁵ While the schools were located in every province and territory apart from New Foundland, New Brunswick and Prince Edward Island,⁶⁶ they were mainly located in Manitoba and west of this province. This flows from the correlation between the location of Indian reserves and the location of the schools. Historically, missionaries established the schools on the reserves and then put pressure on the government for funding. In this regard the government at times experienced frustration as it sought to keep up with the missionary movement. In essence, the government would “blink” and the churches had built another school for which they wanted funding.⁶⁷

Eventually, the Federal Government was involved in the conduct of nearly every Native Residential School. As discussed in more detail below, the arrangement involved Canada contracting with the churches to administer the schools.⁶⁸ The churches were the “managers” of the Native Residential Schools, while the government had the final say on the employment of the principal and had a supervisory role over the conduct of the schools. The courts have characterised the arrangement

62 See Hansen and Lee, *The Impact of Residential Schools and Other Institutions on the Metis People of Saskatchewan: Cultural Genocide, Systematic Abuse and Child Abuse*, A Report Written for the Law Commission of Canada (1999). See also www.metisnation.ca. Note in this regard that some of the claimants under the Baxter class action are Metis.

63 Office of Indian Schools Resolution of Canada, “The Residential School System Historical Overview” www.irsr-rqpi.gc.ca, www.irsr-rqpi.gc.ca.

64 Office of Indian Schools Resolution of Canada, Note 63.

65 Office of Indian Schools Resolution of Canada, Note 63.

66 Cartography prepared by Public History Inc for the Office of Indian Schools Resolution of Canada.

67 See further *RCAP*, note 16.

68 *A(TWN) v Clarke*, note 19, at 253.

as a “joint venture” between the respective churches and the government.⁶⁹

Initially, the funding for the schools was in the form of government *per capita* grants tied to the number of students.⁷⁰ Unfortunately, this meant that it was in the churches’ financial interests for the children to be forcibly removed from their families and placed in the schools, thereby increasing student numbers. In this regard it should be noted that while some children were voluntarily placed in the schools by their parents, believing that the schools would provide their children with greater opportunities, others were forcibly taken without their parents’ consent and/or consent obtained through duress by threats of jail or fines by Department of Indian Affairs authorities.⁷¹ The circumstances of particular cases of forcible removal are often disturbing. Sometimes the children were removed from their communities in planes, which made the removal even more distressing for those children who had never seen a plane before. Other times the children were loaded into the back of trucks and taken to schools, not only days away from their families, but, as noted above, sometimes to other provinces/territories.⁷²

Once the Aboriginal students were at the schools it was again in the churches’ financial interests to keep them there. Allegations have been made of church authorities keeping sick children at schools so they could receive the per capita grant for that child. Even after this funding policy changed in 1957 to one of controlled spending,⁷³ the children were still valuable to the church as they provided cheap labour.⁷⁴ In

69 *Blackwater v Plint (No 1)*, note 19, at [151]; *Blackwater v Plint (No 2)*, note 19, at 246.

70 See *Blackwater v Plint (No 1)*, note 19, at [36]; *Blackwater v Plint (No 2)*, note 19, at 279.

71 *Mowatt*, note 19, at 305; *Blackwater v Plint (No 1)*, note 19, at [34]; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca. See, for example, the evidence regarding the removal of EAJ and ERM in *A(TWN) v Clarke*, note 19, at 259 and 276.

72 See *RCAP*, note 16, p 351.

73 *Blackwater v Plint (No 1)*, note 19, at [47]; *Blackwater v Plint (No 2)*, note 19, at 279; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

74 See, for example, the evidence of RJJ that during the potato season only the mornings were spent in schooling, the afternoons being spent picking potatoes: in *A(TWN) v Clarke*, note 19, at 239. Elijah Baxter and Charles Baxter have alleged in their pleadings in the Baxter class action that they were forced to work

one case it has been alleged that church authorities deliberately kept from a child a letter from the Federal Government that stated that given the subject Aboriginal child's father had died while serving his country during World War II, the government would fund his full education through mainstream educational institutions.⁷⁵ One can surmise that the alleged decision to hide this letter was because the church would have both lost the funding for that student and the benefit of his labour.

In 1951 the Federal Government became obliged under s 113 *Indian Act* 1951 to "establish and operate schools for Indian children".⁷⁶ Under s 113 it could do so in conjunction with religious organisations, but only when Cabinet had approved the contract.⁷⁷

In 1953 regulations under the *Indian Act 1951* provided that the "principal of every school shall assume the responsibilities of parent or guardian with respect to the welfare and discipline of the pupils under his charge".⁷⁸ The regulations required the principal of Native Residential Schools to, *inter alia*, make known to the staff a set of rules for the proper operation of the school, to supervise the staff's performance of their duties and to provide and supervise measures to ensure the health, safety and welfare of pupils.⁷⁹

Post World War II, as a matter of government policy there was a movement from assimilation to integration of Aboriginal peoples into the broader Canadian society.⁸⁰ This change in policy included a plan to close the Native Residential Schools, create a day school system for

as farm and barn labourers, respectively, while at the Pelican Falls Residential School: paras 3 and 4 Draft Fresh As Amended Statement of Claim.

75 Personal conversation with plaintiff's solicitor Mr Alan Farrar, Thomson Rogers, Barristers and Solicitors, Toronto, Ontario, Canada, 17 October 2002.

76 See *Blackwater v Plint (No 1)*, note 19, at [91].

77 *Mowatt*, note 19, at 319. The court in *Mowatt*, note 19, at 319 noted, however, that while such contracts were made with the churches, the necessary Cabinet approval of these contracts had not been obtained with respect to the subject Native Residential School, St George's.

78 Quoted in *Mowatt*, note 19, at 320.

79 *Mowatt*, note 19, at 320. See *Blackwater v Plint (No 1)*, note 19, at [80]. In regard to the Native Residential School considered in *Mowatt*, note 19 and *A(TWN) v Clarke*, note 19, and it can be speculated other schools, despite these regulations, no such rules were ever formulated: *Mowatt*, note 19, at 320.

80 *Mowatt*, note 19, at 321. See *RCAP*, note 16, p 346; Office of Indian Schools Resolution of Canada, "Key Events", www.irsr-rqpi.gc.ca.

Aboriginal students and, most significantly, integrate Aboriginal children into mainstream education by “transferring Indian children to provincial schools ...”.⁸¹ As a consequence, during the 1950’s some Aboriginal students began to attend secular day schools. Students from small and/or remote communities, however, continued to attend Native Residential Schools.⁸² Moreover, during this period the Native Residential Schools took on a new role, as part of the social welfare system.⁸³ A Government Report suggested that at one point 75% of Aboriginal children attending the Native Residential Schools were “neglected” children.⁸⁴ It should be added that these children were adjudged neglected according to non-Aboriginal, Eurocentric notions of childcare.⁸⁵

During this period the Catholic Church, in particular,⁸⁶ opposed the closing of the Native Residential Schools.⁸⁷ The church conducted what the Royal Commission described as an “aggressive political campaign” in the late 1950’s and the 1960’s to try to save the Native Residential Schools it managed.⁸⁸

In 1969 the Federal Government assumed total responsibility for the Native Residential Schools.⁸⁹ At this point the Federal Government ended the joint venture with the churches in regard to the conduct of the schools and became the employer of those working at the schools.⁹⁰ In many cases, however, the churches continued to be involved in the schools through contractual arrangements with the

81 *RCAP*, note 16, pp 346 and 349.

82 *RCAP*, note 16, pp 348; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

83 *RCAP*, note 16, p 349; Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

84 Relationships Between Church and State in Indian Education, 26 September 1966, quoted in *RCAP*, note 16, p 349.

85 *RCAP*, note 16, p 349.

86 There was also opposition from certain Indian associations that wanted to keep the federal schools open: *RCAP*, note 16, p 350. See further *RCAP*, note 16.

87 *RCAP*, note 16, p 350.

88 *RCAP*, note 16, p 350. See further *RCAP*, note 16.

89 *RCAP*, note 16, p 350.

90 *RCAP*, note 16, p 350.

government.⁹¹ In these cases, such as in Native Residential School considered in *Mowatt*⁹² and *A(TWN) v Clarke*,⁹³ control of the schools continued to be joint even after the changes of 1969.⁹⁴

By the late 1970's most residential schools ceased to operate.⁹⁵ The school the subject of the litigation in *Blackwater v Plint (No 1)*⁹⁶ and *Blackwater v Plint (No 2)*⁹⁷ was closed in 1973 and the school considered in *Mowatt*⁹⁸ and *A(TWN) v Clarke*⁹⁹ was closed in 1979. By 1979 only 12 Native Residential Schools continued to exist, with a total resident population of 1899 students.¹⁰⁰ In 1996 the last federally funded school, located in Saskatchewan, was closed.¹⁰¹

In 1989-1990 former students of the schools began making criminal complaints against their abusers, including former Native Residential School staff, in the courts of British Columbia and the Yukon.¹⁰² In each case, the abusers were convicted of multiple counts of gross indecency and sexual assault.¹⁰³ This litigation in turn triggered a chain of police investigations and further prosecutions.¹⁰⁴ During this period the Canadian public became more aware of the abuse that occurred in the Native Residential Schools and "non-Aboriginal voices joined the chorus of condemnation".¹⁰⁵

91 *Mowatt*, note 19, at 343-346; Office of Indian Schools Resolution of Canada, "Key Events", www.irsr-rqpi.gc.ca.

92 *Mowatt*, note 19.

93 *A(TWN) v Clarke*, note 19.

94 *Mowatt*, note 19, at 343-346.

95 *Mowatt*, note 19, at 321.

96 *Blackwater v Plint (No 1)*, note 19.

97 *Blackwater v Plint (No 2)*, note 19.

98 *Mowatt*, note 19.

99 *A(TWN) v Clarke*, note 19.

100 *RCAP*, note 16, p 351.

101 Office of Indian Schools Resolution of Canada, "The Residential School System Historical Overview", www.irsr-rqpi.gc.ca.

102 *RCAP*, note 16, p 378.

103 *RCAP*, note 16, p 378.

104 *RCAP*, note 16, p 378.

105 *RCAP*, note 16, p 378.

In 1990 the Federal Government received the first civil Native Residential School claim.¹⁰⁶ One year later, in August 1991, the Royal Commission on Aboriginal Peoples was established. A further year later, National Chief Fontaine disclosed to the public his own personal experience of abuse at the Fort Alexander Residential School, heightening the public awareness of the issue.¹⁰⁷ During the 1990's most of the churches involved in the conduct of the schools apologised for, *inter alia*, "the pain, suffering and alienation that so many have experienced" at the schools.¹⁰⁸

In 1993 the Native Residential School Task Force was created to examine all residential schools in operation in British Columbia from 1890 – 1984.¹⁰⁹ In 1994 Stratton QC, former Chief Justice of New Brunswick, was appointed to direct an investigation into the five Native Residential Schools in Nova Scotia.¹¹⁰ However, it was not until 1996, when the *Royal Commission on Aboriginal Peoples Final Report (RCAP)* was released containing 440 recommendations, that the full extent of the abuse suffered by Aboriginal children in the schools was revealed. Chapter 10 of the *RCAP* provided detailed information regarding the Native Residential Schools. It detailed the tragic legacy that the Native Residential School experience has left with many of the former students. The *RCAP* recommended, *inter alia*, the establishment of a Public Inquiry into the Native Residential Schools.¹¹¹ It also recommended the establishment of a National

¹⁰⁶ Office of Indian Schools Resolution of Canada, note 101.

¹⁰⁷ Office of Indian Schools Resolution of Canada, "Key Events", www.irs-rqpi.gc.ca.

¹⁰⁸ The Canadian Conference of Bishops "Let justice Flow Like a Mighty River", brief to *RCAP* (Ottawa, 1995) at 16, quoted by *RCAP*, note 16, p 379. On 6 August 1997 Archbishop Michael Peers apologised on behalf of the Anglican Church of Canada for "our failures in the Residential Schools." On 27 October 1998 The Right Reverend Bill Phipps apologised on behalf of The United Church of Canada "for the pain and suffering that our Churches involvement in the Indian Residential School system has caused." On 9 June 1994 the Presbyterian Church in Canada asked for forgiveness for the Church's insensitivity in the conduct of the Native Residential Schools, noting, *inter alia*, "[in] a setting of obedience and acquiescence there was an opportunity for sexual abuse, and some were so abused."

¹⁰⁹ *Aboriginal Healing Foundation*, note 18, p 8.

¹¹⁰ *Aboriginal Healing Foundation*, note 18, p 8.

¹¹¹ It also recommended that the commission of inquiry be comprised of a majority of Aboriginal commissioners. See *RCAP*, note 16, Recommendations 1.10.1 and 1.10.2.

Repository of records and video collections related to Native Residential Schools.¹¹²

While rejecting the need for a Public Inquiry,¹¹³ in response to the *RCAP* the Federal Government established the Indian Residential Schools Resolution Unit, which it created within the Indian and Northern Affairs Department.¹¹⁴ In time the Unit became a new Government Department, independent of the Indian and Northern Affairs Department.

On 7 January 1998, the Federal Minister of Indian Affairs, the Honourable Jane Stewart, announced at a public ceremony *Gathering Strength: Canada's Aboriginal Action Plan*. This outlined a four point government strategy to address the legacy of the Native Residential Schools through (i) a government apology, (ii) "healing" projects, (iii) the development of alternative dispute resolution (ADR) models and (iv) the adoption of litigation strategies that complemented the promotion of ADR. As to the first of these initiatives, on 7 January 1998 the government delivered its *Statement of Reconciliation: Learning from the Past*. In this document the Federal Government acknowledged its role in the development and administration of Native Residential Schools and apologised to those persons who suffered through the schools. Whilst the apology emphasises sorrow for those who suffered physical and sexual abuse, "the worst cases", it also makes reference to the fact that 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". The apology acknowledged that "policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country".

¹¹² *RCAP*, note 16, Recommendation 1.10.3.

¹¹³ See *Aboriginal Healing Foundation*, note 18, p 17. The government believes that the *RCAP* has provided sufficient detail into Native Residential Schools: Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002. Note, the churches have been discussing the possibility of a Truth and Reconciliation Commission, similar to that held in South Africa after the end of the apartheid regime.

¹¹⁴ Office of Indian Schools Resolution of Canada, "Key Events", www.irs-rqpi.gc.ca.

As to the second of these initiatives, on 31 March 1998 the Aboriginal Healing Foundation (the Foundation) was established.¹¹⁵ This is an Aboriginally run, non-profit organisation that operates at arm's length from the government.¹¹⁶ The government granted \$350 million to the Foundation to provide funding for community based healing projects that "address the legacy, including intergenerational impacts, of sexual and physical abuse suffered by Aboriginal people in Canada's Indian residential school system."¹¹⁷ As at May 2002 the Foundation had provided approximately \$209 million to 922 community-based healing projects.¹¹⁸ The types of projects funded included healing services,¹¹⁹ community services,¹²⁰ prevention and awareness programs,¹²¹ traditional activities¹²² and training and education.¹²³ However, the Foundation has not been without criticism.¹²⁴ Criticism has been levelled at the limited life of the Foundation. The Foundation's mandate is limited to a ten-year period.¹²⁵ Perhaps most importantly, its mandate is seen as too restrictive as it is prevented from funding projects that address language and cultural loss through the Native

115 *Aboriginal Healing Foundation*, note 18, message from the President, Georges Erasmus.

116 *Aboriginal Healing Foundation*, note 18, p 9.

117 *Aboriginal Healing Foundation*, note 18, message from the President, Georges Erasmus and p 9.

118 *Aboriginal Healing Foundation*, note 18, p 12. See further *Aboriginal Healing Foundation*, note 18. See also the Foundation's website: www.ahf.ca.

119 For example, healing circles, day treatment centres and sex offender programs: *Aboriginal Healing Foundation*, note 18, p 12.

120 For example, support networks and leadership training for healers: *Aboriginal Healing Foundation*, note 18, p 12

121 For example, educational materials and sexual abuse workshops: *Aboriginal Healing Foundation*, note 18, p 12.

122 For example, support networks for Elders and Healers: *Aboriginal Healing Foundation*, note 18, p 12.

123 For example, parenting skills and curriculum development: *Aboriginal Healing Foundation*, note 18, p 12.

124 Generally, this criticism is not in written form. See, however, www.shingwauk.auc.ca/TalkingCircle/TalkingCircle_forum_web_Cachagee.html The bitterness felt by some is represented in the angry response of Gilbert Oskaboose "The Aboriginal Healing Foundation: A Nest of Maggots" (www.firstnations.com/oskaboose/nest-of-maggots.htm).

125 www.ahf.ca. See *Aboriginal Healing Foundation*, note 18, pp 18 and 19.

Residential School experience.¹²⁶ The Foundation's mandate is confined to addressing the consequences of physical and sexual abuse in the schools.¹²⁷ The Foundation cannot fund projects aimed at compensating cultural loss.

As to the third and fourth of these initiatives, in 1998 The Assembly of First Nations, the Federal Department of Indian Affairs and the Federal Department of Justice met to discuss establishing a process that would redirect Native Residential School litigation away from the courts into speedier ADR models.¹²⁸ In turn, through 1998-1999 the government funded nine Exploratory Dialogues with claimants, Aboriginal leaders, church representatives and senior government officials in locations across Canada, designed to develop solutions to Native Residential School issues.¹²⁹ In response to these dialogues the government launched a series of ADR pilot projects, designed to examine different ways claims could most appropriately be resolved.¹³⁰ In 1999, the first ADR pilot project was launched in regard to Grollier Hall Native Residential School.¹³¹ To date there are ten ADR projects underway, at various stages of resolution.

In 1998, the first Native Residential School civil case was determined, *Blackwater v Plint (No 1)*.¹³² This case is discussed in detail below, but it suffices for present purposes to note that the plaintiffs were successful. Canada and the United Church of Canada were held to be vicariously liable for the sexual assaults upon the plaintiffs by the perpetrator(s). The following year the next major Native Residential School case, *Mowatt*,¹³³ was decided.¹³⁴ Again the plaintiff was successful. Canada and the Anglican Church of Canada were held to

¹²⁶ www.ahf.ca. See *Aboriginal Healing Foundation*, note 18, p 19. See also Assembly of First Nations, Annual General Assembly, Resolution no. 10/2002, 16, 17 and 18 July 2002.

¹²⁷ www.ahf.ca. See *Aboriginal Healing Foundation*, note 18, p 19.

¹²⁸ *Aboriginal Healing Foundation*, note 18, p 16.

¹²⁹ Office of Indian Schools Resolution of Canada, "Key Events", www.irsr-rqpi.gc.ca.

¹³⁰ Office of Indian Schools Resolution of Canada, note 129.

¹³¹ Office of Indian Schools Resolution of Canada, note 129.

¹³² *Blackwater v Plint (No 1)*, note 19.

¹³³ *Mowatt*, note 19.

¹³⁴ Another important case determined in that year was *DW v Canada* [1999] SKQB 187 (plaintiff successful).

be vicariously liable for the sexual assaults upon, *inter alia*, the plaintiff. Canada and the church were also held liable for breaches of their duty of care and, in the case of the church, breaches of its fiduciary duties. The court apportioned liability 60% to the Anglican Church of Canada and 40% to Canada.

In 2001 *Blackwater v Plint (No 2)*¹³⁵ was decided.¹³⁶ *Blackwater v Plint (No 1)*¹³⁷ had only considered the issue of vicarious liability. The issues of, *inter alia*, duty of care, fiduciary duties and statutory duties were determined in *Blackwater v Plint (No 2)*.¹³⁸ As discussed below, while the claims of breach of duty of care and fiduciary duty did not succeed, the plaintiffs were successful in their claims of breach of non-delegable statutory duty and responsibility was allocated 75% to Canada and 25% to the United Church of Canada. The same year *A(TWN) v Clarke*¹³⁹ was decided. On the basis of the earlier findings in *Mowatt*,¹⁴⁰ vicarious liability and breach of duty of care was admitted by the government and the church. The defendants agreed to an apportionment of responsibility on the same basis as in *Mowatt*.¹⁴¹ Aggravated and punitive damages were also ordered against the defendants. Again, these issues are discussed in more detail below.

In furtherance of the above discussed third initiative regarding promoting ADR, in July 2001 the Federal Government began negotiations with the churches¹⁴² towards establishing an ADR model based on an agreed allocation of responsibility and an out-of-court

¹³⁵ *Blackwater v Plint (No 2)*, note 19.

¹³⁶ Other important cases determined that year included *A(M) v Canada* [2001] Sask DJ 954 (plaintiffs successful), *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia* [2001] BCD Civ J 1135 (plaintiff successful in his claims of vicarious liability). Note, this was overturned on appeal, but the matter was remitted for trial in regard to the issue of negligence: *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia* [2003] BCCA 289), *John Doe (No 1) v Catholic Archdiocese of Grouard-McLennan* (2001) 204 DLR (4th) 80 (successful application to have the Catholic Church struck out from the Statement of Claim as it was not a separate legal entity) and *Moar v Roman Catholic Church of Canada* (2001) 205 DLR (4th) 253 (plaintiffs claims held to be statute barred).

¹³⁷ *Blackwater v Plint (No 1)*, note 19.

¹³⁸ *Blackwater v Plint (No 2)*, note 19.

¹³⁹ *A(TWN) v Clarke*, note 19.

¹⁴⁰ *Mowatt*, note 19.

¹⁴¹ *Mowatt*, note 19.

¹⁴² *Aboriginal Healing Foundation*, note 18, p 16.

settlement for all claimants where their claims were validated. On the basis of the litigation that had at that point been determined, the Federal Government offered to pay two-thirds of the agreed compensation if the churches would pay the other third. The churches' initial response was that they were only willing to pay a small fraction, less than 1%, of the estimated cost to settle all claims.¹⁴³ At the time the government estimated that the total compensation payable would be approximately \$1.2 billion.¹⁴⁴

Negotiations with all but the Anglican Church faltered.¹⁴⁵ The Federal Government continued its negotiations with this church towards the outcome discussed below.¹⁴⁶ In the meantime, in October 2001 the Federal Government decided to adopt a slightly different path by offering claimants with validated claims 70% of the agreed compensation in settlement.¹⁴⁷ This 70% figure applied where both the government and a church were involved in the conduct of a school. In such circumstances, the claimant still had the opportunity of suing the appropriate church separately for the additional 30% of damages. Where, however, the government was solely responsible for the conduct of the school, it offered to pay the claimant 100% of the agreed compensation. The government asserts that it is eager for the elderly and the infirmed to consider this offer to ensure that their claims are quickly compensated.¹⁴⁸

In 2002 the first ADR pilot project at Grollier Hall Residential School was completed. Coincidentally, in November and December of the same year the Federal Government announced that it had reached an

143 Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002.

144 Personal conversation with Mr Jack Stagg, note 143. Given the current litigation that involves claims by former students, not all of whom were sexually and physically abused, but who mount their claims on the basis of wrongful imprisonment, cultural loss and breaches of education clauses in treaties, the estimate of damages if these claims are successful could be significantly higher.

145 Office of Indian Schools Resolution of Canada, "Key Events", www.irs-rqpi.gc.ca.

146 Office of Indian Schools Resolution of Canada, note 145.

147 Office of Indian Schools Resolution of Canada, note 145.

148 Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002.

agreement in principle with the Anglican¹⁴⁹ and Presbyterian Churches, respectively, as to how they will compensate those former students of the Native Residential Schools who had been physically and sexually abused.¹⁵⁰ The Federal Government also announced a new proposed resolution framework.¹⁵¹ The model is based upon a binding adjudication¹⁵² that serves the purposes of validating claims and giving victims an opportunity to “tell their story.”¹⁵³ Under the 26 March 2003 draft of this ADR Model, where the incident occurred before 1 April 1969 Canada will pay 70% of the amount of compensation determined by the adjudicator (unless an alternative share of liability has been negotiated with a church). If the abuse occurred after that date, Canada will pay the full amount determined by the adjudicator. The acceptance of 100% liability after this date is particularly interesting given, as noted above and detailed below, even after this date the churches often continued to be involved in the conduct of Native Residential Schools.¹⁵⁴ Under this ADR model, compensation is generally¹⁵⁵ based on a grid formula¹⁵⁶ that takes into account the nature of the proven acts of abuse, the particular consequential harm to the victim, any aggravating factors, cost of any future care and loss of opportunity.¹⁵⁷ The grid is similar to that used in Ireland regarding children abused by clergymen.

This offer of compensation is, however, confined to cases of sexual and physical abuse and wrongful confinement in the sense of solitary

149 See www.anglican.ca/ministry/rs/resources. The Anglican Church has agreed to pay 30% of damages. The church will pay over the next 5 years \$25 million into a fund for this purpose.

150 Office of Indian Schools Resolution of Canada, “Key Events”, www.irsr-rqpi.gc.ca.

151 Office of Indian Schools Resolution of Canada, note 151.

152 A negotiated resolution or collective offer, rather than a binding decision by an adjudicator, may occur where a claim is brought as a group.

153 Personal conversation with Mr Jack Stagg, note 143.

154 See further the discussion below of *Mowatt*, note 19, at 344-346.

155 Where, however, there is a claim of physical abuse, but no lasting injury, or a claim of wrongful confinement, the compensation is set at an amount up to \$1500 or where there are aggravating factors or a lasting negative impact on the student, up to \$3500. See section 7, Draft Dispute Resolution Model for Indian Residential School Abuse Claims.

156 Draft Compensation Framework, Draft Dispute Resolution Model for Indian Residential School Abuse Claims, Appendix II.

157 Draft Compensation Framework, note 156, Appendix VIII.

confinement that was inappropriate in terms of both space and duration given the child's age.¹⁵⁸ Claims are being made for other forms of damage such as loss of language and culture, and inadequate education. Intergenerational claims and claims for breaches of domestic and international treaties are also being made. A major event in regard to these claims was the instigation of the Baxter National Class Action, in 2002. It should be noted that the National Consortium of Plaintiffs' Counsel acting in this class action have entered into a Memorandum of Understanding on 4 October 2002 with the Assembly of First Nations, establishing a working relationship between the consortium and the Assembly of First Nations in regard to these claims.¹⁵⁹

The Canadian Federal Government estimates that there are now over 5,000 cases arising out of the Native Residential Schools, involving nearly 12,000 persons.¹⁶⁰ These figures do not reflect the Baxter Class Action and any other class actions. To date the government estimates that 630 cases have been settled,¹⁶¹ while the number of actual court judgments is few.¹⁶² To this end, Part Two of this article provides a critical analysis of the four key cases on the substantive law causes of action, namely *Blackwater v Plint (No 1)*,¹⁶³ *Blackwater v Plint (No 2)*,¹⁶⁴ *Mowatt*¹⁶⁵ and *A(TWN) v Clarke*.¹⁶⁶

158 See section 7, Draft Dispute Resolution Model for Indian Residential School Abuse Claims.

159 Note, in 2002 *Francis v Canada* [2002] BCD Civ J 664 was determined. The plaintiff's claim was dismissed as the court did not accept her factual allegations of sexual assault.

160 Office of Indian Schools Resolution of Canada, "The Residential School System Historical Overview", www.irsr-rqpi.gc.ca.

161 Office of Indian Schools Resolution of Canada, note 160.

162 The government suggests that there have been eleven judgments: www.irsr-rqpi.gc.ca: 'The Residential School System Historical Overview'. These do not include a number of cases involving interlocutory applications concerning, for example, statutes of limitations (*AK v Canada* [2003] SKQB 46; *PG v Canada* (2003) SKQB 41), the legal identity of church defendants (*Re Residential Schools* (2001) 204 DLR (4th) 80; *Wunnamin Lake First Nation v Rowe* (2002) ACWSJ LEXIS 4569), the ability to plead breaches of international treaties (*Re Indian Residential Schools* (2000) Alta DJ 372) and intergenerational claims: *Re Residential Schools*, note 38.

163 *Blackwater v Plint (No 1)*, note 19.

164 *Blackwater v Plint (No 2)*, note 19.

165 *Mowatt*, note 19.

Part Two: Summary of Issues in Leading Cases

1. Introduction

As noted in more detail below, in the key Native Residential School cases the plaintiffs' claims were based in tort law (both vicarious liability and direct liability), breaches of fiduciary duties and breaches of non-delegable statutory duties. While, as noted above, there are pending claims that do not relate to physical or sexual assault, to date the damages in all successful claims have essentially been confined to damages for assault.¹⁶⁷ The facts of these cases are outlined, before the issues and conclusions in these key cases are examined. The factual circumstances of these cases are tragic and anyone who has read the judgments would be moved by the plaintiffs' plight. The summary below cannot, however, adequately detail the impact of both the removal of the children from their families and the sexual assaults upon them. It is nevertheless important to provide some detail so the cases can be examined in their factual background. As noted above, readers should be aware that the nature of this detail is fairly, but necessarily, explicit.

In *Blackwater v Plint (No 1)*¹⁶⁸ the plaintiffs' sought damages for sexual assaults committed against them by the defendant, Plint, while they were resident at the Alberni Indian Residential School ('AIRS'). In *Blackwater v Plint (No 1)*¹⁶⁹ the court's findings against Canada and the United Church of Canada were confined to the issue of vicarious liability. In *Blackwater v Plint (No 2)*¹⁷⁰ the issues of, *inter alia*, the direct liability of the perpetrator, the church and Canada for

¹⁶⁶ *A(TWN) v Clarke*, note 19.

¹⁶⁷ Note, however, that in the cases that have been determined the plaintiffs did also claim damages for loss of language and cultural loss. However, the damages ordered were ultimately tied to the assaults. For example, in *Blackwater v Plint (No 2)*, note 19, at 270 the plaintiffs alleged that Canada had breached its fiduciary duty by "removing the plaintiffs from their communities, homes and families and causing them to be transported and placed at AIRS [the subject Residential School], depriving them of family love and guidance, friendship and support of their community, and knowledge of the language, culture, customs and traditions of their nation." A breach of fiduciary duty was also claimed against both Canada and the church in the operation of the schools where they were "systematically subjected to abuse, mistreatment and racist ridicule and harassment".

¹⁶⁸ *Blackwater v Plint (No 1)*, note 19.

¹⁶⁹ *Blackwater v Plint (No 1)*, note 19, at [14].

¹⁷⁰ *Blackwater v Plint (No 2)*, note 19.

negligence, breaches of fiduciary duties and non-delegable statutory duties were determined.¹⁷¹

The plaintiffs were all Canadian Indians under the *Indian Act 1927*.¹⁷² Attendance at a Native Residential School was mandatory under the *Indian Act 1927*.¹⁷³ As noted above, Truant Officers were empowered under the Act to force attendance by bringing charges against any parent or guardian who failed to cause an Indian child to attend such a school.¹⁷⁴ Such Truant Officers were also empowered to take any Indian child into custody to convey them to a school “using as much force as the circumstances require”. All the plaintiffs attended AIRS during various years between 1943 and 1970.¹⁷⁵

The Presbyterian Church had founded AIRS in 1891.¹⁷⁶ It was initially administered by that church and, in turn, the United Church from 1925 onwards when the former church combined with two other religions to form the United Church.¹⁷⁷ AIRS operated with periodic government funding.¹⁷⁸ Canada and the church entered into a written agreement in this regard in 1911.¹⁷⁹ Under the 1911 agreement the church agreed to manage the school, including employing qualified teachers and officers, in particular, the principal.¹⁸⁰ Management was to be in accordance with government regulations and standards; in

¹⁷¹ See *Blackwater v Plint (No 1)*, note 19, at [10]. Note, the perpetrator’s liability was not, in essence, in issue as he had already been convicted for the assaults. The quantification of the damages was in issue, however, and is discussed below.

¹⁷² *Blackwater v Plint (No 1)*, note 19, at [1].

¹⁷³ The court in *Blackwater v Plint (No 1)*, note 19, at [32] noted that under s 10(1), (3) and (4) of the *Indian Act, 1927* it was mandatory for Indian children between the ages of 7 and 15 to attend an Indian school. Similarly, under ss 115,116 and 118 of 1951 Act it was, *inter alia*, mandatory for Indian children between the ages of 6 and 16 to attend an Indian school: *Blackwater v Plint (No 1)*, note 19, at [34].

¹⁷⁴ *Blackwater v Plint (No 1)*, note 19, at [32] and [34].

¹⁷⁵ *Blackwater v Plint (No 1)*, note 19, at [1].

¹⁷⁶ *Blackwater v Plint (No 1)*, note 19, at [2] and [36].

¹⁷⁷ *Blackwater v Plint (No 1)*, note 19, at [2].

¹⁷⁸ *Blackwater v Plint (No 1)*, note 19, at [2] and [36].

¹⁷⁹ *Blackwater v Plint (No 1)*, note 19, at [2] and [3].

¹⁸⁰ *Blackwater v Plint (No 1)*, note 19, at [36], [42] and [54]. Note, the 1911 agreement had a five year expiry term, but it was felt unnecessary to renew the agreement as the parties had an understanding that the course of conduct would continue until the 1962 Agreement, discussed below: *Blackwater v Plint (No 1)*, note 19, at [43]-[46].

return for such management the church received funding on a *per capita* basis.¹⁸¹ On two occasions, 1917 and 1937, the main buildings of the school burned down and on both occasions the government rebuilt the school.¹⁸²

A further agreement was signed in 1962.¹⁸³ Again, under the agreement the church was designated the responsibility of managing AIRS¹⁸⁴ in accordance with government rules and regulations.¹⁸⁵ The appointment of teaching staff was, however, now the responsibility of the relevant Minister, but in consultation with the church.¹⁸⁶ In the case of the principal of the school, the church would nominate a person and, if they were considered acceptable by Canada, the church would employ them.¹⁸⁷ The court noted in *Blackwater v Plint (No 1)*¹⁸⁸ that this practice in regard to the principal's appointment in fact pre-dated the 1962 agreement and was relevant to the appointment of the three principals in the period under consideration in that case. The school principal in turn reported directly to a church official, the Assistant Secretary of the Board of Home Missions,¹⁸⁹ but was also required to provide certain reports to the government.¹⁹⁰ The actual removal of Indian children from their homes and placement at AIRS was, however, effected by Canada, through its Department of Indian Affairs.¹⁹¹ Upon placement the school principal became the child's legal guardian.¹⁹² Canada's role in the conduct of AIRS was, therefore, more than just budgetary. It included the children's

¹⁸¹ *Blackwater v Plint (No 1)*, note 19, at [36], [42] and [78].

¹⁸² *Blackwater v Plint (No 1)*, note 19, at [37] and [39]. In regard to the 1917 fire the church also conveyed to the government 16 acres of land on which the new school was to be built.

¹⁸³ *Blackwater v Plint (No 1)*, note 19, at [50]. Note, funding had changed to the controlled cost system by then: *Blackwater v Plint (No 1)*, note 19, at [47].

¹⁸⁴ *Blackwater v Plint (No 1)*, note 19, at [52]-[53].

¹⁸⁵ These included the 1953 Indian Residential School Regulations, detailed above, and an Indian Affairs Branch Field Manual, produced in 1960: *Blackwater v Plint (No 1)*, note 19, at [79]-[86] and [88].

¹⁸⁶ *Blackwater v Plint (No 1)*, note 19, at [53] and [89].

¹⁸⁷ *Blackwater v Plint (No 1)*, note 19, at [53]-[54], [65] and [89].

¹⁸⁸ *Blackwater v Plint (No 1)*, note 19, at [54]-[55].

¹⁸⁹ *Blackwater v Plint (No 1)*, note 19, at [60].

¹⁹⁰ *Blackwater v Plint (No 1)*, note 19, at [62].

¹⁹¹ *Blackwater v Plint (No 1)*, note 19, at [63].

¹⁹² *Blackwater v Plint (No 1)*, note 19, at [56] and [74].

placement in, and discharge from, AIRS and also a supervisory role in the conduct of the school.¹⁹³ In regard to the latter, evidence was provided as to government inspections of AIRS.¹⁹⁴

In 1965 classroom instruction at AIRS ceased; the children being bussed to local schools.¹⁹⁵ On 1 April 1969 Canada took over complete operation of AIRS and operated it until it closed in 1973.¹⁹⁶

Plint was employed as a dormitory supervisor at AIRS from 1948 to approximately 1953 and then again between 1963 and 1968.¹⁹⁷ Dormitory supervisors were responsible for the “daily care and well being of the resident children ...”.¹⁹⁸ Plint reported to, and worked under the direction of, the principal of AIRS.¹⁹⁹ The principal had the power to hire and fire dormitory supervisors.²⁰⁰ During the period from when Plint was first hired as a dormitory supervisor to his dismissal in 1968, the principals were Caldwell (1944-1959), Dennys (1959-1962) and Andrews (1962-1973).²⁰¹

In 1995 and 1997 Plint was convicted of multiple counts of sexual assault involving many of the plaintiffs in *Blackwater v Plint (No 1)*.²⁰² In regard to such plaintiffs, Canada and the church admitted the sexual assaults.²⁰³ A number of the plaintiffs, however, including FLB, RF, RJJ, DBSW, MSW and MBW, gave evidence as to assaults for which Plint had not been criminally tried.²⁰⁴ After hearing the evidence and noting that neither the church nor Canada denied that

193 *Blackwater v Plint (No 1)*, note 19, at [72]-[76], [83] and [86].

194 *Blackwater v Plint (No 1)*, note 19, at [76].

195 *Blackwater v Plint (No 1)*, note 19, at [40].

196 *Blackwater v Plint (No 1)*, note 19, at [3].

197 *Blackwater v Plint (No 1)*, note 19, at [4].

198 *Blackwater v Plint (No 1)*, note 19, at [4].

199 *Blackwater v Plint (No 1)*, note 19, at [4] and [28].

200 *Blackwater v Plint (No 1)*, note 19, at [28].

201 *Blackwater v Plint (No 1)*, note 19, at [5].

202 *Blackwater v Plint (No 1)*, note 19, at [11].

203 *Blackwater v Plint (No 1)*, note 19, at [11]. See *Blackwater v Plint (No 2)*, note 19, at 237.

204 *Blackwater v Plint (No 1)*, note 19, at [12]. Note that evidence was also given by Ms MJ regarding alleged sexual assaults upon her by Caldwell. The court in *Blackwater v Plint (No 2)*, note 19, at 242 found that her allegations were not proved to the requisite standard.

Plint had sexually assaulted any of the plaintiffs, the court accepted that each of the plaintiffs had been assaulted at least once by Plint.²⁰⁵ In this regard, the court noted that to determine the issue of vicarious liability proof of one assault sufficed.²⁰⁶ The issue of the frequency and severity of the assaults was reserved for consideration in *Blackwater v Plint (No 2)*²⁰⁷ where, *inter alia*, damages were assessed.²⁰⁸

The particular circumstances of each of the plaintiffs in *Blackwater v Plint (No 1)*²⁰⁹ whose assaults had not previously been proven at the criminal trials of Plint are briefly outlined. This detail is important because it not only emphasises the tragic human side of such litigation, but also reveals the frequency of the assaults, which is in turn relevant to whether the defendants were aware, or should have been aware, of Plint's abuse of the plaintiffs.

FLB testified that Plint first assaulted him in his second year at AIRS in approximately 1963.²¹⁰ He was taken to Plint's office and forced to perform oral sex.²¹¹ The second assault involved Plint beating him so badly that FLB spent the weekend in the infirmary.²¹² Plint also sodomized FLB.²¹³ On two other occasions Plint forced FLB to perform oral sex.²¹⁴ FLB testified that he told the principal, Andrews, what Plint was doing to him. Andrews responded by strapping him and telling him he did not believe him and that he should not say such things about people who were taking care of him.²¹⁵ FLB testified that he also told his mother that Plint was "doing bad things to him and really hurting him".²¹⁶

205 *Blackwater v Plint (No 1)*, note 19, at [13].

206 *Blackwater v Plint (No 1)*, note 19, at [12].

207 *Blackwater v Plint (No 2)*, note 19.

208 *Blackwater v Plint (No 1)*, note 19, at [13].

209 *Blackwater v Plint (No 1)*, note 19, at [11].

210 *Blackwater v Plint (No 2)*, note 19, at 237.

211 *Blackwater v Plint (No 2)*, note 19, at 237-238.

212 *Blackwater v Plint (No 2)*, note 19, at 238.

213 *Blackwater v Plint (No 2)*, note 19, at 238.

214 *Blackwater v Plint (No 2)*, note 19, at 238.

215 *Blackwater v Plint (No 2)*, note 19, at 238.

216 *Blackwater v Plint (No 2)*, note 19, at 238.

RF testified that Plint first sexually assaulted him when he was in Grade 7 and staying in Dorm 3.²¹⁷ The assault occurred in Plint's office and involved oral sex, masturbation and attempts at anal sex.²¹⁸ This occurred on two occasions.²¹⁹ RF testified to a further ten incidents after he was moved from Dorm 3, when Plint was still able to take him from his dormitory to Plint's room where he was assaulted.²²⁰ Plint also sexually assaulted him on a further six occasions when Plint took him to a motel off the AIRS' grounds.²²¹ Plint told him that if he ever told anyone about the assaults he would never see his parents again and would never go home.²²²

RJJ gave evidence that Plint sexually assaulted him during his first year at AIRS, in 1949.²²³ This involved fondling and oral sex in Plint's office.²²⁴ RJJ gave evidence of another particular assault when he was nine years old and the court accepted that a further unspecified number of sexual assaults occurred.²²⁵ The court also accepted that RJJ was threatened by Plint not to disclose the assaults.²²⁶

DBSW testified that Plint first sexually assaulted him when he was approximately eight years old, when Plint was his dormitory supervisor.²²⁷ This assault and the subsequent assault involved Plint forcing him to fondle him through his clothing.²²⁸

MSW gave evidence that he was first sexually assault by Plint at the end of the first month he was at AIRS, in 1964.²²⁹ The first assault involved fondling and Plint performing oral sex on MSW.²³⁰ A few

217 *Blackwater v Plint (No 2)*, note 19, at 238.

218 *Blackwater v Plint (No 2)*, note 19, at 238-239.

219 *Blackwater v Plint (No 2)*, note 19, at 239.

220 *Blackwater v Plint (No 2)*, note 19, at 239.

221 *Blackwater v Plint (No 2)*, note 19, at 239.

222 *Blackwater v Plint (No 2)*, note 19, at 239.

223 *Blackwater v Plint (No 2)*, note 19, at 239.

224 *Blackwater v Plint (No 2)*, note 19, at 239-240.

225 *Blackwater v Plint (No 2)*, note 19, at 240.

226 *Blackwater v Plint (No 2)*, note 19, at 240.

227 *Blackwater v Plint (No 2)*, note 19, at 243.

228 *Blackwater v Plint (No 2)*, note 19, at 243.

229 *Blackwater v Plint (No 2)*, note 19, at 243.

230 *Blackwater v Plint (No 2)*, note 19, at 243.

weeks later Plint assaulted him again, this time requiring him to perform oral sex on Plint.²³¹ He gave evidence that he was then sick and Plint hit him and then anally raped him.²³² Initially the assaults on MSW occurred one to three times a week and then once a week during the remainder of the three years he was at AIRS.²³³

MBW alleged in his pleadings that Plint fondled and masturbated him and forced him to do the same to Plint.²³⁴ He did not testify at the trial, the defendants admitting that Plint assaulted him between 1 January 1961 and 31 December 1963.²³⁵

The plaintiff in *Mowatt*²³⁶ claimed against the defendants for negligence, breach of fiduciary duty and vicarious liability.²³⁷ The plaintiff was of Canadian Indian descent. He was a “Status Indian” under the *Indian Act, 1952*. Thus again attendance and residency at a Native Residential School was mandatory under s 115 *Indian Act 1952*.²³⁸ A local Indian agent determined the plaintiff’s placement in the St George’s Residential School (St George’s).²³⁹ He had been living in foster homes for several years as there was a familial history of alcoholism and abuse.²⁴⁰ Nevertheless it was his mother who took him, his brothers and several other children to the bus that took them to St George’s. His mother had previously signed the Department of Indian Affairs application form for the school and gave guardianship to the Crown until his return to her custody.²⁴¹

The Anglican Church, through its predecessor, the Church of England, began a school for native boys in 1867 and a school for native girls in 1884.²⁴² In 1901, at the request of the local bishop, St George’s was founded by the New England Company (NEC), a missionary society

231 *Blackwater v Plint (No 2)*, note 19, at 243.

232 *Blackwater v Plint (No 2)*, note 19, at 243.

233 *Blackwater v Plint (No 2)*, note 19, at 243-244.

234 *Blackwater v Plint (No 2)*, note 19, at 244.

235 *Blackwater v Plint (No 2)*, note 19, at 244.

236 *Mowatt*, note 19.

237 *Mowatt*, note 19, at 304.

238 *Mowatt*, note 19, at 305.

239 *Mowatt*, note 19, at 305.

240 *Mowatt*, note 19, at 306.

241 *Mowatt*, note 19, at 306-307.

242 *Mowatt*, note 19, at 313.

of the Church of England.²⁴³ By 1921 the NEC was having financial difficulty operating the school and entered into an agreement with Canada in 1922 for the lease of the school buildings and lands.²⁴⁴ The Federal Government provided most of the funding for the subject school from that date onwards.²⁴⁵ The NEC also provided some funding for the conduct of St George's.²⁴⁶ In 1927 Canada purchased the lands from the NEC at less than valuation in exchange for a government promise that it would continue the Indian School and train the students in the Anglican Church.²⁴⁷ St George's was closed in 1979.²⁴⁸

Even after the 1927 agreement it was understood that both parties would remain associated in the management of St George's.²⁴⁹ The principal of the school would continue to be a clergyman appointed by the NEC, upon the recommendation of the bishop of the diocese.²⁵⁰ The church undertook the day to day running of the school.²⁵¹ The government's role in the school was essentially supervisory, except for its responsibility for the physical premises at the school.²⁵² The Department of Indian Affairs, not the church, however, also determined which children were sent to the school.

The court in *Mowatt*²⁵³ found that St George's was a "religious institution run with military precision." Dormitory supervisors had control over every waking moment of the boys' existence, apart from their schooling.²⁵⁴ The plaintiff in *Mowatt*²⁵⁵ entered St George's in September 1969 when he was eight. From the age of nine, and over a two-year period, his dormitory supervisor, Clarke, sexually assaulted

²⁴³ *Mowatt*, note 19, at 313.

²⁴⁴ *Mowatt*, note 19, at 314.

²⁴⁵ *Mowatt*, note 19, at 320.

²⁴⁶ *Mowatt*, note 19, at 316 and 320.

²⁴⁷ *Mowatt*, note 19, at 315.

²⁴⁸ *Mowatt*, note 19, at 321.

²⁴⁹ *Mowatt*, note 19, at 315.

²⁵⁰ *Mowatt*, note 19, at 316.

²⁵¹ *Mowatt*, note 19, at 321.

²⁵² *Mowatt*, note 19, at 320 and 321.

²⁵³ *Mowatt*, note 19, at 305.

²⁵⁴ *Mowatt*, note 19, at 306.

²⁵⁵ *Mowatt*, note 19, at 306.

the plaintiff and other boys.²⁵⁶ Initially the assaults involved fondling under the plaintiff's blankets.²⁵⁷ All subsequent assaults occurred in Clarke's room, adjacent to the dorm, and involved anal intercourse and forcing the plaintiff to perform oral sex on Clarke.²⁵⁸ The sexual assaults on the other boys, detailed below, similarly involved anal rape and oral sex. The sexual assaults occurred with "incredible frequency", some boys being assaulted two or three times a week.²⁵⁹ Clarke took his "favoured boys" away for weekend trips, when the sexual assaults would occur in motel rooms.²⁶⁰ Such trips required the permission of the school principal.²⁶¹

The court found that the boys' sexual behaviour in the playground revealed Clarke's secrets and that the principal of St George's, Harding, and the principal of the elementary school, Chute, were told of the sexual assaults in 1973.²⁶² The matter was covered up.²⁶³ It appears Clarke was told to resign and Harding gave him a letter of recommendation.²⁶⁴ There was no further investigation.²⁶⁵ The plaintiff and the other boys abused by Clarke were not given counselling or guidance²⁶⁶ and the parents of those children involved were never informed.²⁶⁷ Harding did tell the chaplain and local pastor, Reverend Dixon, and there was evidence that Harding and Chute told the bishop of the day.²⁶⁸ Staff at the Elementary School and the local Anglican community were also aware of the assaults.²⁶⁹ The Department of Indian Affairs was, however, never informed about Clarke's misconduct.²⁷⁰ It appears Harding sought to cover up

²⁵⁶ *Mowatt*, note 19, at 307.

²⁵⁷ *Mowatt*, note 19, at 307.

²⁵⁸ *Mowatt*, note 19, at 307.

²⁵⁹ *Mowatt*, note 19, at 308.

²⁶⁰ *Mowatt*, note 19, at 308.

²⁶¹ *Mowatt*, note 19, at 308.

²⁶² *Mowatt*, note 19, at 308. See also *A(TWN) v Clarke*, note 19, at 256 and 280.

²⁶³ *Mowatt*, note 19, at 346.

²⁶⁴ *Mowatt*, note 19, at 309-310.

²⁶⁵ *Mowatt*, note 19, at 310.

²⁶⁶ *Mowatt*, note 19, at 346.

²⁶⁷ *Mowatt*, note 19, at 311, 312 and 346.

²⁶⁸ *Mowatt*, note 19, at 310.

²⁶⁹ *Mowatt*, note 19, at 310.

²⁷⁰ *Mowatt*, note 19, at 310 and 346.

Clarke's assaults as Harding was also sexually assaulting the boys.²⁷¹ Harding did not want an investigation at the school.²⁷² The diocesan personnel's motive for the cover up seemed to have been their concern that the subject school not attract attention as at the time other Native Residential Schools were being closed.²⁷³

*A(TWN) v Clarke*²⁷⁴ was determined on the basis of an admission of liability by both Canada and the Anglican Church of Canada following the findings in *Mowatt*.²⁷⁵ The plaintiffs were all students at the same Native Residential School considered in *Mowatt*.²⁷⁶ Clarke had sexually abused each plaintiff. Harding also sexually assaulted two of the plaintiffs.²⁷⁷ The plaintiffs' particular circumstances are briefly outlined. Again, this is important because they not only emphasise the human side of such litigation, but also show that not all of the students were taken from their families partly or wholly as what may be called a welfare measure. Moreover, again the facts reveal the frequency of the assaults that in turn relates to whether the defendants were aware, or should have been aware, of Clarke's abuse. Each of the plaintiffs later developed severe psychological conditions, including sexual disorders, post-traumatic stress disorder, suicidal tendencies and extreme depression as a consequences of the assaults.

EAJ was aged six when he started at St George's.²⁷⁸ It seems that he had previously lived a happy life with his extended family on a ranch some distance from the school.²⁷⁹ EAJ's sister, who also attended the school, testified that she was told they had to attend the school because where they lived was too isolated and that if she did not go to the school their parents would go to jail and they would never see them again.²⁸⁰ She also gave evidence as to how students at St George's

271 *Mowatt*, note 19, at 310-312. See also *A(TWN) v Clarke*, note 19, at 253.

272 *Mowatt*, note 19, at 312 and 346.

273 *Mowatt*, note 19, at 312-313 and 346.

274 *A(TWN) v Clarke*, note 19, at 255.

275 *Mowatt*, note 19.

276 *Mowatt*, note 19.

277 *A(TWN) v Clarke*, note 19, at 253.

278 *A(TWN) v Clarke*, note 19, at 255.

279 *A(TWN) v Clarke*, note 19, at 255 and 259.

280 *A(TWN) v Clarke*, note 19, at 259.

were punished for speaking or, in her case, listening to, their native languages.²⁸¹

When EAJ was eight or nine he was moved from the junior dormitory to the intermediate dormitory, where Clarke was the supervisor.²⁸² Some months after the move Clarke arranged a work task that required EAJ to go to Clarke's room where Clarke sexually assaulted him.²⁸³ Many further assaults followed, including fondling, oral sex and anal rape.²⁸⁴ It was EAJ's evidence that when asked, he told Chute that Clarke was sexually assaulting him and that during this meeting Harding was standing in the doorway.²⁸⁵ He said his parents were not told and he was given no assistance in dealing with the trauma he experienced.²⁸⁶ He did not tell his mother of the assaults as he blamed her for "signing [him] in and leaving [him]" at the school.²⁸⁷

TWNA also gave evidence of a happy existence prior to entering St George's. Initially he lived on a ranch, near the ranch where EAJ had lived, with his paternal grandparents and a number of aunts, uncles and cousins.²⁸⁸ Later he lived with his mother in Vancouver and then in time with his maternal grandparents on an Indian Reserve.²⁸⁹ He and a cousin were taken to St George's by his mother and an aunt to enter Grade 1.²⁹⁰

TWNA was moved to the intermediate dormitory, supervised by Clarke, in Grade 3.²⁹¹ Clarke repeatedly sexually assaulted him as much "as he possibly could" over the next four years.²⁹² The only time TWNA was free of the assaults was when he was sick with mumps, measles and flu and was eventually admitted to hospital.²⁹³

281 *A(TWN) v Clarke*, note 19, at 260.

282 *A(TWN) v Clarke*, note 19, at 255.

283 *A(TWN) v Clarke*, note 19, at 255.

284 *A(TWN) v Clarke*, note 19, at 255, 256 and 258.

285 *A(TWN) v Clarke*, note 19, at 256.

286 *A(TWN) v Clarke*, note 19, at 256.

287 *A(TWN) v Clarke*, note 19, at 258.

288 *A(TWN) v Clarke*, note 19, at 260.

289 *A(TWN) v Clarke*, note 19, at 260-261.

290 *A(TWN) v Clarke*, note 19, at 261.

291 *A(TWN) v Clarke*, note 19, at 261.

292 *A(TWN) v Clarke*, note 19, at 261 and 262.

293 *A(TWN) v Clarke*, note 19, at 262.

The assaults did not stop even once he left St George's in Grade 6.²⁹⁴ Clarke contacted TWNA's father, with whom TWNA was living in Seattle, and while visiting Seattle Clarke sexually assaulted TWNA on four occasions.²⁹⁵ The assaults included fondling, oral sex and anal rape.²⁹⁶ TWNA gave evidence as to his efforts to re-immense himself in his cultural heritage that had been lost through attendance at the school.²⁹⁷

Prior to going to St George's, ERM lived a happy existence with his parents and extended family on a homestead about eight miles south of St George's.²⁹⁸ ERM was taken by, *inter alia*, his mother to St George's in 1961 when he was six years old.²⁹⁹ His mother testified that the Indian Agent had told her that if she did not send her children to the school she would go to jail.³⁰⁰

After about three years at the school ERM was transferred to the junior intermediate dormitory where Clarke was the supervisor.³⁰¹ He testified that Clarke "inspected" the boys' after their evening bath and if he was at the end of the line he knew he would be the one that would be taken back to Clarke's room and sexually abused.³⁰² Initially the abuse involved fondling, but the second assault involved attempted anal rape and from then on, two or three times a week, he was sodomized.³⁰³ After the first assault he told his parents and extended family that he did not want to go back to the school, but he did not tell them why.³⁰⁴ A Mr Brigden, who was a counsellor at Kumsheen Secondary School where ERM attended in the 1970's, also subsequently sexually abused him.³⁰⁵ ERM gave evidence that he could no longer speak his Native language because "his family and

294 *A(TWN) v Clarke*, note 19, at 262.

295 *A(TWN) v Clarke*, note 19, at 262-263.

296 *A(TWN) v Clarke*, note 19, at 262.

297 *A(TWN) v Clarke*, note 19, at 266.

298 *A(TWN) v Clarke*, note 19, at 270.

299 *A(TWN) v Clarke*, note 19, at 269 and 270.

300 *A(TWN) v Clarke*, note 19, at 276.

301 *A(TWN) v Clarke*, note 19, at 271.

302 *A(TWN) v Clarke*, note 19, at 271.

303 *A(TWN) v Clarke*, note 19, at 271.

304 *A(TWN) v Clarke*, note 19, at 272.

305 *A(TWN) v Clarke*, note 19, at 272.

way of life were taken from him”³⁰⁶ through the forced attendance at St George’s.

GBS originally lived with his mother and siblings on Indian Reserve No. 17, not far from where St George’s was located.³⁰⁷ One of GBS’s uncles is EAJ.³⁰⁸ At the beginning of Grade 3 he was enrolled into the residence at St George’s because he had been missing too much school.³⁰⁹ In Grade 4 he was moved to the intermediate dormitory.³¹⁰ During his first year in this dormitory he found that he was assigned the chore of cleaning Clarke’s room.³¹¹ Clarke would ensure that GBS was continually assigned this chore.³¹² Again, initially the assaults involved fondling, but by the third assault they also included anal rape.³¹³ Over a period of approximately 18 months the assaults occurred in Clarke’s room once or twice a month.³¹⁴ In addition, Clarke assaulted GBS when Clarke took him and four or five other boys to Vancouver.³¹⁵ Ultimately, GBS refused to return to St George’s.³¹⁶ When Chute asked him why, he told Chute and Harding that Clarke had been sexually assaulting him.³¹⁷ He said that his parents were not told and he was offered no help or counselling to deal with his trauma.³¹⁸

³⁰⁶ *A(TWN) v Clarke*, note 19, at 275.

³⁰⁷ *A(TWN) v Clarke*, note 19, at 278.

³⁰⁸ *A(TWN) v Clarke*, note 19, at 278.

³⁰⁹ *A(TWN) v Clarke*, note 19, at 278.

³¹⁰ *A(TWN) v Clarke*, note 19, at 278-279.

³¹¹ *A(TWN) v Clarke*, note 19, at 279.

³¹² *A(TWN) v Clarke*, note 19, at 279 and 280.

³¹³ *A(TWN) v Clarke*, note 19, at 279.

³¹⁴ *A(TWN) v Clarke*, note 19, at 279.

³¹⁵ *A(TWN) v Clarke*, note 19, at 280.

³¹⁶ *A(TWN) v Clarke*, note 19, at 280.

³¹⁷ *A(TWN) v Clarke*, note 19, at 280.

³¹⁸ *A(TWN) v Clarke*, note 19, at 280.

2. Vicarious liability

In *Blackwater v Plint (No 1)*³¹⁹ and *Mowatt*,³²⁰ Canada and the churches (the United Church of Canada and the Anglican Church of Canada) were held to be vicariously liable for the sexual assaults upon the plaintiffs by the perpetrators. In *A(TWN) v Clarke*,³²¹ on the basis of the previous finding of liability in *Mowatt*,³²² vicarious liability was admitted by Canada and the Anglican Church of Canada.

In *Blackwater v Plint (No 1)*³²³ the plaintiffs contended that both the United Church of Canada and Canada were vicariously liable for, *inter alia*, Plint's assaults.³²⁴ Canada asserted that the church was solely vicariously liable as it was the church that operated and managed the AIRS, including hiring and supervising its staff, in particular the principal and Plint.³²⁵ The church in turn argued that Canada was Plint's employer, asserting that the government directed and controlled all aspects of AIRS, including the employment of staff.³²⁶ It also contended that the reality was that it acted solely as an agent of the government.³²⁷

It was, therefore, necessary for the court to determine which entity, Canada or the church, was the controlling entity of AIRS; namely the entity which controlled the method of execution of the school; to determine who was responsible for Plint's conduct.³²⁸ While, as

³¹⁹ *Blackwater v Plint (No 1)*, note 19.

³²⁰ *Mowatt*, note 19.

³²¹ *A(TWN) v Clarke*, note 19.

³²² *Mowatt*, note 19.

³²³ *Blackwater v Plint (No 1)*, note 19.

³²⁴ *Blackwater v Plint (No 1)*, note 19, at [15]. They also contended that the church and government were vicariously liable for the breaches of fiduciary duty and duty of care by the principals of AIRS at the relevant time, namely Caldwell, Dennys and Andrews: *Blackwater v Plint (No 1)*, note 19, at [15]. These matters are discussed below under duty of care and fiduciary duty.

³²⁵ *Blackwater v Plint (No 1)*, note 19, at [16], [28], [92] and [120].

³²⁶ *Blackwater v Plint (No 1)*, note 19, at [16], [28] and [93].

³²⁷ *Blackwater v Plint (No 1)*, note 19, at [93].

³²⁸ *Blackwater v Plint (No 1)*, note 19, at [29] and [120]-[126]. Note the court also considered the four-part test (control, ownership of the tools, chance of profit and risk of loss) applied by the Privy Council in *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161, but held the facts in this case were distinguishable and the former case did not involve the issue of vicarious liability for the actions

noted above, Plint answered to the school principal and the court found that the principal had the right to hire and fire dormitory supervisors, AIRS was held not to be Plint's employer as AIRS was not a separate legal entity.³²⁹

After considering the relevant statutes and agreements between the church and Canada and the historical development of the Native Residential Schools, the court concluded that both the church and the government were Plint's employer. The court found there was "sufficient joint control and a co-operative advancement of the respective interests" of the church and Canada that the conduct of AIRS was a joint venture.³³⁰ To this end the court noted that the conduct of the Native Residential Schools had long been a joint operation between the church and the government.³³¹ Both Canada and the church were directly involved with, and executed effective and joint control over activities at AIRS, including dormitory supervisors such as Plint, through the office of the principal and through an informal partnership that benefited both the church and Canada.³³² The principal of the school was consequently held to be a representative of both the government³³³ and the church.³³⁴ Both the church and Canada were involved in the appointment of the principals of the school, received reports from the principals and inspected AIRS.³³⁵ In regard to Canada it was noted that it had issued many

of an employee: *ibid* para 135. Similarly, see also the court's discussion of *Re Delta Parking Systems Ltd and Township of Toronto* (1964) 48 DLR (2d) 130: *ibid* paras 144-150. Even if the test were applied to these circumstances, the Court held that only one factor (ownership of tools) assisted the church in its claims that Canada was the sole employer: *ibid* para 136. Both the church and Canada exercised joint control over the school and their interests/obligations were advanced through such joint conduct: *ibid* paras 137-140, 143 and 148. Similarly, the court held that the "organization test", formulated by Lord Denning in *Stevenson Jordan and Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101 at 111, was the same as the "whose business test" and, as discussed below, the court found AIRS was the "business" of both Canada and the church: *Blackwater v Plint (No 1)*, note 19, at [143].

329 *Blackwater v Plint (No 1)*, note 19, at [29].

330 *Blackwater v Plint (No 1)*, note 19, at [151].

331 *Blackwater v Plint (No 1)*, note 19, at [94]-[101].

332 *Blackwater v Plint (No 1)*, note 19, at [119], [121], [125], [137] and [151].

333 *Blackwater v Plint (No 1)*, note 19, at [121]-[126] and [137].

334 *Blackwater v Plint (No 1)*, note 19, at [121], [137] and [139]-[140].

335 *Blackwater v Plint (No 1)*, note 19, at [102].

instructions directly to the principal.³³⁶ It was also noted that both the church and Canada were involved in the training programs for dormitory supervisors.³³⁷ Further, as detailed above, the standards and regulations for the operation of AIRS were established by the government.³³⁸ The court therefore concluded that Canada had not transferred responsibility for all aspects of the operations of AIRS to the church.³³⁹

Canada was also held not to be the sole controlling entity as the church was found to be a controlling entity.³⁴⁰ The court noted that the “business” of each entity was furthered through the joint conduct of the schools. In the case of the government, its “business” was the fulfillment of its obligations under the *Indian Act*.³⁴¹ In the case of the church, its “business” was ministering First Nations children to provide them with a christian education.³⁴²

In turn, the court found both the church and the government vicariously liable for the sexual assaults committed by Plint.³⁴³ In determining such vicarious liability, the court held that there were two tests to be considered, the “conferral of authority test” and the “closeness of connection test.”³⁴⁴ Under the conferral of authority test it had to be established that there was a sufficient nexus between Plint’s duties and his misconduct.³⁴⁵ Whether a sufficient nexus exists depends upon the nature of the power conferred upon the employee and the likelihood that the conferral of power will make probable the very wrong that occurred.³⁴⁶ The court held that Plint had been conferred with the necessary authority over the children to satisfy this test and this conferral of power was sufficiently connected

³³⁶ *Blackwater v Plint (No 1)*, note 19, at [104] and [123].

³³⁷ *Blackwater v Plint (No 1)*, note 19, at [103].

³³⁸ *Blackwater v Plint (No 1)*, note 19, at [103].

³³⁹ *Blackwater v Plint (No 1)*, note 19, at [104].

³⁴⁰ *Blackwater v Plint (No 1)*, note 19, at [10].

³⁴¹ *Blackwater v Plint (No 1)*, note 19, at [119], [125], [138] and [143].

³⁴² *Blackwater v Plint (No 1)*, note 19, at [119], [139] and [143].

³⁴³ *Blackwater v Plint (No 1)*, note 19, at [151].

³⁴⁴ *Blackwater v Plint (No 1)*, note 19, at [22]-[23], relying on *B(PA) v Curry* (1997) 146 DLR (4th) 72.

³⁴⁵ *Blackwater v Plint (No 1)*, note 19, at [23].

³⁴⁶ *Blackwater v Plint (No 1)*, note 19, at [23].

to the wrong. The court held that as a dormitory supervisor, Plint had the authority of a parent conferred upon him. Plint “in all respects functioned as [the children’s] parent” and had been entrusted with the care of the students for a good portion of each day.³⁴⁷ The court applied a quote from *B(PA) v Curry*³⁴⁸ where it was observed that when “the appellant conferred the authority of a parent” on the abuser, it had put that person “in the place of the most powerful person a child can know – that of a parent upon whom the child is totally dependent.” The court in *Blackwater v Plint (No 1)*³⁴⁹ asserted these sentiments were equally applicable to the position Plint occupied in relation to the plaintiffs whilst they were at AIRS.³⁵⁰ As to the second test, the closeness of connection test, as virtually all of Plint’s assaults occurred in his office or adjoining bedroom there was a close connection, both temporally and spatially, between his duties as a dormitory supervisor and the acts of wrongdoing.³⁵¹ Thus both tests were satisfied on the facts and the defendants were held to be vicariously liable for Plint’s acts.

After examining the reasoning and findings in *Blackwater v Plint (No 1)*,³⁵² the court in *Mowatt*³⁵³ similarly held that Canada and the Anglican Church,³⁵⁴ as joint employers of Clarke, were jointly and severally vicariously liable for Clarke’s assaults on the plaintiff. As in *Blackwater v Plint (No 1)*,³⁵⁵ the court in *Mowatt*³⁵⁶ held St

347 *Blackwater v Plint (No 1)*, note 19, at [24].

348 *Blackwater v Plint (No 1)*, note 19, at [22]-[23], relying on *B(PA) v Curry* (1997) 146 DLR (4th) 72 at 100.

349 *Blackwater v Plint (No 1)*, note 19.

350 *Blackwater v Plint (No 1)*, note 19, at [25]. By contrast in *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia*, note 136 at [54] the court found that the employment duties of the perpetrator, Saxey, had not the “remotest connection to dealing with the pupils at the school in any supervisory or parental fashion. ... Although the present case involves a residential school setting that perhaps would tend to enhance some risk of improper contact between students and staff because everyone was there 24 hours every day, what occurred with respect to the plaintiff, E.B., had absolutely no connection to any duty that Saxey was required or authorized to perform on behalf of his employer”

351 *Blackwater v Plint (No 1)*, note 19, at [26].

352 *Blackwater v Plint (No 1)*, note 19.

353 *Mowatt*, note 19, at 346.

354 Note, the Anglican Church of Canada, the Diocese of Cariboo and their respective synods were not represented by separate counsel as no issue was taken regarding the identity of the religious defendants: *Mowatt*, note 19 at 334.

355 *Blackwater v Plint (No 1)*, note 19, at [29].

George's was not a separate entity that had employed Clarke. In this case Canada did not argue that it was not Clarke's employer, but simply asserted that the Anglican Church was jointly liable as co-employer.³⁵⁷ The court rejected the Anglican Church's response that it was a mere agent for Canada and that its role in St George's was merely pastoral.³⁵⁸ The court found that St George's was conducted through a joint venture between the church and the government.³⁵⁹ The "business" of St George's was the business of the church.³⁶⁰ The church had historically provided a "comprehensive administrative structure and service" to St George's, which essentially remained in place even after the changes in 1969,³⁶¹ discussed above, and these existed until at least 1974.³⁶² The court found the church "maintained control over the structure, and direction of the school", including the duties of Clarke, through the principal, who was "directly responsible to the Bishop either as lay reader or clergy, notwithstanding that the federal Crown exercised parallel authority."³⁶³ To this end the court noted that the church could, and in time did, remove Clarke from his position and did so without informing the government.³⁶⁴ "The affair was cleansed. Nobody other than Anglican diocesan personnel was informed."³⁶⁵

Applying *B(PA) v Curry*³⁶⁶ and *Blackwater v Plint (No 1)*,³⁶⁷ the court also held that the necessary strong "connection between the wrongful act and what the employer asked of the employee" existed on the facts.³⁶⁸ There was "a strong connection between the type of risk created by the employment" of Clarke as a dormitory supervisor

³⁵⁶ *Mowatt*, note 19, at 344.

³⁵⁷ *Mowatt*, note 19, at 334-335 and 344.

³⁵⁸ *Mowatt*, note 19, at 334 and 344.

³⁵⁹ *Mowatt*, note 19, at 346.

³⁶⁰ *Mowatt*, note 19, at 346.

³⁶¹ See further *Mowatt*, note 19, at 344-346.

³⁶² *Mowatt*, note 19, at 344, 345-346.

³⁶³ *Mowatt*, note 19, at 344 and 346.

³⁶⁴ *Mowatt*, note 19, at 344 and 346.

³⁶⁵ *Mowatt*, note 19, at 346.

³⁶⁶ *B(PA) v Curry*, note 344.

³⁶⁷ *Blackwater v Plint (No 1)*, note 19.

³⁶⁸ *Mowatt*, note 19, at 337 and 339.

and the sexual assault of the plaintiff.³⁶⁹ The religious, militaristic nature of the social structure of St George's meant that Clarke had been placed not only in the position of parent, but in a position of absolute control over the children's daily lives.³⁷⁰ He had access to the children in the dormitory at all hours and he intimately inspected each boy for cleanliness every night before bedtime.³⁷¹ The boys in turn were weak and vulnerable.³⁷² They could not leave the residence.³⁷³ They were miles away from home and their parents would face penalty if the boys did not attend the school.³⁷⁴ The militaristic conduct of the school also meant that it was unlikely any boy would complain of the assaults and the intimacy of the assaults also dictated that the boys would be too ashamed to tell anyone.³⁷⁵ Added to this imbalance of power the court noted that Clarke was white, as were all the other staff at the school, while the plaintiff was not.³⁷⁶ It was in this factual context that the risk created by the employer had to be assessed.³⁷⁷ The court consequently concluded that the "employer could not possibly have given an employee a greater opportunity to abuse children ...".³⁷⁸ The church and Canada were then held liable for Clarke's acts.³⁷⁹

³⁶⁹ *Mowatt*, note 19, at 339.

³⁷⁰ *Mowatt*, note 19, at 339.

³⁷¹ *Mowatt*, note 19, at 339.

³⁷² *Mowatt*, note 19, at 339.

³⁷³ *Mowatt*, note 19, at 339.

³⁷⁴ *Mowatt*, note 19, at 339.

³⁷⁵ *Mowatt*, note 19, at 339.

³⁷⁶ *Mowatt*, note 19, at 339.

³⁷⁷ *Mowatt*, note 19, at 339.

³⁷⁸ *Mowatt*, note 19, at 339.

³⁷⁹ *Mowatt*, note 19, at 340.

3. Duty of care

In *Blackwater v Plint (No 2)*³⁸⁰ the plaintiffs' claims for breach of duty of care did not succeed. The court held that on the basis of the findings of fact in *Blackwater v Plint (No 1)*,³⁸¹ in particular that the operation of AIRS was a joint venture, there was sufficient proximity on the part of both Canada and the church to find they owed the plaintiffs a duty of care.³⁸² Moreover, Canada was not immune from the claims of negligence under the doctrine that confers on the government immunity from claims that are based on flawed or inadequate policy.³⁸³ Canada's involvement in the Native Residential Schools was held to be operational, not merely a matter of policy.³⁸⁴ While the court held that Canada's decision to involve itself with the Native Residential Schools was clearly one of policy, many of the decisions made to affect that policy were operational.³⁸⁵ In particular, the plaintiffs' allegations were held to pertain to decisions that were substantially operational in nature.³⁸⁶

However, the court ultimately decided that the duty of care had not been breached. The court asserted that the standard of conduct required of the church and Canada had to be determined in accordance with the standards prevailing at the time of the offences.³⁸⁷ This was seen as particularly relevant when considering the issue of foreseeability of paedophilic behaviour.³⁸⁸ In turn, this assisted the court to conclude that the church and Canada had neither actual³⁸⁹ nor constructive knowledge of the sexual assaults. In regard to the former point the court held that neither the principal, nor any other employee of AIRS, had been told of the assaults prior to Plint being fired.³⁹⁰

380 *Blackwater v Plint (No 2)*, note 19.

381 *Blackwater v Plint (No 1)*, note 19.

382 *Blackwater v Plint (No 2)*, note 19, at 246.

383 Espoused in *Brown v British Columbia* [1994] 1 SCR 420.

384 *Blackwater v Plint (No 1)*, note 19, at 248, the court relying on *Brown v British Columbia*, note 383.

385 *Blackwater v Plint (No 2)*, note 19, at 247.

386 *Blackwater v Plint (No 2)*, note 19, at 248.

387 *Blackwater v Plint (No 2)*, note 19, at 249-250.

388 *Blackwater v Plint (No 2)*, note 19, at 249.

389 *Blackwater v Plint (No 2)*, note 19, at 256 and 269.

390 *Blackwater v Plint (No 2)*, note 19, at 256.

The finding that no employee of AIRS had knowledge of the sexual assaults is difficult to accept.³⁹¹ As the court noted in the very context of making this finding, Mr Blackwater and Mr Barney (FLB) testified that they had told Andrews, the principal of AIRS, that Plint was assaulting them.³⁹² It will also be recalled that FLB testified that when he told Andrews what Plint was doing to him, Andrews responded by reprimanding him for saying such things and physically punished him.³⁹³ Similarly, MW testified that he told a Native supervisor of the assaults, only to be chastised for “telling lies”.³⁹⁴ He also testified that he tried to tell Andrews, but he “just got a beating for telling lies...”.³⁹⁵ W also testified that he told Andrews that he was being abused by Plint, but was told to “get out of [Andrews’] office or else” Andrews would “ship” him out.³⁹⁶ The court also noted that RVJ told his public school teacher “the dirty stuff [Plint] was doing to” him, when RVJ was left injured and bloodied after the first assault by Plint.³⁹⁷ RVJ also testified that when he and another student ran away from AIRS and were asked, when apprehended by the police, why they had done this, he described to the police the nature of the sexual assaults.³⁹⁸ EM also testified that he reported the sexual abuse to the nurse at the infirmary.³⁹⁹ HW also asserted that he had told a nurse at the Nanaimo Indian Hospital that he was being abused at AIRS.⁴⁰⁰

Thus there was considerable evidence that persons, in particular, Andrews, had been told of the assaults. Despite this evidence, the court’s approach was either simply dismissive of the evidence,⁴⁰¹ or

³⁹¹ See also the above statement of facts and the discussion in *Blackwater v Plint (No 2)*, note 19, at 251-256.

³⁹² *Blackwater v Plint (No 2)*, note 19, at 251.

³⁹³ *Blackwater v Plint (No 2)*, note 19, at 238.

³⁹⁴ *Blackwater v Plint (No 2)*, note 19, at 252.

³⁹⁵ *Blackwater v Plint (No 2)*, note 19, at 252-253.

³⁹⁶ *Blackwater v Plint (No 2)*, note 19, at 253.

³⁹⁷ *Blackwater v Plint (No 2)*, note 19, at 251-252.

³⁹⁸ *Blackwater v Plint (No 2)*, note 19, at 252.

³⁹⁹ *Blackwater v Plint (No 2)*, note 19, at 252.

⁴⁰⁰ *Blackwater v Plint (No 2)*, note 19, at 253.

⁴⁰¹ See, for example, the court’s comments regarding the evidence of RVJ, EM, HW and W: *Blackwater v Plint (No 2)*, note 19, at 252-253.

the court asserted that given the plaintiffs bore the burden of proof⁴⁰² they had failed to prove that specific information about the assaults had been passed on by, for example, the public school teacher, the nurse, or the police to any staff member of AIRS, in particular Andrews.⁴⁰³ The court accepted that the plaintiffs and others tried to report the abuse to Andrews and others,⁴⁰⁴ but, seemingly, preferred the evidence of Andrews that no student, or any other person, had ever reported to him that Plint was abusing the students.⁴⁰⁵ In regard to the latter point, the court seemed impressed that Andrews was a former naval officer.⁴⁰⁶

Moreover, the court also held that constructive knowledge of the assaults (ie that the defendants ought to have known of the assaults) had not been proved.⁴⁰⁷ The court found that at the time of the sexual assaults paedophilia was not a matter of which the community was aware⁴⁰⁸ and, more specifically, the sexual abuse at AIRS was not known to the wider community.⁴⁰⁹ The court also commented that the evidence of five known and documented incidents of sexual abuse at Native Residential Schools over five decades, and three confirmed incidents resulting in police investigations over thirty years, did not suffice to require the church or Canada to take any extraordinary steps or procedures to protect the students from paedophiles.⁴¹⁰ The court concluded that a reasonable person of the day should not have known of the sexual assaults.⁴¹¹

There are a number of points that can be made in regard to this finding. First, and perhaps foremost, if it is accepted that Andrews did not become aware of Plint's sexual misconduct until the time Plint was fired, he ought to have known. In turn, such constructive knowledge should have been imputed to his employers, Canada and the church.

402 *Blackwater v Plint (No 2)*, note 19, at 256.

403 *Blackwater v Plint (No 2)*, note 19, at 252 and 256.

404 *Blackwater v Plint (No 2)*, note 19, at 255.

405 *Blackwater v Plint (No 2)*, note 19, at 253 and 256.

406 *Blackwater v Plint (No 2)*, note 19, at 255.

407 *Blackwater v Plint (No 2)*, note 19, at 256.

408 *Blackwater v Plint (No 2)*, note 19, at 256.

409 *Blackwater v Plint (No 2)*, note 19, at 261.

410 *Blackwater v Plint (No 2)*, note 19, at 265.

411 *Blackwater v Plint (No 2)*, note 19, at 265.

To this end it is contended that the findings in *Mowatt*,⁴¹² discussed below, are equally applicable here. Knowledge of Plint's sexual abuse would have been revealed "through proper supervision of [Plint], proper establishment and enforcement of rules disallowing students in staff quarters, and proper observation of general conduct of students at the residence by the administrator in the course of his regular duties ... [Plint's sexual activities continued for over two decades] with such frequency that it is unreasonable to expect that it would have gone unnoticed with reasonable supervision of his activities in the dormitory." From Andrews' own evidence, there clearly was a rule that boys were not to be in a dormitory supervisor's room,⁴¹³ but it was not enforced. Andrews testified that on two occasions Plint had been caught with boys in his room.⁴¹⁴ Moreover, given the frequency of the abuse, how could Andrews not be aware of further incidents involving Plint? It must also be recalled that there were a number of boys being sexually assaulted by Plint and in the case of MSW, for example, he testified that he was being abused up to 3 times a week.⁴¹⁵ One plaintiff gave evidence that one of the older plaintiffs was sent by Plint to "rustle up the boys" to be taken to his room. How could these events have gone unnoticed, especially if there was a rule that prevented Plint having the boys in his room?

The court added that even if the defendants knew, or ought to have known, of the assaults, the plaintiffs had failed to show what preventative steps ought reasonably to have been taken.⁴¹⁶ Perhaps it suffices to add that supervising Plint and, specifically, enforcing the rule that boys were not to be in the dormitory supervisors' rooms, would have undoubtedly prevented at least some of the assaults and revealed what Plint was doing.

The principle that the standard of conduct required of the church and Canada was to be assessed according to the standard of care prevailing at the time of the offences⁴¹⁷ was also applicable to the plaintiffs' claim that the duty of care had been breached because the hiring procedure used for the Native Residential Schools was not reasonable.

⁴¹² *Mowatt*, note 19, at 352-353.

⁴¹³ *Blackwater v Plint (No 2)*, note 19, at 253.

⁴¹⁴ *Blackwater v Plint (No 2)*, note 19, at 254.

⁴¹⁵ *Blackwater v Plint (No 2)*, note 19, at 243-244.

⁴¹⁶ *Blackwater v Plint (No 2)*, note 19, at 270.

⁴¹⁷ *Blackwater v Plint (No 2)*, note 19, at 249-250.

The court held that the standard of conduct of the day in hiring was very different to today. Background checks were not made and employers were not aware of the possibility of sexual abuse.⁴¹⁸ The court accordingly found the subject hiring practices at AIRS accorded with the employment practice of the day.⁴¹⁹

This factor was also relevant to the plaintiffs' claims that the Native Residential Schools were unreasonably unsafe. In the context of the standards of the day and budgetary restraints and the personnel and equipment available to it,⁴²⁰ the court held that the environment at AIRS was not unreasonably safe. In particular, the court pointed to glowing reports from Government Inspectors and the District Superintendent of Schools that asserted the school was a "safe, secure place to work and play and to mature".⁴²¹

By contrast, in *Mowatt*⁴²² Canada and the church were held liable for breaches of duty of care arising from the physical assaults upon the plaintiff.⁴²³ The court held that the Federal Government was at all times the guardian of the plaintiff.⁴²⁴ The government had assumed guardianship of the plaintiff and other Aboriginal children when it exercised its powers under the *Indian Act* to remove them from their homes, isolating them from "parental input and responsibility" and placing them in Native Residential Schools.⁴²⁵ Canada then delegated its parental role to the principal of St George's and, in turn, the dormitory supervisors.⁴²⁶ The court held that Canada was in a position of such proximity that it was reasonably foreseeable that actions of the plaintiff's guardian might be likely to cause damage to the plaintiff.⁴²⁷ The court held that the size of the institution, in particular, the number of children involved, did not serve to negate a

418 *Blackwater v Plint (No 2)*, note 19, at 267.

419 *Blackwater v Plint (No 2)*, note 19, at 267 and 268.

420 *Blackwater v Plint (No 2)*, note 19, at 248.

421 *Blackwater v Plint (No 2)*, note 19, at 269.

422 *Mowatt*, note 19.

423 *Mowatt*, note 19, at 347.

424 *Mowatt*, note 19, at 347.

425 *Mowatt*, note 19, at 347-349.

426 *Mowatt*, note 19, at 347.

427 *Mowatt*, note 19, at 347. See also *Mowatt*, note 19, at 348, the court applying *A(C) v C(JW)* (198) 166 DLR (4th) 475 in regard to the duty of care.

relationship of sufficient proximity to create a duty of care.⁴²⁸ The court also noted as relevant to the existence of this duty of care the magnitude of the risk that had been created by placing the children in the care of strangers, far away from their families and homes.⁴²⁹ Unlike *Blackwater v Plint (No 2)*,⁴³⁰ in *Mowatt* it was not “seriously argued” that Canada could invoke immunity from the claims of negligence on the basis that its involvement in the Native Residential Schools was only a matter of inadequate policy, rather than an operational matter.⁴³¹ The law of negligence was, therefore, equally applicable to Canada.⁴³²

In regard to the Anglican Church’s role in St George’s, the court found that whilst the church was not the plaintiff’s legal guardian,⁴³³ the church had assumed the role of “moral counsellor and protector”.⁴³⁴ The church’s involvement was not merely one of pastoral counselling.⁴³⁵ The Anglican Church had adopted a role designed to influence the plaintiff’s “life fundamentally, with the expectation of his blind obedience enforced by discipline”.⁴³⁶ Moreover, by “placing the dormitory supervisor in close proximity to the children in a closed Anglican environment with the expectation that he would control day-to-day moral and religious upbringing,”⁴³⁷ the church “assumed a duty to act reasonably in the best interest of [the plaintiff] to ensure a proper moral environment and to care for known moral harm that might befall him”.⁴³⁸

The church’s and Canada’s duty of care included taking reasonable steps to determine that the “parental and pastoral power given to their joint employee was properly exercised”.⁴³⁹ This necessarily involved

428 *Mowatt*, note 19, at 347-348.

429 *Mowatt*, note 19, at 349-350.

430 See *Blackwater v Plint (No 2)*, note 19, at 247-248.

431 *Mowatt*, note 19, at 349.

432 *Mowatt*, note 19, at 349, citing *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145.

433 *Mowatt*, note 19, at 350.

434 *Mowatt*, note 19, at 350.

435 *Mowatt*, note 19, at 350-351.

436 *Mowatt*, note 19, at 350-351.

437 *Mowatt*, note 19, at 350.

438 *Mowatt*, note 19, at 350.

439 *Mowatt*, note 19, at 350.

adequate and reasonable supervision of the dormitory supervisors.⁴⁴⁰ In determining what a reasonable person would do, the knowledge of the defendants and their ability to act were of course relevant.⁴⁴¹ The court found that where, as in this case, the defendants had an ancillary duty to take precautions to protect against risks of which they would have been aware if their responsibilities had been properly performed, this knowledge might be constructive, if it was not actual.⁴⁴² In this case Harding's knowledge (whether that be actual or constructive) of the sexual abuse by Clarke was, therefore, imputed to his employers, Canada and the Church.⁴⁴³

In this regard the court found that if Harding did not know of the assaults, he ought to have known.⁴⁴⁴ As noted above, the court held that knowledge of the sexual abuse by Clarke would have been revealed:

[T]hrough proper supervision of [Clarke], proper establishment and enforcement of rules disallowing students in staff quarters, and proper observation of general conduct of students at the residence by the administrator in the course of his regular duties ... Clarke's sexual activities continued for eight years with such frequency that it is unreasonable to expect that it would have gone unnoticed with reasonable supervision of his activities in the dormitory.⁴⁴⁵

In turn such constructive knowledge was imputed to the church and Canada.⁴⁴⁶

Both the church and Canada were held to have failed to protect the plaintiff from harm.⁴⁴⁷ Both had failed to take reasonable supervisory precautions against sexual abuse by dormitory supervisors,

440 *Mowatt*, note 19, at 350.

441 *Mowatt*, note 19, at 351-352.

442 *Mowatt*, note 19, at 352.

443 *Mowatt*, note 19, at 353.

444 *Mowatt*, note 19, at 352.

445 *Mowatt*, note 19, at 352-353.

446 *Mowatt*, note 19, at 352-353.

447 *Mowatt*, note 19, at 353.

particularly Clarke.⁴⁴⁸ The church was held to have been in further breach of its duties by failing to investigate properly and report the sexual abuse by Clarke after it became known directly to them and failing to provide counselling and care to the plaintiff after the disclosure.⁴⁴⁹ In regard to the attribution of fault, fault was allocated 60% to the church, 40% to the government.⁴⁵⁰

4. Fiduciary duty

From the point of view of legal, as opposed to factual, controversy, the greatest divergence of thought between *Blackwater v Plint (No 2)*⁴⁵¹ and *Mowatt*⁴⁵² was in regard to the issue of fiduciary duties. These matters have been discussed by the author in detail elsewhere.⁴⁵³ However, it is important to return to the salient issues. As noted above, in *Blackwater v Plint (No 2)*⁴⁵⁴ the plaintiffs alleged that Canada had breached its fiduciary duty by removing the plaintiffs from their families and placing them at AIRS.⁴⁵⁵ A breach of fiduciary duty was also claimed against both Canada and the church in regard to the operation of AIRS where the plaintiffs alleged they were “systematically subjected to abuse, mistreatment and racist ridicule and harassment”.⁴⁵⁶

The court found that through the joint venture the “Defendants could unilaterally affect the plaintiffs’ interests and the plaintiffs were peculiarly vulnerable”⁴⁵⁷ within the definition of a fiduciary relationship asserted by the Supreme Court of Canada in, *inter alia*, *Norberg v Weinrib*.⁴⁵⁸ The court, however, went on to apply a line of

448 *Mowatt*, note 19, at 353.

449 *Mowatt*, note 19, at 353.

450 *Mowatt*, note 19, at 354.

451 *Blackwater v Plint (No 2)*, note 19.

452 *Mowatt*, note 19.

453 Cassidy, note 11.

454 *Blackwater v Plint (No 2)*, note 19.

455 *Blackwater v Plint (No 2)*, note 19, at 270.

456 *Blackwater v Plint (No 2)*, note 19, at 270.

457 *Blackwater v Plint (No 2)*, note 19, at 270-271.

458 *Norberg v Weinrib* [1992] 2 SCR 226 at 230.

case law, in particular the judgment of McEachern CJBC in *A(C) v C(JW)*,⁴⁵⁹ that provides, in essence, that:

- for a breach of fiduciary duties the perpetrator must act dishonestly or obtain a direct or indirect personal advantage and that negligence does not suffice;⁴⁶⁰ and
- a claim of breach of fiduciary duty is excluded where the claim can be resolved in tort or contract law.⁴⁶¹

In regard to the first point, the court in *Blackwater v Plint (No 2)*⁴⁶² held there was no evidence of the requisite “dishonest intentional disloyalty” on the part of Canada or the church. The court concluded that this finding also extended to the plaintiffs’ claims of “linguistic and cultural deprivation”.⁴⁶³ While the Native Residential School policy was held to be “badly flawed,” it did not amount to a breach of fiduciary duties as there was no “dishonesty or disloyalty”.⁴⁶⁴

Four points can be made in regard to the court’s reliance upon the first principle espoused in *A(C) v C(JW)*.⁴⁶⁵ First, and foremost, a fiduciary may breach its duties without acting for reasons of self-benefit or with *mala fides*.⁴⁶⁶ Negligence can suffice. In some cases

⁴⁵⁹ *A(C) v C(JW)*, note 427, at [85]. See also *H(J) v British Columbia* [1998] CarswellBC 2786 (BC SC).

⁴⁶⁰ *A(C) v C(JW)*, note 427, at [85]. This aspect of *A(C) v C(JW)* was similarly applied in a Saskatchewan residential school case *DW v Canada*, note 134 at [19] where the court held that while the person who had sexually assaulted the plaintiff, Mr Starr, had abused his position of trust for personal advantage, the Crown had not. In this regard the case is *per incuriam* as there was no reference to the binding Supreme Court of Canada decisions, discussed below, that were contrary to *A(C) v C(JW)*.

⁴⁶¹ *Blackwater v Plint (No 2)*, note 19, at 271-274.

⁴⁶² *Blackwater v Plint (No 2)*, note 19, at 273.

⁴⁶³ *Blackwater v Plint (No 2)*, note 19, at 273.

⁴⁶⁴ *Blackwater v Plint (No 2)*, note 19, at 273.

⁴⁶⁵ *A(C) v C(JW)*, note 427, at [85].

⁴⁶⁶ *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Harrison v Harrison* (1868) 14 Gr 586.

the fiduciary simply fails to act “in accordance with the undertaking the fiduciary has taken on ...”.⁴⁶⁷ Thus:

[a] breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning.⁴⁶⁸

Second, *A(C) v C(JW)*⁴⁶⁹ is merely a decision of the British Columbia Court of Appeal, yet the court followed this decision despite the existence of contrary Supreme Court of Canada decisions. These cases include *Guerin v The Queen*,⁴⁷⁰ *Norberg v Weinrib*,⁴⁷¹ *M(K) v M(H)*,⁴⁷² *Canson Enterprises Ltd v Boughton & Co*,⁴⁷³ *LAC Minerals v International Corona Resources*⁴⁷⁴ and *Hodgkinson v Simms*.⁴⁷⁵ The court in *Blackwater v Plint (No 2)* made no reference to these contrary, binding decisions. In particular, the court did not address the express statements, in cases such as *Canson Enterprises Ltd v Boughton & Co*,⁴⁷⁶ *LAC Minerals v International Corona Resources*⁴⁷⁷ and *Hodgkinson v Simms*,⁴⁷⁸ that *mala fides* is not necessary for a breach of fiduciary duties.⁴⁷⁹

⁴⁶⁷ *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 per La Forest, citing Sealy “Some Principles of Fiduciary Obligation” [1963] *Cambridge LJ* 119; Sealy “Fiduciary Relationships” [1962] *Cambridge LJ* 69.

⁴⁶⁸ Huband “Remedies and Restitution for Breach of Fiduciary Duties” in *The 1993 Isaac Pitblado Lectures* (1993) at 31, quoted in *Hodgkinson v Simms* [1994] 3 SCR 377.

⁴⁶⁹ *A(C) v C(JW)*, note 427.

⁴⁷⁰ *Guerin v The Queen* (1984) 13 DLR (4th) 321; 2 SCR 335.

⁴⁷¹ *Norberg v Weinrib*, note 458.

⁴⁷² *M(K) v M(H)* (1992) 96 DLR (4th) 289.

⁴⁷³ *Canson Enterprises Ltd v Boughton & Co*, note 467.

⁴⁷⁴ *LAC Minerals v International Corona Resources* (1989) 61 DLR (4th) 14.

⁴⁷⁵ *Hodgkinson v Simms*, note 468.

⁴⁷⁶ *Canson Enterprises Ltd v Boughton & Co*, note 467.

⁴⁷⁷ *LAC Minerals v International Corona Resources*, note 474.

⁴⁷⁸ *Hodgkinson v Simms*, note 468.

⁴⁷⁹ See also relevant English decisions, *Boardman v Phipps* [1967] 2 AC 46; *Regal (Hastings) Ltd v Gulliver*, note 466.

Third, *Blackwater v Plint (No 2)*⁴⁸⁰ was handed down after *Mowatt*,⁴⁸¹ yet the court made no reference to the contrary reasoning in *Mowatt*⁴⁸² discussed below. Thus, the decision in *Blackwater v Plint (No 2)*⁴⁸³ was in this aspect erroneous or, at the very least, *per incuriam*.

Fourth, and following on from the second point, it should be noted that McEachern CJBC in *A(C) v C(JW)*,⁴⁸⁴ was aware of these contrary Supreme Court decisions. His Honour asserted, however, that all of them, apart from *Guerin v The Queen*,⁴⁸⁵ could be reconciled with his first proposition as, factually, in each case the perpetrator obtained a personal benefit.⁴⁸⁶ In turn, McEachern CJBC asserted that *Guerin v The Queen*⁴⁸⁷ had to be confined to its specific facts. *Guerin v The Queen*⁴⁸⁸ certainly did not involve any dishonesty or personal benefit. Briefly, in that case the court held the Indian Affairs Branch of the Federal Government had breached its fiduciary duties owed to the plaintiff Indian Band, and ordered Canada to pay \$10 million in equitable compensation. The subject reserve lands were partly composed of the Band's traditional territory and were highly valuable. The Band surrendered 162 acres of this land "in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people".⁴⁸⁹ Department of Indian Affairs' officials negotiated on behalf of the Band a lease of part of the Band's reserve lands to a golf club. The officials failed to follow the Band's instructions and negotiated the lease on less favourable terms than

480 *Blackwater v Plint (No 2)*, note 19.

481 *Mowatt*, note 19.

482 *Mowatt*, note 19, at 356.

483 *Blackwater v Plint (No 2)*, note 19.

484 *A(C) v C(JW)*, note 427.

485 *Guerin v The Queen*, note 470.

486 *A(C) v C(JW)*, note 427 at [85]. He refers to *Guerin v The Queen*, note 470; *Canson Enterprises Ltd v Boughton & Co* note 467; *Norberg v Weinrib* note 458; *M(K) v M(H)*, note 472; and *LAC Minerals v International Corona Resources*, note 474.

487 *Guerin v The Queen*, note 470.

488 *Guerin v The Queen*, note 470.

489 The terms of the surrender are set out in the case itself: *Guerin v The Queen*, note 470, at 345.

those insisted upon by the Band.⁴⁹⁰ The Department of Indian Affairs obtained no self-benefit from the breach.⁴⁹¹ Nor was there any dishonesty or moral turpitude on the part of the officials. Justice Wilson found that their unconscionable action stemmed from paternalism, rather than intent to deceive or harm the Band.⁴⁹² They had simply failed “to take proper care in carrying out the task that had been assigned to the fiduciary”.⁴⁹³

Most importantly, *Guerin v The Queen*⁴⁹⁴ was not the only decision that McEachern CJBC referred to that did not accord with this principle. *Norberg v Weinrib*⁴⁹⁵ and *M(K) v M(H)*⁴⁹⁶ involved breaches of fiduciary duties through sexual assault. The breaches therefore occurred without a corresponding financial benefit being obtained by the fiduciary.⁴⁹⁷ The only so-called benefit/advantage in these cases was not economic, but sexual gratification. Even if a sexual benefit suffices under this principle, in *Canson Enterprises Ltd v Boughton & Co*⁴⁹⁸ the fiduciary (solicitor) also did not make a profit

⁴⁹⁰ In fact, the Crown's full proposal was never presented to the Band and the Band's Council did not receive a copy of the lease until 1970, twelve years after its execution. See, Hurley, "The Crown's Fiduciary Duty and the Indian Title: *Guerin v The Queen* " (1985) 30 *Mc Gill LJ* 559 at 562.

⁴⁹¹ See McCamus, "Prometheus Unbound Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 *Can Bus LJ* 107 p 113.

⁴⁹² *Guerin v The Queen*, note 470 at 356.

⁴⁹³ Gillen and Woodman, *The Law of Trusts; A Contextual Approach* (2000) p 537, quoting in support McCamus "Equitable Compensation and Restitutionary Remedies: Recent Developments" in *Special Lectures of the Law Society of Upper Canada* (1995) where he refers to this case as "a failure to follow the principal's instructions in negotiating a deal" and *Canson Enterprises Ltd v Boughton & Co*, note 467 at 578 where the court refers to this case as "a failure to disclose information that would have been material to the principal's decision to enter into a transaction with someone other than the fiduciary with respect to which the fiduciary had no personal interests." See also *McCamus*, note 491, p 129.

⁴⁹⁴ *Guerin v The Queen*, note 470.

⁴⁹⁵ *Norberg v Weinrib*, note 458.

⁴⁹⁶ *M(K) v M(H)*, note 472.

⁴⁹⁷ See *Canson Enterprises Ltd v Boughton & Co*, note 467 per La Forest J; *Hodgkinson v Simms*, note 468 per La Forest J. See also *Gillen and Woodman*, note 493, p 536.

⁴⁹⁸ *Canson Enterprises Ltd v Boughton & Co*, note 467. See also *Dodge v Ford Motor Co* (1919) 170 WN 668 where the directors breached their fiduciary duties by acting for the benefit of the public and *Parke v Daily News Ltd* [1962] Ch 927 where the directors breached their fiduciary duties by acting for the benefit of ex-employees.

through the breach.⁴⁹⁹ The breach in *Canson Enterprises Ltd v Boughton & Co*⁵⁰⁰ was a failure on the part of a solicitor to warn his client that an undisclosed third party was obtaining a secret profit from the vendor in the subject real estate transaction. There was no self-benefit.⁵⁰¹ A third party obtained the benefit. The breach was simply a failure to provide all the relevant information with respect to the proposed transaction. McEachern CJBC also did not address the express statements in the Supreme Court cases to which he referred that *mala fides* is not necessary for a breach of fiduciary duties.

The court in *Blackwater v Plint (No 2)*⁵⁰² did not address the second proposition in *A(C) v C(JW)*⁵⁰³ beyond quoting McEachern CJBC to this effect, with seeming approval. It therefore suffices for current purposes to note that again this is contrary to Supreme Court of Canada decisions and was rejected in *Mowatt*.⁵⁰⁴

The court in *Mowatt*⁵⁰⁵ also addressed the first point made by McEachern CJBC in *A(C) v C(JW)*,⁵⁰⁶ namely, that to find a breach of fiduciary duty the defendant must act dishonestly and take “advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage.” In rejecting this aspect of *A(C) v C(JW)*,⁵⁰⁷ the court in *Mowatt*⁵⁰⁸ added that this principle was contrary to, *inter alia*, the finding in *B(KL) v British Columbia*.⁵⁰⁹ In

⁴⁹⁹ *Huband*, note 468, quoted in *Hodgkinson v Simms*, note 468. See also *McInerney v MacDonald* [1992] 2 SCR 138 for a further example of a breach of fiduciary duty that did not involve a consequent profit. The breach in that case was the doctor’s refusal to provide the patient with copies of medical reports from consultants and other doctors.

⁵⁰⁰ *Canson Enterprises Ltd v Boughton & Co*, note 467.

⁵⁰¹ See *McCamus*, note 491, pp 113 and 129.

⁵⁰² *Blackwater v Plint (No 2)*, note 19.

⁵⁰³ *A(C) v C(JW)*, note 427 at [85]. See also *H(J) v British Columbia*, note 459.

⁵⁰⁴ *Mowatt*, note 19.

⁵⁰⁵ *Mowatt*, note 19, at 354-358.

⁵⁰⁶ *A(C) v C(JW)*, note 427, at [85].

⁵⁰⁷ *A(C) v C(JW)*, note 427, at [85].

⁵⁰⁸ *Mowatt*, note 19 at 356.

⁵⁰⁹ *B(KL) v British Columbia* (1999) 172 DLR (4th) 1. Ultimately, the court in *Mowatt* did not have to specifically refuse to follow *A(C) v C(JW)* as it noted that in that case McEachern CJBC had also asserted that “everyone charged with the responsibility for the care of children is under a fiduciary duty towards such children”. Note 19, at 356.

that case the provincial Crown was found to be in breach of its fiduciary duties for abuses that occurred to the plaintiff in a foster home, even though there was no specific finding of dishonesty made against the Crown.

The court also considered the second of the above points from McEachern CJBC's judgment in *A(C) v C(JW)*⁵¹⁰ that, in essence, a breach of fiduciary duties could not be claimed in cases that could be resolved in tort or contract law.⁵¹¹ The court noted that this proposition was contrary to the Supreme Court of Canada decision in *M(K) v M(H)*⁵¹² and chose to follow the latter case.⁵¹³ In *M(K) v M(H)*⁵¹⁴ the court held that the parent/child relationship was fiduciary in nature and in the subject case had been breached by the incestuous relationship between the plaintiff and her father. The breach was held to be actionable in equity even though the plaintiff's claims were in both tort (assault) and equity. The court held "a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims."⁵¹⁵ The court in *M(K) v M(H)*⁵¹⁶ also adopted the comment of Cooke P in *Mouat v Boyce*⁵¹⁷ that "now that common law and equity are mingled the court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted."

The view expressed in, *Mowatt*,⁵¹⁸ *M(K) v M(H)*⁵¹⁹ and *Mouat v Boyce*⁵²⁰ also accords with the findings in another Supreme Court

⁵¹⁰ *A(C) v C(JW)*, note 427, at [85].

⁵¹¹ *Mowatt*, note 19, at 356.

⁵¹² *M(K) v M(H)*, note 472.

⁵¹³ *Mowatt*, note 19, at 355-356. Note, again that ultimately the court did not have to refuse to follow *A(C) v C(JW)* as it noted that in that case McEachern CJBC had also asserted that "everyone charged with the responsibility for the care of children is under a fiduciary duty towards such children".

⁵¹⁴ *M(K) v M(H)*, note 472.

⁵¹⁵ *M(K) v M(H)*, note 472, at 61.

⁵¹⁶ *M(K) v M(H)*, note 472, at 61.

⁵¹⁷ *Mouat v Boyce* unreported decision of the New Zealand Court of Appeal, 11 March 1992 at 11.

⁵¹⁸ *Mowatt*, note 19.

⁵¹⁹ *M(K) v M(H)*, note 472.

⁵²⁰ *Mouat v Boyce*, note 517.

decision, *Norberg v Weinrib*.⁵²¹ In this case a majority of the court held there had been a breach of a fiduciary relationship when the defendant doctor extorted sexual favours from the plaintiff/patient in return for supplying her with prescriptions for a drug to which the patient was addicted. The breach was actionable even though the plaintiff's claims were in both tort (battery) and equity. McLachlin J noted "the doctrines of tort and contract [do not] capture the essential nature of the wrong done to the plaintiff. ... Only the principles applicable to fiduciary relationships and their breach encompass it in its totality."⁵²²

The court in *Mowatt*⁵²³ then turned to the issue of the existence of a fiduciary relationship in the subject case. As Canada had assumed guardianship over those Aboriginal children who had been removed from their families, including the plaintiff, this clearly gave rise to a fiduciary relationship.⁵²⁴ The only question was, therefore, whether that duty had been breached. The court held that Canada's failure to supervise was negligent, but not a breach of its fiduciary duty.⁵²⁵ A possible breach of its fiduciary duties did exist in any failure to report properly and investigate the sexual abuse of the plaintiff and to care for him afterwards.⁵²⁶ However, these failings were held not to be attributable to Canada, which had been deliberately kept ignorant, by the church, of Clarke's assaults.⁵²⁷

The breach was nevertheless attributable to the church.⁵²⁸ In turn, the church would only be liable if it stood in a fiduciary relationship to the plaintiff.⁵²⁹ The court applied the definition of a fiduciary relationship as stated in *Frame v Smith*,⁵³⁰ and approved in *Norberg v Weinrib*,⁵³¹ *Canson Enterprises Ltd v Boughton & Co*⁵³² and

⁵²¹ *Norberg v Weinrib*, note 458.

⁵²² *Norberg v Weinrib*, note 458, at 268-269.

⁵²³ *Mowatt*, note 19, at 356-358.

⁵²⁴ *Mowatt*, note 19, at 347, 349 and 356.

⁵²⁵ *Mowatt*, note 19, at 356.

⁵²⁶ *Mowatt*, note 19, at 356.

⁵²⁷ *Mowatt*, note 19, at 356.

⁵²⁸ *Mowatt*, note 19, at 356.

⁵²⁹ *Mowatt*, note 19, at 356.

⁵³⁰ *Frame v Smith* [1987] 2 SCR 99.

⁵³¹ *Norberg v Weinrib*, note 458.

International Corona Resources v LAC Minerals,⁵³³ and held that the plaintiff was vulnerable and the church was in a position of power over him within this test.⁵³⁴ He was a child isolated from his family in an Anglican institution where “control was almost absolute on a daily basis”.⁵³⁵ The Anglican Church, through the school principal, was in a position to exercise power over the plaintiff in regard to his “moral and emotional well-being and dignity”.⁵³⁶ Moreover, the church “was in a fiduciary relationship with the Plaintiff when it undertook to look after his interests to the exclusion of the federal Crown following the disclosure of the abuse”.⁵³⁷ This relationship of trust was breached when the church did nothing to investigate the matter and care for the plaintiff.⁵³⁸ The court consequently upheld the plaintiff’s claims against the Anglican Church of Canada for breach of fiduciary duty, in addition to his claims in tort.⁵³⁹

5. Non-delegable statutory duty

In *Blackwater v Plint (No 2)*⁵⁴⁰ the court held that Canada’s duty under the *Indian Act* 1951 with respect to the Native Residential Schools was a non-delegable statutory duty. Under the *Indian Act* 1951 Canada intended to have “control over virtually every aspect of the lives of Indians..., including schooling, and the pervasive nature of such control was not consistent with a delegable statutory duty.”⁵⁴¹ This did not mean that the contracts between the churches and the government were contrary to statute, but rather that the government’s duty had not been “vacated” through such contracts.⁵⁴² In the subject case the court found that as Canada was the plaintiffs’ guardian, Canada owed a “duty of special diligence” which had not been

⁵³² *Canson Enterprises Ltd v Boughton & Co*, note 467.

⁵³³ *International Corona Resources v LAC Minerals* [1989] 2 SCR 574.

⁵³⁴ *Mowatt*, note 19, at 357.

⁵³⁵ *Mowatt*, note 19, at 357. See also *Mowatt*, note 19 at 349 and 350.

⁵³⁶ *Mowatt*, note 19, at 357.

⁵³⁷ *Mowatt*, note 19, at 358.

⁵³⁸ *Mowatt*, note 19, at 358.

⁵³⁹ *Mowatt*, note 19, at 357.

⁵⁴⁰ *Blackwater v Plint (No 2)*, note 19, at 275.

⁵⁴¹ *Blackwater v Plint (No 2)*, note 19, at 275.

⁵⁴² *Blackwater v Plint (No 2)*, note 19, at 275.

discharged.⁵⁴³ Given the “very high standard of care imposed on Canada under the provisions of the Indian Act” which had given the government “virtual absolute control over the lives of native peoples,” the government had failed to discharge this duty.⁵⁴⁴

6. Statute of Limitation Defences

In *Blackwater v Plint (No 2)*⁵⁴⁵ the court found that under the relevant statute of limitation in British Columbia, s 3 of the *Limitation Act* 1979, the plaintiffs’ claims pertaining to sexual assault were not subject to a limitation period. However, the United Church of Canada⁵⁴⁶ pleaded, and the court agreed, that causes of action brought by the plaintiffs that were not based on sexual misconduct were statute barred.⁵⁴⁷ While under s 7 *Limitation Act* 1979 the limitation period for these claims was postponed until the plaintiffs were 19 years of age, the latest the subject writs could have been issued was 1993.⁵⁴⁸ The earliest claim was filed in 1995.⁵⁴⁹ While s 6 of the Act allows for further postponement, the plaintiffs had failed to specifically plead the entitlement to postponement.⁵⁵⁰ The plaintiffs’ only relevant pleading was the plaintiffs’ Reply that simply took issue with all the defendants’ Defences. The court held that the Reply did not suffice as “a postponement removes what would otherwise be a good defence to the plaintiff’s claim” and thus must be specifically pleaded.⁵⁵¹ Moreover, even if such a Reply did suffice, the plaintiffs had provided no evidence as to why the postponement provisions ought to apply in this case.⁵⁵² Thus the non-sexual assault related claims were statute-barred because of a failure to specifically plead the right of

⁵⁴³ *Blackwater v Plint (No 2)*, note 19, at 275.

⁵⁴⁴ *Blackwater v Plint (No 2)*, note 19, at 275.

⁵⁴⁵ *Blackwater v Plint (No 2)*, note 19.

⁵⁴⁶ *Blackwater v Plint (No 2)*, note 19, at 277.

⁵⁴⁷ *Blackwater v Plint (No 2)*, note 19, at 278 and 285.

⁵⁴⁸ *Blackwater v Plint (No 2)*, note 19, at 277.

⁵⁴⁹ *Blackwater v Plint (No 2)*, note 19, at 277.

⁵⁵⁰ *Blackwater v Plint (No 2)*, note 19, at 277.

⁵⁵¹ *Blackwater v Plint (No 2)*, note 19, at 277.

⁵⁵² *Blackwater v Plint (No 2)*, note 19, at 277-278.

postponement and a failure on the part of counsel to argue before the court the factual case for postponement.

In *A(TWN) v Clarke*⁵⁵³ the court did not address this matter in any detail. The court simply noted that all actions would have been statute-barred but for the amendment to the *Limitation Act* 1979 that provided that no limitation period applied to misconduct of a sexual nature that occurred while the complainant was a minor.⁵⁵⁴ The court added that in the subject case any award of damages was therefore confined to that resulting from the sexual assaults, not “cultural destruction suffered by native peoples as a result of the residential school system, as just or deserving as such compensation might be”.⁵⁵⁵

In regard to the latter point it should be noted that while the court in *Blackwater v Plint (No 2)*⁵⁵⁶ also asserted that attendance at the Native Residential Schools *per se* (ie other than in regard to the sexual assaults) did not in itself provided a basis for an award of damages, the court said it was still a relevant factor when assessing the impact of the sexual abuse upon the plaintiffs.⁵⁵⁷ In this regard the court said it was relevant that through the forced attendance at the Native Residential Schools, at the time of the assaults the plaintiffs “were away from the comfort of their families and culture”.⁵⁵⁸ These facts were relevant in so far as they made each of the plaintiffs “particularly vulnerable ... so far removed from home community”.⁵⁵⁹

Before turning to the next issue examined in these key cases, it is necessary to more generally consider the issue of statutes of limitation in the context of Native Residential School litigation. In particular, two key observations are made. First, a number of Native Residential School claims have been statute-barred under statutes of limitations. For example, the plaintiffs’ claims in *Moar v Roman Catholic Church of Canada*⁵⁶⁰ were held to be statute-barred under Manitoba’s *Limitation of Actions* 1931 and/or *Limitation of Actions* 1987. The

⁵⁵³ *A(TWN) v Clarke*, note 19.

⁵⁵⁴ *A(TWN) v Clarke*, note 19, at 295.

⁵⁵⁵ *A(TWN) v Clarke*, note 19, at 295.

⁵⁵⁶ *Blackwater v Plint (No 2)*, note 19.

⁵⁵⁷ *Blackwater v Plint (No 2)*, note 19, at 285.

⁵⁵⁸ *Blackwater v Plint (No 2)*, note 19, at 285.

⁵⁵⁹ *Blackwater v Plint (No 2)*, note 19, at 285.

⁵⁶⁰ *Moar v Roman Catholic Church of Canada*, note 136.

statutes of limitations in this Province are strict and limit the ability to bring claims even in the context of the sexual assault of a minor.⁵⁶¹ This legislative regime stands in contrast to the statute of limitations in British Columbia, considered in *Blackwater v Plint (No 2)*⁵⁶² and *A(TWN) v Clarke*.⁵⁶³ It is proposed that the legislature will retrospectively amend the Manitoba statute of limitations to rectify this position so that claims of sexual abuse of minors are not subject to any limitation period.

It should also be noted in this regard that the Office of Indian Residential Schools Resolution Canada asserts that Canada has adopted the position that it will not invoke the statute of limitations as a defence in Native Residential School litigation.⁵⁶⁴ Where, however, the co-defendant church invokes such a defence, the government asserts that it cannot prevent the statute being relied upon by the relevant church.⁵⁶⁵ In support of this assertion it is noted that in *Blackwater v Plint (No 2)*⁵⁶⁶ it was the church that pleaded the *Limitation Act* 1979 in defence. It should also be noted, however, that in this case counsel for both defendants appear to have nevertheless argued the point in court. Moreover, this statement by the Canadian Government is contrary to cases such as *AK v Canada*.⁵⁶⁷ In that case an application was brought by the Attorney-General of Canada to strike out the plaintiff's claims on the grounds that they were, *inter alia*, statute-barred under the relevant Saskatchewan statute of limitations. Under s 3(3.1)(b) of the *Limitation of Actions Act* 1978, claims of trespass to the person, assault or battery are exempt from the normal limitation period when the assault occurred while in a relationship of dependency with the perpetrators of the assaults. The Attorney-General argued that s. 3(3.1)(b)(ii) only exempted claims against a person who actually perpetrated the alleged trespass, assault

⁵⁶¹ They do, however, provide some concessional treatment to claims pertaining to minors. Thus, under s40A(2) *Limitation of Actions* 1931, for example, the right to initiate proceedings is extended to 30 years from the date the right first accrued in a person under a disability (including minors). The plaintiff's claims in this case were, however, still outside the 30 year limitation period.

⁵⁶² *Blackwater v Plint (No 2)*, note 19.

⁵⁶³ *A(TWN) v Clarke*, note 19.

⁵⁶⁴ Personal conversation with Mr Jack Stagg, note 143.

⁵⁶⁵ Personal conversation with Mr Jack Stagg, note 143.

⁵⁶⁶ *Blackwater v Plint (No 2)*, note 19, at 276.

⁵⁶⁷ *AK v Canada*, note 162. Similarly, see also *PG v Canada*, note 162.

or battery.⁵⁶⁸ Thus the Attorney General claimed that it did not exempt claims against Canada who may only be vicariously liable for the conduct.⁵⁶⁹ The court rejected the Attorney-General's submission on this point, finding that even though the "plaintiff's claim in trespass is based on acts that are alleged to have occurred over 50 years ago, it clearly falls within the class of claims contemplated by s. 3(3.1)(b)(ii) of the LAA. As such it is exempted from any limitation period - not only insofar as the alleged perpetrators are concerned, but also as against others liable for their conduct."⁵⁷⁰

7. Third Party Claims of Indemnity

In *Blackwater v Plint (No 2)*⁵⁷¹ the United Church argued that there was an implied term in its relationship with Canada that Canada would "assume responsibility for any claims" arising out of the Native Residential Schools. After examining the history of the relationship between the parties, the court found that while the churches had sought a general form of indemnification in the negotiations leading up to the 1962 Agreement, discussed above, the only indemnification agreed to by the government was restricted to motor vehicle liability.⁵⁷² There was no evidence of an express or implied agreement that Canada had provided the United Church a general indemnity for claims arising out of the Indian Residential Schools, including for the church's negligence or that of its employees.⁵⁷³

In *Mowatt*⁵⁷⁴ it was Canada that sought contribution from the perpetrator, Clarke, and the church. As Clarke did not defend the proceedings, judgment against him was made for any amount that Canada was liable to the plaintiff.⁵⁷⁵ Canada's claim against the Anglican Church was based upon alleged breaches of two contracts, an advisory service contract and a chaplaincy contract.⁵⁷⁶ The advisory

⁵⁶⁸ *AK v Canada*, note 162, at [12].

⁵⁶⁹ *AK v Canada*, note 162, at [12].

⁵⁷⁰ *AK v Canada*, note 162, at [12].

⁵⁷¹ *Blackwater v Plint (No 2)*, note 19, at 279.

⁵⁷² *Blackwater v Plint (No 2)*, note 19, at 280.

⁵⁷³ *Blackwater v Plint (No 2)*, note 19, at 283.

⁵⁷⁴ *Mowatt*, note 19, at 358.

⁵⁷⁵ *Mowatt*, note 19, at 358.

⁵⁷⁶ *Mowatt*, note 19, at 358.

services contract obliged the church to advise the Department of Indian Affairs of any problems in the residences.⁵⁷⁷ The court held that no contribution would be ordered in regard to this contract because, it was said, the church had no knowledge, whether actual or imputed, of the subject offence.⁵⁷⁸ The church was, however, held to have breached its chaplaincy contract by failing to counsel the plaintiff after disclosure of the assault.⁵⁷⁹ The court therefore held Canada was entitled to damages for the breach of this contract.⁵⁸⁰ The measure of the damages was the amount that would be payable for the exacerbation of the effects of the sexual assaults upon the plaintiff through the failure to provide him with proper rehabilitative care up until the point Canada became aware of the reasons for Clarke's departure.⁵⁸¹ The court stressed that this finding did not relieve Canada of liability for the assault itself. Canada was nevertheless liable for the assault, as it could have prevented the assault independently of the church.⁵⁸²

8. Damages

In *Blackwater v Plint (No 2)*⁵⁸³ the court assessed punitive damages against the perpetrator, Plint, but refused to make such an order against Canada and the church. The court held that punitive damages could not be awarded in cases of vicarious liability, absent reprehensible conduct specifically referable to the employer.⁵⁸⁴ As noted above, the court had dismissed claims of direct liability against the defendants.⁵⁸⁵ In regard to the defendants' vicariously liability and Canada's breach of non-delegable statutory duty, the court held that their liability did not arise from "any misconduct or reprehensible conduct" on the part of

⁵⁷⁷ *Mowatt*, note 19, at 358.

⁵⁷⁸ *Mowatt*, note 19, at 358-359.

⁵⁷⁹ *Mowatt*, note 19, at 359.

⁵⁸⁰ *Mowatt*, note 19, at 359.

⁵⁸¹ *Mowatt*, note 19, at 359.

⁵⁸² *Mowatt*, note 19, at 359.

⁵⁸³ *Blackwater v Plint (No 2)*, note 19 at 304. Note that Plint's liability was not, in essence, in issue as he had already been convicted for the assaults. Rather, it was the quantification of the damages that was in issue in his case.

⁵⁸⁴ *Blackwater v Plint (No 2)*, note 19, at 304.

⁵⁸⁵ *Blackwater v Plint (No 2)*, note 19, at 304.

the church or Canada.⁵⁸⁶ Rather this liability was “non-fault based” and arose simply out of “the relationship between the defendant, the tortfeasor and the plaintiff”.⁵⁸⁷ In such circumstances the court held that “there is no basis in law for an award of punitive damages.”

In *A(TWN) v Clarke*⁵⁸⁸ the court awarded aggravated damages to the plaintiffs, applying the considerations stated in *Y(S) v (FG)*.⁵⁸⁹ In this regard the court found:⁵⁹⁰

- * the defendants were in a position of authority and trust over the plaintiffs;
- * the plaintiffs were children at the time of the breaches;
- * the plaintiffs were helpless, cut off from their extended families and even siblings who were also resident in the schools;
- * the use of a military “authoritarian coercive milieu” had been used to “facilitate [the] sexual assaults”;
- * the defendants had originally lacked remorse. The court noted that since the commencement of the proceedings they had “defended the claims with tenacity, requiring the plaintiffs to relive their experiences and repeat the stories a number of times, including in a public courtroom”; and
- * the “sheer horror” of what happened to the plaintiffs, in particular, that the assaults “continued over a period of time that must have seemed exceedingly long to children.”

In these circumstances the court assessed the aggravated damages at \$25,000 for each plaintiff.⁵⁹¹

The court also held that punitive damages were warranted as the subject breaches had involved the “[d]isregard of every principle of decency”.⁵⁹² Punitive damages were held to be warranted in light of

⁵⁸⁶ *Blackwater v Plint (No 2)*, note 19, at 304.

⁵⁸⁷ *Blackwater v Plint (No 2)*, note 19, at 304.

⁵⁸⁸ *A(TWN) v Clarke*, note 19, at 301.

⁵⁸⁹ *Y(S) v (FG)* (1996) 26 BCLR (3d) 155.

⁵⁹⁰ *A(TWN) v Clarke*, note 19, at 301.

⁵⁹¹ *A(TWN) v Clarke*, note 19, at 301.

⁵⁹² *A(TWN) v Clarke*, note 19, at 302.

the “institutional defendants’ failure over so many years to uncover the terrible crimes of Clarke”, the failure to report the matter to the police and the children’s parents when it was disclosed, and the failure to see to the students’ needs when it was revealed.⁵⁹³

The defendants had asserted that punitive damages could not be ordered where their liability was merely vicarious and/or where the underlying tort was merely negligence.⁵⁹⁴ It was submitted that it would be inappropriate to order punitive damages in such contexts because vicarious liability does not involve actual fault and negligence is similarly not intentional.⁵⁹⁵ After considering the relevant cases,⁵⁹⁶ the court held that the authorities provide that in exceptional cases, such as this, punitive damages may be imposed even though liability is merely vicarious.⁵⁹⁷ The court also rejected the proposition that punitive damages cannot be ordered for “negligence, no matter how bad”.⁵⁹⁸ In light of Harding’s “despicable and selfish decision, calculated to protect himself and the school,”⁵⁹⁹ to cover up “Clarke’s abominable behaviour”,⁶⁰⁰ and his abandoning of the “children by failing to go to the police or the families, and in neglecting to find appropriate psychological counselling support services”,⁶⁰¹ the court found the necessary blameworthiness⁶⁰² for an order of punitive damages. In turn Harding’s knowledge was imputed to his employers, Canada and the church, and thus an order for punitive damages was held to be warranted against these

⁵⁹³ *A(TWN) v Clarke*, note 19, at 302.

⁵⁹⁴ *A(TWN) v Clarke*, note 19, at 301.

⁵⁹⁵ *A(TWN) v Clarke*, note 19, at 301.

⁵⁹⁶ In particular, *R(GB) v Hollett* (1996) 139 DLR (4th) 260.

⁵⁹⁷ *A(TWN) v Clarke*, note 19, at 303.

⁵⁹⁸ *A(TWN) v Clarke*, note 19, at 303, quoting in support *Robitaille v Vancouver Hockey Club Ltd* (1981) 124 DLR (3d) 228.

⁵⁹⁹ *A(TWN) v Clarke*, note 19, at 305.

⁶⁰⁰ *A(TWN) v Clarke*, note 19, at 304.

⁶⁰¹ *A(TWN) v Clarke*, note 19, at 305.

⁶⁰² *A(TWN) v Clarke*, note 19, at 305, as required by the court in *Robitaille v Vancouver Hockey Club Ltd*, note 598.

defendants.⁶⁰³ As Clarke had been convicted and incarcerated, punitive damages could not be awarded against him.⁶⁰⁴

As noted above, the court in *Blackwater v Plint (No 2)*⁶⁰⁵ had made a contrary finding, asserting that punitive damages could not be ordered in the context of vicarious liability. In this regard the court in *A(TWN) v Clarke*⁶⁰⁶ made two points. First, the court in *A(TWN) v Clarke*⁶⁰⁷ said the facts in *Blackwater v Plint (No 2)*⁶⁰⁸ were distinguishable. In the former case, the court asserted there was reprehensible conduct that was specifically referable to the employer, thus warranting an order for punitive damages against the defendants.⁶⁰⁹ Second, even if the case was not distinguishable, the court refused to follow *Blackwater v Plint (No 2)*⁶¹⁰ as the decision was, at the very least, *per incuriam*. The judgment in *Blackwater v Plint (No 2)*⁶¹¹ made no reference to the contrary authorities that allow punitive damages to be awarded in such cases, namely *Peeters v Canada*,⁶¹² *R(GB) v Hollett*⁶¹³ (punitive damages for vicarious liability) and *Robitaille v Vancouver Hockey Club Ltd*⁶¹⁴ (punitive damages for negligence).

Conclusion

In conclusion, it is useful to reiterate three key points from the above discussion of the Native Residential Schools. First, unlike the position in Australia,⁶¹⁵ Canada has appropriately responded to the revelations in the *RCAP* of the forced removal of Aboriginal children by apologising to those persons who suffered through the Native

⁶⁰³ *A(TWN) v Clarke*, note 19, at 305, as required by the court in *Robitaille v Vancouver Hockey Club Ltd*, note 598.

⁶⁰⁴ *A(TWN) v Clarke*, note 19, at 305-306.

⁶⁰⁵ *Blackwater v Plint (No 2)*, note 19, at 304.

⁶⁰⁶ *A(TWN) v Clarke*, note 19, at 305.

⁶⁰⁷ *A(TWN) v Clarke*, note 19.

⁶⁰⁸ *Blackwater v Plint (No 2)*, note 19.

⁶⁰⁹ *A(TWN) v Clarke*, note 19, at 305.

⁶¹⁰ *Blackwater v Plint (No 2)*, note 19.

⁶¹¹ *Blackwater v Plint (No 2)*, note 19.

⁶¹² *Peeters v Canada* (1992) 54 FTR 289; (1993) 18 CCLT (2d) 136.

⁶¹³ *R(GB) v Hollett*, note 596.

⁶¹⁴ *Robitaille v Vancouver Hockey Club Ltd*, note 598.

⁶¹⁵ See note 20.

Residential Schools.⁶¹⁶ Canada has also sought to facilitate settlements with many of these persons through its 2001 offer to compensate claimants with validated claims and the 26 March 2003 Draft Dispute Resolution Model, discussed above.

Second, these settlement mechanisms are, however, essentially confined to cases of sexual and physical assault. Moreover, not all claimants will decide to follow the ADR route, preferring to have their claims validated in the courts. In this regard it is reiterated that, unlike the position in Australia, some Aboriginal claimants have successfully brought actions for damages against, *inter alia*, Canada and the churches through the court system for the injuries they suffered in the Native Residential Schools.⁶¹⁷ However, we have seen that the courts' findings in these cases have been far from consistent. The leading cases are divided on whether the conduct of the schools involved a direct breach of the duty of care and/or breaches of fiduciary duties and the availability of punitive damages in this context. Thus guidance on these issues will have to await further judicial consideration. In light of the jurisprudential errors highlighted above, it is hoped that the approach in *Mowatt* will in time become entrenched in Canadian case law.

Finally, there are also a number of issues that have not been determined by the Canadian courts. Most importantly, the legal rights of those members of the Canadian "stolen generation" who were not physically or sexually abused have not been considered.⁶¹⁸ Similarly, the ability to bring "intergenerational claims" has not been

⁶¹⁶ See the *Statement of Reconciliation: Learning from the Past*, 7 January 1998.

⁶¹⁷ See for example *Blackwater v Plint (No 1)*, note 19; *Blackwater v Plint (No 2)*, note 19; *Mowatt*, note 19; *A(TWN) v Clarke*, note 19.

⁶¹⁸ As noted above a class action, known as the Baxter class action, has been instigated that includes such claimants.

authoritatively determined.⁶¹⁹ Thus again we will have to await further judicial consideration before the true parameters of liability arising out of the Native Residential School policy of assimilation can be identified.

⁶¹⁹ As noted above, in *Re Residential Schools*, note 38, second generation claims were held to have no basis in law, but it appears the decision did not have the benefit of counsel's submissions to the contrary. As discussed above the Baxter class action includes such claimants.