

# THE STOLEN GENERATIONS – CANADA AND AUSTRALIA: THE LEGACY OF ASSIMILATION

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*[This article provides a comparative overview of issues pertaining to the stolen generation in Canada and Australia. It includes a historical overview of the removal and detaining of aboriginal children in Canada and Australia. As a consequence of the revelations of this past practice, litigation has been undertaken by members of the stolen generations in both Canada and Australia. The article includes a summary of the key cases in Canada and Australia. Unlike in Australia, some Canadian aboriginal claimants have successfully brought actions for compensation against the federal Canadian government for the damages stemming from their experiences in the aboriginal residential schools. In the course of this discussion, the various causes of actions relied upon by the plaintiffs are examined. While the plaintiffs in these leading Canadian cases were ultimately successful under at least one of their heads of claim, the approaches in these cases in regard to the Crown's liability for breaching fiduciary duties, the duty of care, and non-delegable duties is inconsistent. Thus even in regard to the Canadian jurisprudence key legal issues pertaining to the Crown's liability for the aboriginal residential school experience continues to be unresolved.]*

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## I INTRODUCTION

The common policy of the Australian<sup>1</sup> and Canadian<sup>2</sup> governments<sup>3</sup> of removing aboriginal children from their families and placing them in

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<sup>1</sup> See especially the Human Rights and Equal Opportunity Commission ('HREOC') 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 Anthony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911-1939* (1997); Paul Batley, 'The State's Fiduciary Duty to the Stolen Generations' (1996) 2 *Australian Journal of Human Rights* 177; Antonio Buti, *Separated: Australian Aboriginal Childhood Separations and Guardianship Law* (2004); Julie Cassidy, 'Case Comment: *Cubillo v The Commonwealth: A Denial of the Stolen Generation?*' (2003) 12:1 *Griffith Law Review* 114; Julie Cassidy, 'The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian approaches to fiduciary duties' (2003) 34:2 *University of Ottawa Law Review* 175; Julie Cassidy, 'In the best interests of the child? The stolen generations – Canada and Australia' (2006) *Griffith Law Review* (forthcoming); Jennifer Clarke 'Case Note: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218; Barbara Cummings, Jenny Blokland and Rebecca La Forgia, 'Lessons from the Stolen Generations Litigation' (1997) 19 *Adelaide Law Review* 25; Martin Flynn and Sue Stanton, 'Trial by Ordeal: The Stolen Generation in Court' (2000) 25 *Alternative Law Journal* 71; Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (2001); Rosalind Kidd, *Black Lives, Government Lies* (2<sup>nd</sup> ed, 2003); Rosalind Kidd *The Way We Civilise: Aboriginal Affairs – The Untold Story* (1997); Link-Up (NSW) Aboriginal Corporation, *In the Best Interests of the Child?* (1996); Robert Manne, 'In Denial: The Stolen Generations and the Right' (2001) *The Australian Quarterly Essay* 1; Leslie Marchant, *Aboriginal Administration in Western Australia 1886-1905* (1981); Pamela O'Connor, 'History of Trial: *Cubillo and Gunner v The Commonwealth of Australia*' (2001) 26 *Alternative Law Journal* 27; Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law' (2001) *Griffith Law Review* 139; Peter Read, *The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883-1969* (1982); Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (2000); Robert Van Krieken, 'Is assimilation justiciable? *Lorna Cubillo & Peter Gunner v Commonwealth*' (2001) 23 *Sydney Law Review* 239.

<sup>2</sup> See especially *Royal Commission on Aboriginal Peoples Final Report* (1998) ('RCAP'). See also *Statement of Reconciliation: Learning from the Past*, 7 January 1998; Indian Residential Schools Resolution Department ('IRSR'), 'Key Events' and 'The Residential school System Historical Overview', [www.irsr-rqpi.gc.ca](http://www.irsr-rqpi.gc.ca); Aboriginal Healing Foundation, *The Healing Has Begun: An Operational Update from the Aboriginal Healing Foundation*, May 2002; Julie Cassidy, 'A Legacy of Assimilation: Abuse in Canadian Aboriginal Residential Schools' (2003) 7 *Southern Cross University Law Review* 154.

institutions is now well documented.<sup>4</sup> A key<sup>5</sup> basis for such removals was a policy of assimilation.<sup>6</sup> The underlying idea was that by removing aboriginal children from their families the government could break the child's connection with their family, aboriginal culture and traditional land and ultimately they

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<sup>3</sup> Note, as the policy of removing aboriginal children from their families pre-dated federation, State governments initially promulgated the policy. For example, under the *Aboriginal Protection Act 1869* (Vic) the Board for the Protection of Aborigines was established and under the Act the Governor could order the removal of any aboriginal child from their family and their placement in reformatory or industrial schools. Similarly, under the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) the Chief Protector of Aborigines was authorised to remove aboriginal children from their families and place them in dormitories. Post federation the policy continued to be furthered by the State governments as the Commonwealth's legislative powers over 'race' (*Constitution Act 1901* (UK) s 51(xxvi)) excluded the 'aboriginal race'. It was not until 1967, pursuant to a national referendum amending the Commonwealth Constitution, that the federal government obtained legislative powers over aboriginal affairs. Nevertheless, through the Commonwealth government's control of the Northern Territory pursuant to *Constitution Act 1901* (UK) s 122 and its co-ordination of State and Commonwealth aboriginal affairs, discussed briefly below, from this date the federal government played a primary role in promoting this policy of assimilation.

<sup>4</sup> A similar assimilation policy of removing Indian children from their families existed in the United States of America. To date there has, however, been no litigation of the relevant legal issues except in regard to the preliminary issue whether Indian plaintiffs must first seek to have their cases resolved administratively by the Bureau of Indian Affairs. The court has held that the administrative resolution process must be gone through first, before a claim can be made through the judicial system: *Zephier v United States* (29 October, 2004).

<sup>5</sup> It will be suggested that assimilation was not the sole impetus in Australia for the removal of aboriginal children from their families. Two further matters that prompted this policy was pressure from pastoralists for the governments to provide them with cheap labour (particularly farmhands) and to dispossess aboriginal communities to facilitate the expansion of European settlement in Australia. See further Julie Cassidy, 'In the best interests of the child? The Stolen Generations – Canada and Australia' (2006) *Griffith Law Review* (forthcoming).

<sup>6</sup> In regard to Australia see <http://slq.qld.gov.au/ils/100years/assimilation.htm>; *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084 (*Cubillo 2*) in particular [1146]. See also *Cubillo 2* [2000] FCA 1084, [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister No 2* [1999] NSWSC 843, [88]. In regard to Canada see RCAP, above n 2, 335. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2.

would be assimilated into white society.<sup>7</sup> In Australia the focus was particularly on aboriginal children of mixed parentage.<sup>8</sup> Thus, whilst this policy predated 1937, in that year it was resolved at the first conference of the Commonwealth and State Aboriginal Authorities that the ‘destiny of the natives of aboriginal origin, but not of 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.’<sup>9</sup> The term ‘stolen generation’<sup>10</sup> is now commonly used in Australia to describe those children who were forcibly

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<sup>7</sup> In regard to Australia see *Cubillo 2* *ibid* [172]-[179], [190] and [1146]; Bain Attwood, *The Making of the Aborigines* (1989), 16-17; HREOC, *above n 1*, 9; Kaye Healey (ed) *The Stolen Generation* (1998) 91 *Issues in Society*, 17, 23 and 32. At the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937, it was resolved that such separation and absorption into white society was the answer to the ‘aboriginal problem’: National Report Volume 2 – The Assimilation Years ([www.austlii.edu.au/cgibin/dsipp/au/other/IndigLRes/rciadic/national/vol2/278.html](http://www.austlii.edu.au/cgibin/dsipp/au/other/IndigLRes/rciadic/national/vol2/278.html)). See also *Cubillo 2* *ibid* [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister (No 2)* *ibid* [88]. In regard to Canada see RCAP, *above n 2*, 335. See further RCAP, *above n 2* and Aboriginal Healing Foundation, *above n 2*.

<sup>8</sup> Healey, *ibid* 19, 23-24 and 33; Antonio Buti, *Separated: Australian Aboriginal Childhood Separations and Guardianship Law* (2004) at 49. The children were referred to as ‘half-caste’, ‘quadroons’ or ‘octoroons’ based on the perceived percentage of aboriginal/European blood; such being effectively determined on the child’s complexion. It had been suggested that ‘full blooded’ aboriginal persons would die out. See the discussion of the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 where the conference was unanimous that ‘full blood’ aboriginals would ultimately die out: Healey *ibid* and Lorna Lippmann, *Generations of Resistance: Aborigines Demand Justice* (2<sup>nd</sup> ed 1992), 24. See also HREOC, *above n 1*, 32.

<sup>9</sup> Resolution passed at the first Conference of Commonwealth and State Aboriginal Authorities (21-23 April 1937). Whilst this policy and the focus of part-aboriginal children predated this point, this resolution was an historical watershed in this regard. See also 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* [2000] FCA 1084, [226]. See also the discussion of the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 in Healey (ed) *ibid* 23-24.

<sup>10</sup> Apparently Read coined this term: Peter Read, *The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883-1969* (1982).

removed from their families under this policy. In Canada no distinction was drawn between children on the basis of mixed parentage.<sup>11</sup> Rather the legislative focus was on 'Status' Indian children.<sup>12</sup>

Despite the legislative focus on Status Indians, other Canadian aboriginal children such as Inuit<sup>13</sup> and Metis<sup>14</sup> children were also removed from their families and detained in the institutions pursuant to this policy. The schools where Canadian aboriginal children were taken and detained are known as Indian<sup>15</sup> or aboriginal<sup>16</sup> residential schools.

Whilst the removal of part-aboriginal children from their families had been documented in Australia for many decades, the policy was not really debated in the public domain until the findings of the *Royal Commission into Aboriginal Deaths in Custody*.<sup>17</sup> The Commission found that of the 99 deaths investigated, 43 of the persons had, as children, been separated from their families and

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<sup>11</sup> Under the *Indian Act* 1894 and successive legislation the government was authorised to require attendance by Indian children at aboriginal residential schools. The focus was not on percentage of blood.

<sup>12</sup> That is, persons registered as Indians under the *Indian Act*.

<sup>13</sup> In the 1950s, 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: RCAP, above n 2, 351-352; Cassidy, above n 2, 161.

<sup>14</sup> As a consequence of many Metis living on reservations with Status Indians, some Metis children were also forced to attend the Residential schools. See RCAP above n 2, 351-352; Sara Hansen and Marcus 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); Cassidy, *ibid* 161-162. See also [www.metisnation.ca](http://www.metisnation.ca).

<sup>15</sup> Note in this regard that in response to RCAP the Canadian government established within the Indian and Northern Affairs Department the Indian Residential Schools Resolution Unit, with responsibility to manage issues pertaining to these schools. In time the Unit became a new government Department, independent of the Indian and Northern Affairs Department: IRSR, above n 3.

<sup>16</sup> The author prefers the term aboriginal residential schools as the children taken and placed in the schools were not all Status Indians, but also included Inuit and Metis children. See Hansen and Lee, above n 14. See also [www.metisnation.ca](http://www.metisnation.ca).

<sup>17</sup> *Report of the Inquiry into the Death of Malcolm Charles Smith of the Royal Commission into Aboriginal Deaths in Custody* (1989).

communities.<sup>18</sup> However, it was not until the revelations of the Australian Human Rights and Equal Opportunity Commission ('HREOC') Report, *Bringing them Home*<sup>19</sup> that the general Australian public became truly aware of the removal policy.<sup>20</sup> The Report made 54 recommendations, including acknowledgment of the past policy and a government apology. This in turn led to public calls for a government apology. Whilst State and Territory governments responded with an apology for such removals and the consequent hurt and distress,<sup>21</sup> the Federal parliament merely passed a motion of sincere regret.<sup>22</sup> Moreover, as noted below, the government has vigorously defended

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<sup>18</sup> See Healey, above n 7, 12. Note also the significance of the address of then Prime Minister, Mr Paul Keating, in Sydney on 10 December 1992 when he acknowledged 'We took the children from their mothers' (reproduced: (1993) 2 *Aboriginal Law Bulletin* 4, 4.)

<sup>19</sup> HREOC, above n 1.

<sup>20</sup> The relatively recent release of the film *Rabbit Proof Fences* also served to heighten the public awareness both in Australia and Canada. The film was written and produced by Christine Olsen and is 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.

<sup>21</sup> For example, in response the Queensland Parliament passed a resolution of regret and apology for 'past policies under which indigenous children were forcibly separated from their families': (Queensland, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 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': (South Australia, *Parliamentary Debates*, House of Assembly, 28 May 1997, 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, 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': (Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 17 June 1997, 1604).

<sup>22</sup> *Hansard*, House of Representatives, 26 August 1999.

compensation claims in the courts and has made no attempt to negotiate a compensation package for aboriginal persons who were removed from their families, including those who were abused while being detained.<sup>23</sup>

Similarly in Canada, it was not until the revelations of the *Royal Commission on Aboriginal Peoples Final Report (1998) (RCAP)*<sup>24</sup> that the Canadian general public became aware of the plight of the children, now adults, who had been removed under this policy and so often abused<sup>25</sup> while in the care of the relevant institution. However, unlike the Australian federal government, the Canadian federal government's response to the revelations was, *inter alia*, an apology to those persons who suffered through the aboriginal residential schools.<sup>26</sup> On 7 January 1998 the government delivered its *Statement of Reconciliation: Learning from the Past*. The federal government acknowledged its role in the development and administration of aboriginal 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 notes 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.' More recently, in the 20 November 2005 agreement between Canada and the Assembly of First Nations,<sup>27</sup> the government acknowledged that it and certain religious

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<sup>23</sup> One in six of the witnesses before the *Bringing them Home* Inquiry reported being physically assaulted while detained in aboriginal institutions and one in ten asserted that they had been sexually abused: Healey, above n 7, 19.

<sup>24</sup> RCAP, above n 2, chap 10 provides detailed information regarding the aboriginal residential schools. The Report recommended, *inter alia*, the establishment of a Public Inquiry into the aboriginal residential schools. It also recommended the establishment of a National Repository of records and video collections related to aboriginal residential schools.

<sup>25</sup> 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, A3 reporting the comments of Rix Rogers, special adviser to the Minister of National Health and Welfare, cited by RCAP, *ibid* 378. See further RCAP *ibid* and Aboriginal Healing Foundation, above n 2.

<sup>26</sup> See the *Statement of Reconciliation: Learning from the Past*, 7 January 1998.

<sup>27</sup> On 20 November 2005 an 'Agreement in Principle' was entered into between the Canadian government, the Assembly of First Nations and various law firms representing clients through class actions. On 25 April 2006 the Minister of Indian Affairs and Northern Development, Mr Jim Prentice, announced that a final

organizations 'operated Indian Residential Schools for the education of aboriginal children and certain harms and abuses were committed against those children' and thus it was desirable for the government to provide 'a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools.' Canada has agreed to a \$1.9b settlement agreement that compensates, not only victims of abuse, but also all who attended the residential schools.<sup>28</sup>

This article is a comparative research and teaching resource that provides an overview of issues pertaining to the stolen generation in Canada and Australia.<sup>29</sup> To this end this article is comprised of two parts. First, it provides a historical overview of the removal and detaining of aboriginal children in Canada and Australia. As a consequence of the revelations of this past practice, litigation has been undertaken by members of the stolen generations in both Canada and Australia. In turn, the second part includes a summary of the key cases in Canada and Australia. It will be seen that unlike in Australia, 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 aboriginal residential schools.<sup>30</sup> In the course of this discussion, the various causes of actions relied

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agreement had been reached between all relevant parties. This was finalised in the 8 May 2006 Agreement. Final approval was delayed to some extent by the change in the Canadian federal government.

<sup>28</sup> As noted above, an agreement was entered into between the Canadian government, the Assembly of First Nations and various law firms representing clients through class actions. These class actions included plaintiffs who were not physically or sexually abused whilst detained and thus were claiming damages for the substandard conditions in the schools, loss of language and culture and maternal deprivation. Under the terms of the agreement compensation will be paid to all persons who attended aboriginal residential schools, not only those who were physically or sexually abused. In turn, the agreement provides for the discontinuance of these class actions. It should be noted that the agreement does not remove the right to litigate and thus an individual may still bring a claim if they are unhappy with the extent of the compensation.

<sup>29</sup> The discussion is designed to introduce researchers and students to the legal issues arising out of the stolen generation litigation, rather than providing a comprehensive analysis of those legal issues.

<sup>30</sup> See for example *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Blackwater v Plint (No 3)* (2003) 235 DLR (4<sup>th</sup>) 60; *Blackwater v Plint (No 4)* (2005) 258 DLR (4<sup>th</sup>) 275; *M(FS) v Clarke* [1999] 11 WWR 301 (*Mowatt*); *A(TWN) v Canada* (2001) 92 BCLR (3d) 250.

upon by the plaintiffs are examined.<sup>31</sup> It will be seen from this discussion that while the plaintiffs in these leading Canadian cases were ultimately successful under at least one of their heads of claim, the approaches in these cases in regard to the Crown's liability for breaching fiduciary duties,<sup>32</sup> the duty of care,<sup>33</sup> and non-delegable duties<sup>34</sup> is inconsistent. Thus even in regard to the Canadian jurisprudence key legal issues pertaining to the Crown's liability for the aboriginal residential school experience continues to be unresolved.

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<sup>31</sup> For example, claims were brought for, *inter alia*, breaches of the duty of care, fiduciary duties and statutory duties. Again note that the discussion is designed to introduce researchers and students to the legal issues arising out of the stolen generation litigation, rather than providing a comprehensive analysis of those legal issues. Such comprehensive analysis has been undertaken elsewhere by the author in regards to the issue of breach of fiduciary duties (Julie Cassidy, 'The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian approaches to fiduciary duties' (2003) 34:2 *University of Ottawa Law Review* 175) and the issues of breach of the duty of care, vicarious liability and non-delegable duties (Cassidy, above n 3).

<sup>32</sup> As discussed below, in *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228 the court relied on a particular line of authority to deny the claims based on a breach of fiduciary duties. In *Mowatt* [1999] 11 WWR 301, however, the court followed a contrary line of authority, supported by the Canadian Supreme Court, and upheld the plaintiff's claims in equity against the Anglican Church. See further Cassidy, *ibid*.

<sup>33</sup> As discussed below, it will be seen that in *Blackwater v Plint (No 2)* *ibid* 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. See also *Blackwater v Plint (No 4)* (2005) 258 DLR (4<sup>th</sup>) 275. By contrast, in *Mowatt* *ibid* 353 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. Both Canada and the Church were held to have failed to protect the plaintiff from harm. See further Cassidy, above n 3.

<sup>34</sup> As discussed below, it will be seen that in *Blackwater v Plint (No 2)* *ibid* the court held that Canada had breached its non-delegable statutory duties owed to the children under the *Indian Act*. By contrast, in *Blackwater v Plint (No 4)* *ibid* [49]-[50] and [54]-[55] the court concluded that the non-mandatory nature of the language in the *Indian Act* meant there was no non-delegable statutory duty.

## II HISTORICAL OVERVIEW OF REMOVAL AND DETAINING OF ABORIGINAL CHILDREN

### A *Canada*

To briefly<sup>35</sup> set these legal issues in their historical context, in Canada the aboriginal residential schools were first established in the 1600s,<sup>36</sup> prior to Confederation, as part of the Christian churches' missionary work.<sup>37</sup> It was not until 1874 that the Canadian federal government began to play a role in the administration of the schools. As noted above, the schools were part of the government's policy of assimilation<sup>38</sup> and were advocated as the 'final solution of the Indian problem'.<sup>39</sup> The federal government's involvement was also spurred by its obligation to provide education for Indian children under the *Indian Act* 1894 and in accordance with the terms of treaties with various First Nations.<sup>40</sup> Under the *Indian Act* 1894 and successive legislation<sup>41</sup> the government could require attendance by Indian children at aboriginal

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<sup>35</sup> For a fuller discussion of the history of aboriginal residential schools in Canada see RCAP, above n 2 and Cassidy, above n 2.

<sup>36</sup> Aboriginal Healing Foundation, above n 2, 3. The first aboriginal boarding schools were established in New France between 1620 and 1680 by the Recollets, Jesuits and Ursines religious orders: IRSR, above n 3. See further IRSR, above n 3.

<sup>37</sup> IRSR *ibid.*

<sup>38</sup> RCAP above n 2, 335. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2. This was also spurred by the government's constitutional responsibility for Indians and their lands under the *Constitution Act* 1867: *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253; *Mowatt* [1999] 11 WWR 301, 319. See also *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [91] regarding the constitutional authority under *British North America Act* 1869 s 91(24).

<sup>39</sup> Aboriginal Healing Foundation *ibid* 7, quoting the Deputy Superintendent of Indian Affairs, Duncan Campbell Scott. See further RCAP *ibid* and Aboriginal Healing Foundation *ibid.*

<sup>40</sup> RCAP *ibid* 335. See also IRSR, above n 3. 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.

<sup>41</sup> See *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [32]; *Mowatt* [1999] 11 WWR 301, 305.

residential schools.<sup>42</sup> ‘Truant officers’ were in turn empowered to take any Indian child into custody so as to convey them to a school ‘using as much force as the circumstances require’.<sup>43</sup> 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 or consent that had been obtained through duress, through threats of jail or fines by Department of Indian Affairs officials.<sup>44</sup> Children were in turn taken to schools, not only days away from their families, but sometimes to other provinces/territories.<sup>45</sup> By 1913 there were 107 aboriginal residential schools across Canada. Over time 130 schools existed.<sup>46</sup> While the schools were located in every province and territory apart from New Foundland, New Brunswick and Prince Edward Island,<sup>47</sup> they were mainly located in Manitoba and west of this province.<sup>48</sup>

Eventually, the federal government was involved in the conduct of nearly every aboriginal residential school. The courts have characterised the arrangement as a ‘joint venture’ or ‘partnership’ between the respective Churches and the government.<sup>49</sup> Canada contracted with the Churches to administer the schools,<sup>50</sup> while the government had the final say on the employment of the principal and had a supervisory role over the conduct of the schools.

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<sup>42</sup> IRSR, above n 3. By 1920 it was mandatory for all Indian children between the ages of 7 and 15 to attend school: *Mowatt* ibid 305; *Blackwater v Plint (No 1)* ibid [32]; IRSR, above n 3. Similarly, under *Indian Act* 1951 ss 115, 116 and 118 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)* ibid [34].

<sup>43</sup> *Blackwater v Plint (No 1)* ibid.

<sup>44</sup> *Mowatt* [1999] 11 WWR 301, 305; *Blackwater v Plint (No 1)* ibid; IRSR, above n 3. See, for example the evidence regarding the removal of EAJ and ERM in *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 259 and 276.

<sup>45</sup> See RCAP, above n 2, 351.

<sup>46</sup> IRSR, above n 3.

<sup>47</sup> Cartography prepared by Public History Inc for the Indian Residential Schools Resolution Department.

<sup>48</sup> This flows from the correlation between the location of Indian reserves and the location of the schools.

<sup>49</sup> *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [151]; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228, 246; *Blackwater v Plint (No 4)* (2005) 258 DLR (4<sup>th</sup>) 275, [38].

<sup>50</sup> *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253.

In the 1950s there was a shift in government policy from assimilation to integration of aboriginal peoples into the broader Canadian society.<sup>51</sup> This change in policy included a plan to close the aboriginal residential schools and ‘transferring Indian children to provincial schools’.<sup>52</sup> Students from small and/or remote communities, however, continued to attend aboriginal residential schools.<sup>53</sup> The schools also continued to operate as part of the government’s social welfare system<sup>54</sup> in the sense that aboriginal children were often considered by ‘white’ child welfare personnel to be neglected by their aboriginal families.<sup>55</sup>

In 1969 the federal government assumed total responsibility for the aboriginal residential schools.<sup>56</sup> At this point the federal government ended the joint venture with the Churches and became the employer of those working at the schools.<sup>57</sup> In many cases, however, the Churches continued to be involved in the schools through contractual arrangements with the government.<sup>58</sup> In these cases, control of the schools continued to be joint, even after the changes of 1969.<sup>59</sup> By the late 1970s most residential schools ceased to operate. By 1979 only 12 aboriginal residential schools continued to exist, with a total resident population of 1899 students.<sup>60</sup> In 1996 the last federally funded school, located in Saskatchewan, was closed.<sup>61</sup>

The RCAP found that the conditions in the Canadian aboriginal residential schools where children were placed were substandard.<sup>62</sup> The dormitories in

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<sup>51</sup> *Mowatt* [1999] 11 WWR 301, 321. See RCAP, above n 2, 346; IRSR, above n 3.

<sup>52</sup> RCAP *ibid* 346 and 349.

<sup>53</sup> RCAP *ibid* 348; IRSR, above n 3.

<sup>54</sup> RCAP *ibid* 349; IRSR *ibid*.

<sup>55</sup> A government report suggested that at one point 75% of aboriginal children attending the aboriginal residential schools were ‘neglected’ children: *Relationships Between Church and State in Indian Education*, 26 September 1966, quoted in RCAP *ibid*. These children were adjudged neglected according to non-aboriginal, Eurocentric notions of childcare: RCAP *ibid*.

<sup>56</sup> RCAP *ibid* 350.

<sup>57</sup> RCAP *ibid*.

<sup>58</sup> *Mowatt* [1999] 11 WWR 301, 343-346; IRSR, above n 3.

<sup>59</sup> *Mowatt* *ibid* 343-346.

<sup>60</sup> RCAP, above n 2, 351.

<sup>61</sup> IRSR, above n 3.

<sup>62</sup> RCAP, above n 2, 353 and 362.

which the children slept were overcrowded and lacked heating.<sup>63</sup> There were insufficient resources to clothe and feed the children.<sup>64</sup> The standard of education provided in the institutions was also substandard.<sup>65</sup> As a consequence of the remoteness of the schools and the pay offered to employees, the schools attracted poorly skilled teachers.<sup>66</sup> At times the teachers were not even qualified to teach.<sup>67</sup> The school curriculum was designed to provide only a basic education, in preparation for the students to undertake work as domestic or menial labourers.<sup>68</sup> Children were subjected to excessive physical punishment<sup>69</sup> and in many cases sexual abuse.<sup>70</sup> The children were not allowed to speak their aboriginal languages and were punished if they did.<sup>71</sup>

The federal government estimates that up to 100 schools could be involved in current litigation.<sup>72</sup> It has also been estimated that 90,600 former aboriginal students are still alive today.<sup>73</sup>

## **B      *Australia***

As in Canada, the establishment of aboriginal schools in Australia pre-dated federation. The HREOC found that forcible removals of aboriginal children began in the very first days of European occupation.<sup>74</sup> However, as European

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<sup>63</sup> RCAP *ibid.*

<sup>64</sup> RCAP *ibid* 358, 359 and 364.

<sup>65</sup> RCAP *ibid* 345 and 353.

<sup>66</sup> RCAP *ibid* 345.

<sup>67</sup> RCAP *ibid.*

<sup>68</sup> RCAP *ibid* 345 and 353.

<sup>69</sup> RCAP *ibid* 365-366 and 369-370.

<sup>70</sup> For examples of such abuse see *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Mowatt* [1999] 11 WWR 301; *A(TWN) v Canada* (2001) 92 BCLR (3d) 250. As noted above, 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, A3 reporting the comments of Rix Rogers, special adviser to the Minister of National Health and Welfare, cited by RCAP *ibid* 378.

<sup>71</sup> RCAP *ibid* 341-342. See also *A(TWN) v Canada* *ibid* 260. See further RCAP *ibid* and Aboriginal Healing Foundation, above n 2.

<sup>72</sup> IRSR, above n 3.

<sup>73</sup> *Ibid.*

<sup>74</sup> HREOC, above n 1, 4.

settlement did not occupy Australia until much later than Canada, it was not until the beginning of the 1800s that the first aboriginal school was created in Australia. In 1814 Governor Macquarie opened a school for aboriginal children in Parramatta, New South Wales.<sup>75</sup> Even at this early stage in the history of the stolen generation in Australia, the local aboriginal people, the Darug people, came to realise that the idea behind the school was to separate the children from their families.<sup>76</sup> They in turn removed their children from the school and the school closed in 1820.<sup>77</sup> Governor Hutt of Western Australia similarly supported the establishment of an aboriginal school in 1840 by a missionary, Reverend John Smithies, for the ‘christianising and civilising’ of aboriginal children.<sup>78</sup> Missionaries established similar schools throughout the 1800s with some financial support from relevant governments.<sup>79</sup>

In the lead up to federation the States enacted legislation authorising the removal of aboriginal children from their families. For example, under the *Aboriginal Protection Act 1869* (Vic) the Board for the Protection of Aborigines was established and under the regulations<sup>80</sup> the Governor could order the removal of any aboriginal child from their family and their placement in reformatory or industrial schools if they were deemed neglected or unprotected. In South Australia *Aboriginal Orphan Ordinance 1844* (SA) s 2 empowered the Protector of Aborigines to apply to two justices to order the indenture of any ‘half-caste’ or other aboriginal child.<sup>81</sup> In time legislative removal powers were not premised on neglect, much less required a court order.<sup>82</sup> For example, the neglect requirement in the *Aboriginal Protection Act 1869* (Vic) was removed by the *Aborigines Regulation 1899* (Vic). Broader removal powers were also conferred under the *Aboriginal Protection and*

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<sup>75</sup> Ibid 9.

<sup>76</sup> HREOC *ibid*.

<sup>77</sup> HREOC *ibid*.

<sup>78</sup> Paul Hasluck, *Black Australian: A Survey of Native Policy in Western Australia 1829-1897* (2<sup>nd</sup> ed, 1970), 89.

<sup>79</sup> Buti, above n 8, 58.

<sup>80</sup> *Aborigines Protection Regulations 1871* (Vic). See further [www.foundingdocs.gov.au/places/vic/vic71.htm](http://www.foundingdocs.gov.au/places/vic/vic71.htm).

<sup>81</sup> Heather McRae, Garth Nettheim and Laura Beacroft *Indigenous Legal Issues* (2<sup>nd</sup> ed, 1997), 411.

<sup>82</sup> See also *Aborigines Act 1905* (WA); *Aborigines Protection Regulation 1909* (WA); *Northern Territory Aboriginal Act 1910* (SA); *Aborigines Act 1911* (SA). Under the *Aborigines Act 1934* (SA) aboriginal children were effectively deemed neglected within the terms of the *Maintenance Act*.

*Restriction of the Sale of Opium Act 1897 (Qld)*. Under *Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld)* s 31 the Minister was authorised to remove aboriginal children from their families and detain them in institutions. Under the legislation, whether the child's parents were living or not, legal guardianship of all aboriginal children was placed with the Chief Protector of Aborigines.<sup>83</sup> Even in States such as New South Wales that did not have a legislative regime for the removal of aboriginal children prior to federation, this policy was conducted without legal powers by threatening the child's parents and promises of material benefits such as rations.<sup>84</sup>

Unlike in Canada, federation did not at first see the federal government assume responsibility for aboriginal peoples. The *Constitution Act 1901 (UK)* initially excepted 'the aboriginal race' from the federal Parliament's legislative authority over 'race'. The States continued to retain their legislative competence over aboriginal peoples. Thus post federation, such legislation continued to be passed by the States,<sup>85</sup> rather than the federal legislature.

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<sup>83</sup> Under *Aboriginals Preservation and Protection Act 1939 (Qld)* this role was taken over by the Director of Native Affairs.

<sup>84</sup> Read, above n 10, 2. Legislation was not passed in new South Wales until 1909: *Aborigines Protection Act 1909 (NSW)*.

<sup>85</sup> For example, in 1915 the *Aborigines Protection Act 1909 (NSW)* was amended to authorise under s 13A the New South Wales Aborigines Protection Board to remove aboriginal children without the consent of their parents if the Board considered such to be in the children's best interests. The amendment also removed the precondition of neglect. No court order was required. 'For being Aboriginal' was sufficient to authorise the removal: Read, *ibid*. See also HREOC, *Bringing them home* (Education Module) (2002), 'Track the History'; HREOC, above n 1, 10. See [www.austlii.edu.au/au/other/IndigLRes/rciadac/regional/nsw-vic-tas/206.html](http://www.austlii.edu.au/au/other/IndigLRes/rciadac/regional/nsw-vic-tas/206.html). See further in regard to the history of child welfare in New South Wales: [www.lawlink.nsw.gov.au/lrc.nsf/pages/RR7CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR7CHP2). By 1911 essentially all States and the Northern Territory had legislation in place for the forcible removal of aboriginal children from their families: Healey, above n 7, 11. It has been suggested that the exception was Tasmania as this State denied that it had any aboriginal persons living in the State: Healey, above n 7, 11. However, even in Tasmania the *Cape Barren Island Reserve Act 1912 (Tas)* had some impact in this regard as it authorised the removal of aboriginal persons from the mainland to Cape Barren Island and, more specifically, provided for the creation of a 'half-caste' reserve and authorised the Secretary for Lands to determine who could reside in the reserve. Cf McRae, above n 81, 412. After 1935 aboriginal children continued to be removed from Cape Barren Island and surrounding islands, but pursuant to the *Infants Welfare Act 1935 (Tas)* and subsequent welfare legislation: HREOC, above n 1, 626.

Under the *Constitution*, however, the federal Parliament had authority over the territories<sup>86</sup> and thus also played a role, even at this early stage, in the legislative removal of aboriginal children in the territories. Thus in 1911<sup>87</sup> the federal parliament enacted the *Aboriginals Ordinance* 1911 (Cth) that authorised under s 3 of the Act the Chief Protector to remove any ‘aboriginal or half-caste’ child if it was in the Chief Protector’s opinion in the best interests of the child. Thus given the high concentration of the aboriginal population in the Northern Territory,<sup>88</sup> the Commonwealth’s role in the removal of aboriginal children was significant even at this stage.

In *Cubillo* 2<sup>89</sup> the court found that documents dating from 1911<sup>90</sup> indicated support at the federal level for the removal of part-aboriginal children from their families and placing such children in institutions. While the primary institutions where children were detained in the Northern Territory were in Darwin and Alice Springs, sometimes part-aboriginal boys were placed in an institution in Adelaide, South Australia.<sup>91</sup> Thus, as in Canada, the children could be placed in institutions many miles from their families and possibly interstate.<sup>92</sup>

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<sup>86</sup> See *Constitution Act* 1901 (UK) s 122. Note in regard to the Australian Capital Territory that under the *Aborigines Welfare Act* 1954 (Cth) aboriginal persons residing in this territory were subject to any relevant New South Wales legislation.

<sup>87</sup> This date is significant because the Northern Territory was originally annexed to South Australia and it was not until 1911 that the Commonwealth became responsible for the Northern Territory. This historical fact explains why the discussion below refers to both the *Northern Territory Aboriginal Act* 1910 (SA) and *Aboriginals Ordinance* 1911 (Cth) in regard to the aboriginal peoples of the Northern Territory.

<sup>88</sup> In a sense the existence of removal powers in Western Australia, Queensland and the Northern Territory were, therefore, most significant from a purely numerical perspective as a consequence of their significant aboriginal populations.

<sup>89</sup> See *Cubillo 2* [2000] FCA 1084, [170] and [200] and [220].

<sup>90</sup> *Cubillo 2* *ibid* [171]. This policy of removal is evidenced in a report dated 12 September 1911 from the Acting Administrator of the Northern Territory to the Minister for External Affairs in which it was recommended that despite the undoubted protests from their mothers, ‘all half-caste children who are living with aborigines’ should be gathered in: *Cubillo 2* *ibid* [171]. Similarly a year later the Chief Protector of Aboriginals reported that ‘No half-caste children should be allowed to remain in any native camp, but they all should be withdrawn and placed on stations. So far as practicable, this plan is now being adopted’: *Cubillo 2* *ibid* [172].

<sup>91</sup> See *Cubillo 2* *ibid* [170], [200], [220]-[256].

<sup>92</sup> Cf Healey, above n 7, 17-18.

Patrol officers, sometimes accompanied by other persons, such as missionaries, effected the removals. It seems that parental consent to the removal of part-aboriginal children was not even raised as an issue until the 1940s.<sup>93</sup> In essence, after a number of incidents where aboriginal children were forcibly removed from their families during the 1940s, the policy of forced removals began to be criticised by the public.<sup>94</sup> While it seems that in the 1950s efforts were made in given cases to obtain parental consent to the removal of aboriginal children, it also appears that the parents were not provided with a choice and forced removals continued to be authorised.<sup>95</sup>

The legislation authorising the removal of part-aboriginal children purely on the basis of their aboriginality or, more particularly, mixed heritage was in time repealed. For example, in Victoria the *Aborigines Act 1957* (Vic) deleted the specific power to remove aboriginal children from their families. Thus from this date aboriginal children fell under the general auspices of the *Child Welfare Act 1954* (Vic).<sup>96</sup> In the Northern Territory the *Aboriginal Ordinance 1918* was repealed in 1957, and the *Welfare Ordinance 1957* (Cth) did not replicate the power to remove part-aboriginal children without a 'welfare' reason.<sup>97</sup> From this date, technically, removals could only occur without parental consent if the child was declared a ward or committed by a court to the State's care.<sup>98</sup> It was not until 1964, with the enactment of the *Social Welfare Ordinance 1964* (NT), that aboriginal children were covered by the general welfare provision of that statute, rather than provisions specifically confined to

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<sup>93</sup> *Cubillo 2* [2000] FCA 1084, [201]. See also the discussion of the New South Wales Aborigines Protection Board and the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 in Healey *ibid* 23 and 28 in regard to the need to remove aboriginal children with or without their parents' consent.

<sup>94</sup> See the discussion in *Cubillo 2* *ibid* [201]-[214].

<sup>95</sup> See the discussion in, *inter alia*, *Cubillo 2* *ibid* [218], [220] and [221].

<sup>96</sup> See also *Aboriginal Act 1962* (SA) whereby the removal of aboriginal children was effectively shifted to the auspices of the *Maintenance Act 1926* (SA). It has been stated that that removal on the basis of aboriginality probably continued to be authorised in South Australia until the enactment of the *Community Welfare Act 1972* (SA): McRae, above n 81, 411. Similarly, in New South Wales it was not until the repeal of the *Aborigines Protection Act 1909* (NSW) by the *Aborigines Act 1969* (NSW) that aboriginal children were subject to general child welfare laws and could not be removed on the basis of aboriginality: McRae, above n 81, 411.

<sup>97</sup> *Cubillo 2* [2000] FCA 1084, [259]; HREOC, above n 1, 11.

<sup>98</sup> *Cubillo 2* *ibid*.

aboriginal children.<sup>99</sup> Similarly, in Queensland it was not until the *Aboriginal and Torres Strait Islander Act 1965* (Qld) repealed the *Aboriginals Preservation and Protection Act 1939* (Qld) that aboriginal children fell under the general welfare provisions. It was not until 1971,<sup>100</sup> however, that the statutory power of the Director of Native Affairs to remove aboriginal children from aboriginal reserves was repealed.

Despite the repealing of the legislative bases for the removal of aboriginal children, the policy continued, but removals were technically not on the basis of aboriginality but alleged welfare concerns.<sup>101</sup> Thus, while such removals continue even today, from the early 1970s removals were no longer based purely on race as government policy had shifted towards greater aboriginal participation in aboriginal affairs.<sup>102</sup> Nevertheless, a number of the missions and aboriginal institutions continued to operate throughout the 1970s and 1980s.<sup>103</sup>

The HREOC report, *Bringing Them Home*, concluded that between one in three and one in ten aboriginal children were forcibly removed from their families and communities between 1910 and 1970.<sup>104</sup> In turn it has been estimated that in the course of the 1900s, 40,000 aboriginal children were removed from their families.<sup>105</sup> The conditions in the missions and institutions where the children were placed were poor.<sup>106</sup> There were often insufficient resources to properly shelter, clothe and feed the children.<sup>107</sup> The standard of education provided in the institutions was very basic, being designed essentially to provide a basis for

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<sup>99</sup> McRae, above n 81, 411. Similarly, in New South Wales it was not until the repeal of the *Aborigines Protection Act 1909* (NSW) by the *Aborigines Act 1969* (NSW) that aboriginal children were subject to general child welfare laws and could not be removed on the basis of aboriginality: McRae, above n 81, 411.

<sup>100</sup> Repealed by the *Aborigines Act 1971* (Qld) and *Torres Strait Islanders Act 1971* (Qld).

<sup>101</sup> Healey, above n 7, 16, 18 and 29.

<sup>102</sup> Buti, above n 8, 3.

<sup>103</sup> Buti *ibid* 136, citing Haebich, *Submission to the Human Rights and Equal Opportunity Inquiry into the Removal of Aboriginal Children from their Families* (2000), 229-300.

<sup>104</sup> HREOC, above n 1, 4. It has been stated that between 1919 and 1929 one third of all aboriginal children were removed from their families and between 1950 and 1965 one in five children were separated from their families: Healey, above n 7, 12.

<sup>105</sup> Healey *ibid* 12.

<sup>106</sup> HREOC, above n 1, 15.

<sup>107</sup> HREOC *ibid*. See also Healey, above n 7, 19.

the children to ultimately work as menial labourers such as farm hands and domestic servants.<sup>108</sup> Children were subjected to excessive physical punishment<sup>109</sup> and in many cases sexual abuse.<sup>110</sup> The children were not allowed to speak their aboriginal languages and were punished if they did.<sup>111</sup>

### III SUMMARY OF KEY CASES

#### A *Canada*<sup>112</sup>

##### *Mowatt and A(TWN) v Clarke*<sup>113</sup>

The plaintiffs in *Mowatt*<sup>114</sup> and *A(TWN) v Clarke*<sup>115</sup> were of Canadian Indian descent. As Status Indians under the *Indian Act* attendance and residency at an aboriginal residential school was again mandatory.<sup>116</sup>

In 1901 St George's Anglican school ('St George's') for aboriginal children was founded by the New England Company ('NEC'), a missionary society of the Church of England.<sup>117</sup> By 1921 the NEC was having financial difficulty operating the school and entered into an agreement with the Canadian government in 1922 for the lease of the school buildings and lands.<sup>118</sup> From this date the Canadian government provided most of the funding for the school,<sup>119</sup> although NEC continued to provide some funding.<sup>120</sup> In 1927 Canada purchased the lands from the NEC at less than valuation in exchange for a government promise that it would continue to run the school and train the

<sup>108</sup> HREOC *ibid* 16. See also Healey *ibid*.

<sup>109</sup> HREOC *ibid* 15 and 16.

<sup>110</sup> HREOC *ibid* 17. See also Healey, above n 7, 12 and 19.

<sup>111</sup> Healey *ibid* 18.

<sup>112</sup> For a more detailed account of the factual basis of the claims in *Blackwater v Plint (No 1)*, *(No 2)*, *(No 3)* and *(No 4)* see Cassidy, above n 2.

<sup>113</sup> Again, for a fuller discussion of the factual basis of these cases see Cassidy, *ibid*.

<sup>114</sup> [1999] 11 WWR 301.

<sup>115</sup> (2001) 92 BCLR (3d) 250.

<sup>116</sup> *Mowatt* [1999] 11 WWR 301, 305.

<sup>117</sup> *Mowatt* *ibid* 313.

<sup>118</sup> *Mowatt* *ibid* 314.

<sup>119</sup> *Mowatt* *ibid* 320.

<sup>120</sup> *Mowatt* *ibid* 316 and 320.

students in the Anglican Church.<sup>121</sup> Under the 1927 agreement it was understood that both parties would remain associated in the management of St George's.<sup>122</sup> The Church would undertake the day to day running of the school,<sup>123</sup> while the government would undertake a supervisory role. The government was also responsible for the physical premises at the school.<sup>124</sup>

Again, the Department of Indian Affairs, not the Church, determined which children were sent to the school. St George's was closed in 1979.<sup>125</sup>

The court in *Mowatt*<sup>126</sup> found that St George's was a 'religious institution run with military precision'. Dormitory supervisors had control over every waking moment of the children's existence, apart from their schooling.<sup>127</sup> The plaintiff in *Mowatt*<sup>128</sup> 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 the plaintiff and other boys.<sup>129</sup> The principal of St George's, Harding, and the principal of the elementary school were both told of the sexual assaults.<sup>130</sup>

Harding in turn told the chaplain and local pastor, Reverend Dixon, and there was evidence that both of the principals told the Bishop of the day.<sup>131</sup> However, the matter was simply covered up.<sup>132</sup> It appears that Harding sought to cover up Clarke's assaults as he was also sexually assaulting the boys.<sup>133</sup> He consequently did not want there to be any investigation at the school as this

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<sup>121</sup> *Mowatt* ibid 315.

<sup>122</sup> *Mowatt* ibid.

<sup>123</sup> *Mowatt* ibid 321.

<sup>124</sup> *Mowatt* ibid 320 and 321.

<sup>125</sup> *Mowatt* ibid 321.

<sup>126</sup> *Mowatt* ibid 305.

<sup>127</sup> *Mowatt* ibid 306.

<sup>128</sup> *Mowatt* ibid.

<sup>129</sup> *Mowatt* ibid 307.

<sup>130</sup> *Mowatt* ibid 308. See also *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 256 and 280.

<sup>131</sup> *Mowatt* ibid 310.

<sup>132</sup> *Mowatt* ibid 346. There was no investigation: *Mowatt* ibid 310. Clarke was told to resign and the principal of St George's gave him a letter of recommendation: *Mowatt* ibid 309-310. No counselling was offered to the abused children: *Mowatt* ibid 346.

<sup>133</sup> *Mowatt* ibid 310-312. See also *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253.

might reveal his own sexual assaults.<sup>134</sup> The diocesan personnel's motive for the cover up seemed to have been their concern that the subject school not attract attention because at the time other aboriginal residential schools were being closed.<sup>135</sup> Thus the Department of Indian Affairs was never informed about Clarke's misconduct.<sup>136</sup>

The plaintiff in *Mowatt*<sup>137</sup> was successful in his claims. Canada and the Anglican Church of Canada were held to 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. The court found that the school principal's knowledge of the sexual assaults was imputed to Canada and the Anglican Church, as employers, and that they breached the duty of care by failing to take reasonable supervisory precautions against sexual abuse by dormitory supervisors.<sup>138</sup> Both Canada and the Church were held to have failed to protect the plaintiff from harm.<sup>139</sup> The court apportioned liability 60% to the Church and 40% to Canada.

The court also followed a line of authority, contrary to that in *Blackwater v Plint (No 2)*,<sup>140</sup> discussed below, and supported by the Canadian Supreme Court, and upheld the plaintiff's claims in equity. The court rejected the suggestion in *Blackwater v Plint (No 2)*<sup>141</sup> 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'.<sup>142</sup> Thus the absence of *mala fides* on the part of the Anglican Church did not serve to release it from liability.<sup>143</sup> Again, contrary to *Blackwater v Plint (No 2)*,<sup>144</sup> the breach was held to be actionable in equity even though the plaintiff's

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<sup>134</sup> *Mowatt* *ibid* 312 and 346.

<sup>135</sup> *Mowatt* *ibid* 312-313 and 346.

<sup>136</sup> *Mowatt* *ibid* 310 and 346.

<sup>137</sup> *Mowatt* *ibid*.

<sup>138</sup> *Mowatt* *ibid* 353.

<sup>139</sup> *Mowatt* *ibid*.

<sup>140</sup> (2001) 93 BCLR (3d) 228.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Mowatt* [1999] 11 WWR 301, 354-358.

<sup>143</sup> *Mowatt* *ibid*. For a fuller discussion of the court's findings in regard to breach of fiduciary duties see Cassidy, above n 2.

<sup>144</sup> (2001) 93 BCLR (3d) 228.

claims were in both tort and equity. The court noted that the proposition in *Blackwater v Plint (No 2)*<sup>145</sup> was contrary to the Supreme Court of Canada decision in *M(K) v M(H)*<sup>146</sup> and chose to follow the latter case.<sup>147</sup>

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.<sup>148</sup> The court held that Canada's failure to supervise was negligent, but not a breach of its fiduciary duty.<sup>149</sup> The Church was also held to stand in a fiduciary relationship to the plaintiff. The plaintiff was vulnerable and the Church was in a position of power over him within this test.<sup>150</sup> He was a child isolated from his family in an Anglican institution where 'control was almost absolute on a daily basis'.<sup>151</sup> This relationship of trust was breached when the Church did nothing to investigate the matter and care for the plaintiff.<sup>152</sup> 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.<sup>153</sup>

*A(TWN) v Canada*<sup>154</sup> was determined on the basis of an admission of liability by both Canada and the Anglican Church on the basis of the findings in *Mowatt*.<sup>155</sup> The plaintiffs were all students at the same aboriginal residential school considered in *Mowatt*.<sup>156</sup> Clarke had sexually abused each plaintiff. Harding also sexually assaulted two of the plaintiffs.<sup>157</sup> Again, evidence was given that both Harding and the principal of the elementary school were told of the sexual assaults.<sup>158</sup> No counselling was offered to the abused children.<sup>159</sup> Each of the plaintiffs later developed severe psychological conditions as a

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<sup>145</sup> Ibid.

<sup>146</sup> (1992) 96 DLR (4<sup>th</sup>) 289.

<sup>147</sup> *Mowatt* [1999] 11 WWR 301, 355-356.

<sup>148</sup> *Mowatt* *ibid* 347, 349 and 356.

<sup>149</sup> *Mowatt* *ibid* 356.

<sup>150</sup> *Mowatt* *ibid*, 357.

<sup>151</sup> *Mowatt* *ibid*. See also *Mowatt* *ibid* 349 and 350.

<sup>152</sup> *Mowatt* *ibid* 358.

<sup>153</sup> *Mowatt* *ibid* 357.

<sup>154</sup> (2001) 92 BCLR (3d) 250, 255.

<sup>155</sup> [1999] 11 WWR 301.

<sup>156</sup> Ibid.

<sup>157</sup> *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253.

<sup>158</sup> *A(TWN) v Canada* *ibid* 256 and 280.

<sup>159</sup> *A(TWN) v Canada* *ibid* 280.

consequence of the assaults, including sexual disorders, post-traumatic stress disorder, suicidal tendencies and extreme depression. Canada and the Church admitted vicarious liability and breach of the duty of care. The defendants agreed to an apportionment of responsibility on the same basis as in *Mowatt*.<sup>160</sup> Aggravated and punitive damages were also ordered against the defendants.

***Blackwater v Plint (No 1), (No 2), (No 3) and (No 4)***

The plaintiffs in *Blackwater v Plint* were all Canadian Indians within the terms of the *Indian Act* 1927.<sup>161</sup> Attendance at an aboriginal residential school was mandatory under this legislation, its predecessors and subsequent versions of the Act.<sup>162</sup> All the plaintiffs attended Alberni Indian Residential School ('AIRS') during various years between 1943 and 1970.<sup>163</sup>

The Presbyterian Church had founded AIRS in 1891.<sup>164</sup> This Church, and from 1925,<sup>165</sup> the United Church, administered the school.<sup>166</sup> AIRS operated with periodic government funding.<sup>167</sup> The arrangement between Canada and the Church, which the courts have described in terms of a joint venture,<sup>168</sup> was formalised in 1911<sup>169</sup> through a written agreement and a further written agreement in 1962.<sup>170</sup> Under the 1911 agreement the Church agreed to manage the school, including employing qualified teachers and officers, in particular, the principal.<sup>171</sup>

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<sup>160</sup> [1999] 11 WWR 301.

<sup>161</sup> *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [1].

<sup>162</sup> The court in *Blackwater v Plint (No 1)* *ibid* [32] noted that under *Indian Act* 1927 s 10 it was mandatory for Indian children between the ages of 7 and 15 to attend an Indian school. Similarly, under *Indian Act* 1951 ss 115, 116 and 118 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)* *ibid* [34].

<sup>163</sup> *Blackwater v Plint (No 1)* *ibid* [1].

<sup>164</sup> *Blackwater v Plint (No 1)* *ibid* [2] and [36].

<sup>165</sup> In 1925 the Presbyterian Church combined with two other religions to form the United Church.

<sup>166</sup> *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [2].

<sup>167</sup> *Blackwater v Plint (No 1)* *ibid* [2] and [36].

<sup>168</sup> *Blackwater v Plint (No 1)* *ibid* [151].

<sup>169</sup> *Blackwater v Plint (No 1)* *ibid* [2] and [3].

<sup>170</sup> *Blackwater v Plint (No 1)* *ibid* [50].

<sup>171</sup> *Blackwater v Plint (No 1)* *ibid* [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)* *ibid* [43]-[46].

Again, under the 1962 agreement the Church was designated the responsibility of managing AIRS<sup>172</sup> in accordance with government rules and regulations.<sup>173</sup>

The appointment of teaching staff was, however, now the responsibility of the relevant Minister, but in consultation with the Church.<sup>174</sup> Thus AIRS was managed by the Church, but under the supervision of the government.<sup>175</sup> In regard to the latter, evidence was provided as to government inspections of AIRS.<sup>176</sup> The removal of aboriginal children from their families and placement at AIRS was effected by Canada, not the Church, through its Department of Indian Affairs.<sup>177</sup> Upon placement in AIRS the principal became the child's legal guardian.<sup>178</sup>

In 1965 classroom instruction at AIRS, the children being from then on bussed to local schools.<sup>179</sup> On 1 April 1969 Canada took over complete operation of AIRS and operated it until it closed in 1973.<sup>180</sup>

Plint was employed as a dormitory supervisor at AIRS from 1948 to 1953 and from 1963 to 1968.<sup>181</sup> Dormitory supervisors were responsible for the 'daily care and well being of the resident children'.<sup>182</sup> Plint reported to, and worked

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<sup>172</sup> *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [52]-[53].

<sup>173</sup> 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)* *ibid* [79]-[86] and [88].

<sup>174</sup> *Blackwater v Plint (No 1)* *ibid* [53] and [89].

<sup>175</sup> *Blackwater v Plint (No 1)* *ibid* [72]-[76], [83] and [86]. In this regard evidence was provided as to government inspections of AIRS: *Blackwater v Plint (No 1)* *ibid* [76].

<sup>176</sup> *Blackwater v Plint (No 1)* *ibid* [76].

<sup>177</sup> *Blackwater v Plint (No 1)* *ibid* [63].

<sup>178</sup> *Blackwater v Plint (No 1)* *ibid* [56] and [74].

<sup>179</sup> *Blackwater v Plint (No 1)* *ibid* [40].

<sup>180</sup> *Blackwater v Plint (No 1)* *ibid* [3].

<sup>181</sup> *Blackwater v Plint (No 1)* *ibid* [4].

<sup>182</sup> *Blackwater v Plint (No 1)* *ibid*.

under the direction of, the school principal of AIRS.<sup>183</sup> The principal had the power to employ and in turn terminate the employment of dormitory supervisors.<sup>184</sup>

In 1995 and 1997 Plint was convicted of multiple counts of sexual assault involving many of the plaintiffs in *Blackwater v Plint (No 1)*.<sup>185</sup> In regard to such plaintiffs, Canada and the Church admitted the sexual assaults in the subsequent civil litigation.<sup>186</sup> A number of the plaintiffs, however, gave evidence, which was accepted by the court, as to assaults for which Plint had not been criminally tried.<sup>187</sup> Many of the plaintiffs gave evidence that they told, *inter alia*, the principal that they were being abused by Plint, but were only punished for so doing.<sup>188</sup>

In *Blackwater v Plint (No 1)*<sup>189</sup> the plaintiffs' sought damages for sexual assaults committed against them by Plint while they were resident at AIRS. In *Blackwater v Plint (No 1)*<sup>190</sup> the court's findings against Canada and the United Church of Canada were confined to the issue of vicarious liability. The plaintiffs contended that both the United Church of Canada and Canada were vicariously liable for, *inter alia*, Plint's assaults.<sup>191</sup> Canada asserted that the Church was solely vicariously liable as it was the Church that operated and managed AIRS,<sup>192</sup> while the Church in turn said that Canada was Plint's employer and the Church was a mere agent of the Government.<sup>193</sup>

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<sup>183</sup> *Blackwater v Plint (No 1)* *ibid* [4] and [28]. 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): *Blackwater v Plint (No 1)* *ibid* [5].

<sup>184</sup> *Blackwater v Plint (No 1)* *ibid* [28].

<sup>185</sup> *Blackwater v Plint (No 1)* *ibid* [11].

<sup>186</sup> *Blackwater v Plint (No 1)* *ibid*. See *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228, 237.

<sup>187</sup> *Blackwater v Plint (No 1)* *ibid* [12] and [13].

<sup>188</sup> *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228, 252-253.

<sup>189</sup> (1998) 52 BCLR (3d) 18.

<sup>190</sup> *Ibid* [14]. The issues of, *inter alia*, duty of care, fiduciary duties and statutory duties were determined in *Blackwater v Plint (No 2)* (1998) 52 BCLR (3d) 18.

<sup>191</sup> *Blackwater v Plint (No 1)* *ibid* [15].

<sup>192</sup> *Blackwater v Plint (No 1)* *ibid* [16], [28], [92] and [120].

<sup>193</sup> *Blackwater v Plint (No 1)* *ibid* [16], [28] and [93].

After considering the relevant statutes and agreements between the Church and Canada and the historical development of the aboriginal 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.<sup>194</sup> 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.<sup>195</sup> The principal of the school was in turn held to be a representative of both the Government and the Church.<sup>196</sup>

In determining that both were vicariously liable for the sexual assaults committed by Plint,<sup>197</sup> the court applied two tests, the 'conferral of authority test' and the 'closeness of connection test.'<sup>198</sup> The court held that the authority of a parent<sup>199</sup> over the children had been conferred on Plint and this conferral of power was sufficiently connected to the wrong. As to 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, with his duties as a dormitory supervisor and the acts of wrongdoing.<sup>200</sup> Thus both tests were satisfied on the facts and the defendants were held to be vicariously liable for Plint's acts.<sup>201</sup>

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<sup>194</sup> *Blackwater v Plint (No 1)* *ibid* [151].

<sup>195</sup> *Blackwater v Plint (No 1)* *ibid* [103], [119], [121], [125], [137] and [151].

<sup>196</sup> *Blackwater v Plint (No 1)* *ibid* [102], [104], [121]-[126], [137] and [139]-[140].

<sup>197</sup> *Blackwater v Plint (No 1)* *ibid* [151].

<sup>198</sup> *Blackwater v Plint (No 1)* *ibid* [22]-[23], relying on *B(PA) v Curry* (1997) 146 DLR (4<sup>th</sup>) 72.

<sup>199</sup> *Blackwater v Plint (No 1)* *ibid* [24] and [25].

<sup>200</sup> *Blackwater v Plint (No 1)* *ibid* [26].

<sup>201</sup> See further Cassidy, above n 3.

In *Blackwater v Plint (No 2)*<sup>202</sup> the issues of, *inter alia*, the direct liability of the Church and Canada for negligence, breaches of fiduciary duties and non-delegable statutory duties were determined.<sup>203</sup> While the court in *Blackwater v Plint (No 2)*<sup>204</sup> believed a duty of care was owed to the then children, the court rejected claims of direct liability against Canada and the United Church of Canada for breaches of that duty of care. 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.<sup>205</sup> This was seen as particularly relevant when considering the issue of foreseeability of paedophilic behaviour.<sup>206</sup> In turn, this assisted the court in concluding that the Church and Canada had neither actual,<sup>207</sup> 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 the School, had been told of the assaults prior to Plint being fired.<sup>208</sup>

The plaintiffs also alleged that Canada had breached its fiduciary duty by removing the plaintiffs from their families and placing them at AIRS.<sup>209</sup> 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'.<sup>210</sup> The court found that through the joint venture the 'Defendants could unilaterally affect the plaintiffs' interests and the plaintiffs were peculiarly vulnerable'<sup>211</sup> within the definition of a fiduciary relationship. However, the court ultimately concluded there was no breach of fiduciary duties.<sup>212</sup> The court

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<sup>202</sup> (2001) 93 BCLR (3d) 228.

<sup>203</sup> See *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [10]. Note in this regard 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.

<sup>204</sup> (2001) 93 BCLR (3d) 228.

<sup>205</sup> *Blackwater v Plint (No 2)* *ibid* 249-250.

<sup>206</sup> *Blackwater v Plint (No 2)* *ibid* 249.

<sup>207</sup> *Blackwater v Plint (No 2)* *ibid* 256 and 269.

<sup>208</sup> *Blackwater v Plint (No 2)* *ibid* 256. See further Cassidy, above n 3.

<sup>209</sup> *Blackwater v Plint (No 2)* *ibid* 270.

<sup>210</sup> *Blackwater v Plint (No 2)* *ibid*.

<sup>211</sup> *Blackwater v Plint (No 2)* *ibid* 270-271.

<sup>212</sup> For a fuller discussion of the court's findings in regard to breach of fiduciary duties see Cassidy, above n 2 and Cassidy, above n 31.

relied on a line of authority<sup>213</sup> that provided that a breach of fiduciary duties would only arise where there was dishonesty or a conflict of interest.<sup>214</sup> The court held there was no evidence of the requisite ‘dishonest intentional disloyalty’ on the part of Canada or the Church.<sup>215</sup> It was also asserted that a fiduciary duty could not arise from a factual relationship that was also tortious or contractual in nature.<sup>216</sup> This effectively prevented any claim being made for breach of fiduciary duties in light of the finding that Canada and the Church owed the plaintiffs a duty of care.

While the claims of breach of duty of care and fiduciary duty did not succeed, the court held that Canada’s duty under the *Indian Act* 1951 with respect to the aboriginal residential schools was a non-delegable statutory duty.<sup>217</sup> 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’.<sup>218</sup> In turn, a ‘very high standard of care [had been] imposed on Canada under the provisions of the *Indian Act*’.<sup>219</sup> Moreover, as Canada was the plaintiffs’ guardian, it owed a ‘duty of special diligence’ which had not been discharged.<sup>220</sup> Responsibility was allocated 75% to Canada and 25% to the Church.

While *Blackwater v Plint (No 3)*<sup>221</sup> involved appeals by the plaintiffs, the Church and Canada, as discussed below the key issue considered by the Court of Appeal was whether the Church should have been found vicariously liability in *Blackwater v Plint (No 1)*.<sup>222</sup> The court was quite dismissive of the plaintiffs’ appeals<sup>223</sup> against the finding of no breach of the duty of care, asserting that it

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<sup>213</sup> In particular, *A(C) v C(JW)* (198) 166 DLR (4<sup>th</sup>) 475, [85].

<sup>214</sup> (2001) 93 BCLR (3d) 228, 237.

<sup>215</sup> *Blackwater v Plint (No 2)* *ibid.*

<sup>216</sup> *Blackwater v Plint (No 2)* *ibid* 271-274.

<sup>217</sup> *Ibid* 275.

<sup>218</sup> *Blackwater v Plint (No 2)* *ibid.*

<sup>219</sup> *Blackwater v Plint (No 2)* *ibid.*

<sup>220</sup> *Blackwater v Plint (No 2)* *ibid.*

<sup>221</sup> (2003) 235 DLR (4<sup>th</sup>) 60.

<sup>222</sup> (1998) 52 BCLR (3d) 18, [14].

<sup>223</sup> The court did, however, uphold MJ’s appeal against the trial judge’s finding that the school principal had not sexually assaulted her. The court found that the evidence on which the trial judge had based this conclusion had been rebuked in the course of cross-examination: (2003) 235 DLR (4<sup>th</sup>) 60, [96] and [97]. A new trial of her claims was, therefore, ordered: (2003) 235 DLR (4<sup>th</sup>) 60, [94] and [99].

amounted to an attempted retrial.<sup>224</sup> Equally, in regard to the claim of breach of fiduciary duties, the court simply applied the same case<sup>225</sup> that had been used in *Blackwater v Plint (No 2)*<sup>226</sup> to reject the plaintiffs' claim, refusing to take the opportunity to overrule that decision.<sup>227</sup> The court also rejected the plaintiffs' claims of loss of language and culture. The court found that this had not been properly pleaded before trial as an independent cause of action.<sup>228</sup> Moreover, it was not possible to link this claim to the only cause of action that was not barred by the statute of limitation, namely the sexual assaults.<sup>229</sup>

As the court ultimately concluded that Canada had correctly been found to be vicariously liable for the assaults by Plint, it considered that the issues raised by Canada's cross appeal were 'moot'.<sup>230</sup> It consequently made no substantive comment on the correctness of the finding against Canada for breach of non-delegable duties.<sup>231</sup>

For essentially three reasons the court allowed the Church's appeal against the finding of vicarious liability. First, the court concluded that the trial judge had erred in finding the Church to be Plint's employer. Effectively the court asserted that the aboriginal residential schools were conducted by Canada and thus Canada, not the Church, should be viewed as Plint's employer. The school was found to be conducted in accordance with Canada's statutory obligations under the *Indian Act*.<sup>232</sup> The court asserted that Canada exercised a high degree of control over virtually all aspects of the conduct of the residential school, excepting the religious instruction.<sup>233</sup> Effectively, the court asserted that the Church's only involvement in the schools was in regard to the provision of Christian education.<sup>234</sup> In turn, it was asserted that as the role of the dormitory supervisors, including Plint, was not the provision of religious education, the

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<sup>224</sup> Ibid [72].

<sup>225</sup> Namely, *A(C) v C(JW)* (198) 166 DLR (4<sup>th</sup>) 475.

<sup>226</sup> (2001) 93 BCLR (3d) 228, 237.

<sup>227</sup> (2003) 235 DLR (4<sup>th</sup>) 60, [75].

<sup>228</sup> Ibid [77] and [82].

<sup>229</sup> Ibid [79].

<sup>230</sup> Ibid [52] and [56].

<sup>231</sup> Ibid.

<sup>232</sup> Ibid [29].

<sup>233</sup> Ibid.

<sup>234</sup> Ibid [39].

Church should not be seen as his employer and should not be liable for his acts.<sup>235</sup> In addition, the court held in a rather bizarre manner that the Reverend Joblin, whose office was in the United Church's Board of Home Missions, and who factually most appeared to be the school principal's employer, was the agent of Canada, not the Church.<sup>236</sup> Despite the United Church being Joblin's employer, the court held that 'for the most part, in supervising and directing [the school principal], Joblin was performing on behalf of Canada functions which were fundamentally those of Canada'.<sup>237</sup> Effectively, the court held that Joblin and the Church, in providing supervision and management of the residential school, were acting as mere agents of Canada.<sup>238</sup>

Secondly, the court held that except in the case of a true partnership, more than one person should not be held jointly vicariously liable for the tort of an employee.<sup>239</sup> Finally, through a creative interpretation of *Bazley v Curry*<sup>240</sup> the court invented a new doctrine of charitable immunity that was applied in this case to exempt the Church from liability. The court asserted that where the government is liable, and the non-profit organisation was not directly, but only vicariously, liable, the non-profit organisation should be immune from liability.<sup>241</sup> As the Church was a non-profit charitable organisation and the plaintiffs could make full recovery against Canada, the Court of Appeal held that even if the Church was Plint's employer the finding of liability against the Church should be reversed.<sup>242</sup>

All parties appealed to the Supreme Court of Canada. The primary focus of the court's judgment in *Blackwater v Plint (No 4)*<sup>243</sup> was the issue of the Church's vicarious liability and Canada's liability for breach of non-delegable statutory duties. The plaintiffs' appeal against the finding of no breach of the duty of care was rejected. The court asserted that there 'was no evidence that the possibility

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid [36].

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid [40].

<sup>240</sup> (1999) 174 DLR (4<sup>th</sup>) 45. The court quotes extensively passages from *Bazley v Curry* (1999) 174 DLR (4<sup>th</sup>) 45 that provides to the contrary, that the non-profit nature of the organization does not provided a basis for judicial immunity. See *Blackwater v Plint (No 3)* *ibid* [43]-[47].

<sup>241</sup> Ibid [48].

<sup>242</sup> Ibid [49].

<sup>243</sup> (2005) 258 DLR (4<sup>th</sup>) 275.

of sexual assault was actually brought to the attention of the people in charge of AIRS'.<sup>244</sup> The court reiterated that the conduct had to be adjudged according to the standards of the time,<sup>245</sup> adding sexual abuse was 'an unthinkable idea at the time'.<sup>246</sup> Adjudged according to the standards and awareness of the time, the court concluded the defendants ought not to have known of the risk of sexual abuse that arose in the context of the residential schools.<sup>247</sup>

The Supreme Court of Canada reversed the court's exemption of the Church in *Blackwater v Plint (No 3)*,<sup>248</sup> agreeing with the trial judge that both Canada and the Church were vicariously liable for Plint's conduct.<sup>249</sup> The court in *Blackwater v Plint (No 4)*<sup>250</sup> noted that vicariously liability may extend to wrongful acts that are contrary to the employer's desires. 'Having created or enhanced the risk of the wrongful conduct' it is appropriate that the employer be liable as this promotes deterrence while providing the injured with an adequate remedy.<sup>251</sup>

More directly pertinent to the contrary findings in *Blackwater v Plint (No 3)*,<sup>252</sup> the court agreed with the trial judge that the documentary evidence indicated that the Church was Plint's immediate employer.<sup>253</sup> This included a reiteration that the Church was involved in all facets of the schools' management (not just Christian education) and that it undertook such 'for its own end of promoting Christian education to Aboriginal children', not just for the Canadian government.<sup>254</sup> The Church appointed, and was the direct supervisor of, the school principal.<sup>255</sup> The principal was in turn responsible for the appointment of dormitory supervisors.<sup>256</sup>

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<sup>244</sup> Ibid [14].

<sup>245</sup> Ibid [13] and [15].

<sup>246</sup> Ibid [14].

<sup>247</sup> Ibid [15].

<sup>248</sup> (2003) 235 DLR (4<sup>th</sup>) 60, [36] and [39].

<sup>249</sup> (2005) 258 DLR (4<sup>th</sup>) 275, [19].

<sup>250</sup> Ibid [20], following *Bazley v Curry* [1999] 2 SCR 534.

<sup>251</sup> Ibid.

<sup>252</sup> (2003) 235 DLR (4<sup>th</sup>) 60.

<sup>253</sup> (2005) 258 DLR (4<sup>th</sup>) 275, [21].

<sup>254</sup> Ibid [25] and [34]-[35].

<sup>255</sup> Ibid [23] and [24].

<sup>256</sup> Ibid [23].

The court also rejected the suggestion in *Blackwater v Plint (No 3)*<sup>257</sup> that there could be no joint vicarious liability.<sup>258</sup> The court agreed with the trial judge's characterisation of the relationship between the Church and Canada as a partnership and held there was no jurisprudential reason for confining liability to one employer.<sup>259</sup> In fact, to the contrary, the court asserted that an 'arbitrary rule requiring only one employer for vicarious liability ... would undermine the principles of fair compensation and deterrence'.<sup>260</sup>

Finally on this point, the court in *Blackwater v Plint (No 4)*<sup>261</sup> found there had been a 'misapprehension' on the part of the Court of Appeal in its interpretation of *Bazley v Curry*<sup>262</sup> and in turn rejected the doctrine of charitable immunity.<sup>263</sup>

As the court noted, this doctrine finds no support 'in principle nor in the jurisprudence' and ignores the concerns raised in *Bazley v Curry*<sup>264</sup> itself that led to the court rejecting such a doctrine.<sup>265</sup> This includes the need to encourage non-profit organisations to take precautions to screen their employees and protect children from sexual abuse.<sup>266</sup>

## **B Australia**

### *Kruger*

The plaintiffs in *Kruger v Commonwealth*<sup>267</sup> sought to challenge the constitutional validity of the *Aboriginal Ordinance* 1918 (NT) discussed to some extent above. Under s 7 of the Ordinance the Chief Protector was appointed the legal guardian of every aboriginal and 'half-caste' child until the age of eighteen. This was notwithstanding the existence of a living parent or other relative. The Chief Protector was in turn entitled to 'undertake the care and custody or control of any aboriginal or half-caste'. Under s 6 the Chief

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<sup>257</sup> Ibid [40].

<sup>258</sup> Ibid [36].

<sup>259</sup> Ibid [38].

<sup>260</sup> Ibid.

<sup>261</sup> Ibid [40].

<sup>262</sup> [1999] 2 SCR 534.

<sup>263</sup> (2005) 258 DLR (4<sup>th</sup>) 275, [44].

<sup>264</sup> [1999] 2 SCR 534.

<sup>265</sup> (2005) 258 DLR (4<sup>th</sup>) 275, [41].

<sup>266</sup> Ibid [41].

<sup>267</sup> (1997) 146 ALR 125.

Protector had a discretion to enter onto any premises and remove into his 'care, custody, or control' any aboriginal child or 'half-caste' child if 'in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste'. The power under s 16 was more absolute. Under s 16 the Chief Protector could cause any 'aboriginal or half-caste' to be removed to, and detained in, any reserve or aboriginal institution. There was no need for the formulation of an opinion as to what was in the aboriginal person's best interests. A refusal to comply with such a removal order or a failure to remain on such reserve or aboriginal institution constituted an offence under the Ordinance. Under s 67 the Northern Territory Administrator was authorised to make regulations that, in essence, effected the removal and detention of 'aboriginals and half-castes' under the Ordinance.

The plaintiffs in *Kruger v Commonwealth*<sup>268</sup> were aboriginal persons from the Northern Territory. Of the plaintiffs, five were removed as children from their families between 1925 and 1949 and detained as late as 1960. The sixth plaintiff, Mrs Rosie Napangardi McClary, was the mother of a child, Queenie Rose, who had been so removed from her family and detained in an aboriginal institution.

As Toohey J explained, the plaintiffs' submissions involved two steps.<sup>269</sup> First, it was submitted that Parliament could not confer on the executive power to make laws that the Parliament could not validly enact. Second, for the reasons outlined below, Parliament itself could not have validly enacted the subject legislation. In turn, the plaintiffs challenged the constitutional validity of *Aboriginal Ordinance*, in particular ss 6, 7, 16 and 67. The Ordinance was said to be unconstitutional on a number of bases including that it:

- was not a law for the government of the Northern Territory and thus was not authorised by *Constitution Act* 1901 (UK) s 122 (the 'territories' power);
- exceeded the scope of Commonwealth legislative power, whether that be under s 122 or otherwise, as the Constitution does not extend to laws authorising genocide and crimes against humanity;
- purported to confer judicial power on persons other than federal courts, contrary to *Constitution Act* 1901 (UK) Chap III;

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<sup>268</sup> Ibid.

<sup>269</sup> Ibid 165.

- breached an implied constitutional freedom against being removed and detained without the benefit of the due process of law;
- breached an implied constitutional right of equality under the law;
- breached an implied constitutional freedom of movement and association; and
- breached *Constitution Act* 1901 (UK) s 116 that protects the free exercise of religion.

In turn the plaintiffs sought damages for their personal, cultural, spiritual and financial losses and the losses stemming from their consequent inability to participate in aboriginal land claims. By way of explaining the latter point, the removal of aboriginal children from their communities effected a break in the required<sup>270</sup> continuous connection with traditional aboriginal lands and thus prevented them bringing a claim under, *inter alia*, the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and *Native Title Act* 1993 (Cth).<sup>271</sup>

In defence the Commonwealth pleaded that the Ordinance was a valid law for the government of the Northern Territory. It denied that its legislative power under s 122 was constrained by s 116 or any of the implied constitutional protections pleaded by the plaintiffs. In the alternative, if s 122 was so constrained, the Commonwealth asserted that the Ordinance did not breach s 116 or the implied prohibitions as it was ‘enacted and amended for the purpose of the protection and preservation of persons of the Aboriginal race’ and was appropriate and adapted to that purpose.

In the course of the High Court’s judgment Brennan CJ 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’.<sup>272</sup> Similarly, Gaudron J asserted it was ‘clearly correct’ that the Ordinance had ‘authorised gross violations of the rights and liberties of Aboriginal Australians’.<sup>273</sup> However, a theme that permeated the judgments was that a misuse of power or an

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<sup>270</sup> See in this regard *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1; *Risk v Northern Territory of Australia* [2006] FCA 404.

<sup>271</sup> See also Healey, above n 7, 12-13 and 34.

<sup>272</sup> (1997) 146 ALR 125, 134.

<sup>273</sup> *Ibid* 186.

unreasonable exercise of power did not affect the validity of the subject provisions.<sup>274</sup> What was being challenged in this case was the validity of the legislation, not whether the powers conferred had been abused.<sup>275</sup>

A majority of the High Court<sup>276</sup> held that the Ordinance was not invalid. Brennan CJ,<sup>277</sup> Dawson<sup>278</sup> (with whom McHugh J agreed<sup>279</sup>) and Gummow JJ<sup>280</sup> rejected the existence of the alleged implied constitutional freedoms. Gaudron J, while accepting 'there is a limited constitutional guarantee of equality before the courts', rejected the existence of any implied immunity from discriminatory laws.<sup>281</sup>

However, Gaudron J held that s 122 was subject to an implied constitutional freedom of movement and association that derived from the accepted implied constitution freedom of political communication.<sup>282</sup> Brennan CJ<sup>283</sup> and Dawson J<sup>284</sup> held that s 122 extended to the Commonwealth an absolute legislative power that was not subject to any express or implied constitutional prohibition. Toohey, Gaudron and Gummow JJ disagreed, asserting that s 122 was not necessarily immune from express (s 116) or implied constitutional protections.<sup>285</sup> If s 122 was subject to the alleged constitutional rights, Brennan CJ, Dawson, Toohey and Gummow JJ asserted that they had not been violated.

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<sup>274</sup> See, for example, *ibid* 135 (Brennan CJ).

<sup>275</sup> See, for example, *ibid* 168 (Toohey J).

<sup>276</sup> Gaudron J held that the key provisions of the Ordinance were invalid because they breached the rights to freedom of association and political speech: *ibid* 206.

<sup>277</sup> *Ibid* 142. Brennan CJ found it unnecessary to consider many of the grounds put forward by the plaintiffs' as he believed the Ordinance (i) was not intended to inflict mental harm and (ii) was not intended to prohibit the free exercise of religion. This meant that the crux for him was whether s 122 was limited by these constitutional restrictions: *ibid* 138.

<sup>278</sup> *Ibid* 155-155 and 159-160. Dawson J asserted that the right to due process was procedural in nature and thus did not provide a substantive right or freedom: *ibid* 155.

<sup>279</sup> *Ibid* 218-220.

<sup>280</sup> *Ibid* 227-231.

<sup>281</sup> *Ibid* 194-195.

<sup>282</sup> *Ibid* 195-201 and 204-205.

<sup>283</sup> *Ibid* 138-142. Once there was a sufficient connection between the law and the territories, the territories power was said to be without limitation: *ibid* at 138.

<sup>284</sup> *Ibid* 150, 159-160 and 163.

<sup>285</sup> *Ibid* 168, 173, 178-179 and 181 (Toohey J); *ibid* 196-204 and 217 (Gaudron J); *ibid* 234 and 237-238 (Gummow J).

Toohey and Gummow JJ asserted that while the effect of the Ordinance had been to impair, or even prohibit, the spiritual beliefs and practices of aboriginal persons, that was not its purpose and thus the Ordinance was not invalidated by s 116.<sup>286</sup> Similarly, in regard to the implied constitutional protections of freedom of movement and association and legal equality Toohey J held in light of the prevailing views of the time and the welfare nature of the Ordinance the infringement of the subject freedom may be said to be a justified means of protecting aboriginal persons.<sup>287</sup> Gaudron J rejected these conclusions. The 'removal from their communities and their traditional lands' effected by the Ordinance 'would, necessarily, have prevented the free exercise of their religion', if such a religion was established.<sup>288</sup> In turn, the Ordinance may have breached s 116 as one of its purposes was to remove 'Aboriginal children from their families and communities, thereby preventing them from participating in community practices', including religious practices.<sup>289</sup> Moreover, Gaudron J believed that the Ordinance breached the implied constitutional freedom of movement and association.<sup>290</sup> Sections 6, 16 and 67 all conferred powers which if exercised, operated directly to prevent the freedom of movement and association.<sup>291</sup> Moreover, Gaudron J rejected the suggestion that the legislation could be justified as 'necessary for the protection or preservation of Aboriginal people'.<sup>292</sup>

Specifically in regard to the claim of genocide, the court rejected the suggestion that the Ordinance was intended to authorise actions that were intended to destroy the aboriginal people as a race, contrary to the *Genocide Convention* 1951. The court asserted that the intention to commit genocide,<sup>293</sup> as opposed to the actuality of effecting genocide, was important in terms of the

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<sup>286</sup> Ibid 173-174 (Toohey J); ibid 233 (Gummow J).

<sup>287</sup> Ibid 179 and 182 (Toohey J).

<sup>288</sup> Ibid 210.

<sup>289</sup> Ibid 211.

<sup>290</sup> Ibid 206.

<sup>291</sup> Ibid 207.

<sup>292</sup> Ibid 207-208.

<sup>293</sup> Ibid 161 (Dawson J); ibid 174 (Toohey J); ibid 190 (Gaudron J); ibid 218-219 (McHugh J).

validity of the legislation.<sup>294</sup> As the court believed that the view at the time<sup>295</sup> was that it was in the best interests of aboriginal children to remove them from their families, the Ordinance could not be seen as intending to authorise genocide.<sup>296</sup> Gummow J asserted that the Ordinance was indicative of a concern 'to assist survival rather than destruction'.<sup>297</sup>

Nor was s 122 constrained by Chapter III according to Brennan CJ and Dawson J. It was suggested that Chapter III pertains to federal courts and territory courts were not federal court.<sup>298</sup> The territories power in s 122 was also asserted to constitute a non-federal matter.<sup>299</sup> Even if s 122 were so constrained as Gaudron,<sup>300</sup> Toohey and Gummow JJ contended,<sup>301</sup> in light of the welfare purpose stated in the Ordinance, the court held that the decision to remove the plaintiffs and the action taken to effect such a decision, were not necessarily judicial functions in breach of Chapter III.<sup>302</sup>

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<sup>294</sup> Although, Gaudron J notes that acts were committed with the intention of destroying the plaintiffs' racial group, they might be the subject to an action of damages even if the Ordinance was a valid law: *ibid* 190.

<sup>295</sup> The court stressed that it is community standards at the time of the removal, not today, that must be considered: *ibid* 231 (Gummow J).

<sup>296</sup> *Ibid* 174 (Toohey J); *ibid* 231 (Gummow J). Dawson, Toohey and Gummow JJ noted that the Genocide Convention had been ratified after the enactment of the Ordinance and had not been legislatively incorporated into domestic law: *ibid* 160, 174 and 231-232. Dawson J, with whom Gummow J agreed, also noted that the Genocide Convention was not concerned with cultural genocide: *ibid* 162. Gaudron J, by contrast, asserted that 's 122 should be construed on the basis that it was not intended to extend to laws authorising gross violations of human rights and dignity contrary to established principles of the common law ... s 122 does not confer power to pass laws authorising genocide as defined in Art III of the Genocide Convention': *ibid* 190.

<sup>297</sup> *Ibid* 230-231.

<sup>298</sup> *Ibid* 154 (Dawson J). See also *ibid* 170 (Toohey J). However, Toohey J believed that Chap III was nevertheless a manifestation of the separation of powers doctrine and this could extend to the territories: *ibid* 171.

<sup>299</sup> *Ibid* 142 (Brennan CJ).

<sup>300</sup> Gaudron J believed the protection did not derive from Chap III, but rather was implicit in s 51 as a law 'authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power': *ibid* 192-193.

<sup>301</sup> *Ibid* 171 (Toohey J); *ibid* 234 and 237-242 (Gummow J).

<sup>302</sup> *Ibid* 154 (Dawson J). See also *ibid* 172 (Toohey J); *ibid* 192-193 (Gaudron J); *ibid* 234 (Gummow J).

Moreover, the court asserted that a breach of any alleged constitutional rights gave rise to no direct entitlement to damages.<sup>303</sup> The common law was said to provide adequate remedies and thus there was no need to ‘invent a new cause of action’.<sup>304</sup>

### *Williams (No 1), (No 2) and (No 3)*

The plaintiff in *Williams v Minister, Aboriginal Land Rights Act 1983 (No 1)*,<sup>305</sup> *(No 2)*<sup>306</sup> and *(No 3)*<sup>307</sup> was of aboriginal descent. Following her birth in the early 1940s she was placed, on her mother’s request, under the control of the Aboriginal Welfare Board under *Aborigines Protection Act 1909 (NSW) s 7(2)*. The Board placed the plaintiff with the United Aborigines Mission at an Aboriginal Children’s Home, Bomaderry Children’s Home in New South Wales. At the age of 4 years, because of her ‘fair skinned’ appearance, she was transferred to another home, Lutanda Children’s Home, conducted by the Plymouth Brethren faith for ‘white’ children of European background. The plaintiff subsequently learned of her aboriginality and asserted that the revelation caused her considerable distress as she was told she had ‘mud in her veins’.<sup>308</sup> At the age of 18 years the plaintiff left Lutanda and ‘entered into a period of her life that was disturbed and extremely unhappy’.<sup>309</sup> This included periods of admission to hospital for psychological disorders which, she alleged, stemmed from her removal as an infant from a ‘supportive Aboriginal environment’.<sup>310</sup> The plaintiff asserted that the Board had failed to provide for her custody, maintenance and education and, she alleged, that in consequence of these childhood experiences she suffered a personality disorder. She further claimed that she had been denied bonding and attachment and had been a victim of maternal deprivation and as a consequence suffered a disorder of attachment. In turn the plaintiff sought damages for negligence, breach of fiduciary duty, breach of statutory duty and for trespass. The plaintiff

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<sup>303</sup> Ibid 142 (Brennan CJ); ibid 179 (Toohey J); ibid 204-205 (Gaudron J); ibid 222-223 (Gummow J).

<sup>304</sup> Ibid 205 (Gaudron J).

<sup>305</sup> (1994) 35 NSWLR 497.

<sup>306</sup> [1999] NSWSC 843.

<sup>307</sup> [2000] Aust Torts Rep 64,136.

<sup>308</sup> (1994) 35 NSWLR 497, 501.

<sup>309</sup> Ibid 502. The judgment details the plaintiff’s life as a vagrant, turning to prostitution and petty crime to support herself.

<sup>310</sup> Ibid.

commenced these legal proceedings in 1993 pursuant to a request for an extension of time under the *Limitation Act 1969* (NSW).

The plaintiff was granted an order under *Limitation Act 1969* (NSW) s 60(G) extending the period in which to bring her proceedings against the defendants. Kirby P asserted that it would not be ‘just and reasonable’ to deny the plaintiff the opportunity to prove her case.<sup>311</sup> ‘It will then have been determined as our system of law provided to all Australians – Aboriginal and non-Aboriginal – according to law, in open court and on its merits’.<sup>312</sup> Kirby P found that the Aboriginal Welfare Board was, ‘arguably, obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her ‘custody, maintenance and education’.<sup>313</sup> Kirby P added that it was ‘distinctly arguable that a person who suffers as a result of want of proper care on the part of the fiduciary may recover equitable compensation for losses occasioned by want of care’.<sup>314</sup> In this regard Kirby P followed the Canadian decision *M(K) v M(H)*,<sup>315</sup> asserting that while in this case there was no economic loss, only a human, personal loss, the breach of fiduciary duties was nevertheless arguable.<sup>316</sup>

When the case went to trial in *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)*<sup>317</sup> Abadee J rejected the plaintiff’s claims. In regard to the claim of breach of fiduciary duty, while ultimately Abadee J assumed for the purposes of the litigation that the parent/child or ward/guardian relationship was fiduciary in nature, he held there had been no breach. Abadee J rejected the relevant Canadian case law that had been followed by Kirby P in *Williams v Minister, Aboriginal Land Rights Act 1983 (No 1)*<sup>318</sup> including, relevantly, *Mowatt*.<sup>319</sup> In turn he held that the plaintiff could not claim a breach of fiduciary duties in addition to her tortious claim and asserted further that only economic loss could be compensated in equity.<sup>320</sup> Abadee J concluded that as

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<sup>311</sup> Ibid 514.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid 511.

<sup>314</sup> Ibid.

<sup>315</sup> (1992) 96 DLR (4<sup>th</sup>) 289.

<sup>316</sup> (1994) 35 NSWLR 497, 511.

<sup>317</sup> [1999] NSWSC 843.

<sup>318</sup> (1994) 35 NSWLR 497.

<sup>319</sup> [1999] 11 WWR 301.

<sup>320</sup> [1999] NSWSC 843, [704], [729], [731] and [733].

there were ‘no economic interests at stake’ a fiduciary duty should not be extended to the circumstances.<sup>321</sup> In regard to the duty of care, for policy reasons, particularly the potential for a ‘floodgate’ of litigation, Abadee J refused to find that a duty of care was owed to an institutionalised child.

Abadee J’s judgment was upheld on appeal in *Williams v Minister, Aboriginal Land Rights Act 1983 (No 3)*.<sup>322</sup> The court noted that the plaintiff’s case suffered from an ‘insuperable causation problem’.<sup>323</sup> While the plaintiff had claimed that if the Board had taken her to a Child Guidance Clinic before 1960 she would not have suffered a psychiatric disorder, she did in fact go to a clinic in 1960 and no such disorder was diagnosed. The Court of Appeal also agreed with Abadee J’s policy concerns in refusing to recognise a duty of care, noting that such a conclusion would potentially have a wide impact.<sup>324</sup>

### *Cubillo (No 1), (No 2) and (No 3)*

The plaintiffs, Mrs Cubillo and Mr Gunner, were part-aboriginal persons who were removed from their families as children and detained in institutions against their will.

In 1947, Mrs Cubillo, then aged eight, was living in the Phillip Creek Native Settlement in Northern Territory, with her Aunt Maisie. Mrs Cubillo and 15 or 16 other children ‘were loaded onto the truck’ and taken to the Retta Dixon Home for part-aboriginal children located on an aboriginal reserve in Darwin.<sup>325</sup> The removal was effected by Mr Les Penhall, a cadet patrol officer, and an employee of the Native Affairs Branch and Miss Amelia Shankelton, the Superintendent of the Retta Dixon Home.<sup>326</sup> Under *Aboriginals Ordinance 1918 (Cth) s 7* the Director of Native Affairs, a Commonwealth public servant, was the legal guardian of every aboriginal person. Under *Aboriginals Ordinance 1918 (Cth) s 6* the Director of Native Affairs was authorised to undertake the care, custody and control of a part-aboriginal child if, in the Director’s opinion, it was necessary or desirable in the interests of the child. O’Loughlin J recognised that this power could be exercised ‘almost without

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<sup>321</sup> Ibid [754].

<sup>322</sup> [2000] Aust Torts Rep 64,136.

<sup>323</sup> Ibid 64,175.

<sup>324</sup> Ibid 64,176-64,177. Note that on appeal the plaintiff had essentially abandoned the claim for breach of fiduciary duty: ibid 64,147.

<sup>325</sup> *Cubillo 2* [2000] FCA 1084, [429].

<sup>326</sup> *Cubillo 2* ibid [6].

restraint'.<sup>327</sup> There was no need for a court order. There was no need for a warrant.<sup>328</sup> Moreover, as the court noted, the law permitted the Director to so remove the child against the express wishes of the child's family.<sup>329</sup> Ultimately, and somewhat inconsistently, O'Loughlin J concluded that on the evidence he was unable to conclude one way or the other regarding the issue of parental/carer consent to the removal of the children. As Mrs Cubillo bore the burden of proof, O'Loughlin J held she had 'failed to establish that she was, at that time, in the care of an adult aboriginal person, (such as Maisie) whose consent to her removal was not obtained'.<sup>330</sup>

The Retta Dixon Home was established in 1946 by the Aborigines Inland Mission of Australia ('AIMA'), a Protestant inter-denominational faith mission. In time it was recognised by the Northern Territory Administrator as an official 'Aboriginal Institution'.<sup>331</sup> In 1953 a committal order was made by the Director of Native Affairs under *Aboriginals Ordinance* 1918 (Cth) s 16 committing Mrs Cubillo to the custody of the Retta Dixon Home until she was 18. Mrs Cubillo gave evidence as to the harsh treatment she suffered at the home and the court accepted that one of the male missionaries, Mr Des Walter, had, *inter alia*, viciously beaten her with the buckle of his trouser belt.<sup>332</sup> In consequence of this beating, Mrs Cubillo sustained lacerations to her hands, face and one breast, partially severing one nipple.<sup>333</sup> Written reports to the Native Affairs Branch referred to incidents when Mr Walter had beaten the children.<sup>334</sup>

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<sup>327</sup> *Cubillo 2* ibid [144].

<sup>328</sup> *Cubillo 2* ibid.

<sup>329</sup> *Cubillo 2* ibid [4].

<sup>330</sup> *Cubillo 2* ibid [440], [511] and [1538]-[1539].

<sup>331</sup> See *Cubillo 1* [1999] FCA 518 [25] and [26;] *Cubillo 2* ibid [1], [10] and [514].

<sup>332</sup> *Cubillo 2* ibid [10], [11], [30], [677], [678], [682], [687], [705], [729] and [1156].

<sup>333</sup> *Cubillo 2* ibid.

<sup>334</sup> For example, there were reports in the Native Affairs Branch's files expressing concerns as to Mr Walter's propensity for violence. There was the report of Mr Dentith, the Superintendent of the Bagot Reserve, to Mr McCaffrey the Acting Director of Native Affairs, dated 27 July 1954 that concerned young boys who had been flogged by Mr Matthews and Mr Walter several days earlier. There was the report of Mr McCaffrey to the Administrator under cover of a memorandum dated 28 July 1954 concerning the conduct of Mr Matthews and Mr Walter, (with a handwritten notation of the Administrator on that memorandum). There was also the report of Mr Dentith to the District Superintendent, Native Affairs Branch dated 27 October 1954 concerning an attack by Mr Walter upon another young boy: *Cubillo 2* ibid [664], [668], [669], [671], [672] and [674]; *Cubillo 3* [2001] FCA 1213, [126]-[129], [333] and [382].

In May 1956, Mr Gunner, then aged seven was taken from the station where he lived with his family and was ultimately admitted to St Mary's hostel, near Alice Springs. The hostel was run by the Australian Board of Missions and again was an official Aboriginal Institution.<sup>335</sup> The removal was made on the recommendation of Mr Kitching, a Patrol Officer in the employ of the Native Affairs Branch of the Northern Territory Administration. The evidence of a witness, Mr Skinner, was to the effect that Mr Gunner was forcibly taken against his will. There were, however, reports written by Mr Harry Kitching that indicated that Topsy Kundrilba, Mr Gunner's mother, agreed to Mr Gunner being removed. Among the court documents was a 'Form of consent by a Parent' containing a thumbprint that was said to be that of Mr Gunner's mother. While the court accepted there was no way of knowing if Topsy Kundrilba understood this document,<sup>336</sup> O'Loughlin J ultimately accepted that Mr Gunner's mother had in fact consented to his removal.<sup>337</sup> Interestingly, at one point from this thumbprint, allegedly that of Mr Gunner's mother,<sup>338</sup> O'Loughlin J concluded that Topsy Kundrilba had consented to his removal so that he might obtain a 'western education'.<sup>339</sup>

In 1956 a committal order was made by the Director of Native Affairs under *Aboriginals Ordinance* 1918 (Cth) s 16 committing Mr Gunner to the custody of St Mary's until his 18<sup>th</sup> birthday in 1966. Again, under *Aboriginals Ordinance* 1918 (Cth) s 7 the Director of Native Affairs was the legal guardian of every aboriginal person. A further committal order in the same terms was made in February 1957 and in May 1957 the Northern Territory Administrator declared Mr Gunner to be a ward pursuant to *Welfare Ordinance* 1953 (Cth) s 14.<sup>340</sup>

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<sup>335</sup> *Cubillo 1* [1999] FCA 518, [27] and [28]; *Cubillo 2* ibid [12], [744] and [1156].

<sup>336</sup> See *Cubillo 2* ibid [782] and [787]. However, the court asserted: 'I have no mandate to assume that Topsy ... did not understand the meaning and effect of the document': *Cubillo 2* ibid [788].

<sup>337</sup> *Cubillo 1* [1999] FCA 518, [28]; *Cubillo 2* ibid [13], [787], [782], [788], [790], [806], [807], [838] and [1133]. Thus the court asserted: 'I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document': *Cubillo 2* ibid [788].

<sup>338</sup> The court at times refers to the thumbprint 'allegedly' being Topsy Kundrilba's: *Cubillo 2* ibid [784]. However, the court then later asserted: 'I have no mandate to assume that Topsy did not apply her thumb ...': *Cubillo 2* ibid [788].

<sup>339</sup> *Cubillo 2* ibid [1233].

<sup>340</sup> See *Cubillo 2* ibid [155], [789] and [839]. Note, while this legislation was not expressly confined to persons of aboriginal heritage, as it excepted from its legislative reach persons entitled to vote, only aboriginal persons fell into the class of persons that could be declared wards: HREOC above n 1, 646.

Under the *Welfare Ordinance* 1953 (Cth) the Director of Welfare was made the legal guardian of all wards.

By the end of 1956 the Director of Welfare and the Northern Territory Administrator were expressing grave concerns about the staff and management at St Mary's Hostel. The hostel was inadequately staffed and the facilities were inadequate and unhygienic. In this regard it should be noted that Mr Gunner also alleged that he was ill-treated whilst he was at St Mary's. In particular, the court accepted that Mr Gunner (and four other witnesses) had been sexually assaulted by one of the missionaries, Mr Kevin Constable, and that he had suffered cruel beatings.<sup>341</sup>

Mr Gunner remained at the hostel until February 1963. At this point, when he was about 14, 'he was taken from St Mary's to Angas Downs ... a cattle station, about 250 kilometres to the south of Alice Springs'. Mr Gunner stayed at Angas Downs doing stock work until 1965 when the owner, Mr Liddle, told him that he could leave. Mr Gunner said that 'he was taken by Mr Liddle to Alice Springs and left there to fend for himself'. O'Loughlin J held that 'there was nothing in the evidence to suggest that the Director was 'detaining' Mr Gunner whilst he was at Angas Downs'.<sup>342</sup>

*Cubillo 1*<sup>343</sup> involved a preliminary application by the Commonwealth for summary dismissal of the plaintiffs' cases on the basis that they had no causes of action against the Commonwealth and that their actions were statute barred and barred under the equitable doctrine of laches. Subject to certain comments on deficiencies in the plaintiff's pleadings, O'Loughlin J rejected the Commonwealth application.

In *Cubillo 2*<sup>344</sup> O'Loughlin J held that the psychiatric illnesses the plaintiffs suffered stemmed from their removal, detention and deprivation from their family, rather than the conditions at the institutions or being assaulted whilst detained. Thus it was necessary for him to find the plaintiffs' removal, rather

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<sup>341</sup> *Cubillo 1* [1999] FCA 518, [30]; *Cubillo 2* *ibid* [14], [60], [348], [899]-[905], [907]-[908], [946], [955], [960], [965], [974], [985], [989]-[990], [992]-[994], [1028], [1034], [1050], [1063], [1066] and [1073].

<sup>342</sup> *Cubillo 2* *ibid* [1150]. See *Cubillo 1* *ibid* [32]; *Cubillo 2* *ibid* [27] and [909]-[913].

<sup>343</sup> *Cubillo 1* [1999] FCA 518.

<sup>344</sup> *Cubillo 2* [2000] FCA 1084. For a fuller discussion of O'Loughlin J's determinations see Jennifer Clarke 'Case Note: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218 and Cassidy, above n 31.

than the assaults, to be a breach, for any damages to be awarded. Ultimately O'Loughlin J rejected the plaintiffs' claims with respect to all causes of action.<sup>345</sup> A theme throughout the judgment in regard to the various causes of action was that the removal and detention of the plaintiffs was lawful because it was believed to be in the [then] child's best interests and, as the plaintiffs bore the onus of proof, they had failed to show that they were taken without the consent of their parents/guardians.<sup>346</sup>

The court held that neither the Directors, nor the Commonwealth, owed Mrs Cubillo or Mr Gunner a duty of care. In essence, O'Loughlin J asserted that no duty of care arose from the role of carer of the aboriginal children that had been removed and detained.<sup>347</sup> In regard to the Directors' statutory duties to care for aboriginal children,<sup>348</sup> O'Loughlin J held that these duties were not mandatory and thus gave rise to no duty of care.<sup>349</sup>

O'Loughlin J concluded that even if the Commonwealth had owed the plaintiffs a duty of care, there had been no breach of that duty. As the plaintiffs had never told anyone in authority about what had occurred, O'Loughlin J held that there was no evidence that either the Directors or the Commonwealth knew, or ought to have known, of the assaults or the assailants' propensities to such conduct. Moreover, even if there had been any breach by the relevant Directors, O'Loughlin J asserted that the Commonwealth could not be held vicariously liable because of the 'independent discretion rule'.<sup>350</sup> Thus O'Loughlin J believed that the relevant statutory regime granted the Directors an independent discretion as to whether an aboriginal child should be removed from their family and placed in care.<sup>351</sup> This consequently prevented the Commonwealth being vicariously liable for any breach of the duties by the Directors within the statutory frameworks.<sup>352</sup> In addition, the Superintendents of the institutions where the plaintiffs were held were found not to be agents of the Commonwealth.<sup>353</sup>

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<sup>345</sup> *Cubillo 2* ibid [656], [1244], [1247], [1481]-[1485], [1488], [1536], [1540], [1541] and [1563].

<sup>346</sup> See, for example, *Cubillo 2* ibid [503], [511], [1146], [1167], [1264], [1305] and [1538]-[1539].

<sup>347</sup> *Cubillo 2* ibid [1256].

<sup>348</sup> Specified under *Aboriginals Ordinance* 1918 s 5 and *Welfare Ordinance* 1953 s 8.

<sup>349</sup> *Cubillo 2* ibid [1256] and [1261].

<sup>350</sup> *Cubillo 2* ibid [1122], [1123] and [1133].

<sup>351</sup> *Cubillo 2* ibid [1125]-[1126], [1129]-[1130] and [1132].

<sup>352</sup> *Cubillo 2* ibid [1123]. See further Julie Cassidy, above n 3.

<sup>353</sup> *Cubillo 2* ibid [1142].

O'Loughlin J held that no fiduciary relationship existed between the plaintiffs and the Commonwealth. He held that a fiduciary duty could not exist where a claim was also made in tort.<sup>354</sup> Moreover, as there had been no economic loss by the plaintiffs, only physical and psychological damage, no equitable damages could be claimed.<sup>355</sup>

O'Loughlin J also refused to grant the plaintiffs an extension of time to bring both their common law claims (wrongful imprisonment and breach of duty of care) and equitable claim breach of fiduciary duty) on the basis that the Commonwealth had suffered 'remediable prejudice' in defending the proceedings because with the lapse of time potential witnesses had died or were unavailable because of poor health.<sup>356</sup>

On appeal the Full Court upheld O'Loughlin J's findings of fact and asserted that he had not erred in law.<sup>357</sup> The court also concluded that it was open to O'Loughlin J to find that both the plaintiffs/appellants' common law claims and equitable claims were barred because of the lapse of time. The court did note, however, some disagreement with O'Loughlin J's conclusion that there was no evidence that either the Directors or the Commonwealth knew, or ought to have known, of Mr Walter's assaults of the children.<sup>358</sup> The Full Court asserted that in light of the relevant reports 'there may be some difficulty with his finding that there was no evidence that the Commonwealth knew, or ought to have known, that Mr Walter was prone to violence towards children'.<sup>359</sup>

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<sup>354</sup> *Cubillo 2* ibid [1299]. For a fuller discussion of this aspect of the claim made for breach of fiduciary duties see Cassidy, above n 31.

<sup>355</sup> *Cubillo 2* ibid [1307].

<sup>356</sup> See *Cubillo 3* [2001] FCA 1213, Summary at 2 and 3.

<sup>357</sup> *Cubillo 3* ibid Summary, 3. See also *Cubillo 3* ibid [249], [250], [252], [256], [287], [294], [299]-[303], [323], [324], [327]-[336], [378], [399], [436], [445], [465]-[466] and [471]. The issues on appeal were narrower. The claim for breach of statutory duty by the Director of Native Affairs was, for example, no longer pursued. The Full Court agreed with O'Loughlin J's assertion that where there is a factual overlap between an alleged fiduciary relationship and common law tort, the latter should be the source of any legal liability: *Cubillo 3* ibid [463].

<sup>358</sup> *Cubillo 2* [2000] FCA 1084, [1141], [1241], [1255], [1262], [1263] and [1268].

<sup>359</sup> *Cubillo 3* [2001] FCA 1213, [333].

In addition, a number of the plaintiffs' submissions on appeal were rejected as new claims that had not previously been pleaded or argued at trial.<sup>360</sup> The Full Court held that these new claims could not be brought on appeal as O'Loughlin J had not made relevant findings of fact and the Commonwealth would be prejudiced as it had not had the opportunity to present evidence in defence of such claims.<sup>361</sup>

#### IV CONCLUSION

One cannot help but despair at the difference in approach taken to the plight of the stolen generations by the Australian and Canadian governments. The *Cubillo* decisions are just part of a broader issue as to how/whether the stolen generation in Australia will obtain justice. The federal Australian government appears to want to deny these events happened and as the litigation in *Cubillo I* evidences, will use every mechanism available to it to frustrate potential plaintiffs. By contrast, the Canadian government has apologised for the aboriginal residential school experience. In litigation it has waived potential defences of statute of limitations and laches; defences that the Australian government has sought to utilise with great vigour. Similarly, in settlement negotiations, potential defences of statute of limitations and laches are not used by the Canadian federal government to reduce amounts of compensation offered. Most importantly, the Canadian government has recently agreed to a considerable compensation package that will appropriately take these matters out of the adversarial forum of the courts.

From the above discussion it will be apparent that the inability of Australian aboriginal plaintiffs to successfully claim damages is not purely a political matter. Judicial doctrines have also been used to prevent recourse through the Australian courts. Unlike in Australia, however, the above discussion details how 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 aboriginal residential

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<sup>360</sup> The new claims were, (i) breach of duty in the manner of removal, (*Cubillo 3* *ibid* [351] and [363]-[368]), (ii) failure to ensure the children maintained contact with their families, (*Cubillo 3* *ibid* [370] and [374]), (iii) failure to protect them from physical and sexual assault, (*Cubillo 3* *ibid* [379] and [383]), (iv) the unsuitability of St Mary's Hostel, (*Cubillo 3* *ibid* [387] and [388]) and (v) the failure to inform Mr Gunner's mother as to the conditions at St Mary's Hostel (*Cubillo 3* *ibid* [391] and [392]).

<sup>361</sup> *Cubillo 3* *ibid* [368], [369], [374], [376], [378], [383]-[385], [388]-[390], [394], [396], [397], [398], [442] and [443].

schools.<sup>362</sup> While the plaintiffs in these leading Canadian cases were ultimately successful under at least one of their heads of claim, the approaches in these cases in regard to the Crown's liability for breaching fiduciary duties,<sup>363</sup> breaching the duty of care<sup>364</sup> and breaching non-delegable duties<sup>365</sup> are inconsistent. Thus even in the Canadian jurisprudence key legal issues pertaining to the Crown's liability for the aboriginal residential school experience continue to be unresolved. The resolution of these issues will have to await further litigation, if any, taken by aboriginal claimants outside the negotiated settlement package.<sup>366</sup>

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<sup>362</sup> See for example *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Mowatt* [1999] 11 WWR 301; *A(TWN) v Canada* (2001) 92 BCLR (3d) 250.

<sup>363</sup> As discussed below, in *Blackwater v Plint (No 2)* *ibid* the court relied on a particular line of authority to deny the claims based on a breach of fiduciary duties. In *Mowatt* *ibid*, however, the court followed a contrary line of authority, supported by the Canadian Supreme court, and upheld the plaintiff's claims in equity against the Anglican Church. See further Cassidy, above n 31.

<sup>364</sup> As discussed below, it will be seen that in *Blackwater v Plint (No 2)* *ibid* 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* *ibid* 353 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. Both Canada and the Church were held to have failed to protect the plaintiff from harm. See further Cassidy, above n 3.

<sup>365</sup> As discussed below, it will be seen that in *Blackwater v Plint (No 2)* *ibid* the court held that Canada had breached its non-delegable statutory duties owed to the children under the *Indian Act*. By contrast, in *Blackwater v Plint (No 4)* (2005) 258 DLR (4<sup>th</sup>) 275, [49]-[50] and [54]-[55] the court concluded that the non-mandatory nature of the language in the *Indian Act* meant there was no non-delegable statutory duty.

<sup>366</sup> As noted above, the 8 May 2006 agreement does not remove the right to litigate and thus an individual may still bring a claim if they are unhappy with the extent of the compensation.