

2007

Reconciling Tort and Administrative Law Concepts of Justice: The Case of Historical Wrongs

Laverne Jacobs

University of Windsor, Faculty of Law

Follow this and additional works at: <https://scholar.uwindsor.ca/lawpub>



Part of the [Administrative Law Commons](#)

Recommended Citation

Jacobs, Laverne. (2007). Reconciling Tort and Administrative Law Concepts of Justice: The Case of Historical Wrongs. *University of New Brunswick Law Journal*, 57, 134-161.
<https://scholar.uwindsor.ca/lawpub/70>

This Article is brought to you for free and open access by the Faculty of Law at Scholarship at UWindsor. It has been accepted for inclusion in Law Publications by an authorized administrator of Scholarship at UWindsor. For more information, please contact scholarship@uwindsor.ca.

RECONCILING TORT AND ADMINISTRATIVE LAW

CONCEPTS OF JUSTICE:

THE CASE OF HISTORICAL WRONGS

Laverne Jacobs*

The response of the Canadian courts to the action in *Mack* has been disappointing. ... A fully mature legal system recognizes that the judiciary have a duty alongside the legislature to ensure the proper content of law, and this may in exceptional cases require them to deny the validity of procedurally sound statutes. *Of course, should a reasonable statutory scheme of compensation be created, the courts would respect that as replacing the right to restitution for mistake of law.* But it would seem that on both accounts the Canadian system has yet to reach full maturity.

- Julian Rivers¹

Why can't the Premier understand that when he puts a price on the most fundamental of people's rights, he leaves them without any value at all?

- Alberta Hansard, 11 March 1998

INTRODUCTION

These two quotes reflect a particular situation that metaphorically shackles our ability to provide satisfactory redress for historical wrongs. On the one hand, doctrinal interpretations of the rule of law, though technically correct, have rendered judicial recourse for historical wrongs essentially unfulfilling. Shackling the other hand are administrative schemes for compensation which, although arguably well placed to answer the call for adequate compensation, are riddled with such tensions in their creation and implementation that they often result in unsatisfactory forms of redress as well. What I propose to do in this article is to explore the question of what it takes to create the reasonable compensatory scheme to which Julian Rivers alludes in his work. Specifically, why have our attempts to seek justice through judicial intervention failed? And what can we learn from past experiences to help ameliorate our efforts to create appropriate redress through administrative compensation schemes?

* Ph.D Candidate and SSHRC Canada Graduate Scholar, Osgoode Hall Law School; Visiting Scholar, Cornell University Law School (Spring, 2006) and joining the Faculty of Law, University of Windsor in 2007. This article was drafted during my appointment as a Visiting Scholar at Cornell University Law School. It was presented at the symposium *Public Wrongs, Private Duties: Re-Thinking Public Authority Liability in Canada* held at the University of New Brunswick Faculty of Law on 18 May 2006. I am grateful to the participants of the symposium for their feedback as well as to the Social Sciences and Humanities Research Council of Canada, Cornell University Law School and the Berger International Legal Studies Program of Cornell University Law School for their generous support. Many thanks to Jonas Grimheden, Vreni Hockenjos and Eva Pils for much inspired and inspiring transnational conversation on this topic and to Sasha Baglay, Aloke Chatterjee, Marie-Andrée Jacob, Thomas Kuttner, Lorne Sossin and the anonymous reviewers for their helpful comments on an earlier draft. This article covers developments up to and including May 1, 2007.

¹ Julian Rivers, "Gross Statutory Injustice and the Canadian Head Tax Case" in D. Dyzenhaus & M. Moran, eds., *Calling Power to Account: Law Reparations, and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005) 233 at 251 [emphasis added].

It is an especially timely moment to explore these questions given the many compensation claims that the federal government has recently been asked to address. Among these are claims for redress by Chinese Canadian railway workers who had been denied immigrant status in Canada between 1885 and 1947 (the “Chinese Head Tax case”); claims by Ukrainian Canadians who had been interned during World War I and the ongoing process of trying to provide appropriate redress for Canada’s Aboriginal residential school legacy. Indeed, the recent decision of *Baxter v. Canada*,² decided in December 2006, offers thought-provoking commentary on the difficult intersection between tort and administrative methods of providing compensation that can arise with respect to historical wrongs. In *Baxter*, the Ontario Superior Court of Justice grappled with some of the problems inherent to having the government – a face of the author of the original problem – also act as a master of the compensation process.³ *Baxter* and its parallel cases represent the latest chapter in the Aboriginal residential school class action litigation. In *Baxter*, the Ontario Superior Court of Justice approved the proposed settlement of the parties on condition that certain modifications be made to the procedure planned for administering the settlement.

The first part of this article provides an overview of the most dominant private and public law approaches that have been attempted in the courts by plaintiffs seeking redress for historical wrongs and outlines why these approaches have been unsuccessful. It also defines the notion of historical wrongs and provides background information on the two historical wrongs used as a case study in this paper – Aboriginal residential schools and sexual sterilization in Alberta. In the second part, I turn to discuss the phenomenon of creating compensation schemes as an alternative to traditional court action. The delicate treatment that historical wrongs requires is perhaps most evident in the emotional debates that surround the setting up of compensatory schemes in their regard. Two illustrative examples are the outcry surrounding the introduction of a statute to compensate the victims of sterilization in Alberta and the continuing challenges related to the Aboriginal school resolution process established by the federal government. An examination of the compensation schemes that emerged in these two contexts as well as the process of their emergence provide valuable insight into some of the tensions that can occur when systems of compensation for victims of historical wrongs are designed. These tensions include the challenge of determining the appropriate nature and scope of compensation and dealing appropriately with difficult issues relating to independence and mistrust that can arise when the author of a historical wrong later decides to remedy it. I argue that these tensions may be addressed by fostering continuous dialogue between the government and the victims and through independent oversight. Finally, I offer some observations on the ways in which compensatory schemes for historical wrongs expand our traditional conceptions of administrative justice.

² *Baxter v. Canada* (A.G.), [2006] O.J. No. 4968 (Sup. Ct.) [*Baxter*].

³ *Baxter* is discussed in greater detail below in Part II: Administrative Compensation Schemes; 2) Determining Appropriate Heads of Damage.

The idea that historical wrongs require delicate treatment is also the catalyst for the nuance that must be brought to bear on the aims of this article. Certainly, every historical wrong will have its own factual and historical specificities that demand attention in determining how to go about redressing its victims appropriately. It would be overly ambitious to suggest that the tensions drawn out of the examples examined in this paper speak definitively to any other situation. Rather than offering definitive solutions, then, the point of this article is to extract avenues of exploration that should be considered in the design of compensatory schemes for historical wrongs – particularly when those wrongs involve human rights violations through previously valid government action.

PART I: Historical Wrongs in the Courts

A review of the North American legal literature on past human injustice reveals an almost implicit understanding of the term “historical wrong”. The concept has been used in the Canadian legal literature referring, most notably, to Aboriginal residential schools,⁴ the Chinese Head Tax case,⁵ racial internment⁶ and forced sexual sterilization.⁷ The idea tends to encompass serious physical, psychological and/or cultural injuries that have repercussions over several years and which result from the past creation and implementation of a governmental policy. In the United States, reparations theorists often view historical wrongs as wrongs imposed by one group on another for racially motivated reasons. However, the dominant group has not been conceptually confined to government actors.⁸

⁴ See e.g. Law Commission of Canada, *Minister's Reference on Institutional Child Abuse: Discussion Paper* (Ottawa: Law Commission of Canada, 1998); Z. Oxaal, ““Removing that which was Indian from the Plaintiff: Tort Recovery for Loss of Culture and Language in Residential Schools Litigation” (2005) 68 Sask. L. Rev. 367.

⁵ See e.g. D. Dyzenhaus & M. Moran, eds., *Calling Power to Account: Law Reparations, and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005) [Dyzenhaus & Moran, *Calling Power to Account*].

⁶ See e.g. Gerald L. Gall et al., *Redress for Past Government Wrongs: Issue Position Paper* (Ottawa: Advisory Committee to the Secretary of State (Multiculturalism) (Status of Women) on Canada's preparations for the UN World Conference Against Racism, 2001) online: <http://www.pch.gc.ca/progs/multi/wcar/advisory/redress_e.cfm>.

⁷ Although the expression “historical wrong” is not used expressly in the following two articles, the idea that sterilization is a harmful policy of past government shows clearly in them. See Timothy Caulfield & Gerald Robertson, “Eugenic Policies in Alberta: From the Systematic to the Systemic?” (1996) 35 Alta. L. Rev. 59; and Dwight Newman, “An Examination of Saskatchewan Law on the Sterilization of Persons with Mental Disabilities” (1999) 62 Sask. L. Rev. 329. Forced sterilization is expressly called a historical wrong by the court in *Muir v. Alberta* (1996), 179 A.R. 321 (Q.B.) at paras. 3, 153 [*Muir*].

⁸ See e.g. Eric K. Yamamoto, “Race Apologies” (1997) J. Gender Race & Just. 47; Eric K. Yamamoto, “Racial Reparations: Japanese American Redress and African American Claims” (1998) 40 B.C.L. Rev. 477. See also generally, “Case Comment on *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002)” (2003) 116 Harv. L. Rev. 2694. On reparations for various forms of historical human injustice around the world see e.g., Roy L. Brooks ed., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, (New York: New York University Press, 1999); Eric A. Posner & Adrian Vermeule, “Reparations for Slavery and Other Historical Injustices” (2003) Colum. L. Rev. 689.

I intend to use a definition of “historical wrongs” that encompasses many of the elements seen in the Canadian literature but is narrower than the interpretation used in the United States. Although inflicted on one group by another, historical wrongs in this context will consider only those wrongs imposed by government legislation or policy. Though this legislation or policy may have been later repealed, it will have been validly enacted at the time of the initial injuries. Moreover, the impugned governmental acts or omissions would most likely be considered discriminatory under contemporary legal standards (i.e. under the *Canadian Charter of Rights and Freedoms*⁹ or other domestic human rights legislation), having been directed towards vulnerable groups in society. These vulnerable groups may also be considered to be owed a fiduciary duty. “Historical wrongs”, in this sense, is therefore used to describe more than injustice on *racial* grounds, a ground that is often argued as a basis for reparations claims both in Canada and elsewhere. Instead, the notion of historical wrongs, as it is used here, extends to incorporate injustice done to all vulnerable groups in society. A useful reference point for the idea of a vulnerable group is subsection 15(1) of the *Canadian Charter* and its judicial interpretations.¹⁰

Two examples of such historical wrongs will be used for analysis – the system of Canadian Aboriginal residential schools and the forced sexual sterilization of mentally challenged children in Alberta. This is not to say that there are no other illustrations of historical wrongs in Canada.¹¹ However, these two particular examples show a fascinating mixture of both court action and compensation schemes running concurrently. Historical background of both situations is laid out below, followed by an analysis of the legal and equitable doctrines used in the courts to address historical wrongs such as these.

1. Aboriginal Residential Schools in Canada

The purpose of Aboriginal residential schools was to assimilate native children into mainstream Canadian society. Aboriginal children were separated from their families and sent to boarding schools off the reserves. Aboriginal residential schools existed actively in Canada between the early 17th century and the mid-1980s. The last federally-run school was shut down in 1996.

⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. Subsection 15(1) of the Charter prohibits discrimination on the following explicit grounds and on analogous grounds: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁰ See *e.g. Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

¹¹ An example is the Chinese Head Tax. Surviving Chinese Canadians who had paid the tax in order to immigrate to Canada and their widows received a formal apology on 22 June 2006 from the Prime Minister in the House of Commons and compensation of \$20,000 each, see *House of Commons Debates*, 046 (22 June 2006) at 1513. This mixture of apology and compensation came after unsuccessful litigation in which the arguments of unjust enrichment and violation of international human rights standards and the Canadian Charter were all rejected by the courts. See *Mack v. Canada (A.G.)* (2001), 55 O.R. (3d) 113 (Sup. Ct.), *aff'd* 60 O.R. (3d) 737 (C.A.) [Mack].

Two main reasons are often given for the attempt to assimilate Aboriginal peoples in this way. The first deals with the financial responsibility of the federal government with respect to Aboriginal peoples. The *British North America Act* of 1867 declared Aboriginal peoples and their lands to be a federal responsibility.¹² This obligation was expanded in 1876 when the *Act to amend and consolidate the laws respecting Indians*¹³ made all Aboriginal peoples wards of the federal government. The federal government sought to make First Nations people more like the dominant, non-native Canadian society both economically and culturally. This included teaching Christian morality and technical skills. Some scholars argue that through this process of assimilation, the government hoped to minimize, if not eliminate, its financial and fiduciary obligations for First Nations peoples by having them move off reserves and into mainstream culture.¹⁴ A second reason given for assimilation is that it would help to alleviate conflicts that had started to arise between new British settlers, who began to arrive in the 1800s, and First Nations peoples.¹⁵

Residential schools were first established in New France in the 17th century.¹⁶ The peak of the residential school period was in the 1930s. These institutions passed through several stages until they began to be phased out after 1969.¹⁷ In total, over 100 000 First Nations children attended residential schools, and the federal government estimates that there are approximately 80 000 living former students of the residential school system.¹⁸

¹² *Constitution Act, 1867* (U. K.), 30 & 31 Vict., c.3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5 [BNA Act].

¹³ S.C. 1876, c. 18 [Indian Act].

¹⁴ See e.g. J.R. Miller, "Troubled Legacy: A History of Native Residential Schools" (2003) 66 Sask. L. Rev. 357 at 365 [Miller, *Troubled Legacy*]; and Jennifer J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice" (2002) 52 U.T.L.J. 253 at 256.

¹⁵ See e.g. Llewellyn, *ibid.*; R. Chrisjohn et al., *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada*, (Penticton, BC: Theytus Books, 1997); and J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools*, (Toronto: University of Toronto Press, 1996) [Miller, *Shingwauk's Vision*].

¹⁶ There are several excellent overviews of the history of Native residential schools. See Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Law Commission of Canada, 2000) [Law Commission, *Restoring Dignity*]; Government of Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Indian and Northern Affairs Canada, 1996) [Government of Canada, *RCAP Report*] online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg_e.html>; Miller, *Troubled Legacy*, *supra* note 14; and Miller, *Shingwauk's Vision*, *supra* note 15.

¹⁷ The Law Commission of Canada reports that in 1931, 80 schools existed across Canada: 1 in Nova Scotia; 13 in Ontario; 10 in Manitoba; 14 in Saskatchewan; 20 in Alberta; 16 in British Columbia; 4 in the Northwest Territories; and 2 in the Yukon. See Law Commission, *Restoring Dignity*, *ibid.* at 54.

¹⁸ See *Indian Residential Schools Resolution Canada*, online: <<http://www.irsr-rqpi.gc.ca>>. A total of approximately 15 000 former students have made claims against the government through both traditional litigation in the courts and claims made through the government's alternative dispute resolution process (see Baxter, *supra* note 2 at para. 13). Approximately 12 000 of these are class action cases started in Ontario and Alberta. See Parliament of Canada, *Official Report of debates (Hansard)*, 79 (11 April 2005) (Jim Prentice).

The residential school system was administered as a joint endeavour by the federal government and various churches.¹⁹ Although first established by religious organizations in the 18th century, including various protestant denominations, the government of Upper Canada began establishing an official system of residential schooling in the early 19th century. In 1920, the *Indian Act* was amended to make attendance in residential schools compulsory for all First Nations children aged seven to fifteen. In addition to creating the educational policy, the federal government took charge of funding the schools. The churches operated the schools.

In the 1870s, First Nations groups entered into treaties with the federal government. First Nations negotiators understood these treaties to have the intention of creating on-reserve schools that would help the First Nations communities become self-sufficient.²⁰ However, on-reserve schools were passed over in favour of residential schools. Some argue that the government's ulterior motive of alleviating its responsibilities for Aboriginal peoples by assimilating them into mainstream society is also the reason why it did not respect these treaty obligations.²¹ As such, arguments that the federal government has breached both treaty rights and its fiduciary duty to First Nations peoples are being used in current litigation surrounding Aboriginal residential schools.

Over time, former students have revealed that abuse was a central part of the lives they were forced to lead at residential schools. Forms of abuse included physical, sexual and psychological abuse. Children were punished for speaking their language, following their own customs, truancy etc. The stories of survivors show the line between punishment as a form of discipline and abuse as a form of power being crossed.²² This abuse is the major part of what has led to litigation and alternative dispute resolution (ADR) processes, both of which are discussed in more detail below.

2. Sterilization of the Mentally Disabled in Alberta

Sexual sterilization of the mentally disabled was legislatively sanctioned in Alberta between 1928 and 1972. The *Sexual Sterilization Act*²³ allowed for the sterilization of patients in mental institutions. The decision whether to sterilize was made by a decision-making board constituted for that purpose. In order to proceed, the board was to be "unanimously of opinion that the patient might safely be discharged if the danger of procreation with its attendant risk of multiplication of the evil by

¹⁹ In 1911, the federal government concluded formal contracts with the churches that outlined their shared responsibilities. See "2. Systemic Neglect: Administrative and Financial Realities" in "10. Residential Schools", Government of Canada, *RCAP Report*, *supra* note 16.

²⁰ See Miller, *Troubled Legacy*, *supra* note 14 at 361.

²¹ *Ibid.* at 365-66.

²² See e.g. Law Commission, *Restoring Dignity*, *supra* note 16.

²³ *Sexual Sterilization Act*, S.A. 1928, c. 37 [*Sterilization Act*].

transmission of the disability to progeny were eliminated”.²⁴ Once an affirmative decision had been reached, consent of the individual or substitute consent was to be obtained before sterilization occurred. Although the language of the Act was modernized as the statute went through amendments over its 44 years of existence, the basic idea remained the same – namely, to sterilize mentally disabled persons who were about to be discharged so that they would not reproduce their “illness”. Over the course of the Act’s existence, 2 822 sterilizations were performed.

The *Sterilization Act* embodied a theory of eugenics that was prevalent in many parts of North America and Europe at the time.²⁵ The eugenics movement aimed to foster procreation by groups with desirable characteristics to improve the overall gene pool and to prevent individuals with undesirable traits from passing them along. Although the theory and the policies created to further it were popular in the late 19th and early 20th centuries, over time they increasingly fell to criticism on scientific and moral grounds.²⁶

The most significant decision relating to Alberta’s sexual sterilization regime is *Muir v. Alberta*.²⁷ In *Muir*, a woman who had been admitted to a training school for “mental defectives” was able to recover damages for having been wrongfully admitted to the school and wrongfully sterilized while there. The *Muir* decision sparked over 700 additional claims against the government which were eventually settled through a government designed settlement process. The government had initially tried to fix maximum compensation awards for sterilization victims through legislation, but the proposed legislation caused so much controversy that it was revoked by the Minister of Justice the day after it had been introduced in the Legislative Assembly.

3. Legal and Equitable Doctrines

Four main doctrines of law and equity are generally attempted by Canadian litigants seeking redress for historical wrongs before the courts. These are: negligence, breach of fiduciary duty, application of domestic and international human rights laws (including the *Charter*), and if applicable, unjust enrichment. Other actions which are specific to the situation may also be invoked such as the intentional torts of assault and battery, and the breach of Aboriginal or treaty rights. This discussion focuses most heavily on the use and limitations of tort law, especially negligence, in

²⁴ *Ibid.* s. 5.

²⁵ Sterilization is reported to have occurred during the same time period in various states of the United States, Sweden, Switzerland, Denmark, Norway, Finland, France, Belgium and Austria. See Dwight Newman, “An Examination of Saskatchewan Law on the Sterilization of Persons with Mental Disabilities” (1999) 62 Sask. L. Rev. 329. For an excellent account of the forced sterilization movement in Sweden and in Scandinavia more generally, see the collection of papers in (1999) 24:2 *Scandinavian Journal of History*.

²⁶ On Alberta’s sexual sterilization regime and the influence of eugenics philosophy see e.g. Caulfield & Robertson, *supra* note 7.

²⁷ *Muir*, *supra* note 7.

bringing public authorities to account for historical wrongs, and its interaction with breach of fiduciary duty.²⁸

(A) Negligence & Breach of Fiduciary Duty

(i) Crown Immunity for Policy-making Discretion

When one thinks of holding public authorities accountable, the use of tort law almost automatically comes to mind. In particular, negligence – the causing of loss or damage by failing to meet an appropriate standard of care with respect to one to whom a duty is owed – is a concept that is theoretically wide enough to encompass many types of governmental harm. In practice, however, our historical struggles with delineating the scope of Crown immunity have at times left it difficult to have state actions that seem patently wrong declared *ultra vires*. This is particularly the case when dealing with historical wrongs on the part of the Crown.

There is an inherent intersection between tort and administrative law that becomes evident when dealing with the liability of public authorities. The nexus between the two is judicial review, regardless of whether the review is on public or private law grounds. If judicial review aims to ensure that government behaviour is legal then it follows that the very fact that a historical wrong has been created through governmental policy validly made at the time, is the key to why private law actions in this context fail. More narrowly put, when it comes to holding the government accountable for the past creation of a discriminatory policy, tort law, and in particular, negligence, has a predisposition to fail. This is due to the juristic argument that the government cannot attract liability in its establishment of policy or legislation. At the very most, it can be held responsible only for negligent implementation of the policy or legislation created.

Commonly known as the “policy/operational dichotomy”, this boundary represents the idea that government officials are in the best position to make policy decisions as such decisions involve the balancing of polycentric considerations that rely on social, political, budgetary, technical and similar factors. The theory goes that not only are courts inadequately informed to make such judgments, it is also more appropriate to have decisions of this nature made by officials who are ultimately answerable to the electorate.²⁹ By contrast, matters relating to the execution of a policy, where discretion is narrower and where there may be standards and fixed resources, are held to be more amenable to review on negligence

²⁸ I have limited the discussion to tort and fiduciary duty because of the theme of the symposium of which this paper formed a part. The problems in attempting to apply human rights legislation retrospectively and in applying the doctrine of unjust enrichment are discussed in both levels of court in *Mack, supra* note 11. As with tort law, the problem in holding government to account under human rights legislation or through unjust enrichment is that the valid law at the time provides a juristic reason for the government’s actions. These questions are explored in Dyzenhaus & Moran, *Calling Power to Account, supra* note 5.

²⁹ See e.g. Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 163-65.

principles. As these decisions are more discrete, the application of negligence principles in their regard theoretically should not involve second-guessing the type of polycentric decisions made in the policy creation stage.³⁰ At its core, the policy/operational dichotomy inevitably turns on a question of degree as policy implementation often involves elements of policy discretion; this has rendered the policy/operational dichotomy difficult to apply.³¹

Decided in 2005, the Supreme Court of Canada decision in *Blackwater v. Plint*³² offers an illustration of the strong degree to which Crown immunity for policy creation can be upheld by courts dealing with historical wrongs. *Plint* is one of the first cases dealing with the merits of governmental liability for residential schools to have reached the Supreme Court. Both the Supreme Court and the lower courts' analyses are instructive on how questions relating to Crown immunity will be understood in the context of historical wrongs.

In *Plint*, twenty-seven former students of the Alberni Indian Residential School (AIRS) claimed damages for sexual abuse and other harm suffered while they resided at the school.³³ AIRS had been established in 1891 to provide elementary and high school education to Aboriginal children living in remote areas on the west coast of Vancouver. It was run as a joint venture between the government of Canada and the United Church of Canada. The government was primarily responsible for funding and the Church responsible for managing the school in accordance with regulations and standards prescribed by the government.³⁴ Particularly interesting is

³⁰ The classic cases applying the policy/operational analysis include: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; and *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420.

³¹ See the discussion by Lewis Klar who outlines several cases illustrating the lack of judicial pattern in determining which matters are policy based and which are operational. See Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 277-82. The policy/operational dichotomy as it exists in the United States, England, Canada, Australia, and New Zealand is analyzed comparatively and critiqued by Nicholas W. Woodfield. Woodfield finds strong similarities in the law in these jurisdictions but suggests a two-step approach to determining whether immunity should be accorded. See Nicholas W. Woodfield, "The Policy/Operational Dichotomy in Intra-State Tort Liability: An Example of the Ever-Continuing Transformation of the Common Law" (2000) 29 Denv. J. Int'l L. & Pol'y 27.

³² *Blackwater v. Plint*, [2005] 3 S.C.R. 3 [*Plint SCC*].

³³ The trial judgment was rendered in two phases after a 111 day trial. The first set of reasons for judgment dealt with the issue of vicarious liability for the defendant Plint. The second dealt with all other liability issues raised, including vicarious liability for perpetrators other than Plint, negligence of the government and the church, fiduciary duty, non-delegable statutory duty, limitation defences and the third party claims advanced by the United Church and the government against each other. By the time of the second judgment, all but seven plaintiffs had settled out of court and the judgment related only to those remaining actions.

³⁴ This agreement was formalized as one of the standard agreements that the federal government concluded with all residential schools in 1911. See *supra* note 19 and accompanying text. The trial judge found that although it was created to last only five years, the Alberni school continued to operate under the general principles set out in the 1911 agreement after those years had expired. See the British Columbia Supreme Court discussion in *W.R.B. v. Plint* (1998), 52 B.C.L.R. (3d) 18 (Sup.Ct.) at para. 36 [*Plint I*].

the Supreme Court's way of framing the issues before it. Central to the Court's inquiry was an unusual exploration of the legal bases on which the federal government and the United Church could be held liable instead of simply an examination of whether the dispute showed liability on established doctrinal principles. McLachlin C.J.C. stated the issues in *Plint* as follows:

Are the Government and the United Church of Canada ("Church") liable to Aboriginal students who attended residential schools operated by them in British Columbia in the 1940s, 1950s and 1960s? If so, on what legal basis are they liable, and how should liability be apportioned between them? Finally, what damages should be awarded? These are the central questions on this appeal.³⁵

Before each level of court, the courts placed compensation for abuse at the forefront of the analysis. Despite this, however, one cannot help but observe that the courts were being asked to award damages for something more than the mere mishandling of a policy put into operation. As the case wound its way through the courts, the question of whether the government could be held liable for the harm caused by the actual creation of the residential school policy came up more than once, although it was always relegated by the courts to being tangential to what they considered the main issues of assault and abuse. Grappling with this request resulted in a certain tension and unease as the courts tried to stick firmly to the doctrine of Crown immunity for policy creation.

The question of the government's potential liability for its residential school policy made its most forceful appearance at the British Columbia Court of Appeal. There, it surfaced as a new argument forming part of the appellants' claim for aggravated damages. Supported by intervenors who had not appeared at first instance, the appellants argued that the loss of culture they experienced as a result of being forced to leave their homes and attend at residential schools should be seen as a factor in fixing aggravating damages for sexual abuse. The Court dismissed this argument, holding that it was essentially a new cause of action which they could not address on appeal as it had not been pleaded at trial. Ultimately, the Court of Appeal found that the claim simply constituted "an attack upon the system of residential schools and its overall effect on all students."³⁶ The Supreme Court of Canada reinforced the principle that government policy in itself is immune from suit. McLachlin C.J.C. held at the outset of her decision:

A more general issue lurks beneath the surface of a number of the specific legal issues. ... For example, to what extent is evidence of generalized policies toward Aboriginal children relevant? Can such evidence lighten the burden of proving specific fault and damage in individual cases? I conclude that general policies and practices may provide relevant context for assessing claims for damages in cases such as this. However,

³⁵ *Plint SCC*, *supra* note 32 at para. 1.

³⁶ *W.R.B. v. Plint* (2003), 235 D.L.R. (4th) 60 (B.C.C.A.) at para. 79 [*Plint BCCA*].

government policy by itself does not create a legally actionable wrong. For that, the law requires specific wrongful acts causally connected to damage suffered.³⁷

The British Columbia Court of Appeal and the Supreme Court of Canada decisions in *Plint* suggest that even when a government policy has itself resulted in harm, Crown immunity for discretionary policy-making will be upheld. In *Plint*, all levels of court were insistent that the government could only be held liable for the abuse that the former students suffered because this abuse was a negligent misapplication of the policy that was to be implemented. However, while the courts managed to keep the door to Crown immunity guarded in this case, they ultimately seemed to have left open the possibility of attacking such immunity on the ground of breach of fiduciary duty.

Over the past few decades, the concept of fiduciary duty has grown to encompass a very wide array of equitable obligations. Dickson J. (as he then was) offered a general definition of fiduciary duty in *Guerin v. Canada*,³⁸ one that incorporates its role in both public and private law contexts. He stated: "...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary".³⁹ Once a fiduciary duty is established, equity will then supervise the relationship by holding the empowered party to "the fiduciary's strict standard of conduct."⁴⁰ In the public law realm, fiduciary obligations are commonly used in the context of Aboriginal law.

In *Plint*, all levels of court discussed the appellants' argument that the Crown breached its fiduciary duty by creating a policy which led to the loss of their language and culture. Interestingly, the British Columbia Supreme Court in *Plint* had held that what was missing to make this a situation in which a breach fiduciary duty could be found was evidence of dishonesty or an intention on the part of the Crown to act in its own benefit.⁴¹ Neither the British Columbia Court of Appeal nor the Supreme Court of Canada overturned this proposition.⁴² An interesting question remains as to whether a window of opportunity has been left open for future plaintiffs to show dishonesty by arguing that the government's self-interest in

³⁷ *Plint SCC*, *supra* note 32 at para. 9.

³⁸ *Guerin v. Canada*, [1984] 2 S.C.R. 335.

³⁹ *Ibid* at 384.

⁴⁰ *Ibid*.

⁴¹ See *W.R.B. v. Plint* (2001), 93 B.C.L.R. (3d) 228 (Sup. Ct.) [*Plint 2*] at paras. 246-48.

⁴² The British Columbia Court of Appeal simply did not embark upon an analysis of the question. It agreed with the legal test and with the trial judge's holding. See *Plint BCCA*, *supra* note 36 at para. 75. The Supreme Court of Canada noted that since the issue had not been argued fully at the lower levels of court, it could not address it. See *Plint SCC*, *supra* note 32 at para. 62.

eliminating its financial responsibility for First Nations communities led it to breach its fiduciary obligations.⁴³

As a means of getting beyond the policy/operational dilemma, some theorists argue for a wider and more morally based interpretation of cases in which Crown immunity is invoked. Lorne Sossin argues that the question of governmental liability for past public policies would be better addressed through a “public trust” analysis.⁴⁴ His theory understands public authority as an exercise of public trust in which the Crown is made up of “public decision-makers, bound to discharge the public trust reasonably and fairly”.⁴⁵ This approach proposes the blending of equitable doctrines with traditional private law or public law judicial interpretations. It works to some extent by expanding the use of fiduciary obligations in our public law jurisprudence. The concept of public trust involves recognizing and using a spectrum of equitable obligations suited to a variety of relationships – legal, constitutional and administrative – that exist between the Crown and the citizens affected.⁴⁶ Once it can be agreed that a particular policy was unjust, the public trust analysis focuses the inquiry on the context in which it was implemented and the consequences of the policy for the aggrieved parties. The public trust theory aims to pierce the legalistic formalism that results in cases where Crown immunity is upheld without questioning the fairness and reasonableness of the state’s actions. Underlying Sossin’s theory seems to be the notion that it is the legitimacy of the policies created that merits owing deference to the Crown; yet, legitimacy, and by extension, the right to immunity cannot be adequately evaluated without reference to the fairness and reasonableness of the policy made.

Others, like Julian Rivers, suggest that statutes that are grossly unjust can be declared invalid by judges because they lack a certain moral correctness which is necessary to the normal course of legal reasoning.⁴⁷ The substantive content of what constitutes “grossly unjust” and the amount of injustice required before a statute can be struck are matters for each jurisdiction’s legal system to work out. Rivers draws inspiration from the theories of German legal philosophers, Gustav Radbruch and Robert Alexy in developing this theory.⁴⁸ Even if these approaches are adopted, however, one still faces the challenge of deciding whether to use standards of the time period or contemporary ones in determining if the policy created was grossly unjust.

⁴³ See *supra* note 14 and accompanying text.

⁴⁴ See Lorne Sossin, “Redress for Unjust State Action: An Equitable Approach to the Public/Private Distinction” in Dyzenhaus & Moran, *Calling Power to Account*, *supra* note 5 at 196.

⁴⁵ See Sossin, *ibid.* at 216.

⁴⁶ *Ibid.* at 214-15.

⁴⁷ See Rivers, *supra* note 1 at 239.

⁴⁸ See also the critique of the Radbruch formula by David Dyzenhaus, “The Juristic Force of Injustice” in Dyzenhaus & Moran, *Calling Power to Account*, *supra* note 5.

It is also clear that some plaintiffs may seek redress precisely for the negligent or otherwise unsanctioned behaviour of the public officials acting under a valid governmental scheme. The sexual sterilization case of *Muir* may be an example. In *Muir*, there was no indication that damages were sought for the eugenics policy itself. Rather, negligence law was used to claim damages that arose when the government officials allowed Ms. Muir to be admitted to the training school without following their own procedures, and for sterilizing her when there was no consideration of discharge, contrary to the statute. Although the policy behind the statute was not attacked, it is applaudable that the case itself caused so much social uproar that the government apologized for the eugenics regime and began to offer compensation. However, the litigation approach taken did little to question the policy/operational divide.

Equally important is that many plaintiffs and others still conceive of the reparation of wrongs as containing a very traditional corrective justice component: damages received are, at least in some part, to place the members in the group in the position they would have been in had the wrong not occurred.⁴⁹ This factor coupled with the amount of people who must be compensated when a community or group is affected by a historical injustice leads to a tension between satisfying the individual and the collective.

Finally, if there is truly sovereignty in policy and legislative-making functions, then why not use them to redress the effects of historical wrongs? It may be argued that the courts are not in the position to question political action but certainly the political branches of government should be able to do so. Better use could be made of administrative compensation schemes to address historical wrongs.

PART II: Administrative Compensation Schemes

We have seen the degree to which the notion of government immunity for policy and legislative functions will be upheld. It is very difficult to find a way to hold government liable for the creation of past policy or legislation that has caused lasting significant injury. The historical notion that the “King can do no wrong” has remained steadfast by way of the policy/operational divide.⁵⁰ On the other hand, when it comes to creating governmental administrative programs to compensate for historical wrongs, it seems that the executive and legislative branches of government are well-placed to overcome the policy/operational dichotomy. By using policy, they can attempt to redress the effects of programs the Crown has created in the past.

⁴⁹ On the viability of reparations claims as tort suits in the U.S. see Alfred L. Brophy, “Reparations Talk: Reparations for Slavery and the Tort Law Analogy” (2004) B.C. Third World L.J. 81; and Keith N. Hylton, “A Framework for Reparations Claims” (2004) B.C. Third World L.J. 31.

⁵⁰ Although this expression is used to discuss the dichotomy in tort law, it equally informs the failure of other legal and equitable strategies that have been attempted to hold public authorities accountable, such as the use of human rights law and unjust enrichment. See *supra* note 26 and accompanying text.

However, at least two broad tensions have surrounded the creation of compensatory schemes in Canada for historical wrongs. These are: i) determining the appropriate nature and amount of compensation. In part, this first tension is a question of finding the right balance between compensating according to the heads and amount of damages available in the courts and offering compensation beyond this scope and ii) managing issues of independence and mistrust that may arise from having a future incarnation of the author of the historical wrong provide the remedy. Setting up methods to deal with these tensions in advance and revisiting them as necessary as the compensation project unfolds may allow for smoother implementation of compensation policies. Both the residential schools resolution process and the settlement plan instituted for the Alberta sterilization compensation show the value of one method: keeping an open door to dialogue with those affected. They suggest that the establishment of a compensation process, far from being static, requires the fluidity of continuing discussion to gain legitimacy. They also suggest that the mistrust sometimes experienced by users of the compensation process may, in some circumstances, best be addressed by independent oversight. Finally, on a meta-level, the policy instruments that have been designed to provide compensation, such as the ADR Process for Native residential school abuse claims and the Settlement Plan for sterilization victims in Alberta, raise interesting questions about the new dimension that these instruments add to traditional forms of administrative law and justice.

1. The Nature of Redress

How do we determine appropriate redress? In light of the various historical wrongs and types of redress instruments possible, this is a large question with several potentially viable answers. The methods of redress offered for historical wrongs around the world present quite a varied list. The most common types of redress include apology, truth and reconciliation commissions, commemorative initiatives, rehabilitative or restorative initiatives and of course, monetary compensation. These forms of redress have been offered separately or in conjunction with one another. In Canada, several groups have sought redress for historical wrongs.⁵¹ Table A in the

⁵¹ This includes redress for:

- leprosy patients imprisoned between 1891 and 1956 on two islands around Victoria B.C.;
- the Black Loyalists;
- the destruction of Africville and the relocation of its residents in 1969;
- Canada's denial of entry to Jews between 1938 and 1948;
- Aboriginal war veterans denied benefits;
- Ukrainian Canadians interned during World War I;
- German Canadians interned during World War II (1940 to 1943);
- Italian Canadians interned during World War II;
- Japanese Canadians interned during and after World War II;
- Chinese Canadians subject to the Chinese Head Tax;
- former students of aboriginal residential schools;
- those sexually sterilized under provincial legislation;
- Duplessis orphans.

Appendix outlines the nature and amount of redress that successful groups have received.

The choice to redress a historical wrong with any particular instrument(s) should be crafted from the factual details of the wrong committed, respond to its effects and further a genuine intention of remedying, to the extent possible, the harm that has been suffered by the individuals, their community and the wider Canadian community. This section is not intended to present a comprehensive list of factors to consider in determining appropriate redress or to declare any instrument as definitively necessary. Instead, focusing primarily on compensation as a form of redress, this section aims to identify some of the key issues that have arisen in the development of past compensation processes for historical wrongs and to discuss these issues as possible areas of examination in the creation of future administrative compensation projects.

2. Determining Appropriate Heads of Damage

In some instances, federal and provincial governments offering compensation have tried to stay within the parameters of compensation for which they would be liable through civil litigation. These parameters have been followed for both the heads of damage awarded and the amount of compensation provided.

As an example, the current Indian Residential Schools Alternative Dispute Resolution Process (ADR Process) is very clear to emphasize that it will provide compensation only for the ancillary, negative effects that former students have suffered, such as abuse.⁵² In this regard, the official guide to the ADR Process specifies that there are only three types of claim that it will consider – physical abuse, sexual abuse and wrongful confinement.⁵³ Moreover, Indian Residential Schools Resolution Canada, the federal government ministry responsible for the program, further clarifies that “wrongful confinement” in this context does not refer to the very fact of being forced to attend these schools. The term is used only to designate being detained in an inappropriate space during the time that the student was at the school:

In the Alternative Dispute Resolution Process, you can make a claim for compensation for sexual abuse, physical abuse or wrongful confinement you suffered at a residential school. In this process, wrongful confinement means being kept against your will and alone in a space where both the space and length of time were not appropriate for a child of your age...⁵⁴

⁵² The official document governing the dispute resolution process is the *Guide for the Alternative Dispute Resolution Process*. Indian Residential Schools Resolution Canada, “Guide for the Alternative Dispute Resolution Process”, *Indian Residential Schools Resolution Canada*, online: <<http://www.irs-rqpi.gc.ca/english/pdf/Application-Guide.pdf>>. Note that this ADR process will soon be replaced with an Independent Assessment Process that is very similar. Further discussion of the Independent Assessment Process is found below.

⁵³ *Ibid.* at 1.

⁵⁴ *Ibid.* at 1.

This approach keeps quite closely within the doctrine that governmental liability for improper implementation of a government policy is acceptable while liability for creation the policy itself is not. The federal government received criticism from several angles over the fact that its original process did not even attempt to provide for the loss of language and culture that former students endured. The federal government gave two responses. The first was based on a parsing out of the amount of reparations by form, which allowed them to say that other programs address this issue. Specifically, they pointed to an initiative to preserve, revitalize and protect Aboriginal languages and cultures that they had already established.⁵⁵ Their second response was to indicate that the courts have not yet granted damages for such loss and that if they do so in the future, the ministry may consider the issue.⁵⁶ The problem with their arguments, particularly the first one, is that loss of language in culture has both a collective component and an individual component. While the grant of money given for preservation of culture may address the community's loss of language and culture that resulted from the Aboriginal school legacy, it does not speak to each individual's loss of language and culture that resulted from his or her forced attendance at a residential school. The current ADR Process, which was designed as an alternative to court and aimed, in theory, to be more tailored to an understanding of the Aboriginal residential school experience, does not provide the litigant with compensation for the very real and significant loss suffered.

It is perhaps not surprising that the ADR Process led to lobbying and consultation. Dissatisfied with the process because of its inability to deal with key issues such as loss of language, culture and harm to future generations, the Assembly of First Nations⁵⁷ supported by the Canadian Bar Association,⁵⁸ lobbied the federal

⁵⁵ The government statement is as follows:

The Resolution Framework is for people claiming sexual and/or physical abuse as a result of their experiences at Indian residential schools. It does not address claims based on the loss of language and culture. The federal government is currently implementing a 10-year \$172 million initiative to work with Aboriginal people to preserve, revitalize and protect Aboriginal languages and cultures for all Aboriginal people, reinforcing at the same time Canada's commitment to address the full range of impacts stemming from the Indian residential schools system.

Indian Residential Schools Resolution Canada, "Resolution Framework & ADR", *Indian Residential Schools Resolution Canada*, online: <http://www.irsr-rqpi.gc.ca/english/dispute_resolution_resolution_framework.html>.

⁵⁶ See Ken R. Halvorson, *Indian Residential School Abuse Claims: A Lawyer's Guide to the Adjudicative Process* (Toronto: Carswell, 2005) at 5.

⁵⁷ See Assembly of First Nations, "Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools" *Assembly of First Nations – Assemblée des Premières Nations*, online: <www.afn.ca/cmslib/general/Indian-Residential-Schools-Report.pdf> [Assembly of First Nations, "Report on Canada's Dispute Resolution Plan"]. The document lays out the elements of discontent as well as the aspects that the Assembly found to be more positive in the government's ADR process.

⁵⁸ See Canadian Bar Association, "Resolution 04-08-A Scope of Residential Schools Dispute Resolution Process", *Canadian Bar Association*, available to CBA members online: <<http://www.cba.org/CBA/resolutions/2004res>>.

government for much more comprehensive compensation. As a result, in May 2005, the Honourable Frank Iacobucci, a retired Justice of the Supreme Court of Canada, was appointed by the Government of Canada to be its federal representative in negotiations with legal counsel for former students, legal counsel for the churches and other interested parties, most notably, the Assembly of First Nations. The aim of the negotiations was to seek a fairer, long-lasting resolution to the residential schools legacy. The idea for the negotiations came at a time when there were several claims outstanding, both in the regular courts and in the government's ADR Process.⁵⁹ Negotiations took place with the Honourable Frank Iacobucci over a period of approximately one year. The result was an Agreement that aims to be a global solution which ameliorates the ADR Process and provides a settlement plan for all outstanding class action and other residential school litigation.⁶⁰

The Agreement offers to pay a Common Experience Payment to each former resident of an Indian residential school living on 31 May 2005. The payment represents an acknowledgment of the fact of having lived at an Indian residential school and the impacts of this experience, including loss of language and culture. Once put into effect, each former student would receive \$10 000 for the first year of residence in the school and \$3 000 for each subsequent year upon proof of his or her attendance. As a term of its implementation, the Agreement must be ratified by courts in nine Canadian jurisdictions under substantially the same terms and conditions. In December 2006, the nine courts in question sanctioned the settlement⁶¹; however, some courts asked for modifications to be made within sixty

⁵⁹ At the time of writing his judgment in *Baxter*, Winkler J. noted approximately 15 000 ongoing claims proceeding through traditional court and the government's ADR processes. See *Baxter*, *supra* note 2 at para. 13.

⁶⁰ An Agreement in Principle was reached on 23 November 2005. A copy of the Agreement in Principle can be found on the website of the federal representative for Indian residential schools: Federal Representative – Indian Residential Schools, "Agreement in Principle" *The Office of the Federal Representative*, online: <http://www.iacobucci.gc.ca/english/pdf/AIP_English.pdf>. The final Settlement Agreement is also available: Federal Representative – Indian Residential Schools, "Indian Residential Schools Settlement Agreement" *The Office of the Federal Representative*, online: <http://www.iacobucci.gc.ca/english/pdf/Indian_Residential_Schools_Settlement_Agreement.PDF>.

⁶¹ In addition to the Ontario class action in *Baxter*, *supra* note 2, parallel proceedings were filed and heard in eight other Canadian jurisdictions: Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Québec, Saskatchewan and the Yukon. Counsel both urged and gave consent to the courts of the nine jurisdictions to communicate with each other in reaching their decisions. The degree to which they acceded to this request is reflected in their judgments. All the decisions were rendered in mid-December except for the decision of the Northwest Territories Superior Court which was issued on 15 January 2007. See: *Northwest v. Canada* (A.G.) 2006 ABQB 902; *Quatell v. Canada* (A.G.) 2006 BCSC 1840; *Semple v. Canada* (A.G.) 2006 MBQB 285; *Kuptana v. Canada* (A.G.) 2007 NWTSC 1; *Ammaq v. Canada* (A.G.) 2006 NUCJ 24; *Baxter*, *supra* note 2; *Bosum c. Canada* (A.G.) (15 December 2006) Montréal 500-06-000293-056 (C.S.); *Sparvier v. Canada* (A.G.) 2006 SKQB 533; *Fontaine v. Canada* (A.G.) 2006 YKSC 63.

days of the decision in order for the settlement to be finally approved⁶². The nine courts gave final approval in March, 2007.⁶³ Eligible survivors are currently being asked to either opt out of the class action or submit the request for payment. Once this is done, the Common Experience Payment will be distributed and the rest of the settlement will be put into place.

A couple of lessons can be drawn from the Indian residential school compensation experience. The first is the importance of flexibility in designing a compensation scheme in order to create one that genuinely reflects the harm that has been sustained. With the residential schools, loss of language and culture on an individual basis was a central part of the injuries suffered by the claimants. Yet, the original process adhered so closely to the heads of damage and the philosophy of Crown liability as found in the regular courts that it failed to provide adequate compensation. As an adjunct to flexibility, keeping an open ear to consultation with those affected is also essential.

3. The Dual Role of Author-Master in the Compensation Process

Consultation is one means of gaining legitimacy in developing a compensation process for historical wrongs. Paying attention to the actual injuries suffered as they are described by the claimants is one way to help ensure authenticity in the compensation offered. But, in light of the fact that it is the government, a future iteration of the author of the historical wrong, who has agreed to pay the compensation, other concerns of legitimacy between the claimant and the payer may also arise. One, in particular, deals with overcoming an almost inherent mistrust that a victim and others, including the general public, may feel when the author of the wrong turns into the master of the compensation process. Two examples illustrate different ways in which this mistrust can arise. First, the settlement plan concluded by the federal government and counsel for residential schools exhibited some definite problems in the way that it would be administered. The courts, in ratifying the settlement plan, were quite vigilant in pointing out these administrative deficiencies. I outline these deficiencies and the mistrust that they raised through a discussion of Winkler J.'s decision in *Baxter*. The second example is more subtle. It draws from an analysis of the Hansard debates in the Alberta Legislature that took place on the day that the Alberta government tried to introduce a bill that would limit the amount of compensation that sexual sterilization victims could receive. These examples reinforce the idea that even the slightest appearance of potential self-interest can cause trust to break down in a compensation process. This problem

⁶² The federal government also appealed one of these decisions on a question relating to lawyers fees which may also have delayed final approval, although the federal government maintains that it did not do so. For opposing views on the matter see: Mark Hume "Abuse payout, legal fees separate issues, chief says" *The Globe and Mail* (13 February 2007) S2; and Government of Canada, "Government of Canada News Release: Minister Prentice Provides Update on the Indian Residential Schools Settlement Agreement", online: <<http://www.classactionservices.ca/IRS/PDFs/Settlement%20Agreement%20Update%20Jan%2031%20EN.PDF>>.

⁶³ See "Update for March 23rd, 2007" - Residential Schools Settlement-Official Court Notice: Updates, online: <<http://www.classactionservices.ca/IRS/updates.htm>>.

becomes even more acute when the government offers simultaneously the alternatives of a compensatory process to victims and the option of litigation.

(A) *Conflicts of Interest in the Implementation of Compensation Processes*

As discussed above, a global resolution for all Aboriginal residential school litigation was sought through a settlement plan that would put into effect an agreement between the federal government and former students. The settlement has been ratified by the nine Canadian courts in question although some courts requested modifications to the administration of the process. The main concern that inspired modification was the fact that the federal government was to play, simultaneously, both the role of respondent in its ongoing litigation with former students and administrator of the settlement. Without a clear demarcation between the two roles, the federal government could be perceived to be in a conflict of interest.

In its capacity of administrator of the settlement, the government would determine the eligibility of former students to receive the Common Experience Payment and distribute payments to eligible applicants. It would also run the Independent Assessment Process, establish a Truth and Reconciliation Commission and set aside a significant portion of the settlement fund for healing and commemorative programs.⁶⁴ In a manner similar to the existing ADR Process, the Independent Assessment Process would adjudicate claims for abuse but with the promise of resolving such claims much more quickly.

In *Baxter*, the Ontario Superior Court of Justice was concerned that there may be the appearance of direct or indirect influence by the government on the implementation and administration of the settlement. The Court insisted that the government's litigation interests should not be apparent through its administration of the settlement; otherwise, it would be difficult to ensure that the interests of the claimants were genuinely being met.⁶⁵ To achieve the appearance of independence and neutrality, Winkler J. suggested a total separation of the government's administrative and litigation functions.⁶⁶ He insisted that the person appointed by

⁶⁴ The Government of Canada indicates that it will provide:

- \$60 Million for the establishment of a Truth and Reconciliation Commission and research centre;
- \$20 Million for a Commemoration program for events and memorials to commemorate the legacy of Indian Residential Schools, to be managed by the Government in conjunction with the Truth and Reconciliation Commission;
- \$125 Million as an endowment to the Aboriginal Healing Foundation to continue to support healing programs and initiatives for a further five years; and
- \$100 Million in cash and services toward healing initiatives, to be contributed by the Church entities involved in the administration of Indian Residential Schools.

See "Frequently Asked Questions" on the Indian Residential Schools Resolution Canada website: Indian Residential Schools Resolution Canada, "Independent Assessment Process" *Indian Residential Schools Resolution Canada*, online: <<http://www.irsr-rqpi.gc.ca/english/questions.html#tc3>>.

⁶⁵ See *Baxter*, *supra* note 2 at paras. 37-38.

⁶⁶ *Ibid.* at para. 38.

the federal government to administer the settlement report ultimately to the courts and not to the government. He also suggested that once appointed, this person not be subject to removal by the government without further approval from the courts. These problems were remedied in the final settlement.⁶⁷

A similar concern had been expressed in the earlier decision of *Cloud v. Canada (A.G.)*.⁶⁸ The issue in *Cloud* was whether a proposed class action could be certified. The Ontario Court of Appeal, in deciding to certify the class action, had expressed concern over the fact that the ADR Process had been set up unilaterally by the federal government and could theoretically be dismantled unilaterally by it as well. In this way, the ADR Process could not be seen as a viable or preferable alternative to a class action proceeding.⁶⁹

(B) Conflicts of Interest in the Development of Compensation Processes

Providing redress by government initiative may also give the impression that the government is favouring inappropriate factors such as cost efficiency over a genuine attempt to compensate individuals fairly. One finds a vivid example of this in the Alberta sterilization case. In 1998, the Conservative government aimed to limit the amount of compensation available to individuals who chose to seek damages in the civil courts for what had been done to them under the *Sexual Sterilization Act* and similar statutes enacted to deal with “mental defectives”. To do this, the government introduced a Bill in the Legislature that prescribed the maximum amount of compensation that the Alberta courts could award a plaintiff seeking compensation. The proposed legislation, Bill 26, *Institutional Confinement and Sexual Sterilization Compensation Act, 1998*⁷⁰ capped the amount of damages at \$150 000⁷¹ and was based on the government's study of the average amount of damages that was being awarded in similar actions across the country. The government was prompted to take this route by the success of the *Muir* decision.⁷² At the time that it introduced Bill 26, there were approximately 700 outstanding cases dealing with sterilization and institutional confinement.⁷³

⁶⁷ Although these issues were addressed in the Court's final order, the Court seems to have directed more attention to ensuring that the reporting functions show no conflict than to the question of the administrator's removal. See the final approval order regarding implementation: *Fontaine et al. v. Canada*, Ont Sup. Ct., 00-CV-192059CP, (8 March 2007), (unreported), online: <<http://www.classactionservices.ca/IRS/documents/ORDER4ONTMAR1607.pdf>>.

⁶⁸ *Cloud v. Canada* (2004), 73 O.R. (3d) 401 (C.A.) [*Cloud*].

⁶⁹ *Ibid.* at paras. 91-92.

⁷⁰ 2d Session, 24th Leg., 1998 [Bill 26].

⁷¹ *Ibid.* ss. 4(3), 5(1). It was also proposed that damages awarded in relation to sterilization and other related and legislatively authorized acts not be less than \$5 000.

⁷² See Alberta, Legislative Assembly, *Alberta Hansard*, 803 (10 March 1998) at 781 (Hon. Ralph Klein).

⁷³ *Ibid.* at 779 (Mr. Havelock).

There was significant uproar in the Legislature when the Bill was introduced. Although the Conservative government touted it as a way of establishing compensation principles that would assist in resolving claims in a fair, expeditious and consistent manner⁷⁴, many members of the Legislative Assembly saw the Conservative's plan as nothing but a means of limiting the compensation that victims could otherwise validly receive. The concerns were grounded in a perception that the government was trying to remove the right of litigants to obtain fair compensation in the courts. It was true that one could still go to the courts to obtain redress; however, the amount that could be obtained had been circumscribed. Moreover, the *Charter* and the *Alberta Bill of Rights*⁷⁵ had been overridden, preventing constitutional and quasi-constitutional challenges to the proposed Bill.⁷⁶ Proponents of the Bill argued that the Bill would allow the claimants to resolve their claims quickly without having to endure lengthy constitutional battles. Given that many of the claimants were elderly, working expeditiously was to be a positive factor. The Bill's proponents also maintained repeatedly that the proposed statute would be fair both to claimants and to "the interests of all Albertans".⁷⁷ But this latter argument was interpreted to imply an inappropriate privileging of cost efficiency for taxpayers over fair compensation for the victims.⁷⁸

Opponents of the Bill were outraged by its goals. One member framed the proposed Bill as a form of inappropriate interference with the judiciary by the legislature.⁷⁹ This point may be arguable as, on a technical level at least, courts are to interpret and apply the will of the legislature. Nonetheless, the point remains that if the legislature is supposed to represent the voice of the people, the main group affected here, namely, the sterilization victims themselves, had not been consulted prior to the introduction of the Bill. Moreover, many found the constitutional override to be simply a second stripping of constitutional rights from a vulnerable group that had already been attacked through the initial sterilization legislation.⁸⁰ Finally, there was a general implication of disingenuousness on the part of the Conservative government. It seemed to be using its legislative power in order to win cases that had been validly brought before the courts, and doing so by limiting what the courts could offer so that the judicial remedy suited what the government, as respondent, would be prepared to give. As a result of the clear and loud expressions of disapproval that the Conservative government received, it decided to revoke the Bill the next day in the Legislature. The Minister of Justice stated that the government had instead decided to use the parameters of Bill 26 to negotiate compensation settlements with the sterilization victims and to leave alone the victims' choice to proceed through the courts.

⁷⁴ *Ibid.* at 775 (Mr. Havelock).

⁷⁵ R.S.A. 1980, c. A-16.

⁷⁶ Bill 26, *supra* note 70, s. 3.

⁷⁷ See *Alberta Hansard*, *supra* note 72 at 775, 779, 781, 782 (Mr. Havelock).

⁷⁸ In this regard, see *ibid.* at 782 (Mr. Sapers).

⁷⁹ *Ibid.* at 780 (Ms. Barrett).

⁸⁰ See *e.g.*, *ibid.*; and Alberta, Legislative Assembly, *Alberta Hansard*, 811 (11 March 1998).

In June 1998, approximately two months after the Bill had been withdrawn, the government announced that 500 of the remaining claims had been settled through negotiations between the government and a trustee appointed to represent sterilization victims.⁸¹ For the remaining 250 to 300 outstanding claims, the government instituted a settlement plan through which claimants could apply in order to attempt negotiations with the government. If negotiations failed, the claimants could ask to have their cases reviewed by a Settlement Panel, composed of five distinguished Albertans. This panel was authorized to provide settlements of up to \$150 000 for sterilization and confinement, or settlements of up to \$300 000 if the victim's life had been significantly affected "through exceptional circumstances".⁸² The process was entirely voluntary for the claimants and they retained the option of bringing court action if settlement could not be reached through negotiation or the Settlement Panel. In the end, the vast majority of the claims were settled through this settlement process.⁸³

These two examples, taken from the proposed administration of the settlement for the residential schools and from the Alberta sexual sterilization compensation process, illustrate some of the ways that conflict and mistrust can be perceived when the author of the wrong turns into the master of the compensation process. It is clear that mistrust of the government runs deeper than the actual process that is being created. Mistrust originates as a result of the human rights violation itself. It is compounded by any perception that the government's motivation to provide compensation stems from anything other than a genuine attempt to correct the harm done. Likely, the most effective solution involves having some sort of oversight by a body that is independent of the compensation process itself. One possible oversight body could be the judiciary playing a similar role to the one it generally has under provincial class proceedings legislation⁸⁴, where it gives ultimate direction for the administration of the process. Another solution could be to have the matter of compensation examined by an independent parliamentary committee composed of

⁸¹ See Government of Alberta, "Government of Alberta News Release: Government announces settlements for 500 sexual sterilization claims" *Government of Alberta* (5 June 1998), online: <<http://www.gov.ab.ca/acn/199806/6368.html>>.

⁸² See Government of Alberta, "Government of Alberta News Release: Settlement Panel for Sterilization Claims Announced" *Government of Alberta* (21 October 1998), online: <<http://www.gov.ab.ca/acn/199810/6888.html>>. The expression "exceptional circumstances" is not defined in the news release. Since the settlements are not public, it is also not possible to see how the expression was defined and in what circumstances the additional \$150 000 was awarded. The base amount of \$150 000 is the same amount that had been proposed as a maximum in Bill 26.

⁸³ See Government of Alberta, "Government of Alberta News Release: Stratton Agreement concludes sterilization negotiations" *Government of Alberta* (2 November 1999), online: <<http://www.gov.ab.ca/acn/199911/8353.html>> [Government of Alberta, "Stratton Agreement"]. At the time of producing this news release, the Justice Department reported there were fewer than twenty outstanding claims. The Alberta Justice Department anticipated resolving these claims shortly. See also Government of Alberta, "Government of Alberta News release: Government Settles another 40 Sterilization Claims" *Government of Alberta* (27 October 1998), online: <<http://www.gov.ab.ca/acn/199810/6913.html>>. This is the only other news release on the issue of the sterilization settlement plan available from the Alberta Justice Department.

⁸⁴ See e.g. Ontario's *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

parliamentarians and lay persons who would hear evidence from interested members of the public. The parliamentary committee would then be responsible for the introduction of the compensation process through legislation or other means, and for its enforcement.

4. Determining the Appropriate Amount of Compensation

It is generally understood by complainants and the public that while the award of money to a victim of a historical wrong is termed “compensation”, it can never truly offset the harm that the victim has suffered.⁸⁵ The payment of money is in many senses symbolic.⁸⁶ Yet, even if the payment is symbolic, it is surprising to observe the often wide variances in amounts offered in compensation packages by Canadian federal and provincial governments. For instance, for wrongful institutionalization and abuse, the Québec government has paid Duplessis orphans a generalized lump sum of \$10 000 each plus \$1 000 for each year spent in an asylum. For wrongful institutionalization and sterilization, the Alberta government has made individualized assessments and payments, awarding a total amount that averages out to \$202 000 per claimant. It is hard to deny that both the abuse and sterilization suffered by each of these groups had very distinct impacts on each and every individual involved. Despite the obvious issues of federalism allowing each province the freedom to determine how to deal with such matters within its own jurisdiction, the difference in the nature and amounts of compensation given for two analogous incidents, leads to the identification of a few key questions that any government deciding to award compensation for a historical wrong must address.

A primary question is whether to award compensation on an individualized basis or to provide a standard lump-sum to each recipient. This issue may turn on the amount of time that has elapsed since the wrong occurred and whether victims will easily be able to recount their stories for an individualized assessment. If a long period of time has elapsed or if the trauma is extremely painful, it may be difficult for victims to tell their stories and undesirable to ask them to do so. At the same time, in some instances, it may be the wish of the victim to have his or her story told.

The question of elapsed time may relate also to the age of the population of victims. In many instances, including Aboriginal residential schools, the Chinese Head Tax case and Alberta sexual sterilization, many recipients of the compensation

⁸⁵ In this regard, the Assembly of First Nations (AFN), “Report on Canada’s Dispute Resolution Plan”, *supra* note 57 at 17-18 has a very thoughtful definition of the term “compensation”. The AFN’s definition locates the meaning of compensation within different contexts with the consequence that the term has different significance depending on whether one is in a tort action, an alternative dispute resolution, a settlement, etc. The AFN goes as far as to indicate that they do not expect tort law compensation in the context of a dispute resolution process.

⁸⁶ There are, of course, other reasons for providing money, particularly in tort law, the most relevant of these being deterrence. While deterrence may be a goal of tort law in some circumstances, and may be a possible objective in the case of historical wrongs, it is not a primary goal for claimants seeking monetary recompense. In the few court cases that address historical wrongs, the idea of deterrence is rarely mentioned.

are elderly. A concern in such cases is to be able to compensate these victims before they pass away. A standard lump-sum which does not require individual assessments may be best to achieve this goal.

A related and perhaps larger question is how to determine the quantum of the award. Should the award be based on damages that a victim could receive in court, as was done in the Alberta sterilization case? Or should other methods such as likening the award to a type of insurance-like payment or to a remedy from a tribunal be used? If the choice is to use a court action, other questions that arise include whether the remedy should be based on those found in a tort action or in a *Charter* action. There are clearly numerous ways to determine these and other factors in deciding on the appropriate quantum of a compensation award. However, federal and provincial governments in Canada are not always open about the factors taken into consideration and how they are weighed.⁸⁷ This has led to public confusion about the relative “merit” of various lump sums awarded for historical over time.⁸⁸

CONCLUSION

Compensatory Schemes for Historical Wrongs: A New Form of Administrative Justice?

Redress for historical wrongs is a subject to be treated with tenderness. The poor regard for human rights sanctioned by governmental legislation is shocking in retrospect. We have undoubtedly progressed as a society in recognizing past human rights violations. Yet, it is with frustration that we watch courts apply formalistic legal tests based on the distinction between government “policy” and “operation” to uphold traditional protection of the former at the expense of those who have suffered. Although understood with a doctrinal legal ear, it is difficult to appreciate that society has progressed to change these laws but that the Crown cannot be asked at law to pay for its part of past social mistakes. This is even more difficult to appreciate when one considers that the Crown is continuous – remaining the same even though it represents itself through different government parties over time.

Seeking to hold the Crown liable in tort is sometimes considered to be a newer form of administrative justice. But interestingly, the various compensatory schemes created by the government for redress of historical wrongs form an even more modern and innovative category of administrative justice. What distinguishes this

⁸⁷ It is interesting to compare the general lack of information provided to Canadians in determining compensation for historical wrongs with the approach taken in some other countries. For example, in Sweden, the amount of compensation given for forced sterilization of the mentally disabled was determined by a parliamentary committee after report by an investigator. The investigator's report is a public document which outlines the factors taken into consideration in determining the monetary amount of compensation to be given to each victim. See The Swedish Government Official Reports 1999:2, *Steriliseringsfrågor i Sverige 1935-1975 – Ekonomisk ersättning (Sterilization Questions in Sweden 1935-1975 – Economic Compensation)*, online: <<http://www.regeringen.se/sb/d/108/a/22620>>, summary in English at 29-50.

⁸⁸ See e.g. Roy MacGregor “Why the fate of Maher Arar reminds another Canadian of his years of freedom lost” *The Globe and Mail* (29 January 2007) A2.

category is the lack of a statutory basis for the processes put in place. While the majority of processes we encounter in administrative law are established by statute, initiatives such as the residential schools resolution system and the Alberta Sterilization Settlement Plan seem to be forms of government-initiated contract. However, despite the absence of a statute or orders-in-council, these processes share many typical administrative justice values.

While at one time administrative law's concept of justice focused primarily on keeping the executive within legal bounds, this Diceyan notion of reigning in discretion has seen a few new core elements develop alongside it. Efficiency and expediency are two of these more recent hallmarks of the administrative justice system along with simplified processes developed and used to provide access to justice to a wider range of citizens. Used in conjunction with the expertise of decision-makers in processes that are often less adversarial than the courts, these simplified processes aim to help resolve disputes with the government and others in a faster, less expensive way.⁸⁹ Many compensation processes set up by the government share these core elements – certainly, we have seen them in the residential schools resolution system and the Alberta Sterilization Settlement Plan. In these two examples the ideas of simplified processes, reduced expense for the claimant, efficiency and expediency in rendering compensation, as well as adjudicators who are sensitive to the nature of the wrong and the harms that it has caused, are central goals.

This recent group of governmental compensation schemes challenges our traditional understandings of administrative law by forcing us to consider the ways and at the extent to which judicial review will be possible. It is very likely that lawyers will resort to the use of the traditional prerogative remedies in seeking judicial review of these compensatory schemes; yet, Canadian jurisprudence exhibits a dearth of cases in which non-statutory public bodies have been brought to task through the use of these remedies. The few cases that exist have dealt only with the remedy of *certiorari*.⁹⁰ *Mandamus*, or the forcing of a public official to do what he or she is obliged to do, seems like a very useful judicial review remedy in cases of historical wrongs and it will be interesting to see if it and the other prerogative remedies will serve to be useful as well as the standards of review that will apply.

Placed within the issues that arise in developing such governmental initiatives – including questions of legitimacy, trust and mistrust and determining appropriate methods and amounts of redress – governmental compensatory programs to provide

⁸⁹ Although goals of expediency and expertise often clash within the administrative state. See Laverne Jacobs, "Developments in Administrative Law: The 2004-2005 Term" (2005) 30 Sup. Ct. L. Rev. (2d) 43. On the importance of expediency and access to justice in the administrative justice context see Ontario Agency Reform Commission, *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies* (Toronto: Queen's Printer for Ontario, 1998).

⁹⁰ See *Masters v. Ontario* (1993), 16 O.R. (3d) 439; *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*, [1994] N.W.T.J. No.7; *Scheerer v. Waldbillig* (2006), 265 D.L.R. (4th) 749 and *McDonald v. Anishinabek Police Service et al.* (2006), 83 O.R. (3d) 132.

redress for historical wrongs lead us to question, on somewhat of a meta-level, what the eventual contours of this new form of administrative justice might be.

Table A
Brief Overview of Canadian Redress for Historical Wrongs

	Apology	Commemorative initiatives	Compensation	Rehabilitative/ restorative initiatives
Aboriginal Residential Schools	X ⁹¹	\$20 million upon implementation of Settlement Agreement	\$10,000 per student for initial year of residence in school plus \$3,000 for each subsequent year, upon implementation of Settlement Agreement	\$225 million in healing initiatives, plus \$60 million to establish a truth and reconciliation commission, upon implementation of Settlement Agreement
Aboriginal war veterans	X	X	\$39 million offered; up to \$20,000 to surviving veterans and spouses of the Korean War and WWII 21 June 2002	X
Chinese Canadians	In House of Commons by Prime Minister, 22 June 2006	X	\$20,000 to each living head tax payer or to the spouses of deceased payers	X
Duplessis Orphans (Qc)	Apology by Quebec Premier Bernard Landry (1999)	X	\$26 million - \$10,000 per orphan plus \$1,000 for each is a additional year spent in an asylum (2001)	X

⁹¹ Most do not see the "Statement of Reconciliation" offered in 1997 (see Minister of Indian Affairs and Northern Development, "Statement of Reconciliation" in *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1997)) as a formal apology and would like the government to formally apologize for the Aboriginal residential school legacy. See e.g. CBC News "Atlantic chiefs seek apology for former residential school students" (26 March 2007), online: <<http://www.cbc.ca/cp/Atlantic/070326/t032619A.html>>. On 1 May 2007, the House of Commons unanimously approved a motion to apologize to the residential school survivors. The motion was brought by the opposition, Liberal government. The Conservative majority government indicated, however, that the government of the day (the executive branch of government) thought it best to wait until after the truth and reconciliation commission that it is in the process of establishing, completed its work, before issuing an apology. See Parliament of Canada, *Official Report of debates (Hansard)*, 144 (1 May 2007) (Gary Merasty).

Italian Canadians	X	\$2.5 million and additional provisions offered by the federal government an agreement in principle 15 November 2005	X	X
Japanese Canadians ⁹²	In House of Commons by Prime Minister, 22 September 1988	\$12 million to commemorate those who suffered	\$21,000 for each eligible individual	\$12 million to Japanese Canadian community
Sterilization of mentally disabled (AB)	Alberta Department of Justice 2 November 1999 ⁹³	X	\$142 million	X
Ukrainian Canadians	X	\$2.5 million	X	X

⁹² The settlement with the Japanese Canadians was historic at \$300 million. In addition to the amounts and types of redress given in the table, a further \$12 million was given to establish the Canadian Race Relations Foundation. This foundation was created to foster racial harmony and cross-cultural understanding and to help eliminate racism; Canadian citizenship was given to Japanese Canadians lead been expelled from Canada and \$3 million was put into community liaison administration of redress claims.

⁹³ The News Release statement of this state provides the most expansive expression of regret; see Government of Alberta, "Stratton Agreement", *supra* note 83. The Alberta government had made a more hermetic expression of its regret earlier in the Legislature at the time of revoking Bill 26, see Alberta, Legislative Assembly, *Alberta Hansard*, 811 (11 March 1998) at 812-13 (Mr. Havelock).