July 26, 2013

The Indian Residential School Settlement: Is Reconciliation Possible?

Written by: Kathleen Mahoney

Matter Considered:
The Indian Residential School Settlement

Being the Chief Negotiator for the Assembly of First Nations instigating and completing the Indian Residential School Settlement Agreement, cannot be described in words. The round- the-clock sessions with upwards of 80 lawyers, the meetings from coast to coast to coast with survivors, the conferences with experts from around the world, negotiations with the Vatican and the Prime Minister's office – it doesn't get much better than that for a human rights lawyer and law professor. Out of this amazing odyssey came the largest, most comprehensive and unique class action judgment in Canadian legal history. The question now is, to what effect? Can we expect reconciliation with the First Nations of Canada? Will the wounds finally heal? These are the questions up for discussion in this blog.

The historic Agreement includes several components:

- A fund of $1.9B to fund the Common Experience Payment (CEP) which all survivors, based on a formula of $10,000 for the first year of attendance and $3,000 for every year thereafter, paying an average of $26,000 per claimant with an early payment of the CEP to the elderly and infirm without a requirement of proof of attendance;
- An uncapped Individual Assessment Process (IAP) fund to pay compensation for survivors who were physically, sexually or psychologically abused while in attendance at an Indian Residential School. This fund has paid out, on average, $110,000 per claimant, and includes a contribution of 15% of the sum awarded for legal fees. Over $3B in reparations has been paid to date and this fund will continue paying claims until 2018, likely reaching about $6B before it is over;
- A Truth and Reconciliation Commission (TRC) with a 5 year mandate to hold 7 national events as well as extensive community visits to collect statements from survivors and hold public and private hearings. The Commission has a budget of $60M;
- A research and documentation center to house the documents and statements from the TRC;
- A commemoration fund of $20M for communities and individuals to develop projects to memorialize the residential school experience;
- A healing fund of $125M for the Aboriginal Healing Foundation to work on healing projects with First Nations communities;
- Provision of health supports for survivors at every step of the implementation of the Settlement Agreement.

The large amounts of money awarded in CEP and IAP claims as well as for the other components, are tangible markers that go some way towards vindicating the wrongs perpetrated

by the residential school system and its agents. By comparison with other countries and what they have awarded for similar abuses, it is on the higher end of generous and that is something we can be proud of. But it must always be borne in mind, and I have been told so very many times by survivors, that no amount of money can replace a lost childhood; erase the devastation of sexual and physical abuse, recreate a lost language and culture, and most importantly, make up for the loss of a family life. Something else is required.

To date, the CEP payments have been completed, the healing funds have been spent, the Truth Commission has held 6 national events, innumerable community events, and is entering its last year. Commemoration money is being disbursed to communities and survivor groups. The deadline for applications in the IAP process has been reached and the hearings are proceeding towards a conclusion sometime in 2018. Apologies proffered from both the Prime Minister representing the government of Canada, and the Pope, representing the Catholic Church, have been offered and accepted. On the basis of these facts, there is no doubt that the Settlement Agreement is an incredible accomplishment. But now the questions about reconciliation remain. What will the Settlement Agreement do for the relationship between Aboriginal and non-Aboriginal Canadians going forward? What more is required? Is reconciliation possible?

I think a lesson that we are all learning is that providing a forum for revealing the past, paying reparations, apologizing and creating a world-class settlement agreement cannot, by themselves, accomplish reconciliation for the harms that were continuous throughout the 150 year-long tragedy of the residential schools and their intergenerational aftermath. Fair compensation, healing and closure were always the optimistic goals of the AFN, as was our desire for Canada to finally acknowledge the missing and very dark chapter of its history. Reconciliation was our ultimate goal but it is apparent that reconciliation is far too large a project for the Settlement Agreement to accomplish, even with its generous and comprehensive terms.

That said, it is never sensible to view any settlement agreement as a one-shot event that will solve all of the systemic social problems that lead to it in the first place. Court judgments don't work that way. In this case, generations of colonial domination and discrimination directed towards the first peoples of this country of which the residential schools were one component, have left deep, systemic issues of inequality that will take generations to reverse. But by virtue of the stories that are being told and recorded at the Truth and Reconciliation Commission, in the IAP hearings and in the CEP appeals, the Settlement Agreement can certainly be instrumental in identifying the directions for the future and protecting our country from repeating the mistakes of the past. When it comes to social organization, problems never really go away. Prejudices, racism, cultural genocide, and other forms of abuse against minorities – all can return and given half a chance they will. But once history is known, it can't be unknown. That in itself, will be a permanent achievement of the Settlement Agreement generally and the TRC in particular. As was eloquently stated by Michael Ignatieff in his speech at the AFN/University of Calgary conference on the Settlement Agreement, at the very least, he said, the Truth Commission will "limit the range of permissible lies."

It is also important to understand that the underlying rationale of the Settlement Agreement was rooted more in human rights, aboriginal values and restorative justice than it was in civil law. In this sense, I believe it has a greater potential for contributing to the process of reconciliation than most settlements for personal injury or abuse claims. Civil and political rights and economic, social and cultural rights were central to our positions in the negotiations, and while tort law provided guidance, the AFN insisted that more emphasis was to be placed on restorative justice principles and aboriginal values. This was essential to frame our demands for the Truth

Commission, the Common Experience Payment, healing funds, commemoration funds, all of which are unknown remedies to the common law of tort. The same was true for the relaxed procedural requirements in the IAP and the required apology from the Prime Minister.

But too many people still misunderstand the Settlement Agreement as being some form of welfare payment or "gift" to the survivors. This mistake is both wrong in law and wrong in the spirit and terms of the Agreement. If the Settlement Agreement is misunderstood this way, it will never lead to reconciliation. Properly understood as reparations for human rights abuses to the collective identity of aboriginal peoples as well as reparations for individual personal injuries, it has the potential to be a transitional, restorative justice tool that can bring us closer towards that elusive goal.

A member of the South Africa Truth Commission, Rev Bogani Finca told a story at the U of C/AFN conference on Truth Commissions that powerfully explains the challenge of reconciliation in our country. It is the "Cow Story."

It seems there was gentlemen called Tabo, who had a cow. One day Mr. Smith, with his superior power and racial dominance, overcame Tabo and took his cow away from him. Tabo suffered from the loss of the cow. He lost his livelihood, he became poor, he became depressed, and he couldn't provide proper housing for his children or get them the things they needed to have a successful life.
Many years later, along came a truth commission and Tabo and Mr. Smith were brought together in a process of reconciliation. Mr. Smith offered an apology. Tabo accepted the apology. They hugged, they kissed, and they had a cup of tea together, and even shared a few jokes. At the end of the day, Mr. Smith left the room and as he was going out the gate, Tabo called out, "Mr. Smith, what about the cow?" Mr. Smith said, "Tabo, you are messing up this thing about reconciliation, it has nothing to do with the cow."

I relate this story because "talking about the cow" is where the credibility of the Indian Residential School Settlement Agreement, the apology and the goal of reconciliation will be tested and their ultimate success, determined. "Talking about the cow" will be asking the question, "how can Canada move away from its past history of oppression, deprivation and systemic discrimination of its first peoples?"
Tabo's story teaches us that it is not enough merely to stop doing the wrong things we have been doing and saying we are sorry. "Talking about the cow" would lead us to understand that the Settlement Agreement deals with past wrongs, not future relationships. Systemic issues facing the survivors and their families and the majority of the indigenous population before the Settlement Agreement was signed, are still present. They are still the same. The indigenous communities continue to live lives that are less than they should be.

"Talking about the cow" can be expressed by being truthful about what divides us. It can be talking about power, understanding who has power over the past so as to determine who has power over the present. It can be talking about what government policy should be - about how to best combat racism, deep prejudice and discrimination - about how to advance the position of aboriginal peoples in Canadian society. It can be about improving Aboriginal education, protecting and preserving aboriginal languages, strengthening aboriginal culture and traditions, sharing economic opportunities and appointing aboriginal Canadians to high positions of power and ensuring our universities do their part to advance opportunities for aboriginal students. Aboriginal and non-aboriginal Canadians have not lived the same history and being truthful about that could go some distance towards achieving reconciliation.

Reconciliation also requires a meeting of the minds of aboriginal and non-aboriginal Canadians that justice has been done between us.

Rupert Ross relates a story told to him by a Mohawk woman who said that in her community, they had an expression for the meeting of the minds, that moment of justice as they understand it – only it was called "face cracking." It is the moment when the hard exterior of injustice cracks, and the connection between people on the emotional level takes place. This place is the spiritual realm that comes into play when healing and reconciliation start to occur. But as the Mohawk woman explained, "face cracking" cannot take place unless there is an understanding of the victim's experience of being wronged. If we only look at wrongs in an abstract, objective, legal way no connection will likely occur. Legal descriptions and solutions more often than not, fail to describe things the way they really are and fail to take into account the actual experience of the victims' existence.

To illustrate, Ross used the example of a simple purse snatching on the street. In terms of the common law, all that happened is the loss of a purse. It can be fixed by a conviction, a return of the purse, maybe a fine. That's it. But if we look at the purse snatching from the victim's experience, we would understand that the harm of the purse snatching is much more than the value of the purse. It harms the relationship the victim has with her community. Unless it is recognized that her relationship with the community is altered, and unless that is talked about and dealt with, she will not feel safe in that community and it is likely that she will continue to feel that way indefinitely. In other words, she will not heal from the experience and she will not be able to reconcile with the perpetrator, she will never have that "face cracking" moment.

What the residential school policy did, was to put two cultures into fundamental conflict. The effects of that conflict on Canada and the Aboriginal population altered the relationship between them in a very profound and negative way. For reconciliation to occur, this damage must be understood from the victims' perspective and steps taken to repair it. When it comes to the Settlement Agreement, in order to move down the road of reconciliation towards a "face cracking" moment, those working with it, most of whom are lawyers, must strive to implement it as much as possible from the victims' subjective perspective even though their inclination and legal training tells them otherwise.

I have noticed lately that the Settlement Agreement, now in its 6th year of implementation, is unfortunately moving in the opposite direction from reconciliation. In the past year or so, the disagreements associated with the implementation and interpretation of the Agreement have become more numerous and adversarial than they have been since the Agreement was approved. Canada has seemingly adopted a strategy of delay, litigating for narrow interpretations of the Agreement, refusing to provide documents to the Truth Commission, and imposing of arbitrary new rules on the process. The result is a movement of the Agreement farther and farther away from restorative justice principles and closer to narrow, positivistic principles. When this happens, the more one-sided the Agreement becomes. This bias, in turn, diminishes the sense in the survivor community that justice or healing, or "face cracking" will ever be achieved. The inevitable consequence, I believe, will be a sense of betrayal and re-victimization amongst survivors and their communities. Like the victim in the purse snatching example, victims of residential schools and their families and communities will not feel safe in their relationship with Canada nor will they experience the cracking of the hard shell of injustice when they are denied compensation or other benefits under the Agreement on purely technical or narrow applications

of the "law." When lived experience is trumped by abstract ideas from another culture's reality, there can be no other outcome.

The recent legal battle between Canada and the TRC for disclosure of relevant documents speaks to the mood that has settled over the implementation of the Agreement. Canada moved to strike affidavits, including that of the National Chief, tried to limit the context of the settlement agreement and "relevant documents" to current times even though the residential schools were instituted 150 years ago, and argued that the TRC had no legal capacity to bring the application. Canada took the position that the only documents it was obliged to produce to the TRC were those assembled for the litigation immediately preceding the Settlement Agreement. Even though Canada was unsuccessful in Court, their arguments did nothing to engender confidence that the reconciliation goals of the Settlement Agreement and the truth-seeking mandate of the TRC will be achieved.

Delay has become the most critical issue of all. The time frames within which the IAP claims were to be concluded are not only unmet, they are slowing down. With the numbers of survivors dying now at an average of more than 28 per week, unless there is a concerted, effective and visible effort to improve the speed of implementation by adding resources and streamlining the process, many survivors will not live to have a hearing and the opportunity to tell their stories. Unfortunately, Canada takes the position that there is no need to put more resources into the implementation of the Agreement and say that those who think otherwise should take the matter before the Courts. There could be no clearer example of justice delayed is justice denied. Putting the onus on impecunious survivors to sue Canada is no answer.

The present government should remember that when its predecessor embraced an alternative that took the aboriginal view of fairness and justice into account, the Settlement Agreement was achieved in the record time of five months. By agreeing to compensate survivors for the loss of language and culture and loss of family life, to soften proof of causation requirements in individual abuse claims, to provide health supports, to attend to the early compensation of the sick and elderly, to the truth telling, healing and commemoration components, the government achieved something no other government in the world has been able to achieve. It stood alone as a government that understood that a victim centered, inclusive, generous, holistic and culturally sensitive approach was the appropriate standard and methodology for dealing with mass violations of human rights.

With the "Idle No More" movement happening across Canada and internationally, there is a golden opportunity for the parties to the Settlement Agreement to reach out together to mobilize public opinion and educate the entire population about the truth of the residential school history and how it relates to Aboriginal discontent. The ignorance of the majority population of Canada of the very events at the core of the Settlement Agreement is a challenge that still needs to be overcome. This challenge is achievable but will require the cooperation and collaboration of the parties working together.

I believe if the Settlement Agreement is implemented in the spirit in which it was created, it has the potential to enhance Canada's reputation as a leader in the world and at the same time, increase the stature and respect for First Peoples at home and abroad.

The longer run success of the Settlement Agreement's objective of reconciliation will depend on attitudes, commitments, and circumstances hardly knowable at this moment – including attitudes of Aboriginal peoples about how much they wish to seek participation and achievement within mainstream institutions and goals and how prepared they are to forgive. Although many survivors have been able to forgive those who perpetrated the transgressions inflicted on them, forgiveness for most still remains a question mark. Without forgiveness, wounds will continue to fester and the burden of anger and bitterness will remain and be passed down, generation after generation. Perhaps the TRC will be able to give comfort to those who still struggle with the aftermath of the residential school experience in their daily lives. Then again, if rancor and adversarial attitudes persist between the TRC and Canada, the well will likely be poisoned for a long time to come.

In conclusion, reconciliation is a multifaceted process that may take decades or generations to achieve. It will not happen on its own. Healthier and safer relationships between aboriginal and non-aboriginal peoples in the future will require commitment and political leadership at all levels of government to end the inherited stigma of inferiority that corrupts the majority as much as it corrupts the minority. What is clear is that the goal of reconciliation will not be achieved unless a climate conducive to it is nurtured and encouraged by all the parties. As Canada bears the most responsibility for the devastation visited upon the first peoples that the former Justice Minister Irwin Cotler described as "the most disgraceful, harmful, racist experiment ever conducted in our history," it must lead in demonstrating respect, responsibility and dedication to the struggle for aboriginal equality. True reconciliation will have occurred when we see the first peoples claim back their cultural inheritance, their socio-political dignity, and their land rights.

The Settlement Agreement opened the door, if only a crack, to the transformative power of reconciliation. We would be more than foolish to let it close now.