

## RESIDENTIAL SCHOOLS LITIGATION AND THE LEGAL PROFESSION

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*“I think I finally figured out what it means to live a good life.”<sup>1</sup>*

### KEY WORDS

Professionalism, Ethics, Adversarialism, Aboriginal, Litigation

### ABSTRACT

The first purpose of this article is to examine some of the specific, problematic ways in which the adversarial process has handled the residential schools litigation. The second purpose, in the context of that litigation, is to examine whether the legal profession’s highly adversarial approach to survivors, their families and their claims has been consistent with the core values of the legal profession, and if so, whether those core values continue to be sustainable? What the residential schools legacy affords the legal profession is an opportunity to reflect not just on how it is handling this tragic legacy, but how it serves all Canadian communities – particularly including vulnerable and equity seeking groups – from which, together, the profession derives its very legitimacy and purpose.

### INTRODUCTION

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\* Professor, Osgoode Hall Law School, York University. An early version of this article was presented at “Assessing Canada’s Indian Residential Schools Litigation and Settlement Processes” conference (University of Toronto, Faculty of Law, 18 January 2013). When writing this article, I benefitted from a background research memorandum prepared for the conference by Dean Mayo Moran and Professor Kent Roach, with the assistance of Lindsay Borrows and Christopher Evans. I am also grateful for helpful comments on a draft of this article by Professor Anver Emon, and for excellent research assistance from Hilary Fender.

<sup>1</sup> Cree grandmother from Saskatchewan, cited in Rupert Ross, “Exploring Criminal Justice and the Aboriginal Healing Paradigm”, Discussion Paper, Chief Justice of Ontario’s Advisory Committee on Professionalism, Third Colloquium (Toronto: Law Society of Upper Canada, October 2004) at 2, online: LSUC <[http://www.lsuc.on.ca/media/third\\_colloquium\\_rupert\\_ross.pdf](http://www.lsuc.on.ca/media/third_colloquium_rupert_ross.pdf)> [emphasis omitted].

There is no doubt that the residential schools program is a shameful part of Canada's historic and ongoing mistreatment of its First Nations communities. For well over a century, Aboriginal children were removed from their families and communities and forced into institutions of social engineering.<sup>2</sup> The essential purpose of the program, bluntly put, was to “kill the Indian in the child.”<sup>3</sup> It was characterized by “savage[],” “violent” and “traumatic”<sup>4</sup> treatment that amounted to an overall “assault on child and culture.”<sup>5</sup> The program was devastating for First Nations communities, and for the relationship between Aboriginal people, the government and the rest of Canada.<sup>6</sup> As the Law Commission of Canada noted, the program “inflicted terrible damage not just on individuals but on families, entire communities and peoples.”<sup>7</sup>

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<sup>2</sup> I recognize that the well-established residential schools program, which reached its height in the 1920s and early 1930s and which carried on for more than another half century, was pre-dated by earlier assimilation attempts dating back to the 17<sup>th</sup> and 18<sup>th</sup> centuries. For a useful historic treatment of the residential schools program and its legacy, see J.R. Miller, “Troubled Legacy: A History of Native Residential Schools” (2003) 66 Sask. L. Rev. 357.

<sup>3</sup> Report of the Royal Commission on Aboriginal Peoples (1996) at vol. 1, pt. 2.10, sec. 3, online: Government of Canada <<http://www.aadnc-aandc.gc.ca/eng/1307458586498/1307458751962>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* For judicial commentary on this history, see e.g. *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481, para. 3 (Ont. Sup. Ct. Just.), Winkler R.S.J. [as he then was]. For background discussions, see e.g. 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; Miller, “Troubled Legacy: A History of Native Residential Schools”, *supra* note \_\_. For further reflections, see Shelagh Rogers *et al.*, selection eds., *Speaking My Truth: Reflections on Reconciliation & Residential School* (Ottawa: Aboriginal Healing Foundation, 2012).

<sup>6</sup> The residential school program forms part of what the Honourable Frank Iacobucci recently described as the “tragic history of Aboriginal peoples” and is an example of the “mistreatment, lack of respect, [and] unsound policies” that First Nations communities have experienced. See Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries*, Report of the Independent Review (February 2013) at para. 5, online: Government of Ontario <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/pdf/First\\_Nations\\_Representation\\_Ontario\\_Juries.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/pdf/First_Nations_Representation_Ontario_Juries.pdf)>.

<sup>7</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Minister of Public Works and Government Services, March 2000), Executive Summary at 2, online: Government of Canada <[http://publications.gc.ca/collections/collection\\_2008/lcc-cdc/JL2-7-2000-1E.pdf](http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-7-2000-1E.pdf)>. See further Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors* (Ottawa: Canadian Bar Association, February 2005) at pt. I; Zoë 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.

That the residential schools program amounted to a complete failure of justice is not in dispute. Whether the follow-up treatment by the legal profession of the program's survivors and their families is also a failure of justice remains an open question. The first purpose of this article is to examine some of the specific ways in which the legal process has handled the residential schools litigation. Because several organizations and reports have identified important and significant shortcomings of the litigation process and the dispute resolution regime that was initially set up to deal with these claims,<sup>8</sup> only some of these processes (and shortcomings) are discussed in this article.<sup>9</sup> The second, more general purpose of this article is to examine whether the legal profession's approach to survivors, their families and their claims – through the use of various litigation and dispute resolution strategies and options – has been (and continues to be) consistent with the core values of the legal profession, and if so, whether those core values continue to be sustainable? This second level of inquiry sees the residential schools litigation as a lens through which to examine fundamental values of the legal profession. As such, my ultimate focus with this broader discussion is not so much the litigation and dispute resolution tools themselves, but rather the lawyers who wield those tools. In the end, what the residential schools legacy affords the legal profession is an opportunity to reflect not just on how it is handling this tragic legacy, but how it serves all Canadian communities – particularly

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Rev. 367 at para. 1. For a further discussion of this tragic background, as well as its current implications, see the article by John Burrows in this symposium collection.

<sup>8</sup> See e.g. Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors*, *supra* note \_\_ at pt. II. See further Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: Assembly of First Nations, November 2004); Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Fourth Report, *Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, 38th Parl., 1st sess. (adopted by the Committee on 24 March 2005, presented to the House on 7 April 2005, concurred in by the House on 12 April 2005) (Hon. Nancy Karetak-Lindell).

<sup>9</sup> See *infra* pt. \_\_.

including vulnerable and equity seeking groups – from which, together, the profession derives its very legitimacy and purpose. It is a positive and forward-looking opportunity, albeit on the back of a very tragic and negative past, for lawyers individually, and the profession collectively, to think seriously about what it means to be a legal professional, or put differently, what it means to “live a good life” in the law.

In part I of this article, I look at the residential schools litigation and dispute resolution landscape. Because the litigation and settlement processes have been well documented by others,<sup>10</sup> I only briefly discuss them here – in order to contextualize the discussions that follow. In part II, pursuant to the first purpose of this article, I examine the role of the legal profession in this litigation and dispute resolution landscape, specifically by looking at illustrative examples of potentially problematic adversarial litigation and related strategies and tactics that have been, and continue to be used by lawyers and their clients in the litigation, dispute resolution and settlement processes. With those examples in hand, I then develop the second, broader purpose of the article by examining whether the profession’s role in the residential schools litigation, as exemplified through the strategies and tools it has chosen to deploy, is consistent with its core professional values, and further, if so, to what extent those values continue to be sustainable. My view here, put simply, is that systemic change is needed. Current notions of adversarial professionalism, which animate many of the lawyering choices made in the context of the residential schools cases, need to give way to a more nuanced vision of professionalism, one that

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<sup>10</sup> See e.g. Assembly of First Nations, *Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, *supra* note \_\_ at 9-11; Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors*, *supra* note \_\_ at pt. II. For commentary, see e.g. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice”, *supra* note \_\_; Oxaal, ““Removing that which was Indian from the Plaintiff”: Tort Recovery for Loss of Culture and Language in Residential Schools Litigation”, *supra* note \_\_; Susan M. Vella & Elizabeth K.P. Grace, “Pathways to Justice for Residential School Claimants: Is the Civil Justice System Working?” in Joseph E. Magnet & Dwight A. Dorey, eds., *Aboriginal Rights Litigation* (Canada: LexisNexis, 2003), c. 7.

is more accommodating of the needs and complexities of the diverse communities that lawyers serve. Although a significant focus of this discussion specifically involves examples of lawyers acting on behalf of governments and major institutions (namely churches), as well as the plaintiff-side class action Bar, this discussion is equally applicable to all lawyers and the profession as a whole. Finally, I conclude in part III of the article by identifying and briefly discussing some potentially important sites for change.

### I. RESIDENTIAL SCHOOLS LITIGATION

Stemming from the tragic residential schools program, its damage and its closure, thousands of survivors commenced claims against the Federal Government and the various church organizations that administered the program. As of December 2006 there were approximately 15,000 ongoing claims potentially involving almost 80,000 people.<sup>11</sup> Many of those claims were being advanced as individual litigation claims,<sup>12</sup> and a number of them were being pursued by way of class actions.<sup>13</sup> The remaining claims were being brought forward through alternative dispute resolution processes initially set up by the Federal Government pursuant to the November 2003 National Resolution Framework.<sup>14</sup> Because of the difficulties faced with pursuing these claims individually, by way of class action and also by way of the national alternative dispute resolution framework,<sup>15</sup> the Honourable Frank Iacobucci was

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<sup>11</sup> See *Baxter v. Canada (Attorney General)*, *supra* note \_\_ at paras. 4, 13.

<sup>12</sup> See e.g. *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

<sup>13</sup> See e.g. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50; *Baxter v. Canada (Attorney General)*, *supra* note \_\_. See earlier *Indian Residential Schools (Re)*, 1999 ABQB 823.

<sup>14</sup> See e.g. Indian Residential Schools Resolution Canada, “National Resolution Framework” (2003), online: Government of Canada <<http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/ira/ira02-eng.asp>>.

<sup>15</sup> See e.g. the Standing Committee on Aboriginal Affairs and Northern Development, Fourth Report, *Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, *supra* note \_\_, which described the ADR process as an “excessively costly and inappropriately

appointed to work with all parties involved to try to reach an overall settlement of all outstanding residential schools claims. An “Agreement in Principle” was reached in November 2005.<sup>16</sup> That pan-Canadian settlement, designed to include all outstanding litigation, was subsequently approved by 9 courts across the country on 15 December 2006.<sup>17</sup> Key elements of the settlement include: a common experience payment (CEP) (amounting to at least \$1.9 billion); funds for an individual assessment process (IAP) (an amount that could exceed the CEP); the establishment of a Truth and Reconciliation Commission (TRC), funds for commemorative events and healing processes (funds for these 3 initiatives amounted to \$205 million); funds and in-kind services from various church organizations for programs for victims and families; and an agreement to pay legal fees.<sup>18</sup> The processing of claims under this settlement regime is still ongoing,<sup>19</sup> as is the work of the TRC.<sup>20</sup>

## II. THE LEGAL PROFESSION

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applied failure”. See further Assembly of First Nations, *Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, *supra* note \_\_ at 11. For judicial commentary, see *Cloud v. Canada (Attorney General)*, *supra* note \_\_ at paras. 91-92. For a discussion of the shortcomings of the dispute resolution framework, see the article by Kathleen Mahoney in this symposium collection at \_\_.

<sup>16</sup> Canada *et al.*, Agreement in Principle (20 November 2005), online: <<http://www.residentialschoolsettlement.ca/aip.pdf>>.

<sup>17</sup> See e.g. *Baxter v. Canada (Attorney General)*, *supra* note \_\_; *Northwest v. Canada (Attorney General)*, 2006 ABQB 902. For commentary, see *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839, para. 2; *Law Society of Manitoba v. Tennenhouse*, 2011 MBQB 279, para. 10 [“*Tennenhouse II*”].

<sup>18</sup> See *Northwest v. Canada (Attorney General)*, *ibid.* at paras. 15-16. See further Aboriginal Affairs and Northern Development Canada, “Settlement Agreement” (last modified: 15 September 2010), online: Government of Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100015638/1100100015639>>. With respect to the legal fees in particular, see *Baxter v. Canada (Attorney General)*, *supra* note \_\_ at paras. 53-55.

<sup>19</sup> According to the Federal Government, as of 31 March 2013, approximately 99% of the 80,000 eligible former students have received the CEP (amounting to a total payment of approximately \$1.6 billion). In terms of the IAP, of the 37,716 claims received, approximately 54% (20,413) have been resolved, with an average IAP payment (including legal costs) of approximately \$114,000 (amounting to a total payment of approximately \$1.95 billion). See Aboriginal Affairs and Northern Development Canada, “Statistics on the Implementation of the Indian Residential Schools Settlement Agreement” (last modified: 14 June 2013), online: Government of Canada <<http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192>>.

<sup>20</sup> See generally TRC, online: <<http://www.trc.ca/websites/trcinstitution/index.php?p=26>>.

With this context in hand, I now turn my attention to the legal profession. Although strong support exists for the ultimate settlement agreement that was overseen by the Honourable Frank Iacobucci,<sup>21</sup> there is no doubt that the litigation and settlement process – particularly leading up to the recent settlement regime – has not reflected well on the justice system as a whole. In terms of the Federal Government’s alternative dispute resolution process, the Standing Committee on Aboriginal Affairs and Northern Development condemned the process as being culturally disconnected, slow, too expensive, arbitrary, inadequate, disrespectful, humiliating, and unfeeling.<sup>22</sup> Similar negative evaluations were provided by the Assembly of First Nations<sup>23</sup> and the Canadian Bar Association.<sup>24</sup> In terms of individual court-based litigation claims, similar indictments have been leveled. The adversarial, tort-based system of redress is disconnected from a restorative approach to healing and community building.<sup>25</sup> It often lacks cultural sensitivity and thereby alienates those who use it. Further, the adversarial, tort-based system often re-victimizes claimants through evidentiary requirements of testimony and proof. And the cost of pursuing claims often outweighs any resulting benefit.<sup>26</sup> According to one survivor

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<sup>21</sup> See e.g. comments and papers from “Assessing Canada’s Indian Residential Schools Litigation and Settlement Processes” conference, *supra* note \_\_\_.

<sup>22</sup> Standing Committee on Aboriginal Affairs and Northern Development, Fourth Report, *Study on the Effectiveness of the Government Alternative Dispute Resolution Process for the Resolution of Indian Residential School Claims*, *supra* note \_\_\_.

<sup>23</sup> Assembly of First Nations, *Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, *supra* note \_\_\_ at 11.

<sup>24</sup> Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for All Indian Residential School Survivors*, *supra* note \_\_\_ at pt. II.

<sup>25</sup> For further discussions of the civil litigation process in the context of the residential schools disputes, see the articles by Mayo Moran and Kent Roach in this symposium collection.

<sup>26</sup> For a general discussion and critique, see e.g. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice”, *supra* note \_\_\_ at 268-276.

claimant, the litigation process, and in particular the appeal process, made him feel “abused all over again”.<sup>27</sup>

## 1. LITIGATION STRATEGIES

There are several sources for these problems, including litigation strategies themselves. The very nature of the litigation process is often harsh, intrusive, culturally insensitive and costly. However, the point here is that those processes do not self-execute. They are deployed by the parties and their lawyers, often – in this context – including those working in a largely adversarial manner on behalf of church organizations and governments. Many examples of these procedural strategies and adversarial tactics, as identified below, can be seen in the cases.<sup>28</sup>

### *Apologies*

First, as a threshold matter, there was a general unwillingness on behalf of the government and church organizations to take responsibility and to apologize. Doing so, at least early on and in the context of an adversarial litigation process, was generally perceived to be a sign of weakness and, more importantly, culpability. The Prime Minister of Canada, who ultimately delivered an important apology on behalf of Canadians in 2008, acknowledged that an apology, to that date, had not been forthcoming and that a failure to apologize had been problematic with respect to resolution and healing. According to the Prime Minister, “The government recognizes that an absence of an apology has been an impediment to healing and reconciliation.”<sup>29</sup>

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<sup>27</sup> See *F.S.M. v. Clarke*, 2004 BCCA 23, para. 7.

<sup>28</sup> Most of these examples focus on strategies used by defense counsel on behalf of governments and church organizations, primarily because that is where much of the procedural energy and focus was placed in the extensive litigation process. However, I recognize that there were, at times, reports of problematic tactics and approaches being taken by plaintiffs’ counsel as well. See e.g. *infra* notes \_\_\_ and accompanying text.

<sup>29</sup> Rt. Hon. Stephen J. Harper, P.C., “Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system” (11 June 2008), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>>. For a further discussion of the federal government’s apology, see Mahoney, *supra* note \_\_\_ at \_\_\_.



There was a similar failure on behalf of church organizations to provide early and reaching apologies, which similarly negatively affected settlement and healing efforts.<sup>30</sup> This is not unlike other documented contexts involving religious organizations and liability, namely the Catholic Church and allegations of sexual abuse by Catholic priests of minors. For example, in the context of documented abuse allegations against the Catholic Church in the United States, a review board commissioned by the Church found that lawyers for the Church “counseled Church leaders not to meet with, or apologize to, victims even when the allegations had been substantiated on grounds that apologies could be used against the Church in court.”<sup>31</sup> The review board went on to criticize that advice, saying that the potential for an apology to increase the risk of liability was “questionable.”<sup>32</sup> Further, not only was a failure to apologize hurtful and unlikely related to the Church’s ultimate exposure to liability, it was also reported to have aggravated the litigation process against the Church.<sup>33</sup> Finally, it is clear that a failure to

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<sup>30</sup> See comments from Reverend James Scott, United Church of Canada, at “Assessing Canada’s Indian Residential Schools Litigation and Settlement Processes” conference, *supra* note \_\_\_. One of the earliest settlements of the many residential schools cases did, however, involve an apology. The settlement, reached in 1998 between the Federal Government, the Catholic Church and 10 Aboriginal men who had been assaulted, was well received by all parties involved and played a meaningful role in opening up opportunities for further settlements. See Douglas Todd, “Residential School Settlement Applauded” *Vancouver Sun* (4 November 1998), online: <<http://sisis.nativeweb.org/resschool/nov0498civ.html>>.

<sup>31</sup> The National Review Board for the Protection of Children and Young People, *A Report on the Crisis in the Catholic Church in the United States* (Washington, D.C.: United States Conference of Catholic Bishops, 27 February 2004) at 121, online: United States Conference of Catholic Bishops <<http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/a-report-on-the-crisis-in-the-catholic-church-in-the-united-states-by-the-national-review-board.pdf>>, cited in Robert K. Vischer, “Legal Advice as Moral Perspective” (2006) 19 *Geo. J. Legal Ethics* 225 at 249.

<sup>32</sup> *Ibid.*

<sup>33</sup> For example, the review board cited the views of one bishop regarding the reliance on adversarial legal advice as follows:

We made terrible mistakes. Because the attorneys said over and over “Don’t talk to the victims, don’t go near them,” and here they were victims. I heard victims say “We would not have taken it to [plaintiffs’ attorneys] had someone just come to us and said, ‘I’m sorry.’” But we listened to the attorneys.

apologize was contrary to the very core of the pastoral mission of the Church itself.<sup>34</sup> There is no doubt, particularly given candid acknowledgments by church leaders about the delayed apology process,<sup>35</sup> that similar adversarial approaches were pursued in the context of the Canadian residential schools cases. In hindsight, of course, it is clear that the federal government's apology was a key piece of the settlement and restorative processes. A failure to deliver similar apologies from other defendants hindered these processes; providing them would have helped. If nothing else, this is an important learning moment for litigation strategists. It is also, more generally, an important issue for lawyers – if the ultimate point of the process is not only to resolve cases but also to assist more generally with the healing process.

### ***Limitation Periods***

In line with the challenges that the struggle for apologies created, there were numerous other examples of litigation strategies that, although often defensible under the guise of generic adversarialism, were questionable strategies and tactics if the point was to find a meaningful, lasting and healing resolution. Perhaps the most obvious involves the use of limitation periods as a defense to direct or vicarious tort liability. By definition, many of the residential schools cases involved historic abuses that occurred well before the expiration of relevant limitation periods. Notwithstanding typical exceptions for historic abuses involving minors from some general modern limitation periods,<sup>36</sup> once claimants are deemed to be aware of their legal rights,

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*Ibid.*

<sup>34</sup> See Vischer, “Legal Advice as Moral Perspective”, *supra* note \_\_ at 251-252.

<sup>35</sup> See e.g. *supra* note \_\_ and accompanying text.

<sup>36</sup> See e.g. Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, ss. 6, 15(4)(b). For a further discussion of limitation periods in the context of historic sexual abuse, see Moran, *supra* note \_\_ at \_\_.

limitation periods start to run (other than, typically, for claims for abuses of a sexual nature<sup>37</sup>). While defendants typically need to raise limitation periods as a defense, that is exactly what happened in many cases, specifically including aspects of abuse claims that were not of a sexual nature.<sup>38</sup> For example, in *Blackwater* the United Church of Canada and the Federal Government successfully pleaded limitation defenses for all abuses of a non-sexual nature.<sup>39</sup> Similarly, limitation defenses were successfully raised by the Roman Catholic Church in *M.M. v. Roman Catholic Church*.<sup>40</sup> Clearly these limitation strategies were “successful” if success is defined in adversarial terms of winning and losing in the context of the immediate tort claims of abuse. However, if success is defined by different terms, including the just compensation of victims and the promotion of individual and communal healing, then the long term effectiveness of these strategies comes into serious question. Put differently, if the role of the government or, for that matter, the churches in the resolution of these disputes is framed in terms of opportunities to assist with the healing process, then raising limitation period defenses – although technically open to those institutional defendants – in fact hindered the achievement of this ultimate goal.

### *Limits of Liability and Damages*

Another contested area of adversarial litigation strategy involves several ways in which various defendants in residential schools litigation sought to limit their potential liability. The first involves “thin skull” or “crumbling skull” rules – largely collapsed by the British Columbia Court of Appeal for the purpose of damage assessment in the context of residential schools

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<sup>37</sup> See e.g. *ibid.* at s. 16(1)(h); B.C. *Limitation Act*, S.B.C. 2012, c. 13, s. 3(1)(i). See further Moran, *ibid.*

<sup>38</sup> See e.g. *Blackwater v. Plint*, *supra* note \_\_\_ at para. 82. See further *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403 (this case did not involve a residential school claim).

<sup>39</sup> *Blackwater v. Plint*, *ibid.* at para. 82.

<sup>40</sup> 2001 MBCA 148, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 8. See further *Cloud v. Canada (Attorney General)*, *supra* note \_\_\_ at para. 61.

claims. The basic point of the “crumbling skull” rule is that the defendant should not be required to make the plaintiff better off than he or she originally was.<sup>41</sup> The government and church organizations successfully raised “crumbling skull” defenses on several occasions. In so doing, they have essentially argued that the pre-existing physical, psychological and social challenges – anxiety, alcoholism, lack of higher education, etc., all issues that disproportionately negatively impact Aboriginal communities more than non-Aboriginal communities (perhaps at least in part because of the residential schools program<sup>42</sup>) – limit the form and amount of damages that should be awarded.<sup>43</sup>

One particularly stark example of this litigation strategy can be seen from the trial judgment in *Blackwater*.<sup>44</sup> In order to limit the amount of damages that could be attributed to historic sexual assaults, the Federal Government and the United Church argued that the plaintiff’s background was such that his earning potential should be deemed to be very low. Further, to the extent that the abuse that occurred at the residential school aggravated the plaintiff’s earning capacity, the defendants actually emphasized the traumatic, non-sexual abuses that the plaintiff experienced while at the residential school (in addition to prior life experiences and problems). The reason was because doing so, in line with successful – yet highly adversarial

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<sup>41</sup> The issue was described by Major J. as follows: “The so-called ‘crumbling skull’ rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s ‘original position’. The defendant need not put the plaintiff in a position better than his or her original position.” *Athey v. Leonati*, [1996] 3 S.C.R. 458, para. 34, cited in *T.W.N.A. v. Clarke*, 2003 BCCA 670, para. 27. For a further discussion of the “crumbling skull” rule in the context of the residential schools litigation, see Roach, *supra* note \_\_ at \_\_.

<sup>42</sup> See e.g. the following acknowledgment by all parties in the *Blackwater* case: “All parties in the case at bar agree that the plaintiffs’ original positions were significantly compromised position [sic] by reason of their compulsory attendance at [the residential school]...” *W.R.B. v. Plint*, 2001 BCSC 997, para. 376, var’d [2003] B.C.J. No. 2783 (C.A.), aff’d *Blackwater v. Plint*, *supra* note \_\_.

<sup>43</sup> See e.g. *T.W.N.A. v. Clarke*, *supra* note \_\_ at paras. 14-99; *Blackwater v. Plint*, *supra* note \_\_ at paras. 74-87. See further *M.A. v. Canada (Attorney General)*, 2001 SKQB 504, var’d 2003 SKCA 2, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 151.

<sup>44</sup> For a further discussion, see Roach, *supra* note \_\_ at \_\_.

– litigation strategy, allowed the defendants to blame any relevant aggravating issues on activities against which claims were statute-barred.<sup>45</sup> In so doing, the church and government defendants acknowledged that traumatic abuses occurred. However, they then carefully scripted an understanding of their responsibility that minimized their exposure to damages through the creative use of limitation defences in concert with the “crumbling skull” rule. Put simply, what one hand had given the other took away. This was an exercise of twisting the factual basis of abuse in order to maximize one kind of harm while at the same time minimizing another, from a linguistic perspective, in order ultimately to minimize liability. If that was the sole purpose of the defendants’ litigation strategy, then the result could be considered a “success”. However, if – ultimately – what the institutional defendants cared about was something more lasting and forward looking (in the form of assisting with healing through a meaningful settlement process), these litigation tactics certainly did not assist with that longer term objective.

Another adversarial strategy that has been regularly used to limit liability involves denials that do not so much blame the victim, but rather blame a co-defendant. While effective as a defense strategy, sidestepping responsibility has very difficult ramifications in terms of those claimants who need an acknowledgment of responsibility in order to move to a place of healing and closure. A particularly clear example is the finger pointing that went on in the *Blackwater*

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<sup>45</sup> As the trial judge explained:

In their submissions Canada and the Church stressed all of the traumatic, non-sexual experiences the plaintiffs went through while at [the residential school].... While it may seem anomalous that the parties which ran [the residential school] ... would come to court and emphasize all of the negative aspects of the residential school (excluding the sexual abuse), such is the result of the plaintiffs’ non-sexual abuse claims being statute barred.

*W.R.B. v. Plint*, *supra* note \_\_ at para. 377.

case, where the Government and the Church essentially blamed each other for all of the abuse, attempting to sidestep any responsibility of their own.<sup>46</sup>

When not simply blaming another party, defendants have also argued, and appealed, the issue of apportionment of responsibility, essentially through what amounts to total, or at least substantial, denials of responsibility. The act of denying responsibility clearly raises issues of contributory negligence, as well as the resulting apportionment of damages that are awarded in a given case. However, perhaps more importantly for this discussion, the act of denying responsibility, at first instance and often again on appeal, has been seen – as with the finger pointing examples mentioned above – to have an extremely significant negative impact on a victim’s ability to heal and take comfort in a finding of liability. For example, in *F.S.M. v. Clarke*, the fact of the Anglican Church’s appeal as to apportionment of liability and damages (as well as the Church’s ongoing denial of liability) damaged the plaintiff’s healing process and the overall benefit derived from a positive damages award. –Importantly, this was so notwithstanding the Court of Appeal’s finding that the plaintiff could not have been “more

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<sup>46</sup> The reasons of the trial judge on this point give a flavor of the parties’ positions:

Canada says that at all material times ... the Church operated and managed [the residential school] ... and ... that the Church is solely vicariously responsible for the acts and omissions....

The Church says that Canada directed and controlled all operations of [the residential school].... The Church denies that it was ever the guardian of the plaintiffs and denies any vicarious liability.

Thus the Church and Canada each say that the other is solely vicariously liable for the assaults....

*W.R.B. v. Plint*, [1998] B.C.J. No. 1320, paras. 16-18, var’d [2003] B.C.J. No. 2783 (C.A.), aff’d *Blackwater v. Plint*, *supra* note \_\_.

successful.”<sup>47</sup> – As the plaintiff stated in his factum: “The healing and closure that the trial judgment provided ... was threatened by the Anglican appeal.”<sup>48</sup>

Other examples of potentially problematic adversarial litigation strategies involve contesting other amounts, bases and forms of liability and damages, including punitive damages,<sup>49</sup> contesting the ability of churches to be held liable based on charitable immunity,<sup>50</sup> and questioning whether abuse by a “lay employee” can form the basis of a claim for vicarious liability.<sup>51</sup> Again, the simple yet overwhelmingly powerful animating force behind all of these litigation strategies is the motivation to win. And in this context, winning means getting the best result for a client in terms of avoiding a finding of liability, avoiding the need to take responsibility, and avoiding the need to pay compensation. Healing, restoring and apologizing do not typically factor into a winning strategy that is defined in terms of successful adversarialism. As I discuss and develop further below,<sup>52</sup> however, successful adversarialism should not be the standard by which all professionalism is judged. As the residential schools litigation so painfully illustrates, pursuing an adversarial-based winning strategy can militate against a more successful, long term solution for all involved (including the clients). Put simply,

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<sup>47</sup> 2004 BCCA 23, para. 8.

<sup>48</sup> *Ibid.* at para. 7. Although not specifically ruling on the plaintiff’s stated concern, the Court of Appeal rejected the appeal by the plaintiff (on the basis that the appeal raised by the Church concerned the apportionment of liability and damages vis-à-vis the Church and the Federal Government, taking no issue with the amount of damages awarded to the plaintiff himself).

<sup>49</sup> See e.g. *T.W.N.A. v. Clarke*, *supra* note \_\_ at paras. 103-130.

<sup>50</sup> See e.g. *Blackwater v. Plint*, *supra* note \_\_ at paras. 39-44. See further Moran, *supra* note \_\_ at \_\_.

<sup>51</sup> See e.g. *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45. See further Moran, *supra* note \_\_ at \_\_.

<sup>52</sup> See *infra* pt. II.2.

a more nuanced approach to professionalism allows clients and lawyers to maintain a clear view not only of the trees, but also of the forest.

***Evidentiary and Other Procedural Challenges and Strategies***

Given the historic nature of most of the residential schools claims, as well as the fact that key evidence of claimants often lacks corroboration (given the nature and location of alleged abuses), various evidentiary challenges and hurdles have been forcefully raised by government and church defendants in the context of resisting these claims. For example, the applicability of social science evidence on the issue and effect of generalized government approaches and policies toward the schooling of Aboriginal children when it comes to individual claims for liability and damages was questioned, notwithstanding established and now clearly acknowledged policies regarding those schools and programs.<sup>53</sup> Further, in addition to evidentiary challenges of a systemic nature, government and church defendants have also regularly challenged the credibility of evidence in the context of individual claimants,<sup>54</sup> as well as relying on strict and narrow definitions of key terms, including what qualifies as a residential school (for purposes of victim compensation).<sup>55</sup>

In terms of further procedural challenges, one adversarial tactic has involved challenging the adequacy of pleadings by requesting particulars.<sup>56</sup> Although defendants are certainly entitled to know the case being made against them, serious concerns in these kinds of cases involve issues of confidentiality, sensitivities to victims and the facts of the alleged abuse, and also the

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<sup>53</sup> See *Blackwater v. Plint*, *supra* note \_\_ at para. 9.

<sup>54</sup> See e.g. *F.H. v. McDougall*, [2008] 3 S.C.R. 41. See further Roach, *supra* note \_\_ at \_\_.

<sup>55</sup> See e.g. *Fontaine v. Canada (Attorney General)*, 2012 BCSC 313; *Fontaine v. Canada (Attorney General)*, 2013 BCSC 756.

<sup>56</sup> See e.g. *Indian Residential Schools (Re)*, 1999 ABQB 823.



potential for re-victimization through the litigation process.<sup>57</sup> By raising procedural challenges in the form of requests for particulars, defendants knowingly aggravate the very real potential for re-victimization and further shame. Other strategies, particularly more recently in the context of the work of the TRC, have involved attempts by the Federal Government to strike out affidavits and also, more generally, to avoid the production of relevant documents.<sup>58</sup> A further moment of significant adversarialism came in the form of the resistance to certification in the context of class actions.<sup>59</sup> Of course this resistance to certification ultimately changed several years later in the context of the universal settlement approval process.<sup>60</sup> But at the time, if successful, the idea was essentially to cut the process off at the knees. Simply put, if the cases could not proceed by way of class action, there was a significant likelihood that they would not proceed at all, or at least not nearly to the same degree. Again, the procedural endgame for the government and church defendants, which was ultimately unsuccessful, was based on an adversarial litigation strategy that effectively excluded any consideration for victims and their families.

### ***Problematic Plaintiff-Side Lawyer Conduct***

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

<sup>58</sup> See *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684. For commentary, see e.g. Gloria Galloway, “Government preventing full truth on residential schools to surface: commission”, *The Globe and Mail* (20 December 2012), online: <http://www.theglobeandmail.com/news/politics/government-preventing-full-truth-on-residential-schools-to-surface-commission/article6598267/>. See recently *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283. For commentary, see e.g. Tim Alamenciak, “Feds bid to keep St. Anne’s documents secret” *The Toronto Star* (21 January 2014) A1; Gloria Galloway, “Judge orders release of residential school documents” *The Globe and Mail* (15 January 2014) A3.

<sup>59</sup> For example, in *Cloud*, the government and church respondents ultimately unsuccessfully argued – in the context of Ontario’s *Class Proceedings Act, 1992*, S.O. c. 6, s. 5 – that individual abuse claims are sufficiently individual so as to be incapable of being common issues for purposes of certification. See *Cloud v. Canada (Attorney General)*, *supra* note \_\_ at paras. 58, 60. Compare *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. They further argued, unsuccessfully, that systemic negligence in the context of a school also cannot form the basis of a common issue given that the standard of care would change over time in connection with evolving educational standards. See *Cloud v. Canada (Attorney General)*, *ibid.* at para. 59. The defendants also unsuccessfully challenged certification arguing that a class action was not the preferable procedure and that a workable litigation plan had not been produced. See *ibid.* at paras. 79, 94. See further Moran, *supra* note \_\_.

<sup>60</sup> See *supra* note \_\_ and accompanying text. See earlier *Residential Indian Schools (Re)*, 2003 ABQB 449.

In addition to the often heavily adversarial defendant-side litigation strategies discussed above, there have been some examples of plaintiff-side litigation strategies that have been at best questionable and often plainly unprofessional. For example, there have been IAP claimants who were caught up in schemes in which their counsel purported to provide them with loans, often with criminal interest rates, which were in some cases never received by the borrowing clients.<sup>61</sup> Other cases involved questionable, insensitive and at times misleading approaches to client solicitation by plaintiff-side counsel;<sup>62</sup> inappropriate disclosure to consulting non-lawyers of confidential claimant information;<sup>63</sup> the exaggerated promise of success with respect to certain claims;<sup>64</sup> failure adequately to meet with and prepare clients;<sup>65</sup> conduct amounting to the unauthorized practice of law;<sup>66</sup> unacceptable termination letters and arrangements that did not adequately protect the interests of former clients;<sup>67</sup> conflicts of interest;<sup>68</sup> a disregard for

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<sup>61</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at paras. 17, 48-54, 59, 77-78, 164. For commentary, see Paul Barnsley & Kathleen Martens, “Judge punishes lawyer for ‘loan scheme’ targeting residential school survivors”, *Aboriginal Peoples Television Network* (6 June 2012), online: APTN <<http://aptn.ca/pages/news/2012/06/06/judge-punishes-lawyer-for-loan-scheme-targeting-residential-school-survivors/>>.

<sup>62</sup> See e.g. *Fontaine v. Canada (Attorney General)*, *ibid.* at paras. 15-16, 55-58, 79; *Law Society of Saskatchewan v. Merchant*, [2000] L.S.D.D. No. 24, paras. 24, 53 [“*Merchant I*”], *aff’d* 2002 SKCA 60 [“*Merchant II*”]. For commentary on the *Merchant* cases, see Alice Woolley *et al.*, eds., *Lawyers’ Ethics and Professional Regulation*, 2d ed. (Markham: LexisNexis, 2012) at 127-139.

<sup>63</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at paras. 18, 75.

<sup>64</sup> See e.g. *Merchant I*, *supra* note \_\_ at para. 47.

<sup>65</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at para. 76.

<sup>66</sup> *Law Society of Manitoba v. Tennenhouse* (21 February 2012) Case 11-09 (Discipline Panel) [“*Tennenhouse III*”]. For commentary, see Alexandra Paul, “Lawyer disbarred in fee grab”, *Winnipeg Free Press* (22 February 2012), online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/lawyer-disbarred-in-fee-grab-139949883.html>>.

<sup>67</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at para. 22.

<sup>68</sup> *Tennenhouse v. Law Society of Manitoba*, 2011 MBQB 73, para. 10 [“*Tennenhouse I*”].

important terms of the alternative dispute resolution settlement process;<sup>69</sup> and incorrectly, misleading and falsely signed and completed IAP forms,<sup>70</sup> which – at least in one case – were completed by a lawyer who was “actively engaged in manipulating application forms for the IAP.”<sup>71</sup> Further, in one case, a firm had failed to file 1,159 completed IAP applications, notwithstanding pending and past filing deadlines, as well as unfiled claims on behalf of deceased victims.<sup>72</sup> Finally, some lawyers – through massive contingency arrangements,<sup>73</sup> which at times exceeded the allowable amounts under the national settlement agreement,<sup>74</sup> and high volume residential schools practices – viewed the notion of entrepreneurial lawyering as virtually an end in itself.<sup>75</sup>

These kinds of troubling and at times unprofessional approaches, especially with what courts and tribunals have characterized as particularly “vulnerable”<sup>76</sup> claimants and their families, were described, at least in one case by the Law Society of Alberta, as having the

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<sup>69</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at paras. 146-149.

<sup>70</sup> *Ibid.* at paras. 62-68.

<sup>71</sup> *Ibid.* at para. 68.

<sup>72</sup> *Ibid.* at paras. 17, 37, 73.

<sup>73</sup> For example, according to various reports, the Merchant Law Group was reportedly expected to receive somewhere between \$28-100 million for work done on residential schools files. See e.g. Jonathan Gatehouse, “White man’s windfall”, *Macleans* (4 September 2006), online: *Macleans* <[http://www.macleans.ca/article.jsp?content=20060911\\_133025\\_133025](http://www.macleans.ca/article.jsp?content=20060911_133025_133025)>; Geoff Kirbyson, “The big picture”, *Canadian Lawyer* (August 2007), online: *Canadian Lawyer* <<http://www.canadianlawyermag.com/Cover-Story-The-Big-Picture.html>>. See generally *Baxter v. Canada (Attorney General)*, *supra* note \_\_ at paras. 53-78, and in particular, para. 66, in which the Court describes the Honourable Frank Iacobucci’s “serious concerns” regarding the Merchant Law Group’s fees. For negative commentary, particularly regarding contingency fee percentages that, at least early on, were as large as 45%, see Erin Anderssen, “Lawyers swoop to cash in on native claims” *The Globe and Mail* (10 July 1999) A1.

<sup>74</sup> See e.g. *Tennenhouse I*, *supra* note \_\_ at para. 10; *Tennenhouse II*, *supra* note \_\_ at paras. 17, 35, 42, 47; *Tennenhouse III*, *supra* note \_\_.

<sup>75</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at para. 171. See also *Merchant II*, *ibid.* at para. 132.

<sup>76</sup> *Fontaine v. Canada (Attorney General)*, *ibid.* at para. 120. See also *ibid.* at paras. 138, 153-154. See further *Tennenhouse I*, *supra* note \_\_ at paras. 23, 100.

potential for “re-victimization”.<sup>77</sup> They have also been described in one case by the British Columbia Supreme Court as “unscrupulous”, “indifferent”, amounting to “exploitation”; and designed to “maximize file throughput with minimal overhead”;<sup>78</sup> and further by a discipline tribunal in another case, as “undignified” and “offensive”.<sup>79</sup> One victim indicated that the unprofessional conduct on the part of a plaintiff-side lawyer resulted in “the traumatic feelings she had experienced earlier in her life” coming back, which also resulted in a feeling of “shame”.<sup>80</sup> And in terms of several massive contingency fee arrangements and the approach of a number of particularly entrepreneurial lawyers to these cases, one former residential school survivor, who stated that to “bring this all up about the residential schools is so hard”,<sup>81</sup> commented that: “There are all kinds of lawyers jumping into this. They’re going to make all kinds of money off us.”<sup>82</sup> Similarly, another residential schools survivor described the approach of lawyers as follows: “The vultures are coming. They know where the money is”.<sup>83</sup> Another person, who worked with the Federal Government, described it simply as a “feeding frenzy.”<sup>84</sup> Of course not all plaintiff-side lawyering in this context can be painted with the same questionable brush. However, having said that, there is enough troubling conduct and examples of complaints to warrant significant concern on the part of anyone who cares about how these

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<sup>77</sup> *Fontaine v. Canada (Attorney General)*, *ibid.* at para. 96.

<sup>78</sup> *Ibid.* at paras. 138, 155.

<sup>79</sup> *Merchant I*, *supra* note \_\_ at paras. 88, 92, 94.

<sup>80</sup> *Ibid.* at para. 28.

<sup>81</sup> Anderssen, “Lawyers swoop to cash in on native claims”, *supra* note \_\_ at A1.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at A7.

<sup>84</sup> *Ibid.* According to lawyers who take on this work, however, there is the argument that without contingency fee work, which comes with risk, it is likely that these cases would not go ahead. See e.g. *ibid.*

cases proceed and how the lawyers who conduct these cases are perceived by the parties and, more generally, the public.

## 2. PRINCIPLES OF PROFESSIONALISM

With all of these challenging and potentially problematic examples of litigation strategies, adversarial tactics and overly entrepreneurial approaches in mind, the question that now ultimately interests me is: What role has the legal profession played in this narrative, and more importantly, pursuant to what principles? I think everyone would acknowledge that there have been particularly problematic examples of professional – or unprofessional – litigation and lawyering conduct on all sides. However, I think it is also fair to say that those examples, although extreme, are not fully isolated events, but rather are perhaps extreme examples of a pattern of adversarial or overly entrepreneurial litigation approaches to clients, causes and cases. The basic point that I make here is that, by and large, the plaintiff-side lawyers who were pursuing thousands of claims pursuant to massive contingency fee arrangements, and perhaps more importantly, the defendant-side lawyers who were perpetuating what was, in the end, largely a failed litigation process, were essentially following what has become the dominant narrative of adversarial lawyering. To the extent that we do not like what we see in terms of the litigation and lawyering process in the specific context of the residential schools litigation, we need to take this opportunity to self-reflect more generally on the very core principles that animate what it means to be a lawyer. Because far from deviating from the well-established standards of the legal profession, the lawyers in fact were for the most part following them. For example, to make this point, one only needs to look as far as the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada, which provides that:

In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the

lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law....

The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged ... to assist an adversary or advance matters harmful to the client's case.<sup>85</sup>

The residential schools dispute resolution landscape, particularly before the 2005 Agreement in Principle, was very much a litigation process following this kind of adversarial narrative of professionalism. It is a narrative that largely preferences adversarialism over collaboration, winning over restoring, individual rights over collective interests, power over vulnerability, process over outcomes, and cultural-neutrality over pluralism and diversity. In the context of the residential schools litigation, these principles allowed short term "winning" strategies to become more important than long term and sustainable solutions premised on fair and just treatment and respect. And they allowed the economics of disputes, at least in some cases, to overshadow the justice of the causes. As one judge commented, "claimants were ... treated not as individual people who had in many cases suffered traumatic personal experiences ... but rather as claims, requiring little lawyer interaction"<sup>86</sup>; or more bluntly, "claims became abstracted from claimants".<sup>87</sup> To borrow from John Heywood, lawyering strategies often missed "the wood for the trees."<sup>88</sup>

My point here, regarding professionalism generally, is not to abandon strategies of adversarialism altogether. There are clearly cases – particularly those involving relatively equally resourced civil litigants, or in many criminal defense contexts, where a parity of power

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<sup>85</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended 12 December 2012) at r. 5.1-1 (commentaries 1, 3).

<sup>86</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_\_ at para. 163.

<sup>87</sup> *Ibid.* \_\_\_ at para. 161.

<sup>88</sup> John Heywood, *Proverbs* (1546), pt. II, c. 4.

and resources is not typically present – in which robust (although civil) adversarial advocacy produces fair and just results. However, what the residential schools litigation demonstrates is that the dominant model of lawyering – which has often allowed an adversarial approach to take over when what was so clearly needed was a different, more therapeutic, restorative and respectful approach – needs to be questioned, balanced and potentially tempered in cases dealing with power imbalances, vulnerable litigants, situations calling for a heightened sensitivity to diversity, pluralism and the public interest, and cases with very sensitive facts and contexts, particularly in cases where one of the parties is the government (and perhaps some other large institutional litigants such as church organizations and the like).<sup>89</sup> If we knew at the outset what we knew following the Agreement in Principle, years of litigation and re-victimization by the litigation process could have been avoided, with the money spent on that failed litigation period being spent on healing, compensation and reform. All parties involved would have been better off. Lawyers and their clients need to understand, through extremely active, deliberative, tough and at times uncomfortable lawyer-client discussions, that professional responsibility involves – at its core – an obligation to protect and promote the public interest. And while of course lawyers cannot act to the detriment of their client’s interests, they also cannot act in ways that

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<sup>89</sup> Although admittedly not in the context of government litigation strategy, the current claim by Edgar Schmidt (of the Department of Justice) against the Attorney-General of Canada (see Statement of Claim, Court File No. T-2225-12, online: Slaw <[http://www.slaw.ca/wp-content/uploads/2013/01/Edgar\\_Schmidt\\_Statement\\_of\\_Claim.pdf](http://www.slaw.ca/wp-content/uploads/2013/01/Edgar_Schmidt_Statement_of_Claim.pdf)>) – alleging that the Federal Government maintains a legislative review policy that is, at least at times, contrary to the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 – is perhaps a concrete, current example of why a different approach to government adversarialism is particularly warranted. See further *Schmidt v. Canada (Attorney General)*, [2013] F.C.J. No. 289. For other comments on the challenges created by, and potential inadequacies of, dominant (adversarial) models of lawyering in the context of government legal work, see Adam Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal. L.J. 1; Allan C. Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46:1 Osgoode Hall L.J. 105; Patrick J. Monahan, “‘In the Public Interest’: Understanding the Special Role of the Government Lawyer” (2013) 63 S.C.L.R. (2d) 43. For commentary on adversarialism and the public interest in the corporate sector, see Edward Waitzer, “Ethical Responsibilities of Securities Lawyers” Canadian Centre for Ethics & Corporate Policy – Feature Article (16 January 2012), online: CCECP <[http://www.ethicscentre.ca/EN/resources/Securities\\_Lawyers.pdf](http://www.ethicscentre.ca/EN/resources/Securities_Lawyers.pdf)>.

make a mockery of their professional obligations to others, including the public. The current model is too blunt an instrument to work at all times and in all cases, as we so clearly see with these cases. We need to be able to deploy a different, more balanced and nuanced theory of professionalism without the need to rely on hindsight for justification.

We are not without sources that would lead to – and perhaps require – a more balanced notion of professionalism. In fact, we need only to look at the same codes of conduct for support for a more nuanced and tempered sense of professional responsibility. For example, again according to the *Model Code*, “When acting as an advocate, a lawyer must not ... knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable”.<sup>90</sup> Other *Model Code* provisions require lawyers to consider or give advice on: the “business, economic, policy or social complications involved in the question or the course the client should choose”,<sup>91</sup> not only “the technicalities of the law, but also ... public relations and public policy concerns”;<sup>92</sup> and ways in which an organization can act that are “legal, ethical, reputable and consistent with the organization’s responsibilities to its constituents and to the public....”<sup>93</sup> Further, and simply, the *Model Code* provides that “a lawyer should not hesitate to speak out against an injustice.”<sup>94</sup> Nowhere in the *Model Code* are “[h]onourable”, “ethical”, “reputable” and “[j]ustice” defined. I believe that it is an open question, in hindsight, as to whether all (or in fact most) of the litigation strategies and adversarial tactics, which were pursued in the specific context of the residential schools litigation, would qualify. This is

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<sup>90</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, *supra* note \_\_ at r. 5.1-2(b).

<sup>91</sup> *Ibid.* at r. 3.1-2 (commentary 10).

<sup>92</sup> *Ibid.* at r. 3.2-8 (commentary 6).

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* at r. 5.6-1 (commentary 1).



particularly the case, again in hindsight, given the high degree of ultimate failure of many of those approaches. Of course whether a limitation defense or a crumbling skull defense, for example, is available to a defendant is a viable legal (and professional) question for consideration. However, not only do these defenses – although technically available as potentially workable, “winning” strategies – need to be seriously questioned from time to time, they may also need to be rejected in favour of a different form of successful outcome that takes a more collective and restorative approach to the management and resolution of a given dispute. Doing so, as we saw for example with the earlier discussion around apologies and the mission of the Catholic Church, may align more closely with a client’s ultimate interests (as opposed only to their immediate legal rights).<sup>95</sup> Further, not only are there code provisions that balance or temper what appears to be an overwhelmingly strong preference for adversarialism as the dominant model of lawyering, there are also specific provisions and policies that speak directly to cases dealing with vulnerabilities relating to culture, power, diversity and pluralism. For example, according to the Law Society of Upper Canada’s *Rules of Professional Conduct*:

[A] lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario....<sup>96</sup>

Further still, specifically in the context of residential schools litigation, the Canadian Bar Association developed resolutions designed to protect aboriginal clients who suffered residential

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<sup>95</sup> See *supra* note \_\_ and accompanying text.

<sup>96</sup> Law Society of Upper Canada, *Rules of Professional Conduct* (effective 1 November 2000, as amended) at r. 1.03(1)(b). See further *ibid.* at r. 5.04(1) (commentary), which provides that:

The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.... This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

schools abuse,<sup>97</sup> which were endorsed by several provincial law societies.<sup>98</sup> Together, these important provisions recognize a “special role” for lawyers to respect and promote diversity, and require “special care” and a “high degree of conduct” from counsel.<sup>99</sup>

While the residential schools cases involve particularly vulnerable clients with particularly challenging claims, the need for special care and attention to particular clients and causes is not unique to the Aboriginal context (although, as said, it is certainly important). Given the increasing diversity of the populations being served by the legal profession, with a pluralism of needs and norms that guide those needs, individualized attention and care is often required – beyond the blunt one-size-fits-all adversarial approach to conflict. In fact, it is my contention that the traditional, dominant model of lawyering – often characterized most typically by single minded adversarialism – is in fact an unsustainable model in many cases for many reasons,<sup>100</sup> not the least of which is its heavy and often indiscriminate footprint on cases that typically need a more nuanced and careful hand.

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<sup>97</sup> Canadian Bar Association, Resolution 00-04-A (19-20 August 2000), online: CBA <[http://www.cba.org/cba/sections\\_abor/main/00\\_04\\_a.aspx](http://www.cba.org/cba/sections_abor/main/00_04_a.aspx)>; Canadian Bar Association, “Guidance for Lawyers Acting for Survivors of Indian Residential Schools”, Resolution 07-09-M (17-18 February 2007), online: CBA <<http://www.cba.org/CBA/resolutions/pdf/07-09-MC.pdf>>.

<sup>98</sup> For commentary, see Woolley *et al.*, eds., *Lawyers’ Ethics and Professional Regulation*, *supra* note \_\_ at 138-139. See also *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at para. 153.

<sup>99</sup> *Fontaine v. Canada (Attorney General)*, *supra* note \_\_ at para. 154.

<sup>100</sup> For my recent views on this point, see e.g. Trevor C.W. Farrow, “Ethical Lawyering in a Global Community” (2013) 36:1 *Man. L.J.* 141; Trevor C.W. Farrow, “The Good, the Right, and the Lawyer” (2012) 15:1 *Legal Ethics* 163; Trevor C.W. Farrow, “The Promise of Professionalism” in Benoît Moore, Catherine Piché & Marie-Claude Rigaud, eds., *L’avocat dans la cité: éthique et professionnalisme* (Montréal: Éditions Thémis, 2012) 197; Trevor C.W. Farrow, “Post-9/11 Lawyers” in David L. Blaikie, Thomas A. Cromwell & Darrel Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 167. See also Trevor C.W. Farrow, “Sustainable Professionalism” (2008) 46:1 *Osgoode Hall L.J.* 51. For contrary views, which – although different from each other – are more consistent with the dominant model of lawyering, see e.g. W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010); Alice Woolley, “In Defence of Zealous Advocacy” in Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis, 2011) at 33. For a different challenge to current models of professionalism, in light of the residential schools litigation, see the article by Carrie Menkel-Meadow in this symposium collection.

In the end, I think a nuanced model of professionalism that is more sensitive to the diverse needs of the communities that lawyers serve – including all aspects of cases and causes (including client interests,<sup>101</sup> but also including social, ethical and public interests)<sup>102</sup> – accords with the profession’s foundational promise it continues to make to society in return for the exclusive privilege to provide legal services in ways that it alone, through self-regulation, determines. Key elements of that promise, for example in Ontario, include a “duty” (not an option) to “maintain and advance the cause of justice and the rule of law”; to “act so as to facilitate access to justice”; and to “protect the public interest....”<sup>103</sup> These duties, while obviously not excluding client interests (including adversarial interests), are also not obviously limited to them – quite the opposite.<sup>104</sup> To the extent that the dominant model of lawyering has provided a safe-harbour of role-differentiated client advocacy, which allows lawyers essentially to upload policy responsibility to the state while at the same time to download moral responsibility to their clients, seems to miss the important – and powerful – middle ground of a professional responsibility that owes more to the public than is currently being delivered.<sup>105</sup> Lawyers play an increasingly powerful – and often determining – role in shaping community affairs and relationships. Again, the residential schools litigation is an important example of that power. The professional promise to society, recognized above, is about more than offering

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<sup>101</sup> See e.g. *supra* note \_\_ and accompanying text.

<sup>102</sup> See e.g. *supra* note \_\_ and accompanying text.

<sup>103</sup> *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.

<sup>104</sup> See further Farrow, “Sustainable Professionalism”, *supra* note \_\_ at 83-103.

<sup>105</sup> See earlier Farrow, “The Good, the Right, and the Lawyer”, *supra* note \_\_; Farrow, “Sustainable Professionalism”, *supra* note \_\_ .

competent and independent legal expertise in the name of advancing the rule of law.<sup>106</sup> Although clearly important, executing on that aspect of the promise is only part of a dual obligation, which also involves a duty to advance the cause of justice (as something distinct from the rule of law).<sup>107</sup> What those terms mean will be fact and context specific. But they must mean something, in addition simply to advancing zealously a particular client interest in the face of what can be, at least as we see with the residential schools cases, very much at odds with a generally shared notion of basic justice, ethics and the public interest. We need to expect more from our legal profession, in terms of robust, active and engaged representation and counsel, in all cases, and especially in those that involve particularly sensitive and vulnerable individuals facing systemic issues and challenges.

### III. CONCLUSION

In his searching review of First Nations representation on juries, the Honourable Frank Iacobucci commented that the “justice system, as it relates to First Nations peoples ... is in crisis.”<sup>108</sup> He also described the relationship between the justice system and Aboriginal peoples as “dysfunctional”.<sup>109</sup> Unless we are going to stay on a path that, in effect, continues to blame the victim, the legal profession – and in particular the principles by which it operates – needs to self-reflect and, where possible, re-orient to the changing needs of an increasingly diverse and pluralistic society. Now is the time to explore and experiment with a different, less adversarial and more inclusive notion of professionalism. Not only would this be the right thing to do, it

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<sup>106</sup> See *supra* note \_\_ and accompanying text.

<sup>107</sup> *Ibid.*

<sup>108</sup> Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries*, Report of the Independent Review, *supra* note \_\_ at para. 14.

<sup>109</sup> *Ibid.* at para. 15.

would also be consistent with the promise made by the profession to protect the public interest, in return for the fundamental privilege to deliver legal services. Doing so is in fact also consistent with the spirit of current professional regulation. For example, according to the *Model Code*,

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected.<sup>110</sup>

For a self-reflective professional transformation to take place, there are many sites of potential change and influence. Perhaps one useful place to start would be the definition of “professionalism” that the profession in Ontario itself crafted more than a decade ago.<sup>111</sup> The definition includes 10 elements of professionalism: scholarship, integrity, honour, leadership, independence, pride, spirit and enthusiasm, civility and collegiality, service to the public good, and balanced commercialism.<sup>112</sup> There is nothing particularly troubling about what *was* included in that list. Rather, it was what was *not* included that raises questions. Specifically, there is nothing in the definition about pluralism, diversity, equality, access to justice, truth, dignity, or respect.<sup>113</sup> Given the special role that lawyers play in society,<sup>114</sup> particularly including an

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<sup>110</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, *supra* note \_\_ at preface.

<sup>111</sup> Chief Justice of Ontario, Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, “Elements of Professionalism” (October 2001, rev’d December 2011 and June 2002), online: LSUC <<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>>.

<sup>112</sup> *Ibid.*

<sup>113</sup> For early comments, see Farrow, “Ethical Lawyering in a Global Community”, *supra* note \_\_ at 162. See further Rosemary Cairns Way, “Reconceptualizing Professional Responsibility: Incorporating Equality” (2002) 25 Dal. L.J. 27; David B. Wilkins, “Identities and Roles: Race, Recognition, and Professional Responsibility” (1998) Md. L. Rev. 1502.

<sup>114</sup> See e.g. *supra* note \_\_ and accompanying text.

important obligation to respect dignity and diversity,<sup>115</sup> it is time to revisit how the profession understands and defines itself. What this will look like in practice, in concrete terms, will still need to be fleshed out.<sup>116</sup> However, given the experience of the residential schools litigation, what we do know is that the adversarial model of professionalism that guides so much of what lawyers do has become, at least in many instances, increasingly problematic and unsustainable. Something needs to be done.

In addition to a re-working of the definition of professionalism, codes of conduct, including rules or at least commentaries, could be revisited and potentially revised in order to help all lawyers – and in particular government and other large institutional lawyers – understand their responsibility when it comes to balancing the public interest with client and other interests.<sup>117</sup> Having said that, given the rules and guidelines that already exist, I am of the view that if the challenging process of reforming rules leads to indecision and inaction, then going that route would be worse than doing nothing at all. Put differently, while further clarity with respect to rules of conduct would be helpful (and should be pursued), there already exists enough guidance for action to take place now. Further, in addition to revising the definition of professionalism and potentially revising existing codes of conduct, there are many other immediate sites of change for accomplishing this transformation, including at law schools,<sup>118</sup> Bar

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<sup>115</sup> See e.g. *ibid.*

<sup>116</sup> For one attempt to look at what a new version of professionalism might look like in action, see Farrow, “The Promise of Professionalism”, *supra* note \_\_.

<sup>117</sup> For earlier discussions, see e.g. Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law”, *supra* note \_\_; Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers”, *supra* note \_\_; Waitzer, “Ethical Responsibilities of Securities Lawyers”, *supra* note \_\_.

<sup>118</sup> For commentary on law schools as important sites for professional transformation, see Farrow, “Sustainable Professionalism”, *supra* note \_\_ at 100-102; Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 224-232.

admission and continuing education programs, mentoring processes, and the like.<sup>119</sup> Discussions at this level – on-line and in-person – can have transformative power if people are able to see the premise (and authority) on which they are based, the role that they can play, and their ultimate power for potential good. Ultimately, it will be all of these (and other) sites of change at which meaningful progress gets made.

Returning to the words of the Cree grandmother that opened this article,<sup>120</sup> what the residential schools litigation affords the legal profession is an opportunity of transformation and perhaps emancipation from what has come before, or put differently, an opportunity to explore what it might mean to live a good life in the context of progressive and inclusive modern legal communities. To the extent that we want to honour the residential schools survivors and to learn from our collective past mistakes, we need to reverse the trend of abstracting claims by putting claimants at the centre of the claim process,<sup>121</sup> and more generally, by putting the diverse and culturally sensitive needs of individuals and communities at the centre of how the profession sees itself and how it sees its role vis-à-vis those it is duty-bound to serve.

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<sup>119</sup> For a collection of commentaries on life-long learning and professionalism, see Stephen G.A. Pitel & Trevor C.W. Farrow, eds., Special Feature – “Life Long Learning in Professionalism” (2010) 4 Can. Legal Ed. Annual Rev. 1. See further Farrow, “Sustainable Professionalism”, *supra* note \_\_ at 101.

<sup>120</sup> *Supra* note \_\_ and accompanying text.

<sup>121</sup> See *supra* note \_\_ and accompanying text.