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January 16, 2006

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Attention: The Right Hon. Paul Martin
Leader, Liberal Party

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Attention: Hon. Stephen Harper,
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Leader, Conservative Party

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Attention: Hon. Gilles Duceppe, M.P.
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Attention: Jim Harris
Leader, Green Party of
Canada

Dear Sirs:

Re: Indian Residential School Agreement in Principle

I. Introduction

Over the course Canadian history, Indian Residential Schools have deeply damaged the lives of aboriginal people and their communities. Canada along with the Churches forcibly removed aboriginal children from their families in a nationwide attempt to "Christianize and civilize" them.

The last residential school was closed in 1996. In that same year, the *Royal Commission on Aboriginal Peoples* shed national light on the horrors former

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students experienced within the confines of residential schools. The report discussed the neglect, and the mental, physical, and sexual abuse that many aboriginal children endured in residential schools.

In 1998, Canada issued a *Statement of Reconciliation*. This Statement included an apology to all former students of residential schools that said:

One aspect of our relationship with Aboriginal people over this period that requires particular attention is the Residential School system. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in Aboriginal communities to this day. Tragically, some children were the victims of physical and sexual abuse.

The Government of Canada acknowledges the role it played in the development and administration of these schools. Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasize that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.

Over the years, thousands of former students have filed claims against Canada and the Churches for compensation arising from the damages they suffered in residential schools. In 2001, Canada established Indian Residential Schools Resolution Canada (IRSRC) to manage abuse claims and to promote reconciliation with the residential school legacy.

In 2003, Canada launched an Alternative Dispute Resolution (ADR) process as an alternative to litigation for former students to resolve their abuse claims against Canada and the Churches. Survivors were given the option of choosing to pursue their claims in court or with the ADR process. That process was largely a failure; it was very expensive to administer and resolved relatively few claims. For every dollar paid out to a survivor, the Government spent five dollars in administrative costs.

With the acknowledgement for the need of a more comprehensive strategy to resolve the legacy of residential schools, Canada charged former Supreme Court of Canada Justice, Frank Iacobucci, with leading discussions towards a fair and timely resolution to the residential school legacy. His mandate was to provide the Minister Responsible for Indian Residential Schools Resolution Canada with a settlement package that would address:

- a redress payment for all former students of Indian residential schools,

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- a truth and reconciliation process,
 - community based healing,
 - commemoration,
 - an appropriate ADR process that will address “serious abuse”, as well as legal fees;

Mr. Iacobucci was to present his resolution package by March 31, 2006.

During the discussions, Mr. Iacobucci sent Karim Ramji of our firm invitations to participate in meetings with plaintiff counsel. While Mr. Ramji was unable to attend these meetings, we decided to prepare detailed written submissions. On November 23, 2005, Canada announced that an Agreement in Principle had been reached between Mr. Iacobucci, certain plaintiffs’ counsel, the Assembly of First Nations and the Churches. The Agreement in Principle was signed well before the March 31 deadline; it appears that the Agreement in Principle was expedited to coincide with the current federal election. At that time, we were in the process of preparing written submissions on how a just resolution might be achieved. We now respectfully offer the following comments on the Agreement in Principle.

II. Moving Towards a Just Resolution

Our firm has represented over 100 residential school survivors in their claims against Canada and the Churches. Canada’s residential school policy inflicted multiple harms upon aboriginal people. All of the survivors experienced the loss of language, family and culture. Many were forced to endure the nightmare of physical and sexual abuse. In its *Statement of Reconciliation*, the government of Canada acknowledged all of these harms. In order to achieve reconciliation, Canada must provide adequate redress for all of them.

The Agreement in Principle must be amended in order to address five very serious and fundamental flaws:

1. Survivors who accept the Common Experience Payment (the “CEP”) – a payment meant for everyone who attended residential schools – will be forced to pursue their sexual and physical abuse claims in an ADR process. They will be barred from taking their claims to court.
2. Conversely, survivors who take Canada to Court will be denied the CEP – a payment intended to be paid to all former residential schools students to address their “common experience”.
3. The ADR process proposed in the AIP is based on a dehumanizing “points system” that awards points based on the frequency and precise nature of the acts of sexual and physical abuse. This does not accord with principles of Canadian law which focus on the harm suffered by the victim.

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4. The AIP provides a period for survivors to opt-out of the proposed resolution and maintain their right to litigate. Before the expiration of this period, survivors would have to decide how they wish to resolve their claims of physical and sexual abuse. This will place time limits upon victims of childhood sexual abuse who may not be ready to confront their abuse. The proposed non-consensual extinguishment of claims for childhood sexual abuse, as discussed below, runs contrary to basic principles of Canadian law.
 5. The AIP does not provide redress to the residential school's impact on aboriginal language and culture.

If these fundamental flaws are not corrected, the AIP will not provide a fair resolution of residential schools issue, but rather will be an instrument of further injustice. We discuss the flaws of the AIP and the necessary reforms in detail below. We seek the commitment of each party leader to change the AIP accordingly.

III. Proposed Denial of the Common Experience Payments to Victims Choosing Litigation

The Agreement in Principle provides for a Common Experience Payment (CEP). This payment was to be provided to all former students of residential school in an attempt to compensate for the common harms all former students experienced. All residential school students suffered the loss of family, culture and language. For these losses, the AIP proposes that Canada would pay \$10,000 for the first year of attendance at a school, and \$3,000 for each subsequent year. This payment is meant to be separate and apart from any further wrong that was committed against students within the walls of residential school (for example, physical and sexual abuse). If the AIP is implemented as is, the CEP will not be available to all survivors.

The Agreement in Principle attaches a very significant condition to the acceptance of the CEP. Recipients of the CEP will be deemed to have released Canada and the Churches from all further legal claims arising from the residential school experience. This means that victims who accept the CEP will be forced to resolve their claims through Canada's flawed ADR process. Recipients will be barred from taking their abuse claims against Canada and the Churches to court. Conversely, former students who choose to take their abuse claims to court will not be able to receive the CEP and, therefore, will not be compensated for their losses of family, culture and language.

If the AIP is implemented, the CEP will be available to survivors who have already settled their claims through litigation. Therefore, the proposed resolution will create a very specific group of survivors that are treated unfairly – those who choose not to participate in the government's ADR process. Using the CEP in this manner is an inexcusable method for Canada to make survivors conform to their method of resolution. The CEP must be made available to all former

students of residential school regardless of Canada's preferred choice to pursue litigation or resolve matters through Canada's ADR process.

Canada was responsible for implementing the residential school policy that caused the survivors' a multitude of harms. From this responsibility, Canada has domestic and international legal obligations to resolve claims that arose from the residential school experience. Any compromises in achieving a resolution should be borne by the wrongdoer, which in this case are Canada and the Churches. It would be profoundly unethical for Canada to adopt a resolution scheme that dangles the CEP as a carrot before impoverished residential schools survivors with a view to herding them into Canada's ADR process. The victims of Canada's residential school policy must be given the freedom to resolve their claims as they choose.

IV. The Proposed ADR Process is Unfair, Degrading and Inconsistent With Legal Principles

CEP recipients will be forced to enter the ADR process to resolve their claims of abuse. The AIP establishes a revised ADR process called the Independent Assessment Process (IAP). If the new ADR process properly, justly and expediently handles all of the survivors claims of physical and sexual abuse, then survivors would willingly participate in the system.

The IAP will provide certain advantages that are unavailable in litigation. In particular:

- It is a less adversarial process,
- claimants will receive a contribution towards their legal fees and will recover their reasonable and necessary disbursements,
- the IAP provides for a lower burden of proof on claimants than courts do for some claims,
- In the IAP Canada will accept liability for abuse perpetrated by other students.

The proposed IAP needs revision, however, in the method it uses to award compensation. A claimant must prove to the adjudicators on a balance of probabilities that the abuse occurred. The adjudicators will then award "compensation points" to claimants. These points originate from tables that contain ranges fixed to categories of abuse and harm. The points are then added up and correlated with a specific range of compensation.

The use of this "point system" is offensive to basic human decency and contrary to legal principles. It is a basic principle of tort law that the plaintiff be placed in a position they would have been in had the tort never been committed (*Athey v. Leonati*, [1996] 3 S.C.R. 458, para. 32). The Canadian jurisprudence compensates for the effect of the tort on the victim. The compensation points

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approach places emphasis upon the incidents and frequency of sexual abuse. The consequential harm of the abuse is given significantly less weight.

A victim, who is particularly vulnerable to damage from one or a few incidents of abuse, is not given an adequate level of compensation. The victim will not be placed in the position that they would have been in had they not been abused. Similarly, an act of sexual abuse that Canada, in its chart, characterizes as minor may have a profound impact upon a particular victim. The common law will compensate for this foreseeable harm. Canada's chart approach will under compensate victims of sexual abuse.

When assessing damages, Judges refer to similar case law to find a range of damages that is appropriate. In *Blackwater v. Plint*, 2005 SCC 58, McLachlin C.J.C., stated, when reviewing the plaintiff's appeal of a damage award:

This ground of appeal cannot succeed. The trial judge considered the correct factors in arriving at the damages award. He emphasized the nature and frequency of the assaults and their dreadful physiological and psychological effect on the victim. He referred to numerous decisions of a similar nature, in order to arrive at a fair figure. No basis for interfering with his award of general and aggravated damages has been made out (para. 89).

The trial judge will determine the unique effects of the abuse on the victim. If a link is established between the abuse and the damage, the plaintiff is compensated for the damage. In IAP, the "points chart" establishes correlations between the abuse and resulting compensation that are not supported by legal principles.

Under the proposed process, the adjudicator is bound by the points chart. This chart assigns differing numbers of points for particular types of sexual abuse. For example, if the victim endured one or more incidents of penetration with an object, the adjudicator would award them compensation points in the range of 36 - 44. If they endured one or more incidents of digital penetration, the adjudicator would award them compensation points in the range of 26 - 35. This "points system" creates a disturbing distinction between the perpetrator's methods of penetration for an incident of sexual abuse. Compensation on these grounds is degrading to the victims. It treats abused aboriginal children like objects whose pain and suffering can be pigeonholed for bureaucratic convenience into a tidy chart. This approach does not accord with the honour of the Crown and must be rejected. The points chart distinctions also run contrary to Canadian law. The jurisprudence does not simply tally up the number and precise nature of each perverse assault. Rather it assesses to the degree possible, the extent of damage caused by the defendant's wrongful conduct.

In *JRS v Glendinning*, [2004] OJ No. 285, the court awarded in excess of around \$450,000 in damages to two young boys who were sexually assaulted by a Priest. This included approximately \$250,000 in past and future income loss and

no award for the cost of future care. The Priest befriended the boys, and sexually assaulted them over a period of 5 years. The assaults included fondling, masturbation and oral sex.

The boys did not endure penetrative assaults, but were severely affected by the abuse. One became an abuser, while the other became a prostitute. The trial judge awarded considerable damages to place the victims in a position they would have been in had the abuse not occurred to the extent that this could be achieved through a monetary award. If these plaintiffs entered the complex track of the IAP to resolve their claim, they would have received considerably less than the Court awarded.

The reformed ADR process provides claimants with the opportunity to pursue actual income loss claims. In the process, the amount awarded for actual income loss is not fixed to the compensation tables. The claimant must provide evidence showing income loss to the adjudicators. If this income loss can be linked to the abuse, the adjudicators will directly compensate for that loss. The adjudicator's decision will accord with legal principles. There is no reason that legal principles cannot form the basis of calculating compensation for other heads of damage.

Further, the IAP process will not provide an award for punitive damages. Punitive damages are awarded against the abuser as a punishment. It is a punishment for "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour", *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, at para. 94. A court may find that Canada's or the Churches' actions reached this level of misconduct and accordingly award punitive damages. Under the proposed resolution model, even if such gross misconduct existed, claimants can not pursue a claim for punitive damages. Again we must ask what interest Canada has in not affording aboriginal victims of childhood sexual abuse the full slate of remedies available at common law.

The AIP tells survivors that if you want the CEP then you must bind yourself to a process that is not in accordance with basic principles of Canadian law. It would be fundamentally wrong for Canada to proceed down this road. The proposed ADR process must be revised to reflect basic principles of Canadian law and basic human decency. The ADR approach must be made truly optional, with the CEP available to survivors who seek resolution of their claims in the Courts.

V. Survivors Only Ability to Access the Courts is Fettered By the Chief Adjudicator

Under limited circumstances, an IAP claimant may request the Chief Adjudicator to grant them access to the court to pursue their claim. Before this is done, the Chief Adjudicator must be satisfied that sufficient evidence exists that:

- the claimant has an actual income loss or consequential loss of opportunity claim that may exceed the maximum offered by ADR.

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- the claimant has suffered catastrophic physical harms such that Court awarded compensation may exceed the maximum permitted under AIP.
 - in an “undifferentiated abuse” claim, the evidence is so complex and extensive that a court room would be a more appropriate forum.

Undifferentiated abuse is defined as other wrongful acts apart from sexual or physical abuse that were committed by adults and have caused significant psychological harm to the victim.

This provision for access to the court acknowledges the limits of the IAP. A claimant in the process may not be sufficiently compensated for certain claims, specifically when there has been significant harm to them.

Under the proposed IAP, however, the Chief Adjudicator has the sole power to decide whether the claimant has access to the court. If the Chief Adjudicator refuses this access, the claimant has no alternative but to accept the compensation offered from the IAP, even if the compensation is inadequate. Aboriginal victims of abuse should enjoy unfettered access to the Canadian court system.

VI. The AIP Denies Aboriginal Canadians Basic Legal Protections Available to All Other Canadians

The AIP proposes implementation by way of a class action lawsuit. All former students who do not wish to participate in the class action lawsuit would, the AIP states be permitted to opt-out of the proposed resolution. Unless a former student opts-out however, he or she would be considered to be part of the class action lawsuit.

The AIP, therefore, proposes to place time limits upon victims of sexual abuse. This approach is at odds with Canadian law. Canadian law both statutory and common law, establishes that the tort of childhood sexual abuse is largely unaffected by limitation periods. Victims of childhood sexual abuse are able to pursue civil claims if and when they are ready to do so. The law recognizes the shame and secrecy involved in sexual abuse.

In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, Justice LaForest, in writing for the majority, stated:

What is more, I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse. Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community.

Thus the Supreme Court of Canada has acknowledged that it often takes claimants a longer time to link the abuse with the harm caused. The view that childhood sexual claims should never be time barred was enshrined in *British Columbia Limitation Act*.

In the AIP, the opt-out period undermines the common law and statutory protections afforded to those victims of childhood sexual abuse who happen to be aboriginal. Within the time period proposed by the AIP, victims of sexual abuse in residential school must choose whether to receive the CEP. If they receive the CEP, they will no longer be able to take their abuse claims to court.

If they have not come to terms with the sexual abuse and its effects, the AIP proposes that it be presumed victims have chosen to waive their legal claims. In affording these individuals with the legal protections that any victims of childhood sexual assault are entitled to survivors should be given the opportunity to opt out of the agreement when they are ready and if they choose to.

VII. Redressing the Loss of Language and Culture

The AIP does not deal with the damages that arose from the core purpose of the Indian Residential Schools. Indian Residential schools were meant to assimilate aboriginal children. Generations of children were punished for speaking their own language by a system that sought to destroy their aboriginal heritage.

The AIP does not redress residential schools' impacts on aboriginal languages and cultures. This is a serious oversight. The AIP should propose funding programs to promote and help rebuild the cultures that the school system sought to destroy. The resolution to the Indian Residential School legacy should address this oversight.

VIII. Conclusion

Former students have been waiting since they were children for the Canadian government to redress the wrongs that were inflicted upon them within the walls of Indian Residential Schools. A just resolution to the legacy of Indian Residential Schools must, above all, protect the interests of its survivors. The AIP does not protect these interests. In order to achieve the reconciliation that Canada seeks, Canada must amend the Agreement in Principle to provide a just resolution to the residential school legacy.

The following changes are required:

- The AIP must be amended to provide the CEP to all survivors, even if they decide to pursue their claims through litigation.
- The proposed ADR process must be reformed. The process must remove the degrading and unprincipled "points system" in favour of a determination of damages in accordance with proper legal principles.

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- The ADR must remove the proposed opt-out period. Victims of childhood sexual abuse must be allowed to address their legal claims when they are ready to do so. They should be given the freedom to opt-in to the resolution when and if they are ready to do so.
 - The AIP must redress the damage that residential schools had on aboriginal languages and cultures.

We invite you to show real courage, leadership and commitment in dealing with Canada's darkest chapter in its history so that all survivors will be treated fairly and honourably. We look forward to hearing from you.

Yours truly,

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cc: Phil Fontaine, Assembly of First Nations
Grand Chief Edward John, First Nations Summit
Chief Stewart Phillip, Union of B.C. Indian Chiefs