

Assessing the Right of Forcibly Separated Romani Families to Compensation: Lessons from the Canadian Experience

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HISTORY shows that members of minority groups have been targeted by government practices, both official and unofficial, which appear to aim at the destruction of family units and minority culture. Being Canadian, the Canadian government's history with regard to its treatment of members of Native Canadian groups typifies this notion for me. After having worked in Europe for 7 years on Roma rights issues, I see many parallels which can be drawn between the experiences of Native Canadians and Roma in Europe.

With specific regard to the policies targeting and the treatment of Native Canadian children, striking similarities can be seen between the Canadian and the European experience. This article offers an exploration of Canada's residential schools for Native Canadian children, its parallels with regard to child protection practices targeting Roma in Europe, and seeks to build the case for compensation for Romani families forcibly separated as a result of child protection systems which can be seen to directly and indirectly discriminate against Roma.

The History of Canada's Indian Residential Schools²

Until very recently in Canada, a system of residential schools for Native Canadian children was operated by the government and various church groups. This system grew out of the missionary endeavours of church groups as Canada

was "discovered". Children were forcibly taken from their families and placed in the schools.

In the mid-1600s, the first boarding schools for native youth were established in what was then New France by several religious groups but these efforts were abandoned by 1680. Between 1820 and 1840, residential schools were again established by Protestant, Catholic, Anglican and Methodist church groups. At this time, the Imperial Government was granted money for the maintenance of these schools on the basis of inspections and reports provided by the school administration. From as early as the 1850's government policy moved in direction of assimilation through education. Children were discouraged and even punished from speaking in their native languages, and contact with their families was infrequent.

In 1867, Canada became a country and the education of Native Canadians became the responsibility of the federal government. In 1874, the Canadian government became involved in the development and administration of the system of Indian residential schools. In that same decade, the government began to operate industrial boarding schools where young native children could learn trades from the age of 14.

In 1920, the Indian Act was amended making school attendance mandatory for all Native Canadian children between the ages of 7 and 15. Police officers began enforcing the attendance of Native Canadian children at school, and many children coming from

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² This section contains information available through Indian Residential School Resolution Canada (<http://www.irsr-rqpi.gc.ca/>) and the Canadian Broadcasting Corporation's series "A Lost Heritage: Canada's Residential Schools". Available online at: http://archives.cbc.ca/IDD-1-70-692/disasters_tragedies/residential_schools/.

areas with no school nearby were placed in residential schools where they lived from September until June of every year. Indian residential schools were located in most provinces and all territories.³

Beginning in the middle of the 1940s, a very small movement against the residential schools began and the Anglican Church which operated many schools announced an investigation into its work with Native Canadians and residential schools, and recommended new classes on Native Canadian history be taught in the schools. From 1948, the 40-year period of integrating Native and non-Native schools began. Around that time, the director of the Indian Affairs Bureau recommended that residential school attendance be restricted to orphans, children whose home conditions were undesirable and children who live in areas where it is not possible to attend day schools.

Towards the end of the 1950s, the demolition of the residential school system was recommended at the Fourth Conference of Regional Inspectors of Indian Schools. However, it was subsequently acknowledged that the residential schools were necessary in some cases. In this decade, the number of pupils enrolled in the residential schools rose by 50% to 37,000 in approximately 130 schools.

On 1 April 1969, the Canadian government, through the Department of Indian Affairs and Northern Development (DIAND), assumed complete responsibility for the operation of the Indian residential school system. Church groups continued to be involved in the running of most schools for many years. At this time, residential schools were noted to be a special service only and parental consent became a requirement for the placement of a child in this type of school. According to the Canadian government, 60% of Native Canadian students were enrolled in provincial schools at that time. Between 1970 and 1971, DIAND decided to close the residential schools as soon as practically possible. By 1979, only 15 residential schools continued to operate. The last federally-run residential school closed in 1996.

In the 1970s and 1980s, the Canadian government placed increasing emphasis on native control over Native Canadian educational matters, as well as on support for the increased role of Native professionals in the education system, through teacher training support and other actions.

Legal Claims and the Canadian Government's Response

In 1990, Phil Fontaine, then-leader of the Association of Manitoba Chiefs and a former residential school pupil, was the first former residential school pupil to file a claim against the government, but since then over 12,000 claims related to various forms of abuse, as well as destruction of culture and forcible confinement, amongst others, have been filed against the Canadian government and various churches.

In 1991 the Canadian government established the Royal Commission on Aboriginal Peoples, which received massive amounts of information about people's personal experiences in the Indian residential schools. Beginning in 1993, various churches begin to apologise to Canada's First Nations People. In 1996, the Commission issued its final report, containing over 440 recommendations for changes in the relationships between Aboriginal people, non-Aboriginal people and the government of Canada.

On 7 January 1998, Jane Stewart, Minister for Indian Affairs, formally and publicly apologised to those persons who suffered in Indian residential schools on behalf of the Canadian government. On the same day, Minister Stewart made public "Gathering Strength: Canada's Aboriginal Action Plan", the government's long-term policy response to the report of the Royal Commission on Aboriginal Peoples. Gathering Strength includes an apology to those who suffered in residential schools and acknowledgement of the government's role in the development and administration of the schools, in the "Statement of Reconciliation: Learning from the Past".

³ *Prince Edward Island, Newfoundland and New Brunswick were exceptions.*

CANADA: Statement of Reconciliation: Learning from the Past

As Aboriginal and non-Aboriginal Canadians seek to move forward together in a process of renewal, it is essential that we deal with the legacies of the past affecting the Aboriginal peoples of Canada, including the First Nations, Inuit and Métis. Our purpose is not to rewrite history but, rather, to learn from our past and to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today.

[...]

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.

[...]

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.* [emphasis added] 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.**

In dealing with the legacies of the Residential School system, the Government of Canada proposes to work with First Nations, Inuit and Métis people, the Churches and other interested parties to resolve the longstanding issues that must be addressed. We need to work together on a healing strategy to assist individuals and communities in dealing with the consequences of this sad era of our history.

Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike.

Full text available at: <http://www.irsr-rqpi.gc.ca/english/reconciliation.html>.

At the same time, the government set aside funds for the Aboriginal Healing Foundation, alternative dispute resolution processes and litigation.

Since that time, the government has been dealing with the thousands of claims filed against it and churches. In May 2006, following long negotiations with the lawyers representing former residential school students, the Assembly of First Nations (of which Phil Fontaine is currently National Chief) and the legal counsel representing the churches, the Canadian government approved the Indian Residential Schools Settlement Agreement (IRSSA).⁴

The IRSSA includes the provision of what is called the “Common Experience Payment”. This payment is a lump sum payment to former students who lived at any of the residential schools listed in the Agreement. Former students of the listed school are eligible for payments of \$10,000 for their first year of school plus \$3,000 for each additional year. The government set aside \$1.9 billion for this Fund, with a promise to add additional funds as needed.

Importantly, this payment is for the general harm inflicted by the child’s forced attendance at the school, and does not relate to any specific claims of abuse which may be brought otherwise. These claims are to be dealt with under other provisions of the IRSSA.

In addition, the IRSSA established a 5-year \$125 million endowment for the Aboriginal Healing Foundation, to finance healing programmes for the former students of Indian residential schools and their families. In addition, the Agreement created a Truth and Reconciliation Commission to document and preserve the experiences of affected persons and a Commemoration Fund to support community and national projects.

While not without problems in implementation and delivery, in total, the Canadian government is noted to have committed to over \$5 billion to compensation and reconciliation actions through the Agreement. The Canadian government estimates that around 80,000 former residential school pupils are alive in Canada. Using this figure, funds set aside by the government for individual compensation, healing, commemoration and reconciliation measures average around \$62,500 per person.

Roma Parallels

The targeting of Native Canadian children for placement in special schools was directly aimed at their assimilation. This continuing chapter of Canadian history establishes some interesting and important precedents with regard to justice and compensation for the many years of discrimination and ill-treatment of Roma in Europe. The forced removal of Native Canadian children from their families and their placement in Indian Residential Schools had the effect of destroying many families and has led to segments of generations of Native Canadians who are not prepared to nurture their children or have a normal loving relationship, having grown up in an institutional setting away from their families.⁵ High rates of suicide on some native reserves are linked in part to Canada’s residential school legacy.

In Europe, the results of the experiences of Roma vis-à-vis child protection systems are quite comparable to this. Although in the main not driven by policies of assimilation but rather feelings of distain or ignorance, while most Central and Eastern European governments have not, in recent times, carried out targeted systemic campaigns to remove Romani children from their families and place them in an institutional setting, the impact of

⁴ See: <http://www.irsr-rqpi.gc.ca/english/irssa.html>.

⁵ Canadian Broadcasting Corporation. “A Lost Heritage: Canada’s Residential Schools – Abuse affects the next generation”. Available online at: http://archives.cbc.ca/IDD-1-70-692/disasters_tragedies/residential_schools/.

the child protection framework of many European countries produces similar results nonetheless.⁶

In many countries, the definition of child endangerment is quite broad, referring to criteria such as risks to the moral, physical, intellectual or emotional development of children. Oftentimes, the main reasons for removal can be traced to social and economic conditions in the family, such as low income or substandard housing. Widespread poverty and unemployment plagues Romani communities, many Roma live in substandard housing, experience difficulties in accessing health care and social benefits, and many Romani children face barriers to equal education.

These types of conditions are noted to be subjective in their assessment, with much weight in the evaluation of such conditions dependent on the individual conducting the assessment. At the same time, the majority of social workers in most countries are non-Romani individuals, and anti-Romani sentiment runs strong in Europe.

Many Romani families therefore find themselves under the scrutiny of (probably) non-Romani child protection workers who are additionally overburdened and are not able to effectively provide social support to prevent the necessity to remove children from their families. As a result, Romani children are noted to be disproportionately

represented in state care in many countries, although this was not necessarily the intended effect of the legal system of child protection.

Considering European Legal Experience

Recent judgments by the European Court of Human Rights point to the responsibility of the state in matters pertaining to child protection and with regard to the indirect, discriminatory effects of its law and policy.

In the case *Wallova and Walla v. The Czech Republic*, the European Court found the Czech government in violation of the right to family life (Article 8 of the European Convention on Human Rights) in a case concerning the placement of children in state institutions.⁷ In its judgment, the Court recalled that the only reason that the parents could not care adequately for their children was the fact that the family was large (5 children) and that, due to the family's poverty, they could not find an adequate house. The Court noted that a parent being together with his or her child constitutes a fundamental element of family life.⁸ The Court also noted that the removal of the children in the instant case was grave and that the authorities should have addressed the problem of lack of means by adopting less onerous measures than the total separation of the family.⁹

European Court of Human Rights on Child Protection

On 26 October 2006, the European Court of Human Rights (ECtHR) issued a judgment against the Czech government under Article 8 (right to family life) in the case *Wallova and Walla v. Czech Republic*. The case concerned the assignment of children to state institutions. According to the judgment, domestic courts admitted that effectively the only reason that the family could not

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⁶ Several Western European countries, including Switzerland, however have very different histories, where past governments more or less directly supported targeted assimilation-oriented projects to take Romani and Traveler children from their families and place them in children's homes or with foster parents, in an effort to stop the traveling lifestyle of the children's families.

⁷ *European Court of Human Rights. 26 October 2006. Wallova and Walla v. The Czech Republic. Judgment available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=4901017&skin=hudoc-en&action=similar&portal=hbk&Item=3&similar=frenchjudgement>.*

⁸ *Ibid*, Paragraph 68.

⁹ *Ibid*, Paragraphs 70 – 73.

care adequately for their children was the fact that the family was large (5 children) and that, due to the family's poverty, they could not find an adequate house.

The ECtHR noted that, according to its jurisprudence, for a parent to be together with his / her child constitutes "a fundamental element of family life" (paragraph 68). The Court noted that the state interference in the instant case was grave, stating that the "breakup of a family is a very serious interference" and that such an interference should serve the child's interests and be premised on weighted and solid considerations (paragraph 70). In the Court's opinion, the problem was essentially one of lack of means and the authorities should have addressed it by adopting less onerous measures than the "total separation of the family" (paragraphs 72 and 73).

In its examination of the duties of special protection authorities, the Court found that the role of such authorities is "[...] precisely to help persons that face difficulties and who do not have the knowledge of how the system functions, provide them guidance when they are filling applications/framing their requests, advise them, among others, in relation to the different social benefits available to them, inform them of the possibilities in acquiring social housing or other measures in order to overcome their difficulties" (paragraph 74). In the instant case, however, the Court found that the authorities contented themselves with merely observing the family's efforts to overcome the difficulties they faced and in the end, reacted by placing their children in state care. The stay of children in state care was then prolonged without the authorities regularly assessing whether the applicants had made any progress in their efforts to address the problems they faced (paragraph 76).

The Court noted that although the reasons the social protection authorities invoked for placing the children in state care were pertinent, they were not sufficient and that the authorities had not made any "serious efforts" in order to help the applicants overcome the obstacles they faced and be reunited with their children as soon as possible (paragraph 78).

Judgment available online at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=2926469&skin=hudoc-en&action=similar&portal=hbkm&Item=3&similar=frenchjudgement>.

The Court found the role of child protection authorities to be "[...] precisely to help persons that face difficulties and who do not have the knowledge of how the system functions, provide them guidance when they are filling applications/framing their requests, advise them, among others, in relation to the different social benefits available to them, inform them of the possibilities in acquiring social housing or other measures in order to overcome their difficulties." However, in this case, the Court found that the authorities had satisfied themselves with merely observing the family's efforts and in the end, reacted by placing their children in state care.¹⁰

¹⁰ *Ibid*, Paragraphs 74 and 76.

¹¹ *Ibid*, Paragraph 78.

¹² *European Court of Human Rights. 13 November 2007. D.H. and others v. The Czech Republic. Judgment available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%22THE%20CZECH%20REPUBLIC%22%20%7C%20D.H.%20%7C%20others&sessionid=4901017&skin=hudoc-en>.*

The Court established that the material conditions for which the child protection authorities had removed the children from their parents' care were not sufficient and that the authorities had not made any "serious efforts" in order to help the family overcome the obstacles they faced.¹¹

Further, in November 2007, the Grand Chamber of the European Court made clear that governments are accountable for indirect forms of discrimination in a case related to the segregated education of Romani children.¹² In that decision, the Court stated that where it is shown that legislation produces an indirectly

discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities.¹³ In such cases, where the government is not able to establish that the impact of the law was based on objective reasons unrelated to ground of discrimination claimed, individual cases do not necessarily need to be examined and the respondent government would be in violation of the ban on discrimination.¹⁴

In this case, the respondent government was ordered to pay monetary compensation to the applicants in non-pecuniary damages for the frustrations they had experienced as a result of the indirect discrimination to which they were victim.

Implications for European Roma Affected by Child Protection Matters

The actions of the Canadian government present very pertinent examples for European governments when it comes to the treatment of marginalised minority groups. When analysing child protection legislation and its impacts in different, particularly Central and Eastern, European countries, it is becoming increasingly clear that this legislation disproportionately impacts Romani communities and Romani children negatively, though much more research remains to be undertaken. The results of the disproportionate placement of Romani children in state care may not have been adequately studied either, but one can see from looking at countries with similar histories, like Canada, what the results are likely to look like: Families and individuals destroyed or scarred, increasing social problems amongst the targeted community, the list goes on.

Looking further at the increasing acknowledgement of the responsibility of European

governments for the effects of indirectly discriminatory practices under EU legislation and within the jurisprudence of the European Court of Human Rights, one need not delve into their imagination to see the obvious: Governments are responsible for child protection legislation which disparately impacts Romani communities.

As the concepts of discrimination develop in Europe and intergovernmental institutions and tribunals continue to expand governmental responsibility for remedying discrimination in both its direct and indirect forms, the Canadian government's response to its legacy of forcibly removing Native Canadian children from their families and placing them in residential schools provides some good lessons.

First and foremost, the Canadian government's public apology to Native Canadians is a sign of great strength. It was an important step for both members of Native Canadian communities and the government itself, to acknowledge the past and to begin moving along the path to the future. In addition, for individuals harmed or affected by certain practices, public recognition of the government's responsibility for the overt or covert mistreatment of a particular group is often the most important component in securing a sense of justice.¹⁵

Second, the Common Experience Payment in the Canadian compensation package is a key component of this discussion. The payment is a general payment to individuals forcibly removed from their family and placed in a residential school, and not linked to any specific abuse or harm experienced by pupils in the residential schools. It is offered by the Canadian government as compensation to individuals and families forcibly separated, as are a disproportionate number of Romani children

¹³ *Ibid*, Paragraph 194.

¹⁴ *Ibid*, Paragraph 209.

¹⁵ *Here, I recall listening to several colleagues recount discussions with Romani applicants in a case before the European Court of Human Rights against the Romanian government, in which the government offered the applicants a cash settlement to end the case, without any public recognition of responsibility on the part of the government. As my colleagues discussed the Romanian government's offer, the applicants reportedly refused the government's cash offer outright, insisting that they wanted justice – a public recognition by the government of its responsibility.*

and families in the application of apparently neutral child protection laws.

Although not without problems and likely excessive in comparison to what could constitute adequate remedy for the indirect effects of European child protection systems for Roma,

the compensation package for Native Canadian children forcibly removed from their families provides some good and concrete examples to European governments as to how they might start addressing and compensating Romani families directly or indirectly targeted in child protection matters.