

To: Members of GCE, Commissioners to 38th General Council, ANCC Executive, BC Native Ministries Council, etc

From: James Scott and Brian Thorpe of behalf of the Residential School Steering Committee

Baxter Class Action

Introduction: The General Council Executive was asked at its November 2003 meeting to give guidance to the Residential Schools Steering Committee with regard to the United Church's response to the Baxter class action. This lawsuit, launched in Ontario, seeks to represent all survivors of the federal residential schools system across the country as well as parents and children of survivors.

Also before the General Council Executive was the *Building Towards Right Relations* document, first introduced at General Council 38. This document describes our vision for reconciliation with Aboriginal peoples and proposes 6 principles to guide the church's decision-making related to addressing the legacy of residential schools.

It is a complex and difficult thing to work towards healing and reconciliation when much of the process takes place through the courts, an adversarial and legalistic context. The Residential School Steering Committee has prepared this communication document in order to provide information to the church about our response to the Baxter class action and about the 6 principles adopted by the General Council Executive to guide our work.

Background: The Baxter class action seeks damages for a wide range of harms including physical, emotional, psychological and sexual abuse; loss of language and culture; deprivation of love and guidance from their families; inadequate education; and, inadequate living conditions. Compensation is sought for both the individual residential school survivors themselves but also for affected family members.

The plaintiffs who launched the class action sued only the federal government. However, the federal government has, in turn, named church organizations as third parties in this action.

As one of the defendants, the United Church was required by the court to indicate its legal position with respect to a number of questions arising from the action. These were:

- Will we defend the third party claim of the Crown (government)? *In other words, will the United Church oppose the claims made by the Crown upon which our inclusion in the class action is based?*

- Will we oppose the certification of this class action lawsuit by the court? *In other words, do we feel that this lawsuit fits the definition of a class action?*

- Will we defend against the main charges and allegations made in the lawsuit? *In other words, do we accept or deny the claims made against the church in the class action?*

These were difficult questions. Bearing in mind the apologies, the United Church does not want to avoid or minimize its responsibility (or appear to do so), yet at the same time the church does not accept all the allegations made against it in the class action lawsuit.

The Residential School Steering Committee sought advice from several members of the All Native Circle Conference and B.C. Native Ministries. They expressed concern that the interests of the survivors be paramount in decisions made by the church and that we not lose sight of the principles developed by the Steering Committee, particularly with regard to claims related to loss

of language and culture.

Before adopting an initial legal position (later ratified by the General Council Executive), we examined the questions using various lenses, including our theological understandings, the six principles of the *Building Towards Right Relations* document, the context of our 1986 and 1998 apologies, the input of our Aboriginal communities, and the advice of our lawyers.

The six principles are the following:

1) Anti-racism and Decolonization

“The church’s response to the legacy of residential schools must be framed by a commitment to challenge the ideology of racism and an acknowledgement of our role in the colonization of aboriginal peoples which manifested this racism.”

2) Holistic Approach

“The church’s response to the legacy of residential schools must be comprehensive and must address the loss of language, culture and spirituality as well as sexual and physical abuse within the system.”

3) Full Participation of Aboriginal People

“Any agreement between church and government that affects the rights of survivors of residential schools or of aboriginal peoples in general needs to include the participation of aboriginal peoples in the process leading to an agreement.”

4) Whole Community Involvement

“With regard to the impacts of residential schools there must be an acknowledgement that these are communal as well as individual and that they are intergenerational.”

5) Healing and Education

“Addressing the legacy of residential schools must always include elements of support for healing initiatives within aboriginal communities and a recognition of the need for healing and education within the non-aboriginal community.”

6) Building Right Relations

“In all that we do in relation to our responsibility for the residential school system the goal of working towards right relations between aboriginal and non-aboriginal peoples should be uppermost in our thoughts, words and actions.”

Although these principles were developed by the Residential School Steering Committee to guide the United Church in its negotiations with the federal government, they provided a helpful lens through which to look at the question of our response to the Baxter class action.

We were also mindful in developing an initial position for the court that we not tie the hands of the General Council Executive (whose role it would be to make a more formal decision in November) by adopting positions that could not be altered.

Developing our Initial Position: We found ourselves dealing with incredible ethical dilemmas in this regard. These are some of the dilemmas and considerations.

1. Consistency: The conflict between decisions required by our legal system and our need to be principled and consistent in our statements as a church was evident. If we indicate that we will defend against the class action, does it appear that we are denying responsibility for our role in the harm that was done in the residential schools?

From our lawyer’s point of view the requirement to indicate an initial position to the judge is essentially a procedural request to enable the courts to work out schedules. He advised us that

our response was “in no way supposed to advance or put forward the position of the Church. Rather, it is simply to advise the Court, without argument, of the position that the parties intend to take.” From the point of view of the church, it is very problematic to say in writing that we intend to defend the church in a lawsuit if that is not clearly our intent. Yet not to defend excludes us from the legal process and deprives us of the opportunity to own before the court and the plaintiffs our responsibility for the harm done and to articulate the United Church’s own commitment to building right relations.

To further add to this dilemma we were also advised that if we were to say to the court that we were not going to defend any of the issues, we could not, then, come back that we had changed our minds. If we indicated that we would defend, the Church retains the option deciding not to in the future.

2. Comprehensiveness: Central to the Baxter action is a claim for compensation for loss of language and culture as a legacy of the residential schools experience. Since the principles developed by the Steering Committee emphasize the need for the church’s response to the legacy of residential schools to be “holistic,” and address “the loss of language, culture and spirituality as well as sexual and physical abuse within the system,” it would seem highly problematic to oppose the main action of this class action which includes just such holistic concerns. Our lawyer reminded us that the issue of whether or not language and culture will be considered “causes of action” in the Canadian legal system will not likely be decided by the Baxter class action. Currently in the courts, there are other actions that are much further along which will test the court’s readiness to consider loss of language and culture as a cause of action. Additionally, by lumping all plaintiffs together a class action may not be the best vehicle for differentiating and respecting degrees or experiences of harm or various levels of responsibility from school to school, decade to decade, student to student.

3. Immediacy: One of the strongest concerns expressed by members of ANCC and BC Native Ministries was that the church act in the best interest of survivors. What indeed is in the best interest of survivors? On the one hand, the Baxter class action is supported by a number of plaintiffs with claims against church and government. The Assembly of First Nations has expressed its support for this action. On the other hand, the action is also being vigorously opposed by other plaintiffs with claims against church and government. We also recognized that, if this class action is certified, all other individual actions would be suspended. For some individual survivors, particularly those who are elderly, this would not be in their best interest. The class action itself could take 5-10 years to reach resolution. Further, a class action may even damage the claims of some plaintiffs by watering down and generalizing the outcome. The class action represents all survivors of residential schools unless they individually opt out.

4. Truth-telling: Since it was the intent of the plaintiffs to sue only the government, it would appear that there would be little need for the church to become involved in defense of the main motion. With regard to this our lawyer reminded us of two issues. First, while the plaintiffs did not name church organizations their statements of claim do make allegations against the church organizations. By not being present, we would be turning the defense of the claims over to the government. There would be no incentive on the part of government to defend church organizations and, indeed, it would leave the government free to minimize its own involvement in the residential school system. Second, the claims related to staff at the schools are broad and defamatory. They do not take into account what we know to be true that, within a system that was profoundly wrong, there were individual workers who were better than the system. Some of these individuals were present at the call of their church. We do need to address the question of our current responsibility to defend the reputation of these folk.

The United Church's Initial Position: As a result of the foregoing considerations, the Residential Schools Steering Committee communicated to the court through our lawyer the following position on September 4, 2003:

1. The United Church will defend the Third Party Claim of the Crown. This means that the church wants the opportunity in court to refute the government's claim that the church has primary responsibility for the abuses of the Indian residential schools. It does not mean that we are denying any responsibility.

2. The United Church will defend the Main Action. This means that the church does not accept all the blanket allegations made against it in the class action and would like a voice in the court process to take meaningful responsibility.

3. The United Church will oppose certification of the proposed class action, and in this regard, proposes to fully participate in the Certification Motion. This means that the United Church does not believe that the class action meets the test for certification as a class action and that we do not feel that the individual experiences of claimants can best be dealt with through a class action.

4. The United Church will oppose the Plaintiff's Motion to stay the Third Party Actions. This means that the United Church favours having the liability issues between the church entities and the government determined at the same time as the main action (as in the Blackwater case).

The General Council Executive endorsed this position in November 2003. It also adopted the six principles as those that should guide all aspects of the work of the church to address the legacy of residential schools. It directed that these decisions be communicated to the whole church.

While the legal process unfolds, the United Church will continue to seek to settle its own cases in a timely and non-adversarial manner.