

From Reconciliation to Reparations

Exploiting a Noble Idea

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Executive Summary

Payment of reparations to historically mistreated racial minorities, especially people of African origin, is a lively topic of discussion in the United States and other countries where slavery was institutionalized. In Canada, reparations have been paid to First Nations for almost two decades under the somewhat misleading heading of Reconciliation. The expansion of reparations has been driven by developments in the judicial process, especially the use of class-action lawsuits and the instructions for Justice Canada to negotiate rather than litigate. And, aside from the large sums paid out in compensation, there are two serious political consequences: elected representatives have no meaningful oversight of the negotiations and, contrary to Canadian legal tradition, individual claims of mistreatment are not merely leading to compensation but are being used to overturn core government policies enacted by previous Parliaments.

Reparations began with the Indian Residential Schools Settlement Agreement, finalized in 2007, which awarded almost \$5 billion (2007 dollars) in individual payments to those who had attended the schools. Class actions regarding other forms of education were launched, but the federal Justice Department resisted these claims until 2015, when Justin Trudeau's government came to power. The new Minister of Justice, Jodi Wilson-Raybould, instructed departmental lawyers to seek negotiated settlements instead of litigating vigorously. These instructions were formalized in her "Litigation Guidelines," which were issued in 2019 and are still in effect.

Under the new guidelines, payouts for claims based on education other than Canadian residential schools followed quickly. They included those who had attended residential schools in Newfoundland & Labrador, even though Canada had had no role in running these schools; day schools on reserves, even though children who attended them had continued to live with their families; "day scholars," who had attended residential schools during the day while still living at home; and "boarding home" students, who had lived with families in town while attending public school. The claims of Métis who attended residential schools are still being litigated.

Claims also spread quickly beyond the area of education. The "Sixties Scoop" settlement paid compensation to Indian children who had been "adopted out," that is, given for adoption to non-native parents. The biggest settlement to date is \$43.3 billion for children on Indian reserves taken into foster care by welfare authorities. Of this amount, \$23.3 billion is for individual compensation to children and their families and \$20 billion for improvement to family services. A new claim for off-reserve native children is yet to be negotiated but could also yield a very large pay-out.

Also worthy of mention is a claim by those who were treated in Indian hospitals (still not resolved) as well as the drinking-water settlement, which set aside \$1.5 billion for individual compensation and \$5.4 billion for improvement of the water supply on Indian reserves. Other claims in earlier states of development have arisen from a variety of grievances—alleged mistreatment

of Indian employees of Indian Oil and Gas Canada; involuntary sterilization of Indian women in Saskatchewan; failure to adjust Treaty 1 annuities (Manitoba) for inflation and economic growth; and the impact of foster care on Indian bands (First Nations), as distinct from the impact on individuals and families.

The cost of claims approved thus far is \$27.8 billion in payments to individuals and \$31.9 billion for payments to organizations and promises of improved services, for a total of almost \$60 billion (2023 dollars). Claims now in progress are likely to add significantly to these sums.

This judicially driven approach to reparations is undesirable for several reasons. Large expenditures are being negotiated between the Justice Department and counsel for First Nations and then approved by the courts. Parliament is almost entirely cut out of the process, and elected representatives have no meaningful oversight. Contrary to Canadian legal tradition, individual claims of mistreatment are not merely leading to compensation but are being used to overturn core government policies enacted by previous Parliaments. Examples of overturned policies include all modes of formal education, such as day schools, residential schools, and public schools; child protection through both provincial and federal agencies; and provision of clean drinking water on Indian reserves. The damage is likely to continue as long as the 2019 “Litigation Guidelines” remain in effect because they lead to politically inspired negotiations rather than a thorough examination of claims in court.

Introduction

Paying reparations to designated racial and ethnic groups for historical injustice is a hotly debated issue in contemporary public policy. The liveliest discussion today is in the United States and other countries where slavery was at one time institutionalized (Murawski, 2023). However, appointed commissions in the state of California and city of San Francisco have produced expensive proposals for payments to African Americans, even though slavery was never a legal institution in California. The committee appointed to study the matter in San Francisco has proposed giving a grant of \$5 million to each qualifying Black resident, plus a guaranteed annual income of \$97,000 for the next 250 years (Chavez and Gamble, 2023). While this proposal, which would bankrupt the city, is unlikely to be approved by the state legislature, it shows how high the stakes in the reparations debate have become.¹

If Black reparations go ahead on a wide scale in the United States, there will almost certainly be demands for Black reparations in Canada. Parliament has already declared August 1 to be Emancipation Day, and Black leaders are now demanding an apology for slavery (Canadian Press, 2022a). Reparations to Canadians of African descent would be the logical next step. However, the issue of reparations is not limited to people of African descent. The Mulroney government authorized payments to Japanese Canadians because of their relocation in World War II, and the Harper government compensated Chinese Canadians for the exclusionary head tax (though few were left alive to receive it) (Morse, 2008: 272–274). But the biggest issue of reparations in Canada going forward will concern Indigenous or Aboriginal Canadians: Métis, Inuit, and above all First Nations (Indians).

American scholar Alfred Brophy has itemized the main elements that usually make up a reparations package: apologies, truth commissions, civil rights legislation, community building, and payments to individuals (Brophy, 2006: 10–18). Canada has adopted all these several times over as Indigenous policies, but the most distinctive Canadian contribution is a reparations payments strategy driven by the judicial process, chiefly but not only through class actions. Yet the legal process proposes but the executive government disposes. Crucially, the policy of the federal executive government since 2015 has been to offer only token opposition to Indigenous claims before offering to negotiate a settlement.

Several contrasts between Canada and the United States are obvious. In the United States, reparations have usually been approved by legislative bodies, whether state or local, whereas in Canada the judicial and executive branches have dominated. Also, African Americans' demands for reparations have been made to states and cities, not for any intrinsic reason, but because

1. In 2023, the City of Victoria, perhaps inspired by events in San Francisco, instituted a small-scale reparations program for local First Nations, paying \$200,000 a year into a Reconciliation Contribution Fund and encouraging property taxpayers to make voluntary contributions (Helps, 2023).

chances of success in Congress have seemed dim. In contrast, Indigenous demands in Canada have been made against the federal government, reflecting federal jurisdiction over Indians and Indian lands (Canada, 1867: s. 91(24)). Another difference is that the growth of Canadian reparations has depended on seeking compensation for highly specific claims, which allows further claims to be made once the original one has been satisfied. This contrasts with American practice, where offers of reparations are usually for a large set of historical grievances involving slavery plus subsequent forms of racial discrimination. Finally, it should be noted that reparations to African Americans are always debated and dispersed in terms of payments to individuals. Individuals receive compensatory payments in Canada, too, but payments to collective entities are large and getting larger here because Canadian Indigenous peoples, unlike African Americans, have a continuing existence as collective entities (TAS, 2010).

The Canadian practice appears to seek compensation for damages for individuals, but the government's unwillingness to contest these claims, at least since 2015, has turned them into a kind of *de facto* reparations. Claims are made in virtue of alleged historical mistreatment under this or that federal program; but when the claims are not contested, and no proof is sought of actual damages, they become the equivalent of reparations—but never discussed in the legislature and ratified by public opinion. In effect, Canada is enacting reparations by stealth.

In the Beginning

Indian Residential Schools (IRS) had enjoyed a relatively favourable image in Canadian public opinion until 1990, when Manitoba chief Phil Fontaine was interviewed by Barbara Frum on the CBC about physical and sexual abuse that he claimed to have suffered at the Fort Alexander Indian Residential School (CBC Archives, 1990). Similar complaints then started to come forward from many directions, while historians wrote influential books criticizing the system (Miller; 1996; Milloy, 1999). The Report of the Royal Commission on Aboriginal Peoples devoted a chapter to the topic. In the 1990s, the churches that had run the schools with government funding delivered public apologies, as did the Minister of Indian Affairs in 1998 (but not Prime Minister Jean Chrétien).

By the turn of the century, the courts were swamped with IRS litigation, both class actions and individual claims for compensation. At the normal pace of the judicial process, it would have taken decades to resolve all the claims. Meanwhile, the churches were afraid of being bankrupted and were begging the federal government for a solution. Protracted negotiations between federal representatives and the Assembly of First Nations (AFN), led by Phil Fontaine, resulted in the Indian Residential Schools Settlement Agreement. It was signed by Prime Minister Paul Martin in late November 2005, on the eve of his government's defeat in the House of Commons (Miller, 2017: chs. 5–6; Carson, 2014: 169–174).

The Conservative Party of Canada, led by Stephen Harper, won the ensuing election and formed a minority government in January 2006. It would now be up to Harper and the Conservatives to implement the Agreement, even though they had had no role in negotiating it.² Thus, the Conservatives did not come to the table with a well-thought-out position on IRS and compensation for alleged abuses. In the event, Prime Minister Harper decided to accept the IRS Settlement negotiated between the AFN and Paul Martin's government and to implement it as written, but not to go beyond the four corners of the text.

Despite some warnings from the civil service, Harper and his advisors hoped that implementation of the Agreement, combined with a fulsome apology from the prime minister, would mark the end of an era and the beginning of Reconciliation. However, certain features of the Agreement (CIRNAC, 2019b), combined with the vicissitudes of politics, facilitated the proliferation of claims and class actions that we see today, transforming the dream of Reconciliation into the ever-more expensive reality of reparations. The following features of the Agreement are particularly relevant:

2. Personal note: I worked at a high level with Harper and the party from 2001 through 2005 (Flanagan, 2007); to the best of my recollection, the IRS never appeared in any party platform or other documents in those years.

- ∞ There was a Common Experience Payment of \$10,000 for the first year spent in an IRS, plus \$3,000 for each additional year. No demonstration of harm or loss to the individual claimant would be required, only evidence of enrolment. This was a way of handling a multitude of small claims with relative dispatch, but it also bolstered the view that the IRS were horrible places in which everyone suffered. Also, while everyone got compensated, the federal government could continue to maintain that the compensation was not for loss of language and culture, as had been demanded by the AFN.
- ∞ There was also an Independent Assessment Process for claims of physical and sexual abuse, with the amount of compensation proportional to the severity of the abuse. Evidence was required that the claimant and alleged abuser had been at the same school at the same time, but there was no cross examination or weighing of conflicting testimonies. The process was essentially based on the principle of *ipse dixit*. This may have had some justification in terms of minimizing gut-wrenching testimony about sexual and physical abuse, but it left many factual questions unanswered.
- ∞ The Settlement was limited to students who had attended a list of 140 designated IRS funded by the government of Canada. The list did not include IRS that had operated in Newfoundland & Labrador before that province joined Canada in 1949 because Canada had provided no funding to these schools and exercised no control over them. Even after 1949, Canada did not control these schools, though it provided some funding indirectly through the provincial government. The Settlement also excluded boarding schools, sometimes attended by Métis children, which had not received federal funding. And it excluded on-reserve day schools (more numerous than the IRS), which had been funded by Ottawa and operated by the churches subject to federal supervision, but which had not been residential in character.
- ∞ There were collective expenditures on advocacy and commemoration, plus payments to lawyers. The latter became controversial when evidence appeared that some law firms had charged very large fees (Paul, 2017).

Table 1 shows the amounts of compensation authorized by the IRS Settlement (2007 dollars). Additional expenditures on advocacy, commemoration, and legal fees, plus the number of employment hours invested in negotiation, administration, and adjudication, would bring the true cost to well over \$5 billion.

At the time, this was the largest class-action settlement in Canadian history, yet it proved to be the beginning rather than the end of demands for Indigenous reparations. The large number of people who received compensation and the size of the total payment attracted attention and led others to think they might receive compensation for their own grievances. In particular, the omission of schools in Newfoundland & Labrador, day schools, and Métis boarding schools led those groups to turn to the judicial system for further redress. The decision to pay compensation

Table 1: Cost of the Indian Residential Schools Settlement Agreement (2007 dollars)

Type of Payment	Number of Payments	Average Payment	Total
Common Experience	\$79,309	\$20,457	\$1.62 billion
Independent Assessment	\$28,580	\$111,265	\$3.18 billion
Total			\$4.80 billion

Source: CIRNAC, 2019b.

without cross-examining claims or demanding evidence of harm, while perhaps understandable from the point of view of efficiency and compassion, also encouraged further litigation, as did government payment of legal fees. And dedication of money to advocacy and commemoration, while small in comparison to the total paid to individuals, helped to stoke the sense of grievance from which litigation springs.

“Resistance Is Futile”

In the *Star Trek: Voyager* television series, the Borg was a cybernetic organism that assimilated other cultures in its drive to achieve perfection, and “resistance is futile” was the Borg’s slogan. It is an apt metaphor for the mindset that has come to dominate the treatment of Indigenous claims in the Canadian legal process.

In the wake of the IRS Settlement, other groups began pursuing class actions to obtain compensation for alleged historical grievances, but they did not have much success while the Conservatives were in power. Under Prime Minister Harper’s leadership, the Department of Justice pursued its traditional policy of vigorously defending claims against the public purse. Things changed dramatically, however, when the Liberals under Justin Trudeau won a majority in the national election of October 19, 2015, and formed a majority government on November 4. Trudeau appointed Jodi Wilson-Raybould as Minister of Justice, the first status Indian ever to hold that position. That appointment marked an immediate change in the litigation strategy of the Department of Justice. Wilson-Raybould formalized the new approach on January 11, 2019, three days before the Prime Minister shuffled her to the position of Minister of Veterans Affairs, by issuing the Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples. A main theme of the 20 “Litigation Guidelines” was that, in cases of Indigenous rights, the Department of Justice should do everything possible to avoid litigation in favour of other ways of resolving disputes, such as negotiation. Guideline 4 states:

Counsel’s primary goal must be to resolve the issues, using the court process as a last resort and in the narrowest way possible. This is consistent with a counsel’s ongoing obligation to consider means of avoiding or resolving litigation throughout a file’s lifespan. Counsel must engage in these efforts early and often, ensuring that all reasonable avenues for narrowing the issues and settling the dispute are explored (Government of Canada, 2021).

The Directive on Civil Litigation is still in force, even though Wilson-Raybould has been gone from the Justice portfolio since 2019. It is also obvious from the record of the Department after the Liberals came to power that the new litigation strategy was implemented immediately, long before it was formalized and publicized.

Education explosion

The first sign of a shift came with a negotiated settlement of the Newfoundland & Labrador Residential Schools class action, which had begun in 2007 and finally reached the courtroom in September 2015. In November 2015, only three weeks after taking office, the new Liberal government discontinued its legal defence and asked for negotiations. In 2016, a settlement was reached

that provided \$50 million to those who had attended five boarding schools in Newfoundland & Labrador, plus additional money for “healing and commemoration” (CIRNAC, 2019a). Unlike the situation with IRS in the other provinces and territories, Canada had not given money to the schools or supervised their operation, but it had transferred money to the government of Newfoundland & Labrador for Indigenous education. The settlement, though small in comparison to the IRS settlement of 2006, clearly signalled a new receptivity to Indigenous claims about abuse in education. Four more settlements of education-based claims would follow in the years from 2019 to 2023.

First to come was the Federal Indian Day Schools Settlement, announced in March 2019. Six hundred ninety-nine day schools were funded by the federal government between 1863 and 2000, in every province and territory (except Newfoundland & Labrador). It is estimated that about 200,000 students may have attended them at one time or another, in comparison to an estimated 150,000 who ever attended residential schools (in evaluating these numbers, remember that some children may have attended both types of schools at different times). The settlement provided base compensation of \$10,000 for all who had attended a day school, topped off by an additional \$50,000 to \$200,000 for claims of physical and sexual abuse. Like the IRS agreement, evidence of attendance was required, but claims of abuse were not to be cross-examined and did not require corroboration (CIRNAC, 2020; Deachman, 2021).

It has been reported that \$1.47 billion had been set aside for compensating individuals and that 178,161 claims had been filed as of January 3, 2023 (Deer, 2023). This would yield an average payment of about \$82,000, with much variation depending on claims of abuse. There was also an appropriation of \$200 million for the McLean Day Schools Settlement Corporation for healing, commemoration, and perpetuation of language and culture. An additional provision not seen in previous settlements was that compensation could be paid to the estate of claimants who died on or after July 31, 2007.

Residential schools were criticized because they had taken children away from their families and placed them in congregate settings where they allegedly had to endure malnutrition and disease, physical and sexual abuse from staff and older students, and loss of language and culture. Now compensation was being paid to students who, like most other Canadian children, had continued to live at home while they attended school. It was beginning to look as if all formal education for First Nations children would be considered abusive.

Next to come was a settlement of the day scholars class action, announced in 2021. Day scholars did not attend day schools; rather day scholars were Indian children who continued to live at home while attending an IRS, thus not sleeping overnight in dormitories. This was possible because many residential schools were located on Indian reserves, so children who were near the school could continue to live with their parents, while children from farther away would board at the school. According to the settlement agreement, day scholars will receive \$10,000 apiece, without further provision for physical or sexual abuse. Somewhat like the arrangement in the day school settlement, payments could also be made to descendants of claimants who passed

away after May 30, 2005 (Canadian Press, 2021; Deloitte, 2023). The exact number of claimants is not known yet, but it has been estimated to be 15,000 or more, yielding a minimum payout total of \$150 million. As with earlier settlements, there was a provision for \$50 million to be paid to a Day Scholars Revitalization Fund for the usual purposes.

At the very end of 2022 came a negotiated settlement to the Indian Boarding Homes Class Action. This was for Indian students whose expenses had been paid by the federal government to attend public or Catholic schools in town. While in town they would live with local families, hence the name “boarding home students.” It is estimated that perhaps 40,000 Indian students were involved between 1951 and 1992. The program was created when the federal government started to close residential schools after 1950, leaving many children without easy access to any type of Indian school, especially in the higher grades. The settlement, whose total has no cap, provides for a \$10,000 base payment plus an additional payment of \$10,000 to \$200,000 for abuse, which can include physical or sexual abuse in the homes as well as racial discrimination from teachers or other students in the town schools. A lawyer with the firm carrying the class action estimates that the total value of the payout will be about \$2.2 billion in individual payments, plus \$50 million for a foundation (Klein Lawyers, n.d.; Forester, 2023b).

Finally comes the Band Reparations Class Action Settlement, announced in early 2023. This was originally part of the day scholars class action but was sundered because it presented different and more difficult issues. The claimants in this instance are not individuals but 325 Indian bands (First Nations) that signed onto the class action. The settlement provides \$2.8 billion for a 20-year trust fund, independent of government management, that will pay for programs and services benefiting the participant bands (Waddell Phillips, 2023; Forester, 2023c). The theory behind the award is the novel claim that First Nations suffered as communities because of the loss of language and culture suffered by all the Indian children who received formal education in whatever form. In this claim, harm to individuals is totally abandoned as a cause of action. All earlier education class actions had provided for some degree of collective compensation through setting up independent foundations or corporations, but the collective compensation was small compared to the total of individual payments. Here there are no individual payments at all, just one large collective payment.

The Band Reparations settlement may indicate the path of future litigation. The former chief who had initiated the case said that “it was about time” that Canada stepped aside and let First Nations themselves decide how to overcome the harms caused by residential schools (Canadian Press, 2023b). In context, this was praise for transferring public money to First Nations, letting them decide how to spend it with no accountability measures imposed. This will be an attractive model for future class actions because it will simplify certification. The class will be only a few dozen or a few hundred Indian bands, not tens of thousands of individuals. And the negotiated settlement will simply be divided among the bands according to an agreed-upon formula, obviating the need for a complex and lengthy process of enumerating and verifying individual claims.

Table 2 shows the settlement value of the six class actions in which the issue was education. It includes individual and collective payments but not legal fees and administrative costs, which

Table 2: Cost of First Nations' class action settlements involving education (in millions)

Class Action	Year	Nominal Value			Measured in 2023 Dollars		
		Individual Payments	Collective Payments	Total	Individual Payments	Collective Payments	Total
Residential Schools	2006	\$4,800	\$500	\$5,300	\$6,918	\$721	\$7,639
Newfoundland	2016	\$50	?	\$50	\$61	?	\$61
Day Schools	2019	\$1,470	\$200	\$1,670	\$1,700	\$231	\$1,931
Day Scholars	2021	\$150	\$50	\$200	\$167	\$56	\$222
Boarding Home	2022	\$2,200	\$50	\$2,250	\$2,288	\$52	\$2,340
Band Reparations	2023	\$0	\$2,800	\$2,800	\$0	\$2,800	\$2,800
Total		\$8,670	\$3,600	\$12,270	\$11,134	\$3,859	\$14,993

Note: For conversion to 2023 dollars: Statistics Canada (2023); Porter (BMO), 2023; calculations by author.

Sources: Canadian Press, 2021, 2023b; CIRNAC, 2019a, 2020; Deachman, 2021; Deer, 2023; Deloitte, 2023; Forester, 2023b, 2023c; Klein Lawyers, n.d.; Waddell Phillips, 2023; calculations by author.

are harder to pin down. The figures for payments vary in reliability. The numbers for the IRS Settlement Agreement are based on sums already distributed and accounted for, while some others are based on a cap entrenched in the settlement agreement. Still others will require an enumeration of claimants, so that the final total may not be known for years to come. The estimates, however, are accurate enough to provide a reasonable idea of what these class action settlements based on education will cost Canadian taxpayers.

What I have called the “education explosion” has resulted in compensation for practically all First Nations children who received formal education of any type before the contemporary era of self-government. However, there is still a pending issue with Métis children. According to the law, Métis children were not supposed to attend Indian residential schools, though some did get in through the exercise of local discretion. A famous example is Senator James Gladstone, who was born Métis. He was admitted to St. Paul’s Indian Residential School (Anglican) near Cardston, Alberta upon the request of his white grandfather and later attended St. Joseph’s Industrial School (Catholic) near Calgary. He married a woman of the Blood tribe and became registered as a Blood Indian upon his request (Dempsey, 1986). However, most Métis children, if they went to school at all, were sent by their parents to provincial public or Catholic schools or, in some cases, boarding schools run by religious organizations without federal subsidy. Métis “survivors” of the boarding school at Île-à-la-Crosse, Saskatchewan, have launched a class action seeking compensation (Mosleh, 2023). The federal government has resisted Métis claims up till now; but in view of all the concessions made in the past to First Nations, it would not be surprising to see a negotiated settlement in this case. That would probably open a costly new round of school litigation because the Métis, although definitions vary, number in the hundreds of thousands (Flanagan, 2017).

Beyond education—settlements based on other issues

First Nations people with other grievances, to say nothing of the legal profession, soon saw the potential of the class-action model outside the field of education. The first achievement was the Sixties Scoop Settlement, announced in November 2017. It provided \$750 million in payments to First Nations children, now adults, who had been “adopted out” (that is, adopted by non-Indigenous parents) between 1959 and 1991. As of January 2023, 20,992 claims had been approved out of 34,785 received. After all claims are dealt with, the payout is expected to be about \$25,000 apiece. There was also provision for payment to the estates of deceased claimants, an appropriation of \$50 million for a commemorative foundation, and payment of \$75 million in legal fees.

Though this was not an educational issue as such, there was an indirect link. Adoption of native children became much more frequent in Canada after a 1951 amendment to the *Indian Act* (s. 88) gave provincial welfare agencies the authority to operate on Indian reserves. Before this, neglected and abused children, as well as orphans, had often been sent to residential schools, which acted as *de facto* orphanages. But now provincial authorities moved in just as the federal government started closing Indian residential schools. The result was widespread out-adoption of Indian children for whom provincial social workers could not find Indian homes that they deemed suitable.

Going further afield, negotiated settlements for two class actions involving drinkable water on Indian reserves were announced on July 30, 2021. Clean water on reserves had long been a point of grievance for First Nations, with several ameliorative programs announced over the years. According to a news report, this settlement “includes \$1.5 billion in compensation for individuals deprived of clean drinking water; \$6 billion to upgrade water infrastructure to help settle ongoing water issues; and the creation of a \$400-million First Nation Economic and Cultural Restoration Fund” (Baker, 2022). Eligibility both for First Nations and for individuals requires a drinking water advisory that lasted at least one year between November 20, 1995 and June 20, 2021. The deadline for filing claims is March 7, 2024 (Canadian Press, 2023a), so at this stage it is not clear how many individuals and First Nations will share the proceeds, and in which proportions.

One note of caution is required in understanding the settlement: “6 billion to upgrade water infrastructure” is a promise to increase federal budgetary expenditures but does not entail cash transfers to individuals or to First Nations or to independent foundations, nor is the timetable clear. Is it really “new money”? The government might have decided to spend it in any event. So, in computing the overall cost of the settlement, it may not be quite the same as the collective awards included in the settlements previously discussed. The same qualification applies to the astonishingly large foster-care settlement announced in early 2022 and upgraded in 2023. This will provide \$23.3 billion in individual compensation to First Nations children (and their parents or other caregivers) taken from Indian reserves into foster care between 1991 and the present (Reuters, 2023), as well another \$20 billion for improvement of child-welfare services on reserves over the next five years. This second element of the foster-care settlement resembles the drinking water settlement in that it is a promise by government to spend more money on its programs rather than a distribution of cash to individuals and organizations.

This foster-care settlement was unique not only in size but in its legal format. It was a response to a human rights complaint originally lodged in 2007 rather than a class action (though two class actions later emerged in parallel to the original complaint). The theory of the human rights complaint was that the federal First Nations Child and Family Welfare (FNCFW) program, which came into effect in 1991, was underfunded and poorly organized in comparison to comparable provincial programs. Therefore, anyone affected by it suffered a deprivation of human rights under s.5 of the *Canadian Human Rights Act* and was entitled to compensation. Crucially, compensation was to be paid for the deprivation of human rights, not for harm suffered. Thus, complainants did not have to show evidence of harm to children or their parents. This almost magical legal manoeuvre turned the Human Rights Tribunal³ into a reviewer of the adequacy of government policy and funding rather than a forum for hearing individual grievances. But from a practical point of view, it resembled all the preceding class actions, in which demonstration of individual harm was also not required.

This settlement is not yet final because, after a challenge by the Canadian Human Rights Commission (Stefanovich, 2022), the enlarged award has yet to be approved by the Federal Court of Canada (Reuters, 2023). Technically, it was a negotiated settlement to two class actions brought late in the process, on the premise that the Canadian Human Rights Commission would declare its 2019 compensation order fulfilled. But the Commission declined to do so, arguing that the settlement did not include on-reserve Indian children placed in the foster care of kin.

The magnitude of this settlement deserves some comment. The original human-rights complaint did not specify an amount of damages, but the cost of a positive verdict was thought to be in the range of \$6 to \$8 billion. The figure of \$40 billion emerged at a late date after the federal government decided to settle and brought in former senator and judge Murray Sinclair to lead the negotiations (Flanagan, 2022). Agreement between the parties was reached during the COVID pandemic when the federal government was running very large deficits, so that a total of \$40 billion, which would have previously seemed unthinkable, did not loom so large in comparison to other governmental expenditures. Only time will tell whether this settlement, now increased to \$43.3 billion, was an exception or will prove to be a model for future agreements.

It is also worth noting that the Federal Court of Canada has certified a new class action on behalf of all off-reserve Indigenous children (not just status Indians) taken into non-Indigenous care between 1992 and 2019 (Canadian Press, 2022b). This addresses the alleged injustice that the foster-care class action dealt only with status Indian children on reserve. Unless the Crown vigorously defends this claim, the new class action has the potential for another very large settlement because the number of Indigenous people living off reserve between 1992 and 2019, when Métis and Inuit are included, is certainly larger than the number of status Indians living on reserve.

Again, this is not an education case, but there is an indirect connection through the Sixties Scoop, which, it will be remembered, was the provinces' initial way of coping with the closing of

3. The Canadian Human Rights Tribunal is an adjudicative body that hears complaints referred to it by the Canadian Human Rights Commission.

the IRS. When adopting out came to be seen as an inadequate solution, the federal government stepped in with its FNCFW program in 1991 featuring foster care. With this most recent settlement, all three government approaches since 1951 to protecting the welfare of Indian children have been declared unacceptable—using IRS as *de facto* orphanages, adopting Indian children out to non-Indian families, and taking children into foster care (again mainly to non-Indigenous families since there never seem to be enough Indigenous foster parents). In the real world, there is a difficult situation that no government has resolved and probably no government can resolve through public policy alone: coping with the break-up of Indian families as a result of alcohol and drug abuse as well as welfare dependency, which makes the male breadwinner's role largely superfluous and tends to deprive children of paternal support and supervision.

Another major class action not yet finally settled is the Indian Hospitals case. At one time, the federal government operated at least 29 Indian hospitals. They were established long before public health care became federally funded. Tuberculosis was a lethal plague among native people, and status Indians were not always welcome in local hospitals because they did not pay local taxes and could not afford to pay fees. Now it is claimed that patients in these hospitals received inferior care and (especially the children) were often subjected to physical and sexual abuse. The lawsuit demands \$1.1 billion in compensation for individuals, with the new wrinkle that compensation can also be paid to spouses or other family members negatively affected by the claimants' inferior health care. The federal government has indicated willingness to settle, but a deal has not yet been negotiated (University of British Columbia, n.d.; Barrera, 2020; Koskie Minsky, 2023).

There are also some pieces of litigation at much earlier stages of the judicial process. A class action originating in Calgary claims that Indian employees of Indian Oil and Gas Canada have been treated in a discriminatory way (the claim could perhaps spread to other entities of the federal government). A class action was commenced in Saskatchewan on behalf of Indian women who were involuntarily sterilized, but it seems to be mired in disputes among lawyers. And a man is suing Ottawa for \$11 billion over alleged underpayment of Treaty 1 annuities since 1871, claiming that the annuities, which were fixed at \$3.00 and later \$5.00 per person per year, should have been indexed for economic growth and inflation (Hoye, 2023). The claim may seem like a long shot since the monetary value of the annuities was explicitly specified in the treaty text, but there is a somewhat favourable recent precedent from Ontario in the *Restoule* decision of the Federal Court of Appeal (Flanagan, 2021).

The Treaty 1 litigation began as a would-be class action but has now been converted into a representative action, thus obviating the need for time-consuming certification of a class. The change brings up legal complexities that this author is not competent to address (Canadian Bar Association, 2004). Nonetheless, it illustrates the malleability of the judicial process, in which lawyers are always seeking more efficient ways to press their clients' claims.

This brief survey of past and present litigation shows the potential for the Canadian judicial process to act as a vehicle for securing reparations, far beyond the field of IRS, where the first

claims were filed. The class action has thus far been the workhorse of such litigation, but other forms such as human rights complaints and representative actions may become more common as time goes on. Indeed, the future for such litigation seems almost unlimited if the Crown persists in settling almost every claim rather than using its resources for a vigorous defence.

While this paper was being written, a new class action emerged to emphasize the point. According to *CBC News*: “Ten Prairie-based First Nations are suing the Canadian government over the loss of language, culture and tradition inflicted on communities by the modern First Nations child-welfare system” (Forester, 2023a). Other band governments are invited to join the plaintiff class. The \$43.3 billion foster care settlement described above provided compensation to individuals as well as a promise of greater government program spending, but it did not offer anything to band (First Nation) governments. This class action seeks to fill that lacuna. This class action has not yet been certified by the Federal Court of Canada, and it may never proceed to a negotiated settlement. Indeed, it suffers from legal weakness in that Indian bands have never been held in Canadian law to have a right to the perpetuation of culture and language. If it wishes to mount a serious defence, the government may attack the very concept of the class on that basis. But, in the words of Bob Dylan, “You don’t need a weatherman to know which way the wind blows” (English Language and Usage, 2011). The wind is blowing towards commencement of legal action by every conceivable Indigenous class for every conceivable historical grievance.

Table 3 presents a cost summary for class actions in areas other than education for which settlements have been announced. Note that the total cost of these three settlements, over \$50 billion (2023 dollars) is more than three times larger than the total cost of the six education settlements (\$15 billion in 2023 dollars). This is a remarkable cost explosion, yet it has caused little adverse comment by politicians or media pundits. In the present climate of opinion, First Nations’ claims seem to be beyond criticism.

Table 3 Reparations in areas other than education (in \$ millions)

Subject	Year	Nominal Value			Measured in 2023 Dollars		
		Individual Payments	Collective Payments	Total	Individual Payments	Collective Payments	Total
“Sixties Scoop”	2017	\$750	\$50	\$800	\$908	\$61	\$968
Drinkable water	2021	\$1,500	\$6,400	\$7,900	\$1,665	\$7,104	\$8,769
Foster care	2022	\$23,300	\$20,000	\$43,300	\$24,100	\$20,800	\$44,900
Totals		\$25,550	\$26,450	\$52,000	\$26,673	\$27,965	\$54,637

Note: \$3.3 billion in Foster-care individual payments is in 2023 dollars.

Sources: Baker, 2022; Flanagan, 2022; Hoye, 2023; Koskie Minsky, 2023; Reuters, 2023; Stefanovich, 2022; calculations by author.

Table 4 lists actions that are in various stages of litigation but not yet resolved. For most, the potential cost and allocation between individuals and collective entities is completely unknown. Therefore, totals cannot be calculated. The potential exposure, however, may be large if either the Treaty 1 claim or the band foster care claim has any success.

Table 4: Cases in progress (in \$ millions)

Subject	Year begun	Individual Payments	Collective Payments
Indian hospitals	2018	\$ 1,100	?
Sterilization	2019	?	?
Indian employees	2021	?	?
Treaty 1	2023	\$11,000	?
Foster care (bands)	2023	\$?

Sources: Barrera, 2020; Forester, 2023a; Koskie Minsky, 2023; University of British Columbia, n.d.; calculations by author.

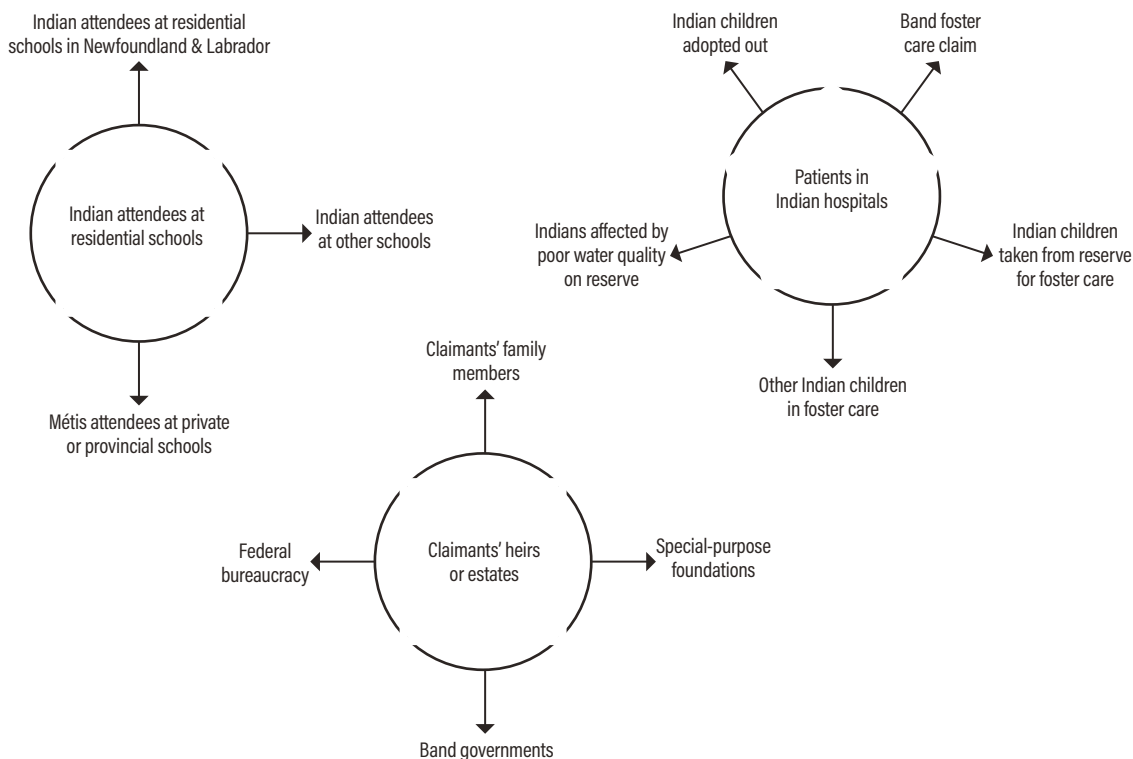
Conclusion

I will not here enter into the debate about whether, and to what extent, reparations to Indigenous people in Canada are justified. That is a controversial matter that would require a treatment at least as long as this paper’s discussion of the legal process. I will limit myself here to making some observations about using the legal process as a tool to provide reparations.

First, the record since 2006 is one of continual expansion of claimant classes and related beneficiaries (figure 1):

- ❧ to include new causes of action, moving from IRS to other modes of formal education, to other aspects of Indigenous health and welfare having little or nothing to do with education;
- ❧ to include new groups of claimants, going from status Indians with grievances, to their family members and heirs, to whole First Nations as collective entities, to Métis, to all Indigenous people;
- ❧ to raise the stakes, from about \$5 billion in compensation for IRS to \$43.3 billion for foster care;
- ❧ to employ new legal processes, starting with class actions, then moving on to a human rights grievance and then a representative action.

Figure 1: The Proliferation of Indigenous claims since 2006



Reconciliation demands finality. It cannot succeed in the face of the continual multiplication of claims and grievances that has marked the legal process thus far. In addition to the burden imposed upon the public purse, Canadians are eventually bound to ask, “What is the point of paying damages if claimant groups are never satisfied, if satisfaction of claims leads only to more claims?” At that point, turning the settlement of claims into stealth reparations could jeopardize the whole project of Reconciliation.

Another point is that none of these settlements is exclusive, as far as I can tell. That is, none states that a person who has received benefits from one settlement is ineligible to share in another settlement. To take an example, IRS claimants can also file a claim under the settlements for day schools, day scholars, and boarding students if they fit into any of these categories. It was not uncommon for IRS students to have also attended other types of schools. Moreover, educational claimants may also have been patients in Indian hospitals at some point, and they may have lived on a reserve with low-quality drinking water. Their children may have been adopted out or put into foster care. No data are available on how extensive this overlapping eligibility is, but it seems like a serious issue. The ability to pile one claim on top of another could turn the cultivation of grievances into an income stream.

The same is true of band government claims. A band that makes a claim as part of the drinking-water class action may also claim as part of the new foster-care band claim and may join other band-focused class actions as they appear. Again, cultivation of grievances may turn into an income stream.

Although these actions are styled as claims for damages, they are really a critique of public policy, using the judicial system as a forum. In none of these actions have individual claimants been required to document damage they allegedly suffered as individuals. Yet in other areas of law, the Crown is not liable for damages resulting from past public policy enacted in good faith, using the information available at the time. The Supreme Court of Canada said in the *Marchi* case (2021) that governments may be sued for damages arising from the operational implementation of policy, but “core policy decisions” should be shielded from civil liability:

Core policy decisions are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social, and political factors, provided they are neither irrational nor taken in bad faith. Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary’s private law oversight. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity. In addition, four factors emerge that help in assessing the nature of a government’s decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying

rationale—protecting the legislative and executive branch’s core institutional roles and competencies necessary for the separation of powers—serves as an overarching guiding principle for how to weigh the factors in the analysis (SCC, 2021; Best, 2023).

These words are based upon classic separation-of-powers doctrine in a democracy. The chief function of the legislature, which is accountable to the people through elections, is to make “core policy” through legislation, while the main function of the executive is to implement that policy.

The litigation discussed here has dealt mainly with core policy issues—what is the appropriate structure for education, how should neglected and abused children be dealt with, how should health care be delivered to Indians, how should drinkable water be delivered on Indian reserves, and so on. If there were operational failures connected with the policies, those could have been addressed by documenting the harm caused to individuals rather than indicting the whole policy, but that did not happen. Canadian courts have been turned into a forum for the retrospective judgment of past policy rather than a venue for adjudicating harm done to individuals by mistakes in implementation.

Another departure from Canadian legal tradition will be found in the role played by the federal Department of Justice since 2015. Previously, the Department defended the public interest by vigorously defending claims. As a consultant and expert witness for the Department in the *Manitoba Metis Federation* case (SCC, 2013), the author had a chance to observe how Justice lawyers, under both Progressive Conservative and Liberal governments, kept the case from coming to trial for almost 20 years by contesting issues of standing. Whether or not this would now be considered best practice, it certainly represented “going to the mat” against Indigenous litigants. Against this backdrop, Jodi Wilson-Raybould’s practice directive may have some justification; but since 2015 the Department of Justice has called for negotiations at an early opportunity in almost all these cases of historical grievance, thus preventing grave and novel issues from being heard in the Supreme Court or other appellate courts. This frustrates the development of the law. It also turns the federal government into a *piñata*, waiting for litigants to beat it and collect what falls out.

The current approach of not litigating Indigenous claims amounts almost to collusion between claimants and the executive branch of the federal government, negotiating early settlements while cutting Parliament out of any meaningful role. It uses the legal process as theatre to legitimize *de facto* reparations that have never been approved in Parliament. In the British tradition of representative democracy, Parliament is supposed to have the power of the purse, authorizing all public expenditures. To a degree, this is a fiction in times when the prime minister and cabinet control a majority of seats in the House of Commons, because MPs vote as directed, and Senators almost never interfere with budgets. But apart from formal votes in Parliament, there is still room for scrutiny of expenditures, which helps focus public awareness on how government is spending public money. Indeed, this scrutiny is highly formalized, with presentation of an annual budget, ensuing debate on the floor of the Commons, further review of the

estimates in committee, and studies by the Parliamentary Budget Office. At every stage, MPs, mostly Opposition MPs, have a chance to make comments that the media can report and that can become the basis of public discussion.

Unfortunately, the current method of litigating Indigenous claims for reparations short-circuits the process. Parliament never had a chance to debate and approve Jodi Wilson-Raybould's Directive on Civil Litigation; it was drawn up by her legal advisers, then adopted by cabinet *fiat*. A settlement negotiated by the executive according to the Wilson-Raybould directive reaches Parliament as a virtual *fait accompli*. It is almost impossible for Parliamentarians to track all the expenditures because the negotiation and implementation of settlements extend over many years while claimants to class actions are being enumerated and compensated. Extension of deadlines for applications is normal. It might still be possible to use committee hearings, but the Opposition has shown no interest in using its small powers to explore these settlements and expenditures.

To top off the lack of accountability, an increasing proportion of settlements is being directed not to the individuals who were allegedly harmed by policy (though proof of individual harm does not need to be presented) but to organizations of various types—foundations, corporations, band governments, and the federal bureaucracy through expanded service arrangements. The amount promised so far to such organizations is very large—almost \$32 billion in 2023 dollars, according to tables 2 and 3. All settlement agreements provide that the recipient organizations other than the federal bureaucracy will be independent in the way they spend this money. In effect, the federal government is now starting to out-source to Indigenous organizations its constitutional responsibility for the oversight of public expenditures in this area.

For all these reasons, the judicial model of incremental and never-ending reparations is highly undesirable. Now that it is well entrenched, we cannot expect internal reform without intervention from the elected government. Indigenous litigants are prospering by filing claims and negotiating settlements; class-action law firms also prosper when the federal government pays their legal fees. Justice Department lawyers are employees who must act as directed by the Minister, who in turn must follow government policy. To effect any change, the current Directive on Civil Litigation must be withdrawn, either by a change of heart in the elected government or a change in the government by means of an election.

References

Baker, Oscar, III (2022). First Nations drinking water settlement open for claims from communities, individuals. *CBC News* (March 11). <<https://www.cbc.ca/news/indigenous/first-nations-water-drinking-settlement-1.6382206>>, as of May 10, 2023.

Barrera, Jorge (2020). Ottawa eyes “meaningful resolution” to Indian hospitals class action lawsuit. *CBC News* (January 14). <<https://www.cbc.ca/news/indigenous/indian-hospitals-class-action-lawsuit-1.5425171>>, as of April 24, 2023.

Best, Peter (2023). *The Federal Government’s Heedless and Unprincipled Giveaway of Billions of Taxpayer Dollars to Legally Undeserving Aboriginal Litigation Claimants*. <http://thereisnodifference.ca/?page_id=1726>, as of April 24, 2023.

Brophy, Alfred L. (2006). *Reparations Pro & Con*. Oxford University Press.

Canada (1867). *Constitution Act, 1867*. 30 & 31 Victoria., c. 3 (U.K.). Justice Laws Website. <<https://laws-lois.justice.gc.ca/eng/const/page-1.html>>, as of April 24, 2023.

Canadian Bar Association (2004). *Re: Impact of Class Action Rules on Lawsuits by Aboriginal Nations in Federal Court*. Jeffrey F. Harris to Éloïse Arbour (August 10). <<https://www.cba.org/CMSPages/GetFile.aspx?guid=10fcb587-edaa-4d9f-83f0-0ef06b5483a7>>, as of April 24, 2023.

Canadian Press (2021). Settlement reached on residential school day scholars class-action lawsuit. *CBC News* (June 9). <<https://www.cbc.ca/news/indigenous/day-scholars-residential-school-settlement-1.6059661>>, as of April 24, 2023.

Canadian Press (2022a). Black leaders want Canada to apologize for its history of slavery. *CBC News* (August 2). <<https://www.cbc.ca/news/canada/windsor/a-specific-form-of-anti-black-racism-scholars-want-canadian-apology-for-slavery-1.6538399>>, as of April 24, 2023.

Canadian Press (2022b). Federal court approves class action on behalf of off-reserve Indigenous children, *CBC News* (June 20). <<https://www.cbc.ca/news/canada/british-columbia/federal-court-certifies-millennium-scoop-lawsuit-1.6494816>>, as of April 24, 2023.

Canadian Press (2023a). Claim period for compensation extended again for First Nation Drinking Water Settlement. *Microsoft Start* (February 28). <<https://www.msn.com/en-ca/news/other/claim-period-for-compensation-extended-again-for-first-nation-drinking-water-settlement/ar-AA182MAw?ocid=ennewsntp&pc=U531&cvid=81f23b5e3c5b434aaa6d34422949c957&ei=21>>, as of April 24, 2023.

Canadian Press (2023b). Indigenous chiefs across Canada laud the pending approval of \$2.8 billion settlement deal. *Microsoft Start* (February 27). <<https://www.msn.com/en-ca/news/other/indigenous-chiefs-across-canada-laud-the-pending-approval-of-2-8b-settlement-deal/ar-AA180S1d?ocid=entnewsntp&cvid=0f39fd3df4fa4bba9862dde9e89d607e&ei=8>>, as of April 24, 2023.

Carson, Bruce (2014). *14 Days: Making the Conservative Movement in Canada*. McGill-Queen's University Press.

CBC Archives (1990). Phil Fontaine's 1990 account of physical and sexual abuse at residential school. <<https://www.cbc.ca/player/play/1776926760>>, as of April 24, 2023.

Chavez, Nicole, and Justin Gamble (2023). San Francisco reparations committee proposes a \$5 million payment to each Black resident. *CNN* (January 19). <<https://www.cnn.com/2023/01/19/us/san-francisco-reparations-proposal-reaj/index.html>>, as of April 24, 2023.

Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC] (2019a). *Newfoundland and Labrador Residential Schools Healing and Commemoration*. <<https://www.rcaanc-cirnac.gc.ca/eng/1511531626107/1539962009489>>, as of April 24, 2023.

Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC] (2019b). *Statistics on the Implementation of the Indian Residential Schools Settlement Agreement*. <<https://rcaanc-cirnac.gc.ca/eng/1315320539682/1571590489978>>, as of April 24, 2023. [Statistics on the Implementation of the Indian Residential Schools Settlement Agreement \(rcaanc-cirnac.gc.ca\)](https://rcaanc-cirnac.gc.ca/eng/1315320539682/1571590489978).

Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC] (2020). *Are You Part of the Federal Indian Day Schools Class Action*. <<https://www.rcaanc-cirnac.gc.ca/eng/1552427234180/1552427274599>>, as of April 24, 2023.

Deachman, Bruce (2021). Federal Indian Day School settlement closes in on 130,000 claimants. *Ottawa Citizen* (October 25). <<https://ottawacitizen.com/news/local-news/federal-indian-day-school-settlement-closes-in-on-130000-claimants>>, as of April 24, 2023.

Deer, Ka'anhehsí:io (2023). As extension period for Indian Day Schools comes to an end, concerns remain. *CBC News* (January 11). <<https://www.cbc.ca/news/indigenous/indian-day-schools-extension-deadline-1.6710474>>, as of April 24, 2023.

Deloitte (2023). *Indian Residential Schools Day Scholars Class Action Claims Administration*. <<https://www.classaction.deloitte.ca/en-CA/Indian-Residential-Schools-Day-Scholars-Class-Action-Settlement/>>, as of April 24, 2023.

Dempsey, Hugh (1986). *The Gentle Persuader: A Biography of James Gladstone, Indian Senator*. Western Producer Prairie Books.

English Language and Usage (2011). *Origins of the Phrase “You don’t need a weatherman to know which way the wind blows”?* <<https://english.stackexchange.com/questions/36195/origins-of-the-phrase-you-dont-need-a-weatherman-to-know-which-way-the-wind-bl>>, as of April 24, 2023.

Flanagan, Tom (2007). *Harper’s Team: Behind the Scenes in the Conservative Rise to Power*. McGill-Queen’s University Press.

Flanagan, Tom (2017). *Incentives, Identity, and the Growth of Canada’s Indigenous Population*. <<https://www.fraserinstitute.org/studies/incentives-identity-and-the-growth-of-canadas-indigenous-population>>, as of April 24, 2023.

Flanagan, Tom (2021). Courts Take Activist Approach to Treaty Interpretation. *Fraser Institute Blog* (November 29). <<https://www.fraserinstitute.org/blogs/courts-take-activist-approach-to-treaty-interpretation>>, as of April 24, 2023.

Flanagan, Tom (2022). *A \$40 Billion Settlement for Indigenous Child Welfare: Is Anyone Minding the Fiscal Store?* Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/40-billion-settlement-for-indigenous-child-welfare.pdf>>, as of April 24, 2023.

Forester, Brett (2023a). First Nations sue Canada over child-welfare system’s destruction of culture, language. *CBC News* (March 14). <<https://www.cbc.ca/news/indigenous/first-nations-class-action-child-welfare-collective-1.6777536>>, as of May 10, 2023.

Forester, Brett (2023b). Ottawa, plaintiffs agree to settle “Indian boarding homes” class action. *CBC News* (January 3). <<https://www.cbc.ca/news/indigenous/boarding-homes-class-action-settlement-1.6702587>>, as of April 24, 2023.

Forester, Brett (2023c). Proposed settlement reached in residential schools reparations class action. *CBC News* (January 20). <<https://www.cbc.ca/news/indigenous/settlement-residential-school-band-reparations-1.6721526>>, as of April 24, 2023.

Government of Canada (2021). *The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples*. <<https://www.justice.gc.ca/eng/cs-j-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>>, as of April 24, 2023.

Helps, Lisa (2023). *Message from the Mayor* [to the residents and business owners of Victoria, BC; property tax insert]. Letter from the Mayor. <https://www.victoria.ca/assets/Departments/Finance/Documents/Property%20Tax%20Insert_2022%20DIGITAL.pdf>, as of April 24, 2023.

Hoye, Bryce (2023). Manitoba First Nations man sues federal government for \$11B over “unfulfilled” treaty annuity payments. *CBC News* (February 8). <<https://www.cbc.ca/news/canada/manitoba/manitoba-first-nations-lawsuit-annuity-payments-attorney-general-1.6741271>>, as of April 24, 2023.

Klein Lawyers, L.L.P. (n.d.). *Indian Boarding Homes Class Action*. <<https://www.callkleinlawyers.com/class-actions/indian-boarding-homes-class-action/>>, as of April 24, 2023.

Koskie Minsky (2023). *Indian Hospitals Class Action*. <<https://kmlaw.ca/cases/indian-hospitals-class-action/>>, as of April 24, 2023.

Miller, J.R. (1996). *Shingwauk’s Vision: A History of Native Residential Schools*. University of Toronto Press.

Miller, J.R. (2017). *Residential Schools and Reconciliation: Canada Confronts Its History*. University of Toronto Press, e-book.

Milloy, John S. (1999). *A National Crime: The Canadian Government and the Residential School System, 1879-1986*. University of Manitoba Press.

Morse, Bradford W. (2008). Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations. In Federico Lenzerini, ed., *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press): 271–316.

Mosleh, Omar (2023). Métis survivors sue Saskatchewan, Canada over residential school. *Toronto Star* (January 24). <<https://www.thestar.com/news/canada/2023/01/24/mtis-survivors-sue-saskatchewan-canada-over-residential-school.html>>, as of April 24, 2023.

Murawski, John (2023). Black Reparations Inspiring a Multicolored Box of Intersectional Demands. *Real Clear Investigations* (February 2). <https://www.realclearinvestigations.com/articles/2023/02/02/black_reparations_inspiring_a_multicolored_pandoras_box_of_intersectional_demands_879083.html>, as of April 24, 2023.

Paul, Alexandra (2017). Residential school survivors reimbursed for high legal fees. *The Free Press* (February 17). <<https://www.winnipegfreepress.com/breakingnews/2017/02/17/disbarred-lawyer-only-manitoban-among-56-who-gouged-residential-school-survivors>>, as of April 24, 2023.

Porter, Douglas (2023). *Canadian Economic Outlook for Mar. 3, 2023*. BMO Capital Markets Economic Research. <https://economics.bmo.com/media/filer_public/b3/ed/b3ed820a-23a7-419c-bf50-aa88cf2319ea/outlookcanada.pdf>, as of May 15, 2023.

Reuters (2023). Canada unveils revised \$23 bln Compensation deal for Indigenous children. Reuters (April 6). <<https://www.reuters.com/world/americas/canada-unveils-revised-c23-bln-compensation-deal-indigenous-children-2023-04-05/>>, as of April 24, 2023.

Statistics Canada (2023). Table 18-10-0005-01. Consumer Price Index, annual average, not seasonally adjusted. Release January 17. <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1810000501>>, as of May 15, 2023.

Stefanovich, Olivia (2022). Uncertainty clouds fate of \$40B First Nations child welfare agreement. *CBC News* (September 29). <<https://www.cbc.ca/news/politics/uncertainty-40-billion-first-nations-child-welfare-deal-1.6488895>>, as of April 24, 2023.

Supreme Court of Canada [SCC] (2013). *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 SCR 623. *CanLII*. <<https://www.canlii.org/en/ca/scc/doc/2013/2013scc14/2013scc14.html>>, as of April 24, 2023.

Supreme Court of Canada [SCC] (2021). *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII). *CanLII*. <<https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.html?resultIndex=1>>, as of April 24, 2023.

The Atlas Society [TAS] (2010). *Reparations for Native Americans and Descendants of Slaves*. <<https://www.atlassociety.org/post/reparations-for-native-americans-and-descendants-of-slaves>>, as of April 24, 2023.

University of British Columbia, Indian Residential School History and Dialogue Centre (n.d.). *Indian Hospitals Settlement Agreement Information Available*. <<https://irshdc.ubc.ca/for-survivors/records-and-research-support/indian-hospitals-settlement-agreement-information-available/>>, as of April 24, 2023.

Waddell Phillips (2023). *Band Reparations Class Action Settlement*. <<https://bandreparations.ca/>>, as of April 24, 2023.

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