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FISCAL EXPLOSION

Federal Spending on Indigenous Programs, 2015–2022

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Fiscal Explosion

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by Tom Flanagan

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Executive Summary

Previous studies published by Fraser Institute have documented the remarkable long-term rise in federal spending on Indigenous programs since the end of World War II. Since the election of the Liberal government headed by Prime Minister Justin Trudeau in 2015, this increase has reached explosive levels, more than doubling in the six fiscal years between Budget 2015 and Budget 2021. It may accelerate even faster now that the Liberals have been returned in the 2021 election with another minority government, which will probably depend on the support of the New Democratic Party to remain in power. Both the Liberal and NDP campaign platforms contained proposals for additional spending on Indigenous priorities.

To a considerable extent, the fiscal explosion is driven by offers of financial compensation for past injustices. One branch of this is the settlement of specific claims for alleged violations of treaties or the *Indian Act*. After 47 years of payments, the number of claims continues to grow as the federal government funds research to discover new claims of past injustice. The government should follow the example of the United States and set a termination date for the specific-claims process. Half a century should be enough time to bring claims of this type.

A more recent aspect of the fiscal explosion is the rise of class-action litigation leading to financial settlements. The prototype of Indigenous class action was the residential schools case, which resulted in a \$6 billion settlement in 2006. More recent class actions have concerned other types of schools, adoption practices known as the “Sixties Scoop,” funding of foster care for Indigenous children, treatment of patients in Indian hospitals, and long-term water advisories on Indian reserves. There have been six settlements of such class actions, with four more still under negotiation, and an unknown number in preparation.

The process through which class action cases are settled drives spending not just through multi-billion-dollar payouts to individuals but through declarations that past federal programs were inadequate, leading to promises to provide more funding for programs in the future. As these class actions proliferate, the Indigenous budgetary envelope is increasingly controlled by the outcome of judicial processes rather than by official planning. Since the federal government’s policy is to prefer negotiation to litigation, the prospect of easy and quick settlements encourages more class actions to be filed. It is submitted that the government, instead of rushing to negotiate settlements, should contest these class actions more vigorously in court, through the appellate courts if necessary. These cases offer many novel interpretations of law, which deserve to be considered by Canada’s best legal minds.

This is particularly the case as subjects of litigation have multiplied. After beginning in a limited way with residential schools, all modes of Indigenous education came under fire. There were also class action attacks on different forms of protecting Indigenous children

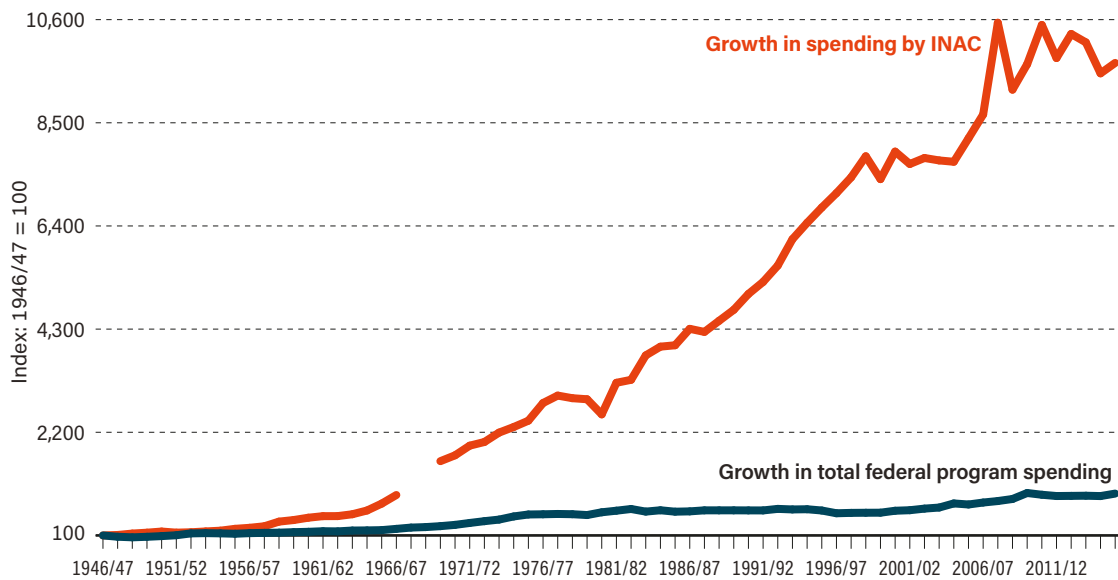
and on Indian hospitals. Finally came a class action based on the provision of water in First Nation communities. In light of these precedents, virtually any public service would seem to be a suitable target for litigation designed to lead to negotiated compensation.

Class actions have become a significant part of the legal business in Canada. They are a profit centre for law firms; indeed, they lie at the core of the business model of certain firms, which have built the machinery necessary to find representative plaintiffs, recruit members of the aggrieved class, and pursue action in court. Indigenous class actions are different only in that they often depend on old grievances rather than recent events. Class actions bring compensation to individuals, but they also mean lucrative fees to law firms. Rushing to settle class actions helps the law firms that pursue them earn more money more quickly and virtually guarantees the proliferation of class actions in the future. Reducing the number of Indigenous class actions requires making them less remunerative, thereby affecting the profit-cost calculations of the lawyers who pursue them.

Introduction

Previous studies by Fraser Institute researchers have documented the remarkable increase in federal government spending on First Nations since the end of World War II. **Figure 1** shows the general shape of the trend over the 60 years extending from 1946 to the end of Stephen Harper’s Conservative government in late 2015 (Flanagan and Jackson, 2017: 4). There was a steady increase in spending on Indigenous priorities from the late 1950s to the fiscal crisis of the mid-1990s. The spending curve then flattened for the better part of a decade as the Liberal government of Jean Chrétien brought deficit spending under control; shot up after Paul Martin became prime minister; then levelled off again under the Conservative government of Stephen Harper, albeit with some sharp ups and downs. Growth in the Indigenous population accounted for about half of the spending increases over these 60 years; the other half came from introducing new Indigenous programs and making existing programs more generous (Flanagan, 2021: 1–2).

Figure 1: Growth in spending by INAC compared to growth in total federal program spending, 1946/47–2015/16 (index: 1946/47 = 100)

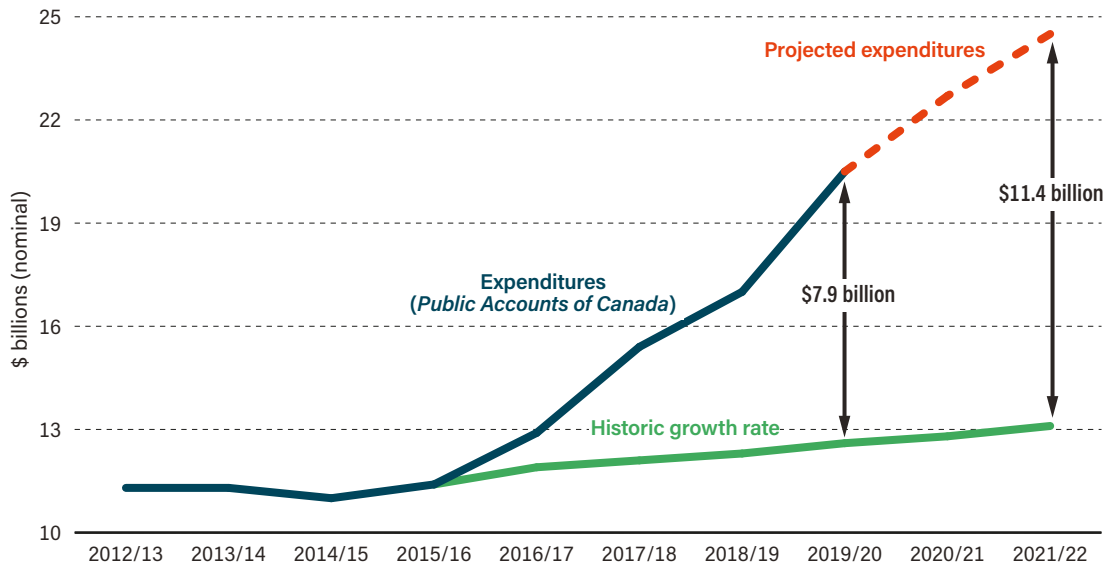


Sources: Canada, Dep’t of Finance, 2008, 2020; Library and Archives Canada, 2021; Public Works and Government Services Canada, 2021; Statistics Canada, 2021; author’s calculations.

Justin Trudeau’s accession to power in 2015 brought repeated waves of new spending promises. Budget 2017 claimed that spending on Indigenous priorities would rise from “over \$11 billion” in 2015/16, the last fiscal year planned by the Conservatives, to “over \$14 billion” in fiscal 2021/22—an increase of 27%. Budget 2019 increased the goal for 2021/22 to “over

\$17 billion,” an increase of 50% over 2015/16. Finally, as shown in **figure 2**, Budget 2021 upped the ante to about \$24.5 billion in 2021/22, a rise of more than 100% over the spending on Indigenous priorities planned in the last Conservative budget, fiscal 2015/16.

Figure 2: Investments in Indigenous priorities (actual and projected), 2012/13–2021/22



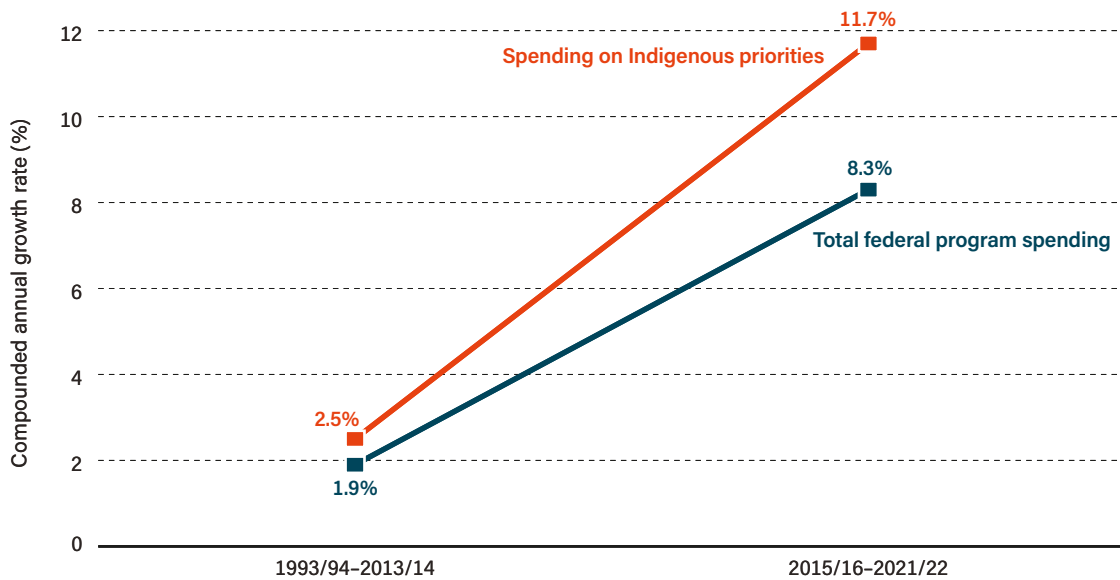
Source: Canada, Dep't of Finance, 2017: chart 8.1.

This represents an annual compound growth rate of 11.7%, much higher than at any time in Canadian history since World War II. For purposes of comparison, see **figure 3a** and **figure 3b**, which show annual compound growth rates for Indigenous and general spending in selected periods (Flanagan, 2021: 7). The government’s current projections show spending on Indigenous priorities rising at more than twice the rate projected in Justin Trudeau’s first budget (2017), which in turn was more than twice as high as the growth rate of Indigenous spending in the two decades before Trudeau’s Liberals came to power. By any measure, this is an extraordinary acceleration of federal government spending.

The fiscal explosion of Indigenous programs under the Trudeau government is part of a general spending increase. Program expenditures in Budget 2015, the last Harper budget, were “only” \$263.2 billion, compared to \$497.6 billion in Budget 2021, an increase of \$234.4 billion in nominal dollars, or 89% over six years. But spending on Indigenous priorities has grown even faster—over 100% in the same period of time—so it is at the forefront of federal spending increases.

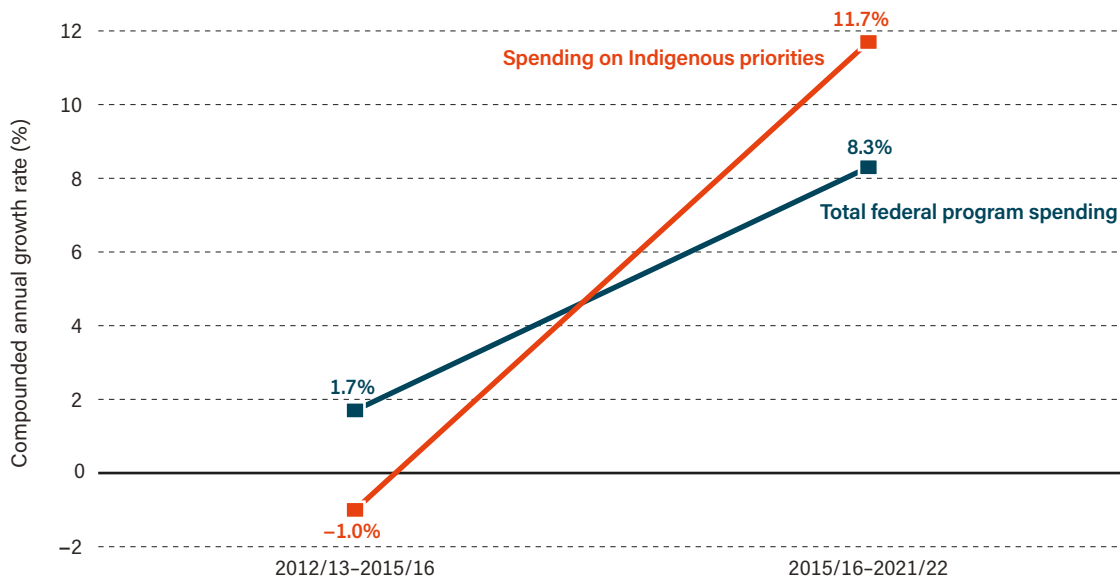
To the extent that campaign platforms are a reliable guide to government action, increases in spending on Indigenous priorities will continue since the election of another Liberal government on September 20, 2021. The Liberal platform specifies an increase of \$1.3 billion, most of which is for housing, for the remainder of fiscal 2021/22, and another

Figure 3a: Compounded annual growth rate (%) of federal spending (\$2020 constant) on Indigenous priorities and total federal program spending, 1993/94–2013/14 and 2015/16–2021/22



Note: Values for 1993/94, 2013/14, and 2015/16 are actual data. Values for 2021/22 are a projection. Sources: Canada, Dep't of Finance, 2008, 2020, 2021a, 2021b; Library and Archives Canada, 2021; Public Works and Government Services Canada, 2021; Statistics Canada, 2021; author's calculations.

Figure 3b: Compounded annual growth rate (%) of federal spending (\$2020 constant) on Indigenous priorities and total federal program spending, 2012/13–2015/16 and 2015/16–2021/22

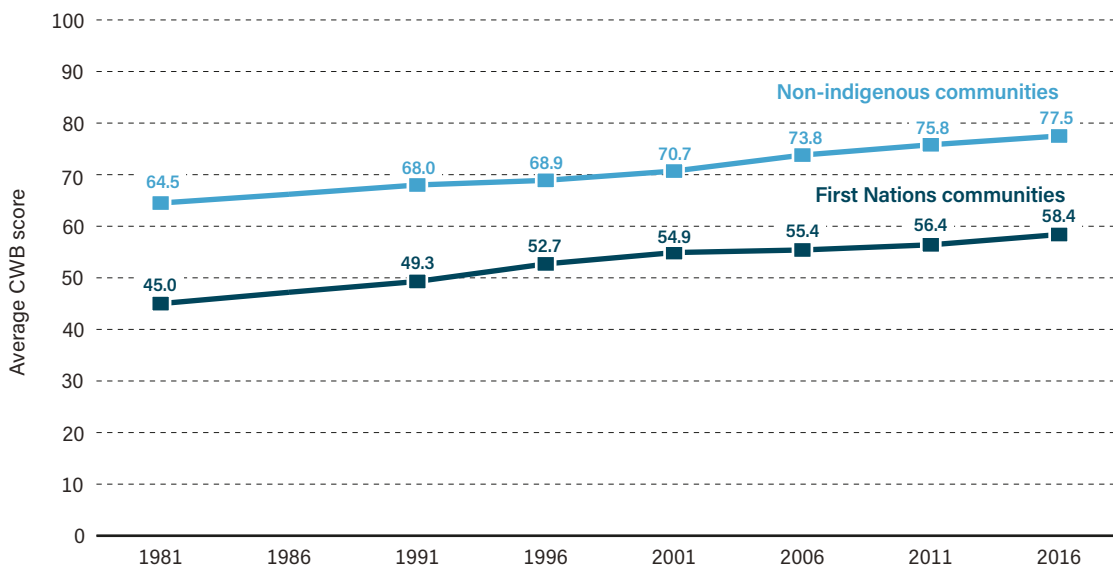


Note: Values for 2012/13 and 2015/16 are actual data. Values for 2021/22 are a projection. Sources: Canada, Dep't of Finance, 2008, 2020, 2021a, 2021b; Library and Archives Canada, 2021; Public Works and Government Services Canada, 2021; Statistics Canada, 2021; author's calculations.

\$880 million in 2022/23 (Liberal Party of Canada, 2021: 77–78). But the minority Liberal government will depend on support from the New Democratic Party (NDP), and the NDP’s platform was even more expansive, calling for an additional \$16.5 billion in the current year and \$4.7 billion in 2022/23 (NDP, 2021: 9–10). The *Realpolitik* of maintaining support from the NDP may well lead to increases even larger than the government pledged during the 2021 election campaign.

The government proposes to increase “investments” in virtually all aspects of First Nations’ community life, including health, education, welfare, governance, economic development, and language retention. It remains to be seen whether this cornucopia will have a measurable positive impact on the well-being of First Nations. As shown in **figure 4**, there was no discernible relationship between federal spending and the average First Nations’ Community Well-Being (CWB) index in the years from 1981 to 2016 (Flanagan, 2021: 14). During these years, the gap between average First Nations’ CWB and that of other Canadian communities barely changed, even though federal spending on First Nations increased enormously, as shown in figure 1. If the government’s spending explosion is meant to raise First Nations’ standard of living, history suggests it is a gamble with taxpayers’ money and First Nations’ futures.

Figure 4: Community Well-Being average scores over time, First Nations and non-indigenous communities, 1981–2016



Sources: Indigenous Services Canada, 2019: fig. 1; Flanagan, 2021: fig. 6.

Reconciliation and Reparations

Measurable improvement in standard of living is no longer the only, or even the major, goal of spending on Indigenous priorities. Increasingly, compensation for past injustices is driving Indigenous programming, under the watchword of “reconciliation.” The Parliamentary Budget Office noted this trend in its comments on contingent liabilities (expenditures that may be required, depending on the outcome of litigation or negotiations) related to Budget 2021, pointing out the existence of \$3.2 billion intended to resolve outstanding legal claims and fulfil settlement obligations with Indigenous stakeholders. This includes:

- ∞ \$1.2 billion to Indigenous Services Canada (ISC) to satisfy out-of-court settlements;
- ∞ \$1.1 billion to ISC to implement a settlement agreement reached with the First Nations & Family Caring Society regarding First Nations’ child and family services;
- ∞ \$610 million to Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) for compensation payments stipulated by the Federal Indian Day Schools Settlement Agreement; and,
- ∞ \$257 million to CIRNAC for the Sixties Scoop Settlement.

Outstanding legal claims by First Nations and related groups make up the largest share of the Government’s \$24.9 billion in contingent liabilities (\$17.5 billion, or 70%) ... overall contingent liabilities rose roughly 50% since 2016/17 (\$8.4 billion), primarily driven by a 65% increase in estimated liabilities associated with Specific Claims by First Nations (\$5.5 billion) and Comprehensive Land Claims (\$1.5 billion) (PBO, 2021: 8–9).

The term “reconciliation” first emerged to prominence in the 1997 *Delgamuukw* decision of the Supreme Court of Canada, where Chief Justice Lamer said that aboriginal rights “are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory” (Supreme Court of Canada, 1997: *Delgamuukw* [1997], para. 81). The setting of *Delgamuukw* was property rights and title to land, and reconciliation in that context meant the recognition under Canadian sovereignty of aboriginal land claims based on prior occupancy. But since then, particularly due to the influence of the Truth and Reconciliation Commission, reconciliation has become a talismanic word of Indigenous politics. It can now refer to any political, social, or economic claim made in virtue of alleged past injustice.

Such claims are typically embodied in legal processes that lead to litigation, negotiations, and settlements with the government of Canada. They are becoming major drivers of

budgetary expenditure in the Indigenous field. Class actions are the most common, though not the only, legal vehicle for these claims. Below we look at the main instances of using judicial processes to generate financial settlements.

Specific Claims

Canada established the Office of Native Claims in 1974. After many changes in organization and procedure, 450 claims based on violation of the *Indian Act* or of treaty rights had been settled as of November 15, 2017, for a total value of \$5.7 billion dollars (2017 dollars) (Flanagan, 2018: 8). Since then, the pace has accelerated, with an additional 135 settlements (CIRNAC, 2021b).

The Canadian specific-claims process was more or less modelled upon that of the United States Indian Claims Commission, which ran for 22 years from 1946 to 1968. However, unlike the United States, Canada has never imposed a terminal date on its claims process, which has now run for 47 years and shows no signs of shutting down. According to the latest data summary from the Specific Claims Branch, 124 claims are in litigation, either before the Specific Claims Tribunal or before Canadian courts, while another 365 are in various stages of assessment or negotiation (CIRNAC, 2021b). To cope with these pending claims, Budget 2021 promised to “replenish the Specific Claims Settlement Fund in 2022-23” (Canada, Dep’t of Finance, 2021a: §8.4).

The specific claims process was originally conceptualized as a time-limited way of offering compensation for past injustices. Half a century later, the process goes on seemingly without completion, as further claims continue to follow upon achieved settlements. The federal government itself subsidizes the research into past history, guaranteeing that there will be a steady flow of new claims to replenish the stock of those that are satisfied (Flanagan, 2018: 22).

Specific claims are a collective form of reparations. Payment is made not to individuals but to First Nations as collective entities, represented by their governments. However, the money is ordinarily paid not to the First Nation government of the day but to a settlement trust fund to generate revenue for future generations (Cooper, 2014; Young, 2019). The current value of such trust funds is estimated at about \$11 billion¹ derived from a variety of sources, including specific-claims settlements.

Residential Schools

In 2006, the government of Canada signed the Indian Residential Schools Settlement Agreement (CIRNAC, 2021a). The largest expenditure arising from the Agreement was \$3.18 billion paid out from 2007 to 2019 from the Independent Assessment Process (IAP), which heard claims of physical and sexual abuse. The money was divided among roughly 31,000 approved claimants, for an average payout of about \$111,000, including legal costs

1. E-mail message from Michele Young-Crook, President and CEO, National Aboriginal Trust Officers Association (NATO), to Tom Flanagan, February 11, 2021.

(CIRNAC, 2019). Claimants alleged physical and sexual abuses that would have been tortious (that is, legally deserving of compensation) at the time they were committed, so the principle of paying compensation was not really a break with past Canadian practices of child protection. However, claims were not cross-examined or otherwise corroborated, except to insure that students had actually attended the school where these abuses were said to have occurred and that abusers, if named, had been there at the same time.

In addition to the Independent Assessment Process, there was also a Common Experience Payment (CEP) of \$1.62 billion divided among about 79,000 claimants for an average payout of slightly over \$20,000 (CIRNAC, 2019). To receive the CEP one did not have to claim abuse, only establish attendance at a residential school funded by the federal government.² This was an important development, because compensation did not depend upon legal negligence or commission of illegal acts. It was restitution for a policy that was legal in the past but was now, with the benefit of hindsight, deemed to have been mistaken and injurious. The CEP proved to be the harbinger of several other reparation-style payments for policies now deemed to have been mistakes in policy (minimum interpretation) or genocidal crimes (maximum interpretation).

The roughly \$4.8 billion in direct payments to individuals was not the whole cost of the Residential Schools Settlement Agreement because the agreement also provided for many additional programs of healing, information, and commemoration, including the Truth and Reconciliation Commission, which in turn made many recommendations for new program expenditures. The scope of the Agreement was subsequently expanded to include a few schools not originally deemed to qualify as residential schools, as well as the residential schools of Newfoundland & Labrador, which existed before the entry of Newfoundland into Confederation (CIRNAC, 2018).

The extension of the Agreement to Newfoundland & Labrador plus new social programs easily identified as related to the Agreement certainly total over \$400 million, but that would still not be the total additional cost of the Residential Schools Settlement Agreement. Many staff hours have been devoted to the process of hearing claims and implementing programs. Moreover, even if the precise contribution cannot be identified, the Agreement has certainly been a factor in the enrichment of many federal programs in health, education, welfare, policing, self-government, and language retention, on grounds that the past trauma of residential schools, extending across generations, requires broad compensatory measures in the future in addition to individual payouts.

Finally, the Residential Schools Settlement Agreement has furnished a template for other claims of compensation for historical mistreatment. The basic strategy is to launch a class action as a springboard for negotiating a settlement with the Canadian government. So far, the Trudeau government has negotiated settlements, or announced its willingness to settle,

2. Some residential schools were funded by provincial governments and private organizations. Students who attended these did not receive compensation, which remains a matter of contention (Niezen, 2017).

in most of these class actions. As long as chances of success are high, class actions can be expected to proliferate, because they offer potential payouts worth billions to the beneficiaries and millions to the law firms that carry such actions.

Extending the Residential Schools Settlement

At least four groups of former students felt they had been unjustly left out of the residential schools settlement and have launched separate class actions. These include:

1. Indigenous people from Newfoundland & Labrador, who attended residential schools founded before the province became part of Canada;
2. “day scholars,” who attended classes in residential schools but did not stay there overnight;
3. “day students,” who lived at home while attending federally funded, non-residential schools for Indian children (many of these were run by churches with payment from the Department of Indian Affairs);
4. “boarding home students,” who attended public schools in towns or cities while living in privately run boarding houses.

Of the four groups, the class action by those from Newfoundland & Labrador was first to reach a negotiated settlement (CIRNAC, 2018). The federal government set aside \$50 million for compensation of individuals plus commemorative activities. The terms of compensation were roughly parallel to those in the Residential School Settlement. There is a general compensation payment of \$15,000 for those who stayed at a residential school for less than five academic years, and \$20,000 for those who lived there five or more years. There is also an abuse-compensation payment up to a maximum of \$200,000 per claimant, but the actual amount will depend on the number of claimants and the severity of abuse that they allege (Koskie Minsky, 2021).

A settlement for Indian day schools was announced in early 2020 (CIRNAC, 2020a). It is estimated that day school “survivors” will number 120,000 to 140,000, once all claims are received and examined. Canada will set aside \$1.4 billion (\$10,000 apiece) for these people on the assumption that they all suffered “Level 1” harm (for example, mocking, humiliation, threats of violence, and physical discipline that did not leave permanent physical damage). Additional compensation of up to \$200,000 apiece will also be awarded to those who claim higher levels of sexual and/or physical abuse (Levels 2 to 5). There will also be \$200 million for legacy projects and \$55 million for legal fees to Gowlings, the law firm that carried the class action (Grand Council of the Crees, 2021; Gowing, 2020).

A settlement for day scholars, who attended residential schools but did not live there, was accepted by Ottawa on June 9, 2021, and will go before the Federal Court for approval in September 2021. The terms are similar to the other settlements: a payment of \$10,000 to all “survivors” plus possibility of extra compensation for physical and sexual abuse. The number

of claimants is unknown but is estimated at between 12,000 and 25,000. The settlement will also include a Day Scholars Revitalization Fund of \$50 million, plus reimbursement of legal fees to the Kamloops and Sechelt First Nations, who have been paying the lawyers. A unique provision in this settlement is that the category of survivors includes all those alive as of May 31, 2005, even if they are no longer living (Canadian Press, 2021; Martens, 2021), thus generating payments to those who might be called survivors of survivors.

A class action for students who lived in boarding homes while attending public schools has been certified but not yet come to trial (Klein Lawyers, 2021). No settlement has been announced but the lead litigator publicly stated in 2019 that the Liberal government was willing to settle out of court (Barrera, 2019). The Indian Boarding Home Program began in the 1950s and continued into the early 1990s. Its purpose was to bring rural Indian children to towns or cities where they could attend public school. It is estimated that about 30,000 to 35,000 students were involved. The statement of claim filed in Federal Court in Vancouver in 2018 does not say how large the primary class of claimants will be nor does it specify the amount of damages they are seeking (Klein, 2018). Alleged harms include claims of sexual and physical abuse, loss of culture and language, and discriminatory behaviour on the part of boarding home supervisors, as well as teachers and non-Indian students in the public schools.

It is not yet possible to estimate the total cost of settling these four class actions because only that involving Newfoundland & Labrador has a well-defined cap (\$50 million). The day scholars' settlement will certainly run into the hundreds of millions; a basic payment of \$10,000 for 20,000 claimants will cost \$200 million, and additional compensation for sexual and physical abuse will be added to that, as well as legal fees and the \$50 million Revitalization Fund. The day students' settlement will be the most expensive because there will be well over 100,000 claimants. A sum of \$1.4 billion is already set aside for Level 1 harm, and Level 2–5 claims will be added to that, plus \$200 million for legacy projects and \$55 million for legal fees. The number of claimants in the boarding home class action may be similar to the day scholars, but no other information is publicly available to help estimate the cost of a settlement. One might speculate that the total cost of these four class actions could eventually reach \$3 billion or even more, adding at least 50% to the cost of the original residential schools settlement.

Even more important than the increase in cost are some of the conceptual shifts associated with these class actions and settlements. Residential schools were said to be uniquely harmful because students were separated from their families, discouraged from speaking their maternal language, and prevented from learning their tribal culture and way of life. Such harms were invoked to justify the Common Experience Payment offered to every living survivor of a residential school, while extra payments went to those who said they suffered sexual and/or physical abuse. But day scholars at residential schools and students at day schools did not undergo the residential experience; they continued to live with their immediate families or other relatives, where they could speak their language and learn about their

culture. It would make sense to compensate them if they could demonstrate physical or sexual abuse, but why should they be compensated simply for attending a day school? Yet the federal government’s announcement of the day school settlement says: “This settlement is based on the premise that those who were sent to Federal Indian Day Schools were harmed” (CIRNAC, 2020a), without specifying what those harms were.

The situation of boarding home students was perhaps most similar to that of residential school students in that both were separated from their families and cut off from their linguistic and cultural background for long periods of time. But boarding home students attended public schools, and they did not live in large dormitories. Supervision by government authorities was probably less consistent in boarding homes than in residential schools, so physical and social conditions may have been both better and worse, depending on time and place.

Most Indian and Inuit children in the relevant time period fall into these four categories—residential school students, day scholars, day school students, and boarding home students.³ A few may have missed school altogether, have lived with their parents while going to public or Catholic schools in towns or cities, or, like Louis Riel (Flanagan, 1979: 6–8), been sent to private residential schools; but those numbers were relatively small. For all practical purposes, the government of Canada has now embraced the position that providing a Canadian education to native children was an injustice deserving of compensation. All methods of delivery, as implemented at that time, have been found wanting: residential schools, separate day schools for native children, and attendance at public schools.

Would not leaving native children without any formal education been as great an injustice as leading them into residential schools or the other alternatives of the time? That practice was common in parts of Canada during the 19th and early 20th centuries when many Indians and most Inuit were still supporting themselves by hunting, fishing, and trapping; but it could not be maintained forever as Canadian society shifted to an agricultural and then industrial model requiring formal education. Providing education as part of the transition to the new society was necessary and indeed was spelled out as a requirement in some of the treaties.

A still unfinished piece of litigation, which was originally part of the day scholars’ class action but was sundered from it in 2020 because it was impeding compensation for individuals, seems to push the indictment of formal education even farther. The new class action, supported by 105 First Nations, demands compensation not to individuals but to bands. The statement of claim says: “Canada’s residential school policy ripped away the foundation of identity for generations of Aboriginal People and caused incalculable harm to both individuals and communities” (Barrera, 2021). Thus, people alive today who never attended residential schools or day schools deserve compensation, if not as individuals, then as members of damaged communities. This is close to a demand for general reparations for colonialism.

3. These categories are not watertight compartments. Some students may have attended different types of schools at different times.

Canada is opposing this claim, but for how long? The federal government has eventually negotiated a settlement in most other Indigenous class actions, so it may be only a matter of time until this one is settled, too.

The “Sixties Scoop”

The term “Sixties Scoop” is a bit of misnomer; it actually refers to the adoption of Indian and Inuit children by non-native parents between 1951 and 1991. The beginning date comes from the passage of s. 88 of the *Indian Act*, which allowed for provincial laws of general application to apply to Indians in the province unless those laws conflicted with the *Indian Act* or related federal legislation. Under colour of s. 88, provincial departments of child protection began to take native children into custody and place them for adoption with non-native parents, often far from the child’s original home and even outside of Canada. Residential schools had long served as *de facto* orphanages for native children, but these schools were being gradually phased out in the post-war period, leaving the provinces to deal with children who previously might have gone to federal institutions. The ending date, 1991, comes from creation of the First Nations Child and Family Services Program, which allowed (but did not require) First Nations to take over child protection (Sinclair, Dainard, and Gallant, 2020).

Interracial adoption was considered progressive in the 1960s and 1970s.⁴ One high-profile Canadian example is that of Jean and Aline Chrétien, who adopted an Inuk boy from an Inuvik orphanage in 1971, when Mr. Chrétien was Minister of Indian Affairs. Another example was CBC broadcaster Barbara Frum and her husband Murray, who adopted an Indian child in the 1960s. At the time, it was thought to be an act of selfless charity to adopt a native child perceived to be in need of a home. Now such adoptions are often decried as acts of cultural genocide and theft (the Australian term parallel to Sixties Scoop is “Stolen Generations”) (Philp, 1999).

Class action suits were launched in several provinces in the 1990s, demanding compensation for children who had been adopted out, on grounds that they had been deprived of their language and cultural heritage. The Trudeau government negotiated a settlement in 2017, calling the Sixties Scoop “a dark and terrible chapter in Canada’s history” (CIRNAC, 2020b). The settlement provided for a maximum expenditure of \$800 million—\$50 million to endow a healing foundation and the rest for individual compensation. The precise amount of individual compensation will not be known until there is a final tally of approved claims, but it cannot go above \$50,000 per person (Sixties Scoop Settlement, 2017). As of July 31, 2021, 34,770 claims had been received and 16,794 had been approved (Sixties Scoop Settlement, 2021). If, say, 25,000 claims are ultimately approved, claimants will receive about \$30,000 apiece. The COVID pandemic caused processing delays, so interim payments of \$21,000 to approved claimants were made in 2020 (Deer, 2021).

4. Full disclosure: I adopted two children in the 1960s and 1970s. Although they did not have Indigenous ancestry, the experience of being their adoptive father perhaps colours my perception of this issue.

Phasing out interracial adoption, without finding an equivalent number of Indigenous adoptive homes, has led to an increase in the number of Indigenous children in foster care. At the time of the 2016 census, 7.7% of all Canadian children, but 52.2% of children under the age of 15 in private foster homes were Indigenous (CIRNAC, 2020b). In light of those facts, it is not surprising that a class action was launched seeking \$6 billion to compensate Indigenous children who were in foster homes from 1991 onwards. Ottawa announced its desire to settle, but then the Assembly of First Nations launched another class action seeking \$10 billion. The two lawsuits seek to benefit the same primary class—Indigenous children who went through foster care—but emphasize somewhat different legal theories (Barrera, 2019; Sortor, 2019; Sixties Scoop Settlement, 2021). They will probably be consolidated when the government settles. Also factoring into the negotiations will be a decision by the Canadian Human Rights Tribunal (2016 CHRT 16) ordering the federal government to pay \$40,000 apiece to Indigenous children who went through foster care (CHRT, 2016), a decision that has been appealed to the Federal Court. Apparently the government is willing to compensate the adopted children through direct negotiations but disputes the jurisdiction of Canadian Human Rights Tribunals to order such payments.

This series of class actions involving child welfare has larger implications. In the original Sixties Scoop case, the federal government was sued essentially for not having its own program—for leaving the field of Indigenous child welfare to the provinces—resulting in adopted children losing their language and tribal traditions. In the more recent class actions, the federal government is admitted to have had a policy and program including a role for First Nations’ authorities, but is accused of providing inadequate funding, resulting in the victimization of Indigenous children. The course of class actions in the field of child welfare, as well as in education, suggests there could be an open-ended series of lawsuits as new policies and programs are tested in practice and found to be imperfect.

Indian Hospitals

On the Canadian frontier, missionaries often set up small hospitals for Indians, sometimes in connection with residential schools, whose students could go to the hospital when they were sick. As populations became greater, Indians were sometimes sent to special wings of local community hospitals. But the prevalence of tuberculosis among Indigenous patients made many hospitals reluctant to admit them, even though the Indian Health Service offered some funding. Starting in 1936, the federal government started to establish separate Indian hospitals, which were transferred to the jurisdiction of the Department of National Health and Welfare in 1945. Thirty-one Indian hospitals existed at different times and places until they were shut down in the 1980s (Koskie Minsky LLP, 2020; Indigenous Corporate Training, 2017).

A class action for \$1.1 billion damages was filed in 2018. The representative plaintiff, Ann Hardy, was admitted as a ten-year-old girl in 1969 to the Charles Camsell Indian Hospital in Edmonton in 1969, where she recovered from tuberculosis. She now claims to have been groped by male technicians while being X-rayed and to have witnessed the sexual exploitation

of her pre-teen roommate. The statement of claim alleges in general that Indian hospitals were underfunded, offered inferior care in substandard facilities, permitted experimentation on patients, and were rife with sexual and physical abuse. An important feature of the claim is that it is made on behalf not only of the primary class—former patients at Indian hospitals—but also of the family class—family members connected to the primary class. In the case of Ann Hardy, that includes her husband, because he has had to live with the long-term psychological consequences of the trauma allegedly caused by Ann’s stay at the hospital.

Carolyn Bennett, Minister of Crown-Indigenous Relations, was quoted in 2018 as saying that the government “respects” the plaintiffs’ decision, and that “Canada believes that the best way to address outstanding issues and achieve reconciliation with Indigenous people is through negotiation and dialogue rather than litigation” (Pelley, 2018). Negotiations have apparently not yet been successful, because an amended statement of claim was filed in 2020 (Koskie Minsky LLP, 2020). The government may be balking at the concept of the family class, because previous settlements have been restricted to “survivors” of impugned social and educational programs (including heirs of deceased survivors in the day scholars’ settlement). Recognition of harm to the family class opens the door to far more claimants—in Ann Hardy’s case, a husband whom she did not meet until many years after she had been a patient in an Indian hospital.

Water Advisories

In November 2019, a class action was filed on behalf of 120 First Nations who have lived with water advisories for at least one year since 1995 (Annable, 2020). Minister of Indigenous Services Marc Miller announced an agreement to settle on July 30, 2021. Terms are apparently still being hammered out; but according to news reports, as many as 142,000 persons could be compensated individually and 120 First Nations collectively. The amount set aside for compensation is reported to be \$1.5 billion, plus \$400 million for a First Nation Economic and Cultural Restoration Fund. The total settlement is evaluated at about \$8 billion, because the government is renewing its commitment to spend about \$6 billion that it has pledged at various times to lift long-term water advisories (Stefanovich and Raycraft, 2021). Thus, the new spending generated by the class action seems to be about \$2 billion, though it is hard to know for sure without seeing the final terms of the agreement.

This settlement breaks new ground in that it is the first one not to be based, at least in part, on claims of sexual and physical abuse, or loss of culture and language. The harm here is the inconvenience of not having clean water, plus potential harm to health through contamination and infection. If lack of clean water is actionable, can there be further class actions dealing with allegedly substandard public services to First Nations, such as unsafe road connections or inadequate policing?

Summary and Conclusions

The use of alleged past injustices to obtain financial benefits in the present and future, under the global heading of reconciliation, is sure to increase if present trends continue. In the realm of specific claims, the government of Justin Trudeau is signing settlements at a faster rate than ever. But rather than saying that these settlements close the book on past injustice, the government is planning to “replenish the Specific Claims Settlement fund” in 2022/23.

With respect to class actions, several trends signal future growth. As shown in **table 1**, one class action (residential schools) was settled in 2006, followed by no more settlements for a decade. But, shortly after the Trudeau government came to power, the pace picked up dramatically, with one settlement announced in each of 2017, 2018, and 2020, two in 2021, and four major class actions still pending. The Trudeau government has repeatedly signalled that it would rather negotiate than litigate. The result has been, not an end to litigation but an increase of class action litigation designed to lead to compensation through negotiations.

Table 1: Timetable of Indigenous class actions

Year of settlement	Subject of class action
2006	Indian Residential Schools
2017	Sixties Scoop
2018	Newfoundland & Labrador Residential Schools
2020	Indian day schools
2021	Indian day scholars
2021	Long-term water advisories
In progress	Indian boarding students
In progress	Foster care
In progress	Indian hospitals
In progress	Indian day scholars (collective aspect)

Subjects of litigation have multiplied. After beginning in a limited way with residential schools, all modes of Indigenous education came under fire. There were also class action attacks on different forms of protecting Indigenous children and on Indian hospitals. Finally came a class action based on the provision of water in First Nation communities. In light of these precedents, virtually any public service would seem to be a suitable target for litigation designed to lead to negotiated compensation. Indeed, in the late stages of drafting this paper, a new class action was filed, seeking compensation for alleged discrimination against

all Indigenous employees of the two ministries dealing with Indigenous affairs—Indigenous Services Canada, and Crown-Indigenous Relations and Northern Affairs Canada. The two representative plaintiffs are First Nation women who have worked for Indian Oil and Gas Canada (Grant, 2021).

Litigation has also expanded the numbers and categories of people claiming compensation. It started with claims for compensating individual victims—those who had attended residential schools. But more recently claims have been made for compensating heirs of victims, family members of victims, and whole communities in which victims lived. Canada is now only one step away from accepting the position of RoseAnne Archibald, the new National Chief of the Assembly of First Nations, that reparations must be paid to all Indigenous people because of the harm caused by colonialism. All the various settlements paid thus far, she said, amount to “only one piece of reparations. We need those reparations to happen not only with individuals, but communities and nations” (Jones, 2021).

Researching the past for grievances raises total budgetary expenditure in two ways. It directly increases spending as billions of dollars are paid out in compensation, and it indirectly contributes to rising expenditure by leading governments to promise increased spending on services to Indigenous people while denouncing its own past efforts as inadequate. Reining in the litigation-negotiation process will be an essential part of bringing the Indigenous budgetary envelope under control. Here are three suggestions toward that end:

1. Stop funding the research that First Nations conduct to prepare specific claims. Why should taxpayers fund research designed to extract more money from them?
2. Even better, declare that recognition of specific claims will come to an end in 2024, the 50th anniversary of establishing the Office of Native Claims. Half a century of compensating for past injustices should be enough, particularly when the number of alleged injustices keeps growing rather than diminishing.
3. Stop rushing to settle class actions. This last point requires further elaboration.

Class actions have become a significant part of the legal business in Canada (Reynolds, Gotowiec, and Shiff, 2017). They are a profit centre for law firms; indeed, they lie at the core of the business model of certain firms, which have built the machinery necessary to find representative plaintiffs, recruit members of the aggrieved class, and pursue action in court. Indigenous class actions are different only in that they often depend on old grievances rather than recent events. Class actions bring compensation to individuals, but they also mean lucrative fees to law firms. Rushing to settle class actions helps the law firms that pursue them earn more money more quickly and virtually guarantees the proliferation of class actions in the future. Reducing the number of Indigenous class actions requires making them less remunerative, thereby affecting the profit-cost calculations of the lawyers who pursue them.

The government of Canada can do this with the resources at its disposal. Instead of rushing to settle, it can contest class actions vigorously by mounting a full defence at trial. If

defeated at trial, it can appeal, even to the Supreme Court of Canada if necessary. This would not only make the litigation more time-consuming and costly to those who are making a business of it, it would benefit the law. These lawsuits all raise novel questions of government liability. By rushing to settle, the government prevents these issues from being considered by the top legal minds on Canada's appellate courts.

This new approach would require a change of attitude on the part of the current government, whose members frequently say that negotiation is preferable to litigation. In effect, they have fitted a political straitjacket on the conduct of litigation. Carolyn Bennett, Minister of Crown-Indigenous Relations, said about the day school settlement: "This agreement demonstrates a comprehensive approach accomplished by working with survivors which cannot be achieved through court processes" (CIRNAC, 2020a). She had said much the same thing in connection with the Indian hospitals class action: "Canada believes that the best way to address outstanding issues and achieve reconciliation with Indigenous people is through negotiation and dialogue rather than litigation" (Pelley, 2018). The same attitude was expressed in Jody Wilson-Raybould's "Directive on Civil Litigation Involving Indigenous Peoples," posted in 2017 just before she resigned as Minister of Justice and Attorney General (Canada, Department of Justice, 2021; Wilson-Raybould, 2021). But greater reliance on court processes may be necessary to reduce the search for past injustice and the annual outflow of billions of dollars in compensation.

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