

From the Fall/Winter 2012 edition of Nexus

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Civil action, redress and memory



Lessons learned from the Canadian
residential schools context

*From the **Fall-Winter 2012** issue of Nexus.*

By Mayo Moran, Dean, Faculty of Law / Illustration by Sebastien Thibault

When we think of countries with troubled pasts, it is not Canada but places like Germany and South Africa that generally come to mind. Yet established democracies have their own difficult histories of widespread wrongdoing. How ought we to respond to these legacies? There are lessons to be learned from Canada's Indian Residential Schools Settlement Agreement (IRSSA), arguably the most comprehensive effort yet to respond to widespread historic injustice. It came into effect five years ago and its deadlines are beginning to pass. **On January 18, 2013, the Faculty will bring together key parties to reflect on what has been accomplished and what challenges lie ahead.**

Until recently most Canadians were unaware of residential schools. Yet more than 150,000 Aboriginal children were taken from their families and placed into Indian Residential Schools in this country. Once in the schools, children were often punished for speaking their languages and for their beliefs. Malnutrition, neglect, physical and sexual abuse were widespread. Mortality rates were high. The effects of the schools remained long after they closed but were rarely discussed.

By the late 1980s, the Charter's influence was being felt throughout our legal system. And so when the residential schools legacy began to be litigated, there was more openness to removing procedural barriers such as limitations periods, immunities, vicarious liability rules and the like. As the barriers fell, the litigation increased. In 1998 the federal government responded with a multi-part strategy but it did little to stem the tide. By 2002, more than 12,000 legal claims had been filed against the federal government and the churches, and the numbers continued to mount.

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Then in May of 2005, the federal government undertook negotiations aimed at producing a comprehensive settlement to address the legacy of residential schools. The process was led by The Honourable Frank Iacobucci, LLD 1989 *Hon.*, acting as Canada's representative, who worked closely with Chief Phil Fontaine, National Chief of the Assembly of First Nations (AFN) at that time. The negotiations included counsel for former students, churches and government, the AFN and the other national Aboriginal organizations. They produced an agreement that many had viewed as impossible to achieve given the diversity of interests. The Indian Residential Schools Settlement Agreement (IRSSA) was signed by all of the many parties in May of 2006, approved by courts that had certified class actions throughout Canada, and came into effect on September 19, 2007.

As the largest class action settlement in Canadian history, the IRSSA is daunting in its complexity. Nine judges from across the country approved it. Under a Court Administration Protocol, two administrative judges, Madam Justice Brown from BC and Chief Justice Winkler from Ontario, maintain ongoing supervisory jurisdiction and have issued a number of important rulings. A National Administration Committee (NAC) composed of representatives of the parties is charged with a number of tasks, including overseeing the agreement.

The IRSSA mandated a Common Experience Payment (CEP). Eligible former students receive \$10,000 for the first school year and \$3,000 for each subsequent year. More than 105,000 applications were received and more than 78,000 were found eligible. The average payout per recipient was a little more than \$20,000. The total payout under the CEP to date is \$1.664B. The remainder of the \$1.9B allocated to the CEP in the IRSSA is to be distributed for educational purposes.

The IRSSA also provided for healing funds in the amount of \$120 million to be assigned to the Aboriginal Healing Foundation for survivors and their relatives who were affiliated with the residential schools system. Funds were also provided for lawyers' fees.

The Truth and Reconciliation Commission (TRC) is perhaps the most widely known element of the IRSSA. It was created to promote public education and awareness about the Indian Residential Schools system and its legacy, as well as to provide former students, their families and communities an opportunity to share their Indian Residential Schools experiences. The TRC has held national and community events and issued an interim report. It is also charged with establishing a research centre, and will issue its final report detailing the history and legacy of the schools and the prospect for reconciliation in 2014. Professor Kent Roach of our Faculty serves as a special adviser to the TRC.

The IRSSA also created an Independent Assessment Process (IAP). Administered by an independent Adjudication Secretariat, the IAP was designed to be a fair and impartial claimant-centered adjudication process for awarding compensation for serious harms, including physical and sexual abuse. The original projection was for 12,000 to 15,000 claims. In fact, as of the September 19, 2012 deadline, more than 30,000 applications had been received. More than 17,000 claims have been resolved through hearings and negotiated settlement, and over \$1.6B in compensation awarded. The Oversight Committee advises the chief adjudicator, and I have served as independent chair of the Oversight Committee since 2007.

On June 11, 2008, Prime Minister Stephen Harper, speaking on behalf of all Canadians in the House of Commons, issued a full apology for the residential schools system.

The fifth anniversary of the coming into force of the IRSSA provides an opportune moment to reflect on the progress to date, what has been accomplished by this remarkable agreement, and what challenges lie ahead. The Faculty of Law has long been involved with the issues. In 2000, with litigation mounting and pressure rising, my colleague Professor John Borrows and I organized an intensive week for the entire first-year law class on the subject of redressing historic injustice. Opened by National Chief Phil Fontaine, the week featured all of the key parties as well as colleagues and alumni. Over the years, Professors Darlene Johnston, Douglas Sanderson, Patrick Macklem, Kent Roach and I, along with many others, have raised these issues into the classroom and have organized roundtables and colloquia with leading players to help support the process with research and comparative lessons. But undoubtedly our law school's most important contribution to the process was The Honourable Justice (and former Faculty of Law Dean) Frank Iacobucci. Along with National Chief Fontaine, he arrived at an agreement that many thought impossible. The historic settlement was inked in the last days of the minority Liberal government led by another distinguished U of T Law graduate, the Right Honourable Paul Martin, LLB 1964, LLD 2011 *Hon.*

As a Faculty, we bring rigorous academic thinking to bear on the most pressing issues of our day. So last summer, when my colleague Professor Kent Roach and I were discussing some of the larger issues associated with the IRSSA, we realized that it was an opportune moment **to host an event to reflect on what has been accomplished and what lies ahead.** The Honourable Frank Iacobucci, Chief Fontaine, The Honourable Justice Murray Sinclair of the TRC, and many others involved in this historic agreement will join us. We would be delighted if you were also part of this important occasion for the Faculty on January 18, 2013.

Read coverage of the January 18, 2013 conference.

<http://www.law.utoronto.ca/news/conference-takes-stock-canada%E2%80%99s-indian-residential-schools-settlement-agreement>