

## Class Actions

# Survivors reflect on Indian residential schools settlement

By Angela Bespflug and Janelle O'Connor



Angela Bespflug



Janelle O'Connor

(May 21, 2020, 2:47 PM EDT) -- One of the most significant and large-scale settlements in Canadian history, the Indian Residential Schools Settlement Agreement (IRSSA), resolved thousands of individual claims and numerous class actions brought by survivors of the Indian residential schools system.

Between late 2006 and early 2007, nine courts across the country issued judgments certifying the class actions and approving the IRSSA as "... fair, reasonable, and in the best interests of the Class Members." (*Fontaine v. Canada (Attorney General)* 2018 ONSC 6381 at para. 31.)

As summarized in *Fontaine*, the major parts of IRSSA were: a \$1.9 billion fund for "common experience payments" (in amounts of \$10,000 and greater), which were payments for general compensation available to each claimant who attended an Indian residential school; a separate "independent assessment process" through which claimants could apply for additional compensation for any physical or sexual abuse they suffered while at residential schools; and the creation of the Truth and Reconciliation Commission, which had a mandate to create a historical archive and research centre about the Indian residential school system and the experiences of children who attended the schools.

IRSSA was met with mixed reactions. Some spoke of its success, including the independent adjudication process and the closure that these oral hearings afforded claimants. Others spoke of its shortcomings, including the 10-plus year period required to process claims.

In 2018, the National Centre for Truth and Reconciliation (NCTR) initiated a project to identify lessons learned from IRSSA's claims process. For this purpose, NCTR sought input from various stakeholders, including the parties to the litigation and Indian residential school survivors across the country — including intergenerational survivors. The project culminated in a recently published report by the NCTR, *Lessons Learned: Survivors Perspectives*. The report was published just prior to the COVID-19 crisis

and, as such, didn't garner the attention it deserved.

The perspectives and experiences shared by survivors in the report are invaluable and provide much-needed guidance to lawyers tasked with designing future settlements for collective wrongs against Indigenous peoples. The stories of survivors also serve as an important reminder that adopting a western-centric settlement claims process — based on the adversarial nature of Canada's judicial system — can retraumatize survivors and undermine the fundamental goals of settlement: namely, redress and reconciliation.

The report highlights the importance of creating a culturally sensitive claims process that prioritizes Indigenous law and cultural practices, and that promotes substantive healing between the Crown and Indigenous peoples. This requires that lawyers be cognizant of Indigenous worldviews when crafting any settlement claims process, and that cultural competency and the use of Indigenous

methodologies are utilized and prioritized.

Ultimately, the report demonstrates that a survivor-focused, trauma-informed approach (including aftercare) is essential in future settlements for institutional abuse. This is not easily accomplished, since the rigour required by defendants is often at odds with a trauma-informed claims process. However, with careful design and delivery — in consultation with class members and experts — and ongoing transparency, evaluation and communication, such an approach is attainable.

A trauma-informed claims process has been utilized, in part, in the recent Indian day schools class action settlement, which the Federal Court approved as "... fair, reasonable and in the best interests of the class as a whole ...": *McLean v. Canada* 2019 FC 1075. The Indian day schools settlement seeks to compensate survivors of Indian day schools who were subjected to verbal, physical and sexual abuse while attending school. Its settlement claims process is simple, expeditious and avoids the need for oral hearings; from this perspective, it seeks to avoid the retraumatization and hardship experienced by some survivors in IRSSA's claims process. In October of 2017, over one hundred thousand Indian day schools survivors were still alive.

The Indian day schools settlement does not contain a "common experience payment"; instead, compensation is acts-based. In order for a person to receive compensation under the settlement, they need to not only have attended an Indian day school but must also have been subjected to harm while at the school. The settlement provides for five levels of compensation, ranging from \$10,000 for Level 1 acts (such as verbal abuse and sexual comments) to \$200,000 for Level 5 acts (such as repeated and persistent incidents of sexual intercourse). Canada has allocated \$1.27 billion for Level 1 claims, which can be increased to \$1.4 billion, if required. There is no cap for Level 2 through 5 claims, meaning that all claimants assessed as having valid Level 2 through 5 claims will be compensated, and the compensation provided will not be *prorated* if the settlement is over-subscribed.

Similar to the Sixties Scoop class action settlement — which established and funded a foundation to promote healing, commemoration and education activities for survivors of the Sixties Scoop and their communities: *Riddle v. Canada* 2018 FC 641 — the *McLean* settlement provides for a \$200-million Legacy Fund to support commemoration events, healing projects and the restoration of Indigenous languages and cultures. The implementation of the Indian day schools settlement, and its impact on survivors, has yet to be realized. As with so many settlements, "... the proof of the pudding is in the eating." (*Tiller v. Canada* 2020 FC 321 at para. 56.)

What we do know is that the report offers invaluable insight to lawyers on both sides of the table who are tasked with designing settlements. Class counsel hold tremendous responsibility when seeking redress for harms of this nature and should take note of what did and did not work in IRSSA. Properly designed and executed, class action settlements provide a real opportunity for truth, healing and reconciliation.

*Angela Bessflug and Janelle O'Connor are class action lawyers at Murphy Battista LLP in Vancouver. They act exclusively for plaintiffs. They are thankful to the IRSSA survivors for sharing their invaluable perspectives.*

*Photo credit / PeterSnow ISTOCKPHOTO.COM*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437 828-6772.*