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Litigating and Adjudicating as if Reconciliation Didn't Really Matter:

A Critical Look at Justice Canada and the Chief Adjudicator in the
Indian Residential School Settlement Agreement

David Schulze

***Whose Settlement Agreements?
Learning from the 60s Scoop and Indian Residential Schools***

University of Regina

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Learn to do right; seek justice.
Defend the oppressed. Take
up the cause of the fatherless;
plead the case of the widow.

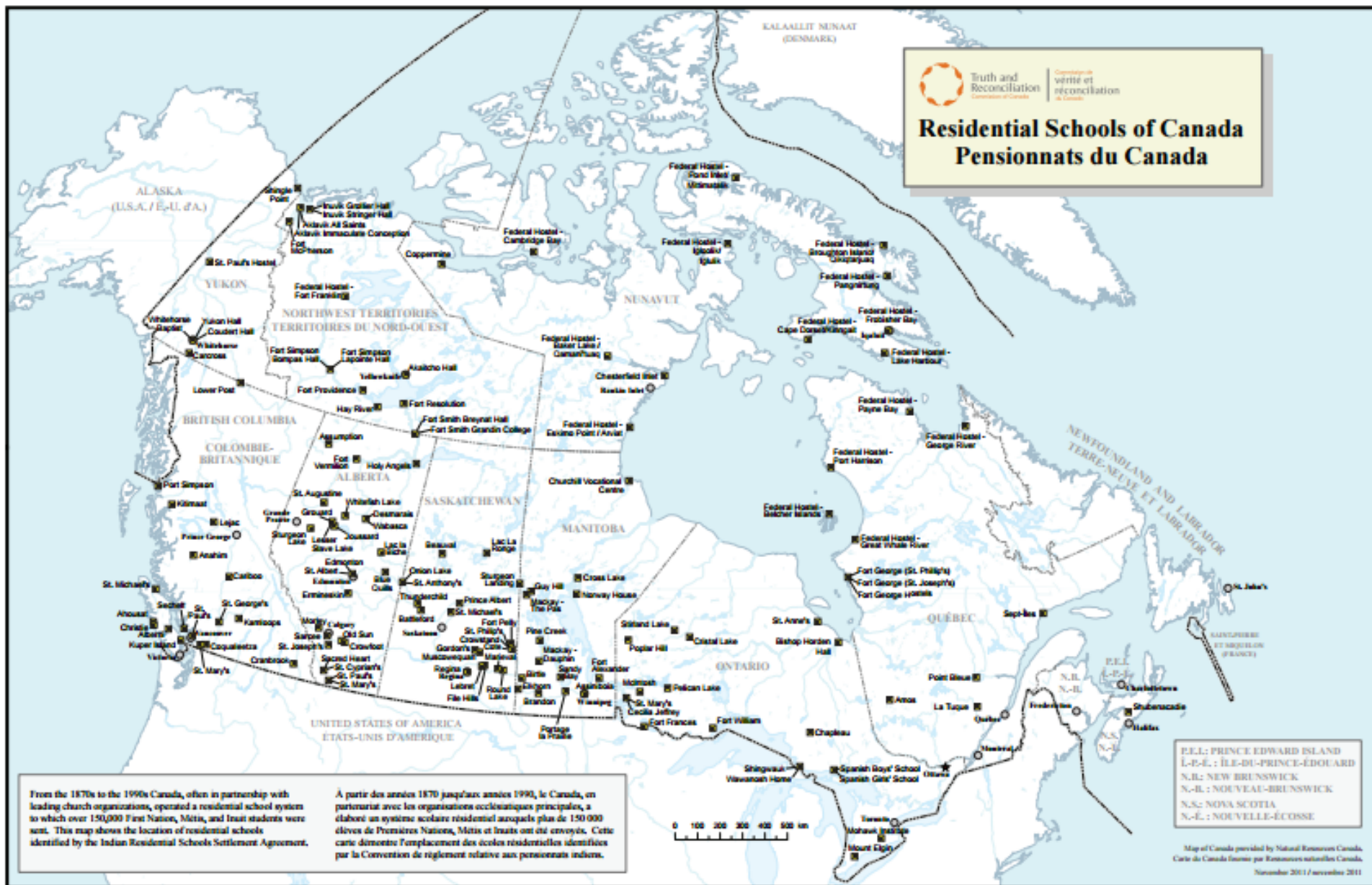
Isaiah 1: 17



Reconciliation is not what you
say; it is what you do.

Cindy Blackstock





In the Independent Assessment Process (IAP) under the Indian Residential School Settlement Agreement (IRSSA), legal arguments made by Justice Canada lawyers and accepted by IAP adjudicators:

- undermined the Agreement;
- denied compensation to a significant minority of victims of abuse; and
- worked against reconciliation.

Most IAP claims proceeded without significant legal complications and resulted in compensation awards.

However, complex cases were denied when:

- Canada adopted restrictive and complicated interpretations of the IAP;
- to which adjudicators repeatedly conceded.

Clear abuse went uncompensated due to:

- complicated, mean-spirited legal arguments by Canada;
- complex and poorly-reasoned adjudication decisions.

Indian Residential Schools

Adjudication Secretariat

Secrétariat d'adjudication

des pensionnats indiens

When claimants brought the results before the supervising courts, Justice Canada and the Chief Adjudicator joined forces to deny relief to the victims.



The IRSSA's goals are:

- “a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools”; and
- “the promotion of healing, education, truth and reconciliation and commemoration.”

Those goals required better litigation and adjudication than Justice Canada and the Chief Adjudicator demonstrated.

May 8, 2006

CANADA, as represented by the Honourable Frank Iacobucci

-and-

PLAINTIFFS, as represented by the National Consortium
and the Merchant Law Group

-and-

Independent Counsel

-and-

THE ASSEMBLY OF FIRST NATIONS and INUIT REPRESENTATIVES

-and-

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA,
THE PRESBYTERIAN CHURCH OF CANADA,
THE UNITED CHURCH OF CANADA AND
ROMAN CATHOLIC ENTITIES

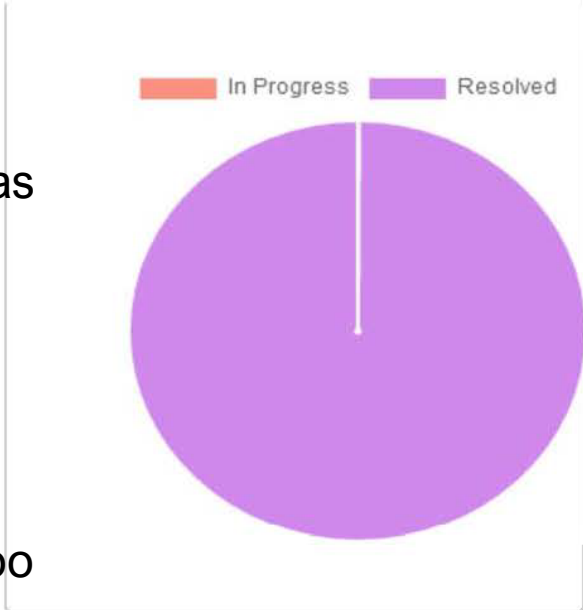
**INDIAN RESIDENTIAL SCHOOLS
SETTLEMENT AGREEMENT**



1st caveat: the IAP was a success.

How do we know?

- Canada hates the process: “too complicated, too expensive, took too long”
- The numbers: 27,000 claims heard, 89% compensated, \$3.24 billion paid in compensation including negotiated settlements.



Province	All claims received	Claims Resolved	Claims in Progress
Total	38,261	38,233	28
CLAIMS IN PROGRESS			28
Claims at Post Hearing Stage			23
Claims with Hearings Scheduled			0
Other claims to be resolved			5
Hearings to be scheduled (ESTIMATED)			3
Claims that may be resolved through other means (estimate)			2
CLAIMS RESOLVED IN THE LAST SIX MONTHS			71
TOTAL IAP HEARINGS HELD			26,703
SUCCESSFUL CLAIMS			89%
AVERAGE COMPENSATION			\$91,471.07
AWARDS BY ADJUDICATORS			\$2.139 Billion
TOTAL PAYMENTS			\$3.24 Billion

2nd caveat: if it were up to Canada and a corporate law firm, it would be much worse

Every positive feature of the IAP was removed from the *McLean* Indian day schools settlement:

- no hearings – paper-based process for an accounting firm to evaluate
- no budget for support workers – victims must write their trauma down by themselves
- short deadlines: 2½ years instead of 5 years, with total extinguishment of all rights after that.

Court File No. T-2169-16

FEDERAL COURT

CERTIFIED CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN, ROGER AUGUSTINE,
CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN AND MARIETTE BUCKSHOT

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

SETTLEMENT AGREEMENT

Why pick on Justice
Canada lawyers and
IAP adjudicators?

What about claimant
counsel?

Claimant counsel
strategies were the
results of choices made
by hundreds of lawyers
acting independently



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Federal government strategy was
directed by Justice Canada and Indian
Affairs: it was coordinated and deliberate



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October 9, 2019

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**Liberals to lash out at selves after
decisive win over residential school
survivors**

JANUARY 18, 2018

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The Liberal government said it would lash out at itself after a British Columbia Supreme Court justice ruled that [new evidence of abuse](#) was not enough to reopen rejected Indian residential school

Adjudicators were directed by the Chief Adjudicator, who assigned them their cases and read all their decisions

While claimant counsel choices affected only their clients, Justice Canada and the Chief Adjudicator's decisions affected the entire IAP

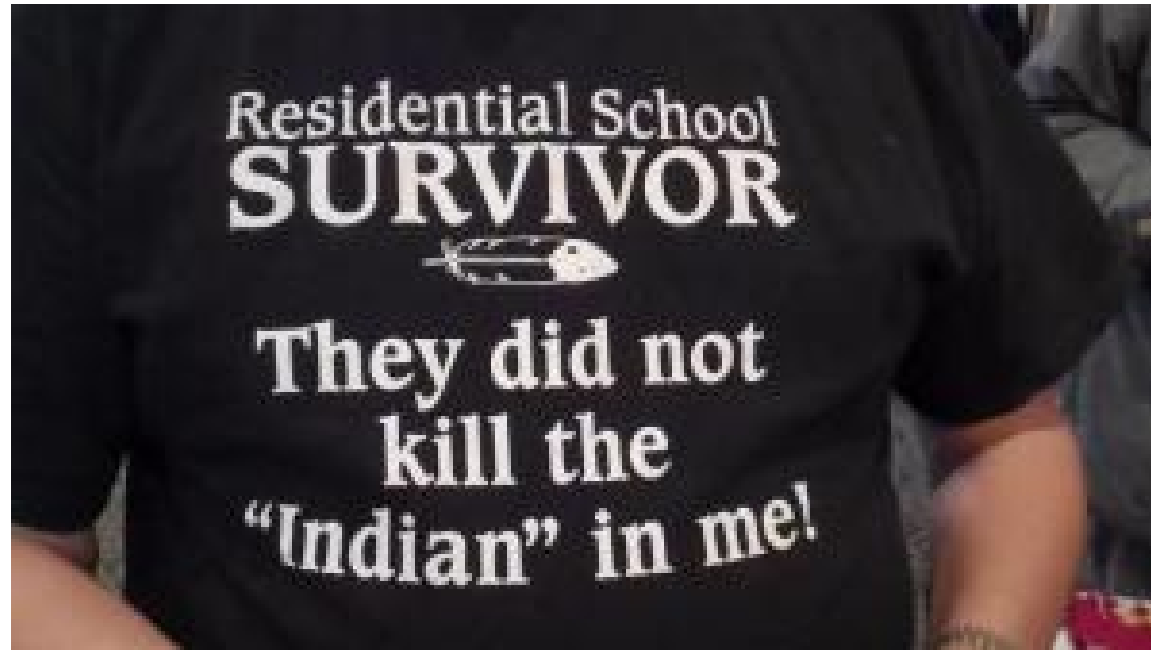
Indian Residential Schools

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des pensionnats indiens

What accounts for the success of the IAP?
Above all, claimant testimony, claimant credibility



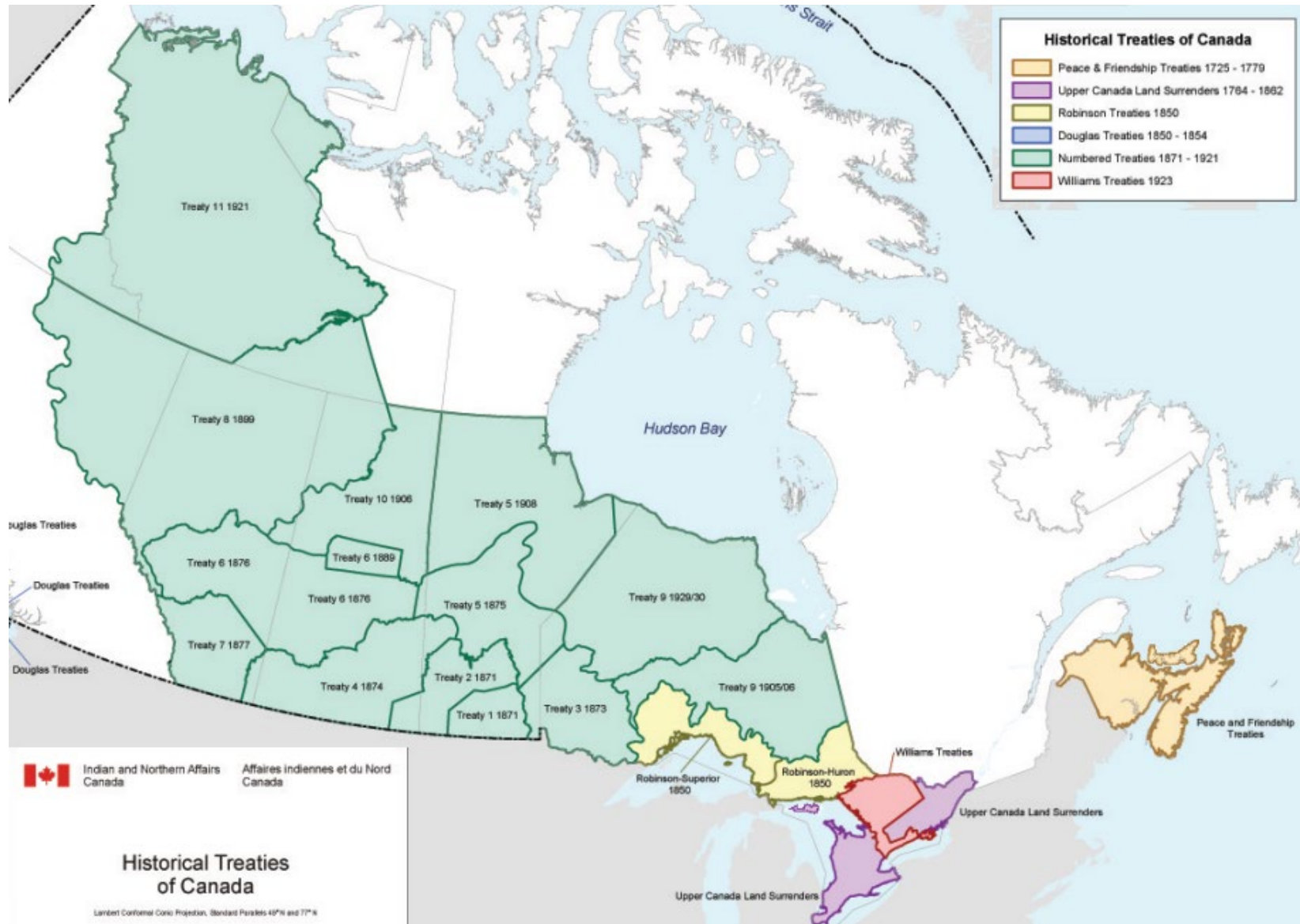
But the number of claims filed vastly exceed the estimates when the Agreement was signed

What was the federal government response?
Jurisdictional arguments
to deny compensation to claimants whose abuse was not
in doubt



What was the adjudicators' response?
Unhealthy deference to Canada's interpretation of the Agreement

Why?



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Why?



M.F. and the Spanish IRS



Spanish IRS then and now

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M.F. and the Ontario courts



J.W. at Indian Residential School



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J.W. in the Manitoba courts and the Supreme Court of Canada



H and St. Anne's IRS



St. Anne's IRS then and now

H and St. Anne's IRS and "Procedural Fairness"

