From Reconciliation to Reparations

Exploiting a Noble Idea

by Tom Flanagan

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.

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