

**Residential School Adjudication Process: Beyond Dispute Resolution
Ethical Issues Confronting Legal Counsel for Claimants**

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I. INTRODUCTION

The Residential Schools Adjudication Process arose out of a complex series of issues following the earliest disclosures of sexual abuse at the Indian residential schools. In 1988, a young man named Gilbert Spinks, together with 6 others including Terry Aleck, first laid charges against Derek Clarke in 1988 for sexual abuse that occurred at St. George's Anglican Indian Residential School in Lytton. Within 2 years, the newly elected head of the Assembly of First Nations, Grand Chief Phil Fontaine, publicly disclosed that he himself had been a victim of abuse at residential schools in Manitoba. Notwithstanding these disclosures at widely disparate schools and the follow-up investigation with respect to sexual abuse at Alberni Indian Residential School leading to convictions of certain perpetrators of sexual abuse from these schools, Canada and the Churches for several years maintained that these were exceptional situations. In the later 1990s it was disclosed that there had actually been knowledge by both Canada and the United Church of abuse in the 1960s at Edmonton IRS.

Inevitably, disclosure of sexual abuse and severe physical abuse at the Indian residential schools began to spread although many victims refused to disclose the severe abuse that they had suffered. This is typical of victims of childhood sexual abuse who often feel that they are "to blame" for the abuse that occurred.²

By the beginning of the 21st century, a class action, known as the *Baxter* case, was commenced in Ontario. When the Ontario High Court and the Ontario Court of Appeal

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² Dr. J. Herman, [Trauma and Recovery](#), p.2

upheld the certification of a class action for all students who attended the specific IRS, it triggered Canada's desire to start to address sexual abuse and serious physical abuse through a broader national negotiation. In March 2005 the Honourable Frank Iacobucci, formerly Justice of the Supreme Court of Canada, was retained by Canada to negotiate a resolution of these claims. The negotiations were intense and culminated on October 22, 2005, several months before the scheduled mandate for Frank Iacobucci was to expire. This was because it was clear the Federal government would fall within 2 days.

There were over 70 lawyers and aboriginal representatives at the table in these negotiations which made them very complex. There was representation from the Assembly of First Nations (AFN), the Inuit (3 organizations), the Catholic, Anglican and United Churches, Canada, and three plaintiffs' counsel's organizations. The lawyers involved in the *Baxter* class action had worked and arranged a consortium of lawyers ["Consortium"] involving approximately twenty law firms that joined with them in negotiating one settlement based on the success of the *Baxter* class action. Tony Merchant of the Merchant Law Group had attested that he had over 4,000 claims and, on that basis, he was represented at the meetings as there was such a large number of claimants who he stated he represented. Finally, there was the Independent Counsel group which involved over twenty law firms from across Canada who were not engaged in a class action but who had, between them, between 4,000 and 5,000 clients who were survivors of Indian residential schools. Each of these plaintiffs' counsel entities has continued to operate subsequent to the settlement.

A. Ethical Issues During Negotiation

The outcome of what has occurred in the settlement with respect to the role of legal counsel for claimants had its genesis in the perceptions of Canada, the Churches and the AFN, the pressure of finalizing an agreement at the 11th hour and the observations of Justices from nine courts in seven provincial jurisdictions and in all three Territories.

Firstly, none of the cases in Alberta had moved forward as it was anticipated that there would be one test case there, which case never advanced. There were several thousand

claims in Alberta. Justice McMahon had been informed that there were cases in which people were invited to public meetings in communities and the attendance list at the community was appended by some legal counsel as a list of their clients. This issue was raised during the finalization of the terms of the court orders by Justice McMahon.

There was also a very serious concern with respect to the assignment of funds from settlements that had occurred. For example, car dealers and lenders were advancing money at exorbitant interest rates to aboriginal people in anticipation that they would be reimbursed by the funds received from the settlement. It was agreed by several of the parties that assignments should be prohibited under the terms of the Settlement Agreement to avoid this conduct.

B. Legal Fees

The legal fees issue was complex because the Consortium and the Merchant claims could be based on class actions proceedings which allowed for a top up of a lump sum fee. This resolved the issue of payments for Common Experience Payments for those two groups which was a new benefit obtained by the claimants as a result of the Settlement Agreement.

Independent Counsel, with whom negotiations on legal fees was only addressed in the last 2 days of the negotiations, were informed that they would be prohibited as well from collecting on the Common Experience Payment. The Independent Counsel who represented the Independent Counsel negotiated a process by which they would be paid up to \$4,000 of their work in progress on claims that they had as of the commencement of the negotiation process up to the date of the Agreement-in-Principle (October 22, 2005).

Canada was concerned and refused to negotiate a flat fee because of the suggestion that some law firms were adding clients to their list without any substantial relationship or work for the client. For that reason, the base was to be the actual work in progress up to October 22, 2005 with a ceiling of \$4,000 in fees, plus reasonable disbursements. This rather complex process led to two court appearances in which the claims of Independent

Counsel were upheld and a 2 ½ -year delay until March 2010 for finalization of most of these claims.

In exchange for what had been anticipated as a relatively quick process at the time, Independent Counsel agreed along with the other claimants' counsel that, so long as they were signatories to the Agreement and received these payments, they would not be able to make other claims for the Common Experience Payment.

C. Fee Reviews

This culminated when Justice Winkler, during the hearing, insisted that there should be a right of a fee review without the necessity of going through the court process (taxation officers). It has been theorized that this was in part because contingency fees were relatively new in Ontario and the enforcement of those fees was not a matter with which the courts in Ontario were that familiar.

As a result of comments made by a few of the courts, adjudicators are being encouraged to do fee reviews virtually in every case. This has added to the cost of the process, the delay in finalization for the claimant and a potential serious undermining of the relationship of trust that legal counsel must address with claimants in these cases.

D. The CBA Guidelines

The author is proud to have been actively involved from 1998 on in the advocacy of what became the CBA Guidelines (see copy of Guidelines appended to this paper). These Guidelines were aimed at overcoming many of the issues that ultimately were brought to the fore in 2005.

It is critical that those who wish to become involved in this area of work recognize the extreme vulnerability of the claimants. This includes the following factors:

- i. Possible self-medication;
- ii. Self-destructive activity;
- iii. Attempted suicide;

- iv. Hiding of the abuse and serious medical impacts when the abuse is first disclosed;
- v. Inability to trust people;
- vi. Cultural loss damages which may be able to be helped through the healing and cultural activities as part of the future care;
- vii. Vulnerability with the receipt of more money than they had potentially received in their entire life; and
- viii. Ongoing anger even after resolution of the claim.

CBA Guidelines have been adopted in the Northwest Territories, the Yukon, Manitoba and the Law Society of Upper Canada. It is hoped that they will be adopted by other jurisdictions.

E. Conclusion

It is strongly urged that lawyers representing claimants in this area recognize that these cases involve a lot more than physical or psychological damage. Cases require full-time commitment with the claimants and sensitivity to their needs and concerns. The pace of advancing a claim should be tied to the ability of the claimant to handle the disclosure which is often progressive. Our law firm only takes a limited number of these cases because we spend an intensive amount of time with each claimant. From anecdotal comments made by some adjudicators, it appears that this is not a universal practice of all counsel. There is an enormous amount of time investment involved in these cases. From the writer's experience and those in our firm who act for these claimants, there is a great satisfaction at the end of the day, but these are amongst the most difficult claims that lawyers can address. Notwithstanding there is a short-cut process that is less adversarial than the courts, the issues involved in these cases remain complex. If you wish to either act in this area or increase the amount of work you do in this area, please look carefully at the CBA Guidelines and consider acting on them in the conduct of your cases.

These cases are amongst the greatest challenges for legal counsel but, for those who successfully work in this field, it is a matter of pride that we can show the highest standards of conduct in working with survivors in the residential school process.