

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

LARRY PHILIP FONTAINE et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendants

**REQUEST FOR DIRECTIONS FROM THE CHIEF ADJUDICATOR OF THE
INDEPENDENT ASSESSMENT PROCESS AND DUBOFF, EDWARDS,
HAIGHT & SCHACHTER**

DIRECTION

1. On December 15, 2006, the courts in nine provinces and territories concurrently issued reasons approving a national settlement concluding various class actions related to the Indian Residential Schools throughout Canada. These reasons were followed by a set of orders, incorporating the Settlement Agreement and addressing issues pertaining to the implementation and administration of the Settlement. The orders were issued in substantially the same form in each court. I will refer to these orders collectively as the "Settlement Orders".
2. There are two elements of the Settlement through which claimants may obtain individual compensation. One aspect is the Common Experience Payment ("CEP"), available to all eligible class members who resided at a Residential School. The second aspect of individual compensation is the Individual Assessment Process ("IAP") which provides for compensation to class members who establish that they suffered serious physical abuse, sexual assaults or serious psychological harm at a Residential School.
3. While claimants under the CEP generally advance claims without the assistance of counsel, the norm under the IAP is for claimants to retain counsel. Further, most, if not all, retainers are on a contingency basis. The courts were concerned that the

Settlement Agreement did not provide a mechanism for a review of the legal fees charged by counsel to their clients in respect of IAP claims.

4. The courts dealt with the omission of a legal fee review process, and several other administrative matters upon which the Settlement Agreement was silent, through provisions in the formal orders issued in respect of the implementation of the Settlement. In particular, a review of legal fees relating to IAP claims has been incorporated into the Settlement Orders. These orders also provide for the ongoing supervisory role of the courts in relation to the Settlement.
5. One of the Settlement Orders is known as the Implementation Order. In paragraph 20 it provides that, where issues arise regarding the administration or implementation of the settlement, applications are to be made to the courts pursuant to the Court Administration Protocol (Schedule "A" to the Implementation Orders.) Pursuant to the Protocol, applications are made by way of a Request for Directions to the designated Administrative Judges.
6. On March 26, 2010, the Chief Adjudicator of the IAP and Duboff, Edwards, Haight & Schachter ("DEHS") brought a Request for Directions concerning the Settlement Agreement. DEHS is a law firm which represents claimants under the IAP and is a signatory to the Settlement Agreement.
7. Certain other parties to the Settlement Agreement were invited to make submissions also. Subsequently, submissions were received from the Chief Adjudicator, DEHS, the Attorney General of Canada ("Canada"), the Merchant Law Group and the National Consortium, all of whom are signatories to the Settlement Agreement.
8. Paragraphs 18 and 19 of the Implementation Orders set out a legal fee review and appeal process for counsel fees charged under the IAP. Paragraph 18 gives the Adjudicator hearing an IAP claim the power to review the legal fees of counsel for the claimant for fairness and reasonableness. Paragraph 19 gives the claimant or counsel the right to have the fee decision of the Adjudicator reviewed by the Chief Adjudicator. Here, the Chief Adjudicator seeks directions regarding the extent to which IAP legal fee reviews conducted by him (or his designate) are subject to any further appeal; if there is a right to further appeal, to whom the appeal lies; and the nature of such appeal.
9. DEHS also seeks direction on issues specific to the Chief Adjudicator's legal fee review in IAP File No. [REDACTED] In addition to the IAP file-specific issues, DEHS seeks directions concerning the various factors to be considered by IAP Adjudicators when they are conducting fee reviews.

Analysis

A) *Legal Fee Reviews*

10. As stated above, most IAP claims are advanced with the assistance of counsel. Generally, counsel are compensated for legal services provided to successful claimants under the IAP through two sources. First, Canada provides an amount up to 15% of the compensation awarded to the claimant for legal expenses. In addition, counsel may charge the claimant a percentage of the actual compensation awarded. Paragraph 17 of the Implementation Orders mandates that legal fees charged by counsel to IAP claimants shall not exceed 30% of the compensation awarded to the claimant inclusive of Canada's 15% contribution to legal fees under the terms of the Settlement Agreement.

11. Paragraph 18 of the Implementation Orders provides that an Adjudicator is empowered to review the legal fees charged to a claimant on the Adjudicator's own motion or at the request of the claimant. Paragraph 18 reads:

“18. **THIS COURT FURTHER ORDERS** that upon a claimant's request which request shall be made at the conclusion of the hearing, or within fourteen (14) days thereof, or on the Adjudicator's own motion, legal counsel's legal fees for conducting the IAP may be reviewed by the Adjudicator for fairness and reasonableness. In the event of such review legal counsel shall in addition to submitting their retainer agreement provide any other information pertinent to their legal fees. The Adjudicator shall assess the fairness and reasonableness of the legal fees in accordance with the generally accepted principles and authority for the assessment of accounts, including the following:

- a. time expended by legal counsel;
- b. the legal complexity of the matters;
- c. the degree of responsibility assumed by legal counsel;
- d. the monetary value of the matters at issue;
- e. the importance of the matter to the claimant;
- f. the degree of skill and competence demonstrated by the legal counsel;
- g. the results achieved and the contribution of legal counsel to the result;
- h. the ability of the claimant to pay; and
- i. the claimant's expectations as to the amount of the legal fees,

and shall take into account the fact that Canada will contribute an amount equal to 15% of the compensation award towards legal fees. In all cases, the Adjudicator shall inform the claimant of their right to have the account of their counsel reviewed. The Adjudicator's decision on the fees will be issued at the same time,

or following, the decision on the claim and a copy shall be sent to the claimant personally together with an explanation of the right to a review.”

12. As set out in paragraph 19 of the Implementation Orders, where a fee review has been conducted by an Adjudicator, a claimant or counsel dissatisfied with the Adjudicator’s ruling may request that the Chief Adjudicator (or his designate) review the ruling.
13. The issue on which direction is sought is whether the decisions rendered by the Chief Adjudicator or his designate pursuant to paragraph 19 of the Implementation Orders are subject to any further appeal.
14. DEHS argues that the Chief Adjudicator’s decisions must be subject to a full appeal or judicial review process which recognizes “the inherent jurisdiction of the Superior Courts to conduct judicial review proceedings”. This position is adopted by the Merchant Law Group LLP. The Chief Adjudicator takes no position on whether his fee review decisions are subject to further appeal, but rather requests directions on that point, and submits that if his fee review decisions are appealable, any such appeal must be conducted pursuant to the Implementation Orders and the Court Administration Protocol. Canada adopts the Chief Adjudicator’s position on the latter point. The National Consortium takes no position on these issues.
15. It is tempting to view a class action settlement with a claims administration or assessment process as continuing litigation. Nonetheless, such a view is incorrect. All class action settlements must be approved by a court. When an approval order is issued, it constitutes the final order of judgment with respect to the litigation, regardless of whether the settlement provides for benefit distribution by way of a continuing claims administration or assessment process. The underlying litigation, or the *lis* between the parties, does not continue but instead merges in the settlement.
16. The claims administration or assessment process is simply a creature of the agreement giving effect to the settlement. In essence, it is a distribution process under which the entitlement of each individual class member to share in the compensation available is determined. Moreover, the fact that a settlement may contemplate such a process does not alter the finality of the court orders approving the settlement. That process simply becomes a term or terms of the order of judgment.
17. Insofar as there is a “right of appeal”, as has come to be considered the norm for litigation, it arises at the time when the final order approving the settlement is issued. That is the point from which the clock runs for an appeal to an appellate court. In the absence of an appeal within the prescribed time, the order approving the settlement becomes final and binding. Thereafter, the only appeal rights from decisions rendered under the claims administration and assessment process in respect of individual claims are those expressly set out in the terms of the order.

18. Accordingly, I cannot accede to the submission that the decisions of the Chief Adjudicator pursuant to paragraph 19 must be subject to a full appeal or judicial review process which recognizes “the inherent jurisdiction of the Superior Courts to conduct judicial review proceedings”.
19. The “right of appeal” from the Settlement Orders, the final orders of the courts, has long since expired. The argument regarding judicial review similarly has a fatal flaw. The reality is that the Chief Adjudicator, in conducting a paragraph 19 review, is acting pursuant to the terms of orders issued by nine superior courts. The courts issued those orders through the exercise of jurisdiction arising from the pertinent statutes, rules of court and, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton* (2001 SCC 46 at para. 34) the “inherent power to settle the rules of practice and procedure as to disputes brought before them...”. Judicial review may be available where a statutory power of decision has been exercised by an inferior tribunal, but a superior court does not judicially review its own order. Here, where the Chief Adjudicator is acting pursuant to a term of the orders issued by superior courts, he cannot be said to be exercising a statutory power of decision subject to judicial review.
20. Further, it must be remembered that the right to have a claim assessed in the IAP, or for counsel to receive fees in respect of that assessment, are incidents of the Settlement Agreement and the terms of orders approving and implementing that Settlement. Class members were given an opportunity to opt out of the Settlement. Those who chose to advance claims through the Settlement are bound by its terms, as are the counsel who choose to represent them. Moreover, they are bound by all of the terms of the Settlement and cannot attempt to expand upon them to serve their own purposes.
21. The Implementation Orders provide for an appeal from the claim Adjudicator to the Chief Adjudicator or his designate in relation to legal fee decisions. That is the only appeal available to counsel who wish to challenge a fee decision of an Adjudicator. In my view, the legal fee review process set out in the court orders is exclusive and exhaustive. There is no further right of appeal available under the Settlement Orders. Once an appeal is taken to the Chief Adjudicator regarding a legal fee decision, all appeal rights have been exhausted.
22. Further, no right of appeal can be grounded on the supervisory jurisdiction that the courts have over the implementation of the Settlement and the Settlement Orders. In other words, there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function.

B) Procedure, Notice and Standing

23. Having determined that no further right of appeal exists from fee review decisions of the Chief Adjudicator, it is unnecessary to deal with the procedure for pursuing such appeals.

C) Additional Issues

24. DEHS seeks directions concerning the manner in which certain factors are to be considered by IAP Adjudicators conducting reviews of the fairness and reasonableness of legal fees charged to claimants. In particular, directions are sought respecting the manner in which IAP Adjudicators consider the following: contingency agreements; the 30% cap for legal fees under the IAP; Canada's 15% contribution to legal fees; the IAP claimant's views concerning legal fees; and fees charged by other lawyers.

Contingency Contracts

25. In a class action settlement, the claims administration and assessment process is conducted under the supervision of the courts that approved the settlement. This includes the fee relationship between counsel and claimants. (See *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, (Ont. S.C.J.) at paras. 75, 78).
26. The fee review procedure in the instant case is intended to regulate fees charged by counsel under the IAP.
27. A fee review conducted by an IAP Adjudicator involves the application of the criteria listed in paragraph 18 of the Implementation Orders, and also requires Adjudicators to "assess the fairness and reasonableness of the legal fees in accordance with the generally accepted principles and authority for the assessment of accounts".
28. The terms of a contingency agreement are only one factor to be considered by the Adjudicator. The weight to be given to the contingency agreement must be assessed in the context of the facts of each case.

Views of the Claimant

29. Legal fee reviews can be initiated on the request of the claimant or on the Adjudicator's own motion. DEHS argues that there should be limits on the Adjudicator's ability to conduct fee reviews on his or her own motion. Specifically, DEHS submits that the Adjudicator "has no business interfering with that freedom of contract [between counsel and claimant] unless the adjudicator is satisfied that the claimant's choice is not one that a reasonable person could possibly have agreed to". By this DEHS means that there should be no interference in any agreement as to fee unless the fee is one that no reasonable person would agree to.

30. The National Consortium argues that no fee review should be ordered absent factors clearly indicating the need for a review, including the following: the claimant did not understand or was not otherwise able to exercise the right to request a review; counsel's conduct suggested a lack of appropriate attention to the client's interests; or the award is of such a magnitude that there is a significant likelihood of the agreed contingency rate resulting in a grossly disproportionate fee.
31. There is no support in the Implementation Orders for the proposition that the broad discretion conferred on the IAP Adjudicators to conduct a fee review on their own motion ought to be limited.
32. Moreover, once the Adjudicator decides that a fee review is appropriate, the claimant's views are one of the factors that the Adjudicator must take into consideration. In particular, the claimant's views go to his or her expectations, one of the factors listed in paragraph 18 of the Implementation Orders. The weight to be given to the views of the claimant must be assessed in the context of the facts of each case.

The 30% contingency rate and Canada's contribution

33. Paragraph 17 of the Implementation Orders caps the legal fees payable to counsel for a successful claimant under the IAP at 30% of the compensation awarded to the claimant. The 30% cap includes Canada's 15% contribution to legal fees.
34. DEHS seeks directions as to whether there is a "presumption" that the 30% contingency rate is reserved for the most complicated or time-consuming IAP matters and whether Canada's contribution ought to be viewed as a "positive" or "negative" factor in the legal fee assessment.
35. In his decision approving the Settlement Agreement in *Quatell v. Attorney General of Canada*, 2006 BCSC 1840 (Can LII), Brenner C.J. addressed the 30% contingency rate at paragraph 20:

"I agree that the final fee award should be determined by the IAP arbitrator. In my view, the 30% total figure for legal fees should be viewed as a maximum amount that would only be recoverable in the most time-consuming or difficult of cases."
36. DEHS suggests that IAP Adjudicators have elevated the foregoing proposition to a "presumption" that the maximum allowable contingency rate is only available in the most complicated IAP matters.
37. In conducting a review of the fairness and reasonableness of legal fees, IAP Adjudicators must consider the factors set out in paragraph 18 of the Implementation Orders. That said, 30% represents a substantial percentage of a compensation award. Indeed, it is the maximum allowable contingency rate under the IAP. I agree with

Brenner C.J.'s statement in *Quatell*, that the maximum fee under the IAP, 30% of a claimant's compensation award, ought to be reserved for the "most time-consuming or difficult of cases". It is difficult to understand how a straightforward matter should attract the maximum allowable fee. However, the test is "fairness and reasonableness" in all the circumstances and, as such, it remains necessary for Adjudicators to apply the required factors in arriving at their determination in any particular case.

38. Canada's contribution of 15% to the legal fees of an IAP claimant, is neither a "positive" nor "negative" factor in the fee assessment process. An Adjudicator must have regard to the total amount of legal fees sought in order to conduct the fairness and reasonableness review.

Legal fees charged by other lawyers in other jurisdictions

39. DEHS also seeks directions as to the extent to which Adjudicators can take "judicial notice" of fees charged by lawyers in other jurisdictions in conducting fee reviews.
40. DEHS takes issue with the following statement of the Chief Adjudicator in his Legal Fee Review in [REDACTED]

"An adjudicator does not operate in a vacuum. Adjudicators bring with them the experience of handling other cases and learning what other lawyers charge for the same kind of work. To refer again to my fee review decision of [REDACTED] I stated:

Many lawyers across Canada accept Canada's contribution of 15% as full payment for their services. Lawyers in Quebec who handle IAP cases have agreed among themselves to limit their fees to Canada's contribution. It is difficult to accept that some lawyers would expect more than others for similar cases and delivery of the same quality of work. In fact, in many cases the difference can not be reconciled."

I continue to stand by these words. The fact that other lawyers working in the IAP process accept payment at Canada's contribution is a well known fact among lawyers and adjudicators working in this process.

41. Paragraph 18 of the Implementation Orders is clear as to the factors to be taken into account in rendering a decision as to the fairness and reasonableness of the legal fees being charged to the claimant. In the same way that the lawyers cannot limit the discretion of the Adjudicators as set out in paragraph 18, the Adjudicators cannot ignore its provisions. The range of fees that are being charged by lawyers across the country in relation to IAP claims is a fact that may go to the claimant's expectations. That said, it is no more than one factor to be considered. The fee must be assessed on

its fairness and reasonableness in the context of the facts of the case and the language set out in paragraph 18.

42. Adjudicators and the Chief Adjudicator must take care, however, not to simply resort to generic statements regarding the level of fees or quality of work of counsel in similar cases. While consistency and predictability are important objectives, counsel are entitled to a transparent determination.

Chief Adjudicator's Legal Fee Review in IAP File Number [REDACTED]

43. DEHS seeks directions on issues specific to the Chief Adjudicator's Legal Fee Review in IAP File No. [REDACTED]. Specifically, DEHS requests that the decision of the "reviewing adjudicator" be quashed and that DEHS be awarded an additional \$10,300.00 in legal fees.
44. No appeal lies from the decision of the Chief Adjudicator pursuant to paragraph 19 of the Implementation Orders. Accordingly, the request for a review of the decision is denied.

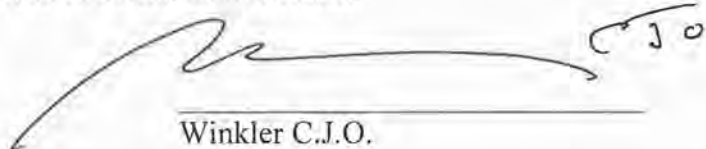
Direction Issued on October 21, 2010

45. On October 21, 2010, pursuant to a supplementary Request for Directions submitted by DEHS, I issued the following direction:

"Accordingly, the Chief Adjudicator is directed to abstain from issuing any further legal fee review decisions until a decision is rendered on the Request for Directions under reserve."

With the rendering of this decision, the above direction is revoked.

Date: March 7, 2011

C.J.O.

Winkler C.J.O.