Chief Adjudicator's Guidance Paper

Factors to consider in the exercise of adjudicators' responsibilities to review legal fees

This Guidance replaces the Interim Guidance to adjudicators dated January 17, 2008, Guidance Paper 1, Rev.1, dated August 15, 2008, and Guidance Paper 1, Rev. 2, dated June 8, 2010.

A. Background

The IAP is a complicated process. The expertise and assistance of claimant counsel is necessary to its effective functioning. All parties to the Settlement Agreement agree that claimants should be represented by a lawyer, though some will chose not to.

The issue of legal fees charged by counsel in addition to the 15% payable by Canada was not negotiated by the parties, so there is no reference to claimant's legal fees either in the Settlement Agreement or the IAP. Rather, the courts took the unusual step of including in the orders approving the Settlement Agreement, the requirement that adjudicators play a significant role in regulating legal fees.

The decision of Winkler, R.S.J., the lead class actions judge from Ontario, in *Baxter,* (see Appendix A) explains the courts' approach. Simply put, the courts were of the view that claimants are unlikely to use the court system to tax their lawyers' accounts and they had concerns about the amount of fees being charged to some claimants. It was felt that the adjudicator who presides over the hearing would be in the best position to make the necessary determinations.

The courts have imposed two obligations on adjudicators:

1. In every case the adjudicator must answer the following question: Are the legal fees charged to the claimant within the 15% cap allowed by the courts (in addition to the 15% payable by Canada)? If the answer is "no" the adjudicator must make any order necessary to ensure that the fees do not exceed the maximum.
2. Even if the fees are within the maximum, the adjudicator must review the fees for "fairness and reasonableness" if the claimant requests. An adjudicator may conduct such a review on his or her own motion.

The consensus of the class actions courts, as reflected in the terms of the orders implementing the courts' decisions, was that it is within the adjudicators' discretion to determine what is fair and reasonable, bearing in mind certain criteria. (See Appendix A for a survey of the court judgments approving the Settlement Agreement.)

Because of the unpredicted nature of this obligation, this paper sets out some of the substantive and procedural considerations that may guide you in the exercise of your court-delegated jurisdiction as to:

3. when to decide to do a "fairness and reasonableness" review, if the claimant does not request it; and
4. what factors, background and context may be relevant in deciding what is "fair and reasonable" in the circumstances.

This paper is not intended to lay down definitive norms or default positions for certain types of cases, or to fetter the adjudicator's discretion. Rather, it is intended to outline the factors that the Chief Adjudicator intends to consider on requests to review adjudicators' decisions on legal fees. Also, claimants and legal counsel need to be made aware of the approaches that adjudicators may take.

B. Reasons for Judgment and Implementation Orders

Extracts from the reasons for judgment of each court approving the class actions settlement, with key passages high-lighted, are at Appendix A. While the reasons for judgment differ from one approving jurisdiction to another, the implementation orders are identical in each jurisdiction - the relevant provisions are at Appendix B.

C. Distillation of principles derived from the courts' reasons

In requests for review of adjudicators' decisions with respect to the fairness and reasonableness of legal fees, the Chief Adjudicator's office adopts the following interpretation of the major themes of the class actions judgments and implementation orders:

1. A "hands-on" approach by adjudicators to legal fees is unmistakably signaled, in particular by the lead class actions judges: Ontario Justice Winkler in *Baxter*; and British Columbia Chief Justice Brenner in *Quatell*.
2. The Yukon decision does not seem to object to a total of 30% in legal fees as a default position (unless reasons are given for why the fee is not justified) but, this decision appears to stand in isolation.
3. Chief Justice Brenner, of the BC Supreme Court (endorsed by the Quebec court), saw the 30% figure as a maximum, recoverable in only the most time-consuming or difficult cases.
4. There will be circumstances that will justify no fee—or a relatively small fee—in addition to Canada's contribution.

5. In addition to the usual relevant factors, adjudicators are expected to consider the reduced risk in this process, the absence of examination for discovery, and the simplified adjudicative process.
6. The IAP is part of a historic settlement. Its implementation should cause Canadians to look back with pride on the way the parties have agreed to put to rest the issues arising from the legacy of Indian residential schools. A process for the effective and meaningful review of legal fees will ensure that the IAP—a major element of this process—will not be clouded by public perceptions of windfall to the legal profession.

D. Guidance on factors to consider in giving effect to the principles derived from the judgments and implementation orders

(a) Substantive considerations

Although the implementation orders use the word "may," if a claimant requests a fee review, as long as the fee are in excess of Canada's contribution of 15%, there would be few cases in which such a review would not take place. But even without a request, adjudicators need to determine whether or not to exercise their discretion to conduct a fee review.

If a claimant or lawyer asks for a review of an adjudicator's Schedule 2 fee ruling, the Chief Adjudicator's office is obliged to review it. In fulfilling this obligation, the Chief Adjudicator begins from the premise that a "hands-on" approach by adjudicators to the issue of legal fees represents the will of the courts, as expressed in *Baxter* and clarified in particular in *Quatell* and *Semple*.

This means that adjudicators are expected to do more than "rubber stamp" proposed legal fees. Instead, the 30% figure (including the 15% payable by Canada) should be viewed, as the court stated in *Quatell,* as a maximum, recoverable only in the most difficult or time-consuming cases. On the other end of the spectrum, as the court stated in *Semple*, "It is easy to visualize circumstances in which no or a relatively small fee might be justified in addition to the contribution made by Canada,"—presumably even if there is no suggestion of lack of preparation or expertise. Where there is such a lack, adjudicators have on occasion awarded less than the 15% contributed by Canada.

Drawing from these judgments, the Chief Adjudicator's office will expect that in all cases, adjudicators should be satisfied that the proposed fees are justified and "earned" by legal counsel.

Some cases may be obvious and, absent a request by a claimant, the adjudicator may easily decide that a fee review is not warranted. Other cases may not be so obvious and the adjudicator may conclude that the issue can only be properly determined following a review.

Several policy options were considered and rejected in response to the imposition of this role on adjudicators: one would have been to decide, as a matter of policy, that "fairness and reasonableness" reviews would be conducted in all cases; a second option would have required reviews only if some form of misconduct was alleged; a third would have been to establish default percentages as acceptable norms.

These policy options may offer the advantage of certainty and predictability but none satisfactorily express the will of the courts, or give sufficient leeway to address the unique circumstances of each case.

Therefore, the Chief Adjudicator's office decided not to determine in advance when a review is required or if required, the amounts or percentages that should be awarded—which would simply become new defaults. Rather, the process is left to the discretion of adjudicators, with guidance for the exercise of that discretion.

Clearly, adjudicators have the discretion to require counsel to provide time records and other information they deem relevant, but it is the adjudicator's call as to when and how to proceed. The process is intended to protect claimants, and not as an extra hoop for them to jump through. But the will of the courts must be given full and robust effect at all times when carrying out these functions.

For example, it is reasonable to assume that different considerations would apply in assessing the fairness and reasonableness of fees in a straightforward standard track claim, as opposed to a difficult complex track claim. If liability is in issue, different issues arise than when liability is admitted. A complicated negotiated settlement may at times require more time and effort than the hearing process, and a straightforward negotiation, less.

The requirements imposed on adjudicators by the courts do have the potential to create discomfort. They introduce a potentially adversarial element into relationships between claimant counsel and adjudicators on one hand, and between claimants and their lawyers on the other.

This is not a responsibility that can be avoided, but it can be handled with sensitivity and care. The significant contributions made by legal counsel to the resolution of claims must be acknowledged. At the same time, claimants' rights and interests are to be safeguarded and respected.

Many of the factors to consider in attempting to strike the right balance are listed in the implementation orders; the reasons for judgment list others. Further, adjudicators may consider both negative and positive factors that may tilt the scales in one direction or another along the spectrum of fees that may be charged.

For example, adjudicators may consider "negative factors" such as counsel misconduct, lack of preparation, or lack of expertise.

Earlier in this process it was thought that adjudicators had no authority to approve a fee of less than the 15% normally contributed by Canada. But that has changed. In a number of cases (available on the database) fees of less than 15% have been awarded where representation fell below an acceptable standard. In one case, a fee of 3% was awarded when Canada refused to pay its 15% share because the lawyer had sent an articling student to the hearing in his stead.

On the other hand, it is also appropriate for adjudicators to consider "positive factors" such as extraordinary skill and competence demonstrated by counsel, exceptional results achieved, and positive contributions of counsel to the result.

In the context of the unique challenges associated with this work, there are many ways to measure the worth of the work counsel has done. For example:

- Adjudicators may consider the overall relationship that the lawyer appears to have with the claimant; the degree to which a trust relationship has been established may indicate the amount of work that went into establishing the relationship.
- A highly supportive role beyond the call of duty may also be recognized.
- It should not be assumed that a lawyer's hourly rate should automatically increase with the years, and a lawyer should not be compensated based on reputation alone, but in some cases reputation may be a factor.
- Lawyers who work with Aboriginal clients have often earned their trust and the trust of their families and communities over many years of visiting and working in those communities. This may be reflected in their communication skills, and in a presentation that reflects an understanding of circumstances beyond their own world view. These lawyers may deserve higher fees.
- In particular areas of Canada—in the north for example—there are no resident lawyers doing this work, and in vast areas no resident lawyer at all. People receive legal services only if the lawyer goes to them. These lawyers often must be away from their offices and homes for a week or two at a time, often with

limited phone service and internet access, and limited accommodation. Flight schedules and weather conditions can create a lot of dead time on these trips.

(b) Practical Considerations

Disbursements

Adjudicators are not required to review or approve disbursements in the first instance: those are to be dealt with between Canada and legal counsel [page 7 IAP, section III (a) (vi)]. Only if there is a dispute between Canada and legal counsel may an adjudicator be called upon to decide whether a particular disbursement was reasonable and necessary. Subject to an adjudicator's decision in that regard, there should be no need for counsel to deduct any disbursement from the award otherwise payable to a claimant.

Mandatory review to determine whether the fees fall within the cap

The only issue to be decided at this stage is whether the proposed fees fall within the boundaries of paragraph 17 of the implementation order (i.e. the combined fees payable by Canada and the Claimant are not to exceed 30%, plus applicable taxes, and disbursements payable by Canada).

In all cases, at the conclusion of the hearing, the adjudicator should

1. request a copy of the retainer agreement;
2. inform the claimant that the adjudicator will review the agreement to ensure that the fees do not exceed the allowable percentage;
3. advise the claimant of his or her right to have the proposed account reviewed for fairness and reasonableness.

If the claimant does not request a fee review, and the adjudicator does not decide to undertake a review, then after the decision on the merits is issued, and after the time for the claimant's review request has passed, the adjudicator will submit a fee ruling in the form attached (Schedule 1).

Discretionary Review of Fees for Fairness and Reasonableness

If there is to be a fee review—whether at the request of the claimant, or on the adjudicator's own motion—the adjudicator must determine what materials are required, and offer both claimant counsel and the claimant the opportunity to make submissions. The adjudicator will decide whether those submissions should be in writing, oral (usually by telephone), or both. Once the materials are reviewed and

submissions made, the adjudicator will submit a fee ruling in the form attached (Schedule 2).

Common Sense Approach

In practical terms, it is anticipated that an adjudicator will conduct at least a first-level review in every case, with the degree of scrutiny dependent on the circumstances. Knowing the case and having seen claimant's counsel's work, the adjudicator will have a good understanding of the degree of counsel's preparedness and the complexity or difficulty of the case.

On receipt of the retainer agreement, the adjudicator will learn of the agreement as to fees and may be in a position to perform a perfunctory review or a "smell test" to determine if a fairness and reasonableness review is necessary.

If the adjudicator is satisfied at this stage (after the amount of the award is determined), no further review will be necessary unless requested by the claimant. The adjudicator will simply submit a completed Schedule 1 and the Secretariat will send this to the claimant and to counsel.

But in almost every case, an adjudicator will want to review counsel's time records, to get a better idea of the time and effort that has been expended.

However, if after considering the retainer agreement and the time records, the adjudicator is not satisfied that the fee is patently fair and reasonable, a full review will be necessary. Time sheets, if not already in hand, and such other relevant information as is available will be requested. After both parties have had the opportunity to make submissions, the adjudicator will complete and submit a fee ruling in Schedule 2, which the Secretariat will send to claimant and counsel.

What are the time limits for a claimant to exercise a request to review legal fees?

The request must be made within 14 days of the "hearing." Because it is not possible to know the amount of the fees or assess the results of the lawyer's work until the decision on the merits is reached, it is assumed that for these purposes, the hearing concludes when the decision on the claim is released. The14-day clock starts ticking at that time.

Method of informing claimants of the right to a fee review

The court orders require notice but do not specify how it is to be given. It is suggested that adjudicators explain this right to claimants in person at the hearing, because this may be their only direct personal contact. But claimants should not be put in the difficult position of being asked to decide whether to request a review at the time of the hearing in the presence of counsel, and before the results of their claim are known.

Therefore, adjudicators are expected to give claimants a written notice that they can take home with them, consider in their own time, and if they choose, complete and return to the Secretariat. The form to be left with the Claimant at the hearing is attached. The form is designed to be uncomplicated, yet provide the information for those who wish to know what the key criteria are. Adjudicators should explain to claimants that they should not return this form until they have received their decision and their statement of fees.

Finally, the Secretariat will send another copy of the fee review notice to the claimant personally, along with a letter advising that the decision is being sent to their lawyer. This notice is sent three days after the decision on the merits of the claim is delivered to claimant counsel, and the 14-day time limit for requesting a fairness and reasonableness review starts to run after the notice is sent to the claimant.

Reviewing legal fees after negotiated settlements

Paragraph [78] of *Baxter* makes it clear that the obligation to review legal fees applies not only to adjudicated decisions, but to negotiated settlements as well. Because the Secretariat has no independent means of knowing when a settlement occurs, it is expected that Canada's representative and legal counsel will notify the Secretariat in writing immediately upon any negotiated settlement being reached. Legal counsel will supply the Secretariat with a copy of the retainer agreement and the Secretariat will send the fee review notice to the claimant. If no adjudicator has been assigned to the file, one will be assigned for the purposes of the fee ruling.

Who should be involved in discussions regarding fees?

Canada has no involvement in the issue of legal fees, so the discussion will include simply the adjudicator, the claimant and legal counsel.

What is the format for fee rulings?

If fees are approved in the amount proposed by the lawyer, the claimant has not asked for a review, and no substantial review has been performed, the adjudicator should complete a Schedule 1 fee ruling.

If the adjudicator has undertaken a review, whether upon the claimant's request or not, and has reviewed materials and received submissions, the adjudicator should complete a Schedule 2 ruling.

If, during the course of the Schedule 2 review, the adjudicator receives information to support the fees claimed, unless the review is requested by the claimant, the adjudicator may conclude the matter on the basis of a Schedule 1 ruling.

Taxes on Legal fees – GST, HST, PST and QST

The issue of taxes on legal fees can be complicated. Liability for GST would depend on whether the services are provided in whole or in part on Reserve. PST would depend on whether the services are provided in whole or in part in provinces or territories that require payment of PST. Some firms have offices in more than one jurisdiction.

Adjudicators have no jurisdiction to deal with taxes. They simply rely on tax information provided by counsel, in order to provide claimants with a breakdown of the net amount they will receive after payment of legal fees and taxes. Schedules 1 and 2 indicate that questions regarding taxes must be addressed to claimant counsel or the appropriate taxation authorities, as neither adjudicators nor the Secretariat has jurisdiction or expertise in this area.

Who receives the ruling with respect to legal fees?

Legal fee rulings will be sent by the Secretariat to claimant's counsel and to the claimant personally. The defendants do not receive a copy. Canada's only involvement in these matters relates to disbursements.

C. Step by Step Guide

For a more detailed discussion of the practical aspects of conducting fee reviews, see the Step-by-Step Process for Fee reviews, at Appendix "C". The time guidelines set out there are summarized here:

At the hearing	**Hearing** • Discuss legal fees with claimant. • Obtain the claimant's current address. • Obtain contingency fee agreement from counsel. • Explain that you have the right to conduct a review on your own initiative.
Day 1	**Notice of Decision** • You will receive an email notice from the Secretariat that the decision has been sent to the claimant. The claimant has 14 days (plus 5 for mailing) to request a fee review.

Day 20	**Document Collection**
	• Ask claimant's counsel for:
	  ○ record of billable hours,
	  ○ usual hourly rate, and
	  ○ a statement of the legal fees and taxes proposed in this case.
	• If you decide to conduct a Schedule 1 review, prepare, sign, and submit it via EDI.
	• If you decide to conduct a Schedule 2 review, remember that the claimant and counsel are now adverse, and should be treated as two parties in any dispute resolution process.

Day 41	**Exchange of written materials** • Ask counsel to provide to the claimant all materials provided to you, but if that doesn't happen, do it yourself. • Schedule a conference call with claimant and counsel (email iaps_schedulers@irsad-sapi.gc.ca)
Day 70 (or earlier)	**Oral submissions** • By this date, your teleconference should be completed.
Day 100 (or earlier)	**Ruling** • Submit ruling via EDI to the Secretariat. • Retain all written material received and considered for 60 days.

Appendix A

Some relevant excerpts from court decisions approving the Settlement Agreement

Ontario

Baxter v. Canada (Attorney General), 2006 CanLII 41673 (ON S.C.) (Winkler R.S.J.)

[70] . . . . . The IAP is meant to address the more serious personal injury claims. It is almost certain that most claimants will require the assistance of counsel to advance their claims in this process. Under the terms of the settlement, Canada has agreed to pay an additional 15% on top of any compensation awarded under the IAP to help defray the legal costs of claimants. However, notwithstanding this, lawyers representing individual IAP claimants will be charging contingent fees in excess of 15% payable by Canada. The settlement does not prevent this practice nor does it restrict the amount of such contingent fees payable by the claimant. Indeed, the absence of any control mechanism on individual fee arrangements appears to have been a conscious choice in the drafting of the settlement. This is evident from Mr. Merkur's affidavit. He deposes at paragraph 18:

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the [IAP] established by the Settlement Agreement. With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November, 2003. (Emphasis added by court.)

[71] During argument, Mr. Merchant advised the court that the Merchant Law Group would limit its contingent fees to an additional 15% of any IAP compensation award, for a total of 30% when added to the amount to be paid by Canada. Although this position regarding fees was eventually adopted by all counsel appearing at the hearing, this voluntary concession does not limit the fees that may be charged by other lawyers who may act for claimants under the IAP.

[72] It is estimated that the number of claimants under the IAP may reach 15,000. Mr. Merchant suggested that the total value of the settlement could be as much as $5 billion when all of the claims made under the IAP have been adjudicated. No other counsel challenged this number. Accordingly, when the value of the other benefits under the settlement are subtracted from this total, the IAP could generate over $2.5 billion in compensation. If this number is correct, it means that additional legal fees payable by

Canada will total $375 million. Further, if the additional amount of fees charged by lawyers to individuals is held to another 15%, the total fees to counsel under the IAP alone would total $750 million. This is in addition to the "class" fee of $100 million for total legal fees of $875 million, if all contingent fee agreements are limited to 30%, which is not the case. Again, these numbers are based on limited data and conjecture by counsel.

[73] As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees. This position was urged upon the court as the proper approach. I cannot accede to this submission. During argument, I expressed a concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best. As Mr. Merkur, addressing the difficulties counsel have in representing claimants in this case, deposes at paragraph 25 of his affidavit:

> Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty [sic] for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumors about settlements and funds received.

Further, at paragraph 26 he deposes:

> Because of these challenges the process of making legal representations available to residential school claimants is more time-consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to motions, and meetings with clients in order to get ready for examinations for discovery and other litigation steps are more difficult than in conventional litigation.

[74] In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

[75] As a general principle, wherever a settlement incorporates a claims resolution procedure, the entirety of that procedure is to be conducted under the supervision of the court. This must of necessity include the relationship between counsel and clients engaged in the process, especially where the legal fees or part thereof are paid pursuant to the settlement. As stated above, the court must ensure that claimants obtain the expected benefits of the settlement.

[76] One of the purported benefits of the settlement is the fact that it presents a comprehensive scheme for dealing with all issues arising from the residential school program. In keeping with the general principle, claimants must have recourse within the administration of this settlement to challenge the reasonableness of the fees they are charged by counsel.

[77] In my view, the submissions of Mr. Merchant on the contingent fee issue may serve as a guide. Mr. Merchant made representations to the court that he spoke from personal experience in that he has been involved in a number of contested trials relating to the residential schools. Accordingly, it appears that his suggestion that an additional 15% was appropriate was based on that experience. Further, a fee of 30% on a contingent basis is a substantial retainer in any event.

[78] There must be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP must be provided to the adjudicator hearing the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant must be clearly set out. This means that any counsel participating in the process will be under an obligation to make full disclosure in respect of the fees charged, directly or indirectly to the claimant, including disbursements and taxes. **The adjudicator will assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15% of the compensation awarded will be paid by Canada**. The adjudicator's decision as to fees may be subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle. Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the Adjudicator will be considered void. (emphasis added)

British Columbia

***Quatell v. Attorney General of Canada*, 2006 BCSC 1840 (CanLII) (Brenner, C.J.)**

[19] One issue that arose during the hearing was the question of counsel's fees for the IAP. Under the terms of the settlement, Canada has agreed to pay up to 15% over and above any IAP award to the IAP counsel for legal expenses. During the course of the hearings, the Merchant Law Group, the National Consortium and the independent counsel groups all agreed that they would charge their clients no more than an additional 15% of any IAP recovery.

[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.** (emphasis added)

Alberta

***Northwest v. Canada (Attorney General)*, 2006 ABQB 902 (CanLII) (McMahon J.)**

Legal Fees for the Independent Assessment Process

[81] . . . . The Settlement deliberately does not address fees for IAP claims as it does for CEP claims. The affidavit of D. Merkur says at paragraph 18:

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the Individual Assessment Process established by the Settlement Agreement (the "IAP"). With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. . . . .

[82] However, the Court cannot take a "hand's off" approach. The suit having been certified as a class proceeding, the Court is obliged to ensure the fairness and reasonableness of all fees. While S. 39 of the CPA should apply, these circumstances involving thousands of IAP claims, to be resolved over a period of years, calls for a different solution. I concur with my colleagues in other jurisdictions and direct that the legal fees arising from IAP claims are to be approved in Alberta in the manner prescribed by S. 39, but before the adjudicator who heard the claim. Schedule D to the Settlement requires that the adjudicators have law degrees and relevant experience. **In determining the appropriate fees, they will have regard to all relevant factors, including the greatly reduced risk at this stage, the absence of examination for discovery and the simplified adjudicative process. Also, there can be no double**

recovery. Plaintiffs' counsel cannot be paid a second time for the services to which the fees approved by Article 13 relate. The adjudicators will perform the function of a taxing officer pursuant to the Alberta Rules of Court and have regard to the Code of Professional Conduct regarding lawyers' fees.

[83] Claimants must have the right of appeal from the adjudicators to the approving court on the matters of fees. (emphasis added)

Saskatchewan

***Sparvier v. Canada (Attorney General)*, 2006 SKQB 533 (CanLII) (Ball J.)**

[18] To summarize, I concur that the following matters identified by Winkler R.S.J., are to be addressed (references are to the relevant paragraphs in the *Baxter, supra,* judgment): . . . .

(c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional 15% of the compensation award will be paid as fees by Canada (para. 78); and . . . .

[76] . . . I cannot begin to place a monetary value on the IAP benefits with any degree of reliability. Even if I could, I would not take them into account in determining the amount of legal fees to be approved now. The reason is that lawyers remain entitled to receive payment of fees for any amounts that may be recovered by their clients under the IAP in addition to any amounts to be awarded now for settling the class action. Not only has the Government of Canada agreed to increase any IAP award by 15% to pay for legal fees, but lawyers may charge an additional contingency fee to clients over and above that 15%. Regulating these additional fees has been identified as a concern by Winkler R.S.J. in *Baxter, supra,* at paras. 69 to 77 and in this decision at para. 18(c) above. Since the hearing of this motion all counsel have stated that they will limit their total fee to 30% of the amount recovered under the IAP, inclusive of the 15% to be paid by Canada. Even so, I agree that each adjudicator must have authority to approve the amount of legal fees and disbursements payable to counsel on IAP applications. I would add that no contingency fee should be permitted on the recovery of disbursements.

Manitoba

Semple et al v. The AG of Canada et al, 2006 MBQB 285 (CanLII) (Schulman J.)

g) The feature of the settlement relating to payment of legal fees;

[30] . . . . The area of concern for me is the question of the absence of express provision in the agreement for review of legal fees on IAP claims. Under the settlement agreement Canada will on the making of an award, pay to each claimant's counsel an additional 15 percent of the award on account of legal fees. It appears that many of the lawyers who will be conducting the proceedings in the IAP claims are acting on contingency agreements entered into before the settlement agreement was made. None of the agreements are before the court but it appears that prior to the making of the settlement agreement many contingency agreements were entered into under which law firms may be entitled to claim 30 per cent or more of the recovery in a court action. One firm that claims to represent several thousand claimants has undertaken not to charge any IAP claimant more than 15 percent of the recovery in addition to the amount received from Canada. That is, the firm has agreed to limit its claim to fees to 30 percent of the amount of the recovery. Even if every law firm in Canada were to agree to do the same, there is a risk that IAP claimants may be called on to pay unreasonably large amounts. **On the IAP claims, liability is not in issue as the parties must have contemplated in composing the contingency agreements. There may be settlements short of hearing in some cases. It is easy to visualize circumstances in which no or relative small fee might be justified in addition to the contribution made by Canada**.

[31] Under section 55 of the **Legal Profession Act** S.M. 2002 c.44, lawyers practicing in Manitoba must give clients a copy of the contingency agreement on execution of it, failing which it will be unenforceable. Further, along with a copy of the agreement they must give the client a copy of the section that articulates their right to apply for a declaration that the agreement is unfair and unreasonable. However, the evidence shows that many members of the class are illiterate and likely not aware of their rights to have their legal bills reviewed. While no evidence was led on the point one presenter did tell us that she put her name on a list provided by a law firm which she believed related to an offer of information about making an IRS claim. She later was told that she had signed a contingency agreement and when she tried to terminate the services of the law firm she was told that she could not do so. Winkler J. has made a very practical suggestion in the *Baxter* case for implementing a procedure for review of legal fees in the IAP claim. I recommend that the parties give serious consideration to implementing his suggestion. Members of the class made negative comments at the hearing before me about the amounts paid to lawyers and about the conduct of lawyers who persuaded

them to sign contingency agreements. In this paragraph I have approved the settlement as it relates to payment for work done to this time. **This settlement is historic and I feel sure that once implemented, Canadians will look back with pride on the way the parties have agreed to put to rest the issues arising from the IRS legacy. An effective review of the legal fees would ensure that the IRS legacy would not be viewed as a windfall to the legal profession.** (emphasis added)

Quebec

***Bosum c. Canada (Attorney General)*, 2006 QCCS 5794 (CanLII) (Tingley J.S.C.)**

[3] The Court has had the advantage of reviewing the reasons for judgment of Regional Senior Justice Winkler of the Ontario Superior Court of Justice and of Chief Justice Brenner of the Supreme Court of British Columbia. ***In full agreement with the Chief Justice, the Court agrees with and adopts the reasons and conclusions of Mr. Justice Winkler***. His concerns as regards certain elements of the Settlement Agreement are shared by this Court, particularly as regards the ongoing duties and requirements of the Courts following authorization and during implementation of the Settlement Agreement. (emphasis added)

Yukon

***Fontaine et* al. *v. Canada et al.*, 2006 YKSC 63 (CanLII) (Veale J.)**

Legal Fees

[57] I find the legal fees problematic, not in the global amount, but in the early payment for achieving what is undoubtedly an outstanding political agreement. My concern is that once the lawyers are paid out, they will have little interest in assisting the survivors who may have continuing issues over relatively small amounts of the Common Experience Payment and Independent Assessment Process claims that remain unresolved. There is no simple resolution of this problem, although counsel that brings such issues to court may apply for interim costs and be awarded those costs in appropriate cases.

[58] Plaintiffs' counsel had various explanations with respect to the Common Experience Payment. Some said the legal fee was a pre-payment for work to be done and that counsel had undertaken to work on the Common Experience Payment problems. The unresolved Common Experience Payment problems still present a concern.

[59] Similarly, once an award is granted under the Independent Assessment Process, further reviews or appeals to court will not necessarily be covered by retainer agreements.

[60] The other aspect of the legal fees issue is that **under the Independent Assessment Process, Canada only pays an additional 15% of the award for legal fees which will typically be 30%.** Several survivors raised this issue in Court. The balance of the lawyers' fees will inevitably come off the award.

[61] In Yukon, it would not be unusual for 100% of legal fees to come off the award with the defendant paying court costs which are usually less than a lawyer's contingency fee. **So in that sense, Canada's contribution of 15% is a distinct improvement over the court process where the full extent of disputed liability remains. Moreover, the 15% paid by Canada is a far sight better than the uncertainty of a trial where success is not guaranteed**. (emphasis added)

Northwest Territories

***Kuptana v. Attorney General of Canada*, NWTSC01 (Richard JSC)**

There was no specific reference to this issue in the reasons for judgment.

Nunavut

***Ammaq et al. v.* Canada *(Attorney General)*, 2006 NUCJ 24 (CanLII) (Kilpatrick J)**

D. Absence of any Summary Review Procedure for Fees Charged by Counsel to Clients Engaged in the IAP

[78] Most of the claimants pursuing compensation through the IAP will likely have counsel to assist them through this process. Most of these lawyers will likely be compensated on the basis of contingency fee arrangements entered into with their clients. Many of the IAP claimants entered into these fee arrangements prior to the settlement agreement being reached.

[79] Under the Settlement, Canada is only obligated to pay counsel 15 per cent of any award made to the client through the IAP. Many of the contingency fee agreements provide for payment of fees based upon percentages well in excess of this amount**.** Any fees exceeding the 15 per cent paid by Canada will be absorbed by the client, and will come off the top of any award in damages. **There may well be situations arising where the stipulated legal fee becomes grossly disproportionate to the work done or the risk undertaken**.

. . . .

[83] While the proposed settlement agreement may not provide for a review mechanism, there is an effective remedy still available to aggrieved citizens in this jurisdiction to address any problems that may arise. When the 'flaw' is weighed against the risks associated with requiring the parties to renegotiate a summary review procedure, the balance still weighs heavily in favor of settlement approval. (emphasis added)

Appendix "B"

Provisions of implementation orders with respect to legal fees

[17] **THIS COURT ORDERS** that all legal fees charged by legal counsel to claimants pursuing claims through the IAP shall not exceed 30% of compensation awarded to the client. This 30% cap shall be inclusive of and not in addition to Canada's 15% contribution to legal fees, but exclusive of GST and any other applicable taxes. The 30% cap shall also be exclusive of Canada's contribution to disbursements. Upon the conclusion of an IAP hearing legal counsel shall provide the presiding Adjudicator . . . with a copy of their retainer agreement and the Adjudicator shall make such order or direction as may be required to ensure compliance with the said limit on legal fees.

[18] **THIS COURT FURTHER ORDERS** that upon a claimant's request . . . 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 assessments of accounts, including . . . :

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 in 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 the legal fees. In all cases, the Adjudicators 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.

[19] **THIS COURT ORDERS** that claimants or their legal counsel may request the Chief Adjudicator or his designate to review a ruling by an adjudicator on the fairness and reasonableness of legal fees. Any such request shall be made within seven (7) days of the adjudicator's ruling. The Chief Adjudicator or his designate shall review the materials before the adjudicator and shall issue reasons in writing within fourteen (14) days.

Appendix "C"

Fee Reviews: A Step-by-Step Process

The purpose of this paper is to assist adjudicators in completing a Schedule 1 or Schedule 2 fee review and in complying with the expected timelines. It is intended to be a simple, step-by-step guide.

Legal Principles

An adjudicator's authority to conduct fee reviews is found in the implementation orders that effected the Settlement Agreement. The relevant provisions of the orders are reprinted above, in Appendix B. For ease of reference, the following are listed as being among the factors to be considered in determining fairness and reasonableness:

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 in 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 the fact that Canada will contribute an amount equal to 15% of the compensation award towards the legal fees.

The court orders oblige adjudicators to inform claimants of their right to have their fees reviewed..

It is important for adjudicators to remember that not only must their rulings be reasonable, but their reasons must be clearly articulated. These principles derive from the Supreme Court of Canada decision, *New Brunswick (Board of Management) v. Dunsmuir* 2008 SCC 9. In early fee review appeals, the standard articulated in the *Dunsmuir* decision was applied to Schedule 2 rulings. See, for example, the following from Fee Appeal R-10380:

> When applying these principles to a paragraph 19 review, the reviewing Adjudicator must be satisfied that the original Adjudicator applied the relevant legal principles and delineated factors and that a proper analysis was carried out.

The reasoning path must be clear. If a ruling meets these requirements, then it must be determined if the ruling falls within the range of reasonable outcomes. Thus, two questions must be asked:

i) Is the Adjudicator's reasoning path clear?

ii) Does the ruling fall within the range of reasonable outcomes?

If the above criteria are met, then the original decision will stand.

In addition to these requirements, adjudicators must conduct themselves within the authority given and must follow rules of procedural fairness. If, on appeal, there is an issue as to the original adjudicator's jurisdiction or as to procedural fairness, the reviewing adjudicator does not apply the reasonableness standard enunciated in *Dunsmuir* but rather must decide whether the original adjudicator acted within the authority granted or if the process followed was fair.

Step-by-step process

1. The Hearing

At some point during the hearing process, you should discuss legal fees with the claimant. It is helpful to explain the history behind the Settlement Agreement and that the supervising courts imposed on adjudicators the obligation to act as regulators of the fees. Most importantly, you must explain that the claimant has the right to ask for a review and that this must be done within 14 days of receipt of the decision - or that it can be done earlier. It is helpful to have a copy of the Notice to Claimant that is delivered along with the decision to review with and leave with the Claimant. This helps to explain to the Claimant what he or she must do to complete the request for a review. Sometimes claimants will immediately tell you that they do or do not want a review.

Make sure you obtain the claimant's current mailing address. The address found in the claimant's application may be out-of- date, or the address of counsel. Many claimants use email, or prefer to be contacted by telephone. You should explain that you might need to contact them personally at some point, and ask how they would like to be contacted. If they give a phone number, ask whether you may leave a message at that number if necessary.

Counsel should provide you with the contingency fee agreement. Most lawyers routinely bring a copy to the hearing, but it doesn't hurt to remind them by email ahead of time, that you will be asking for it. If they fail to bring it to the hearing, they should email it to you immediately afterwards.

Also explain to the claimant that you, as adjudicator, have the right, independent of

the claimant, to conduct a review. If it is your decision to conduct such a review, you should ask if the claimant wishes to participate. This request may save much time later in the process. But remember that claimants may be in an emotional state at the hearing, or may be reluctant to offend their lawyer; so even a claimant who, at the hearing, declines the invitation to participate, should be offered that opportunity again later.

2. Notice of Decision: Day 1

After you have sent your decision in the claim to the Secretariat, you will be notified when it has been mailed to the claimant. This email notice asks you to wait 19 days before proceeding with a Schedule 1 or 2 review., because the implementation order gives the claimant 14 days in which to apply for a Schedule 2 review; an additional 5 days is allowed for mailing.

3. Document Collection: Day 20

If you have not yet decided whether to do a Schedule 1 or Schedule 2, it is useful to ask claimant's lawyer to provide his or her record of billable hours and advice as to what the account would be if invoiced on the basis of the lawyer's usual hourly rate. Although the amount of time and hourly rate is only one factor to be considered, virtually all adjudicators have found a substantial premium to be a significant factor in determining whether to do a Schedule 2 review.

Some lawyers have asked to provide submissions on the decision to write a Schedule 1 ruling or conduct a Schedule 2 review. Previous fee appeal rulings have decided that such a process is not to be adopted.

Now that there have been many Schedule 2 rulings and appeals, claimant's counsel have a better understanding of what can be expected if a Schedule 2 review is conducted and many counsel are adjusting their fees practices.

The following are some current trends:

- A growing number of counsel who charge 25% - 30% now voluntarily reduce their fees once the case is over. It is common for counsel to voluntarily reduce their fees to 20%.
- There continue to be a substantial number of lawyers who charge only 15%.
- Some lawyers charge fees based on the Chief Adjudicator's Legal Fee Guidelines. Such fees are not approved automatically and must be justified in all cases.
- A small minority of lawyers continue to charge 30% on every case,.

The courts have noted that 30% should be reserved for the most difficult or time-consuming cases. Fee Appeal R-10380 observes that even without the direction of the courts, it is fairly obvious that where a range of 15% to 30 % is allowed, the top of the range should be for the most time-consuming or difficult cases. Thus, it is more likely that an adjudicator will conduct a Schedule 2 review where the fees claimed are at or near 30%, unless the total award is quite small.

If you have not been notified of a fee reduction at this point, this would be the time to ask: "Now that you have received and reviewed the decision, please advise as to the legal fees (and taxes) you are proposing in this case."

If you have decided that a Schedule 1 ruling is in order, it should be prepared, signed and submitted via EDI immediately following the expiry of the review period.

If a Schedule 2 ruling is in order, you should initiate your document collection and notify the claimant of your intention. Sample letters and emails to the claimant and claimant's lawyer are included. You should ask for delivery of the documents within **21** days.

If a Schedule 2 review is conducted, the adjudicator must remember that there is no longer a solicitor/client relationship between claimant and lawyer. Their interests are now adverse and they should be treated as opposing parties would be treated in any dispute resolution process. Thus:

- There should be no *ex parte* communications with one party except for the purpose of scheduling teleconferences or for other matters that are not substantive;
- Any documents or submissions received from one party must be provided to the other party; if necessary, you will take care of this yourself.
- If the claimant uses email, all emails, even for routine matters, must include both parties.

4. Scheduling the conference call: Day 41

At this time you should schedule a conference call with the claimant and lawyer. You can ask the scheduling department to set this up.
Email: IAPS.POST.HEARINGUNIT@irsad-sapi.gc.ca
The schedulers will email instructions to the participants. You must mail this information to any claimant or lawyer who does not use email.

5. Oral Submissions: Day 70

By this date you should have completed your teleconference in which you have received oral submissions. You may hold the teleconference in the absence of any party who does not wish to participate. Of course, if neither wants to participate you will cancel the call.

6. Writing the Ruling

These are the essential requirements of a Schedule 2 ruling:

- You must address all the factors enumerated in paragraph 18 of the implementation orders. Not all will be of equal importance in every case and may not deserve equal attention, but if you fail to consider all the factors or fail to address them in your ruling, you are inviting a review on the grounds that you failed to consider any factor not mentioned.
- Your reasoning path must be clear and understandable – *Dunsmuir*
- Your decision must fall with a range of reasonable outcomes – *Dunsmuir.* To decide whether a fee falls within a range of reasonable outcomes, you need an appreciation of the rulings of other adjudicators and the reasoning and results of fee review appeals. This is best gained through studying fee review decisions. Adjudicators are encouraged to approve fees within a consistent range.
- Your decision must be within the jurisdiction given to the adjudicator in paragraph 17 – 19 of the implementation orders. For example, although we calculate GST and PST from provided by counsel, we have no jurisdiction to assess taxes or decide whether they are payable or not.
- Your decision must follow the rules of procedural fairness.

Adjudicators are encouraged to focus on the dollar amount of the fee, more than the percentage. Percentage fees often result in skewed results: for example, a 20% fee on an award of $180,000 is $36,000, while a 20% fee on an award of $70,000is $14,000. A better approach is to decide what the work is worth in dollar terms.

Currently, a standard track IAP case initiated in the IAP that concludes in a hearing of less than a day, typically results in billable hours ranging from $10,000 - $20,000. Depending on all other factors, it is accepted that a premium over billable hours is normally awarded. If the billable hours are on the lower end of the scale, fees up to double the billable hours often are awarded. Where the billable hours are higher, the premium tends to be less. (See Fee Appeal M-10360.)

Fee rulings should be submitted via EDI, to the Secretariat, within 30 days.

All written material that you received and considered in your decision making process must be retained along with the rest of the adjudication file for a further 60 days. If a fee review appeal is filed you will be asked to produce all written material provided by the claimant and counsel.

If you need help, call your Deputy.

Checklist - essential elements of a Schedule 2 ruling

☑	All factors listed in paragraph 18 of the implementation orders are addressed

	Reasoning path is clear and understandable
	Result falls within a range of reasonable outcomes
	Focus is on the dollar amount of the fee, not the percentage
	Ruling is within the jurisdiction given by paragraphs 17-19 of the implementation orders
	Process follows the rules of procedural fairness