

Comments on Systemic Incivility
For Harmed Individuals & Communities

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Case Study of Former Students of Indian Residential Schools

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Good morning. It is a pleasure to be with you today.

Encouraging and regulating civility in the legal profession is an important topic for the administration of justice. The adversarial system and so-called “zealous advocacy” does not necessitate uncivil behaviour which, to my mind, simply undermines the goals of justice. In this regard, I must admit to little patience with ivory tower debates about whether existing mechanisms adequately control incivility or whether something more and targeted is required. Just as workplace managers and policies are finding better ways to control inappropriate workplace behaviour, it is wholly appropriate, indeed necessary, for the legal profession, law societies and courts to seek more effective means to control inappropriate, unprofessional behaviour that simply diverts resources, energy and attention away from needs of clients and from the proper administration of justice.

My concern, however, is that the focus of courts and law societies on this targeted concept of professional incivility may mask a much more insidious type of incivility within the administration of justice, and that is the profound challenges, embedded in our system of justice, for harmed, damaged, marginalized individuals and communities who seek some measure of justice and a chance at healing. Viewed from my experience, professional, procedural and substantive incivility for them - systemic incivility, if you will - should be a topic of as much concern for the legal profession.

I come at this issue from my experience as a former Assistant Deputy Attorney General responsible for Aboriginal Affairs at the federal Department of Justice. During my tenure we addressed, amongst a lot of other litigation involving the Aboriginal peoples and the Crown, a part of the harmful legacy of Canada’s Indian Residential Schools policy, a policy that started in the 1870’s and 1880’s and lasted until 1996 when the last IRS school was closed. Some 23 class

actions were ultimately settled in 2007. While the level and magnitude of the IRS cases may be unique – mass Torts, if you will - many of the lessons they provide about systemic incivility within the adversarial system may apply equally to other contexts involving harmed, vulnerable and marginalized Canadians - the disabled, refugees, the systemically poor, for instance.

Let me draw out only a few of the lessons that I took away from my conversations with former students and their counsel across the country and from my experience in Ottawa as the official who would review case after case seeking settlement approval.

I come at this in 3 ways: 1. professional, 2. substantive and 3. procedural incivility.

1. Professional Incivility: By this term, I mean incivility by members of the legal profession towards former IRS students.

To be clear, some plaintiff counsel were both highly professional and sensitive in dealing with individual former students who had been seriously harmed by their IRS experience. Some lawyers were undeniably heroic in their efforts to bring justice to former students.

Other counsel were not. Indeed, former students were often vulnerable to counsel who saw them as investments, money grabs with the Crown footing the bill, rather than wounded human beings, tragically maltreated by long-standing Crown policy and Church conduct - a part of First Nations, Inuit and Metis history within Canada, “a long history of grievances and misunderstanding” as Mr Justice Binnie understated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.¹ During my tenure as ADAG I heard about many circumstances of conduct unbecoming a solicitor and grossly uncivil counsel behaviour towards the most vulnerable of Canada’s most vulnerable.

Moreover, from what I heard, such counsel who failed to comprehend the depth and harm of this tragedy and who failed to treat former students appropriately were not limited to counsel for any one party, whether plaintiff, church or the Crown.

The case of Tony Merchant is a reported example. In his case, two former students laid complaints against Mr. Merchant, as a result of his letters sent to reserve communities soliciting business from former students. In 2000, Mr Merchant was found guilty of conduct unbecoming a solicitor and disciplined by the Law Society of Saskatchewan, a decision confirmed by a majority of the Saskatchewan Court of Appeal.²

¹ 2005 SCC 69, para.1

² *Law Society of Saskatchewan v. Merchant* [2000] L.S.D.D. No. 24, upheld (2/1) in [2002]S.J. No. 288, 2002 SKCA 60. It is also worth noting that Mr. Merchant was subsequently disciplined by the Law Society of Saskatchewan

I note that while the Saskatchewan Law Society reprimand, fine (\$5,000) and costs (\$10,000) in the 2000 complaint were considered “severe” by the Saskatchewan Court of Appeal, Mr. Merchant went on to earn a minimum of \$25 million³ in the subsequent class action settlement while former students would receive on average a mere \$19,000 Common Experience Payment and \$114, 000 in individual assessment, where eligible, for serious physical and sexual abuse.

Obviously unequal. Systemic incivility?

Apparently early in his mandate in the late 1990’s, the then National Chief, Phil Fontaine wrote to all law societies and bar associations “begging them to rein in their more aggressive colleagues”.⁴ Ultimately law Societies and CBA attempted to constrain the negative conduct by members of the bar towards former students. For example:

- Law Society of Saskatchewan rule 1602(1) (added in 1999): “No member shall initiate contact with a prospective client who is in a weakened state for the purposes of soliciting the prospective client’s legal work except by mail or advertisement”
- CBA Resolutions (2000 & 2007): “Lawyers should not initiate communications with individual survivors of Aboriginal residential schools to solicit them as clients or inquire as to whether they were sexually assaulted” and “lawyers should not accept retainers until they have met in person with the client, whenever reasonably possible” - endorsed by Yukon, North West Territories and Law Society of Upper Canada
- LSUC Guidelines for Lawyers Acting in Aboriginal Residential Schools Cases (adopted in 2003, amended in 2012).⁵

following a decision by the Saskatchewan Court of Appeal that he had breached a court order for having “counselled and/or assisted his client to act in defiance of a court order” after he refused to follow a court order that required him to pay his clients IRS claim payment into court to secure child support obligations. [2008] S.J. No. 623, 2008 SKCA 128, Leave to appeal refused: [2008] S.S.C.A. No. 538.

³ See art. 13.08 and sch. V, art. 4 “that amount shall in no event be more than \$40, million or less than \$25, million” in the IRS Settlement Agreement which can be found at <http://www.residentialschoolsettlement.ca/settlement.html>.

⁴ Reported in Jonathon Gatehouse “White man’s windfall: The biggest winner in the residential schools settlement is not a native. He’s a lawyer named Tony Merchant, and his firm’s take could hit \$100 million. No wonder he has so many critics” (Maclean’s, September 4, 2006) at http://www.macleans.ca/article.jsp?content=20060911_133025_133025

⁵ Referred to in Woolley, Alice et al, Lawyers’ Ethics and Professional Regulation 2nd (Markham, Ontario: LexisNexis, 2012)at pages 138-139

The questions now are: How effective have these directives been and does the profession need to do more? Is the profession complacent that this form of professional incivility is fixed?

2. Substantive Incivility:

In large measure, legal principles developed in typical torts cases are ill-equipped to deal with the level and core nature of these mass torts. The original and central harm - the children's forced removal from their parents, families and communities on a massive scale - was apparently legal under the *Indian Act*.⁶ Based on what I heard from former students and their counsel, and on what I read in documents from our counsel seeking a settlement mandate, the core harm was both individual and collective in nature, and stemmed from the legal removal of the children from their parents, families and their communities. Neither the harm to the children nor to the communities from their removal to these schools could be redressed in Canadian law, at least not as the courts were interpreting it. All across Canada I heard from former students and counsel about the hurt they felt on the day they were forced to leave their homes and communities, the moment they were taken from distraught parents, the long whistle as the train pulled out of the station, the ride in the back of the truck as the community disappeared into the distance. Even when the children were taken to schools without known sexual predators or bullying supervisors, these memories of loss, hurt and longing still haunt them today. And what of the loss of language and culture to the communities and individuals?

To achieve any form of justice, former students harmed by the IRS experience had to hang their legal hat on some sort of tort cause of action:

- intentional tort of battery ranging from physical abuse, such as a strapping beyond the standards of the day, to the most egregious forms of sexual battery of a kind that most Canadians would fail to comprehend;
- wrongful confinement, such as locking a child, after a failed attempt to return to his home community, in a reed cage in middle of a school hall for all the children to see; and of course
- Negligence and vicarious liability.

And yet, courts, including the SCC, did not always grasp the enormity and unique context of the IRS experience, and often failed to grant former students the justice they were seeking. Clearly, some judicial decisions did support individual plaintiffs' claims in these mass torts,⁷ but this

⁶ See sections 114 *et seq.* of the *Indian Act*, R.S.C., 1985, c. I-5 and earlier versions.

⁷ For instance, the Ontario Court of Appeal decision in *Cloud v. Canada (Attorney General)*, [2004] O.J. 4924, the first certified IRS class action decision; SCC leave to appeal refused [2005] S.C.C.A. No. 50, para 41).

was far from invariably so, even where established legal tests could be interpreted to support plaintiffs' claim.⁸

3. Procedural/Process Incivility:

In addition, there is procedural incivility, if you will, inherent in usual civil litigation. I see this systemic incivility to IRS claimants, let alone Aboriginal claimants more generally, in at least two ways: delay and the adversarial process itself.

1. Delay:

Many IRS claimants are now seniors ("elders") and many have carried the scars of their removal from family and communities and the harm of their IRS experience for decades. Many died before the harm was acknowledged by the Crown, the Churches and Canadians more generally. And many of their families and communities are obviously still coping today with the negative fall-out from this harmful legacy. Of course, "when access is delayed, justice will be denied."⁹

The resolution of IRS claims speaks in spades to delay in access to justice.

Since 1996, with the release of report of Royal Commission on Aboriginal Peoples (RCAP), Canada and Canadians had the opportunity to be informed about full extent of the IRS harm. In fact some Crown officials and some of the four Churches made some significant efforts in the late 1990's and early 2000's to address the harmful legacy of IRS. In response to RCAP, for instance, the then INAC Minister Jane Stewart made a "Statement of Reconciliation" in 1998. In the late 1990's and early 2000, Crown officials in conjunction with former students and their counsel established a voluntary ADR process for individual claims.

It was not until 2005, however, that the then Government of Canada entered into a political agreement committing to achieve "a broad reconciliation package", which with the

⁸ For instance in the SCC's 8/1 decision in *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45, 2005, the majority failed to find in favour of an extremely vulnerable plaintiff on the basis of vicarious liability because the abuse suffered was at the hand of the baker/boatman, not child care workers authorized to be in contact with the child. Only Abella J. pointed to the inherent flexibility of *Bazley/Curry* test for vicarious liability and focussed on the unique context, vulnerability and power imbalance for the children created by these residential schools.

⁹ As O'Neil J (Ontario Superior Court of Justice) opined in *R. v. Powley*, [2000] 2 CNLR 233 para.75-76

"... Access to justice is fundamental to achieving justice. When access is delayed, justice will be denied.
... While many segments of, and persons in, our society understandably are concerned about a delay in accessing or securing justice, measured over a period of years, **these concerns become all the more serious and alarming when the struggle for justice is measured over decades or generations...**"

appointment of Frank Iacobucci as the federal representative, ultimately led to the November, 2005 Agreement-in-principle. In 2006 the subsequent Government of Canada ratified the final agreement that was approved by courts across Canada. This Agreement is still being implemented and will ultimately cost \$5 Billion plus.

Moreover, it was not until June 11, 2008 that Prime Minister Harper issued the long awaited apology, an executive prerogative that could not be ordered by the courts.

I note in passing that IRS cases are not the only claims by Aboriginal peoples against the Crown that involve considerable delay in resolution.¹⁰ These claims are many and varied. It will take a considerable degree of societal, broad-based support to aggressively resolve them, as was required for the IRS Class Actions Settlement itself.

2. Adversarial procedure:

In addition to delay is the inherent incivility in litigation processes within the adversarial system itself.

Classic pre-trial examinations for discovery and cross-examination at trial are ill suited and insensitive to the reoccurring - or slowly revealed - harm of plaintiffs who have been seriously damaged by their IRS experiences. We used to talk about the need to gently pull back the layers of harm – peeling the onion - to get at facts to justify (“validate”) compensation under usual tort principles.

Typical examinations for discovery and cross-examination in a process of “zealous advocacy” can be especially harmful – uncivil - for already damaged individuals and may not, in any event, assist in the truth gathering process. Indeed “E4Ds” and cross-examinations may often shut down the truth gathering function and amount to a further denial of access to some form of justice.

In the late 1990’s and early 2000’s, Crown officials and some plaintiff and church counsel attempted a more sensitive alternative to traditional “zealous advocacy”. The pilot was based on an inquisitorial approach whereby trained adjudicators questioned the claimants to validate the claim. The DR model was faster and less costly than traditional litigation and sought to validate claims of individual abuse in a non-adversarial, sensitive way. The alternate DR model, however, was subject to criticism: still lengthy, complicated by written formality, continued

¹⁰ *Joseph et al v. R. (Hagwilget)* 2008 FC 574 is an example.

constraint of tort law principles, no provision for truth sharing and no compensation for the common experience of removal from family and community, for loss of language and culture, and for collective harms to the communities.¹¹

The pervasive impact of inherent incivility within the adversarial system doubtlessly cuts across a broader range of disempowered individuals harmed by abuse and trauma. The residential schools experience, however, stands out because of the magnitude of the harm to Canada's original peoples and communities. The 2007 settlement of some 23 class actions attempted to come to terms with some of the professional, substantive and procedural incivility to Aboriginal individuals and communities. It contains several elements:

- Common Experience Payment,
- Independent assessment process for serious sexual and physical abuse, a process that addressed many of the concerns with the prior DR model, but that still based on a more sensitive inquisitorial/adjudicative process,
- Truth and Reconciliation Commission,
- Health supports and
- Liability of church organizations.

The settlement agreement is also an important form of reconciliation amongst Canada, Aboriginal peoples and other Canadians.

However, the 2007 settlement only goes as far as the four corners of the agreement. As the Truth and Reconciliation Commission points out in its interim report, the agreement only directly covers 134 schools and does not cover "day students" who attended residential schools, but did not live at them, and Labrador boarding schools.¹² Since the cases for these individuals and communities continue to work their way through the substantive and procedural challenges of usual litigation, the TRC points out, "the stories of both these groups are yet to be told". From the perspective of these former students excluded from the

¹¹ See Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools at http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf

¹² Truth and Reconciliation Commission, Interim Report "They Came for the Children" (Dec. 31, 2011), page 1, available at <http://www.myrobust.com/websites/trcinstitution/index.php>. At page 3, the TRC notes

"Since the agreement was reached, former students have applied to have over 1300 schools added to the list. Eight of these applications have been accepted to date (August 31, 2011). The vast majority of applications have been rejected. In August 2011, the Ontario Supreme Court of Justice ordered that two more schools be added to the list. ... In addition, many students attended residential schools, but did not live at them. Day students have initiated court action seeking compensation for their school experiences. Students who attended boarding schools in Labrador have launched similar court actions."

settlement agreement, justice remains an illusion, and the incivility and insensitivity embedded in the system of zealous advocacy remains their reality.

The question then is what should be done about this more systemic form of incivility.

At a minimum, and given the short time available, let me suggest first and foremost that the profession, law societies and courts should not be complacent that in addressing incivility as it is more commonly understood within the profession, we forget the more systemic incivility for severely harmed individuals and communities. Lawyers, law societies and judges should not permit an important, yet targeted, concern about uncivil behaviour by some lawyers to conceal this broader, more pernicious form of professional, substantive and procedural incivility. Indeed, our duty of competence would suggest that it is incumbent on professionals working within the administration of justice to educate ourselves about the profound needs and sensitivities of harmed and vulnerable parties and to seek ways to counterbalance the negative impact on them of this other form of incivility.

Thank you.