Law Society
of Saskatchewan

CANADA)
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PROVINCE OF SASKATCHEWAN)
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IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF EVATT ANTHONY MERCHANT, Q.C.,
A LAWYER OF REGINA, SASKATCHEWAN

TO: EVATT ANTHONY MERCHANT, Q.C.

NOTICE OF PENALTY HEARING

You are hereby notified that a Penalty Hearing will be held in relation to the matters referred to in the attached Report of the Hearing Committee as follows:

Tuesday, April 7, 2020 at 10:00 a.m.,
at the Ramada Plaza,
located at 1818 Victoria Avenue, Regina, Sk.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 22nd day of January, 2020.

Beth Gibson

Chairperson of the Hearing Committee
The Law Society of Saskatchewan

Attachment - Copy of Hearing Report

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF CERTAIN COMPLAINTS AGAINST
EVATT ANTHONY MERCHANT, Q.C., A LAWYER OF REGINA, SASKATCHEWAN

Hearing Committee:	**Beth Bilson, Q.C., Chair** **Heather Hodgson** **Alma Wiebe, Q.C.**
Counsel for the Membe:	**Gord Kuski, Q.C.** **Amanda Quayle**
Counsel for the Conduct Investigation Committee:	**Tim Huber**

Decision of the Hearing Committee

1. A Hearing Committee appointed by the Law Society of Saskatchewan (the "Hearing Committee") composed of Beth Bilson, Q.C. (Chair), Heather Hodgson and Alma Wiebe, Q.C., convened on Friday, July 12, in Regina to hear the complaint against Evatt Anthony Merchant (the "Member"). The Member was represented by Gord Kuski, Q.C. and Amanda Quayle. The Conduct Investigation Committee was represented by Tim Huber.

2. Neither counsel raised any objection to the jurisdiction or the composition of the Hearing Committee.

3. An Amended Formal Complaint dated October 12, 2016, was provided to the Hearing Committee. The complaint alleged that the Member was guilty of conduct unbecoming in that he:

   a) did in relation to a client of his firm, J.S., induce J.S. to provide a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement when such conduct was prohibited; and

   b) did in relation to a client of his firm, J.S., cause a form of assignment in relation to an amount payable pursuant to The Indian Residential Schools Agreement to be acted upon when such conduct was prohibited.

4. Counsel provided the Hearing Committee with an Agreed Statement of Facts. This statement read as follows:

   a) Evatt Francis Anthony Merchant (Tony Merchant) (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing Member of the Law Society of Saskatchewan (hereinafter the "Law Society"), and accordingly is subject to the provisions of The Legal Profession Act, 1990 (hereinafter the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at TAB 1 is a Certificate of the Executive Director of

the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's practicing status.

b) The Member is the subject of an Amended Formal Complaint dated October 12, 2016. The original Formal Complaint containing the exact same allegations as the Amended Formal Complaint, but with a different Hearing Committee, was issued on January 29, 2016. Attached at TAB 2 are copies of both the original Formal Complaint and the Amended Formal Complaint with proof of service. The prosecution of the Amended Formal Complaint was held in abeyance by agreement while related matters were addressed by the courts.

Background of the Complaint

c) This matter was brought to the attention of the Law Society by Crawford Class Actions ("Crawford"), an organization appointed by the Court to monitor the Indian Residential School settlement process. Crawford made the complaint against the Member on behalf of the Member's client J.S. J.S. later adopted the materials provided by Crawford in her own complaint.

Facts

d) In June 2000, the Member's firm, Merchant Law Group (MLG) began representing a residential school survivor, J.S., eventually assisting her with her claim via the Independent Assessment Process (IAP) under the Indian Residential School Settlement Agreement (Settlement Agreement). The Member and his firm were parties to the Settlement Agreement. MLG also acted for J.S. with respect to at least one other legal matter unrelated to the IAP claim, as well as for her son, C.S., both with respect to his own IAP claim and other unrelated criminal matters.

e) On June 26, 2000, J.S. signed an assignment to MLG of any proceeds from J.S.'s Residential School Claim "necessary to pay for the reasonable accounts of Merchant Law Group on all legal matters undertaken for me including without limiting the generality of the foregoing, work regarding my Residential School Claim and any foreclosure action...now or in the future."

f) That assignment was provided prior to the Settlement Agreement coming into effect on May 6, 2006. It became unenforceable because of provisions contained within the Settlement Agreement, specifically, Article 18.01 [TAB 3] which states that "[n]o amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement."

g) On January 28, 2014, Adjudicator Dirk Silversides granted J.S. compensation under the IAP in the amount of $93,000.00. Canada's contribution towards legal fees was $13,950.00. An additional $559.62 was awarded for payment of disbursements. On March 18, 2014, the Government of Canada issued a cheque for the total amount of $107,509.62 payable to Merchant Law Group in trust for J.S. representing the settlement proceeds.

h) At the time Canada issued this cheque, it appears that J.S. was about 69 years old.

i) On March 28, 2014, Mr. Alberts of the Merchant law firm drafted (but did not send) a letter addressed to J.S. enclosing a cheque in the amount of $54,949.17, together with an account for professional services rendered in connection with her IAP claim.

j) The account contemplated a contingency fee of 30%, or $27,900 (plus G.S.T. and P.S.T.) and disbursements, for an "invoice total" of $31,249.62. According to a "trust listing" attached to the account, this amount was to be deducted from the funds being held in trust for J.S. The listing also reflected the deduction of a total of $21,310.83, being the total of seven prior accounts of MLG relating to other services on behalf of J.S. and her son dating back to 2003. According to the listing, the $21,310.83 was to be deducted from the funds held in trust, which would leave net proceeds of $54,949.17 in trust. Mr. Alberts' draft letter did not mention these earlier accounts, but stated in part:

> The Adjudicator will conduct a review of the amount of fees that we are entitled to collect. After we receive the Fee Decision we will forward an additional cheque to you.
> Please sign the enclosed receipt and return it to us in the enclosed self-addressed stamped envelope.

k) On the same date as the draft letter, Mr. Alberts contacted J.S. to inquire of J.S. if she would agree to pay the various old accounts. In an internal memorandum to Mr. Tony Merchant [TAB 5], a legal assistant advised the Member that J.S. was "not willing to pay these accounts because she said her son has his own IAP action and he can pay his own accounts. C.S. does not have an IAP claim. He got awarded $0 at trial because the judge did not believe him."

l) This information led Mr. Alberts to not to send the letter of March 28 or to make the deductions from trust contemplated by the trust listing.

m) However, on April 7, 2014, the Member did send a letter to J.S. The Member's April 7, 2014 letter is attached at TAB 6. The letter stated in part:

n)

> You agreed to pay accounts for C.S. in connection with criminal charges that he faced and on the basis of your having promised to pay those accounts, we provided legal services to C.S. and you.
> In the case of two of those accounts, one regarding a criminal matter and the other regarding a family law matter, these were really your accounts where you were the client. Those accounts were for $754.30 and $442.77. We could legally withhold that money because those are your debts but we are not prepared over $1,200 to get into a fight if you instruct me that you will not even pay these debts. Regarding 5 other debts that you also owe in amounts of $1,545.30, $972.75, $6,787.64, $6,840.44, and $3,967.63, we have no legal right to enforce assignments against you, notwithstanding the fact that for these 5 other criminal defence matters on behalf of C.S., you agreed and promised that you would pay the accounts out of the money that we expected you would receive from your IAP claim.

Those 5 criminal defence debts on behalf of C.S. as well as the criminal defence debt of $754.30 where you were the client with C.S. and the $442.77 where you were the client in connection with a family law matter, totals $21,310.83.
You owe the money. You agreed to pay the money. That should not be confused with the fact that we do not have legally enforceable assignments by which we may legally hold back the money from the funds. Do not confuse your obligation both morally and legally with the fact that the assignments are not legally enforceable. We could sue you for the $21,310.83. My expectation is we would succeed with that law suit and obtain a judgment against you. We could then seize your assets, your car, your bank account, or whatever, in order to collect these debts that you owe.
I understand that you told Mr. Alberts that you are not prepared to have these debts paid out of the IAP money that you have received. You said that C.S. can pay his own debts because he had a claim. He did not have a claim. He was not truthful. He was not believed. He did not get an award. When the legal work was done for him based on your agreeing to pay, we relied on your word and your promise to pay and we did not rely on the prospect of being paid out of money going to C.S.
In fairness and acting honestly, you should instruct us to pay the $21,310.83 out of the money that we are going to send to you or instruct us to pay a part of that money if you decide that you will not pay it all, even though it is all owing, and decide that you will instruct us to pay $15,000 or $10,000 out of the money that you owe.
However, if you contact me and instruct me not to deduct any of the money, we will follow those instructions and pay $76,260.00 without deduction.
Incidentally not just with debts like this that are owed to our law firm, but with debts owing by others who have IAP claims where money is owing to other law firms, to suppliers of good or services, for funeral services, cars, loans or whatever, we regularly contact our clients, in a manner similar to my contact with you, and remind our clients that they owe the money even if the assignments are not legally enforceable, and seek instructions.
Tell us what you want us to do. We will pay $76,260.00 to you or keep $21,310.83 or keep some lesser sum if you instruct us to keep some amount to pay your debts.Enclosed with the April 7, 2014 letter was a new account dated April 7, 2014 which was identical to that proposed in the March 28 draft letter, and the same "trust listing" that contemplated deduction of the further $21,310.83 in total for the 'old' accounts of J.S. and C.S [Tab 7].

o) After receiving Mr. Merchant's letter, J.S. confirmed in a phone conversation with a legal assistant that same day (April 7) that she wanted to apply IAP funds to these outstanding accounts. J.S. attended the offices of MLG and met with that legal assistant. During that meeting, J.S. signed written instructions [Tab 8] directing MLG to pay the outstanding unrelated accounts out of her IAP settlement monies. The instructions were as follows:

I J.S. instruct Merchant Law Group to pay criminal accounts of C.S. and
my family law account out of my IAP settlement money.
"J.S."

p) Two cheques totaling $54,949.17 — representing $76,260.00 less $21,310.83 for the "old accounts" pertaining to J.S. and C.S. — were issued by MLG to J.S. on April 7, 2014. The firm acted upon the direction to pay the unrelated "old accounts".

q) In reasons dated May 9, 2014, Adjudicator Dirk Silversides issued a Schedule 2 ruling concerning a legal fee review for fairness and reasonableness based on MLG's time and billing records for J.S.'s IAP claim. While MLG had proposed total legal fees of $20,100.00, the Adjudicator approved legal fees and taxes totaling $17,391.00. Taking into account Canada's $13,950.00 contribution to legal fees, the Adjudicator determined the amount payable to J.S. was $89,559.00. MLG issued an additional cheque to J.S. in the amount of $13,299.00 to account for the revised fee with a cover letter and revised account [Tab 9].

r) The fact that J.S. had signed a document agreeing to pay portions of her proceeds to MLG to satisfy outstanding legal accounts for unrelated legal work came to the attention of the Daniel Shapiro, then Chief Adjudicator for the IAP. Shapiro confronted the Member with the issue on May 28, 2014.

s) In an explanatory letter to the Chief Adjudicator dated July 21, 2014, Mr. Kuski, as counsel for MLG, informed him, among other things, that a portion of J.S.'s IAP award had been applied to satisfy outstanding accounts for other unrelated legal matters at J.S.'s direction.

t) On October 1, 2014, the Independent Special Advisor to the Court Monitor, Ian Pitfield, informed Mr. Kuski that the Chief Adjudicator had forwarded to him J.S.'s complaint concerning the application of her IAP fees to MLG's unrelated legal accounts. Mr. Pitfield directed MLG to repay J.S. the sum of $21,310.83. In support of this direction, Mr. Pitfield wrote that there was no evidence that J.S. was a party to an enforceable obligation to pay her son's accounts, nor that she was provided independent legal advice prior to accepting any such obligation, nor that there was any consideration for the handwritten direction she had allegedly signed on April 7, 2014. Mr. Pitfield also raised concerns that the content of Mr. Merchant's letter to J.S. suggested these funds were inappropriately procured.

u) On October 23, 2014, MLG brought a request for a direction that it is entitled to retain the amount of $21,310.83 pursuant to J.S.'s written instructions.

v) That application yielded the following Court Decisions:
Fontaine v. Canada (Attorney Genera/),2016 BCSC 1306 [TAB 10]; and
Canada (Attorney General) v. Merchant Law Group LLP, 2017 BCCA 198 [TAB 11].

[NOTE: Because of the similarity of the names in many of the cases concerning the IRSSA, the Hearing Committee will refer to these two cases as *MLG* 2016 BCSC and *MLG* 2017 BCCA.]

w) The British Columbia Superior Court ruled that the $21,310.83 was impermissibly withheld as it constituted an assignment prohibited by the Settlement Agreement. The Court directed MLG to pay J.S. $21,310.83 forthwith, with interest, and he complied. The British Columbia Court of Appeal upheld the Superior Court's decision. The Member sought leave to appeal to the Supreme Court of Canada. Leave was denied on or about August 2, 2018.

5. The documents referred to by tab numbers in the Agreed Statement of Facts were also provided to the Hearing Committee. In addition, the Member provided correspondence with the Law

Society from 2012-2013. The Member also submitted a book of authorities that was consented to by counsel for the Conduct Investigation Committee.

6. This complaint arose in the context of the legal framework established to address claims made for compensation by survivors of the residential school system for First Nations children overseen by the Government of Canada and operated largely by various religious organizations. In the late 1990s and early 2000s a significant number of individual and class actions were launched on behalf of former residential school students alleging physical, sexual and psychological abuse, as well as cultural loss and estrangement from their families. In 2006, after protracted and complex negotiations involving Canada, the religious organizations and counsel representing individual and class claimants, the Indian Residential School Settlement Agreement (the "IRSSA") was concluded. This agreement had a number of components; the aspects of the IRSSA most relevant to this complaint were those outlining a common process for addressing the large number of existing or anticipated claims for compensation. The IRSSA was approved, with some revisions, by the Ontario Superior Court of Justice in *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481, and was subsequently approved by superior courts in eight other provinces.

7. It is not necessary for the purposes of this decision to describe in detail the provisions of the IRSSA, but several features of the agreement pertinent to this complaint should be mentioned. Under the agreement, all claimants who could demonstrate that they had attended a residential school would receive a Common Experience Payment (CEP) based on the length of time they had been at the school. In addition, a claim could be made under an Independent Assessment Process (IAP) for compensation based on treatment that inflicted damage on individuals beyond the cultural and familial deprivation common to all survivors.

8. Given that the IRSSA had its roots in class action litigation, and that the Government of Canada would continue to be one of the parties subject to the claims being made, Winkler, J. made it clear in the *Baxter* decision that the courts would be responsible for overseeing the regime put in place for determining the claims, rather than leaving it up to the federal government to administer the process, as the IRSSA originally contemplated. The courts eventually developed a protocol for the ongoing monitoring of the adjudicative process put in place to determine the IAP claims. One component of this monitoring system was to require lawyers and others involved to make requests for direction to the courts in the event of any dispute or uncertainty about the process; such a request for direction from the Member was the subject of the decisions of the British Columbia Supreme Court in *MLG* 2016 BCSC and the British Columbia Court of Appeal in *MLG* 2017 BCCA alluded to in the Agreed Statement of Facts.

9. It should also be noted that a portion of the agreement as approved by the courts was devoted to the legal fees charged by counsel to the claimants. It was agreed that, aside from work already completed or in progress when the agreement was approved, lawyers would not charge fees to the claimants in relation to the CEP. In connection with the IAP, the Government of Canada agreed to pay legal fees calculated as 15% of any IAP payments, which would be paid to lawyers as an addition to the IAP payment itself. In addition, lawyers could charge fees of up to an additional 15% which could be charged against the IAP payment, though these proposed fees were made subject to review by the adjudicator determining the IAP claim. The IAP payment could be held in trust by the lawyer or law firm while the final amount of permissible fees was being determined.

10. Central to the issues before the Hearing Committee is a difference of opinion over the possible meaning of Section 18.01 of the IRSSA, which reads as follows:

> 18.01 No Assignments
> No amount payable under this Agreement can be assigned and such assignment is null and void except as expressly provided for in this Agreement.

A related statutory provision which was the subject of comment in the courts was section 67 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 [FAA], which reads as follows:

> 67. Except as provided for in this Act or any other Act of Parliament,
> a) a Crown debt is not assignable; and
> b) no transaction purporting to be an assignment of Crown debt is effective to confer on any person any rights or remedies of that debt.

11. As the Agreed Statement of Facts indicates, the Member began representing the residential school claimant J.S., on whose behalf the complaint was submitted, in 2000. At that time she signed an assignment permitting the Member's law firm to deduct legal fees owing from any amount she stood to receive under the processes then in place for determining residential school claims, which were focused on the class action litigation. In this respect, the Member was using one of the mechanisms commonly resorted to by lawyers to ensure that their legal fees would be paid. Counsel for the Member indicated in his submissions to us that the Member has not relied on this assignment in taking the steps to collect his fees that led to the complaint and the request for direction heard by the BC courts. The Agreed Statement of Facts describes these more recent developments.

12. Counsel for the Conduct Investigation Committee argued that the regime established by the courts in relation to the process of determining IAP payments constituted a significant departure from the usual methods available to lawyers for collecting their fees. Though section 18.01 of the IRSSA referred to "assignments" this had been broadly interpreted by the supervising courts to make the point that the intent was – aside from legal fees related to the IAP itself, which, subject to the review by the adjudicator, could be withheld by the lawyer or law firm – that the IAP payment be paid to the claimant and was not to be subject to any other deductions by the lawyer. He argued that the Member was in a position to be familiar with the body of jurisprudence developed around section 18.01, and that he would know that a "workaround" such as the one the Member had devised was not consistent with the spirit of that body of decisions.

13. Counsel for the Conduct Investigation Committee further alluded to the direction given by J.S. to deduct from the IAP funds being held in trust by the Member's law firm sums for legal work done for J.S. and her son unrelated to her IAP claim. He argued that this direction was made in response to a letter from the Member dated April 7 which was of an inappropriately threatening nature.

14. Counsel for the Member acknowledged that the legal arguments advanced on behalf of the Member in the BC courts had not been successful, and that the courts had found that the method used by the Member to obtain the agreement of J.S. to the deduction of legal fees not related to the IAP constituted an assignment prohibited by section 18.01. He argued, however,

that the Member's reliance on what he saw as a legitimate agreement by J.S. to direct the disposition of funds owing to her, though it turned out to be mistaken in law, was sincere, and that the failure to persuade the courts that his interpretation of section 18.01 was legally correct did not mean his conduct was unethical.

15. He also argued that the term "assignment" is a legal term of art, with a meaning well-understood by lawyers. Though he acknowledged that the courts had interpreted section 18.01 to include ways of dealing with deductions from trust funds that were not, strictly speaking, assignments, the core meaning of the term remained the same, and the Member could not be faulted for making an agreement with his client that he did not think was covered by the existing interpretations of section 18.01. When it was brought to the Member's attention that a complaint had been made about this agreement, he asked the supervising courts for a ruling to clarify the matter, as he was entitled to do. Counsel disagreed that the letter of April 7, 2014 was threatening in tone. He said that it is open to lawyers to pursue the payment of legal fees owed to them by their clients in a variety of ways, and here the Member was simply stressing the debt he was owed by J.S. for legal fees, and proposing that she authorize him to settle the debt using money he knew was available for her to dispose of. Counsel for the Member argued that the course of action taken by the Member was consistent with the kind of steps taken by lawyers in the normal course of events to ensure the payment of their fees, and the fact that the Member drew a mistaken conclusion that he sincerely believed to be legally correct does not mean that he was guilty of conduct unbecoming a lawyer.

16. Counsel for the Member also pointed to correspondence between the Member and the Law Society from 2012 and 2013, in which the Member asked for some guidance about another residential school claimant, who also owed his law firm money for legal work unrelated to the residential schools claim. He was asking to know whether paying money from the trust account into court on an interpleader basis would constitute an ethical violation. After an exchange between the Member and the Complaints Counsel for the Law Society, the inquiry was referred to the Ethics Committee. That committee decided that providing an answer would require a legal interpretation of the IRSSA, which they did not think fell within their purview. Counsel argued that the Law Society had thus led the Member to view this kind of question as a legal rather than an ethical question, and it is not surprising that he carried this view into his dealings with JS concerning the payment of her legal fees.

17. Counsel for the Member also argued that it is conceivable that the legal question itself might have been resolved differently had the request for direction been heard in Saskatchewan rather than in BC. He cited to us two Saskatchewan decisions, *Merchant Law Group v. Compushare Ltd.*, 2008 SKCA 173 [*Compushare*] and *Saskatchewan Government Insurance v. Merchant*, 2011 SKQB 174 [*SGI*], which he argued demonstrated two different approaches to the disputed issues. He argued that the Member's request for direction in this case might have led to a different outcome had it been determined by a Saskatchewan court.

18. Counsel for the Member provided the Hearing Committee with a book of authorities. Though we found them all informative, we looked especially closely at a number of decisions of the courts supervising the implementation of the IRSSA. We would draw attention in particular to: *Baxter*, cited *supra* at paragraph 6; *Fontaine v. Canada (Attorney General)*, 2007 BCSC 1641 [*Levesque* 2007 BCSC]; *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329 [*Levesque* 2008 BCCA]; *Daniels v. Daniels*, 2011 MBCA 94; *Compushare*, cited *supra* at paragraph 17; *SGI*, cited *supra* at

paragraph 17; *MLG* 2016 BCSC; and *MLG* 2017 BCCA. These cases involved slightly different scenarios; some of them were related to CEP rather than IAP payments, for example, and some of them dealt with the issue of when the funds could be said to be under the control of a lawyer or of a claimant. They all, however, reveal something about the nature of the system that was established to carry out the provisions of the IRSSA.

19. We wish to make it clear that we understand that the decisions in *MLG* 2016 BCSC and *MLG* 2017 BCCA – the ones that address the conduct of the Member that is the subject of the complaint before us – were made after he had taken those actions, and we must assess their relevance in that context. These decisions do shed light, however, on how the supervising courts understood the nature of the regime that had been put in place to administer the IRSSA. In our view, since the courts had oversight of the implementation of the agreement, it is relevant to our assessment of the Member's conduct to examine how the courts characterized the regime that had been established and their expectations of counsel operating within it.

20. Several features of this system are clear as early as the *Baxter* case, the decision in which the Ontario Superior Court of Justice approved the IRSSA, at the same time directing that modifications be made to the agreement that had been reached by the parties. One of these directions concerned the payment of legal fees. At paragraph 73 of the decision, Winkler J. made the following comment:

> As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees… I cannot accede to this submission. During argument, I expressed 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.

21. At paragraph 74, he continued:

> 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.

22. This concern led the court to create the process by which the adjudicator determining an IAP claim would also assess the reasonableness of proposed legal fees beyond the 15% that the federal government would pay on top of the amount of any IAP settlement. An appeal could be made to the chief adjudicator. Winkler, J. said at paragraph 78:

> 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.

23. Though the comments in paragraph 73 and 74 of *Baxter* relate specifically to the creation of a process for assessing legal fees related to legal representation in the IAP itself, and this must

certainly be taken into account, there are in our view two points of broader significance that can be identified in Winkler J's judgment. One is the desire of the courts to ensure that the process would protect the interests of a group of claimants who could not be expected to grapple with the ordinary requirements of the legal system, and who were thus entitled to a process more tailored to their circumstances.

24. The other thing we would point to in connection to these passages is the use of the term "direction to pay" rather than "assignment" in paragraph 78. Although the term "assignment" was used in section 18.01 of the agreement, Winkler, J. seemed to view the term "direction to pay" as appropriate to describe what was being prohibited.

25. The point we are making here is that, at the foundation of the regime established to administer the IRSSA, the courts were characterizing the claimants as a special and vulnerable population in need of judicial vigilance to protect their interests, and that they were concerned about ensuring that the payments under the agreement, aside from an amount determined to constitute reasonable fees for their legal representation in the IAP, should get into the hands of the claimants without further deductions.

26. In *Levesque* 2007 BCSC and *Levesque* 2008 BCCA, a lawyer advising a CEP claimant argued that a document containing direction to pay a debt owing to a third party should be viewed as separate from an executed assignment relating to the same debt, that assignment being prohibited by Section 18.01 of the IRSSA and section 67 of the FAA. In *Levesque* 2007 BCSC, Brenner J. concluded at paragraph 30:

> The essence of the respondents' argument is that if one separates the direction to pay from any assignments or other pending instructions, the payment as directed by the CEP claimant to a party other than solely him or herself cannot be impugned. I disagree, To sanction such a procedure where the CEP monies are subject to a pre-existing "assignment" or "assignment of proceeds of claim" would be to elevate form over substance. It would contravene the clear intention of the Settlement Agreement as well as the FAA.

27. In *Levesque* 2008 BCCA, Saunders J.A. upheld the lower court decision, and commented:

> The effect of the transaction was to assign wholly the amounts payable under the Settlement Agreement to lenders, contrary to s. 18.01 of the Settlement Agreement. It is not beyond human experience that a compensation scheme broadcast widely (as was this one) would attract people seeking a share of the proceeds in arrangements such as these. I think it may be safely said that the purpose of s. 18.01 was to limit the potential for the class members to be fleeced of their funds, or any portion of them, before they were received by the individual. That it was intended they should receive the entire payment is apparent from the restriction in the Settlement Agreement to their counsel charging fees in respect to these payments. In other words, an end run around the Settlement Agreement ought not to be countenanced.

28. Madam Justice Saunders also emphasized the distinctive nature of the IRSSA process, at paragraph 16:

> The process whereby these complicated, long-standing and culturally significant claims have been settled, and the settlement administered, is *sui generis*…. In my view, this appeal is but another marker of unique proceedings that have led to this landmark resolution.

29. We are, of course, aware both that the *Levesque* decisions dealt with purported disposition of funds received under the IRSSA prior to those funds being received by either the lawyer or the claimant, and also that they concerned the CEP, which was governed by slightly different rules. It should be remembered, however, that Section 18.01 of the agreement covered both CEP and IAP funds; in this respect, it is instructive that the courts held that the differentiation between an assignment and another kind of instrument which led to the same result should be rejected. The decisions also reiterate the concern of the courts that the interest of the claimants in these funds should be protected and given priority.

30. In *MLG* 2016 BCSC, Brown, J. found that the April 2014 direction from J.S. to pay legal fees to the Member fell within the prohibition in Section 18.01 of the IRSSA, and was also a violation of Section 67 of the FAA (the Court of Appeal found it unnecessary to reach a conclusion in relation to the latter). In arriving at this conclusion, Brown J. said at paragraph 62:

> [Article 18.01]'s purpose is to protect vulnerable class members…Further, the meaning of this provision and the question of whether a certain arrangement is captured by it should be considered in light of one of the overarching purposes of the IRSSA, which is to "make right wrongs committed in the course of a failed government policy": *Levesque* 2008 BCCA at paragraph 41.

31. Brown, J. referred to the comments of Winkler, J. at paragraph 78 of *Baxter*, cited above at paragraph 22, to the effect that all directions to pay to "any person other than the claimant" an amount in excess of the amount approved by the adjudicator must be regarded as void. She also referred to Expectations of Legal Practice issued by the chief adjudicator in 2013; although she indicated these were not binding on the Court, she clearly saw them as pertinent and did not state any reservations about their content.

32. In *MLG* 2017 BCCA, Newbury, J.A. also considered the significance of *Baxter*, and characterized it in these terms, at paragraph 5:

> This was the first step in the evolution of a complex framework of orders, rules, guidelines, protocols and directions – essentially a discrete body of law – intended to ensure *inter alia* that compensation paid under the Settlement Agreement would reach the plaintiffs without deductions that were not fair or appropriate.

33. Newbury, J.A. also referred to the Chief Adjudicator's Expectations of Legal Practice, pointing at paragraph 16 to the following passage from that document:

> 12. Lawyers must not:…
> b) withhold any part of the compensation amount payable to the claimant for any purpose, other than legal fees approved by the adjudicator. The lawyer must not deduct any third party assignments, cash advances, directions to pay, disbursements, costs associated with the management of the file, or anything else, from the amount payable to the claimant.

34. In upholding the decision of the British Columbia Supreme Court, Newbury, J.A. said the following, at paragraph 41:

> By agreeing to act for J.S. in the IAP, [the Member] must be taken to have been aware that it was subject to the terms of the Settlement Agreement, the Implementation Orders, court judgments interpreting them, and the policies of the Chief Adjudicator, all discussed above, and that it would not be operating under the usual rules generally applicable to lawyers in the relevant province. As we have seen, the 'entire' procedure for the resolution of the plaintiffs' claims in this action was to be supervised by the courts. Part of the procedure that has been specified is that assignments or directions to pay under which *any amount in excess of a lawyer's approved fees*, are null and void.

The Court went on to say that "the direction to pay in this case offends a prohibition that has been woven into the cloth of the administration of the Settlement Agreement."

35. We have concluded that the actions of the Member in obtaining and acting on a direction from J.S. to deduct an amount from her IAP payment at the time those funds were in the Member's trust account did constitute conduct unbecoming a lawyer. One of our reasons for this has to do with the extensive involvement the Member has had with the process for determining the claims of residential school survivors as that process has unfolded. There can be few lawyers in Canada who are in a position to know more about the initiation of the class actions that predated the conclusion of the IRSSA or about the negotiations that led to the agreement, or who have been a participant in more court proceedings about the meaning of the agreement and how it should be administered. In particular, he has been at least an observer and often a party in the cases where the payment of legal fees and the meaning of Section 18.01 have been at issue.

36. As we read these decisions, though they deal with different scenarios, different types of methods for payment and different kinds of actors, the bottom line is that the intention of the protection in Section 18.01 is that – save for an amount of legal fees related to pursuing the process under the agreement itself found to be reasonable – the full amount obtained under the IRSSA is to be placed in the hands of the claimant without additional deductions. As early as the *Baxter* decision, the supervising courts made it clear that the term "assignment" in Section 18.01 would not be interpreted in a narrow or technical way, but would be taken to include other forms of directions to pay under which claimants purportedly gave instructions for sums to be deducted from their payments under the settlement agreement. Given the judicial comments we have sampled above, it is hard to know how the courts could have been much clearer on this point. It is not credible to us that the Member could have had any lingering doubt that the proper course for dealing with the IAP funds in his trust account was to turn them over to the claimant J.S., or that he could have held a sincere belief that there was still some remaining mechanism that would be seen as a permissible method of deducting money from the IAP payment when mechanisms virtually indistinguishable from this one had been rejected. Though the Member denies that he "withheld" money as prohibited by the Expectations of Legal Practice, it is hard to know how else to characterize maintaining control of a sum of money which had never been put in the hands of the client.

37. It is also clear from the judicial decisions that the rationale for this approach was that the claimant population was seen as particularly vulnerable. From the *Baxter* case on, the courts

made it clear that they did not consider the usual methods for determining and collecting legal fees to include adequate means of protecting the interests of the claimant group. Though the system that was put in place incorporated procedures that would to some extent assure lawyers that their work on the residential schools claims would be sufficiently rewarded, Winkler, J. rejected the proposition that the existing safeguards for clients would be enough. It should be noted that in *MLG* 2016 BCSC, at paragraph 64, Brown, J. observed that a claimant "remains in a position of vulnerability vis-à-vis the holder of the trust account."

38. Since the whole premise of the system of adjudication and court supervision that was put in place under the IRSSA was that claimants are a vulnerable group in need of special protection, we must also state our concern about the means by which the Member obtained the signed direction from J.S. that has been in dispute. We do not agree with the submission of counsel for the Member that the letter of April 7, 2014, is benign or unthreatening in tone. J.S. had already indicated that she did not wish to have any outstanding legal fees for matters unrelated to her IAP claim taken out of the trust account, and that she viewed it as her son's responsibility to pay his own legal bills. Though it is true that the letter did ask for the client's instructions, the alternative was presented as a lawsuit in which the law firm would be able to "seize your assets, your car, your bank account, or whatever" in order to collect the debt. In our view, this language was not in keeping with a lawyer's obligation to treat clients, and particularly vulnerable clients, with courtesy and consideration.

39. The Member made a request for guidance to the Law Society in 2012, which concerned another case. It should be noted that this request concerned somewhat similar circumstances, in that it related to the question of whether there was some way the Member could have access to IAP funds to pay legal fees owed for work unrelated to the IAP claim. It can be distinguished, however, on the grounds that the proposal there was to place the money in court where the claimant could dispute the payment of the legal fees; it did not concern the kind of direction from a claimant that is at issue here. In her initial response, the Complaints Counsel for the Law Society cautioned the Member as follows:

> From an "ethical perspective" I am of the view that it would be an onerous requirement to expect the IAP client to retain counsel or appear on his own behalf to argue before the Court against your claim to the monies remaining in trust. I understand that the IAP claim is difficult for the client in the first instance and to request that the adjudicator assess his lawyer's IAP account adds a layer of further difficulty. To then subject the client to a third level of legal process in order to claim the monies remaining if your account is reduced by the adjudicator would be, in my respectful view, inappropriate.

40. This comment must, of course, be seen in the context of the ultimate decision of the Ethics Committee of the Law Society to decline to provide an ethics ruling on the grounds that they saw the question of whether an interpleader action would be appropriate as in the first instance a legal question. Whatever their reasons for coming to that conclusion, it does not seem to us that a reluctance to comment on the particular vehicle of an interpleader action in a situation similar to that before us can be taken to have given the Member license to adopt other mechanisms for avoiding the consequences of what appears to be a clear "off limits" policy for settling third party claims or claims for legal fees other than those related to the IAP out of funds which were received as an IAP payment and which were still in the hands of the lawyer.

41. Counsel for the Member argued that the status of such methods as the Member adopted in this case must be viewed as unresolved in Saskatchewan, given the apparently inconsistent decisions in *Compushare* and *SGI*, both cited *supra* at paragraph 17. We are not persuaded by this argument. For one thing, the *Compushare* decision of the Saskatchewan Court of Queen's Bench was dated March 22, 2007; this was only days after the approval of the IRSSA in the same court on March 8, 2007. This may help to explain why there was no reference to Section 18.01 of the IRSSA (or to Section 67 of the FAA) in either the Queen's Bench or Court of Appeal decisions in *Compushare*. While it is true that the courts dealt with the issue in that case according to traditional commercial law principles, this approach was clearly repudiated in subsequent cases where Section 18.01 was considered.

42. In *SGI*, Zarzeczny, J. pointed out that the Court was unable to consider the impact of Section 18.01 of the IRSSA because the agreement had not been incorporated into the Agreed Statement of Facts submitted by the parties. He also pointed out that Section 67 of the FAA had not been cited in *Compushare*, and went on to approve the decision based on that provision to resist paying SGI under an assignment against payments made under the agreement.

43. It is hard to say that either of these cases is strongly supportive of the argument that the Member's legal fate might have been different had the Saskatchewan courts been asked to decide the legal issues in the current case. *Compushare* did not refer to Section 18.01 at all, and in *SGI*, the Court felt precluded from fully addressing this provision because of the failure to reference the agreement in the Agreed Statement of Facts. Speculation about a likely outcome in a Saskatchewan court seems somewhat fruitless in this context.

44. We would also note that the courts administering the IRSSA have evidently made considerable efforts to create a coherent national approach to the issues arising under their supervision of the agreement. Through the administrative protocol, the system of reference to supervising judges, and the cross-referencing of cases from one jurisdiction to another, it can be seen that the courts have tried to develop consistency in the way the settlement agreement is administered. Not all procedural and legal distinctions between provinces can be eliminated, but the supervising judges have not favoured the creation of a province-specific approach over all.

45. The Hearing Committee acknowledges that a lawyer who advances an incorrect legal proposition based on a sincerely-held belief should not be held to have committed an infraction of professional obligations for this reason alone. As we stated above, however, we are not persuaded that this is an accurate description of the circumstances here. The Member has been immersed in the IAP and the system under which the IRSSA was administered, and has had many opportunities to digest the message of the courts and the administrators of the system that the IAP payments determined through adjudication were to be kept intact except for legal fees also assessed under the scheme. We do not dispute that lawyers are entitled to be paid for the work that they do, and that the legal system has sanctioned a number of mechanisms for pursuing these debts. Under this regime, however, the funds awarded to residential schools claimants through the IAP have been characterized as having special status, and it is not believable that the Member had any basis for believing that an assignment according to a particular limited meaning was the only mechanism he was not entitled to use to obtain the fees he claimed were owed. We are also of the view that the way he extracted from J.S. her instruction to pay the legal fees was not in keeping with the clear intention of the IRSSA regime to protect a vulnerable group.

46. For the reasons we have given, the Hearing Committee finds that the Member is guilty of conduct unbecoming a lawyer under both counts of the complaint: that he induced J.S. to provide an assignment prohibited under Section 18.01 of the IRSSA, and that he acted on that improper assignment. We will remain seised of this matter pending a determination of appropriate sanctions.

DATED at Saskatoon, Saskatchewan, the 26th day of September, 2019.

Beth Bilson

Beth Bilson, Q.C., Chair

Heather Hodgson

Alma Wiebe, Q.C.