

**Indian Residential Schools Resolution Canada  
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Actualité**

**Wednesday, September 6, 2006 ♦ mercredi, 6 septembre 2006**

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## Articles Related to Indian Residential Schools

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### 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.**

JONATHON GATEHOUSE

There are six Dictaphones spread out like a fan on the table in Tony Merchant's hotel-suite-cum-Ottawa-office, each labeled with the name of a different secretary. It's more efficient that way, as he bounces from file to file, shuffling through the stacks of legal documents set out before him. When the tapes are full, he couriers them home to Regina to be transcribed into letters, court submissions and statements of claim. Time is money.

Merchant may well be the busiest lawyer in Canada. By his own account, he billed an astounding 5,300 hours last year -- an average of almost 15 hours each and every day, devoted solely to his clients. (A lawyer who bills 2,000 hours annually is considered a top producer at most big Canadian firms, and that requires lots of late evenings and weekends.) The fact that Merchant sleeps only a few hours a night helps. So does his long-ago acquired habit of eating only one meal a day -- dinner. Still, it doesn't leave much time for family life, or his other passions, travel and politics. Merchant's wife, Pana, a Liberal senator for Saskatchewan, recalls a recent Christmas Day when they had five of Tony's clients scattered throughout the house, waiting to discuss their cases.

Merchant's firm, the Merchant Law Group, employs about 40 lawyers, including his three sons, based mostly in Saskatchewan, Alberta and British Columbia. It claims to have the largest family law practice in Canada, and is involved in more than two dozen class action lawsuits, including product liability claims against General Motors, Sears, and the makers of Paxil, Vioxx, and silicon breast implants, as well as actions on behalf of shareholders of Molson Inc. and Hollinger Inc. But that's not the legal work Tony Merchant has been banking on for the past decade.

This trim 61-year-old with the kind of preternaturally smooth skin and dark hair one used to associate with Dick Clark also claims to represent more than 10,000 former students of Indian residential schools -- and that's put his firm in line for the lion's share of the biggest legal payday in Canadian history. This week, an Ontario court begins the process of signing off on the federal government's new \$1.9-billion settlement package for survivors of the state- and church-run Aboriginal education system. The proceedings, which will be followed by similar hearings in five other provinces and three territories between now and mid-October, were supposed to be a formality. No longer.

That's because the Merchant Law Group and the federal government are locked in a nasty battle over fees that threatens to delay -- if not derail -- the implementation of a deal designed to redress one of Canadian history's greatest wrongs. Merchant is sure what his take should be: \$40 million upfront, and tens of millions more once special tribunals start handing out additional compensation to former students who were physically or sexually abused. In the past, he has publicly mused about

hitting the \$100-million mark. "Our evidence will support a payment of \$70 million alone for the work we've already done," he says.

But Ottawa is balking, raising questions about just how many former students Merchant actually represents, and how much work his firm has really done on the files it does have. Government affidavits allege incidents of shoddy bookkeeping, questionable billing practices, and suggest that Merchant has many hundreds of phantom clients. Frank Iacobucci, a former Supreme Court justice now acting as the federal overseer of the residential school agreement, has declared that he has "very serious concerns about the information put forward by the Merchant Law Group to justify its position on legal fees." And a deal, struck last fall, to have a forensic accountant examine the firm's client base, files and bills, has fallen apart. Merchant, backed by the opinions of several provincial law societies, says the audits were a violation of solicitor-client privilege. And he's refusing to provide the government accountants with any more information. "We've complied with the verification process," says Merchant. "When we signed the deal there was never a word about pulling our files."

It's just the latest chapter in the saga of Tony Merchant vs. The World. In his own version, and to his many supporters, Merchant is a hero, one of the few people with the vision and drive to obtain justice for Aboriginals who were taken from their families and stripped of their language and culture in a state-sponsored assimilation. To his critics, including many native groups, he's a relentless self-promoter who exploited vulnerable clients in his quest for the big cheque. Merchant has been at the centre of controversy before, but this time, the stakes are huge. Across the country, an estimated 80,000 survivors are anxiously waiting for their compensation cheques. And Tony Merchant is taking a stand that won't make them happy: none of the victims are getting their money until he gets paid.

Home base is still Regina, but Tony Merchant seems pretty comfortable around Parliament Hill these days. He flashes his spousal ID to bypass the security checkpoints; they know him by name in the parliamentary restaurant. When a reporter comes to visit, he arranges to meet in his wife's Senate offices. The walls are decorated with photos of Merchant, and sometimes Pana, with Pierre Trudeau, Jean Chrétien and other heavy hitters from the Liberal glory years. A thick packet of photocopied press clippings about Merchant's career sits on the coffee table. When the senator's conversation with her assistant, outside in the anteroom, becomes too distracting, he gets up and shuts the door. Power has its privileges. So, apparently, does being power's consort.

Merchant's Liberal pedigree can be traced back several generations. His grandfather and mother were both members of the Saskatchewan legislature. He won election himself in 1975, and staged an unsuccessful bid for the provincial Liberal leadership the next year. Merchant has also run federally on three occasions, losing each time. He was an early supporter of Chrétien's leadership ambitions. (This time, he and his family are lining up behind Michael Ignatieff.) And it is accepted wisdom in Saskatchewan legal circles that during the Liberal years Merchant was able to influence who was appointed to the federal bench. "I've been able to make some contributions about ideas of people over time," he says coyly.

It was not, therefore, unexpected to see a Merchant appointed to the Senate in 2002. The surprise was that it was Pana, not Tony, going to the Red Chamber. "There were discussions," says Merchant, "but it would have been impossible unless I was prepared to back away from practice. And I wasn't ready to do that." Regardless, Pana's Senate appointment has proven to be something of a two-for-one deal. Merchant, who boasts that he and his wife have only spent seven nights apart in their 35-year marriage, is now an Ottawa fixture.

For all his connections and visibility, however, the one area where Merchant never felt he held much federal sway was the residential school file. Chrétien, a former Indian affairs minister, didn't understand the scope of the problem, he says. Paul Martin was more sympathetic, but movement

toward a settlement came only in the dying days of his minority government. "I think the jig was up," says Merchant. "Our firm had a huge number of cases moving forward."

In the spring of 2005, Martin signed a political agreement on residential schools with the Assembly of First Nations and appointed Iacobucci as an official knuckle-breaker, tasked with making all the parties sit down and hammer out a deal. An agreement in principle was reached last November. After the January federal election, the new Tory government spent months tweaking the settlement, trying to make it more politically palatable for its voters. The final deal, signed in early May, provides a "common experience payment" (CEP) for all the living survivors of the 130 boarding schools -- \$10,000 for the first year they attended, and \$3,000 for each additional year. (Those over 65 can already apply for a fast-tracked \$8,000 advance on their compensation.) The landmark package also includes \$125 million over five years for an Aboriginal Healing Foundation, \$60 million for a truth and reconciliation commission, and \$20 million for national and local commemorative projects. Sexual and physical abuse claims will be dealt with under something called the Independent Assessment Process (IAP), a low-stress, simplified hearing that aims to resolve 2,500 cases a year. In return, survivors will agree to drop all other legal claims against the government and churches.

Ottawa has attached a \$1.9-billion price tag to the deal, but the true cost of the settlement package will depend on how many survivors come forward to share their experiences. The IAP awards are expected to be more generous than prior out-of-court settlements, which ranged from \$5,000 to \$10,000 for milder cases of physical abuse, and up to \$245,000 for repeated cases of rape and molestation. Merchant puts the true value of the deal at closer to \$5 billion, which in turn will mean tens of millions more in compensation for lawyers.

The government has already put aside more than \$100 million for legal fees, demolishing the previous Canadian record. (In 2000, a national class action settlement for people who contracted hepatitis C from blood transfusions paid lawyers \$56 million.) According to the agreement in principle, the Merchant Law Group, with more than half of all current claimants, would get \$40 million. The National Consortium -- 19 firms from across the country that have been pressing other class actions -- will receive the same. Independent counsel -- dozens of small firms and individual lawyers with residential school clients -- will share the remaining \$20 million. The lawyers involved have agreed not to deduct anything from their clients' CEP payouts, and to help any new claimants access the general compensation without charge.

The abuse payments are a different matter, however. Under the deal, the government will add 15 per cent to all amounts awarded by the IAP to help with legal fees, but lawyers remain free to deduct additional payments from their clients' compensation. Many survivors have contingency arrangements with their counsel, with some agreeing to hand over almost half of any settlement.

Legal fees are a touchy subject, and were reportedly a big sticking point for the Tories when they inherited the deal. The image of white lawyers raking in millions, while their poor native clients wait for cheques that might not even be enough to buy a new car, is not a palatable one. And there's no question that Merchant -- a man who admits to having visited a reserve only six or seven times in his life -- stands to be the biggest single winner. He wasn't the first lawyer in Canada to take on residential school cases, but whatever the exact number, he now has more than anyone else, and his client list grows by five or six a day. In 2005, he won the biggest award to date for a native school victim when the Supreme Court of Canada ruled that a man who had been sexually abused by a Saskatchewan school administrator was entitled to compensation. (Or, as Merchant's son Matthew bluntly put it in a letter to a client: "We just took a case to the SCOC and got in excess of \$300,000 for a Survivor who had been fondled three times.")

Even Tony Merchant's fiercest critics concede that his legal strategy of flooding the courts with abuse claims -- he has filed more than 6,000 individual lawsuits and 11 class actions over the past decade -- helped force the reluctant churches and federal government to the bargaining table. For years, he helped keep the issue in the spotlight, giving interviews to newspapers, the BBC, CNN, even 60 Minutes II. In Merchant's telling, he's a crusader. And he's made one concession, at least, on his fees: his firm has decided, without being asked, he says, to take only 15 per cent of its clients' abuse awards, in addition to Ottawa's matching 15 per cent top-up.

Still, with perhaps \$100 million coming his way, it's the other picture, the one painted by his detractors -- other lawyers, native groups, former clients -- that seems destined to grab the headlines. Earlier this summer, even before the government's new allegations, Rosalind Caldwell, who runs an inner-city ministry in Regina, called his share "misery" money, and demanded a portion be returned to disadvantaged Aboriginals. Tony Merchant is an opportunist, critics say, someone who aggressively recruits vulnerable clients, promises them the moon, and leaves them wondering what they are receiving in return for the hefty fees.

The red brick building still dominates the reserve. Three storeys high and unmistakably institutional, it's perched atop a small rise with a view of the Bow River and the rolling Alberta prairie beyond. Converted to a community college in 1971, its classrooms are still in use, but the chapel has been turned into a library. The basement playrooms are now a cafeteria. And the top-floor dormitory, where it must have been possible for students to gaze out the windows and see their family homes in the distance, is now the Siksika Nation Museum.

Between 1929 and the late 1960s, the Anglican Church educated thousands of Blackfoot children at the Old Sun residential school. And for many of those students, the memories are anything but happy. Ruth Majoros, now 65, arrived as a six-year-old, with no English and little understanding of white culture. She says it took her three years to learn to recognize the name the Church gave her. Majoros's eyes fill with tears when she recalls the frequent beatings. "Even when we were 14 or 15 they used to strip us naked and spank us in front of everyone." Once when she bent down to pick up a pencil in class, her male teacher, thinking she was passing notes, pounced and shoved her into a desk. She ended up in hospital with a severe gash to her head and a broken arm. And when she returned to the school a month later, she was greeted with a spanking for being such an inconvenience. Fifteen years ago, Majoros signed up for some courses at the community college, but she didn't last a week. Just being in the building was enough to make her shake and cry.

When lawyers first came to Siksika, about an hour east of Calgary, in the late 1990s for a community meeting about potential compensation, Majoros was among a hundred or so curious participants. For many, that night was the first time they had ever discussed their experiences. It was cathartic, but few seemed to understand what they were getting into. "I signed the guest book, and next thing I knew, I had a lawyer," she says.

In 1999, changes to Alberta's legal limitations period sparked a flood of residential school lawsuits, as native groups and any number of law firms rushed to enter claims before they were deemed to be too old to pursue. The Merchant Law Group stepped up to the plate, paying the \$200-a-claim fee and filing thousands of suits before the deadline. (At one point, Merchant recalls, his firm was spending more than \$20,000 a day at the courthouse.) In Siksika, Merchant took over some clients from a small, independent law firm, and signed up hundreds more. Soon, he and his firm represented most of the survivors on the reserve.

Hopes for compensation for the years of mistreatment, and the decades of after-effects, were high, but few of the survivors on the reserve seemed to understand how long, complex, and costly the legal battle could be. "The lawyers were telling us how much money they could get for us -- maybe

\$500,000," says Majoros. "Sorry to say that nobody got anything anywhere near that." A disgruntled former client of Merchant's, she is now a competitor, shepherding groups of fellow survivors through the settlement process, free of charge.

Those who were already Merchant clients were frequently encouraged to provide names of relatives and friends who had also attended residential schools. Craig Weaselhead received a 2004 letter, in care of his uncle, with an attached questionnaire asking about his residential school experiences. ("Were you hit? What was the effect of being hit? Who hit you? What were you hit with?" asks the form, identified as the Merchant Law Group's Residential School Initial Interview. Under the heading of sexual abuse, it asks, "Who touched you? What part of their body touched which part of your body?" and provides a helpful example. "His hand touched my genitals. His penis penetrated my anus. Her hand fondled my genitals, or whatever.") The letter, signed by Matthew Merchant, seems to promise a guaranteed return. "All you need to do is answer the questionnaire and be sure that we know where to find you so that when the case resolves in a year-and-a-half, or two-and-a-half years or three-and-a-half-years we can find you to get to you the compensation to which you are entitled."

Many Siksika clients say that despite the promises, little progress was being made on their cases, and updates from the Merchant Law Group lawyers were few and far between. "For me, out of all those years, I only got two letters from him," says Donna Littlelight, another former Old Sun student. "That man never did anything for us." (Merchant blames the slow progress on the courts and government. "Alberta became a judicial black hole," he says, as his lawsuit flood was diverted into a lengthy case management process. His firm wanted to proceed individually; the Crown and courts wanted to try the cases in bunches.)

Regardless of who bears responsibility, frustration grew in Siksika as claimants died without ever seeing their cases resolved. Majoros learned of an alternative dispute resolution program that the government had set up to quickly settle residential school cases. (She claims that neither Merchant's office, nor the band's legal department, had ever mentioned it to her or other survivors as an option. Merchant, who calls the ADR program "cruel," says that he never recommends it, and depending on the client's circumstances may not even tell them it exists.) Majoros collected the necessary information, filled in the forms, and took a group of 19 friends and relatives through the out-of-court process. Once the compensation cheques started arriving, more and more survivors asked to join. She is now preparing her third group for their hearings, and has close to 200 more former students on a waiting list. Almost all are former Merchant clients. "We don't say that we fired him, because that's not a very nice word," says Majoros.

The confidentiality rules governing the relationship between lawyers and their current and former clients make it impossible for Merchant to respond directly to the complaints, but he questions the motives of his critics, noting that a competing firm now has a satellite office in Siksika. "It's interesting that the only First Nation in Canada where we have a problem is one of the few that has a lawyer right there on the reserve."

But the Merchant Law Group has not let its former clients go without a fight. It papered the reserve with letters advising survivors that someone was "manipulating the people of Siksika to do a very unwise thing." The ADR process is "largely a trick," wrote Tony Merchant. The letters also contained a warning: the firm wouldn't wait for a settlement -- all clients who found new lawyers would be expected to pay their outstanding accounts immediately. Those who persisted received bills for thousands of dollars.

Peter Cayen, now 77, spent 11 years as a student at the reserve's Catholic-run Crowfoot Indian Residential School. Sitting on his front porch, he's comfortable enough talking about the beatings inflicted by staff and other students, but he draws the line at discussing the sexual abuse. "I don't

want to say those things in front of other guys." When Cayen fired Merchant in October 2005, he received an invoice for \$8,217.72. Interest on any unpaid balance would be 27 per cent, it warned. "I got worried. I got scared of them," he says. The itemized bill, stretching back to 1999, shows an initial one hour and 20 minute consultation with Cayen, and then three letters over a six-year period. Most charges on the seven-page bill are for the mass Alberta case management meetings. An examination for discovery was finally held in June 2005. Last February, months after he dismissed Merchant, Cayen says he got a call from the firm's Calgary offices telling him to come and pick up a cheque. He met with a paralegal and signed an "irrevocable direction" authorizing the government to pay the Merchant Law Group \$2,750, settling his case. He was then sent home empty-handed. "Good thing I had enough gas in my car," says Cayen. Months later, he got a cheque for \$500, the only payment he has received to date from the firm. Cayen has given up hope of getting more.

Merchant has aggressively pursued his former clients in other jurisdictions as well. In October 2005, he convinced a Saskatchewan Court of Queen's Bench judge to order the government to pay all future residential school awards due to two survivors -- including their common experience payments -- into the court so that his bills, \$4,500 and \$7,500, could be satisfied first. The Crown is appealing the case.

In a sworn affidavit filed in court last January, Ron Manyheads, the manager of the Siksika Nation Justice Service, complained that Merchant's collection attempts were "creating an atmosphere of uncertainty as well as creating feelings of intimidation" in the community. He attached several examples of the letters, as well as communications with Tony Merchant. The band questioned how the firm could double dip -- billing former clients and collecting \$40 million in legal fees under the settlement agreement. "Merchant Law Group has an arrangement by which our fees for our clients will be paid by the government," was the response. Merchant's letter invoked the Saskatchewan court ruling, and said the band should be advising its people to return to the firm's fold. If not, the consequences were clear: "[W]e are going to get the \$40M and we are going to get more money as well."

If there is living proof of the maxim that there is no such thing as bad publicity, chances are that his name is Tony Merchant. Over the past 35 years, he has survived, and thrived through a series of headline-making brushes with the police, judges, and law societies, and never lost his taste for battle. In January 1983, Regina police charged Merchant with abduction after he helped his friend and client Colin Thatcher forcibly remove his nine-year-old daughter Stephanie from the home of a family friend. Stephanie's mother, and Thatcher's ex-wife, JoAnn Wilson, had been savagely beaten and shot in the garage of her Regina home the evening before. Thatcher is still serving time for her murder. Merchant, who represented his former political colleague in the acrimonious divorce and custody battle, later pleaded guilty to a lesser charge of mischief and was granted an absolute discharge. The Law Society of Saskatchewan reprimanded him for "conduct unbecoming" and fined him \$1,000, and \$5,000 in costs.

Merrilee Rasmussen, a Regina lawyer, says the first thing she asks when she takes on a family law case is whether she's up against Tony Merchant. "His personal credo is that he doesn't settle anything," she says. "It's fight at all costs." In a recent Ontario court battle to see which law firms would be allowed to participate in a class action against the makers of Vioxx, the judge criticized Merchant for submitting "scandalous" statements, alleging that his competition had sold out their clients in the past. His conduct, including dumping thousands of pages of "largely irrelevant" material on an opposing lawyer just before 5 p.m. the evening before the hearing, left many scratching their heads. "We filed our material six months before the date," says Mike Peerless, a London, Ont., class action specialist. "This type of thing isn't usually a blood sport."



In 1998, a Tax Court judge slammed Merchant for "stonewalling" Revenue Canada auditors who tried to reassess his taxes. When the court ordered him to disclose his financial documents, he dragged his heels, then submitted an avalanche of disorganized papers, including a list of 16,000 items with no description or explanation. When he pressed the case to the Federal Court of Appeal, the three-judge panel criticized his "unacceptable conduct" and disrespect before the court. At particular issue were Merchant's efforts to file a legal memorandum that exceeded the court's 30-page limit. After it was twice rejected, he changed the page margins and filed the same argument in eye-straining, extra-small type.

The Merchant legend has been further burnished by his eccentricities. In his days at the University of Saskatchewan, he was known for not wearing shoes, even in the middle of winter (perhaps explaining the nickname "Tippy Toes"). He owns 35 suits, all of them in a style-defying double-breasted cut, and only wears white shirts with French cuffs. He is also a self-confessed cheapskate, proudly sharing the tale of how his mother purchased his wife's engagement ring. That may also explain why he's currently embroiled in a lawsuit with Saskatchewan's provincial auto insurance body. At issue is a refused claim for \$1,450 in repairs to the interior of Pana's 1999 Oldsmobile, for damage caused by his son Matthew's dog, a black Labrador retriever named Bobs (in the fashion of all 19 Labs the family has ever owned, stretching back to 1922).

To some extent, Merchant enjoys the notoriety. "It's part of being larger than life in Saskatchewan," he says. Nor does it seem to bother him that his detractors are so vociferous that it sometimes feels like the meetings of the Tony Merchant fan club could be held in a phone booth. "I have always been strong medicine," he says. "I've always been impatient about doing the things I want to do. I've been unhappy since I was 12 that I was going to die."

Native groups have been complaining since the late 1990s about the way some lawyers have been recruiting the often emotionally vulnerable survivors of residential schools. In his first term as grand chief of the Assembly of First Nations, Phil Fontaine wrote to all of the country's law societies and bar associations, begging them to rein in their more aggressive colleagues. Only the Canadian Bar Association responded, adopting a set of voluntary, non-binding guidelines that say in part that lawyers should not initiate communications with former students, or inquire whether they were sexually assaulted.

Tony Merchant can speak movingly about the stories he has heard from clients over the years. "You'd think you'd get used to it, but on probably a dozen occasions a year, I have to leave my office because my eyes are watering," he says. His outrage shines through, as does his pride in being part of the historic settlement of their claims. "First Nations peoples were perfect victims," says Merchant. "They suffered in silence. It is part of their culture to be strong about bad things . . . It isn't the amount of money that makes people feel better, it's the monetary recognition. When they get that \$1,800 and a letter of apology, they are satisfied. It's sort of like they feel that someone has been fined."

In no small way, Merchant sees himself as an evangelist. Survivors should be made aware they have legal options, that they are entitled to compensation for what happened, whether it's a small amount or a big one, he says. That's one of the reasons he has always made himself so available to the media, and especially those outlets with large First Nations audiences. On this day, he breaks off an interview to take a call from CBC North. It is a happy intersection of duty and business, says Merchant. "They get 20-second sound bites and I get to say Merchant Law Group all the time on the only radio station anybody listens to north of Prince Albert." All of the firm's offices have easy-to-remember phone numbers ending in the same digits -- 7777. Type [www.residentialschools.ca](http://www.residentialschools.ca) into an Internet browser and you end up at Merchant's website.

But that zeal to spread the word has caused problems. In 2000, the Law Society of Saskatchewan convened a disciplinary hearing over letters Merchant sent to two survivors in the fall of 1998. "We believe the compensation that we can achieve for you will be significant and you have nothing to lose," said the unsolicited pitches. "For sexual assault, the amount of compensation could be \$50,000, \$75,000, or \$150,000 so a lot is at stake." One of the recipients told the law society panel that she became ill after receiving the letter, suffering nightmares, missing work and ultimately seeking psychological help for her fear that others would learn of the abuse she had suffered. The committee declared the letters "reasonably capable of misleading the intended recipient," severely reprimanding Merchant, and fining him \$5,000 as well as \$10,000 in costs. He appealed and lost.

Merchant was unapologetic, and blasted the country's law societies for being too timid to support his "cutting edge work." If the regulators had their way, he says, every letter to a client would read like a prospectus. "Lawyers are good at making rules." (In February 2006, the law society again found Merchant guilty of misleading communications, this time for letters he sent to residents of the town of Estevan following a 2004 train derailment. At the same hearing, he was also found guilty of withdrawing or authorizing the withdrawal of trust funds without consent. In June, he was given a two-week suspension from practice and fined more than \$60,000. He is appealing the decision.)

The way firms recruit former students is a long-standing problem, says Sharon Thira, executive director of British Columbia's Residential Schools Survivors Society. "We've had situations where lawyers went into communities, set up a table, and started collecting names. Many of the survivors didn't even realize that they were signing retainer agreements," she says. In 2000, her organization complained to the provincial law society about the activities of two Merchant Group lawyers who had held meetings on a number of reserves in southern B.C. "When they left, there were a number of people who went into crisis," says Thira. "Some survivors haven't talked about the residential school experience in 30 or 40 years. It can create a flood of emotions." The firm said its lawyers had been invited by band members, and the complaint was dismissed in May 2001 after the law society determined that no rules had been broken. (The British Columbia bar has yet to adopt any specific guidelines for dealing with residential school clients.)

Merchant's volume business with residential school clients has also raised the hackles of other lawyers. "He's done an amazing thing with this file, getting himself \$40 million, for frankly not \$40 million of work," says Laura Cabott, a Whitehorse practitioner. Cabott, who represents about 300 former students, says each case requires a tremendous amount of legwork and direct contact. And her role is frequently as much counsellor as counsel, as emotional clients seek support and reassurance. "Merchant says he has 9,000 clients, which makes it impossible to service those people the way you are supposed to," she says. "It's just not the right way to practise law."

There has also been considerable confusion about just how many residential school clients Merchant actually represents. A class action he filed in Alberta in September 2005 had a list of names that stretches 440 pages. But other lawyers have found many of their own clients included in Merchant's tally. Peter Grant, a Vancouver lawyer who represented independent counsel at the residential school bargaining table, says about 10 per cent of his clients were mistakenly listed as Merchant's, and that several other firms have had the same problem. In some cases, payouts have been delayed as the government tries to figure out just who is representing the survivor. "All of a sudden you can't settle because there's a court action somewhere else," he says. The elderly clients often have no recollection of ever signing up with Merchant's firm.

As Merchant himself notes, anyone with as long a career, and as many clients as he has, is bound to have rubbed some people the wrong way. He referred Maclean's to three clients who might provide a more balanced picture. Christine Semple, a survivor of the MacKay Residential School in Dauphin, Man., says she trusts Merchant more than any other lawyer. The process has been a

lengthy one, and she is still awaiting compensation, but Semple has never lost faith. Those who complain about his share of the settlement simply don't understand how much work he has done. "People are always trying to dig up dirt on the good people," she says. "He's a god in my eyes." Flora Northwest, who spent a decade at the Ermineskin School on the Hobbema reserve, has referred more than 100 fellow survivors from the Samson Cree Nation to the Merchant Law Group. She blames the slow pace of her case on the government. "Tony's worked on my case for 81/2 years. He deserves the money."

But Jane Glennon, a Saskatchewan resident who attended the Guy Hill Residential School in Manitoba, seemed surprised to be getting a call about the Merchant Law Group. "I haven't been getting any kind of meaningful feedback from them. It's a slow process." Glennon, who was named as a representative plaintiff in one of the firm's class actions, says she has no idea where her file stands. She's currently shopping around for another lawyer. "I really don't understand why he'd have you call me," she says.

In the four months after the federal election, the residential schools settlement went through 27 new drafts. What went on behind closed doors remains something of a mystery, but in early April, Jim Prentice, the Indian affairs minister, blasted an unnamed law firm for "dragging its feet" and holding up the final deal. Tony Merchant says it wasn't him, but several others who were at the table point the finger squarely at the Merchant Law Group.

One of the few significant changes between the agreement in principle and the final deal is the language about Merchant's compensation. Gone were the references to the \$40 million. Instead, the settlement says his fees "will be determined" and verified as per a new, separate side agreement called "Schedule V" (Merchant Law Group is the only firm being held to this standard of proof). That one-page agreement doesn't mention Merchant's client files, but it does specify that government-hired auditors were to review his dockets, computer records of work in progress, and "any other evidence" relevant to his claimed legal fees. And it sets his firm's fees at no less than \$25 million and no more than \$40 million.

In an interview earlier this summer, Frank Iacobucci was tight-lipped about the dispute, but clear on the government's position. "We will not be paying fees unless the fees are satisfactorily presented to us," he said. Before courts in the nine jurisdictions give their final stamps of approval to the deal, the former Supreme Court justice was supposed to sign an affidavit attesting that all the legal fees being charged are "fair and reasonable." But that's a far cry from what he recently submitted to the courts in Saskatchewan and Ontario. Iacobucci cited "uncertainty" about the Merchant Law Group's actual number of clients, a "lack of evidence or rationale" to support claims of \$80 million worth of work in progress, and "an apparent discrepancy between the amount of class action work MLG represented it had carried out and the amount of class action work it had actually done." Iacobucci attached a Department of Justice review of a Saskatchewan residential school class action lawsuit filed by Merchant Law Group that discovered 264 of the named plaintiffs had already settled, eight had gone to trial, and 84 names were duplicates. (That exhibit was ruled inadmissible as he had not identified the exact source of the unproven allegations.)

A government affidavit from Edward Nagle, a senior manager with Deloitte & Touche's forensic accounting group, detailed what auditors found before Merchant refused further access to his files this past January. The firm was only able to supply retainer agreements for 4,823 of its then 8,560 purported clients. Nagle states that his team was never allowed "unsupervised" access to the Merchant Group's records, and that its review of work product was restricted to a "cursory" look at four files, handpicked by the firm. All the same, the auditors note several problems with the documentation they did receive. Work-in-progress reports showed "multiple time and disbursement entries" made on Feb. 1, 2004, pertaining to work done over the prior six years, including one charge

for 1,200 hours of a single lawyer's time in a "Settlement Conference." (The Merchant Law Group says the charges were due to the conversion from an older billing system.) Nagle also questions why Merchant was charging residential school clients \$750 an hour for his work "in contrast to \$450 per hour charged by him on an apparently unrelated engagement."

Merchant has responded with a 248-paragraph, 61-page affidavit from his firm's executive director, Donald Outerbridge, refuting the allegations, appending several dozen photocopies of newspaper and magazine articles about his career as proof of his expertise, accomplishments and sterling reputation. Outerbridge goes into great detail about the financial burden the residential school work has put on the firm. Several partners, including Merchant, provided loans to keep the business afloat. The firm was overdrawn on its main line of credit 17 times in 2005, and 19 times in 2004, says the affidavit. Payroll day was always a scramble, and the phones were cut off for non-payment on at least one occasion. And he provides a very different version of what went on during the closed-door negotiations, painting a picture of government duplicity and strong-arm tactics. He suggests that the firm settled for \$40 million in the agreement in principle -- less than it claims it's entitled to -- in part because it worried Stephen Harper would win the election and put an end to the deal. Negotiations were fractious and Iacobucci became "anger [sic] and ill-tempered during discussions."

Although it was the Assembly of First Nations that reportedly pushed the issue of legal fees at the table, Phil Fontaine, a former student himself, is treading lightly when it comes to First Nations complaints, and the government's ongoing battle with Merchant. "We have been very, very careful not to interfere with the privileged relationship between lawyers and clients," he says. "We would never advise survivors to fire their lawyers, but we also let them know that they can if they wish." Fontaine allows that he has "heard stories" about "some lawyers," but says that's a problem for the law societies to deal with. The main concern for the AFN these days is what will happen to First Nations communities after the lawyers take their cut and the compensation starts flowing. "There's going to be a lot of money out there and it's going to attract good and bad people," says Fontaine. "We want to inform communities and try to protect the elders."

Others who were at the table say the focus on legal fees is misguided. Kirk Baert, a lawyer with Toronto's Koskie Minsky, part of the national consortium, says the final figure is far less than what the standard class action payout -- three or four times the lawyers' docketed time -- would be. Besides, it was a tough fight. "If it was so easy, why didn't all the other law firms in Canada do it?" asks Baert. "If the people who are on about the size of the legal fees can think of a better system to litigate these cases, I'd like to hear about it."

But as long as Merchant and the feds are squabbling over his \$40-million bill, legal fees -- not the historic deal -- will continue to make the headlines. The settlement agreement says the lawyers get paid first, then the victims, notes Merchant: "You can't do anything else." So residential school survivors across the country are now left guessing about when -- or if -- they will get their compensation cheques. "Merchant can definitely slow the deal down, but I think it's unlikely he'll be able to kill it," says one Ontario lawyer involved in the process. "But the really sad part is that five survivors die every day that people hold this up."

What's strange is that, as aggressive as Merchant has been about protecting his firm's residential school turf, there's a sense that on a personal level he may not even care that much about the actual dollars and cents. Compared to many successful lawyers, he lives modestly. A shiny grey Jaguar and a taste for Hermès ties are the only evidence of high living. The recipient of the biggest payday in Canadian legal history says he has no firm plans for the money. Except that he won't be retiring.

What really seems to matter to him is that he gets credit for the win. On a recent Monday morning, there were five rambling voicemails from Merchant waiting on my phone. Each message ran out the

tape. "Much has been written favourably about me as a person. Candid, intelligent, loyal, organized, goal-organized and productive, made for television". . . "mixed with the crusader is great determination made effective by financial capacity". . . "I'm a brown belt in karate." There were passing references to topless rights activists, The Rockford Files, and 18th-century liberalism. "I spoke in Arabia on a number of occasions. I was in the navy. I was co-editor of my student newspaper . . . I have a lifetime record of 102 wins and two losses as a debater." In one message, Merchant listed his five Supreme Court appearances in declining order of importance. "There's a theme here of what matters to me as an individual." Each voicemail picked up where the last had left off, often in mid-sentence. One seamless, if extremely odd, 10-minute statement of principles. The clock on the phone showed the messages had been left hours apart, over the course of three days.