

Potential claims related to serving Indigenous clients

We hope that this issue of *LAWPRO Magazine* has contributed to your understanding of the incredible breadth and complexity of “Aboriginal law.” We would not be fulfilling our risk management mandate, however, if we didn’t contribute our own perspective as claims prevention specialists.

To avoid claims, lawyers need to know how they develop. What are the key areas of risk when practising Aboriginal law?

1. Communication errors: as noted by all of the lawyers we’ve consulted, Indigenous people often have a perspective on the law that is radically different from that of non-Aboriginals. This creates a “culture gap” that becomes an additional challenge in the already-difficult process of building a relationship of mutual trust and understanding between lawyer and client.

Failing to build that trust and understanding opens lawyers up to a wide range of potential claims based on miscommunication, information gaps, lack of consent to legal steps taken, and failure to meet client expectations.

Prevention:

- Listen at least as much as you speak.
- Be aware of your own gaps in understanding.
- Avoid making unfounded assumptions.
- Maintain regular contact with the client and provide frequent updates.
- Confirm all instructions and advice in writing.
- Seek out high-quality cultural competence training.

2. Inadequate investigation errors: failure to investigate all of the relevant facts of a matter can be related to communication problems, and to the tendency to make unfounded assumptions.

Prevention:

- Follow the good communication strategies outlined above.
- Schedule multiple interviews with a client if you anticipate that building trust will take time.
- Be aware that clients may avoid talking about matters that cause them stress or remind them of past traumas; exercise patience and offer alternatives (for example, ask whether the client would be more comfortable relating the facts to a support person, or putting them down in writing).
- Carefully organize the information gathered so that nothing is overlooked.

3. Ineffective assistance: a poor lawyer-client relationship, especially in criminal law matters, can give rise to appeals based on ineffective assistance by counsel, which can in turn lead to claims.

Prevention:

- Take the time to build a relationship of mutual trust with a criminal law client: meet in person, in private, and with sufficient time to listen thoroughly and understand all the issues.
- In all appropriate circumstances, order and file a *Gladue* report. Do not assume that a person who lives in an urban setting is “not really Aboriginal” and that the *Gladue* analysis does not apply.
- Be aware that *Gladue* reports can be relevant outside the narrow context of *Criminal Code* sentencing.
- If your client is not fluent in the language you speak, consider whether there is alternative representation available to him or her, and if there is not, whether you can understand each other well enough to collaborate effectively.

4. Failure to know or apply the law:

there are a wide range of statutes that contain provisions specific to Aboriginal people, as well as a well-developed body of common law. Failure to identify the law that applies to a client’s situation can lead to a poor result and a claim based on failure to know or apply the law.

Prevention:

- Familiarize yourself with the law that applies to the clients you represent, and keep your knowledge up to date. There are many written resources, including statute annotations, available to assist you.
- Be aware that many courts (and the CBA) have recognized that there are multiple valid legal traditions in Canada, including Aboriginal legal traditions, and that Aboriginal people have the right to have their own legal traditions taken into account. Investigate Aboriginal approaches to the issues that face your clients, and consider ways to give effect to those approaches in your representation.