Independent Assessment Process Oversight Committee

Meeting of February 26, 2013
Vancouver, BC

Minutes

Members present

Mayo Moran	Chair
Mitch Holash	Church representative
David Iverson	Church representative
Kerry O'Shea	Claimant counsel representative
David Paterson	Claimant counsel representative
Caroline Clark	Government of Canada representative
Line Paré	Government of Canada representative
Les Carpenter	Inuit representative
Paul Favel	Assembly of First Nations representative

Also present

Daniel Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Dan Shapiro	Deputy Chief Adjudicator; Chair, Technical Subcommittee *present for items 1 and 2 only*
Shelley Trevethan	Executive Director, IRSAS
John Trueman	Senior Policy Advisor, IRSAS (recorder)

1. Introduction: Line Paré

Caroline Clark introduced Line Paré, who started as Director General of Settlement Agreement Operations for Aboriginal Affairs and Northern Development Canada on February 4, 2013. She has a wealth of experience in education and policy fields. She is a member of the Gesgapegiag First Nation in the Baie Comeau area of Quebec.

2. Report of the Technical Subcommittee

Dan Shapiro reported on the meeting of the Technical Subcommittee held February 25, 2013.

<u>Resolution of incomplete files</u>

The policy paper on incomplete file resolution is nearing completion. The parties have requested some additional time for consultations and comment, and have agreed to provide comments by March 11.

It was agreed that if there was agreement among the members of the Technical Subcommittee, that the paper would be distributed by email for approval by the Oversight Committee prior to the April 24 meeting.

Application of the hearing cancellation policy to negotiated settlement discussions

Kerry O'Shea had raised a concern forwarded to her by another claimants' counsel, who had been invited to enter into a negotiated settlement of a claim that had been expedited due to the claimant's health. The counsel had apparently been advised by someone in the Adjudication Secretariat that, if a settlement was not reached, the postponement policy would apply and the lawyer could be held liable for the costs of the postponed hearing. Kerry O'Shea said that this put the claimant's counsel in a conflicted situation, where the lawyer was trying to do the best thing possible for the client, but might have costs deducted from legal fees as a result.

John Trueman said that the Adjudication Secretariat's practice is not to apply the postponement policy to negotiated settlement-related cancellations, but that he would look into why a different message was communicated in this case.

Dan Shapiro expressed concern about last-minute cancellations arising from negotiated settlements, and possible lack of communication between the parties and the Secretariat when a claim settles. He said that there is a process where Canada will notify the adjudicator when a case moves into negotiated settlements, but that the claimant's counsel should also notify the Adjudication Secretariat and the adjudicator in such circumstances.

Dan Shapiro also said that he did not think adjudicators were being punitive in applying the postponement policy. He said that 99% of cases that enter negotiations are resolved there, so it is not responsible for claimants' counsel to hold open a hearing date while negotiating a settlement, when it is almost certain to result in a cancellation.

In response to a question, Dan Shapiro said that the Secretariat calculates the costs "thrown away" when a hearing is postponed on less than ten weeks' notice, and provides them to the adjudicator. The adjudicator has the discretion to assess any or none of the costs to the counsel.

Schedule P releases

Caroline Clark advised that Canada will be revising its approach to the Schedule P releases that are signed by claimants who did not live at a residential school, and therefore are not class members. Canada will now be requesting Schedule P releases from all claimants where there are indications they did not live at the

school, regardless of whether the Common Experience Payment was paid to the claimant.

Accelerated hearing process

Dan Shapiro reported that the Technical Subcommittee reviewed a paper on the "Accelerated Hearing Process," which grew out of the review of the Over 65 Pilot Project conducted in 2012. The basic premise of the AHP is to take existing blocks of hearing-ready claims in the same location with the same claimants' counsel, and try to fill out an entire week by adding other claims that are not yet ready. The adjudicator would undertake file management efforts to help ensure that all the scheduled hearings become ready before the hearing, but hearings will proceed even if some mandatory documents remain incomplete. This will allow the claimant's evidence to be taken sooner and reduce the risk of claimants passing away before their hearing. Submissions would take place once all the documents are complete. In the rare case where it becomes necessary to re-interview the claimant, the parties would be encouraged to hold a videoconference.

Dan Shapiro said that the AHP would help address the current situation, where the low number of hearing-ready files is resulting in fewer hearings than the Adjudication Secretariat is able to schedule. The focus would be on elderly claimants and those in the process a long time, though not exclusively so.

The Technical Subcommittee has agreed to the process going ahead, subject to the Secretariat's readiness to implement it.

Future care

David Paterson had brought forward a case in which the claimant had brought forward a future care proposal for counselling, which Canada supported at the hearing, but which the adjudicator declined to award based on her understanding that the counselling was already funded by Health Canada. The concern is that the adjudicator relied on facts not in evidence, and did not adopt the recommended best practice of putting concerns to the parties and inviting submissions.

The Technical Subcommittee suggested that the Chief Adjudicator should communicate to adjudicators that they should not consider matters regarding Future Care for which there is no evidence. There was concern that Health Canada's policy was open to interpretation and change. Dan Shapiro indicated that he would raise it with the Chief Adjudicator for discussion at a meeting the following day.

3. Approval of minutes

The committee approved the minutes of the January 15, 2013 meeting with minor corrections.

4. Key performance indicators

Shelley Trevethan provided an overview of the statistical reports distributed before the meeting.

- Just over 37,600 applications have been received to date. Over 19,000 claims have been resolved, leaving about 48% of claims remaining.
- If the historic rate of about 14% of claims withdrawn or ineligible, about 16,000 claims remain to be processed. At a rate of 4,000 hearings per year, this would take first claimant hearings to March 2017, with post-hearing work to follow.
- Claimant document production remains low. The Adjudication Secretariat's goal is to schedule 400 hearings per month, in order to hold 4500 hearings per year after cancellations or postponements. In recent months, there has been a 27% decrease in requests for hearings submitted by claimants' counsel, which means that, at most, 4,200 hearings could be held in 2013-14. If the rate of hearing-ready files remains low, there is a risk that hearings will not even reach 4,000 over the year.

Committee members discussed several facets of the issue:

- The Adjudication Secretariat still has a 25% vacancy rate, with the biggest staff shortages in the Operations area in Regina. The government's insistence that the Secretariat hire only term employees, and delays in staffing approvals because of layoffs in other areas, have made it more difficult and time-consuming to fill positions.
- Dave Iverson pointed out that someone who applied on September 19, 2012, could wait four years for a hearing, and that was based on 4,500 hearings per year. The Chief Adjudicator pointed out that the 4,500 target was agreed upon in close cooperation with the former Court Counsel, and represents the very minimum that needs to be accomplished.
- David Paterson said the more significant problem is the likelihood of hearing-ready cases exceeding 1,000 per month in the not too distant future. The Settlement Agreement says that claimants will be offered a hearing date within nine months of being admitted, and the approval orders were made on that basis. We would be proposing to operate in breach of the terms of a court order. He suggested that the Adjudication

Secretariat be provided its own direct authority to hire employees, with Canada to pay the bill.

- Shelley Trevethan pointed out that taking the Adjudication Secretariat outside the Public Service Employment Act would likely cause it to lose the 135 people already employed there on an indeterminate basis, and also many of the term employees. She pointed out that the government has provided a number of exemptions from hiring restrictions and she is meeting with the Deputy Minister of Aboriginal Affairs and Northern Development the following week to review the issues and confirm his approval.
- The Chief Adjudicator said that there may be aspects of the operation that Crawford could provide greater assistance to. He also pointed out that it takes about a year to hire more adjudicators, from the start of the request for proposals to having new adjudicators conducting their own hearings.

Shelley Trevethan outlined several steps underway in the Adjudication Secretariat to increase the number of hearings:

- She is working with Crawford to have some experienced information line staff call claimants' counsel to review the status of claims. The Interactive File Management System is available for counsel to track case status.
- The Secretariat is looking at getting authority to identify the cases with specific missing documents, such as Canada Pension Plan records, and go directly to the responsible government agency with a list of names.
- Two staff from the Secretariat's Client Services group will be dedicated to provide assistance to the Case Management group for a six month period.
- A working group is being established between the Adjudication Secretariat and Canada's Settlement Agreement Operations division, to improve administrative efficiencies between the Secretariat and the government.
- Expedited hearings, for claimants who are at risk of dying or losing the capacity to provide testimony, continue to be held quickly when required.
- The Accelerated Hearing Process holds a lot of promise, but will require staff to implement. It focuses primarily on the first hearing, but claimants will still need to wait while mandatory documents are collected and submitted.
- Once the admissions process is concluded in the summer, Admissions Unit staff will be dedicated to intensive case management work to resolve some of the issues holding up the oldest files.

Members discussed the level of work with claimants' counsel that would be appropriate. It was suggested that while many counsel do not need support from the Secretariat, there may be some who are overextended and require assistance to case manage their practices.

David Paterson said that working with claimants' counsel may help rustle up some cases during the present slow period, but that in eight or ten months there should be "tons" of hearing-ready cases.

Kerry O'Shea suggested that the Secretariat might be able to hold more hearings if less time and effort were put into scrutinizing travel expenses.

5. Executive Director's report

Shelley Trevethan reported on some key activities in the Adjudication Secretariat:

- In addition to the human resources already discussed, work is underway on procurement issues related to adjudicators, Oversight Committee members, and legal counsel for the Chief Adjudicator.
- The Secretariat is working on creating an outreach and community liaison strategy, for the post-application deadline environment. The focus is on maintaining relationships, helping claimants understand how the process works and how to work with their lawyers, and to contribute in a more meaningful way to healing and reconciliation. Group IAP, which provides a modest amount of funding for claimants to undertake activities and receive mutual support in the IAP, is also an element of this.

6. Chief Adjudicator's report

The Chief Adjudicator reported that he had recently written the first major review decision on an actual income loss case, and he used it as an opportunity to flesh out a number of aspects that will affect cases coming through t he system.

A case has been brought to the supervising courts seeking direction in cases where the Chief Adjudicator has granted access to the courts as provided in Schedule D. The case seeks to have part of the case dealt with in court and part by an IAP adjudicator.

The rate of appeals of legal fee review decisions is down significantly. It appears that a number of decisions and court rulings have helped define the appropriate range for legal fees and the factors to be taken into account in determining fees.

Regional adjudicator meetings are planned for April 2013 in Vancouver and Montreal. This year's meetings will be two days long, and include a component on adjudicator wellness and prevention of vicarious trauma.

The Chief Adjudicator's request for directions regarding certain form fillers in Manitoba has still not been set for hearing.

The Chief Adjudicator reported on the Stephen Bronstein/Ivon Johnny case that was scheduled for a hearing in the Supreme Court of British Columbia the previous week. The case involved a lawyer, Stephen Bronstein, who was working with a form-filler, Ivon Johnny, who was on parole for second-degree murder. Mr. Johnny was involved in 284 cases and faced several accusations that he had extorted significant sums of money from IAP claimants. The Chief Adjudicator had conducted an investigation and submitted the findings to the Court Monitor, who applied to the Court for authority to conduct a full investigation.

At a hearing on January 18, 2013, the court prohibited Ivon Johnny from any further involvement in the IAP process. The Parole Board of Canada, which had suspended his parole in the fall, revoked it later in January.

The part of the case involving Mr. Bronstein was scheduled for three days of hearings on February 20-22. At the beginning of the hearings, the judge asked the parties if they could try to negotiate a resolution to save the time and cost of a full investigation. This led to a Consent Order proposed to the Court on Friday, February 22, by the Court Monitor, Canada, and counsel for Stephen Bronstein.

The Consent Order contains a list of documents that Bronstein will provide to the Monitor, and allows the Monitor to interview Mr. Bronstein and the claimants who provided affidavits, but not any other claimants. It also requires Mr. Bronstein to recertify all the application forms where Mr. Johnny had been involved as a form-filler, and to hire a Practice Advisor to assist in the management of his practice.

The Chief Adjudicator explained that he did not sign on to the Consent Order, for several reasons: it did not order a full investigation; the Monitor will not have full and unfettered access to documents and witnesses; examinations will not be under oath; only about a dozen claimants will be interviewed; the recertification will be done by Bronstein himself; and the level of ongoing supervision of Bronstein's practice is limited.

The Chief Adjudicator expressed his disappointment that Canada did not support his call for a full investigation into the 284 cases in which both Mr. Johnny and Mr. Bronstein were involved. He indicated that he will cooperate fully with the "review" that the Monitor will conduct, and will continue to provide any information or materials to their investigators.

The Chief Adjudicator indicated that he had requested a transcript of his counsel's submissions to the Court, and he would add the pertinent parts of it to the Oversight Committee's record. Subsequent to the meeting, it was provided and reads as follows:

> MR. HOFLEY [counsel to the Chief Adjudicator]: So on behalf of the Chief Adjudicator, My Lady, the Chief Adjudicator is not able to agree in full to the resolution that counsel for Mr. Bronstein, Canada and the monitor have crafted to resolve this very serious matter concerning the alleged conduct on Mr. Bronstein and Mr. Ivon Johnny.
>
> The parties to the consent order have agreed to a process which is essentially, in the Chief Adjudicator's view, an interview gathering of information from Mr. Bronstein and any other third party, excluding claimants except for a very limited few.
>
> The Chief Adjudicator does not believe that a meaningful investigation [indiscernible] can be achieved without the participation of the claimants and the hearing of claimants' concerns [indiscernible] the very person who have the information, and that is the basis for the concerns that brought us here. This is why the Chief Adjudicator's office brought the matter forward. And so we wish to make -- the Chief Adjudicator wishes to make it very clear on the record he does not agree to this resolution that has been agreed to in this mediation process.
>
> The Chief Adjudicator is aware that people [indiscernible] continue to feel intimidated -- intimidation and fear and in light of the relationship that existed between Mr. Johnny and Mr. Bronstein over a number of years that a recertification of the claims by Bronstein & Company as contemplated in the consent order gives rise to a concern for that reason. Accordingly the Chief Adjudicator believes that it's important that you make very clear to the claimants in the recertification process that they have a right to have another lawyer recertify their claim.
>
> So in conclusion, My Lady, the Chief Adjudicator believes it's very important to the healing process of the claimants and to the integrity of the settlement that survivors be heard and that their concerns be reached and dealt with. The Chief Adjudicator will continue, of course, in his efforts to ensure that survivors are heard and that their concerns are addressed in the most meaningful way possible.

Members discussed various aspects of the situation:

- Concern was expressed over how a consent order could be made without the consent of one of the participating parties, and without reasons from the Court.

- Concern was expressed about Canada's opposition to a full investigation.
- Concern was expressed over the impact of this situation on the upcoming request for direction regarding form fillers in Manitoba.
- It was suggested that adjudicators should ask claimants about any improper activities, as they did in the Blott matter.
- It was suggested that the matter be turned over to the RCMP for investigation.
- A question was raised about the scope of the publication ban in the Bronstein case. The Chief Adjudicator said that he was seeking legal advice.
- Members expressed their appreciation for the priority given by the Chief Adjudicator to the integrity of the process.
- Concern was expressed about the role of the law and the courts in re-victimizing or condoning the re-victimization of claimants.
- It was suggested that the recertification of application forms required by paragraph 9 of the consent order be suspended until the Monitor's review is completed.
- It was pointed out that the requirement for IAP applications to be certified came out of a Group ADR situation where application forms differed significantly from the evidence. The claimants' counsel in that case was Stephen Bronstein. Chief Adjudicator Hughes ordered an investigation, which recommended that the claimant's lawyer certify that the application accurately reflected the claimant's statement.
- It was pointed out that there was nothing to prevent other claimants from coming forward to the Monitor during the review, but that the Monitor cannot seek out claimants to interview. There is nothing restricting what Mr. Bronstein can say to his clients.
- Concern was expressed for the safety of the individuals who provided evidence to the Chief Adjudicator's investigation.

Members discussed the wording of possible motions in support of the Chief Adjudicator's position. Subsequent to the meeting, agreement was reached by email on the following motion:

- *Decision [passed on 7/9 majority]:* The Oversight Committee supports the Chief Adjudicator's dissent from the issued "Consent" Order as reflected in the Submissions presented to the Court by counsel on behalf of the Chief Adjudicator.

Subsequent to the meeting, Line Paré provided the Oversight Committee with a letter outlining Canada's position on the motion. The letter is appended to these minutes.

David Paterson raised the issue related to Future care that was discussed earlier in the meeting. He said that adjudicators had gotten information from a Deputy Chief Adjudicator or off a web site advising that Canada pays for all counselling before and after the process, and that this was not true. He said it was problematic for adjudicators to take evidence *ex parte* outside the adjudication process and make findings not found in evidence.

He also indicated his objection to a Health Canada official speaking at the upcoming adjudicator meetings in April. He said that it was improper for the government to provide evidence outside hearings, and that if Health Canada were to make such representations he would like the opportunity to be present, to question them, and to make his own submissions.

The Chief Adjudicator said that he would discuss the issue with his deputies at a meeting scheduled the following day.

7. Evaluation of the IAP

Shelley Trevethan raised the idea of doing a formal evaluation of the IAP for the Oversight Committee. Such an evaluation could outline the process followed, how the governance structure was put in place, whether objectives were met, how the parties worked together, and identify best practices and areas that could have been done differently. She said that if there was agreement, she would hire an outside evaluator to work with the Oversight Committee.

Members voiced their support for the project. Mayo Moran suggested that an interim report could be prepared, to identify opportunities for learning and improvement going forward.

8. Resignation of the Chief Adjudicator

Dan Ish provided the Oversight Committee with his resignation as Chief Adjudicator, effective no later than June 30, 2013. He said that the last five and a half years have taken a toll on him, with complex challenges and continuous travel. With the IAP unlikely to conclude until 2016 or 2017, it is time to move on and find someone with new energy. He expressed confidence that a good structure is in place, including six deputies and the Adjudication Secretariat.

Members of the committee expressed their appreciation to Dan Ish for his hard work over many years. Mayo Moran said that she has had some initial

discussions with Shelley Trevethan about starting a request for proposals process to select a new Chief Adjudicator.

9. Next meeting

The next Oversight Committee meeting is scheduled for Wednesday, April 24, 2013, in Montreal.

Independent Assessment Process Oversight Committee

Meeting of February 26, 2013
Vancouver, BC

Appendix to the minutes

Letter from Line Paré, April 5, 2013

Dean Mayo Moran
University of Toronto Faculty of Law
84 Queen's Park
Toronto, ON
M5S 2C5

April 5, 2013

Dear Dean Moran:

RE: Draft Motions with respect to Williams Lake Consent Order

Further to our discussion at the February 26, 2013 Oversight Committee meeting and the subsequent email exchanges, we are writing to provide Canada's position and comments with respect to the draft motions circulated by Mitch Holash.

It is unfortunate that we did not have the benefit of a full debrief from Canada's litigation counsel before the February 26th meeting in which the Chief Adjudicator provided his report. We have now had that debrief and would like to provide the following response by way of clarification.

The motion before the Court was brought by the Court Monitor and Canada supported it. . Indeed, two employees of Aboriginal Affairs and Northern Development Canada provided supporting affidavits and Canada's position, which was clearly set out in its written submissions, was that there was sufficient evidence of actual and potential interference with the administration of the IRSSA to warrant the Court's exercising its supervisory jurisdiction and ordering an investigation into Mr. Bronstein and his firm.

However, at the outset of the hearing, the Court indicated that it had concerns about the materials before it as well as the potential cost of an investigation. As a result, the Court invited the parties to attempt a consensual resolution. All of the parties agreed to this approach. They recognized that a compromise had to be reached; otherwise, there was a risk that the Court would dismiss the application.

All parties who were in attendance were included in each caucus session and they were all represented by counsel. However, while representatives for Independent Counsel, Merchant Law Group and the National Consortium were present at the outset of the court proceeding, they elected not to participate in the negotiation

sessions leading to the Order and did not make submissions at any point. Further, all of the parties to the IRSSA had notice of the Court Monitor's application.

During the February 26 meeting, there were discussions about what took place during the hearing and the Court Order itself. One of the issues raised was the question of the cost of an investigation. This issue was raised by the Court and, as the administrator of the IRSSA, it is appropriate for Canada to be concerned with it. However, Canada's decision to support the Order was not based on cost considerations.

With respect to the Court Order itself, it preserves the Court Monitor's ability to come back and seek further orders from the Court should the circumstances warrant. The Court Monitor will be at liberty to consult the Court once it obtains information from the review. Canada believes that this represents a reasonable compromise in the circumstances.

In light of the foregoing, we confirm that Canada will not support motion number 1. We agree with the other Committee members that motions number 2 and 3 are unnecessary.

In conclusion, as a party to and the administrator of the IRSSA, Canada has a key interest in ensuring the integrity of the process and public confidence in it. Canada remains committed to working cooperatively with the parties and stakeholders to ensure that the IAP is implemented in a fair, efficient and timely manner.

Sincerely,

Line Paré

cc: Oversight Committee