

BETWEEN:

LARRY PHILIP FONTAINE AND OTHERS

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA ET AL.

Defendants



Proceeding under the *Class Proceedings Act*, 1992 S.O. 1992, C. 6 in respect of the Indian Residential Schools Settlement Agreement, May 8, 2006

CONSENT ORDER

BEFORE)
) THE HONOURABLE JUSTICE PERELL ► DATE June 19, 2014
)
)

ON THE APPLICATION OF the Chief Adjudicator of the Independent Assessment Process, Schedule D of the Indian Residential Schools Settlement Agreement [“the IRSSA”], and following review of the Affidavit of J. Trueman, including without limitation, the Completion Strategy Report, attached thereto as Exhibit A, and on consent and unanimous approval of both the National Administration Committee, as established pursuant to s. 4.11 of the IRSSA and the Independent Assessment Process [“the IAP”] Oversight Committee as established pursuant to Schedule D of the IRSSA.

THIS COURT ORDERS, by consent, that the Incomplete File Resolution Procedure [“IFRP”] attached hereto as Appendix “A” is hereby approved and, subject to direction from the Oversight Committee regarding the implementation of Step 2 of the IFRP, proclaimed in full force and effect.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Catherine Coughlan
Counsel for Canada’s Representatives

Rod Donlevy, Q.C.
Counsel for the Catholic Entities

Alex Pettingill
Counsel for the Protestant Entities

Kathleen Mahoney, Q.C.
Counsel for the Assembly of First Nations

Hugo Prud'homme
Counsel for the Inuit Representatives

Jon Faulds
Counsel for the National Consortium of Counsel

Peter Grant
Counsel for the Independent Counsel

Jane Ann Summers
Counsel for the Merchant Law Group

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 15 2014

PER / PAR: *JK*

By the Court:

Perell, J.

The Honourable Justice P. Perell

Approved by IAP Oversight Committee April 24, 2013;
amended May 28, 2013 and December 10, 2013

Incomplete file resolution procedure

Background

This approach to incomplete file resolution is designed to address recurring problems in the administration of the Independent Assessment Process (IAP) and to facilitate the orderly wind-up of the IAP:

- Some claims for a variety of reasons are failing to proceed to hearing.
- Some claims have no reasonable possibility of concluding. Such claims include, but are not limited to, situations where the claimant has died or become incapacitated (and the estate / representative is not pursuing the claim), or where contact with the claimant has been lost.
- At present there is no way to end such claims.¹

Objectives

- Resolve claims in the normal stream wherever possible.
- Identify and resolve issues quickly, informally, and cooperatively.
- A process that is as simple and informal as possible, while ensuring that the rights of the parties are protected.
- Reserve adjudicator time (part of Step 1) and formal procedures (Step 2) only for those cases that require them.
- The overarching objective at both steps is to facilitate claims proceeding to hearing, where at all possible. If at any stage within the 2-Step process the claim becomes "hearing-ready," the process will allow the claim to be referred to the normal stream for Scheduling.

¹ Presently, an IAP claim can be concluded only by an adjudicator's decision (following a hearing or jurisdictional teleconference), a negotiated settlement, a voluntary withdrawal, or non-admission by the Secretariat.

Step One: Case Analysis and Resolution (CAR) - Intensive Administrative / Adjudicative file management

Case Analysis and Resolution Group

1. The Secretariat will establish a dedicated team of experienced, senior operational staff to identify and assess issues in respect of such claims and assist in resolving them. A variety of administrative approaches will be employed depending on the issues involved, including but not limited to, the following:
 - 1.1. Identify the root cause of problems/delay/inaction.
 - 1.2. Facilitate communication.
 - 1.3. Convene teleconferences with any or all parties.
 - 1.4. Utilize IFMS and other electronic tools where appropriate.
 - 1.5. Provide specialized assistance where feasible.
 - 1.6. Document circumstances and efforts made.
 - 1.7. Resolve problems informally, and return claims to the normal stream where possible.
 - 1.8. CAR will incorporate some of the Admissions Unit's existing work, including estate claims and Schedule P matters.
 - 1.9. The CAR process will support implementation of new approaches to issues such as incapacitated claimants and lost contact cases throughout the Secretariat.
 - 1.10. Overall, CAR will also provide the Chief Adjudicator and the Oversight Committee with a clearer understanding of the nature of claims that are not moving ahead, and why.

Step One - Process

2. The Secretariat may initiate Step One through identification of claims by CAR or referral of claims by other parts of the Secretariat.
3. CAR will manage the file administratively and may refer a claim to a File Management Adjudicator when it determines that it has exhausted the possibilities of administrative resolution .
4. Also, any party may ask that a claim in the CAR process be referred to a File Management Adjudicator, upon notice to the Secretariat and the other parties.
5. Possible outcomes of Step 1:
 - 5.1. Issue resolved; case proceeds normally.

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- 5.2. Referral to a Jurisdictional Pre-Hearing Teleconference (CAD-9).
 - 5.3. An administrative withdrawal under Guidance Paper 8 (GP-8).
 - 5.4. Referral for Adjudicative File Management, whereby an adjudicator works with the parties on a consensual basis to ready the claim for hearing.
 - 5.5. At Step 1, the File Management Adjudicator does not have the power to
 - 5.5.1. dismiss the claim or take any other steps set out in Step 2, except on consent;
 - 5.5.2. set the claim down for hearing with incomplete documents, unless the claim is deemed suitable for the Accelerated Hearing Process.
 - 5.6. The File Management Adjudicator may refer the file to Step 2, Special Resolution Process. The File Management Adjudicator may also be the Step 2 adjudicator, unless a participating party requests in writing that a new adjudicator be appointed as the Step 2 Adjudicator.
6. Proceeding directly to Step 2: The file may at any time proceed directly to Step 2:
- 6.1. Upon consent of the parties;
 - 6.2. At the direction of the File Management Adjudicator where such Adjudicator determines that further file management steps would be futile;
 - 6.3. Upon the referral of CAR in cases where the Secretariat determines that contact with a claimant (whether represented by counsel or self-represented) has been lost, and all reasonable efforts to attempt to locate the claimant have been exhausted.

Referral to File Management Adjudicator

7. In cases where the file does not proceed directly to Step 2 as provided in paragraph 6, and where efforts by CAR have not resolved the issues relating to the file, CAR will send a referral notice to a File Management Adjudicator and provide it to self-represented claimants, claimant counsel and other participating parties. The notice will include:
 - 7.1. the identity and contact information of the parties;
 - 7.2. the evidentiary package;
 - 7.3. a summary of the general nature of the IAP claim;

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- 7.4. a summary of the issues that prevent the claim from proceeding in the normal way;
- 7.5. a summary of the intensive file management steps taken by CAR to mitigate or resolve the issues identified; and
- 7.6. notice to the parties that the File Management Adjudicator will work with the parties on a consensual basis in a concentrated effort to ready the file for hearing and:
 - 7.6.1. will not make any orders dismissing a claim (except in cases where a self-represented claimant or claimant counsel advises in writing or by such other means as the adjudicator deems reliable, that the claimant wishes to withdraw the claim); and
 - 7.6.2. will not make any orders directing that a claim be set for hearing at the levels of harms or opportunity loss supported by the documents provided (except in cases where the claimant advises in writing or by such other means as the adjudicator deems reliable that this is the claimant's wish).
- 7.7. The notice will also indicate that in the event that the claim does not become "hearing-ready" or otherwise resolved within a reasonable time despite the interventions of the File Management Adjudicator, the File Management Adjudicator will, upon further written notice to the self-represented claimant, claimant counsel and the parties, initiate a process that could ultimately result in such steps being taken (Step 2).
8. The File Management Adjudicator may contact the parties and CAR and establish a dialogue and process to seek to move the claim towards hearing-readiness. The adjudicator may take steps as are envisaged by existing practices and protocols within the IAP to move the claim forward and may, without limiting the generality of the foregoing:
 - 8.1. Convene one or more teleconferences with the parties and CAR;
 - 8.2. Identify steps necessary to ready the claim for hearing;
 - 8.3. Obtain clarification on any aspects of the claim deemed to require clarification;
 - 8.4. Obtain confirmation as to the levels of harms and opportunity loss being pursued by the claimant;
 - 8.5. Establish time-tables and, where necessary, suggest methods, for obtaining missing documents and/or taking necessary steps to ready the claim for hearing;

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- 8.6. Obtain undertakings (or commitments in the case of non-lawyers) from parties to produce documents and/or take other steps as are required by the IAP;
- 8.7. Obtain undertakings (or commitments in the case of non-lawyers) from parties to provide information or reports on progress, using information systems provided by the Secretariat or otherwise;
- 8.8. Where requested by all parties, facilitate settlement discussions (as per Schedule D, page 8, paragraph b. vii);
- 8.9. Determine whether there are issues that can be addressed by Chief Adjudicator's Directive 9 (CAD-9, Jurisdiction Pre-hearing Teleconferences - JPHTs) and make arrangements and decisions accordingly;
- 8.10. Where advised that the claimant wishes to withdraw the claim, issue a decision confirming the withdrawal of a claim pursuant to Chief Adjudicator's Guidance Paper 8 (GP-8);
- 8.11. Where the parties agree, make determinations that documents are either not available or not relevant;²
- 8.12. Determine, in consultation with Secretariat staff, whether the claim is suitable for referral to the "Accelerated Hearing" (setting claims down for hearing with incomplete research / document production, as if they were "expedited hearings") process, as amended from time to time;
- 8.13. Determine that the claim is "hearing-ready," either on the basis of the harms and opportunity loss levels claimed in the application, or at such lower levels as the claimant may otherwise claim. Once such determination is made, the adjudicator shall refer the claim to the Secretariat to be scheduled in the usual way.

Conclusion of Step One and Referral to Step Two

9. It is expected that the file management process will result in a significant number of claims becoming "hearing-ready". However, the File Management Adjudicator may also determine that all reasonable steps to resolve certain outstanding issues on a consensual basis have been exhausted and that there are no reasonable prospects of the file becoming hearing-ready within a reasonable period of time. In these circumstances, the File

² Schedule D, Appendix IV states that exchange of documents should be "as complete as reasonably necessary" (p. 23); Appendix VII states that the claimant must produce "or explain the absence of" mandatory documents (p. 28), and that treatment records need only be "relevant to the harms claimed" (p. 28).

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Management Adjudicator shall prepare a written notice to self-represented claimants, claimant counsel, other participating parties and CAR that will:

- 9.1. summarize the file management steps taken by the adjudicator and the parties to mitigate or resolve the issues identified as preventing the claim from becoming hearing-ready;
- 9.2. advise that all steps that have been identified to seek to resolve the issues on a consensual basis through adjudicative file management have been exhausted;
- 9.3. initiate Step 2 of this policy;
- 9.4. provide a summary of Step 2.

Step Two: Special Resolution Process

Implementation

10. The implementation of Step Two will be deferred until: (a) Court approval thereof; and (b) the Oversight Committee provides direction regarding its implementation.

Overview

11. Purpose of Step Two:

- 11.1. Where the intensive file management (Step 1) has not resolved the issue(s), and the File Management Adjudicator determines that all reasonable steps to resolve the outstanding issues on a consensual basis have been exhausted and there are no reasonable prospects of the file becoming hearing-ready within a reasonable period of time, the case may be referred to a Special Resolution Adjudicator³ for resolution of outstanding issues.
- 11.2. A more formal process designed to protect the parties' rights while resolving issues.
- 11.3. A roster of Special Resolution Adjudicators selected by the Chief Adjudicator.

12. Possible outcomes of Step Two:

- 12.1. Issue resolved – case proceeds normally.
- 12.2. Case set for hearing, with or without conditions;
- 12.3. Claim dismissed without a hearing.

³ The File Management Adjudicator may also be the Special Resolution Adjudicator, provided no participating party objects.

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Details

A. Referral to Adjudicator for “Special Resolution” Process

13. Dispensing with paragraphs 14 to 20 inclusive: The Special Resolution Adjudicator may dispense with paragraphs 14 to 20 inclusive and proceed directly to paragraph 22:
 - 13.1. in cases where he/she determines that the Secretariat has lost contact with a self-represented claimant and exhausted all reasonable efforts to attempt to locate the claimant; or
 - 13.2. in cases where counsel advises the Secretariat that having exhausted all reasonable efforts to locate the claimant, contact with the claimant has been lost (unless counsel advises in writing that he/she wishes to make submissions); or
 - 13.3. in cases where the claimant is deceased/mentally incompetent, no estate representative has come forward.
14. Referral notice to be served on parties: In all cases where paragraph 13 does not apply, CAR will send the referral notice to a Special Resolution Adjudicator, a self-represented claimant, claimant counsel and other participating parties. The referral notice will:
 - 14.1. include all material provided to the File Management Adjudicator and the report of the File Management Adjudicator.
 - 14.2. warn that the Special Resolution Process may result in the dismissal of a claim without a hearing, the setting of a claim down for hearing with such conditions as the Special Resolution Adjudicator may impose, or such other Directions as may be determined by the Special Resolution Adjudicator.
15. Expectations of Claimant Counsel: Claimant counsel must forthwith upon receipt of the referral notice also deliver the referral notice to the claimant and satisfy the Special Resolution Adjudicator that the claimant has received and understood the referral request. If the claimant cannot be located, claimant counsel must provide the Special Resolution Adjudicator with a statement attesting to the circumstances and efforts to locate the claimant.
16. Authority of Special Resolution Adjudicator: In addition to the authorities set out elsewhere in Step 2, the Special Resolution Adjudicator may take any step that could be taken by a File Management Adjudicator (Step 1).

B. Submissions

(i) Written Submissions

17. Parties may make submissions: Unless the parties waive the right to make written submissions, any party may, within 60 days of receipt of the Step 2 referral, or such further time as the Special Resolution Adjudicator may allow, make written submissions to the Special Resolution Adjudicator.
18. Other written submissions: The Special Resolution Adjudicator may:
 - 18.1. invite or permit the parties to make written reply submissions (whether or not that party made initial submissions) within a time period specified by the Special Resolution Adjudicator;
 - 18.2. require a party or CAR to provide additional information within a time period specified by the Special Resolution Adjudicator.
19. Service of written submissions: All written submissions and additional information must be provided to the other participating parties, CAR and the Special Resolution Adjudicator.

(ii) Oral Submissions:

20. Unless all parties have invited the Special Resolution Adjudicator to resolve the issues raised in the referral notice on the basis of written materials provided, the Special Resolution Adjudicator shall arrange to provide written notice to all parties and CAR setting a date and time for oral submissions to address the issues raised in the referral notice, written submissions and materials, by way of teleconference, or otherwise. Oral submissions shall be recorded.
21. The failure of a party, in the absence of reasonable cause, to attend / participate in submissions of which they have been provided with written notice, shall not be a bar to submissions proceeding.

C. Directions

22. Resolution Direction: Upon conclusion of submissions, the Special Resolution Adjudicator will rule on the referral request by way of written reasons provided to the participating parties and CAR, and may make one or more of the following Resolution Directions:
 - 22.1. Any of the steps that could be taken by a File Management Adjudicator (Step 1, paragraph 8).
 - 22.2. Directing claimant counsel or CAR to make further specified attempts, or employ specified methods, to locate a claimant who could not be located.

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- 22.3. Deciding that additional documents to support the levels of harms and opportunity loss claimed are not available or are not relevant.
- 22.4. Directing that the claim be referred to the Secretariat to be scheduled for a hearing before an adjudicator without conditions.
- 22.5. Directing that the claim be referred to the Secretariat to be scheduled for a hearing before a hearing adjudicator with conditions. Such conditions may include limiting the harms or opportunity loss claims to the levels permitted by the claimant documents filed. The hearing adjudicator will have the discretion to determine whether or not to allow further time, either before or after the hearing, for a claimant to provide documents required to support such claims at higher levels.
- 22.6. [deleted 10 December 2013]
- 22.7. Directing that a decision will be issued dismissing the claim if the claimant has not met the conditions for scheduling a hearing by a date set by the Special Resolution Adjudicator.
- 22.8. Dismissing the claim without a hearing, where the Special Resolution Adjudicator determines that there is no realistic prospect of the case proceeding to hearing within a reasonable time.

D. Rights of review

23. A summary of a Resolution Direction pursuant to paragraphs 22.1 through 22.6 shall also be included in the final decision and is subject to the usual rights of review at that time.
24. A Resolution Direction dismissing the claim is subject to reconsideration in accordance with paragraph 25.

E. Reconsideration of Direction dismissing claim

25. Where a claim has been dismissed without a hearing pursuant to paragraphs 22.7 or 22.8 above:
 - 25.1. The claimant may apply to the Chief Adjudicator for leave to allow his/her claim to be reconsidered.
 - 25.2. An application under this paragraph must:
 - 25.2.1. be in writing,
 - 25.2.2. be filed by the reconsideration deadline, and
 - 25.2.3. be on notice to participating parties.
 - 25.3. The Chief Adjudicator may grant leave on such terms as the Chief Adjudicator may deem just, provided the Claimant commits to attend

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a hearing on any date offered by the Secretariat prior to the conclusion of scheduled first claimant hearings.

- 25.4. The Chief Adjudicator will set aside such dismissal of a claim unless the application is without any merit or the hearing cannot reasonably be held within the time frame referred to in paragraph 25.3.
- 25.5. The Chief Adjudicator's decision is not subject to review within this process.
- 25.6. In this section,
 - 25.6.1. "reconsideration deadline" means the date that is six months before the last practical date to hold first Claimant hearings, as determined by the Oversight Committee;
 - 25.6.2. "Chief Adjudicator" includes his or her Deputy Chief Adjudicator designate.

FONTAINE et al.
Plaintiffs and
AG CANADA et al.
Defendants

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

CONSENT ORDER

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