

Independent Assessment Process Oversight Committee

Meeting of August 3, 2011
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
Marielle Doyon	Government of Canada representative
Alison Molloy	Government of Canada representative
Les Carpenter	Inuit representative
Paul Favel	Assembly of First Nations representative

Also present

Randy Bennett	Court counsel
Dan Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Akivah Starkman	Executive Director, IRSAS
John Trueman	Recorder, IRSAS

1. Approval of minutes

The committee approved the minutes of the June 21, 2011 meeting with minor corrections.

2. Key performance indicators

Akivah Starkman gave an overview of key trends in the 'dashboard' report distributed before the meeting. New application volumes are holding steady. The overall volume of aging cases remains steady, but the number of cases becoming hearing-ready has exceeded performance standards. This means that a greater number of cases are flowing into the scheduling phase than can be scheduled.

A member suggested that an annual total on the scheduling page, and possibly elsewhere, would be helpful.

There was discussion on the factors affecting the ability to schedule more hearings. Hearing targets are a factor of the capacity of adjudicators, Canada's

representatives, Adjudication Secretariat support staff, and claimants' counsel. Presently, hearings are scheduled up to Canada's indicated capacity, to avoid postponements. Adjudicators travel across the country as needed; it was suggested that Canada's representatives do the same. The role of postponements in meeting hearing targets was also discussed.

3. Chief Adjudicator's report

The Chief Adjudicator reported on arrangements made by the Law Society of Manitoba in relation to a lawyer who has been suspended from practice for improperly withholding fees from clients' awards in contravention of adjudicators' legal fee rulings. The matter is presently before the Law Society's discipline committee. If convicted by the Law Society, the Law Society's Reimbursement Fund will be available to claimants, and the Law Society will develop simplified claim forms for IAP claimants. If not, claimants may be able to recover their money through the lawyer's insurance or other sources.

The Law Society has appointed a custodian to oversee the lawyer's practice, and has identified several experienced IAP lawyers who they are referring claimants to.

Oversight Committee member Paul Favel, Q.C., has been appointed a Commissioner of the Saskatchewan Human Rights Commission.

The Chief Adjudicator brought forward a recommendation from staff to remove an expert from the approved list of expert psychologists, because of the person's inability to complete reports in a timely way.

➤ *Decision: The Oversight Committee removed an individual from the roster of expert psychologists in the IAP.*

A committee member raised another expert, where concerns were raised about the quality of the report. The Chief Adjudicator undertook to follow up with staff.

There was discussion of the process for evaluating experts on the roster. Presently, the process is mostly complaints-driven, although the Adjudication Secretariat monitors response times. [Subsequent to the meeting, it was confirmed that adjudicators also provide feedback on experts through their post-hearing report.]

4. Executive Director's report

Much of the Adjudication Secretariat's work since the previous meeting is reflected in documents provided for items later on the agenda.

The Interactive File Management System (IFMS) is about to be rolled out. It is a web-based tool designed to provide the Adjudication Secretariat with better information on the status of claims, particularly those in the document collection stage. It will also assist claimants' counsel in managing their caseload, if they choose to use it. One law firm with a large IAP caseload has agreed to use it, and the Secretariat will be undertaking site visits to several other law firms to help them evaluate the usefulness of the tool. Michael Mooney distributed a brief summary of the project.

Akivah Starkman and several Adjudication Secretariat staff attended the Truth and Reconciliation Commission's national event held in Inuvik in late June. Between 1,000 and 1,200 people were in attendance. The Secretariat's presence served two major purposes: (1) outreach to individuals and community leaders about the IAP, and (2) responding to questions from individuals. Both activities were well received.

A member reported on a meeting of claimants' counsel convened by the TRC's General Counsel at the Inuvik event to discuss the possible disclosure of IAP records to the TRC. At that meeting, counsel had stressed the importance of Settlement Agreement provisions that require consent of the claimant for their records to be transferred.

Members of the committee shared their experiences from the TRC event.

The next TRC event will be held in Halifax in October 2011.

5. Matters for decision

a. Completion strategy

Akivah Starkman gave an overview of the Adjudication Secretariat's paper entitled "Options for completion: strategies to complete more IAP claims by 2013," which was distributed to committee members in advance.

There are two key challenges: (1) completing new claims in a more expeditious manner (no longer than 12 months), and (2) removing blockages that prevent older claims from moving forward. Timelines in the IAP are driven by three factors: (1) volume – the total number of claims in the process, (2) capacity – the number of claims that can be processed and heard each year, and (3) process – requirements that create built-in delays.

The Secretariat's paper takes a chronological approach, breaking down the process into three phases. Within that, the paper outlines measures already underway, potential measures within the Secretariat's authority, measures that could be taken with agreement of the parties, and measures

requiring court approval. It also flags thematic issues, such as claimants over age 70, cancellations and postponements, direct contact with claimants, and case conference approaches. The paper is intended to provide options for consideration by the parties; it is not a 'take it or leave it' package.

Committee members discussed various aspects of the paper:

- it incorporated past discussions at the Oversight Committee and elsewhere;
- concern was raised about measures that would involve direct contact with claimants who are represented by lawyers – a more targeted approach might be appropriate in cases where a serious concern exists, but otherwise it might create more problems than it would solve, including concerns of privacy and safety;
- it was noted that Appendix IV of Schedule D says that the hearing date will be set based on availability of parties, counsel, and the adjudicator – and also that this provision exists in the context of the whole Settlement Agreement, which also says that the claimant should receive a hearing date within nine months of being admitted;
- hearing locations and the use of videoconferencing were discussed as a way of increasing capacity; and
- earlier exchange of documents was suggested as a way of prioritizing cases and increasing the potential for negotiated settlement.

Committee members discussed several ways of responding to the paper, prioritizing the items within it, and commencing discussions on action items.

➤ *Decision: The Oversight Committee agreed on five steps to move forward with the completion strategy:*

1. *The Court Counsel will convene a meeting between representatives of claimants' counsel and Canada, with support from the Chief Adjudicator and the Adjudication Secretariat, to discuss possible action on five items identified by the Oversight Committee:*
 - a. *a pilot project for the approximately 500 pre-hearing cases where the claimant is over age 70;*
 - b. *a pilot project for a case management approach for other cases with high-volume lawyers;*
 - c. *expanding the parameters for short form decisions [item 3.11 in the "Options for completion" paper];*

- d. potential for 'medium form decisions' [item 3.12 in the "Options for completion" paper; and
 - e. negotiated settlements.
- 2. The Adjudication Secretariat will be free to proceed with items listed as being within the Secretariat's authority in the "Options for completion" paper. Oversight Committee members will provide any concerns about the listed items in writing to John Trueman by Wednesday, August 10.
- 3. Oversight Committee members will respond to the other items discussed in the "Options for completion" paper in writing, to assist with future discussions. Members are asked to reference the numbered items, where possible, with responses in one of three categories: (i) agree, (ii) agree if..., or (iii) disagree because.... General observations and new suggestions are also welcome. Responses should be sent to John Trueman by Wednesday, August 31, after which they will be compiled and sent out to committee members.
- 4. The regular Oversight Committee meeting will continue as scheduled on Tuesday, September 13, in Toronto.
- 5. In addition to the above, a special full-day Oversight Committee meeting will be scheduled to look at the larger issues raised by the completion strategy.

6. Matters for discussion

a. Deterring hearing postponements

Akivah Starkman gave an overview of the Adjudication Secretariat's paper, "Deterring hearing postponements." From the Secretariat's perspective, postponements are problematic, especially because a significant number are avoidable, and many are cancelled so close to the hearing date that the date cannot be re-used. For example, if the Secretariat schedules five consecutive days of hearings which an adjudicator and Canada's representative travel to, and the Tuesday and Thursday hearings are cancelled on short notice, it is very difficult to fill those slots. The goal is to reduce the number of unnecessary or avoidable hearing postponements.

The key elements of the proposed approach are: (a) a rescheduling window, to give parties a short time to make changes once the date is set; (b) a requirement that all cancellations and postponements after the rescheduling window must be approved by the adjudicator; (c) consequences for situations where a hearing is cancelled, or a party does not attend, without the proper approval; and (d) an officer within the Secretariat charged with the responsibility of coordinating these activities.

Committee members discussed several aspects of the proposal:

- members articulated some concern about the proposed procedures being complicated, technical, and unwieldy;
- it was suggested that the Secretariat might follow the court approach of 'overbooking' cases with the knowledge that many settle or plea-bargain without a trial, but it was pointed out that in the IAP cases are usually postponed to another day, rather than settled, and also that the distribution of IAP hearings across the country makes it harder to reuse dates;
- the earlier exchange of documents was suggested as a way of identifying claims earlier for negotiated settlements, and dealing with issues of admissions in student on student cases;
- it was suggested that the measures proposed in Annex B, to reduce cancellations due to negotiated settlements, would be premature without addressing other problems with the negotiated settlement process; and
- committee members discussed various reasons for postponements and cancellations and ways they might have been avoided.

Akivah Starkman thanked the members for their input, and indicated that the Secretariat would redraft and simplify the procedures. The Annex B material on negotiated settlements will be placed on hold until a more comprehensive discussion of the negotiated settlement process takes place.

b. Legal counsel code of best practice

Akivah Starkman introduced the draft legal counsel code of best practice distributed in advance. The concept is to make the code available to legal counsel to self-attest to. If counsel choose to agree to the code, the Secretariat would include their name on a list of counsel who attest to these principles. These lawyers would also be invited to attend the Secretariat's outreach activities. The draft code is a consolidation of guidelines issued by the Canadian Bar Association and several provincial and territorial law societies, as well as input from Oversight Committee members and other sources.

Committee members suggested several changes to the draft code, as well as the need for plain-language communications to claimants to explain what to expect from their lawyer.

Akivah Starkman thanked the committee for its input.

c. Correspondence re: alleged perpetrators

Mayo Moran referred committee members to a pair of letters addressed to the Oversight Committee from a lawyer representing alleged perpetrators in the IAP. Dan Ish provided some background to the situation.

It was agreed that the Oversight Committee does not have jurisdiction to intervene in particular cases, as the letter requested. The cases in question have already been decided by the Chief Adjudicator.

The committee also noted the broader interpretive question raised by the letter.

d. Expedited hearing request form

At the request of David Paterson, committee members discussed the new expedited hearing request form published by the Adjudication Secretariat in early July:

- concern was expressed that aspects of the form did not appear to match the text of the Settlement Agreement, that portions incorporated timelines not consistent with the agreement, and that the introduction of the form would make it more difficult for lawyers with seriously ill clients to bring cases to a hearing;
- it was asked whether nurse practitioners could sign the form instead of a physician, especially for claimants in remote communities;
- it was explained that the new form had been introduced to bring clarity to the categories of 'expedited' and 'high priority' hearings, and to deal with abuse: some legal counsel submit all of their cases for expedited hearings, and the Adjudication Secretariat has seen a 40% increase in the number of requests for expedited hearings – the overall goal is that people who legitimately require expedited hearings may not get one;
- expedited hearings are frequently scheduled on a one-off basis and take place in remote communities, creating significant expense for all involved – especially when people arrive to find a claimant who seems to be perfectly healthy.

Akivah Starkman undertook to review the form and discuss it directly with David Paterson.

e. Adjudicator training agenda

Dan Ish reviewed the draft agenda for adjudicator training scheduled for August 22-26, 2011, in Saskatoon. He noted that it looks very similar to the previous round of training in 2010, but that a panel had been added on the fifth day to deal more directly with hearings for alleged perpetrators.

7. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, September 13, in Toronto.