

Independent Assessment Process Oversight Committee

Meeting of October 25, 2011

Toronto, ON

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 <i>present for items 1 through 4</i>
Daniel 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 September 13, 2011 meeting as presented.

2. Key performance indicators

Akivah Starkman gave an overview of key trends in the 'dashboard' report distributed before the meeting:

- The rate of new applications continues to increase. In the July-September 2011 quarter, 1600 new applications were received, a new record. Michael Mooney noted that the rate of calls and application form requests is also very high: by the beginning of September, Crawford had received more calls than they had in all of 2010.
- These trends suggest that the total number of applications, which is projected at just under 30,000, will likely be met or exceeded. This puts continued

pressure on the Adjudication Secretariat and the parties to support the number of hearings that will be required.

- The number of hearings held surpassed 1000 in the July-September quarter for the first time. This is a necessary step to reach 4000 hearings per year. It demonstrates that this target is at least potentially achievable. The question is whether it can be sustained.
- However, the number of hearing-ready cases continues to exceed the number of hearings scheduled, resulting in a longer scheduling horizon in many provinces. Currently, in mid-October, the Adjudication Secretariat is scheduling hearings into May 2012. The Secretariat is looking at adding further resources to support more hearings, as well as being more nimble if a hearing is cancelled or needs to be rescheduled.

In response to a question about the priority given to older claimants, Akivah Starkman explained that the Settlement Agreement provides three options: (1) the agreement says that priority should be given to claimants over age 70 and over age 60, and (2) when the Adjudication Secretariat receives a medical indication that a claimant is in failing health, priority is granted. However, these only come into play when the mandatory documents are submitted and the claim is hearing-ready. A third option, of holding an “expedited” hearing to gather evidence before all the documents are submitted, is available when there is medical evidence that a claimant may die or lose the capacity to provide testimony. In addition to these three options, the completion strategy proposals presented to the Oversight Committee at its August meeting include extraordinary measures that could be taken for older claimants, perhaps on a pilot project basis.

In response to a question about the rate of short form decisions, Akivah Starkman indicated that they are holding at about 45% of hearings. He also noted the completion strategy proposals to expand the range of claims that could be considered for short form decisions. Dan Ish added that short form decisions are not a complete panacea, but they do save about a day of adjudicator time, plus some Deputy Chief Adjudicator and staff time. Overall, they can reduce a claimant’s waiting time for compensation by about two months.

3. Chief Adjudicator’s report

Dan Ish reported that all the new adjudicators trained in August have now observed a Deputy Chief Adjudicator conduct a hearing, and have then conducted a hearing of their own under observation by a DCA. As in the past, new adjudicators are being assigned a small number of files and monitored to

ensure they properly write decisions and can successfully complete decisions on time.

In response to a question, Akivah Starkman and Dan Ish indicated that adjudicator capacity is adequate for the number of hearings being scheduled. Attrition remains a concern: in the past month, three adjudicators have been unable to continue working because of medical reasons.

Meanwhile, the DCAs are concluding the second round of evaluations of existing adjudicators. This round is similar to the first one conducted in 2010, but will lead to recommendations to assist the CA to make his recommendations to the Oversight Committee for renewal beyond the fall of 2012. The DCAs have discussed their evaluations with each adjudicator, and adjudicators who are unhappy with their evaluation can appeal to the Chief Adjudicator before he makes his recommendations to the Oversight Committee.

Dan Ish asked the stakeholders on the committee to advise him in advance if they have any serious concerns with an adjudicator that would lead them to not support an adjudicator for renewal.

In response to questions:

- Dan Ish said that he would be recommending renewals from 2012 to the end of the IAP, whenever that occurs. The Adjudication Secretariat would then navigate the government contracting rules for those persons the Oversight Committee has approved.
- He noted that there will continue to be scrutiny of adjudicators, and that poor performance could result in no further cases being assigned, or even a recommendation for termination of an adjudicator's contract.
- At the December meeting, he will provide two lists: (1) a list of adjudicators recommended for renewal, and (2) a list, for information, of adjudicators not recommended for renewal or who have indicated they do not wish to be renewed. There will also be a list, at a later meeting, covering any special circumstances as well as the 19 new adjudicators recently appointed.

Dan Ish discussed the September 28 meeting chaired by Randy Bennett, which examined several items referred by the Oversight Committee as well as others raised by the participants. Further to the meeting, some reports are being prepared by Canada and the Adjudication Secretariat. There are also discussions underway about a pilot project for claimants over age 70.

A guidance paper on cancellations and postponements of hearings is nearing completion and will be distributed to all parties within a few weeks. The paper will give consistent guidance to adjudicators, who hold responsibility for managing hearings, on the circumstances in which postponements should be

approved. Greater rigour will be required from the parties and there will be consequences for non-compliance. Currently, the rate of cancellations is around 20%, which is particularly unsatisfactory because in the IAP most cancellations are not because the claim has been settled, and therefore require the hearing to be rescheduled.

The Oversight Committee discussed the application to the courts to extend the completion date beyond September 19, 2013. Several key points emerged from the discussion:

- It seems unlikely that the courts would entertain a request for directions before the application deadline of September 19, 2012. Only then will there be a clear indication of the total number of claims that will need to be resolved.
- The completion strategy work currently underway between the parties and within the Adjudication Secretariat will need to be concluded by late spring 2012, to form the basis of a submission to the courts outlining what efficiencies can be found within the current process.
- It appears that the National Administration Committee, perhaps jointly with the Oversight Committee, has the jurisdiction to bring the application. Ideally it should be done on a consent basis, including a submission from Canada on funding the associated costs.
- Committee members discussed the need to engage counterparts on the NAC to lay the groundwork for this application.

Akivah Starkman noted that independently from the court process, the Adjudication Secretariat and Aboriginal Affairs and Northern Development Canada are preparing an application to the government for the required funds to continue operating the IAP beyond the 2011-12 fiscal year. This should allow Canada to speak with some certainty at the time of the court application.

4. Executive Director's report

Akivah Starkman reviewed significant activities underway within the Adjudication Secretariat:

- The Secretariat has explored with the parties ways of enabling earlier distribution of documents. The most straightforward approach is to distribute the evidentiary packages at the time the hearing is scheduled, rather than waiting until closer to the hearing as at present. A team is currently working on a mechanism to make this happen.

- There had also been discussion at the September 28 meeting about exchanging documents on a more incremental basis, perhaps through the Interactive File Management System (IFMS), but this did not receive universal acceptance. While this could be useful in some cases, some parties felt that documents need to be read in context.
- The Truth and Reconciliation national event in Halifax is happening this week. The Adjudication Secretariat will have a team of people present. As at the Winnipeg and Inuvik events, the IAP presence is useful for building connections that lead to subsequent outreach invitations, as well as providing information to individual claimants.
- The Secretariat continues to expand its outreach activities in the North. It is also expanding its work with friendship centres to provide outreach to homeless populations, and is working to provide more sessions in prisons. The goal of the outreach program continues to be to do everything possible to give every eligible person the opportunity to file a claim. The Secretariat keeps records of the number of sessions held and the number of attendees to help demonstrate this. To date, 185 separate outreach sessions have been delivered.
- In addition to its outreach work, the Adjudication Secretariat is working with Canada on a formal notice plan, similar to that done for the Common Experience Payment deadline. Presently, this is aimed towards March/April 2012. The goal is to leave enough time so that it is not confused with the CEP notice, but timely enough that potential applicants have enough time to put in an application.

In response to a question, Akivah Starkman indicated that the Adjudication Secretariat still plans to implement a voluntary code for legal counsel, based on the principle of self-attestation, which would form the basis of referrals to lawyers. Self-attesting lawyers would also receive invitations to attend outreach events.

In response to a question about application assistance services, Akivah Starkman indicated that the Assembly of First Nations had received a contract and hired seven workers, who were trained in late September. The Adjudication Secretariat is working with the AFN to receive and process feedback received from the workers. Crawford is working with the Secretariat's Admissions Unit to track forms and provide quality control.

Randy Bennett left the meeting.

5. Matters for discussion

5(a). Completion strategy

Committee members continued discussion of the Completion Strategy that had begun during the Chief Adjudicator's report.

Dan Ish indicated that current discussions are focussing on incremental changes to the process, while the message from the courts last May was that an exponential increase is required. It is not apparent how this could be achieved while maintaining equity between claimants who proceeded earlier and those who will come later, and without rushing hearings or devaluing the claimant experience.

David Paterson noted that the completion strategy document tabled by the Adjudication Secretariat in August seems to have "fallen off the table" in favour of a handful of items being dealt with in the discussions with Randy Bennett. There are a few things the Secretariat could be implementing on its own initiative, but many items in the paper went well beyond that.

Committee members discussed various ways of structuring a discussion on completion strategy topics. It was agreed that Dan Ish would work with Randy Bennett to establish a schedule for future meetings of his working group. Akivah Starkman undertook to produce a summary status report of the remaining items in the completion strategy document for future Oversight Committee discussion.

5(b). Disposition of records

Mitch Holash reported on the meeting of the disposition of records working group held October 17. The working group was given a dual mandate at the September meeting: (1) to consider means of implementing the Schedule D requirement to give claimants the option to have their hearing transcript deposited in an archive, and (2) to consider the long-term disposition of IAP case file records.

The working group proposed six 'first principles,' which were printed during a break and distributed for comment:

1. The OC and the IRSAS are committed to provide its assistance and available resources in support of the TRC archival mandate.
2. The OC and IRSAS would provide full respect to the confidentiality entitled to claimants and individuals affected under terms of court orders and SA.
3. The specific terms of the SA and the underlying agreement in the SA (limited defence rights for alleged perpetrators) gave protections that were

above the minimum provided by the Privacy Act and Access to Information Act.

4. "Individuals affected" includes the claimant and persons materially implicated in the claim, including alleged perpetrators – persons worthy of having their personal information protected – does not include persons mentioned in passing.
5. Personal information will be shared with the TRC (or with another archive) only in situations where "individuals affected" provide their agreement.
6. If an "individual affected" were identifiable, consent would be required. No consent is required if an individual is not identifiable. In practice, it is contemplated that consent would be sought from claimants, but we might avoid consent if documents released into archives were in a redacted form that didn't identify persons, like an alleged perpetrator, who haven't consented.

➤ *Decision: The draft 'first principles' to be distributed to Oversight Committee members by email for comment.*

Committee members discussed various aspects of how these principles would apply to a transcript sharing process, and to the disposition of IAP records generally. Numerous facets of the issue emerged:

- The desirability of providing an archive for future generations, and the Schedule D mandate that an archive of transcripts be provided, while respecting the promises of confidentiality made to claimants, alleged perpetrators, and other participants in the process.
- The practicality of redacting millions of pages of documents on the way to an archive. Normally, unredacted documents are provided to an archive, and they are redacted at the time of an access request, if necessary.
- Questions of the ownership of the records. The Oversight Committee has received a legal opinion indicating that once received by the Adjudication Secretariat, the records are under its custody and control. Some committee members expressed views that some records remain the property of the claimant, as in civil litigation, or that they should be under the jurisdiction of the supervising courts.
- The Truth and Reconciliation Commission has taken the view that it is entitled to immediate access to all of the documents, but the Settlement Agreement specifies that information from the IAP can be transferred to the TRC only with "consent of the individuals affected."

- The need for consent from affected individuals and the practicality of obtaining consent from an estimated 30,000 claimants, over 10,000 of whom have already had a hearing.
- The disposition of records where the claimant has not given consent. The only sure way to guarantee permanent privacy is through destruction of the records, which is opposed by the TRC and may be politically unpalatable to many.

The committee agreed that work should proceed on implementing the Schedule D provision for claimants to be given the option of having their transcript placed in an archive, even in the absence of a final decision on the disposition of other records. It was noted that considerable work had gone into discussions to have the TRC act as this archive, but agreement could not be reached.

- *Decision: The Oversight Committee agreed to create a Transcript Archive to be housed within the Adjudication Secretariat on an interim basis, for later transfer to a permanent home. The privacy protection offered to claimants will be the same as for records held at Library and Archives Canada (110 years from date of birth). Where the claimant has given consent, transcripts will enter the archive with names of persons 'materially implicated' in the claim (this includes alleged perpetrators but not persons mentioned in passing) removed. The claimant's own information will not be removed.*
- *Decision: The Adjudication Secretariat will redraft the consent form and accompanying materials, and circulate them to Oversight Committee members for comment.*
- *Decision: Following approval by the Oversight Committee, the Chair will write to the TRC to advise that the IAP plans to implement the Transcript Archive on this basis. An opportunity will be provided for the TRC to comment and perhaps enter discussions with the Oversight Committee.*

6. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, December 6, in Toronto.