

Independent Assessment Process Oversight Committee

Meeting of December 6, 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
Daniel Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Dan Shapiro	Deputy Chief Adjudicator; Chair, Technical Subcommittee <i>present for item 1 only</i>
Akivah Starkman	Executive Director, IRSAS
John Trueman	Recorder, IRSAS

1. Report of the Technical Subcommittee

Dan Shapiro reported on the meeting of the Technical Subcommittee held December 5, 2011.

Chief Adjudicator Directive 8 requires Canada to provide the source of information for a student-on-student admission. While this was being provided in the adjudicator-only database, it was not provided for the evidentiary package for the parties. Canada responded at the end of October that the source of admissions would, going forward, be provided in the evidentiary package.

However, claimants' counsel are of the view that in order to meaningfully follow up on this information, access to staff lists is needed to see if there is carry over of knowledge from one staff member to another. This led to a broader discussion of school narratives, including their content, how they are developed, and how they could be added to.

- Canada will return to the next meeting to articulate its present policies on these documents, and the hope is to develop a directive that could transparently identify what should be included in the narrative.
- It was also suggested that there be a mechanism for a party or the adjudicator to add material to the narrative.
- Canada is still considering whether to post the school narratives on the decision database. This would enable a 'live' version on the database rather than sending them out in every evidentiary package.

An issue was raised about cases with evidence that students were living in dormitories with family members working at the school, where Canada had been inconsistent in its admissions. It was suggested that there be broader disclosure and rules applied across the board.

Another issue raised was a case in which Canada had requested an amendment to a decision when further research revealed that the wrong alleged perpetrator may have been named. This research was not before the adjudicator at the hearing. Typically, an adjudicator will obtain both parties' input on a proposed change to a decision. Kerry O'Shea and Alison Molloy will communicate directly on this issue.

The subcommittee again discussed Canada's policy not to agree to a short form decision in cases where a Schedule P non-resident claimant release is used. The reason for this policy is unclear, and when the cases proceed to full decisions, Canada's representative does not make submissions on the issue. Recent data for the second quarter indicates that the rate of SFDs has dropped from 45.7% last year to 38.4% this year. Anecdotally, adjudicators report that Schedule P cases are the biggest barrier to a SFD. The parties will consider adding a box to the SFD template, which could incorporate language Canada requires to feel comfortable proceeding in these cases.

Other barriers to short form decisions, including cases where allegations were made against a new alleged perpetrator but then withdrawn, or minor loose ends prevent an SFD from being completed the day of the hearing. This would require Canada to revisit its policy. It was suggested that this be dealt with either at the Technical Subcommittee or through the Randy Bennett Working Group.

David Iverson raised an issue involving notification of student alleged perpetrators, who apparently were receiving the same letter as staff alleged perpetrators. Alison Molloy said she did not believe this was the case, and noted that former students have access to health support services and former employees do not. Several members reflected on the numerous difficulties, significant health risks and community impacts arising from the Schedule D requirement to notify all former students named as alleged perpetrators.

2. Approval of minutes

The committee approved the minutes of the October 25, 2011 meeting with minor changes.

3. Key performance indicators

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

- Close to 11,000 claims have been resolved and decisions rendered. When you take into account the 2,000 claims closed or withdrawn, the IAP has surpassed the original estimate of 12,500 claims. However, over 24,000 applications have been received, and the Adjudication Secretariat projects between 29,000 and 30,000 by the September 19, 2012 application deadline.
- Eight ADR claims remain, all in the post-hearing stage.
- The number of claims sent to be scheduled has dropped off over the past couple of months. The Adjudication Secretariat diverted staff to a project to 'blitz' files that were stuck in the case management phase, and were able to move 156 outstanding files forward to scheduling.
- The rate of hearings scheduled continues to exceed the number of claims sent for scheduling, but the overall number of hearings scheduled is down. The scheduling horizon is now very long: the Adjudication Secretariat is seeking the parties' availability for July 2012, and many counsel will not commit to dates that far in the future. Many counsel and others are also committed to outreach and other activities in advance of the September 2012 application deadline.
- The increase in the cancellation rate is almost entirely attributable to the 56 hearings for Blott & Company cancelled following the October 31, 2011 court order. Hearings for Blott & Company have now resumed pursuant to the November 17, 2011 order, and the Adjudication Secretariat is working to reschedule the cancelled hearings.

4. Executive Director's report

Akivah Starkman reviewed significant activities underway within the Adjudication Secretariat:

- The Secretariat continues to work on its funding request for continuation of the IAP beyond 2012.

- As part of the normal departmental audit program, KPMG conducted an audit of Aboriginal Affairs and Northern Development Canada's support to the IAP, including the Adjudication Secretariat. The audit looked at management of resources, controls, risk management, and similar items; it did not review matters involving claims, adjudicators, or the rights of the parties. The audit was generally favourable, with some minor administrative recommendations which will be implemented. The final audit will be made publicly available once it has been approved by AANDC's audit committee.
- Since late 2008, AANDC has required the Adjudication Secretariat to hire primarily term employees, rather than indeterminate (permanent) staff. The normal government policy is to automatically convert employees from term to indeterminate status after three years' service in the same department. In early November, AANDC and several other departments suspended the conversion of term employees. Over 60 staff in the Adjudication Secretariat are impacted, as well as over 100 staff at AANDC working on the Settlement Agreement. While no one is being laid off, and the Adjudication Secretariat anticipates continuing operations for several more years, this has caused significant morale issues and raises concerns about employee retention.
- The Adjudication Secretariat has done extensive consultation with law societies on the legal counsel code of practice. The focus now is to use the code as a basis for education of claimants and others on their rights and what they can expect from lawyers, rather than on something that is complaints-driven. Materials in claimant-friendly formats and languages will be made available over the coming months.
 - David Paterson indicated his disagreement, and recalled the Oversight Committee's motion of August 2010, in which lawyers were to be invited to outreach events if they commit to the Canadian Bar Association guidelines and certain performance standards. He noted many parts of Canada with inadequate access to lawyers. Akivah Starkman replied that educating claimants on their rights does not prevent that from still taking place.
- On November 16, Chief Justice Winkler issued his order adding Stirland Lake and Cristal Lake Schools to the schools list in the Settlement Agreement. Canada has until December 16 to appeal the decision; no decision has been announced to date. In the absence of a stay of the decision, the Adjudication Secretariat is carrying out the order. To date, the Adjudication Secretariat has received one application from these schools, which has been admitted and is being processed.

5. Chief Adjudicator's report

Dan Ish reported that much of his time since the last meeting has been taken by the court orders and hearing regarding Blott & Company.

On the application of the Court Monitor, an ex parte order was issued on October 31, 2011 by the western administrative judge, Madam Justice Brown of the Supreme Court of British Columbia, suspending all hearings of claimants represented by Blott & Company.

A hearing was held on November 10, 2011 with 18 lawyers appearing before the court; the Chief Adjudicator also made submissions. The resulting order, on November 17, 2011, lifted the suspension, and Blott & Company hearings resumed on November 21. The order also directed the Court Monitor to conduct an investigation into Blott & Company and a number of other organizations.

In addition to the Court Monitor's reports to the Court on its investigation, the Chief Adjudicator is now required to report monthly on the conduct of hearings by Blott & Company. To inform his report, the Chief Adjudicator has directed adjudicators to canvass certain issues at hearings and provide a written report after each Blott hearing using a template provided. Adjudicators have also been asked to complete this report if similar issues arise at hearings conducted by other lawyers.

Dan Ish reported that the recent events indicate a heightened concern by the Courts which requires renewed vigour. He emphasized his concern for claimants, most of whom are a vulnerable population, and the limited role that he can play as the neutral in the IAP.

Howard Tennenhouse, a Manitoba lawyer, was unsuccessful in his court application to have the Law Society of Manitoba's custodial order overturned. It appears from the judgement that he continued to take 30% legal fees from his claimants, despite legal fee reviews that reduced them in many cases. The judgment refers to approximately \$800,000 that has been improperly taken from claimants.

Dan Ish noted the retirement of two key employees in the Chief Adjudicator's Office. Bonita Breti, the Manager of Administration, recently retired, and Tina Eberts, the Director of the Chief Adjudicator's Office, will be retiring in December.

6. Program for claimants to consent to have their hearing transcript deposited in an archive

John Trueman discussed the work done following the October 25 meeting, where the Oversight Committee decided to create a Transcript Archive on an interim basis, for later transfer to a permanent home. A draft consent form and related materials were prepared and sent to committee members for comment. The comments raised two questions for further discussion: (1) when a claimant consents to have their transcript placed in an archive, how long should it be kept private, and (2) what should the consent documents say will happen to the transcript if the claimant does not consent.

Committee members discussed several aspects of these issues:

- It was suggested that the consent form provide a list of acceptable uses during any closed period, similar to the list on the TRC's consent form. Alternatively, it was suggested that the form explicitly provide for the TRC to have access to the transcripts, so long as the claimant was not identified.
 - It was suggested that instead of (or in addition to) a single national archive, the claimant should have the option of giving their transcript given to an archive or cultural institution with which the claimant is affiliated.
 - If the claimant consents for their transcript to be available 'immediately,' the documents should be clear that the archive might not be set up for several years.
 - Committee members were generally of the view that court intervention would likely be required to keep transcripts confidential, in cases where the claimant does not consent. The TRC would likely be involved, either responding to the Oversight Committee's application or bringing its own application if the OC did not bring one.
- *Decision: The Oversight Committee decided to contact the Truth and Reconciliation Commission to determine whether the TRC would be open to a structured discussion of these issues with the possible assistance of The Hon. Frank Iacobucci.*

Committee members noted that further discussions would be needed, to refine the OC's position and select a subset of members to represent the OC in discussions.

7. Completion strategy

Akivah Starkman gave an update on a number of initiatives related to completion of the IAP that are underway. An overall status report/matrix is also under development.

The court order to implement the Interactive File Management System has been obtained, and testing has been completed with five law firms. A meeting is scheduled to firm up the implementation plan, help desk, and training manual. Meetings will then be scheduled with key law firms to roll out the system.

The Adjudication Secretariat plans to implement earlier distribution of the evidentiary package at the time the Hearing Set Notification is sent by the Scheduling Unit. A second evidentiary package will be sent two weeks prior to the hearing, if required.

The Secretariat is also working with Canada on a pilot project for claimants over age 70, to be implemented in the new year.

The Chief Adjudicator's guidance paper on cancellation and postponement of hearings was implemented on December 5, 2011. The guidance paper requires adjudicator approval of cancellation and postponement requests made later than 10 weeks before the hearing, and allows the adjudicator to impose consequences for non-attendance.

- Kerry O'Shea discussed comments she had received from claimants' counsel on the new policy, and her concern that the paper lacked context. Akivah Starkman replied that the intention of the policy is to discourage postponements, and that it gives the adjudicator considerable discretion to consider the facts of the case.
- In response to a suggestion that cancellation requests be considered by a panel of adjudicators, the Chief Adjudicator said that he had considered that model, but decided instead to leave the decision with the hearing adjudicator, and provide adjudicators with guidance to promote consistency.

The Chief Adjudicator reviewed the items that were referred at the August meeting to the working group chaired by Randy Bennett. In response to a question, Randy Bennett said that the purpose is twofold: (1) to improve things so that as many claims as possible can be resolved more quickly, and (2) to be able to demonstrate to the courts the best that can be done, to help inform a decision on an extension of the September 2013 completion date.

- *Decision: The Oversight Committee decided to hold a full-day meeting on Monday, January 16, in advance of the regular meeting on Tuesday, January 17, to consider the completion strategy items in detail.*

8. Dates of future meetings

- *Decision: The Oversight Committee set the following meeting dates for 2012:*

Tuesday, January 17, 2012 – Vancouver

Tuesday, February 28, 2012 – Toronto
Tuesday, April 17, 2012 – Vancouver
Tuesday, May 29, 2012 – Toronto
Tuesday, July 10, 2012 – Vancouver
Tuesday, September 25, 2012 – Toronto
Tuesday, October 30, 2012 – Toronto
Tuesday, December 4, 2012 – Vancouver

9. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, January 17, 2012, in Vancouver, with a special all-day session set for Monday, January 16.