Independent Assessment Process Oversight Committee

Meeting of January 17, 2012
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
Daniel Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Dan Shapiro	Deputy Chief Adjudicator; Chair, Technical Subcommittee *present for item 1 only*
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 January 16, 2012.

The subcommittee discussed the use of short form decisions in cases where a Schedule P non-resident claimant release is used. Canada has agreed that this will no longer be a bar to use of an SFD. The electronic SFD form will be changed to include appropriate text for these situations. This is expected to be a very helpful development.

The subcommittee continued its discussion of the school narrative documents produced by Canada for each IRS. There are three primary questions: (1) Canada's present policies on the content of school narratives, (2) whether there could be a mechanism for others to add material to a school narrative, and (3) whether the school narratives could be posted to the decision database rather than sent out on individual claims.

Canada did not have the opportunity to obtain complete advice on these points, but a teleconference has been scheduled for February 8. At that time, the person responsible for coordinating school narrative research will explain three things: (1) how and when staff lists are included or excluded, (2) documents related to school boundaries and what is, or is not, on school premises, and (3) the availability of chronicles, or nun's logs, that were kept in schools and include records of visiting priests and other events.

The subcommittee will then have a follow-up discussion on these issues. Mitch Holash asked that the proposal be circulated before it is finalized.

2. Approval of minutes

The committee approved the minutes of the December 6, 2011 meeting as presented.

3. Business arising from the minutes

Alison Molloy provided information on the notification of alleged perpetrators, which had been raised at the December 6 meeting. Separate letters are sent to student and staff alleged perpetrators, although they are very similar. The letters sent to student alleged perpetrators include information on Resolution Health Support Program services available to former students, as well as the availability of health supports for hearings. She pointed out that the letters go out infrequently, and only when Canada has been unable to make personal contact.

Alison Molloy agreed to distribute electronic copies to committee members.

4. Key performance indicators

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

- The rate of new applications is down from its peak in September 2011, but the trend line remains the same. The Adjudication Secretariat's projection of the total number of applications likely to be received by the deadline remains valid.
- The aging of cases waiting for the claimant to submit mandatory documents has remained pretty consistent. The average time from a case being admitted to being sent for scheduling is 347 days. However, there are 1,279 cases that have taken longer than 540 days out of a total of 5,588 cases. This number has remained stable between 1,200 and 1,300 cases for the last ten months. At present this is not problematic because there is always a very high volume of

cases ready for hearings. However, following the application deadline the Secretariat intends to reassign Admissions Unit staff to work intensively on cases that, for various reasons, are taking longer than the norm.

- The Adjudication Secretariat is working to refine the definition of "on hold" cases to reduce confusion.
- The number of standard track hearing dates offered remains below target. The Secretariat is finding that many legal counsel are unable to commit to dates six months or more in the future.
- The number of hearings actually held has exceeded targets, with the exception of the court-imposed cancellation of Blott & Company hearings in November.
- A new chart, on processing of decisions, was introduced. The number of decisions issued is good, but the service standard for processing them is often not being met. Short form decisions are averaging 13 days when the service standard is 7 days. Staff shortages are the major cause of delays.

Committee members discussed the upcoming official Notice Program for the IAP application deadline, as well as various outreach opportunities in the months before the deadline.

Dan Ish noted that the projections included a 50% increase in the rate of applications in the last six months before the deadline, but mentioned that he has heard rumours that some firms are planning to concentrate their efforts over the summer on completing applications. Committee members asked if this could jeopardize hearing targets in 2012; Akivah Starkman said that it is too soon to say because the Secretariat is just beginning to schedule hearings for the summer.

Committee members discussed various aspects of administration of the application deadline. Akivah Starkman advised that work is underway in the Secretariat to plan for this, and a plan will be presented for information at a future meeting. It was noted that there is no authority in the Settlement Agreement to accept late applications, so approval from the supervising courts would be required. Randy Bennett discussed the situations in which this approval typically takes place.

Alison Molloy raised the issue of withdrawal of claims on or shortly before the hearing date. Dan Ish said that his advice to adjudicators is to write a decision confirming that no evidence was led, to formally end the claim. Some committee members expressed concern about whether such withdrawals constituted an abuse of process, particularly if the claimant reapplies before the application deadline; withdrawal should not be a means of circumventing the postponement policy. It was suggested that such cases should be considered "withdrawal with prejudice," meaning that the claimant cannot bring another claim.

5. Executive Director's report

Akivah Starkman reviewed significant activities underway within the Adjudication Secretariat:

- Following discussion at the December 2011 Oversight Committee meeting, the Adjudication Secretariat is ready to implement lawyer participation at outreach events for lawyers who self-attest to the Canadian Bar Association guidelines and related targets adopted at the August 2010 meeting. A mailing will be sent to all claimants' counsel shortly, but interested lawyers can contact John Trueman in the meantime if they wish to participate.
- On the broader issues of legal representation, the Adjudication Secretariat is working on a number of fronts, including providing better information to claimants about reasonable expectations and what is available to them if expectations are not met, as well as consolidating the existing means by which questions and complaints about lawyers are being received at the Secretariat. The Secretariat is developing an Ombudsperson function, to be staffed by an experienced lawyer and appropriate staff support, and referrals from the info line run by Crawford.
- Further to discussion at the December 2011 Oversight Committee meeting about information sharing with the Truth and Reconciliation Commission, Akivah Starkman and John Trueman will be holding a meeting with the TRC's Executive Director and General Counsel on February 2 to outline the Oversight Committee's views and see if the TRC would be open to a facilitated discussion.
- Separately, Akivah Starkman was approached by a TRC employee conducting research on residential school staff. She was potentially seeking information from the IAP on allegations of abuse against employees. The Oversight Committee had taken the position in its January 2011 letter that while claim information is protected by the Settlement Agreement, statistical information could be made available to the TRC. However, the Adjudication Secretariat has very little statistical information available on alleged perpetrators. He referred the TRC employee to Canada and the church organizations.

6. Chief Adjudicator's report

Dan Ish said that in the short time since the last Oversight Committee meeting, he has focussed on getting caught up on decision writing.

As reported at the December 3, 2011 OC meeting, the November 17, 2011, order of Madam Justice Brown requires the Chief Adjudicator to provide a monthly report to the court on the conduct of Blott & Company hearings. To inform the reports he has asked adjudicators to inquire into issues of representation and financial arrangements and file a supplementary hearing report form on these issues for all Blott hearings. He has also asked adjudicators to file reports in cases involving other lawyers if concerns arise.

David Paterson raised a number of concerns on behalf of claimants' counsel. While he does not think it improper for the Chief Adjudicator to be attentive to matters that involve counsel generally, he thinks this action overreaches in a number of areas. Some adjudicators seem to be posing these questions of every counsel on every case. Some of the questions are intrusive on the solicitor/client relationship, and asking them at the hearing may imply that the adjudicator believes that counsel is incompetent or negligent or unscrupulous, which is communicated at a time when the lawyer and client still need to work together.

David Paterson made several suggestions, including having reasonable and probable grounds before asking the questions, posing them at the time of the legal fee review instead of at the hearing, and convening a meeting of claimants' counsel to try to gain buy-in on an appropriate approach. It was suggested that such a meeting might include other stakeholders, such as the Assembly of First Nations.

Dan Ish responded that he had specifically asked adjudicators not to ask the questions in a rote manner. Usually the information sought will surface at the hearing, or in the legal fee review process. He said that he strongly supports a representative group of counsel taking the initiative to improve the quality of practice. Peer pressure could play a strong role.

Mitch Holash suggested that the three areas of concern are (1) the types of questions asked, (2) the threshold of when to ask them, and (3) the appropriateness of asking them at the hearing. He suggested that it might be impractical to pose the questions at any other time but the hearing, when the claimant and the adjudicator are face to face.

David Paterson pointed out that there is normally a teleconference with the adjudicator, claimant, and claimants' counsel in the fee review process, where these questions could be raised. Dan Ish responded that the legal fee review teleconference would be too late to get the information required for the report to the courts on Blott cases, but that it would be worth considering for cases from other lawyers. The fee review process has a built-in threshold. He pointed out, however, that the claimant often does not attend the fee review conference call.

Les Carpenter pointed out that all of these discussions have taken place after the fact, if the claimant has received poor legal service. The real question is how a claimant can be guaranteed good representation at the start of the process?

Intervention from the Adjudication Secretariat and the Chief Adjudicator's Office is necessary to prevent and address further injustices.

Paul Favel said that it is important to be seen to be doing things to help claimants. The complaints about legal counsel have been getting louder and more frequent.

Marielle Doyon asked if it was unusual for a tribunal to incorporate an Ombudsperson role. Dan Ish replied that most other tribunals do not have a unique relationship with claimants. The IAP is designed to be a claimant-centered process, and are thus seen by often vulnerable claimants as a repository of authority and information. We could say that legal practice is not our concern, but this would leave claimants without anywhere else to turn.

Michael Mooney observed that the questions about representation issues are really about putting the interests of the claimants first. IAP claimants are particularly vulnerable and this places a larger burden on us to fulfil this role. It is important to respect the solicitor/client relationship, but we cannot sublimate the interests of protecting claimants to these concerns.

Dan Ish explained some other aspects that make the IAP unusual on this issue. In other environments, there is a more normal "marketplace" where dissatisfied clients can find another lawyer. Also, when a lawyer crosses the line and acts unethically, normally the lawyer for the other party will report them to the Law Society. However, he does not believe that Canada has ever reported an IAP lawyer to a provincial law society. It is an unusual and uncomfortable position for the neutral to be placed in.

Kerry O'Shea said that the questions do not affect the people being targeted by them, and that the bad lawyers do not care that they are being asked. Where the client enjoys a good relationship with their lawyer, the questions can be very destructive and presuppose that something has gone wrong.

7. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, February 28, 2012, in Toronto.