

Independent Assessment Process Oversight Committee

Meeting of July 10, 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
Caroline Clark	Government of Canada representative
Marielle Doyon	Government of Canada representative
Alison Molloy	Government of Canada representative <i>present for items 1 and 2 only</i>
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 items 1 and 2 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 July 9, 2012.

The subcommittee discussed the Secretariat's admissions practices for student on student abuse. Since implementation, the Secretariat has sought the claimant's assertion that staff knew or should reasonably have known that abuse of the kind alleged was occurring at the IRS, as an essential component of an eligible claim of this kind. However, with the implementation of CAD-8, it is possible for a claim to succeed even if the claimant cannot prove staff knowledge, because Canada discloses admissions of staff knowledge from previous claims. While the Secretariat admits applications that indicate an intention to rely on Canada's admissions at the hearing, there was concern that some claimants may not be

aware of this possibility. It was also argued that pleading this point should not be necessary.

The parties agreed that:

- the Secretariat will no longer require a claimant's assertion of staff knowledge for a student-on-student claim to be admitted;
- the Secretariat will review any claims that have been refused admission on staff knowledge grounds; and
- going forward, some cautionary text explaining the requirements that the claimant will need to meet at the hearing will be sent to admitted claimants where appropriate.

Reasonable and necessary disbursements are paid to counsel for all successful claimants. The practice in the IAP is for Canada to review counsel's disbursements, and if there are disputes about the disbursements to be paid, the question is referred to the adjudicator.

Claimants' counsel raised concerns with the internal policies that Canada applies to disbursements:

- the policy limits counsel to two meetings with their client (unless justification is provided for why more meetings are required), which is inconsistent with good practice and recent legal fee rulings that stress the importance of regular contact between lawyer and claimant;
- some other costs, such as assessments commissioned by the claimant's lawyer to evaluate a possible opportunity loss claim, are not being paid.

Dan Shapiro pointed out that Canada's internal policies are not binding on adjudicators. However, referrals to adjudicators have been very rare: after over 13,000 hearings, perhaps only 3 or 4 disbursement decisions have been placed on the decision database.

The subcommittee discussed the adjudicator's letter of instruction to experts retained for medical or psychological assessments. There seems to be inconsistent practice in terms of providing a draft letter to the parties on request, in order to avoid misunderstandings or correct errors. The parties agreed to ask the Chief Adjudicator to recommend that all adjudicators provide the draft letter of instruction to parties on request, with a short period of time (one week) for comments.

Canada asked about the guidance given to adjudicators when imposing conditions on hearing postponements. Dan Shapiro provided the subcommittee members with access to a video-recorded seminar for adjudicators on the postponement policy, and invited Canada to provide particulars of any issues they are concerned about.

Dan Shapiro provided an update on the over 65 pilot project. The first hearings started the previous day (July 9) in Saskatoon, with two adjudicators each conducting two hearings. In the first week, it was anticipated that 19 claims would be heard with two claimants' counsel.

One aspect of the pilot project is testing the usefulness of file management teleconferences. Claimants' counsel are finding that these calls are useful for getting them engaged earlier, which in turn has led to more complete document packages in time for the hearing.

The pilot has also been successful as motivating negotiated settlements. About 200 files were evaluated by Canada for negotiation; of these, 71 have been settled or set for hearing.

There have been some challenges and growing pains, including the timing of evidentiary packages and conference calls, availability of claimants' counsel in the summer, and travel. Dan Shapiro said that all participants have a certain level of discomfort with doing things differently, but everyone is motivated to ensure a positive outcome. An evaluation document was circulated to the subcommittee and the feedback of all participants is welcomed.

The Adjudication Secretariat provided a discussion paper to the subcommittee on the resolution of incomplete and inactive IAP claims as part of the broader work done for the completion strategy. Most IAP claims move forward on their own: two-thirds become hearing-ready within one year, and 85% within 18 months. However, this leaves 15% of claims that are still not ready for hearing within 18 months.

The first thrust of the strategy is to do everything possible to get cases hearing-ready. The Secretariat plans to dedicate Admissions Unit staff to an intensive case management role once the admissions process winds down in 2013. These staff have a strong skill set, familiarity with the IAP, and ability to work with claimants' counsel to remove barriers and address issues.

However, measures will be needed for claims that may never become hearing ready, despite intensive efforts. Currently, there is no mechanism in the IAP to close an admitted IAP claim, unless it is decided by an adjudicator, settled, or withdrawn. The Secretariat's discussion paper outlined several possible options

for dealing with these claims, which would be developed into specific proposals for inclusion in the application to the courts this fall.

The parties agreed to provide feedback to the Secretariat within two weeks.

2. Farewell to Alison Molloy

Marielle Doyon announced that Alison Molloy would be retiring from Aboriginal Affairs and Northern Development in the coming months, after nearly 34 years in the public service. This will be her last Oversight Committee meeting.

Committee members expressed their appreciation and thanks for Alison's dedication and commitment to resolution of the legacy of Indian Residential Schools for over 12 years, including over 3 years on the Oversight Committee.

Dan Shapiro also expressed his appreciation for Alison's work on the Technical Subcommittee since its inception.

Alison Molloy and Dan Shapiro left the meeting.

3. Approval of minutes

The committee approved the minutes of the May 29, 2012 meeting with minor corrections.

4. Key performance indicators

Akivah Starkman gave an overview of key trends in the statistical reports distributed before the meeting.

Over 27,000 claims have now been received, which does not include the unsubmitted claims from Blott & Company dealt with in the recent court decision. It appears that the Secretariat's projection of approximately 29,700 total applications will be met or exceeded.

Several factors are affecting the Secretariat's ability to offer hearings. Several claimants' counsel have scaled back their availability for the summer months leading up to the application deadline. The Adjudication Secretariat has also encountered serious technical problems with the internet capacity in the new office for Case Management staff in Regina. This limits the staff's ability to receive documents and prepare and send evidentiary packages. The contract that the government arranged with the service provider apparently provides 80 days in which to resolve problems.

Both the Secretariat and Canada have experienced serious staffing delays related to layoffs elsewhere in government. AANDC is eliminating about 500 positions, and approximately 19,000 positions are being eliminated across government. New procedures have been implemented to find appropriate positions for people who would otherwise be laid off.

This has caused serious delays in filling positions but also, paradoxically, makes positions more difficult to fill. While there are no cuts or layoffs in the Adjudication Secretariat, the Secretariat is only permitted to offer 'term' positions because of the sunset nature of the IAP. Surplus staff from other government organizations are unwilling to accept term positions, or will accept a position and then leave as soon as an indeterminate (permanent) position becomes available elsewhere.

Between the Adjudication Secretariat and Canada, over 100 positions are fully funded but vacant. Ideally, these positions could be filled indeterminately with people who would otherwise be laid off. The normal attrition rate over the next several years would then reduce the government's liability.

Akivah Starkman said that as a result of these issues, the Secretariat expects to be 20 to 30 hearings per month short of the target for the next three months.

Marielle Doyon said that Canada is experiencing these same issues when hiring staff to attend hearings. It takes a minimum of eight weeks to train a Resolution Manager, and it is very discouraging to invest the time and effort in training only to have the person leave because they cannot be offered an indeterminate position.

Akivah Starkman stressed that these issues do not appear to reflect a lack of commitment on the government's part to the IAP. In fact, the government recently approved funding to continue the IAP through to 2015-16. However, staffing reductions elsewhere in government, and AANDC's inflexibility toward staffing positions in the Adjudication Secretariat, are having a material impact on putting staff in place to meet hearing targets.

The Secretariat is working to refine its method for tracking hearing postponements. Present measures count any hearing that does not proceed on the originally scheduled date. If only postponements made within 10 weeks of the hearing date are considered, the postponement rate averaged 11.3% between January and June 2012.

5. Executive Director's report

The IAP application deadline is September 19, 2012, a week before the next Oversight Committee meeting. The Adjudication Secretariat continues to focus its outreach efforts on the deadline. A detailed paper on the Secretariat's

initiatives to help ensure survivors are aware of the IAP and the deadline will be distributed shortly.

Adjudication Secretariat staff attended the Truth and Reconciliation Commission's Saskatchewan National Event on June 21-24 in Saskatoon.

The RFP for a new Deputy Chief Adjudicator is still with Public Works and Government Services Canada. It has been over two months, an unacceptably long period of time.

The Chief Adjudicator's Annual Report to the Oversight Committee is nearing completion, and will be distributed by the Chief Adjudicator as soon as it is finished.

The court decision on Blott & Company was released on June 5. The Adjudication Secretariat had a response team in place since the fall and was prepared for a number of possible scenarios.

Shortly after the decision was issued, Dan Ish and Akivah Starkman met with Mr. Ian Pitfield, the court-appointed Transition Coordinator. Mr. Pitfield's priorities include maintaining hearing dates already scheduled in the near future, and communicating effectively with the Blott Claimants.

Blott & Company closed its doors on June 30. Its toll-free lines are now forwarded to the IAP Info Line. Notices have been sent to the Blott Claimants and Mr. Pitfield has travelled to communities to meet with people. Information materials developed by the Adjudication Secretariat and Mr. Pitfield are available at outreach events, through the Info Line, and through health support workers.

So far, virtually all Blott Claimant hearings have proceeded as scheduled. Generally, Mr. Pitfield is authorizing the Blott Associate lawyers to handle hearings up to July 15, and is arranging new counsel for hearings after that date. The challenge for the Secretariat in the short term is making logistical arrangements for hearings where new counsel have not been appointed and Blott & Company is no longer operating.

The Adjudication Secretariat is also working with Mr. Pitfield and the Court Monitor to deal with the unfiled claims, "DNQ files," estate files, and similar material identified in the court order. The material on hand will be inventoried to identify the persons whose applications are deemed to be received by the application deadline. Communications to claimants have encouraged survivors to call the Info Line if they have not heard about the status of their claim. Once Mr. Pitfield has appointed successor counsel, they will review each application with the claimant and certify it.

A number of issues raised at the hearing remain to be dealt with by the Court in supplemental reasons, including the Chief Adjudicator's role in monitoring the

conduct of legal counsel, the Court Monitor's request to reopen claims already adjudicated, and the costs of the investigation.

In response to a question, Akivah Starkman said that the Blott Associates are now functioning as independent counsel, and allowed to complete existing cases. If they want to continue in the IAP beyond the existing cases, they would need to be under the direction and guidance of another firm.

Akivah Starkman distributed a paper on communications activities, describing the proactive approach taken by the Secretariat to inform claimants and the public about the IAP.

The contracts for Oversight Committee members will be amended shortly to bring their daily rates in line with those for adjudicators, as provided in the Settlement Agreement.

6. Chief Adjudicator's report

Dan Ish discussed his meeting with Ian Pitfield regarding the Blott & Company decision. He has assigned Deputy Chief Adjudicator Rodger Linka to work with Mr. Pitfield and the Secretariat has also assigned staff. While there are challenges, he said that it is likely being handled as well as it possibly can. His message to claimants is that there are a lot of people looking carefully and working hard with claimants' interests at heart.

Dave Iverson said that he would attempt to make contact with Mr. Pitfield to discuss the practice of Blott & Company and Honour Walk to systematically refuse church representation at hearings.

Tony Merchant was suspended by the Law Society of Saskatchewan for three months. He does not personally have any active claims in the IAP, but his firm does. Claimants are continuing to deal with their individual lawyers at the Merchant Law Group.

The Ontario Court of Appeal has ruled on the appeal brought by Duboff Edwards Haight & Shachter about adjudicators' legal fee review decisions. The appellate court confirmed that there is no appeal or judicial review of fee reviews. A request for directions to the supervising court is available in limited circumstances where the Chief Adjudicator or designate's decision reflects a failure to enforce the Implementation Orders or the Settlement Agreement.

7. Addition to the list of review adjudicators

The Chief Adjudicator requested the Oversight Committee's approval to add one name to the list of approved delegates to conduct 'correctness' reviews of adjudicators' decisions. The list was last amended on April 17, 2012.

- *Decision: The Oversight Committee approved the addition of an adjudicator to the list of delegates of the Chief Adjudicator authorized to conduct 'correctness' reviews of adjudicators' decisions.*

8. Meeting with the National Administration Committee regarding the application to the courts to extend the Completion Date

Mayo Moran reported on a meeting with the National Administration Committee held June 21, 2012. Mayo Moran, Dan Ish, Akivah Starkman and John Trueman attended on behalf of the Oversight Committee.

The primary purpose was to brief the NAC about the need for an extension to the completion date and the nature of the application that will need to be brought to the courts. The Adjudication Secretariat had prepared a discussion paper outlining the progress to date, caseload projections, measures proposed to facilitate completion, and risk factors. The meeting was very positive and helpful.

Committee members discussed who would bring the application to the courts. The sense of the committee was that the Oversight Committee or the Chief Adjudicator would retain counsel and make the application, but that the Settlement Agreement requires the unanimous approval of the NAC for a material change to the approval orders. Randy Bennett pointed out, however, that this was a unique situation not contemplated by the Agreement, which the courts might need to consider even if the NAC is not unanimous.

In response to a question, Akivah Starkman said that he anticipated the application would be brought in the autumn, after the final number of IAP applications is known. Randy Bennett said it could be brought as a full application or as a consent order if all the parties agree.

9. Truth and Reconciliation Commission - joint request for directions re disposition of records

Akivah Starkman reported on a meeting that he and John Trueman attended on June 22, 2012, with Tom McMahon and Julian Falconer of the Truth and Reconciliation Commission. It was a very positive meeting, and Mr. Falconer indicated that time might be available in September for mediation if the Oversight Committee were ready to proceed. Both the Oversight Committee and the TRC share a strong desire to keep the IAP issues separate from the TRC's dispute with Canada.

Akivah Starkman mentioned that he is still waiting to hear back from the TRC's Executive Director about any research needs the Adjudication Secretariat could assist with that do not affect claimant privacy.

The Oversight Committee has retained William McDowell of the Lenczner Slaght law firm to work with the TRC's counsel to develop questions to be put to the court. John Trueman will consolidate previous papers and discussions on this issue to be provided to Mr. McDowell for briefing purposes. It will also be circulated to Oversight Committee members.

Committee members also discussed the TRC's Saskatchewan National Event, held June 21-24 in Saskatoon.

10. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, September 25, 2012, in Toronto.