Independent Assessment Process Oversight Committee

Meeting of September 25, 2012
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
Caroline Clark	Government of Canada representative
Élisabeth Châtillon	Government of Canada representative
Les Carpenter	Inuit representative
Paul Favel	Assembly of First Nations representative

Also present

Randy Bennett	Court counsel *present for items 1 through 5 only*
Daniel Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Dan Shapiro	Deputy Chief Adjudicator; Chair, Technical Subcommittee *present for items 1 and 2 only*
Akivah Starkman	Executive Director, IRSAS
John Trueman	Senior Policy Advisor, IRSAS (recorder)

1. Farewell to Marielle Doyon

Élisabeth Châtillon distributed a farewell letter from Marielle Doyon, whose last day as Director General of Settlement Agreement Operations was the previous Friday, September 21. She has accepted a position in human resources at Public Works and Government Services Canada.

2. Report of the Technical Subcommittee

Dan Shapiro reported on the meeting of the Technical Subcommittee held September 24, 2012.

The subcommittee reviewed proposals on the resolution of incomplete claims prepared in anticipation of the forthcoming application to the courts to extend the September 19, 2013 completion date. Among other things, the application

will need to include a clear plan for resolving claims by a certain date: one element of that is to provide tools to address situations where claims are not moving through the system. At present, there is no mechanism for resolving an admitted claim without a hearing, negotiated settlement, or withdrawal.

The Adjudication Secretariat's paper addressed three issues: (1) a more intensive case management approach to be established within the Secretariat once admissions work winds down; (2) a 'reserved hearing process' to bring a case with incomplete mandatory documents forward to an adjudicator for hearing; and (3) a 'special resolution process' to bring a case to an adjudicator to deal with other issues.

The subcommittee achieved consensus that intensive case management work is required, but there was not consensus on whether the other processes should proceed. The biggest issue was whether more information and analysis was required on the nature of the cases causing delay. It was also suggested that implementation should wait until a new completion date is set, and work backwards from that date.

Randy Bennett indicated that the courts would want to know the type of claims a special procedure would be used for, why they should be subjected to special procedures, what procedures are proposed, and how they will ensure that claimants receive the full benefit of the settlement and not prejudice or compromise their rights. The court application will have to indicate the position of the Oversight Committee and the National Administration Committee.

Dan Shapiro suggested that there be further communication between the Adjudication Secretariat and court counsel as the application is put together.

An issue that arose from the draft paper was the withdrawal of claimant's counsel from a case and the suggestion that leave of the adjudicator be required. The principal concern is that the claimant's lawyer has the best information on how to locate the claimant, which the Secretariat will need if the claimant has not hired a new lawyer. It was suggested that this should proceed as a stand-alone item, and Dan Shapiro has undertaken to draft something for the next meeting.

The subcommittee discussed the master list of admissions related to student on student abuse. The Oversight Committee's decision in September 2010 was that after the application deadline, the Chief Adjudicator may release information from the master list to claimant counsel on such terms as he deems appropriate. The subcommittee was asked for advice as to how the Chief Adjudicator might exercise his discretion. Presently, the master list is only accessible to adjudicators.

Claimants' counsel were of the view that the master list should be made available to all counsel, and the only issue was whether it would be posted on the web site or in another medium. Canada is concerned that release of the master list could enable claimants to alter their evidence to match the admissions. Caroline Clark had requested more time to consult with staff and discuss the issue further with Kerry O'Shea and David Paterson.

Finally, the subcommittee discussed the over 65 pilot project. Originally, 514 claims had been identified for consideration. Of these, 161 claims remain in the pilot project, of which 74 hearings have been held. Other claims were removed from the project for a number of reasons, including 120 claims where hearing had already been scheduled, 70 where no response was received from counsel, 60 that were resolved through negotiation, and a variety of other reasons. One consequence of fewer claims remaining in the project is that the Adjudication Secretariat had set aside blocks of dates for hearings; when the claims did not proceed, it was too late to use those dates for other hearings.

Generally there has been very positive feedback on the file management process with early intervention by adjudicators. The jury is still out on whether more than one hearing could be scheduled per day. It is hoped that more evaluative information will be available by the October meeting.

It was pointed out that the pilot project's proximity to the September 19, 2012 application deadline may have affected participation.

3. Approval of minutes

The committee approved the minutes of the July 10, 2012 meeting as presented.

4. Key performance indicators

Akivah Starkman reported on the volume of applications in the week leading up to the deadline. By September 17 – two days before the deadline – 32,192 applications had been received. Approximately 4,300 applications have been received since then, although these preliminary numbers have not been verified. Applications continue to arrive that were postmarked by midnight on September 19.

It will be some time before the final number of admitted claims is known. Many applications filed at the last minute will require more information, and applicants will have 60 days to respond to the Secretariat's request for more information. If an application is not admitted, the applicant will have six months to appeal to the Chief Adjudicator or provide more information.

The Adjudication Secretariat has revised hearing targets for 2012-13 from 4,500 to 4,000 first claimant hearings. Three factors influenced this decision: (1) continuing staffing problems at both the Secretariat and Canada, where key areas are operating with a 30% vacancy rate; (2) availability of legal counsel, which has declined by 30% in the lead-up to the application deadline; and (3) the smaller size of the pilot project, which led to the loss of some hearing dates.

By August 31, five months into the fiscal year, 1,687 hearings were held including 53 pilot project hearings.

Akivah Starkman reported that he had worked with Élisabeth Châtillon to develop a joint strategy for staffing positions related to the Indian Residential Schools Settlement Agreement that provided more flexibility to fill positions during the current downsizing exercise in government. This culminated in a meeting with the Deputy Minister of Aboriginal Affairs and Northern Development and an agreement that will address some of these issues.

The rate of hearing postponements has declined, from up to 20% in 2011 to 11% in August 2012. In addition, postponement requests are being made earlier, which allows the hearing date to be used for another claim. Since implementation of the Guidance Paper on postponements, 317 requests for adjournments have been made; 11 were denied and 74 were approved with conditions.

A continuing problem is the cancellation of hearings when a negotiated settlement is achieved, especially since 72% of those cancellations happen within ten weeks of the hearing. Many legal counsel are unwilling to give up a hearing date until a settlement is reached. However, 99% of cases that go into the negotiated settlement process are resolved there. The Adjudication Secretariat intends to look at this issue jointly with the parties.

The rate of decisions remains problematic. The issue is mostly on the staff side, where there is currently a 50% vacancy rate in the unit that processes decisions.

The number of self-represented claimants has increased significantly, from 500 in April 2012 to 725 in early September; the number may be even higher in last-minute applications filed just before the deadline. This increase may be temporary: so far this year, 160 self-represented claimants have retained counsel.

5. Executive Director's report

Akivah Starkman distributed a document outlining key activities towards completion of the IAP.

The application for a court order to extend the completion date is expected to be made in the fall. Mayo Moran, Dan Ish, Akivah Starkman, and John Trueman

met with the National Administration Committee in June, and another meeting is scheduled for October 18.

The government has committed funding for a further four years, from 2012 to 2016. A further funding request may be necessary once requirements in later years are known. In addition, a submission will go forward by December 2012 to address barriers to the payment of adjudicators, Oversight Committee members, and independent legal counsel for the Chief Adjudicator.

The Adjudication Secretariat previously distributed a paper outlining efforts to promote awareness of the application deadline. These include the official notice program, phase 4 of which ran from March to May 2012 at a cost of $1.2 million. The Adjudication Secretariat's outreach program held 363 sessions in communities and care facilities using 19 person-years exclusively dedicated to outreach efforts at a cost of $3.5 million. The Secretariat contracted with the Assembly of First Nations to provide an application assistance service, with $160,000 spent. Since July, the Chief Adjudicator has given 11 media interviews on the deadline and 17 articles have appeared, including one picked up by Canadian Press that ran in over 300 online and print outlets.

The Secretariat has developed clear and consistent messaging around administration of the application deadline, beginning with a paper presented to Oversight Committee in February 2012, and two notices to counsel since that time. The info line remained open until 3:00am on the day of the deadline. After the application deadline passed, the web site was updated to remove the application form and references to applying. Applicants who submit claims after the deadline will receive letters indicating that applications cannot be accepted without leave of the court.

Élisabeth Châtillon asked about the circumstances in which a claimant could obtain leave of the court. Randy Bennett replied that while he could not comment on how leave would be granted in any specific case, in the past the judge has considered the case: if a legitimate issue prevented a claim being submitted on time, the judge is generally lenient; if the class member has simply not availed themselves of their rights, the judge has not been as lenient. In some cases, the judge decided against granting leave for any late cases. In any case, the courts will look at individual circumstances and try to come to a just solution.

In response to a question, Randy Bennett said that an application for leave can be made throughout the period the settlement is being administered. Claimants have the right to come to court to ask for relief, but whether their request is granted is a different matter.

Akivah Starkman mentioned that there were a number of article 12 requests to add schools to the Settlement Agreement that are still outstanding. The Adjudication Secretariat is putting mechanisms in place to be able to respond to the court's direction if necessary.

In terms of managing the caseload, considerable work had been done in 2011 to develop options for the Oversight Committee's consideration. The postponement policy has been implemented, as has the Interactive File Management System, which is now used by 126 law firms. Proposals for intensive case management and incomplete file resolution have been discussed by the Technical Subcommittee.

Randy Bennett left the meeting.

The Oversight Committee and the Adjudication Secretariat had committed to support the Truth and Reconciliation Commission's research needs in ways that did not affect claimant privacy. The TRC provided a detailed request at the end of August; the Secretariat has responded with an analysis of what can be provided now, what will require more work, and what is better sought from other sources.

The Chief Adjudicator's Annual Report for 2011 was published at the beginning of September.

Implementation of the court decision on Blott & Company has proceeded quickly. As of September 15, 2,361 claims had been assigned to new counsel, including 550 unsubmitted claims and 66 that had been deemed 'did not qualify' by Blott or Honour Walk. Most hearings have proceeded as scheduled: in July and August, 16 of 91 hearings were postponed; so far in September, 6 of nearly 50 hearings did not proceed.

Mr. Blott's counsel have filed an appeal of Justice Brown's decision, but no application for a stay of the decision has been made. As well, a number of other issues are to be dealt with in supplemental reasons which have not yet been issued.

A group called Eagle Vision, in cooperation with the National Film Board, have produced a film titled We Were Children. Akivah Starkman attended a pre-screening, and the film will debut at the Vancouver and Toronto film festivals. Élisabeth Châtillon said that Aboriginal Affairs is looking at purchasing copies and helping to distribute the film.

Élisabeth Châtillon said that the Oversight Committee and a number of other bodies had received a letter from the National Chief of the Assembly of First Nations regarding the application deadline and other issues. She has written a reply which she committed to distribute to Oversight Committee members.

Dave Iverson mentioned a letter from the Iroquois Caucus of Ontario to the Prime Minister, the churches, and others, which recommended an additional ten year extension of the application deadline.

David Paterson suggested that it might be appropriate to evaluate the effectiveness of the various notice and outreach efforts. Akivah Starkman said that the Chief Adjudicator and the Adjudication Secretariat remain neutral on the issue of the deadline. If the issue comes to court, the Chief Adjudicator will provide factual information on the efforts made but will allow the court to judge whether they were effective.

6. Chief Adjudicator's report

Dan Ish discussed the significant media interest related to the application deadline. One article, written by a northern newspaper, was picked up by Canadian Press, which edited the text to suggest the deadline was two days later than it actually was. The error was caught quickly and the Canadian Press corrected it in all the online versions.

In late August, the Chief Adjudicator released a document titled Expectations of Legal Practice in the IAP, which also received some media attention. It has been received positively by legal counsel and the Law Society of Saskatchewan has distributed it to all members.

Several court applications are anticipated in the coming months. The Assembly of First Nations has indicated that it has retained counsel to apply to reopen the application period. As well, claimants' counsel may make one or two applications concerning decisions of the Chief Adjudicator interpreting the Settlement Agreement.

7. Application to the courts to extend the completion date

Akivah Starkman outlined the work underway for the court application. Several issues have been flagged for discussion with court counsel, including who brings the application, where it should be filed, the degree of formality expected, and related issues.

The content of the application will need to include detailed data and projections, and outline the measures already taken, the challenges to full completion, and the tools being sought from the courts. A particular issue that came up at the June meeting with the National Administration Committee is the meaning of the word "processed" in Article Six of the Settlement Agreement.

Dave Iverson asked if March 2015 was still envisioned as the proposed date by which the final first claimant hearing would be held. Akivah Starkman said that the projections will need to be updated to reflect a lower rate of hearings in 2012-13, as well as any change from the estimated number of admitted claims that will need to be heard.

Mitch Holash asked if the application should allude to potential pressures that could impact the need for further extensions, such as additional schools added to the agreement or the AFN's application to extend the filing deadline. Akivah Starkman said the application might need to flag these items and perhaps provide estimates of the potential impact of those pressures. Advice from court counsel will be required.

8. Application to the courts regarding disposition of IAP records

Mayo Moran reported on a preliminary meeting held with Will McDowell in August 2012, attended by herself, Dan Ish, Akivah Starkman, and John Trueman. The primary purpose of the meeting was to provide background information to assist counsel in understanding the issues. Canada had also raised a potential conflict of interest issue, which has since been resolved.

In the course of the meeting, it became clear that understanding Canada's position on the records would be important to formulating an approach.

Caroline Clark said that ongoing litigation with the Truth and Reconciliation Commission has required Canada to crystallize its position on these issues. Canada is asserting that the Adjudication Secretariat's records are, in fact, Canada's records. The exception is decisions of adjudicators and the Chief Adjudicator, because of their independent function. However, Canada is taking the position that without the consent of claimants, these documents cannot be disclosed to the TRC.

Canada is presently in mediation with the TRC, which will resume on October 4 and 5. The court hearing has been adjourned pending the outcome of mediation.

Dan Ish said that the outcome of the mediation, and particularly which records Canada proposes to disclose to the TRC, would be important in developing his own position as Chief Adjudicator.

In response to a question, Élisabeth Châtillon said that the TRC's general position is that Canada should hand over absolutely everything. Canada responds that that is not possible because some documents are not relevant, and that relevant documents must be reviewed by the Department of Justice for cabinet privilege, solicitor client privilege, implied undertaking, and privacy issues. Canada has given the TRC over a million documents from Aboriginal Affairs and a number of other departments.

Mitch Holash referred to the basic principles discussed at the October 2011 Oversight Committee meeting, and asked whether Canada has considered the Oversight Committee's view of appropriate principles in developing its position. Caroline Clark said that she would look into the matter further.

9. Stained glass artwork on residential schools

Élisabeth Châtillon distributed a document depicting the artwork for the stained glass window on Indian Residential Schools that will appear above the door of the House of Commons. The artwork was unveiled in June 2012 and is presently being built in a studio in Peterborough, Ontario. It will be installed in October and unveiled by the Prime Minister in November.

10. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, October 30, 2012, in Toronto.