Independent Assessment Process Oversight Committee

Meeting of October 30, 2012
Toronto, ON

Minutes

Members present

Mayo Moran	Chair
Mitch Holash	Church representative
David Iverson	Church representative
David Paterson	Claimant counsel representative
Caroline Clark	Government of Canada representative
Les Carpenter	Inuit representative
Paul Favel	Assembly of First Nations representative

Attending by teleconference

Aideen Nabigon	Government of Canada representative
Kerry O'Shea	Claimant counsel 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	Senior Policy Advisor, IRSAS (recorder)

1. Report of the Technical Subcommittee

Dan Shapiro reported on the meeting of the Technical Subcommittee held October 29, 2012.

Withdrawal of counsel

The subcommittee proposed that the Oversight Committee adopt the draft Chief Adjudicator's Directive 10, on withdrawal of counsel. The proposed directive does not require a lawyer to obtain leave from the adjudicator before withdrawing, but does ensure that claimants are served with notice and the Secretariat has sufficient information to contact the claimant and respect any privacy requirements. Before withdrawing, the lawyer would need to provide a certification of what steps he or she has taken to notify the claimant.

The draft directive was placed on the agenda for consideration later in the meeting.

Over 65 pilot project

Dan Shapiro provided a report on the over 65 pilot project. There have been 125 pilot project hearings held or scheduled to date, in Yellowknife, Vancouver, Calgary, Saskatoon, Winnipeg, Thunder Bay, Val D'Or, and Quebec City. Six weeks of hearings were cancelled because claimants' counsel were unavailable – a significant issue in the lead-up to the application deadline.

Initially, 569 files had been identified as potential candidates for the pilot. 411 were removed for various reasons, including becoming ready for hearing in the normal process (125), the immediate scheduling of hearings for claimants over age 80 (51), no response from counsel (70), removed by counsel (61), removed to negotiated settlement process (25), and a number of other reasons.

As of October 17, 2012, 89 hearings had been held. Of these, 35 were resolved through short form decisions, 10 regular decisions have been issued, 41 cases are awaiting for decisions, 1 was settled through negotiation after the hearing, and 3 required further hearings to be scheduled.

Several aspects of the pilot project worked well, especially the use of case management teleconferences, which prompted earlier document submission, engaged Canada's representatives earlier, and helped identify cases for possible negotiated settlements. The case management and scheduling approach worked best for legal counsel with high volumes of files. Setting immediate hearings for claimants over age 80 was also a positive outcome.

Many participants indicated that holding two hearings per day was not sustainable: it placed more pressure on representatives, and raised concern that some claimants might have felt under time pressure and not told their story fully. It was difficult to predict in advance which hearings could be completed in a half day and which required a full day. The case management process required more preparation time by adjudicators; one adjudicator said it added 30% to the time required. As well, the teleconference process was challenging with self-represented claimants.

Suggestions for further work included the use of case management approaches to hold more full weeks of hearings. For example, when three claims from a lawyer are scheduled for hearing in a week, work could focus on identifying two more claims from the same lawyer to help fill out the week. The use of adjudicative case conferences is also under consideration as part of the strategy for resolving incomplete files.

Akivah Starkman explained how the financial procedures imposed on the Adjudication Secretariat by the government limited the Secretariat's ability to adapt to changing circumstances. When some pilot hearings could not go ahead, there was too little time to schedule other hearings at those times, which led to the loss of some hearing dates. The Secretariat has put forward a number of proposals for increased flexibilities for section 32 travel approvals but have not received a favourable response from government to date.

Mitch Holash pointed out that of the 500 claims initially identified, 120 went into the normal stream, 125 were scheduled for hearings in the pilot, 51 had immediate hearings because they were over age 80, and a further number were settled through negotiation – meaning that altogether, over 300 of the 500 claims identified were given priority through this initiative.

Kerry O'Shea suggested that some thought be given to the size of the group. The ADR pilot projects were limited to about 60 people.

Future care

The subcommittee discussed a memorandum sent by a Deputy Chief Adjudicator about future care, which indicated the kinds of counselling services covered by Health Canada. The concern is that if counselling costs are paid elsewhere, the adjudicator should take this into account when assessing the cost of care.

A related issue is finding reliable information about which programs are in danger of losing their funding from the Aboriginal Healing Foundation, and when that will occur. Some counsel are uncertain whether to request only travel expenses, or the full cost of the program.

Aideen Nabigon said that she had recently spoken to the Executive Director of the Aboriginal Healing Foundation, and offered to circulate a list of the 11 healing centres open across the country, and when their funding will end.

Admissions of staff knowledge of student on student abuse

The subcommittee continued its discussion on admissions of staff knowledge of student on student abuse. The Oversight Committee decided in September 2010 that after September 19, 2012, the Chief Adjudicator would have discretion to decide on releasing information from the master list of admissions, which only adjudicators have access to at present. Advice was sought from the subcommittee on how this discretion should be exercised, but the parties are not on common ground. Caroline Clark is working on options that would be acceptable to Canada but was unable to finalize them in time for the meeting.

The Chief Adjudicator has a number of files awaiting his attention that raise this issue. Dan Shapiro had suggested a tight timeline, but the parties have expressed a willingness to engage in bilateral discussions on this. The idea is to hold a meeting within one or two weeks, and the Secretariat will provide a resource person if required.

Dan Shapiro pointed out that if Canada is looking to place limitations on the distribution of the master list, it will be important to point out why those limitations are needed, and if they involve costs, to identify how those costs would benefit the participants in the IAP.

In response to a question, Dan Shapiro said that the admissions are drafted quite broadly, and do not name a particular individual. However, it sometimes becomes an issue where counsel request staff lists to identify whether the same principal or senior administrator was in place.

Dan Ish said that this was an interesting and welcome development. He urged the parties to keep moving on this issue, which has been around for years, so that it is resolved quickly.

Resolution of incomplete files

Finally, the subcommittee discussed proposals for the resolution of incomplete files. Dan Shapiro had drafted material for an approach involving three steps: (1) intensive file management conducted administratively by the Secretariat; (2) adjudicative file management to work with the parties to come up with solutions and timetables, and incorporating some of the positive outcomes of the pilot project; and (3) if neither process is successful, referral to a special hearing adjudicator, who would have a number of authorities including granting more time if appropriate, establishing timelines, offering a hearing date at a lower level of harms and opportunity loss than claimed, and ultimately dismissal of the claim if there is no realistic prospect of it proceeding to hearing. Ultimately, these authorities would need to come from the supervising courts.

Another suggestion offered at the subcommittee was the ability of an adjudicator to remove a claimants' counsel from a file if the counsel were found to be the cause of delay. Other ideas are welcomed.

The key issue is whether it is premature to move forward without detailed information on the exact problem holding each file up. One view is that the plan should not to rush forward at this point, while the other is that we should be proactive in defining the kinds of authorities that will need to be in place to deal with issues as they are identified.

The subcommittee members resolved to return to the next meeting, on December 3, with constructive proposals and suggestions. Dan Shapiro indicated that his

goal is to further develop and refine the policy to the point where it can be included in the package to the court on completion of the IAP.

2. Approval of minutes

The committee approved the minutes of the September 25, 2012 meeting with minor corrections.

3. Key performance indicators

Akivah Starkman highlighted some key items in the reports distributed before the meeting:

- Hearing targets are back on track after a difficult summer. Staffing issues are being rectified and claimant counsel availability is recovering. The Secretariat believes the revised target of 4,000 first claimant hearings is attainable this year.
- The percentage of postponements is tracking around 14%, which matches the Secretariat projections used for hearing scheduling. This rate includes postponements related to the Blott transition and the application deadline. It remains well below the rate prior to implementation of the postponement policy.
- Decision processing remains short of targets, almost entirely due to staff shortages.
- The percentage of hearings resulting in short form decisions remains consistently about half of all decisions.

The Adjudication Secretariat and Crawford continue to process the volume of applications received in the week leading up to the deadline. The Secretariat has not provided application numbers to the media or posted them on the web site while the applications are carefully verified to ensure that duplicates and resubmissions are properly accounted for. At latest count, the total applications accepted exceeded 35,000 – well above the 29,700 forecast.

Akivah Starkman pointed out that the bulk of the workload is driven by the number of admitted claims, which will take several months to determine. If an application is incomplete, claimants will have 60 days to provide missing information from the date of the request. If a claim is then refused admission, the claimant will have six months to provide more information or appeal to the Chief Adjudicator. Because of the urgency around the application deadline, the

Secretariat expects a relatively high percentage of last-minute applications will require more information.

4. Executive Director's report

Akivah Starkman reported that the Blott & Company transition has proceeded quickly, and counsel has now been assigned to all of the approximately 3,000 Blott claimants. Mr. Pitfield is presently dealing with about 100 situations where claimants had retained their own counsel around the same time that Mr. Pitfield was recommending counsel.

Operationally, the percentage of cancelled hearings for Blott claimants is around 18% -- somewhat higher than the average. Postponements are driven primarily by two factors: (1) successor counsel who are unable to contact the claimant in advance of the hearing, and (2) successor counsel who found, in discussions with their new clients, significant discrepancies between the claimant's statement and what was recorded on the application form.

5. Chief Adjudicator's report

Dan Ish reported that Catherine Knox, who had been selected as a Deputy Chief Adjudicator at the September 25 meeting, now has a contract in place and is taking on her new duties.

Further to Akivah Starkman's announcement in September that he will be leaving the Executive Director position at the end of the year, the Chief Adjudicator has been working with the Deputy Minister and Associate Deputy Minister of Aboriginal Affairs and Northern Development Canada to search for a replacement. The position is currently posted internally within government, but can be opened up to the general public if necessary.

6. Meeting with the National Administration Committee

Akivah Starkman reported on the meeting with the National Administration Committee held on October 18, 2012, and attended by Mayo Moran, Dan Ish, Akivah Starkman, and John Trueman. The meeting was an opportunity to update the NAC on developments since June. As well, discussions leading up to the meeting helped clarify a few issues.

The court application will be more helpful if it provides clarity about the number of claims actually admitted, not just received. This number will not be known until mid-2013. Akivah Starkman said that his sense is that we should start working immediately to frame the report to the courts, but wait to file it until we

have a lot more clarity on the number of claims admitted and projections of how long it would take to hear them.

Dan Ish observed that for several years we have operated on the premise that the Settlement Agreement says that things come to an end in September 2013. In fact, there is a strong clause in the Agreement saying that all cases in the system have to be dealt with. The September 2013 clause talks about Canada's obligation to provide resources, which Cabinet has already done. He offered his view that we should go to the court, but with a plan outlining how we are going to bring the IAP to completion.

The Chief Adjudicator pointed out that we will need court authority to wind down incomplete files. There will be claims – hopefully not many – that will need to be signed off on before the IAP can be concluded. Work on this process is underway at the Technical Subcommittee.

In response to a question, Randy Bennett summarized the status of Article 12 applications currently underway to add schools to the Settlement Agreement. As well, the Assembly of First Nations has given notice that they plan to make an application to extend the IAP application deadline, but no request for directions has been filed. He said that a report to the courts in 2013 would be fine, and that no special interim report is required. The Chief Adjudicator pointed out that he already reports to the courts quarterly.

7. Dates for future meetings

Mayo Moran referred to a list of proposed meeting dates distributed before the meeting, and asked members to report any serious conflicts to John Trueman within two weeks.

8. Proposed Chief Adjudicator's Directive on Withdrawal of Counsel (CAD-10)

- *<u>Decision:</u> The Oversight Committee approved Chief Adjudicator's Directive 10 (CAD-10) – Procedures for withdrawal of counsel in the IAP, as proposed by Technical Subcommittee.*

9. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, December 4, 2012, in Vancouver.