

## Independent Assessment Process Oversight Committee

Meeting of May 6, 2014

Toronto, ON

### Minutes

#### Members present

Mayo Moran	Chair
Les Carpenter	Inuit representative
Caroline Clark	Government of Canada representative [alternate]
Karen Cuddy	Government of Canada representative
Paul Favel	Assembly of First Nations representative
Mitch Holash	Church representative
David Iverson	Church representative
David Paterson	Claimant counsel representative
Diane Soroka	Claimant counsel representative

#### Also present

Kaye Dunlop	Deputy Chief Adjudicator; Chair, Technical Subcommittee <i>present for item 1 only</i>
Michael Mooney	Court Monitor, Crawford Class Action Services
Daniel Shapiro	Chief Adjudicator
Shelley Trevethan	Executive Director, IRSAS
John Trueman	Senior Policy and Strategic Advisor, IRSAS (recorder)

#### 1. Report of the Technical Subcommittee

Kaye Dunlop reported on a meeting of the Technical Subcommittee held May 5, 2014.

The management of student on student claims project is well underway. Most remaining student on student claims are from five firms, three of which have capacity challenges. Success of the project will depend on Canada's participation, which has been strong so far, and claimants' counsel, whose participation is mixed. The number of cases in the project has dropped by half from the numbers reported in fall 2013, because many claims have moved forward on their own. Phases one and two will be finished by the end of August, if there is cooperation from claimants' counsel.

The Chief Adjudicator has asked Kaye Dunlop to oversee implementation of the Incomplete File Resolution procedure. A team at the Secretariat has been

coordinating planning. A significant issue is expected to be claimants with capacity issues. An existing project, for “claimants who struggle to self-represent,” has helped gather information on successful approaches for claimants with physical or mental disabilities. Other situations expected to enter IFR include estate claims, lost claimants, and withdrawals of claims before a formal policy was adopted in GP-8.

The Secretariat is continuing to investigate possible expansion of the Electronic Document Interchange system to enable claimant counsel to securely upload items. Presently, claimant counsel submit mandatory documents and other items by email, fax, or mail.

From time to time, complaints arise that one of Canada’s admissions of staff knowledge of student on student abuse is not broad enough, does not match the decision it was derived from, or does not exist where a decision warrants one. Canada will create a generic email address that can be used by claimant counsel for bilateral discussions of these issues.

Canada reconfirmed its decision to require a Schedule P non-resident claimant release from all claimants who did not live at a residential school, regardless of whether the Common Experience Payment was previously paid to that individual. Canada has agreed that represented claimants can sign the release at their hearing with the assistance of their legal counsel. Sometimes, a self-represented claimant arrives at a hearing and requires a Schedule P. In such cases, Canada is agreeable to the adjudicator explaining the meaning of the document to the claimant. If the claimant does not sign the Schedule P, the hearing will be completed, but the Schedule P will need to be signed before a decision is issued.

At the previous meeting, the issue of missing quarterly returns from St. Philips and Beauval IRS was discussed. The Truth and Reconciliation Commission had discovered documents at Library and Archives Canada that were not previously in Canada’s collections. Canada is continuing its review of IAP claims that may have been affected by missing records, and will advise the Technical Subcommittee of its findings.

A number of issues have arisen relating to school narratives, including how they are updated, why documents are added and removed, and the need to bring changes to the attention of the parties. At the June 9 meeting of the Technical Subcommittee, Canada will bring a representative from Aboriginal Affairs and Northern Development Canada to discuss these issues. Last month, Line Paré committed that Canada will flag new documents in future revisions of the narratives. This is important for claimants’ counsel and adjudicators who otherwise would not be aware of changes. It was agreed that Canada would provide information on how this will be done in the future.

The issue of school yearbooks was put over to the next meeting, as Canada is still consulting on whether it can disclose school yearbooks and how to redact them.

The Oversight Committee had asked the Technical Subcommittee to discuss self-represented claimants affected by the St. Anne's IRS court decision. There are 50 self-represented claimants who attended St. Anne's IRS, of which 22 have not yet had a hearing. No self-represented St. Anne's claimant has received a zero dollar award. In total, 216 IAP claims from St. Anne's have been resolved, of which 11 received no compensation.

Shelley Trevethan said that Adjudication Secretariat staff contacted all self-represented St. Anne's claimants by telephone to convey the same messages that had been provided to legal counsel. The Secretariat is now preparing a more formal written notice to self-represented claimants, and will provide it to Diane Soroka for comment.

## **2. Approval of minutes**

The committee approved the minutes of the April 1, 2014 meeting with minor amendments.

## **3. Key performance indicators**

Shelley Trevethan discussed some key statistical indicators:

- Of the almost 38,000 applications received, 33,100 have been admitted and 3,614 (about 10%) not admitted. About 1,100 applications are awaiting an admissions decision.
- About 5,000 cases are waiting for mandatory documents, a number that continues to drop.
- Almost 21,000 hearings have been held, including 4,201 hearings held in 2013/14.
- The supply of hearing-ready cases is of some concern, and the number of cases waiting for scheduling has declined to about 300.
- About 1,900 cases are awaiting a decision after a hearing.
- Over 27,000 cases have been resolved, about 72% of all claims. There are 10,700 claims still in progress, which includes post-hearing claims. Almost 8,000 claims have yet to be heard: 1,400 are scheduled for hearing, 5,400 are admitted but no hearing has been scheduled, and 1,100 are awaiting admission.
- About \$2.4 billion in compensation has been paid.

- About 31% of the remaining cases are from Saskatchewan.

Members discussed whether the compensation amount could be adjusted to remove disbursements, Canada's contribution to legal fees, and legal fees paid by the claimant, in order to more clearly show what claimants have actually received. Shelley Trevethan said she would look into whether this information is available.

Dave Iverson asked about zero-dollar awards. Several points were made:

- The number of zero awards is increasing, and is above 10% of all decisions now. Reasons include more credibility and reliability challenges at hearings, and more jurisdiction and 'years of operation' challenges.
- It is hard to know whether more difficult cases have naturally gravitated towards the end of the process, or if parties are taking tougher positions than they would have taken previously.
- It was suggested that the IAP should guarantee consistency, and the application of the IAP not be changed to the detriment of a claimant.
- The Chief Adjudicator said that there are issues of temporal fairness in the IAP. In the case of student on student claims, those who went through the process first were disadvantaged. In the case of schools where the years of operation are in dispute, those who have come later were disadvantaged.
- There are some safeguards in the process, but the standard for review – palpable and overriding error – is a high threshold to meet.

#### **4. Executive Director's report**

Shelley Trevethan provided information on deceased claimants requested at the previous meeting. There are 249 claimants who have passed away before being admitted, 590 who passed away after being admitted but before their hearing, and 281 who have passed away post-hearing. In total, almost 800 claimants (about 2%) have passed away prior to a hearing.

The Secretariat is working on a number of issues related to health supports. In February a concern was raised that Health Canada would not pay for an Elder and a Resolution Health Support Worker at the same hearing. Health Canada has now confirmed that they can provide both, depending on the claimant's wishes.

In mid-April, an issue arose regarding Health Canada's ability to provide a health support worker for hearings in the United States. Health supports have been arranged for an upcoming hearing in June, but discussions will continue to ensure a long-term solution for hearings held outside Canada.

In March, Justice Sinclair of the Truth and Reconciliation Commission stated in a media interview that Canada was ending the health support program. Health Canada responded that this is not the case. Like the Adjudication Secretariat and Aboriginal Affairs and Northern Development Canada, funding is in place to 2015/16, and work will be taking place to secure additional funding to the end of the IAP. Health Canada has committed to providing health support services as long as the IAP is operating.

Finally, the BC First Nations Health Authority has taken over delivery of the health support program in British Columbia. The Adjudication Secretariat has signed a Memorandum of Understanding with FNHA in order to continue providing information that will enable them to support hearings.

The Adjudication Secretariat operates a Group IAP contribution program that enables former students to fund healing and reconciliation-related activities. Program funding was expanded to \$650,000 in 2013/14 and was fully subscribed. For the 2014/15 fiscal year, the Secretariat held a call for proposals and received 25 proposals, of which 14 were selected for funding. Funded activities include facilitated workshops, counselling and therapy, traditional ceremonies and gatherings, and traditional activities such as feasts or star blanket making.

## **5. Report on process improvements**

Shelley Trevethan presented a report commissioned by the Adjudication Secretariat that examined work done since implementation to improve efficiency and/or the claimant experience. Monique Bond, who was Interim Executive Director of the Secretariat from 2007 to 2008, identified 92 process improvements and reported in detail on those that were seen as key improvements. The report will be one of the inputs to the IAP Final Report.

Committee members expressed their appreciation for the excellent work.

## **6. Chief Adjudicator's report**

Dan Shapiro shared a recent anecdote about a claimant who needed an urgent hearing in the James Bay area a couple of weeks earlier. After receiving notice on a Friday afternoon, the Secretariat found an adjudicator, Michael Bay, who was available to attend. With no commercial transportation available, the Adjudication Secretariat arranged a charter flight for the adjudicator, Canada's representative, and a health support worker to fly to James Bay and conduct the hearing on a Saturday. The adjudicator heard submissions on Sunday and submitted his decision on Monday, which was released by the Secretariat on Monday afternoon. The Chief Adjudicator acknowledged the efforts of everyone who worked together to make this happen.

Dan Shapiro has received further communication from the National Administration Committee on the list of claimant counsel. The NAC had decided not to update the list after all, but rather to remove it from the court web site, which is of no help to self-represented claimants who need legal help. Members discussed several possible approaches:

- David Paterson recalled an Oversight Committee decision in 2010 to recommend lawyers who undertook to adhere to the Canadian Bar Association guidelines.
- The issue was raised of what to do with lawyers who committed to adhere to the guidelines but did not abide by them.
- It was suggested that the Adjudication Secretariat should not be required to recommend lawyers who have been sanctioned by a Law Society.
- Many lawyers are no longer practising in the IAP, or not taking new clients. It was suggested that the list only include lawyers who are willing to accept referrals.
- It was suggested that the list should not include firms with identified capacity issues.

The regional adjudicator meetings took place in April in Vancouver and Montreal. Each meeting lasted for two full days and covered numerous topics, and included a lunchtime speech from former Chief Justice Winkler of Ontario, who also participated in a panel on review writing. The sessions received much positive feedback from adjudicators.

For 2015, the Chief Adjudicator is considering holding a single national meeting, probably in Winnipeg. There may be an opportunity to collaborate with the Canadian Museum of Human Rights, which will have a large wing devoted to Aboriginal issues.

In conjunction with the regional meetings, the Chief Adjudicator held focus groups for Aboriginal adjudicators, which attracted nine adjudicators in each city. Attending adjudicators appreciated the opportunity to meet together as a group and expressed the need to continue to do so in the future. Many spoke bluntly about the challenges that all adjudicators face, particularly administrative challenges where many Aboriginal adjudicators work from home and do not have administrative support. There was interest in a program of mentoring or partnering with an Aboriginal colleague.

Adjudication Secretariat staff are preparing a package for all claimants' counsel which will include the Secretariat's DVD, *Telling Your Story: the Indian Residential Schools Independent Assessment Process*, as well as a brochure on the role of the churches in the IAP.

## **7. Manitoba form fillers**

Dan Shapiro reported on the 'pilot case' hearing held before Justice Schulman in Winnipeg on April 25. The lawyer involved in the pilot case, Ken Carroll, has at some points had about 500 claims in the IAP. He filed an affidavit saying that the two claimants who provided affidavits to the Chief Adjudicator are the only two he knows of who ever paid any money to form fillers. He also claimed to have no idea about the coercive tactics used by form fillers, and once he found out, he paid these two clients back out of his own money. One other lawyer who was served with the RFD retained counsel to make submissions. No form filling agencies were represented at the hearing.

Canada took the position that while it was concerned with the practices of certain form fillers, it respected the autonomy of First Nations people to make their own contractual choices. The Court Monitor also expressed concern with the practices but noted that Justice Brown did not deal with third party agencies in the Blott case. Kareena Williams of Peter Grant's office gave a very clear and unequivocal presentation on behalf of Independent Counsel, who believe these practices are offensive and unethical and should be stopped by the court. The Assembly of First Nations said that they were concerned with the practice of form fillers operating on contingency, but they were supportive of the role that form fillers played in improving access to the IAP in remote communities.

Dan Shapiro said his position was that form fillers are essentially agents, working closely with lawyers, and they should not escape the scrutiny of the legal fee process. Another issue is whether non-lawyers can charge contingency fees. He noted there was considerable media interest in the case.

Karen Cuddy said a strong pillar of Canada's position is that any contracts facilitated by counsel would be void, and are not permitted under the Settlement Agreement. Canada was also concerned about due process for lawyers accused of wrongdoing.

Dan Shapiro said that his counsel circulated a draft order to the other parties for consideration. Rather than suggesting a full investigation, the order would put the onus on lawyers served with the Request for Directions to provide a statutory declaration to the Court Monitor within 30 days, following which the Court Monitor would report to the court on any irregularities.

## **8. Completion Strategy**

Dan Shapiro circulated two draft orders prepared by his counsel and reviewed by Court Counsel Brian Gover. The first order approves the Incomplete File

Resolution procedure and the second provides the necessary authorities to locate lost claimants.

In response to a question, Dan Shapiro said that the orders were drafted as consent orders to be signed by the Chief Adjudicator, the Chair of the National Administration Committee, and the Chair of the IAP Oversight Committee, on behalf of those bodies which have already unanimously approved the two documents.

It was suggested that the orders should refer to the consenting “bodies,” not “parties.”

Karen Cuddy indicated that Canada’s representatives will require further time to obtain instructions.

- Decision: The Oversight Committee approved the draft orders for the Completion Strategy and authorized Mayo Moran to sign them, subject to Canada’s approval to be communicated as soon as possible.

## **9. Correspondence regarding St. Anne’s IRS**

Mayo Moran referred to correspondence circulated before the meeting from Edmund Metatawabin of the Peetabeck Keway Keykaywin Association, which requested that the Oversight Committee conduct an investigation into Department of Justice Canada lawyers involved in the withholding of documents related to St. Anne’s IRS.

Mayo Moran agreed to circulate a draft reply for the committee’s consideration.

## **10. Next meeting**

The next Oversight Committee meeting is scheduled for Tuesday, June 10, 2014, in Vancouver.