

Independent Assessment Process Oversight Committee

Meeting of October 28, 2014

Vancouver, BC

Minutes

Members present

Mayo Moran	Chair
Les Carpenter	Inuit representative
Karen Cuddy	Government of Canada representative
Paul Favel	Assembly of First Nations representative
David Iverson	Church representative
Line Paré	Government of Canada 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>
Daniel Shapiro	Chief Adjudicator
Shelley Trevethan	Executive Director, IRSAS
John Trueman	Senior Policy and Strategic Advisor, IRSAS (recorder)

Regrets

Mitch Holash	Church representative
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1. Report of the Technical Subcommittee

Kaye Dunlop reported on the meeting of the Technical Subcommittee held October 28, 2014.

The student on student admissions project is moving along more smoothly, with a shift in focus. Now, individual cases will be targeted which have the best chance of generating admissions that will benefit other cases.

The project will no longer rely on the voluntary participation of claimants' counsel. The Technical Subcommittee has agreed that the Adjudication Secretariat will identify the cases that need to go forward, and they will be set down for a teleconference with an adjudicator specially trained for the project.

Work is underway for the many components of the completion strategy, including the Accelerated Hearing Process, Intensive Case Management, Lost Claimants Protocol, Estate Claims, and Incomplete File Resolution.

The Technical Subcommittee discussed expedited hearings, which are held when the claimant provides medical evidence that there is a significant risk they may die or lose the capacity to provide testimony. The subcommittee has asked the Secretariat to consider adopting a more flexible policy towards “medical evidence” in cases where claimants are elderly.

Shelley Trevethan said that the current approach was adopted to ensure the Secretariat’s limited capacity to arrange expedited hearings was applied where it was most needed, and to curtail abuse by certain counsel.

Canada was unable to provide an answer on whether it would provide a list of residential school yearbooks in its possession. This will be revisited at the December meeting.

The Electronic Document Interchange pilot project for claimants’ counsel has concluded and implementation of full sending capabilities for all law firms is underway. This will provide significant security improvements over the current practice of sending confidential information by email. The Secretariat is also considering whether representatives of Canada could upload documentation by EDI related to reviews and appeals.

Canada is working with the Secretariat to place school narratives on the decision database for access by claimant counsel and others. Work is also underway to make it easier for readers to determine when documents have been added to a narrative. Kaye Dunlop, David Paterson, and Deanna Sitter will meet before the next Technical Subcommittee meeting to discuss this further.

At the last meeting, Canada had undertaken to do a number of things related to the redaction of St. Anne’s IRS documents:

- Canada considered whether to provide staff names unredacted in the St. Anne’s narrative and supporting documents.

Canada has determined that it will not change its current practice, as it wants to be consistent with all other school narratives. However, when a staff member is named in a particular case – at St. Anne’s or any other

school – information for that staff member is provided in a POI report and supporting documents, with the individual’s name identified.

- Canada considered whether it could unredact witness names and witness statements.

Canada determined that it cannot unredact witness names because this would be contrary to Schedule D, Appendix VIII, which specifically protects the names of witnesses.

- Canada considered unredacting the criminal transcripts that are part of the narrative.

The documents at issue relate to five alleged perpetrators. Canada has possession of criminal proceedings transcripts for these individuals. However, Canada has determined that it will produce unredacted documents only if they are presently available to the public.

In two cases, the original recordings are no longer available, as more than ten years have passed since they were created. In one case, Canada is still making inquiries of the transcriptionist as to whether a transcript could be available. In two other cases, recordings are available. Canada committed to provide its position at the next meeting.

Claimant counsel did not agree with Canada’s position that it would not provide transcripts it holds in unredacted form if they are no longer available to the public.

Karen Cuddy said that civil documents, specifically discovery transcripts, had also been mentioned. She said that many discovery transcripts are captured by settlement privilege and promises of confidentiality, and cannot be disclosed. An exception are the transcripts of plaintiffs who enter the IAP, whose transcripts enter the IAP under Schedule D, Appendix XI.

The Technical Subcommittee discussed the timeliness of review and re-review decisions. The subcommittee agreed that some adjudicators are providing late decisions, for a number of legitimate reasons. The Chief Adjudicator’s Office is doing all it can to speed up the process.

Kaye Dunlop said that the number of review and re-review requests is increasing, and adjudicator resources needed to address the issue are immense.

An issue was raised in a particular case about an interpreter. The subcommittee discussed the work that the Secretariat has done to improve the quality of hearing interpretation, including an Interpreter Liaison and development of an

Interpreter roster, an extensive interpreter handbook, a code of conduct for interpreters, and a tip sheet for adjudicators. As well, a mechanism has been created for adjudicators and counsel to provide feedback on the quality of individual interpreters.

2. Approval of minutes

The committee approved amendments to the minutes of the June 10, 2014 meeting.

The committee discussed the draft minutes of the September 9, 2014 meeting. A discussion arose as to the precise decision reached on the question of providing a list of lawyers to self-represented claimants.

The committee approved the minutes of the September 9, 2014 meeting with amendments to the decision related to this item.

3. Key performance indicators

Shelley Trevethan explained that increasingly, the Secretariat's reporting focus is not just on hearings but on claims resolved. A new section was added to the statistical report to show claims resolved during the fiscal year.

Shelley Trevethan discussed a number of performance indicators:

- About 33,500 claims have been admitted to the process. 3,801 claims have not been admitted. Of the 664 claims awaiting admission, almost half are deceased or have lost contact with their lawyer and/or the Secretariat.
- The number of claims awaiting mandatory documents has declined by about 500, to 3,351.
- Only 141 claims are available to be scheduled – one of the lowest numbers in the Secretariat's history. There are a further 287 hearing-ready claims that are on hold for a number of reasons, including possible negotiated settlements, the claimant passing away, or holds at the claimant's request.
- 22,943 hearings have been held since implementation, including 2,094 hearings held this fiscal year.
- The small number of claims available for scheduling is causing difficulty meeting hearing targets. 1,094 hearings (97% of target) were held in the April-June quarter and 1,000 hearings (89%) in the July-September quarter. At present, 1,096 hearings are scheduled for the final two quarters of the fiscal year.

- 29,438 claims have been resolved since implementation, including 2,981 this fiscal year.
- 8,496 claims (22%) remain in progress. Of these, 6,251 have not yet had a hearing.
- \$2.55 billion in compensation has been paid.

Members discussed the impact of reduced hearing numbers on completion of the IAP. Shelley Trevethan said that it is still possible to finish all first claimant hearings by spring 2016. While the target for 2014-15 was 4,500, and likely will not be met, the target for 2015-16 was just over 2,000, which provides some flexibility. A number of initiatives are in place to bring cases to hearing more quickly, but they depend on claimant counsel for success.

Line Paré said that Canada has the capacity to attend hearings at present, but it has started to communicate to its employees about the winding down of the organization. Retention of staff is a significant risk.

Shelley Trevethan said that in her meetings with claimant counsel, she provides an analysis of their caseload, and the stage of those yet to be heard. She has also raised the possibility of simply scheduling hearings for all of their remaining cases. Many claimant counsel have responded very positively to this idea. It will be important to ensure this does not simply lead to more postponements.

Shelley Trevethan said there are seven law firms that she has serious concerns about. One firm would need to attend 15 additional hearings every month in order to complete on time.

She noted that it appears that fewer claims than expected may require hearings. Examples include cases where the claimant has passed away, has lost contact with their lawyer, or intends to withdraw.

Diane Soroka asked if the Secretariat tracks the success rate of claims. Shelley Trevethan said that she could provide an analysis.

Line Paré said that Canada had resolved 267 claims through negotiated settlements between April 1 and October 12, 2014 – only 65% of their target for this point in the year. She said that Canada is reallocating resources in order to catch up and meet the goal of 708 negotiated settlements this year.

Line Paré discussed her agreement to provide funding to Corrections Canada to speed the production of mandatory documents. They have 379 active files, of which 70 have been dealt with since the end of September. The project will continue until January 2015, with regular monitoring by Line Paré's team.

Shelley Trevethan mentioned that some health authorities are also having difficulty providing mandatory documents, and the Secretariat has had discussions with Health Canada about providing assistance. One health

authority with a significant backlog allows lawyers to pay for documents only once counsel receives disbursements from Canada, which may be a year or more after the documents are produced. Most agencies require payment before records will be released.

4. Executive Director's report

Shelley Trevethan reported on initiatives underway in the Secretariat:

- The Secretariat has undertaken a big project to inform self-represented claimants of the benefits of hiring a lawyer. Staff communicated with 600 claimants, and 240 decided to retain counsel. The high number of self-represented claimants – about 1,600 – is of concern. Only about 30% are active files, however. 13% indicated an intention to withdraw, 18% are deceased, 23% have lost contact, 10% have not yet been admitted, and 6% have a hearing held or scheduled.
- The first step under the lost claimant protocol, a general notice to claimants, should go out by mid-November. A poster targeted to Aboriginal organizations will encourage claimants who haven't had a hearing to contact their lawyer, or call the info line. The Secretariat is continuing to plan implementation of the other parts of the protocol.
- Senior Secretariat staff have completed visits to claimant counsel in Manitoba, Alberta, Ontario, and most of Saskatchewan. Some visits are planned for British Columbia and Quebec. These visits have found that claimant counsel are often not receiving or using information provided by the Secretariat.
- The Secretariat has taken action to ensure that smudging can take place in its hearing centres, and special ventilation has been, or is being, installed in Winnipeg and Vancouver. The issue has arisen with some hotels as well. David Paterson mentioned that the City of Vancouver has an express exception for Aboriginal ceremonial purposes in city bylaws about smoking.

Over the past year, the Secretariat has struggled with the impact of missed expert assessment appointments. In 2013/14, about 6% of scheduled appointments were missed – some more than once. The financial cost to the Secretariat was about \$35,000, but there is an even greater cost in terms of the Secretariat's relationship with experts and the timeliness of claim resolution. The post hearing unit suggested requiring 72 hours' notice of cancellation, and if proper notice is not given, the adjudicator could determine whether another appointment should be scheduled or the claim resolved without an assessment –

which would mean limiting the claim to no more than Harm 3 and Opportunity Loss 3. They also suggested that an adjudicator could determine if the costs for the missed visit would be paid by the claimant counsel.

David Paterson suggested that a similar approach be applied as in hearing postponements. If a claimant does not attend a scheduled hearing, the postponement policy applies, and the adjudicator has authority to decide when and how the hearing should be rescheduled. He suggested that a similar approach be used with missed expert assessment appointments.

In response to a question, Dan Shapiro said that the hearing postponement policy can result in a claim being denied, if the adjudicator rules that there will be no further postponements and makes a decision based on the available information.

It was agreed that a policy would be prepared for missed expert assessment appointments.

5. Chief Adjudicator's report

Dan Shapiro reported that since the September meeting, Justice Perell issued a costs award in the disposition of IAP records case in favour of Independent Counsel and against the Truth and Reconciliation Commission. Since then, appeals or cross-appeals have been filed by the TRC, the National Research Centre, Independent Counsel, and Canada. These are in addition to appeals already filed by three groups of Catholic entities. Only the Assembly of First Nations and the Chief Adjudicator have not appealed.

The TRC's appeal says that all records should be retained unless an individual claimant authorizes their destruction. Canada's appeal asks for the notice program to be set aside, and for an order saying that the IAP records are subject to three federal Acts. Independent Counsel objects to the 15-year notice program and the finding that the records are within the control of Canada.

As requested by Justice Perell, the Chief Adjudicator's counsel provided a draft order to the parties on August 25. Comments were received from Canada, the TRC, and the Sisters of St. Joseph of Sault Ste. Marie. A further hearing will likely be required to settle the order.

Next steps will include the preparation of facta for the Ontario Court of Appeal. There will have to be a determination of whether the notice program hearing should take place before or after the appeal.

The Chief Adjudicator provided the Oversight Committee with the Manitoba Court of Queen's Bench decision in the claimant as employee case, which he said

was the first time in seven years that a Court has overturned the decision of an adjudicator or the Chief Adjudicator.

The case raises the difficult issue of what to do about other cases with similar issues when a decision is overturned. Dan Shapiro said that he has asked staff to look at ways of identifying such cases. A Notice to Counsel has also been sent.

Dave Iverson asked what a claimant's remedy might be in these cases. Dan Shapiro said that it would be through a Request for Direction to the courts to re-open a settled case. The Secretariat is doing what it can to let people know, but the process can be more challenging in the case of self-represented claimants.

The Manitoba Court of Appeal recently ruled on the process for access to the courts case, which largely upholds the lower court decision establishing a bifurcated process where the Chief Adjudicator has granted access to the courts in actual income loss cases. The issue of how a potential request for review might be handled was left to another day.

The Chief Adjudicator recently released a re-review decision on estate claims that clarifies rules on the use of eyewitness testimony in cases where the claimant has passed away before testifying. A significant number of estate claims have been waiting for these decisions.

6. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, December 9, 2014, in Toronto.