

## Independent Assessment Process Oversight Committee

Meeting of January 20, 2015

Vancouver, BC

### Minutes

#### Members present

Mayo Moran	Chair
Les Carpenter	Inuit representative
Karen Cuddy	Government of Canada representative
Mitch Holash	Church representative
David Iverson	Church representative
Nicole Ladouceur	Government of Canada representative (interim)
David Paterson	Claimant counsel representative

#### Attending by teleconference

Diane Soroka	Claimant counsel representative
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#### Also present

Kaye Dunlop	Deputy Chief Adjudicator; Chair, Technical Subcommittee <i>present for items 1 and 2 only</i>
Daniel Shapiro	Chief Adjudicator
Deanna Sitter	Government of Canada representative (alternate)
Shelley Trevethan	Executive Director, IRSAS
John Trueman	Senior Policy and Strategic Advisor, IRSAS (recorder)

#### Absent with regrets

Paul Favel	Assembly of First Nations representative
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#### 1. Welcome: Nicole Ladouceur

Karen Cuddy introduced Nicole Ladouceur, who is serving as Acting Director General, Settlement Agreement Operations for Aboriginal Affairs and Northern Development Canada.

#### 2. Report of the Technical Subcommittee

Kaye Dunlop reported on the meeting of the Technical Subcommittee held January 19, 2015.

David Paterson, Deanna Sitter and Kaye Dunlop will meet on February 3 to discuss the marking of additions, changes, and deletions in school narratives, in the hopes of having a protocol to bring to the March meeting.

Claimant counsel had asked to discuss the use of church documents in the IAP; however, Canada asked not to discuss this issue because it is before the Courts in the Bishop Horden IRS Request for Directions.

Canada was unable to provide its position on the use of civil judgements in school narratives, and this was put over to the next meeting.

Canada has agreed to provide a list of all school yearbooks in its possession. There are approximately 100 yearbooks, although it is not yet clear which are in the public or private domain. The list of yearbooks will be made available, and discussions are continuing as to how this will be done.

In response to a question, Karen Cuddy said that yearbooks are already used in cases where quarterly returns are unavailable or incomplete. If the claimant is not found in quarterly returns, secondary documents such as yearbooks will be searched. If a claimant is found in a yearbook, Canada will provide the page of the yearbook with the claimant shown. Other names and photographs will be redacted.

The student on student admissions project aims to be completed by December 2015. There are 55 'priority 1' cases and 15 'priority 2' cases remaining.

A further issue, related to delays in the posting of new admissions of staff knowledge of student-on-student abuse, will be discussed at the March meeting.

Kaye Dunlop discussed the elements of the Completion Strategy and referred members to documents circulated in advance. Significant work is underway with staff and adjudicators to address a number of discrete issues that prevent claims moving forward to a hearing. The two major approaches are the Accelerated Hearing Process, where hearing dates can be set without a complete set of mandatory documents, and Step One of the Incomplete File Resolution procedure, which provides a number of tools to file management adjudicators to move claims forward. Coming out of this work is a significant number of lost claimants, as well as lawyers who wish to withdraw from representation.

Dan Shapiro suggested that amendments to Chief Adjudicator's Directive 10 (Withdrawal of Counsel) might be appropriate in lost contact cases.

David Paterson said that it is not possible to preclude lawyers from withdrawing from the case, and lawyers do not need to give reasons for doing so. However, there might be ways to persuade lawyers to remain on the file if there is a possibility that the claimant can be located.

Step Two of the Incomplete File Resolution procedure requires Oversight Committee approval before it can be implemented. Kaye Dunlop said that there are now a small number of cases ready to move forward to Step Two. This step provides the adjudicator with authority to take a number of steps to move files ahead, including setting down the case for hearing. It also provides the power to dismiss claims without a hearing in appropriate cases.

Kaye Dunlop said that the Technical Subcommittee was now in a position to approve implementation of Step Two.

*Moved* by David Paterson, *Seconded* by Karen Cuddy: that the Oversight Committee approves the implementation of Step Two of the Incomplete File Resolution procedure.

Kaye Dunlop said that at the time the Incomplete File Resolution procedure was negotiated, there was concern that files would be dismissed without receiving proper consideration. The Technical Subcommittee is satisfied that the targeted approaches established by the Secretariat represent significant and substantial efforts to address barriers. Moreover, Step Two is not just about dismissing claims, but is oriented toward moving claims to a hearing, with measures taken by consent or on an adjudicator's order.

Nicole Ladouceur said that the IFR is a complicated process but she agrees with its logic, and she commended the members on the work that has been done.

Mayo Moran said the IFR fills a gap in the IAP procedures, and that no stone has been left unturned to produce a fair and claimant-centred way of addressing it.

Dan Shapiro acknowledged the work of Shelley Trevethan and her staff in the Secretariat for their work in developing procedures to implement IFR and other completion initiatives.

- *Decision:* The Oversight Committee unanimously approved the implementation of Step Two of the Incomplete File Resolution procedure.

Kaye Dunlop provided the Technical Subcommittee with materials prepared by the Secretariat for estate claims for their information. There are 146 active estate claims, where the claimant has passed away and estate representatives have filed documents with the Secretariat to pursue their claims. There is an additional number of claimants who have passed away and no estate representative has come forward.

Work on estate claims had been put on hold while a number of pilot cases were decided and reviews conducted. There is now enough guidance in these re-review decisions to lift the freeze on estate claims, and an information sheet has

been prepared outlining the evidence required to successfully pursue an estate claim.

On Friday, January 16, letters were sent to active estate claims to advise them on their options going forward. A roster of four adjudicators has been developed to hold conference calls with those who wish to proceed. The primary purpose of the calls is to determine whether there is sufficient evidence to proceed to a hearing. If there is not, the adjudicator can deal with the claim through the Jurisdictional Pre-Hearing Teleconference process.

Kaye Dunlop noted that Canada indicated at the Technical Subcommittee meeting that it was still considering its legal position with respect to estate claims.

Diane Soroka noted that estate claims can be proven with the benefit of eyewitness testimony, but that the names of witnesses are not available because of confidentiality provisions. For example, statements may have been taken in police investigations, or people may have testified in criminal trials but Canada refuses to make these transcripts available in the IAP because they are not presently available to the public. She said her concern is that estate representatives may not be aware that these documents exist. She asked if there is an obligation to disclose them to estates, to ensure no claim is dismissed for lack of evidence.

Members asked if a Request for Directions might be required on this issue.

Dan Shapiro said that at the pre-hearing teleconference, Canada can be asked if it is aware of criminal proceedings or transcripts that could shed light on potential eyewitnesses.

Work is underway to update Chief Adjudicator's Directive 7, the Transcript Distribution Policy. Work is underway to bring this back to the next meeting.

Canada had asked for a discussion of requirements to prove a physical abuse claim. This arose out of an unfortunate case presently under re-review. Kaye Dunlop undertook to remind adjudicators of the requirements of the IAP for medical assessments, and the need to document Canada's position in their decisions.

### **3. Approval of minutes**

The committee approved the minutes of the December 9, 2014 meeting as presented.

#### 4. Key performance indicators

Shelley Trevethan discussed significant performance indicators since the December meeting:

- 33,552 applications have been admitted since implementation, and 3,878 applications have not been admitted. Only 516 claims remain in the admissions stage, of which 207 are active. Of these, a maximum of 100 are expected to be admitted.
- 2,830 claims are in the case management stage, down 400-500 cases since the last meeting. In addition to claims proceeding to hearings, the Secretariat is moving special situations, such as lost claimants or estate claims, out of this category so that it reflects only those awaiting mandatory documents.
- 23,774 hearings have been held since implementation. The postponement rate is at 14%, and is increasing. The Chief Adjudicator has asked adjudicators to consult with their DCA before allowing a postponement.
- So far, 3,579 hearings have been held or scheduled for the 2014-15 fiscal year. This number will increase slightly, but will not reach 4,000.
- Even if fewer than 4,000 hearings are held in 2014-15, this still leaves only about 3,000 hearings to hold in 2015-16, and some of these claims may be withdrawn or not proceed.
- Already, 316 hearings are scheduled for the 2015-16 fiscal year, which begins April 1, 2015.
- 2,285 cases are in the post-hearing-phases, which is 22% higher than a year ago. Some of this is attributable to the Accelerated Hearing Process, where the case must wait after hearing for outstanding mandatory documents to be collected. The Secretariat has moved case officers to the post-hearing unit to assist with the workload.
- 30,466 claims have been resolved, or 80.3% of all claims received.
- \$1.8 billion has been awarded by adjudicators, and \$2.66 billion in total compensation has been paid, including awards, negotiated settlements, contributions towards legal fees, and disbursements.

Nicole Ladouceur indicated that Canada has lowered its target for negotiated settlements from 708 to 500 in the 2014-15 fiscal year. So far, Canada has resolved 355 claims through negotiation this fiscal year, totalling \$42.5 million.

In response to a question about the 20% of claims that are in progress, Shelley Trevethan provided a breakdown:

- 2,285 claims have been heard and are awaiting decisions; and
- 5,195 claims have not been heard. Of these, 977 claims are scheduled for hearings at later dates, 3,702 claims are admitted but not yet scheduled, and 516 have not yet been admitted.

Members discussed whether it would be possible to produce a total compensation amount that reflected monies paid to claimants, including negotiated settlements but not legal fees paid by Canada or by claimants. Shelley Trevethan said that she would work with Nicole Ladouceur to see whether a single compensation number could be produced.

## 5. Executive Director's report

Shelley Trevethan reported on initiatives underway in the Secretariat.

- The Secretariat is working to set down remaining claims for hearings and allocate work among adjudicators. The Secretariat is trying to continue upholding claimants' gender preference, but more claimants are requesting female adjudicators than males.
- The Secretariat is presently setting down all files for 12 law firms that were very keen on this process. Between 300 and 400 files have been identified. Participating claimant counsel have been asked to indicate which files should be prioritized.
- Meetings with claimant counsel have also made a difference in improving interest in the Accelerated Hearing Process. So far, 201 claims have been scheduled in AHP and a further 87 claims are participating but not yet scheduled.
- Implementation of the Lost Claimant Protocol is underway, with the general notice and outreach program completed. The next step is database searches, and the Secretariat has met with most of the relevant agencies. Most have indicated a need to consult legal counsel, but have identified contact people to work with.
- In response to a question, Shelley Trevethan said that approximately 700 claimants are known to be 'lost.'
- An internal audit was conducted in fall 2014 on Aboriginal Affairs and Northern Development Canada's support to the IAP, which covered both the Adjudication Secretariat and AANDC's Settlement Agreement Operations branch. The audit did not include Adjudication Secretariat work conducted under the direction of the Chief Adjudicator, or the work of the independent adjudicators.

- Overall, the audit observations were positive: the Secretariat's strategic and operational planning processes, accountability mechanisms, IAP completion planning, and performance management were found to be in place and adequate. The Secretariat's risk management process was identified as a best practice and the audit recommended that it be brought down to the unit level.
- The audit found that AANDC's Settlement Agreement Operations governance and accountability mechanisms, management, training for staff, and IAP completion planning was in place and adequate. The audit recommended a formal risk management framework for SAO, and recommended that the organization leverage the results of its value stream mapping process to improve efficiencies between groups.
- The audit identified a number of issues with Human Resources support provided to the Adjudication Secretariat. The audit recommended a formal agreement between the Executive Director of the Adjudication Secretariat and the Director General of Human Resources.

## 6. Chief Adjudicator's report

Dan Shapiro reported that the written submissions to Justice Perell to settle the order in the records disposition case were completed January 7, but the order has not yet been issued. He said that the Chief Adjudicator's counsel had attempted to fashion a workable order that was capable of implementing the court's August 2014 direction.

Some of the other parties objected to the order containing provisions not dealt with in the direction. There are disputes over the nature of consent required, the organization that should manage the IAP documents during the 15-year retention period, whether Alternative Dispute Resolution process or Negotiated Settlement Process records should be included, and the standard of redaction required. There are also disputes over when the 15-year retention period should start, and over what should be done with records that are not in the four categories that are to be retained for 15 years.

On December 23, the Truth and Reconciliation Commission filed a new Request for Directions to establish a notice program to advise claimants of their right to transfer their IAP documents to the National Research Centre. It is not yet clear whether this RFD will go ahead while the appeals of Justice Perell's decision are heard.

Another Request for Directions has been filed on St. Anne's IRS, dealing with Canada's redaction of records produced in response to Justice Perell's January

2014 decision on that school. Dan Shapiro said that the Chief Adjudicator does not plan to participate in this RFD as the dispute is primarily between the applicants and Canada.

The Bishop Horden RFD is proceeding. The primary issue of concern to the Chief Adjudicator is the proposal to contact claimants who say they witnessed abuse, and ask them to have their contact information provided to other claimants who suffered abuse. This proposal has serious privacy implications that need to be addressed.

The Grouard IRS / years of operation RFD will be argued on January 27 before Justice Nation in Calgary. The Chief Adjudicator is not participating but a number of re-review decisions are on hold until the court decides the case.

The Chief Adjudicator is carefully considering the assignment of work to adjudicators in an environment of reduced workload as the IAP moves towards completion. Some of the factors here include quality of work, cost effectiveness, timeliness, and self-imposed or DCA-imposed workload restrictions.

A related issue is the significant number of requests for female adjudicators. There are presently 50 female and 48 male adjudicators, but female adjudicators are likely to be overburdened by the number of hearing requests while some male adjudicators are underutilized. The practice of honouring gender preference is mentioned in the ADR Guide, and on the IAP Application Form. He asked Oversight Committee members for their views.

David Paterson suggested that perhaps claimants could be asked how strong their preference is. He said that some claimants have only a mild preference while others are very insistent that everyone present at their hearing be a particular gender. He said that the second category of claimant is essentially denied a hearing if the gender preference is not honoured.

Members discussed several aspects of this issue:

- There is a risk that some adjudicators will leave and pursue other work if they feel that little work will be assigned to them in the future.
- Gender preference may be more important in sexual abuse cases than in physical abuse cases.
- One member suggested that all 98 adjudicators be polled for their views on how the remaining workload should be distributed.
- The need for adjudicators to keep up to date with their decision-writing was raised.

Dan Shapiro thanked members for their comments, and invited further comments by email.

### **7. In Memoriam: Rod Donlevy**

Oversight Committee members noted with sadness the passing on December 25, 2014, of W. Rod Donlevy, a long-time member of the National Administration Committee and lawyer for Catholic Entities involved with Indian Residential Schools. Members praised his energy, civility, and longstanding commitment to Indian Residential Schools issues.

### **8. Next meeting**

The next Oversight Committee meeting is scheduled for Tuesday, March 3, 2015, in Vancouver.