

## Memo to Guidance Paper 2 (GP-2)

### **Memo to Adjudicators and Claimant Counsel, accompanying Chief Adjudicator's Guidance Paper#2, re: Actual Income Loss Preparation**

Colleagues,

I am appending Chief Adjudicator's Guidance Paper #2, dealing with preparation for Actual Income Loss (AIL) claims. Please note that Schedule D, a sample AIL Preparation Worksheet, needs to be printed on legal size paper.

AIL is a significant new remedy that is potentially available under the IAP. As there is very little in the IAP that details what the parties intended, the parameters of AIL claims have been the subject of much discussion and work by the Technical Subcommittee of the Oversight Committee. Members of the Technical Subcommittee are Government representatives Alison Molloy and James Ward [in his absence Myriam Girard] and Claimant Counsel representatives, David Paterson and Len Marchand. The Chief Adjudicator's office has requested input from the Technical Subcommittee on what the parties intended the scope of AIL claims to be. To the extent that the parties are in agreement as to what was intended, adjudicators wished to understand and respect such areas of agreement. To the extent that the parties are not agreed, adjudicators will, of course, ultimately be called upon to make such decisions in individual hearings.

The attached materials represent the current consensus of the Technical Subcommittee, as approved by the Oversight Committee, on some of the procedural and substantive issues related to AIL claims. While there is much more work to be done in this area, the Subcommittee considered it a priority to get this information out to the parties and adjudicators alike at the earliest possible time. The intent is to allow claimant counsel to be as fully informed as possible before proceeding with AIL claims. While Canada has its own distribution network and the Secretariat is able to distribute materials to adjudicators, steps are being taken to concurrently communicate this important information to claimant counsel.

Further discussions are underway to determine whether the parties may be able to agree on a "basket" of defaults that parties may choose to accept in individual cases, in order to simplify and expedite AIL claims, with a view to obviating or minimizing the need for financial experts. If the entire basket is not acceptable, claimants would remain free to explore their remedy with more individualized evidence, and usually financial experts.

I also wish to bring to your attention the up-shot of discussions the Technical Subcommittee has had with respect to broad questions dealing with the substantive scope of AIL claims. In that regard, there are 4 scenarios that illustrate the positions of the parties at this time:

**Scenario #1 – Interrupted earnings stream**

Example: The claimant had a well established and documented flow of employment or business earnings that was interrupted by harms proven to be related to residential school abuse. As was put forward during the Calgary adjudicators' training in November 2007, the parties acknowledge that the period during which income was disrupted or interrupted would clearly qualify for an AIL award.

**Scenario #2 – Delayed entry into work force**

Example: By reason of harms proven to be related to residential school abuse, the claimant initially did not have a well established and documented flow of earnings. However, the Claimant was eventually able to achieve a well established flow of earnings. The parties have now agreed that the period before the earnings flow was established would also qualify for consideration for an AIL award.

**Scenario #3 – No established earnings flow, but proven earnings potential**

Example – The claimant has proven harms related to residential school abuse, but never enjoyed an established flow of earnings. However, the claimant was able to establish that his or her family members, who had no history of residential school abuse, went on to solid employment or professional careers. In this situation, Claimant Counsel have taken the position that such a claim could qualify for consideration of AIL, subject to meeting higher causation hurdles. Canada has taken the position that this scenario represents a loss of opportunity claim that would not be eligible for consideration as AIL. There is therefore no agreement on this type of claim at this time.

**Scenario #4 – No established earnings flow or reduced earnings flow, but proven earnings potential**

Example – The claimant has proven harms related to residential school abuse, but never enjoyed an established flow of earnings or only enjoyed a reduced flow of earnings. However, the claimant has established the potential to have done much better, for example through demonstrated academic potential. In this situation, Claimant Counsel have taken the position that such a claim could qualify for consideration of AIL, subject to meeting higher causation hurdles. Canada has taken the position that this scenario represents a loss of opportunity claim that would not be eligible for consideration as AIL. There is therefore no agreement on this type of claim at this time.

The above are simply examples of claims that have been discussed by the Technical Subcommittee. There is nothing in this memo or the attached Guidance Paper that is intended to foreclose other types of actual income loss claims from being advanced. Claimants and their counsel should simply be aware that Scenarios #3 and #4 and any other scenarios will or may be contested.

I hope that the attached Guidance Paper is helpful to the parties. I welcome any feedback you may have.

Daniel Shapiro  
Deputy Chief Adjudicator

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