

Independent Assessment Process Oversight Committee

Meeting of April 1, 2014

Edmonton, AB

Minutes

Members present

Mayo Moran	Chair
Les Carpenter	Inuit representative
Karen Cuddy	Government of Canada representative
Paul Favel	Assembly of First Nations representative
Mitch Holash	Church 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>
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)

Guest

Brian Gover	Court Counsel
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1. Report of the Technical Subcommittee

Kaye Dunlop reported on a meeting of the Technical Subcommittee held March 31, 2014.

Concern had been raised at the previous meeting about the amount of information provided to alleged perpetrators. Both the Adjudication Secretariat and Canada looked into two files identified by claimant counsel, and found nothing untoward. It was a good opportunity to refresh the memories of committee members on the current process. If any issues arise in the future, they can be brought back to the Technical Subcommittee.

Also raised previously was the issue of school yearbooks and their possible production as evidence in IAP claims. This connects to the larger issue of how

documents can be added to the school history. Canada has agreed to look at the issue of yearbooks and how they can be released in an unredacted manner. Yearbooks can be useful at hearings for a number of reasons, including enabling participants to identify individuals in photographs, or to assist where attendance records are not available.

A complaint was raised in relation to the Schedule P non-resident claimant release, which requires further investigation by the Adjudication Secretariat and Canada.

A number of issues have been raised relating to documents:

- school histories are revised from time to time by Canada, but it is unclear what changes have been made, and which documents have been added or removed;
- fourteen quarterly returns have been discovered by the Truth and Reconciliation Commission at Library and Archives Canada that had not been located by Canada, which could provide information on claimant attendance; and
- in situations where documents arise after a claim has been resolved, there is the question of how the resolved case should be dealt with.

Canada has agreed to analyze the fourteen quarterly returns and determine which IAP claimants attended during the relevant time, and whether lack of attendance records in any way affected the decision. Canada will bring its report back to the Technical Subcommittee for discussion and possible further action.

Canada also agreed to have a person responsible for the production of school histories attend the June meeting of the subcommittee.

Dan Shapiro referred to previous discussions, in April 2012 when Canada set up an email address for parties to suggest additions to school narratives, and in February 2012, when Canada committed to put school narratives on the decision database and indicate where changes had been made.

Line Paré confirmed that the email address is still being monitored, and that Canada would find a way to highlight additions or deletions to school narratives.

2. Introduction to Brian Gover

Mayo Moran welcomed Court Counsel Brian Gover to the Oversight Committee.

Brian Gover introduced himself and discussed his background. He described his role as Court Counsel as ensuring the orderly administration of the Settlement Agreement from the perspective of the courts, and working with the judges to ensure that they are current and able to discharge their own responsibility in

supervising the administration of the Settlement Agreement. He said that in the final days of the Settlement Agreement, maintaining public confidence in everyone engaged in administering the Settlement Agreement will be key, and he looked forward to working with committee members to find the best possible way moving forward.

In response to a question, Brian Gover said that under the Court Administration Protocol, a Request for Directions is not brought in any one jurisdiction. Rather, it is brought to the attention of Court Counsel and the Administrative Judges determine where it will be heard. He noted that this raises the issue of media access to Settlement Agreement court proceedings.

Dan Shapiro said that he had been in touch with Mr. Gover about applications before the courts, and expressed his appreciation for the comprehensive list provided. The Chief Adjudicator and Court Counsel have committed to continued dialogue on matters of mutual interest.

3. Approval of minutes

The committee approved the minutes of the February 25, 2014 meeting as presented.

4. Key performance indicators

Shelley Trevethan discussed some key statistical indicators:

- 37,931 applications have been received and 33,067 admitted.
- 3,560 claims have been not admitted, and represent 9.7% of claims received. About 1300 claims are awaiting an admissions decision.
- 4,747 claims are awaiting mandatory documents before hearing. This is down from 10,200 in January 2013.
- 20,686 hearings have been held since implementation in September 2007. Almost 4,200 hearings were held in the fiscal year ended March 31, 2014. The rate of postponements is down to 10.4%.
- 391 cases are currently available to schedule, a number which is a little worrisome. A good number of hearings have been scheduled for April, May, and June 2014 but more cases will need to become hearing-ready to sustain momentum through the summer.
- 1,873 cases are active in the post-hearing stage. The median number of days for adjudicator writing time remains stable.

- 26,411 claims have been resolved, about 70% of the total. 11,520 active claims remain.
- \$2.3 billion in compensation has been paid.

David Paterson asked if the 'active cases' numbers could also show those claims still requiring hearings.

Dave Iverson noted that about 30% of active claimants are in Saskatchewan, and asked what challenges this presents. Shelley Trevethan said that the Secretariat moves adjudicators, and Canada moves its representatives, to meet the demand for hearings.

Dan Shapiro said that claimant counsel capacity may be a concern. Two law firms have a very large caseload, and one has recently had a lawyer suspended by the Law Society.

Les Carpenter asked about the number of claimants who have passed away before their hearing. Shelley Trevethan said that this is not contained in the current reports but she could obtain it.

Brian Gover mentioned a number of Requests for Direction seeking relief from the IAP Application Deadline that are presently before the court. Most of these involve solicitor's negligence. Dan Shapiro said that in cases where a survivor has not filed a claim in the IAP (or in a previous process), the Settlement Agreement allows them to bring a lawsuit against Canada for certain kinds of abuse at residential school.

5. Executive Director's report

Shelley Trevethan reported on work underway to meet the goal of 4,500 hearings in 2014-15:

- The first quarter (April-June 2014) is looking good, but the low number of cases in the scheduling queue is worrisome.
- Much work was undertaken in 2013-14 to address issues relating to production of mandatory documents. The Adjudication Secretariat has worked with provincial correctional departments, and Canada has worked with Corrections Canada and Service Canada to speed the production of records for claimants.
- The Secretariat continues its analysis of hearing rates by law firm. Some firms have been identified that, based on their rate of hearings to date, may not meet the March 2016 target for the final first claimant hearings. The Secretariat will be requesting a plan from those firms that appear unlikely to meet the target. If necessary, a Deputy Chief Adjudicator will

be assigned to work with the firm, and if performance is unsatisfactory the Courts may be asked for assistance.

Mitch Holash suggested that law societies might be helpful in dealing with this. Dan Shapiro said that he has regular communication with the thirteen law societies, although this particular issue has not been discussed yet. He noted that there is presently some additional claimant counsel capacity, as some firms have completed most of their cases. However, there seems to be a reluctance from other firms, which lack the capacity to bring their clients' claims to hearing, to take on new lawyers.

- Shelley Trevethan noted that self-represented claimants also pose a challenge. Adjudication Secretariat staff provide significant information and support to these claimants, and help them obtain their mandatory documents, but cannot act as legal counsel. Staff continue to provide information on hiring a lawyer to those claimants who are interested.
- The Accelerated Hearing Process was approved in early 2013 but not utilized as much as expected because the number of hearing-ready files increased during the year. In 2014, the Secretariat plans to use AHP to ensure that claimants over age 80 receive a hearing as soon as possible, and have their testimony preserved. There are approximately 83 claimants over age 80 who have not had a hearing. These claimants will be scheduled into blocks where possible. Secretariat staff will work to make them hearing ready, but the hearings will proceed through AHP if this is not possible.

Shelley Trevethan reported on other initiatives:

- The Incomplete File Resolution procedure is before the courts for approval. Part one of the IFRP does not require court direction, and will begin this month with a small team in the Secretariat. Initial work will focus on intensive case management approaches and ways of locating lost claimants that do not require court approval. An outreach strategy will begin this summer to encourage claimants to re-establish contact with their lawyer.
- The policy on claimant substitution was approved last year. To date, two substitution requests have been made.
- The Adjudication Secretariat participated in the Truth and Reconciliation Alberta National Event last week. Over 1,000 people visited the kiosk and 1,200 DVDs and guidebooks were distributed. 162 claimants received updates on their IAP claims in private one-to-one sessions.

- The Chief Adjudicator held a news conference on March 26 to launch the new DVD, Telling Your Story: the Indian Residential Schools Independent Assessment Process. David Paterson appeared in the English version.
- Flowing from the Completion Strategy filed with the courts, the Secretariat is developing a Completion Action Plan to guide the internal work that will be required. The plan includes obtaining additional funding from the government to support the remaining work. The Secretariat has done a full examination of what is required and developed organizational charts and costing for each year of the plan.

Line Paré said that Canada is undertaking a similar exercise, which includes the Common Experience Payment and Personal Credits in addition to the IAP. Meetings are scheduled for mid-April to begin engaging with staff.

6. Chief Adjudicator's report

Dan Shapiro reported that the manual on security measures for adjudicators has been finalized, translated, and distributed to adjudicators.

The National Administration Committee has provided a Record of Decision on the list of legal counsel in the IAP, indicating a process to add or remove lawyers from the list. Counsel may be added to the list after signing an undertaking to comply with the Settlement Agreement and Implementation Orders, and will receive a copy of the Chief Adjudicator's Expectations of Legal Practice in the IAP, the Canadian Bar Association Guidelines, and the Supreme Court of British Columbia's decision in the Blott case.

For the Completion Strategy, the Chief Adjudicator's counsel will prepare a consent order for review by the parties. The Incomplete File Resolution order is relatively straightforward, but the Lost Claimants order is somewhat more complicated as it implicates numerous agencies that might hold information that would assist in locating claimants.

Brian Gover said that similar issues affect the CEP, and the Assembly of First Nations and Inuit representatives offered their services to the court to help locate people.

The Chief Adjudicator held a small ceremony during the TRC event to honour Charlene Belleau for her work on the residential schools settlement. She was recently elected as Chief of the Esketemc First Nation in Alkali Lake, BC.

A lawyer was suspended by the Law Society of Saskatchewan. The law firm has arranged for other counsel to take over the cases, so no hearings were affected.

Another Saskatchewan lawyer, Ron Cherkewich, was convicted of professional misconduct for his behaviour towards an adjudicator. He refused to provide the adjudicator with a copy of the contingency fee agreement as required by the court orders. He eventually returned with a fee agreement written on a piece of toilet paper. The Law Society fined him \$500 and ordered him to pay \$10,000 in costs.

7. Regional adjudicator meetings

Dan Shapiro reported that the Vancouver regional meeting for western adjudicators is coming up on April 8 and 9, with the Montreal meeting for eastern adjudicators on April 29 and 30. Some of the topics include gathering evidence in a way that is sensitive to Aboriginal perspectives, therapeutic jurisprudence, and decision-writing. Ongoing dialogue between adjudicators is an important part of the Chief Adjudicator's mandate to ensure quality and consistency in decision-making. It is the only opportunity for adjudicators to get together, as they work independently and not from regional offices.

Dan Shapiro said that the necessary Ministerial approval had still not been received. At his direction, the Adjudication Secretariat has secured the venues, and adjudicators have made their travel arrangements.

Shelley Trevethan said that meetings of this kind are held by all tribunals and in fact, IAP adjudicators meet less frequently than many tribunals. The IAP is not being specifically targeted, but increased scrutiny across government has led to many meetings being cancelled or not approved.

Members discussed the costs and benefits of the regional meetings, including the following:

- many innovative initiatives have come out of discussions with adjudicators;
- the target of 4,500 hearings in 2014-15 places significant strain on adjudicators, and appropriate self-care strategies are essential;
- the meetings promote a claimant-centered focus, and claimants are not well served if adjudicators do not have the tools to do their jobs;
- failure to conduct training and promote consistency may have a major cost impact in the long haul, and delay completion of the IAP.

➤ Decision: The Oversight Committee unanimously affirmed the importance of the Regional Adjudicator Meetings.

8. Integrity protocol

Dan Shapiro recalled the “integrity framework” signed in December 2013, which led to a number of concerns raised by the Oversight Committee. He circulated a revised version to address those concerns, and Mayo Moran had contacted Court Counsel Brian Gover to discuss the outstanding issues. The two remaining issues were the method of selection for the Independent Special Advisor(s), and the channel by which issues could be brought to the attention of the advisor.

Brian Gover said that the current process for investigations is problematic. There is a need to be flexible and have officials with the power to conduct investigations. He said that it is natural that people would contact the Chief Adjudicator or the Adjudication Secretariat, and that many complaints can be addressed by providing more information. However, for those that do require further investigation, there is a need to insulate the Chief Adjudicator and the adjudicators to protect their independence.

He said that he has reviewed the Integrity Protocol with the administrative judges, and they have requested two changes. The first change provides that the administrative judges will appoint the Independent Special Advisor(s) in consultation with the National Administration Committee, but their discretion is otherwise unencumbered. The second change enables complaints to be brought to the Independent Special Advisor(s) through either the Chief Adjudicator or the Court Monitor.

David Paterson asked if the latter change could give rise to “forum-shopping.” Brian Gover replied that the change helps mitigate the potential for someone arguing that the Chief Adjudicator should not be involved. He said he anticipates that the vast majority of complaints will continue to come through the Chief Adjudicator. Whether the complaint originates from the Chief Adjudicator or the Court Monitor, reports on the complaints and their disposition will still come to the Oversight Committee.

In response to a question, Brian Gover said he expected that one or two people would be appointed as Independent Special Advisors, rather than a roster of people.

- Decision: The Oversight Committee indicated its support for the Integrity Protocol.

9. St. Anne’s IRS court decision

Diane Soroka said that a number of issues arose from Justice Perell’s January 2014 decision on St. Anne’s IRS. Canada has to produce documents in accordance with the judgement but, she said, the decision is more far-reaching

than that. She asked: (1) what is Canada doing to produce documents that it did not produce previously because of its misinterpretation of the disclosure requirements; (2) for St. Anne's, what will be done for people who had hearings that may have been compromised by lack of proper disclosure; and (3) will the Chief Adjudicator allow medical reports from the Anna Wesley criminal trial (where it was held that forcing a child to eat his own vomit constituted the administration of a noxious substance) to be entered into evidence in IAP proceedings.

Line Paré said that the transcripts held by Canada were sent to the TRC on March 26. A list of Ontario Provincial Police documents held by Canada has been sent to the OPP, which has until April 30 to indicate whether it will claim privilege for any documents. They are scanned and coded, and analysis has begun. She said that Canada will respect the court's August 1 deadline to revise the school narratives and person of interest reports used in the IAP.

With respect to the expert reports prepared in criminal proceedings, Line Paré said that the applicant's counsel has approached the Governments of Ontario and Canada for a consent order for these documents to be produced by Ontario and given to Canada and the TRC.

Karen Cuddy said that the order is taken seriously by Canada and has imposed a tremendous amount of work on Canada. She said that she would update the Oversight Committee as work continues.

Dan Shapiro said that the issue of expert reports was raised in the RFD with the request that the supervising court create a new head of damages in the IAP for forcing a child to eat vomit. The court declined to do that, and specifically stated that it would not tell adjudicators how to handle evidence of this kind. He said that these issues should be argued before adjudicators, and that he would not make a blanket direction that the court has already declined to make.

Diane Soroka asked if Canada would be reviewing its disclosure for other schools, or whether claimants' counsel would need to file RFDs across the country. Line Paré said that she was not in a position to provide more information at this point.

Diane Soroka asked what would be done about cases that had already been heard, particularly involving self-represented claimants. Karen Cuddy said that where the claimant had a lawyer, counsel can read the decision and decide whether to bring an application. She said that self-represented claimants have made the decision to act in their own best interests, but could retain counsel for advice on this issue.

Dan Shapiro said that the Adjudication Secretariat sent a notice to self-represented claimants following the court's decision, and asked Diane Soroka if she would review the notice and provide any additional suggestions on how to

make self-represented claimants aware of the decision. Of the 216 resolved cases from St. Anne's IRS, 11 resulted in a zero-dollar award. He suggested that it might be possible to review these 11 cases and if any involved a self-represented claimant, efforts could be made to encourage them to hire a lawyer. He pointed out, however, that the RFD requested a systematic review of all decided cases and the court decided not to order one.

Mayo Moran suggested that the issue of dealing with cases already decided be referred back to the Technical Subcommittee for further discussion.

Brian Gover said that there has been a high level of engagement in the St. Anne's case by community organizations, and they may be able to assist in outreach if a decision is made to pursue that option.

10. IAP Final Report

Shelley Trevethan presented the proposed objectives to be assessed in the IAP final report, following a series of focus groups and discussions at the previous Oversight Committee meeting. She said that with objectives in place, some writing work will begin, as well as analysis for the claimant profile chapter. The Secretariat will also start to develop a methodology for interviews with claimants, which will require some careful consideration.

Mitch Holash said that he saw the final report as important in raising awareness of the work done in the IAP to right historical wrongs, and said he wondered how active or passive the committee should be in promoting this work.

Brian Gover said that he has not discussed this with the supervising courts, but there might be room for a joint statement by the Oversight Committee, the National Administration Committee, and the courts upon conclusion of the Settlement Agreement. By then, the IAP final report will likely be released. He said that it is common for commissions of inquiry to devote a chapter to the process they followed, in order to create a body of knowledge for the future. The IAP is unique and it is important to capture that knowledge.

Committee members expressed agreement for the objectives as presented.

11. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, May 6, 2014, in Toronto.