Independent Assessment Process Oversight Committee

Meeting of December 9, 2014
Toronto, ON

Minutes

Members present

Mayo Moran	Chair *absent for items 1-3*
Les Carpenter	Inuit representative
Karen Cuddy	Government of Canada representative
Luc Dumont	Government of Canada representative (interim)
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 *present for item 1 only*
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)

David Iverson was acclaimed as Acting Chair.

1. Report of the Technical Subcommittee

Kaye Dunlop reported on the meeting of the Technical Subcommittee held December 8, 2014.

The student on student admissions project is moving forward with a focus on individual cases that have the potential to generate admissions affecting a significant number of other cases. Meanwhile, however, many files are moving ahead on their own. As of December 1, only 110 knowledge-alleged and 242 no-knowledge-alleged student-on-student claims remained to be heard.

Meanwhile, student-on-student cases on hold waiting for admissions pursuant to the Chief Adjudicator's direction are to be reviewed after one year. In some cases, Canada's representative has not agreed to further adjournments. Kaye

Dunlop has asked Canada to agree to adjournments of these cases, at least until the conclusion of the student-on-student project. Adjudicators will continue to be advised to wait for admissions.

Finally, claimant counsel will be reminded that they can request information from Canada on the employment tenure of staff at an IRS, in cases where corporate knowledge of student-on-student abuse is at issue.

Kaye Dunlop distributed a diagram and data sheet illustrating the Incomplete File Resolution procedure and related approaches for cases that are not resolving in the regular way. She provided brief updates on several projects:

- The general public notice for lost claimants was distributed in mid-November to Aboriginal organizations, with a view to encourage claimants to contact their lawyer or the info line.
- Pre-hearing teleconferences for estate claims will resume shortly, with the benefit of two re-review decisions from the Chief Adjudicator. An information sheet will be distributed shortly to provide guidance to parties on what evidence is required. A jurisdictional pre-hearing teleconference will determine whether there is sufficient evidence to proceed.
- Two adjudicators are starting Step One Incomplete File Resolution work in cases with missing mandatory documents. The vast majority of these claims are expected to proceed to a hearing.
- Targeted approaches are underway for self-represented claimants with various issues, including jurisdictional questions, unclear withdrawals, questions of eligibility for the complex issues track, difficulty obtaining legal counsel, and capacity issues.

In response to a question, Kaye Dunlop said that adjudicators are not assisting claimants in preparing their case; rather, they provide direction to the Secretariat's client services staff who provide assistance in gathering mandatory documents, completing forms, and connecting self-represented claimants to available support services.

Mitch Holash asked whether the reticence of claimant counsel towards implementation of Step 2 of the Incomplete File Resolution procedure had been allayed. David Paterson replied that there is still reticence, because there is still the possibility of claims being dismissed without a hearing. At some point it will be necessary, because the IAP had no provision for dismissal for want of prosecution. He said that the principle should be to move cases forward, and not simply conduct a 'housekeeping' of difficult claims.

Luc Dumont stressed the need for careful tracking of files in Incomplete File Resolution, and monitoring to ensure that the time and resources invested result in the movement of claims.

Canada has reported back that it now has a complete list of all residential school yearbooks in its possession. Canada has not yet decided whether it will make the list available to the Secretariat or the other parties. Canada has agreed to make fully unredacted yearbooks available, if they are already in the public sphere.

Karen Cuddy said that to the extent material in a yearbook may be relevant to a hearing, Canada will provide the information in redacted form. For example, if claimant attendance is an issue, Canada will provide a page from the yearbook showing the claimant's name and picture, but the information of other students will be redacted.

Kaye Dunlop said that adjudicators have been advised that if there are any issues with identification or presence of claimants or alleged perpetrators, they are to ask Canada if it has yearbook information in its possession.

The Technical Subcommittee renewed its discussion of Canada's obligation to disclose documents, including school narratives, POI reports, criminal convictions and civil judgements:

- Canada will confirm at the March 3, 2015 meeting whether there will be any further revisions to school narratives on the 'years of operation' issue.
- In response to questions from claimant counsel, Canada will provide an explanation of how documents provided by the church organizations are incorporated into school narratives.
- A well-known criminal conviction from Dauphin/McKay IRS was missing from the school narrative. Canada immediately corrected the narrative, and is now producing addendums to the narratives from other schools where the individual worked. The parties are waiting for Crawford Class Action Services to post the narratives to the decision database for access by counsel.
- Canada has agreed to look into whether civil judgements can be included in school narratives.

Some progress was made on issues relating to St. Anne's IRS:

- Of the five criminal transcripts in Canada's possession, two will be produced in unredacted form as these are presently available in the public

domain. The unredacted transcripts will be placed on the decision database and included in the evidentiary package for individual claims.

- The other three transcripts, which Canada possesses, are no longer available to the general public because of the length of time that has elapsed. They will be provided in redacted form. There is also an individual who was acquitted, for whom no transcript exists.

Kaye Dunlop said that the Technical subcommittee has reached the end of its discussions on the St. Anne's IRS issues. Any further issues will need to be resolved by the Court.

Canada had committed to report to Technical Subcommittee of any further missing quarterly returns located by the Truth and Reconciliation Commission. Returns were recently located for St. Joseph's IRS (August 1885) and Mount Elgin IRS (July 1878). In both cases it was confirmed that there were no IAP claims impacted. As well, five partial documents were located for Sacred Heart IRS (December 1953-December 1954), which were a better copy of documents already in Canada's possession.

Shelley Trevethan reviewed the work underway to improve the quality of interpretation at hearings. A number of tools have recently been released on the Adjudication Secretariat's web site.

An issue was raised at the subcommittee about the conduct of a Resolution Health Support Worker in a hearing, which led to a broader discussion of the role of support workers in hearings. In most cases the claimant does not know the identity of the support worker until the day of the hearing, which can be problematic if the support worker turns out to be a neighbour or relative. Shelley Trevethan will contact Health Canada to see if a solution can be found that respects claimant privacy.

David Paterson raised the issue of Health Canada sending a support worker to a hearing even when not requested by the claimant. He has no trouble with the general proposition of having support available on a standby basis, but on two recent occasions the support worker refused to leave even after being asked by the claimant.

Dan Shapiro said that that adjudicator has authority over the conduct of the hearing, including determining who can be present. When the claimant has given informed instructions that they do not want a support worker present, it would be appropriate to ask the worker to leave and wait in the lobby or be available by phone if needed.

2. Approval of minutes

The committee approved the minutes of the October 28, 2014 meeting with minor amendments.

3. Key performance indicators

Shelley Trevethan discussed significant performance indicators since the October meeting:

- A total of 615 applications have been received since the application deadline. More than half (350) are former Blott claimants; 13 were from Mistassini Hostel, 74 were accepted after review of the postmark, and 173 have been sent not-accepted letters.
- 33,510 applications have been admitted to the IAP. Of the 610 files remaining in the admissions stage, only 310 are active. A number are deceased or lost claimants, and a number are outstanding for lawyer certifications, usually because the lawyer cannot locate the claimant.
- The number of claims in case management continues to decrease: a little over 3,100 claims are waiting for mandatory documents, of which 500 are post-hearing. The case management process has become more intensive, with case officers assigned to certain law firms. This often results in other issues, such as lost or deceased claimants, being identified.
- Only 101 hearing-ready claims are available to schedule, the lowest number ever. However, there are additional accelerated hearings being scheduled that are not included in these numbers.
- 23,276 hearings have been held since implementation. Of concern, only 430 claims are scheduled for the January-March 2015 quarter. A further 227 claims are scheduled for dates after March 31, 2015. Some law firms are scheduling hearings into Fall 2015, even though the Secretariat can offer much earlier dates.
- Interest in the Accelerated Hearing Process is increasing. So far, 170 files are identified for AHP, with 101 confirmed to participate.
- 29,875 claims have been resolved, about 79% of all claims received.
- $2.61 billion in compensation has been paid.
- 183 reviews and 81 re-reviews are in progress. A large number of these are zero-award cases.
- 16.9% of active claims are self-represented.

Members discussed the declining rate of negotiated settlements, which were 291 compared with a target of 475. The same claimant counsel availability issues that have affected hearing numbers also impact negotiated settlements. As well, the number of files suitable for negotiation is diminishing.

Luc Dumont said that the current forecast for negotiated settlements for the 2014-15 fiscal year is 491, down from the 708 initially projected.

Shelley Trevethan said that despite the shortfall of hearings and negotiated settlements, she still expects that all first claimant hearings will be concluded by Spring 2016. This will require an increase above the approximately 2000 hearings that were projected for the 2015-16 fiscal year since there will be fewer completed in 2014-15. As well, the workload required to implement the Incomplete File Resolution procedure for claims that require it is unknown.

In response to a question, Shelley Trevethan said that the Adjudication Secretariat's staff vacancy rate has declined from 26% to 17%, the lowest since implementation. Staff attrition is 4%, half the usual rate at Aboriginal Affairs. However, as the focus moves to the winding down of the Secretariat, the impact on staff will be very significant.

Mayo Moran joined the meeting.

4. Executive Director's report

Shelley Trevethan reported on initiatives underway in the Secretariat.

The Secretariat has done a full analysis of capacity amongst claimant counsel. Presently, 16 firms are in danger of not completing hearings for their clients' claims by Spring 2016. Two firms would require almost an additional year. The Secretariat will be requesting business plans from those firms that appear to be at risk.

Senior Secretariat staff have now met with 33 law firms to discuss the Completion Strategy and related initiatives. Each firm was provided with a full list of its caseload and a template asking it to identify special claim situations, such as a lost claimant or a claim being resolved through negotiation.

Luc Dumont suggested that the Secretariat publish performance information for law firms, so that claimants could make informed decisions. Committee members discussed the pros and cons of publishing this information.

Mayo Moran suggested that law firms be asked to respond by January 10, 2015, so that information is available for the January meeting of the Oversight Committee.

Members discussed whether work around claimant counsel capacity issues might be construed as an "investigation" within the meaning of the recent Joint Direction from the Supervising Courts. Members were in agreement that the Secretariat provides facilitation and assistance as part of its normal operations, and that an exchange of information is essential for this to take place. The challenge is determining what to do if it appears that the facilitation mode is exhausted.

The public notice to help lost claimants reconnect with their lawyer and/or the Secretariat was sent out in November. Where claimants are still not located, the next step involves database searches using the authority provided by orders of the supervising courts. The Secretariat has identified an initial set of databases for searching and work is underway to establish relationships with the relevant agencies. It will also be necessary to determine what level of searching is reasonable before moving to the next steps under the Lost Claimant Protocol.

The meetings with claimant counsel indicate support for the concept of setting down all remaining claims for hearings. The current focus is on legal counsel where there are concerns that hearings will not be completed by Spring 2016. An approach will be required that minimizes unnecessary postponements.

An analysis of the self-represented claimants indicates that the challenge may not be as large as it appears. Of the 1,600 active self-represented claims, only about 500 are pre-hearing files that can be actively worked on. An additional 28% are lost contact, 19% are deceased/estate claims, 16% are being withdrawn, 5% are waiting for additional information, and 1% are post-hearing.

Implementation of Electronic Document Interchange for mandatory documents is underway. The notice to counsel was sent out the Friday before the meeting in advance of the launch the day before. In addition to being able to send mandatory documents to the Secretariat through EDI, claimant counsel will also be able to submit documents on a "rolling" basis as they are received. Work continues to explore the possible use of EDI for reviews and appeals.

In response to a question at a previous meeting about the age of claimants, Shelley Trevethan reported that about 7% of pre-hearing claimants are age 70 or older, a rate that has decreased significantly because of the Secretariat's efforts to move those claims to hearing. Unfortunately, 1,252 claimants (about 3% of

admitted claimants) have passed away. Of those, approximately 30% passed away after their hearing.

5. Chief Adjudicator's report

Dan Shapiro reported that Justice Perell has set a timetable for written submissions to settle the order in the records disposition case. The Chief Adjudicator's counsel are to circulate a revised draft order by December 10; other parties are to circulate their drafts or comments by December 22; and the Chief Adjudicator's final draft with comments or submissions is due by January 7, 2015. One outstanding question is when the RFD on the notice program will take place, given the appeals underway.

In October, the Manitoba Court of Queen's Bench issued its decision in the claimant as employee case. There has been no appeal of the decision.

No application for leave to appeal to the Supreme Court of Canada has been brought in respect of the process for access to the courts in actual income loss case. Dan Shapiro reported that he recently wrote a decision providing some guidance in these situations in light of the court decision. The application to the Chief Adjudicator for access to the court should be postponed until the IAP adjudicator has reached a prima facie determination as to whether a complex issues track case has been made out. The decision tries to mesh the Manitoba Court of Appeal's decision with Practice Direction 1.

To date, only four applications for access to the courts have been made, although a number of inquiries have been received since the court decision. Dan Shapiro said that the Technical Subcommittee may want to review the Guidance Paper on actual income loss claims if the number of requests for access to the courts increases.

A new request for direction has been filed by Fay Brunning involving Bishop Horden IRS. The Chief Adjudicator has retained counsel to assist in a similar role as the St. Anne's RFD: the Chief Adjudicator will not take a position on the merits of the case but will assist the court on issues that affect the Secretariat or the process operationally.

An unusual aspect of the RFD is the request that the Secretariat contact claimants to advise them of their ability to testify at each others' hearings about witnessing abuse at a residential school. Dan Shapiro said that this would involve a

dramatic change to how the IAP has been interpreted, impose significant obligations on the Secretariat, and create significant privacy risks for claimants.

The Chief Adjudicator has issued a second re-review decision on eyewitness testimony in estate cases, which provides a refinement of guidance given in an earlier decision.

The Chief Adjudicator has also written a re-review decision involving an IAP claimant who had rejected a settlement in the ADR process. The re-review decision held that nothing prevents an ADR claimant from proceeding in the IAP if their claim did not resolve in a previous process.

Dan Shapiro reported that many adjudicators are disappointed with the shortage of hearings. He has encouraged them to use the opportunity to get caught up on writing decisions, review decisions, and legal fee rulings. He has also reinforced the message that postponement of hearings should be very rare. In one unfortunate case recently, the claimant's counsel had postponed the hearing on three occasions, and when it finally convened the claimant had lost the capacity to testify.

6. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, January 20, 2015, in Vancouver.